IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER
1101 14th St., NW, Ste. 400
Washington, D.C. 20005

CATHERINE HINCKLEY KELLEY
1101 14th St., NW, Ste. 400
Washington, D.C. 20005

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION
1050 First St., NE
Washington, D.C. 20463

Defendant.

Civil Action No: 1:19-cv-02336-JEB

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiffs Campaign Legal Center ("CLC") and Catherine Hinckley Kelley bring this action for declaratory and injunctive relief against the Federal Election Commission ("FEC" or "Commission") pursuant to 52 U.S.C. § 30109(a)(8), challenging as contrary to law the FEC's dismissal of their administrative complaint filed against a political committee, Correct the Record ("CTR"), and the campaign committee of 2016 presidential candidate Hillary Clinton, Hillary for America ("Clinton campaign"), for engaging in a multi-million dollar coordination scheme and failing to report coordinated expenditures in violation of the Federal Election Campaign Act ("FECA" or "Act"), 52 U.S.C. § 30101 *et seq.*, and Commission regulations.

2. In the 2016 election cycle, CTR founder and chair David Brock publicly declared that the so-called "super PAC" would coordinate many of its activities with the Clinton campaign.

Under FECA, coordinated expenditures are considered in-kind campaign contributions, subject to reporting requirements, contribution limits, and source restrictions. However, despite spending millions of dollars on opposition research, campaign spokesperson training and booking, video production, and press outreach—at least some portion of which, by CTR's own admission, was conducted in coordination with the Clinton campaign—the Clinton campaign never reported receiving in-kind contributions from CTR, and CTR never reported making such contributions.

3. Plaintiffs filed an administrative complaint on October 6, 2016, which the FEC designated as Matter Under Review ("MUR") 7146, alleging there was reason to believe that CTR and the Clinton campaign had violated FECA's contribution limits, 52 U.S.C. § 30116(a)(1), its prohibition on contributions to a candidate from union or corporate funds, *id.* § 30118(a) and (b)(2), and its requirement that candidate committees and non-connected political committees report and disclose all in-kind contributions made and accepted, *id.* § 30104(b). *See* Admin. Compl., MUR 7146 (Correct the Record) (Oct. 6, 2016), [Dkt. #1, Ex. 1].

4. After reviewing the allegations in plaintiffs' administrative complaint, the FEC's Office of General Counsel ("OGC") recommended the Commissioners find reason to believe that CTR and the Clinton campaign violated FECA by making and accepting, respectively, "unreported excessive and prohibited in-kind contributions" in the form of coordinated expenditures, and authorize an investigation to determine "the extent" of the unreported in-kind contributions. First General Counsel's Report at 25-26, MURs 6940, 7097, 7146, 7160, and 7193 (Correct the Record) (Oct. 16, 2018) ("OGC Report").[1]

5. On June 4, 2019, the Commission voted on OGC's recommendation but failed, by a vote of 2-2, to obtain the four affirmative votes needed to find "reason to believe" and to proceed

[1] The OGC Report is available at https://www.fec.gov/files/legal/murs/7146/19044472082.pdf.

with an investigation into the alleged violations. *See* 52 U.S.C. § 30109(a). The Commission subsequently voted 4-0 to dismiss the complaint.[2]

6. On August 21, 2019, 78 days after the Commission closed the file, 19 days after plaintiffs commenced this lawsuit, and 18 days after the expiration of the 60-day statutory period for seeking judicial review, the two "controlling" Commissioners who voted against finding "reason to believe" that FECA was violated with respect to the allegations in MUR 7146—and who thereby forced the dismissal of plaintiffs' administrative complaint—issued a Statement of Reasons explaining their votes.[3]

7. The Commission's failure to find reason to believe and its dismissal of plaintiffs' administrative complaint, as belatedly explained in the controlling Commissioners' Statement of Reasons, rested on impermissible interpretations of FECA and FEC regulations, and was arbitrary, capricious, and otherwise contrary to law. *See Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986).

8. Whereas truly *independent* expenditures may not "pose dangers of real or apparent corruption," the Supreme Court has repeatedly recognized that *coordinated* expenditures function as "disguised contributions"—and that the failure to regulate them as such creates an acute risk of corruption and deprives the public of valuable information about the true sources of candidates' financial support. *Buckley v. Valeo*, 424 U.S. 1, 46-47 (1976) (per curiam).

9. If coordinated expenditures are not subject to contribution limits and source restrictions, wealthy interests such as CTR and its donors will continue to procure influence over

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[2] *See* Amended Certification in MURs 6940, 7097, 7146, 7160, and 7193 (Correct the Record) (signed June 13, 2019), https://www.fec.gov/files/legal/murs/7146/19044472151.pdf. Other documents in the MUR file are available on the FEC's website, at https://www.fec.gov/data/legal/matter-under-review/7146.

[3] *See* Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter, MURs 6940, 7097, 7146, 7160, and 7193 (Correct the Record) (Aug. 21, 2019) ("controlling Statement of Reasons"), https://www.fec.gov/files/legal/murs/7146/7146_1.pdf.

candidates and officeholders by making expenditures at their behest, raising the "danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." *Buckley*, 424 U.S. at 47. And without the full and accurate reporting of coordinated expenditures as in-kind contributions to candidates, voters will not have the campaign finance information necessary to "place each candidate in the political spectrum," understand "the interests to which a candidate is most likely to be responsive," or make "predictions of future performance in office," *id.* at 67—all of which are crucial to casting an informed and meaningful vote.

10. The dismissal of plaintiffs' complaint has undermined FECA's purposes, including its goals of preventing the corruptive impact of large "disguised" contributions and providing the electorate with comprehensive disclosure "as to where political campaign money comes from and how it is spent by the candidate." *Buckley*, 424 U.S. at 66.

