**ORAL ARGUMENT NOT YET SCHEDULED**

No. 22-5336

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

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**CAMPAIGN LEGAL CENTER AND CATHERINE HINKLEY KELLY**,
Plaintiff-Appellees,

v.

**FEDERAL ELECTION COMMISSION**,
Defendant-Appellant,

**HILLARY FOR AMERICA AND CORRECT THE RECORD,**
Intervenor-Defendant Appellees.

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On Appeal from the United States District Court
for the District of Columbia

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# BRIEF FOR THE FEDERAL ELECTION COMMISSION

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Lisa J. Stevenson
Acting General Counsel
lstevenson@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

Greg J. Mueller
Attorney
gmueller@fec.gov

Federal Election Commission
1050 First Street NE
Washington, DC 20463
(202) 694-1650

May 24, 2023

## APPELLANT FEDERAL ELECTION COMMISSION'S CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

**(A) Parties and Amici.** Campaign Legal Center and Catherine Hinkley Kelly are the plaintiffs in the district court and appellees in this Court. The FEC is the defendant in the district court and an appellant in this Court. Hillary for America and Correct the Record were intervenor-defendants in the district court and are appellees here. The Institute for Free Speech was an *amicus curiae* in the district court.

**(B) Ruling Under Review.** The Federal Election Commission appeals the December 8, 2022 final order and judgment of the United States District Court for the District of Columbia (Boasberg, J.), which granted the plaintiff-appellees motion for summary judgment and denied Correct the Record and Hillary for America's motion for summary judgment. The Memorandum Opinion is available at *Campaign Legal Center, v. Federal Election Commission*, Civ. No. 19-2336, 2022 WL 17496220, (D.D.C. Dec. 8, 2022).

**(C) Related Cases.** This case was previously before this Court on appeal in *Campaign Legal Center v. Federal Election Commission*, No. 21-5081. The Court's opinion reversing the district court's dismissal in that prior appeal is available at 31 F.4th 781 (D.C. Cir. 2022). Following the decision of the district court, Campaign Legal Center filed a lawsuit purporting to invoke a right to file a lawsuit against Correct the Record and Hillary for America pursuant to 52 U.S.C. § 30109(a)(8)(C) to remedy the alleged campaign finance

violation involved in the administrative decision under review in this appeal. *Campaign Legal Ctr v. Correct the Record & Hillary for Am.*, No. 23-cv-00075, (D.D.C. January 10, 2023). The FEC is not aware of any other related cases at this time.

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## GLOSSARY

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| FEC | Federal Election Commission |
| FECA | Federal Election Campaign Act |
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## INTRODUCTION

Defendant-appellant Federal Election Commission ("FEC" or "Commission") dismissed an administrative complaint filed by the Campaign Legal Center and Catherine Hinkley Kelly ("Complainants"). The controlling group of Commissioners' rationale for this dismissal was based in part on their interpretation of FEC regulations — the "internet exemption" — that exclude certain internet communications not placed for a fee from the definition of a coordinated communication, therefore excluding such communications from certain of the Federal Election Campaign Act's (FECA) limitations and prohibitions.

The district court erroneously concluded that the controlling Commissioners' rationale was contrary to law (1) because it was based on an impermissible interpretation of the internet exemption and (2) the analysis of the record failed to weigh certain evidence of coordination between Hillary for America and Correct the Record (collectively here "Respondents").

The question this case presents is whether the controlling Commissioners' decision reasonably interpreted this regulation and properly weighed the evidence before them in reaching their conclusions. The answer to both questions is "yes." These Commissioners properly applied a regulation within the scope of their expertise, and reasonably assessed whether the record established any connection

between the Respondents' coordination and the relevant transactions. The controlling group considered the information in the record that the district court identified and reached a different conclusion, one that is entitled to deference here.

The nonjurisdictional issues raised here were presented to the district court and are properly considered here.

## STATEMENT OF JURISDICTION

On December 8, 2022, the district court issued a final district court judgment finding that a Commission dismissal of an administrative complaint was contrary to law. *See* 52 U.S.C. § 30109(a)(8). (J.A. 11.) The district court had jurisdiction under 28 U.S.C. § 1331 over alleged reporting violations for which there are claims of informational injury, but lacked subject matter jurisdiction over alleged violations of FECA limits. (*See infra* Part I.) Complainants timely appealed on December 21, 2022. (J.A. 11.) This Court has jurisdiction from a final district court judgment finding Commission action contrary to law under 28 U.S.C. §§ 1291, 1294(1) but, like the district court, possesses subject matter jurisdiction only with respect to the alleged reporting violations at issue.

## STATEMENT OF THE ISSUES

1. Whether the district court had subject matter jurisdiction to issue an unqualified remand order regarding a multi-count administrative complaint without

considering whether plaintiff-appellees had standing to pursue each count of that administrative complaint.

2. Whether the district court committed reversible error when it determined that the controlling rationale supporting the FEC's dismissal was based on an impermissible interpretation of FECA and implementing regulations and remanded the case to the agency.

3. Whether the district court erred in concluding that the controlling rationale supporting the FEC's dismissal improperly weighed allegations regarding alleged coordination between the Respondents.

## STATUTES AND RULES

The relevant statutory and regulatory provisions are set out in the Addendum to this brief.

## STATEMENT OF THE CASE

### I. STATUTORY AND REGULATORY BACKGROUND

#### A. Commission

The FEC is a six-member, independent agency vested with statutory authority over the administration, interpretation, and civil enforcement of FECA. Congress authorized the Commission to "administer, seek to obtain compliance with, and formulate policy with respect to" FECA, 52 U.S.C. § 30106(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions

of [FECA]," *id.* §§ 30107(a)(8), 30111(a)(8); and to investigate possible FECA violations, *id.* § 30109(a)(1)-(2). The FEC has "exclusive jurisdiction" to initiate civil enforcement actions for FECA violations. *Id.* §§ 30106(b)(1), 30109(a)(6).

**B. Enforcement and Judicial Review**

Any person may file an administrative complaint with the Commission alleging a FECA violation. 52 U.S.C. § 30109(a)(1). After considering these allegations and any response, the FEC determines whether there is "reason to believe" that the respondent violated FECA. *Id.* § 30109(a)(2). If the Commission so finds, then it conducts "an investigation of such alleged violation" to determine whether there is "probable cause to believe" that a FECA violation has occurred. *Id.* § 30109(a)(2), (4). If probable cause is found, the Commission is required to attempt to reach a conciliation agreement with the respondent. *Id.* § 30109(a)(4)(A)(i). If the Commission is unable to reach a conciliation agreement, FECA provides that the agency may institute a *de novo* civil enforcement action. *Id.* § 30109(a)(6)(A). At each stage, the affirmative vote of at least four Commissioners is required for the agency to proceed. *Id.* § 30109(a)(2), (a)(4)(A)(i), (a)(6)(A).

If the Commission dismisses an administrative enforcement matter, a party "aggrieved" by the dismissal may file suit to seek judicial review to determine whether the decision was "contrary to law." 52 U.S.C. § 30109(a)(8)(A), (C). By

statute, the judicial task in such an action "is limited." *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988) (describing 52 U.S.C. § 30109(a)(8) (formerly 2 U.S.C. § 437g(a)(8))). As the Supreme Court has explained, the Commission "has the 'sole discretionary power' to determine in the first instance whether or not a civil violation of the Act has occurred" and "Congress wisely provided that the Commission's dismissal of a complaint should be reversed only if 'contrary to law.'" *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981); *see Citizens for Resp. & Ethics in Wash, v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007) ("[J]udicial review of the Commission's refusal to act on complaints is limited to correcting errors of law.").

In cases where an administrative enforcement matter is dismissed after Commissioners divided evenly on a staff recommendation to proceed, the "Commissioners who voted to dismiss must provide a statement of their reasons" in order "to make judicial review a meaningful exercise." *FEC v. Nat'l Republican Senatorial Comm*., 966 F.2d 1471, 1476 (D.C. Cir. 1992). "Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did." *Id.*; *Citizens for Resp. and Ethics in Washington*, 892 F.3d 434, 437-38 (D.C. Cir. 2018) ("*Commission on Hope*") (explaining that under Circuit precedent, "for purposes of judicial review, the statement or statements of those naysayers — the so-called

'controlling Commissioners' — will be treated as if they were expressing the Commission's rationale for dismissal" (quoting *Common Cause*, 842 F.2d at 449)).

