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.	Civ. No. 16-259 (BAH) REPLY IN SUPPORT OF SUMMARY JUDGMENT

FEDERAL ELECTION COMMISSION'S REPLY
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Lisa J. Stevenson (D.C. Bar No. 457628)
Acting General Counsel

Kevin Deeley
Associate General Counsel

Harry J. Summers
Assistant General Counsel

Seth Nesin
Attorney

FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
(202) 694-1650

January 24, 2018

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Miscellaneous

The Federal Election Commission ("Commission" or "FEC") lawfully dismissed the administrative complaint filed by plaintiffs Citizens for Responsibility and Ethics in Washington ("CREW") and Nicholas Mezlak against Crossroads Grassroots Policy Strategies ("Crossroads GPS"). Three members of the Commission, representing a controlling group, found no reason to believe that Crossroads GPS had violated the disclosure requirements of the Federal Election Campaign Act ("FECA" or "Act") or the relevant FEC regulation. The FEC's opening brief explained that both the statutory provision and regulation require entities like Crossroads GPS only to disclose those contributions that are made "for the purpose of furthering" an independent expenditure. But the facts alleged did not provide evidence that any contributions here were made for that specific purpose. The agency also exercised its prosecutorial discretion to dismiss an additional potential allegation, which plaintiffs did not raise in their administrative complaint, that relied on a novel statutory interpretation and therefore raised equitable concerns.

Plaintiffs' opposition primarily argues that the Commission has misinterpreted the meaning of two FECA provisions since the time they were enacted in 1980, and that under plaintiffs' preferred legal interpretation, Crossroads GPS should have disclosed its contributors. Plaintiffs ask the Court not only to reverse the decision to dismiss the administrative complaint but also to strike down the agency's longstanding regulatory interpretation of FECA. They claim that the statute lacks any ambiguity and that the FEC is misrepresenting the facts and the law. But plaintiffs' opposition itself relies on distortions and misplaced policy arguments that obscure the true issues before the Court. It was reasonable to dismiss plaintiffs' administrative complaint and the agency's regulatory interpretation of the statute is permissible, particularly given the highly deferential standard of review that applies to agency decisions like this. The Court should grant summary judgment to the Commission.

I. THE DISMISSAL OF THE ADMINISTRATIVE COMPLAINT WAS LAWFUL

In the relatively short portion of plaintiffs'opposition brief devoted to challenging the actual dismissal of their administrative complaint, plaintiffs primarily argue that the conclusions of the controlling group of Commissioners are entitled to little or no deference and that the Commissioners relied on flawed legal reasoning when dismissing plaintiffs' claims. (Pls.' Mem. of P&As in Opp'n to Def. FEC's and Intervenor Def. Crossroads GPS's Cross-Mots. for Summ. J. and in Supp. of Pls.' Mot. for Summ. J. ("Pls.' Opp.") at 41-50 (Docket No. 33).) These arguments lack merit and largely ignore the factual information on which the controlling group of Commissioners based their decision.

A. The FEC's Dismissal of the Administrative Complaint Is Entitled to Deference

This Court may set aside an administrative dismissal order of the Commission only if it is "contrary to law." 52 U.S.C. § 30109(a)(8)(C). As the Commission explained in its opening brief, the contrary to law standard is highly deferential. *See* FEC's Mem. of P&As in Supp. of its Mot. for Summ. J. and in Opp'n to Pls.' Mot. for Summ. J. ("FEC Mem.") at 14-16 (Docket No. 31); *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986); *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005). When the Commission exercises its prosecutorial discretion to dismiss, that determination is subject to even greater deference from the Court. *See* FEC Mem. at 28; *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *La Botz v. FEC*, 61 F. Supp. 3d 21, 33 (D.D.C. 2014).

Despite the abundant authority affirming the Commission's deference, plaintiffs make several arguments that the agency is entitled to little or no deference in this particular case. First, plaintiffs claim that no deference is warranted here because the Commission's determination was the result of an evenly divided vote by Commissioners. (Pls.' Opp. at 42.) But this argument conflates deference in the judicial review of an administrative action with the precedential value

of that action. Plaintiffs cite *Common Cause v. FEC* for the proposition that a statement of only three FEC Commissioners is not binding precedent. 842 F.2d 436, 449 n.32 (D.C. Cir. 1988). But that very case, which involved the dismissal of an administrative complaint due to a 3-3 split, confirms that "[d]eference is particularly appropriate in the context of the FECA, which explicitly relies on the bipartisan Commission as its primary enforcer." *Id.* at 448. Other cases involving evenly divided Commission votes have stated the same principle. *See, e.g.*, *In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000) ("We have . . . held that we owe deference to a legal interpretation [issued by the FEC] supporting a negative probable cause determination that prevails on a 3-3 deadlock."); *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) (citations omitted) ("[I]f the meaning of [FECA] is not clear, a reviewing court should accord deference to the Commission's rationale . . . [even in] situations in which the Commission deadlocks and dismisses.").

Plaintiffs wrongly argue that the ample precedent in favor of deference for split decisions was overturned in 2001 by *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001), which held that certain administrative decisions that do not carry the "force of law" are not entitled to deference under *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Plaintiffs claim that because the decisions of a divided Commission are not precedential, they are entitled to no deference (Pls.' Opp. at 42), but a different court in this district recently rejected that same argument when CREW made it. In *CREW v. FEC*, Judge Cooper reaffirmed that deference was appropriate because "the prospective, binding nature of an agency's interpretation is not the sole consideration" when determining whether an agency decision should be afforded deference. 209 F. Supp. 3d 77, 85 n.5 (D.D.C. 2016), *appeal dismissed*, No. 16-5300, 2017 WL 4957233 (D.C. Cir. Apr. 4, 2017). As that *CREW* opinion noted, *Mead* itself

explained that "an agency's power to engage in an adjudication" can be sufficient to show the delegated authority required for deference. *Id.* (citing *United States v. Mead*, 533 U.S. 218, 227 (2001)). The *CREW* opinion noted that *In re Sealed Case* had observed that FEC enforcement actions, even those that result from evenly divided votes, are "analogous to a formal adjudication" and therefore entitled to deference. *Id.* (quoting *In re Sealed Case*, 223 F.3d at 780). Thus, "seeing nothing in *Mead* that directly contradicts *Sealed Case*, the Court [determined that it would] abide its 'obligat[ion] to follow controlling circuit precedent.'" *CREW*, 209 F. Supp. 3d at 85 n.5 (quoting *United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997)). This Court should reach the same conclusion and afford the Commission deference.

With respect to the Commission's exercise of prosecutorial discretion to not pursue a theory that Crossroads GPS violated 52 U.S.C. § 30104(c)(1) — an allegation not raised in the administrative complaint — CREW argues that that decision was based on an erroneous interpretation of law and is therefore not entitled to deference. But the agency plainly does receive deference in interpreting the very statute it administers, *United States v. Kanchanalak*, 192 F.3d 1037, 1049 (D.C. Cir. 1999), and in any event, the notion of prosecutorial discretion itself means that the Commission can dismiss an administrative complaint even if it identifies a possible violation, because the "FEC is not required to pursue every potential violation of FECA." *La Botz*, 61 F. Supp. 3d at 35. The Supreme Court has expressly recognized that the Commission may decline to pursue an enforcement matter *even if* that means some potential FECA violations go unpunished. *FEC v. Akins*, 524 U.S. 11, 25 (1998) (The Commission could "still have decided in the exercise of its discretion not to require" certain disclosures "*even had* the FEC agreed with respondents' view of the law" that FECA required such disclosure (emphasis added)); *CREW v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007) ("No one contends that

the Commission must bring actions in court on every administrative complaint. The Supreme Court in *Akins* recognized that the Commission, like other Executive agencies, retains prosecutorial discretion."). Prosecutorial discretion means that an agency receives judicial deference in making decisions on whether to pursue particular enforcement matters.

B. It Was Reasonable for the Controlling Group to Find That the Facts CREW Alleged Did Not Create a Reason to Believe Crossroads GPS Violated 52 U.S.C. § 30104(c)(2)(C) or 11 C.F.R. § 109.10(e)(1)(vi)

As the FEC explained (FEC Mem. at 17-23), it was reasonable based on the facts before the Commission not to find that Crossroads GPS violated the independent expenditure disclosure statute and regulation at issue here. Plaintiffs' administrative complaint relied upon press reports about a phone call in which a contribution was allegedly promised and a fundraiser at which contributions were allegedly solicited, and that complaint noted that Crossroads GPS identified no contributors in its disclosures to the FEC. (*See generally* FEC Mem. at 8-12.) The complaint suggested there was reason to believe that this lack of disclosure violated FECA because the circumstances suggested that those contributions were made for the purpose of furthering independent expenditures. (*See* AR108-115.) But after considering all information before the FEC, including the response to the allegations provided by Crossroads GPS, the controlling group of Commissioners agreed with the FEC's Office of General Counsel that there was "no reason to believe" Crossroads GPS had violated the regulation at 11 C.F.R. § 109.10(e)(1)(vi) or the statutory provision that is currently codified at 52 U.S.C. § 30104(c)(2)(C). A key basis for this decision was the lack of evidence that any particular contribution met the applicable legal standard, which requires that it be made "for the purpose of furthering" an independent expenditure by Crossroads GPS. (AR185-187, 187 n. 52.) The controlling group acted reasonably in relying on this lack of evidence. (*See* FEC Mem. at 17-19.)

Plaintiffs' opposition makes only a cursory argument that the facts available to the Commission required a finding of reason to believe that Crossroads GPS violated the statute or the regulation. Plaintiffs' argument amounts to claims that: 1) the "reason to believe" standard is very low; 2) Crossroads GPS received contributions from individuals interested in electing certain candidates; and 3) Crossroads GPS made a lot of independent expenditures, so those contributors should have expected that their contributions would be used to further independent expenditures. (Pls.' Opp. at 45-46.)

