UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant, CROSSROADS GRASSROOTS POLICY STRATEGIES, Intervenor-Defendant.	Civil Action No. 1:16-cv-00259-BAH

CROSSROADS GRASSROOTS POLICY STRATEGIES' REPLY MEMORANDUM IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

LIST OF ABBREVIATIONS

APA – Administrative Procedure Act (5 U.S.C. § 500 *et seq*.)
CGPS – Crossroads Grassroots Policy Strategies
CREW – Citizens for Responsibility and Ethics in Washington
EC – electioneering communication
FEC – Federal Election Commission
FECA – Federal Election Campaign Act of 1971, as amended (52 U.S.C. § 30101 *et seq.*)
IE – independent expenditure
MUR – FEC matter under review
PAC – political committee

INTRODUCTION

Crossroads Grassroots Policy Strategies ("CGPS"), which takes seriously its obligation to carefully comply with applicable campaign finance laws, relied on a longstanding regulation promulgated by the Federal Election Commission ("FEC") in 1980, 11 C.F.R. § 109.10(e)(1)(vi), to lawfully report its independent expenditures ("IEs") in 2012. CGPS so clearly complied with the regulation that the controlling commissioners, at the FEC career staff's recommendation, dismissed the administrative complaint in this matter filed by Citizens for Responsibility and Ethics in Washington ("CREW"). CREW hardly even contests this point. Instead, as its reply brief makes clear, CREW's principal goal is to bootstrap a challenge to the validity of the underlying regulation to its complaint seeking judicial review of the FEC's dismissal of this enforcement matter. CREW's challenge must be rejected because it would violate CGPS's statutory and constitutional right to rely on a long-accepted regulation; moreover, it fails to exhaust administrative remedies, it comes 30 years too late, and it essentially asks this Court to subvert congressional intent and the FEC's considered judgment on this regulatory issue.

In all of its briefing, CREW fails to identify a single contribution that CGPS omitted from its reports in violation of the controlling FEC regulation. CREW weakly speculates that perhaps some such funds "may" have required reporting. CREW Opp. Br. (Doc 33) at 45. But the FEC's longstanding enforcement policy, which is backed by judicial precedent and was applied consistently here, is to dismiss unsubstantiated complaints based on mere speculation. CREW entirely fails to show that the FEC's dismissal here was "contrary to law" – the demanding standard CREW must satisfy to overturn the FEC's action.

Beyond this basic factual point, CREW does not deny that the Federal Election Campaign Act of 1971, as amended ("FECA"), expressly provides a safe harbor for those who comply in

good faith with applicable FEC regulations. CREW asserts that CGPS's reliance was not in good faith because the regulation supposedly fell short of the statute's requirements. However, the FECA explicitly made the regulation – not the statute – the measure of good faith. And where a party has dutifully complied with a regulation of more than 30 years' standing, as CGPS has done here, objective good faith exists as a matter of law.

CREW's own reply brief makes clear that the asserted reporting violation by CGPS is merely a pretext for CREW's real objective: to obtain facial judicial review of the underlying FEC regulation. CREW's attempt to misuse the FECA's enforcement process for this purpose fails even the most basic scrutiny. First, CREW failed to exhaust its administrative remedies by not alleging the regulation's invalidity in its administrative complaint, and CREW also failed to participate altogether in an earlier petition for rulemaking concerning the regulation, which is the primary avenue for such challenges under the Administrative Procedure Act ("APA"). Second, CREW's attacks on the regulation are time-barred. CREW's procedural objection to the "[in]adequate" contemporaneous explanation for the regulation, CREW Opp. Br. (Doc 33) at 5, is categorically prohibited outside the six-year statute of limitations for challenges to FEC regulations. Moreover, CREW asks this Court not only to strike the regulation, but also for the extraordinary remedy of retroactively applying CREW's reading of the law against CGPS for its 2012 activity – a precedent that would also profoundly affect many other organizations' past activities. Such an unprecedented retroactive remedy is statutorily and constitutionally barred in light of CGPS's reasonable reliance on the regulation. Relatedly, because CREW's requested remedy is unavailable, CREW lacks standing to challenge the regulation outside of the ordinary six-year statute of limitations, even if the regulation is considered to have been "applied" to CREW.

Even assuming that the merits of CREW's challenge to the regulation are properly before this Court – and they are not – CREW cannot and does not deny that: (1) the FEC was actively involved in drafting the underlying statutory provisions passed in 1979; (2) the agency promptly drafted the regulation to implement the statute; (3) Congress then reviewed the regulation under a special procedure intended to ensure compliance with legislative intent; (4) Congress allowed the regulation to take effect; and (5) in the more than 30 years thereafter, Congress has repeatedly amended FECA's reporting requirements, including specifically the IE reporting regime, but chose to leave the FEC's regulations in this area intact. All this belies CREW's out-of-context, ahistorical, and incorrect readings of the Coverage and Content Provisions, 52 U.S.C. § 30104(c)(1) and (c)(2)(C), respectively, of the FECA's IE reporting section.

CREW attempts to refute this mountain of authority by using data from the 2010-2016 election cycles to unilaterally claim the regulation is not implementing the statute properly. But CREW assumes too much about the statute's purposes and fails to present any pertinent evidence countering the extensive legislative history CGPS recited in support of the regulation. And even assuming the FEC was required to exercise clairvoyance when promulgating the underlying regulation in 1980, CREW fails to explain why, if these new and changed circumstances call for further analysis, CREW should not be required to present these facts to the FEC first in the form of a direct challenge to the regulation – i.e., a rulemaking petition – thus exhausting its administrative remedies and giving the FEC a fair chance to address the supposed problem.

Below, CGPS refutes CREW's various assertions in detail. But at the end of the day, the simple fact is that the FEC and its professional staff reasonably concluded that CGPS complied with a longstanding FEC regulation as it has been consistently interpreted by the agency over many decades. That is enough to dispose of the enforcement aspect of this case. CREW's wide-

ranging attack on the regulation likewise should be dismissed to allow CREW to properly exhaust its administrative remedies. CGPS should not be subject to any additional enforcement or sanctions simply because CREW failed to follow the proper procedures.

ARGUMENT

I. THE COURT SHOULD DISMISS CREW'S COMPLAINT BECAUSE CGPS COMPLIED WITH THE FEC'S REGULATION.

CGPS's compliance with the regulation poses a fundamental and insurmountable obstacle to CREW's present complaint. In its reply, CREW tries to sidestep the facts by arguing for a lower threshold for initiating an FEC investigation and asserting that the FECA's protection for good faith reliance on the regulation does not apply here. Neither argument has merit.

A. CGPS Complied With the FEC's Regulation, and the FEC Properly Declined to Open an Investigation.

There is little question that CGPS complied with the underlying regulation as written, interpreted, and applied by the Commission for more than 30 years. In fact, CREW's opening and reply briefs devote a scant two and three paragraphs, respectively, arguing the facts of the case. *See* CREW MSJ Br. (Doc 27) at 44-45; CREW Opp. Br. (Doc 33) at 50.

Lacking any actual evidence of a violation, CREW erroneously attempts to lower its burden by recasting the FEC's "reason to believe" threshold – the standard for deciding whether to move forward in the enforcement process – as "a low one that only asks whether there are 'credibl[e] alleg[ations]' that a violation 'may' have occurred." CREW Opp. Br. (Doc 33) at 50. But that is not the relevant test.

The "reason to believe" standard entails "a minimum evidentiary threshold that require[s] at least 'some legally significant facts'" that are "'incriminating' and not satisfactorily answered by the respondents." *DSCC v. FEC*, 745 F. Supp. 742, 745-46 (D.D.C. 1990) (quoting

Supporting Memorandum for the Statement of Reasons (Commissioner Josefiak)). Complaints that state charges "only in the most conclusory fashion," without supporting evidence, are dismissed by the Commission. *In re FECA Litigation*, 474 F. Supp. 1044, 1047 (D.D.C. 1979).

Consistent with these principles, the FEC's policy is not to find "reason to believe" to open an investigation unless the alleged facts lead to "a reasonable inference that a violation has occurred," and "evidence provided in the response" may defeat inferences that otherwise might be drawn. CGPS MSJ Br. (Doc 28) at 18. "[M]ere speculation," as a bipartisan group of commissioners wrote, cannot form a basis for finding "reason to believe." FEC, Matter Under Review ("MUR") 4960 (Hillary Rodham Clinton for U.S. Senate Expl. Comm.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas, *available at* http://eqs.fec.gov/eqsdocsMUR/0000263B.pdf; *see also*, *e.g.*, MUR 6435 (Rangel), First General Counsel's Report at 11-12 n.40 (citing and quoting MUR 4960 Statement of Reasons), *available at* http://eqs.fec.gov/eqsdocsMUR/14044364410.pdf.

As the FEC's General Counsel's Report explained in this matter, "[n]othing in the record before the Commission indicated that a donor had made a contribution for the purpose of funding the reported independent expenditure[s]" at issue. AR173. In fact, 13 of the 14 ads that were shown at the August 30, 2012, American Crossroads meeting that CREW's complaint focuses on had already been "broadcast and fully paid for before August 30, 2012," and the remaining ad was never aired or intended to be aired. AR175. Thus, no one who donated to CGPS could have done so to further those ads, as CREW alleges. *See* CREW Compl. at ¶ 114. Thus, the FEC properly dismissed CREW's allegation that CGPS violated the regulation.

B. CGPS Was Entitled to Rely on the Regulation and Did So in Good Faith, Thereby Defeating CREW's Claims Two and Three.

1. *CGPS Had a Statutory Right to Rely on the Regulation.*

CREW attacks CGPS's right to rely on 52 U.S.C. § 30111(e), the statutory protection for persons who rely in good faith upon an FEC regulation, as well as the scope of that protection. *See* CREW Opp. Br. (Doc 33) at 37-38. But CREW's arguments here border on frivolous.

As an initial matter, the FECA's good faith reliance protection is to be evaluated by an objective standard: compliance with the applicable regulation. This is consistent with a basic tenet governing campaign finance law, which regulates the freedom of speech and therefore requires standards that "are both easily understood and objectively determinable," *McConnell v. FEC*, 540 U.S. 93, 103 (2003), and that "entail minimal if any discovery . . . [a]nd . . . eschew the open-ended rough-and-tumble of factors, which invite[s] complex argument in a trial court and a virtually inevitable appeal." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (internal citations, quotation marks, and brackets omitted) (Roberts, C.J.).[1]

Furthermore, even if CREW's arguments about CGPS's good faith were relevant – and they are not – they are all easily dispatched.

First, CREW's attacks on CGPS's good faith ring hollow because CGPS complied with the regulation as it was universally understood. The opening paragraph of CREW's reply brief acknowledges that, like CGPS, "the FEC relied on [the regulation] to find no reason to believe [CGPS] needed to disclose its contributors" under either 52 U.S.C § 30104(c)(1) or (c)(2)(C). CREW Opp. Br. (Doc 33) at 1. It is hard to accuse CGPS of operating in bad faith when, as CREW readily admits, the federal agency charged with enforcing the statute interprets the law

[1] CREW erroneously cites a case about the evidentiary principles for proving the common law defense of duress for its supposition that the burden to prove good faith reliance here will fall on CGPS. CREW Opp. Br. (Doc 33) at 37 (citing *Dixon v. U.S.*, 548 U.S. 1, 9 (2006)).

the same way CGPS did. *See also* AR1503 (explaining that the FEC's IE regulation "has been amended to incorporate the changes set forth at 2 USC §§ 434(c)(1) and (2)") (emphasis added).