If a court finds a reviewable dismissal decision to be "contrary to law," the court can "direct the Commission to conform" with its ruling "within 30 days." 52 U.S.C. § 30109(a)(8)(C). If the Commission fails to conform, the complainant may bring "a civil action to remedy the violation involved in the original [administrative] complaint." *Id.*

### C. FECA Provisions Defining Coordinated Expenditures and the Internet Exemption

Under FECA, a "contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i). FECA defines "expenditure" similarly as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." *Id.* § 30101(9)(A)(i). "[E]xpenditures made by any person in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be contributions made to such candidate." *Id.* § 30116(a)(7)(B)(i). Expenditures made in this way are called "coordinated expenditures." 11 C.F.R. § 109.20(a) (defining "coordinated"

as "made in cooperation, consultation or concert with, or at the request or suggestion of . . . a political party committee.").

Commission regulations provide that "the term *anything of value* includes all in-kind contributions," which include "the provision of any goods or services without charge or at a charge that is less than the usual and normal charge," 11 C.F.R. § 100.52(d)(1), and, as relevant here, coordinated expenditures. *See id.* § 109.20(b) (providing that an expenditure that is coordinated, but not made for a coordinated *communication* as defined in FEC regulations, "is either an in-kind contribution to, or a coordinated party expenditure with respect to, the candidate or political party committee with whom or with which it was coordinated").

The FEC regulations that limit regulation of unpaid internet activity in key respects are collectively known as the "internet exemption." FECA defines "public communication" in relevant part as "general public political advertising," 52 U.S.C. § 30101(22), which the Commission construed as not including "communications over the Internet, except for communications placed for a fee on another person's Web site." *See* 11 C.F.R. § 100.26; Internet Communications, 71 Fed. Reg. 18,589, 18,603-07, 18,613 (Apr. 12, 2006).

The Commission's regulations construing coordination requirements set forth different requirements for "coordinated communications" and other coordinated expenditures. 11 C.F.R. §§ 109.20(b), 109.21. Under those

regulations, a "coordinated communication" is an in-kind contribution to a candidate if it satisfies a three-pronged test, including a payment prong, a content prong, and a conduct prong. *See* 11 C.F.R. § 109.21. As relevant here, the content prong of that test is satisfied only if the communication is a "public communication." *Id.* § 109.21(c)(2)-(5). Since information that is uploaded to the internet without charge or placed on a person's own site is not "advertising" and thus outside the definition of "public communication," such communications do not fit within the "coordinated communication" definition and therefore are not deemed in-kind contributions.

As a result, certain internet communications are not defined as in-kind contributions to a campaign, provided they were not placed for a fee, even if that campaign coordinates with the party making such communications. *See* 11 C.F.R. § 100.26 (excluding "communications over the Internet, except for communications placed for a fee on another person's Web site" from the definition of "public communication"). The Commission also excluded "uncompensated Internet activity" in its construction of the definitions of "contributions" or "expenditures." 11 C.F.R. §§ 100.94, 100.155. The Commission thereby created a "broad exemption" to enable individuals to participate in unpaid online electoral activity without fear of implicating the federal campaign finance laws. 71 Fed. Reg. at 18,603.

### D. Administrative Proceedings

Complainants filed an administrative complaint with the Commission in 2016, alleging that the Respondents in this case violated campaign finance reporting requirements, contribution limits, and source restrictions in the FECA. (J.A. 112-63.) The administrative complaint alleged in four counts that Respondent Correct the Record made, and Respondent Hillary for America received, in-kind contributions with funds from prohibited sources and in excess of the contribution limits in the Act. (J.A. 149-60.) In particular, the administrative complaint alleged that campaign had received prohibited and excessive contributions in kind in the form of opposition research, message development, surrogate support, video production, and press outreach. (*Id.*) The administrative complaint also alleged in two distinct counts FECA reporting violations for failure to disclose the alleged prohibited and excessive contributions. (JA 159-60.)

When the Commission considered the administrative complaint filed by the complainant, it voted 2-2 at the first step of the enforcement process, the determination whether based on Complainants' allegations there was "reason to believe" a FECA violation occurred and to open an investigation. (J.A. 263.) *See* 52 U.S.C. § 30109(a)(2); Add. 5 (explaining FEC enforcement procedures). The FEC thus fell short of the required four votes to make such a finding. 52 U.S.C. § 30109(a)(2).

The two Commissioners who voted against further enforcement issued a Statement of Reasons explaining the basis of their vote. (*See* Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter (J.A. 267-84).) "Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did." *Nat'l Republican Senatorial Comm.*, 966 F.2d at 1476.

These controlling Commissioners principally concluded that certain of the conduct challenged in Complainants' administrative complaint was exempt from FECA's limits on in-kind contributions and disclosure requirements because they fell within the "internet exemption" that excludes unpaid internet communications from the definitions for advertising and public communication that are subject to the agency's coordinated communication regulation. J.A. 278-80; *see* 11 C.F.R. § 100.26; Internet Communications, 71 Fed. Reg. at 18,603-07.

The controlling Commissioners also concluded that the record did not suggest that the Respondents coordinated on any activity beyond that which was exempt from regulation, and therefore there was no other activity to be reported or subjected to FECA's contribution limits. (J.A. 280-83.)

Then-Chair Ellen L. Weintraub separately issued a statement of reasons concluding that there was reason to believe violations had been committed. (*See* Statement of Reasons of Chair Ellen L. Weintraub (J.A. 285-95).) In her

statement she explained her view that Correct the Record's stated purpose was to coordinate its activities, and that just because some disbursements were dedicated to communications disseminated via the internet, that did not mean that all of Respondent Correct the Record's expenditures were exempt from the Commission's definition of coordinated, in-kind contributions.

### E. District Court Proceedings and the Initial Appeal

Complainants sought judicial review of the dismissal under 52 U.S.C. § 30109(a)(8). After failing to garner the necessary four votes, the FEC did not appear to defend the agency in the district court. 52 U.S.C. §§ 30106(c), 30107(a)(6). The district court granted the Respondents' motion to appear in the lawsuit and defend the dismissal. (J.A. 5.) The case proceeded without the Commission's involvement through final judgment at the district court.

Initially, the district court found that the Complainants had alleged informational injury sufficient to establish standing, but it then reconsidered that decision and found that information had been disclosed, even if not in the form Complainants sought, and therefore the Complainants lacked standing to challenge the dismissal. *See Campaign Legal Ctr. v. FEC*, 466 F. Supp. 3d 141, 152 (D.D.C.), *on reconsideration in part,* 507 F. Supp. 3d 79 (D.D.C. 2020), *rev'd and remanded,* 31 F.4th 781 (D.C. Cir. 2022).

Complainants hinged their entire case for standing before this Court on the two counts of their administrative complaint alleging reporting violations. Appellants' Opening Br., *Campaign Legal Ctr. v. FEC*, No. 21-5081, Doc. #1906933 at 2 (July 19, 2021) (describing the charge that Respondents "had violated 52 U.S.C. § 30104 by failing to disclose any of the in-kind contributions made by [Correct the Record] or received by [Hillary for America" and citing to "Counts IV & V" of the administrative complaint). The district court's conclusion that Complainants lacked standing to sue was reversed by this Court, which concluded Complainants had informational standing reasoning that while "Correct the Record has disclosed its aggregated expenditures publicly . . . it has not broken down its expenditures to show which were coordinated contributions, . . . factual information that is subject to disclosure under the statute." *CLC v. FEC*, 31 F.4th at 783–84. Consistent with the briefing from Complainants, the opinion's apparent base was exclusively Complainants' reporting counts. The case was then remanded back to the district court.

Complainants and Respondents then prepared summary judgment briefs arguing whether the controlling dismissal rationale was contrary to law. (J.A. 11.) On December 8, 2022, the district court granted summary judgment to Complainants, concluding that the controlling Commissioners' rationale was contrary to law in two respects.

First, the district court concluded that the controlling commissioners contravened the plain language of the statute when it found the majority of Correct the Record's expenses could not be in-kind contributions because they reflected the input costs of creating the communication to be placed on the internet for no fee and fit within the internet exemption. (J.A. 99-100.) The district court relied on broad statements of the Respondents' purpose when it rejected the controlling commissioners' rationale rooted in a lack of information showing that Correct the Record did not receive fair market compensation from Hillary for America and that the record did not suggest that Respondents coordinated on anything beyond the unpaid internet communications that Commission regulations exempted from regulation. (*Id*.)