11. Plaintiffs have suffered as a result, because they, as well as the public, have been deprived of disclosure about the scale and scope of CTR's expenditures coordinated with the Clinton campaign—which, in turn, has deprived plaintiffs of key information about the sources of the Clinton campaign's financial support, as well as the size and purposes of the campaign's expenditures. This is information to which plaintiffs are legally entitled under FECA, and which CLC needs for work central to its mission and Ms. Kelley needs to properly evaluate candidates for federal office and to cast an informed vote.

12. Accordingly, plaintiffs seek a judicial declaration that the dismissal of their administrative complaint was arbitrary, capricious, and contrary to law. Plaintiffs further seek an order requiring the FEC to conform with such declaration within 30 days.

JURISDICTION AND VENUE

13. This Court has jurisdiction over this action under 52 U.S.C. § 30109(a)(8)(A) and 5 U.S.C. § 702. This Court also has jurisdiction pursuant to 28 U.S.C. §§ 1331, 2201(a), and 2202.

14. Venue in this district is proper pursuant to 52 U.S.C. § 30109(a)(8)(A) and 28 U.S.C. § 1391(e).

PARTIES

15. Plaintiff CLC is a nonpartisan 501(c)(3) organization that works to strengthen the U.S. democratic process through, among other activities, protecting the public's right to access information about the financing of federal, state, and local election campaigns and the influence that campaign money has on governmental decisionmaking. To realize its mission of improving democracy and promoting representative, responsive, and accountable government for all citizens, CLC engages in litigation, regulatory practice, legislative policy, and public education. *See* CLC, *About CLC*, https://campaignlegal.org/about.

16. CLC relies on the accurate and complete reporting of campaign finance information to carry out activities central to its mission, including research, analysis, and reporting about campaign spending and the true sources and scope of candidates' financial support.

17. A central aspect of CLC's programmatic work, and a key way it advances its organizational mission, involves research regarding the money used to influence elections. Disclosure reports filed with the FEC are an important source of campaign finance information, which CLC uses for its fact-based legal analysis and evaluation of existing and proposed campaign finance laws, as well as to educate the public about the sources and extent of candidates' financial support so that voters can evaluate the full context of the political messages they hear. *See* CLC, *Issues: Campaign Finance*, https://campaignlegal.org/issues/campaign-finance.

18. CLC also uses this analysis in its active docket of campaign finance cases in federal and state courts across the country.

19. CLC is involved in litigation regarding campaign contribution limits, disclosure, political advertising, enforcement issues, and other campaign finance matters. Since representing the legislative sponsors of the Bipartisan Campaign Reform Act as intervenor-defendants in *McConnell v. FEC*, 540 U.S. 93 (2003), CLC has filed amicus briefs in every campaign finance case decided by the Supreme Court, including *McCutcheon v. FEC*, 572 U.S. 185 (2014), and *Citizens United v. FEC*, 558 U.S. 310 (2010).

20. In addition, CLC uses its analyses of federal campaign finance disclosure as the foundation for its administrative practice at the FEC and before state and local campaign finance agencies, and relies on this information when preparing administrative enforcement complaints and participating in rulemaking and advisory opinion proceedings.[4]

21. CLC also uses information obtained from campaign finance disclosure reports in preparing testimony or public comment for Congress[5] or for state and local legislatures and

[4] *See, e.g.*, CLC, *Letter to the FEC re: REG 2014-10 (Party Contribution Limits)* (May 19, 2019), https://campaignlegal.org/document/letter-fec-cromnibus-accounts (urging the FEC to issue rules defining permissible uses of funds from certain special-purpose "Cromnibus" accounts based on analysis of political party committees' disbursements from such accounts); CLC, *Petition for Rulemaking to Revise and Amend Regulations Relating to the Personal Use of Leadership PAC Funds* (July 24, 2018), https://campaignlegal.org/document/petition-fec-rulemaking-revise-and-amend-regulations-relating-personal-use-leadership-pac.

[5] *See, e.g.*, *Responses to Questions for the Record in Supp. of H.R. 1: Submitted to H. Comm. on the Judiciary*, 116th Cong. (2019), https://campaignlegal.org/document/congressional-testimony-support-hr-1-response-questions-record (testimony of Adav Noti, CLC senior director of trial litigation and chief of staff).

agencies,[6] as well as to produce in-depth research reports and publications,[7] op-eds, blog posts, and other commentary through appearances on broadcast media and in interviews for print and web publications.[8] These communications are directed toward educating policymakers and the public about the true sources of money raised and spent to influence elections and the scale of candidate campaign spending, whether the money is contributed to or spent by candidates, political parties, other political committees, or non-committee individuals or entities.

22. Similarly, CLC expends significant resources to assist reporters and other members of the media in their investigative research into candidates' financial support, to ensure that the public is equipped with the information necessary to evaluate different candidates and messages and to cast informed votes.

23. Many of these press calls and contacts involve questions about the sources and amounts of funds being contributed to super PACs supporting specific candidates. This information is relevant to an analysis of the interests to which a candidate is likely to be responsive.

24. When inadequate disclosure of federal campaign finance activity makes it difficult to ascertain the origin and magnitude of a candidate's financial support, as occurs when a candidate's fundraising and media operations are illegally outsourced to an "independent" super

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[6] *See, e.g.*, CLC, *Comments to Oklahoma Ethics Commission regarding Proposed Rule Amendments 2019-01*, https://www.ok.gov/ethics/documents/CLC%20Comments%20on%20Proposed%20Rule%20Amendments.