Moreover, CREW itself represented to the FEC in 2015 that "under the Commission's regulations, the identity of a contributor who gives to the organization for the broad purpose of influencing a federal election, or even the specific purpose of making independent expenditures, need not be disclosed." CREW, *Comments in Response to Advance Notice of Proposed Rulemaking on Earmarking, Affiliation, Joint Fundraising, Disclosure, and Other Issues* (Jan. 15, 2015) at 3, *available at* http://sers.fec.gov/fosers/showpdf.htm?docid=312990. "Only if the contributor makes a contribution with the purpose of furthering a *specific* advertisement or other independent expenditure must the organization identify the contributor." *Id.* at 4 (emphasis in the original).[2] CREW cannot now turn around and argue unreasonable reliance when even it was espousing CGPS's position regarding the regulation at issue well after the conduct giving rise to this case.

Second, CREW claims the "FEC sent [CGPS] notices that it was failing to comply with its reporting obligations." CREW Opp. Br. (Doc 33) at 37. But the letter CREW references is "quite common and rarely newsworthy." Womble Carlyle, *Don't Sweat the Details . . . Unless You're Filing at the Federal Election Commission (FEC)*, NAT'L L.J., May 9, 2014. It is not uncommon, nor does it signal that the FEC believes that an organization has failed to comply with its reporting obligations, when it sends a letter asking a filer to "explain report information for the public record [or to provide] an FEC Campaign Finance Analyst [with] additional

[2] CREW attacks CGPS's "misleading representation" that "CREW has previously taken the position that the regulation accurately incorporates all of the reporting provisions under § 30104(c)." CREW Opp. Br. (Doc 33) at 24-25 (emphasis added). CGPS said no such thing. CGPS simply pointed out that CREW has conceded (and continues to concede in its reply brief) that the regulation purports to implement both statutory provisions (whether "accurately" or not). *Compare id. with* CGPS MSJ Br. (Doc 28) at 28-29.

clarification." FEC, *Request for Additional Information (RFAI)*, *available at* https://www.fec.gov/help-candidates-and-committees/request-additional-information/. The transmission of such a letter does not mean, as CREW categorically (and falsely) claims, that CGPS was "failing to comply with its reporting obligations." *See* CREW Opp. Br. (Doc 33) at 37.

Third, CREW cites previous courts' rejections of defendants' good faith defenses in two other fact-intensive cases involving the FEC. CREW Opp. Br. (Doc 33) at 37. However, in the *O'Donnell* case, the court did not even apply Section 30111(e)'s good faith reliance provision to the facts of the case because the candidate did not rely on a "rule or regulation." *See FEC v. O'Donnell*, 209 F. Supp. 3d 727, 743 n.12 (D. Del. 2016) (considering existence of disputed phone calls when assessing good or bad faith of candidate for penalty purposes). And in the *Craig* case, there were disputes about whether the legal authorities the defendant relied on actually covered the transactions in question and whether certain authority had been issued at the time of the relevant transactions. *See FEC v. Craig for U.S. Senate*, 70 F. Supp. 3d 82, 89, 91, 98 (D.D.C. 2014), *aff'd* 816 F.3d 829 (D.C. Cir. 2016). No party disputes those issues here.

Fourth, CREW claims that every party interested in sponsoring an IE – or, for that matter, engaging in any regulated activity – must familiarize itself not only with an administrative agency's regulations, but also with all of the comments and rulemaking petitions ever filed, such as the 2011 Van Hollen petition, to see if someone at some time may have disagreed with the agency's reading of a statute (even where the agency formally rejected such an alternative reading). *See* CREW Opp. Br. (Doc 33) at 37. That is absurd and also practically impossible in many instances, as many IE reports are required to be filed within 24 or 48 hours of an ad's dissemination. *See* 52 U.S.C. § 30104(g)(1), (2). CREW's position would effectively

shut down almost all political speech, as few speakers could afford the legal research costs or could practically comply with such an onerous requirement. For this reason, the FEC "is precisely the type of agency to which deference should presumptively be afforded" in its rulemaking and adjudicative functions. *FEC v. DSCC*, 454 U.S. 27, 37 (1981). Even worse, CREW's position would effectively give anyone who disagrees with an agency's regulation a heckler's veto, whereby they could impeach the validity of a regulation merely by voicing disagreement with it – regardless of the position's merit.

Fifth, CREW cites a nineteenth century case, *Swift & Courtney & Beecher Co. v. U.S.*, 105 U.S. 691 (1881), to say that CGPS was obliged to "read the statute" and, *sua sponte*, ignore the FEC's decades-old regulation. CREW Opp. Br. (Doc 33) at 37-38. While there are many obvious problems with relying on this authority, including that its facts are readily distinguishable and the decision predates modern administrative agencies, the most glaring fault here is that Congress enacted a statute – Section 30111(e) – that directly contradicts CREW's argument.

2. *The Regulation Protects CGPS Against "Equitable" Remedies.*

CREW separately contends Section 30111(e)'s safe harbor does not prohibit "equitable remedies" against CGPS. CREW Opp. Br. (Doc 33) at 38. But the FECA's protections for reliance on FEC regulations are unequivocally expansive: Section 30111(e) removes "certain conduct from <u>any</u> risk of enforcement," establishes "'<u>legal rights</u>' to engage in that conduct," *Shays v. FEC*, 414 F.3d 76, 95 (D.C. Cir. 2005) (internal citation omitted) (emphasis added), "insulates [such person] from liability," *O'Donnell*, 209 F. Supp. 3d at 743 n.12, and "is a defense to criminal prosecution or civil suit," *Martin Tractor Co. v. FEC*, 627 F.2d 375, 385 (D.C. Cir. 1980) (interpreting analogous safe harbor for advisory opinion reliance). It would

undermine the statute's protections – and contradict clear legal precedent – if a court were to exclude FECA-derived equitable relief from the scope of this broad protection.[3]

Congress added the good faith regulatory reliance provision specifically so that a "person who relies upon such regulations in good faith will not be subject to subsequent enforcement action." *Legislative History of Federal Election Campaign Act Amendments of 1979* at 208 ("1979 FECA History"), *available at* http://classic.fec.gov/pdf/legislative_hist/legislative_history_1979.pdf. As the Supreme Court has explained concerning a similar provision in the Truth in Lending Act, 15 U.S.C. § 1640(f), such provisions "signal[] an unmistakable congressional decision to treat administrative rulemaking and interpretation under the [statute] as authoritative . . . Courts should honor that congressional choice." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566-68 (1980).[4]

CREW's reliance on *LaRouche v. FEC*, 28 F.3d 137 (D.C. Cir. 1994) to undermine the scope of Section 30111(e)'s protections also is unavailing. CREW Opp. Br. (Doc 33) at 38. *LaRouche* involved a presidential candidate's obligation to repay funds under the Presidential Primary Matching Payment Account Act ("PPMPAA") rather than imposition of a sanction under the FECA. *See* 28 F.3d at 142. A PPMPAA repayment determination is only a "statutory recoupment remedy," *John Glenn Presidential Comm., Inc. v. FEC*, 822 F.2d 1097, 1098 (D.C. Cir. 1987), and is "more in the nature of an effort to collect upon debt than a penal sanction," Respondent's Br., *Lenora B. Fulani for President Comm. v. FEC*, No. 97-1466, 1998 WL 35240588, at 27 n.16 (D.C. Cir. Feb. 20, 1998) (internal citation and quotation marks omitted).

[3] This is particularly true given CREW's own characterization of its administrative complaint as "seeking immediate investigation and enforcement action against [CGPS]." AR098, 001 (emphasis added).

[4] Similar to what CREW alleges here, *Ford Motor Credit Co.* involved an agency regulation that arguably required less disclosure on loan documents than what the statute required. *See id.* at 557 and 568.

Thus, *LaRouche* is inapposite here because it did not involve a sanction.

3. *CGPS Had a Constitutional Right to Rely on the Regulation.*

CGPS also has a constitutional right to fair notice that prohibits the retroactive application of the FECA's IE reporting requirements in the manner CREW urges. *See* CGPS MSJ Br. (Doc 28) at 27-32. CREW's response that "[a] lack of fair notice bars only criminal or criminal-like sanctions" is mistaken. CREW Opp. Br. (Doc 33) at 38. CREW's own cited authority, *General Electric Co. v. EPA* ("*GE*"), 53 F.3d 1324 (D.C. Cir. 1995), and the cases discussed therein, directly contradict CREW's position. In *GE*, the court explained that the "fair notice" requirement applies not only to cases "imposing civil or criminal liability," but also to cases involving "the civil administrative context." *Id.* at 1328-29.[5]

CREW also incorrectly maintains that the FECA did in fact give CGPS fair notice here. But CREW's cited authorities are either easily distinguishable or fail to support this proposition. *See* CREW Opp. Br. (Doc 33) at 37-39. For example, CREW states that *FEC v. Mass. Citizens for Life* ("*MCFL*"), 479 U.S. 238 (1986) gave notice that CGPS's "reporting obligations were more than what it understood [the regulation] required" and, specifically, that "subsection (c)(1) imposed its own obligation to disclose 'all contributors who annually provide in the aggregate $200 in funds intended to influence elections.'" CREW Opp. Br. (Doc 33) at 37, 26. But CREW's conjecture about *MCFL* is on an island unto itself. For one thing, "[b]efore a judicial

[5] *See also*, *e.g.*, *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551 (D.C. Cir. 1987) (applying fair notice requirement to agency denial of cellphone license); *Satellite Broad. Co., Inc. v. FCC*, 824 F.2d 1 (D.C. Cir. 1987) (applying fair notice requirement to agency denial of broadcast license); *Keeffe v. Library of Congress*, 777 F.2d 1573, 1575-76, 1582 (D.C. Cir. 1985) (applying fair notice requirement to agency's enforcement of political conflict of interest rules in reassigning employee); *Radio Athens, Inc. v. FCC*, 401 F.2d 398 (D.C. Cir. 1968) (applying fair notice requirement to agency denial of broadcast license); *Armstrong v. Dist. of Columbia Pub. Library*, 154 F. Supp. 2d 67, 70, 81-82 (D.D.C. 2001) (applying fair notice requirement to public library's ability to block patrons based on staff guidelines prohibiting "objectionable appearance"). Certainly, the administrative ramifications in these cases were not "criminal or criminal-like sanctions" by any means. Rather, they were equivalent to (or arguably less punitive than) the "equitable" remedy CREW asks this Court to impose on CGPS.

construction of a statute . . . may trump an agency's, the court must hold that the statute unambiguously requires the court's construction." *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 985 (2005). The *MCFL* Court made no such proclamation. For another, after referencing various authorities (including *MCFL*), the *en banc* D.C. Circuit has cited only the following disclosure requirement when discussing the reporting requirements applicable to non-PAC entities (like CGPS) that sponsor IEs: "2 U.S.C. § 434(c)(2)(C) (requiring only the reporting of contributions 'made for the purpose of furthering an independent expenditure')." *SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010) (*en banc*) (emphasis added). The FEC agreed, concluding that in "*MCFL*, the Court [required IE makers to] only identify each person who contributed more than $200 'for the purpose of furthering an independent expenditure.' 2 U.S.C. §§ 434(c)(2)(A)-(C)." Respondent's Opp. Br., *Keating v. FEC*, No. 10-145, 2010 WL 3777212, at *17-*18 (U.S. Sept. 27, 2010) (emphasis added). And, as discussed previously, *see* CGPS MSJ Br. (Doc 28) at 50, the Ninth Circuit confirmed post-*MCFL* that the IE reporting requirements were far less expansive than the ones CREW proposes here, *see FEC v. Furgatch*, 807 F.2d 857, 859 n.2 (9th Cir. 1987). So, if anything, CREW should have been on notice that its interpretation of *MCFL* was in error.

