UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMON CAUSE GEORGIA, *et al.*,	)	
Plaintiffs,	)	Civ. No. 22-3067 (DLF)
v.	)	
FEDERAL ELECTION COMMISSION,	)	MEMORANDUM
Defendant.	)	

FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

Statutes and Regulations

Miscellaneous

Plaintiffs Common Cause Georgia and Treaunna C. Dennis challenge the Federal Election Commission's ("FEC" or "Commission") dismissal of their administrative complaint alleging violations of the Federal Election Campaign Act ("FECA"), but the dismissal was a permissible exercise of enforcement discretion. In particular, plaintiffs alleged that the group True the Vote ("TTV") made, and the Georgia Republican Party ("Georgia GOP") accepted and failed to report, prohibited in-kind contributions in the form of coordinated expenditures during the 2021 Senate runoff election in Georgia. After duly considering plaintiffs' allegations and responses from the entities involved, the FEC did not approve pursuing the matter further, and it thereafter voted to close its file.

As a threshold matter, plaintiffs lack standing to challenge the dismissal of their claims as to alleged in-kind contributions made by TTV and accepted by the Georgia GOP. Plaintiff Common Cause Georgia alleges that its voter registration and protection work was harmed by TTV's ballot-integrity activities during the 2021 runoff election. But plaintiffs do not claim that those activities were *themselves* illegal, merely that the alleged coordination with the Georgia GOP was unlawful, and the record indicates that TTV would have engaged in the same conduct regardless of any such coordination. Plaintiffs thus have not shown that the decision not to pursue an FEC investigation was the cause of any alleged harm, nor that this harm would be redressed by a favorable decision from this Court. In addition, any such harm from the ballot-integrity activities would simply be too attenuated from the Commission's alleged failure to enforce FECA's prohibitions on corporate contributions against TTV and the Georgia GOP. Accordingly, plaintiffs lack standing to challenge the dismissal of their contribution claims.

As to the merits of the dismissal of plaintiffs' claims, the Commission is entitled to summary judgment because plaintiffs cannot meet their heavy burden of demonstrating that the

dismissal was contrary to law. Under longstanding D.C. Circuit precedent, a dismissal like this one is entitled to considerable judicial deference, and it need only be a reasonable decision in the circumstances — not the only possible decision — in order to be upheld. Moreover, contrary to plaintiffs' claims, that same precedent makes clear that in split-vote FEC decisions like the one at issue here, the reasoning of the controlling Commissioners is likewise entitled to deference. *See Campaign Legal Center v. FEC*, 952 F.3d 352, 357 (D.C. Cir. 2020).

The controlling Commissioners permissibly relied on two independent grounds in concluding that the TTV ballot-integrity activities at issue were beyond the statutory limit on the agency's jurisdiction to activities done "for the purpose of influencing" federal elections. First, the Commissioners concluded that these activities were directed at promoting compliance with state laws governing the *administration* of elections, an area that they determined is not within the scope of FECA, as reflected in an FEC regulation. *See* 11 C.F.R. § 108.7(c). Second, the Commissioners reasonably concluded that the activities constituted non-partisan issue advocacy with regard to such election administration, which like many activities *could* influence federal elections, but which was not undertaken for the purpose of doing so. Plaintiffs argue that these determinations reflect an unduly narrow view of the agency's jurisdiction, but such interpretations need only be reasonable to survive review under the deferential standard, and these were.

In addition, the controlling Commissioners determined, after a comprehensive review of the facts in the administrative record, that the record did contain sufficient evidence of actual "coordination" between TTV and the Georgia GOP within the meaning of FECA. Plaintiffs strongly disagree with that conclusion, seizing upon a few phrases TTV used in an email and a press release. But they do not demonstrate, as they must to prevail under deferential review, that

this is the rare case in which a federal agency entirely failed to consider an important aspect of the matter before it, or offered an explanation that ran counter to the evidence or was so implausible that it could not be ascribed to a difference in views or the exercise of agency expertise. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). On the contrary, the controlling Commissioners carefully considered the entire factual record, including other evidence in which TTV explained its ballot-integrity activities more fully, such as the fact that it had also made them available to the Democratic Party of Georgia and the public. The Commissioners issued a detailed explanation of their reasoning, with extensive citation to supporting legal authority, including prior Commission enforcement proceedings, advisory opinions, and numerous judicial precedents.

The controlling Commissioners' decision thus reflects a reasonable application of agency expertise to FECA's text and implementing regulations. It is also consistent with courts' repeated admonitions that the FEC interpret FECA with sensitivity to the First Amendment area in which the Commission regulates. Because the controlling analysis readily satisfies the deferential standard of review applicable here, the Court should grant the Commission's motion for summary judgment and deny plaintiffs' motion.

BACKGROUND

I. LEGAL BACKGROUND

A. The FEC and Its Administrative Enforcement Process

The FEC is an independent agency of the United States government with jurisdiction over the administration, interpretation, and civil enforcement of FECA. *See generally* 52 U.S.C. §§ 30106(b)(1), 30107(a), 30109. Congress provided for the Commission to "prepare written rules for the conduct of its activities," 52 U.S.C. § 30106(e), "formulate policy" under FECA, *see, e.g.*, 52 U.S.C. § 30106(b)(1), and make rules and issue advisory opinions, 52 U.S.C.

§§ 30107(a)(7), (8); *id.* §§ 30108; 30111(a)(8); *see also Buckley v. Valeo*, 424 U.S. 1, 110-11 (1976) (per curiam). The Commission is also authorized to institute investigations of possible violations of FECA, 52 U.S.C. § 30109(a)(1)-(2), and to initiate civil enforcement actions in the United States district courts, *id.* §§ 30106(b)(1), 30107(a)(6), 30107(e), 30109(a)(6).

FECA permits any person to file an administrative complaint with the Commission alleging a violation of FECA. 52 U.S.C. § 30109(a)(1); *see also* 11 C.F.R. § 111.4. The Commission's consideration of such an administrative complaint is governed by detailed procedural requirements. After reviewing the complaint and any response filed by the respondent, the Commission considers whether there is "reason to believe" that the statute has been violated. 52 U.S.C. § 30109(a)(2). If at least four of the FEC's six Commissioners vote to find such reason to believe, the Commission may investigate the alleged violation. *Id.* §§ 30106(c), 30109(a)(2).

If the Commission votes to proceed with an investigation, it then must determine whether there is "probable cause" to believe that FECA has been violated. 52 U.S.C. § 30109(a)(4)(A)(i). Like a reason-to-believe determination, a determination to find probable cause to believe that a violation of the statute has occurred requires an affirmative vote of at least four Commissioners. *Id.* §§ 30106(c), 30109(a)(4)(A)(i). If the Commission so votes, it is statutorily required to attempt to remedy the violation informally and attempt to reach a conciliation agreement with the respondent. *Id.* § 30109(a)(4)(A)(i). Entering into a conciliation agreement requires an affirmative vote of at least four Commissioners and such an agreement, unless violated, operates as a bar to any further action by the Commission related to the violation underlying that agreement. *Id.* If the Commission is unable to reach a conciliation agreement, FECA authorizes the agency to institute a *de novo* civil enforcement action in federal district court. *Id.*

§ 30109(a)(6)(A). The institution of a civil action under section 30109(a)(6)(A) requires an affirmative vote of at least four Commissioners. *Id.* § 30106(c).

If, at any point in this process, the Commission dismisses an administrative enforcement matter, FECA provides the complainant with a narrow cause of action for judicial review of the Commission's dismissal decision. *See* 52 U.S.C. § 30109(a)(8)(A) (detailing the procedure for seeking judicial review of an administrative dismissal and the scope of such review). That statutory provision also allows a party who has filed an administrative complaint with the Commission to bring a civil action in this District alleging that the Commission has "fail[ed] to act" on its complaint within 120 days. *Id*. § 30109(a)(8)(A).

FECA expressly limits the scope of relief available to a plaintiff challenging an FEC dismissal decision or alleging that the Commission has failed to act on an administrative complaint. The reviewing court may only (a) declare that the Commission's failure to act or dismissal was "contrary to law" and (b) order the Commission to "conform with" the court's declaration within 30 days. 52 U.S.C. § 30109(a)(8)(C). If the Commission does not conform with such an order, the original administrative complainant may bring "a civil action to remedy the violation involved." *Id.*

B. The Federal Election Campaign Act and FEC Regulations Regarding Coordinated Expenditures and Related Disclosures

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

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

FECA generally prohibits corporations from making contributions to federal political committees. 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b). However, there are exceptions for committees that do not make contributions and make only independent expenditures, and for hybrid committees that maintain segregated bank accounts to finance independent expenditures. *See, e.g., SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc); *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011). This corporate-contribution ban extends to coordinated expenditures. 11 C.F.R. § 114.10(a) ("Corporations . . . are prohibited from making coordinated expenditures as defined in 11 C.F.R. § 109.20"). Relatedly, committees and other persons may not knowingly accept, 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b), (d), and corporate officers

and directors may not consent to, 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(e), such prohibited contributions. Finally, federal law requires public disclosure of federal contributions, including those that take the form of coordinated expenditures. 52 U.S.C. § 30104(a)(l), (b)(3)(A).

