IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMON CAUSE GEORGIA and TREAUNNA C. DENNIS Plaintiffs, v. FEDERAL ELECTION COMMISSION Defendant.	Civil Action No. 1:22-cv-03067

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The Plaintiffs, Common Cause Georgia and Treaunna C. Dennis, by their undersigned counsel, and pursuant to Federal Rule of Civil Procedure 56 and Local Rule 7(h), the Federal Election Campaign Act ("FECA"), 52 U.S.C. § 30109(a)(8)(C), and the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) and (C), respectfully move this Court for a summary judgment declaring that the failure of the Federal Election Commission ("FEC") to find reason to believe that True the Vote and the Georgia Republican Party violated FECA, and the FEC's subsequent dismissal of plaintiffs' administrative complaint, was arbitrary, capricious, an abuse of discretion, and otherwise contrary to law, and directing the Commission to conform with such declaration within thirty days consistent with the Court's judgment.

Support for this motion is set forth in the accompanying Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment; the Declaration of Treaunna C. Dennis, attached hereto as Exhibit 1; and the joint appendix containing copies of those portions of the administrative record that are cited or otherwise relied upon, to be filed no later than May 18, 2023. Plaintiffs' requested relief is set forth in the accompanying Proposed Order.

Dated: February 16, 2023

Respectfully submitted,

s/ Megan P. McAllen

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MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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APA	Administrative Procedure Act
CLC	Campaign Legal Center
BCRA	Bipartisan Campaign Reform Act
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
F&LA	Factual and Legal Analysis
GOTV	Get Out the Vote
MUR	Matter Under Review
OGC	Office of General Counsel (FEC)
SOR	Statement of Reasons
TTV	True the Vote

INTRODUCTION AND SUMMARY OF ARGUMENT

To guard against corruption and its appearance, the Federal Election Campaign Act ("FECA" or "Act") and Federal Election Commission ("FEC") regulations broadly prohibit corporations from making contributions to political party committees. 52 U.S.C. § 30118; 11 C.F.R. § 114.2(a). The same provisions correspondingly prohibit political party committees from knowingly accepting or receiving corporate contributions. 52 U.S.C. § 30118; 11 C.F.R. § 114.2(d). This prohibition extends to a corporate expenditure made in coordination with a party committee or its agents—because under FECA, any expenditure that is *coordinated* with a candidate or party is treated as an in-kind contribution to "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam); *see also* 52 U.S.C. § 30116(a)(7)(B)(ii); 11 C.F.R. § 109.20. Federal law likewise mandates public disclosure of federal contributions, including those that take the form of coordinated expenditures. 52 U.S.C. § 30104(a)(l), (b)(3)(A). FECA's disclosure requirements ensure that plaintiffs and others have access to crucial information about the money spent to influence elections—information that helps safeguard the First Amendment rights of voters to fully participate in the political process.

Plaintiffs Common Cause Georgia and Treaunna C. Dennis filed this action under 52 U.S.C. § 30109(a)(8) to challenge the FEC's unjustified refusal to enforce these rules—including by inventing new exceptions to them and arbitrarily ignoring relevant facts—when the agency dismissed plaintiffs' allegations of unlawful and undisclosed coordination between True the Vote ("TTV"), a nonprofit corporation, and the Georgia Republican Party ("Georgia GOP" or "Party") during the 2021 U.S. Senate runoff elections in Georgia.

In late 2020, after it became clear that both U.S. Senate races in Georgia would go to runoff elections on January 5, 2021, the Georgia GOP made a request to TTV for assistance. TTV, motivated by "what happened in November," AR 60, agreed to join forces with the Georgia GOP at the Party's "request," and announced, in multiple public statements, its "partnership" with the Georgia GOP to provide a variety of services in connection with the 2021 Senate runoff elections. Those services included a voter hotline, ballot-curing support, signature verification training, absentee ballot drop box monitoring, and other so-called "election integrity initiatives." The fundamental goal of this enterprise, as described in emails summarizing conversations between TTV's legal counsel and donors, was to "'win by eliminating votes and changing the count.'" AR 73. In other words, TTV, a corporation, coordinated with the Georgia GOP, at the Party's express request, to provide free services to the Party to influence a federal election.

These facts provided ample reason to believe TTV and the Georgia GOP violated federal campaign finance law—and when plaintiffs filed a complaint with the FEC urging the agency to investigate, the FEC's Office of General Counsel ("OGC") agreed. But despite OGC's recommendation that the Commission find "reason to believe" the Act was violated and open an investigation, a "controlling" group of three FEC Commissioners rejected that finding, and the Commission deadlocked. A majority of Commissioners then voted to dismiss plaintiffs' administrative complaint.

The controlling Commissioners' Statement of Reasons makes clear that their decision to depart from OGC's recommendations relied on unsupported conclusions of law and counterfactual assumptions that cannot be reconciled with FECA's clear mandate to regulate and require disclosure of all expenditures "made in cooperation, consultation, or concert, with, or at the request or suggestion of," a political party as in-kind contributions. 52 U.S.C. § 30116(a)(7)(B)(ii).

Because the dismissal thus rested on impermissible interpretations of the Act and arbitrary and capricious decisionmaking, *see Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986), it was contrary to law and should be set aside.

First, in explaining why they believed the coordination alleged here was beyond the purview of the FEC, the Commissioners relied on impermissibly constrained interpretations of the Act to carve out broad swaths of coordinated, campaign-related spending from FECA—inventing a new, categorical exemption for purported "state law compliance" expenditures and applying a constitutional narrowing construction of the term "expenditure" that the Supreme Court has recognized has no application in the context of *contributions*, including contributions in the form of coordinated expenditures. The Commissioners' finding that TTV's election-related services—performed at a political party's "request" and explicitly directed at federal elections—nevertheless constituted unregulable spending on "state law compliance" or "issue advocacy" was unmoored from FECA's statutory text, contrary to its purposes, and will facilitate rampant evasion of the Act's core contribution restrictions.

Second, the Commissioners' finding that TTV did not "coordinate" any activities with the Georgia GOP within the meaning of the Act hinged on both an unduly stringent conduct standard that FECA does not permit, and the unexplained and unreasonable disregard of facts established in the administrative record. Indeed, the Commissioners simply sidestepped any inconvenient facts to reach a predetermined conclusion, ultimately offering no cogent explanation of their reasoning that could merit judicial deference.

"An agency's action must be within its lawful authority, and 'the process by which it reaches that result must be logical and rational.'" *Farrell v. Blinken*, 4 F.4th 124, 137 (D.C. Cir. 2021) (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998)). The FEC

dismissal here fails on both counts. If left unchecked, it could open a huge loophole in the Act for any coordinated spending ostensibly related to "compliance" with state election law—providing an expedient avenue for attempts to circumvent FECA's contribution restrictions and disclosure requirements given the States' role in election administration.

The Court should award summary judgment to plaintiffs, declare the FEC's dismissal of plaintiffs' complaint contrary to law, and order the FEC to conform with that declaration.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

A. Coordinated expenditures are in-kind contributions subject to FECA's contribution limits, source prohibitions, and disclosure requirements.

FECA imposes certain restrictions and disclosure requirements on "contributions" and "expenditures." Under the Act, both terms are defined broadly to include "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); *see also* 11 C.F.R. § 100.52(a) (payment of money or "anything of value made by any person for the purpose of influencing any election for Federal office is a contribution").[1] In addition, an expenditure made by a person other than a candidate or the candidate's authorized committee "in cooperation, consultation, or concert with, or at the request or suggestion of a national, State, or local committee of a political party shall be considered to be a contribution made to such party committee." 52 U.S.C. § 30116(a)(7)(B)(ii).

The Act and Commission regulations broadly prohibit corporations from making contributions to federal political committees. *See* 52 U.S.C. § 30118; 11 C.F.R. § 114.2(a). For

[1] The statutory phrase "anything of value" is understood to include "all in-kind contributions," including the provision of "any goods or services without charge or at a charge that is less than the usual and normal charge." 11 C.F.R. § 100.52(d)(1).

purposes of the corporate contribution ban, a "contribution or expenditure" also includes "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . in connection with any election." 11 C.F.R. § 114.l(a)(l).

A corporate expenditure made in coordination with a party committee—*i.e.*, "in cooperation, consultation, or concert, with, or at the request or suggestion of" the party or its agents—is a prohibited in-kind contribution to that party committee. 52 U.S.C. § 30116(a)(7)(B)(ii); 11 C.F.R. § 109.20; *see also* 11 C.F.R. § 114.10 ("[C]orporations . . . are prohibited from making coordinated expenditures as defined in 11 CFR 109.20."). Political committees (other than independent expenditure-only committees or "super PACs") are correspondingly prohibited from knowingly accepting or receiving corporate contributions. 52 U.S.C. § 30118; 11 C.F.R. § 114.2(d). Corporate officers and directors are also prohibited from consenting to such prohibited contributions. 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(e).

Consistent with the statutory and regulatory definitions, the Commission has emphasized that "payments which are coordinated with candidates constitute expenditures and in-kind contributions to those candidates even if the communications do not contain express advocacy." FEC, Corporate and Labor Organization Activity; Express Advocacy and Coordination With Candidates, 60 Fed. Reg. 64260, 64262 (Dec. 14, 1995). "A corporation . . . that engages in election-related activities directed at the general public must avoid most forms of coordination with candidates," or else risk making "prohibited in-kind contributions." *Id.* at 64263.

