IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant, and HILLARY FOR AMERICA, *et al.*, Defendant-Intervenors.	Civil Action No. 19-2336 (JEB)

DEFENDANT-INTERVENORS' RESPONSE IN OPPOSITION TO PLAINTIFFS' SECOND CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF DEFENDANT-INTERVENORS' SECOND MOTION FOR SUMMARY JUDGMENT

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AR	Administrative Record
CLC	Campaign Legal Center and Catherine Hinckley Kelly
CTR	Correct the Record
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
HFA	Hillary for America
MSJ	Motion for Summary Judgment
MUR	Matter Under Review
SOR	Statement of Reasons

Campaign Legal Center, a campaign finance reform interest group, does not support the Unpaid Internet Communication Exemption to the coordination rule (the "Internet Exemption"), because it views it as unmoored from the text of the Federal Election Campaign Act of 1971, as amended, ("FECA"), and it seeks to use this case as a backdoor means of challenging it. Campaign Legal Center's and Catherine Hinkley Kelly's (together, "CLC") Second Motion for Summary Judgment lays bare CLC's true objective with respect to this litigation and the underlying enforcement action when it argues that "[t]here is no textual basis for the internet exemption in the Act," and the Internet Exemption is "closer to an act of administrative grace." Pls.' 2d Cross Mot. for Summ. J. at 13, 17-25, ECF No. 62. But the Internet Exemption was created in response to *Shays v. FEC*, in which the D.C. Circuit explicitly recognized that "all Internet communications do not fall within" the meaning of "public communication." *Shays v. FEC*, 337 F. Supp. 2d 28, 67 (D.D.C. 2004) ("*Shays I*"), *aff'd sub nom*. *Shays v. Fed. Election Comm'n*, 414 F.3d 76 (D.C. Cir. 2005) ("*Shays II*"). While the *Shays* court did not delineate which Internet communications should be regulated and which should not, it instructed the FEC to create a new regulation that would do so. *Shays I,* 337 F. Supp. 2d at 67, 70; *see also id.* at 67, 70. In accordance with the D.C. Circuit's direction and the FEC's broad authority to formulate policy with respect to the administration of FECA, the FEC concluded in 2006 that *unpaid* Internet communications would be exempt, and it rejected CLC's view that input costs for such communications should be subject to regulation. CLC may not agree with the Internet Exemption, but it is the FEC's job to promulgate campaign finance regulations, not CLC's.

The controlling Commissioners' Statement of Reasons ("SOR") in the underlying administrative action is consistent with sixteen years' worth of rules, regulations, enforcement decisions, and advisory opinions applying FECA and the 2006 rulemaking codified at 11 C.F.R. §

100.26. Tellingly, CLC fails to point to a single source of law in support of its contrary and preferred reading of FECA and the Internet exemption. It is clear that CLC would prefer if there was a distinction in the law that required "indirect" input costs to be treated differently from "direct" input costs, but there is no support for that theory in FECA, FEC regulations, or any other FEC legal authority. It simply does not exist. And neither CLC—nor this Court—is empowered to substitute its judgment for FEC's reasonable policy choices.

Defendant-Intervenors do not "demand" that CLC should be required to substantiate its concern with evidence of abuse of the Internet exemption post-dating the dismissal of CLC's administrative complaint. *See* Pls.' 2d Cross Mot. for Summ. J. at 18, ECF No. 62. Defendant-Intervenors merely point out that if the Commission's SOR created the significant loophole that CLC says it did, and if it were such a departure from FECA and prior enforcement decisions, one would expect to have seen at least some indication that a political actor has taken advantage of it. There is no indication that this has happened. The SOR did not create the loophole that CLC imagines it did. To the contrary, the decision to dismiss the administrative complaint was based on the plain language of the regulations and consistent with prior enforcement decisions.

For the reasons discussed herein and in Defendant-Intervenors' prior summary judgment briefing, this Court should deny CLC's motion for summary judgment and grant summary judgment in favor of Defendant-Intervenors.