II. FACTUAL BACKGROUND

A. Administrative Proceedings and the 2021 Georgia Senate Runoff Election

On March 31, 2021, administrative complainants Common Cause Georgia, Campaign Legal Center Action, and Treaunna C. Dennis filed an administrative complaint with the Commission alleging that True the Vote ("TTV"), TTV's executive director Catherine Engelbrecht, the Georgia Republican Party and Joseph Brannan in his official capacity as treasurer ("Georgia GOP"), and Georgia GOP chairman David Shafer had violated FECA. (Administrative Record ("AR") 0001.) Specifically, the Complaint alleged that as a result of TTV's election-integrity initiatives during the 2021 Georgia Senate runoff election, TTV had made, and the Georgia GOP accepted, illegal corporate contributions. (AR0001-14.) The administrative complaint was designated FEC Matter Under Review ("MUR") 7894. (AR0001.)

TTV is a nonprofit organized under Internal Revenue Code § 501(c)(3) and describes itself as being "the country's largest voters' rights organization and well known for [its] ability to lead unified national plans to protect election integrity." (AR0277.) According to a declaration Engelbrecht submitted in this matter, TTV works "with other organizations to implement targeted election integrity initiatives to expose and deter election fraud." (AR0046; AR0277.) The declaration also stated: "TTV does not have an interest in which candidates are elected, nor do they advocate for particular candidates. Instead, TTV focuses its efforts on free and fair elections for Republicans, Democrats, and everyone in between." (*Id.*)

TTV pursued various election-integrity initiatives during the 2020 general election in multiple U.S. states, including during the 2021 Georgia Senate runoff election. (AR0034;

AR0278.) Engelbrecht explained that, "[i]n support of these election integrity efforts in Georgia and across the nation, TTV engaged in a number of activities" — namely, it "ran a statewide election integrity hotline to support voters and election workers," "hosted election worker training and signature verification courses," and "provided the data and research to preemptively challenge potentially ineligible voters." (AR0046-47; AR0278.) Engelbrecht stated that "[a]ll of these activities were pursued in a non-partisan manner." (AR0047; AR0278.)

The Georgia GOP is a state party committee of the Republican Party. (AR0278.) In December 2020, Engelbrecht met with the Georgia GOP, who she stated "were also interested in election integrity." (AR0047; AR0278.) The meeting attendees "discussed TTV's efforts promoting election integrity," and Engelbrecht "explained that TTV was already engaging in numerous election integrity efforts and that all of [TTV's] trainings and information were publicly available online." (*Id.*) After the meeting, TTV discussed its efforts in Georgia in a "Weekly Update" email to supporters, stating that "[w]e'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." (AR0278.)

TTV also issued a press release in December 2020 discussing a "partnership with the Georgia Republican Party to assist with the Senate runoff election process, including publicly available signature verification training, a statewide voter hotline, monitoring absentee ballot drop boxes, and other election integrity initiatives." (AR0278.) The press release quoted Engelbrecht as stating that "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. True the Vote is already on the ground and proud to be serving Georgia voters

with a laser focus on the effort to ensure a free, fair, and secure election for all Georgia voters irrespective of political party." (*Id.*) The press release also quoted Georgia GOP Chairman Shafer as stating, "the resources of [TTV] will help us organize and implement the most comprehensive ballot security initiative in Georgia history." (*Id.*)

TTV also contacted the Democratic Party of Georgia in December 2020 "to offer [its] assistance to the Democratic Party of Georgia for the Senate runoff, including publicly available signature verification training, a statewide voter hotline, monitoring absentee ballot drop boxes, and other election integrity initiatives," but it received no response. (AR0048-49; AR0279.) TTV updated its press release to reflect that it had "reached out to both parties to offer assistance with critical election training and resources." (AR0279 & n.16.)

In December 2021, after evaluating the administrative complaint, responses from the respondents, and certain publicly available information, the FEC's Office of General Counsel ("OGC") issued its First General Counsel's Report recommending that the Commission find reason to believe that TTV had made, Engelbrecht consented to the making of, and the Georgia GOP knowingly accepted prohibited in-kind corporate contributions.[1] (AR0078.) OGC also recommended finding reason to believe that the Georgia GOP had failed to report receipts and disbursements in connection with the alleged prohibited in-kind contributions. (AR0078.)

On August 11, 2022, the Commission voted 2-3, with one Commissioner recused, on whether there was reason to believe a violation of FECA occurred, falling short of the four

[1] As part of its initial assessment of the Complaint, OGC consulted Engelbrecht's declaration in a lawsuit filed against TTV in Texas federal court by a donor seeking a refund of his donation. (AR0062-63.) That declaration discusses TTV's work in states including Texas, Georgia, Pennsylvania, Nevada, Arizona, Michigan, and Wisconsin, which included "help[ing] voter challenges of over 364,000 people in Georgia whose residence made them potentially ineligible to vote in the runoff election." (*Id.*)

affirmative votes needed to initiate an investigation. (AR0268.) The Commission also voted 2-3, with one recusal, on whether to find no reason to believe with respect to all of the allegations in the administrative complaint. (AR0269.) Finally, the Commission voted 4-0, with one recusal and one abstention, to "[c]lose the file." (AR0269-70.)

Two of three Commissioners who voted against finding reason to believe a violation occurred, Chairman Allen J. Dickerson and Commissioner James E. ("Trey") Trainor, III, issued a Statement of Reasons ("SOR") explaining the basis for their votes. (AR0277-87.) Because these two Commissioners' views were decisive in the Commission's decision not to proceed with enforcement in this MUR, their reasoning is controlling for purposes of FECA's judicial review provisions. *See* 52 U.S.C. § 30109(a)(8)(C). In their SOR, these Commissioners (the "controlling Commissioners") explained in detail that, in their view, further investigation was not warranted because TTV's activities were neither "for the purpose of influencing any election for Federal office," nor coordinated with the Georgia GOP. (AR0280-86.)

First, the controlling Commissioners stated that TTV's activities were not undertaken "for the purpose of influencing an election," but rather for two purposes that were beyond the FEC's jurisdiction. (AR0281-85.) In their view, TTV's activities fell "outside of the ambit of FECA" because: (1) the activities 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 instead amounts to protected "issue advocacy" that is beyond regulation in this context as a matter of constitutional law. (AR0282.)

Second, the controlling Commissioners determined that TTV's activities were not undertaken "in cooperation, consultation, or concert with, or at the request or suggestion of" the Georgia GOP under FECA. (AR0285.) The Commissioners cautioned that finding reason to

believe coordination has occurred requires "a concrete and plausible factual basis," and they stated that the requisite factual basis was absent here, explaining that "[t]wo primary facts" distinguished this case from those where the Commission has found reason to believe that there has been a coordinated expenditure. (AR0285-86.) First, they noted that True the Vote's services "were equally available to all comers," including the Democratic Party of Georgia and the public. (AR0285.) Second, they stated that TTV was pursuing, and would have continued to pursue, the same ballot-integrity initiatives regardless of the organization's meeting with the Georgia GOP. (AR0285.) These Commissioners also explained why in their view TTV's use of the word "partnership" in certain communications was not decisive with regard to coordination under FECA, and they relied on precedent where the Commission had declined to find that various activities were coordinated with federal candidates or political parties. (AR0286.)

The controlling Commissioners concluded that in light of the foregoing, and "absent a credible indication that TTV acted for the purpose of influencing a federal election or coordinated with the Georgia GOP within the meaning of [FECA], we found no reason to believe that (1) TTV and Engelbrecht violated 52 U.S.C. § 30118(a) and 11 C.F.R. § 114.2(b) and (e) by making and consenting to make prohibited corporate in-kind contributions; (2) the Georgia GOP violated 52 U.S.C. § 30118(a) and 11 C.F.R. § 114.2(d) by knowingly accepting prohibited corporate in-kind contributions; or (3) the Georgia GOP failed to report receiving contributions in violation of 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.3." (AR0286.)

B. This Judicial Review Action

Plaintiffs filed this action on October 10, 2022, challenging the FEC's dismissal of their administrative complaint as contrary to law. (Compl. (Docket No. 1).) Plaintiffs bring a single cause of action under FECA's judicial review provision, 52 U.S.C. § 30109(a)(8)(A). (*Id.* ¶¶ 72-74.) The FEC filed an answer to plaintiffs' complaint on December 16, 2022, and it filed its

certified list of the contents of the administrative record in MUR 7894 on January 24, 2023. (Docket Nos. 10, 12-1.) Plaintiffs moved for summary judgment on February 16, 2023. (Pls.' Mot. for Summ. J. ("Motion") (Docket No. 13).)

