HOLTZMANVOGELJOSEFIAKTORCHINSKY PLLC
Attorneys at Law
45 North Hill Drive • Suite 100 • Warrenton, VA 20186

August 17, 2018

Chair Caroline C. Hunter
Vice Chair Ellen L. Weintraub
Commissioner Matthew S. Petersen
Commissioner Steven T. Walther
Federal Election Commission
1050 First Street, NE
Washington, DC 20002

Re: MUR 6696; Response of Crossroads GPS to Memorandum Opinion of Judge Howell in *CREW v. FEC and Crossroads GPS*

Dear Commissioners,

This response is submitted by the undersigned counsel on behalf of Crossroads GPS in response to Judge Howell's order and memorandum opinion in *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission and Crossroads Grassroots Policy Strategies*, Civil Action No. 16-259 (D.D.C. Aug. 3, 2018) (referred to herein as the "Memorandum Opinion" or "Judge Howell's Opinion"). Judge Howell found the Commission's 38-year-old regulation at 11 C.F.R. § 109.10(e)(1)(vi) to be invalid and summarily vacated it, with vacatur stayed for 45 days in which time the Commission would be required to develop and issue interim regulations. Judge Howell also ordered the Commission to reconsider CREW's administrative complaint (MUR 6696) within 30 days.[1]

[1] At the outset, we note the extremely aggressive schedule set by Judge Howell's ruling for complex regulatory and administrative actions that directly impinge upon core First Amendment freedoms. If there is one fixed principle in the long history of constitutional jurisprudence in this area, it is that the government must carefully and narrowly intrude upon the rights of citizens to freely speak and petition their government for grievances. The sharp brevity of

Crossroads GPS intends seek a stay from Judge Howell and, if necessary, from the D.C. Circuit, prior to appealing Judge Howell's decision to the D.C. Circuit. However, in the event the Commission remains subject to Judge Howell's remand order in the interim, we submit this response regarding the Commission's reconsideration of MUR 6696 on remand.

As set forth in greater detail below, we urge the Commission to again dismiss CREW's administrative complaint for the following reasons:

1. There is no evidence suggesting that Crossroads GPS solicited or received any contributions for the purpose of furthering either "an independent expenditure" or "the reported independent expenditure."

2. Crossroads GPS relied in good faith on the plain meaning of 11 C.F.R. § 109.10(e)(1)(vi) and cannot be subjected to "any sanction" under 52 U.S.C. § 30111(e).

3. Any alleged violation of 52 U.S.C. § 30104(c)(1) should be dismissed as an exercise of prosecutorial discretion.

4. The applicable statute of limitations has expired with respect to all events and actions at issue.

I. Factual Background

The basic facts of this matter are set forth in Crossroads GPS's response of January 17, 2013 (included as Attachment A) and the First General Counsel's Report (included as Attachment B), and are supplemented by filings submitted to Judge Howell. We set forth what we believe are the pertinent facts below.

Judge Howell's dictated deadlines diminishes the ability of both regulator and the regulated community to ensure that that strict constitutional standard is fully met in this instance.

American Crossroads hosted an event on August 30, 2012, in Tampa, Florida.[2] This event was informational in nature, and was not specifically structured as a fundraiser: there was no stipulated ticket price, no listed donor "hosts," and no demand for any specific financial commitment.[3] The purpose of the event was to provide an update to various persons interested in American Crossroads' activities.[4] As part of this event, the American Crossroads briefers showed fourteen (14) television advertisements to attendees.[5] Two of these advertisements were independent expenditure advertisements that American Crossroads had already paid for and aired earlier in the year.[6] A third advertisement that was paid for by American Crossroads was also shown to attendees. This third advertisement was produced as a "focus group" advertisement that was never intended for public distribution, and in fact was not publicly distributed.[7] The

[2] The news reports upon which CREW based its Complaint make clear that the event at issue was an American Crossroads event. The first paragraph of the *BusinessWeek* article explains that "Karl Rove took the stage at the Tampa Club to provide an exclusive breakfast briefing" and during the event "Rove explained to an audience … how his super PAC, **American Crossroads**, will persuade undecided voters in crucial swing states to vote against Barack Obama. He also detailed plans for Senate and House races…." Sheelah Kolhatkar, *Inside Karl Rove's Billionaire Fundraiser*, BusinessWeek (Aug. 31, 2012) (emphasis added).

[3] *See* Attachment C, [Proposed] Answer and Affirmative Defense of Intervenor-Defendant Crossroads GPS (April 26, 2016), ¶ 40.

[4] *See* Attachment A, Response of Crossroads GPS (Jan. 17, 2013), Rove Affidavit ¶ 2; Attachment C, [Proposed] Answer and Affirmative Defense of Intervenor-Defendant Crossroads GPS, ¶ 49.

[5] Attachment A, Response of Crossroads GPS (Jan. 17, 2013) at 5-6; Attachment C, [Proposed] Answer and Affirmative Defense of Intervenor-Defendant Crossroads GPS, ¶ 47; Memorandum Opinion at 7.

[6] Attachment A, Response of Crossroads GPS (Jan. 17, 2013) at 5-6; Attachment C, [Proposed] Answer and Affirmative Defense of Intervenor-Defendant Crossroads GPS, ¶ 47. "Behind" was aired in June 2012, and expressly advocated the defeat of Tim Kaine. "Smoke" aired in July 2012 and expressly advocated the defeat of President Obama.

[7] Attachment A, Response of Crossroads GPS (Jan. 17, 2013) at 6; Attachment C, [Proposed] Answer and Affirmative Defense of Intervenor-Defendant Crossroads GPS, ¶ 47.

American Crossroads hosts also showed eleven (11) advertisements that had already been paid for and aired by Crossroads GPS.[8]

The following advertisements were screened at the August 30 meeting:

1. American Crossroads, "Behind," aired on or about June 13, 2012.
(http://www.youtube.com/watch?v=wrEPOIeA3sY)
(Independent expenditure; expressly advocated defeat of Tim Kaine)

2. Crossroads GPS, "Cost," aired on or about August 15, 2012.
(http://www.youtube.com/watch?v=q58ADyndS8w)
(Issue advocacy; referenced Tim Kaine)

3. Crossroads GPS, "Cheap," aired on or about July 3, 2012.
(http://www.youtube.com/watch?v=aIFDqqWhk6Y)
(Issue advocacy; referenced Senator Sherrod Brown)

4. Crossroads GPS, "Get Up," aired on or about August 23, 2012.
(http://www.youtube.com/watch?v=_lXFzKsuBmM)
(Issue advocacy; referenced Senator Jon Tester)

5. Crossroads GPS, "Suffered," aired on or about August 23, 2012.
(http://www.youtube.com/watch?v=S2fTu4UHsdI)
(Issue advocacy; referenced Senator Bill Nelson)

6. Crossroads GPS, "Foundation," aired on or about November 9, 2011.
(http://www.youtube.com/watch?v=tNxez4ddpa0)
(Issue advocacy; referenced Elizabeth Warren)

7. Crossroads GPS, "Investigation," aired on or about August 3, 2012.
(http://www.youtube.com/watch?v=tWY38AvvU98)
(Independent expenditure; expressly advocated defeat of Rep. Shelley Berkley)

8. Crossroads GPS, "Wake Up," aired on or about July 7, 2011.
(http://www.youtube.com/watch?v=ESAszBVMnC4)
(Issue advocacy; referenced President Obama)

9. Crossroads GPS, "Typical," aired on or about December 9, 2011.
(http://www.youtube.com/watch?v=L3UNOsHgbFI)
(Issue advocacy; referenced President Obama)

[8] Attachment A, Response of Crossroads GPS (Jan. 17, 2013) at 5-6; Attachment C, [Proposed] Answer and Affirmative Defense of Intervenor-Defendant Crossroads GPS, ¶ 47; Memorandum Opinion at 7.

10. Crossroads GPS, "Tried," aired on or about July 12, 2012. (http://www.youtube.com/watch?v=spu06VOiT8E) (Issue advocacy; referenced President Obama)

11. Crossroads GPS, "News," aired on or about July 31, 2012. (http://www.youtube.com/watch?v=zkWJrf_x2rA) (Issue advocacy; referenced President Obama)

12. Crossroads GPS, "Stopwatch," aired on or about June 5, 2012. (http://www.youtube.com/watch?v=DnwQAUM8D9E) (Issue advocacy; referenced President Obama)

13. American Crossroads, "Smoke," aired on or about July 19, 2012. (http://www.youtube.com/watch?v=s_AHL5K1XeA) (Independent expenditure; expressly advocated defeat of President Obama)

14. The fourteenth advertisement screened was an advertisement prepared for focus group purposes, and which was never intended for public distribution.

Only one of the eleven ads shown that had been aired by Crossroads GPS was classified as an independent expenditure because it contained express advocacy. This independent expenditure, which was reported to the Commission, was "Investigation," which aired on or about August 3, 2012.

The other ten Crossroads GPS advertisements that were shown did not qualify as either independent expenditures or electioneering communications and therefore were not reported to the Commission. Of these ten advertisements:

- Three aired in 2011 (one in July, which referenced Elizabeth Warren, one in November, and one in August, both of which referenced President Obama);
- Three aired in 2012 and referenced President Obama; and
- Of the remaining four, one referenced Tim Kaine ("Cost"), one referenced Senator Sherrod Brown ("Cheap"), one referenced Senator Jon Tester ("Get Up"), and one referenced Senator Bill Nelson ("Suffered").

Judge Howell's Opinion asserts that "[e]vent attendees were also solicited for contributions to Crossroads GPS, after being shown these advertisements."[9] As noted, all of the advertisements shown *had already aired* (with the exception of the "focus group" advertisement that was never intended for airing) during the period July 2011 – July 2012. Despite Judge Howell's clear implication, no funds were solicited for the purpose of paying for any of the advertisements shown at the Tampa meeting.[10] There is similarly no evidence to support CREW's broader contention that meeting "attendees were solicited for contributions … to broadcast advertisements *like* those the attendees had just watched."[11] At the Tampa meeting, attendees were not solicited to help pay for or fund the specific advertisements shown, or even substantially similar ads.[12] The ad "screening" was not part of any solicitation. The advertisements were shown simply to demonstrate the quality and range of the two entities' activities and, perhaps most importantly, to add excitement and entertainment to an otherwise fact-laden political briefing.[13]

The hosts orally solicited financial support at the event,[14] but those oral solicitations (made by Mr. Law and Mr. Barbour) were for contributions to support the general work of

[9] Memorandum Opinion at 8.

[10] Attachment A, Response of Crossroads GPS (Jan. 17, 2013) at 5 ("The Complaint wrongly presumes that the advertisements that were screened for attendees at the August 30 meeting were advertisements for which Crossroads GPS was seeking funding. . . . This is not the case, and CREW's speculation on this point is simply wrong."); Attachment D, Crossroads GPS Opposition at 16.

[11] CREW Motion for Summary Judgment Brief at 20 (emphasis added).

[12] Attachment D, Crossroads GPS Opposition at 16.

[13] *Id*. at 16-17.

[14] Attachment C, [Proposed] Answer and Affirmative Defense of Intervenor-Defendant Crossroads GPS at ¶ 49.

American Crossroads.[15] CREW's administrative complaint and filings before Judge Howell speculated that Mr. Law and Mr. Barbour used the name "American Crossroads" to refer to both American Crossroads and Crossroads GPS, but there is absolutely no evidence to support this claim. In fact, both organizations have always gone to considerable lengths to maintain the distinctiveness of each organization and its brand, even working to correct erroneous press accounts that conflate the two groups. The only solicitation for Crossroads GPS that was made at the event was included in the written materials provided to attendees. These materials included *separate* donor information sheets for American Crossroads and Crossroads GPS.[16]

During the meeting, Karl Rove, an unpaid, informal adviser to American Crossroads and Crossroads GPS, recounted a conversation he had with a donor months before, in the spring of 2012.[17] According to a *BusinessWeek* reporter who gained access to the meeting by claiming to be another attendee's guest, Mr. Rove said that this donor told him, "I really like Josh Mandel." The donor asked Mr. Rove what his budget in Ohio was, and Mr. Rove told the donor the Ohio budget was $6 million. The donor then said to Mr. Rove, "I'll give ya $3 million, matching challenge."[18] In an affidavit submitted with Crossroads GPS's response to the administrative

[15] *Id*. at ¶ 51; *see also* Attachment A, Response of Crossroads GPS (Jan. 17, 2013) at 10 ("The news articles written by Ms. Kolhatkar on which CREW relies indicate that Mr. Law and Mr. Barbour made separate, general solicitations of funds for American Crossroads, and not Crossroads GPS. This is entirely consistent with the fact that the August 30 meeting was hosted by American Crossroads. . . . Thus, to the extent that CREW's complaint pretends that attendees were orally solicited for contributions to Crossroads GPS, *see, e.g.*, Complaint 'Count IV,' the evidence does not support that claim.").

[16] Attachment D, Crossroads GPS Opposition at 15.

[17] Attachment A, Response of Crossroads GPS (Jan. 17, 2013) at 7-8; Attachment D, Crossroads GPS Opposition at 17.

[18] *See* Attachment A, Response of Crossroads GPS (Jan. 17, 2013) at 7-8.

complaint, Mr. Rove stated that his recollection of the conversation with the "matching challenge" donor that was recounted as hearsay in *BusinessWeek* was "substantially accurate."[19]

Mr. Rove stated that "the donor indicated that he was a supporter of Josh Mandel, and offered to donate funds toward Crossroads GPS's budget in the State of Ohio."[20] Mr. Rove's conversation with the donor "did not include any discussion of any particular television advertisements, or television advertisements in general. There was no discussion of the contents, timing, or targeting of any actual or hypothetical television advertisements."[21] Mr. Rove's conversation with this donor did not include:

- "any discussion of specific efforts that would or could be made by Crossroads GPS,"[22]
- "any discussion of spending the donor's funds on any specific methods of communication,"[23] or
- "any discussion of independent expenditures."[24]

During this conversation, "at no time did the donor ask, insist or require that any of the pledged funds be spent in any particular manner or on any particular or specific efforts or

[19] Attachment A, Response of Crossroads GPS (Jan. 17, 2013), Rove Affidavit ¶ 3.

[20] *Id*. at ¶ 5.

[21] *Id*. at ¶ 6.

[22] *Id*. at ¶ 7.

[23] *Id*. at ¶ 8.

[24] *Id*. at ¶ 9.

projects."[25] As Mr. Rove stated, however, it was his understanding "that the donor intended the funds to be used in some manner that would aid the election of Josh Mandel."[26]

Mr. Rove stated that approximately $1.3 million was raised in connection with the "matching" program he referenced at the Tampa meeting. "These funds were not solicited for a particular purpose other than for general use in Ohio."[27] Finally, the "matching challenge" donor never made a single contribution of $3 million. "Rather, this donor subsequently contributed a larger amount to Crossroads GPS that was not in any way earmarked for any particular use."[28]

As the record reflects, after the Tampa meeting Crossroads GPS paid for and reported a total of 32 independent expenditure advertisements in connection with U.S. Senate races in Montana, Nevada, Ohio, and Virginia. These advertisements were paid for and aired between September 11, 2012 and October 31, 2012.

CREW's Complaint identified "three categories of contributors" that Crossroads GPS allegedly failed to disclose on independent expenditure reports.[29] According to CREW, Crossroads GPS was required to identify the individual with whom Mr. Rove spoke who offered the $3 million "matching challenge" for unspecified efforts in support of Josh Mandel.[30] CREW also alleged that Crossroads GPS was required to disclose any contributors who responded to or were part of the "matching challenge."[31] Finally, CREW alleged that Crossroads GPS was

[25] *Id*. at ¶ 10.

[26] *Id*. at ¶ 10.

[27] *Id*. at ¶ 13.

[28] *Id*. at ¶ 14.

[29] Attachment E, FEC's Motion for Summary Judgment at 8.

[30] *Id*.

[31] *Id*. at 8-9.

required to disclose any contributors who contributed to Crossroads GPS after viewing the advertisements shown as the Tampa meeting.[32]

II. Consideration of 52 U.S.C. § 30104(c)(2) Issues on Remand

Judge Howell found that the Office of General Counsel's recommendation (that was approved by three Commissioners) to find no reason to believe that Crossroads GPS violated 11 C.F.R. § 109.10(e)(1)(vi) and 52 U.S.C. § 30104(c)(2) "relied entirely on the invalid challenged regulation" and "this first recommendation is inherently contrary to law."[33] Echoing CREW's complaint, Judge Howell explains:

> Whether 52 U.S.C. § 30104(c)(2)(C) requires disclosure of the identity of any of the following donors is an issue to be addressed on remand: (1) the anonymous donor who initiated the alleged "matching challenge" and "ended up making a donation 'that was not in any way earmarked for any particular use'—even for use in Ohio," CGPS's Opp'n at 24 (quoting AR 95 (Rove Aff. ¶ 14)); (2) any individuals who gave to "the $1.3 million raised in matching donations [that] 'were not solicited for a particular purpose other than for general use in Ohio' and were not 'for the purposes of aiding the election of Josh Mandel,'" *id.* (citing AR 95 (Rove Aff. ¶ 13)); and (3) any of the individuals who gave money after watching the advertisements at the Tampa event in 2012, *id.*[34]

On remand, the Commission must consider whether Crossroads GPS was required to disclose any of these three categories of donors under 52 U.S.C. § 30104(c)(2)(C), as that provision has been interpreted by Judge Howell.

