ORAL ARGUMENT NOT YET SCHEDULED
No. 21-5081

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

CAMPAIGN LEGAL CENTER and CATHERINE HINCKLEY KELLEY,

Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee,

HILLARY FOR AMERICA and CORRECT THE RECORD,

Intervenor-Appellees.

On Appeal from the U.S. District Court
for the District of Columbia, No. 1:19-cv-02336-JEB
Before the Honorable James E. Boasberg, District Court Judge

INTERVENOR-APPELLEES' PRINCIPAL AND RESPONSE BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Appellees Hillary for America (the "Campaign") and Correct the Record hereby certify as follows:

(a) Parties and *Amici*: Campaign Legal Center ("CLC") and Catherine Hinckley Kelley ("Kelley") are plaintiffs in the District Court and appellants in the instant appeal.

The Federal Election Commission ("FEC") is the defendant in the District Court and appellee in this Court. While the FEC has the authority to defend itself in cases brought against it, the Commissioners must authorize the defense by a majority vote. 52 U.S.C. §§ 30106(c), 30107(a)(6). In this case, the Commissioners did not authorize suit and the FEC has never made an appearance.

The Campaign and Correct the Record intervened in this matter in the District Court. "After the FEC fell one vote short of the four required to authorize its defense of this lawsuit, the [District] Court permitted the Campaign and Correct the Record to intervene as Defendants." JA 287. They are appellees in this matter.

Pursuant to Circuit Rule 26.1(a), the Campaign and Correct the Record certify that neither the Campaign nor Correct the Record have parent companies, subsidiaries, or affiliates which own at least 10% of the stock of the Campaign or Correct the Record which have any outstanding securities in the hands of the public. Pursuant to Rule 26.1(b), the Campaign is the presidential campaign committee to

elect Hillary Rodham Clinton. Pursuant to Rule 26.1(b), Correct the Record is a dormant hybrid political action committee or "PAC."

The Institute for Free Speech appeared before the district court in this case as *amicus curiae*, and no *amici* have appeared or sought to appear before this Court.

(b) Rulings Under Review: CLC and Kelley appeal from the December 2, 2020 memorandum opinion and order of the U.S. District Court for the District of Columbia (Boasberg, J.), denying CLC and Kelley's motion for summary judgment and granting the Campaign and Correct the Record's motion for summary judgment on the basis that CLC and Kelley lack standing because they had failed to establish an injury-in-fact, and from the District Court's February 12, 2021 final order dismissing the case. The December 2, 2020 memorandum opinion is reported at *Campaign Legal Center v. FEC*, 507 F. Supp. 3d 79 (D.D.C. 2020).

(c) Related Cases: The ruling under review has not previously been before this Court or any other court on appeal. There are no related cases pending in this Court or any other court of which counsel are aware.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

GLOSSARY OF ABBREVIATIONS

CLC	Campaign Legal Center
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
JA	Joint Appendix
PAC	Political Action Committee

INTRODUCTION

Alarmed by what campaign finance reformers saw as a major loophole that emerged during a hotly contested presidential election, when a Democratic group spent large sums for the Clinton campaign's apparent benefit, the adherent of a pro-reform organization sued the Federal Election Commission ("FEC"), asking the agency to step in and uphold the contribution limits. To get into federal court and avoid asserting a generalized grievance, the plaintiff reform organization claimed informational standing, alleging that, because the Democratic group did not disclose its spending as contributions, and because the Clinton campaign did not disclose receiving the asserted contributions, the controlling Commissioners' decision not to act deprived the reform group of information about the true extent of the Clinton campaign's financing. But this claim had a fatal flaw, which was that the Democratic group had already registered with the FEC, and already disclosed all of its receipts and disbursements, even if not characterizing its spending as contributions. This Court rejected the reform group's claim for lack of standing, holding that the reform group was not really seeking additional facts, but only the legal determination that the Democratic group was making illegal contributions and the Clinton campaign receiving them.

These are the facts of *Wertheimer v. FEC*, 268 F.3d 1070 (D.C. Cir. 2001)—and of this case. Here, the plaintiff is not Fred Wertheimer nor the organization he led, Democracy 21, but a different organization, the Campaign Legal Center ("CLC"), and its senior leader, Catherine Kelley. The candidate is not Bill Clinton, who won re-election to the presidency in 1996, but Hillary Rodham Clinton, who was the Democratic nominee in 2016. And the Democratic group is not the Democratic National Committee, but Correct the Record, which, like the DNC in 1996, is a political committee registered with the FEC that publicly discloses all of its receipts and disbursements.

Appellants CLC and Kelley concede, as they must, that the ***only*** issue on appeal is whether the District Court erred in applying the well-settled law of this Circuit to conclude that they lack standing under Article III of the United States Constitution.[1] The District Court did not err, as *Wertheimer* and this Circuit's other precedent make clear, and the decision should therefore be affirmed on appeal.

CLC and Kelley go to considerable lengths to discuss the merits of their underlying, substantive claim about the campaign finance laws. But the ink they spill is just a distraction from the central question of whether they have standing. In fact,

[1] *See, e.g.*, *Corrected* Appellants' Opening Brief, Doc. No. 1907371 ("Br.") at 6 (framing the issues on appeal as first, whether the District Court erred in finding they lacked standing, and second, whether in so doing the District Court erred in applying this Court's clear precedent).

CLC and Kelley have ***not*** suffered any concrete or particularized *informational* injury, which is their only articulated basis for standing. *See* JA 292.

This appeal is only the most recent chapter in a long history of CLC's attempt to re-write the FEC's rules as to when political communications posted on the internet should be treated as "public communications" that are subject to the FEC's coordination rules and otherwise regulated by the Federal Election Campaign Act of 1971, as amended ("FECA")—which itself is just a continuation of the broader efforts of reform adherents' turn to the federal courts to secure desired policy ends, when they cannot obtain those results from the FEC or Congress.

In this litigation against Correct the Record and Hillary for America (the "Campaign"), CLC pushes the same convoluted theory of coordination it did during the FEC's 2006 Internet Rulemaking: that the costs to produce an unpaid online communication—including for example, filming costs, staff time, and overhead costs (hereinafter referred to as "input costs")—should be treated as "coordinated expenditures" or "in-kind contributions" under FEC regulations, and thus as subject to the contribution limits. The centerpiece of CLC and Kelley's 2016 Administrative Complaint before the FEC was that Correct the Record made prohibited in-kind contributions to the Campaign, in the form of input costs for unpaid online communications. Time and time again, however, the FEC has rejected CLC's theory because the FEC recognizes that "uncompensated Internet activity" will inevitably

result in the speaker incurring certain input or operating costs, and that such costs are necessarily not *in-kind* contributions, even if the unpaid online communications are coordinated with a campaign. JA 268.

When the FEC applied the plain text of its regulations and longstanding precedent to dismiss CLC and Kelley's 2016 Administrative Complaint, CLC and Kelley initiated this suit against the FEC in the District Court, challenging the FEC's decision under FECA and the Administrative Procedure Act.[2] After cross-motions for summary judgment, the District Court applied the clear precedent of this Circuit to correctly hold that CLC and Kelley lack standing to bring their claims because they have not suffered any concrete or particularized injury-in-fact. It is undisputed that Correct the Record disclosed each of its 2015-2016 expenditures on campaign finance reports that are publicly available on the FEC's website. CLC and Kelley lack no factual information.

Specifically, as the District Court found, CLC and Kelley's singular alleged injury—an informational harm—is synonymous with their desire for the FEC to make a legal determination that Correct the Record coordinated with the Campaign

[2] The FEC is the defendant in the District Court and appellee in this Court. While the FEC has the authority to defend itself in cases brought against it, the Commissioners must authorize the defense by a majority vote. 52 U.S.C. §§ 30106(c), 30107(a)(6). In this case, the Commissioners did not authorize that action and the FEC has never made an appearance. As a result, the District Court permitted Correct the Record and the Campaign to intervene as defendants.

as a matter of law and thereby made excessive contributions to the Campaign. Precedent makes clear that CLC and Kelley's request for a purely legal determination of coordination does not meet the injury-in-fact requirement, because it would not lead to the disclosure of any additional factual information. Indeed, in *Wertheimer v. FEC*, the seminal Circuit precedent on this issue, this Court affirmed the district court's similar order dismissing a complaint for lack of standing because, "[t]he Commission contends, and we agree, that, under the *Akins* test, appellants have failed to show either that they are directly being deprived of any information or that the legal ruling they seek might lead to additional factual information." *Id.* at 1074. So too here.