In 2014, following the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), the Commission updated its regulations and made clear that, while the Court had permitted corporations to make unlimited independent expenditures, that holding applies only to corporate and labor organization expenditures "that are not coordinated and do not otherwise constitute in-

kind contributions." FEC, Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, 79 Fed. Reg. 62797, 62804 (Oct. 21, 2014). In revising 11 C.F.R. § 114.4(c), which governs corporate communications to the general public in connection with a federal election, the Commission removed the pre-*Citizens United* prohibition on express advocacy and added "an explicit prohibition on corporations and labor organizations coordinating with candidates or party committees, pursuant to the Commission's coordination regulations, on communications to the general public." *Id.* at 62805; *see* 11 C.F.R. § 114.4(c)(1) (noting that a corporation or labor organization may not make "coordinated expenditures as defined in 11 CFR § 109.20, coordinated communications as defined in 11 CFR § 109.21, or contributions as defined in 11 CFR part 100, subpart B").[2]

In its 2014 rulemaking, the Commission also emphasized that corporations may not coordinate with a candidate or political party regarding non-communication expenditures, including but not limited to expenditures for the voter registration and get-out-the-vote ("GOTV") drives described in 11 C.F.R. § 114.4(d). *See* 79 Fed. Reg. at 62805 (explaining that under revised C.F.R. § 114.4(a), corporations remain prohibited from making coordinated expenditures for voter registration and GOTV drives); 11 C.F.R. § 114.4(a).

FECA and Commission regulations require all federal political committees to file periodic reports accurately disclosing their receipts, disbursements, and debts and obligations, including in-kind contributions in the form of coordinated expenditures. 52 U.S.C. § 30104; 11 C.F.R. § 104.3. Political committees must also itemize the names of each person from whom the committee received contributions and each person to whom it made expenditures aggregating over $200 in

[2] The corporate communications referenced in 11 C.F.R. § 114.4(c) include the distribution of voter registration or GOTV communications, *id.* § 114.4(c)(2)(ii), (c)(2)(ii)(B); and registration or voting information produced by official election administrators, *id.* § 114.4(c)(3)(i), (c)(3)(iv)(B).

value, together with the dates, amounts, and purposes of such receipts and disbursements. 52 U.S.C. § 30104(b)(3)(A), (5)(A); 11 C.F.R. § 104.3(a)(4)(i), (b)(3)(i).

B. The statutory framework for FEC administrative complaints.

Any person may file a complaint with the Commission alleging a violation of FECA. 52 U.S.C. § 30109(a)(l). After reviewing the complaint, any responses thereto, and the Office of General Counsel's recommendations, the Commission votes on whether there is sufficient "reason to believe" that a FECA violation occurred to justify an investigation, *i.e.*, whether a complaint "credibly alleges" 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); *see also id.* (reason to believe requires that "the available evidence . . . is at least sufficient to warrant conducting an investigation"). After any investigation, if the Commission determines that there is probable cause to believe the law has been violated, *id*. § 30109(a)(3), it seeks a conciliation agreement with the respondent, which may include civil penalties, *id*. § 30109(a)(4)(A), (5). If the Commission is unable to correct the violation and enter a conciliation agreement, it may institute a civil action in federal district court. *Id*. § 30109(a)(6)(A). All of these decisions require four affirmative votes.

If, at any of these decision-making junctures, fewer than four Commissioners vote to proceed, the Commission may vote to dismiss the complaint and the "controlling" group of Commissioners who voted not to proceed must issue a Statement of Reasons to serve as the basis for any judicial review. *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988). "Any party aggrieved" by the dismissal of its FEC complaint may seek review in the U.S. District Court for the District of Columbia to determine whether the dismissal was "contrary to law," 52 U.S.C. § 30109(a)(8)(A), (B). If the Court finds the dismissal contrary to law, the dismissal should be set

aside and the matter remanded to the Commission to conform with such declaration within thirty days, failing which the complainant "may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint." *Id.* § 30109(a)(8)(C).

II. Statement of Facts

A. Plaintiffs' administrative complaint.

On March 31, 2021, Common Cause Georgia, Treaunna C. Dennis, and Campaign Legal Center Action filed an administrative complaint (designated Matter Under Review ("MUR") 7894), alleging that TTV made, and the Georgia GOP accepted and failed to report, prohibited in-kind contributions in the form of coordinated expenditures, in violation of FECA's reporting requirements and contribution restrictions. AR 3-6 ¶¶ 7-16, 10-12 ¶¶ 30-40.

The administrative complaint—relying on publicly available information including press releases and statements from both TTV and the Georgia GOP—documented how, in late 2020, TTV received a "request" from the Party for assistance with the 2021 Georgia Senate runoff election and publicly announced the groups' "partnership" to provide a variety of services in connection with the election, including a voter hotline, ballot-curing support, signature verification training, absentee ballot drop box monitoring, and "other election integrity initiatives." *See generally* AR 3-4 ¶¶ 9-12.

On December 14, 2020, for example, TTV founder and president, Catherine Engelbrecht, sent an email to TTV supporters describing its work in Georgia and the Georgia GOP's "request" for assistance:

> For the past two weeks, I've been in Georgia with a small team from True the Vote, working on specific, tangible ways to help ensure transparency and accuracy in the critical run-off elections that will determine the balance of power in the Senate. We've met with voters and state leaders, leading ultimately to a request from the Georgia Republican Party to provide publicly available nonpartisan signature verification training, a 24x7 voter hotline, ballot-curing support, and more.

AR 3-4 ¶ 9 (quoting Email from True the Vote, *Weekly Update | Validate the Vote GA | 12.13.20* (Dec. 14, 2020, 12:26am), https://politicalemails.org/messages/318884 ("Dec. 14 TTV Email")). The email further described "leading webinars and FAQ sessions for government leaders" to support constituents "who are understandably angry about what happened in November." Dec. 14 TTV Email; *see also* AR 60. Engelbrecht's email concluded with a fundraising appeal pledging that any donations received in response "will be used to fund the work in Georgia." AR 4 ¶ 9.

Later the same day, TTV issued a press release touting its "partnership with the Georgia Republican Party to assist with the Senate runoff election process," including by providing "publicly available signature verification training, a statewide voter hotline, monitoring absentee ballot drop boxes, and other election integrity initiatives." AR 4 ¶ 10 (quoting Press Release, True the Vote, *True the Vote Partners With Georgia GOP to Ensure Transparent, Secure Ballot Effort for Senate Runoff Elections* (Dec. 14, 2020), https://truethevote.org/true-the-vote-partners-with-georgia-gop-to-ensure-transparent-secure-ballot-effort-for-senate-runoff-elections). The press release included a quote from Georgia GOP Chairman David Shafer that the party was "grateful for the help of the TTV team in the fight for election integrity," and avowing that "[t]he resources of TTV will help us organize and implement the most comprehensive ballot security initiative in Georgia history." AR 4 ¶ 11. The press release also quoted Ms. Engelbrecht as saying, "[w]e have focused our 'Eyes on Georgia' in these critical final days before the runoff, and we are thrilled to partner with the Georgia Republican Party, Chairman Shafer, and his team to ensure the law is upheld and law-abiding voters have their voices heard." AR 4 ¶ 12.

Three days after announcing its partnership with the Georgia GOP, TTV challenged the eligibility of more than 360,000 Georgia voters. AR 6 ¶ 15. Nevertheless, according to the Georgia

GOP's publicly filed FEC disclosure reports, it has not disclosed any contributions from, nor payments to, True the Vote. *See* AR 6 ¶ 16.

On the basis of this evidence, plaintiffs' administrative complaint: (1) urged the Commission to find "reason to believe" that TTV made, and the Georgia GOP accepted and failed to report, illegal in-kind contributions in the form of coordinated expenditures, in violation of 52 U.S.C. §§ 30104, 30118 and 11 C.F.R. § 114.2, 114.10; and (2) requested that the Commission conduct an immediate investigation under 52 U.S.C. § 30109(a)(2). AR 10-12 ¶¶ 30-41.

B. True the Vote and the Georgia GOP's responses to the administrative complaint.

True the Vote and its president, and the Georgia GOP and its chairman, represented by counsel, filed separate responses to plaintiffs' administrative complaint. *See* AR 33-50 (TTV & Engelbrecht Response); AR 52-55 (Georgia GOP response).

TTV and Ms. Engelbrecht acknowledged in their response and attached declaration that Ms. Engelbrecht met with the Georgia GOP in December 2020, that the Georgia GOP "requested that [TTV] provide their publicly available nonpartisan signature verification, a 24x7 hotline, and ballot-curing support, etc. to Georgians," and that TTV's public statements "mentioned a 'partnership'" with the Party. AR 35, 43; *see also* AR 47 ¶¶ 9-12. The Georgia GOP likewise acknowledged the December 14, 2020 public statements announcing its "partnership" with TTV, though it disputed the implications of those statements. *See* AR 53.

Despite these admissions, both TTV and the Georgia GOP generally denied the allegations in the administrative complaint. Both argued that TTV's activities were not "expenditures" under FECA because all of TTV's trainings and materials were publicly available, so "nothing of value was provided to the [Georgia] GOP," AR 40, 53-54; TTV further argued that its efforts were "related to election integrity and voting procedures," and "did not engage in express advocacy,"

so were not for the purpose of influencing a federal election, AR 40. Both respondents also broadly denied that the groups had coordinated, despite announcing their "partnership" after the Georgia GOP's "request" for help in the 2021 Georgia Senate runoff. *See* AR 42-44, 54-55.