These claims miss the mark. As an initial matter, the "reason to believe" standard is not a trivial or *de minimis* one. On the contrary, "[u]nwarranted legal conclusions from asserted facts . . ., or mere speculation, . . . will not be accepted as true" and "[s]uch purely speculative charges, especially when accompanied by a direct refutation, do not form an adequate basis to find reason to believe that a violation of the FECA has occurred." Statement of Reasons, Matter Under Review ("MUR") 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee, et al.), Dec. 21, 2000, at 2-3, https://www.fec.gov/files/legal/murs/current/38206.pdf (citations omitted)); First General Counsel's Report, MUR 6021 (Democratic National Committee, et al.), Dec. 1, 2009 at 15, https://www.fec.gov/files/legal/murs/current/80542.pdf (providing the reasoning for the agency's actions accepting the staff recommendation). In this case, plaintiffs simply speculate that because Crossroads GPS received contributions and made independent expenditures, those contributions must have been made with the purpose of furthering those expenditures. That is not enough to show that it was unlawful for the FEC to decline to make a reason to believe finding here.

Plaintiffs argue that the facts "clearly give rise to the *possibility* that contributors '*may*' have given to Crossroads GPS to further an independent expenditure and that Crossroads GPS

violated the law by not reporting them" (Pls.' Opp. at 45-46 (emphasis added)), but this assertion suggests that there is reason to believe a violation occurred every time an entity makes independent expenditures using undisclosed contributions. A primary inquiry in determining whether 11 C.F.R. § 109.10(e)(1)(vi) or 52 U.S.C. § 30104(c)(2)(C) was violated involves learning the purpose of possibly relevant contributions. It is not enough to point to such contributions and expenditures generally and assert that an investigation is warranted because some of the contributions might meet FECA's "purpose of furthering" independent-expenditure reporting standard. And while communications between the parties involved are relevant to that standard, it does not follow that the FEC should be *required* to investigate an entity simply because of the possibility that it has not disclosed contributor information.

In this case, Crossroads GPS denied any knowledge of a contribution made for the purpose of furthering the independent expenditures at issue. While it is possible that an investigation would have turned up evidence that a particular contribution was made for the purpose of furthering an independent expenditure, under the deferential standard of review that mere possibility is not enough to support a judicial determination that it was unlawful for the agency to decline to go forward here.

C. The FEC Properly Exercised Prosecutorial Discretion as to Any Potential Violation of 52 U.S.C. § 30104(c)(1), and in Any Event Plaintiffs Failed to Timely Raise Their Arguments With Respect to Such a Claim

As the FEC explained (FEC Mem. at 23-31), 52 U.S.C. § 30104(c)(1) is ambiguous and the agency properly exercised its considerable discretion not to pursue a claim based on that provision in this case. Moreover, plaintiffs did not even argue in their administrative complaint that Crossroads GPS had violated section 30104(c)(1). As the Commission pointed out in its opening brief, that failure means plaintiffs appear to lack standing to pursue such a claim now, a

defect that is by itself sufficient for the Court to grant summary judgment to the Commission on the plaintiffs' claim under that legal theory. (FEC Mem. at 24 n.7 (Court should "limit its substantive judicial review to alleged violations that were actually presented to the agency by plaintiffs.") Plaintiffs claim (Pls.' Opp. at 46-48) that they were not required to exhaust their administrative remedies by presenting the section 30104(c)(1) violation theory to the Commission and that they actually did raise the theory, but those arguments are unavailing.

It is well-settled that theories not raised before the Commission cannot be raised in subsequent litigation. "Simple fairness to those who are engaged in tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against the objection made at the time appropriate under its practice." *United States v. L.A. Truck Lines, Inc.*, 344 U.S. 33, 37 (1952), *cited in Gill v. U.S. Dept. of Justice,* 875 F.3d 677, 682 (D.C. Cir. 2017). Thus, it is "a hard and fast rule of administrative law, rooted in simple fairness, that issues not raised before an agency are waived and will not be considered by a court on review." *Coburn v. McHugh,* 679 F.3d 924, 929 (D.C. Cir. 2012); *accord*, *Nuclear Energy Inst. Inc. v. EPA*, 373 F.3d 1251, 1297 (D.C. Cir. 2004); *Omnipoint Corp. v. FCC*, 78 F.3d 620, 635 (D.C. Cir. 1996) ("As a general rule, claims not presented to the agency may not be made for the first time to a reviewing court."). The rule holds "special force where, as here, an appeal follows an adversarial administrative proceeding in which parties are expected to present issues material to their case. In that setting, the rationale for requiring issue exhaustion is at its greatest." *Fritch v. U.S. Dept. of State,* 220 F. Supp. 3d 51, 62 (D.D.C. 2016); *Wallaesa v. FAA.,* 824 F.3d 1071, 1078 (D.C. Cir.), *cert. denied*, 137 S. Ct. 389 (2016). The "principle policy underlying the waiver rule is that judicial review might be hindered by the failure of the litigant to allow the agency to make a

factual record, exercise its discretion, or apply its expertise." *Pacific Ranger, LLC v. Pritzker*, 211 F. Supp. 3d 196, 224 (D.D.C. 2016) (internal quotation marks omitted), *citing Salt Lake Cmty. Action Program v. Shalala*, 11 F.3d 1084, 1087 (D.C. Cir. 1993). Moreover, courts "require the argument [petitioner] advances here to be raised before the agency, not merely the same general legal issue." *Koretoff v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013) (internal quotation marks omitted), *citing Nuclear Energy Inst.*, 373 F.3d at 1291. "The question is whether the specific argument advanced by the plaintiffs – rather than the same general legal issue – was raised before the agency." *Hispanic Affairs Project v. Acosta*, 263 F. Supp. 3d 160, 186 (D.D.C. 2017) (internal quotations removed).

Plaintiffs cite *Sims v. Apfel*, which stands for the proposition that when "an administrative proceeding is not adversarial, . . . the reasons for a court to require issue exhaustion are much weaker," 530 U.S. 103, 110 (2000), but that case is inapposite. Sims considered an administrative process before the Social Security Administration which plaintiffs here argue is similar to the FEC enforcement process (Pls.' Opp. at 47), but the *Sims* opinion reveals key differences justifying the decision not to apply issue exhaustion there. The *Sims* court noted that the form to submit a claim to that agency "provides only three lines for the request for review, and a notice accompanying the form estimates that it will take only 10 minutes to 'read the instructions, gather the necessary facts and fill out the form'" and that "a large portion of Social Security claimants either have no representation at all or are represented by non-attorneys." *Sims*, 530 U.S. at 111–12. Given those circumstances, the court found that it would be unfair to apply issue exhaustion to individuals seeking benefits. By contrast, a "complete and proper" administrative complaint to the Commission must "[c]learly recite the facts that describe a violation of a statute or regulation under the Commission's jurisdiction," "[c]learly identify each

person, committee or group that is alleged to have committed a violation," "[i]nclude any documentation supporting the allegations, if available[,]" and "[d]ifferentiate between statements based on the complainant's personal knowledge and those based on information and belief." Guidebook for Complainants and Respondents on the FEC Enforcement Process at 6, https://transition.fec.gov/em/respondent_guide.pdf. Plaintiffs' administrative complaint in this matter was twenty-pages long with extensive legal argument and fourteen separate exhibits. (AR98-159.) It was responded to by attorneys. (AR73-98, AR162-163) The situation is in no way analogous to the three-line form at issue in *Sims*. Thus, because there is "a near absolute bar against raising new issues – factual or legal – on appeal in the administrative context," *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 562 (D.C. Cir. 2002), and plaintiffs here failed to raise arguments based on section 30104(c)(1) in the FEC's administrative process, the Court should deem such arguments to have been waived.[1]

Plaintiffs also claim that they actually did raise the issue of how section 30104(c)(1) should be interpreted during the administrative proceedings (Pls.' Opp. at 33), but they did no such thing. Plaintiffs' administrative complaint was organized in several sections: "Complainants" (AR98-100), "Respondents" (AR100-01), "Legal Framework" (AR101-02),

[1] Although plaintiffs failed to clearly allege a subsection 30104(c)(1) violation in the administrative complaint, the FEC's Office of General Counsel did briefly raise that issue in its First General Counsel's Report ("FGCR"). However, the FGCR merely noted that while section 30104(c)(1) might be read to require additional disclosure, the Commission should not pursue such a theory because of equitable concerns. (AR176.) The Commission was not on notice that the complainants might pursue the issue, and it was not presented with any argument in support of going forward under that theory. The controlling group of Commissioners adopted the General Counsel's recommendation on the issue without further comment. The doctrine of administrative exhaustion serves the important policy of ensuring that administrative complainants raise all issues they may pursue judicially, a policy interest that remains critical even if an agency happens to give an issue some level of consideration for an independent reason, as in this case. Plaintiffs should not obtain section 30109(a)(8) review of an issue simply because the Commission's attorneys engaged in a thorough review of relevant legal questions.

"Factual Allegations" (AR103-08), "Count[s I-V]" (AR 108-115), and "Conclusion" (AR115). Within the section identified as "Legal Framework," plaintiffs quoted various provisions of FECA and the FEC regulations interpreting the disclosure of independent expenditures. (AR101-02.) For example, plaintiffs discussed what an independent expenditure is (AR101 ¶ 13), what constitutes a "person" under the statute (AR101 ¶ 14), and when disclosure reports are due (AR102 ¶ 17). None of these topics was at issue in the administrative complaint; they were presumably included as background so that readers could understand the nature of the complaint and how the allegations fit into the overall legal landscape. It was in this "Legal Framework" section that plaintiffs made their sole reference to 30104(c)(1) and their belief that the provision contains an independent reporting requirement. (AR101 ¶14.) In a footnote in this background section, plaintiffs asserted generally that "[t]he FEC's interpretation of the statute fails to give full effect to these provisions" and that "[a]t a minimum," the regulatory language of "*the* reported independent expenditure" differed from the use of "*an* independent expenditure" in 52 U.S.C. § 30104(c)(2)(C). (AR102 n.1.)