ARGUMENT

As an initial matter, plaintiffs lack standing to challenge the dismissal of their claims as to prohibited in-kind corporate contributions. Plaintiffs have not shown that that dismissal caused any harm to their programmatic activities, nor that a favorable decision from the Court would redress it, where the TTV activities giving rise to the alleged harm would have occurred regardless of any unlawful coordination. On the merits, the dismissal of plaintiffs' administrative complaint was not contrary to law under the applicable and highly deferential standard of review. The controlling Commissioners offered several reasonable rationales for their decision not to proceed against the respondents, each of which independently provides sufficient support for that decision to be upheld. Their decision reflects a thorough review of the record before the Commission, resulting in an explanation of their reasoning that addressed the key factual elements in the record and cited extensive relevant legal precedent. It also accorded with courts' instructions that FECA be interpreted in a manner that is sensitive to the First Amendment activity regulated by the statute. Accordingly, the Court should grant the Commission's motion for summary judgment and deny plaintiffs' Motion.

I. PLAINTIFFS LACK STANDING TO CHALLENGE THE DISMISSAL OF THEIR CLAIMS THAT RESPONDENTS VIOLATED FECA'S PROHIBITION ON CORPORATE CONTRIBUTIONS TO POLITICAL PARTIES

A. Standard of Review

A plaintiff bears the burden of demonstrating that it has properly invoked this Court's subject-matter jurisdiction. *See Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015). At the summary judgment phase, a plaintiff must demonstrate with admissible evidence that it has

established the elements of standing. *See Lujan v. Def's. of Wildlife*, 504 U.S. 555, 561 (1992). While "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, . . . [i]n response to a summary judgment motion, . . . the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts[.]'" *Id*. (quoting Fed. R. Civ. P. 56(e); *see Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 115 n. 31 (1979)); *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002); *Democratic Senatorial Campaign Comm. v. FEC*, 139 F.3d 951, 952 (D.C. Cir. 1998) ("evidence there must be" to establish the elements of standing at the summary judgment stage); *Humane Soc'y of the U.S. v. Perdue*, 935 F.3d 598, 602 (D.C. Cir. 2019) (quoting *Lujan*, 504 U.S. 561) (The plaintiffs "must prove injury in fact with 'specific facts' in the record.").

To have Article III standing a plaintiff must establish: (1) it has "suffered an 'injury in fact[,]" which the Supreme Court defines as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not [merely] conjectural or hypothetical," *Lujan*, 504 U.S. at 560 (internal citations and quotation marks omitted); (2) that there is a "causal connection between the injury and the conduct complained of[,]" which requires the injury to be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court," *id.* (internal quotation marks and alterations omitted); and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (internal quotation marks omitted). These three components of the Article III "case or controversy" requirement are designed to ensure that the "plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction and to justify [the] exercise of the court's remedial powers on his behalf." *Simon v. E. Ky. Welfare Rights Org*., 426 U.S. 26,

38 (1976) (internal quotation marks omitted). Moreover, "standing is not dispensed in gross" and "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis v. FEC*, 554 U.S. 724, 734 (2008) (internal quotation marks and alterations omitted).

Where a plaintiff asserts a procedural right, it must show a personal and particularized injury that impairs one of its concrete interests. *Int'l Bhd. of Teamsters v. TSA*, 429 F.3d 1130, 1135 (D.C. Cir. 2005). "[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation — a procedural right *in vacuo* — is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009).

Although FECA provides that "[a] complainant may bring . . . a civil action to remedy the violation involved in the original complaint[,]" 52 U.S.C. § 30109(a)(8)(C), this provision does not confer Article III standing on any party. *See Common Cause v. FEC*, 108 F.3d 413, 419 (D.C. Cir. 1997) ("Section [30109(a)(8)(A)] does not confer standing; it confers a right to sue upon parties who otherwise already have standing."). Rather, a plaintiff bringing a claim under section 30109(a)(8)(A) must allege that it suffered some additional concrete injury beyond the mere alleged agency inaction. *See Campaign Legal Ctr. v. FEC*, 860 F. App'x 1, 4-5 (D.C. Cir. 2021) (per curiam).

B. Plaintiffs Lack Standing to Pursue Their FECA Contribution Claims

Plaintiffs can be seen to have challenged the dismissal of their administrative complaint with regard to two basic categories of claims: (1) that TTV made and the Georgia GOP knowingly accepted in-kind corporate *contributions* in the form of coordinated expenditures, in violation of 52 U.S.C. § 30118(a) and 11 C.F.R. § 114.2; and (2) that the Georgia GOP failed to *report* those contributions to the FEC, in violation of 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.3. However, plaintiffs lack standing to pursue the contribution claims, because they have

failed to demonstrate the required elements on the basis of organizational harm or any other type of injury, where the decision not to pursue an investigation of those claims — about TTV ballot-integrity activities that evidence indicates would have occurred regardless of any alleged coordination — caused them no cognizable harm this Court could redress.

In addition to alleging informational injury to support their claims of FECA disclosure violations (Compl. ¶¶ 12, 17), plaintiffs appear to attempt to support their claims regarding contribution violations on the basis of alleged organizational injury to plaintiff Common Cause Georgia. Specifically, Common Cause Georgia alleges injury to its "organizational mission" to "expand voting rights for all eligible Georgians and to empower citizens through public education[.]" (Compl. ¶ 18.) Plaintiffs posit that "the Commission's failure to enforce FECA's prohibition on corporate contributions to party committees against True the Vote, a nonprofit corporation that seeks to 'protect election integrity' through, inter alia, voter challenges," has required Common Cause Georgia to counteract that harm by "divert[ing] resources from other organizational needs." (*Id.*; *see* Motion at 18-19.) Plaintiffs offer one example of resource diversion, specifically "hiring a contractor to work on voter protection efforts, such as disinformation monitoring and public education on the implications of voter challenges like those brought by True the Vote." (Docket No. 13-1, ¶ 13 (Declaration of Treaunna C. Dennis).) However, it is important to remember that plaintiffs' claims were not that TTV's election-integrity activities were unlawful standing alone, but that those activities were unlawful because they were allegedly undertaken *in coordination with* the Georgia GOP. (Compl. ¶ 2.) Plaintiffs' purported informational injury may be sufficient to establish standing as to the disclosure allegations, but such injury would not support a challenge to substantive campaign finance regulations that do not deal with disclosure, like the contribution claims. *See Campaign Legal*

Ctr. v. FEC, 578 F. Supp. 3d 1, 582 (D.D.C. 2021) ("a plaintiff can establish standing by demonstrating a denial of *access to information*") (emphasis added).

In fact, plaintiffs' theory of organizational standing is insufficient to confer standing to challenge the alleged violation of the prohibition on corporate in-kind contributions by TTV and the Georgia GOP. As an initial matter, plaintiffs cannot rely on their abstract desire to see the law enforced against TTV and the Georgia GOP to establish Article III standing for their contribution claims. A plaintiff's interest in "seeing that the laws are enforced" is not "legally cognizable within the framework of Article III." *Sargent v. Dixon*, 130 F.3d 1067, 1069 (D.C. Cir. 1997); *see Lujan*, 504 U.S. at 573-74. Such concerns cannot be the basis for standing because there is no "justiciable interest in having the Executive Branch act in a lawful manner." *Common Cause*, 108 F.3d at 419. Plaintiffs have no Article III right to seek "a legal conclusion that carries certain law enforcement consequences" for others. *Wertheimer v. FEC,* 268 F.3d 1070, 1075 (D.C. Cir. 2001). "While 'Congress can create a legal right . . . the interference with which will create an Article III injury,' . . . Congress cannot . . . create standing by conferring 'upon *all* persons . . . an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law.'" *Common Cause,* 108 F.3d at 418 (quoting *Lujan*, 504 U.S. at 573) (emphasis in original, internal citation omitted).

More fundamentally, plaintiffs have not shown that the alleged failure to enforce FECA's prohibition on corporate contributions *through coordinated expenditures* has caused them any injury that this Court could redress. The evidence in the record is that TTV would have undertaken its ballot-integrity work regardless of its contacts with the Georgia GOP, whether those contacts are deemed to be unlawful coordination or not. (AR0044-45, 48; AR0285-86.) Plaintiffs have pointed to no evidence in the record that TTV's activities in any way depended on

the Georgia GOP; on the contrary, the evidence is that TTV acted autonomously as part of a multi-state effort to pursue its ballot-integrity goals. (*Id.*) And of course, if TTV's activities would have happened anyway, then presumably any alleged diversion of resources or other response by Common Cause Georgia would have happened anyway as well. Once again, it is important to emphasize that plaintiffs do not claim that the ballot-integrity work of TTV was inherently unlawful. To have been injured by the Commission's lack of enforcement in this context, plaintiffs must show that TTV's alleged *coordination with the Georgia GOP* materially increased the harm TTV's efforts inflicted, over and above what TTV would have done in the absence of any such coordination. *See Lujan*, 504 U.S. at 560 (standing requires that there is a "causal connection between the injury and the conduct complained of[,]" which requires the injury to be "fairly traceable to the challenged action of the defendant[.]"). Thus, plaintiffs have not shown that the decision not to pursue the allegations of unlawful contributions has caused them any harm. And even if plaintiffs were to obtain a favorable ruling in this case, there is no reason to believe that would redress their alleged grievance, because TTV would remain free to engage in the same ballot-integrity initiatives in the future in the absence of coordination.