ARGUMENT

I. The controlling Commissioners' dismissal of CLC's claims regarding the input costs of unpaid Internet communications is not "contrary to law."

The controlling Commissioners' dismissal of CLC's claims regarding the input costs incurred in creating and disseminating unpaid Internet communications is not "contrary to law." The SOR reflects the rules, regulations, and policy positions the Commission has consistently

maintained since adopting the Internet regulations sixteen years ago. CLC has failed to offer a single controlling enforcement decision or advisory opinion that has ever adopted its preferred interpretation of the scope of 11 C.F.R. § 100.26's unpaid Internet communication exemption. For that reason and the other reasons discussed herein, this Court should find that, at minimum, the controlling Commissioners' dismissal of CLC's claims was "sufficiently reasonable" to withstand this Court's deferential review.

a. The controlling Commissioners' construction of the unpaid Internet communications exemption was, at minimum, "sufficiently reasonable."

As this Court has recognized, an action alleging that the Commission's dismissal of an administrative complaint was "contrary to law" under 52 U.S.C. § 30109(a)(8)(c) is *not* an opportunity for the judiciary to "substitute its judgment for that of the agency." *CLC v. FEC*, 466 F. Supp. 3d 141, 156 (D.D.C. June 4, 2020) (quoting *Airmotive Eng'g Corp. v. FAA*, 882 F.3d 1157, 1159 (D.C. Cir. 2018)). The question the Court must decide is simply whether "the Commission's construction was 'sufficiently reasonable,'" *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981) (quoting *Train v. Nat. Res. Def. Council*, 421 U.S. 60, 75 (1975)). That is because Congress vested the Commission with "extensive rulemaking and adjudicative powers" and the authority to "formulate general policy with respect to the administration of [the] Act"; the Commission is thus afforded a presumption of deference. *Democratic Senatorial Campaign Comm.*, 454 U.S. at 39 (quoting *Buckley v. Valeo*, 424 U.S. 1, 110 (1979)).

Despite CLC's disagreement with the controlling Commissioners' SOR (and, more aptly, the FEC's longstanding policy, precent, regulations, and consistent interpretation of 11 C.F.R. § 100.26), what matters here is that the SOR is undeniably faithful to the FEC's longstanding policy, precedent, and regulations regarding the 2006 unpaid Internet communication exception to the

coordination rule. *See infra* at Section I(b)-(c). That provides ample evidence for this Court to find that the controlling Commissioners' decision to dismiss was "sufficiently reasonable."

b. CLC's argument that FECA itself is unambiguous as to Congress's intent to regulate the input costs of unpaid Internet communications is unfounded.

CLC misses the point when it contends that FECA's mandate to regulate expenditures made in cooperation, consultation, or concert with, or at the request or suggestion of a candidate as in-kind contributions to that candidate is "unambiguous." Pls.' 2d Cross Mot. for Summ. J. at 12, ECF No. 62. Defendant-Intervenors do not dispute the longstanding general principle that "coordinated expenditures" constitute "contributions" under FECA. But what constitutes a "coordinated expenditure" under the law—which is all that is relevant in this case—is far from clear. Indeed, that issue has been the subject of countless FEC enforcement actions and litigation over the past fifty years. *See*, *e.g.*, *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986) (challenging review of FEC determination that corporate contributions to a picnic sponsored by a congressman were not prohibited contributions to a campaign); MUR 6849 (Kansans for Responsible Government) (Dec. 25, 2015) (reviewing allegations of coordination with regard to the alleged republication of campaign material); MUR 6955 (Kasich For America) (addressing contentions that independent expenditures organization's advertisements constituted coordinated communications); MUR 6044 (Musgrove for U.S. Senate) (addressing whether a communication "republi[shed] campaign materials" and therefore must be considered an in-kind contribution to the campaign); MUR 6502 (Nelson) (addressing whether a communication satisfied the content requirements under 11 C.F.R. § 109.37(a)(2) and was therefore a coordinated communication); MUR 6037 (Merkley) (considering whether ads in which the candidate appeared were coordinated communications that therefore resulted in excessive in-kind contributions).