Second, the district court concluded that the controlling Commissioners' analysis of the record was arbitrary and capricious because it did not properly weigh certain evidence of coordination between the Respondents. (J.A. 102-05.) It noted "[t]hey did not meaningfully consider these broad statements of intent to coordinate and instead looked for 'transaction-by-transaction' evidence of coordination." (J.A. 104.) The court referenced statements by Hillary for America in a memorandum that "proposed countering attacks on Clinton 'through work of [Correct the Record] and other allies'" and another memo referenced that "having [Correct the Record] pay a governor to work as a surrogate to make sure her work

"met our needs/requests." (J.A. 103.) It did not credit the controlling group's analysis of whether "specific conduct occurred with respect to particular expenditures." (J.A. 104, 282.)

As relief, the district court ordered the Commission to conform with its ruling within 30 days. (J.A. 88.) The district court did not specify the counts of the administrative complaint that were subject to the remand order and made no apparent effort to tailor the relief ordered with the basis for standing identified by this Court.

On December 21, 2022, while the conformance period remained open, the Commission filed a timely appeal and sought a stay of the district court's order. (J.A. 109.) The district court acknowledged that "the present case involves serious legal questions about the metes and bounds of the FEC's internet exemption," but denied the FEC's motion for a stay on February 1, 2023 on the basis of other considerations. (Mem. Op., at 5, No. 19-2336, (Feb. 1, 2023) (ECF No. 80).)

One of the Complainants, Campaign Legal Center, filed a private suit under 2 U.S.C. § 30108 against the Respondents, Correct the Record and Hillary for America. *See* Civ. No. 23-75 (D.D.C. Jan. 10, 2023) (ECF No. 1). The district court stayed that action on April 7, 2023, recognizing that a decision in this appeal "would necessarily influence" the private suit. Mem. Op., *Campaign Legal Ctr. v. Correct the Record*, No. 23-75, at 8 (Apr. 2, 2023) (ECF No. 17).

The Complainants also filed before this Court a motion to dismiss this appeal, arguing that Commission had forfeited arguments it had not raised below. That motion was opposed by the Commission, has been referred to this merits panel, and is addressed below. *See infra* Part III.

## SUMMARY OF ARGUMENT

The district court's decision should be reversed and remanded. First, the district court insufficiently parsed this Court's previous ruling and failed to address Complainants' standing to challenge violations of the contribution limits and source restrictions in FECA as it ordered a remand to the FEC. Complainants lack standing for violations other than disclosure violations because an informational injury sufficient to establish standing for a disclosure violation, does not automatically establish standing for alleged violations of the contribution limits or source restrictions in FECA. Second, the District Court incorrectly determined that the Commission's dismissal of MUR 7146 was contrary to law by failing to defer to the controlling commissioners' reasoned application of agency precedent; incorrectly concluded that "input costs" could not be exempt under the internet exemption; failed to credit the controlling group's application of the text of statute

and regulations; and failed to adequately credit the controlling group's evaluation of evidence.

The nonjurisdictional issues raised here were pressed and decided by the district court and would not, in any event, be forfeited given the exceptional circumstances connected with the composition of the Commission during the pendency of this case.

## STANDARDS OF REVIEW

This Court reviews the district court's summary judgment ruling *de novo*. *Judicial Watch, Inc. v. U. S. Secret Serv.,* 726 F.3d 208, 215 (D.C. Cir. 2013); *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005).

## ARGUMENT

### I. COMPLAINANTS LACK ARTICLE III STANDING TO SEEK RELIEF REGARDING PORTIONS OF THEIR ADMINISTRATIVE COMPLAINT

The Complainants must establish standing for each violation on which it asserts the Commission acted contrary to law. The fact that the Complainants may have an informational injury with respect to a particular claim in its administrative complaint — i.e. that the Respondents failed to file required information in reports to the FEC — does not mean it also has standing to seek a court order compelling the Commission to act on *other* administrative claims for which it lacks constitutional injury. Though Complainants' court complaint intersperses

reporting violations within the two counts of the Amended Complaint, it also focuses on alleged violations of contribution limits and source restrictions for which it has not established standing. Only two out of the six counts in the administrative complaint at issue are for reporting violations. But the Complainants must establish standing for each alleged violation for which it seeks redress. Merely mentioning a reporting violation within a particular count of a court complaint seeking judicial does not satisfy the requirement that Complainants demonstrate jurisdiction over each alleged violation within the six-count administrative complaint.

**A. Standards**

Complainants bear the burden of demonstrating that it has properly invoked this Court's subject-matter jurisdiction. *See Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015); *Attias v. Carefirst, Inc.*, 865 F.3d 620, 625 (D.C. Cir. 2017).

To have Article III standing a plaintiff must establish: (1) it has "suffered an 'injury in fact[,]" which the Supreme Court defines as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not [merely] conjectural or hypothetical," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations and quotation marks omitted); (2) that there is a "causal connection between the injury and the conduct complained of[,]" which requires the injury to be "fairly traceable to the challenged action of the

defendant, and not the result of the independent action of some third party not before the court," *id.* (internal quotation marks and alterations omitted); and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (internal quotation marks omitted). These three components of the Article III "case or controversy" requirement are designed to ensure that the "plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal court jurisdiction and to justify [the] exercise of the court's remedial powers on his behalf." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37-38 (1976) (internal quotation marks omitted).

Moreover, "standing is not dispensed in gross" and "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis v. FEC*, 554 U.S. 724, 734 (2008) (internal quotation marks and alterations omitted); *see Allen v. Wright*, 468 U.S. 737, 752 (1984) ("[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the *particular claims* asserted" (emphasis added)); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207–08 (2021)) (holding that a plaintiff must establish standing for each claim he presses and each form of relief that they seek).

Accordingly, courts in this Circuit have conducted a separate standing analysis of each part of a plaintiff's claims alleging violations of multiple statutes

and regulations, or subparts of such laws. *See Del. Dep't of Nat. Res. & Env't Control v. E.P.A.*, 785 F.3d 1, 10 (D.C. Cir. 2015) (plaintiff had standing to challenge one part of 2013 EPA rule regarding home power generation, but not another); *Elec. Priv. Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 377 (D.C. Cir. 2017) (separately analyzing plaintiff's standing to challenge various subparts of government order regarding E-Government Act); *see also Disner v. United States*, 888 F. Supp. 2d 83, 87 (D.D.C. 2012) ("Pursuant to Federal Rule of Civil Procedure 12(b)(1), a defendant may move to dismiss a complaint, *or any portion thereof*, for lack of subject matter jurisdiction.") (emphasis added).

In all cases, the claimed injury must be commensurate with the challenged statute or regulation. For instance, in *Wagner v. FEC*, 793 F.3d 1 (D.C. Cir. 2015), plaintiffs alleged that FECA's prohibition on federal contractors making federal campaign contributions while they negotiated or performed federal contracts violated contractors' First Amendment and equal protection rights. *Id.* at 3. During the pendency of litigation two plaintiffs completed their contracts, mooting their claims. *Id.* at 4. The remaining plaintiff retained standing. *Id.* However, because his injury was "notably narrower than" those of the dismissed plaintiffs, he had standing "only as it applies to contributions to candidates and parties" and not

as to contributions to political causes generally. *Id.* at 4-5 (citing *Davis*, 554 U.S. at 734).

Furthermore, the Supreme Court has itself made clear that standing to challenge FECA and associated Commission regulations requires a separate standing analysis for each substantive provision of law at issue. In *Davis v. FEC*, a former Congressional candidate brought a facial constitutional challenge to the "Millionaires' Amendment," a provision of the Bipartisan Campaign Reform Act that modified FECA to relax limits on the ability of the opponent of self-financed candidates to raise money from donors and coordinate campaign spending with party committees. 554 U.S. at 728-29. After the FEC informed the plaintiff candidate that it had reason to believe he had violated the Millionaire's Amendment by failing to report personal expenditures during the 2004 campaign, he filed the suit alleging that the Amendment was unconstitutional. *Id.* The court determined that Davis had standing to challenge the *disclosure* requirements of the provision, *id.* at 733, but it noted that that did "not necessarily mean that [Davis] also [had] standing to challenge the scheme of contribution limitations that applie[d] when [the provision came] into play." *Id.* at 733-34. The court ultimately found Davis did have standing to challenge those as well, but it made clear that a distinct standing analysis was required. *Id.* *See also FEC v. Cruz*, 142 S. Ct. 1638, 1650 (2022) (noting that a litigant cannot, "by virtue of his standing to

challenge one government action, challenge other governmental actions that did not injure him" (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353, n.5, (2006))).