In addition, plaintiffs' theory of standing fails because the harm it alleges, from TTV's election-integrity efforts in the Georgia 2021 runoff election, is too attenuated from the specific conduct it challenges, namely the decision not to pursue enforcement of FECA's prohibition on in-kind contributions by corporations to political committees here. Specifically, this theory fails because of a lack of causation and traceability to the alleged harm. To establish causation in the Article III standing analysis, the alleged injury must have "a nexus to the substantive character of the statute or regulation at issue." *Shays v. FEC*, 337 F. Supp. 2d 28, 46 (D.D.C. 2004) (citing *Diamond v. Charles*, 476 U.S. 54, 70 (1986)). Past FEC cases have focused closely on this

requirement. In *Freedom Republicans, Inc. v. FEC*, a group representing minority members of a political party challenged an FEC decision to provide public funds to the party because of an allegedly discriminatory delegate-allocation scheme used by that party. 13 F.3d 412, 413-14 (D.C. Cir. 1994). In determining that plaintiffs lacked standing, the Court explained that it found "neither sufficient causal nexus between the actions of the FEC authorizing convention funding and the delegate-selection practices of the Republican Party nor adequate likelihood, as opposed to speculation, that the Party would choose to change its time-tested delegate-selection mechanism rather than forego the convention funding." *Id*. at 418. Similarly, in *Fulani v. Brady*, 935 F.2d 1324, 1328-29 (D.C. Cir. 1991), this Circuit held that alleged harm to a presidential candidate because of that candidate's deprivation of media coverage and political legitimacy as a result of her exclusion from a debate could not be traced to the Internal Revenue Service's grant of tax-exempt status to the debate sponsor.

Here, plaintiffs claim that the Commission's failure to enforce laws prohibiting in-kind corporate contributions caused harm to its voter protection work, but their work in that area is simply too attenuated from these campaign finance restrictions, and plaintiffs have failed to establish "a nexus to the substantive character of the statute or regulation at issue." *Shays*, 337 F. Supp. 2d at 46. Similarly, plaintiffs have failed to demonstrate that their alleged injury would be redressed by a favorable decision by this Court. Plaintiffs have not shown that TTV would alter the ballot-integrity work that plaintiffs have alleged has caused them harm (as opposed to any alleged coordination with the Georgia GOP), and redressability cannot be founded on mere speculation as to what third parties might do in response to a favorable ruling. *See Renal Physicians Ass'n v. U.S. Dep't of Health & Human Servs.*, 489 F.3d 1267, 1274 (D.C. Cir. 2007).

To the extent plaintiffs may be making a claim of competitor standing, that path too is foreclosed, as competitor standing may only arise from a certain injury related to participation in a future election, not from harm allegedly suffered as a result of past infractions. *See Nader v. FEC*, 725 F.3d 226, 228-229 (D.C. Cir. 2013) ("the problem with [plaintiff's] argument" was that "a favorable decision…will not redress the injuries [claimed]."). Plaintiffs have not provided evidence sufficient to show that Commission enforcement of FECA's coordinated-contribution restrictions here would redress any alleged competitive harm they might suffer in any future election in which both they and TTV would be involved. And where plaintiffs have failed to support such a claim with evidence, as they must to establish such standing at summary judgment, *see supra* pp. 12-13, they cannot proceed on that basis either.

In sum, with respect to the alleged violations of FECA's corporate contribution prohibition, plaintiffs have failed to meet their burden to establish standing, *Lujan*, 504 U.S. at 561, and their claim should therefore be dismissed with respect to these challenges.

II. THE COMMISSION'S DISMISSAL OF MUR 7894 WAS NOT CONTRARY TO LAW

A. Standard of Review

1. FECA's "Contrary to Law" Standard of Review Is Highly Deferential

It has long been established that judicial review of Commission dismissal decisions under FECA is "limited." *Common Cause*, 842 F.2d at 448; *CREW v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007). A court may only set aside a dismissal decision, where that decision is reviewable at all, if it is "contrary to law." 52 U.S.C. § 30109(a)(8)(C). This means that the Commission's decision cannot be disturbed unless it was based on an "impermissible interpretation of" FECA or was otherwise "arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). Courts will not overturn agency decisions absent evidence that the

agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

When the FEC interprets FECA in the context of a section 30109(a)(8) dismissal, the D.C. Circuit has held that courts must accord *Chevron* deference to that decision.[2] *E.g.*, *FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 185 (D.C. Cir. 2001); *In re Sealed Case*, 223 F.3d 775, 779-81 (D.C. Cir. 2000); *Orloski*, 795 F.2d at 161-62; *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("*NRSC*") ("[I]f the meaning of the statute is not clear, a reviewing court should accord deference to the Commission's rationale."). The Commission's decision need only be "sufficiently reasonable to be accepted." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981) ("*DSCC*") (internal quotation marks omitted). It does not need to be "the only reasonable one or even the" decision "the [C]ourt would have reached" on its own "if the question initially had arisen in a judicial proceeding." *Id.* In recent decisions, this Circuit has continued to consistently apply *Chevron* deference where an agency offers a reasonable interpretation of ambiguous statutory text. *See, e.g.*, *Solar Energy Indus. Ass'n v. FERC*, 59 F.4th 1287, 1292 (D.C. Cir. 2023) (applying *Chevron* deference and upholding FERC's interpretation of Public Utility Regulatory Policies Act); *Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359, 369 (D.C. Cir. 2022) (finding "some question" about the meaning of a statute enough to trigger *Chevron* deference).

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

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

2. Deference Applies Equally to Split-Vote Decisions

The deferential standard of review is not altered by the vote counts leading to the dismissal, which here resulted from split votes rather than from a majority vote of four or more Commissioners against enforcement. The D.C. Circuit has squarely held that it owes deference to an FEC decision not to proceed on an enforcement matter, even if it only occurs due to a lack of four votes to proceed.[3] *Campaign Legal Center v. FEC*, 952 F.3d 352, 355 (D.C. Cir. 2020); *Sealed Case*, 223 F.3d at 779; *NRSC*, 966 F.2d at 1476. In all of these cases, the Court of Appeals held that a controlling statement deserves deference, even though it is not joined by four

[3] That the particular dismissal here resulted from 2-3 split votes instead of a 3-3 split vote does not change the analysis. In either instance, "the Commission dismissed the complaint for lack of the requisite four votes in favor of pursuing the investigation." *Common Cause*, 842 F.2d at 449. The statement of reasons of the two Commissioners voting against proceeding thus likewise "necessarily states the agency's reasons for acting as it did." *NRSC*, 966 F.2d at 1476. Indeed, while *Common Cause* ultimately involved a 3-3 split vote, the D.C. Circuit expressed a desire for a statement of reasons from one Commissioner because "[h]is unexplained shift" from voting to proceed in a 4-2 vote to voting against proceeding "caused the 3–3 deadlock among the Commissioners that resulted in a dismissal." 842 F.2d at 438; *id.* at 449 ("[S]ome statement from [that Commissioner], while not law, would have informed [the administrative complainant] of the evidence practically necessary to convince a majority of the Commission to proceed with an investigation of a committee"); *id.* at 450 (deciding not to remand the matter to the FEC to require a statement of reasons because the Commissioner at issue was no longer on the FEC).

or more Commissioners. *Campaign Legal Center*, 952 F.3d at 355; *Sealed Case*, 223 F.3d at 780; *NRSC*, 966 F.2d at 1476.

Despite this precedent, plaintiffs in this case argue that "[t]he controlling Commissioners' legal interpretations . . . 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.'" (Motion at 17 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001)).) This argument is clearly wrong, as this Court has reaffirmed the applicability of *Chevron* to split-vote dismissals in multiple post-*Mead* decisions. *Campaign Legal Center*, 952 F.3d at 357; *NRA*, 254 F.3d at 184-86; *see also CREW v. FEC*, 209 F. Supp. 3d 77, 85-86 n.5 (D.D.C. 2016) (rejecting argument that *Mead* altered the standard of review).

Plaintiffs further argue that deference is not appropriate here because the interpretation of FECA under review "must be the agency's authoritative or official position" and "[a] legal interpretation announced by fewer than four FEC Commissioners is neither" (Motion at 17 (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019)), but plaintiffs' interpretation of *Kisor* is mistaken. First, the Supreme Court in *Kisor* was explicitly evaluating the Federal Circuit's application of deference to an agency's interpretation of its own *regulations*, pursuant to *Auer v. Robbins*, 519 U.S. 452 (1997), typically referred to as "*Auer* deference." The case did not concern the scope of judicial deference as to an agency's interpretation of its implementing statute. *Kisor*, 139 S. Ct. at 2425 (Roberts, J., concurring in part) (noting that "issues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress" and that *Kisor* did not "touch upon the latter"). Courts in this Circuit have accordingly continued to apply *Chevron* deference in this context without reference to *Kisor*.