Here, while FECA says that "coordinated expenditures" are "contributions" as a general matter, it does not define with any concrete, applicable standards when a *communication*, much less a communication made online, is "coordinated" as a matter of law. It is therefore unsurprising that Defendant-Intervenors do not repeatedly cite FECA in their briefing; FECA is silent on this question in the context of unpaid Internet communications. Pls.' 2d Cross Mot. for Summ. J. at 14, ECF No. 62 (criticizing that Defendant-Intervenors "make nary a mention of [FECA]"). The controlling Commissioners thus relied on the text of FEC regulations and prior FEC decisions to resolve CLC's administrative complaint.

Under Commission regulations, the costs of a communication result in an in-kind contribution only if the communication is a "coordinated communication." 11 C.F.R. § 109.21(b)(1). To be a coordinated communication, a communication must be either (1) an "electioneering communication" or (2) a "public communication." *Id*. § 109.21(c). "Electioneering communication[s]" include only certain "broadcast, cable, or satellite communication[s]" and do *not* include any communications made over the Internet. *Id.* § 100.29; *see also* 52 U.S.C. § 30104(f)(3). "Public communications" explicitly exclude "communications over the Internet, except for communications placed for a fee on another person's Web site." 11 C.F.R. § 100.26. Put another way, a significant percentage of political communications made over the Internet are unpaid and thus can never amount to an in-kind contribution, because they are not subject to the coordination rule. *See id.* § 100.29; *id.* § 100.26. The *only* Internet communications that are subject to the coordination rule are those that satisfy both of the following criteria: (1) they are placed on a third party's website; and (2) the third party requires a fee for the placement of the communication. All other communications made over the Internet are not "public communications" and therefore not subject to the coordination rule. *See id.* §§ 100.26, 100.29.

That is by design. Prior to the 2006 rulemaking, the definition of "public communication" did not include any Internet communications at all. *Shays I*, 337 F. Supp. 2d at 65 (citing 11 C.F.R. §§ 100.26 (2003)); *see also* Fed. Election Comm'n, Coordinated and Independent Expenditures, 68 Fed. Reg. 421-01 (Jan. 3, 2003) (explaining that, at that time, "[a]lthough the term 'public communication' cover[ed] a broad range of communications, it d[id] not cover some forms of communications, such as those transmitted using the Internet and electronic mail."). In *Shays I*, the Commission was ordered to open a rulemaking process to decide when political communications posted on the Internet should be treated as "public communications" that are subject to the coordination rules. *See* Fed. Election Comm'n, Notice of Proposed Rulemaking: Internet Communications, 70 Fed. Reg. 16967-02 (Apr. 4, 2005). The FEC published a final rule that provided a blanket exemption for *unpaid* Internet communications, announcing that it "approved regulations that *narrowly* expand the definition of 'public communication' to include *certain types* of paid Internet content." Fed. Election Comm'n, *Internet final rules* (May 1, 2006), https://www.fec.gov/updates/internet-final-rules/ (emphasis added). The Commission's stated intention behind the new regulations was to "continue to exempt most Internet communications" except for the narrow category of communications that are "placed on another person's web site for a fee." *Id.* Thus, under the current and operative rules, those Internet communications that are subject to the coordination rule are the *exception* to the general rule that Internet communications are generally not subject to the coordination regulations. No party disputes that the communications at issue in this case were related to influencing an election; that is not the relevant inquiry. Pls.' 2d Cross Mot. for Summ. J. at 15, ECF No. 62. The question is whether it was "sufficiently reasonable" for the controlling Commissioners to find that CTR's communications and the relevant input costs fell within the Internet Exemption created by the FEC following the

Shays decision. As Defendant-Intervenors have argued, the controlling Commissioners' decision to dismiss met that standard.

c. Commission enforcement decisions and advisory opinions consistently construe the Internet Exemption to include input costs, and CLC offers no contrary authority.