[7] *See, e.g.*, Brendan Fischer & Maggie Christ, CLC, *FARA Zombies: How Some Retired Politicians Use Leftover Campaign Funds to Advance Their Careers as Foreign Agents* (2019), https://campaignlegal.org/sites/default/files/2019-07/07-25-19%20FARA%20Zombie%20Report%20%28final%29.pdf; Brendan Fischer & Maggie Christ, CLC, *Dodging Disclosure: How Super PACs Used Reporting Loopholes and Digital Disclaimer Gaps to Keep Voters in the Dark in the 2018 Midterms* (2018), https://campaignlegal.org/sites/default/files/2018-11/11-29-18%20Post-Election%20Report%20%281045%20am%29.pdf.

[8] For other examples of CLC's work, see http://www.campaignlegal.org.

PAC without disclosure, reporters often contact CLC for guidance as to whether or where they can find the campaign finance information that is not being properly reported. This work requires CLC to divert resources and funds from other organizational needs.

25. Plaintiff Catherine Hinckley Kelley is CLC's Director of Policy and State Programs.

26. She is a citizen of the United States and a registered voter and resident of Washington, D.C.

27. As a registered voter, Ms. Kelley is entitled to receive all the information FECA requires those engaged in political activities to report publicly, and her informed exercise of the vote is impaired when such information is unavailable. She is further entitled to the FEC's proper administration of the federal campaign finance laws.

28. Ms. Kelley is harmed by the FEC's failure to require CTR and the Clinton campaign to disclose the extent of their coordinated activity because she was deprived of campaign finance disclosure information that she has a statutory right to access and that she uses to evaluate candidates for federal office.

29. Both plaintiffs rely on information about campaign-related spending to evaluate different speakers and messages and to monitor the influence of campaign money on officeholders and public policy.

30. The dismissal of plaintiffs' administrative complaint has deprived plaintiffs, as well as the public, of disclosure information regarding the scale and scope of CTR's expenditures coordinated with the Clinton campaign.

31. FECA gives each plaintiff a right to access this information, which CLC uses for its organizational work and advocacy and Ms. Kelley uses in exercising her right to an informed

vote. By depriving plaintiffs of access to this information, the dismissal impairs CLC's ability to carry out a central part of its mission and harms Ms. Kelley's informational interests as a voter.

32. Defendant FEC is an independent federal agency charged with the administration and civil enforcement of FECA. 52 U.S.C. § 30106.

FACTS

STATUTORY AND REGULATORY FRAMEWORK

Statutory and Regulatory Definition of "Contribution"

33. Under the Act, a "contribution" is a "gift . . . 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). "Anything of value" includes "all in-kind contributions." 11 C.F.R. § 100.52(d)(1).

34. In-kind contributions include "the payment . . . of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose." 52 U.S.C. § 30101(8)(A)(ii).

Coordinated Expenditures Are Deemed In-Kind Contributions

35. Any expenditure made in coordination with a candidate is an in-kind "contribution" to such candidate. "[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 a contribution to such candidate*." 52 U.S.C. § 30116(a)(7)(B)(i) (emphasis added).

36. The Supreme Court has endorsed this treatment of "coordinated" spending, accepting the proposition that "expenditures controlled by or coordinated with the candidate and

his campaign might well have virtually the same value to the candidate as a contribution and . . . pose similar dangers of abuse." *Buckley,* 424 U.S. at 46.

37. Because a "coordinated" expenditure is treated as an in-kind contribution to the candidate with whom it was coordinated, it is subject to the Act's contribution limits and source restrictions, as well as its related disclosure requirements.

38. In the 2016 election cycle, federal law limited to $2,700 the amount of a contribution that a presidential candidate or the candidate's authorized campaign committee could accept from an individual donor or a non-multicandidate political committee. 52 U.S.C § 30116(a)(1)(A); FEC, *Contribution limits for 2015-2016* (Feb. 3, 2015), https://www.fec.gov/updates/contribution-limits-for-2015-2016.

39. FECA also prohibits a corporation or labor union from making a contribution to a federal candidate or political committee. 52 U.S.C. § 30118(a).

40. Candidates and political committees are prohibited from knowingly accepting any contribution, including in-kind contributions in the form of coordinated expenditures, in violation of any restriction imposed on contributions under the Act. 11 C.F.R. § 110.9.

41. FECA also requires all political committees to file regular reports with the Commission disclosing their receipts and disbursements, including in-kind contributions in the form of coordinated expenditures. 52 U.S.C. § 30104(a)(1).

42. For any political committee other than a candidate-authorized committee, such reports must include the total amount of contributions, including in-kind contributions, made to other political committees. 52 U.S.C. § 30104(b)(4)(H)(i). The report must also identify the name and address of each political committee that has received a contribution from the reporting

committee during the reporting period, together with the date and amount of such contribution. *Id.* § 30104(b)(6)(B)(i).

43. Candidate-authorized campaign committees must file reports disclosing all contributions received from other political committees, including in-kind contributions in the form of coordinated expenditures. 52 U.S.C. § 30104(b)(2)(D). An in-kind contribution in the form of coordinated expenditures must be reported as both a contribution received and an expenditure made by the candidate. 11 C.F.R. §§ 104.13(a), 109.20(b), 109.21(b).

44. An in-kind contribution to a candidate from another committee must be itemized regardless of its amount as both a receipt and a disbursement. A candidate-authorized committee must report each in-kind contribution from a committee as an itemized receipt, and disclose the date and amount of the contribution, as well as the name and address of the contributor. 11 C.F.R. § 104.3(a)(4)(ii). The committee must also report an in-kind contribution as an itemized disbursement, and disclose the amount and date of the disbursement, the name and address of the recipient of the disbursement, and a description of its purpose. *Id.* § 104.3(b)(4)(i); *see also* FEC, *How to report: In-kind contributions*, https://www.fec.gov/help-candidates-and-committees/filing-reports/in-kind-contributions.

