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. 16-00259 (BAH)

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS FEDERAL ELECTION COMMISSION'S AND CROSSROADS GPS'S MOTIONS TO DISMISS

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INTRODUCTION

Plaintiffs Citizens for Responsibility and Ethics in Washington and Nicholas Mezlak (the "Plaintiffs") brought the underlying administrative complaint against Crossroads Grassroots Policy Strategies ("Crossroads GPS") alleging Crossroads GPS failed to disclose contributors for certain of its independent expenditures. When the Federal Election Commission ("FEC" or the "Commission") dismissed that complaint, it did so in part by relying on the FEC regulation which specified that only those contributors who contributed for the purpose of furthering "the reported independent expenditure" need be reported under 11 C.F.R. § 109.10(e)(1)(vi). By way of this litigation, Plaintiffs challenge that dismissal as contrary to law. Plaintiffs also bring as-applied and facial challenges, however, to the validity of 11 C.F.R. § 109.10(e)(1)(vi) itself under the Administrative Procedures Act ("APA"), 5 U.S.C. § 706, as the regulation contradicts the disclosure requirements outlined in the Federal Election Campaign Act ("FECA"). In contrast to the regulation, the FECA requires disclosure of all contributions provided for the purpose of funding "an" independent expenditure, even those not directed to the particular reported independent expenditure. 52 U.S.C. § 30104(c)(2). In adopting the regulation, purportedly to incorporate the disclosure mandated by section 30104(c)(2) (then codified at 2 U.S.C. § 434(c)(2)), the FEC provided no explanation for narrowing the disclosure mandated by the statute. Accordingly, the regulation cannot be justified, is invalid, and may not be enforced as a substitute for the plain terms of section 30104(c)(2). Plaintiffs seek an injunction invalidating the regulation, as well as reversal of the FEC's dismissal of Plaintiffs' complaint against Crossroads GPS, premised on that invalid regulation.

Nonetheless, the FEC, later joined by Crossroads GPS, moved pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure to dismiss Plaintiffs' claim for relief against the unlawful

regulation because this suit was brought more than six years after the FEC adopted 11 C.F.R. § 109.10(e)(1)(vi). But Plaintiffs' claim is timely: in dismissing Plaintiffs' complaint against Crossroads GPS in December 2015, the FEC applied 11 C.F.R. § 109.10(e)(1)(vi) to that complaint, giving rise to new six-year period in which Plaintiffs could lawfully challenge the regulation pursuant to 28 U.S.C. § 2401(a). Plaintiffs indisputably filed this lawsuit within those six years.

Crossroads GPS, which the court allowed to join the FEC's motion and provide supplemental authority to it, provides no additional support. Rather, Crossroads GPS uses the joinder to file a procedurally improper motion under Rule 12(b)(6) seeking to dismiss Plaintiffs' APA claims because, it argues, the FECA provides an exclusive avenue for judicial review. In fact, however, as Plaintiffs bring a challenge to the validity of an FEC regulation, Plaintiffs assert a proper claim under the APA.

Accordingly, Plaintiffs respectfully request the Court deny Defendants' motions.

STATEMENT OF FACTS

As alleged in the Complaint, Plaintiffs filed an amended administrative complaint with the FEC on April 24, 2013 asserting that Crossroads GPS failed to disclose contributors for certain independent expenditures the group ran in Ohio and various other battleground states, as required by the FECA. Compl. ¶ 55, ECF No. 1. On November 17, 2015, the Commission deadlocked three to three on the question of whether to find reason to believe Crossroads GPS failed to report its contributors, resulting in a dismissal of Plaintiffs' complaint. *Id.* ¶ 70. The three commissioners who voted against finding reason to believe did not issue a statement of reasons for their vote but, rather, relied on the rationale provided by the FEC's Office of General

Counsel ("OGC"), which recommended against finding a reason to believe that Crossroads GPS failed to report its contributors. *Id.* ¶¶ 68, 72.