Section 30104(c)(2)(C) requires "the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the

[32] *Id*. at 9.

[33] Memorandum Opinion at 12-13.

[34] *Id*. at 104 n.53.

purpose of furthering an independent expenditure." Judge Howell's Opinion interprets the meaning of Section 30104(c)(2) as follows:

> [S]ubsection (c)(2)(C) requires reporting not-political committees to … identify[] each donor who contributed over $200 for the purpose of furthering the entity's independent expenditures "expressly advocating the election or defeat of a clearly identified candidate" for federal office. . . . Use of the indefinite article "an" before "independent expenditure" indicates a broader coverage than a particular, specified independent expenditure and instead means that disclosure must be made as to each non-trivial donor contributing to fund "an independent expenditure" to a candidate, without regard to the actual reported form of the express advocacy funded by the expenditure.[35]

Judge Howell also cites *FEC. v. Mass. Citizens for Life, Inc.* (*MCFL)* as interpreting Section 30104(c)(2)(C) to require the reporting entity to "identify all persons making contributions over $200 who request that the money be used for independent expenditures."[36]

For purposes of this enforcement action, it makes no difference which reporting standard applies. Crossroads GPS did not receive any contributions that were made for the purpose of furthering either "*the* reported independent expenditure" under 11 C.F.R. § 109.10(e)(1)(vi), or "*an* independent expenditure" under 52 U.S.C. § 30104(c)(2)(C), as both phrases are interpreted in Judge Howell's Opinion. Nothing in the record "demonstrates that any contribution was made for the purpose of funding any particular advertisements, advertisements in general, or that the donor had any knowledge of any particular Crossroads GPS efforts."[37] Crossroads GPS previously noted that "[t]here is no evidence in the Complaint (or anywhere else) that Crossroads GPS solicited or received funds for even the general purpose of making independent

[35] *Id*. at 59.

[36] *Id*. at 60 *citing FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986).

[37] Attachment A, Response of Crossroads GPS (Jan. 17, 2013) at 13.

expenditures."[38] Whether the applicable reporting standard refers to "the reported independent expenditure" or "an independent expenditure," Crossroads GPS was not required to report any donors on its independent expenditure reports under Section 30104(c)(2).

Crossroads GPS's response to the administrative complaint made clear that the "matching challenge" donor with whom Mr. Rove spoke was not solicited for the purpose of funding "an independent expenditure," and that donor did not contribute for the purpose of funding "an independent expenditure."[39] The evidence shows only that the donor pledged funds to be used somehow in connection with the Ohio Senate race.[40] The only evidence of the donor's intention is in the donor's statement, "I really like Josh Mandel," the donor's inquiry into the size of the Ohio budget, and the donor's offer to Mr. Rove to put up a "matching challenge" of $3 million.[41] As explained previously, Mr. Rove stated that he understood the donor intended the pledged funds to be used generally in some manner that would benefit Josh Mandel.[42]

There was no discussion of any particular television advertisements, television advertisements in general, or the contents, timing, or targeting of any existing, planned, or hypothetical advertisements.[43] Not only was there no specific discussion of independent expenditures, there was no discussion at all of spending the donor's funds on any particular method of communication.[44] The donor did not ask, insist, or require that any of the pledged

[38] *Id*. at 14.

[39] *Id*. at 7-8, 13, 14.

[40] *Id*. at 16.

[41] *Id*. at 7-8.

[42] *Id*.

[43] *Id*. at 7-8.

[44] *Id*. at 8.

funds be spent in any particular manner or on any specific efforts or projects.[45] Thus, there is no evidence indicating that the donor either offered or contributed these funds "for the purpose of furthering *an* independent expenditure."

Moreover, as previously noted, the donor ultimately did not make a single contribution of $3 million. Instead, the donor contributed a larger amount to Crossroads GPS, over time, that was not in any way earmarked for any particular purpose.[46] Even if it is assumed solely for the sake of argument that the $3 million pledged earlier was subsumed within the larger donation made, and the previous statements evidencing the donor's intent still applied, Crossroads GPS remained free to spend that money in any way it wished so long as it *somehow* benefited the election of Josh Mandel. This general, unspecified purpose could have been served in countless ways other than funding "an independent expenditure."

The "matching program" generated approximately $1.3 million in contributions.[47] There is no information whatsoever in the Complaint about these donors, when they gave, or what their intentions were.[48] Mr. Rove's sworn statement regarding these donors and the contributions they provided is clear: "[t]hese funds were not solicited for a particular purpose other than for general use in Ohio."[49]

Finally, there is no evidence provided by CREW regarding any persons who may have contributed following the Tampa event. It is pure speculation on CREW's part that any person

---

[45] *Id*.

[46] *Id*.

[47] *Id*.

[48] *Id*. at 17-18.

[49] *Id*. at 8.

contributed funds to Crossroads GPS after watching the advertisements that were shown at the Tampa event, or in response to these advertisements. As noted previously, these advertisements were shown for the purposes of demonstration and entertainment and were not a part of any specific solicitation. There is no evidence to suggest that any donor to Crossroads GPS who contributed following the Tampa event referred to the screened advertisements or otherwise earmarked the contribution for any particular purpose in the course of contributing funds.

For the reasons set forth above, the Commission should find no reason to believe that Crossroads GPS violated the reporting requirements set forth at Section 30104(c)(2)(C), as those requirements are interpreted and explained in Judge Howell's Opinion.

As an alternative basis for dismissing the allegation that Crossroads GPS violated Section 30104(c)(2), the Commission should also find that, regardless of the requirements of Section 30104(c)(2)(C), Crossroads GPS cannot be subject to "any sanction provided by this Act" pursuant to 52 U.S.C. § 30111(e). As discussed in more detail below, Section 30111(e) provides that Crossroads GPS was entitled to rely in good faith on 11 C.F.R. § 109.10(e)(1)(vi) – even if that regulation is subsequently found to be invalid.

III. Consideration of 52 U.S.C. § 30104(c)(1) Issues on Remand

Judge Howell determined that 52 U.S.C. § 30104(c)(1) imposes a separate and distinct reporting obligation on persons who file independent expenditure reports pursuant to Section 30104. Ever since the Commission adopted regulations implementing Section 30104 in 1980, the agency has never before taken the expansive view expressed by Judge Howell, nor have there ever been regulations implementing the disclosure requirement imposed by Judge Howell's

Opinion.[50] From the perspective of the regulated community, Judge Howell's Opinion demands the enforcement of a new regulatory regime that has not previously existed.

CREW's administrative Complaint referenced Section 30104(c)(1) briefly in Paragraph 14 of its "Legal Framework," but made no further allegations regarding how that provision might apply to the facts alleged in the Complaint. Crossroads GPS did not address the issue of liability under Section 30104(c)(1) in any detail in its Response because the "complaint did not allege that any respondent had failed to disclose information pursuant to 52 U.S.C. § 30104(c)(1)."[51] The First General Counsel's Report addressed Section 30104(c)(1) briefly, noting that the issue was raised in a separate matter that is redacted (and, to the best of our knowledge, still not public). The General Counsel wrote,

> [A]s we have explained, Section 434(c)(1) of the Act may impose additional reporting obligations for certain contributions made for the purpose of influencing a federal election generally. The Commission's regulation at 11 C.F.R. § 109.10(e) is silent concerning any such additional reporting requirement.[52]

This assessment is not accurate, and on remand, we strongly encourage the Commission to disavow and correct this misstatement of law that subsequently undermined the Commission's position in litigation. The 1980 Explanation and Justification accompanying what is now 11 C.F.R. § 109.10(e)(1)(vi) made clear 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 (2)] regarding reporting requirements for persons, other than a political committee, who make independent

[50] Attachment G, FEC's Reply at 39 ("the Commission itself has never taken the position that subsection 30104(c)(1) is a stand-alone reporting requirement").

[51] Attachment D, Crossroads GPS Motion for Summary Judgment at 20.

[52] Attachment B, MUR 6696, First General Counsel's Report at 12-13 (emphasis added).

expenditures."[53] Thus, the regulation is *not* "silent" on the matter, and it does *not* ignore Section 30104(c)(1). Instead, the regulation reflects the Commission's long-established, affirmative determination that Section 30104(c)(1) does *not* impose a separate and distinct reporting requirement. To the best of our knowledge, the Commission has never otherwise addressed this specific issue, and the regulated community has abided by the Commission's long-settled standard for 38 years.

After mischaracterizing the applicable law and the Commission's understanding of that law, the General Counsel explained that "a Respondent could raise equitable concerns about whether a filer has fair notice of the requisite level of disclosure required by law if the Commission attempted to impose liability under Section [30104](c)(1)."[54] While "fair notice" and "equitable concerns" support the Commission's exercise of prosecutorial discretion, it is important to make clear that it is *not* the regulation's "silence" on the matter that raises these considerations. Rather, "fair notice" and other "equitable concerns" are raised by the long-established understanding that the regulation affirms that *no* separate and distinct reporting obligation exists.

Three Commissioners (the controlling bloc) voted to approve the General Counsel's recommendation to dismiss the allegation that Crossroads GPS violated 2 U.S.C. § 434(c)(1) [now 52 U.S.C. § 30104(c)(1)] "as a prudential matter in the exercise of its prosecutorial discretion."[55] On the question of whether the Commission adequately explained its reasons for not pursuing a Respondent for liability in connection with a reporting obligation that the

[53] Amendments to Federal Election Campaign Act; Regulations Transmitted to Congress, 45 Fed. Reg. 15,080, 15,087 (March 7, 1980).

[54] Attachment B, MUR 6696, First General Counsel's Report at 13.

[55] *Id*.

Commission declared in 1980 did not exist and then never addressed again, Judge Howell concludes that it is a "close call" and the question should be remanded "for the FEC to consider … in the first instance."[56] Judge Howell directed the Commission to reconsider, on remand, the following arguments that have been made in support of the Commission's decision to dismiss: (1) the reliance protection afforded by Section 30111(e); (2) equitable concerns stemming from a lack of fair notice; and (3) the degree of deference due where the agency exercises prosecutorial discretion.[57]

On remand, the Commission should again dismiss any alleged violation of 52 U.S.C. § 30104(c)(1) as an exercise of prosecutorial discretion under *Heckler v. Chaney*, for the following reasons:

1. Crossroads GPS relied upon a decades-old, duly-promulgated regulation in a manner consistent with the universal understanding of what that regulation required, and therefore cannot be subjected to "any sanction" under Section 30111(e);

2. Application of Section 30104(c)(1) to Crossroads GPS in the suggested manner would violate Crossroads GPS's due process rights and constitutional right to fair notice; and

3. The applicable statute of limitations has expired with respect to all events at issue in this matter.

Dismissal on the basis of prosecutorial discretion, for the reasons set herein, would not be subject to judicial review under *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018).

[56] Memorandum Opinion at 106.

[57] *See id*. at 105.

A. Regardless of the Commission's Conclusions on Remand, 52 U.S.C. § 30111(e) Precludes the Commission from Imposing "Any Sanction" Against Crossroads GPS

Regardless of the ultimate validity of 11 C.F.R. § 109.10(e)(1)(vi), Crossroads GPS was entitled to conduct its affairs in good faith reliance on that regulation. As a result, Crossroads GPS cannot be subject to "any sanction provided by this Act" in connection with this enforcement matter.[58] For purposes of the statute, the "good faith" of an actor is established by the actor's efforts to conform his or her activities with the Commission's regulation. Thus, regardless of the Commission's conclusions with respect to whether there is "reason to believe" a violation would have occurred under either statutory provision as interpreted by Judge Howell, no penalties of any nature may be imposed on Crossroads GPS and the matter must be closed.

Crossroads GPS's reliance on 11 C.F.R. § 109.10(e)(1)[59] – and specifically, its well-founded understanding that that provision set forth the <u>full extent</u> of the applicable reporting requirements – was altogether reasonable and justified in light of the regulation's long history. Commission regulations and reporting guidance have never mentioned a separate reporting requirement or a separate contributor reporting schedule for non-committee independent expenditure filers. Neither Crossroads GPS nor any other similarly situated organization had any reason whatsoever to wonder if it should be filing a separate report under Section 30104(c)(1).

52 U.S.C. § 30111(e) provides:

> Notwithstanding any other provision of law, 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

[58] *See* 52 U.S.C. § 30111(e).

[59] Crossroads GPS is entitled to rely on 11 C.F.R. § 109.10(e)(1) as the applicable regulatory standard that implemented the requirements imposed by *both* Sections 30104(c)(1) and (c)(2), given that the Commission's regulation has always been understood to implement the requirements of both sections.

> shall not, as a result of such act, be subject to any sanction provided by this Act or by chapter 95 or chapter 96 of Title 26.

The legislative history of 52 U.S.C. § 30111(e) makes absolutely clear that the intent of this provision is to shield from legal liability persons who rely in good faith upon this agency's duly-promulgated regulations:

> The Committee added a new provision which specifically allows persons to rely upon a regulation prescribed by the Commission in accordance with the requirements of this section. A person who relies upon such regulations in good faith will not be subject to subsequent enforcement action.[60]

Crossroads GPS's "good faith" is objectively demonstrated by its compliance with the regulation at issue.[61] Furthermore, Crossroads GPS complied with that regulation as it was universally understood.[62] The Office of General Counsel and three Commissioners agreed that Crossroads GPS complied with the regulation. The two Commissioners who explained their dissent contended that Crossroads GPS should be regulated as a political committee and did not suggest that Crossroads GPS at any point failed to properly comply with 11 C.F.R. § 109.10(e)(1)(vi).[63] There is no credible argument to be made, nor did the Commission previously determine, that Crossroads GPS failed to rely on and comply with 11 C.F.R. § 109.10(e)(1)(vi) in good faith.

The Supreme Court has recognized the significance of Section 30111(e). In 1990, the Court referred to Section 30111(e) as an example of "legislative relief" designed to

[60] Legislative History of Federal Election Campaign Act Amendments of 1979 at 208 (H.R. Rep. No. 96-422, at 24 (1979)).

[61] *See* Attachment F, Crossroads GPS Reply at 6.

[62] *See id*.

[63] *See* MUR 6696, Statement of Reasons of Commissioners Ann M. Ravel and Ellen L. Weintraub.

protect against "significant detrimental reliance on the erroneous advice of Government agents." In full, the Court wrote:

> In numerous other contexts where Congress has been concerned at the possibility of significant detrimental reliance on the erroneous advice of Government agents, it has provided appropriate legislative relief. **See, e. g., Federal Election Campaign Act of 1971, 2 U.S.C. §§ 437f and 438(e);** Federal Trade Commission Act, 15 U.S.C. § 57b-4; Securities Act of 1933, 15 U.S.C. § 77s(a); Truth in Lending Act, 15 U.S.C. § 1640(f); Portal-to-Portal Act of 1947, 29 U.S.C. § 259; Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1028; Technical and Miscellaneous Revenue Act of 1988, Pub. L. 100-647, § 8018, 102 Stat. 3794.[64]

The D.C. Circuit subsequently explained that Section 30111(e) permits the public to "undertake any conduct permitted by the challenged regulations without fear of penalty, *even if that conduct violates campaign statutes*."[65] Furthermore, "[b]y removing certain conduct from any risk of enforcement, the challenged safe harbors establish 'legal rights' to engage in that conduct."[66] Thus, Section 30111(e) precludes the Commission from imposing the full range of FECA-authorized sanctions that CREW seeks, including any so-called "equitable remedies" requiring Crossroads GPS to retroactively file amended independent expenditure reports.

Instances of Commission application of Section 30111(e) are rare. In MUR 2601 (League of Women Voters Education Fund), the Complainant was excluded from a Presidential debate sponsored by the Respondent. The Respondent relied on a Commission regulation that established selection criteria requirements for non-partisan debate sponsors. The Complainant urged the Commission to reinterpret its debate rules. The Commission approved the

---

[64] *Office of Pers. Management v. Richmond*, 496 U.S. 414, 428-429 (1990) (emphasis added).

[65] *Shays v. FEC* ("*Shays I*"), 414 F.3d 76, 84 (D.C. Cir. 2005) (emphasis added).