C. The FEC's Office of General Counsel recommends finding reason to believe.

After reviewing plaintiffs' administrative complaint, respondents' written replies, and other available evidence, OGC recommended that the Commission find reason to believe that TTV, Ms. Engelbrecht, and the Georgia GOP violated FECA by making, consenting to, and accepting prohibited in-kind contributions, and that the Georgia GOP also violated FECA by failing to report those contributions. *See* AR 58-59, 73-75, 77.[3]

Based on the available information, OGC concluded that TTV had "provided services to the Georgia GOP by researching and implementing ballot challenges at the request of and in partnership with the Georgia GOP," and that such services "should have been treated like services from any other vendor and reported as in-kind contributions or else paid for . . . and reported as disbursements." AR 58. OGC arrived at this conclusion based largely on the "unrebutted public statements" from TTV and Georgia GOP officials and "True the Vote's own explanation of a meeting with the Georgia GOP." AR 58; *see also* AR 59-61 (describing public statements); AR 67-68 ("[I]n True the Vote's own words, [its] activity followed a consultation with and then a request from a political party committee" and was undertaken "to 'assist' that political party committee."). OGC also found additional "detailed information" about TTV's Georgia activities contained in filings from a civil lawsuit between TTV and one of its donors, indicating that TTV

[3] OGC recommended taking no action at that time with respect to the allegation that David Shafer, Chairman of the Georgia GOP, knowingly accepted prohibited in-kind corporate contributions, "[b]ecause the record is incomplete as to [his] involvement." AR 59; *see also* AR 74 ("[W]e expect to learn more information about his activities during the investigation.").

"did more than offer publicly available resources" to the Georgia GOP, but instead worked on "a variety of projects involving data collection, investigation and research, analytics, media production, and software development, acquiring teams of data miners, analysts, investigators, and subject-matter experts in connection with those projects." AR 57-58; *see also* AR 61-63, 72-73, 111-12 (declaration from *Eshelman v. TTV, Inc.*, No. 20-cv-4034 (S.D. Tex. Jan. 21, 2021)).

In evaluating the matter, OGC highlighted two key considerations: whether the available information was sufficient to provide reason to believe that TTV's activities were "coordinated" with the Georgia GOP, *i.e.*, were undertaken "in cooperation, consultation or concert with, or at the request or suggestion" of the Georgia GOP or its agents, AR 67-71; and if so, whether TTV's payments for these coordinated activities were "expenditures" as defined in FECA, *i.e.*, were made "for the purpose of influencing" the Georgia Senate runoff election, AR 72-73.

Because TTV had publicly announced receiving a "request" from the Georgia GOP to "assist" with the Georgia Senate runoff election and expressly "characterized the endeavor as a 'partnership,'" OGC concluded that the record was more than sufficient to show coordination between the two entities. AR 67-68, 70; *see also* AR 71 (noting that Ms. Engelbrecht's declaration acknowledged that TTV met with the Georgia GOP, discussed TTV's Georgia operations with the party, and received the party's imprimatur to continue them—indicating that TTV had "consulted the Georgia GOP in connection with its intended activity in Georgia" and sought the party's "input" regarding those activities). The OGC further concluded that available information suggested a partnership between TTV and the Georgia GOP "for the Georgia GOP to provide access to Georgia county residents willing to serve as 'challengers' and challenge the ballots identified by TTV in the counties in which the challengers resided." AR 71; *see also* AR 60-61. OGC explained that "at least two of the individuals thanked by Engelbrecht" in a December 18,

2020 press release announcing TTV's statewide voter challenges, who were "identified as having 'led the charge in recruiting hundreds of volunteer challengers across the state,' have held prominent county-level roles within the Georgia GOP." AR 71 (citation omitted). And because TTV's December 18 press release indicated that it "worked with members of the Georgia GOP to recruit volunteers," OGC found the record more than sufficient to "suggest active cooperation between the two groups beyond their initial discussions," and to "indicate the presence of both a request from the Georgia GOP and subsequent cooperation between the two entities." AR 70.

In finding sufficient reason to believe TTV coordinated its activities with the Georgia GOP, OGC rebuffed TTV's arguments based on the purported absence of an "official" partnership or "joint venture" with the party, "substantial discussions between the groups," or proof that the Georgia GOP had exerted "control" over TTV's activities. AR 43. OGC stressed instead that "[t]he Commission does not require a formalized agreement or official partnership structure" or a "loss of autonomy" to find coordination. AR 68, 70.

OGC next turned to whether TTV's activities in coordination with the Georgia GOP were "undertaken for the purpose of influencing the runoff election"—again answering in the affirmative. AR 72-73. OGC reasoned that TTV's activities were not only undertaken in partnership with the Georgia GOP, "a committee whose fundamental purpose is to help Republicans win elections in Georgia," but were also evidently "motivated by 'what happened in November'" and instigated with the specific goal of "influenc[ing] the [Georgia runoff] election by challenging absentee voter registrations." *Id.*; *see also* AR 73 (citing email conversations between TTV donors about efforts to "win by eliminating votes and changing the count").

Finally, OGC concluded that there was reason to believe that the Georgia GOP violated FECA's reporting requirements by "fail[ing] to disclose any contribution or expenditure

information in connection with its self-described partnership with True the Vote, including the dates, amounts, and purposes of the in-kind contributions." AR 74-75. OGC further noted that the record "does not include how much money True the Vote expended in connection with its election integrity efforts in Georgia," and therefore proposed that the Commission's investigation should "focus first on determining the nature and extent to which True the Vote and the Georgia GOP coordinated True the Vote's activity, and request information to ascertain the costs associated with those efforts." AR 76.

D. The Commission deadlocks and subsequently votes to dismiss the complaint.

On August 11, 2022, the Commission, by a deadlocked vote of 2-3 with one Commissioner recused, failed to approve OGC's reason-to-believe recommendations, falling short of the four affirmative votes needed to initiate an investigation. AR 268. The Commission also failed, again by a deadlocked vote of 2-3 with one recusal, to reject OGC's recommendations and find no reason to believe with respect to all of the allegations. AR 269. Finally, the Commission voted 4-0, with one recusal and one abstention, to "[c]lose the file," thereby dismissing the matter. AR 269-70.

Two of three Commissioners who voted against OGC's reason-to-believe recommendations subsequently issued a Statement of Reasons explaining the basis for their votes. *See* AR 277-87. These two Commissioners, whose Statement is controlling for purposes of judicial review, posited that TTV's activities were neither "for the purpose of influencing any election for Federal office," nor coordinated with the Georgia GOP. AR 280-86.

First, they argued that TTV's activities were not undertaken "for the purpose of influencing an election," but rather for two purposes they described as categorically beyond the FEC's jurisdiction: "state law compliance" and "core issue advocacy." AR 281-85. In the view of these two Commissioners, TTV's activities fell "outside of the ambit of FECA" because: (1) the

activities assertedly targeted compliance with state election laws; and (2) "trying to influence how elections are administered, as a policy matter, is different from acting 'for the purpose of influencing' a federal election"—and amounts to protected "issue advocacy" that the Commissioners believed could not be regulated as a matter of constitutional law. AR 282.

Second, the controlling Commissioners determined, notwithstanding the extensive and unrebutted evidence to the contrary, that TTV's activities were not undertaken "in cooperation, consultation, or concert with, or at the request or suggestion of" the Georgia GOP. AR 285. After cautioning that finding reason to believe coordination has occurred requires "a concrete and plausible factual basis" and suggesting that the requisite factual basis was absent, the Commissioners summarily asserted that "[t]wo primary facts" foreclosed further investigation. AR 285-86. First, they noted that True the Vote's services "were equally available to all comers," without explaining how that was material to whether they coordinated with the Georgia GOP; and second, again in conclusory fashion, they posited that True the Vote would have undertaken the same activities regardless of the Georgia GOP's involvement. *Id.* The Commissioners denied that the respondents' use of the term "partnership" suggested that they coordinated within the meaning of the Act, asserting without further explanation that the term "had a colloquial and not a legal significance." AR 286.

III. Procedural History

Plaintiffs filed this action on October 10, 2022, challenging the FEC's dismissal of their administrative complaint as contrary to law. Compl., ECF No. 1. The FEC filed an answer to plaintiffs' complaint on December 16, 2022. *See* ECF No. 10. Plaintiffs now move for summary judgment.

STANDARD OF REVIEW

Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). FEC dismissals of administrative complaints are reviewed based on the administrative record under the contrary-to-law standard. 52 U.S.C. § 30109(a)(8)(C); *see, e.g.*, *Campaign Legal Ctr. v. FEC*, 952 F.3d 352, 357 (D.C. Cir. 2020) ("*CLC I*").

FECA provides for a Commission decision dismissing an administrative complaint to be set aside if it is "contrary to law," 52 U.S.C. § 30109(a)(8)(C), meaning the dismissal: (1) rests on an impermissible interpretation of law; or (2) is "arbitrary or capricious, or an abuse of discretion." *Orloski*, 795 F.2d at 161. The test for whether the FEC's dismissal of a complaint was arbitrary, capricious, or an abuse of discretion is similar to the "arbitrary [or] capricious" standard applied under the Administrative Procedure Act. *In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538, 550-51 (D.C. Cir. 1980) (Wald, J., concurring in the decision to affirm). Under that analysis, a court must set aside agency action "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem," or "offered an explanation for its decision that runs counter to the evidence . . . or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

FEC dismissals are subject to judicial review under the contrary-to-law standard regardless of whether they spring from a majority vote or a deadlock. *Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987). When a complaint is dismissed after a deadlocked vote among the Commissioners, the Commissioners who voted to dismiss "constitute a controlling group for purposes of the decision, [and] their rationale necessarily states the

agency's reasons for acting as it did." *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992). When the FEC dismisses an administrative complaint "contrary to [its] General Counsel's recommendation to proceed," the "declining-to-go-ahead Commissioners" must issue a Statement of Reasons explaining their decision. *Common Cause*, 842 F.2d at 449.