In relevant part, the OGC recommended against finding a reason to believe Crossroads GPS violated the FECA by failing to report its contributors because the OGC concluded Crossroads GPS satisfied the reporting obligations of 11 C.F.R. § 109.10(e)(1)(vi). *Id.* ¶ 64. That regulation requires disclosure of only those contributors who contributed for the purpose of furthering "the reported independent expenditure." *Id.* The OGC concluded that, despite the fact that the evidence indicated Crossroads GPS accepted at least one contribution "for it to use to support the election of Josh Mandel," a federal candidate, the evidence did not indicate that Crossroads GPS accepted a contribution for the purpose of furthering a particular and specific independent expenditure, rather than independent expenditures in support of Josh Mandel in general. *Id.* ¶ 64. Accordingly, the OGC concluded Crossroads GPS did not violate 11 C.F.R. § 109.10(e)(1)(vi). *Id.* The OGC recognized, however, that 11 C.F.R. § 109.10(e)(1)(vi) conflicted with the statutory disclosure requirement under 2 U.S.C. § 434(c)(2) (now codified as 52 U.S.C. § 30104(c)(2)), which the OGC recognized "may reasonably be construed to require disclosure of the identity of certain contributors regardless of whether the contributor made a contribution to further a specific independent expenditure." *Id.* ¶¶ 65, 66. Nonetheless, despite recognizing that 11 C.F.R. § 109.10(e)(1)(vi) conflicted with the FECA, the OGC concluded that the regulation reflected "the Commission's controlling interpretation of the statutory provision." *Id.* ¶ 66.

The OGC did so because, it noted, the Commission promulgated 11 C.F.R. § 109.10(e)(1)(vi) (first codified at 11 C.F.R. § 109.2) after Congress adopted 2 U.S.C.

§ 434(c)(2) in 1979. *Id.* ¶ 120.[1] At the time of adoption, the Commission provided as its sole rationale for the regulation the intent to "incorporate the changes set forth at 2 U.S.C. § 434(c)(1) and (2)." *Id.* ¶ 120.[2] Those changes, now codified at 52 U.S.C. § 30104(c)(1) and (2), respectively required those making independent expenditures to (1) identify "each person . . . who makes a contribution . . . during the reporting period . . . in excess of $200" and (2) disclose "each person who made a contribution in excess of $200 . . . which was made for the purpose of furthering *an* independent expenditure." *See* Federal Election Campaign Act Amendments of 1979, Pub. L. 96-187 § 104(c)(1), (2)(C) (1980), 93 Stat. 1339 (codified at 2 U.S.C. § 434(c)(1), (2)) (emphasis added). The FEC did not explain why the regulation, which was solely intended to incorporate the changes in the statute, did not reflect the language in the amendments but, rather, provided for disclosure that the OGC recognizes is less "expansive" than that mandated by the statutory changes. *See* Compl. ¶ 120; OGC Report 12 n.57.

Despite this admitted conflict between the statute and the regulation, the OGC relied on 11 C.F.R. § 109.10(e)(1)(vi) to recommend the Commission find no reason to believe Crossroads GPS violated 52 U.S.C. § 30104(c)(2). Compl. ¶ 122. After the Commission deadlocked in a vote on whether to find reason to believe Crossroads GPS failed to report its contributors for its independent expenditures as required by law, the Commission voted to dismiss Plaintiffs' administrative complaint on December 17, 2015. *Id.* ¶ 71. Plaintiffs filed the instant suit challenging the FEC's dismissal on February 16, 2016.

[1] *See also* First General Counsel's Report 12 n.57 (MUR 6696) (Mar. 7, 2014) (the "OGC Report"), *available at* http://eqs.fec.gov/eqsdocsMUR/15044385153.pdf.
[2] *See also* OGC Report 12 n.57; *see also* FEC, Amendments to Federal Election Campaign Act of 1971, 45 Fed. Reg. 15,080, 15,087 (Mar. 7, 1980).