[66] *Id*. at 95; *see also FEC v. O'Donnell*, 209 F. Supp. 3d 727, 743 n.12 (D. Del. 2016) ("FECA's 'safe harbor' provision, 52 U.S.C. § 30111(e), insulates from liability a person acting in good faith reliance on 'any rule or regulation prescribed by the Commission.'"); *Shays v. FEC*, 424 F. Supp. 2d 100, 115 (D.D.C. 2006) ("FECA provides a defense to 'any person' who relies in 'good faith' on FEC rules. 2 U.S.C. § 438(e).").

recommendations in the First General Counsel's Report which determined that the Respondent's debates and selection criteria were consistent with "the Commission's regulations as interpreted by the Explanation and Justification."[67] The General Counsel also explained that under 2 U.S.C. § 438(e) [now 52 U.S.C. § 30111(e)], "the fact that the League relied upon this regulation in formulating its procedures for selecting candidates to be invited to League-sponsored debates would prevent the Commission from pursuing an enforcement action with regard to the application of Section 110.13."[68]

Judge Howell notes that the Commission argued in litigation that the safe harbor provision was "based on the same rationale" as the "equitable concerns" referenced in the First General Counsel's Report.[69] She acknowledges "[t]hat the safe harbor 'affords a defense,'" but asserts this "does not mean this provision operates as the absolute bar urged by defendants."[70] Judge Howell then asserts that several "potential forms of notice" were available which could, in her view, serve to undermine a "fair notice" claim.[71] (CREW's briefings raised the same issues, but contended that these forms of notice demonstrate, as a factual matter, that Crossroads GPS did not act in "good faith."[72]) To the extent that either CREW or Judge Howell reads a "fair notice" exception into Section 30111(e), or conflates the separate issues of "fair notice" and "good faith," we maintain that this is an incorrect and unprecedented reading of the statute.

[67] MUR 2601 (League of Women Voters Education Fund), First General Counsel's Report at 7.

[68] *Id*.

[69] Memorandum Opinion at 106.

[70] *Id*.

[71] *Id*.

[72] *See* CREW Opposition Brief (Dec. 4, 2017) at 37-38.

Section 30111(e) does *not* contain a "fair notice" exception on its face, "good faith" and "fair notice" are not synonymous, and we are unaware of any precedent that holds otherwise. The question of whether "fair notice" existed is simply not relevant to the Section 30111(e) safe harbor. "Fair notice" considerations are relevant only to the broader, constitutional due process considerations that apply as a general matter within the administrative law regime.

While Section 30111(e) is unquestionably premised upon "equitable concerns," and may very well reflect traditional concepts of due process, it does not follow that Section 30111(e) contains the various exceptions that have been recognized in the much broader general context of the constitutional right to fair notice. Section 30111(e) is a specific statutory protection written in clear and absolute terms, the Supreme Court has recognized that it protects persons who rely on "erroneous advice of Government agents,"[73] and the D.C. Circuit's description of the provision in *Shays I* makes clear that the public may "undertake any conduct permitted by the challenged regulations without fear of penalty, *even if that conduct violates campaign statutes*."[74] Thus, both the Supreme Court and the D.C. Circuit have held that reliance on a Commission regulation is protected even if that regulation is contrary to "campaign statutes." As a result, even if Crossroads GPS had "fair notice" that the Commission's adoption and decades-long implementation of 11 C.F.R. § 109.10(e)(1) were somehow invalid or improper, it would be irrelevant for purposes of Section 30111(e). Here, Crossroads GPS had an absolute statutory right to rely on 11 C.F.R. § 109.10(e)(1) in good faith, and the Commission is prohibited from imposing "any sanction" against Crossroads GPS for doing so.

[73] *Richmond*, 496 U.S. at 428-429.

[74] *Shays I*, 414 F.3d at 84.

B. Equitable Concerns, Fair Notice, and Due Process

For purposes of traditional due process and the constitutional right to fair notice, Crossroads GPS was also entitled to rely on 11 C.F.R. § 109.10(e)(1). The "fair notice" requirement applies in the "civil administrative context."[75] As the D.C. Circuit explained, "[t]raditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule."[76] "We thus ask whether 'by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform….'"[77]

In the present matter, "the standards with which the agency expect[ed] parties to conform" were set forth at 11 C.F.R. § 109.10(e)(1), which clearly detailed the disclosures required of non-political committees that made independent expenditures. No argument has been made that Crossroads GPS misread or misinterpreted 11 C.F.R. § 109.10(e)(1) and failed to comply with its terms. To the contrary, the meaning of 11 C.F.R. § 109.10(e)(1) was understood by all, and Crossroads GPS disclosed what the regulation required. The Office of General Counsel and three Commissioners agreed in 2014 that there was no reason to be believe that Crossroads GPS had violated 11 C.F.R. § 109.10(e)(1). Judge Howell's Opinion, if it is upheld, would have the effect of dramatically changing the disclosure requirements that apply to non-

[75] *General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995).

[76] *Affum v. U.S.*, 566 F.3d 1150, 1163 (D.C. Cir. 2009) (quoting *PMD Produce Brokerage Corp. v. USDA*, 234 F.3d 48, 52 (D.C. Cir. 2000).

[77] *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) (quoting *General Electric Co. v. EPA*, 53 F.3d at 1329).

political committees that may make independent expenditures. It goes without saying that Crossroads GPS would have had no notice of such a dramatic *ex post facto* change in the law prior to August 3, 2018.

There is ample precedent supporting the principle that where a party relies on an agency's regulation and "a court [subsequently] determines that the regulation is invalid," the judicial decision requires "nonretroactive application" where the decision "will work an injustice or hardship" or "establish[es] a new principle of law, either by overruling clear past precedent . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed."[78] More generally, "prior notice is required where a private party justifiably relies upon an agency's past practice and is substantially affected by a change in that practice."[79] Moreover, this principle applies with special force where the relevant conduct is core First Amendment free speech and association. To avoid chilling such highly protected activity, the law must provide clear advance notice before burdens may be imposed.[80]

There is no dispute that the regulation in question has been in effect and consistently applied for 38 years. Neither CREW nor Judge Howell's Opinion identifies any instance or precedent where the Commission interpreted or applied the regulation in a manner that reflects Judge Howell's construction. The Commission's reporting instructions and guidance – which

[78] *Teich v. FDA*, 751 F. Supp. 243, 249 (D.C. Cir. 1990) (quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 355 (1971)) (emphasis added).

[79] *Nat'l Conservative Pol. Action Comm. v. FEC*, 626 F.2d 953, 959 (D.C. Cir. 1980).

[80] *Marks v. U.S.*, 430 U.S. 188, 196 (1977) ("We have taken special care to insist on fair warning when a statute regulates expression and implicates First Amendment values."); *Buckley v. Valeo*, 424 U.S. 1, 77 (1976) ("Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for 'no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.' … Where First Amendment rights are involved, an even 'greater degree of specificity' is required.").

are legally significant in this context – have consistently described independent expenditure reports as only requiring identification of contributions "made for the purpose of furthering the independent expenditures" being reported,[81] or contributions made "for the purpose of making the independent expenditures" being reported.[82]

Even CREW has conceded the limited scope and dispositive effect of the Commission's regulation. In 2015, well after it filed the administrative complaint that initiated this matter, CREW filed public comments with the Commission that observed that "under the Commission's regulations, the identity of a contributor who gives to the organization for the broad purpose of influencing a federal election, or even the specific purpose of making independent expenditures, need not be disclosed."[83] CREW also acknowledged that the Commission's existing reporting regulation implemented "both contributor disclosure provisions of the statute."[84]

In sum, the applicable reporting requirements were universally understood to be set forth in 11 C.F.R. § 109.10(e)(1), and there was similarly no dispute as to the meaning and scope of that regulation. Nevertheless, Judge Howell's Opinion identifies four "potential forms of notice" which she believes may undercut any possible "equitable concerns" that could be raised by

---

[81] *See* Federal Election Commission, Instructions for Preparing FEC Form 5, *available at* https://transition.fec.gov/pdf/forms/fecfrm5i.pdf.

[82] Federal Election Commission, *Campaign Guide for Corporations and Labor Organizations* (Jan. 2007) at 36, *available at* https://transition.fec.gov/pdf/colagui.pdf. The Commission guide provides Crossroads GPS with yet an additional protection against any sanctions. Under the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 601 note, reliance by a "small entity" on an agency's designated "small entity compliance guide" "may be considered as evidence of the reasonableness or appropriateness of any proposed fines, penalties, or damages." The FEC has designated its guide as a "small entity compliance guide." See *Campaign Guide for Corporations and Labor Organizations* at ii. As a non-profit entity, Crossroads GPS meets the definition of a "small entity." 5 U.S.C. § 601(6), (4).

[83] CREW, Comments in Response to Advance Notice of Proposed Rulemaking on Earmarking, Affiliation, Joint Fundraising, Disclosure, and Other Issues (Jan. 15, 2015) at 3-4, *available at* http://sers.fec.gov/fosers/showpdf.htm?docid=312990.

[84] *See id*. at 2-5.

applying a new, different, and previously unrecognized disclosure requirement to Crossroads GPS in this matter. Judge Howell suggests that "both the FECA and *MCFL* [are] potential forms of 'notice,'" along with the "multiple RFAIs received by Crossroads GPS about deficient reporting."[85] In addition, according to Judge Howell's Opinion, "the inadequacies of the challenged regulation identified through then-Congressman Van Hollen's rulemaking petition in 2011" may also have served as notice.[86] Judge Howell faults the Office of General Counsel for "ma[king] no attempt to connect these observations to any concerns about a lack of fair notice."[87]

As explained below, none of the "potential forms of notice" identified by Judge Howell render Crossroads GPS's reliance on the Commission's regulation in any way "unreasonable." In this matter, the traditional concepts of fair notice and due process support the nonretroactive application of any new requirements.

1. Federal Election Campaign Act

Crossroads GPS reported its independent expenditure activity in accordance with the Commission's 1980 regulation, which the Commission stated at the time "incorporate[d] the changes set forth at 2 USC 434(c)(1) and (2) regarding reporting requirements for persons, other than a political committee, who make independent expenditures."[88] Thus, the agency tasked with administering and implementing the Act adopted a regulation that, the Commission explained, specifically addressed the reporting requirements of Section (c)(1). Crossroads GPS

[85] Memorandum Opinion at 107.

[86] *Id*.

[87] *Id*.

[88] Amendments to Federal Election Campaign Act; Regulations Transmitted to Congress, 45 Fed. Reg. 15,080, 15,087 (March 7, 1980).

filed its reports accordingly. We are aware of no doctrine that requires a person subject to the Act to second-guess the Commission's regulations and file reports that the Commission itself says are not required. In fact, the Act itself, at 52 U.S.C. § 30111(e), provides that this *cannot* be required.

2. Massachusetts Citizens For Life

CREW argued, and Judge Howell now suggests, that the Supreme Court's decision in *MCFL* provided "'fair notice' of the requisite donor disclosures to be made by a reporting not-political committee."[89] Following the Supreme Court's *MCFL* decision, the Commission held hearings in 1988 on how to implement the decision, and ultimately adopted new regulations in 1995. To the best of our knowledge, however, the reporting matters addressed in Judge Howell's Opinion were never raised or addressed during that period.[90] This is not surprising, however, because most incorporated nonprofit organizations were prohibited from making independent expenditures until 2010, meaning that relatively few filed independent expenditure reports. As the Commission's rulemaking reflects, the significance of *MCFL* at the time was its treatment of express advocacy and the recognition that a narrow class of "qualified nonprofit corporations" were exempted from certain corporate political spending prohibitions.

The year after *MCFL* was decided, the Ninth Circuit explained the disclosure requirement at issue here as follows: "Section 434(c)(1) requires that any person making an 'independent expenditure' greater than $250 file a statement with the FEC. The contents of the statement are specified in 434(c)(2) . . . ."[91] This language plainly supports the Commission's construction of

[89] Memorandum Opinion at 107.

[90] *See* Final Rule on Express Advocacy; Independent Expenditures; Corporate and Organization Expenditures, 60 Fed. Reg. 35,292, 35,296 (July 6, 1995).

[91] *FEC v. Furgatch*, 807 F.2d 857, 859 n.2 (9th Cir. 1987).

the statute, and is binding on the Commission, but Judge Howell dismisses it because it "appears only in a footnote," and "the *Furgatch* Court seems unaware of the Supreme Court decision." There is, of course, no rule of judicial interpretation that judicial language which appears in a footnote is of less significance or may be disregarded, and one hopes the Ninth Circuit can be safely presumed to be aware of Supreme Court precedent. While not binding on Judge Howell within the D.C. Circuit, *Furgatch* is binding on the Commission.

The *Furgatch* decision is not easily dismissed. *Furgatch* was decided subsequent to *MCFL*. Whether consistent with *MCFL* or not, *Furgatch* was not overturned by the Supreme Court, which denied a petition for writ of certiorari.[92] In fact, *Furgatch* has become a key precedent in federal campaign finance law and is the source of both 11 C.F.R. § 100.22(b) and Chief Justice Roberts' "functional equivalent" standard in *Wisconsin Right to Life*. Judge Howell's point of view that it is deficient appears to be an outlier view. Where a Circuit Court of Appeals decision seemingly upholds the Commission's construction of a statute, that decision strongly supports the regulated community's reliance on the Commission's construction.

For decades after *MCFL* and *Furgatch* were decided, the law on independent expenditure reporting did not change. In 2010, during the *SpeechNow* litigation (referred to as *Keating v. FEC* before the Supreme Court), the Commission represented to the Supreme Court:

> In *MCFL*, the Court struck down political-committee reporting and registration requirements for certain issue-oriented organizations that only "occasionally make independent expenditures," i.e., those "whose major purpose is not campaign advocacy." 479 U.S. at 252- 253, 263. **Such groups need only identify each person who contributed more than $200 "for the purpose of furthering an independent expenditure."** 2 U.S.C. 434(c)(2)(A)-(C); see p. 3, *supra*. The Court explained, however, that if MCFL's independent campaign spending became its major purpose, MCFL would have to abide by the rules applicable to entities whose "primary objective is to influence political campaigns," that is,

[92] *See Furgatch v. FEC*, 1987 U.S. LEXIS 3982 (Oct. 5, 1987).

> political committees. 479 U.S. at 262. Those rules include the organizing, reporting, and administrative obligations that petitioners challenge here.[93]

Regardless of the language used by the Supreme Court in *MCFL* to describe a provision that was not the subject of the litigation,[94] it is clear that the Commission *never* recognized the significance that CREW and Judge Howell now afford the decision. It does not appear that the points raised by CREW and Judge Howell regarding *MCFL* were ever even debated until now.

3. Reports Analysis Division Requests For Additional Information

The requests for additional information (RFAI) received by Crossroads GPS that are referenced in CREW's administrative complaint did not provide Crossroads GPS with "fair notice" that the Commission's regulation was invalid. RFAIs are form notices produced by Reports Analysis Division (RAD) analysts and do *not* represent legal determinations, let alone formal notices of new regulatory or enforcement policies. The Commission's website explains: "An RFAI is your opportunity to correct or explain report information for the public record. You receive an RFAI when an FEC Campaign Finance Analyst needs additional clarification or identifies an error, omission or possible prohibited activity."[95]

For several years now, non-political committees that file independent expenditure reports without disclosing donors have routinely received letters similar to those received by Crossroads GPS. Crossroads GPS has objected in the past that these form letters misstate the applicable law.

---

[93] Respondent's Opp. Br., *Keating v. FEC*, No. 10-145, at 17-18 (Sept. 27, 2010) (emphasis added), https://transition.fec.gov/law/litigation/sn_sc_fec_brief_in_opposition.pdf.

[94] *See* Attachment G, FEC's Reply at 26-28 ("*MCFL* was not about disclosure. . . . 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. . . . Unsurprisingly, the *MCFL* Court's opinion likewise did not focus on the independent expenditure reporting provision. . . . 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 . . . . 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.")

[95] Federal Election Commission, Request for Additional Information (RFAI) (visited Aug. 14, 2018), https://www.fec.gov/help-candidates-and-committees/request-additional-information/.

We have no information regarding how the text used in these RFAIs was generated or approved. According to the RFAI received by Crossroads GPS dated June 14, 2011, "Commission regulations require that you disclose identification information for each individual who made a donation used to fund the independent expenditure." The letter cites to 11 C.F.R. §§ 109.10(e)(1)(vi) and 114.10(f). A second RFAI dated October 25, 2012, asserts that "[e]ach contributor who made a donation in excess of $200 used to fund the independent expenditure(s) must be itemized on Schedule 5-A." The April 9, 2013 RFAI stated that "[e]ach contributor who made a donation in excess of $200 to further the independent expenditures must be itemized on Schedule 5-A." None of these three quoted statements tracks either the cited regulation or the corresponding statutory language (Section 30104(c)(2)(C)), although the 2013 version comes closest. Crossroads GPS (and numerous other filers) have repeatedly complained to the Commission about the language used in these RFAIs, noting that they misstate the law.