See Solar Energy Indus. Ass'n, 59 F.4th at 1292; *Loper Bright Enterprises*, 45 F.4th at 369. *Kisor* therefore has nothing to say about the controlling Commissioners' interpretation of FECA itself, a subject on which courts routinely defer to the Commission's expertise. *See Van Hollen v. FEC*, 811 F.3d 486, 495 (D.C. Cir. 2016) (disclosure); *United States v. Kanchanalak*, 192 F.3d 1037, 1049 (D.C. Cir. 1999) (soft money reporting) ("[T]he FEC's express authorization to elucidate statutory policy in administering FECA 'implies that Congress intended the FEC … to resolve any ambiguities in statutory language. For these reasons, the FEC's interpretation of the Act should be accorded considerable deference.'") (citation omitted); *DSCC*, 454 U.S. 27, 37 (1981) (delegation of spending authority) ("[T]he Commission is precisely the type of agency to which deference should presumptively be afforded.").

Furthermore, *Kisor*'s clarification as to the scope of *Auer* deference did not abrogate the deference courts have traditionally applied to the reasoning of the controlling Commissioners in dismissing administrative complaints. *Kisor* clarified that an agency's interpretation of its regulations is entitled to deference where it is the agency's "authoritative" or "official position," "implicate[s] its substantive expertise," and reflects "fair and considered judgment[.]" 139 S. Ct. at 2416–18. Where these "three guiding principles" weigh in favor of the agency's regulation, the agency's interpretation will prevail. *See Doe v. SEC,* 28 F.4th 1306, 1313-16 (D.C. Cir. 2022). Plaintiffs argue that the Commissioners' SOR is not entitled to deference because it is "not law" and does not create "binding legal precedent or authority for future cases" (Motion at 17 (citing *Common Cause*, 842 F.2d at 449 n.32, 453)), but that is mistaken. In fact, *Kisor* expressly held that a regulatory interpretation does not need to be binding in future cases to warrant deference. 139 S. Ct. at 2420 (noting that agency interpretive rules may receive *Chevron* deference even if they do not "bind private parties.") (citing *Perez v. Mortgage Bankers Assn.*,

135 S. Ct. 1199, 1204 (2015)). And FEC split dismissals like the one in this case would continue to merit deference from the courts even if *Kisor* did apply. First, the controlling Commissioners' SOR, which comprehensively addressed liability regarding prohibited corporate contributions to political parties, "implicate[s]… substantive expertise" in the field of campaign finance law. *Kisor*, 139 S. Ct. at 2417. Second, in light of the SOR's lengthy and well-supported treatment of the issues, over ten single-spaced pages, it reflects "fair and considered judgment[.]" *Id.* Finally, FEC enforcement proceedings and dismissals are "analogous to a formal adjudication[,]" including in the context of split dismissals. *Sealed Case*, 223 F.3d at 780. The SOR thus is and remains an "authoritative" or "official position" in that sense. *Kisor*, 139 S. Ct. at 2416; *see Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 316, 319 (D.C. Cir. 2015) (FEC split dismissal conferred significant benefit on respondent because the dismissal has legal force in that it resolves the underlying matter and precludes further enforcement proceedings); *cf. CREW*, 209 F. Supp. 3d at 85-86 n.5 (finding that other considerations apart from whether decisions were prospectively binding demonstrated that FEC enforcement was an authoritative delegation warranting deference).

In sum, the controlling Commissioners' stated reasons for dismissing MUR 7894 are entitled to substantial deference.

B. The Controlling Commissioners Permissibly Viewed the Commission's Enforcement Authority as Limited in Nature

In their SOR, the controlling Commissioners explained their view of the Commission's limited role in our Constitutional structure, as prescribed by both FECA itself and "jurisprudence narrowing that legislative grant." (AR0280.) Relying on substantial authority, the Commissioners noted that "federal courts have carefully limited our jurisdiction as a matter of constitutional imperative[,]" and that "[t]o respect those limits is to remain mindful that, to put it

plainly, not everything that could impact an election is a potential FECA violation." (AR0281; *see id*. n.36.)

This prefatory language by the controlling Commissioners provides insight into their decision-making here, including whether their "construction [was] sufficiently reasonable[.]" *Common Cause*, 842 F.2d at 448 (citation omitted). And it was reasonable to note that this Circuit has instructed the FEC to construe FECA narrowly in light of First Amendment concerns. For instance, in *Van Hollen*, the D.C. Circuit considered regulations promulgated by the FEC to "'implement the Supreme Court's decision in [*FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007)].'" 811 F.3d 486, 491 (D.C. Cir. 2016) (quoting FEC, Electioneering Communications, 72 Fed. Reg. 50261, 50262 (Aug. 31, 2007)). The court applied *Chevron* deference and the importance of taking into consideration constitutional concerns. *Van Hollen,* 811 F.3d at 499. In fact, the D.C. Circuit noted that, by tailoring regulation to satisfy constitutional interests, "the FEC fulfilled its unique mandate." Other cases have followed a similar pattern. *See FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 394 (D.C. Cir. 1981) (holding that, because evaluating political-committee status arises in the "delicate" First Amendment area, "there is no imperative" to stretch the statute); *Common Cause*, 842 F.2d at 448 (according *Chevron* deference where FEC narrowly interpreted FECA due to constitutional concerns).

Indeed, attention to such concerns is consistent with the principle that the Commission's enforcement decisions are owed deference even when they do not result in a four-vote consensus. With the four-vote requirement for proceeding with enforcement matters, Congress was generally guarding against the risk of partisan or ill-considered use of enforcement powers. *See Combat Veterans for Cong. Political Action Comm. v. FEC*, 795 F.3d 151, 153 (D.C. Cir.

2015); *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1171 (D.C. Cir. 2016) (explaining that "unlike other agencies — where deadlocks are rather atypical — [the Commission] will regularly deadlock as part of its modus operandi"); *see also Heckler v. Chaney*, 470 U.S. 821, 832 ("[W]hen an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights."). "Congress vested enforcement power in the FEC, carefully establishing rules that tend to preclude coercive Commission action in a partisan situation, where the Commission, itself statutorily balanced between the major parties, . . . is evenly split." *Sealed Case*, 223 F.3d at 780. By providing in FECA that it takes four Commissioner votes to proceed on an enforcement matter, Congress sought to ensure that the agency would not "provide room for partisan misuse." H.R. 12406, H. Rep. No. 94-917, 94th Cong., 2d Sess. at 3 (1976).

Thus, it was permissible for the controlling Commissioners to cautiously employ their enforcement authority over constitutionally protected activity, based on a careful interpretation of the agency's authority as set out in the text of FECA itself. (AR0280-81.)

C. The Controlling Commissioners Reasonably Determined That TTV's Activities Were Not Undertaken "for the Purpose of Influencing" a Federal Election Under FECA

The controlling Commissioners reasonably found insufficient evidence that the activities at issue here were undertaken "for the purpose of influencing" a federal election. In their complaint to the FEC, the administrative complainants here claimed that TTV had made coordinated expenditures resulting in prohibited in-kind contributions to the Georgia GOP. (AR0001-13.) Such a claim requires the Commission to determine that TTV in fact made "expenditures," and that these expenditures were in fact "coordinated," as those terms are defined by FECA and FEC regulations. *See* 52 U.S.C. § 30101(9)(A)(i); 11 C.F.R. § 109.20(a). FECA defines "expenditure" as "any purchase, payment, distribution, loan, advance, deposit, or

gift of money or anything of value, made by any person *for the purpose of influencing any election for Federal office*[.]" 52 U.S.C. § 30101(9)(A)(i) (emphasis added). Starting with this language, the controlling Commissioners evaluated the facts, including material in plaintiffs' complaint, the responses of the respondents, and OGC's First General Counsel's Report, alongside Commission regulations and prior enforcement decisions. These Commissioners ultimately concluded that there was no reason to believe that TTV's activities were undertaken "for the purpose of influencing any election [for Federal office.]" (AR0285.) As explained below, that decision was reasonable and permissible in light of the deference that is owed to it.

1. The Controlling Commissioners Reasonably Determined That TTV's State Law Compliance Activities Were Beyond the Commission's Jurisdiction

The Commissioners first noted that the TTV activities at issue "targeted compliance with valid Georgia laws governing signature-verification, ballot-curing, ballot drop boxes, and residence requirements[.]" (AR0282.) They observed that Commission regulations explicitly disclaim any superseding of "State laws which provide for," among other things, "[v]oter registration" and the "[p]rohibition of false registration, voting fraud, theft of ballots, and similar offenses." (AR0282 (citing 11 C.F.R. § 108.7(c)(3), (4)).) The Commissioners reasonably concluded that TTV's ballot-integrity efforts "fall squarely within this exemption" and thus "fall outside of the ambit of FECA." (AR0282.)