Subsequently, the FEC moved to dismiss one of Plaintiffs claims on April 19, 2016. In particular, the FEC sought to dismiss Plaintiffs' challenge to 11 C.F.R. § 109.10(e)(1)(vi) as beyond the Court's subject matter jurisdiction. Def. Partial Mot. to Dismiss 6-7, ECF No. 12. Crossroads GPS thereafter joined the FEC's motion on May 16, 2016. Crossroads GPS further moved to dismiss Plaintiffs' APA claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Def. Notice of Joinder and Suppl. of Partial Mot. to Dismiss 1-2, ECF No. 17 ("Crossroads GPS's Joinder").

ARGUMENT

I. Standard of Review

In evaluating a defendant's motion to dismiss, the court "treat[s] the complaint's factual allegations as true . . . and must grant plaintiff 'the benefit of all inferences that can be derived from the facts alleged."' *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000); *see also Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005). This standard governs the Court's considerations of Defendants' contentions under both Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) ("[I]n passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader."); *Walker v. Jones*, 733 F.2d 923, 925–26 (D.C. Cir. 1984) (same). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007).

II. Plaintiffs' APA Challenge to the Regulation is Timely

Plaintiffs allege, among other things, that 11 C.F.R. § 109.10(e)(1)(vi) conflicts with the statutory requirements of 52 U.S.C. § 30104(c)(2) and that Plaintiffs were injured when the FEC relied upon the unlawful regulation to dismiss Plaintiffs' administrative complaint on December 17, 2015. Accordingly, Plaintiffs bring facial and as-applied challenges seeking relief pursuant to section 706 of the APA in the form of a declaration that 11 C.F.R. § 109.10(e)(1)(vi) conflicts with the FECA and an injunction striking 11 C.F.R. § 109.10(e)(1)(vi) as unlawful. *See INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 188 (1991) (characterizing challenge to regulation's application to plaintiffs as an "as-applied" challenge); *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1401 (D.C. Cir. 1998) (characterizing challenge to regulation as contrary to agency's enabling statute as a facial challenge).

In its motion to dismiss, the FEC, joined by Crossroads GPS, argues that Plaintiffs cannot seek that relief because, purportedly, Plaintiffs could only challenge the legality of the regulation within the six years after the FEC adopted the regulation. Def. Partial Mot. to Dismiss 6–7. According to Defendants, the six-year statute of limitations that applies to APA challenges to the validity of the regulation began to run when the FEC adopted the regulation in 1980. *Id.* (citing 28 U.S.C. § 2401). Defendants thus argue that Plaintiffs may not question the legality of the regulation here. Defendants are mistaken.

"An agency's regulations may be attacked in two ways once the statutory limitations period has expired." *Nat'l Labor Relations Bd. Union v. FLRA*, 834 F.2d 191, 195 (D.C. Cir. 1987).

> First, a party who possesses standing may challenge regulations directly on the ground that the issuing agency acted in excess of its statutory authority in promulgating them. A challenge of this sort might be raised, for example, by way of a defense in an enforcement proceeding. . . . The second method of obtaining

> judicial review of agency regulations once the limitations period has run is to petition the agency for amendment or rescission of the regulations and then to appeal the agency's decision.

Id. Thus, "when an agency seeks to apply [a regulation], those affected may challenge that application on the grounds that it 'conflicts with the statute from which its authority derives'" even outside the limitations period running from the regulation's issuance. *Weaver v. Federal Motor Carrier Safety Admin*, 744 F.3d 142, 145 (D.C. Cir. 2014) (citations omitted).

In contrast, "the statutory time limit restricting judicial review of [agency] action is applicable only to cut off review directly from the order promulgating a rule." *FLRA*, 834 F.2d at 195–96 (internal quotation marks omitted). "It does not foreclose subsequent examination of a rule where properly brought before this court for review of further [agency] action applying it." *Id.* Rather, "an agency's application of a rule to a party creates a new, six-year cause of action to challenge [the] agency's constitutional or statutory authority." *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997) (cited by *P&V Enter. v. U.S. Army Corps of Eng'rs*, 466 F. Supp. 2d 134, 142 (D.D.C. 2006), *aff'd*, 516 F.3d 1021 (D.C. Cir. 2008)). Thus, "a facial challenge to a regulation can be brought outside § 2401(a)'s limitations period when it is accompanied by an as-applied challenge." *P&V Enter.*, 466 F. Supp. 2d at 142.