In each instance, Crossroads GPS replied to RAD's RFAI, explained its legal position, and informed RAD that Crossroads GPS had not solicited or received any contributions "*for the purpose of furthering the reported independent expenditures*," and accordingly, no such disclosures were required. To the best of our knowledge, no further action was taken on any of these matters, and Crossroads GPS never received any notice of referral. Crossroads GPS reasonably concluded that its explanation had been accepted, that the "additional clarification" needed had been supplied, that there would be no further inquiry with respect to the report at issue, and that the RFAI was sent only because RAD's manual requires a RFAI to be generated any time Form 5 is filed without a donor schedule.

Regardless of whether the referenced RFAIs accurately conveyed the substance of the law, an RFAI is not a legal determination and obviously does not supersede or invalidate a long-

established Commission regulation. For purposes of reporting independent expenditures, the applicable law was – at all relevant times – 11 C.F.R. § 109.10(e)(1)(vi). RAD does not have any authority to change the regulation. If there is a conflict between a description of the law that appears in a RFAI and a Commission-approved regulation, the regulation unquestionably controls. That conflict does not – and cannot – provide "fair notice" that a Commission regulation is invalid. It stretches credulity to claim otherwise.

4. Van Hollen Rulemaking Petition

The fourth and final form of potential notice identified in Judge Howell's Opinion is Representative Van Hollen's 2011 rulemaking petition.[96] This petition sought a Commission rulemaking to "revise and amend 11 C.F.R. § 109.10(e)(1)(vi)" in a manner that is, for all intents and purposes, identical to CREW's and Judge Howell's reading of the statute.

During consideration of the petition, Commissioner Petersen explained that in light of the age of the regulation and post-*Citizens United* efforts in Congress to enact new disclosure requirements, it was now up to Congress to determine if the Commission's disclosure requirements should be changed. Commissioner Petersen continued, "[u]ntil that happens, the rules that have been on the books for 30 years and have been relied upon for three decades are the rules that should remain until Congress or the courts tell us to do otherwise."[97] The Commission did not approve initiating a rulemaking in response to the petition, and the regulated community was justified in concluding that the existing 11 C.F.R. § 109.10(e)(1)(vi) would continue to apply.

[96] Representative Van Hollen's Rulemaking Petition is available at http://sers.fec.gov/fosers/showpdf.htm?docid=61143.

[97] Consideration of Van Hollen Rulemaking Petition, Statement of Commissioner Petersen (Dec. 15, 2011), *available at* https://www.fec.gov/resources/audio/2011/2011121503.mp3.

The rulemaking petition specifically identified Crossroads GPS as an organization that had made independent expenditures without disclosing contributors.[98] In other words, the petitioner brought Crossroads GPS's reporting to the Commission's attention, asked the Commission to revise the reporting regulation so that a different standard would apply to Crossroads GPS, and the Commission declined to do so.

A rejected petition for rulemaking creates no "positive" law and does not provide "notice" that any regulated entity should change its behavior and comply with the rejected proposal. The fact that one lawmaker presented to the Commission an alternative reading of a statute (which he hoped the agency would adopt after Congress declined to amend the statute) does not establish any actionable legal obligation for the regulated community to apply a new standard to itself. For the regulated community, the Commission's rejection of a petition for rulemaking means only one thing: the status quo is retained and may be relied upon. Even if the Commission's reading of the underlying law was wrong, when the agency rejected the rulemaking petition, it reaffirmed to the regulated community that 11 C.F.R. § 109.10(e)(1)(vi) remained in place as the applicable disclosure requirement.

C. Prosecutorial Discretion and Applicable Standard of Review

Under the D.C. Circuit's decision in *CREW v. FEC*, the Commission's decision not to institute enforcement proceedings as a matter of prosecutorial discretion generally is not subject to judicial review. The D.C. Circuit determined that the Act does not "provide[] guidelines for the agency to follow in exercising its enforcement powers," which in turn means that "[n]othing in the substantive statute [the Federal Election Campaign Act] overcomes the presumption

[98] *See* Van Hollen Rulemaking Petition at ¶ 10.

against judicial review."[99] Thus, the Act "imposes no constraints on the Commission's judgment about whether, in a particular matter, it should bring an enforcement action."[100] Judge Howell's Opinion refers to two remaining exceptions to *Heckler v. Chaney*'s general rule that the D.C. Circuit acknowledged in *CREW v. FEC*.[101] If neither exception applies, the Commission's action is deemed "committed to the agency's discretion" and "there can be no judicial review for abuse of discretion, or otherwise."[102]

1. Agency "Abdication"

First, Judge Howell notes that "*Chaney* left open the possibility that an agency nonenforcement decision may be reviewed if 'the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities."[103] The full footnote in *Heckler v. Chaney* reads as follows:

> We do not have in this case a refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction. Nor do we have a situation where it could justifiably be found that the agency has "consciously and expressly adopted a general policy" that is so extreme as to amount to an abdication of its statutory responsibilities. See, *e. g.*, *Adams* v. *Richardson*, 156 U. S. App. D. C. 267, 480 F.2d 1159 (1973) (en banc). *Although we express no opinion on whether such decisions would be unreviewable under § 701(a)(2), we note that in those situations the statute conferring authority on the agency might indicate that such decisions were not "committed to agency discretion*."[104]

[99] *CREW v. FEC*, 892 F.3d 434, 439 (D.C. Cir. 2018).

[100] *Id*.

[101] Memorandum Opinion at 109.

[102] *CREW v. FEC*, 892 F.3d at 441.

[103] *Id*. at 440 n.9 (*quoting Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985)).

[104] *Heckler v. Chaney*, 470 U.S. at 833 n.4 (emphasis added).

As the D.C. Circuit noted in 1989, "the [Supreme] Court stopped short of stating that the presumption of unreviewability is inapplicable in such circumstances."[105] The exception has been cited with some frequency by plaintiffs, but rarely, if ever, invoked by the courts. The D.C. Circuit explained that under the "abdication" exception, "an extreme case … might warrant judicial examination."[106] A review of *Adams v. Richardson* explains why application of the exception is so rare: the "abdication" exception is reserved for instances in which an agency expressly and consciously refuses to implement a statutory directive.[107] Simple disagreements over matters of statutory interpretation do not rise to that level of defiance.

Adams v. Richardson involved the Department of Health, Education and Welfare's "conscious[] and express[]" determination *not* to take certain actions where "Title VI not only requires the agency to enforce the Act, *but also sets forth specific enforcement procedures*."[108] The practical result of this agency policy was that "HEW is actively supplying segregated institutions with federal funds, contrary to the expressed purposes of Congress."[109] The matter at

---

[105] *Safe Energy Coalition v. U.S. Nuclear Regulatory Com*., 866 F.2d 1473, 1477 (D.C. Cir. 1989); *see also Giacobbi v. Biermann*, 780 F. Supp. 33, 40 (D.D.C. 1992) ("*Chaney* did not purport to decide whether judicial review is available where an agency has 'consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities.'").

[106] *Cutler v. Hayes*, 818 F.2d 879, 892 (D.C. Cir. 1987).

[107] *See, e.g., Safe Energy Coalition*, 866 F.2d at 1477 ("The NRC has hardly taken the position that it may refuse to demand compliance with its quality assurance regulations where they do apply; it has done nothing of the sort."); *Messier v. United States Consumer Prod. Safety Comm'n*, 741 F. Supp. 2d 572, 577 (D.Vt. 2010) (noting that the Second Circuit "determined that if a plaintiff can show that an agency had 'indisputable proof' that the general purpose of the relevant statute was not being met 'and nonetheless decided it would do nothing to address the situation, [the plaintiff] might then plausibly charge that [the agency] had 'abdicated' its statutory responsibility'").

[108] *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (emphasis added).

[109] *Id*.; *see also Cutler v. Hayes*, 818 F.2d at 892-893 ("In *Adams*, we directed the Secretary of Health, Education, and Welfare and the Director of the Office of Civil Rights to commence enforcement proceedings against primary and secondary school districts operating racially segregated schools while receiving federal funding. Title VI of the Civil Rights Act of 1964 explicitly directed all federal departments and agencies distributing federal funds to effectuate the provision of the Act prohibiting racial discrimination in programs accepting such funds. We held that the consistent failure of the federal defendants to carry out this clear and direct statutory mandate was a 'dereliction of duty reviewable in the courts,' and ordered the defendants to institute enforcement proceedings against schools

hand does not involve a situation that is even remotely comparable, the Commission has not ignored any "specific enforcement procedures," and *Heckler v. Chaney*'s purported "abdication" exception is therefore not applicable here.

Judge Howell asserts, however, that "discrepancies between the challenged regulation compared to the statutory disclosure obligations . . . had been acknowledged without remedial action by the FEC for years prior to the dismissal of the plaintiffs' amended administrative complaint, raising the issue whether the FEC had intentionally 'abdicat[ed] … its statutory responsibilities.'"[110] Judge Howell's claim is inaccurate. It is simply not true that discrepancies "*had been acknowledged without remedial action by the FEC for years*" prior to the present matter. While Congressman Van Hollen and elements of the professional campaign finance regulation lobby together had alleged such "discrepancies," "the FEC" has *never* agreed that the regulation was inconsistent with, or failed to properly implement, the statute. (In fact, in the litigation that prompted this remand, the FEC argued that the regulation was consistent with, and properly implemented, the statute.) These alleged "discrepancies" were repeated and given unwarranted credibility by the Office of General Counsel in footnotes in the First General Counsel's Report that ultimately harmed the General Counsel's client in litigation.[111] After crediting views that the Commission rejected in 2011, the General Counsel ultimately conceded that the consistent position of "the FEC" has been that the regulation faithfully and accurately implements the statute.[112]

operating in violation of the Act.").

[110] Memorandum Opinion at 110.

[111] Attachment B, MUR 6696, First General Counsel's Report at 12-13.

[112] On remand, we encourage the Commission to issue a Statement of Reasons that makes clear that its earlier approval of the General Counsel's recommendations was not an endorsement of the General Counsel's "dicta"

In the present matter, there is no indication that the Commission has "consciously and expressly adopted a general policy" of non-enforcement with respect to the matter at hand. For 38 years, the Commission has *enforced* the statutory provisions through a regulation that reflects the Commission's longstanding view of what those statutory provisions require. Where an agency adopts a regulation for the express purpose of implementing a statutory provision, it makes little sense to suggest that the agency has refused to enforce that provision.[113] While Judge Howell clearly objects to the substance of the regulation, and to the underlying interpretation of the statute that the regulation reflects, neither the record nor Judge Howell's Opinion identifies any Commission "enforcement policy" that is at odds with statutory requirements. A differing view of what the statute requires is a far cry from expressly adopting of policy non-enforcement.

2. Non-Enforcement on the Basis of FECA Interpretation

Second, Judge Howell states that "if the Commission declines to bring an enforcement action on the basis of its interpretation of FECA, the Commission's decision is subject to judicial review to determine whether it is 'contrary to law.'"[114] As explained herein, there are ample justifications for declining to bring an enforcement action in this matter that are not premised upon the Commission's "interpretation of FECA."

Both the D.C. Circuit and the District Court for the District of Columbia have recently upheld Commission non-enforcement decisions that identified numerous reasons for not

---

assessing the controlling regulation, which in turn, has now been used to support claims that the Commission has consciously and expressly abdicated its statutory duties for 38 years.

[113] *See generally Block v. SEC*, 50 F.3d 1078, 1084 (D.C. Cir. 1995) ("we cannot agree that the Commission *has refused to implement* § 2(a)(19); the agency has merely chosen thus far to enforce it informally rather than formally") (emphasis added).

[114] Memorandum Opinion at 109 (*quoting CREW v. FEC*, 892 F.3d at 441 n.11)

proceeding with an enforcement action. The D.C. Circuit's decision in *CREW v. FEC* involved a case in which the controlling Commissioners who voted to dismiss on the basis of prosecutorial discretion,

> were concerned that the statute of limitations had expired or was about to; that the association named in CREW's complaint no longer existed; that the association had filed termination papers with the IRS four years earlier; that it had no money; that its counsel had resigned; that the "defunct" association no longer had any agents who could legally bind it; and that any action against the association would raise "novel legal issues that the Commission had no briefing or time to decide."[115]

The D.C. Circuit held that these reasons were not premised on the Commissioners' "interpretation of FECA," and also noted that "[t]he law of this circuit 'rejects the notion of carving reviewable legal rulings out from the middle of non-reviewable actions.'"[116]

In a footnote, Judge Howell agrees with CREW's contention that the D.C. Circuit's ruling *against* CREW in a separate case is "of very limited value on the questions before this Court."[117] Judge Howell notes that the D.C. Circuit's decision did not "involve[] review … of an FEC dismissal decision predicated on an invalid regulation, with only brief mention of 'prosecutorial discretion' and 'fair notice' concerns."[118] These concerns would be easily addressed with a more thorough discussion of both topics, which would, in turn, render the D.C. Circuit's decision directly on point, and binding precedent.

---

[115] *CREW v. FEC*, 892 F.3d at 438.

[116] *Id*. at 441-442 (*quoting Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994)).

[117] Memorandum Opinion at 110 n.57.

[118] *Id*.

The recent decision in *Campaign Legal Center v. FEC* is also instructive with respect to the nature of the explanation required to sustain an exercise of prosecutorial discretion.[119] In *Campaign Legal Center*, Judge McFadden upheld the Commission's dismissal of a series of enforcement matters involving allegations of "straw donor" contributions from limited liability companies (LLCs) to independent expenditure-only committees on the grounds of prosecutorial discretion. The controlling Statement of Reasons explained that the Commission determined to dismiss the complaints at issue but also explained the new legal standard that would apply prospectively.[120]

Judge McFadden summarized the controlling Statement of Reasons as follows:

> The Commission stated that it declined to find reason to believe a violation occurred as "an exercise of the Commission's prosecutorial discretion," … because the Supreme Court's decision in *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) created a sea change in campaign finance law, overturning the ban on corporate political speech and making it necessary to examine as "an issue of first impression" how Section 30122's straw donor ban applied to corporate contributions. . . .The Commission also "kept . . . in mind" (1) that the Commission had previously applied the straw donor ban "almost exclusively" in situations involving "excessive and/or prohibited contributions," while the matters under review involved donations to super PACs not subject to such limitations, (2) that "Commission precedent has treated funds deposited into a corporate account and then used for contributions as the funds of that corporation," (3) that the Commission had "rejected an attribution rule that would deem the individual owners of corporate LLCs as the makers of those LLC's contributions," and (4) that "the speech rights recognized in *Citizens United* would be hollow if closely held corporations and corporate LLCs were presumed to be straw donors—thus, triggering investigations and potential punishment—each time they made contributions."[121]

[119] The Campaign Legal Center filed a notice of appeal in this case on either August 3 or August 8, 2018.

[120] *See* MURs 6485, 6487, 6488, 6711, and 6930, Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman, http://eqs.fec.gov/eqsdocsMUR/16044391107.pdf.

[121] *Campaign Legal Ctr. v. FEC*, 2018 U.S. Dist. LEXIS 96142 (D.D.C. June 7, 2018), *6-7.

Judge McFadden determined that "this decision was not a direct 'result' of the Commission's 'interpretation of the Act,' … but an exercise of the Commission's 'considerable prosecutorial discretion.'"[122] For Judge McFadden, it was not dispositive that "[t]he Commission recognized that the conduct at issue 'could potentially violate section 30122,' because the controlling Statement of Reasons instead "concluded that the "[r]espondents did not have prior notice of the [Commission's] legal interpretation," and that due process and First Amendment principles counseled against investigation.[123] In addition, while the controlling Statement of Reasons "did not explicitly rely on 'agency resource[]' constraints or likelihood of success to support its decision," it nevertheless undertook the "complicated balancing" of the factors referenced in *Heckler v. Chaney*.[124]

Judge McFadden's decision makes clear that in exercising its prosecutorial discretion, the Commission is not required to invoke a specific list of justifications drawn from the case law. Considerations of "whether agency resources are better spent elsewhere, whether its action would result in success, and whether there are sufficient resources to undertake the action at all" are *not* the sole considerations that may factor into a Commission prosecutorial discretion decision.[125] Furthermore, the mere consideration of the requirements of the Act or Commission regulations does not render the Commission's decision subject to review under the "contrary to law" standard.[126]

---

[122] *Id*. at *13.

[123] *Id*.

[124] *Id*.

[125] *Id.* at *11-12.