Plaintiffs now suggest that this footnote was enough to raise the claim that section 30104(c)(1) contained an independent reporting requirement. But neither that footnote nor any other part of the brief suggests that Crossroads GPS violated FECA by failing to identify all of its contributors over $200. Instead, each Count of the administrative complaint alleges that Crossroads violated FECA by failing to disclose contributions made for the purpose of furthering independent expenditures, a reference to the requirement in 30104(c)(2)(C). (AR108 ¶ 40 (referring to the purpose requirement in section 30104((c)(2)(C)); AR109 ¶ 44 (same); AR109 ¶ 45 (same); AR110 ¶ 46 (same); AR110 ¶ 50 (same); AR110-11 ¶ 51 (same); AR111 ¶ 52 (same); AR111 ¶ 53 (same); AR112 ¶ 54 (same); AR112 ¶ 57 (same); AR113 ¶ 59 (same); AR113 ¶ 60

(same); AR113 ¶ 61 (same); AR114 ¶ 62 (same); AR114 ¶ 63 (same), AR114 ¶ 64 (same), AR114 ¶ 66 (same).)

In summary, the administrative complaint explicitly alleges numerous times that Crossroads GPS violated FECA by failing to disclose donors that gave for the purpose furthering independent expenditures, but none of the complaint's counts even suggest that Crossroads GPS violated FECA by failing to disclose all of its over-$200 contributors. Plaintiffs failed to raise even the "same general legal issue" as an issue to be addressed in the administrative enforcement proceeding, much less the "specific argument" they now seek to advance. *Hispanic Affairs Project*, 263 F. Supp. 3d at 186. They have failed to preserve the section 30104(c)(1) issue here.

D. Equitable Concerns and FECA's Safe Harbor Provision Would Likely Have Presented Barriers to Pursuit of an Alleged Section 30104(c)(1) Violation

Contrary to plaintiffs' claims (Pls.' Opp. at 44-45), the Commission's controlling group properly exercised its prosecutorial discretion regarding any 52 U.S.C. § 30104(c) claim here because moving forward with the claim raised equitable concerns that the Commission's regulation did not give fair notice of the requisite level of disclosure if section 30104(c)(1) were to be interpreted as an independent disclosure provision. (AR176.) These equitable concerns are based on the same rationale as the "safe harbor" provision in FECA, which provides that "any person who relies upon any rule or regulation prescribed by the Commission in accordance with the provisions of this section and who acts in good faith in accordance with such rule or regulation shall not, as a result of such act, be subject to any sanction provided by this Act." 52 U.S.C. § 30111(e). Although the controlling group did not specifically cite that provision, it was therefore reasonable to exercise prosecutorial discretion based on these concerns.

Plaintiffs argue that the safe harbor provision would not be an obstacle to pursuing a claim that Crossroads GPS violated 52 U.S.C. § 30104(c)(1) because "there are significant

reasons to believe Crossroads GPS's reliance is not in good faith." (Pls.' Opp. at 37.) But plaintiffs present no affirmative evidence that Crossroads GPS failed to act in good faith. Rather, plaintiffs rely on theories that assume Crossroads GPS shared plaintiffs' flawed view of the relevant reporting requirements. First, plaintiffs argue that Crossroads GPS had notice that section 30104(c)(1) imposed a stand-alone reporting requirement due to a Request for Additional Information that the FEC sent the group stating that it had failed to include contributor information in its disclosures. (*Id.* (citing AR42).) But such a letter is merely an "opportunity to correct *or explain report information for the public record*." Request for Additional Information ("RFAI"), https://www.fec.gov/help-candidates-and-committees/request-additional-information/ (emphasis added). The instructions for the independent expenditure reporting form state that reporting entities must disclose "each contribution over $200 that was made for the purpose of furthering the independent expenditures" (Instructions for Preparing FEC Form 5, https://www.fec.gov/resources/cms-content/documents/fecfrm5i.pdf), but the form itself does not provide an opportunity for a reporting entity to clarify whether contributors are undisclosed due to an oversight or due to the fact that none contributed for the purpose of furthering an independent expenditure. *See* FEC Form 5, https://www.fec.gov/resources/cms-content/documents/fecfrm5.pdf. FEC Campaign Finance Analysts routinely send out RFAIs to filers without contributor information so that such filers can either provide the information or explain the reason why information was not provided. Crossroads GPS received several such letters.[2] But none provided notice that the organization "was failing to comply with its reporting obligations," as plaintiffs claim. (Pls.' Opp. at 37.)

[2] RFAI, http://docquery.fec.gov/pdf/455/11330010455/11330010455.pdf (June 14, 2011); RFAI, http://docquery.fec.gov/pdf/453/11330010453/11330010453.pdf (June 14, 2011);

Plaintiffs' other arguments are no stronger. They next point to *FEC v. Massachusetts Citizens for Life, Inc.* ("*MCFL*"), 479 U.S. 238 (1986), a case that plaintiffs believe makes clear that 52 U.S.C. § 30104(c)(1) is an independent reporting requirement, as evidence that Crossroads GPS had notice. (Pls.' Opp. at 37.) But as discussed *infra* pp. 26-28, *MCFL* is not controlling authority on this issue, and language from a 32-year-old case that has not been followed or definitively explained in the intervening time can hardly be considered such clear notice as to make the Commission's determination unreasonable. Plaintiffs also point to a petition for rulemaking filed by then-Congressman (now Senator) Christopher Van Hollen in 2011, which requested that the FEC amend its regulation to reflect the interpretation that section 30104(c)(1) is an independent reporting requirement. (Opp. at 37.) But Van Hollen's petition for rulemaking cannot be considered much notice to Crossroads about the state of the law because the Commission did not ultimately decide to open a rulemaking in response to Van Hollen's request. Lastly, plaintiffs assert that if only a lawyer for Crossroads GPS had read the statute, that would have provided notice. (*Id*.) But given the ambiguity of the relevant provision and regulatory framework (*see infra* pp. 33-41), simply reading the statute would not have provided adequate notice in this case.

Indeed, the FEC has never interpreted 52 U.S.C. § 30104(c)(1) as a stand-alone reporting requirement in the 38 years of the provision's existence. *See infra* pp. 38-40. Plaintiffs' claim that Crossroads failed to act in good faith is thus completely unsupported. The controlling group reasonably exercised its prosecutorial discretion to not pursue such a theory for the first time in this enforcement matter.

RFAI, http://docquery.fec.gov/pdf/945/12330014945/12330014945.pdf (Oct. 5, 2012); RFAI, http://docquery.fec.gov/pdf/481/13330028481/13330028481.pdf (Apr. 9, 2013).

E. The Commission's Exercise of Prosecutorial Discretion Does Not Automatically Confer on CREW the Authority to Sue Crossroads GPS in Its Own Capacity

As explained earlier, the Commission has considerable discretion in determining whether to pursue an investigation against a party accused of wrongdoing. (FEC Mem. at 14-16.) Plaintiffs concede that the Commission has prosecutorial discretion, but they argue that exercising that discretion in a case in which there is reason to believe a violation occurred is "contrary to law." (Pls.' Opp. at 43-44 & n.27.) According to plaintiffs, FECA's provision stating that the FEC "shall make an investigation" of any complaint as to which it finds reason to believe a violation occurred means that the FEC acts contrary to law every time it exercises its discretion not to pursue a claim, and that CREW is therefore entitled to bring a private action pursuant to FECA's citizen-suit provision, 52 U.S.C. § 30109(a)(8)(C). (Pls.' Opp. at 43, 44 n. 27.) But in the forty-year history of the citizen-suit provision — which includes many challenges to discretionary FEC dismissals — no court has adopted CREW's view of the law.

FECA's text squarely contradicts CREW's argument. Three statutory conditions must be met before a private litigant may bring its own civil action to redress alleged FECA violations. First, the litigant must file an administrative complaint with the Commission, which may either act on the complaint or choose not to do so. *See* 52 U.S.C. § 30107(e); *In re Fed. Election Campaign Act Litig.*, 474 F. Supp. 1051, 1053 (D.D.C. 1979). Second, if the FEC elects to dismiss the administrative complaint, the private litigant must obtain a declaration from the district court that the dismissal was contrary to law. 52 U.S.C. § 30109(a)(8)(C). Third, the FEC must fail "to conform with such declaration within 30 days." *Id.* Then, and only then, may a private litigant bring a lawsuit in her own name to redress an alleged FECA violation. *Id.*

Recognizing the FEC's prosecutorial discretion does not invalidate any portion of this statutory scheme. That is because Commission decisions not to prosecute, unlike those of most agencies, remain subject to judicial review. *Akins*, 524 U.S. at 26; *see Heckler*, 470 U.S. at 832. When the Commission dismisses an administrative complaint, even as an exercise of prosecutorial discretion, it must explain its rationale for doing so. *See Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1135 (D.C. Cir. 1987). On judicial review of that decision, courts evaluate the Commission's exercise of discretion to determine whether it depends on any errors of law or is otherwise unreasonable. *Orloski*, 795 F.2d at 161; *see also CREW*, 475 F.3d at 340 ("At this stage, judicial review of the Commission's refusal to act on complaints is limited to correcting errors of law.").

If the Commission supplies reasonable grounds for invoking its discretion not to pursue an enforcement matter, its decision is not contrary to law and the condition precedent for a private right of action is never triggered. *See* 52 U.S.C. § 30109(a)(8)(C). In the event the Commission's rationale for not pursuing a case is unreasonable — or if the Commission makes errors of law in its analysis — that exercise of discretion would be rejected on judicial review and the matter would be remanded to the agency. *Id.* If the Commission failed to conform to such a court declaration, a complainant could bring a civil action in its own name. *Id.* Each potential court determination and resulting circumstance is fully consistent with the plain statutory text. In contrast, CREW's argument is inconsistent with FECA's text because it would permit a private right of action even when the Commission acted reasonably in exercising its discretion to dismiss and its analysis did not depend on any impermissible legal judgments.