Definition and Regulation of Coordinated Expenditures

45. FECA defines a coordinated expenditure as one made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." 52 U.S.C. § 30116(a)(7)(B)(i).

46. FEC regulations define "coordination" in almost identical terms to mean "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." 11 C.F.R. § 109.20(a).

47. In addition to this broad "coordination" regulation, the Commission has also promulgated a regulation pertaining to a subset of coordinated expenditures—those made for certain "coordinated communications"—at 11 C.F.R. § 109.21.

48. To be a "coordinated communication," a communication must (1) be paid for by a person other than the candidate, as described in 11 C.F.R. § 109.21(a)(1); (2) satisfy one of the "content standards" set forth in 11 C.F.R. § 109.21(c); and (3) satisfy one of the "conduct standards" set forth in 11 C.F.R. § 109.21(d).

49. The "content standards" set forth in 11 C.F.R. § 109.21(c) all pertain to "public communications," a term defined by the Commission to mean a communication:

> [B]y 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.

Id. § 100.26.

50. The Commission's "coordinated communication" regulation at 11 C.F.R. § 109.21 thus applies only to expenditures for communications disseminated via media covered by the definition of "public communication" at 11 C.F.R. § 100.26.

51. In 2006, the Commission promulgated internet rules that, among other things, created an "internet exception" from the definition of "public communications," which exempted unpaid online communications, but continued to cover "communications placed for a fee on another person's Web site," under 11 C.F.R. § 100.26. Explanation and Justification for Internet Communications, 71 Fed. Reg. 18589 (April 12, 2006). The intent of this internet rulemaking was to ensure that "individual citizens" were not impeded "from using the Internet to speak freely regarding candidates and elections," while at the same time sustaining the legal requirement that

"political committees [like CTR] properly finance and disclose their Internet communications." *Id*. at 18589.

52. The regime created by the coordinated communication rule, 11 C.F.R. § 109.21, and 11 C.F.R. § 100.26, as modified by the 2006 internet rulemaking, accordingly provides that *unpaid* "communications over the Internet" are not "public communications" and thus not covered by the definition of "coordinated communications." *Id.* § 109.21.

53. But all other types of expenditures, such as expenditures that do not constitute communications, are governed by the coordination regulation at 11 C.F.R. § 109.20. Under this regulation, any such expenditure will be treated as an in-kind contribution to a candidate if made "in cooperation, consultation or concert with, or at the request or suggestion of," a candidate or the candidate's campaign committee. 11 C.F.R. § 109.20

FECA's Regulation of Political Committees

54. Generally, "non-connected" political committees—i.e., those committees that are not authorized candidate committees or party committees—may not accept contributions from any source that, in the aggregate, exceed $5,000 in a calendar year. 52 U.S.C. § 30116(a)(1)(C). FECA also prohibits political committees from accepting contributions from corporations or labor unions. *Id.* § 30118(a).

55. However, following court decisions in *Citizens United* and *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), the FEC created a new class of political committees known as "super PACs." FEC Advisory Op. 2010-11 (Commonsense Ten) at 2-3. Political committees that "intend[] to make only independent expenditures" but no "monetary or in-kind contributions (including coordinated communications) to any other political committee or

organization" may solicit and accept unlimited contributions from individuals, corporations, labor organizations, and other committees. *Id.*

56. In 2011, pursuant to the stipulated order and consent judgment in *Carey v. FEC*, No. 11-259-RMC (D.D.C. Aug. 19, 2011), the Commission issued further guidance allowing certain political committees to operate as "hybrid" committees that make both independent expenditures and campaign contributions from segregated accounts. FEC Statement on *Carey v. FEC*, Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011), https://www.fec.gov/updates/fec-statement-on-carey-fec.

57. A hybrid or "*Carey*" committee may establish (1) a "non-contribution" bank account that accepts contributions in unlimited amounts from individuals, corporations, labor organizations and other political committees that may be used only for independent expenditures—*not* for in-kind contributions to candidates; and (2) a separate "contribution" account subject to FECA's contribution limits and source prohibitions for making contributions to federal candidates. *Id.*

Commission Enforcement Actions

58. Any person may file a complaint with the FEC alleging a violation of FECA. 52 U.S.C. § 30109(a)(1). Commission regulations specify, in relevant part, that a complaint must identify the complainants and be sworn and signed, and that the allegations in a complaint "not based upon personal knowledge" should identify the source of the information that "gives rise to the complainant's belief in the truth of such." 11 C.F.R. § 111.4(b), (d).

59. The Commission, after reviewing the complaint and any responses, then votes on whether there is "reason to believe" a violation has occurred, in which case it "shall" investigate.

52 U.S.C. § 30109(a)(2). FECA requires the FEC to find "reason to believe" by at least four affirmative votes of the members of the Commission. *Id.*

60. The Commission will find "reason to believe" where a complaint "credibly alleges" that a FECA violation "may have occurred." FEC, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545 (Mar. 16, 2007).

61. When the Commission rejects OGC's recommendation to pursue a possible FECA violation, the reasoning of the Commissioners who voted against proceeding—as set forth in a Statement of Reasons—provides the basis for judicial review. *FEC v. Nat'l Republican Senatorial Comm.*, 842 F.2d 436, 449 (D.C. Cir. 1988).