The controlling Commissioners' legal interpretations, however, are not entitled to the added boost of *Chevron* or *Auer* deference because they do not reflect an exercise of delegated authority to make "rules carrying the force of law." *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). To qualify for either form of deference, an FEC interpretation of FECA or Commission regulations "must be one actually made by the agency," meaning "it must be the agency's 'authoritative' or 'official position.'" *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019) (quoting *Mead*, 533 U.S. at 257-59 & n.6 (Scalia, J., dissenting)). A legal interpretation announced by fewer than four FEC Commissioners is neither. *Common Cause*, 842 F.2d at 449 n.32, 453 (recognizing that three-vote Statement of Reasons is "not law" and does not create "binding legal precedent or authority for future cases").

ARGUMENT

I. Plaintiffs Have Standing to Challenge the Dismissal of Their Administrative Complaint.

Plaintiffs have informational and organizational standing because they "suffered an injury in fact" that is both "fairly traceable" to the FEC's dismissal of their complaint and "likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

First, both plaintiffs have suffered "a quintessential informational injury." *Campaign Legal Ctr. v. FEC*, 31 F.4th 781, 784 (D.C. Cir. 2022) ("*CLC II*"). It is well settled that "a denial of access to information qualifies as an injury in fact . . . where a statute (on the claimants' reading) requires that the information be publicly disclosed and there is no reason to doubt their claim that

the information would help them." *CLC I*, 952 F.3d at 356. And "FECA clearly gives [plaintiffs] a statutory right to information about the amounts, dates, recipients, and purposes of any coordinated expenditures and contributions" made by TTV to the Georgia GOP, a federally registered political committee subject to comprehensive disclosure obligations under the Act. *CLC II*, 31 F.4th at 790; *see also* 52 U.S.C. § 30104(b); 11 C.F.R. § 104.3(a), (b). As the Commission's OGC recognized, however, "the Georgia GOP failed to disclose any contribution or expenditure information in connection with its self-described partnership with True the Vote, including the dates, amounts, and purposes of the in-kind contributions." AR 75; *see also* AR 76 (noting that "[t]he available information in this matter does not include how much money True the Vote expended" in connection with its Georgia activities).

The inability to access this FECA-required disclosure information has concretely injured both plaintiffs. Ms. Dennis uses information gained from FEC disclosure reports to assess candidates for elective office and considers this information essential to her ability to cast an informed vote in federal elections. Exhibit 1, Decl. of Treaunna C. Dennis, ¶ 5-7. Without the information required by FECA, Plaintiff Dennis cannot fully "evaluate the roles that True the Vote and similar outside groups play in elections," "obtain[] complete and accurate information about the true sources of parties' and candidates' support," or otherwise use this information to "guide [her] participation in the political process." *Id.* ¶¶ 7-9.

Plaintiff Common Cause Georgia also suffers an informational injury by virtue of being denied information to which it is statutorily entitled. Common Cause Georgia "relies on the accurate and complete reporting of campaign finance information to carry out activities central to its mission," and the FEC's failure to require the disclosure of this information "concretely impair[s]" the organization's mission. *Id.* ¶¶ 10-13. Common Cause Georgia has also suffered a

distinct organizational injury because the FEC's failure to enforce the prohibition on corporate contributions against TTV—a nonprofit corporation that pursues large-scale voter challenges in the name of protecting "election integrity"—has concretely impaired Common Cause Georgia's voter protection activities, and it has been forced to divert resources to counteract that harm. Dennis Decl. ¶ 13; *see People for the Ethical Treatment of Animals v. U.S. Dep't of Agriculture*, 797 F.3d 1087, 1094 (D.C. Cir. 2015).

Second, plaintiffs' informational injuries are indistinguishable from those recognized in *FEC v. Akins*, 524 U.S. 11 (1998), and as such, "easily satisfy the causation and redressability requirements of Article III standing." *CLC II*, 31 F.4th at 784 (citing *Akins*, 524 U.S. at 25). If plaintiffs succeed on the merits of their FECA claim, the Georgia GOP "would be obligated to disclose FECA-required factual information about the amounts of the contested coordinated, in-kind contributions. That 'information would help [plaintiffs] (and others to whom they would communicate it) to evaluate candidates for public office . . . and to evaluate the role that [TTV's] financial assistance might play in a specific election." *Id.* at 783 (quoting *Akins*, 524 U.S. at 21).

II. The Dismissal Was Contrary to Law

FECA's text and history make clear that its comprehensive scheme of contribution limits, source restrictions, and disclosure requirements demands vigilant regulation of the line between expenditures that are "*totally* independent" and those that are coordinated with candidates or parties. *Buckley*, 424 U.S. at 47 (emphasis added). The Commission shirked that responsibility here.

The record before the Commission established that TTV, a corporation, provided valuable election-related services at the "request" of the Georgia GOP, a federally registered political party committee, for the avowed purpose of "assist[ing] with the Senate runoff election" in Georgia, AR

59-60, 67-68; that the groups' admitted "partnership" encompassed research and implementation of mass challenges to the eligibility of more than 360,000 Georgia voters, *see* AR 60-61, 71, 111-12; that TTV's Georgia activities included a broad and costly range of services beyond providing the "publicly available" materials touted in its press releases, *see* AR 57-58, 61-63; and that a key motivation of TTV's Georgia efforts (and the Georgia GOP's entire *raison d'être*) was to help both Republican Senate candidates "win" their runoff elections and thereby secure a Senate majority, *see* AR 72-73, 134.

This factual record provided ample reason to believe TTV made, and the Georgia GOP accepted and failed to disclose, prohibited corporate contributions in the form of coordinated expenditures. But the controlling Commissioners decided that not one dollar TTV spent through this "partnership" to help "win" a federal election was an in-kind corporate contribution. To justify that unjustifiable conclusion, the Commissioners relied on creative-but-invalid legal theories and an unexplained disregard of material facts in the record.

Specifically, the Commissioners made up two categorical exceptions to the Act's regulation of coordinated expenditures that are as fanciful as they are damaging to FECA's core mandate, including a novel "non-preemption" theory for "state law compliance" activities that has no basis in the Act, and a constitutional limitation that the Supreme Court has already rejected in the context of coordinated expenditures. They also applied an unduly narrow coordination standard that is facially inconsistent with FECA. Finally, the Commissioners arbitrarily and unreasonably ignored unrebutted evidence in the record and failed to "articulate a . . . rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (citation omitted). The dismissal of plaintiffs' complaint thus fails under both *Orloski* prongs. 795 F.2d at 161. Indeed,

this is precisely the type of impermissible legal interpretation and arbitrary and capricious decisionmaking that judicial review exists to correct.

A. FECA unambiguously mandates that coordinated expenditures like those at issue here be regulated as in-kind contributions.

As the Supreme Court has recognized since *Buckley*, the "primary interest" served by FECA's contribution limitations is "the prevention of corruption and the appearance of corruption." 424 U.S. at 25. Failing to regulate expenditures made "at the request or suggestion" of a candidate or party, the Court has likewise made clear, fatally undermines FECA's contribution limits and compromises the Act's core purposes, because such coordinated expenditures have "virtually the same value . . . as a contribution and would pose similar dangers of abuse." *Id.* at 46; *see also, e.g.*, *McConnell v. FEC*, 540 U.S. 93, 221-22 (2003) ("[E]xpenditures made after a 'wink or nod' often will be 'as useful . . . as cash.'") (citation omitted). Accordingly, the Act has always treated coordinated expenditures "as contributions rather than expenditures . . . [to] prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Buckley*, 424 U.S. at 46-47, 67.

To this end, a "contribution or expenditure" for purposes of the corporate contribution ban includes "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value" to any political party "in connection with any election" to federal office. 52 U.S.C. § 30118(a), (b); *see also* 11 C.F.R. § 114.1(a)(1). And FECA generally defines the terms "contribution" and "expenditure" to include "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), (9)(A)(i). FECA and Commission regulations likewise make clear that any expenditure made in coordination with a party committee—*i.e.*, a payment or "anything of value" made by any person "for the purpose of influencing" a federal election and "in cooperation, consultation, or concert,

with, or at the request or suggestion of," the party or its agents—is an in-kind contribution to that party committee. 52 U.S.C. § 30116(a)(7)(B)(ii); *see also* 11 C.F.R. §§ 114.4(a),109.20.

Congress's intent to broadly proscribe "disguised contributions" and "attempts to circumvent the Act through prearranged or coordinated expenditures," *Buckley*, 424 U.S. at 47, is plain on the face of these provisions. "FECA's longstanding definition of coordination 'delineates its reach in words of common understanding,'" *McConnell*, 540 U.S. at 222 (quoting *Cameron v. Johnson*, 390 U.S. 611 (1968)), and further evinces Congress's desire "to cover 'coordination' whenever it occurs." 148 Cong. Rec. S2145 (daily ed. Mar. 20, 2002) (statement of Sen. McCain). In statutory interpretation, "the best evidence of Congress's intent is the statutory text." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012). FECA makes clear, and four decades of Supreme Court precedent confirms, Congress's intent that any "expenditure" coordinated with a candidate or political party committee—or broader still, that a corporation's provision of any "direct or indirect payment" or "anything of value" to a candidate or party "in connection with" a federal election—"shall" be considered a contribution to such committee. *See* 52 U.S.C. §§ 30116(a)(7)(B)(ii), 30118; *see also* 11 C.F.R. §§ 109.20, 114.2(d), 114.10.[4]

Here, there can be no question that TTV's services—provided at the "request" of the Georgia GOP in furtherance of the groups' self-described "partnership"—were directed at influencing the 2021 Senate runoff elections in Georgia and "coordinated" within the meaning of FECA. TTV itself explained that it was motivated by "what happened in November" to join forces

[4] For purposes of TTV's alleged violations of the corporate contribution ban, the relevant question is thus whether TTV provided the Georgia GOP "anything of value . . . *in connection with* any election." 52 U.S.C. § 30118(a), (b)(2) (emphasis added); *see also* 11 C.F.R. § 114.l(a)(l). That standard, on its face, is even less demanding than the general "for the purpose of influencing" definition that applies to the FEC's regulation of contributions and expenditures outside the context of those made by corporations. But the distinction is immaterial to the outcome here, because the FEC's approach under the general standard was plainly contrary to law.

with the Georgia GOP and to "assist with the Senate runoff election process." AR 60; the group also claimed that "illegal votes" occur "in Democrat counties," AR 73, and, as the OGC noted, the record evidence included emails summarizing communications between TTV's legal counsel and donors, reflecting that the purpose of TTV's activities was to "'win by eliminating votes and changing the count.'" AR 73 (citation omitted). Moreover, beyond the undisputed fact that TTV responded to a "request" from the Georgia GOP by "partnering" with it to provide these services, *see* AR 3-4, 35, 43, 47, 59-60, 67-68, available information also indicated ongoing and "active cooperation between the two groups after their initial discussions," AR 70-71. On this record, the controlling Commissioners' finding that they lacked the authority to even open an investigation into the groups' coordination was both factually and legally untenable. *See infra* at 38-44.