As to CREW's other cited authorities, unlike the situation here, *Abhe & Svoboda* did not involve any alleged conflict between an agency regulation and a statute, but rather examined whether the plaintiff had fair notice of how an agency would make an administrative determination. The court determined the plaintiff had fair notice of the law based on "[e]xisting administrative and judicial decisions and the [statute] itself." *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1060 (D.C. Cir. 2007) (emphasis added). Here, more than 30 years of administrative and judicial decisions and practice pointed consistently to the opposite conclusion CREW draws.

See CGPS MSJ Br. (Doc 28) at 27-28, 50. Thus, CGPS did not have the same agency-endorsed notice that was present in *Abhe & Svoboda.*

CREW's fleeting attempt to cite *National Association of Manufacturers v. Taylor* ("*NAM*"), 549 F. Supp. 2d 33, 67 (D.D.C. 2008), for the general proposition that a statute "provides 'fair notice of the type of activities encompassed by the section's disclosure threshold'" also is in error. *NAM* involved the specific question of whether the statutory language at issue, on its face, provided sufficient "fair notice" so as not to be unconstitutionally vague. 549 F. Supp. 2d at 67.[6] *NAM* also did not involve decades of agency precedent confirming the law's narrow scope.

Lastly, CREW cites *Teich v. FDA*, 751 F. Supp. 243 (D.D.C. 1990) for the general proposition that agency regulations provide no protection "if a court [subsequently] determines that the regulation is invalid." CREW Opp. Br. (Doc 33) at 38-39. However, as CREW concedes, CREW Opp. Br. (Doc 33) at 39 n.24, *Teich* held that a judicial decision may not be applied "[]retroactive[ly]" if the decision "establish[es] a new principle of law, either by overruling clear past precedent . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed," 751 F. Supp. at 249. For the reasons explained previously (CGPS MSJ Br. (Doc 28) at 27-28) and elsewhere in this brief (at 11-12 and 36), the remedy CREW asks the Court to impose here falls squarely into this area. Moreover, unlike here, where the statute, 52 U.S.C. § 30111(e), specifically provides a liability-free guarantee for good faith reliance on agency regulations, the Freedom of Information Act at issue in *Teich* contains no

[6] Using CREW's method of cherry-picking language from cases, CGPS could just as easily (and illogically) cite a multitude of other authorities finding laws to be unconstitutionally vague for the general proposition that statutes do not provide "fair notice" to the public. *See*, *e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 77 (1976) (holding that the "ambiguity" in the FECA's definitions of "contribution" and "expenditure" failed to provide "adequate notice").

such protection, *see* 5 U.S.C. § 552.[7]

II. THE COURT SHOULD DISMISS CREW'S CLAIMS TWO AND THREE BECAUSE CREW FAILED TO EXHAUST ADMINISTRATIVE REMEDIES.

CREW failed to exhaust administrative remedies in its administrative complaint by: (1) not squarely challenging the validity of 11 C.F.R. § 109.10(e)(1)(vi) – a claim which CREW first presented in its complaint for judicial review as Claim Two; and (2) not alleging CGPS violated 52 U.S.C. § 30104(c)(1) (the Coverage Provision) – a claim which CREW first presented in its complaint for judicial review as Claim Three. CREW mistakenly contends it did not have to present these claims first to the FEC, but in reality, its failure to do so is fatal to both claims.

A. CREW's Administrative Complaint Failed to Challenge the Regulation's Validity or Claim any Violation of the FECA's IE Coverage Provision.

CREW's administrative complaint failed to squarely challenge the validity of the underlying regulation or to allege that CGPS violated the Coverage Provision of the FECA's IE reporting requirement, 52 U.S.C. § 30104(c)(1). CREW's administrative complaint only mentioned in passing in a footnote in the background section that the underlying regulation "fails to give full effect to th[e] [Coverage and Content P]rovisions" of the statute. None of the complaint's five "counts" alleging violations of the law contended the regulation was invalid. *Compare* AR102, AR003-004 *with* AR108-115, AR010-016.[8] Similarly, CREW's administrative complaint only included a passing recitation in the background section to 52 U.S.C. § 30104(c)(1) (the Coverage Provision) as imposing a substantive donor reporting

[7] The same is true of the relevant statutes in *Abhe & Svoboda* (40 U.S.C. § 3141 *et seq*. (Davis-Bacon Act)) and *NAM* (2 U.S.C. § 1601 *et seq*. (Lobbying Disclosure Act)).

[8] CGPS's response to CREW's administrative complaint did address CREW's passing reference that "the statute and corresponding regulation are inconsistent." AR083. However, that should not be read as anything more than simply a response to CREW's attempt to have the FEC enforce 52 U.S.C. § 30104(c)(2)(C) – as CREW interprets it – in "disregard [of] the plain language of [the] regulation." *See id*. CGPS did not respond to any claim about the regulation's facial validity because CREW did not present such a claim.

requirement, but it did not cite this provision in any of the claims it alleged against CGPS. *Compare* AR101, AR004 *with* AR108-115, AR010-016.[9]

CREW's fleeting commentary on the regulation and recitation of the Coverage Provision failed to give full (or even partial) effect to any claims on these issues and therefore were insufficient to serve as a basis for judicial review. *See* CGPS MSJ Br. (Doc 28) at 33-34. The *Coburn* case CREW cites on this point is not to the contrary and, in fact, goes against CREW's position. Exactly like CREW's administrative complaint, the appellant in *Coburn* discussed an agency action "as background" in its submission to the agency but did not assert the agency action "was unlawful in its 'Discussion'" section of the submission. *Coburn v. McHugh*, 679 F.3d 924, 930 (D.C. Cir. 2012). The D.C. Circuit held that the appellant had not properly presented to the agency its claim that the agency action was unlawful and therefore declined to review the claim. *Id.* at 931.

B. CREW Failed to Exhaust Administrative Remedies by Not Presenting These Claims in Its Administrative Complaint, as the FECA Required It to Do.

CREW does not meaningfully contest that it failed to exhaust administrative remedies by not presenting these issues to the FEC. Rather, CREW contends it "did not have to present" these issues because: (1) a plaintiff "may bypass the administrative process where [it] would be futile or inadequate"; (2) the FEC proceedings were "not adversarial"; and (3) judicial review under the FECA is "non-jurisdictional." CREW Opp. Br. (Doc 33) at 33-34 and n.21. CREW is incorrect on all counts.

"The doctrine [of exhaustion] provides that no one is entitled to judicial relief for a

[9] Significantly, CREW's administrative complaint immediately thereafter described 52 U.S.C. § 30104(c)(1) as a coverage provision that merely provides an overview of what activity triggers the IE reporting requirement generally: "The FECA and FEC regulations require every person who is not a political committee who makes independent expenditures totaling more than $250 in a calendar year to file quarterly reports regarding the expenditures. 2 U.S.C. § 434(c)(1); 11 C.F.R. § 109.10(b)." AR102, AR005 (emphasis added).

supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Woodford v. Ngo*, 548 U.S. 81, 88-89 (2006) (internal citation and quotation marks omitted). Importantly, "[c]ourts 'will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise.'" *Rosenberg v. U.S. Dept. of Immigration and Customs Enforcement*, 956 F. Supp. 2d 32, 40-41 (D.D.C. 2013) (internal citation and quotation marks omitted). This is just such a case. FECA's enforcement provision, 52 U.S.C. § 30109, "is as specific a mandate as one can imagine" that "exhaustion is required"; "the procedures it sets forth – procedures purposely designed to ensure fairness not only to complainants but also to respondents – must be followed before a court may intervene." *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996).

Ignoring this clear precedent, CREW cites a hodgepodge of inapposite authorities purporting to create a number of exceptions to the exhaustion requirement. *See* CREW Opp. Br. (Doc 33) at 33-34 n.21. For example, CREW cites *Honig* as supporting a general futility exception to the exhaustion requirement. But *Honig* (and the authorities cited therein) specifically addressed dispensation of the exhaustion requirement under the federal Education of the Handicapped Act – not the FECA – and the decision only underscores that exhaustion is the default rule, subject to narrow exceptions that do not apply here. *See Honig v. Doe*, 484 U.S. 305, 327 (1988).

Moreover, even if futility were a valid excuse to the exhaustion requirement here – and it is not – CREW undermines its own futility claim. CREW cites the FEC's 2011 vote not to proceed with a rulemaking petition to amend the IE reporting regulation as evidence of futility. CREW Opp. Br. (Doc 33) at 33-34 n.21. But as discussed later (at 29), CREW also purports to demonstrate the regulation is invalid based on data for the 2012, 2014, and 2016 election cycles.

Compare CREW Opp. Br. (Doc 33) at 33-34 n.21 *with id*. at 18-20; CREW MSJ Br. (Doc 27) at 15-17. While CREW's recent data is not properly before the Court in this matter (as explained below at 27-28), its data post-dating the FEC's 2011 rulemaking vote undercuts CREW's categorical and speculative claim that presenting these issues and new data to the FEC would be futile.

CREW also contends exhaustion is not required because the FEC's administrative complaint process is "not adversarial." CREW Opp. Br. (Doc 33) at 33 n.21. In support of this claim, CREW erroneously cites the *Sims* case involving informal Social Security benefits determinations, in which the agency decisionmakers are charged with "investigat[ing] the facts and develop[ing] the arguments both for and against granting benefits," and reviewing "new and material evidence" at any point in the proceedings. *Sims v. Apfel*, 530 U.S. 103, 111 (2000). But those informal, "no[n-]adversarial" proceedings are a far cry from the FEC's formal, adversarial administrative complaint process, in which the agency determines whether there is "reason to believe" a violation has occurred based solely on a written complaint and a response from the accused. *Compare id. with* 52 U.S.C. § 30109(a)(1). Therefore, under the FECA, CREW's failure to present issues in its administrative complaint meant those issues were not properly before the FEC and, therefore, are not properly before this Court.[10]

Because the FECA requires exhaustion, *Perot*, 97 F.3d at 559, CREW's claim that the exhaustion requirement here is "non-jurisdictional" also is incorrect, CREW Opp. Br. (Doc 33) at 33-34 n.21. And even if exhaustion were "non-jurisdictional" here, the doctrine still requires

[10] CREW attempts to bolster its claim that the FEC's enforcement process is "not adversarial" by citing this Court's observation that an FEC submission had argued that CREW was "not a party to the [enforcement] proceeding." CREW Opp. Br. (Doc 33) at 33 n.21. However, the Court decided the question at hand "regardless of the plaintiff's degree of involvement in the administrative process," and thus did not determine the question of whether CREW was a party in the administrative proceeding. Mem. Op. at 16.