CLC and Kelley's claim that "[n]one of the in-kind contributions resulting from intervenors' coordination scheme have been disclosed in any form, nor is the information FECA requires otherwise available to plaintiffs," Br. at 5, is simply not true. In fact, the District Court held that CLC and Kelley already have all information to which they are entitled. *See* JA 290, 295-303. The same goes for CLC and Kelley's argument that "[i]ntervenors did not contend that they reported the information FECA requires with respect to those contributions; instead, they argued that plaintiffs can gather much of the information they seek from the disclosure reports that Correct the Record, a registered federal political committee, filed with the FEC in the 2015-2016 election cycle." Br. at 3. To the contrary, as a registered

political committee, Correct the Record discloses all of its spending according to FEC rules. It has already disclosed all its 2015-2016 expenditures on campaign finance reports that are publicly available on the FEC's website. Therefore, as the District Court properly found, the statutorily-required information CLC and Kelley claim to seek regarding the amount, date, purpose, and recipient of each expenditure made by Correct the Record has already been publicly reported. JA 290, 295-303.

Put slightly differently, CLC and Kelley seek a legal determination that Correct the Record's expenditures were unlawfully coordinated, but they lack no factual information. Practically speaking, if CLC and Kelley prevailed, then Correct the Record would have had to file amended FEC reports that would have merely moved expenses from one line of its FEC report to another, classifying them as in-kind contributions instead of operating expenditures. The Campaign would similarly have been required to amend its reports to duplicate this information. But under *Wertheimer* and the cases applying it, this type of duplicative reporting, in which litigants "only seek the same information from a different source," is trivial and does not support a cognizable informational injury. *Wertheimer*, 268 F.3d at 1075.

Contrary to CLC and Kelley's suggestion, the District Court recognized that seeking a legal determination of coordination does not ***always*** foreclose a cognizable informational injury, if such a legal determination of coordination would actually result in the reporting of further factual information. *See* JA 305 (citing *CLC v. FEC*,

245 F. Supp. 3d 119 (D.D.C. 2017)). Unfortunately for CLC and Kelley, this is no such case.

CLC and Kelley again try to manufacture an informational injury by advancing arguments that directly contradict their arguments on the merits. On the merits, CLC and Kelley have argued that *every* expenditure Correct the Record made was required to have been reported as an in-kind contribution. *See, e.g.*, *Campaign Legal Ctr. v. FEC*, Case No. 1:19-cv-02336-JEB, Doc. No. 42 at 38 (D.D.C. Sept. 25, 2020) ("[B]road, systematic coordination with the Clinton campaign was [Correct the Record's] *raison d'être*."). Yet, in direct contradiction to these merits arguments, in an attempt to create standing, CLC and Kelly now argue that only some of Correct the Record's expenditures, or some part of certain expenditures, may have been reportable as in-kind contributions. *See* Br. at 27-28.

The clear purpose behind these contradictory claims is to try to create an informational injury based on the parsing of the undisputedly already-reported expenditures. The District Court saw through this scheme. JA 300-301 ("For one thing, a plaintiff armed with this theory could seemingly manufacture standing in nearly every conceivable case—trimming its sails and claiming only that some portion of a previously disclosed expenditure (or some subset of previously disclosed expenditures) should be treated as coordinated, and then asserting an interest not in knowing whether the expenditure(s) *themselves* were coordinated (not

okay), but in knowing what *proportion* of an entity's expenditures or activities were coordinated (okay). *Wertheimer* cannot admit of such an easy workaround."). At this point in this litigation, the parties have exchanged multiple briefs. Yet, CLC and Kelley have never once attempted to reconcile their view that Correct the Record and the Campaign coordinated on all manner of expenditures for merits purposes, with their contrived theory that only some of Correct the Record's expenditures, or that only some part of some expenditures, were coordinated with the Campaign for standing purposes. Moreover, as the District Court recognized, even if one credited CLC and Kelley's theory that only certain expenditures were coordinated (despite the fact that such a theory is plainly inconsistent with their view of the law), "the disaggregation Plaintiffs seek would not actually entail the disclosure of any information other than legal determinations as to some subset of already-disclosed expenditures — exactly the sort of information that Plaintiffs have no standing to learn." JA 301.

The District Court granted summary judgment in favor of Correct the Record and the Campaign based on the well-settled law of this Circuit, including *Wertheimer*. This Court should affirm the District Court.

JURISDICTIONAL STATEMENT

This Court, like the District Court, is without jurisdiction, because Appellants CLC and Kelley lack standing under Article III to bring their claims, as the District

Court properly concluded and as is detailed more fully herein. Whether a plaintiff has standing is a jurisdictional question. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 86 (1998); *Wertheimer*, 268 F.3d at 1074. "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Steel Co.*, 523 U.S. at 94–95 (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

ISSUE PRESENTED

Whether the District Court correctly held that CLC and Kelley failed to establish an informational injury-in-fact when it dismissed their Complaint for lack of standing.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

1. Powers and duties of the FEC.

The FEC is an independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of FECA. *See generally* 52 U.S.C. § 30101 *et. seq.* The FEC consists of six members appointed by the President and confirmed by the United States Senate. *Id.* at § 30106(a)(1). Congress designed the FEC so that it would not be controlled by a single political party; as a result, no more than three Commissioners can be members

of the same party, *id.*, and an affirmative majority of four Commissioners must vote to find reason to believe a violation of FECA has occurred in order to institute an investigation of possible violations of the law based on a complaint. *Id.* at § 30109(a)(2). The FEC may also institute a civil action for relief if it cannot correct or prevent any violation of FECA pursuant to its administrative enforcement processes. *Id.* at § 30109(a)(6)(A).

Any person who believes a violation of FECA has occurred may file an administrative complaint with the FEC. *Id.* at § 30109(a)(1). After reviewing the complaint and any response filed by the respondent, the FEC considers whether there is "reason to believe" a violation of FECA has occurred. *Id.* at § 30109(a)(2).[3] If at least four of the Commissioners vote to find such reason to believe, the FEC may investigate the alleged violation; otherwise, the FEC must dismiss the administrative complaint. *Id.* at §§ 30106(c), 30109(a)(2).

2. FEC regulations provide clear and strict definitions as to when an internet communication may be deemed a reportable in-kind contribution.

As the controlling Commissioners noted when they dismissed CLC and Kelley's Administrative Complaint, "[t]o be an in-kind contribution to a candidate

[3] Prior to the FEC's vote, the FEC's Office of General Counsel recommends to the FEC in a report whether there is "reason to believe" a violation has occurred. *Id.* at § 30109(a)(3). The FEC is not bound to adopt or follow the Office of General Counsel's recommendation. *Id.*

with whom it has been coordinated, an internet communication must be both a 'public communication' and a 'coordinated communication' under [FECA] and [FEC] regulations." JA 263. FECA "defines a 'public communication' as '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.'" JA 263-64 (quoting 52 U.S.C. § 30101(22)). And the FEC's implementing regulations clearly define "public communication" to explicitly *exclude all* internet communications "*except* for communications placed for a fee on another person's Web site." 11 C.F.R. § 100.26 (emphasis added). As a result, an internet communication is *not* a "public communication" *unless* the speaker posts it on a third party's online platform and pays a fee to do so. *See* JA 264. These provisions and regulations together are commonly referred to by the FEC as the "internet exemption." *See* Statement of Reasons of Chair Hunter & Commissioners Goodman & Petersen at 4, FEC Matter Under Review 7023 (Kinzler for Congress) (Jan. 23, 2018); Statement of Reasons of Vice Chair Ravel at 1 n.2, FEC Matter Under Review 6729 (Checks and Balances for Economic Growth) (Oct. 24, 2014).

Through the internet exemption, the FEC "deliberately excluded the vast majority of internet communications from regulation as 'public communications' in a 2006 rulemaking that focused on internet communications." JA 264; *see also*

Internet Communications, 71 Fed. Reg. 18589 (Apr. 12, 2006). In so doing, the FEC "created a 'broad exemption' to enable individuals and groups to engage in online political discourse without fear of government regulation." JA 264 (citing 71 Fed. Reg. at 18603). CLC and Kelley do not dispute the existence of the internet exemption, but instead focus on the input costs associated with generating and disseminating such exempt internet communications.