B. The controlling Commissioners improperly assessed True the Vote's electoral purpose based on invented and impermissible legal standards.

The administrative record here establishes reason to believe that TTV provided valuable services concededly undertaken in "partnership" with and at the "request" of the Georgia GOP to "assist with the Senate runoff election" in Georgia. *See, e.g.*, AR 59-60. The controlling Commissioners' contrary conclusion that TTV's activities could not be subject to regulation under the Act defies Congress's unambiguous mandate to treat "anything of value" provided "at the request or suggestion of" a political party as an in-kind contribution. To reach that conclusion, the Commissioners invoked creative but unsupported legal theories—specifically, that TTV's activities coordinated with the Georgia GOP lacked the statutorily required electoral purpose because they supposedly related to "state law compliance," or else constituted unregulable "core issue advocacy," and either way, were "beyond the ambit" of the Commission's enforcement jurisdiction. *See* AR 281-82. But those legal interpretations have no basis in the statute, "unduly compromise[]" its purposes, and are contrary to law. *See Orloski*, 795 F.2d at 164.

1. Neither FECA nor FEC regulations provides a categorical enforcement exemption for electoral contributions that relate to "state law compliance."

The Commission acted contrary to law by dismissing plaintiffs' complaint on the basis of a made-up legal theory that has no grounding in FECA and no bearing on the violations alleged here. *See Orloski*, 795 F.2d at 161. The theory that disbursements related to supposed "state law compliance" must be categorically exempted from the Act's regulation of contributions—even when coordinated with a political party in connection with a federal election, and without regard to other indicia of federal electoral purpose—is inconsistent with FECA, "unduly compromise[s] the Act's purposes," and clearly "create[s] the potential for gross abuse." *Id.* at 165.

According to the controlling Commissioners, the plainly election-related nature of TTV's services to the Georgia GOP may not be viewed as having "the purpose of influencing" a federal election, and thus are exempt from regulation and enforcement under FECA, because they were focused on "state law compliance." AR 281. The terse, single-paragraph explanation offered for this supposed jurisdictional limitation argues that FECA does not supersede state laws providing for "'[v]oter registration' and the '[p]rohibition of false registration, voting fraud, theft of ballots, and similar offenses,'" and declares that TTV's activities "fall squarely within this exception." AR 281-82 (quoting 11 C.F.R. § 108.7(c)(3), (4)); *see also id.* (characterizing the range of TTV's activities as "target[ing] compliance with valid Georgia laws governing signature-verification, ballot-curing, ballot drop boxes, and residence requirements"). "In other words," the Commissioners concluded, "because Congress has declined to preempt the Georgia laws at the heart of [TTV]'s activities, the Commission has no authority to police those activities." AR 282. That conclusory assertion has no basis in the Act's text and manifestly frustrates its purposes.

It also makes no sense. Even if TTV's activities were *related to* certain, non-preempted state laws, enforcement of the federal contribution limits and reporting requirements at issue here,

see 52 U.S.C. §§ 30104, 30118, does not even implicate, much less interfere with or call into question, the application of any Georgia laws. This case concerns *payments* for activities seeking to influence federal elections—a subject that is not "outside the ambit of FECA," AR 282, but in its heartland. *See, e.g.*, 52 U.S.C. § 30143 (preempting "any provision of State law with respect to election to Federal office" with single exception allowing state and local party committees to use nonfederal funds "for the purchase or construction of an office building"); 11 C.F.R. § 108.7(b) (providing that "Federal law supersedes state law" regarding "[d]isclosure of receipts and expenditures by" and "[l]imitations on contributions and expenditures regarding" federal candidates and political committees). Indeed, the FECA provisions at issue here do not relate at all to the substance of TTV's self-described "election integrity" activities, but simply require that when such activities are performed in coordination with a political party committee to influence federal elections, their underlying costs are in-kind contributions subject to FECA's limits, source prohibitions, and disclosure requirements. *See* 52 U.S.C. §§ 30104, 30118; *see also id.* § 30116(a)(7)(B)(ii) (all expenditures made "in cooperation, consultation, or concert with, or at the request or suggestion of, a . . . committee of a political party, shall be considered to be contributions made to such party committee"); 11 C.F.R. § 109.20 (same).

In particular, the Commissioners' suggestion that FECA's contribution limits cannot reach any payments for activities related to "voter registration" is directly refuted by the FEC's own regulations, which confirm that a corporation makes a prohibited contribution when it coordinates with a political party regarding, *inter alia*: the distribution of voter registration or GOTV communications to the general public, 11 C.F.R. § 114.4(c)(2)(ii), (c)(2)(ii)(B); the distribution of

registration or voting information produced by official election administrators, *id.* § 114.4(c)(3)(i), (c)(3)(iv)(B); or voter registration or GOTV drives, *id.* § 114.4(d)(1), 114.4(a).[5]

The Commissioners' unfounded non-preemption theory is also impossible to reconcile with FECA or the statute's core purposes. *See Orloski*, 795 F.2d at 161. For one thing, the suggestion that TTV's services fell "outside the ambit of FECA," *see* AR 282, is contrary to the whole history of Congress's efforts to rein in soft money, and specifically, its adoption of limits to prevent state political parties like the Georgia GOP from serving as vehicles for the evasion of FECA's contribution restrictions and disclosure requirements. Indeed, Congress's adoption of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), was largely aimed at correcting this very problem. BCRA was passed to plug the so-called "soft-money loophole" that lax FEC enforcement had previously opened—much of it through allocation rules permitting state party committees to deploy vast sums of unregulated soft money on mixed-purpose activities affecting both federal and state elections. *See Shays v. FEC*, 414 F.3d 76, 80-82 (D.C. Cir. 2005) ("*Shays II*") (describing passage of BCRA following "meltdown" of then-existing campaign finance system). The Commissioners' categorical exclusion of the coordinated expenditures at issue here due to their supposed relevance to "state law compliance" threatens to reopen that loophole, and flies in the face of Congress's mandate in enacting BCRA: "[p]reventing corrupting activity from shifting wholesale to state [party] committees and thereby eviscerating FECA." *McConnell*, 540 U.S. at 165-66; *cf. Shays II*, 414 F.3d at 112 (invalidating post-BCRA rule involving state and local

[5] *See also* 11 C.F.R. § 114.4(c)(1)-(2) (providing that a corporation's disbursements for "[v]oter registration and get-out-the-vote communications" "are not contributions or expenditures, *provided that* . . . the preparation and distribution of voter registration and get-out-the-vote communications is not coordinated with any candidate(s) or political party"); Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, 79 Fed. Reg. at 62809 ("Voter registration and GOTV drives that are not 'nonpartisan' are governed by the general statutory and regulatory definitions of 'expenditure.'").

parties' financing of certain "[f]ederal election activity" because the FEC had unreasonably "construed a BCRA provision sweeping *state* activities within FECA as an excuse to punt *federal* activities outside it").

Providing valuable election-related services to a political party committee in the immediate weeks before a hotly contested federal election, at the party's request and with an avowed goal of assisting the party in that election, *see supra* at 8-14, cannot be carved out of FECA merely because the activity also purports to advance other valid "state law" goals. Nothing in FECA authorizes the FEC to create such sweeping exceptions to its statutory mandate.

Even if the relevant statutory terms were at all ambiguous—and they are not—the Commissioners' construal would still fail. Because their approach unduly narrows the scope of FECA's coordination provisions, it "directly frustrates" the purposes of federal campaign finance law and poses a clear risk of abuse—by creating a new regulatory loophole in a context where the D.C. Circuit has specifically admonished against them. *See, e.g.*, *Shays v. FEC*, 528 F.3d 914, 925 (D.C. Cir. 2008) ("*Shays III*") ("[B]y allowing soft money a continuing role in the form of coordinated expenditures, the FEC's . . . rule would lead to the exact perception and possibility of corruption Congress sought to stamp out."); *Shays II*, 414 F.3d at 115 ("[I]f regulatory safe harbors permit what BCRA bans, we have no doubt that savvy campaign operators will exploit them to the hilt, reopening the very soft money floodgates BCRA aimed to close."). Likewise, here, the determination that TTV's Georgia activities were unregulable creates an "enormous loophole" and the manifest "potential for gross abuse." *Shays III*, 528 F.3d at 927-28. Armed with this decision, any person could seek to evade FECA's contribution limits and disclosure requirements by simply characterizing their coordinated expenditures to influence federal elections as targeting

"compliance" with some aspect of state election law—an option sure to be frequently available given the States' constitutional role in election administration.