[126] Judge McFadden explained that the controlling Commissioners had offered a "rationale basis" for the decision to dismiss, and that dismissal was not "contrary to law." Under the D.C. Circuit's decision in *CREW v. FEC*, the Commission's decision may have been unreviewable altogether given there was no finding that the Commissioners'

Campaign Legal Center affirms the Commission's broad authority to exercise prosecutorial discretion, and also makes clear that the Commission may justify its decision by reference to factors that go beyond the commonly cited passage in *Heckler v. Chaney*. Judge McFadden specifically upheld lack of fair notice, due process concerns, risk of chilling protected speech, "the importance of notice in the First Amendment context," and broader changes to the legal landscape as valid considerations – in addition to the traditional *Heckler v. Chaney* considerations – that may inform a decision to exercise prosecutorial discretion.[127]

IV. Statute of Limitations Has Expired

An additional factor weighing in favor of dismissal of this matter is the fact that the applicable statute of limitations has expired. The events at issue here occurred over the course of 2012. It is now 2018, and more than five years has passed with respect to all events and actions at issue. Any potential violation arising in 2012 is now time-barred and the Commission may not seek to impose any civil penalty or fine in MUR 6696.[128]

---

decision rested on an interpretation of the Act or court precedent. Judge McFadden referenced the judicial review standard from *La Botz v. FEC*, 61 F. Supp. 3d 21 (D.D.C. 2014) as well and the standard applied in the district court decision *CREW v. FEC*, 236 F. Supp. 3d 378 (D.D.C. 2017) that was overturned eight days later. Thus, in *Campaign Legal Center*, the Commission's reasoning survived a more rigorous standard of review than is now applicable under *CREW v. FEC*.

[127] See *Campaign Legal Ctr. v. FEC*, 2018 U.S. Dist. LEXIS 96142, *23-24.

[128] *See* 28 U.S.C. § 2462 ("Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon."); *see also FEC v. Christian Coalition*, 965 F. Supp. 66, 70 (D.D.C. 1997) ("the FEC's cause of action accrued when the events at issue occurred, and 28 U.S.C. § 2462 operates according to its terms to bar the enforcement of any civil fine, penalty or forfeiture for events that occurred more than five years before the Complaint was filed"); *FEC v. National Right to Work Comm.*, 916 F. Supp. 10 (D.D.C. 1996); *FEC v. National Republican Senatorial Comm.*, 877 F. Supp. 15 (D.D.C. 1995).

As a matter of prosecutorial discretion, the Commission should also decline to pursue any "equitable remedy" that may not be barred by the statute of limitations. In the past, the District Court for the District of Columbia has noted that "[u]nder the FECA, the Commission has the authority to seek injunctive relief wholly separate and apart from its authority to seek a legal remedy. *See* 2 U.S.C. § 437g(a)(6)."[129] The referenced statutory provision makes clear that this form of remedy, however, must be sought through institution of a civil action for relief, meaning the Commission would be required to commit itself to additional litigation. For the reasons previously discussed, however, the Commission should decline to seek any form of relief as a matter of prosecutorial discretion.

V. Conclusion

For the reasons set forth above, the complaint in MUR 6696 should again be dismissed. Thank you for your consideration.

Sincerely,

Thomas J. Josefiak
Michael Bayes
Counsel to Crossroads GPS

Attachments

cc: Acting General Counsel Lisa J. Stevenson

[129] *FEC v. Christian Coalition*, 965 F. Supp. at 72.

Attachment A

Response of Crossroads GPS in MUR 6696 (Jan. 17, 2013)

HOLTZMANVOGELJOSEFIAK PLLC
Attorneys at Law

45 North Hill Drive
Suite 100
Warrenton, VA 20186
p/540-341-8808
f/540-341-8809

January 17, 2013

Jeff. S. Jordan
Supervisory Attorney
Complaints Examination & Legal Administration
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Response in MUR 6696

Dear Mr. Jordan,

This response is submitted on behalf of Crossroads Grassroots Policy Strategies (GPS), Karl Rove, Haley Barbour, Steven Law, and Caleb Crosby jointly, by the undersigned counsel in the above-referenced matter. Mr. Rove received a copy of this Complaint from the Commission on December 3, 2012. Crossroads GPS received a copy of this Complaint, via its registered agent, on December 6, 2012. Crossroads GPS requested, and was granted, a 30-day extension of time to submit a response to the Commission.

Mr. Rove and Governor Barbour are uncompensated advisors to Crossroads GPS. Neither is an officer and neither sits on the Board of Directors. Mr. Law is the President of Crossroads GPS. Mr. Crosby is the Treasurer of Crossroads GPS. We presume that Messrs. Law and Crosby are named as Respondents only in their capacities as officers.

CREW's latest stunt is a press release roll-out of a complaint filed against Crossroads GPS with both the FEC and FBI.[1] The charges are typically sensational (Ms. Sloan claims a "criminal conspiracy" in her press release), but as is often the case with CREW, there is very little actual substance, and no merit whatsoever, to the alleged legal violations. The Complaint is

[1] *See* CREW Press Release, "CREW Files FEC Complaint Against Crossroads GPS For Failing To Disclose Donors" (Nov. 15, 2012) *available at* http://www.citizensforethics.org/legal-filings/entry/crew-files-fec-complaint-crossroads-gps-failing-to-disclose-donors.

based primarily on two news articles that appeared on August 31 and September 4, 2012. Both articles were written by a *Bloomberg BusinessWeek* reporter who duplicitously gained entry to a private meeting hosted on August 30 by American Crossroads. While this meeting was widely reported among the Washington political press, no individual or organization used it as the basis of a complaint in the following months – until now. The reason is quite obvious: the article is only of political interest, and it reveals no wrongdoing.

Many of the "facts" that CREW alleges in support of its case do not actually appear in any of the cited materials, nor are they otherwise substantiated. Rather, CREW draws many inferences that are simply not true, and the Complaint is replete with speculation. Many of CREW's conclusory statements are not reasonably drawn. Finally, several claims made in the Complaint – including claims regarding the state of mind of unknown persons – are so obviously fabricated that it is almost certain that Ms. Sloan and Ms. Markley falsely swore to the Verifications submitted with their Complaint.

CREW's Complaint should be quickly dismissed and CREW admonished for, once again, filing an abusive, harassing, and baseless Complaint. We also request that Ms. Sloane and Ms. Markley be referred to the appropriate authorities for investigation into whether either or both violated 18 U.S.C. § 1001 when they executed their respective Verifications and submitted this Complaint.

I. Questions Presented

Despite the length of the Complaint, the relevant questions raised are quite simple. Does the Complaint present credible and unrebutted evidence demonstrating that Crossroads GPS (i) solicited or received funds that were provided by a donor "for the purpose of furthering the reported independent expenditure" and (ii) then failed to properly report those contributions?

As explained below, CREW's complaint does not satisfy the reason to believe standard set forth in MUR 4960 (Hillary Clinton), nor does it provide any evidence of a substantive violation of the law. For either or both reasons, the Complaint should be dismissed.

II. "Reason To Believe" Standard

The Commission has previously explained:

> The Commission will make a determination of 'no reason to believe' a violation has occurred when the available information does not provide a basis for proceeding with the matter. The Commission finds 'no reason to believe' when the complaint, any response

filed by the respondent, and any publicly available information, when taken together, fail to give rise to a reasonable inference that a violation has occurred, or even if the allegations were true, would not constitute a violation of the law. For example, a 'no reason to believe' finding would be appropriate when:

- A violation has been alleged, but the respondent's response or other evidence convincingly demonstrates that no violation has occurred;
- A complaint alleges a violation but is either not credible or is so vague that an investigation would be effectively impossible; or
- A complaint fails to describe a violation of the Act.

Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,546 (March 16, 2007).

"'Reason to believe' is a threshold determination that by itself does not establish that the law has been violated. In fact, 'reason to believe' determinations indicate only that the Commission found sufficient legal justification to open an investigation to determine whether there is probable cause to believe that a violation of the Act has occurred." Statement of Reasons of Commissioners Bauerly and Weintraub in MUR 6056 (Protect Colorado Jobs, Inc.) at 2; *see also* Statement of Reasons of Commissioner Walther in MUR 6570 (Berman for Congress) at 9 ("A 'reason to believe' finding is not a finding that a respondent violated the Act, but instead simply means that the Commission believes a violation may have occurred.").

"In order for the Commission to determine that a complaint provides a reason to believe a violation occurred, the complainant, under penalty of perjury, must provide specific facts from reliable sources that a respondent fails to adequately refute." Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter and McGahn in MUR 6056 (Protect Colorado Jobs, Inc.) at 6. Taking into account the complaint, the sources of the allegations, and the response(s), Commissioners may ask if there is "sufficient information to find *no* reason to believe a violation occurred," or whether discrepancies or unanswered questions "raise[] sufficient questions to warrant further inquiry." Statement of Reasons of Commissioners Bauerly and Weintraub in MURs 6051 and 6052 (Wal-Mart Stores, Inc.) at 2.

"Unwarranted legal conclusions from asserted facts …, or mere speculation … will not be accepted as true. In addition, while credibility will not be weighed in favor of the complainant or the respondent, a complaint may be dismissed if it consists of factual allegations that are refuted with sufficiently compelling evidence provided in the response to the complaint …. [P]urely 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 of Commissioners Mason, Sandstrom, Smith, and Thomas in MUR 4960

(Hillary Clinton) at 2-3.[2] "[M]ere 'official curiosity' will not suffice as the basis for FEC investigations." *FEC* v. *Machinists Non-Partisan League*, 655 F.2d 380, 388 (D.C. Cir. 1981).

"[U]nder the Act, before making a reason to believe determination, the Commission must assess both the law and the credibility of the facts alleged. To do so, the Commission must identify the sources of information and examine the facts and reliability of those sources to determine whether they 'reasonably [give] rise to a belief in the truth of the allegations presented.' Only once this standard is met may the Commission investigate whether a violation occurred." Statement of Reasons of Vice Chair Hunter and Commissioners McGahn and Petersen in MUR 6296 (Kenneth Buck) at 5-6

As discussed in more detail below, the Complainant's allegations warrant a "no reason to believe" finding and should be dismissed. The evidence presented in the Complaint does not show any violation of the law. The specific "facts" cited by CREW that allegedly demonstrate the violation are based entirely on incorrect inferences and assumptions that CREW refers to as its "information and belief." That "information and belief," however, is maliciously wrong – as opposed to being merely mistakenly wrong. CREW simply makes up critical "facts" for which there is absolutely no evidentiary basis.

CREW's general lack of credibility as a legitimate "watchdog"[3] and its history of filing frivolous complaints with the Commission should also be taken into account when weighing the reliability of the allegations made. Coupled with the Respondents' correction of the record that CREW presents, and the specific refutations of the "facts" that CREW alleges, the Commission should have no difficulty dispensing with this matter. There is more than "sufficient information

---

[2] *See also* Statement of Reasons of Vice Chair Hunter and Commissioners McGahn and Petersen in MUR 6296 (Kenneth Buck) at 6 ("As in MUR 4960 (Hillary Clinton), the complaint in this matter lacked specific facts to establish that Buck, his authorized committee, and Morgensen violated the Act. Instead, the complaint was based 'upon information and belief,' a phrase that appears at least once on every page. None of the allegations were based on personal knowledge and, with two exceptions, the complaint does not identify any source for its allegations, credible or otherwise. Moreover, Respondents sufficiently refuted the factual allegations made in the complaint. Thus, the Commission is required under the statute and its own regulations to find no reason to believe Respondents violated the Act.").

[3] *See, e.g.*, Karen Tumulty, "The Hill Monitor," *Time* (Oct. 23, 2006) ("Since its founding in 2003, CREW has worked through legal and regulatory channels to press allegations of impropriety almost exclusively against Republicans.") *available at* http://www.time.com/time/magazine/article/0,9171,1549301,00.html; Paul Singer, "Watchdog, Donors Share Common Foes," *Roll Call* (Jan. 29, 2008) ("a review of entities against which CREW has filed complaints and information about its donors suggests that the organization may be guilty of the same practice — attacking groups and individuals who are the foes of CREW's donors") *available at* http://www.rollcall.com/issues/53_85/-21796-1.html.

to find *no* reason to believe a violation occurred" here. Statement of Reasons of Commissioners Bauerly and Weintraub in MURs 6051 and 6052 (Wal-Mart Stores, Inc.) at 2 (emphasis in original).

III. Discussion of Factual Matters Raised In Complaint

A. The 14 Advertisements Screened

The Complaint wrongly presumes that the advertisements that were screened for attendees at the August 30 meeting were advertisements for which Crossroads GPS was seeking funding. The Complaint alleges: "Crossroads GPS officials solicited the attendees for additional contributions, *apparently* to pay to broadcast the advertisements the potential donors just viewed or to broadcast other ads in those races."[4] Complaint at ¶ 28 (emphasis added). This is not the case, and CREW's speculation on this point is simply wrong.

The following advertisements were screened at the August 30 meeting:

1. American Crossroads, "Behind," aired on or about June 13, 2012. (http://www.youtube.com/watch?v=wrEPOIeA3sY)

2. Crossroads GPS, "Cost," aired on or about August 15, 2012. (http://www.youtube.com/watch?v=q58ADyndS8w)

3. Crossroads GPS, "Cheap," aired on or about July 3, 2012. (http://www.youtube.com/watch?v=aIFDqqWhk6Y)

4. Crossroads GPS, "Get Up," aired on or about August 23, 2012. (http://www.youtube.com/watch?v=_lXFzKsuBmM)

5. Crossroads GPS, "Suffered," aired on or about August 23, 2012. (http://www.youtube.com/watch?v=S2fTu4UHsdI)

[4] *See also* Complaint at ¶ 55 ("Crossroads GPS showed attendees of the August 30, 2012 fundraiser advertisements targeting Democratic Senate candidates in Ohio, Virginia, Montana, Florida, Massachusetts, and Nevada. Several of the ads were produced by Crossroads GPS. *Immediately after the ads were shown, Crossroads GPS solicited contributions from the attendees.* Among other things, Mr. Law noted more money was needed because advertising rates had increased."); Complaint at ¶ 56 ("On information and belief, *Crossroads GPS received contributions given with the intention that the money be spent on independent expenditures broadcasting the advertisements shown at the fundraiser* or broadcasting other ads in the Ohio, Virginia, Montana, and Nevada Senate races.") (emphasis added).

6. Crossroads GPS, "Foundation," aired on or about November 9, 2011. (http://www.youtube.com/watch?v=tNxez4ddpa0)

7. Crossroads GPS, "Investigation," aired on or about August 3, 2012. (http://www.youtube.com/watch?v=tWY38AvvU98)

8. Crossroads GPS, "Wake Up," aired on or about July 7, 2011. (http://www.youtube.com/watch?v=ESAszBVMnC4)

9. Crossroads GPS, "Typical," aired on or about December 9, 2011. (http://www.youtube.com/watch?v=L3UNOsHgbFI)

10. Crossroads GPS, "Tried," aired on or about July 12, 2012. (http://www.youtube.com/watch?v=spu06VOiT8E)

11. Crossroads GPS, "News," aired on or about July 31, 2012. (http://www.youtube.com/watch?v=zkWJrf_x2rA)

12. Crossroads GPS, "Stopwatch," aired on or about June 5, 2012. (http://www.youtube.com/watch?v=DnwQAUM8D9E)

13. American Crossroads, "Smoke," aired on or about July 19, 2012. (http://www.youtube.com/watch?v=s_AHL5K1XeA)

14. The fourteenth advertisement screened was an advertisement prepared for focus group purposes, and which was never intended for public distribution.

Thirteen of the fourteen advertisements screened at the August 30 meeting **had already been paid for and aired**. These advertisements were not screened as part of an effort to secure funding so that they could be aired, as the Complaint speculates. The fourteenth advertisement was a focus group ad that was not produced for public distribution, and was never aired.

The screened ads were nothing more than examples of advertisements for which American Crossroads (in two cases) and Crossroads GPS (in eleven cases) had already paid and aired.

B. Mr. Rove's Recounting of Conversation With Donor

CREW's limited information regarding Mr. Rove's conversation with a supporter and donor comes from two versions of the same source.

Ms. Kolhatkar's September 4, 2012, article includes the following passage:

> As for the closely watched race in Ohio, one of the states that has generated the most political spending by outside groups like American Crossroads, Rove said that he'd had a call from an unnamed out-of-state donor who told him, "I really like Josh Mandel," referring to the Ohio treasurer attempting to unseat Democrat Sherrod Brown. The donor, Rove said, had asked him what his budget was in the state; Rove told him $6 million. "'I'll give ya $3 million, matching challenge,'" Rove said the donor told him. "Bob Castellini, owner of the Cincinnati Reds, is helping raise the other $3 million for that one."

Sheelah Kolhatkar, Exclusive: How Karl Rove's Super PAC Plays the Senate, *Bloomberg BusinessWeek* (Sept. 4, 2012).