CREW "to exhaust available administrative remedies before bringing [its] case to court." *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004).

C. The Fact That CREW Is Now Challenging a Regulation's Validity Does Not Excuse Its Failure to Exhaust Administrative Remedies.

CREW also mischaracterizes authorities for the proposition that the exhaustion doctrine does not apply to CREW's challenge to a regulation's validity where CREW first raises such a claim in a complaint for judicial review of CREW's administrative complaint. CREW Opp. Br. (Doc 33) at 33. In *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), exhaustion of administrative remedies was not even at issue, as the question of the regulation's validity in that case was presented explicitly to the agency in an administrative adjudicative proceeding. *See id*. at 730 ("AT&T contended [in an administrative filing that] [i]f the Fourth Report were a substantive rule . . . it was invalid . . . because it exceeded the FCC's statutory authority"). By contrast, CREW's administrative complaint failed to press any claim about the validity of the FEC's IE reporting regulation.

Darby v. Cisneros, 509 U.S. 137 (1993) is also inapposite. *Darby* specifically addressed the issue of finality of an agency action, and "whether [the Administrative Procedure Act, 5 U.S.C. § 704], by providing the conditions under which agency action becomes 'final for the purposes of' judicial review, limits the authority of courts to impose additional exhaustion requirements as a prerequisite to judicial review." 509 U.S. at 145. Here, there is no dispute over the finality of the FEC's action, and the exhaustion requirement was also imposed by Congress.

At bottom, CREW's position is that it is entitled to attack the validity of the FEC's IE reporting regulation by presenting such a claim for the first time to this Court. But CREW chose to bring this case as a complaint seeking judicial review of the FEC's dismissal of CREW's

administrative enforcement complaint under 52 U.S.C. § 30109(a)(8). CREW's Claim Two, which is the only claim in its complaint for judicial review under which CREW even raises the issue of the regulation's validity, alleges "[t]he FEC's Failure to Find Reason to Believe that Crossroads GPS violated 52 U.S.C. § 30104(c)(2) was Arbitrary, Capricious, an Abuse of Discretion, and Contrary to Law." *See* Compl. at 24 and ¶ 123. In other words, CREW's challenge to the validity of the underlying regulation is integral to and inseparable from its administrative complaint against CGPS and the FEC's dismissal thereof.[11]

This is precisely the type of claim that a plaintiff alleging FECA violations is required to first present to the FEC. *See supra* at 16; *Perot*, 97 F.3d at 559. Because CREW failed to properly present its claim about the validity of the FEC's IE reporting regulation in its administrative complaint, and therefore failed to exhaust its administrative remedies, this claim is not properly before this Court.[12]

D. CREW Failed to Follow the Appropriate Procedure for Challenging the Validity of the FEC's IE Reporting Regulation.

CREW does not contest that it failed to even participate (whether as a petitioner or commenter) in the 2011 petition for the FEC to open a rulemaking to revise the regulation at issue in this case. *See Rep. Van Hollen Petition for Rulemaking to Revise and Amend Regulations Relating to Disclosure of Independent Expenditures* (Apr. 21, 2011), *available at* http://classic.fec.gov/pdf/nprm/citizensunited/van_hollen.pdf. Nor does CREW contest that it

[11] For this reason, *Murphy Exploration and Production Company v. U.S. Department of Interior*, 270 F.3d 957 (D.C. Cir. 2001) also is of no help to CREW. Not only did *Murphy* reaffirm the general rule that exhaustion of administrative remedies is required when seeking judicial review of an agency action, but the exception *Murphy* contemplates – i.e., that a party can raise an issue in a separate proceeding – is inapplicable here since CREW participated in the FEC enforcement process appealed from to this Court. *See id.* at 958.

[12] Even if the Court determines CREW's challenge to the regulation's validity is proper – and it should not – CGPS still cannot be held liable because of its statutory and constitutional rights to rely on the regulation, as discussed above (at 6-14) and in CGPS's opening brief.

can, this very day, file its own rulemaking petition with the FEC. Nor does CREW contest that, if the FEC were to deny such a petition, CREW could seek judicial review of the agency's action under the APA.

Instead, CREW complains the APA-established rulemaking petition procedure would not be "an adequate forum for CREW to protect its rights" because an agency's refusal to engage in rulemaking is "subject to only the most deferential review by a court." CREW Opp. Br. (Doc 33) at 32 n.20. This is not so. Judicial review of the FEC's dispositions of a rulemaking petition and an enforcement matter are subject to the same "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard. *Level the Playing Field v. FEC*, 232 F. Supp. 3d 130, 137 (D.D.C. 2017) (internal citation and quotation marks omitted). While this standard is "highly deferential," the FEC has been found to have "acted arbitrarily and capriciously by refusing to engage in rulemaking" where the agency acted "without a thorough consideration of the presented evidence and without explaining its decision." *Id.* at 148.

Here, because CREW "may petition the [FEC] directly for the relief [CREW] seek[s] in this lawsuit" but has not done so, and "the [FEC]'s discretion to issue [or amend or repeal] regulations is left in the first instance to the [FEC], not the federal courts, [CREW] must first challenge the [FEC]'s exercise of that discretion before the agency." *Assoc. of Flight Attendants-CWA v. Chao* ("*CWA*"), 493 F.3d 155, 158-59 (D.C. Cir. 2007).[13] Accordingly, this Court should dismiss CREW's Claims Two and Three.

[13] Similar to the circumstances here, in *CWA* labor unions "sued to force the government to increase its regulation of aircraft working conditions" after the Federal Aviation Administration had denied a rulemaking petition eight years earlier, and where "[t]he union [that had filed the petition] did not seek judicial review of that [agency] decision." *Id*. at 157-58. The D.C. Circuit held that the plaintiffs' challenge to the agency's regulatory posture without filing another rulemaking petition was improper because "the unions did not pursue – much less exhaust – any administrative remedies before bringing this case in federal court." *Id*. at 158. The D.C. Circuit admonished that "the exhaustion rule does not contain an escape hatch for litigants who steer clear of established agency procedures altogether." *Id*. at 159.

III. THE COURT SHOULD DISMISS CREW'S CLAIM TWO BECAUSE CREW'S CHALLENGE TO THE REGULATION IS TIME-BARRED.

Both CREW's substantive and procedural challenges to the underlying regulation's validity are time-barred. With respect to CREW's substantive challenge, its ability to assert such a claim outside of the usual statute of limitations for challenging the regulation's validity depends on its having standing. *NLRB Union v. FLRA*, 834 F.2d 191, 195 (D.C. Cir. 1987). However, as the parties' briefs have revealed, the relief CREW seeks is to retroactively impose a new reporting burden on CGPS – a remedy that is unavailable. *See supra* at 6-14. Absent a redressable injury in this matter, CREW does not have standing to challenge the validity of the regulation (Claim Two).[14] *See Lujan v. Defenders of Wildlife, et al.*, 504 U.S. 555, 561-62 (2006).

With respect to its procedural challenge, CREW does not contest that such a challenge is time-barred, but denies it raises a procedural challenge. *See* CREW Opp. Br. (Doc 33) at 35-36. CREW is mistaken on this. One of the principal points of contention CREW raises – nearly four decades after the actual rulemaking – is that the FEC should have written a lengthier explanation for the IE reporting rule. *See id*. at 1, 5. This is a procedural argument. As the Supreme Court has held, "[o]ne of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (emphasis added). Other courts agree that CREW's challenge here is procedural, *see, e.g.*, *Ne. Md. Waste Disposal Authority v. EPA*, 358 F.3d 936, 948 (D.C. Cir. 2004) (explaining that agency's failure to articulate a rulemaking rationale was a "procedural

[14] Because the regulation implements both the Coverage Provision, 52 U.S.C. § 30104(c)(1), and the Content Provision, *id.* § 30104(c)(2)(C), *see* AR1503, to the extent CREW's attack on the regulation fails, CREW's Claim Three, which alleges a violation of the Coverage Provision, also fails.

charge"),[15] and that an agency's failure "to adequately explain its reasoning" is "subject to the general six-year limitations period," *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1077 (9th Cir. 2016).

Under "this circuit's long-standing rule . . . a statutory review period" – like the six-year limit applicable here, 28 U.S.C. § 2401(a) – "permanently limits the time within which a petitioner may claim that an agency action was procedurally defective." *Pub. Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 152 (D.C. Cir. 1990) (emphasis added). Put another way, procedural challenges are "forever barred" after expiration of the six-year review period. *Mobil Expl. & Producing U.S., Inc. v. Babbitt*, 913 F. Supp. 5, 12 (D.D.C. 1995).[16]

Unlike "an ordinary statute of limitations, § 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity, and as such must be strictly construed," *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987); *see also Horvath v. Dodaro*, 160 F.Supp.3d 32, 43 (D.D.C. 2015) (noting same), and never "relaxed by the courts for equitable considerations," *Spannaus v. U.S. Dep't of Justice*, 643 F. Supp. 698, 700 (D.D.C. 1986). Similar to CGPS's right to rely in good faith on the FEC regulation, this limitation serves "the important purpose of imparting finality into the administrative process, thereby conserving

[15] *See also Montgomery Cnty, Md., v. FCC*, 863 F.3d 485, 491 (6th Cir. 2017) (noting that a challenge to an administrative decision that contains "scarcely any explanation at all" is "procedural" under the APA); *Utility Workers Union of America, Local 369, AFL-CIO v. FEC*, 691 F. Supp. 2d 101 (D.D.C. 2010) (crafting a "detailed explanation and justification" is a "procedural" activity). For its part, CREW cites authority, such as *George E. Warren Corp. v. EPA*, 159 F.3d 616 (D.C. Cir. 1998), that is of little help because it uses the words "procedural" and "substantive" inconsistently. *Id.* at 622, 626 (discussing a "procedural challenge" under a heading labelled "Substantive challenges").

[16] The Court's earlier ruling on the FEC's motion to dismiss on grounds of standing and statute of limitations is not to the contrary. Specifically, the Court held that, generally, "when an agency applies a regulation to dismiss an administrative complaint, the party whose complaint was dismissed may challenge the regulation after the statute of limitations has expired on the ground that the regulation conflicts with the statute from which it derives" – provided, of course, that the "party [] possesses standing." Mem. Op. at 15 and13 (quoting *NLRB Union*, 834 F.2d at 195). The Court did not specifically address how the statute of limitations applies to CREW's procedural attack on the regulation and CREW's lack of standing where the retroactive relief it seeks against CGPS is unavailable.

administrative resources and protecting the reliance interests of regulatees who conform their conduct to the regulations." *Nat. Res. Def. Council v. Nuclear Regulatory Comm'n*, 666 F.2d 595, 602 (D.C. Cir. 1981). Absent such a limitation, "procedural challenges [could] be brought twenty, thirty, or even forty years after the regulations were promulgated. No greater disregard for the principle of finality could be imagined." *Id.*

At bottom, this Court should not – and in fact jurisdictionally cannot – hear CREW's procedural challenge to the adequacy of the FEC's explanation for the underlying regulation.