Further, the "application" which may give rise to a challenge to the validity of a regulation "is not limited to formal 'enforcement actions.'" *Weaver*, 744 F.3d at 145. For example, "despite want of a prior timely attack," courts have "considered the validity of rules that an agency applied in an order imposing certain limitations on a broadcast licensee, in an order rejecting challenges to auction procedures to which a bidder objected, in an order dismissing a complaint based on the FCC's tariff-filing requirements, and in an order denying a

mineral lessee's claim to certain royalty reimbursements." *Id.* at 145–46 (citations omitted).

Indeed, the D.C. Circuit has found a timely challenge to a regulation in a situation very similar to the one here: where a plaintiff sought judicial review of a regulation used to dismiss its administrative complaint. In *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992) (cited by *Weaver*, 744 F.3d at 145), the D.C. Circuit considered a judicial challenge brought by AT&T after the FCC had dismissed AT&T's administrative complaint against a third party. *Id.* at 729. AT&T had asserted that the third party had violated federal law, but the FCC dismissed the complaint because the third party had complied with a 1983 FCC regulation which authorized the third party's behavior. *Id.* at 729, 731. Notably, AT&T did not file a petition for rulemaking to ask the FCC to repeal the regulation in question but challenged the validity of the regulation in adjudication. *Id.* at 731. The agency rejected AT&T's challenge to the regulation on the ground that it "has been in place for almost ten years." *In re AT&T Commc'ns v. MCI Telecomm. Corp.*, 7 FCC Rcd. 807 (1992). Nonetheless, the D.C. Circuit held that "a rule may be reviewed when it is applied in an adjudication." *AT&T*, 978 F.2d at 734 (citing *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959)).[3] The court noted that the regulation "clearly provided the underlying rationale for the order under review," that is, the dismissal of AT&T's complaint. *Id.* at 734. Accordingly, the court found that AT&T's

[3] The cited portion of *Functional Music* discussed the ability of a plaintiff to challenge a rule outside "the statutory time limit restricting judicial review of Commission action . . . directly from the order promulgating a rule." 274 F.2d at 546. The court held that the plaintiff could nonetheless bring the challenge because the time limit "does not foreclose subsequent examination of a rule where properly brought before this court for review of further Commission action applying it." *Id.*

challenge to the regulation was properly before it, and went on to review the legality of that regulation. *Id.* at 735.[4]

Nor is AT&T the only case in which the D.C. Circuit has found that a jurisdictional time limit did not prevent judicial review of a regulation after an agency applied it in an administrative proceeding. *See Alvin Lou Media, Inc. v. FCC*, 571 F.3d 1, 7–8 (D.C. Cir. 2009) (allowing plaintiff to challenge regulation applied in adjudication over plaintiff's complaint against third party even though the time limit applicable to immediate review had expired; noting "[t]his court permits both constitutional and statutory challenges to an agency's application or reconsideration of a previously promulgated rule, even if the period for review of the initial rulemaking has expired." (internal quotation marks omitted)); *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1495–96 (D.C. Cir. 1988) (finding jurisdictional time-limit to bring challenge to regulation did not bar challenge to application of regulation in administrative proceeding to dismiss plaintiff's complaint).

Plaintiffs' challenge is similarly timely and allowable. Plaintiffs bring as-applied and facial challenges to the validity of 11 C.F.R. § 109.10(e)(1)(vi). Plaintiffs have standing to challenge the regulation because they are aggrieved by the FEC's application of the regulation to Plaintiffs' administrative complaint, an application resulting in the unlawful dismissal of that complaint and unlawful denial of Plaintiffs' access to information to which they are entitled. 52 U.S.C. § 30109(a)(8)(A) (parties aggrieved by wrongful dismissal may seek relief); *RCA Global Commcn's, Inc. v. FCC*, 758 F.2d 722, 410 (D.C. Cir. 1985) (finding parties "aggrieved" by application of regulation may challenge validity of regulation outside of "statutory time limits");

[4] The D.C. Circuit further found that a remand to the agency to consider the legality of the regulation in the first instance was not required. *Id.*

see also Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549–50 (2016) (citing *Akins v. FEC*, 524 U.S. 11, 24–25 (1998) (finding plaintiffs' informational injury sufficient to confer standing)). Plaintiffs brought this challenge within six years of the unlawful application of the regulation to Plaintiffs and thus bring a timely challenge under 28 U.S.C. § 2401.