Subsequently, in an interview with *Democracy Now!*, Ms. Kolhatkar recounted the same comments as follows:

> Rove specifically mentioned that he'd had a call from an anonymous benefactor who did not come from Ohio, who came from another state but who was just very interested, and wanted to donate half of their $6 million budget in the state. So the condition was it had to be a matching challenge. This donor was a big fan of Josh Mandel, who is running against Brown. So Rove mentioned that the owner of the Cincinnati Reds baseball team was helping raise that money.

Sheelah Kolhatkar, *Democracy Now!* Interview, September 5, 2012.

The conversations recounted by Mr. Rove to attendees at the August 30 meeting took place months before, in the spring of 2012. *See* Affidavit of Karl Rove at ¶ 4. Mr. Rove had at least one other conversation with Mr. Castellini regarding the so-called "matching challenge" in summer of 2012. *Id*. at ¶ 11.

The conversation with the donor who stated, "I'll give ya $3 million, matching challenge," did not include any discussion of any particular television advertisements, television advertisements in general, or the contents, timing, or targeting of any existing, planned, or

hypothetical advertisements. *See* Affidavit of Karl Rove at ¶ 6. No specific efforts that could or would be made by Crossroads GPS were discussed. *See id*. at ¶ 7. There was no discussion of spending the donor's funds on any specific method of communication. *See id*. at ¶ 8. There was no discussion of independent expenditures. *See id*. at ¶ 9.

At no time did this donor ask, insist, or require that any of the pledged funds be spent in any particular manner or on any particular or specific efforts or projects. *See id*. at ¶ 10. Rather, this donor indicated to Mr. Rove that he was a supporter of Josh Mandel, and offered to donate funds toward Crossroad GPS's budget in the State of Ohio. Mr. Rove understood that the donor intended the pledged funds to be used in some manner that would aid the election of Josh Mandel. *See id*. at ¶¶ 5, 10.

The resulting "matching program" generated approximately $1.3 million; these funds were not solicited for any purpose other than for general use in the State of Ohio. *See id*. at ¶13.

The donor who issued the "matching challenge" never made a single contribution in the amount of $3 million. Rather, this donor contributed a larger amount to Crossroads GPS that was not in any way earmarked for any particular use. Upon receipt of this contribution, Mr. Rove understood that the donor did not intend the earlier "matching program" to be a formal program, but rather, was simply a way of encouraging Crossroads GPS's general fundraising efforts. *See id*. at ¶ 14.

C. Crossroads GPS 2012 Activity In Ohio

CREW alleges that "Crossroads GPS spent $6,363,711 on independent expenditures opposing Sen. Brown in the Ohio Senate race." Complaint at ¶ 40. This figure comes from the Center for Responsive Politics' repackaging of FEC data. This total includes only Crossroads GPS's independent expenditures opposing Senator Brown's re-election, and does not reflect Crossroads GPS's total activity within Ohio during 2012, or its "Ohio budget."

Crossroads GPS spent over $10 million on television advertising in Ohio in 2012 that mentioned one or both of the two candidates in the Senate race. Some of these advertisements were reported to the Commission as electioneering communications or independent expenditures, and those reports are on the public record. Other issue and policy advocacy ads did not fall into either category and were not required to be reported to the Commission. Production costs for these television ads amounted to approximately $150,000. Crossroads GPS also spent an additional $240,000 on online (Internet) advertising directed to Ohio residents, and approximately $43,000 on polling.

CREW's lazy reliance on the work of a third party aggregator yields incomplete information in its Complaint. While the $6.3 million figure conveniently corresponds to the $6 million "matching" program that never fully existed, that figure represents only a bit over half of what Crossroads GPS actually spent.

D. Crossroads GPS RFAI Response Dated July 19, 2011

The Complaint makes much of a response to a Request For Additional Information (RFAI) submitted on behalf of Crossroads GPS on July 19, 2011. That response speaks for itself, as does another substantially similar response filed by Crossroads GPS on November 29, 2012, after CREW submitted its Complaint.

Crossroads GPS is fully aware of its FEC reporting and disclosure obligations and has endeavored to satisfy those obligations at all times during its existence. Crossroads GPS has never failed to report contributions required to be reported under the Act and FEC regulations. CREW seeks to cast Crossroads GPS's July 19, 2011, response to a RFAI that should never have been sent as "proof" of a knowing and willful violation of law. As demonstrated in this Response, however, there was no violation of the law, period.

To the extent that the aforementioned RFAI suggests that Crossroads GPS did not satisfy certain disclosure obligations, we reiterate here that the canned language used by the Reports Analysis Division (RAD) badly misstates the disclosure requirement set forth at 11 C.F.R. § 109.10(e)(1)(vi). Rather than simply quote the regulation at issue, RAD uses an incorrect restatement of that regulation.

In June 2011, the Commission sent to Crossroads GPS a RFAI that was immediately available to the public via the Commission's website. That RFAI contained a poor restatement of 11 C.F.R. § 109.10(e)(1)(vi) that very obviously does not track the language of the actual regulation. The media, either intentionally or lazily, misunderstood and misreported both the nature and meaning of the RFAI.[5] The Commission never made any sort of public correction of this misstatement of law, and the RFAI remains on the public record. RAD has subsequently delivered RFAIs featuring the same incorrect language to a variety of entities.

Crossroads GPS's RFAI response was necessitated solely because the Commission publicly distributed a misstatement of the law, which has gone uncorrected. Now, the phony "watchdogs" at CREW believe they have found a way to turn Crossroads GPS's correction of the

[5] *See, e.g.*, Alex Roarty, FEC Asks Crossroads to Reveal Donors, *National Journal* (June 16, 2011) *available at* http://www.nationaljournal.com/hotline/campaign-law-watch/fec-asks-crossroads-to-reveal-donors-20110616.

Commission's mistake into "evidence" of an alleged knowing and willful (*i.e.*, criminal) violation of the law.

E. American Crossroads vs. Crossroads GPS

American Crossroads and Crossroads GPS are legally separate organizations. Nearly all of the specific material to which CREW cites in its Complaint refers to "American Crossroads" fundraising and "American Crossroads" efforts, yet CREW's complaint is lodged against Crossroads GPS. CREW attempts to gloss over the distinction with the claim that "While Mr. Law and Mr. Barbour *apparently* used the name 'American Crossroads' in their fundraising pitches, … they *evidently* used it to mean both American Crossroads and Crossroads GPS." Complaint at ¶ 30 (emphasis added). This is pure speculation on CREW's part, and it is both apparent and evident that CREW has absolutely no personal knowledge of what Mr. Law or Mr. Barbour said or intended.

The author of the two articles which serve as the sole basis of CREW's Complaint acknowledged in her interview with *Democracy Now!* that American Crossroads and Crossroads GPS are separate organizations. While Ms. Kolhatkar offered her own (incorrect) opinion that the two organizations share very similar missions, she nevertheless clearly understood that there are two organizations and she distinguished between them in her reports. Thus, there is absolutely no reason to pretend – as CREW does – that either Ms. Kolhatkar or Messrs. Law, Rove, and Barbour, carelessly used the term "American Crossroads" as some sort of catch-all phrase that encompasses both groups.

The news articles written by Ms. Kolhatkar on which CREW relies indicate that Mr. Law and Mr. Barbour made separate, general solicitations of funds for American Crossroads, and *not* Crossroads GPS. This is entirely consistent with the fact that the August 30 meeting was hosted by American Crossroads. Based on these facts and Ms. Kolhatkar's acknowledged awareness of the separateness of the two organizations, the most reasonable conclusion to draw is that Mr. Law and Mr. Barbour actually meant what they said and solicited funds specifically for American Crossroads. Thus, to the extent that CREW's complaint pretends that attendees were orally solicited for contributions to Crossroads GPS, *see, e.g.*, Complaint "Count IV", the evidence does not support that claim.

IV. Application of 11 C.F.R. § 109.10(e)(1)(vi)

A. History of the Regulation

Central to this matter is the proper application of 11 C.F.R. § 109.10(e)(1)(vi), which requires that persons other than political committees disclose on independent expenditure reports "the 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*" (emphasis added). This regulation was adopted in 1980 and has not been substantively modified since then.[6] The 1980 Explanation and Justification indicates that "[t]his section has been amended to incorporate the changes set forth at 2 USC 434(c)(1) and (2) regarding reporting requirements for persons, other than a political committee, who make independent expenditures." Final Rules On Amendments to Federal Election Campaign Act of 1971, 45 Fed. Reg. 15,080, 15,087 (March 7, 1980).

B. CREW's Suggestion That The Regulation Does Not "Give Full Effect" To The Act Is Irrelevant

In what is obviously a suggestion that the Commission should disregard the plain language of a regulation that has existed for over 30 years, CREW claims:

> The FEC's interpretation of the statute [2 U.S.C. § 434(c)(2)(C)] fails to give full effect to these provisions. At a minimum, the statute requires identification of persons who made contributions "for the purpose of furthering *an* independent expenditure," but the regulation only requires identification of persons who made contributions "for the purpose of furthering *the* reported independent expenditure."

Complaint at ¶ 16 n.1. This argument is entirely irrelevant in an enforcement context. To read the reporting requirement set forth at 11 C.F.R. § 109.10(e)(1)(vi) as CREW suggests – which would apply a very different substantive standard – would require a formal rulemaking to amend the regulation. The FEC cannot conduct a rulemaking exercise under the guise of an enforcement matter, or otherwise disregard the language of a duly-enacted, longstanding regulation. One should *not* simply accept CREW's argument that the statute and corresponding regulation are inconsistent, or that the regulation does not adequately reflect Congressional intent. To do so is to conclude that CREW's self-serving reading of the 1979 Amendments to

[6] Prior to the BCRA-era revisions to the Commission's regulations, this provision was located at 11 C.F.R. § 109.2(a)(1)(vi).

the Act, 33 years later, is somehow more "correct" than the Commission's essentially contemporaneous interpretation of those Amendments in 1980.

C. Operation of the Existing Regulation

In a recent enforcement matter, three Commissioners explained that under Section 109.10(e)(1)(vi), "a donation must be itemized on a non-political committee's independent expenditure report only if such donation is made for the purpose of paying for the communication *that is the subject of the report*." Statement of Reasons of Chairman Petersen and Commissioners Hunter and McGahn in MUR 6002 (Freedom's Watch, Inc.) at 5. *See also* Findings of Fact in *SpeechNow.org*. v. *FEC*, 2009 U.S. Dist. LEXIS 89011 (D.D.C. Sept. 28, 2009) at 22 ("52. Because SpeechNow does not accept any targeted or 'earmarked' funds, it need only disclose all of its contributors who provided money 'for the purpose of furthering' its independent expenditures. Keating Decl. at P 36; 2 U.S.C. 434(c)(2)(C). For each independent expenditure SpeechNow were to make, SpeechNow would have to disclose all donors whose contributions were given for such purpose and were used to fund any portion of the independent expenditure at issue. *Id*.").

The professional campaign finance "reform" industry, with Representative Van Hollen serving as the named filer, recently submitted a petition for rulemaking to revise 11 C.F.R. § 109.10(e)(1)(vi). Even those who make their living as the FEC's greatest detractors recognize that the regulation can only be revised via the formal rulemaking process. In their rulemaking petition, the "reform" lobby describes Section 109.10(e)(1)(vi) as requiring "disclosure only of those contributors who state a specific intent to fund a specific ('the reported') independent expenditure." Rep. Van Hollen Petition for Rulemaking to Revise and Amend Regulations Relating to Disclosure of Independent Expenditures (April 21, 2011) at 3. Furthermore, the petition explains, "under the regulation, all contributions to the person making the independent expenditure that were not given for the *specific purpose of furthering the specific reported independent expenditure* are not required to be disclosed." *Id*. (emphasis in original). The petitioners also note:

> Under present-day 11 C.F.R. § 109.10(e)(1)(vi), even if a contributor gave money to a person making independent expenditures with knowledge that the contributed funds would be used for independent expenditures, and specifically intended that the funds be used for that purpose, the contribution would still not be subject to disclosure under the regulation unless the contributor intended that the funds be earmarked and used for a specific independent expenditure.

Id. at 4.

While the existing regulation may be unpopular in some quarters at the moment, due to circumstances that changed decades after the regulation was adopted, there appears to be broad agreement across the spectrum with respect to what the existing regulation says, and how it operates in practice.

D. Donative Intent

As noted, the critical elements of Section 109.10(e)(1)(vi) are (1) the intent of the donor in making a contribution, and (2) the specificity of that intent. To the extent that any of the donors referenced in CREW's complaint actually made contributions to Crossroads GPS, CREW's various characterizations of their donative intent(s) should not be accepted by the Commission as fact. CREW has no personal knowledge of any of these matters. Rather, any conclusions drawn by the Commission regarding the intent of any donors referenced in the Complaint must be drawn from the actual evidence presented, and not from CREW's self-serving legal conclusions.

Counts I, II, and III of CREW's complaint are based entirely on a brief passage from Ms. Kolhatkar's September 4, 2012, article, and her September 5 interview on *Democracy Now!*. All that CREW really knows about the supposed intent of the "unnamed out-of-state donor" – notwithstanding its sworn assertions that go well beyond this evidence – comes exclusively from these two sources.

As explained above, CREW's "factual" claims about this supposed series of transactions are badly flawed. The passage that appeared in *Bloomberg BusinessWeek* indicates that the contribution was *not* made for the purpose of funding any particular advertisements. Rather, to the extent the donor's intent is described at all, the evidence indicates that the funds were intended as a general grant for use in Ohio. In the *Democracy Now!* interview, Ms. Kolhatkar's recounting indicates that the donor's intent was described as an intention to "donate half of their $6 million budget in the state." Again, nothing here demonstrates that any contribution was made for the purpose of funding any particular advertisements, advertisements in general, or that the donor had any knowledge of any particular Crossroads GPS efforts.

As noted above, the independent expenditures that Crossroads GPS reported making in connection with the 2012 Ohio Senate race were developed *well after* the conversation recounted in the *Bloomberg BusinessWeek* article and at ¶ 23 of the Complaint took place in Spring 2012. There is also no evidence – and CREW does not suggest – that this "unnamed donor" and Mr. Rove discussed or otherwise developed advertisements during their conversation. In short, there is no evidence and no suggestion that the unnamed donor "exercised control over how his [or her] contribution was spent." Statement of Reasons of Vice Chair Bauerly and Commissioner

Weintraub in MUR 6002 (Freedom's Watch, Inc.) at 2, 4. Accordingly, this donor could not possibly have had the requisite and specific intent to finance the advertisements that Crossroads GPS subsequently created, aired, and reported.

Furthermore, as Mr. Rove attests, the "unnamed donor" never made a single contribution in the amount of $3 million. Rather, that donor made a larger contribution that was not earmarked in any way.

There is no basis to conclude, and CREW points to no actual evidence indicating, that Crossroads GPS financed *any* reported independent expenditure "in whole or in part with funds donated for the purpose of furthering that particular advertisement." CREW's "information and belief" is not actual evidence – it is speculation and wishful thinking. There is no evidence presented in the Complaint (or anywhere else) that Crossroads GPS solicited or received funds for even the general purpose of making independent expenditures. At best, CREW's complaint lazily regurgitates a news articles that shows that an "unnamed donor" discussed providing funds for general use in a specified state. Far more specificity is required before Section 109.10(e)(1)(vi) is triggered.

Nor is there is any evidence of any subsequent actions or events from which information regarding donative intent might conceivably be gleaned. Specifically, there is no information indicating that any particular donor "parcel[led] out his money project by project," "rejected almost all of the staff's proposals that have been brought to him," or otherwise "exercised control over how his contribution was spent." Statement of Reasons of Vice Chair Bauerly and Commissioner Weintraub in MUR 6002 (Freedom's Watch, Inc.) at 2, 4.

V. Discussion of Legal Matters Raised In Complaint

A. Complaint "Count I"

"Count I" asserts that an individual made $3 million in contributions to Crossroads GPS that should have been disclosed on corresponding independent expenditure reports. The donor's supposed intent is described several different ways:

- Paragraph 37 asserts that this person "made $3 million in contributions for the purpose of furthering the independent expenditures Crossroads GPS made in the Ohio Senate race."
- Paragraph 38 asserts that this person "told Mr. Rove he was giving Crossroads GPS $3 million to spend on the Ohio Senate election between Sen. Brown and

Mr. Mandel. The donor further said the contribution was a 'matching challenge' to meet Crossroads GPS's $6 million budget for the state."

- In Paragraph 39, CREW alleges, "on information and belief," that "Crossroads GPS received $3 million from the unnamed donor who contributed the money with the intent that it be spent on the Ohio Senate race."
- Paragraph 41 alleges that Crossroads GPS's independent expenditure reports failed to identify the person "who made $3 million in contributions for the purpose of furthering those independent expenditures."
- Paragraph 42 alleges that Crossroads GPS "received $3 million in contributions from the unnamed donor for the purpose of furthering the reported independent expenditures in the Ohio Senate race."