IV. THE COURT SHOULD DISMISS CREW'S CLAIMS TWO AND THREE BECAUSE THE FEC's EXPLANATION FOR THE REGULATION IMPLEMENTING THE STATUTE WAS SUFFICIENT.

Even if it were not time-barred, CREW's claim that the FEC failed to adequately explain and justify the regulation falls wide of the mark. For example, citing *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983), CREW maintains its peculiar fixation with the number of words used to explain the regulation's rationale. CREW Opp. Br. at 4-5. "But *State Farm* does not require a word count; a short explanation can be a reasoned explanation." *Multicultural Media, Telecom and Internet Council v. FCC*, 873 F.3d 932, 939 (D.C. Cir. 2017) (internal citation and quotation marks omitted). All that is required is "that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision." *Jost v. Surface Transp. Bd.*, 194 F.3d 79, 85 (D.C. Cir. 1999) (internal citation and quotation marks omitted). And even where an agency's rationale is "not fully articulated" in writing, the regulation is valid when the court "can reasonably discern the basis for the agency's action." *Am. Iron & Steel Inst. v. EPA*, 526 F.2d 1027, 1047 (3d Cir. 1975), *amended*, 560 F.2d 589 (3d Cir. 1977); *see also Wilhelmus v. Geren*, 796 F. Supp. 2d 157, 161 (D.D.C. 2011) ("a decision that is not fully explained may be upheld if

the agency's path may reasonably be discerned") (internal citation and quotation marks omitted).

Where an agency "has merely followed Congress's mandate, its 'path may reasonably be discerned.'" *Nat'l Ass'n for Home Care v. Shalala*, 135 F. Supp. 2d 161, 169 (D.D.C. 2001). Here, Congress explained that the statute was intended to regulate a "person who receives the contribution, and subsequently makes the independent expenditure." 1979 FECA History at 103, 458 (emphasis added). It should surprise no one that when the FEC required the reporting of a contribution "made for the purpose of furthering the reported independent expenditure," 11 C.F.R. § 109.10(e)(1)(vi), the bipartisan Commission did not feel obliged to write an exhaustive treatise explaining its decision to follow congressional intent. Instead, given the integral role the FEC played in recommending the statutory revisions to Congress and assisting with the legislative drafting, *see* CGPS MSJ Brief (Doc 28) at 9-10, all that was necessary was for the FEC to state that the regulatory revisions "incorporate the changes set forth at 2 USC 434(c)(1) and (2)" that it helped enact into law, *see* AR1503.[17]

V. THE COURT SHOULD DISMISS CREW'S CLAIMS TWO AND THREE BECAUSE THE REGULATION PROPERLY IMPLEMENTS THE STATUTE.

A. The FEC's IE Reporting Regulation Properly Construes the Content Provision.

1. *The Statute Supports the FEC's Interpretation Under Chevron Step One.*

CREW cites *Mylan Pharm., Inc. v. Shalala*, 81 F. Supp. 2d 30 (D.D.C. 2000) for the proposition that Congress's choice "to employ the indefinite article does not imply that

[17] CREW contends the FEC's 1979 legislative recommendations did not specifically ask to "limit the reporting of contributions" on IE reports. CREW Opp. Br. (Doc 33) at 22. This is not so, and CREW's over-hyped "fabrication" rhetoric, *id.* at 13, is simply an attempt to distract from a legislative record that runs counter to its argument. The FEC's recommendations, upon which Congress acted, were specifically crafted to "reduce the burdens on those required to comply with [the FECA]," and they emphasized that a person filing an IE report should only have to identify the sources of "any contributions . . . donated with a view toward bringing about an independent expenditure." 1979 FECA History at 33, 25. Even assuming *arguendo* CREW's reading of the FEC's legislative recommendations has merit (which it does not), Congress's decision to narrowly limit the reporting requirement was made while working closely with the FEC. *See* CGPS MSJ Br. (Doc 28) at 9. Thus, the Commission was well-positioned to know Congress's intent.

'Congress has explicitly left a gap for the agency to fill.'" CREW Opp. Br. (Doc 33) at 9. However, this does not mean that CREW's reading of the statute is correct, much less that the use of an indefinite article in 52 U.S.C. § 30104(c)(2)(C) (the Content Provision) leaves no room for the FEC's interpretation.[18] Quite to the contrary, as *Mylan* recognized, a statute containing an indefinite article cannot be read in isolation, and "an analysis of the text and structure of the statute" is needed to determine what is meant by the use of the indefinite article. 81 F. Supp. 2d at 38. In short, "context matters." *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 413-14 (2012).

CREW's attempt to distort CGPS's *New Hampshire Motor Transportation Association* authority also backfires. As CREW acknowledges, CREW Opp. Br. (Doc 33) at 10, the court there recognized that "'[a]ny' means 'one . . . of whatever kind,' and 'an' means 'one.'" *N.H. Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 72 (1st Cir. 2006) (emphasis added) (internal citation omitted). From this, CREW concludes the two are "synonymous" (when they clearly are not), and thus the Content Provision's use of the indefinite article "an" means the filer of an IE report is required to identify donors who give for the purpose of funding "any" IE. CREW Opp. Br. (Doc 33) at 10. This does not follow.

To illustrate the fallacy in CREW's linguistic sleight of hand, suppose a customer is asked at a farmer's market where several apple varieties are sold whether she would like "an apple." A response of, "Yes, I would like one," would be very different from a response of, "Yes, I would like 'one . . . of whatever kind.'" *Cf. N.H. Motor Transp. Ass'n*, 448 F.3d at 72. While the former response will prompt a follow-up question as to which variety of apple the

[18] CREW incorrectly suggests the Supreme Court held in *McFadden v. U.S.*, 135 S. Ct. 2298 (2015) that a statute's use of an indefinite article was "unambiguous." CREW Opp. Br. (Doc 33) at 9-10. In fact, the Court's discussion of whether the statute was ambiguous was in the context of the statute's scienter requirement. *McFadden*, 135 S. Ct. at 2306-07.

customer would like, the latter response rather clearly means she would be just as happy with a Braeburn, Red Delicious, or Granny Smith.

In the same manner, the purported language variance between the FEC's IE reporting regulation, 11 C.F.R. § 109.10(e)(1)(vi), and the Content Provision, 52 U.S.C. § 30104(c)(2)(C), is consistent with congressional intent under *Chevron* Step One because the statute's requirement that an IE report identify donors whose contributions were "made for the purpose of furthering an independent expenditure" begs the question: which IE?[19] Relatedly, CREW attempts to deflect CGPS's *Foo v. Tillerson*, 244 F. Supp. 3d 17 (D.D.C. 2017) and *Abbott GmbH & Co. KG v. Yeda Research and Dev. Co., Ltd.*, 516 F. Supp. 2d 1 (D.D.C. 2007) authorities as cases that "merely show that the word modified by the indefinite article may be ambiguous" (in this case, the term "independent expenditure"). CREW Opp. Br. (Doc 33) at 10. But once again, this begs the question: which IE does a donor have to support in order to be reported under the Content Provision? The statute leaves this question open for interpretation.

CREW suggests Congress's choice to "use different articles in other sections" of 52 U.S.C. § 30104(c)(2) indicates the Content Provision was meant to encompass reporting a broad universe of donors. *Id.* at 11. But CREW's cited authority, *Pillsbury v. United Eng'g Co.*, 342 U.S. 197, 199 (1952), only supports the general canon of statutory interpretation that where "Congress knew the difference between [two different terms in a statute]," it is presumed to have

[19] The court's conclusion in *N.H. Motor Transp. Ass'n* that "if a state law is preempted as to one carrier, it is preempted as to all carriers" is not to the contrary because the statute at issue contained preemption provisions for both "*any* motor carrier" and "*an* air carrier." 448 F.3d at 72 (emphases in the original). But while the more general term encompassed the more specific term in that case, the converse is not true. Here, the FECA's Content Provision requires reporting of the more specific term – "an independent expenditure," and does not necessarily encompass reporting of a more general universe of "any independent expenditures." Indeed, *N.H. Motor Transp. Ass'n* acknowledged that had the statute only used the article "an" without a corresponding provision containing the article "any," "an" may have been ambiguous. *Id*. at 72 n.8. At minimum, the interpretive question the FECA's Content provision leaves open here with the indefinite article "an" should be resolved in favor of more specificity (as the FEC did) because the surrounding FECA provisions use the definite article "the." *See* CGPS MSJ Br. (Doc 28) at 38-40.

"used the words advisedly." CREW's attempt to characterize that case as addressing how to construe definite and indefinite articles in a statute fails in light of the cases discussed above that actually address this specific issue.

Lastly, the fact that the FEC's EC reporting regulation, 11 C.F.R. § 104.20(c)(9), was "modeled on" the Content Provision, 52 U.S.C. § 30104(c)(2)(C), has no bearing on whether the statute invites interpretation, as CREW suggests. CREW Opp. Br. (Doc 33) at 14. Even though the EC regulation is "modeled on" the statute in concept, the two provisions clearly use different language. Moreover, the fact that a controlling group of FEC commissioners has adopted a narrowing interpretation of the EC regulation, *id.* at 14 n.4, is just further evidence that, to the extent the EC regulation is modeled on the Content Provision, both provisions invite interpretation.

2. *The Regulation Is Proper Under* Chevron *Step Two*.

i. Extrinsic *post hoc* campaign finance data cannot provide evidence of congressional intent or be considered in an APA challenge to the regulation's validity.

CREW cites the Federal Rules of Evidence for a rather novel theory of statutory interpretation: that this Court should look to recent campaign finance data to divine the "proper meaning" of the FECA's IE Content Provision and thereby determine whether the FEC's 1980 rulemaking was permissible under *Chevron* Step Two. CREW Opp. Br. (Doc 33) at 18. There is good reason why this not a recognized theory of statutory interpretation, *see*, *e.g.*, *Cong. Research Svc. Rept. No. 97-589*, *Statutory Interpretation: General Principles and Recent Trends*, *available at* https://fas.org/sgp/crs/misc/97-589.pdf: it places the cart before the horse and would convert the Court into a legislature unto itself.

Even under the "purposive" approach to statutory construction CREW appears to be

urging here, it is still first necessary to determine Congress's purpose in enacting the Content Provision before looking to *post hoc* data to determine whether a law is being implemented to achieve its purposes. In other words, post-enactment facts do not shed light on Congress's enacting intent unless Congress somehow could have known those facts at the time it legislated. CREW has simply pointed to no evidence of legislative intent supporting its theory.