Courts "must reject administrative constructions . . . that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981). FECA does not permit the FEC to create an unbounded exception to the contribution limits allowing corporations to provide valuable election-related services to candidates and parties free of cost and with virtual impunity, provided the services nominally relate to "state law compliance." A categorical exception of this magnitude plainly "compromise[s] the Act's purposes" and "create[s] the potential for gross abuse." *Orloski*, 795 F.2d at 165.

2. The controlling Commissioners' "issue advocacy" rationale is foreclosed by FECA and Supreme Court precedent.

In addition to their newly invented "non-preemption" theory, the controlling Commissioners offered a different, though equally flawed, rationale for their action, suggesting that it would be unconstitutional to regulate TTV's free services to the Georgia GOP as in-kind contributions. Essentially, the Commissioners claimed that TTV's supposed "election integrity" services amounted to "core issue advocacy" that is constitutionally excluded from regulation under "*Buckley*'s narrowing construction of the phrase 'for the purpose of influencing.'" AR 283-84. Apart from contradicting the Commissioners' own conclusion that these activities were merely directed at securing compliance with state law, AR 281-82, this argument is foreclosed by Supreme Court precedent. It also relies on the wrong statutory standard: the Commissioners assessed only whether TTV provided the Georgia GOP "anything of value . . . for the purpose of influencing" an election, AR 281-285, while entirely ignoring the applicable standard for assessing whether TTV made prohibited corporate contributions under 52 U.S.C. § 30118—*i.e.*, whether it provided

the Georgia GOP "anything of value . . . *in connection with* any election." *Id.* § 30118(a), (b)(2) (emphasis added); *compare* AR 277-286.

But even with respect to the narrower test they did apply, the Commissioners' constitutional argument is unsustainable. The Supreme Court has confirmed that *Buckley*'s narrowing construction is not constitutionally required with respect to FECA's regulation of contributions, including in-kind contributions and coordinated expenditures. *See McConnell*, 540 U.S. at 203 (affirming that "*Buckley*'s narrow interpretation of the term 'expenditure' was not a constitutional limitation" on the Act "such that coordinated expenditures for communications that avoid express advocacy cannot be counted as contributions"); *Buckley*, 424 U.S. at 23 n.24; *see also Orloski*, 795 F.2d at 167 (noting that *Buckley* narrowly construed "provisions curtailing or prohibiting independent expenditures" but "[t]his [express advocacy] definition is not constitutionally required for those provisions limiting contributions").[6] And, contrary to the Commissioners' exhortations that enforcing the Act here would unconstitutionally impinge on protected issue speech, *see* AR 282-84, the Supreme Court has flatly "rejected the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy," *McConnell*, 540 U.S. at 194.

While it is true that *Buckley* narrowly construed the term "expenditure" to alleviate potential vagueness connected to the statutory phrase "for the purpose of influencing" an election, 424 U.S. at 79, the Court addressed *and rejected* the contention that FECA's definition of

[6] Nor was it required under Commission regulations or enforcement precedents. *See, e.g.*, 79 Fed. Reg. at 62806-07; F&LA at 12-14, MURs 7324, 7332, & 7366 (A360 Media, LLC f/k/a American Media, Inc.) (Apr. 13, 2021); F&LA at 1-3, 5-6, MUR 5924 (Tan Nguyen for Congress) (Aug. 31, 2010); F&LA at 8-9, MUR 5645 (America's Foundation, *et al.*) (Mar. 15, 2006) (matters where the Commission treated coordinated payments as "contributions" even though they involved activity other than express advocacy).

"contribution" was impermissibly vague even though that term also relies on the same "for the purpose of influencing" language, *see* 52 U.S.C. § 30101(8)(A)(i) (defining "contribution"); *id.* § 30101(9)(A)(i) (defining "expenditure"); *Buckley*, 424 U.S. at 23 n.24, 78. In the context of *independent expenditures*, the Court found that "for the purpose of influencing" was vague because it potentially "encompass[ed] both issue discussion and advocacy of a political result." 424 U.S. at 79. Consequently, where the actor was not a "political committee," the Court narrowly construed the term "expenditure" to reach only "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 79-80.

But the Court separately found that this phrase "presents fewer problems in connection with the *definition of a contribution* because of the limiting connotation created by the general understanding of what constitutes a political contribution." *Id.* at 23 n.24 (emphasis added). Instead of imposing an "express advocacy" construction on "contribution," therefore, the Court merely clarified that a contribution includes "not only contributions made directly or indirectly to a candidate, political party, or campaign committee, and contributions made to other organizations or individuals but earmarked for political purposes, but also all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate." *Id*. at 78. In light of this "general understanding" of what constitutes a political contribution, the Court held that the FECA provision defining contributions was neither vague nor overbroad and the limiting construction of "express advocacy" was unnecessary. *Id.* at 23 n.24, 78-80.

Likewise, in *McConnell*, the Court specifically recognized that BCRA "pre-empts a possible claim that [the definition of coordinated expenditures] is similarly limited, such that coordinated expenditures for communications that avoid express advocacy cannot be counted as contributions." 540 U.S. at 203; *see also id.* ("*Buckley*'s narrow interpretation of the term

'expenditure' was not a constitutional limitation on Congress's power to regulate federal elections," and there was "no reason why Congress may not treat coordinated disbursements . . . in the same way it treats all other coordinated expenditures.").

Buckley's narrowing of the phrase "for the purpose of influencing" with respect to expenditures thus has no bearing on the Act's regulation of "contributions," including expenditures placed in coordination with a political party. *See* 52 U.S.C. § 30116(a)(7)(B)(ii) ("[E]xpenditures made by any person . . . in cooperation, consultation, or concert, with, or at the request or suggestion of, a . . . political party, shall be considered to be contributions made to such party committee"); 11 C.F.R. § 109.20(a) (same). Nor, to be sure, did *Buckley* establish any "foundational distinction" as a constitutional matter between (in the Commissioners' phraseology) "trying to influence how elections are administered" and making contributions "'for the purpose of influencing' a federal election." AR 282. Under the Act, only the latter inquiry is relevant.

The Commissioners paid lip service to *Buckley*'s proviso that the phrase "for the purpose of influencing" requires no commensurate narrowing limitation with respect to FECA's definition of "contributions." AR 282-83. But they failed to explain at all why they nevertheless applied that construction here. "[A]n agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 328 (2014). Where the congressional mandate is clear, the Commission has no authority to sidestep it—based on assumed constitutional concerns or otherwise. *Cf. Syracuse Peace Council v. FCC*, 867 F.2d 654, 658 (D.C. Cir. 1989) (observing "that regulatory agencies cannot invalidate an act of Congress").

In any event, the Commissioners' conclusory pronouncement that TTV's admitted "partnership" with the Georgia GOP was directed at policy advocacy and not influencing federal elections was unsupported by any cogent factual analysis or reasoning, and therefore cannot be

credited. *National Gypsum Co. v. EPA*, 968 F.2d 40, 43 (D.C. Cir. 1992) (holding agency action arbitrary and capricious where its "inferences [were] nothing more than unsupported assumptions"). The bromide that "trying to influence how elections are administered, as a policy matter, is different from acting 'for the purpose of influencing' a federal election," AR 282, certainly does not shed light on how the Commissioners arrived at their conclusion that TTV's activities lacked any federal electoral purpose. And that conclusory statement was essentially the sum total of their analysis. The reasons for an agency action "must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action." *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947).

Rather than explaining their reasoning with logic and supporting it with record evidence, the Commissioners resorted to various digressions about factual scenarios wholly unlike this case—including generalizations about "advocacy groups" whose "programmatic activities could, in practice, *impact* a federal election," AR 283 (emphasis added),[7] and the observation that a corporation engaging in *bona fide* commercial activity is not acting with a purpose of influencing federal elections, AR 284-85.[8] None of their postulated concerns about groups whose activities

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[7] The Commissioners analogized this matter to MUR 7024 (Van Hollen for Senate), claiming that both involved activities "too indirect and attenuated" from federal elections "to fall within FECA's ambit." AR 284. But these matters are not alike. In MUR 7024, the Commission found that *pro bono* legal services to an elected federal official were not provided "for the purpose of influencing" a federal election, where the representation focused solely on challenging specific FEC regulations through an administrative rulemaking petition and subsequent, related litigation. *See* F&LA at 4-6, MUR 7024 (May 31, 2017). TTV's services, in contrast, were avowedly undertaken at a political party's request and intended to assist with a specific and imminent federal election.

[8] Besides the fact that TTV did not allege that its activities were undertaken for a commercial purpose, *see generally* AR 33-50, the precedent on which the controlling Commissioners relied involves commercial activity incomparable to TTV's self-professed "partnership with the Georgia Republican Party to assist with the Senate runoff election process." AR 3-4. *Compare with* Advisory Op. 2018-11 (Microsoft Corp.); F&LA at 7-11, MUR 7870 (Google LLC, *et al.*) (Mar. 28, 2022); Statement of Reasons of Chair Broussard, Vice Chair Dickerson, & Comm'rs Trainor, Walther, & Weintraub at 5-7, MUR 7832 (Twitter, Inc.) (Oct. 26, 2021). Moreover, none of the

"*could* influence a federal election," AR 283, had any bearing on the operative question the Commissioners were purporting to answer. The issue was not whether some group's theoretical activities "*could* influence" or "impact" a federal election, or incidentally "benefit" a candidate, AR 283, 284, but whether *TTV's* activities were *in fact* undertaken for that purpose. Hypotheticals are no answer to whether TTV's election-related disbursements qualified as contributions within the meaning of FECA because they were undertaken in cooperation and partnership with a political party committee in connection with, and for the conceded purpose of, assisting the party with a specified federal election. *See, e.g.*, AR 3-4 ¶¶ 9-12, 59-60, 73.