CLC and Kelley claim that, while the communications themselves are exempt, the *input costs* associated with such exempt internet communications are in-kind contributions from Correct the Record to the Campaign. Br. at 24-25. This mirrors comments that CLC submitted during the FEC's 2006 rulemaking regarding internet communications, in which they tried and failed to convince the FEC to treat input costs for online communications as subject to coordination under 11 C.F.R. § 109.20, a regulation that only applies to "expenditures that are *not* made for communications," instead of as costs "for a coordinated communication" under 11 C.F.R. § 109.21. *See* 11 C.F.R. § 100.26; Notice of Proposed Rulemaking: Internet Communications, 70 Fed. Reg. 16967 (Apr. 4, 2005); Democracy 21, CLC & Center for Responsive Politics, Comment on Notice 2005-10: Internet Communications (June 3, 2005). The FEC considered CLC's argument and declined to adopt it, instead writing a rule that does *not* treat the costs associated with producing unpaid online communications differently than the online communications themselves.

Because CLC's preferred rule was never adopted, there is no support in the FEC regulations for CLC and Kelley's position that the costs associated with producing unpaid online communications should be regulated under the FEC's general coordinated expenditure regulation, which is found at 11 C.F.R. § 109.20, rather than under the regulation that specifically applies to communications, found at 11 C.F.R. § 109.21. As the controlling Commissioners explained in dismissing CLC and Kelley's Administrative Complaint: the FEC "has repeatedly interpreted the internet exemption to encompass expenses incurred by the speaker to produce an internet communication." JA 267; *see also id*. at n. 60 (collecting decisions in which the FEC has so held).

3. FEC decisions regarding rulemaking and in evaluating administrative complaints are entitled to deference.

"Congress has legislated in no uncertain terms with respect to FEC dominion over the election law." *Common Cause v. Schmitt*, 512 F. Supp. 489, 502 (D.D.C. 1980) (three-judge court), *aff'd mem.*, 455 U.S. 129 (1982). Indeed, when Congress enacted FECA, it vested the FEC "with exclusive jurisdiction over civil enforcement of the Act." *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 198 n.2 (1982) (citations omitted). Congress's plain intention was that the vast majority of issues arising under FECA, a highly technical statute that must be interpreted and applied in an environment rife with serious First Amendment issues, would be informed by the "FEC's specialized knowledge and cumulative experience" in the area of

campaign finance. H.R. Rep. No. 94-917, at 4 (1976) (citations omitted); *see also Burson v. Freeman*, 504 U.S. 191, 196 (1992) ("[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." (citations omitted)). Accordingly, courts have regularly and properly found that decisions made by the FEC in this highly technical area should be afforded substantial deference.

In particular, this Court has held that a court may not disturb the FEC's decision to dismiss an administrative complaint unless that decision was "contrary to law." 52 U.S.C. § 30109(a)(8)(C); *see also Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). A decision is "contrary to law" *only if* "(1) the FEC dismissed the complaint as a result of an impermissible interpretation of the Act or (2) the FEC's dismissal . . . was arbitrary or capricious, or an abuse of discretion." *Akins v. FEC*, 736 F. Supp. 2d 9, 16 (D.D.C. 2010). When examining whether the FEC has permissibly interpreted FECA, a court is "not to interpret the statute as it [thinks] best." *FEC v. DSCC*, 454 U.S. 27, 39 (1981). Rather, the court's role is to determine "whether the Commission's construction was sufficiently reasonable." *Id.*

4. Relevant FEC Reporting Regulations

Under FECA and the FEC's implementing regulations, all political committees, including Correct the Record and the Campaign, must file regular reports disclosing the contributions they receive and the expenditures they make. *See*

52 U.S.C. § 30104(b); 11 C.F.R. § 104.3. The FEC has created reporting forms for committees to use, and each form has multiple "schedules."[4] "Schedule A" is where committees report the contributions they receive, and "Schedule B" is where they report their expenditures.[5] There are also "lines" within each "schedule." On the form that political committees like Correct the Record use when they disclose all of their receipts and disbursements, Line 21 of Schedule B is for operating expenditures and Line 23 of Schedule B is for contributions to federal candidates. *See* Form 3X.

When a political committee itemizes an operating expenditure on Line 21 of its Schedule B, it must report the amount, date, purpose, and recipient of the expenditure. 52 U.S.C. § 30104(b)(5)(A); 11 C.F.R. § 104.3(b)(3)-(4). Specifically, as to the "purpose" requirement, the FEC instructs committees to provide a "brief statement or description of why the disbursement was made," and it provides a list

[4] *See Registration and Reporting Forms*, FEC, https://www.fec.gov/help-candidates-and-committees/forms/ (last visited Aug. 6, 2021).

[5] *See* FEC, Form 3 (Report of Receipts and Disbursements for an Authorized Committee), https://www.fec.gov/resources/cms-content/documents/fecfrm3.pdf (rev. May 2016); FEC, Form 3X (Report of Receipts and Disbursements for Other than an Authorized Committee), https://www.fec.gov/resources/cms-content/documents/fecfrm3x.pdf (rev. May 2016) ["Form 3X"].

of descriptions committees should use, such as "travel," "wages," "meals," and "mileage." 11 C.F.R. § 104.3(b)(3)(i)(A)-(B), (4)(i)(A).[6]

An in-kind contribution, when made by a committee to a campaign, is a particular type of expenditure. When a committee makes an in-kind contribution, it reports the in-kind contribution on Schedule B, Line 23 *in the manner just described above for operating expenditures*. *See* 11 C.F.R. § 104.13(b)(2). The only differences are that the expense is on a different line, the committee must note "contribution in-kind" within the entry, and it must state the name and address of the campaign that received the in-kind and the office sought by the relevant candidate.[7]

When a campaign receives an in-kind contribution, it reports the value of the item or service as a contribution on its Schedule A and as an expenditure on its Schedule B. 11 C.F.R. § 104.13(b)(2).[8] The reason the campaign must also report the in-kind contribution as an expenditure is simply so that the campaign's cash-on-

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[6] *See also Purpose of Disbursement*, FEC, https://www.fec.gov/help-candidates-and-committees/purposes-disbursements/ (Aug. 21, 2018).

[7] *See* FEC, Instructions for FEC Form 3X and Related Schedules, 8, 10, https://www.fec.gov/resources/cms-content/documents/fecfrm3xi.pdf (rev. May 2016).

[8] *See* FEC, Instructions for FEC Form 3 and Related Schedules, 10, https://www.fec.gov/resources/cms-content/documents/fecfrm3i.pdf (rev. May 2016) ["Form 3 Instructions"].

hand balance remains accurate, not because doing so requires the campaign to report any additional information.[9]

When a campaign reports receiving an in-kind contribution, it states on Schedule A the source, value, and date of the contribution, a notation saying, "contribution in-kind," and a statement of the nature of the contribution. Form 3 Instructions at 10. Just like the purpose statement for an expenditure, the description of the nature of an in-kind contribution should be brief, such as "consulting" or "polling." *Id.* The campaign will then make a corresponding entry on Schedule B, providing the same information as required for an operating expenditure, along with a notation that the expense resulted from an in-kind contribution. *Id.*

B. Factual Background

The Campaign is the principal campaign committee of former United States Secretary of State Hillary Clinton, who was the nominee of the Democratic Party for the office of President of the United States in the 2016 general election. Correct the Record is a "hybrid" or *Carey* political action committee ("PAC") that registered with the FEC in June 2015. Correct the Record reported all of its contributions and expenditures on disclosure reports that were regularly filed with the FEC throughout

[9] If the campaign only reported the in-kind contribution as a receipt, it would appear that the campaign had more money in its bank account than it actually does. But by reporting the value of the in-kind as an expenditure also, the contribution and the expenditure cancel each other out, and the amount of money the campaign reports having in its bank account remains accurate.

the 2016 election cycle, during which it served as a strategic research and rapid response team designed to defend Secretary Clinton from baseless political attacks. As a hybrid PAC, Correct the Record disclosed all of its receipts and disbursements to the FEC. It maintained one bank account that was subject to the Act's contribution limits and source restrictions and could make contributions to candidates, and a second bank account that could accept unlimited contributions from any source but could not contribute to federal candidates, while disclosing the activity from both accounts on a single report. *See Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011). In other words, Correct the Record was half traditional PAC and half super PAC, but while disclosing all of its activity to the FEC. *See id.*

Correct the Record conducted the vast majority of its activities online, using its website and social media accounts to set the record straight about Secretary Clinton's record when her opponents and media outlets made false and misleading claims about her. Correct the Record also shared similar content with the people who subscribed to its email list. It conducted a handful of other activities that were not related to its online presence, but those activities were relatively rare and represented a minor portion of its program. It is undisputed that Correct the Record reported every dollar it spent from both of its accounts as "expenditures" or "disbursements"

on its regularly filed FEC reports and included a purpose description for each itemized disbursement.[10]

In October 2016, CLC and Kelley filed their Administrative Complaint before the FEC, contending, based in part on information "illegally obtained by Russian intelligence officers through hacking operations that targeted computers and networks used by [the Campaign] and thereafter published on WikiLeaks," JA 257 n.4, that Correct the Record made, and that the Campaign received, excessive prohibited in-kind contributions in the form of coordinated expenditures during the 2016 presidential election. JA 258. CLC and Kelley advanced a sweeping claim that Correct the Record's spending represented coordinated expenditures, and thus in-kind contributions to the Campaign. *See, e.g.*, *Campaign Legal Ctr.*, Case No. 1:19-cv-02336-JEB, Doc. No. 42 at 38. In their administrative responses before the FEC, Correct the Record and the Campaign argued that the activities CLC and Kelley described in their Administrative Complaint were for unpaid communications over the internet that did not fall within the legal definition of "public communications" and, thus, would not be in-kind contributions to the Campaign pursuant to the internet exemption, regardless of whether they were coordinated. JA 259. The other

[10] *See Correct the Record*, FEC, https://www.fec.gov/data/committee/C00578997/ (last visited Aug. 26, 2020).

expenditures were either paid for by the Campaign[11], were not coordinated, or were otherwise exempt from being treated as coordinated expenditures under 11 C.F.R. § 100.73, the media exemption. JA 259-60.