To conclude otherwise would be to render an absurdity, "[f]or unlike ordinary adjudicative orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity." *FLRA*, 834 F.2d at 196. Indeed, in situations such as this it would cause a manifest injustice. The regulation's reporting obligations were mandated in a world in which independent expenditures played a minor role in elections, one in which corporations and unions could not spend any money on such expenditures. It is unsurprising, therefore, that no one apparently took notice of the regulation's discrepancy with the statute at the time: it simply was not an important issue. The campaign finance landscape, however, has undergone significant changes since 1980. Corporate and union independent expenditures are now lawful, and the money spent on such independent expenditures has ballooned beyond anything anyone could predict in the 1980s. The vital importance of the discrepancy in the disclosure regime mandated by the regulation and provided by the statute has only recently become apparent. Plaintiffs, as parties "ultimately affected by [the] rule," must have "an opportunity to question its validity." *FLRA*, 834 F.2d at 196.

III. Crossroads GPS's Motion Is Procedurally Improper

On April 29, 2016, the Court modified the briefing schedule to allow Crossroads GPS to file a "notice of joinder" in the FEC's Motion and to file a "supplemental memorandum of points and authorities in support therefor." Crossroads GPS filed that notice of joinder on May 16, 2016. Crossroads GPS did not, however, provide supplemental support for the FEC's motion,

which sought to dismiss Plaintiffs' challenge to 11 C.F.R. § 109.10(e)(1)(vi) pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Rather, the full extent of Crossroads GPS's discussion of that motion consists of the mere statement that "Crossroads GPS joins the FEC's Partial Motion to Dismiss Claim Two in its entirety for the reasons set forth in the FEC's Memorandum of Points and Authorities in support thereof." Crossroads GPS's Joinder 4 n.1.

Nevertheless, Crossroads GPS devotes almost the entirety of its memorandum to argue a new motion: a motion to dismiss Plaintiffs' APA claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Crossroads GPS's attempt to shoehorn a new motion into its notice of joinder in the FEC's motion is improper. Although the Court allowed Crossroads GPS to join the FEC's motion to dismiss under Rule 12(b)(1), a party may not use a notice of joinder to add new issues not previously raised in the motion to which the party joins. *Cole v. Carey*, No. 06-cv-0336 GEB GGH P, 2007 WL 4355171, at *1 (E.D. Cal. Dec. 11, 2007), *report and recommendation adopted*, No. 2:06CV0336GEBGGHP, 2008 WL 596093 (E.D. Cal. Mar. 3, 2008); *Miss. Band of Choctaw Indians v. Mississippi*, No. J90-cv-0386(B), 1991 WL 255614, at *4 (S.D. Miss. Apr. 9, 1991). Nor could Crossroads GPS raise these arguments in a separate Rule 12(b)(6) motion as Crossroads GPS has already filed an answer. *See* Fed. R. Civ. P. 12(b) ("A motion asserting any of these defenses must be made before pleading."). Accordingly, Crossroads GPS may not use the joinder to file a new and untimely motion to dismiss in the guise of joining the FEC's motion.

IV. Plaintiffs Properly State a Claim Under the APA

Even if Crossroads GPS's Rule 12(b)(6) motion was properly before the Court, it still should be denied because FECA does not provide an adequate remedy for Plaintiffs' claims. Crossroads GPS's motion seeks to dismiss Plaintiffs' claims under the APA on the ground that the FECA provides the "exclusive avenue of judicial review for parties seeking to challenge

enforcement decisions." Crossroads GPS's Joinder 2 (citation omitted). Crossroads GPS's argument, however, shows that a FECA challenge does not provide an adequate remedy for Plaintiffs' claims and, thus, Plaintiffs are not limited to asserting claims under the FECA.