The fact that Commission dismissals based on prosecutorial discretion remain subject to reasonableness review is sufficient to respond to plaintiffs' contention here. If the Commission

relied on an arbitrary or otherwise impermissible rationale for invoking its discretion, that dismissal would be declared contrary to law on judicial review. *See La Botz v. FEC*, 61 F. Supp. 3d at 33 n.5 (rejecting hypothetical argument that the Commission could use its prosecutorial discretion in a way that was racially discriminatory because the "hypothetical would likely not survive an arbitrary and capricious challenge").

The extremely limited circumstances that trigger a private action under FECA make clear that Congress intended such suits to be rare. *See* 52 U.S.C. § 30109(a)(8)(C). The Commission has the sensitive task of regulating political activities of the nation's elected officials and other political actors. *See FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (noting that the Commission must decide "issues charged with the dynamics of party politics"); *Van Hollen v. FEC*, 811 F.3d 486, 499 (D.C. Cir. 2016) (describing the unique role of the FEC in having the sole purpose of regulating "core constitutionally protected activity"). The Commission's authority is "considerable" and its power "potentially enormous," including the authority to "conduct investigations, authorize subpoenas, . . . and initiate civil actions." *Combat Veterans for Cong. Political Action Comm. v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015) (citing 52 U.S.C. § 30107). Congress provided for an independent commission and procedural safeguards to ensure that enforcement actions in this area would not be used as a partisan or political weapon. *See id.*; H.R. Rep. No. 94-917, at 3 (1976) ("It is . . . essential in this sensitive area that the system of administration and enforcement enacted into law does not provide room for partisan misuse . . . ."). Had Congress intended to provide for citizen suits upon the mere discretionary decision of the FEC not to pursue a matter, it could easily have done so, as it has in other contexts. *See, e.g.*, 42 U.S.C. § 2000e-5(f)(1) (explicitly permitting

"persons aggrieved" to file employment discrimination lawsuits if the Equal Employment Opportunity Commission dismisses or fails to act on a charge within a specified time).[3]

Plaintiffs provide no citation to any principle of law that an agency is required to resolve the merits of every case presented to it. *See, e.g.*, *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986); *cf. N.Y. State Dep't of Law v. FCC*, 984 F.2d 1209, 1214 (D.C. Cir. 1993) (upholding agency's decision to settle "an enforcement action without resolving any of the legal issues raised in the Order to Show Cause initiating that action"). And the FEC is aware of no such authority.

The Court should grant summary judgment to the Commission on plaintiffs' claims that the agency acted unlawfully by dismissing plaintiffs' administrative complaint.

II. THE COMMISSION'S REGULATION AT 11 C.F.R. § 109.10(e)(1)(vi) WAS LAWFULLY PROMULGATED AND IT REMAINS VALID

The FEC regulation that plaintiffs challenge, 11 C.F.R. § 109.10(e)(1)(vi), was reasonable when promulgated in 1980 and continues to be reasonable today. (*See* FEC Mem. at 31-50.) Plaintiffs make a procedural argument that the regulation should be struck down due to a purportedly inadequate explanation, but that argument is untimely and should not be considered by the Court. In any case, under the deferential standards of review, the Commission's explanation was sufficient, the agency had authority to promulgate the regulation, and the regulation itself is a reasonable interpretation of the ambiguous requirement for disclosure of

[3] The long history of judicial review of the Commission's handling of enforcement cases indicates that Congress's statutory scheme is operating as intended. Although judicial review of Commission dismissals is appropriately deferential, courts have on occasion declared such dismissals contrary to law. *See, e.g.*, *CREW v. FEC*, 209 F. Supp. 3d 77, 95 (D.D.C. 2016). When they have done so, the Commission has almost always fulfilled its duty to conform to those decisions in the first instance. And although the conferral of a private right of action under FECA is accordingly rare, it has happened. *See Democratic Senatorial Campaign Comm. v. Nat'l Republican Senatorial Comm.*, No. 1:97-cv-1493 (D.D.C. filed June 30, 1997).

contributor information in 52 U.S.C. § 30104(c)(2)(C). Furthermore, it is reasonable for the Commission's independent expenditure regulation not to encompass plaintiffs' reading of 52 U.S.C. § 30104(c)(1) as a separate reporting requirement. The Court should thus reject plaintiffs' efforts to strike down this longstanding regulation.

A. Judicial Review of the Commission's Regulation Is Deferential

The Commission's earlier brief explained that the Court's review of plaintiffs' challenge to the regulation under the Administrative Procedure Act ("APA") and under *Chevron* is "highly deferential" and based solely on the administrative record before the Commission when promulgating the regulation. (FEC Mem. at 31-34 (quoting *Sierra Club v. EPA*, 353 F.3d 976, 978 (D.C. Cir. 2004).) Plaintiffs now argue that this routine deference is unwarranted because the explanation the FEC gave for the regulation when it was promulgated was purportedly inadequate. (Pls.' Opp. at 4.) Plaintiffs' argument is flawed, both because it is foreclosed by the statute of limitations and because the Commission's explanation was sufficient to explain the modest clarification made to the statutory language by the regulation. *See infra* pp. 20-23. Plaintiffs argue that deferential review predicated on the FEC's expertise is also undeserved, but there is little doubt that, as the agency responsible for receiving and analyzing campaign finance reports of various types, the agency is the entity in the best position to identify ambiguities that could be problematic in implementing FECA. Nothing about this case would justify depriving the FEC of the ample deference routinely accorded to federal agency rulemaking.[4]

[4] Plaintiffs also claim that the FEC argued it could adopt rules "contravening the statute" (Pls.' Opp. at 4 n.1), but of course the agency argued no such thing (*see* FEC Mem. at 32).

B. Plaintiffs' Challenge to the Sufficiency of the Regulation's Explanation and Justification Is Untimely and Erroneous

The regulation at issue in this case, passed as a result of the 1979 FECA amendments, contains language almost identical to the statutory language in 52 U.S.C. § 30104(c)(2)(C). The statute requires entities other than political committees who make independent expenditures to report "each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering *an* independent expenditure." 52 U.S.C. § 30104(c)(2)(C) (emphasis added.) The regulation simply requires such filers to report "each person who made a contribution in excess of $200 to the person filing the report, which contribution was made for the purpose of furthering *the reported* independent expenditure." 11 C.F.R. § 109.10(e)(1)(vi) (emphasis added). At the time the regulation was promulgated in 1980, the Commission explained that "[t]his section has been amended to incorporate the changes set forth at 2 USC 434(c)(1) and (2) [now 52 U.S.C. § 30104(c)(1) and (c)(2)] regarding reporting requirements for persons, other than a political committee, who make independent expenditures." (AR1503.)

Plaintiffs argue that this explanation was insufficient and so the regulation is invalid on that basis alone. (Pls.' Opp. at 6 (citing *Public Citizen, Inc. v. FAA*, 988 F.2d at 186, 197 (D.C. Cir. 1993) and *Shays v. FEC*, 414 F.3d 76, 100 (D.C. Cir. 2005)).) But as an initial matter, the relevant statute of limitations precludes bringing procedural challenges like this more than six years after the regulation's promulgation. And in any case the Commission's explanation, while concise, is adequate given that the language of the statute and regulation are virtually identical.

This Court previously held that there is jurisdiction for plaintiffs to challenge 11 C.F.R. § 109.10(e)(1)(vi) here because "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.*" *CREW v. FEC*, 243 F. Supp. 3d 91, 101 (D.D.C. 2017) (emphasis added). The Court's description of permissible challenges as those involving conflicts between a regulation and statute is consistent with a line of cases distinguishing between substantive challenges brought to regulations after the statutory period (which are permitted) and procedural challenges (which are not permitted). "[C]hallenges to the *procedural lineage of agency regulations*, whether raised by direct appeal, by petition for amendment or rescission of the regulation or as a defense to an agency enforcement proceeding, will not be entertained outside the [time] period provided by statute." *JEM Broad. Co., Inc. v. FCC*, 22 F.3d 320, 325 (D.C. Cir. 1994); *Schiller v. Tower Semiconductor Ltd.*, 449 F.3d 286, 293 (2d Cir. 2006). The very purpose of the statutory limitations period is to promote the agency's interest in prompt review and to provide "finality in administrative processes." *JEM Broad. Co., Inc.*, 22 F.3d at 325. "While an agency's ultra vires or unconstitutional act might outweigh these policy concerns and therefore justify reaching an otherwise time-barred challenge to agency action, a mere procedural defect does not." *Schiller*, 449 F.3d at 293.

Plaintiffs do not challenge the caselaw distinguishing between jurisdiction for procedural challenges and substantive challenges. However, they argue that a challenge to an agency's explanation and justification for a regulation is substantive, not procedural, and therefore their challenge to the regulation on that basis is not barred by the statute of limitations. (Pls.' Opp. at 35-36.) Plaintiffs cite several cases that describe an explanation for a rule as "substantive." (*Id.* (citing *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 701 (D.C. Cir. 2016); *George E. Warren Corp. v. E.P.A.*, 159 F.3d 616, 620 (D.C. Cir. 1998); and *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 78

(D.D.C. 2007).) But none of those cases is about a statute of limitations, nor does any use the term "substantive" to distinguish between justiciable and non-justiciable regulatory challenges.