A group of controlling Commissioners agreed with Correct the Record and the Campaign, which led to the dismissal of CLC and Kelley's Administrative Complaint. As the controlling Commissioners explained, there was no reason to believe that a violation of FECA had occurred. JA 256-72. "[T]o be an in-kind contribution to a candidate with whom it has been coordinated, an internet communication must be both a 'public communication' and a 'coordinated communication' under [FECA] and [FEC] regulations." JA 263. Here, "consistent with [FEC] precedent," the controlling Commissioners declined to find that "Correct the Record's expenses for its online communications, including creation and production costs, [were] in-kind contributions to [the Campaign] under the 'coordinated communication' standard at 11 C.F.R. § 109.21." JA 266. In addition, the information in the record "did not support finding reason to believe Correct the Record and [the Campaign] violated" FECA with regard to "Correct the Record's

[11] In fact, in their Opening Brief, CLC and Kelley concede that Correct the Record did report receiving payments from the Campaign in 2015, Br. at 28 n.5, and fail to point to any evidence in the record to support their contention that these payments might not have been fair market value for the services that Correct the Record provided. *See also* JA 269 ("[t]he complaints fail to provide the Commission with information showing that Correct the Record did not receive fair market compensation from Hillary for America for its work").

spending that appears unrelated to creating and disseminating online political communications" JA 266. Because the controlling Commissioners would not find reason to believe a violation occurred, the Commission dismissed CLC and Kelley's Administrative Complaint.

On August 2, 2019, CLC and Kelley filed a Complaint in the United States District Court for the District of Columbia challenging the dismissal of their Administrative Complaint. *See* JA 8-61. In so doing, CLC and Kelley alleged an informational harm as well as an organizational injury derived entirely from the alleged informational harm, as their basis for asserting Article III standing throughout their Complaint (and their Amended Complaint, which made no substantive changes in this regard). *See* JA 11 at ¶ 10; JA 35 at ¶ 11 (alleging CLC and Kelley "have suffered as a result" of the FEC's dismissal of their Administrative Complaint "because they, as well as the public, have been deprived of . . . key information about the sources of the campaign's expenditures," which "CLC needs for work central to its mission and Ms. Kelley needs to properly evaluate candidates for federal office"); *see also* JA 12 - JA 15 (alleging informational injuries only); JA 36 - JA 40 (same).

At the motion to dismiss stage, the District Court originally concluded that CLC and Kelley had alleged an informational injury, based on the mistaken conclusion that "whether an expenditure was coordinated . . . is a piece of

information—regardless of its separate law-enforcement consequences," rather than a legal conclusion. JA 297. However, at the summary judgment stage, the District Court revisited its own prior holding, noting that a faithful reading of the clear precedent of this Circuit demanded a different outcome. *Id.* The District Court therefore held that CLC and Kelley had failed to establish an informational injury-in-fact, on the basis that the "information" CLC and Kelley claimed to lack was merely a legal determination that the FEC declined to make. Because CLC and Kelley failed to establish an injury-in-fact, the District Court rightly concluded that they had failed to establish an essential element of standing. In so doing, the District Court carefully applied this Circuit's decision at *Wertheimer*, 268 F.3d at 1074, to the facts of this case, and also explored and debunked all of CLC and Kelley's attempts to couch their law enforcement grievance within the terms of an informational injury. JA 297-307. While the District Court did not separately analyze any direct organizational harm alleged by CLC and Kelley, this was for good reason: all of their alleged harms were predicated on the information they wrongly claimed to have been deprived by the FEC's dismissal of their complaint. *See e.g.*, JA 36-39 (pleading harm to CLC as an organization *only* as the direct result of the purported deprivation of information).

CLC and Kelley raise the same arguments again here, hoping for a different conclusion on appeal.

STANDARD OF REVIEW

This Court reviews grants and denials of summary judgment *de novo*. *W. Sur. Co. v. U.S. Eng'g Constr., LLC*, 955 F.3d 100, 104 (D.C. Cir. 2020) (citing *Mayo v. Reynolds*, 875 F.3d 11, 19 (D.C. Cir. 2017)). "Summary judgment is appropriate if, viewing the facts in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact." *Id*. (citing Fed. R. Civ. P. 56).[12]

ARGUMENT

The District Court did not err in holding that CLC and Kelley lack standing. First, CLC and Kelley have failed to "show either that they are directly being deprived of any information or that the legal ruling they seek might lead to factual information." *Wertheimer*, 268 F.3d at 1074. Their own brief lays this bare: CLC and Kelley state that they "seek information about what expenditures Correct the Record made on the activities it coordinated with the Clinton campaign, and the amounts, dates, and purposes of these expenditures, *see* 52 U.S.C. § 30104(b)(3), as the law requires to the extent they do not qualify for the FEC's limited regulatory exemption for unpaid online communications." Br. at 24. The first and most obvious

[12] CLC and Kelley wrongly assert that the Court accepts as true their material factual allegations. *See* Br. at 20-21. For support, CLC and Kelley cite *Maloney v. Murphy*, 984 F.3d 50, 58 (D.C. Cir. 2020), which involved an appeal from the district court's grant of a motion to dismiss and not a motion for summary judgment. Br. at 21. On appeal following summary judgment, the Court is not required to accept material facts alleged by CLC and Kelley as true.

problem with this argument is that the information CLC and Kelley seek about the amounts, dates, and purposes of Correct the Record's expenditures has already been publicly reported. As a political committee, Correct the Record must publicly disclose its financial activity. While Correct the Record did not classify its expenditures as in-kind contributions on the belief that they were not coordinated, requiring the re-reporting of the same information as in-kind contributions, rather than expenditures, would be a legal conclusion that is not sufficient to show an informational injury under *Wertheimer*. That is because reclassifying Correct the Record's expenditures as in-kind contributions would not lead to additional factual information. *Supra* at 17-19, 20-21.

Because they realize that reclassifying expenditures as in-kind contributions will not provide additional factual information, CLC and Kelley have tried to manufacture standing by "trimming their sails" to assert that only some portions of Correct the Record's expenditures were coordinated. *See* JA 300-301. But that position is not only disingenuous, it is completely inconsistent with their view of the law, which is dispositive for purposes of the informational standing analysis. *FEC v. Akins*, 524 U.S. 11, 21 (1998) ("The 'injury in fact' that respondents have suffered consists of their inability to obtain information . . . that, on respondents' view of the law, the statute requires that [a political committee] make public."). And even if it were not inconsistent with their view of the law, the reclassification of expenditures

as contributions and the duplicative reporting of that information would reveal only a legal finding of coordination; it still would not lead to additional factual information.

Second, CLC and Kelley's claim that the District Court erred by suggesting that whenever litigants seek a legal determination of coordination there can be no informational harm is false and turns on a clear misstatement of the District Court's order. *See* Br. at 19. Contrary to CLC and Kelley's claims, the District Court made clear that seeking a legal determination of coordination does *not* always foreclose a cognizable informational injury; if a legal determination of coordination would also actually result in the reporting of further factual information, then there would be a cognizable informational harm. JA 306 ("And even where the Commission is unwilling or unable to act, the foregoing standing analysis likely would not bar a suit alleging coordinated spending by an entity that does not already disclose its expenditures under separate FECA provisions — for example, an individual spender."). But the District Court correctly determined that was not the case here, where it is undisputed that Correct the Record has already publicly reported its expenditures under FECA.