To support their conclusion about the limits of FECA's reach into state law matters, the controlling Commissioners cited the Sixth Circuit's recent opinion in *Priorities USA v. Nessel*, 978 F.3d 976, 983 (6th Cir. 2020). (AR0282 n.41.) In that case, plaintiff voter advocacy organizations challenged a Michigan election statute regulating voter transportation, asserting that it was preempted by FECA. 978 F.3d at 978-79. The Sixth Circuit ruled against plaintiffs, finding that they were unlikely to prevail on the merits of their claim that FECA preempted the

laws at issue. *Id.* at 979. The court considered the same pre-emption regulation invoked by the controlling Commissioners here, 11 C.F.R. § 108.7, and noted that "the three types of laws mentioned there are about campaign *finance*: the sources of funding and reporting on its collection and distribution." 978 F.3d at 983. Thus, "[b]y *ejusdem generis*, the kind of state regulations contemplated as preempted likely do not include restrictions on selling alcohol on election day, treating voters to coffee, and transporting voters to the polls." *Id.* Perhaps more significantly, that court determined that the voter transportation law at issue was among the types of state statutes that are explicitly not pre-empted by FECA under 11 C.F.R. § 108.7(c), despite the fact that there is no mention of voter transportation in that subsection, relying instead on the regulation's description of covered statutes as those defining "false registration, voting fraud, theft of ballots, *and similar offenses*[.]" *Id.* (citing § 108.7(c)(4)) (emphasis in original opinion).

It was reasonable to view the TTV conduct at issue here as fitting more directly within the scope of 11 C.F.R. § 108.7(c) than the catchall language ("similar offenses") on which the *Nessel* court relied. TTV described its activities as targeting the detection of things explicitly identified in the regulation, including "false registration, voting fraud, [and] theft of ballots[.]" 11 C.F.R. § 108.7(c)(4). As such, the controlling Commissioners permissibly concluded that, "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." (AR0282.)

This conclusion is consistent with prior Commission precedent in the enforcement context, as well as the Commission's interpretation of its authority via FEC advisory opinions. The FEC has, for example, invoked 11 C.F.R. § 108.7(c) on multiple occasions where it determined that the complained-of conduct was outside the purview of the Commission. *See, e.g.,* MUR 6003, John McCain 2008, Inc. (Factual and Legal Analysis) at 2 (qualifying as a

candidate on state ballots), https://www.fec.gov/files/legal/murs/6003/28044214660.pdf (Nov. 10, 2008); MUR 492, Gerald S. Feldman (Notification of Counsel) (candidate inclusion on partisan primary election ballot), https://www.fec.gov/files/legal/murs/492.pdf (Jan. 30, 1978).

The Commission has also interpreted the phrase "for the purpose of influencing a Federal election" in a restrained manner, particularly where there were indications that Congress did not envision that certain activity would be within the scope of the Commission's authority. FEC Advisory Op. 1993-9 (Michigan Republican State Committee), 1993 WL 332067, at *3 (cost of construction and purchase of an office facility by a national or state political party committee was not "for the purpose of influencing a Federal election" where Congressional intent was to exclude such activity from FECA's prohibitions).[4]

Plaintiffs do not appear to dispute that TTV's activities here are directed at categories of state law compliance that are covered by 11 C.F.R. § 108.7(c). Instead, plaintiffs argue that this is immaterial because "enforcement of the federal contribution limits and reporting requirements at issue here . . . does not even implicate, much less interfere with or call into question, the application of any Georgia laws." (Motion at 24-25.) However, plaintiffs exaggerate the scope of what the controlling group concluded here. It was reasonable to foresee a chilling effect on efforts to deter "false registration, voting fraud, theft of ballots, and similar offenses," 11 C.F.R.

[4] The Commission has in the past also relied upon the "nonpartisan" nature of proposed activity to determine that it was not undertaken "for the purpose of influencing an election[.]" FEC Advisory Op. 2000-16 (Third Millennium), 2000 WL 1228803, at *6 (display of candidate advertisements would not be for purposes of influencing a federal election where conducted as part of study as "research for nonpartisan purposes"); FEC Advisory Op. 1999-34 (Election Zone LLC), 1999 WL 1800073, at *4 (organization's commercial advertisements were not for the purpose of influencing a Federal Election where conducted "on a nonpartisan basis" and where "each political party will have an opportunity to post its website"). Of course, as discussed *infra* pp. 35-36, the controlling group here noted that TTV's ballot-integrity efforts were available on a nonpartisan and public basis.

§ 108.7(c)(4), if the Commission were to interpret such activities as presumptively having a partisan impact in federal elections and thus constituting in-kind contributions. Here, while treating ballot integrity measures taken by an organization like TTV as in-kind contributions would not explicitly prohibit TTV from undertaking such activities as permitted under Georgia law, the practical effect would be to limit the activities to the contribution limits applicable to parties and candidates under FECA.[5] That could reasonably be seen to "interfere with or call into question" the application of state law. Although federal law preempts state law in the event of a conflict, U.S. Const., Art. VI, cl. 2, the controlling Commissioners permissibly interpreted their authority so as to avoid such a conflict, and thus act consistently with the agency's limited role in an area of constitutionally protected activity. *See supra* pp. 24-26.

In any event, to the extent there is any uncertainty as to whether it was reasonable to conclude that the Commission "has no authority to police" the "Georgia laws at the heart of TTV's activities" (AR0282), the Court should defer to the controlling Commissioners' interpretation here. *See Teper v. Miller*, 82 F.3d 989, 998 (11th Cir. 1996) ("An agency like the FEC, to which Congress has delegated broad discretion in interpreting and administering a complex federal regulatory regime, is entitled to significant latitude when acting within its statutory authority, *even in its decisions as to the scope of preemption of state law*.") (emphasis added); *Weber v. Heaney*, 793 F. Supp. 1438, 1455 (D. Minn. 1992), *aff'd*, 995 F.2d 872 (8th Cir. 1993) ("Determining the scope of preemption appears to fall within the competence of the commission in light of its administrative responsibilities.").

[5] FEC, Contribution limits (last visited Mar. 14, 2023), https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits/ (listing contribution limits for 2023-2024 federal elections).

2. The Controlling Commissioners Reasonably Determined That TTV's Ballot-Integrity Activities Constituted Issue Advocacy That Was Not Undertaken for the Purpose of Influencing a Federal Election

The controlling Commissioners also determined that TTV's activities in "trying to influence how elections are administered" were, "as a policy matter, [] different from acting 'for the purpose of influencing' a federal election" and therefore "fall outside our jurisdiction." (AR0282.) This separate and independent basis for their decision not to go forward was likewise reasonable and is entitled to deference from this Court.

The controlling Commissioners' conclusion in this regard begins with the foundational premise, established in *Buckley*, that the language "for the purpose of influencing any election for Federal office" in FECA's "expenditure" definition was unconstitutionally vague, as it has the "potential for encompassing both issue discussion and advocacy of a political result." (AR0282 (citing *Buckley*, 424 U.S. at 79).) These Commissioners determined that TTV's activities did reflect "issue advocacy," and thus "TTV's engagement around election integrity issues can be no less protected than any other organization's engagement around any other policy issue." (AR0283.) The controlling Commissioners provided multiple examples of a wide variety of organizations engaged in issue advocacy directly impacting the administration (and potentially the outcome) of federal elections. (AR0283.) And they further cited numerous instances where the Commission previously concluded that programmatic activity with the potential to influence the outcome of a federal election has nonetheless been deemed to exist outside FECA's definitions of either "expenditures" or "contributions[.]" (AR0283 n.49.)

Plaintiffs do not appear to contest that election integrity is a core programmatic activity of TTV, or that its efforts at issue here were undertaken at least in part to advance the policy goals of the organization as to election administration and ballot integrity. Plaintiffs do claim that the controlling Commissioners effectively analyzed TTV's election integrity efforts as

expenditures, which are subject to a narrower statutory construction of the "purpose of influencing" language under *Buckley*, arguing that TTV's alleged coordination with the Georgia GOP mandates that TTV's expenditures instead be treated as contributions. (Motion at 29-33.) However, in fact the controlling Commissioners discussed the construction of the "purpose of influencing" language in the contribution context at some length, making clear that its reach is not unlimited in that context either. (AR0282-83.) Moreover, as the Commissioners noted, "TTV's activities can only arguably be regarded as in-kind 'contributions' if they were 'coordinated' with the Georgia GOP" (*id*. n.45), and the controlling group reasonably determined that such coordination within the meaning of FECA did not occur. (*See* AR0285-86.)