By contrast, in *Perez-Guzman v. Lynch*, the Ninth Circuit actually examined the question of whether an allegedly inadequate explanation for a federal regulation was procedural or substantive for the purpose of applying the statute of limitations. 835 F.3d 1066, 1077–78 (9th Cir. 2016), cert. denied, No. 17-302, 2018 WL 410912 (Jan. 16, 2018). The appellant in *Perez-Guzman* argued that the Attorney General had based an immigration regulation on a flawed interpretation of law. *Id.* at 1077. The appellant also argued that the regulation was not entitled to *Chevron* deference because "the agency allegedly failed to explain its interpretation of [the law] when it originally promulgated the regulation." *Id.* The court found that the argument that the Attorney General had unreasonably interpreted the law was timely, but that the argument that the government had failed to explain the interpretation could not be considered because it was a "procedural error[]" and had to be brought within the six-year statute of limitations. *Id.* at 1077-78; *see also Marsh v. J. Alexander's LLC*, 869 F.3d 1108, 1118 n.11 (9th Cir. 2017) (declining to reach challenge to regulation based in part on fact that it was promulgated "without reasoned explanation or forewarning" because "this objection comes well after the statute of limitations period for procedural challenges to agency actions"). In support of its holding, *Perez-Guzman* cited the Supreme Court's opinion in *Encino Motorcars, LLC v. Navarro*, which stated that "[o]ne of the basic *procedural requirements* of administrative rulemaking is that an agency must give adequate reasons for its decisions." 136 S. Ct. 2117, 2125 (2016) (emphasis added). This Court therefore should not consider plaintiffs' arguments about the sufficiency of the FEC's explanation and justification.

Even if the Court did consider the explanation, however, it should reject plaintiffs' challenge because the Commission's explanation was adequate given the circumstances. While "an agency is required to adequately explain its decision," it need not do so with perfect precision. *Van Hollen*, 811 F.3d at 496-97. "It is enough that a reviewing court can reasonably discern the agency's analytical path," *id.* at 497, even if the decision is "of 'less than ideal clarity,'" *Nader v. FEC*, 823 F. Supp. 2d 53, 58 (D.D.C. 2011) (quoting *Common Cause v. FEC*, 906 F.2d 705, 706 (D.C. Cir. 1990)). As discussed *infra* pp. 23-25, the indefinite article "an" created ambiguity in the statute, and the Commission's regulation was a reasonable clarification of that ambiguity. The reason for this modest change to the statutory language is not "[i]nexplicable" (Pls.' Opp. at 5); rather, it is readily apparent if one compares the language of the statute to that of the regulation. Finally, as discussed in the Commission's prior brief, even if the Court were to find this issue justiciable and agree with plaintiffs that the Commission's explanation was inadequate, the appropriate remedy would be to remand to the Commission to obtain additional explanation. (FEC Mem. at 50 n.10.)

C. The Regulation Passes *Chevron* Step One Because the Ambiguity of the Statute Provided the Commission With Authority to Promulgate 11 C.F.R. § 109.10(e)(1)(vi)

The first step of *Chevron* analysis considers whether the statute unambiguously expresses Congressional intent, and if so, the court must give effect to that statutory intent. *Chevron*, 467 U.S. at 842; *see* FEC Mem. at 31-34. Plaintiffs argue that 52 U.S.C. § 30104(c)(2)(C) is unambiguous, that the Commision's regulation differs from the statutory text, and that therefore the Commission's regulation should be invalidated. But as the Commission has explained, the requirement in the statute that a specific report filed with the FEC identify contributions "made for the purpose of furthering an independent expenditure" is inherently ambiguous because the

scope of independent expenditures contemplated by the word "an" is undefined. 52 U.S.C. § 30104(c)(2)(C); *see* FEC Mem. at 34-41.

As an analogy, imagine that you have a parent or friend who is worried about what you are eating in the morning. This breakfast monitor asks you to do the following: (1) If you eat more than five omelets in a year, you should send *a* letter that; (2) contains the following information — (A) what ingredients were in *the* omelet, (B) whether anyone helped you make *such* omelet, and (C) the number and brand of eggs that you got for the purpose of making *an* omelet. The articles italicized above are identical to the articles used in 52 U.S.C. § 30104(c), and the ambiguity in part (C) is evident. In each letter your breakfast monitor has asked you to send, are you to identify the number and brand of eggs that you obtained for the purpose of making the omelet (or omelets) that are being described in the rest of the letter? Or should you, in each letter, list the number and brand of every egg that you have ever obtained for the purpose of making any omelet? And even determining the precise meaning of "an" would not resolve the ambiguity, because "an" merely refers to an unspecified omelet within a group, but the size of the group is undefined. It would be entirely reasonable to interpret your monitor's instructions to mean that the group envisioned by "an" in subsection (C) is limited to the omelets that are being reported in subsections (A) and (B). That is precisely what the Commission's regulation does.

In addressing this issue, plaintiffs' opposition tries to distinguish *United States v. Hagler*, a case cited by Crossroads GPS. (Pls.' Opp. at 10 n.3 (citing *Hagler*, 700 F.3d 1091 (7th Cir. 2012)).) In that case, the defendant argued that the use of "an identified person" in one part of a criminal statute involving DNA evidence should be interpreted broadly to mean any identified person. *Id.* at 1097. But the Seventh Circuit rejected that argument, because "the rest of the statute is written using definite articles" and "[t]aken together, these words all suggest that the

DNA evidence in question must be much more specific." *Id.* ("statutory interpretation also 'depends upon reading the whole statutory text . . .'" (quoting *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006))).

The statute at issue in this case, just like the statute at issue in *Hagler*, contains both definite articles and indefinite articles. It is therefore reasonable to interpret "an independent expenditure" in subsection 30104(c)(2)(C) to be constrained by "the independent expenditure" in 30104(c)(2)(A) and "such independent expenditure" in 30104(c)(2)(B).[5] As the Commission noted previously, because the other parts of the provision make clear that independent expenditure reports describe one or more specific independent expenditures, "the word 'an' can be read to refer to any of the independent expenditures *that are described in the actual report*." (FEC Mem. at 39.)

Plaintiffs also fail to distinguish *Ctr. for Individual Freedom v. Van Hollen*, a case involving a similar reporting provision of FECA. (Pls.' Opp. at 13-14 (discussing *Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012).) In *Van Hollen*, the D.C. Circuit held that the statutory language requiring "the names and addresses of all contributors who contributed" to the person making an electioneering communication was sufficiently ambiguous that it was reasonable for the Commission to draft an implementing regulation requiring reporting of contributions "made for the purpose of furthering electioneering communications." *Van Hollen*, 694 F.3d at 108, 109 (citing 52 U.S.C. § 30104(f)(2)(F) and 11 C.F.R. § 104.20(c)(9)). The *Van Hollen* court held that Congress had not expressed a clear intention as to what had to reported, explaining that the context of a statute can make seemingly plain text ambiguous.

---

[5] Plaintiffs repeatedly, but wrongly, claim that the FEC contends plaintiffs' interpretation of the statute is "absurd." (Pls.' Opp. at 6, 11, 12, 25, 29, 30.) The Commission's position is merely that the statutory language is ambiguous, and that it was reasonable for the Commission to have interpreted it as the agency does in the regulation. That is the relevant inquiry here.

Plaintiffs attempt to distinguish *Van Hollen* by arguing that the regulation there was interpreting a statute "[w]ithout a scope of reporting specified" but that the statute at issue in this case has "no unspecified scope." (Pls.' Opp. at 13-14.) Plaintiffs' position seems to be that it is acceptable for the FEC to clarify that "contributors who contributed" means contributions "made for the purpose of furthering electioneering communications," but not that "made for the purpose of furthering an independent expenditure" means "made for the purpose of furthering the reported independent expenditure." That argument is unpersuasive. If the Commission has the authority to make a significant clarifying alteration to resolve ambiguity in the electioneering communication provision, it has the authority to make the modest clarification at issue here.[6]

Lastly, plaintiffs assert that the independent expenditure reporting statute was definitively interpreted more than 30 years ago in *MCFL*, 479 U.S. 238 (1986), to require broader disclosure than the FEC's regulation does and therefore this Court is bound by that Supreme Court precedent. (Pls.' Opp. at 14-15). But that is a gross mischaracterization of the *MCFL* decision. (*See* FEC Mem. at 27.)

MCFL was not about disclosure. The case examined whether FECA's prohibition on corporations using general treasury funds for independent expenditures was constitutional as

---

[6] Plaintiffs also argue that the Commission's regulation at issue in *Van Hollen* is inconsistent with the agency's position that 52 U.S.C. § 30104(c)(2)(C) is ambiguous, claiming that the Commission would not have drafted a regulation using the phrase "for the purpose of furthering electioneering communications" if it believed that "for the purpose of furthering an independent expenditure" was unclear. (Pls.' Opp. at 14.) However, there are meaningful differences in the language and surrounding context of those two phrases, including the word "an" as discussed above. Some Commissioners have taken the view that the electioneering communications regulation should be interpreted in the same manner as the independent expenditure regulation — including only contributions made for the purpose of furthering "the communication *that is the subject of the report*." Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn at 5, MUR 6002 (In the Matter of Freedom's Watch, Inc.), August 13, 2010, https://www.fec.gov/files/legal/murs/current/80943.pdf.

applied to a non-profit corporation with certain distinct characteristics, including that it was not a political committee and that it received no funding from corporations or labor unions. *MCFL*, 479 U.S. at 264. The Court held that the law as applied to such organizations violated the First Amendment because it infringed on protected speech without a compelling justification. *Id*. at 263. Because the law had previously prohibited entities like MCFL from making such independent expenditures at all, neither the parties nor the Court paid much attention to what MCFL's disclosure requirements would look like if it were permitted to make such expenditures. Neither the FEC's initial brief in that case nor any of the four amicus briefs even mentioned the provision at issue in this case. *See* Brief for Appellant FEC, *MCFL*, No. 85-701, 1986 WL 727481 (Feb. 27, 1986); Amicus Brief of the Reporters Committee for Freedom of the Press et al., *MCFL*, No. 85-701, 1986 WL 727484 (Apr. 4, 1986); Amicus Brief for the National Rifle Association of America, *MCFL*, No. 85-701, 1986 WL 727486 (Apr. 4, 1986); Amicus Brief for the Home Builders Association of Massachusetts, *MCFL*, 1986 WL 727491 (Apr. 4, 1986); Amicus Brief of the ACLU, et al., *MCFL*, No. 85-701, 1986 WL 727489 (Apr. 4, 1986). The two remaining Supreme Court briefs touched briefly on disclosure but made no specific arguments about how the provision at issue here should be interpreted. *See* Brief ofor the Appellee MCFL at 36, 45, *MCFL*, No. 85-701, 1986 WL 727495 (Apr. 4, 1986); Reply Brief for Appellant FEC at 31, *MCFL*, No. 85-701, 1986 WL 727498 (Sept. 30, 1986).