Nor has CREW adequately refuted the substantial legislative history CGPS has presented previously. *See* CGPS MSJ Br. (Doc 28) at 8-11. CREW's broad statements about the FECA's generic disclosure purposes also are unavailing, as CREW's cited authorities do not specifically address the Content Provision at issue here. *See* CREW Opp. Br. (Doc 33) at 17. Moreover, although the FECA is, in large part, a reporting statute, it does not require the type of "maximal disclosure" CREW demands here. *See Van Hollen, Jr. v. Fed. Election Comm'n*, 811 F.3d 486, 494 (D.D.C. 2016).

CREW also is not permitted to point to extrinsic contemporary evidence, *see* CREW Opp. Br. (Doc 33) at 18-19, to demonstrate the FEC's enactment of a regulation in 1980 was in error. "Under the APA, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court . . . [I]f a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision . . . ." *Am. Wild Horse Pres. Campaign v. Salazar*, 859 F. Supp. 2d 33, 41 (D.D.C. 2012) (internal citations and quotation marks omitted). If CREW wishes to introduce this type of extrinsic, *post hoc* evidence before the Court to demonstrate a decades-old regulation is no longer achieving the statute's purposes, CREW must first present this evidence to the FEC in a rulemaking petition. Only if the agency denies the petition may CREW properly seek judicial review of the agency's action. *See CWA*, 493 F.3d at

158-59.

ii. CREW's extrinsic *post hoc* evidence fails to show the regulation has resulted in "*no* disclosure" of contributors on IE reports.

Even if CREW's resort to contemporary evidence were proper, CREW – not CGPS –is the party mischaracterizing the cited evidence. *See* CREW Opp. Br. (Doc 33) at 19. According to CREW, CGPS claimed that "between 7.2% and 29.7% of contributions" by non-PAC entities making independent expenditures were reported in recent election cycles. *See id*. at 18 (emphasis added). But CGPS said no such thing. Rather, CGPS merely cited the CRP website for the proposition that "the percentage of 'outside spending' by organizations that have publicly reported some of their donors in recent years has ranged between 7.2% (in 2010) to 29.7% (in 2012)." CGPS MSJ Br. (Doc 28) at 46 (emphasis added).[20]

Moreover, CREW's own characterization of the CRP website is erroneous. It is not true that the "CPR [*sic*] label[] [of] 'some disclosure' refers to the total spending by organizations that either report $5,000 in contributions or contributions equal to 5% of their total expenditures," and "if [CGPS] reported only 5% of its contributors, the entirety of its more than $70 million in independent expenditures would be treated as 'some disclosure.'" *See id*. In fact, CREW's characterization of the CRP data applies only "[if] the entity is a super PAC"; for a 501(c)(4) entity such as CGPS, the "some disclosure" label "means the group has disclosed some of the donors, either voluntarily or because the donor earmarked the funds for political expenditures." CRP, Outside Spending by Disclosure, Excluding Party Committees, *available at* https://www.opensecrets.org/outsidespending/disclosure.php (emphasis added).

Nor is it clear where, as CREW claims, the CRP website indicates that, of "tax exempt

[20] Again, this extrinsic *post hoc* data is not relevant to the regulation's validity, and CGPS cited it *arguendo* for the sole purpose of refuting CREW's claim about the regulation's effects. *See id*.

501(c) groups like [CGPS] . . . reported contributions used to fund independent expenditures amounted to only about $8 million, or about 2.7%" in 2012. CREW Opp. Br. (Doc 33) at 19. The page on the CRP website that CREW cites only appears to show the group types and their total spending on IEs and ECs. It does not appear to provide any dollar or percentage amounts for their reported contributions. *Compare id*. *with* CRP, 2012 Outside Spending, by Group, *available at* http://bit.ly/2nm87vU.

In short, notwithstanding CREW's mischaracterizations, the CRP data still do not corroborate CREW's claim that the FEC's regulation has "effectively resulted in *no* disclosure of contributions used to fund independent expenditures." CGPS MSJ Br. (Doc 28) at 46 (quoting CREW MSJ Br. (Doc 27) at 34) (emphasis in the original)).

iii. The regulation is not redundant.

CREW's reply maintains the regulation is invalid under *Chevron* Step Two because it "[c]reates [r]edundancy" with "other reporting requirements." CREW Opp. Br. (Doc 33) at 20. It appears CREW really means the regulation is internally inconsistent, but either way, CREW is mistaken.

CREW's argument hinges on a single FEC authority that has no bearing here. Specifically, CREW cites an FEC advisory opinion for the proposition that, when "a company that allowed individuals to fund already existing ads . . . the company would not be the one who makes the independent expenditure; rather it would be the person providing the funds who did so." *Id.* at 21 (citing FEC Adv. Op. No. 2008-10 (VoterVoter)). From this out-of-context discussion of the VoterVoter advisory opinion, CREW concludes the FEC's IE reporting regulation misreads the FECA's Content Provision by requiring only the reporting of donors who choose to fund the specific IE being reported, since that would convert the donors into the IE's

sponsors (and, in turn, the donors would have to file the IE reports, but would not be reported as contributors on any reports). *See id.* However, the VoterVoter advisory opinion CREW cites does not apply here because that opinion specifically addressed a commercial vendor selling existing political ads to individual clients. *See* FEC Adv. Op. No. 2008-10 (VoterVoter), *available at* http://saos.fec.gov/aodocs/AO%202008-10.pdf. It is axiomatic under the FEC's regulations and precedents that commercial vendors are treated differently from groups engaged in regulated political speech; otherwise, every political consultant or ad vendor would be at risk of making excessive or prohibited contributions or having to file campaign finance reports. *See*, *e.g.*, 11 C.F.R. §§ 114.2(f)(1), (2)(i), 116.3; FEC Adv. Op. No. 2017-06 (Stein and Gottlieb) at 6 (collecting authority), *available at* http://saos.fec.gov/aodocs/AO%202017-06%20(Stein%20Gottlieb)%20Final%20(09.14.17).pdf.

Moreover, the extremely close nexus between funders and the particular ads identified on IE reports, which CREW contends is absurd, actually tracks closely with the legislative history behind the Content Provision of the FECA's IE reporting requirement, and which is faithfully implemented in the FEC regulation. CREW's suggestion to the contrary fails to acknowledge and grapple with how the Content Provision actually came to be. As CGPS has previously explained, prior to the 1979 amendments that enacted the Content Provision into the FECA, separate reports were, in fact, required to be filed by both: (1) donors to persons or groups sponsoring IEs; and (2) the IEs' sponsors themselves. *See* CGPS MSJ Br. (Doc 28) at 8-9; *see also* 2 U.S.C. § 434(e)(1) (1976); 11 C.F.R. §§ 109.2(b) (1976) ("Reporting of independent expenditures"), 109.5 (1976) ("Reporting of independent contributions").

To eliminate the reporting burden on contributors, Congress (at the FEC's recommendation) consolidated the separate reports by placing the reporting responsibility solely

on the IEs' sponsors. 1979 FECA History at 24-25, 104, 145. This did not mean, however, as CREW suggests, that there no longer had to be "a direct link between the contribution and the independent expenditure" to require a donor to be reported. *See* CREW Opp. Br. (Doc 33) at 20. In fact, such a "direct link" is quite consistent with the logic and breadth of donor reporting under the pre-1979 reporting regime that even CREW concedes was carried over in the 1979 amendments. *See id.* at 28-29. To wit, just as a donor was required to report her contribution for a specific IE on the pre-1979 "independent contribution" report, post-1979, the IE report is required to identify the donor making the contribution for the specific ad being reported.

B. The FEC's IE Reporting Regulation Properly Construes the Coverage Provision, and CREW's Alternative Reading Would Result in Misleading Reporting.

The FEC's regulation interprets 52 U.S.C. § 30104(c)(1) (the Coverage Provision) as merely providing an overview of the scope of persons and activities covered by the FECA's IE reporting requirement. *See* CGPS MSJ Br. (Doc 28) at 49-50. This reading is consistent with the relevant canons of statutory construction, which support consideration of the Coverage Provision within "the specific context in which that language is used" (here, the FECA's IE reporting section), "and the context of the [FECA] as a whole." *U.S. v. Mosquera-Murillo*, 172 F. Supp. 3d 24, 30 (D.D.C. 2016).

CREW, for its part, urges this Court to read the Coverage Provision in isolation from the surrounding context and the entire statute. Under CREW's alternative reading, IE reports would need to include acontextual and misleading information about donors who have nothing to do with the reported independent expenditure. The Court should reject such an odd reading. *See*, *e.g.*, *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 454 (1989).

CREW contends its interpretation of the Coverage Provision merely requires reporting of donors "based on when the[ir] contribution was made" in a way that is consistent with the

statutory scheme for electioneering communication ("EC") reports. CREW Opp. Br. (Doc 33) at 29. This is comparing apples to bananas. Specifically, CREW appears to suggest that because reporting of ECs under the FECA is "defined by time," it is also appropriate to require sponsors of IEs to report their donors based on when they gave (under CREW's misreading of the Coverage Provision), in addition to whether they gave to further the reported IE (under the Content Provision). *See id.*; *see also id.* at 6. However, this only scratches the surface of the statutory text while ignoring the legislative history for regulating ECs. The regulation of certain ads within pre-election time windows as ECs, 52 U.S.C. § 30104(f), was supported by a legislative record "over 100,000 pages long" indicating that "candidate advertisements masquerading as issue ads" were "almost all [] aired in the 60 days immediately preceding a federal election." *Citizens United v. FEC*, 558 U.S. 310, 332 (2010) (internal citation and quotation marks omitted); *McConnell*, 540 U.S. at 127, 132 (internal quotation marks omitted).

By contrast, CREW has pointed to no evidence whatsoever that "almost all" – or even most – donors who would be reported under its misreading of the Coverage Provision give for the purpose of supporting an organization's IEs. Nor is it clear what the scope of donor reporting would even be under CREW's misreading of the Coverage Provision. On the one hand, CREW contends the Coverage Provision imposes an "unbounded contributor disclosure requirement" under which filers "must report all of their contributions without regard to earmarking." CREW Opp. Br. (Doc 33) at 30 n.19 (emphasis added). Yet, CREW also maintains that "a person who donates money . . . without 'the purpose of influencing any election for Federal office' . . . is not a contributor . . . under any reading of . . . [52 U.S.C. § 30104](c)(1) . . . and thus would not be disclosed." *Id*. at 17-18.

Despite these disparate understandings of what constitutes a "contribution" or

"contributor," CREW nonetheless contends "the statute's reference to 'contributions' . . . is not ambiguous in [52 U.S.C. § 30104](c)(1)." This blithely ignores the Supreme Court's holding, which has been undisturbed for more than 40 years, that the term "contribution," even as statutorily defined, is laden with "ambiguity." *Buckley v. Valeo*, 424 U.S. 1, 77 (1976). In fact, even *Buckley*'s attempt to clarify the "contribution" definition was not entirely satisfactory. In light of the remaining "hazards of uncertainty" in this term, the Second Circuit subsequently further construed "contributions" to mean only funds "that will be converted to expenditures subject to regulation under FECA. Thus, *Buckley*'s definition of independent expenditures that are properly within the purview of FECA provides a limiting principle for the definition of contributions . . . as applied to groups acting independently of any candidate or his agents and which are not 'political committees' under FECA." *FEC v. Survival Educ. Fund*, 65 F.3d 285, 295 (2nd Cir. 1995) (emphasis added).