### B. Complainants Do Not Have Standing to Seek Relief Regarding Claims of Violations of Contribution Limits or Source Restrictions By Others

As an initial matter, Complainants cannot rely on their abstract desire to see the law enforced against the Respondents in its preferred manner to establish Article III standing on its alleged violations of contribution limits or source restrictions. Complainants' interest in "seeing that the laws are enforced" is not "legally cognizable within the framework of Article III." *Sargent v. Dixon*, 130 F.3d 1067, 1069 (D.C. Cir. 1997); *see Lujan*, 504 U.S. at 573-74. As to its claims regarding contribution limits and source restrictions, Complaints have not alleged that those alleged violations caused it a cognizable injury. Nor could they, because even if the Commission brought a successful enforcement action based on allegations that the Respondents had violated contribution limits or source restrictions, no additional disclosure would result. *See Citizens for Resp. & Ethics in Wash. v. FEC*, 267 F. Supp. 3d 50, 53 (D.D.C. 2017) ("Plaintiffs have alleged no facts that they were harmed by the money spent by [administrative respondent] or by the direct donations that [administrative respondent's] employees gave. The

particularized harm they plead is not about the money in politics but about the lack of information about that money.").

To the extent the relief the Complainants seek is for this Court to compel the FEC to enforce a contribution limit or source restriction against a committee, such concerns cannot be the basis for standing because there is no "justiciable interest in having the Executive Branch act in a lawful manner." *Common Cause v. FEC*, 108 F.3d 413, 419 (D.C. Cir. 1997). Complainants have no Article III right to seek "a legal conclusion that carries certain law enforcement consequences" for others. *Wertheimer v. FEC,* 268 F.3d 1070, 1075 (D.C. Cir. 2001). "While 'Congress can create a legal right . . . the interference with which will create an Article III injury,' . . . Congress cannot . . . create standing by conferring 'upon *all* persons . . . an abstract, self-contained, noninstrumental 'right'" to have the Executive follow the law. *Common Cause,* 108 F.3d at 418 (quoting *Lujan*, 504 U.S. at 573) (internal citation omitted).

Count One of the Amended Complaint alleges the Commission acted contrary to law because it did not find that "there 'was reason to believe' that [Respondent Correct the Record] made excessive and prohibited in-kind contributions in violation of 52 U.S.C. §§ 30116(a) and 30118(a), and failed to report these contributions in violation of 52 U.S.C. § 30104(b)." (J.A. 64.) Of the three statutory violations in the Amended Complaint, only one was a reporting

violation for which Complainants have established an informational injury. Count One also goes on to allege that Respondent Hillary for America accepted "excessive and prohibited in-kind contributions in violation of 52 U.S.C. §§ 30116(f) and 30118(a), and failed to report these contributions in violation of 52 U.S.C. § 30104(b)." (J.A. 64.) Likewise, this allegation predominantly focuses on violations of the contribution limits and source restrictions, while intermixing a reporting violation as well. Count Two of the Amended Complaint does the same thing, challenging the application of the coordination regulations by the FEC because they allegedly failed to implement the "contribution limits, source restrictions, and disclosure requirements." (J.A. 65.) The court complaint thus seeks relief as to all six of the counts in the administrative complaint, only two of which are for reporting violations.

Courts have rejected attempts to establish standing to challenge FEC enforcement decisions as to substantive campaign financing limitations or prohibitions that do not of their own force mandate the disclosure of information. *See Citizens for Resp. & Ethics in Wash.*, 267 F. Supp. 3d at 54 (finding no standing where "plaintiffs cannot plausibly allege that an FEC enforcement action on [the straw donor prohibition, 52 U.S.C. § 30122] would require [the respondent] to disclose any information"). The D.C. Circuit requires such precision in claims to standing that even an allegation of a reporting violation is not sufficient for

informational injury if the administrative complaint does not seek the required reporting as a remedy. *Common Cause*, 108 F.3d at 418 (reviewing dismissal of administrative complaint alleging excessive contributions and failures to report them). Just as with the *Citizens for Responsibility* case, required disclosure cannot be "plausibly alleged" as a remedy for the alleged violation of the corporate contribution prohibition. *Citizens for Responsibility & Ethics in Wash.*, 267 F. Supp. 3d at 54. This Court has already rejected conflation of allegations of unlawful coordination and failures to comply with reporting requirements when it declined to find standing for transactions already sufficiently reported but arguably required to be reported by another party. *See Wertheimer*, 268 F.3d at 1074-75; *see also Am. Soc'y for Prevention of Cruelty to Animals v. Feld Ent., Inc.*, 659 F.3d 13, 23 (D.C. Cir. 2011) (no standing to challenge prohibition on certain activity where even injunction in plaintiffs' favor "would [not] entitle plaintiffs to any information").

As noted, courts regularly dismiss portions of claims that have jurisdictional defects, while permitting the plaintiff to pursue other portions of those same claims. *See Wagner*, 793 F.3d at 4-5; *Finca Santa Elena, Inc. v. U.S. Army Corps. of Eng'rs*, 873 F. Supp. 2d 363, 371 (D.D.C. 2012) (granting motion to dismiss claims as unripe only "to the extent those claims" challenge a certain aspect of a project). Plaintiffs' standing thus must be evaluated as to each substantive

statutory provision and regulation for which they allege violations, and those portions unsupported by a legally cognizable injury sufficient to establish standing must be dismissed.

This Court should remand for dismissal of claims upon which the Complainants have not established an informational injury. If the Complaints were allowed to pursue both counts as they stand, an administrative complainant could evade the standing rule for at least some allegations through artful pleading of disparate violations. The Commission's procedures for submitting administrative complaints contain no rules limiting the joinder of disparate claims. *See* 11 C.F.R. § 111.4. Under the Complainants' approach, a savvy litigant could strategically allege any reporting violation to join with a claim over which no informational injury exists and obtain access to judicial review of both as a result. If Complainants here are allowed to pursue their administrative allegations of violations of contribution limits and source restrictions for contributions alongside claims presenting informational injury, then administrative complainants would be entitled to judicial review of every violation asserted in a multi-count administrative complaint by establishing an injury on any small part.

Should the Court in this matter ultimately rule in this case that the Commission's handling of the administrative complaint was contrary to law, the practical import of this standing dispute is to affect the scope of conduct the

Commission could be required to address under court order. *See* 52 U.S.C. § 30109(a)(8)(C). Allowing section 30109(a)(8) complainants to establish standing in gross would have the downstream effect of broadening the allegations the agency would be under order to address beyond the scope of the case or controversy in dispute, i.e. the injury establishing the court's jurisdiction to consider plaintiffs' claims.

In sum, an allegation that a dismissal is contrary to law under § 30109(a)(8) alone does not provide a plaintiff with Article III standing to seek court relief for all counts of an administrative complaint. Complainants must instead show how the Commission's dismissal caused a concrete and particularized injury as to each alleged violation. Because Complainants have not shown this on their excessive or restricted source contribution claims, they lack standing as to those claims.

For all the foregoing reasons, the Court should hold that the Complainants lack standing regarding Counts I-III and VI of their administrative complaint, claims regarding contribution source and amount limitations, and direct the district court to dismiss the complaint to the extent it seeks an order regarding those counts.

## II. THE DISMISSAL OF MUR 7146 WAS NOT CONTRARY TO LAW

The district court incorrectly determined that the Commission's dismissal of MUR 7146 was contrary to law, based upon three reversible errors. First, the court

failed to defer to the controlling commissioners' reasoned application of FEC regulations. Second, based on the proceeding error, the court incorrectly concluded that "input costs" could not be exempt under the internet exemption and failed to credit the controlling group's application of the text of statute and regulations, instead relying upon its own "bounded analysis" standard. Third, the district court relied upon its own evaluation of the Commissioners' broad, generalized statements, and failed to adequately credit the controlling groups' evaluation of the evidence, when determining whether other costs were coordinated expenditures.