CLC offers no meaningful rebuttal to the numerous Commission advisory opinions and enforcement decisions that treat the costs associated with unpaid Internet communications as exempt from the coordination regulations. CLC largely argues that several (though not all) of the controlling statements of reasons on which Defendant-Intervenors rely are not precedential, and thus should not be given significant weight. Pls.' 2d Cross Mot. for Summ. J. at 17, ECF No. 62 (citing *Common Cause v. FEC*, 842 F.2d 436, 449 n.32 (D.C. Cir. 1988)). But the Statements of Reasons cited by Defendant-Intervenors are all "controlling" decisions and, in practice, articulate the prevailing opinion of the FEC. *See, e.g.*, *Common Cause*, 842 F.2d at 449 (explaining that despite being binding on future cases, controlling decisions inform the public on what is "practically necessary" to convince or satisfy the Commission). The fact that the decisions are not "precedential" does not undermine the fact that the FEC has issued consistent decisions on this issue since 2006. Courts have recognized that Statements of Reason give notice to the regulated community about how the Commission will rule in similar future matters. *See id.* at 450 (stating that Statements of Reason "enhance the predictability of Commission decisions"). For that reason, had the controlling Commissioners here departed from the FEC's longstanding position on input costs associated with unpaid Internet communications, they would have had to grapple with serious due process concerns. *See infra* at Section II.

For its part, CLC is unable to point to a single enforcement decision—controlling or unanimous—that tracks its preferred interpretation of 11 C.F.R. § 100.26's exemption for unpaid Internet communications. Instead, the best it can do is to point to a 2014 General Counsel report

in MUR 6729 that opined that there was some *ambiguity* over whether 11 C.F.R. § 100.26's exemption for unpaid Internet communications "also exempts production costs that are incurred unrelated to the advertisement's dissemination over the internet" and characterized the exemption's scope as "indeterminate." Pls.' Opp'n to Ints.' Cross Mot. for Summ. J. & Reply in Supp. of Mot. for Summ. J. at 23, ECF No. 42 (quoting First Gen. Counsel's Rpt. ("FGCR") at 5-6, MUR 6729 (Checks and Balances) (Aug. 6, 2014)); Pls.' 2d Cross Mot. for Summ. J. at 15-16, ECF No. 62 (quoting First Gen. Counsel's Rpt. at 5-6, MUR 6729 (Checks and Balances) (Aug. 6, 2014), https://www.fec.gov/files/legal/murs/6729/14044363781.pdf). This is telling. Beyond an eight-year-old non-binding recommendation from the Commission's General Counsel—which also resulted in a deadlocked decision and therefore a dismissal of the complaint—CLC lacks even a scintilla of support for its argument that the controlling SOR in this case is inconsistent with the Commission's longstanding policy, 11 C.F.R. § 100.26, or the Commission's numerous enforcement decisions that Defendant-Intervenors have cited in their briefing and relied on in good faith.

The Commission's enforcement decisions and advisory opinions have consistently concluded that "all associated production costs" of unpaid Internet communications, including "the cost of staff time, office space, equipment usage, etc.," fall squarely within the exemption. SOR of Comm'rs Hunter, Goodman & Peterson at 5 n.21, MUR 7023 (Kinzler for Congress) (Jan. 23, 2018)); SOR of Comm'rs Goodman, Hunter & Petersen at 4, MUR 6729 (Checks and Balances for Economic Growth) (Oct. 23, 2014)). This is because the unpaid Internet communication "exemption would be meaningless if [the Commission] were to scrutinize and regulate the component costs of an exempt communication or otherwise limit the exemption to only the

negligible costs of a communication's Internet distribution." SOR of Comm'rs Hunter, Goodman & Petersen at 5, n.21, MUR 7023 (Kinzler for Congress) (Jan. 23, 2018).