Conjuring a parade of horribles is not a substitute for reasoned agency decisionmaking, nor license for an agency to disregard its statutory mandate. *Shays II*, 414 F.3d at 101-02. The Commissioners' reliance on *Buckley*'s narrowing construction for fear of "unconstitutionally subjecting a broad swath of" completely dissimilar activity to "the specter of Commission enforcement action," AR 284, was improper and unreasonable, and accordingly, contrary to law.

C. The dismissal rested on an impermissible coordination standard.

In addition to flouting the Act's clear text and purposes in their categorical exclusion of TTV's coordinated expenditures from regulation, the controlling Commissioners also employed an impermissibly constrained coordination standard to conclude that TTV's activities were not undertaken "in cooperation, consultation or concert with, or at the request or suggestion of," the Georgia Republican Party. AR 285.

First, the controlling Commissioners unreasonably disregarded the Georgia GOP's explicit "request" for help and discounted the groups' own characterization of their efforts as a "partnership," terming that phrasing "colloquial" and not "legal[ly] significant," and providing no

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cited FEC decisions involved any evidence of coordination, the crux of the allegations here. *See, e.g.*, F&LA at 11, MUR 7870 (noting that there was "no indication" of coordination).

further explanation of their reasons. AR 286. As the OGC emphasized, however, *see* AR 68, Commission regulations and precedent do not require a formalized agreement or official partnership to find coordination. *Cf.* 11 C.F.R. § 109.21(e) (providing that "agreement"—meaning "a mutual understanding or meeting of the minds on all or any part of the material aspects of the communication or its dissemination"—"is not required for a communication to be . . . coordinated"); *see also* Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 440 (Jan. 3, 2003) ("[C]oordination under section 109.21 does not require a mutual understanding or meeting of the minds as to all, or even most, of the material aspects of a communication," and "in the case of a request or suggestion . . . agreement is not required at all.").[9]

And more importantly, the Act explicitly precludes the Commission from employing the rigid standard the Commissioners applied here. In Section 214 of BCRA, Congress specifically directed that the Commission "shall not require agreement or formal collaboration to establish coordination." BCRA § 214(c), 116 Stat. at 95. Congress instead, recognizing that "[i]nformal understandings and de facto arrangements can result in actual coordination as effectively as explicit agreement or formal collaboration . . . . expect[ed] the FEC to cover 'coordination' whenever it occurs." 148 Cong. Rec. S2145 (daily ed. Mar. 20, 2002) (statement of Sen. McCain). Accordingly, whether TTV's reference to its "partnership" with the Georgia GOP was meant colloquially or to denote a more formalized relationship is of no consequence; all that matters is that "in [its] own words, TTV's activity followed a consultation with and then a request from a

[9] *See also* F&LA at 3-4, 10-11, MURs 7324, 7332, 7366 (American Media, Inc.), https://www.fec.gov/files/legal/murs/7324/7324_22.pdf (finding a single in-person meeting at which a corporation's CEO offered to "help" a candidate committee sufficient to support a finding of coordination); F&LA at 12-13, MUR 5564 (Alaska Democratic Party), https://www.fec.gov/files/legal/murs/5564/28044191227.pdf (finding the suggestion that "some degree of cooperation or consultation may have occurred" sufficient for reason-to-believe finding).

political party committee, and TTV agreed to 'assist' that political party committee." AR 66.[10] The Commissioners' approach here of requiring a more formal arrangement, or an official partnership, was flatly contrary to FECA and Commission precedent.

Second, the Commissioners made too much of TTV's general statement that its services were "free" and equally available to all. AR 285. For example, the Commissioners asserted that TTV "not only met with the Georgia GOP and contacted the Democratic Party of Georgia to provide information about its initiatives, it also offered these services to the public, for free." AR 285. But the Commissioners conspicuously omitted any discussion of "available information indicat[ing] that TTV did more than offer publicly available resources," AR 57, and also ignored evidence casting doubt on the sincerity and motivations of TTV's claimed offer of assistance to the Georgia Democratic Party.[11] The Commissioners also failed to explain how broader availability of TTV's services contradicts evidence that TTV coordinated certain of its activities with the Georgia GOP—it does not. There is no "bipartisan" exception to FECA's contribution or coordination provisions. *Cf. McConnell*, 540 U.S. at 148 & n.47 (noting "[p]articularly telling" and "troubling" evidence in the BCRA record that most big soft-money donors "gave substantial sums to *both* national parties"). Nor can an organization shield from regulation its provision of valuable, election-related services to a political party committee—*at the request of that*

[10] The Commissioners argued that this matter was "more akin to" one in which the Commission declined to find coordination when a person associated with a candidate committee attended and spoke at an event hosted by a super PAC. AR 286 (citing F&LA at 5, MUR 7119 (Donald J. Trump, *et al.*)). The Commissioners' insistence that both this case and MUR 7119 involved only "*communicati*[*ons*] with a regulated committee," and not "*coordinati*[*on*] within the meaning of the Act," *id.*, belies unrefuted record evidence confirming that TTV and the Georgia GOP went far beyond simply communicating. *See generally supra* at 8-14.

[11] As noted in the administrative complaint, TTV altered its December 14, 2020 press release weeks after distributing it, on or around January 7, 2021—only then adding a reference to TTV's supposed attempt to "contact" the Democratic Party and linking to a letter not created until December 21, 2020. *See* AR 4-6.

committee—simply by providing similar or other services to committees of another party or to members of the public.

Likewise, TTV's provision of valuable services to members of the public, whether for free or at a charge, does not change the fact that TTV coordinated with the Georgia GOP when it agreed to provide the party some of the same services—*and others*—for free. *Cf.* 11 C.F.R. § 100.52(d)(1) ("anything of value" includes the "provision of . . . services without charge"). As the Supreme Court recognized with respect to party-coordinated expenditures in *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001), if a candidate or party could "arrange for a [corporation] to foot his bills" or coordinate spending for desired election-related services by disclaiming the value of requested services after the fact, the risk that "contribution limits would be eroded" was "beyond serious doubt." *Id.* at 457, 460. So too here. "If suddenly every dollar of spending could be coordinated" with political parties but escape regulation through that simple expedient, "the inducement to circumvent would almost certainly intensify." *Id.* at 460. This is why FECA and its regulations must be construed to minimize available "channels for circumventing contribution and coordinated spending limits." *Id.* at 432, 455. The Commissioners failed to heed this instruction.

Third, the Commissioners selectively emphasized the significance of TTV's putatively autonomous pursuit of its election-related initiatives as if to negate its founder-president's meeting with Georgia GOP officials. AR 284. The Commissioners' approach was unreasonable both because the record belies the alleged autonomy of TTV's operation, *see, e.g.*, AR 3-4, 70, and also because any such autonomy has little bearing on whether TTV's activities were coordinated with the Georgia GOP. As OGC rightly noted, moreover, this approach is also inconsistent with FECA's plain language and Commission regulations, which broadly define coordination and impose no

requirement that the spender experience a "loss of autonomy." AR 70 (citing 11 C.F.R. § 109.20(a)). *See* 52 U.S.C. § 30101(9)(A)(i) (defining expenditures to include "anything of value"); *id.* § 30116(a)(7)(B)(ii) (regulating as contributions all "expenditures made by any person . . . in cooperation, consultation, or concert with, or at the request or suggestion of, a national, State, or local committee of a political party").

More importantly, the evidence in the record did not support the Commissioners' supposition that TTV would have engaged in the same activities absent the request from the Georgia GOP, *see* AR 285: "the available information indicate[d] the presence of both a request from the Georgia GOP and subsequent cooperation between the two entities," AR 70. It was TTV's partnering with a political party committee, "whose fundamental purpose is to help Republicans win elections in Georgia," AR 72, that confirms the value and objectives of those activities on both sides of the coordinated transaction. Indeed, the Chairman of the Georgia GOP publicly thanked TTV for the "resources" it provided. AR 4 ¶ 11 (citation omitted).

As courts have recognized, FECA's expansive coordination rule is necessary to prevent political actors from "evad[ing] contribution limits and other restrictions by having donors finance campaign activity directly—say, paying for a TV ad or printing and distributing posters," or, in this case, providing valuable services connected to a whole host of so-called "election integrity" activities. *Shays II*, 414 F.3d at 97. The Commissioners' reliance on an impermissibly constrained coordination standard flouts that admonition and contravenes FECA's clear language, and for this reason alone, their decision was contrary to law. *See Orloski*, 795 F.2d at 161.

D. The dismissal was contrary to law because it rested on conclusions that were arbitrary and capricious, irrational, and unsupported by the record.

The controlling Commissioners purported to support their flawed legal analyses with an equally flawed approach to the factual record. In particular, the Commissioners broadly

disregarded material, undisputed facts in the administrative record and imposed an improperly high standard of proof at the pre-investigation "reason to believe" stage. These errors compounded the unreasonableness of the Commissioners' misapplication of relevant law and cannot be reconciled with the record or the constraints of reasoned agency decisionmaking. Indeed, the Commissioners' wholesale dismissal of the record was all the more unreasonable given the low threshold of evidence required at the preliminary "reason to believe" stage of FEC enforcement proceedings, which section 30109(a) of FECA makes clear is a less demanding standard than what is required to find liability or even probable cause.[12] Because the controlling Commissioners' curtailed analysis was not supported "with reasoning and evidence," *Shays III*, 528 F.3d at 928-29, and in fact "runs counter to the evidence," *State Farm*, 463 U.S. at 43, the dismissal was contrary to law for this additional reason and should be set aside.