Unsurprisingly, the *MCFL* Court's opinion likewise did not focus on the independent expenditure reporting provision.[7] The Court determined first that the law's prohibition on

[7] The Commission's previous brief mistakenly argued that the reference to the independent expenditure reporting provision in *MCFL* "was in a portion of the opinion only signed by four justices." (FEC Mem. at 27.) As plaintiffs have pointed out (Pls.' Opp. at 15), five Justices did sign that portion of the opinion. Nonetheless, for the additional reasons stated in this brief and the FEC's prior brief, *MCFL* is not controlling on the issues in dispute here.

independent expenditures applied to MCFL (*MCFL*, 479 U.S at 245-51), then that this prohibition infringed on the First Amendment (*id.* at 251-56), and then that the government lacked a compelling interest for infringing on that right (*id.* at 256-63). In that last part of its opinion, the Court examined several possible government interests for the law and found them lacking. In particular, the Court was unpersuaded that entities such as MCFL could be used as a conduit by other corporations and unions wishing to engage in political activities because MCFL would have disclosure requirements under FECA. *Id.* at 262. Without stating that any particular disclosure requirement was sufficient to alleviate the concern about MCFL-type organizations being used as conduits, the Court briefly described what it believed to be those disclosure requirements. Plaintiffs now rely on those few sentences to argue that subsection 30104(c)(2)(C) is unambiguous (and that subsection (c)(1) is a standalone reporting requirement, *see infra* p. 38). But in fact those issues were peripheral to the decision in *MCFL*, were not contested by the parties there, and do not appear to have made a significant difference in the case's outcome.[8]

D. The Regulation Passes *Chevron* Step Two Because It Reasonably Clarifies the Language of 52 U.S.C. § 30104(c)(2)(C)

The regulation at 11 C.F.R. § 109.10(e)(1)(vi) is a reasonable interpretation of ambiguous statutory language. Plaintiffs argue that the regulation fails even the deferential standards of *Chevron* Step Two review primarily because it "frustrates the purposes of the FECA and creates redundancies with other provisions of the law." (Pls.' Opp. at 16.) These arguments lack merit.

[8] Plaintiffs incorrectly claim that the FEC "concedes" that 11 C.F.R. § 109.10(e)(1)(vi) "requires less disclosure than" 52 U.S.C. § 30104(c)(2)(C). (Pls.' Opp. at 16 (citing FEC Mem. at 37).) In fact, the FEC's consistent position has been that the statute is ambiguous and the regulation is a reasonable interpretation of the statute. (FEC Mem. at 43 ("[T]he regulation was a useful clarification, consistent with the intent of Congress . . .").)

1. Evidence Regarding the Extent of Disclosure Today Cannot Be Considered in Determining Whether the Commission Acted Reasonably in Passing the Regulation in 1980

As the Commission explained in its opening brief, judicial review of agency action is based upon the administrative record before the agency when it acted. (FEC Mem. at 47-49.) Any other standard would "require[] administrators to be prescient." *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984). Despite this well-established rule of judicial review, plaintiffs continue to argue that this Court should take the extraordinary step of considering information about the amount of disclosure regarding contributions to those making independent expenditures in recent election cycles. (Pls.' Opp. at 18-19.) Plaintiffs make no attempt to respond to the numerous cases cited by the Commission and Crossroads GPS in their prior briefs about this bedrock principle of administrative law. Plaintiffs do rely on a comment from the Federal Rules of Evidence and a case that discusses judicial notice, but that reliance is misplaced. (*See* Pls.' Opp. at 18 (citing Fed. R. Evid. 201 (cmmt..) and *Sanders v. Kerry*, 180 F. Supp. 3d 35, 41 (D.D.C. 2016)).) The principle of judicial notice concerns the reliability of evidence. While under most circumstances a court will only consider evidence that is properly introduced and authenticated by the parties to a lawsuit, there are certain circumstances in which facts in the public domain can be considered to be so beyond doubt that a court can rely upon them even though they have not been introduced or authenticated by the parties. However, the reason for excluding information unavailable to the Commission when it promulgated the rule involves fairness to administrators about the reasonableness of their determination based on the information available to them at the time and is not limited to concerns regarding reliability.[9]

[9] In any case, neither the rule comment nor the case plaintiffs cite are relevant here. The quoted language from the commentary to Rule 201 originally comes from a 1944 Harvard Law Review article that merely recites the unremarkable proposition that if a judge is unfamiliar with

This Court considered and rejected the same judicial notice argument plaintiffs now make in *Silver State Land, LLC v. Beaudreau*, 59 F. Supp. 3d 158 (D.D.C. 2014) (Howell, J.). In that case, the plaintiff asked the Court to take judicial notice of a state court order that was not part of the administrative record in the case. But the Court explained:

> Judicial notice is "typically an inadequate mechanism" for a court to consider extra-record evidence in reviewing an agency action. *Dist. Hosp. Partners, L.P. v. Sebelius*, 971 F. Supp. 2d 15, 32 n. 14 (D.D.C. 2013). "Instead, a court may only consider an adjudicative fact subject to judicial notice that is *not* part of the administrative record if it qualifies for supplementation as extra-record evidence under [*Esch v. Yeutter*, 876 F.2d 976 (D.C. Cir. 1989)]." *Id.* (citing *Cnty. of San Miguel v. Kempthorne*, 587 F. Supp. 2d [64,] 78–79 [(D.D.C. 2008)]) (emphasis in original). As the Nevada Order does not qualify for supplementation of the administrative record or extra-record review, for the reasons set forth above, the plaintiff's request for judicial notice of the Nevada Order is also denied.

Silver State Land, LLC, 59 F. Supp. 3d at 172.

Plaintiffs' final argument is that the Court should consider evidence about independent expenditure disclosure that post-dates the Commission's 1980 rulemaking because such information "shows how the regulation is frustrating the purpose of the statute" and shows that the FEC did not consider all factors in its rulemaking. (Pls.' Opp. at 18 n.7.) Plaintiffs rely on *Shays v. FEC*, but that case does not support the proposition that a court can look at data from thirty years after a regulation was passed to determine if it is reasonable, because *Shays* merely considered information about the foreseeable consequences of a regulation that had recently been promulgated, not information about what actually happened long afterwards. 528 F.3d 914, 925 (D.C. Cir. 2008). The notion that evidence post-dating the FEC's rulemaking should be

---

an area of the law or how it should be applied to the facts of a case, she can use information not presented by the parties to inform herself. *See* Edmund M. Morgan, *Judicial Notice*, 57 Harv. L. Rev. 269, 272 (1944) (a judge "must take judicial notice of what everyone knows and uses in the ordinary process of reasoning about everyday affairs."). And the case plaintiffs cite simply notes that a court can consult certain information "without converting a motion to dismiss into a motion for summary judgment because such records are public document[s] of which a court may take judicial notice." *Sanders*, 180 F. Supp. at 41 (internal quotation marks omitted).

considered because it shows the agency failed to examine all relevant factors is illogical and would swallow the rule against consideration of facts outside the administrative record. The Court therefore cannot consider the evidence that plaintiffs have put forward about disclosure after the regulation was issued.[10]

2. The Interpretation of the Statute in the Regulation Does Not Create Redundancies

The language of 11 C.F.R. § 109.10(e)(1)(vi) requires a filer of an independent expenditure report to include "[t]he identification of each person who made a contribution in excess of $200 to the person filing such report, which contribution was made for the purpose of furthering the reported independent expenditure." 11 C.F.R. § 109.10(e)(1)(vi) (emphasis added). Plaintiffs have argued that interpreting subsection 30104(c)(2)(C) of the statute in this manner makes the provision redundant with requirements that makers of independent expenditures file their own reports, but the FEC pointed out multiple scenarios in which a contributor would be disclosed under the regulation but not be considered the maker of an independent expenditure required to file his own statement. (FEC Mem. at 46-47.)

Plaintiffs now assert (Pls.' Opp. at 20-21) that a 2008 Advisory Opinion by the Commission supports their position. It does not. In that Advisory Opinion, the Commission considered VoterVoter.com, a for-profit non-partisan internet service that allowed individuals to pay to have existing advertisements on the website aired on television. AO 2008-10 (VoterVoter.com) (Oct. 24, 2008), https://www.fec.gov/files/legal/aos/73731.pdf. The Commission's Advisory Opinion stated that the person paying for the advertisement would be the person responsible for reporting that independent expenditure. *Id.* at 7. The Commission

[10] In addition, as discussed in the FEC's prior brief, it is by no means clear that the FEC's regulation, rather than the statute itself, is responsible for any lack of disclosure of contributions to those engaged in independent expenditures. (FEC Mem. at 43-44.)

stated its determination was based on the facts that VoterVoter.com "will be acting as a commercial vendor engaging in the proposed activity for genuinely commercial purposes and not for the purpose of influencing any Federal election" and that it would "accept and post ads on a non-partisan basis." *Id.* That is a very particular commercial context far afield from the activity at issue in this case.

The overwhelming majority of groups engaged in independent expenditures are partisan ideological entities doing so for the purpose of influencing federal elections. Under neither the regulation nor the statute does an individual become the maker of an independent expenditure merely because she gave a contribution to a group for the purpose of that group running an independent expenditure. There is no merit to plaintiffs' claim that the regulation makes the statute redundant.