For example, in MUR 6657 (Akin for Senate), which CLC characterizes as "most on point," the Commission unanimously acknowledged that the $118,160.72 in expenditures for "Email List Rental" or "Online Processing" of email communications were not public communications and were therefore exempt from the coordination rule under 11 C.F.R. § 100.26. *See* Factual & Legal Analysis ("F&LA") at 2, 5-6, MUR 6657 (Akin for Senate) (Sept. 17, 2013). CLC attempts to distinguish MUR 6657 (Akin for Senate), but its assertion that the decision "is not remotely analogous" is wholly misplaced. *See* Pls.' 2d Cross Mot. for Summ. J. at 17, ECF No. 62. There, the Commission considered whether over one hundred thousand dollars in input costs transformed an otherwise unpaid Internet communication into a paid Internet communication that would be subject to the coordination rule. *See* F&LA at 2, 5-6, MUR 6657 (Akin for Senate) (Sept. 17, 2013). That is precisely the question that the controlling Commissioners faced in the underlying enforcement matter in this case. In MUR 6657, the Commission unanimously found that the "significant related expenses" incurred in making the communication did not transform the communication from an unpaid Internet communication. *Id.* As a result, the $118,160.72 in input costs incurred in generating and disseminating the communications there were necessarily similarly exempt from the coordination rule. The Commission did not base its decision on the fact that the costs were for "Email List Rental" or "Online Processing," which CLC apparently puts into the category of "direct" input costs that should fit within the Internet Exemption; that is a distinction that CLC alone has drawn. CLC's attempt to distinguish Akin for Senate from this case is thus misplaced.

In enforcement matter after enforcement matter, various blocs of controlling Commissioners have dismissed complaints involving similar activity. In MUR 6477 (Turn Right USA), the Commission unanimously concluded that a super PAC's spending of close to $6,000 in input costs to produce a YouTube video attacking a candidate that was only distributed through unpaid online communications was therefore exempt from the coordination rule under 11 C.F.R. § 100.26. *See* F&LA at 3, 7–8, MUR 6477 (Turn Right USA) (July 17, 2012). In MURs 6722/6723 (House Majority PAC), the controlling Commissioners found, regarding both "the production and dissemination" of Internet videos posted to a super PAC's website and on YouTube, that none of the production or dissemination costs incurred in generating the unpaid Internet communications were subject to the coordination rule. *See* F&LA at 3-4, MURs 6722/6723 (House Majority PAC) (Mar. 6, 2014). In MUR 6522 (Lisa Wilson-Foley for Congress), the controlling Commissioners found that a corporation's featuring of a candidate in its social media and website postings did not constitute coordinated communications and was therefore not a contribution, without any separate reference to the staff time involved in creating the posts. *See* F&LA at 6, MUR 6522 (Lisa Wilson-Foley for Congress) (July 3, 2013). In MUR 6414 (Carnahan in Congress Committee), the controlling Commissioners found that individuals—who were working at least for some time with a candidate—did not violate the coordination rule when they paid a vendor to research the candidate's opponent and then used their own resources to design a website featuring information and a video about the opponent and to purchase a domain name and web hosting. *See* F&LA at 6–7, 11–12, MUR 6414 (Carnahan in Congress Committee) (July 17, 2012). The decision to dismiss in this case is consistent with each of these controlling decisions.

II. The SOR properly considered the constitutional implications of CLC's administrative complaint.

Defendant-Intervenors do not dispute that the FEC's decision must be upheld on the basis articulated by the agency itself. *See Motor Vehicles Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). However, CLC misrepresents what the controlling Commissioners actually considered in their SOR. For example, CLC is wrong when it says that the controlling Commissioners "never adopted or even indicated that they considered" the constitutional dimensions of CLC's complaint. Pls.' 2d Cross Mot. for Summ. J. at 18, ECF No. 62. The controlling Commissioners' SOR explicitly and repeatedly invokes the constitutional concerns inherent in CLC's complaint and claims, and this Court can properly consider those concerns as part of the controlling Commissioners' decision-making. *See e.g.*, SOR at 1 ("These matters raise questions of statutory and regulatory interpretation, fair notice, and First Amendment rights."); *id.* at 13-14 (finding that Defendant-Intervenors, in fair and reasonable reliance on "the policy determinations that the Commission made in the 2006 Internet Communication rulemaking and the Commission's subsequent affirmations of those principles in the enforcement and advisory opinion contexts, . . . properly understood Correct the Record's internet communications posted without charge on its own internet platforms, and associated expenses, as not providing in-kind contributions to Hillary for America."); *id.* at 14, n.66 (explaining that good faith reliance on a rule or regulation cannot be subject to sanction under FECA) (quoting 52 U.S.C. § 30111(e)); *id.* (collecting cases for the proposition that good faith reliance on a rule or regulation is not actionable under FECA because a "retroactive policy reversal[]" would violate the right to due process).