### A. The District Court Failed to Apply FECA's Highly Deferential "Contrary to Law" Standard of Review

The district court incorrectly concluded that the controlling Commissioners' interpretation of the internet exemption was contrary to law. (J.A. 98.) On the contrary, here the Commissioners reasonably and permissibly interpreted the internet exemption as applying to all input costs and other spending at issue in plaintiffs' administrative complaint. Because this case involves a controlling group's application of a Commission regulation, however, judicial review of that decision should give "'controlling weight'" to the controlling group's interpretation "'unless it is plainly erroneous or inconsistent with the regulation.'" *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415-16 (2019) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). And instead of deferring to the controlling

group's consideration, here the district court substituted its own "bounded" analysis.

It has long been established that judicial review of Commission dismissal decisions under FECA is "limited." *Common Cause*, 842 F.2d at 448; *Citizens for Resp. and Ethics in Washington v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007). A court may only set aside a dismissal decision, where that decision is reviewable at all, if it is "contrary to law." 52 U.S.C. § 30109(a)(8)(C). This means that the Commission's decision cannot be disturbed unless it was based on an "impermissible interpretation of" FECA or was otherwise "arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). Courts will not overturn agency decisions absent evidence that the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Here, the record illustrates a careful and deliberate analysis. The controlling Commissioners state at the outset of their Statement, they "approached [the] matters deliberately and with caution" and were "[m]indful that every action the Commission takes implicates core constitutionally protected activity," and thus

"chose to rely on precedent whenever possible rather than adopt aggressive or novel legal theories." (J.A. 267.) The controlling group of Commissioners "thoroughly analyzed the information presented in the complaints in light of the Commission's precedent" and found that the legal issues presented "lend themselves to consideration under the Commission's traditional coordination framework." (J.A. 283.)

When the FEC interprets FECA in the context of a section 30109(a)(8) dismissal, the D.C. Circuit has held that courts must accord *Chevron* deference to that decision.[1] *E.g.*, *FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 185 (D.C. Cir. 2001); *In re Sealed Case*, 223 F.3d 775, 779-81 (D.C. Cir. 2000); *Orloski*, 795 F.2d at 161-62). The Commission's decision need only be "sufficiently reasonable to be accepted." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981) ("*DSCC*") (internal quotation marks omitted). It does not need to be "the only reasonable one or even the" decision "the [C]ourt would have reached" on its own "if the question initially had arisen in a judicial proceeding." *Id.* In recent decisions, this Circuit has continued to consistently apply *Chevron* deference where an agency offers a reasonable interpretation of ambiguous

[1] The familiar two-step *Chevron* framework requires the Court first to determine "whether Congress has directly spoken to the precise question at issue" and, if not, to defer to the agency's interpretation as long as it is "based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

statutory text. *See, e.g.*, *Solar Energy Indus. Ass'n v. FERC*, 59 F.4th 1287, 1292 (D.C. Cir. 2023) (applying *Chevron* deference and upholding FERC's interpretation of Public Utility Regulatory Policies Act); *Loper Bright Enter., Inc. v. Raimondo*, 45 F.4th 359, 369 (D.C. Cir. 2022) (finding "some question" about the meaning of a statute enough to trigger *Chevron* deference).

When determining whether an FEC decision was arbitrary, capricious, or otherwise an abuse of discretion, the Court must be "extremely deferential" to the agency's decision, which "requires affirmance if a rational basis . . . is shown." *Orloski*, 795 F.2d at 167 (internal quotation marks omitted). Courts must defer to the FEC unless the agency fails to meet the "minimal burden of showing a coherent and reasonable explanation [for] its exercise of discretion." *Carter/Mondale Presidential Comm., Inc. v. FEC*, 775 F.2d 1182, 1185 (D.C. Cir. 1985) (internal quotation marks omitted).

### B. The Controlling Group of Commissioners' Application of the Internet Exemption For Input Costs Was Reasonable

The district court substituted its judgment for that of the controlling group when it incorrectly concluded that the Commission was required to find that Correct the Record made excessive and prohibited in-kind contributions to Hillary for America because activity was coordinated and not excluded by the internet exemption. (J.A. 10-14.) Two FEC Commissioners, enough to block further enforcement at the time, concluded there was not "reason to believe" intervenor-

defendants violated FECA. These controlling Commissioners concluded that the majority of Correct the Record's expenses could not be in-kind contributions because they reflected the input costs of creating the communication to be placed on the internet for no fee and therefore were excluded by the internet exemption.

### 1. The Internet-Exemption Regulations Are Entitled to Deference and Are Valid

FECA regulates "contributions" and "expenditures," including "anything of value [given] by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A), (9)(A). Expenditures that are "made by any in person in cooperation, consultation, or concert, with, or at the suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." 52 U.S.C. § 30116(a)(7)(B)(i). FECA further provides that ''[t]he term 'public communication' means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising," 52 U.S.C. § 30101(22). The FEC's series of regulations to implement these and related provisions included efforts to adapt them to the then-nascent democratizing possibilities of the Internet. It was not one of the means of communication Congress specified would in some cases constitute "general public political advertising." *Id.* While considering one of the FEC's efforts, a review in this

District found that "all Internet communications do not fall within" the meaning of "public communication" and instructed the FEC to delineate which Internet communications should be regulated. *Shays v. FEC*, 337 F. Supp. 2d 28, 67 (D.D.C. 2004) ("*Shays I*"), *aff'd sub nom. Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005 ("*Shays II*").

The Commission's regulations defining "public communication" fill the gap on which Internet activity constitute "general public political advertising" by specifying that it is only internet communications "placed for a fee on another person's website." 11 C.F.R. 100.26. Complainants do not make any direct "attack on the facial validity of any regulation" (Mem. Op. at 5 No. 19-2336 (D.D.C. Feb 12, 2021) (ECF No. 53), as the district court concluded, for good reason. The "public communication" definition connects with the coordination regulation and, along with an exemption for "uncompensated Internet activity," permitted the development of electoral discourse on blogs and social media while limiting the potential that persons would be chilled in such activity for fear of being deemed to be prohibited by campaign finance law or required to file disclosure reports with the FEC.

Though not directly challenging the internet exemption, Complainants prevailed on the district court to hold that the regulation must be "bounded" in a manner that they prefer. (J.A. 99-100.) That holding not only conflicts with the

agency's authority to interpret its own regulations as explained below, *see infra* Part II.B.2, it also conflicts with the agency's prerogative to interpret FECA through the promulgation of the regulation itself. In layering an additional bounding requirement without any textual support in the regulation, the district court improperly usurped the agency role. *See FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("*NRSC*") ("[I]f the meaning of the statute is not clear, a reviewing court should accord deference to the Commission's rationale."). The agency's internet exemption was "sufficiently reasonable" to be accepted and the judgment should be reversed in order to affirm the agency's authority to promulgate regulations in such circumstances without judicial modification.

### 2. The Controlling Group Reasonably Construed the Regulation to Exclude Input Costs

Under FEC regulations, internet communications not placed for a fee do not constitute in-kind contributions to a campaign. Consistent with FECA's limitation that "public communications" are limited in relevant part to "general public political advertising," 52 U.S.C. § 30101(22), Commission regulations exclude unpaid internet communications from the definition of "public communication." 11 C.F.R. § 100.26 (excluding "communications over the Internet, except for communications placed for a fee on another person's Web site" from the definition of "public communication"). The Commission's regulations construing

coordination requirements set forth different requirements for "coordinated communications" and other coordinated expenditures. 11 C.F.R. §§ 109.20(b), 109.21. Under those regulations, a "coordinated communication" is an in-kind contribution to a candidate if it satisfies a three-pronged test, including a payment prong, a content prong, and a conduct prong. *See* 11 C.F.R. § 109.21. As relevant here, the content prong of that test is satisfied only if the communication is a "public communication." *Id.* § 109.21(c)(2)-(5). Since information that is uploaded to the internet without charge or placed on a person's own site is not "advertising" and thus outside the definition of "public communication," such communications do not fit within the "coordinated communication" definition and thus are not deemed in-kind contributions.

The controlling Commissioners concluded that the "plain text of" the coordination regulation dictated that Correct the Record's expenses for online communications, including input costs, were not in-kind contributions. (J.A. 278.) The Court need not resolve whether the conclusion is compelled by plain regulatory text because the construction at a minimum is a permissible construction of the regulations if the treatment of input costs is assumed to be ambiguous. *Kisor*, 139 S. Ct. at 2415. The purposes of the applicable regulations and prior Commission authorities support the permissibility of the approach.