1. Abundant record evidence showed that True the Vote made—and the Georgia GOP accepted and failed to disclose—contributions in the form of coordinated expenditures.

The undisputed record evidence was more than sufficient to provide reason to believe that TTV's spending in connection with the 2021 Georgia Senate runoff elections was undertaken in "partnership" with and at the "request" of the Georgia GOP. The controlling Commissioners' determination to the contrary was unsupported and irrational.

Press releases and statements from TTV and the Georgia GOP document how TTV responded to the Georgia GOP's "request" for assistance in the 2021 runoff election by "partnering" with the party to provide various election-related services and otherwise coordinate

[12] A reason-to-believe finding is a necessary precursor and precondition for a subsequent "probable cause" determination or civil enforcement action. *See* 52 U.S.C. § 30109(a)(2) ("reason to believe" finding authorizes investigation); *id.* § 30109(a)(4)(A) (probable cause finding); *see also Campaign Legal Ctr. v. FEC*, No. 19-cv-2336-JEB, 2022 WL 17496220, at *18 (D.D.C. Dec. 8, 2022) ("*CLC III*") (noting that reason to believe is a "low bar") (citation omitted).

such activities on the party's behalf. *See generally* AR 3-4; *see also* AR 43, 47, 59-60, 67-68. On December 14, 2020, for example, TTV founder and president, Catherine Engelbrecht, emailed supporters that the organization had received "a request from the Georgia Republican Party to provide publicly available nonpartisan signature verification training, a 24x7 voter hotline, ballot-curing support, and more." AR 3; *see also* AR 59-60. The email further described "leading webinars and FAQ sessions for government leaders in support of their constituents who are understandably angry about what happened in November." AR 3-4; AR 59-60. Engelbrecht's email concluded with a fundraising appeal pledging that any donations received in response "will be used to fund the work in Georgia." AR 3-4.

Later the same day, TTV issued a press release advertising its "partnership with the Georgia Republican Party to assist with the Senate runoff election process." AR 60. The press release included a quote from Georgia GOP Chairman David Shafer, noting that the party was "grateful for the help of the TTV team in the fight for election integrity," and declaring that "[t]he resources of TTV will help us organize and implement the most comprehensive ballot security initiative in Georgia history." AR 4. The press release also quoted Ms. Engelbrecht as saying, "we are thrilled to partner with the Georgia Republican Party, Chairman Shafer, and his team to ensure the law is upheld and law-abiding voters have their voices heard." AR 4.

Three days after announcing its partnership with the Georgia GOP, TTV challenged the eligibility of more than 360,000 Georgia voters—a process requiring TTV "to locate a Georgia resident in each of Georgia's 159 counties to challenge the ballots identified by TTV for his or her county." AR 60-61; *see also* AR 6. Additional evidence detailed in the OGC Report further corroborates that TTV's voter challenges were coordinated with the Georgia GOP. *See* AR 71 ("[T]he available information also suggests a partnership between TTV and the Georgia GOP for

the Georgia GOP to provide access to Georgia county residents willing to serve as 'challengers' and challenge the ballots identified by TTV in the counties in which the challengers resided."). The OGC noted that "at least two of the individuals thanked by Engelbrecht in the press release announcing the voter challenge, whom she identified as having 'led the charge in recruiting hundreds of volunteer challengers across the state,' have held prominent county-level roles within the Georgia GOP." AR 71; *see also* AR 61. And because TTV's December 18 press release indicated that it "worked with members of the Georgia GOP to recruit volunteers," the record was more than sufficient to "suggest active cooperation between the two groups beyond their initial discussions." AR 70.

None these basic facts is in dispute. For example, TTV and Ms. Engelbrecht acknowledged in their administrative responses that "[i]n December of 2020, Ms. Engelbrecht met with [the Georgia] GOP," that the Georgia GOP "requested that [TTV] provide their publicly available nonpartisan signature training verification, a 24x7 voter hotline, and ballot-curing support, etc. to Georgians," and that TTV "mentioned a 'partnership with [the Georgia GOP]" in its public statements. AR 35, 43; *see also* AR 47, 53, 60-61 nn.9-10 (noting involvement of GOP officials in TTV's voter challenges following the groups' initial consultation). In addition, the record contained corroborating evidence of TTV's Georgia activities from filings in a separate litigation between TTV and one of its donors. *See generally* AR 61-63; *see also, e.g.*, AR 134 (emails between TTV donors noting that "Republicans [had been] reaching out" to ask whether group would "play in GA Senate run-off," referencing two Republican candidates, and stressing that both "ha[d] to win" to "have the Senate 51-49").

2. The controlling Commissioners imposed an unjustifiably strict standard of proof, arbitrarily disregarded key facts, and failed to support their conclusions with reasoning or record evidence.

The abundant record evidence left the controlling Commissioners no choice but to concede that TTV "undoubtedly communicated with the Georgia GOP about its election integrity initiatives." AR 286; *see also* AR 278-79 (acknowledging that "Engelbrecht met with the Georgia GOP," that TTV issued the December 14, 2020 press release and email, and quoting Ms. Engelbrecht's Texas declaration). Yet the Commissioners offered no explanation for why they discounted the unrebutted evidence showing that TTV did much more than merely "communicate[]" with the Georgia GOP, instead providing its services at the Georgia GOP's "*request*" to assist with the Senate runoff elections. *See, e.g.*, AR 3-4, 57-58. In so doing, the Commissioners flagrantly disregarded conduct falling squarely within the plain terms of the statute, *i.e.*, FECA's definitional language providing that all expenditures made "*at the request or suggestion of* . . . a political party committee" "*shall* be considered to be a contribution." 52 U.S.C. § 30116(a)(7)(B)(ii) (emphasis added). And, tellingly, the controlling Commissioners did not even attempt to justify their omission. This failure to "examine the relevant data and articulate a . . . rational connection between the facts found and the choice made" confirms that the Commissioners' conclusions were unreasonable, arbitrary, and merit no deference. *State Farm*, 463 U.S. at 43 (citation omitted).

The Commissioners compounded their error by imposing an unduly heightened pleading standard that is incompatible with FECA and its implementing regulations. Despite the Commissioners' bland statement that there must be "a concrete and plausible factual basis" to find reason to believe coordination had occurred, AR 285, their explanation for finding that that standard had not been met here indicates that the Commissioners were in fact setting a substantially

higher bar—specifically, one requiring definitive proof or acknowledgement of illegal coordination. *See* AR 285 (criticizing the absence of evidence commensurate with that presented in a past enforcement case where the respondent "specified" coordination violations with particularity, by reference to a formal Non-Prosecution Agreement with the Department of Justice (citing MURs 7324, 7332, & 7366 (A360 Media, LLC f/k/a American Media, Inc., *et al.*)). But a reason-to-believe finding requires "only a credible allegation" of wrongdoing, and "does not require 'conclusive evidence' that a violation occurred or even 'evidence supporting probable cause' for finding a violation." *CLC III*, 2022 WL 17496220, at *8; *see also* FEC Statement of Policy, 72 Fed. Reg. at 12545 ("The Commission will find 'reason to believe' in cases where the available evidence in the matter is at least sufficient to warrant conducting an investigation."). The Commissioners' rote invocation of a facially tolerable standard does not obscure—nor can it excuse—their actual application of a far more exacting and impermissible test.

Finally, in applying this test to reach the incredible conclusion that "*nothing* in the record" indicated coordination between TTV and the Georgia GOP, *see* AR 286 (emphasis added), the Commissioners made no attempt to support their reasoning with facts in the record. Nor could they. Instead, they squeezed their operative assessment of coordination into three sentences of conclusory and counterfactual pronouncements, *see id.*, while unjustifiably discounting any contradictory evidence—if not simply ignoring it altogether. But as detailed above, *see supra* at 38-41, the respondents' own statements belie the Commissioners' claim that "nothing in the record" indicated coordination between the two groups, AR 286, and there was copious "concrete and plausible" corroborating evidence from other sources showing the contrary: that TTV responded to the Georgia GOP's "request" for assistance by "partnering" with the party to provide various election-related services and resources—not all of which were publicly available or "open

to all comers," *see* AR 3-4, 35, 47, 57-58, 61-63, 67-68; that TTV continued to collaborate with the Georgia GOP following the groups' initial discussions on voter challenges and other election-related endeavors, *see* AR 70-71; and that it undertook these activities "for the purpose of influencing" the Senate runoff elections, *see* AR 3-4, 46, 72-73, 111-12, 134.

This record, far from providing insufficient factual grounds for the Commission to make a threshold reason-to-believe finding and open an investigation, instead compelled the opposite conclusion. Agency action is arbitrary and capricious where it "offer[s] an explanation for its decision that runs counter to the evidence." *State Farm*, 463 U.S. at 43. The explanation provided here falls far short of that baseline requirement. Indeed, the controlling Commissioners' cursory and selective evaluation of the record evidence does not reflect reasoned agency decisionmaking, but rather *post hoc* rationalization in pursuit of a desired outcome.

CONCLUSION

For all the foregoing reasons, the Court should find that the FEC's dismissal of plaintiffs' administrative complaint was contrary to law, and the Court should remand this matter to the FEC with instructions to conform to the Court's order within thirty days.

Dated: February 16, 2023

Respectfully submitted,

/s/ Megan P. McAllen

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2023, I caused a true and correct copy of the foregoing document to be served upon all counsel of record registered with the Court's ECF system, by electronic service via the Court's ECF transmission facilities.

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