The idea that the First Amendment is not at issue in this case because Defendant-Intervenors do not contend that the Commission has extended the Act beyond election-related advocacy or impermissibly regulated independent speech misconstrues the concerns considered

and expressed by the controlling Commissioners when they decided to dismiss. *See* Pls.' 2d Cross Mot. for Summ. J. at 13, 19-20, ECF No. 62. There are significant due process issues that would arise if the Commission had reversed course and retroactively applied CLC's preferred and novel interpretation of 11 C.F.R. § 100.26 to conduct undertaken by Defendant-Intervenors in 2016. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 254 (2012) (finding a due process violation where "[t]he Commission's lack of notice . . . [as to how the law would be] interpreted and enforced by the agency 'fail[ed] to provide a person of ordinary intelligence fair notice of what is prohibited.'") (quoting *U.S. v. Williams*, 553 U.S. 285, 304 (2008)). But even setting those concerns aside, CLC's preferred interpretation of 11 C.F.R. § 100.26, which would apparently distinguish between "direct" input costs, which would be exempt, and more attenuated input costs, which would not be exempt, would be unconstitutionally vague. Pls.' Opp'n to Ints.' Am. Mot. to Dismiss at 40, ECF No. 27. If CLC's position is that the Internet Exemption is a product of "administrative grace," then improperly creating a rule via an enforcement action that would result in arbitrary line-drawing between "direct" and "indirect" costs of unpaid Internet communications that has no support in FECA, FEC regulations, or any other FEC authority would only exacerbate the problem CLC claims it wants to fix.

As a practical matter, if the FEC were required to embrace an interpretation of its regulations where the "direct" input costs of an online communication are regulated and more "attenuated" production costs are not, it would be exceedingly difficult for the regulated community to predict what activity is allowed and to structure its expenditure so that they comply with the law. It would fail "[to] provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal." *Buckley*, 424 U.S. at 77. Any group seeking to add content to its website or create a Facebook post after speaking with a candidate would have to decide whether

it wants to risk potentially making an excessive contribution or filing a false FEC report, or if it would rather not speak at all and remain safe. That choice is untenable under the Constitution. *See Orloski*, 795 F.2d at 167 ("In this politically-charged area, bright-line tests are virtually mandated . . ."). Unlike the rule that CLC argues for, the Commission's current bright-line rule that exempts all input costs associated with the production or distribution of free online communications from treatment as contributions achieves the delicate balance between enforcing campaign finance laws and not regulating more speech than is necessary to achieve the anti-corruption purpose of FECA. Def.-Ints.' 2d Mot. for Summ. J. at 13, ECF No. 61-1.

III. The dismissal of CLC's claims regarding CTR's non-communication expenditures was not arbitrary, capricious, or an abuse of discretion.

The controlling Commissioners rightly concluded that CLC's only basis for asserting that CTR's expenditures that were not related to unpaid Internet communications—such as polling and surrogacy training—were coordinated was that CTR's unpaid Internet communications expenditures were admittedly (and permissibly) coordinated. *See* AR396–97. This speculative assumption was never enough to satisfy the reason to believe standard.

A complaint against a respondent must include a "clear and concise recitation of the facts which describe a violation of a statute or regulation over which the Commission has jurisdiction." 11 C.F.R. § 111.4(d)(3). In addition, the Commission may only find "reason to believe" and commence an investigation when a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the Act, or Commission regulations. MUR 4960 (Clinton for U.S. Exploratory Committee), SOR of Comm'rs David M. Mason, Karl J. Sandstrom, Bradley A. Smith & Scott E. Thomas at 1 (Dec. 21, 2000). In determining whether it has reason to believe, "[u]nwarranted legal conclusions from asserted facts" and "mere speculation" will not be accepted as true. *Id.* at 2; *see also* MURs 6789/6852 (Special Operations for America, et al.), SOR of Vice

Chairman Matthew S. Petersen and Comm'r Caroline C. Hunter at 4 (May 28, 2019) ("We do not authorize Commission investigations based on mere speculation").