*a. The Exclusion of Input Costs Was Consistent With Expressed Purposes of the Rulemakings*

In promulgating several of the regulations at issue here, the Commission expressed purposes and made references to effects that are consistent with the outcome in the underlying matter. The controlling statement explicitly highlighted explanations for the coordination and internet-communication regulations and Complainants chose not to facially challenge either of them in the district court.

When the Commission explained the coordinated communication regulation, it stated that the content prong is made up of "'bright line tests,'" which "'may serve to exclude some communications that are made with the subjective intent of influencing a Federal election, thereby potentially narrowing the reach of [the provision.'" (J.A. 276 (quoting 68 Fed. Reg. at 426, 428).) In so doing, the content prong served as a "'clear and useful'" way to "'ensure that the coordination regulations do not inadvertently encompass communications that are not made for the purpose of influencing a federal election.'" (*Id.* 276-77 (quoting 68 Fed. Reg. at 426, 428).)

In its rulemaking regarding internet communications, the Commission made an explanation for a "restrained regulatory approach" in that context, namely that the internet was a "unique and evolving mode of mass communication and political speech that is distinct from other media." (J.A. 275 (citing 71 Fed. Reg. at 18,589).) The Commission was explicit about how the revised definition of

"public communication" would interact with the coordination regulation to exclude internet communications not placed for a fee on another person's website. (*Id.* (citing 71 Fed. Reg. at 18,589 n.2, 18,594).) The regulation's explanation even provided an example, noting that a person's republication of a candidate's campaign materials on his or her own internet site would not be considered coordinated as it would if it aired through other media. (*Id.* (citing 71 Fed. Reg. at 18,600).) Complainant Campaign Legal Center submitted a comment on the proposed internet communications rule noting that the FEC typically treats the cost of producing campaign-related materials the same as the costs of distributing them and expressing concern that an individual could spend large sums of money for the professional production of campaign ads in coordination with a candidate and post the ads on their own website. Democracy 21, *et al.*, Comment on Notice 2005-10: Internet Communications (Shays I) at 12 n.10 (June 3, 2005).[2] The Commission did not change the final rule in response to the comment and instead maintained its approach of treating production and distribution costs the same. Internet Communications, 71 Fed. Reg. at 18,590-91. Thus, when the rule was being finalized, Campaign Legal Center anticipated essentially the same allowable interpretation of the regulation as the controlling group here.

[2] https://sers.fec.gov/fosers/showpdf.htm?docid=36918.

Bright lines to protect and enable speech on the Internet were expressly intended by the regulations and the concomitant permission for some election-influencing activity to take place were thus features and provide no basis to find an application of the regulations infirm.

*b. The Input-Cost Conclusion Was Supported By Prior Commission Matters*

The reasonableness of the controlling statement is further confirmed by the FEC's repeated affirmation of its interpretation that input costs are exempted. The controlling group pointed to support from both an advisory opinion and past enforcement cases. (J.A. 278-79.)

A few years after the internet exemption was adopted, the FEC specifically concluded in the context of expenditures by individuals that "[t]he costs incurred by an individual in creating an ad will be covered by the Internet exemption from the definition of 'expenditure' as long as the creator is not also purchasing TV airtime for the ad he or she created." Advisory Opinion 2008-10 (VoterVoter.com), 2008 WL 4754871 *6 (Oct. 24, 2008).

Several FEC enforcement matters under review ("MURs") contained explicit similar holdings. The FEC unanimously held, for example that there was no reason to believe any violations occurred when a group paid $5,800 to create an ad and post it on its own website. Factual & Legal Analysis, MUR 6477 (Turn

Right USA) at 3, 7-8 (July 17, 2012);[3] Amended Certification, MUR 6477 (July 26, 2012).[4] In another, the Commission concluded that payments to a vendor, "at least in part, to gather some of the information ultimately displayed on the website, on the facts presented here, such payments do not amount to the Committee having placed an Internet communication on another person's website for a fee." Factual & Legal Analysis, MUR 6414 (Russ Carnahan in Congress Committee) at 11 (July 17, 2012).[5]

In the greatest detail, the Commission unanimously concluded that one group's payments for "services necessary to make an Internet communication," including $118,000 spent on email list rentals and contribution-processing fees were not in-kind contributions under the coordinated communication regulation. Factual & Legal Analysis, MUR 6657 (Akin for Senate) at 2, 4-5 (Sept 17, 2013).[6] Those related expenses that the group had "incurred . . . to finance[] email solicitations were not in-kind contributions because the emails had not been "placed for a fee" on another person's website. *Id.* at 5; Vote Certification, MUR 6657 (Akin for Senate) (Sept. 12, 2013).[7]

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3 https://www.fec.gov/files/legal/murs/6477/12044314858.pdf.
4 https://www.fec.gov/files/legal/murs/6477/12044314855.pdf.
5 https://www.fec.gov/files/legal/murs/6414/12044320498.pdf.
6 https://www.fec.gov/files/legal/murs/6657/13044343294.pdf.
7 https://www.fec.gov/files/legal/murs/6657/13044343292.pdf.

The district court concluded that the Akin for Senate matter involved narrower facts more directly connected to specific unpaid internet communication than the alleged conduct here, making the differences "one of kind and not of degree." (J.A. 102.) But that weighing of agency authorities in the course of applying regulations to new facts is quintessential agency construction to which the courts owe deference. The controlling group's application of the Akin for Senate precedent was sufficiently reasonable such that its disturbance by the district court was unwarranted.[8]

*c. Excluding Input Costs Was Neither Plainly Erroneous Nor Inconsistent With the Regulation and Should Be Given Controlling Weight*

For all the reasons explained above, the controlling statement reasonably and permissibly interpreted the internet exemption as applying to all input costs. The district court attempted to determine whether that "decision contravenes FECA's plain language" of the statute (J.A. 99.) or the explanation underlying the adoption of the internet exemption (J.A. 100-01), while failing to consider adequately how the text of the FEC regulations aid in determining whether the controlling Commissioners' reasoning was permissible. The district court in essence jumped

[8] The controlling statement also relied on statutory protection for those who rely on FEC regulations and the potential that a contrary position would constitute a due process violation. (*See* J.A. 280 n.66 (citing, *inter alia*, 52 U.S.C. § 30111(e) and *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 254 (2012)).)

straight from the facts the Commission considered to the statutory text, which does not explicitly address how FECA should apply to internet communications and the costs to create them. The district court failed to analyze adequately the regulatory text on which the controlling Commissioners relied.

Reasoning the way it did, the district court concluded that "the internet exemption must be meaningfully bounded" to "comply with [FECA's] statutory language." (J.A. 99.) But Complainants did not facially attack any regulation. Rather than determine whether the internet exemption is appropriately "bounded" to the statutory text in a manner suggested by Complainants, the district court should have deferred to the controlling group's application of Commission regulations.

The district court rested its conclusion in part on a note in the FEC's explanation for the internet exemption 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.'" (J.A. 100 (quoting 71 Fed. Reg. at 18,606).) But where there are apparently competing indications from earlier agency documents, the agency receives deference on how it resolves them.

Here, the controlling group examined the requisite regulations and whole body of agency authorities and determined that "[r]equiring speakers to further

allocate overhead expenses across internet communications (or other activities) and then exempting only those component fees deemed essential for the internet communication's placement would eviscerate the internet exemption and the deliberate policy decisions behind it, and potentially chill political speech online." (J.A. 279.) The controlling Commissioners' application of agency regulations was not plainly erroneous and thus should be given controlling weight and affirmed.

### C. The Controlling Commissioners Reasonably Determined There Was Insufficient Evidence to Find Reason to Believe Other Expenses Were In-Kind Contributions

In addition to internet communications, the controlling Commissioners also reasonably and permissibly concluded that there was not sufficient evidence related to other, non-internet expenses, to find reason to believe FECA violations had occurred. (J.A. 102-05.) The district court determined that the Commissioners did not "meaningfully consider" that organization's "broad statements of intent to coordinate and instead looked for 'transaction-by-transaction' evidence of coordination." (J.A. 104.) The record does not compel the conclusion that Respondents' offline activities — including surrogate training, tracking, and research — were in-kind contributions. The district court's conclusion otherwise is erroneous for at least four reasons and should be reversed.