ADMINISTRATIVE PROCEEDINGS

Plaintiffs' Administrative Complaint Against Correct the Record and Hillary for America

62. Plaintiffs filed a sworn administrative complaint on October 6, 2016 asking the FEC to find "reason to believe" that Hillary for America violated FECA by failing to report in-kind contributions from CTR in the form of coordinated expenditures and compensation for personal services, 52 U.S.C. § 30104(b), and by accepting excessive and prohibited contributions in violation of FECA's amount limits, *id.* § 30116(a)(1), and source restrictions, *id.* § 30118(a) and (b)(2). Likewise, the complaint asked the FEC to find "reason to believe" that CTR violated FECA by failing to report its in-kind contributions to the Clinton campaign, 52 U.S.C. § 30104(b), by making excessive and prohibited contributions that violated FECA's amount limits, *id.* § 30116(a)(1), and source restrictions, *id.* § 30118(a) and (b)(2). *See* Admin. Compl. ¶ 112, attached hereto as Exhibit A.

63. Plaintiffs documented how CTR spent millions on opposition research, message development, surrogate training and booking, professional video production, and press outreach for the benefit of the Clinton campaign—and noted that, by its own admission, CTR did at least some portion of this in coordination with the Clinton campaign, although CTR has not identified which specific activities were in fact coordinated with the campaign. As a result, the complaint alleged, there was reason to believe CTR had made, and the Clinton campaign had accepted, prohibited and excessive in-kind contributions, likely totaling millions of dollars, and failed to disclose them to the public. Admin. Compl. ¶¶ 87-111.

64. The administrative complaint, citing the *Washington Post*, stated that CTR split off from its parent organization, American Bridge, to become a "stand-alone super PAC" in May of 2015, Admin. Compl. ¶ 9, and functioned as a "hybrid committee," *id.* ¶ 1.

65. The complaint noted that CTR had announced via press release on May 12, 2015 that it was a "strategic research and rapid response team designed to defend Hillary Clinton from baseless attacks," and that it would "be allowed to coordinate with campaigns and Party Committees" because it would "not be engaged in paid media." Admin. Compl. ¶ 12. The *Wall Street Journal* similarly reported that "[b]y not making independent expenditures, the group said there are no restrictions on its ability to coordinate with Mrs. Clinton's campaign. The group will spend money on activities that can legally be coordinated with a campaign, such as social media, the [CTR] spokeswoman said." *Id.* ¶ 10.

66. The administrative complaint acknowledged that CTR had asserted publicly that its activities were exempt from the statutes and regulations governing coordination on the ground that its operations involved unpaid "communications over the Internet" which are exempted from the

FEC's rule covering "coordinated communications" at 11 C.F.R. § 109.21. Admin. Compl. ¶¶ 92-96

67. But the administrative complaint argued that "those rules have no bearing here" because this case "involves *compensated* political committee staffers and contractors" and the vast majority of CTR's activities did not involve communications and "did not take place on the Internet at all." Admin. Compl. ¶ 93.

68. The complaint described how CTR reportedly made expenditures for numerous purposes that did not constitute communications or internet activities, including:

a. Paying staff to produce and circulate memos to reporters "detailing Republicans' stance on prescription drugs" on the same day that Clinton announced her health care policy. Admin. Compl. ¶ 25.

b. Paying staff to contact reporters by phone and email to offer "off the record" story pitches critiquing Clinton's primary election opponents, even as the Clinton campaign was stating publicly that it would not engage in such negative attacks. Admin. Compl. ¶ 34.

c. Paying staff to run a "30-person war room" to defend Clinton during hearings before the House Select Committee on Benghazi, Admin. Compl. ¶ 28, which included "flood[ing] the emails of Washington reporters with a running, blow-by-blow critique of Mrs. Clinton's contentious appearance" before the committee, *id.* ¶ 29.

d. Hiring and paying so-called "trackers" who were deployed to discreetly record the public events of Clinton's opponents in the Democratic Party primaries in states across the country. Admin. Compl. ¶¶ 16-17.

e. Paying staff to "develop relationships with Republicans" and "sleuth out confidential information from the Trump campaign" in order to distribute that information to reporters, including leaking drafts of Donald Trump's nomination speech before it took place. Admin. Compl. ¶ 60.

f. Paying staff to produce and distribute "an extensive prebuttal" memo to reporters in advance of a Trump speech and then "pepper[ing] reporters' inboxes with emails at the rate of about one every four minutes during the time Trump was speaking." Admin. Compl. ¶¶ 55-56.

g. Contracting with consulting firms to provide "on-camera media training" for Clinton supporters, Admin. Compl. ¶ 5; *see also id.* ¶¶ 15, 33, 39, and to conduct an "aggressive surrogate booking program . . . in support of Hillary Clinton," *id.* ¶ 51.

h. Commissioning a private polling firm to conduct polls showing that Clinton won the Democratic debate. Admin. Compl. ¶ 31.

i. Making expenditures for professional media production, travel expenses, and personnel time to conduct "hundreds of interviews" across the country to portray Clinton in a positive light for a "Let's Talk Hillary" video project, and then pitching the video interviews to reporters. Admin. Compl. ¶ 30.

69. The administrative complaint additionally alleged that compensation paid by CTR to its staff or contractors to provide services related to these activities would constitute in-kind contributions to the Clinton campaign if the services were conducted at the request or suggestion of, or otherwise in coordination with, Clinton or her campaign staff. Admin. Compl. ¶¶ 98-99 (citing 52 U.S.C. § 30101(8)(A)(ii) and 11 C.F.R. § 100.54). CTR publicly acknowledged that it coordinated many of its activities with the Clinton campaign, and therefore, the complaint alleged,

any such compensation for personal services rendered to the Clinton campaign constituted in-kind contributions, subject to FECA's reporting requirements and contribution source and amount prohibitions. Admin. Compl. ¶ 102.