The controlling Commissioner relied explicitly on FEC MUR 7024 in support of their conclusion that the issue-oriented advocacy here was beyond the reach of FECA. *See* AR0284; FEC MUR 7024 (Van Hollen for Senate, *et al.*). In that enforcement proceeding, a complaint was filed by a Congressman and Senate candidate who made campaign finance "a centerpiece" of his "campaign rhetoric." MUR 7024, Factual & Legal Analysis at 2, https://eqs.fec.gov/eqsdocsMUR/17044420401.pdf. Van Hollen sued to challenge an FEC regulation, claiming an "interest in participating in elections untainted by expenditures from undisclosed sources," and he also petitioned the Commission for a rulemaking. *Id*. In this effort Van Hollen received *pro bono* legal services in the lawsuit and rulemaking from Democracy 21 and Campaign Legal Center (which also represents the plaintiffs in the current litigation), and in the lawsuit from Wilmer Hale LLP. *Id*.

In its evaluation of whether these legal services constituted an illegal campaign contribution, the Commission made clear that the fact that services rendered may benefit a campaign does not answer the question of whether such services were provided for the purpose

of influencing a federal election. MUR 7024, Factual & Legal Analysis at 5-8. In Van Hollen's situation, the Commission found that *pro bono* legal services rendered by Campaign Legal Center and the other groups were provided to advance the programmatic activities of those organizations, despite those organizations having as their core purpose the desire to impact how federal elections are conducted and administered. *Id*. Furthermore, the Commission reasonably determined that the potential impact on a particular candidate's election is not enough where that impact is too indirect and attenuated to constitute a contribution. *Id.* at 6. Here, the controlling Commissioners similarly concluded that in close cases, line drawing between issue advocacy regarding federal election administration and conduct designed to impact the outcome of that election is constitutionally fraught, and that it could "unconstitutionally subject[] a broad swath of protected advocacy and civic participation to the specter of Commission enforcement action." (AR0284.)

The controlling Commissioners further supported their conclusion that TTV's activities here represent issue advocacy by noting that this is "consistent with the fact that '[t]he Commission has long considered activity engaged in for *bona fide* commercial reasons not to be 'for the purpose of influencing an election,' and thus, not a contribution or expenditure under section 30118(a).'" (AR0284 (citing MUR 7870 (Google LLC, *et al.*), Factual & Legal Analysis at 7, https://eqs.fec.gov/eqsdocsMUR/7870_14.pdf).) Under longstanding Commission precedent, actions taken for *bona fide* commercial reasons are not "for the purpose of influencing an election" even "if a candidate benefitted from the commercial activity." *Id.* In various enforcement proceedings and advisory opinions, the Commission has found that disparate activities that may have provided some indirect benefit to a particular campaign or party were nonetheless beyond the Commission's jurisdiction when taken for a genuine and good faith

commercial purpose. *See*, *e.g.*, FEC Advisory Op. 2022-14 (Google), 2022 WL 3445085, at *5 (concluding that proposed pilot program would not violate FECA) ("although Google would be modifying its service only for certain political committees and would not include other entities in the pilot program, Google would be doing so for commercial, as opposed to political, reasons."); MUR 7870, Factual & Legal Analysis at 8-11 (altering of algorithms and protocols to depress internet traffic to some content did not result in contribution); FEC Advisory Op. 2018-11 (Microsoft Corp.), 2018 WL 4489368, at *2 (proposal to offer a free account-security product to "election-sensitive" customers for reasons including "to protect [Microsoft's] brand reputation" would not result in an in-kind contribution); Statement of Reasons of Chair Broussard, Vice Chair Dickerson, & Commissioners Trainor, Walther, & Weintraub, MUR 7832 (Twitter, Inc.), https://eqs.fec.gov/eqsdocsMUR/7832_11.pdf (Twitter did not make an in-kind contribution to the primary and general election opponents of a congressional candidate by declining to "verify" that candidate's account but "verifying" the accounts of the candidate's opponents).

The consistent thread running through the FEC precedents in the controlling statement as well as others is that the existence of *bona fide* reasons for the actions of a non-partisan organization that are central to its purpose, whether to promote issue goals (including with respect to election administration) or for commercial interests, constitutes strong evidence that the organization was *not* acting "for the purpose of influencing a federal election[,]" a prerequisite in this context to enforcement under FECA. Here, the controlling Commissioners reasonably determined that TTV exists to "protect election integrity," and that its actions in the Georgia 2021 runoff election were motivated by that purpose. (AR0277-79.) Moreover, that interest is clearly an important one. *Cf. Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008) ("There is no question about the legitimacy or importance of the State's interest in

counting only the votes of eligible voters."). On this basis, the controlling Commissioners reasonably concluded that TTV did not act "for the purpose of influencing a federal election[,]" and that conclusion is entitled to deference. *See supra* pp. 19-24.

D. The Controlling Commissioners Reasonably Determined That TTV's Activities Were Not Coordinated with the Georgia GOP

Separate and apart from TTV's purpose in engaging in ballot integrity initiatives in the 2021 Georgia runoff election, the controlling Commissioners also declined to find reason to believe a FECA violation occurred because "TTV's alleged activity was not undertaken 'in cooperation, consultation, or concert with, or at the request or suggestion of' the Georgia GOP." (AR0285.) "Consequently, no coordination occurred, foreclosing a finding of a coordinated expenditure resulting in an in-kind contribution to the Georgia GOP." (*Id*. (citing 52 U.S.C. § 30116(a)(7)(B)(ii); 11 C.F.R. § 109.20(b)).)

The controlling Commissioners began their analysis by noting that there is no presumption of coordination in an FEC enforcement proceeding, and instead the Commission looks for a "concrete and plausible factual basis for finding reason to believe that coordination has occurred." (AR0285.) The Commissioners then cited two occasions, including a recent one, where the Commission had made such a finding, underscoring that this standard is not an impossible hurdle and that the Commission has not eschewed enforcement of coordinated contribution limitations where appropriate. (AR0285 (citing MURs 4568/4633/4634 (Triad Mgmt. Servs., Inc.), Factual & Legal Analysis at 32–33; MURs 7324/7332/7366 (A360 Media, LLC f/k/a American Media, Inc., *et al.*), Factual & Legal Analysis at 11).)

The controlling Commissioners then explained that "[t]wo primary facts distinguish this case from those where we have found reason to believe that there has been a coordinated expenditure." (AR0285.) First, "TTV's election integrity initiatives were equally available to all

comers[.]" (*Id.*) This conclusion was supported by record evidence that "the Georgia GOP [ ] contacted the Democratic Party of Georgia to provide information about its initiatives," and "also offered these services to the public, for free." (*Id.*) In particular, evidence including the Engelbrecht Declaration detailed both the content and timing of TTV's offer to the Democratic Party of Georgia. (AR0048-49.) The Commissioners further noted that the record reflected that "TTV was pursuing these initiatives — and would have continued to do so — *regardless* of Engelbrecht's meeting with the Georgia GOP." (AR0285.) This conclusion was also supported by TTV's and Engelbrecht's responses to the Commission in which the respondents stated that, even assuming TTV did coordinate with the Georgia GOP, TTV took no action that it would not have taken in the absence of any such coordination or agreement. (AR0044-45, 48.)

Plaintiffs' criticisms of the controlling Commissioners' reasoning on these points (Motion at 33-37) largely seem to reflect disagreement with the weight to be given to the evidence of coordination, and they thus fail to demonstrate that the Commissioners' conclusions were "contrary to law" under the deferential standard that applies here. 52 U.S.C. § 30109(a)(8). For instance, plaintiffs claim that the Commissioners "ignored evidence casting doubt on the sincerity and motivations of TTV's claimed offer of assistance to the Georgia Democratic Party," implying that TTV did not attempt to reach out to the Democratic Party until significantly later than it first indicated. (Motion at 35 & n.11.) However, plaintiffs fail to note that TTV's response to the Commission explained the apparent discrepancy as a clerical error, explicitly denying that it altered the date on its letter to the Democratic Party of Georgia in order to mislead the Commission or anyone else. (AR0036 n.1.) Furthermore, plaintiffs' discounting of statements such as this from TTV is inconsistent with its insistence that TTV's *other* statements should be taken as true and construed to have legal ramifications. Most notably, plaintiffs

repeatedly invoke the press release issued by TTV in December of 2020 stating that TTV would "partner with" the Georgia GOP (Motion at 33-35), but they do not appear to credit many other TTV statements, including its statement that its election integrity efforts were pursued in a non-partisan manner, and its offer of assistance to the Democratic Party of Georgia, including in its December 2020 letter to that Party. (*See* AR0047-49.)

In fact, the controlling Commissioners' analysis directly addressed the TTV press release's reference to a "partnership" with the Georgia GOP, and it explained why the Commissioners did not deem this evidence to be conclusive as to coordination between those two entities. (AR0286.) The Commissioners explained that "the term 'partnership', as used here, had a colloquial and not a legal significance[,]" and they further noted that "nothing in the record indicates that TTV, in fact, undertook any of its activities 'in cooperation, consultation, or concert with, or at the request or suggestion of' the Georgia GOP." (AR0286.) In reaching this conclusion, the Commissioners were entitled to credit TTV's explanation in the record for its use of the term "partnership," where it stated that it had used the term not "in an official sense" or to indicate a "joint venture[,]" but rather to refer "to all persons who were also pursuing election integrity" including "parties, voters, other organizations, individuals, and others who were pursuing election integrity through their own efforts." (AR0047-48.) While the controlling Commissioners' SOR did not cite that explanation directly, it did cite "the record" showing that the use of the term "partnership" here had a "colloquial and not a legal significance" (AR0286), and the factual background section of the SOR is replete with citations to the Engelbrecht Declaration (*see* AR0277-79), making clear that the Commissioners considered this record evidence in reaching their conclusions.