Third, the District Court was not required to separately consider any organizational harm alleged by CLC as a result of the dismissal of the Administrative Complaint, because any such harm was predicated exclusively on the informational

injury-in-fact that CLC and Kelley failed to establish. In other words, there was no injury to CLC's mission or diversion of CLC's resources that could, by any stretch of the imagination, be disentangled from their purported informational harm.

Accordingly, each of CLC and Kelley's arguments fail, and the District Court's well-reasoned and precedent-bound decision should be affirmed.

A. CLC and Kelley lack standing because they failed to establish an injury-in-fact.

As the District Court rightly held, under the clear precedent of this Circuit, CLC and Kelley do not have any cognizable interest in compelling the FEC to carry out a different law enforcement result, and they have failed to establish that they have actually been deprived of any information to which they are statutorily entitled. CLC and Kelley's disagreement with the FEC's coordination rules, and their related belief that Correct the Record and the Campaign engaged in an impermissible coordination scheme, does not give rise to the informational injury that they allege.

To establish standing, a plaintiff must show (1) a concrete, particularized, and actual or imminent injury-in-fact that is (2) fairly traceable to the Defendant's challenged action and (3) likely to be redressed by a favorable decision. *Friends of the Earth v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). The "injury-in-fact" element of standing "serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere

interest in the problem." *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973).

"What a plaintiff must assert to satisfy this burden varies depending on the stage of the litigation," and the evidentiary burden on a plaintiff "grows heavier at each stage." *Freedom Watch, Inc. v. McAleenan*, 442 F. Supp. 3d 180, 186 (D.D.C. 2020). Here, because the District Court dismissed CLC and Kelley's complaint on a motion for summary judgment, CLC and Kelley were required to set forth specific evidence that establishes *each element* of Article III standing and disposes of any remaining, genuine issues of material dispute. *See* Fed. R. Civ. P. 56.

To carry their burden of "demonstrating a sufficiently concrete and particularized informational injury" to confer standing under Article III, a "plaintiff must show that (1) it has been deprived of information that, *on its interpretation*, a statute requires the government or a third party to disclose to it, and (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure." *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 378 (D.C. Cir. 2017) (emphasis added); *see also Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016).

An informational injury-in-fact arises when plaintiffs suffer from an "inability to obtain information . . . that, on [their] view of the law, the statue requires that [other litigants] make public." *Akins*, 524 U.S. at 21. And "denial of access to

information [only] qualifies as an injury in fact where a statute (on the claimant['s] reading) requires that the information be publicly disclosed and there is no reason to doubt their claim that the information would help [it]." *CLC v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020).

As to the federal campaign finance laws, "[t]he Supreme Court has long recognized that FECA creates an informational right—the right to know who is spending money to influence elections, how they are spending, and when they are spending it." *Citizens for Resp. & Ethics in Wash. v. Am. Action Network*, 410 F. Supp. 3d 1, 12 (D.D.C. 2019) (citing *Akins*, 524 U.S. at 24-25). But not just any information will do to show an informational injury: "the nature of the information allegedly withheld is critical to the standing analysis." *Common Cause v. FEC*, 108 F.3d 413, 417 (D.C. Cir. 1997). "Only if the statute grants plaintiff a concrete interest in the information sought will he be able to assert any injury in fact." *Nader v. FEC*, 725 F.3d 226, 229 (D.C. Cir. 2013).

1. CLC and Kelley have not been deprived of any factual information sufficient to show informational injury.

It is well-settled that a plaintiff's mere "desire for information concerning a violation of FECA," or what a plaintiff alleges to have been a violation of FECA, does *not* give rise to an injury-in-fact. *Vroom v. FEC*, 951 F. Supp. 2d 175, 179 (D.D.C. 2013); *see also Common Cause*, 108 F.3d at 418 (holding a plaintiff cannot "establish injury in fact merely by alleging that he has been deprived of the

knowledge as to whether a violation of the law has occurred"). This is because plaintiffs do not have any cognizable legal interest in "forc[ing] the FEC to 'get the bad guys.'" *Nader*, 725 F.3d at 230 (quoting *Common Cause*, 108 F.3d at 418). Instead of seeking redress for a cognizable informational injury, "[a]sking the FEC to compel information . . . in the hope of showing that [another party] violated" campaign finance law "amounts to seeking disclosure *to promote law enforcement*." *Nader*, 725 F.3d at 230 (emphasis added). An injury to any such law-enforcement interest is merely a generalized grievance insufficient to confer standing. *Nader*, 725 F.3d at 230. In other words, there is no "justiciable interest in enforcement of the law." *Common Cause*, 108 F.3d at 418.

Here, the District Court rightly concluded that CLC and Kelley are after a purely legal determination and that they have therefore failed to allege any cognizable informational injury-in-fact. CLC and Kelley filed their Complaint before the District Court in hopes of a court order compelling the FEC to adopt CLC and Kelley's narrow view of the internet exemption, which would, in turn, result in penalties for Correct the Record and the Campaign and override the deference owed to the FEC in this area of the law. *See supra* at 13-14. But seeking law enforcement consequences is not sufficient to confer standing. *See Vroom*, 951 F. Supp. 2d at 179; *Common Cause*, 108 F.3d at 418. This is because CLC and Kelley do not have any cognizable legal interest in "forc[ing] the FEC to 'get the bad guys,'" or to adopt

their interpretation of the law. *Nader*, 725 F.3d at 230. The law is clear that CLC and Kelley have no "justiciable interest in enforcement of the law." *Common Cause*, 108 F.3d at 418.

2. The re-classification of Correct the Record's already-disclosed expenditures would not result in the disclosure of any additional factual information.

A plaintiff also lacks an informational injury-in-fact where the information it seeks "is already required to be disclosed" elsewhere and, under that obligation, has been "reported in some form." *Wertheimer*, 268 F.3d at 1074-75. When that is the case, as it is here, it is a clear indication that the plaintiff "do[es] not really seek additional facts," but instead seeks "only the legal determination that" the facts the plaintiff already possesses amount to a legal violation. *Id.* at 1075. Where "plaintiffs have all of the information they are entitled to pursuant to FECA," their coming to court anyway makes it "apparent that what they really want is a legal determination" that they have no standing to seek. *Alliance for Democracy v. FEC*, 362 F. Supp. 2d 138, 148 (D.D.C. 2005).[13]

[13] *See also id.* at 149; *CLC v. FEC*, 254 F. Supp. 3d 119, 125 (D.D.C. 2017) (finding plaintiffs lacked standing where they "already possess all the relevant information about [certain] contributions"); *Citizens for Resp.*, 799 F. Supp. 2d 78, 89 (D.D.C. 2011) (finding plaintiff's failure to "allege any specific *factual information* they lack that is not already publicly available" only "reveals [that] what [they] [we]re actually seeking" was a legal determination); *Jud. Watch*, 293 F. Supp. 2d 41, 47 (D.D.C. 2003) (holding that plaintiff sought only a "legal determination" because it "appear[ed] unlike that [his] administrative complaint [would] yield additional facts . . . that [he] was not already aware of.").

That CLC and Kelley seek only a legal determination of coordination is clear because the information they claim to seek is already publicly available. "[L]ike any other 'citizen who wants to learn the details of'" Correct the Record's disbursements, CLC and Kelley "can already find the amount, date, recipient, and purpose of every single one simply 'by visiting the Commission's website.'" JA 295 (quoting *CREW v. FEC*, 475 F.3d 337, 339 (D.C. Cir. 2007). Indeed, a close examination of the FEC's reporting regime makes plain that CLC and Kelley already have all the information to which they are entitled under FECA concerning Correct the Record's spending, even if the FEC adopted their view of the law that Correct the Record's spending was coordinated with the Campaign. As explained *supra* at section A.4 of the Statement of the Case, under FECA and the FEC's regulations, all political committees, including Correct the Record and the Campaign, must file regular reports disclosing the contributions they receive and the expenditures they make. *See* 52 U.S.C. § 30104(b); 11 C.F.R. § 104.3. Under those regulations, Correct the Record has already publicly disclosed all of its disbursements in accordance with FEC reporting guidelines, in the same detail as if it had treated (or been required by the FEC to treat) these disbursements as in-kind contributions.

In fact, CLC and Kelley admit that "[d]uring the 2015-2016 election cycle, Correct the Record filed periodic reports with the FEC disclosing $9.61 million in disbursements." Br. at 28. CLC and Kelley claim that they lack information about

the dates, amounts, and purposes of Correct the Record's expenditures, but after multiple rounds of briefing in this case, ***they have still not explained what further detail would be required by the FEC's reporting requirements***. Their most recent brief repeatedly argues that in-kind contributions would have to be "itemized." While that is true, all "itemization" means is that a reporting entity like Correct the Record must report the dates, amounts, purposes, and sources of the contributions. *See* Br. at 22, 25-27, 46, 50. Correct the Record's disbursements are already itemized to disclose that exact information. *Supra* at 17-19, 20-21.