70. The administrative complaint also noted that CTR reported two small payments from the Clinton campaign for its services, including a $275,615 payment on June 1, 2015 described as "research: non-contribution account," Admin. Compl. ¶ 18, and a $6,346 payment on July 17, 2015 described as "Payment for Research Services: Non Contribution Account," *id.* ¶ 33; but these payments were dwarfed by CTR's total reported expenditures in the relevant period, and most likely by CTR's coordinated expenditures, although the total amount of the latter is unknown.

71. In light of CTR's broad range of non-communication expenditures, plaintiffs' administrative complaint alleged that "the vast majority of Correct the Record's expenditures have been for activities like opposition research, message development, surrogate training, reporter pitches, media booking, video production, 'rapid response' press outreach, and other 'earned media,'" and to the extent any such expenditures were "made in 'cooperation, consultation, or concert, with, or at the request or suggestion of' Clinton's campaign committee," they were unreported, excessive in-kind contributions to the campaign. Admin. Compl. ¶ 91 (citing 52 U.S.C. § 30116(a)(7)(B)(i) and 11 C.F.R. § 109.20).

The FEC's Office of General Counsel Recommends Finding Reason to Believe CTR and the Clinton Campaign Violated FECA

72. Plaintiffs were not the only parties to file a complaint alleging coordination between CTR and the Clinton campaign. In 2015 and 2016, the Commission received four other administrative complaints making related allegations, which were assigned MUR numbers 6940, 7097, 7160, and 7193.

73. For the purposes of its report and analyses, the FEC's Office of General Counsel considered those four complaints together with plaintiffs' complaint, although the allegations made and evidence cited differed across complaints.

74. Based on plaintiffs' complaint, the respondents' written replies, and other available evidence, OGC recommended that the Commission find reason to believe that CTR violated 52 U.S.C. §§ 30116(a), 30118(a), and 30104(b) by making excessive and prohibited in-kind contributions to the Clinton campaign and failing to report them; and that the Clinton campaign violated 52 U.S.C. §§ 30116(f), 30118(a), and 30104(b) by accepting and failing to report those contributions. OGC Report at 25.

75. Although CTR and the Clinton campaign argued in written responses that CTR's expenditures were not in-kind contributions because they constituted "communications" that were not covered by the FEC's "coordinated communications" regulation, OGC found to the contrary that "CTR raised and spent approximately $9 million on a wide array of activities, *most of which are not fairly characterized as 'communications,*' in furtherance of its stated mission of working in support of Clinton's candidacy in coordination with [the Clinton campaign]." OGC Report at 5. "As such," OGC concluded, "these payments for CTR's coordinated activities constitute coordinated expenditures and thus contributions to [the Clinton campaign]." *Id.*

76. As OGC noted, CTR did not dispute "the description or scope of its activities on behalf of [the Clinton campaign] as set forth in the MUR 7146 [plaintiffs'] Complaint." OGC Report at 10 n.28. Those undisputed activities, explained OGC, "cannot fairly be described as for 'communications,' public or otherwise, unless that term covers almost every conceivable political activity." *Id.* at 20.

77. For example, OGC rejected CTR's argument that "its contacts to reporters are not public communications, and therefore are not in-kind contributions," instead concluding that "paying CTR staffers for this activity—activity that [the Clinton campaign] appeared to depend on CTR to conduct—is more akin to a non-coordinated in-kind contribution such as paying for personal services rendered to a political committee without charge" than to a communication. OGC Report at 23.

78. Likewise, distinguishing between, on the one hand, payments for the posting of poll results on the internet and, on the other, the original payments to conduct the underlying polling, OGC concluded that the latter payments qualified as coordinated expenditures because "[t]he fact that the polling results were subsequently transmitted over the internet does not retroactively render the costs of the polling a 'communication' cost." OGC Report at 20.

79. CTR and the Clinton campaign did not dispute that their activities were coordinated, and OGC concluded that "[t]he available information shows that CTR systematically coordinated with [the Clinton campaign] on its activities." OGC Report at 16. Among other evidence, OGC cited CTR's press releases and its representatives' statements to the media, which plaintiffs' complaint also cited. *Id*. at 7-8, 16.

80. To further support its coordination conclusion, OGC's report additionally cited evidence not included in plaintiffs' complaint or derived from public statements by CTR, including internal materials published by WikiLeaks. OGC Report at 12-13. OGC stressed, however, that even without such evidence, "the record contains ample evidence, in the form of press releases and public interviews with CTR officers, as well as public tweets, as Brock referenced in his podcast interview, to support a coordination determination." *Id*. at 18.

81. Thus, according to OGC, the evidence "suggest[ed] that most of CTR's entire range of activity during 2015-16 represents coordinated expenditures and therefore a contribution to [the Clinton campaign]." OGC Report at 25.

The Commissioners Deadlock 2-2 on a Reason to Believe Finding, and Dismiss the Complaint

82. On June 4, 2019, by a deadlocked vote of 2-2, the FEC's four Commissioners failed to find reason to believe—and failed to authorize any investigation into the allegations—that CTR and/or the Clinton campaign had violated 52 U.S.C. §§ 30116(a), (f), 30118(a), and 30104(b). *See* Amended Certification at 1-2, MURs 6940, 7097, 7146, 7160, and 7193 (Correct the Record) (signed June 13, 2019).

83. Also on June 4, 2019, the Commission failed to approve OGC's recommended factual and legal analyses (by a vote of 1-3), failed to dismiss the complaint's allegations as an exercise of the Commission's prosecutorial discretion under *Heckler v. Chaney* (by a vote of 0-2), and, finally, voted to dismiss the complaints and close the file (by a vote of 4-0). Amended Certification at 3-4.