Contributions are reportable under Section 109.10(e)(1)(vi) only if the donor made the contribution "*for the purpose of furthering the reported independent expenditure*." To the extent that CREW's various characterizations attempt to assert a standard different from the one set forth at Section 109.10(e)(1)(iv), those allegations should be ignored and dismissed. The Commission could also reasonably conclude from CREW's varying descriptions of the donor's intent that CREW knows nothing about the subject.

1. Complaint ¶ 37

The donor referenced in Paragraph 37 of the Complaint did not actually make a single contribution in the amount of $3 million. Rather, the donor contributed a larger amount that was not earmarked in any way.

Paragraph 37 of the Complaint alleges that "Crossroads GPS knowingly and willfully failed to identify the person who made $3 million in contributions *for the purpose of furthering the independent expenditures Crossroads GPS made in the Ohio Senate race*." Complaint at ¶ 37 (emphasis added). As noted above, there is no evidence of any such intent. Even assuming for the sake of argument that the donor actually did contribute to Crossroads GPS "*for the purpose of furthering the independent expenditures Crossroads GPS made in the Ohio Senate race*," that donative intent would create a reporting obligation under 11 C.F.R. § 109.10(e)(1)(iv) *only if* the donor had specific knowledge of the actual independent expenditures referenced. Here, this is not possible. The advertisements that CREW erroneously alleges the donor funded were not created until well after the contributor donated the funds at issue. The contributor had no creative discussions with any representative of Crossroads GPS about these independent expenditures.

In other words, this donor played no role whatsoever in developing, creating, or funding any specific independent expenditure – rather, the donor simply *pledged* funds to be spent *somehow* in connection with the Ohio Senate race, and later made a larger donation with no strings attached. Even if we assume that the $3 million pledged earlier was subsumed within the larger donation made, Crossroads GPS was free to spend that amount in any way it wished so long as it *somehow* aided in the election of Josh Mandel. This general "purpose" does not create any reporting obligation under 11 C.F.R. §109.10(e)(1)(vi).

If Crossroads GPS had received a donation or contribution from a person, "which contribution was made for the purpose of furthering the reported independent expenditure," *then* Crossroads GPS *would have* reported it as required by FEC regulations. However, no such contribution was made for such purpose, and accordingly, Crossroads GPS was not required to make any corresponding donor disclosure.

2. Complaint ¶¶ 38 – 42

Paragraphs 38-42 of the Complaint purportedly provide the factual basis for CREW's Count I allegation. The Complaint, however, simply assumes the facts not in evidence that CREW believes *would be* necessary to show the violation alleged. CREW substitutes its own legal conclusions and "information and belief" as "facts" and plants them into a restatement of the regulatory provision it claims was violated.

For example, at Paragraph 38, CREW claims that "[a]n unnamed donor told Mr. Rove he was giving Crossroads GPS $3 million to spend on the Ohio Senate election between Sen. Brown and Mr. Mandel." This is decidedly *not* what this "unnamed donor told Mr. Rove." Mr. Rove's recounting of what this donor said to him is set forth in the Complaint at Paragraph 23.

At Paragraph 42, CREW goes a step further and fabricates a key piece of information it believes is necessary to establish a violation. CREW claims that Crossroads GPS "received $3 million in contributions from the unnamed donor *for the purpose of furthering the reported independent expenditures in the Ohio Senate race*" (emphasis added). First, as explained above, Crossroads GPS never received a single contribution in the amount of $3 million from this donor. Second, there is absolutely no evidence in support of CREW's concocted assertions regarding the donor's purported intent or purpose. The disconnect between the vague recounting of a conversation paraphrased in a news account and the specificity of CREW's allegation is readily apparent. The news report indicates that a donor reportedly said, "I really like Josh Mandel," asked the size of a state budget, and said 'I'll give ya $3 million, matching challenge. From this, CREW concludes, in a sworn complaint no less, that this donor contributed "*for the purpose of furthering the reported independent expenditures in the Ohio Senate race*." Aside

from the obvious impossibility of CREW knowing anything about this particular individual's specific donative intent, it is also worth noting that "the reported independent expenditures" had not even been conceived at the time the donor made this statement.

B. Complaint "Count II"

In "Count II," CREW refers to donors about whom it knows next to nothing, and maintains that there are one or more donors out there somewhere who contributed a combined $3 million to Crossroads GPS. Simply put, there was no "$3 million in 'matching' contributions." As explained above, one or more donors contributed a total of approximately $1.3 million in connection with the Ohio matching program.

As is the case in "Count I," the intent of these unknown donors is described several different ways.

- In Paragraph 43, CREW refers to "the persons who made $3 million in 'matching' contributions for the purpose of furthering the independent expenditures Crossroads GPS made in the Ohio Senate race."
- Paragraph 44 claims that "[a]s of August 30, 2012, Crossroads GPS was in the process of soliciting 'the other' $3 million in contributions for spending in the Ohio Senate election."
- In Paragraph 45, on CREW's "information and belief," "Crossroads GPS solicited and received $3 million in contributions from donors given with the intention that the money be spent on the Ohio Senate race."
- Paragraph 47 refers to "the persons who made $3 million in contributions as part of the 'matching challenge' for the purpose of furthering those independent expenditures."
- Finally, in Paragraph 48, CREW claims that "Crossroads GPS had received $3 million in contributions as part of the 'matching challenge' from donors for the purpose of furthering the reported independent expenditures in the Ohio Senate race."

Based on the evidence presented and the Complaint itself, it is obvious that CREW has no idea who these alleged donors might have been, how many there were, how much any of them gave individually, when they made these alleged contributions, or why they contributed. However, CREW is certain that they gave "*for the purpose of furthering the reported independent expenditures in the Ohio Senate race*." There is no evidence presented to support this conclusion, and CREW has no relevant personal knowledge.

Where a complainant cannot provide credible details regarding "who," "what," and "when," it certainly cannot be relied upon to provide the "why." The allegations are not adequately substantiated under the "reason to believe" standard set forth in MUR 4960 (Hillary Clinton) and amount to "purely speculative charges … [that] do not form an adequate basis to find reason to believe that a violation of the FECA has occurred." Statement of Reasons of Commissioners Mason, Sandstrom, Smith, and Thomas in MUR 4960 (Hillary Clinton). Furthermore, CREW's assertions regarding the specific intent of donors about which nothing else is known are so obviously fabricated that Ms. Sloan and Ms. Markley almost certainly falsely swore to the Verifications submitted with this Complaint. The rote prefacing of an assertion with the hedge "on information and belief" does not create a license to lie.

"Count II" of the Complaint alleges that "Crossroads GPS knowingly and willfully failed to identify the persons who made $3 million in 'matching' contributions for the purpose of furthering the independent expenditures Crossroads GPS made in the Ohio Senate race." Complaint at ¶ 43; *see also* Complaint at ¶ 47. As explained above, there are no "persons who made $3 million in 'matching' contributions for the purpose of furthering the independent expenditures Crossroads GPS made in the Ohio Senate race," meaning Crossroads GPS could not possibly have "knowingly and willfully failed to identify" them.

The donors who contributed approximately $1.3 million in connection with the matching program did not make those contributions "for the purpose of furthering the independent expenditures Crossroads GPS made in the Ohio Senate race." There is no evidence presented regarding any donor's intent. However, any funds solicited or received by Crossroads GPS in connection with the matching program were limited for subsequent use only to the extent that donors expected the funds would be spent *somehow* in Ohio.

C. Complaint "Count III"

Complaint "Count III" asserts a "conspiracy" to "violate the FECA and defraud the FEC by knowingly and willfully failing to identify" the donors/contributions referenced in Counts I and II. Complaint at ¶ 49. This allegation is presumably targeted to the FBI (and the media), as the Commission does not enforce 18 U.S.C. § 371. Nevertheless, the "facts" on which CREW premises its Counts I and II are badly flawed, and CREW presents no evidence of any wrongdoing or of any violation of the Act or Commission regulations. There can be no "conspiracy" to "violate the FECA" where there is no violation of FECA.

Messrs. Rove, Law, and Crosby **did not** "unlawfully conspire[] to violate the FECA and defraud the FEC." *See* Complaint at ¶ 49. Nor did they "knowingly enter[] into an unlawful agreement to intentionally violate 2 U.S.C. § 434 and 11 C.F.R. §§ 109.10(b) – (e) and to defraud the FEC by failing to identify the person who made $3 million in contributions for the

purpose of furthering the independent expenditures Crossroads GPS made in the Ohio Senate race, and by failing to identify the persons who made $3 million in 'matching' contributions for the purpose of furthering those independent expenditures." *See* Complaint at ¶ 50. Neither Mr. Crosby, nor Mr. Law, nor Mr. Rove "committed overt acts to effect the object of the conspiracy in violation of 18 U.S.C. § 371," nor "caused others to commit overt acts to effect" the same. *See* Complaint ¶¶ 51-53.

D. Complaint "Count IV"

The allegations contained in "Count IV" of the Complaint should be dismissed outright. CREW alleges that "Crossroads GPS knowingly and willfully failed to identify the persons who made contributions for the purpose of broadcasting the advertisements shown at the August 30, 2012 fundraiser or broadcasting other ads in those races." Complaint at ¶ 54. On CREW's "information and belief, Crossroads GPS received contributions given with the intention that the money be spent on independent expenditures broadcasting the advertisements shown at the fundraiser or broadcasting other ads in the Ohio, Virginia, Montana, and Nevada Senate races." Complaint at ¶ 56.

As noted above, the materials on which these particular allegations rest (*i.e.*, Sheelah Kolhatkar's August 30 article) indicate that towards the end of the August 30 meeting, Mr. Law and Mr. Barbour made separate, general solicitations of funds for *American Crossroads*, not Crossroads GPS.

Once again, the advertisements that were screened for attendees at the August 30 meeting were *not* screened for the purpose of seeking funding for them. Thirteen of fourteen ads had already been paid for and aired, and the fourteenth advertisement was never intended for public distribution. As a basic factual matter, no attendee *could have* contributed "for the purpose of broadcasting the advertisements shown at the August 30, 2012 fundraiser." In addition, the Complainant has presented no evidence whatsoever indicating that anyone in attendance actually made a contribution following the August 30 meeting, let alone made a contribution "for the purpose of … broadcasting other ads in those races." To the extent CREW's allegations in "Count IV" are even a factual possibility, those allegations are "purely speculative" and should be dismissed pursuant to the Statement of Reasons in MUR 4960 (Hillary Clinton) ("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").

The allegations in "Count IV" that are not precluded as a basic factual matter amount to: "*if* someone in attendance at the August 30 meeting subsequently made a contribution to Crossroads GPS, and *if* that contribution was made "for the purpose of broadcasting … other ads

in the Ohio, Virginia, Montana, and Nevada Senate races," *then* that person should have been reported on a Crossroads GPS report, and Crossroads GPS 'knowingly and willfully' failed to do so." There is no evidence for either of these "ifs," and the alleged donative purpose does not create a disclosure requirement under Section 109.10(e)(1)(vi). At a minimum, a donor who is subject to disclosure under Section 109.10(e)(1)(vi) must know what advertisement he or she is funding. A donation made for the far more general purpose of funding unspecified advertisements to be broadcast in a handful of states at some later date does not satisfy the requirement that the contribution be made "for the purpose of furthering *the reported independent expenditure*." Here, CREW simply engages in baseless speculation in the hopes the Commission will undertake an investigation.

Nevertheless, Crossroads GPS **did not** solicit or receive, at any time, any contributions "for the purpose of … broadcasting other ads in those races."

E. Complaint "Count V"

Finally, Complaint "Count V" asserts a "conspiracy" to "defraud the FEC by knowingly and willfully failing to identify" the donors/contributions referenced in "Count IV." Complaint at ¶ 59. Like "Count III," "Count V" and its allegations based on 18 U.S.C. § 371, are presumably targeted to the FBI and the media. As explained above, "Count IV" does not identify any violation of the Act or Commission regulations or present any evidence of any "conspiracy" to violate any law.

VI. Conclusion

For the reasons set forth above, CREW's complaint should be dismissed because it fails to satisfy the standards set forth in MUR 4960 (Clinton). Alternatively, the Commission should

find no reason to believe a violation of the Act occurred. In addition, Ms. Sloan and Ms. Markley should be referred to the appropriate authorities for investigation into whether they executed false Verifications in connection with the submitted Complaint.

Sincerely,

Thomas J. Josefiak
Michael Bayes
Counsel to Crossroads GPS, Karl Rove, Haley Barbour, Steven Law, and Caleb Crosby

AFFIDAVIT OF KARL ROVE

PERSONALLY came and appeared before me, the undersigned Notary, the within named KARL ROVE, and makes this his Statement and General Affidavit upon oath and affirmation of belief and personal knowledge that the following matters, facts and things set forth are true and correct to the best of his knowledge:

1. I am Karl Rove. I am an uncompensated advisor to Crossroads GPS and American Crossroads, and have served in those capacities since 2010.

2. American Crossroads hosted an event on August 30, 2012, in Tampa, Florida. Invited attendees included a variety of interested persons, some of whom had previously made donations, and some of whom had not previously made donations. Some of the persons in attendance have never, to the present date, made a donation to either Crossroads GPS or American Crossroads.

3. The recollection of a conversation I had with a donor regarding Crossroads GPS efforts in Ohio that is recounted by Sheelah Kolhatkar in her two articles in Bloomberg BusinessWeek is substantially accurate.

4. The conversation with the donor who issued the "matching challenge" took place in the spring of 2012.

5. During the conversation referenced in Paragraph 4 above, the donor indicated that he was a supporter of Josh Mandel, and offered to donate funds toward Crossroads GPS's budget in the State of Ohio.

6. The conversation referenced in Paragraph 4 above did not include any discussion of any particular television advertisements, or television advertisements in general. There was no discussion of the contents, timing, or targeting of any actual or hypothetical television advertisements.

7. The conversation referenced in Paragraph 4 above did not include any discussion of specific efforts that would or could be made by Crossroads GPS.

8. The conversation referenced in Paragraph 4 above did not include any discussion of spending the donor's funds on any specific methods of communication.

9. The conversation referenced in Paragraph 4 above did not include any discussion of independent expenditures.

10. During the conversation referenced in Paragraph 4 above, at no time did the donor, ask, insist or require that any of the pledged funds be spent in any particular manner or on any particular or specific efforts or projects. It was my understanding, however, that the donor intended the funds to be used in some manner that would aid the election of Josh Mandel.

11. I had multiple conversations with Mr. Castellini during the spring and summer of 2012. One or more of these conversations included discussion of the other donor's "matching challenge."

12. Mr. Castellini participated in efforts to raise funds for Crossroads GPS toward the "matching challenge."

13. In total, approximately $1.3 million was raised in connection with this "matching" program. These funds were not solicited for a particular purpose other than for general use in Ohio.

14. The donor who issued the "matching challenge," as referenced in Paragraph 4 above, never made a single contribution of $3 million. Rather, this donor subsequently contributed a larger amount to Crossroads GPS that was not in any way earmarked for any particular use. Upon receipt of this donor's contribution, it was my understanding that this donor did not intend the earlier "matching challenge" to be a formal program. Rather, it was my understanding that this person was simply encouraging our general efforts to raise funds.

DATED this the 17 day of January, 2013

Karl Rove

Signature of Affiant, Karl Rove

SWORN to subscribed before me, this 17 day of January, 2013

NOTARY PUBLIC

My Commission Expires:

8/13/15

MARILEA A. JOYNER
Notary Public, State of New York
No. 01JO6172750
Qualified in New York County
Commission Expires August 13, 2015

Unsigned copy included for reference purposes

AFFIDAVIT OF KARL ROVE

PERSONALLY came and appeared before me, the undersigned Notary, the within named KARL ROVE, and makes this his Statement and General Affidavit upon oath and affirmation of belief and personal knowledge that the following matters, facts and things set forth are true and correct to the best of his knowledge:

1. I am Karl Rove. I am an uncompensated advisor to Crossroads GPS and American Crossroads, and have served in those capacities since 2010.

2. American Crossroads hosted an event on August 30, 2012, in Tampa, Florida. Invited attendees included a variety of interested persons, some of whom had previously made donations, and some of whom had not previously made donations. Some of the persons in attendance have never, to the present date, made a donation to either Crossroads GPS or American Crossroads.

3. The recollection of a conversation I had with a donor regarding Crossroads GPS efforts in Ohio that is recounted by Sheelah Kolhatkar in her two articles in Bloomberg BusinessWeek is substantially accurate.

4. The conversation with the donor who issued the "matching challenge" took place in the spring of 2012.

5. During the conversation referenced in Paragraph 4 above, the donor indicated that he was a supporter of Josh Mandel, and offered to donate funds toward Crossroads GPS's budget in the State of Ohio.