This is because there is no difference between the level or type of information a political committee provides when reporting an operating expense and an in-kind contribution.[14] The only change that would occur is that after a legal determination of coordination, expenses now reported as "expenditures" would be disclosed instead as "in-kind contributions." *Supra* at 6, 14-17. CLC and Kelley already know who Correct the Record paid, when they paid them, and how much they paid them. Indeed, if Correct the Record amended its reports to change its operating expenditures into in-kind contributions, all it would do is move its existing entries from Line 21 to Line 23, label the expenditures in-kind contributions, and note that the in-kind contributions benefited the Campaign. *See id.* The amount, date, and

[14] *See* Instructions for FEC Form 3X and Related Schedules 10, FEC, https://www.fec.gov/resources/cms-content/documents/fecfrm3xi.pdf.

purpose description of each expenditure would remain the same, and CLC already knows that Correct the Record's expenditures benefited the Campaign. *See* JA 299. Correct the Record reported the following "purposes" of its expenditures, for example: "payroll, salary, travel, lodging, meals, rent, fundraising consulting, computers, digital software, domain services, email services, event tickets, hardware, insurance, office supplies, parking, and shipping." Br. at 27 (citing JA 192). If these expenditures were reported as in-kind contributions, no more detail would be required. *See* 11 C.F.R. § 104.3(b)(3)(i)(B).[15] Thus, CLC would not learn *any* new information from this hypothetical amended report. In short, "each transaction appellants allege is illegal is reported in some form" already, and requiring the Campaign to report these transactions is simply "seek[ing] the same information from a different source," which is insufficient for an informational injury. *Wertheimer*, 268 F.3d at 1074-75.

3. CLC and Kelley's attempt to manufacture standing by "trimming the sails" on their theory of coordination fails.

Because they already have the information that is required to be disclosed under FECA, CLC and Kelley have revamped their theory of coordination in this case to conjure up an informational injury. The District Court correctly rejected this

[15] *Purpose of Disbursement*, FEC, https://www.fec.gov/help-candidates-and-committees/purposes-disbursements/ (Aug. 21, 2018); FEC, Instructions for FEC Form 3X and Related Schedules, 10, https://www.fec.gov/resources/cms-content/documents/fecfrm3xi.pdf (rev. May 2016).

effort, and this Court should too. On appeal, CLC and Kelley claim that their purported informational injury "is premised on their desire to learn 'which disbursements' made by [Correct the Record]—all of which, recall, have already been publicly disclosed—'were made in coordination with [the Campaign] and are thus by definition in-kind contributions, and 'which were made for non-coordinated exempt activities.'" JA 294-95 (quoting and extensively citing CLC and Kelley's briefing before the District Court). They focus in particular on Correct the Record's reported expenditures for overhead expenses like travel and rent, arguing that if the FEC found Correct the Record's activities to be coordinated with the Campaign, then Correct the Record would have to amend its reports to show *how much* of each overhead payment was an operating expenditure because it related to an exempt activity, and how much was an in-kind contribution because it supported coordinated activity. *See id.* at 31. However, as the District Court pointed out, at bottom, the classification of a certain portion of an expenditure as an in-kind contribution is a *legal* determination, not an inquiry for additional facts. *See CREW*, 799 F. Supp. 2d at 88–89 (finding plaintiff lacked standing where "[t]he only remaining question was a legal dispute about *how much* of the $10,243 expenditure should be considered a contribution to the presidential campaign, and how much should be considered a non-contribution expenditure in furtherance of the PAC's own mission" (emphasis added)).

Moreover, CLC and Kelley's assertion that some expenditures were coordinated while others were not—while convenient for standing—is at odds with their own interpretation of the law. On the merits, CLC and Kelley advance a sweeping claim that Correct the Record's spending represented coordinated expenditures, and thus in-kind contributions to the Campaign, because of the "voluminous record evidence showing that [Correct the Record] and [the Campaign] were collaborating across the full range of [Correct the Record]'s activities . . . ." *CLC*, Case No. 1:19-cv-02336-JEB, Doc. No. 42 at 38. They allege "broad, systematic coordination with the Clinton campaign …" *Id.* They even say it was error for the FEC to seek "conclusive evidence on a transaction-by-transaction basis to determine whether specific conduct occurred with respect to particular expenditures." *Id.* (quotation marks omitted). CLC and Kelley are not genuinely trying to determine which of Correct the Record's expenditures were coordinated, and which were not. CLC and Kelley have gone to court to advance the argument that *all* of Correct the Record's spending was coordinated. Under *Akins*, the relevant question to determine whether a plaintiff has informational standing is whether, *on their view of the law*, they have been deprived of factual information. 524 U.S. at 21. CLC and Kelley fail that test here.

The argument with respect to David Brock's salary provides an example of the problems and inconsistencies with CLC and Kelley's position. On the one hand,

they contend that (1) only the portions of David Brock's salary that are "connected" to unpaid internet activity should be exempt from being treated as an in-kind contribution; (2) the remaining portions of David Brock's salary that are unrelated to unpaid internet activity are in-kind contributions to the Campaign; and (3) requiring Correct the Record to divide up Brock's salary in that manner would indicate to Plaintiffs how much time he spent on unpaid internet activity while working for Correct the Record. *See* Br. at 30-31. Yet, CLC and Kelley have repeatedly claimed that input costs for unpaid Internet activities are not exempt under *any* circumstances: in their view, Correct the Record's "disbursements for staff salaries amounted to 'compensation for personal services' rendered to the campaign, and were therefore in-kind contributions under FECA *whether or not* the ultimate activity qualified as a 'public communication.'" *CLC*, Case No. 1:19-cv-02336-JEB, Doc. No. 27 at 41 n.13 (emphasis added). This Court would have to ignore CLC and Kelley's arguments on the merits to adopt their strained and contradictory standing argument here.

B. The District Court properly found that *Wertheimer* and the cases that followed foreclose CLC and Kelley's claim of informational injury.

Wertheimer's standing analysis precludes jurisdiction here, where CLC and Kelley seek a legal finding of coordination that would not result in any additional factual information. *Wertheimer* instructs that a plaintiff lacks a cognizable informational injury sufficient to establish standing where the information she seeks

is already required to be disclosed and is reported in some form. *Supra* at 30; JA 294 (citing *Wertheimer*, 268 F.3d at 1074-75). Such a conclusion makes sense, because if a plaintiff already has access to the information she seeks, then she is not really searching for additional facts, but is instead looking for a legal determination that the facts she knows amount to a legal violation. *Supra* at 30; JA 294 (citing *Wertheimer*, 268 F.3d at 1075). Nothing about this Circuit's holding in *Wertheimer* indicates that it turns on whether the informational harm is prospective or retrospective.

CLC and Kelley strain to differentiate *Wertheimer* by pointing out that it was based on an action brought under the Presidential Election Campaign Fund Act ("Fund Act"), not FECA. Br. at 40. But that is a distinction without a difference for purposes of analyzing standing. *Wertheimer*, 268 F.3d at 1074 ("Although recognizing the tenuous nature of appellants' claimed interrelationship between the two statutes we prefer to rest our decision on appellants' failure to assert an injury in fact because that is the logical anterior question in any standing analysis."). Indeed, many decisions have relied on *Wertheimer* despite not involving any allegations under the Fund Act. *See, e.g.*, *Free Speech for People v. FEC*, 442 F. Supp. 3d 335, 344 (D.D.C. 2020) (finding a case that only involved FECA "nearly on all fours" with *Wertheimer*); *CREW*, 799 F. Supp. 2d at 87 (similar).

Like this case, the claims in *Wertheimer* turned on whether the appellants had established an informational injury sufficient to satisfy Article III's injury-in-fact requirement. 268 F.3d at 1074. Wertheimer's grievance was that the Democratic National Committee and Republican National Committee were spending millions of dollars on issue ads that were coordinated with presidential campaigns, which he thought were "contributions" under FECA. *Id*. at 1071. Wertheimer believed such spending amounted to coordinated party expenditures under section 441a(d) of FECA that vastly exceeded the 441a(d) limits. *Id*. However, "[b]ecause § 441a(d) expenditures were already required to be disclosed and itemized in a way that revealed all of the pertinent information about each transaction—the fact of cooperation between the party and the candidate, and the expenditure's amount, date, and purpose—declaring that those expenditures were 'coordinated' would amount *only* to a 'legal conclusion' that the expenditures were unlawful." Br. at 43. Thus, the Court found that Wertheimer lacked an informational harm. *Wertheimer* stands for the proposition that a litigant cannot dress up a generalized grievance as an informational injury, and that a plaintiff does not really suffer an informational injury when his only grievance is that a category of expenditures should have been reported on a different line of the defendant's FEC reports.