84. By a letter dated June 17, 2019, and received June 19, 2019, the Commission notified plaintiffs that it had dismissed plaintiffs' complaint and closed the file. Notification to Campaign Legal Center at 1, MUR 7146 (June 17, 2019).

The Commissioners' Statement of Reasons

85. On August 21, 2019, 78 days after the Commission dismissed the administrative complaint, 19 days after plaintiffs commenced this lawsuit, and *18 days* after the expiration of the 60-day statutory period for seeking judicial review of the dismissal, the two Commissioners who forced the dismissal of plaintiffs' complaint issued a Statement of Reasons ("SOR") explaining their votes against finding "reason to believe."

86. Their Statement of Reasons explains the controlling Commissioners' votes with respect to five different administrative complaints, i.e., MURs 6940, 7097, 7146, 7160, 7193, and consequently evaluates arguments and evidence—for instance, certain hacked materials released by Wikileaks—that were not raised in plaintiffs' administrative complaint (MUR 7146).

87. The Statement rejects the analysis of the OGC and its recommendation to find reason to believe that CTR and the Clinton campaign violated FECA by making, or accepting, excessive and prohibited in-kind contributions and failing to report them. In so holding, the controlling Commissioners rely on arbitrary, incorrect, and legally unsustainable rationales, including an impermissibly restrictive interpretation of the Commission's regulations governing "coordination" that is contrary to FECA and congressional intent, and an impossibly high standard for the information necessary to support a "reason to believe" finding and launch an investigation.

88. With respect to those expenditures by CTR that the controlling Commissioners believed supported CTR's internet communications, the Commissioners found that these expenditures should be analyzed under the "coordinated communication" framework at 11 C.F.R. § 109.21, but ultimately exempted because they fell within the so-called "internet exception" for "public communications" that would otherwise be subject to the "coordinated communication" rule.

89. The controlling Commissioners' theory was that an expenditure cannot be deemed "coordinated" if it in any way supports, or can be retrospectively "associated" with, an internet communication exempted from 11 C.F.R. § 100.26 by the Commission's 2006 internet rulemaking. This is the case even if the expenditures—for instance, payments for polling or general opposition research—may have supported other *non-internet* CTR activities such as press outreach

or surrogate training, and only incidentally resulted in a communication posted on CTR's website. Petersen and Hunter SOR at 13.

90. Based on this unbounded and unprecedented expansion of the internet exemption, the controlling Commissioners concluded that most of CTR's nearly $10 million in spending—including reported disbursements "that are not communication-specific," like "payroll, salary, travel, lodging, meals, rent, fundraising consulting, computers, digital software, domain services, email services, equipment, event tickets, hardware, insurance, office supplies, parking, and shipping," OGC Report at 9—constituted mere "input costs" that the internet exemption immunizes from regulation, even if these disbursements supported multiple organizational functions.

91. The controlling Commissioners thus expanded the so-called "internet exception" to exempt coordinated spending with any nexus—however remote or incidental—to any eventual covered internet communication. They even rejected the possibility that expenditures supporting multiple CTR functions should be allocated between internet communications and the non-internet activities they supported, claiming that "exempting only those component fees deemed essential for the internet communication's placement would eviscerate the internet exemption . . . and potentially chill political speech online." Petersen and Hunter SOR at 13.

92. This construction of the internet exemption is inconsistent with the plain language of FECA and frustrates Congress's intent to regulate and require disclosure of all expenditures made in "in cooperation, consultation or concert with, or at the request or suggestion of," a candidate, 52 U.S.C. § 30116(a)(7)(B)(i), as in-kind contributions to the candidate. This construction is similarly contrary to the Commission's own regulation at 11 C.F.R. § 109.20. Thus

construed, the exemption "swallow[s] the Act's longstanding prohibition on coordinated expenditures," and "does not withstand scrutiny." OGC Report at 24.

93. As for the narrow universe of CTR's spending that the controlling Commissioners could *not* categorically subsume under the internet exemption—because it was undeniably "*unrelated* to creating and disseminating online political communications," Petersen and Hunter SOR at 11 (emphasis added)—they claimed that proceeding at the reason-to-believe stage requires complainants to establish coordination conclusively, "transaction-by-transaction," and that complainants had "fail[ed] to meet their burden." *Id.* at 16.

94. In insisting on proof of coordination on a "transaction-by-transaction" basis, the controlling Commissioners set an unreasonably high bar for complainants that neither the Act nor Commission regulations require at the reason-to-believe stage.

95. Plaintiffs' inability to obtain required disclosure information about the extent and character of the coordination between CTR and the Clinton campaign, "transaction by transaction," is a central element of the relief sought here—not a justification for dismissal. It is precisely this information—about which transactions CTR in fact "coordinated" with the Clinton campaign and their value, scope, and purpose—that plaintiffs and the public are entitled under FECA.

96. Moreover, the controlling Commissioners justified their blanket refusal to proceed against CTR and the Clinton campaign with respect to these non-internet activities by repeatedly citing *other* complainants' reliance on "hacked" information, imputing this material to all five consolidated MURs and suggesting that its exclusion was dispositive in every case. But plaintiffs' administrative complaint did not cite or rely on any such "illegally obtained information," Petersen

and Hunter SOR at 17, nor were these materials necessary to support a reason-to-believe finding given the ample evidence already available.

97. At the same time, the controlling Commissioners ignored, mischaracterized, or refused to consider other reliable and publicly available evidence of coordination unconnected to any illegal "hacking," claiming that it would be "unfair" to consider anything outside the four corners of an administrative complaint—including, in this case, first-person interviews and statements from the respondents acknowledging their extensive coordination. Petersen and Hunter SOR at 7, 16.