By means of this suit, Plaintiffs seek not only an order reversing the FEC's unlawful dismissal of Plaintiffs' complaint—a remedy all parties agree is available under the FECA—but also seeks an order enjoining enforcement of 11 C.F.R. § 109.10(e)(1)(vi) as unlawful and contradictory to the FECA, and ordering the FEC to enforce 52 U.S.C. § 30104(c)(2) in all pending and future cases brought before it raising similar questions about the disclosure of contributors to independent expenditures. Although APA relief is limited to cases in which "there is no other adequate remedy, . . . [a]n alternative remedy will not be adequate under § 704 if the remedy offers only 'doubtful and limited relief.'" *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009) (citation omitted). Accordingly, to the extent there is any "doubt[]" about the ability of Plaintiffs to obtain their requested relief under the FECA, then the FECA does not provide an adequate alternative remedy, and Plaintiffs may seek such remedy under the APA. Indeed, courts have consistently allowed plaintiffs to challenge the validity of FEC regulations under the APA, finding a FECA challenge to the FEC's unlawful dismissal of an administrative complaint does not provide an adequate alternatively remedy. *See Shays v. FEC*, 414 F.3d 76, 96 (D.C. Cir. 2005) (finding court had jurisdiction under the APA to review a challenge to an FEC regulation as an impermissible interpretation of the FECA; finding review of a dismissal as contrary to law inadequate); *see also Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 555 n.4 (4th Cir. 2012) (upholding authority to review legality of FEC regulation under APA); *Unity08 v. FEC*, 596 F.3d 861, 866–67 (D.C. Cir. 2010) (finding FECA's procedure for review for dismissal of complaints did not foreclose APA review); *Perot v. FEC*, 97 F.3d 553, 560–61

(D.C. Cir. 1996) ("The FECA has no provisions governing judicial review of regulations, so an action challenging its implementing regulations should be brought under the judicial review provisions of the [APA] . . . .").

CREW v. FEC, the sole authority on which Crossroads GPS relies, does not hold otherwise. In that case, CREW challenged the FEC's *de facto* policy of refusing to apply the FECA's political committee reporting rules to any group which did not devote a majority of its funding over its life to independent expenditures, regardless of whether the group engaged in other political activities or even whether it spent a majority of its money on independent expenditure in recent years. *See CREW v. FEC*, No. 14-cv-1419-CRC, 2015 U.S. Dist. LEXIS 114114, at *3 (D.D.C. Aug. 13, 2015). That policy, which was not adopted with notice and comment rulemaking, contradicted the FEC's prior statements of policy that it would engage in a case-by-case analysis to determine a group's "major purpose." *Id.* The court dismissed CREW's APA claims, however, because "the Commissioners' interpretation of the 'major purpose' test may constitute a new principle that the FEC has announced in adjudication; it does not constitute a regulation under the APA." *Id.* at *10. Accordingly, because the court found that CREW sought to challenge a policy advanced in adjudication and not a regulation, the court concluded that CREW's sole remedy was to seek relief under the FECA. *Id.* at *13; *see also id.* at *14 ("This alternative, comprehensive judicial review provision [under the FECA] precludes review of FEC *enforcement decisions* under the APA." (emphasis added)).

In contrast, 11 C.F.R. § 109.10(e)(1)(vi) is a regulation, not a policy announced in an adjudication. A party may challenge the legality of a regulation under the APA, and the FECA does not provide an adequate or exclusive means to bring such challenge. *Shays*, 414 F.3d at 96. Moreover, a party may bring that challenge within six years of the application of that regulation

to the party, including an application in a review of an administrative complaint brought by the party. *AT&T*, 978 F.2d at 735. Consequently, Plaintiffs adequately state a claim under the APA and dismissal is unwarranted.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request the Court deny Defendants' motions.

Dated: June 13, 2016.

Respectfully submitted,

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