The Commissioners further explained their conclusions by noting that "there is a difference between *communicating* with a regulated committee and *coordinating* within the meaning of [FECA] — a principle the Commission has also recognized in the coordinated-communication context." (AR0286.) To concretely articulate this principle, the Commissioners then referenced numerous analogous enforcement proceedings where the Commission had not found reason to believe coordinated spending occurred on the basis of mere communications or other incidental contact. (AR0286 & n.63.) The Commissioners cited MUR 7119 (Donald J. Trump, *et al.*), where the Commission had declined to find reason to believe that the Trump Committee had coordinated with an independent-expenditure-only committee, ALFE, when "a person associated with the Trump Committee . . . attended and spoke at an ALFE event." (AR0286 (MUR 7119, Factual & Legal Analysis at 5, https://eqs.fec.gov/eqsdocsMUR/18044451980.pdf).) Similarly, the Commissioners stated, the fact that TTV may have hosted "publicly available nonpartisan signature verification training, a 24x7 voter hotline, [and] ballot-curing support" attended by the Georgia GOP does not necessarily bring this conduct into the realm of coordination. (AR0279.)

The Commissioners also cited MUR 7797 (Sara Gideon for Maine, *et al.*), where the Commission found no coordination when the campaign staff of a U.S. Senate candidate tweeted "Voters across Maine should see and hear how Collins has taken money from drug and insurance companies and then voted their way instead of for Maine people. In Portland they should also see and hear how Collins has stood with Trump and McConnell instead of Maine people," and shortly thereafter, an independent-expenditure-only PAC uploaded communications to YouTube and aired ads matching those themes. (AR0286 n.63; *see* MUR 7797, Factual & Legal Analysis, https://eqs.fec.gov/eqsdocsMUR/7797_19.pdf.) This underscored the Commissioners' point that

mere communication does not establish coordination, particularly where the communications, whether they be tweets as in MUR 7797 or press releases and public trainings in this proceeding, are open and public.[6]

Plaintiffs make only a modest attempt to engage with the above analysis, in a footnote asserting that it "belies unrefuted record evidence confirming that TTV and the Georgia GOP went far beyond simply communicating" and citing plaintiffs' description of the record generally. (Motion at 35 n.10.) However, this again does no more than establish a simple disagreement over the significance of evidence in the record. The controlling Commissioners' decision with regard to the existence of coordination in this matter — based to a large extent on an analysis of the record which is entitled to significant deference — was reasonable.

E. Plaintiffs' Attack on the Controlling Commissioners' Factual Analysis Is Meritless and Does Not Establish That They Acted Contrary to Law

Plaintiffs conclude their Motion with a brief section arguing that the Commission's dismissal of MUR 7894 was "arbitrary and capricious, irrational, and unsupported by the record" (Motion at 37), but this too is unavailing. In support of this argument, plaintiffs primarily present a one-sided rehash of facts already discussed in detail elsewhere in their Motion. (*Id.* at 37-40.)

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[6] The significance of the public nature of the communications at issue was also underscored in the controlling Commissioners' reliance (AR0286 n.63) on MUR 7700 (VoteVets, *et al*.), where the FEC declined to find reason to believe that a presidential campaign and a multicandidate hybrid PAC had engaged in coordination based on a tweet. *See* Statement of Reasons of Chairman Dickerson & Commissioners Cooksey, Trainor, & Weintraub, MUR 7700, https://eqs.fec.gov/eqsdocsMUR/7700_14.pdf; *see also* 11 C.F.R. § 109.21(f) (establishing safe harbor, in the coordinated-communication context, for candidates' and political parties' responses to inquiries about their position on legislative or policy issues); Statement of Reasons of Chairman Dickerson & Commissioner Trainor, MUR 7510 (Katie Arrington for Congress, *et al*.) (discussing same), https://eqs.fec.gov/eqsdocsMUR/7510_19.pdf .

What this recitation fails to acknowledge, however, is the high degree of deference owed to agency decision-making generally, and to the Commission's campaign finance expertise in particular. As discussed *supra* p. 21, the Court must be "extremely deferential" to the agency's decision in an enforcement context, which "requires affirmance if a rational basis . . . is shown." *Orloski*, 795 F.2d at 167 (internal quotation marks omitted). Courts must defer to the FEC unless the agency fails to meet the "minimal burden of showing a coherent and reasonable explanation [for] its exercise of discretion." *Carter/Mondale Presidential Comm.*, 775 F.2d at 1185 (internal quotation marks omitted); *see Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (Courts will not overturn agency decisions absent evidence that the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

Here, the controlling Commissioners plainly met the standard for deference. They considered the record in this matter carefully, resulting in a ten-page, single-spaced SOR with 65 supporting footnotes, many citing apposite Commission enforcement proceedings and advisory opinions, alongside numerous judicial precedents. (AR0277-86.) The SOR addressed each of the central contentions made in plaintiffs' Complaint, and plaintiffs do not suggest otherwise. Plaintiffs do contend (Motion at 41) that 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." But the Commissioners' SOR did discuss the relevant record evidence, and the SOR cited at least seven previous Commission matters that informed the Commissioners' decision-making and spoke to the precise issue of coordination. (AR0285-86.) In addition, plaintiffs' focus on the coordination issue here omits the Commissioners'

independent bases for declining to find "reason to believe," namely those based on the determination that TTV's ballot integrity efforts were not undertaken "for the purpose of influencing a federal election[.]" (AR0281-85; *see supra* pp. 26-35.) Under these circumstances there can hardly be doubt that the Commission has met the "minimal burden of showing a coherent and reasonable explanation [for] its exercise of discretion." *Carter/Mondale Presidential Comm.*, 775 F.2d at 1185 (internal citation omitted).

Finally, plaintiffs argue that the controlling Commissioners set an impermissibly high bar for determining whether there is "reason to believe" a violation of FECA occurred, but this claim too is mistaken. (Motion at 41-42.) While the evidentiary standard at issue is of course relevant to the Court's determination as to the reasonableness of the dismissal here, plaintiffs greatly understate the extent to which the controlling Commissioners did carefully evaluate the record in simply reaching a different conclusion from the one plaintiffs would prefer. Nor do any of plaintiffs' arguments for a lower standard of proof alter the fundamental deference owed to agency decision-making in this context. *See supra* pp. 19-24; *Orloski*, 795 F.2d at 167 (applying an "extremely deferential standard" to the FEC's determination that a complaint failed to establish "reason to believe" (internal quotation marks omitted)).

Plaintiffs' arguments are akin to the unsuccessful claims of the plaintiff in *Nader v. Federal Election Commission*, where a former presidential candidate sought review of the FEC's dismissal of his administrative complaint alleging a conspiracy to deny him ballot access in numerous states. 854 F. Supp. 2d 30, 32 (D.D.C. 2012). After entry of summary judgment in the FEC's favor, Nader moved to alter or amend the judgment, based in part on his contention that the Court had placed an "improper evidentiary burden" on him by requiring "actual proof" of FECA violations rather than the less stringent "reason to believe" standard of what is now 52

U.S.C. § 30109(a)(2). *Id.* at 34. Nader appeared to allege that the court had applied the wrong evidentiary burden without explicitly saying it was doing so, a claim that is similar to the one plaintiffs make here. *Compare id.* ("perhaps what Nader is saying is that the Court applied the wrong standard *sub silentio*") *with* Motion at 42 ("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."). The *Nader* court dismissed that plaintiff's contentions as "frivolous[,]" noting that they were refuted by the plain language of the court's earlier opinion, which could and should be taken at face value. 854 F. Supp. 2d at 35-36. After walking through the plaintiff's allegations regarding the FEC's and the court's treatment of the evidence in painstaking detail (*see id*. at 36-38), the court ultimately concluded that "Nader's identification of mere disagreements he has with the Court's Opinion is insufficient to warrant relief[.]" *Id.* at 38. Likewise here, plaintiffs' disagreements with the controlling Commissioners' conclusions are no basis for overturning reasoned decision-making.

In sum, the controlling Commissioners issued a lengthy, detailed SOR explaining their reasoning. They addressed the facts in the record and cited numerous applicable precedents in support of their conclusions. The usual deference to that decision is fully warranted, and the dismissal of plaintiffs' administrative complaint was reasonable.

CONCLUSION

For the foregoing reasons, plaintiffs' Motion for Summary Judgment should be denied, and the Commission's Motion for Summary Judgment should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2023, I served the foregoing pursuant to Fed. R. Civ. P. 5(b)(2)(E) on counsel of record, as a registered ECF user, through the Court's ECF system.

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