Therefore, even if the Coverage Provision is incorrectly read out of context as CREW does – i.e., to require a non-PAC entity such as CGPS to report its sources of "contributions" – the FEC could not have simply adopted CREW's "unbounded" understanding, CREW Opp. Br. (Doc 33) at 30 n.19, without interpreting "contribution" in the unconstitutionally vague manner that *Survival Education Fund* confirmed was impermissible. Thus, it was reasonable – indeed, necessary – for the FEC's IE reporting regulation to interpret and implement both the Coverage and Content Provisions, *see* AR1503, as requiring only the identification of those who give for the purpose of furthering the IE being reported, *see Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the

intent of Congress").

CREW also claims "it is unconstitutional for the FEC to limit disclosure" to avoid the type of misleading donor reporting that CREW urges under its misreading of the Coverage Provision. CREW Opp. Br. (Doc 33) at 8. However, the authority CREW cites (at *id.*) does not support this proposition, as it addressed an outright ban on speech that was purportedly harmful to the public. *See Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 767-68 (1976). CREW's authority does not address the type of compelled speech at issue here, and whether the government may define the parameters of the speech it compels to avoid creating public confusion. Nor is it valid for CREW to suggest that donors concerned about being associated misleadingly with certain IEs could simply "limit their contributions" and stop giving to certain groups, CREW Opp. Br. (Doc 33) at 12, as this would infringe upon their First Amendment right of association, *Van Hollen*, 811 F.3d at 500; *Buckley*, 424 U.S. at 15.

CREW's supposition that Congress intended non-PAC entities like CGPS to report "all of their contributions without regard to earmarking" on the same basis as PACs, CREW Opp. Br. (Doc 33) at 30 n.19, 6-7,[21] also ignores the fact that PACs are organizations whose "major purpose . . . is the nomination or election of a candidate," *Buckley*, 424 U.S. at 79. Just as requiring PACs to report all of their spending "can be assumed to fall within the core area sought to be addressed by Congress" because "[t]hey are, by definition, campaign related," *id.*, requiring PACs to report all of their revenue sources serves the interests in public disclosure the Court

[21] *See also id.* at 21 ("the FECA is not concerned solely with contributions earmarked to particular purposes" because "there is no dispute that political committee contributions need not be earmarked to their final use in order to be reported," and "by referencing this requirement, [52 U.S.C. § 30104](c)(1) [the Coverage Provision] imposes a similar unconstrained reporting requirement on those making independent expenditures." CREW Opp. Br. (Doc 33) at 21.

CREW cites no legislative history, or any authority for that matter, for its claim that Congress intended non-PAC entities filing IE reports to identify their donors in a manner similar to the way PACs must report their contributors.

identified in *Buckley*, *see id.* at 79-82. Conversely, non-PAC entities such as CGPS, by definition, do not have the "major purpose" of influencing elections, and thus not all donors to such entities may be presumed to have given for a purpose justifying their inclusion on IE reports. *See Survival Education Fund*, 65 F.3d at 295 (distinguishing regulable "contributions" for PAC and non-PAC entities based on *Buckley*'s "major purpose" test for PACs).

CREW also mischaracterizes the FEC's disposition of MUR 3503 (Perot Petition Committee) as evidence the agency has interpreted the Coverage Provision as creating a "standalone reporting obligation" for information about an IE sponsors' donors. CREW Opp. Br. (Doc 33) at 26.[22] MUR 3503 involved the reporting of independent expenditures made by an individual, and therefore the reporting of donor information was never at issue. *See* FEC MUR 3503, First General Counsel's Report at 3 ("Carmack Watkins stated that he alone placed the newspaper advertisements" at issue) (emphasis added). In fact, the FEC's staff specifically recommended that the Commission find reason to believe there had been a violation of 52 U.S.C. § 30104(c)(1) because "[t]he costs incurred by Mr. Watkins' use of office space . . . along with the $100 for newspaper ads, may have exceeded $250, making the expenditures subject to [52 U.S.C. § 30104](c)(1)." *Id.* at 4 (emphasis added). As CGPS has noted previously, the FEC's enforcement precedents have actually dismissed the notion that subsection (c)(1) imposes a standalone donor reporting requirement. CGPS MSJ Br. (Doc 28) at 21; AR172-73.

Ultimately, CREW's arguments fail to demonstrate: (1) that the Coverage Provision, 52 U.S.C. § 30104(c)(1), is unambiguous in the manner CREW suggests; and (2) that the FEC impermissibly and unreasonably interpreted (c)(1) and (c)(2)(C) (the Content Provision) in the agency's implementing regulation by reading the provisions together to not require misleading

[22] CREW mistakenly refers to this matter as "MUR 5303." However, it is clear from CREW's description of the matter and the "short URL" CREW provides that it is referring to MUR 3503.

and unconstitutionally vague and overbroad reporting of donor information.

C. Congress Has Ratified the FEC's IE Reporting Regulation.

Ironically, while CREW relies on subsequent developments to attack the underlying FEC regulation (*see supra* at 29), CREW urges this Court to ignore the one legitimate way in which *post hoc* events are relevant here: Congress's subsequent ratification of the FEC's regulation. *See* CGPS MSJ Br. (Doc 28) at 43-45; CREW Opp. Br. (Doc 33) at 21-23. While CREW heavily downplays this development, its significance is unavoidable.

To begin, none of CREW's authorities that purport to negate the significance of congressional acquiescence in agency regulations, *see* CREW Opp. Br. (Doc 33) at 22-23, discusses FECA's special congressional review provision, 52 U.S.C. § 30111(d). Congress adopted this provision specifically to assure that FEC regulations would not "depart[] . . . from Congressional intent" and would "conform to the campaign finance laws." *Legislative History of Federal Election Campaign Act Amendments of 1974* at 643, *available at* https://transition.fec.gov/pdf/legislative_hist/legislative_history_1974.pdf.[23] Moreover, Congress used this special review provision repeatedly prior to 1980 to disapprove FEC regulations. *See* CGPS MSJ Br. (Doc 28) at 13. The Supreme Court also validated an FEC regulation, in part, because "neither House [of Congress] expressed disapproval" pursuant to this process. *See FEC v. DSCC*, 454 U.S. 27, 34 (1981). CREW fails to explain why this Court should not do likewise here.[24]

[23] The Committee on House Administration's Report ultimately was incorporated into the final Conference Committee Report. *See id*. at 1065.

[24] CREW observes in passing that the special congressional review provision should be discounted because "§ 109.10 was one of over a hundred regulations spanning thirty pages sent to Congress for review." CREW Opp. Br. (Doc 33) at 23. The inconsistency with such an "overworked" argument is, of course, that CREW's brief also demands that the FEC – which had to actually write (and not just read) the hundred-plus regulations and accompanying explanations – should have written more content during the narrow window Congress gave it for promulgating the regulations.

Nor does CREW adequately justify disregarding Congress's longstanding acquiescence in the FEC's 1980 rulemaking, even as it repeatedly amended FECA in other respects. *See Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 194 (D.C. Cir. 1993) (where Congress had amended a statute on several occasions over two decades without disturbing an agency's preexisting authority to regulate, Congress is presumed to adopt the agency's interpretation of the statute when it reenacts the statute without change). Such acquiescence is "a significant indicator of the legislature's will," *Abourezk v. Reagan*, 785 F.2d 1043, 1055 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987) and, indeed, such "a consistent administrative construction of that statute must be followed by the courts unless there are compelling indications that it is wrong." *Haig v. Agee*, 453 U.S. 280, 291 (1981) (emphasis added, internal citation and quotation marks omitted).

CREW points to language in *Rapanos v. U.S.*, 547 U.S. 715, 749 (2006) expressing "skepticism . . . of congressional inaction" as a basis for concluding congressional acquiescence to a regulation. CREW Opp. Br. (Doc 33) at 22. But CREW fails to mention that the foregoing language did not garner the support of a Court majority. *See Rapanos*, 547 U.S. at 758 (Roberts, J., concurring) ("no opinion commands a majority of the Court . . ."). Moreover, that same plurality opinion (and other authorities CREW cites) fully acknowledges that the Court has "recognized congressional acquiescence to administrative interpretations of a statute," *id.* at 749, including where, as here, legislative inaction is "long-standing," *Bismullah v. Gates*, 551 F.3d 1068, 1074 (D.C. Cir. 2009).

Nowhere are these legal principles more compelling than in this case. After all, members of Congress are acutely aware and concerned about the process by which they are elected. During the nearly 40 years the FEC IE reporting regulation has been in effect, Congress has repeatedly debated independent expenditures and the reporting thereof. *See, e.g.*, 144 Cong. Rec.

S884-02 (Feb. 24, 1998) (Sen. Baucus) (discussing "unreported, undisclosed contributions spent by 'independent expenditure' campaigns"); 145 Cong. Rec. S12734-02 (Oct. 18, 1999) (Sen. Murray) (discussing the "right to know who is funding these so-called 'independent expenditures'"). And some Senators even introduced amendments designed specifically to force 501(c)(4) organizations like CGPS that sponsor IEs to report their donors in the more expansive manner that CREW urges the Court to impose here. *See, e.g.*, 143 Cong. Rec. S10485-01 (Oct. 7, 1997) (Sen. Torricelli Amndt., No. 1308, to the Bipartisan Campaign Reform Act of 1997); 143 Cong. Rec. S10661-02 (Oct. 8, 1997) (Sen. Murray Amndt., No. 1315, to the Bipartisan Campaign Reform Act of 1997).

Yet through it all, Congress never actually amended the FECA to impose the sweeping IE donor reporting regime CREW now asks the Court to graft onto the statute. In fact, Congress specifically amended the IE reporting statute six times since the FEC's 1980 rulemaking. *See* CGPS MSJ Br. (Doc 28) at 44. As part of the 2002 major overhaul of the FECA, Congress even made a change to 52 U.S.C. § 30104(c) to alter the IE reporting regime, but did not change the language of (c)(1) and (c)(2)(C) at issue here, *see* H.R. Rep. No. 131, 107th Cong., 1st Sess., pt. 1, at 23 (2001), thereby further ratifying the FEC's regulation, which implements both of those provisions, *see* AR1503.

As the Supreme Court has held in reviewing similar legislative efforts, Congress "spurned multiple opportunities to reverse [the FEC's rulemaking] – openings as frequent and clear as this Court ever sees. . . . Congress's continual reworking of the [IE reporting] laws – but never of the [the FEC's regulation –] supports leaving the decision in place." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409-10 (2015). CREW fails to show why this compelling evidence of legislative intent should be discounted here.