Here, Defendant-Intervenors carefully explained before the Commission how each of Defendant-Intervenors' non-Internet activities in question were lawful. Def.-Ints.' 2d Mot. for Summ. J. at 17-18, ECF No. 61-1. Specifically, Defendant-Intervenors demonstrated to the Commission that CTR's public statements about coordination were limited to coordination around *exempt* unpaid Internet communications and that any coordinated expenditures not related to unpaid Internet communications were paid for by HFA for the express purpose of avoiding an in-kind contribution. *See* AR062-68; AR079; AR394; *see also* Def.-Ints.' 2d Mot. for Summ. J. at 17-18, ECF No. 61-1. The controlling Commissioners accepted these explanations and proofs over CLC's rank speculation. *See* MUR 4960 (Clinton for U.S. Exploratory Committee), SOR of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas at 2 (Dec. 21, 2000) (explaining that "mere speculation" cannot give rise to sufficient "reason to believe" the allegations alleged); *see also* AR394 ("Indeed, [CLC's] complaint . . . seems to concede the speculative nature of its coordination allegations, asserting them in the conditional tense: '*If* any of these expenditures *were* coordinated with the Clinton campaign, they *would* constitute in-in contributions to the campaign. Compensation paid by [Correct the Record] to its staff or contractors to conduct [these activities] *would* constitute in-kind contributions to Hillary for America *if* the services were conducted at the request or suggestion of, or otherwise in coordination with, Clinton or her campaign staff.'") (alterations and emphases in original). Accordingly, the controlling Commissioners' finding that CLC's pleading failed to satisfy the reason-to-believe standard was therefore not arbitrary, capricious, or an abuse of discretion.

IV. CLC's injuries are not redressable.

Even if this Court finds that the controlling Commissioners acted contrary to law when they dismissed CLC's administrative complaint and directs the FEC to act within 30 days—and it should not for the reasons discussed herein—the FEC would likely dismiss this matter once again, this time on statute of limitations grounds. And even if the allegations were not time-barred, it would now be impossible for Defendant-Intervenors to comply with an order requiring them to amend their 2016 and 2017 reports to disclose the detailed and piecemeal information that CLC apparently seeks.

CLC argues that because the Circuit Court recently held that it had alleged a cognizable injury-in-fact, this means that it has satisfied all other requirements for standing, including, specifically, redressability. Not so. The Circuit Court decision focused its analysis on finding that CLC had established an informational injury. *Campaign Legal Ctr. v. FEC*, 31 F.4th 781, 790-93 (D.C. Cir. 2022). It then cited *Akins* for the proposition that causation and redressability would likely be similarly satisfied. *Id.* at 793 (citing *FEC v. Akins*, 524 U.S. 11, 25 (1998)). However, the Circuit Court did not address redressability in the context of the lapsed statute of limitations, because that was not yet at issue. The five-year statute of limitations, which began to run on a FECA claim on "the date when the claim first accrued," expired on or around February 1, 2022, five years after the 2016 year-end report was due. 28 U.S.C. § 2462; 52 U.S.C. § 30104(a)(3)-(4); *FEC v. Williams*, 104 F.3d 237, 239-40 (9th Cir. 1996).