First, the district court never contested the controlling Commissioners' legal conclusion that an expenditure is only an in-kind contribution if that transaction is

coordinated, not if an entity declares its intent to coordinate with a candidate as a general matter. The relevant statutory and regulatory language confirms that whether an expense is an in-kind contribution depends on whether the "expenditure[]" is made "in cooperation, consultation, or concert, with, or at the request or suggestion of" the candidate, not whether the outside group intends to coordinate generally. 52 U.S.C. § 30116(a)(7)(B)(i); *see also* 11 C.F.R. 109.20(b) ("Any expenditure that is coordinated [is] an in-kind contribution . . . ."). The controlling Commissioners' insistence on assessing whether the record established any connection between the Respondents' coordination and the relevant transactions was a reasonable method of implementing that requirement at the reason-to-believe stage.

Second, the expenses may have been reimbursed at market rates. If they were reimbursed, the spending would not be an in-kind contribution. Indeed, evidence in the record, identified by the controlling commissioners, shows reimbursements from the campaign to Correct the Record, which those parties' responses before the Commission claimed fully covered tracking and research services. (J.A. 103.)

Third, the controlling group found that the allegations in the administrative complaints were speculative and untethered from evidence. (J.A. at 102.) The Complainants only alleged "*[i]f* any of these expenditures *were* coordinated," they

then "*would* constitute in-kind contributions" or that compensation to staff in this context "*would* constitute in-kind contributions … *if* the services *were* conducted at the request or suggestion of, or otherwise in coordination" with the campaign. (J.A. 280.) Correct the Record provided a response to the Commission denying that it coordinated its training programs with the campaign. And the controlling group noted that Correct the Record claimed it provided training only as a free service to local volunteers and did not include or accept suggestions on training from any campaign personnel or surrogates. (J.A. 281.)

Fourth, the controlling statement examined the broad record. For example, it noted that a newspaper article attached as evidence to the complaint suggested these expenses were not coordinated with the campaign. (J.A. 281.) The article states that the campaign played "no role" in Respondents' training sessions and acknowledges that the campaign had its own surrogate operation. (*Id.*) The district court suggested that the controlling Commissioners "fail[ed] to engage" with the public information suggesting broad coordination between Correct the Record and Hillary for America, but their Statement of Reasons did consider that information and simply reached different conclusions than the district court would have. Indeed, the controlling Commissioners specifically addressed the statements cited by the district court. Compare J.A. 103-04 (citing Correct the Record press

release and David Brock interview)] with J.A. 281-82 (quoting the press release language cited by the Court) and J.A. 104 (addressing Brock interview).

In sum, the controlling group reached this conclusion based on their careful review of the evidence and were simply unwilling to conclude that Correct the Record's broad statement, to the effect that it would be able to coordinate much or most of its activities with the Clinton campaign, established that there was reason to believe that all of Correct the Record's expenses were in-kind contributions. Even assuming that reasonable persons could disagree with the controlling statement, as the district court did here, the Commissioners nonetheless made a "rational connection" between the facts in the record and the conclusions they ultimately drew. *Airmotive Eng'g Corp. v. FAA*, 882 F.3d 1157, 1159 (D.C. Cir. 2018). The district court's substitution of its views for that of the Commissioners should be reversed.

## III. THE COMMISSION HAS NOT FORFEITED AN APPEAL AND, IN ANY EVENT, CONSIDERATION IS WARRANTED HERE BY EXCEPTIONAL CIRCUMSTANCES

The Complainants have moved to dismiss this appeal arguing that the Commission forfeited its arguments by not appearing in the district court. This Court referred consideration of the arguments presented in that motion to this merits panel. (Order (Apr. 10, 2023) (per curiam) (Doc. No. 1994031.)

### A. The Issues Raised Here Were Pressed and Decided by the District Court

Generally, it "is not [this Court's] practice to entertain issues first raised on appeal." *Roosevelt v. E.I Du Pont de Nemours & Co.*, 958 F.2d 416, 419 (D.C. Cir. 1992). "That rule, however, does not apply where the district court nevertheless addressed the merits of the issue." *Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699, 707 (D.C. Cir. 2009); *cf. United States v. Williams*, 504 U.S. 36, 41 (1992) (noting that Supreme Court's "traditional rule" precluding review of questions "not pressed or passed upon below . . . operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon") (internal quotation marks omitted).

The district court decision on review here plainly passed upon two of the three issues the Commission seeks to raise on appeal: whether the controlling rationale supporting dismissal of Complainants' administrative complaint was based on an impermissible interpretation of FECA and FEC regulations and whether that rationale's conclusions about alleged coordination between the Respondents was arbitrary and capricious. (J.A. 98-102) (concluding that the controlling rationale's legal conclusions were "contrary to law and thus invalid"); J.A. 102-05 (concluding that the controlling Commissioners' "view of the record" was "arbitrary and capricious").) The third issue the Commission seeks to press on appeal involves an attack on the district court's subject-matter jurisdiction and,

because it goes to the court's power to hear the case, "can never be waived or forfeited." *United States v. Miranda*, 780 F.3d 1185, 1188 (D.C. Cir. 2015) (citing *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006)).

That is enough to resolve Complainants' forfeiture argument. But there is much more. The Commission's arguments are also not forfeited because the two non-jurisdictional issues it raises were "asserted at the District Court level" — by the Respondents. *Potter v. District of Columbia*, 558 F.3d 542, 550 (D.C. Cir. 2009) (internal quotation marks omitted). True, the Commission did not muster sufficient votes to defend its dismissal in Court. The Respondents, however, participated from the earliest stages of this case and pressed each of the non-jurisdictional arguments the Commission raises here. *Cf. Nat. Res. Def. Council, Inc. v. Env't Prot. Agency*, 824 F.2d 1146, 1151 (D.C. Cir. 1987) (explaining that administrative exhaustion requirement does not bar a party that did not participate in a rulemaking before an agency from pressing argument on judicial review "if the agency has had an opportunity to consider the identical issues . . . but which were raised by other parties") (citation and internal quotation marks omitted).

Because the Respondents actively raised these issues at the district court, Complainants' arguments as to the policies underlying the forfeiture rule fall flat. There is no risk that Complainants could be "'surprised on appeal by final decisions there upon which they have had no opportunity to introduce evidence.'"

(Mot. to Dismiss at 8 (Feb. 6, 2023) (Doc. No. 1984805) (quoting *Hormel v. Helvering*, 312 U.S. 552, 556 (1941).) Nor is there any risk of "'sandbagging the district court.'" (*Id.* (quoting *Shatsky v. Palestine Liberation Org.*, 955 F.3d 1016, 1031 (D.C. Cir. 2020).) Complainants cannot claim unfair surprise when a party raises an issue on appeal that was actually pressed and decided below. *See Shatsky*, 955 F.3d at 1131 ("[G]iven the parties' full presentation of the issue before the district court . . . this case does not implicate concerns about sandbagging[.]"). They had every opportunity to develop arguments during three years of district court proceedings on these same issues when they were raised by the Respondents.

There is also no concern that Complainants will have been denied an opportunity to introduce evidence relevant to any appeal. Because this is a case on review of an agency nonenforcement action, the "entire case on review is a question of law, and only a question of law." *Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993). The record relevant to that question is "the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Despite its default below, the Commission submitted its certified administrative record during district court proceedings, and that record was available to all parties through the entire pendency of the litigation. (J.A. 6.) The Commission's default

did not deprive Complainants or the district court of any record-building opportunity.

If anything, the unusual circumstances leading to the Commission's default suggest that permitting its appeal would not incentivize other parties to engage in gamesmanship. Unlike other parties that come before the courts, the Commission is an even-numbered multimember governmental agency regulating a portion of the political system whose membership rules legally mandate that no political party can have a majority for significant actions. 52 U.S.C. § 30106(a)(1); *Combat Veterans for Congress Political Action Comm. v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015); *cf. Van Hollen v. FEC*, 811 F.3d 486, 499 (D.C. Cir. 2016) (noting the FEC's "unique mandate" whose actions "implicate[] fundamental rights"). The balanced structure Congress provided ensures that any Commission decision that requires four votes, which includes votes to defend litigation like the one Complainants brought here, require bipartisan buy-in. *See* 52 U.S.C. §§ 30106(c), 30107(a)(6). But it also increases the chances that an evenly divided Commission will be unable to approve certain actions. That dynamic here resulted in a Commissioner who had supported Complainants' position before the agency exercising discretion not to authorize the Commission to defend its dismissal in court, thereby causing that authorization vote to fail. (J.A. 265-66.) Given the Commission's unusual structure and the uncommon facts here, there is little

chance that permitting the Commission to defend itself at this point would have a detrimental effect on the administration of justice.