3. Congress Has Not Acted on This Issue Despite CREW's Argument That the Regulation Has Been in Conflict With the Statute for 38 Years

Although plaintiffs argue that the FEC's regulation has been misinterpreting FECA's disclosure requirements since 1980, Congress has taken no action to correct this purported misinterpretation, despite the fact that there are few areas of the law more familiar to Members of Congress than campaign finance law. And Congress has had ample opportunity to overturn 11 C.F.R. § 109.10(e)(1)(vi) since its promulgation in 1980. Indeed, some members of Congress have tried and failed several times to enact legislation to change the disclosure requirements for independent expenditures. For example, starting in 2010 and continuing in subsequent Congressional sessions, a bill known as the "DISCLOSE Act," would have required persons that meet certain thresholds of independent expenditure activity using their general funds to disclose *all* of their contributors, without regard to whether those contributions were made for the purpose

of furthering independent expenditures. *See, e.g.*, H.R. 430, 114th Cong. § 324(a)(2)(F) (2015), https://www.congress.gov/bill/114th-congress/house-bill/430/text. The DISCLOSE Act, however, has not been enacted despite being reintroduced multiple times. While this inaction is of course not dispositive regarding whether Congress believes the FEC's regulation is consistent with the statute in the circumstances of this case, it is appropriate to consider this inaction as an indication of tacit approval by Congress. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 600-01 (1983) (upholding regulation in part due to Congressional acquiescence both because the subject matter was one with which Congress was intimately familiar and because Congress made several unsuccessful attempts to override the regulation).

E. It Is Reasonable to Interpret Section 30104(c)(1) as Too Ambiguous, in the Overall Context of the Statute, to Treat as an Independent Reporting Requirement

The Commission's opening brief showed why 52 U.S.C. § 30104(c)(1) is an ambiguous statutory provision that can be read in multiple ways. (FEC Mem. at 23-28.) The FEC explained that each plausible interpretation of the provision has some flaws, and so it is reasonable for the Commission to interpret section 30104(c)(1) as a description of who should file independent expenditure statements rather than an independent requirement about the content of those statements.

Plaintiffs argue repeatedly, however, that 52 U.S.C. § 30104(c)(1) can only be interpreted as a stand-alone requirement that filers identify all persons who made contributions of more than $200 generally, even those that were not made to further an independent expenditure. (Pls.' Opp. at 24-30; *see, e.g.*, *id.* at 24 ("the clear language of the statute"), *id.* at 25 ("there is no ambiguity about what subsection (c)(1) requires"), *id.* at 26 ("subsection (c)(1) unambiguously requires reporting all those who contribute more than $200 annually").) According to plaintiffs,

"no honest attempt can be made to reconcile the regulation with what is required by Congress under subsection (c)(1)." (*Id*. at 30.) Yet despite such rhetoric, nowhere do plaintiffs resolve the fundamental ambiguities in the statute; indeed, their efforts to explain away those ambiguities would seem to make the meaning of the statutory provision even murkier.[11]

1. Interpreting Section 30104(c)(1) as an Independent Reporting Requirement Creates Tension With the Language and Structure of the Law

Plaintiffs' arguments for their preferred interpretation of subsection 30104(c)(1) simply underscore the statute's ambiguity. For example, the Commission noted that the list of three subparts in the title of the subsection ("filing; contents; indices of expenditures") fits with an interpretation that (c)(1) is about filing statements, (c)(2) is about the content of those statements, and (c)(3) is about indices. (FEC Mem. at 25.) In response, plaintiffs cite cases for the proposition that "the title of a statute and the heading of a section cannot limit the plain meaning of the text." (Pls.' Opp. at 26 (quoting *Bhd. of R.R. Trainmen v. B&O R.R.. Co.*, 331 U.S. 519, 528-29 (1947)).) But plaintiffs' argument simply assumes without justification that the text actually has a plain meaning. And the same case plaintiffs cite explains that titles and headings are not useless for statutory interpretation, as they can "shed light on some ambiguous word or phrase" and can be "tools available for the resolution of a doubt." *Bhd. of R.R. Trainmen*, 331 U.S. at 529. For all of the reasons the FEC has explained, there are significant doubts about the meaning of the provision and so the title can be a useful interpretative tool. Plaintiffs suggest

[11] Plaintiffs suggest that the Commission is evasive on the issue of whether 11 C.F.R. § 109.10(e)(1)(vi) incorporates 52 U.S.C. § 30104(c)(1). (Pls.' Opp. at 30 ("no honest attempt can be made to reconcile the regulation with what is required by Congress under subsection (c)(1). This is why the FEC does not even attempt to do so here, instead merely arguing that the subsection (c)(1) is ambiguous without arguing 11 C.F.R. § 109.10(e)(1)(vi) reasonably interprets it.").) But that is a red herring: The Commission's regulation interprets an ambiguous, multi-provision statutory reporting structure of which subsection (c)(1) is an interdependent part.

that the heading does not perfectly encompass the meaning of each subpart (Pls.' Opp. at 27 & n.13), but they make no attempt to explain how the title fits with their favored interpretation.

Similarly, the Commission pointed out the confusion stemming from the cross-reference in 52 U.S.C. § 30104(c)(1) to subsection (b)(3)(a), which includes terms that are solely applicable to political committees, despite the fact that subsection 30104(c)(1) only applies to persons that are *not* political committees. (FEC Mem. at 26.) Plaintiffs respond by simply observing that subsection (b)(3)(a) is contained in a section relating to political committee reporting, so of course it would contain language applicable to political committees. (Pls.' Opp. at 28.) But this is unresponsive to the actual issue here. If Congress's intent was to make subsection (c)(1) a reporting requirement to identify all persons who made over $200 in contributions, it is not clear why it would do so by cross-referencing a provision that contains inapplicable language instead of by simply describing the requirements directly. Plaintiffs make no attempt to provide a reason.

The Commission also noted that 52 U.S.C. § 30104(c)(1) states that "a" statement should be filed, but that reading (c)(1) and (c)(2) in the manner suggested by plaintiffs would result in multiple statements being filed, containing different but overlapping information. (FEC Mem. at 26-27.) Furthermore, if the requirement to file a statement in (c)(1) was intended to apply to a statement with the content described in subsection (b)(3)(a), as plaintiffs argue, then there is no provision in the law that requires the filing of a statement with the contents described in subsection (c)(2). (FEC Mem. at 26-27.) Plaintiffs argue that it is possible to resolve these issues by reading "a statement" to refer to multiple statements and by reading the filing requirement in (c)(1) to apply to statements with the content described in both (b)(3)(a) and (c)(2). (Pls.' Opp. at 27.) But once again this ignores the question of why Congress would draft

the provision in this manner when there are simpler ways to accomplish what plaintiffs claim was the Congressional intent.[12]

2. The Duplicative Reporting CREW Envisions Would Be Dissimilar to Other Provisions of FECA

Plaintiffs' position is that subsections 30104(c)(1) and (c)(2)(C) contain separate reporting requirements involving some distinct and some duplicative information. The Commission has noted, however, that interpreting these provisions to include dual reporting requirements would be redundant and inconsistent with comparable other provisions in FECA, and therefore it is reasonable not to read subsection (c)(1) in that manner. (FEC Mem. at 27-28.) Plaintiffs argue that the provisions are not redundant and that they are similar to the "paired reporting mechanism" for independent expenditures and electioneering communications. (Pls.' Opp. at 29.) Both arguments are incorrect.

Plaintiffs argue first that their interpretation of subsections 30104(c)(1) and (c)(2) is not duplicative because the two provisions "target two complimentary [*sic*] sets of contributors, one based on the purpose of the contribution (52 U.S.C. § 30104(c)(2)([C])) and one based on when the contribution was made ([52 U.S.C.] § 30104(c)(1))." (Pls.' Opp. at 29.) But the two provisions clearly are duplicative, because every contribution that is reported under section 30104(c)(2)(C) would also need to be reported pursuant to plaintiffs' interpretation of section

[12] Plaintiffs also assert that interpreting subsection (c)(1) to require disclosure of all those who contribute over a certain threshold makes sense because it is similar to the disclosure requirement prior to the 1979 FECA Amendments and Congress did not intend that the amendments would make significant changes. (Pls.' Opp. at 28-29.) But this reflects an insufficiently broad perspective. The law prior to the 1979 amendments had no equivalent to 52 U.S.C. § 30104(c)(2)(C). As a result, reading the whole law as plaintiffs suggest means that Congress made a very significant change — one reporting requirement was replaced with two reporting requirements of different and overlapping information. By contrast, if (c)(1) is not read as a separate reporting requirement, then the overall change to reporting is far less significant, because in that event it merely clarified the type of contributions that persons other than political committees need to report.

30104(c)(1). Thus, the two reporting provisions would not be complementary at all, under plaintiffs' interpretation, but instead one reporting provision would be simply a subset of the other reporting provision. Plaintiffs fail to explain why Congress would create a scheme in which the same contributions to those making independent expenditures are being reported multiple times, and if Congress did create such a scheme, why it would have drafted a single statutory provision stating clearly that all contributions should be reported and those made for the purpose of furthering an independent expenditure should be separately designated.

Next, plaintiffs suggest that the dual reporting mechanism they describe is not unique because FECA also has a "paired reporting mechanism" for independent expenditures and electioneering communications. (Pls.' Opp. at 29.) But there are key differences between these two sets of reporting requirements. Most importantly, while plaintiffs' statutory interpretation would cause duplicative reporting, the "paired reporting" of independent expenditures and electioneering communications does not, because the statute makes the two types of communication mutually exclusive. *See* 52 U.S.C. § 30104(f)(3)(B) ("The term 'electioneering communication' does not include . . . (ii) a communication which constitutes an expenditure or an independent expenditure under this Act"). While the same entity may need to separately report its independent expenditures and its electioneering communications, there is no overlap between those two reports—no communication is, or should be reported as, both an independent expenditure and an electioneering communication.