Separately, CLC argues that the redressability prong is otherwise met here, because the Commission *might* use its discretionary powers to consider the complaint *despite* that the five-year statute of limitations has run. Pls.' 2d Cross Mot. for Summ. J. at 30-31, ECF No. 62 (citing *Akins*, 524 U.S. at 25; *NTCH, Inc. v. FCC*, 841 F.3d 497, 506 (D.C. Cir. 2016)). However, neither *Akins* nor *NTCH* involved instances in which the statute of limitations for prosecuting a violation of the

Act had run. In *Akins*, the Commission argued that even if the petitioner was right on the law, the Commission would still have exercised its enforcement discretion not to require the American Israel Public Affairs Committee to produce further information as an act of prosecutorial discretion. *Akins*, 524 U.S. at 25. The Supreme Court held that just because the decision of whether to prosecute would be committed to agency discretion on remand did not mean that the redressability prong of Article III standing was not met. *Id.* Similarly, in *NTCH*, which relies on *Akins* for this point, the District of Columbia Circuit held that the existence of discretion alone will not thwart satisfaction of the redressability prong. *NTCH*, 841 F.3d at 506 (citing *Akins*, 524 U.S. at 25).

In this case, the Commission does not appear to have any discretion (or legal authority) to enforce CLC's administrative complaint now that the five-year statute of limitations has run. Indeed, several Commissioners have recently stated that "we cannot lawfully act on alleged violations that are more than five years old," and when the statute of limitations has expired "we lack[ ] discretion, prosecutorial or otherwise, as to whether to proceed." SOR of Comm'rs Dickerson & Trainor, MUR 6992 (Trump) (Aug. 31, 2021). That applies to complaints seeking both monetary and equitable relief. *See also* SOR of Comm'rs Dickerson, Cooksey & Trainor, MUR 7859 (Citizens for a Working America) (Dec. 17, 2021) (current controlling bloc of Commissioners concluding that the five-year statute of limitations prevents the FEC from imposing fines and bars equitable relief); SOR of Comm'rs Dickerson, Cooksey & Trainor, MUR 7181 (Independent Women's Voice) (Mar. 18, 2021) (remarking on the five-year statute of limitations and the policy reasons for it).

Separately, CLC argues that it would like to eventually bring a citizen action against Defendant-Intervenors should this Court declare the dismissal contrary to law *and* the Commission

fails to conform after such an order, and that it is unclear whether the statute of limitations applies to citizen actions at all. Pls.' 2d Cross Mot. for Summ. J. at 35, ECF No. 62. First, a citizen action against Defendant-Intervenors seeking a retroactive application of a rule that does not exist would fail for all the same reasons that this action must fail. *See supra* at Sections I-III. Second, because this argument for "redress depends on the cooperation of a third party, it becomes the burden of the [plaintiff] to adduce facts showing that" the actions of the third party who has discretion "will be made in such manner as to . . . permit redressability of injury." *U.S. Ecology, Inc. v. U.S. Dep't of Interior*, 231 F.3d 20, 24-25 (D.C. Cir. 2000) (quotation marks omitted). CLC has not and cannot show that the Commission would not act if this Court entered an order requiring it to conform to its ruling.

Finally, CLC's only attempt to rebut Defendant-Intervenors' assertion of impossibility is to argue that CLC finds the claim "dubious." But despite CLC's apparent doubts, as Defendant-Intervenors have explained, "[a]t this point—almost seven years since much of the activity in question occurred—HFA and CTR are defunct, memories have faded, and it would be impossible to obtain the granular information necessary to file accurate amended reports disclosing the information Plaintiffs seek." Def.-Ints.' 2d Mot. for Summ. J. at 26, ECF No. 61-1. CTR would be flatly incapable of accurately disclosing—as CLC demands—what portion of each monthly or biweekly salary payment, for example, represented (1) compensation for activities conducted on behalf of CTR or that were properly exempt from treatment as a contribution according to CLC's preferred rule, and (2) what portion represented compensation for non-exempt activities undertaken to benefit HFA. *See* Def.-Ints.' 2d Mot. for Summ. J. at 26, ECF No. 61-1. This is especially true because there is no test for determining whether a particular task is sufficiently

directly connected to the production of an unpaid Internet communication such that it would fall within the exemption. *See supra* at Section II.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Defendant-Intervenors' prior summary judgment briefing, the Court should grant Defendant-Intervenors' Second Motion for Summary Judgment and deny CLC's Second Cross-Motion for Summary Judgment.

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Respectfully submitted,

By: /s/ *Aria C. Branch*

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2022, 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.

By: /s/ *Aria C. Branch*

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