98. Finally, after finding no reason to believe that CTR made, or the Clinton campaign benefited from, a single coordinated expenditure in the course of what they admitted was an "extraordinary" $9-million pro-Clinton operation, the controlling Commissioners ended their Statement with the purported assurance that nevertheless "[o]ur conclusion here should not be read as sanctioning close working relationships between Super PACs and the candidates that they support." Petersen and Hunter SOR at 17 & n.83.

99. On September 20, FEC Chair Ellen L. Weintraub issued a Statement of Reasons explaining her vote to find "reason to believe" and proceed with an investigation.[9] Chair Weintraub concluded that the administrative complaints sufficiently "alleged widespread violations of the Act," Weintraub SOR at 3, and were supported by credible evidence "tend[ing] to show that CTR systematically coordinated its activities with HFA and did so 'off the internet.'" Weintraub SOR at 6.

100. Chair Weintraub agreed with her colleagues that it "would be inappropriate for the Commission to consider" hacked materials "stolen and disseminated by the Russian government,"

[9] *Available at* https://www.fec.gov/files/legal/murs/7146/7146_2.pdf.

but emphasized that "there was more than enough evidence outside of the Wikileaks documents for the Commission to find reason to believe that CTR and [the Clinton campaign] engaged in impermissible coordination." Weintraub SOR at 6 & n.30.

101. Circuit authority requires the Commissioners who decline to proceed, contrary to the recommendation of the Commission's General Counsel, to provide an explanation for their vote. *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988); *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987).

102. The Commission's failure to issue the required statement of reasons or explanation for the dismissal within 60 days left plaintiffs without a "reasoned basis" for the dismissal before the statutory period to seek judicial review had run. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

103. The delay also suggests that the eventual explanation the controlling Commissioners provided is little more than a post hoc rationalization for arbitrary and results-oriented decisionmaking, which is itself indicative of a general policy of non-enforcement in the face of clear coordination violations—and indeed, as Commissioner Weintraub stated in her dissenting Statement, since the 2010 decision in *Citizens United*, "the Commission has not once entered into pre-probable cause conciliation or found probable cause to believe that a respondent violated the coordination regulations." Weintraub SOR at 8.

104. In any event, the rationale set forth in the controlling Commissioners' statement itself is arbitrary, capricious, and contrary to law, and does not meet the test of "reasoned decisionmaking" under FECA or the Administrative Procedure Act. *See Orloski*, 795 F.2d at 161.

COUNT I

105. Plaintiffs reallege and incorporate by reference paragraphs 1 to 104 as if fully set forth herein.

106. There was "reason to believe" that CTR 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); and that 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).

107. The Commission's failure to find "reason to believe" these violations occurred and its subsequent dismissal of plaintiffs' administrative complaint was arbitrary, capricious, and contrary to law. 52 U.S.C. § 30109(a)(8)(A); 5 U.S.C. § 706; *see also Orloski*, 795 F.2d at 161.

COUNT 2

108. Plaintiffs reallege and incorporate by reference paragraphs 1 to 107 as if fully set forth herein.

109. The two controlling Commissioners who voted against finding "reason to believe" justified their vote on grounds that the "internet exception," 11 C.F.R. § 100.26, exempted not only certain internet communications from regulation as coordinated expenditures under 11 C.F.R. §§ 109.20 and 109.21, but also any expenditure that could be deemed an "input expense" for such internet communications, even if such expenditures also supported non-internet activity or constituted general overhead payments. Petersen and Hunter SOR at 13.

110. The controlling Commissioners announced in their Statement that this treatment of "input expenses"—and in particular, the absolute exemption of such expenses from regulation as

a coordinated expenditure—has been the Commission's consistent position since the 2006 internet rulemaking. Petersen and Hunter SOR at 12, 13.

111. Accordingly, the relevant regulations, *see* 11 C.F.R. §§ 100.26, 109.20, 109.21, as construed, are inconsistent with the plain language of FECA, as well as the Commission's own regulations, and frustrate Congress's intent to regulate all coordinated expenditures as in-kind contributions subject to FECA's contribution limits, source restrictions, and disclosure requirements.

112. Because this construction of the relevant coordination regulations conflicts with FECA and the Commission's own regulations, it is arbitrary, capricious, an abuse of discretion, and contrary to law. 5 U.S.C. § 706(2)(A), (2)(C).

113. Further, because the coordination regulations, as construed, conflict with FECA and the Commission's own regulations, the controlling Commissioners' reliance on this construction to find no "reason to believe" in connection to the allegations in plaintiffs' administrative complaint is arbitrary, capricious, an abuse of discretion, and contrary to law.

REQUESTED RELIEF

WHEREFORE, plaintiffs, by their undersigned counsel, respectfully request that the Court grant the following relief:

a) Declare that the Commission's decision to dismiss plaintiffs' administrative complaint was arbitrary, capricious, and contrary to law under 52 U.S.C. § 30109(a)(8)(A);

b) Order the Commission to conform to such a declaration within 30 days, *see* 52 U.S.C. § 30109(a)(8)(C);

c) Declare that the construction of the coordination regulations, *see* 11 C.F.R. §§ 100.26, 109.20, 109.21, to exempt all "input expenses" connected to internet

communications from regulation as "coordinated expenditures" is contrary to law, arbitrary and capricious, and invalid;

d) Award legal fees and costs of suit incurred by plaintiffs; and

e) Grant such other and further relief as this Court deems just and proper.

Dated: October 29, 2019

Respectfully submitted,

/s/ Tara Malloy

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