The exact same logic applies to this case. Correct the Record's expenditures have already been reported in a way that reveals all of the pertinent information

about each transaction—over $9 million dollars of disbursements have already been reported according to their amount, date, and purpose, and it is public record that Correct the Record and the Campaign coordinated on a myriad of online activities. *See supra* at 17-19, 31. CLC and Kelley can point to Correct the Record and the Campaign's expenditures with certitude. *See, e.g.*, JA 47 at ¶ 63 (Plaintiffs know and have "documented" Correct the Record's millions of dollars spent on specific activities, including opposition research, message development, surrogate training and booking, and much more. Purportedly all that is missing is whether certain of these expenses were made in "coordination" with the Campaign.); JA 49-50 at ¶ 69 (Plaintiffs know the salaries that Correct the Record paid its staff. Supposedly "missing" is exactly what portion of staff salary was considered "coordinated" with the Clinton campaign)[16]; JA 50 at ¶ 70 (Plaintiffs cite exact dollar amounts that Correct the Record reported that it paid in coordination with the Campaign, complete with the precise dates and subjects, including a $275,615 payment on June 1, 2015 for research, and a $6,346 payment on July 17, 2015 for research services).

[16] As explained above, this information is hardly "missing." *See supra* at 8, 17-19, 33-36 (explaining how, instead, their arguments about disaggregating disbursements, including salary disbursements, turns on a contrived attempt by CLC and Kelley to "trim[] their sails" in a way that is inconsistent with their arguments on the merits). In any event, Correct the Record disclosed the amount, source, date, and purpose for each of its expenditures. All CLC demands is (a) a movement of that existing information, and (b) a duplication of that information on the Campaign's reports.

As the District Court pointed out, the only information that CLC and Kelley are potentially missing is whether there are portions of Correct the Record's *already disclosed* expenditures that were made in coordination with the Campaign. JA 294-95, 296-97, 299. CLC and Kelley concede as much in their brief, admitting that the information they seek is "itemized information about each unreported in-kind contribution arising from" coordination with a candidate during the election cycle. Br. at 44-45. Practically, this "itemized information" amounts to nothing more than Correct the Record and the Campaign taking the *already disclosed expenditures* and rearranging them on new lines in their disclosures. *Supra* at 6, 14-19, 30-34. Thus, despite CLC and Kelley's assertion that there are "*new* factual revelations" to be made, Br. at 43, there is nothing in the record to support this.

Just as CLC and Kelley do here, the appellants in *Wertheimer* also cited *Akins* to support their claim that they were injured by not knowing whether certain expenditures were coordinated, as they understood the term to be defined under the statute. *Id*. at 1074. But *Akins* was diametrically different: it involved an organization that had failed to register and report as a political committee at all. Accordingly, the complainants were completely in the dark as to contributions or expenditures made by the organization. Moreover, *Akins* only supports the claim that a plaintiff suffers an informational injury when she is "deprived of information that the Act requires be disclosed." *Id*.; *see also Akins*, 524 U.S. at 21. The court in *Wertheimer* rejected

the notion that *Akins* controlled because "appellants have failed to show either that they are directly being deprived of any information or that the legal ruling they seek might lead to additional factual information." *Wertheimer*, 268 F.3d at 1074. There, "appellants' counsel did not dispute that all political parties currently report all disbursements or that each transaction appellants allege is illegal is reported in some form." *Id*. The only additional "fact" that could be gleaned was the "fact" of "coordination," but the court concluded that "coordination" is a legal conclusion, not a "fact" sufficient to prove an injury-in-fact and establish standing. *Id*. The same is true here. CLC and Kelley do not dispute that all of Correct the Record's expenditures have been reported "in some form."

CLC and Kelley also repeatedly claim that their injury is no different from the plaintiff in *Shays v. FEC*, 528 F.3d 914, 921-22 (D.C. Cir. 2008) ("*Shays III*"), who this court found to have standing to challenge a coordination regulation. Br. at 2-3, 23-24, 48. However, they brush aside critical differences between their case and *Shays III* in making this claim. *Shays III* involved a facial challenge to an FEC regulation that provided that any public communication that referenced a candidate and appeared before the candidate's electorate within 120 days of an election for a presidential candidate, or 90 days for a House or Senate candidate, was a coordinated communication if there was evidence of coordinating conduct. *Shays*, 528 F.3d at 921-22. Shays argued that the regulation was contrary to FECA because it allowed

coordinated advertisements aired before the relevant window to evade regulation. *See id.* at 922.

This Court concluded that Shays had standing to bring his challenge because, if the regulation stood, he would be denied information about who was funding candidates' campaigns. *Id.* at 923. Critically, though, because this was a facial challenge, the Court was able to take into account the fact that the entities with which candidates might be coordinating included not just political committees, but corporations and labor unions that do not report their spending. Accordingly, if the FEC did not require campaigns to report coordinated communications outside of the 90/120-day window as in-kind contributions, no one would ever know any information about who funded certain communications, the dates, or the amount of the expenditures, as corporations and labor unions have no disclosure obligations. That is the direct opposite of the situation in this case, where Correct the Record reports all of its receipts and disbursements to the FEC.

CLC and Kelley's attempts to distance themselves from cases applying *Wertheimer* also fail. For example, CLC and Kelley distinguish *Judicial Watch, Inc. v. FEC*, 293 F. Supp. 2d 41, 47 (D.D.C. 2003) by arguing the case turned on the fact that plaintiff was seeking information about his own contributions. Br. at 43. Not so. Factually, the plaintiff was ultimately seeking a legal determination that the money he spent on the Clinton campaign was a contribution and should have been reported

as such. *Judicial Watch*, 293 F. Supp. 2d at 47. But the case turned on whether the plaintiff had an informational injury because he did not have a full view into *how* the Clinton campaign was reporting contributions. *Id*. The court, citing *Wertheimer*, found the plaintiff lacked standing because he was already aware of the contribution amounts and his complaint was unlikely to yield new facts; therefore, he was seeking "only 'a legal characterization or duplicative reporting of information that under existing rules is already required to be disclosed.'" *Id*. at 47 n.9. *Judicial Watch* is not meaningfully distinguishable from this case, where CLC and Kelley are aware of the contribution amounts—indeed, *they* are the ones who have brought the amounts to light in their complaint and briefing—and are merely seeking a legal characterization of whether certain of these amounts should have been reported as "coordinated" expenses.

Similarly, plaintiffs in *Alliance for Democracy v. FEC* lacked standing because they "already possess[ed] the information they claim to lack." 362 F. Supp. 2d 138, 144 (D.D.C. 2005). There, the plaintiffs were aware that a PAC gave John Ashcroft a fundraising list of 100,000 donors during his Senate campaign. *Id*. at 139. They sought the precise value of the list, despite no statutory requirement to disclose the precise value of the list. And, there were "voluminous documents" available on the FEC's website that provided raw data indicating how the list was developed and at what cost, how the committees used the list, and how much income the list

generated. *Id*. 145. The plaintiffs cited *Akins* to support their standing arguments, but the court rejected the analogy, noting that, unlike the plaintiffs in *Akins*, the *Alliance for Democracy* plaintiffs were "seeking a specific monetary value of an item that has already been reported" and "began this action while already in possession of information regarding the transfer of the mailing list from the [PAC] to Ashcroft 2000." *Id*. at 147. The court reiterated: no informational injury is sustained when "the information required to be disclosed by the statute has already been disclosed." *Id*. (explaining the "present case is more analogous to *Judicial Watch*" than to *Akins*.)

Finally, *Free Speech for People v. FEC* is another example that mirrors this case and similarly found that the plaintiff lacked standing. There, the plaintiff claimed that American Media made a $150,000 payment to Karen McDougal "for the purpose of influencing the 2016 presidential campaign." *Free Speech for People*, 442 F. Supp. 3d at 340. The plaintiff was aware of this payment, including when it was made and its purpose. What the plaintiff wanted to know, and what formed the basis of its lawsuit, was whether the Trump Campaign coordinated with American Media to pay McDougal. *Id*. at 343. Applying *Wertheimer*, a case that it viewed as "nearly on all fours," the court properly found that the plaintiff had failed to establish an injury-in-fact for standing purposes. *Id*. at 344-45.