Furthermore, Congress designed the dual reporting scheme for independent expenditures and electioneering communications to address a specific problem. While the term "independent expenditures" dates back to the era of FECA's original passage, Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976), there was no such thing as

"electioneering communications" until 2002. Prior to that time, independent groups had begun to spend millions of dollars on so-called "issue ads" — ads that avoided express advocacy but, under the guise of advocating for or against an issue, actually supported or opposed the election of federal candidates. *See McConnell v. FEC*, 540 U.S. 93, 126-128 (2003). Congress determined that because the express advocacy standard was easy to evade, entities were funding broadcast ads designed to influence federal elections "while concealing their identities from the public." *Id*. at 196-97. To address this and other developments in federal campaign finance, Congress enacted the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (2002). In particular, in response to what Congress identified as "sham issue ads," Congress imposed new disclosure requirements on those making "electioneering communications." BCRA §§ 201, 203, 204. *See McConnell*, 540 U.S. at 126. Under BCRA, an "electioneering communication" is any broadcast, cable, or satellite communication that refers to a clearly identified federal candidate, is publicly distributed within 60 days before a general election or 30 days before a primary election, and is targeted to the relevant electorate. *See* 52 U.S.C. § 30104(f)(3)(A). Congress therefore never set out to create a dual reporting mechanism for electioneering communications and independent expenditures; rather, it created "electioneering communications" in response to a legislative concern and set up a disclosure regime for those types of communications. That situation bears no resemblance to what plaintiffs claim happened here — that in 1979 Congress developed a dual reporting mechanism for independent expenditures made by persons that are not political committees.

3. No Court Has Held That Section 30104(c)(1) Imposes an Independent Reporting Requirement, Nor Has the Commission Itself Ever Enforced the Statute in Accord With That Interpretation

As discussed at *supra* pp. 26-28, the Supreme Court's decision in *MCFL* does not control on the issue of the proper interpretation of subsection 30104(c)(1). In its prior brief, the Commission pointed out that courts had not considered *MCFL* binding on this issue, citing *FEC v. Furgatch*, 807 F.2d 857, 859 n.2 (9th Cir. 1987), a case that came out a year after *MCFL* and interpreted the provision differently. Plaintiffs argue that *Furgatch* does not bind this Court, and of course the opinion is merely persuasive authority rather than binding, but the citation to *Furgatch* does show that *MCFL* is not dispositive authority on the relevant issues. To the Commission's knowledge, no court has spoken definitively about the meaning of subsection 30104(c)(1).[13]

Beyond this lack of guidance from the courts, the Commission itself has never taken the position that subsection 30104(c)(1) is a stand-alone reporting requirement. Plaintiffs claim that "[t]he agency has previously enforced subsection (c)(1) as a standalone reporting obligation," pointing to a single enforcement action from 1992. (Pls.' Opp at 26.) But plaintiffs' claim is baseless, and the enforcement matter they cite actually indicates that the FEC has been consistent in its treatment of the law. The enforcement action plaintiffs identify involved an individual named Carmack Watkins, who took out a political advertisement in his local newspaper but "had no previous political experience and was not aware of applicable election law requiring him to disclose who paid for the ads." MUR 3503 (Perot Petition Committee), First General Counsel's

[13] Plaintiffs also state that interpreting the law in a manner they disagree with is "unconstitutional" because it infringes upon the rights of CREW and others to receive information about contributions. (Pls.' Opp. at 8, 32.) But there is no constitutional claim in this case, nor could there be, because CREW has no constitutional right to have the FEC take action against Crossroads GPS or any other third parties.

Report at 3, https://www.fec.gov/files/legal/murs/3503.pdf.[14] Acting on the recommendation of the FEC's Office of General Counsel, the Commission found that Mr. Watkins had violated 52 U.S.C. § 30104(c)(1) and another FECA provision, but took no further action. *See* Certification, https://www.fec.gov/files/legal/murs/3503.pdf. Plaintiffs suggest that this is evidence that the Commission deemed (c)(1) a standalone reporting requirement, but to the contrary, the citation to that provision makes sense under any statutory interpretation because Mr. Watkins *failed to file any independent expenditure statement at all*. (*See* 52 U.S.C. § 30104(c)(1) (stating that persons that make independent expenditures "shall file a statement.") The letter the Commission sent to Mr. Watkins after the MUR was closed stated that "the failure to file a statement of independent expenditures made on behalf of presidential candidate Ross Perot appears to be in violation of 2 U.S.C. § 434(c)(1) [now codified at 52 U.S.C. § 30104(c)(1)]." While it is true that the First General Counsel's Report paraphrased the statutory language of subsection (c)(1) when describing the relevant legal provisions, there was no discussion anywhere in the MUR about the relevant issue in this case – whether (c)(1) and (c)(2)(C) each require the disclosure of different sets of contributors. Indeed, because Mr. Watkins acknowledged using his own money, there were no contributors to report at all.

Neither judicial nor FEC precedent provides support for plaintiffs' argument that subsection 30104(c)(1) unambiguously creates a stand-alone reporting requirement. To the contrary, the absence of such support suggests that there is no unambiguous requirement.

4. FECA Treats Persons That Are Not Political Committees Differently from Political Committees

Political committees are entities that have the major purpose of electing federal candidates, *Buckley v. Valeo*, 424 U.S. 1, 79 (1976), and FECA treats them differently from other

[14] Plaintiffs misnumbered the MUR as "5303" in their brief. (Pls.' Opp. at 26.)

groups that engage in independent expenditures. Overall, political committee reporting requirements are far more extensive. *Compare* 52 U.S.C. § 30104(a)-(b) (reporting requirements of political committees) *with* 52 U.S.C. § 30104(c) (reporting requirements for other groups engaged in independent expenditures). As the FEC noted, one problem with plaintiffs' preferred interpretation of 52 U.S.C. § 30104(c)(1) is that it would cause political committees to have *fewer* disclosure requirements than persons that are not political committees. (FEC Mem. 27-28.) Plaintiffs' interpretation would require such persons to file statements disclosing all contributors, just like political committees, but also to file statements about which contributions were for the purpose of an independent expenditure, which political committees are not required to do.

Plaintiffs' response to the FEC's argument was simply that political committees are required to report all contributions (Pls.' Opp. at 29 n.16), but that does not address the issue. Plaintiffs make several other claims that also fail to reconcile their interpretation of FECA with the unique requirements that Congress imposed on political committees but not other groups. (*See, e.g.*, Pls.' Opp. at 6-7 ("just as Congress wanted voters to know the identities of all contributors to a political committee . . . Congress similarly wanted viewers of independent expenditures to understand the full scope of the ad's financial support."); *id.* at 7 ("the confusion defendants fear is also present with political committees, which must report all of their contributors, even if those contributors did not intend to impact the specific election in which a voter might interact with the political committee."); *id*. at 12 (arguing that there is no problem if a particular contributor is improperly linked with an independent ad he did not support because "[t]he exact same situation could happen when someone donates to a political committee, yet there is no dispute that that person must be reported."); *id*. at 21 (stating that non-earmarked

contributions to Crossroads GPS must also be reported because "there is no dispute that political committee contributions need not be earmarked to their final use in order to be reported.").) But to suggest that the provision at issue in this case must be read a particular way because political committees are also treated that way ignores FECA's special treatment of political committees. Because political committees are primarily concerned with influencing federal elections, Congress provided distinct, comprehensive regulatory requirements for them. The fact that political committees are treated a certain way under the law is not evidence that other groups should be treated the same way.

III. REMAND TO THE COMMISSION WOULD BE THE APPROPRIATE REMEDY IF THE COURT DETERMINED THAT THE COMMISSION ERRED

If the Court determined that the FEC had acted unlawfully in either dismissing plaintiffs' administrative complaint or in promulgating the regulation, the proper remedy would be to remand the case to the FEC to give the agency the opportunity to correct its mistake. (FEC Mem. at 49-50 (citing *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993).) Plaintiffs argue that the Court should instead vacate the regulation because it purportedly conflicts with the statute, it cannot be explained, and there is no serious risk of disruption from vacating the law. (Pls.' Opp. at 39-40.) But the unusual and potentially disruptive remedy of vacatur is inappropriate here under the standards identified in *Allied-Signal*, as discussed in the Commission's prior brief. The general rule when courts review agency decision-making is, "except in rare circumstances," to give the agency an opportunity to fix any problems on its own. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

Plaintiffs' argument that vacatur is appropriate because the regulation conflicts with the statute is true of every regulation that fails at *Chevron* step one, yet vacatur is not the normal remedy in such cases. *See, e.g.*, *Shays v. FEC*, 337 F. Supp. 2d 28, 128 (D.D.C. 2004) (*Chevron*

step one loss with no vacatur). Moreover, if the Court were to rule against the Commission at *Chevron* step two, vacatur would be inappropriate because there is a "non-trivial likelihood" that the Commission could justify the regulation on remand. *WorldCom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002). Plaintiffs' argument that there is little risk of disruption misunderstands the "disruption" prong of the *Allied-Signal* test — the 2018 federal elections are quickly approaching, and persons making independent expenditures as well as those making contributions to such groups are acting in reliance on the current regulation. While CREW may wish to obtain additional information on contributors, plaintiffs have not met the standards required to vacate a 38-year-old regulation.

Lastly, plaintiffs ask that if this case is remanded, the Court should take the extraordinary step of setting an explicit and draconian timetable of as little as two weeks to provide a new explanation and justification for the regulation. (Pls.' Opp. at 40-41.) But plaintiffs have presented no evidence that the Commission will act in an untimely way to respond to whatever order the Court may issue. Indeed, district courts that oversaw cases involving multiple recently promulgated FEC regulations saw no need for such a remedy or short timetable. *See*, *e.g.*, *Shays v. FEC*, 337 F. Supp. 2d at130 ("Accordingly, it is up to the agency to determine how to proceed next — not for the Court to decide or monitor."); *Shays v. FEC*, 508 F. Supp. 2d 10, 70-71 (D.D.C. 2007) (denying plaintiffs' request for an injunction, expedited rulemaking, and retention of jurisdiction).

CONCLUSION

For the reasons stated in this brief and the FEC's initial brief, the Court should grant summary judgment to the Commission.

Respectfully submitted,

Lisa J. Stevenson (D.C. Bar No. 457628)
Acting General Counsel
lstevenson@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

Harry J. Summers
Assistant General Counsel
hsummers@fec.gov

/s/ Seth Nesin
Seth Nesin
Attorney
snesin@fec.gov

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
(202) 694-1650

January 24, 2018