The Commission's post-suit conduct also rebuts Complainants' assertions of impropriety. Despite lacking authorization to defend itself in court, the Commission prepared and submitted its administrative record, pursuant to court order. (J.A. 6.) As Complainants recognized, the composition of the Commission changed substantially after the administrative proceedings at issue in this case. The agency's approach to this litigation switched from default to defense at the first decisional juncture thereafter. The Commission's switch from default at earlier stages of the litigation was in no sense an attempt at gamesmanship or sandbagging but rather a product of changed membership.

Although not framed in these terms, the natural result of accepting Complainants' arguments on forfeiture, would be to prevent any party from appealing an adverse judgment after defaulting without seeking relief in the district court. As courts have reasoned, however, "[n]o statute or rule of civil procedure requires a defaulting party to first contest the default judgment in district court. In particular, Rule 55(c) itself makes clear that a party *may* move under Rule 60(b) to set aside a default judgment, but it does nothing to suggest that the party *must* do so." *Stelly v. Duriso*, 982 F.3d 403, 407 (5th Cir. 2020); *see Prime Rate Premium Fin. Corp. v. Larson*, 930 F.3d 759, 768 (6th Cir. 2019) ("[W]e do not see anything

in the Federal Rules that requires a party always to file a Rule 60(b) motion in order to appeal a default judgment[.]"). This Circuit does not appear to have directly addressed this question and there is "a circuit split on whether a party must file a Rule 60(b) motion challenging a default judgment in the district court prior to appealing," *Stelly*, 982 F.3d at 406. The absence of a requirement in the Federal Rules suggests that the courts of appeal holding that no such motion is required have the better view.

Although this Circuit has not directly addressed the issue, prior cases have declined to dismiss appeals from default judgments entered after a party failed to appear or make arguments to the district court prior to the appeal. *See Gates v. Syrian Arab Republic*, 646 F.3d 1, 3 (D.C. Cir. 2011); *cf. Consarc Corp. v. Iraqi Ministry*, 27 F.3d 695, 700 (D.C. Cir. 1994) (concluding that government agency not named in original action had not timely challenged default judgment against nonappearing foreign entity because the agency "could have intervened after the [default] judgment and appealed within the time limit"); *Pulliam v. Pulliam*, 478 F.2d 935, 936 (D.C. Cir. 1973) ("[T]he question whether the default judgment was properly entered in this case is not before us, since the defendant did not file a timely appeal from that judgment."). The reasoning of these courts makes it clear that a party does not automatically forfeit an appeal by not first appearing in the district court.

This case presents even less reason to require a party to seek relief at the district court before filing an appeal because the decision below was a summary judgment against the Commission after full briefing of purely legal issues by a Respondent.[9] Making a post-judgment motion to ask the district court to reconsider its legal analysis on the same basis pressed by the Respondents would have been a fruitless exercise and a waste of resources both on behalf of the parties and the court. The district court had just rejected those arguments. Making them again would have been a needless formality.

None of which is to say that in the usual case any party may decline to appear in the district court and then try the case anew at the court of appeals. Any issue capable of being forfeited or waived that is not presented to or decided by the district court remains forfeited. A defaulting party is "unable to raise any fact questions that were not brought before the district court" and may forfeit other defenses not affirmatively pled, but "if the existing record and pleadings do not support the judgment, the defaulting party can prevail on appeal without having raised the issues first in the district court." *Stelly*, 982 F.3d at 407. The Commission's appeal does not exceed those limitations, however, and so there is no basis to conclude that it has forfeited its appeal.

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[9] If the district court had resolved this case by issuing a default judgment, it would still have had to address the merits of Complainants' claim because the Commission is an agency of the United States. Fed. R. Civ. P. 55(d).

### B. This Case Presents "Exceptional Circumstances" That Permits This Court to Consider Otherwise Forfeited Issues

Though the Respondents' assertion and the district court's resolution of the non-jurisdictional issues the Commission seeks to press here were sufficient to preserve those issues for appellate review, this case also presents "exceptional circumstances" that would permit this Court to exercise discretion to consider otherwise forfeited issues. *Roosevelt*, 958 F.2d at 419 n.5. The atypical circumstances leading to this appeal described above qualify as exceptional. *See supra* pp. 9-14. Again, the Commission seeks to assert purely legal issues that do "not depend on any additional facts not considered by the district court." *Id.* The basic question underlying this appeal — which involves the scope of a Commission regulation addressing the applicability of federal campaign finance contribution limits and disclosure requirements to communications on the internet — is unquestionably one of great importance. Indeed, the district court indicated that this case "involves serious legal questions about the metes and bounds of the FEC's internet exemption." (Mem. Op. at 5, No. 19-2336 (Feb. 1, 2023) (ECF No. 80).

Complainants have argued that this case cannot present exceptional circumstances because the controlling rationale did not command four votes and is

therefore not precedential. (Mot. to Dismiss at 13 (Feb. 6, 2023) (Doc. 1984805).) While Complainants' premise regarding administrative authoritativeness may be correct, their conclusion does not follow. In this Court, the Commission challenges a district court order concluding that its controlling legal analysis is contrary to law. Even if the underlying controlling Commissioner rationale is not binding in a later agency proceeding, the district court's opinion has continuing legal effect.

Beyond the effect the district court's analysis has on the scope of the Commission's internet exemption, its order also continues to undermine the Commission's exclusive enforcement authority. *See* 52 U.S.C. § 30107(e). Congress granted to the Commission exclusive authority to interpret and enforce FECA, subject only to the possibility that judicial review might declare its failure to act or dismissal "contrary to law." 52 U.S.C. § 30109(a)(8)(C); *see In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538, 544-46 & n.9 (D.C. Cir. 1980) (discussing importance of FEC's "exclusive jurisdiction" given "the extremely delicate nature of the tremendous power entrusted to it"). Any third-party suit improperly authorized by a district court undermines the Commission's interest in that exclusivity.

The filing of Campaign Legal Center's private civil action against the Respondents after the district court's order does not divest the Commission of any

interest in this appeal. The very fact of a four-vote Commission majority to vote to appeal indicates significant and bipartisan interest in this Court addressing the consequential interpretive questions presented regarding the scope of the agency's internet exemption. *See supra* p. 14.

## CONCLUSION

For all the foregoing reasons, the Court should reverse the decision below in its entirety and remand to the FEC for consideration of allegations regarding disclosure violations.

Respectfully submitted,

Lisa J. Stevenson
Acting General Counsel

Kevin Deeley
Associate General Counsel

/s/ Greg J. Mueller
Greg J. Mueller
Attorney

FEDERAL ELECTION COMMISSION
1050 First Street NE
Washington, DC 20463
(202) 694-1650

May 24, 2023

# ADDENDUM

# ADDENDUM – TABLE OF CONTENTS

## Federal Statutes



## Federal Regulations

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

### § 30101. Definitions

When used in this Act:

* * *

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

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

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

* * *

### § 30104. Reporting requirements

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

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

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

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

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

**(3)** the identification of each—

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

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

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

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

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

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

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

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

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

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

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

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

(E) repayment of all other loans;

(F) contribution refunds and other offsets to contributions;

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

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

(i) contributions made to other political committees;

(ii) loans made by the reporting committees;

(iii) independent expenditures;

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

(v) any other disbursements; and

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

**(5)** the name and address of each—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

**§ 30109. Enforcement**

**(a)** *Administrative and judicial practice and procedure*

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

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

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

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

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

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

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

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

* * *

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

* * *

9

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

### § 100.26 Public communication

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

* * *

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

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

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

* * *

### § 109.20 What does "coordinated" mean?

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

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

**§ 109.21 What is a "coordinated communication"?**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) The content of the communication;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 11,682 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App P 32(a)(6) because the brief uses the proportionally spaced typeface Microsoft Word 14-point Times New Roman.

/s/ Greg J. Mueller
Greg J. Mueller
Attorney
Federal Election Commission

## CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May 2023, I electronically filed the Brief for Federal Election Commission with the Clerk of the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system. Service was made on the following through CM/ECF:

Tara Malloy
Megan P. McAllen
Campaign Legal Center
1101 14th St. NW, Suite 400
Washington, DC 20005

I further certify that I also will cause the requisite number of paper copies of the brief to be filed with the Clerk.

/s/ Greg J. Mueller
Greg J. Mueller
Federal Election Commission
1050 First Street NE
Washington, DC 20463
(202) 694-1650
gmueller@fec.gov