There is little daylight between *Wertheimer*, the cases applying it, and this case. CLC and Kelley know with certainty the amounts that Correct the Record and the Campaign spent, when those payments were made, and the purposes of each payment. *Supra* at 28-34. Correct the Record and the Campaign disclosed everything that they were required to disclose under FECA and the relevant FEC regulations. CLC and Kelley do not have standing to bring this lawsuit just because they wish that they had more granular—and unnecessary—details about how each dollar was spent, or because they wish that that same information would have been reported differently, in accordance with a legal conclusion that the FEC declined to make. "Not every unrequited demand for information from the FEC is sufficient to establish Article III standing." *Free Speech for People*, 442 F. Supp. 3d at 342.

C. The District Court did not conclude that a request for a legal determination always forecloses an informational injury-in-fact.

CLC and Kelley's claim that the District Court's decision somehow suggests that anytime a plaintiff also seeks a legal determination that there can be no informational harm is false and turns on a clear misstatement of the District Court's order. *See* Br. at 19. Contrary to CLC and Kelley's claims, the District Court correctly recognized that seeking a legal determination of coordination does ***not*** always foreclose a cognizable informational injury, if a legal determination of coordination would actually result in the reporting of further factual information. *See* JA 305.

As an example of such a case, the District Court referenced a prior litigation involving CLC. In *CLC v. FEC*, which involved a review of the FEC's dismissal of five administrative complaints, the court held that with respect to three of the complaints, it was clear that neither the FEC nor the plaintiffs knew who was truly behind the contributions at issue. JA 305 (citing *CLC*, 245 F. Supp. 3d at 123-27). As to those three complaints, the court found an informational injury, because the plaintiffs had a right to information about *who made* the contributions under *Akins*. JA 305. The District Court here explained that, "[t]he rule sensibly applied by the court, therefore, was that the [FEC]'s failure to investigate confers standing only if the sought-after injury would uncover nonpublic information *that the plaintiffs have a cognizable interest in obtaining*: the identity of a contributor qualifies; the FEC's confirmation of a fact already known to the public does not." *Id.* Here, there is no such information. And as discussed above, CLC and Kelley's only attempt to even try to claim there is some such information is in direct contravention to their arguments on the merits that virtually all of Correct the Record's expenditures were actually in-kind contributions. *See supra* at34-37. Accordingly, the District Court rightly (and narrowly) held that CLC and Kelley did not establish an informational injury-in-fact here; the Court's holding did not preclude finding an informational injury-in-fact simply because a litigant also seeks a legal determination.

D. Contrary to what Appellants now claim, CLC did not plead a separate and discrete organizational injury and, even if it had, no such injury would be cognizable.

CLC and Kelley make the misleading argument that CLC asserted an injury-in-fact that was separate and discrete from its putative informational injury, and that the District Court erred in ignoring this separate basis for standing. *See* Br. at 36-39. This argument is wrong on the facts and on the law.

CLC and Kelley's Complaint lays bare that they did not assert any organizational injury to CLC which is, in any way, separate from its alleged informational injury. This Court need look no further than the Complaint to see that a putative informational injury was the only injury alleged. *See supra* at 21; *see also* JA 38-39 (alleging that CLC is only harmed as an organization *because of* the purported deprivation, since it uses such campaign finance information, for example, to testify before Congress, speak with reporters, and generate publications, and because its mission turns on policing such information). In other words, because CLC has failed to establish an informational harm, it cannot possibly prove its entirely dependent organizational harm.

This is not an open question of law. When a theory of organizational standing is rooted in the organization's inability to obtain information, the organization cannot satisfy organizational standing by showing that access to the information is important to its core mission or has impacted its activities and has caused a drain on

its resources if it has not *actually been denied access to the information*. *See, e.g.*, *Friends of Animals v. Jewell*, 115 F. Supp. 3d 107, 115 n.9 (D.D.C. 2015), *aff'd*, 828 F.3d 989 (D.C. Cir. 2016) (rejecting plaintiff's theory of organizational injury, which was rooted in denial of information, after finding plaintiff had not actually been denied information); *see also Lawyers' Comm. for 9/11 Inquiry, Inc. v. Wray*, 424 F. Supp. 3d 26, 33 (D.D.C. 2020), *aff'd*, 848 F. App'x 428 (D.C. Cir. 2021) (noting the plaintiff's theories for both informational and organizational standing "allege harms that *stem from the FBI's failure to disclose the desired information*" and thus their organizational injury was "part and parcel of the alleged informational injury" and "[s]ince the organizations have suffered no informational injury . . . the alternative theories also fail").

When an organizational injury fails for the *same reason* an informational injury does, it is neither unusual nor improper for courts to address only the plaintiff's informational standing argument and summarily reject their organizational standing.[17] Similarly, when courts find the plaintiff has stated a

[17] *See, e.g.*, *Friends of Animals*, 115 F. Supp. 3d at 115 n.9 ("Friends of Animals alleges the same (supposedly) concrete injuries to support its informational—and organizational—injury theories . . . . Because these allegations (and the arguments surrounding them) overlap, the Court will spare the reader a separate discussion of their merit. Thus, the Court rejects FOA's organizational-standing arguments for the reasons described *infra* at 115-16."); *cf. Elec. Priv. Info. Ctr.*, 878 F.3d at 381 (Williams, J., concurring) ("Where an organization's only asserted injury is an informational one, we have not engaged in a separate analysis of informational and

cognizable informational injury, and the plaintiff alleges an organizational injury rooted in the same lack of information, they may skip the "injury in fact" analysis for organizational standing and just consider whether there has been an impact on the organization's interests. *Air All. Houston v. U.S. Chem. & Safety Hazard Investigation Bd.*, 365 F. Supp. 3d 118, 127 (D.D.C. 2019) ("[T]his court need not re-evaluate Plaintiffs' injury in fact for organizational standing purposes, when it already has held that Plaintiffs suffered a cognizable informational injury. As to the second element of organizational standing—use of resources to counteract the harm—Plaintiffs have satisfied it."). Here, the District Court rightly found that the *only* separate and discrete injury alleged by CLC and Kelley was informational in nature, because any organizational harm was collateral and indistinguishable from their purported informational harm. Accordingly, the Court did not err in not separately addressing and rejecting any allegation of organizational harm.

Indeed, none of the cases that CLC and Kelley cite are contradictory to this well-settled law. Instead, the cases that CLC and Kelley cite are merely cases where courts have taken for granted that an interrelated and inextricable informational harm has occurred and then turned their analysis to the collateral organizational injury.

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organizational injury."); *id.* ("In its capacity as an organization, EPIC has alleged one harm, packaged as two theories (perhaps in the hope that such packaging will increase the odds of success). There is no need for us to accept that packaging; doing so is a step away from, not towards, legal clarity.").

See, e.g., *People for the Ethical Treatment of Animals v. USDA*, 797 F.3d 1087, 1094-96 (D.C. Cir. 2015) (examining only whether an alleged deprivation of information impaired the organization's interests). The cases CLC and Kelley cite certainly do not stand for the proposition that an organization's diversion of resources *because of and in response to* an informational harm that *does not exist* can somehow give rise to a separate and independent injury-in-fact. Indeed, undersigned counsel is not aware of a single case that reaches that result.

E. Kelley's alleged harm is not redressable.

The only issue before this Court is whether CLC and Kelley have proven an injury-in-fact to establish standing—they have not. Even if Kelley could establish an injury-in-fact (she cannot), she still fails to establish standing because any alleged harm she claims cannot be redressed. *Friends of the Earth*, 528 U.S. at 180-81. Kelley claims that she needed information about coordination between Correct the Record and the Campaign to "assess" and "evaluate candidates," and to ensure that she was "exercising her right to an informed vote." JA 39-40. Kelley states that understanding coordinated spending between Correct the Record and the Campaign will "allow her to understand the sources of [Clinton's] financial support, and thus the interests to which they are likely to be responsive." JA 69. The 2016 election is long-since over, and Secretary Clinton is no longer a candidate for office, nor is there any indication that she will be a candidate in the future. Thus, even if Kelley did

allege an injury, it would not be related to her "informed participation in the political process," which is required to show an informational injury. *Free Speech for People*, 442 F. Supp. 3d at 343.

CONCLUSION

For the foregoing reasons, the District Court's decision that CLC and Kelley lack standing under Article III of the United States Constitution should be affirmed.

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Dated: August 18, 2021

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2021, I electronically filed this Brief with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all person required to be served.

/s/Marc E. Elias
Marc Erik Elias