CREW also makes a fleeting attempt to downplay the value of the FEC's contemporaneous rulemaking. CREW Opp. Br. (Doc 33) at 22 n.9. But a close-in-time interpretation is a "particularly persuasive" indicator of congressional intent, *United Transp. Union v. Lewis*, 711 F.2d 233, 242 (D.C. Cir. 1983), that can even "carry the day against doubts that might exist from a reading of the bare words of a statute," *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 414 (1993). In fact, "[u]nder Supreme Court precedent, it is well-established that a court should defer to the [agency's] interpretation . . . when the administrative practice at stake involves contemporaneous construction of a statute by the [agency] charged with a responsibility with setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Pub. Serv. Co. of Ind., Inc. v. ICC*, 749 F.2d 753, 765 (D.C. Cir. 1984) (internal citation, brackets, and quotation marks omitted).[25]

VI. THE FEC'S DISMISSAL IS ENTITLED TO DEFERENCE.

Courts accord a high degree of deference to the FEC's dismissals of enforcement matters. *See* CGPS MSJ Br. (Doc 28) at 22-23. Despite CREW's bizarre claim to the contrary, CREW Opp. Br. (Doc 33) at 42-43, this is true even in 3-3 deadlocks like the one at issue here: "[W]hen the Commission deadlocks 3-3 . . . the three Commissioners who voted to dismiss must provide a statement of their reasons for so voting . . . [and] their rationale necessarily states the agency's reasons for acting as it did," *FEC v. NRSC*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) (internal citations omitted) (emphasis added), and "if the meaning of the statute is not clear, a reviewing court should accord deference to the Commission's rationale," *id.*; *see also DSCC*, 745 F. Supp. at 745 ("the Commission's split vote [does not] make its decision unreasonable").

[25] *See also U.S. v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 219 (2001) (noting the "particular force" a regulation can have "if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent"); *Miller v. Youakim*, 440 U.S. 125, 144 (1979) (an agency's construction is "especially persuasive" where "the agency participated in developing the provision").

CREW mischaracterizes the authorities it contends are to the contrary. CREW erroneously cites *Akins* and even its own eponymous case for the categorical proposition that courts afford no deference to the FEC's dismissal of enforcement matters. CREW Opp. Br. (Doc 33) at 42. In fact, those authorities simply state the "fairly intuitive principle, that courts need not, and should not, defer to agency interpretations of opinions written by courts," *CREW v. FEC*, 209 F. Supp. 3d 77, 87 (D.D.C. 2016) (emphasis added), or "an agency's interpretation of Supreme Court precedent" when reviewing FEC dismissals, *Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (emphasis added). Those authorities do not apply where, as here, the FEC's dismissal is based on the agency's interpretation of its own regulations and the statute.

It is similarly disingenuous for CREW to cite *U.S. v. Mead Corp.*, 533 U.S. 218 (2001) to negate the deference accorded to the FEC's dismissal of administrative complaints. CREW Opp. Br. (Doc 33) at 42, 43 n.26. In fact, *Mead* specifically reaffirmed that *Chevron* deference is "merit[e]d" in cases involving "express congressional authorizations to engage in the process of rulemaking or adjudication" by agencies. 533 U.S. at 229 (emphasis added). This deference was held unwarranted in *Mead* because the government agency was acting far afield from the anticipated area of congressional delegation. *Id.* at 231. Here, by contrast, the FEC indisputably has "primary and substantial responsibility for administering and enforcing" the FECA. *Buckley* 424 U.S. at 109 (emphasis added).

CREW's attempt to call into question the "extremely deferential" review accorded to the FEC's exercise of its prosecutorial discretion in this matter also attacks a strawman. According to CREW, no deference is warranted "[i]f the agency makes a legal error in the course of exercising its prosecutorial discretion." CREW Opp. Br. (Doc 33) at 43. CREW appears to

imply that the FEC's *Heckler* dismissal[26] of the agency's self-initiated hypothetical theory regarding the FECA's IE Coverage Provision, *see* CGPS MSJ Br. (Doc 28) at 34, was based on an error of law. However, the FEC's dismissal of this theory was based on the fair notice concerns discussed above arising from the agency's previous practice of not enforcing the Coverage Provision as a separate and additional reporting requirement. AR176; *see also supra* at 36; CGPS MSJ Br. (Doc 33) at 27-28. In exercising the agency's prosecutorial discretion, the Commission made no determination on the merits of the legal question CREW now alleges (for the first time) regarding the Coverage Provision. In fact, CREW's reply brief contradicts itself on this point by later characterizing the FEC's *Heckler* dismissal as a "prudential decision" as opposed to a "decision on the merits." CREW Opp. Br. (Doc 33) at 49.

Related to this point about the FEC's discretion, CREW also prematurely and incorrectly declares that if the Court were to remand this matter to the FEC and the agency still does not proceed with enforcement, "CREW will have the authority to bring its own suit to protect its own rights." CREW Opp. Br. (Doc 33) at 44. This is not true. The FEC's exercise of prosecutorial discretion "is a decision generally committed to [its] absolute discretion" and is "presumptively unreviewable." *Heckler*, 470 U.S. at 831-32. "The FEC is not required to pursue every potential violation of FECA," *La Botz v. FEC*, 61 F. Supp. 3d 21, 35 (D.D.C. 2014), and its *Heckler* dismissals "are entitled to great deference," *Combat Veterans for Cong. Political Action Comm. v. FEC*, 983 F. Supp. 2d 1, 15 (D.D.C. 2013), *aff'd*, 795 F.3d 151 (D.C. Cir. 2015). And outside of the FEC's enforcement process, "there is no private right of action to enforce the FECA against an alleged violator." *Perot*, 97 F.3d at 558 n.2.[27]

[26] *Heckler v. Chaney*, 470 U.S. 821 (1985).

[27] Moreover, even if – contrary to all of the reasons CGPS has provided – the Court were to adopt CREW's reading of the FECA's IE Coverage and Content Provisions, that still would not enable CREW in a separate suit to seek

VII. TO THE EXTENT THE COURT DOES NOT GRANT SUMMARY JUDGMENT TO THE FEC AND CGPS, THE APPROPRIATE REMEDY IS TO LEAVE THE REGULATION IN PLACE AND REMAND TO THE FEC FOR FURTHER PROCEEDINGS.

While CGPS remains confident in its position, because CREW raises the issue of remedy, CREW Opp. Br. (Doc 33) at 39-41, a brief response is in order. Contrary to CREW's plea for this Court to strike the FEC's IE reporting regulation, "[i]f the record before the agency does not support the agency action . . . the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Banner Health v. Price*, 867 F.3d 1323, 1356 (D.C. Cir. 2017). This is because an "agency must first be afford[ed] . . . an opportunity to articulate, if possible, a better explanation." *Id.* (internal citation and quotation marks omitted).

Vacatur need not accompany the remand of an inadequately supported rule. *See Allied–Signal, Inc. v. NRC*, 988 F.2d 146, 150 (D.C.Cir.1993). Courts have "commonly remanded without vacating an agency's rule . . . where the failure lay in lack of reasoned decisionmaking [or where the agency's action] was otherwise arbitrary and capricious." *Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 966–67 (D.C. Cir. 1990). In fact, "remanding without vacating" is the "established administrative practice," *Sugar Cane Growers Co-op. of Florida v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002), and is warranted even in circumstances that "invite prejudicial agency delay." *U.S. Sugar Corp. v. EPA*, 844 F.3d 268, 270 (D.C. Cir. 2016).

Ultimately, the decision to vacate depends on two factors: (1) "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly)"; and (2) "the disruptive consequences of an interim change that may itself be changed." *La. Fed.*

---

enforcement of these provisions *post hoc* against CGPS in a manner contrary to the FEC's regulation and longstanding prior interpretation. *See supra* at 6-14.

Land Bank Ass'n, FLCA v. Farm Credit Admin., 336 F.3d 1075, 1085 (D.C. Cir. 2003) (concluding that vacatur was inappropriate) (internal citation and quotation marks omitted).

With regard to the first factor, "[w]hen an agency may be able readily to cure a defect in its explanation of a decision, the first factor . . . counsels remand without vacatur." *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009). This is particularly true "if the basis for remand is a gap in the agency's reasoning that the court finds troubling but thinks the agency may well be able to cure, or to ameliorate with minor changes in the rule or order." Ronald M. Levin, "*Vacation*" *at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 Duke L.J. 291, 379 (2003). Again, while not conceding the regulation needs further explanation, CGPS believes the FEC could take any steps the Court requests to remedy any concerns the Court may have about the regulation.

As to the second factor, courts "consider disruptive impacts to the regulated industry." *Pub. Employees for Envtl. Responsibility v. U.S. Fish & Wildlife Serv.*, 189 F. Supp. 3d 1, 3 (D.D.C. 2016), *appeal dismissed*, No. 16-5224, 2016 WL 6915561 (D.C. Cir. Oct. 31, 2016). It is hard to believe that the 2018 elections will be irreparably compromised if a regulation that has existed for almost 40 years now – and lasted through nearly 20 election cycles – is allowed to remain in place until the FEC issues a more detailed explanation for its 1980 rulemaking. *Cf. A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1492 (D.C. Cir. 1995) (remanding, but not vacating, agency decision relied on "in good faith for over thirteen years").

As even CREW acknowledges, the "2018 election is quickly approaching and there have already been significant independent expenditures this year." CREW Opp. Br. (Doc 33) at 40. The corollary to this, of course, is that there likely have been significant donations to organizations already made in reliance on the FEC's regulation. It is not hard to see how,

without warning or an opportunity to adjust their giving habits, a Republican who donated to the Sierra Club or a Democrat who donated to the National Rifle Association for those organizations' general programs will suddenly find themselves involuntarily identified on public campaign finance reports because they did not retain a lawyer to read the FEC's regulation, analyze whether it comports with the statute, and then survey third-party resources to see who might still question the rule's validity.

Immediate vacatur of the rule also would open up a Pandora's Box of other problems. For example, the political and non-profit worlds would be thrown into chaos the moment a vacatur takes effect, as any entity that spent money on an IE within the five-year statute of limitations period (for enforcement matters) could immediately find itself the subject of an FEC complaint. Moreover, vacatur means the burden would fall on this Court in the first instance – rather than the FEC – to weigh the relevant constitutional and other issues in deciding which of the reporting standards suggested by CREW is the correct one – i.e., is the reporting limited only to those who gave for the purpose of funding IEs generally, does it extend to all those who gave for "political purposes," or does it cover any donor who gave any money to an organization making IEs? Rather than the Court getting into these regulatory thickets, the best remedy would be to keep the existing regulation in place and either (a) let the FEC offer a revised explanation or (b) give the agency time to conduct further rulemaking proceedings and offer its guidance on the most appropriate way forward.

CONCLUSION

For the foregoing reasons, CGPS respectfully requests this Court deny CREW's Motion for Summary Judgment and grant CGPS's Cross-Motion for Summary Judgment.

Respectfully submitted,

/s/ Thomas W. Kirby

Thomas J. Josefiak
J. Michael Bayes (D.C. Bar No. 501845)
HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186
Tel.: 540.341.8808
Fax: 540.341.8809

Michael E. Toner (D.C. Bar No. 439707)
Thomas W. Kirby (D.C. Bar No. 915231)
Andrew G. Woodson (D.C. Bar No. 494062)
Eric Wang (D.C. Bar No. 974038)
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
Tel.: 202.719.7000
Fax: 202.719.7049

Counsel for Crossroads Grassroots Policy Strategies

January 22, 2018