6. The conversation referenced in Paragraph 4 above did not include any discussion of any particular television advertisements, or television advertisements in general. There was no discussion of the contents, timing, or targeting of any actual or hypothetical television advertisements.

7. The conversation referenced in Paragraph 4 above did not include any discussion of specific efforts that would or could be made by Crossroads GPS.

8. The conversation referenced in Paragraph 4 above did not include any discussion of spending the donor's funds on any specific methods of communication.

9. The conversation referenced in Paragraph 4 above did not include any discussion of independent expenditures.

10. During the conversation referenced in Paragraph 4 above, at no time did the donor, ask, insist or require that any of the pledged funds be spent in any particular manner or on any particular or specific efforts or projects. It was my understanding, however, that the donor intended the funds to be used in some manner that would aid the election of Josh Mandel.

11. I had multiple conversations with Mr. Castellini during the spring and summer of 2012. One or more of these conversations included discussion of the other donor's "matching challenge."

12. Mr. Castellini participated in efforts to raise funds for Crossroads GPS toward the "matching challenge."

13. In total, approximately $1.3 million was raised in connection with this "matching" program. These funds were not solicited for a particular purpose other than for general use in Ohio.

14. The donor who issued the "matching challenge," as referenced in Paragraph 4 above, never made a single contribution of $3 million. Rather, this donor subsequently contributed a larger amount to Crossroads GPS that was not in any way earmarked for any particular use. Upon receipt of this donor's contribution, it was my understanding that this donor did not intend the earlier "matching challenge" to be a formal program. Rather, it was my understanding that this person was simply encouraging our general efforts to raise funds.

DATED this the ____ day of January, 2013

_____
Signature of Affiant, Karl Rove

SWORN to subscribed before me, this ___ day of January, 2013

_____
NOTARY PUBLIC

My Commission Expires:

_____

Attachment B

MUR 6696, First General Counsel's Report

FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 6696
DATE COMPLAINT FILED: November 15, 2012[1]
DATE OF NOTIFICATION: November 28, 2012
DATE OF LAST RESPONSE: January 18, 2013
DATE ACTIVATED: April 3, 2013

EXPIRATION OF STATUTE OF LIMITATIONS:
October 30, 2017
ELECTION CYCLE: 2012

COMPLAINANT:	Citizens for Responsibility and Ethics in Washington Melanie Sloan Nicholas Mezlak
RESPONDENTS:	Crossroads Grassroots Policy Strategies Steven Law Karl Rove Haley Barbour Caleb Crosby
RELEVANT STATUTES:	2 U.S.C. § 434(c) 11 C.F.R. § 109.10
INTERNAL REPORTS CHECKED:	Disclosure Reports; Commission Indices
FEDERAL AGENCIES CHECKED:	None

I. INTRODUCTION

The Complaint contends that Crossroads Grassroots Policy Strategies ("Crossroads") failed to disclose donors in certain independent expenditure reports that Crossroads filed with the Commission, in violation of 2 U.S.C. § 434 and 11 C.F.R. §§ 109.10(b)-(e).[2] The Complaint

[1] An Amended Complaint was filed on April 24, 2013. The Amended Complaint replaced Jessica Markley with Nicholas Mezlak as a complainant and included references to additional public filings made by Crossroads but did not assert any new substantive allegations.

[2] Am. Compl. at 11-14 (Apr. 24, 2013).

further alleges that Crossroads was aware of its legal obligation to identify those donors, and that several individuals associated with Crossroads — Steven Law, Karl Rove, Haley Barbour, and Caleb Crosby — conspired to prevent disclosure of the donors' identities.[3] Respondents argue that Crossroads was not required to disclose any contributions for the independent expenditures at issue because no donor made a contribution "for the purpose of furthering the reported independent expenditure."[4]

As discussed, the record reflects that an unnamed individual contributed to Crossroads in furtherance of Crossroads' effort to support a clearly identified federal candidate. Nonetheless, because the relevant information does not reasonably suggest that the donor made a contribution "for the purpose of furthering the reported independent expenditure," it does not appear that Crossroads was required to identify that contributor on its relevant independent expenditure report or reports under the applicable Commission regulation.[5] Likewise, with respect to the other reported independent expenditures in question, the facts alleged here do not support the conclusion that the applicable Commission regulation imposed an obligation on Crossroads to identify contributors in connection with those reports.[6] We therefore recommend that the Commission find no reason to believe that Crossroads violated 2 U.S.C. § 434(c)(2) and 11 C.F.R. § 109.10(e)(1)(vi). Further, to the extent the question is presented on these facts, we

[3] The Complaint and Responses make cross-allegations of criminal violations under Title 18, including conspiracy and false statements, each recommending that the Commission refer the other to the appropriate law enforcement authorities. *See* Compl.; Resp. at 2 (Jan. 18, 2013); Supp. Resp. at 1 (May 14, 2013). We make no recommendation concerning alleged violations of federal criminal law outside the scope of the Commission's jurisdiction, nor do we see any basis warranting a Commission referral of any individual to another law enforcement agency in connection with this matter. *See* 2 U.S.C. § 437d(a)(9). Accordingly we recommend that the Commission close the file as to Steven Law, Karl Rove, Haley Barbour and Caleb Crosby.

[4] Resp. at 2, 11-14 (citing 11 C.F.R. § 109.10(e)(1)(vi)).

[5] 11 C.F.R. § 109.10(e)(1)(vi) (emphasis added).

[6] *Id.*

recommend that the Commission dismiss in the exercise of prosecutorial discretion the allegation that Crossroads violated 2 U.S.C. § 434(c)(1).

II. FACTUAL BACKGROUND

Crossroads is a non-profit organization established under section 501(c)(4) of the Internal Revenue Code.[7] It was formed as a Virginia corporation on June 2, 2010.[8] Steven Law is Crossroads' President, and Karl Rove is reportedly a co-founder, fundraiser, and an uncompensated advisor.[9] Caleb Crosby serves as Treasurer for Crossroads.[10] Mississippi Governor Haley Barbour joined American Crossroads — a political committee registered with the Commission — in 2011 to serve as a fundraiser.[11]

The Complaint relies upon published accounts of a reporter who gained access to an August 30, 2012, fundraiser for Crossroads and American Crossroads.[12] According to those reports, Karl Rove, Haley Barbour, and Steven Law spoke before 70 donors and apparently solicited contributions in connection with the presidential race and various senate races during

---

[7] *See* Commonwealth of Va., State Corp. Comm'n, https://sccefile.scc.virginia.gov/Business/0723872 (last visited June 11, 2013).

[8] *Id.*

[9] *See* Am. Compl. at 3; Resp., Affidavit of Karl Rove ¶ 1 ("Rove Aff.").

[10] Am. Compl., Ex. L (Letter from Caleb Crosby to Christopher Whyrick, RAD (Nov. 29, 2012)).

[11] Am. Compl., Ex. A; *see* Cameron Joseph, *Barbour to Join American Crossroads*, THE HILL (Sept. 9, 2011), http://thehill.com/blogs/ballot-box/presidential-races/180511-barbour-to-join-american-crossroads.

[12] *See* Sheelah Kolhatkar, *Exclusive: Inside Karl Rove's Billionaire Fundraiser*, BLOOMBERG BUSINESSWEEK, Aug. 31, 2012, [hereinafter Kolhatkar, *Rove Fundraiser*] (Exhibit B of Amended Complaint); Sheelah Kolhatkar, *Exclusive: How Karl Rove's SuperPAC Plays the Senate*, BLOOMBERG BUSINESSWEEK, Sept. 4, 2012, [hereinafter Kolhatkar, *Rove SuperPAC*] (Exhibit D of Amended Complaint); *Interview with Sheelah Kolhatkar*, DEMOCRACY NOW (Sept. 5, 2012) (Exhibit C of Amended Complaint).

the 2012 election.[13] Rove also reportedly identified numerous states that could be competitive for Republicans.[14] With respect to Ohio, the Complaint relies on the reporter's claim that

> Rove stated that he'd had a call from an unnamed out-of-state donor who told him, "I really like Josh Mandel," referring to the Ohio treasurer attempting to unseat Democrat Sherrod Brown. The donor, Rove said, had asked him what his budget was in the state; Rove told him $6 million. "'I'll give ya $3 million, matching challenge,'" Rove said the donor told him. "Bob Castellini, owner of the Cincinnati Reds, is helping raise the other $3 million for that one."[15]

The Complaint notes that Crossroads later reported making $6,363,711 in independent expenditures in Ohio, which the Complaint contends involved funds that Crossroads raised as a result of the matching challenge Rove described during his speech.[16] The Complaint further alleges that Rove's conversation with the unnamed out-of-state donor concerning his support for Mandel indicates that Crossroads should have disclosed in its independent expenditure reports the identity both of that donor and the donors who made $3 million in matching contributions.[17] Because Crossroads did not identify any donors in ten reports disclosing independent expenditures in Ohio, the Complaint alleges that Crossroads violated 2 U.S.C. § 434 and 11 C.F.R. §§ 109.10(b)-(e).[18]

In addition, the Complaint further asserts that at the August 30, 2012, fundraiser, Crossroads showed attendees advertisements targeting Senate candidates in Ohio, Virginia,

---

13 *See* Kolhatkar, *Rove Fundraiser*, *supra*; Kolhatkar, *Rove SuperPAC*, *supra*.

14 *Id.*

15 Kolhatkar, *Rove SuperPAC*, *supra*, at 2-3.

16 Am. Compl. at 13.

17 *Id.* at 11-14.

18 *Id.*

Montana, Florida, Massachusetts, and Nevada and then solicited attendees for contributions.[19] The Complaint notes that after the fundraiser, Crossroads filed 32 reports disclosing independent expenditures for broadcasting advertisements in Virginia, Montana, and Nevada.[20] From these facts, the Complaint concludes that individuals present at the fundraiser made contributions for the purpose of furthering the advertisements in Virginia, Montana, and Nevada and should have been identified in Crossroads' independent expenditure reports.[21] The Complaint alleges that Crossroads violated 2 U.S.C. § 434 and 11 C.F.R. §§ 109.10(b)-(e) by not doing so.[22]

The Response disputes the Complaint's recitation of facts and argues that Crossroads had no obligation to identify any contributors in connection with the challenged independent expenditure reports, as no donor made a contribution for the purpose of furthering a specific independent expenditure.[23] The Response relies on a sworn affidavit of Karl Rove.[24] Rove concedes in his affidavit that Kolhatkar's description of his conversation with the Ohio donor is "substantially accurate."[25] Rove states that the conversation took place in Spring 2012 and that the "donor indicated that he was a supporter of Josh Mandel, and offered to donate funds toward

---

[19] *Id.* at 15. The Complaint states that organizers of the fundraiser reportedly screened 14 television advertisements, which included ads "targeting Democratic Senate candidates in Virginia, Ohio, Montana, Florida, Massachusetts, and Nevada." Kolhatkar, *Rove Fundraiser*, *supra*. Some were Crossroads ads, and others were for American Crossroads. Kolhatkar, *Rove SuperPAC*, *supra*. After the ads were shown, the Complaint alleges that Law and Barbour solicited funds on behalf of both American Crossroads and Crossroads, and that Law specifically noted increases in advertising rates in connection with his solicitation. Am. Compl. at 8, 15, Ex. G (Paul Blumenthal, *Karl Rove-Backed Groups Are Largest Single Outside Force in 2012*, HUFFINGTON POST, Nov. 4, 2012); Kolhatkar, *Rove Fundraiser*, *supra*, at 3.

[20] Am. Compl. at 16.

[21] *Id.*

[22] *Id.*

[23] Resp. at 13. The Response further contends that the fundraising appeals in question were made on behalf of American Crossroads, not Crossroads. *Id.* at 19.

[24] Resp. at 7-8.

[25] Rove Aff. ¶ 3.

[Crossroads'] budget in the State of Ohio."[26] Rove asserts that the conversation did not "include any discussion of any particular television advertisements, or television advertisements in general," nor did it include any discussion of any "specific efforts" that Crossroads would take to support Mandel.[27] Nonetheless, Rove understood "that the donor intended the funds to be used in some manner that would aid the election of Josh Mandel."[28] Rove avers, however, that the unnamed donor never made a $3 million contribution; rather, the donor contributed a larger amount to Crossroads "that was not in any way earmarked for any particular use."[29]

With respect to the alleged matching challenge, Rove claims that the unnamed donor who extended the offer did not intend for the challenge to be a formal program; rather, Rove understood that the donor wanted "simply [to] encourage[] our general efforts to raise funds."[30] Rove further avers that Crossroads raised $1.3 million for "general use in Ohio" as a result of the matching challenge.[31]

Concerning the independent expenditure reports addressing Crossroads-funded broadcasts in Virginia, Montana, and Nevada, the Response contends no donor contributed money specifically to fund those advertisements.[32] Further, none of the donors who attended the August 30, 2012, fundraiser made contributions to further any of the fourteen ads displayed

---

26 *Id.* ¶ 5.

27 *Id.* ¶¶ 6-7.

28 *Id.* ¶ 10.

29 *Id.* ¶ 14.

30 *Id.*

31 *Id.* ¶ 13.

32 Resp. at 5-6.

during the event.[33] Indeed, 13 of the 14 advertisements at issue were fully "paid for and aired" before the August 30, 2012, fundraiser, and the 14th advertisement was shown to a focus group and not publicly aired at all.[34] The Response also asserts that Law and Barbour did not solicit funds on behalf of both Crossroads and American Crossroads at the fundraiser; rather, their solicitations related specifically and solely to American Crossroads.[35]

The Response further asserts that, contrary to the representations in the Complaint, Crossroads spent over $10 million in Ohio on TV ads mentioning one of the two U.S. Senate candidates.[36] The Response represents that these ads included either independent expenditures or electioneering communications and "[o]ther issue and policy advocacy ads [that] did not fall into either category and were not required to be reported. . . ."[37] Production costs for those ads not required to be reported totaled approximately $150,000.[38] The Respondents explain that the Complaint's $6.4 million figure includes only funds that Crossroads spent on independent expenditures that opposed Senator Brown.[39]

The Complaint also contends that the Respondents' violations were knowing and willful. It cites responses to Requests for Additional Information ("RFAIs") sent to Crossroads that were

---

33 *Id.*

34 *Id.* at 6.

35 *Id.* at 10.

36 Resp. at 8.

37 *Id.* Commission disclosure reports confirm that Crossroads spent approximately $6.4 million on independent expenditures in Ohio. Although the Response here suggests that Crossroads may have spent some amount of money in connection with electioneering communications, Crossroads has not filed any electioneering communication reports in connection with its Ohio activities. As such, it remains unclear how Crossroads spent that additional $3.6 million in Ohio beyond those funds it claims were committed to independent expenditures in the state.

38 *Id.*

39 *Id.*

issued in connection with other Crossroads independent expenditure reports.[40] Those notices informed Crossroads that it had failed to itemize any contributions in its independent expenditure reports.[41] The June 2011 and October 2012 RFAIs stated that Crossroads was required to disclose identification information for each individual who made a donation in excess of $200 "used to fund the independent expenditure[s]."[42] In its response, Crossroads asserted that the RFAIs misstated the law and that Crossroads neither solicited nor received contributions "for the purpose of furthering the reported independent expenditure."[43] Moreover, Crossroads declared that it understood the applicable reporting regulations and that any omission of contributor information in future reports "should not be assumed to be an oversight."[44] The legal position Crossroads described in its responses to the RFAIs is therefore consistent with the position the Respondents take concerning the allegations raised here.

III. LEGAL ANALYSIS

An independent expenditure is an expenditure that expressly advocates the election or defeat of a clearly identified federal candidate and "that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents."[45] The Federal Election

---

40 *See* Am. Compl. at 15-16.

41 *See* Letter from Christopher Whyrick, FEC to Crossroads (June 14, 2011) ("June 2011 RFAI") (Exhibit I of Amended Complaint); Letter from Christopher Whyrick, FEC to Crossroads (Oct. 25, 2012) ("Oct. 2012 RFAI") (Exhibit K of Amended Complaint); Letter from Christopher Whyrick, FEC to Crossroads (Apr. 9, 2013) ("Apr. 2013 RFAI") (Exhibit M of Amended Complaint).

42 June 2011 RFAI at 1; October 2012 RFAI at 2.

43 *See* Letter from Thomas Josefiak to Christopher Whyrick, FEC at 1 (June 19, 2011) ("June 2011 Resp.") (Exhibit J of Amended Complaint); Letter from Caleb Crosby to Christopher Whyrick, FEC (Apr. 10, 2013) (Exhibit N of Amended Complaint).

44 June 2011 Resp. at 2.

45 2 U.S.C. § 431(17).

Campaign Act of 1971, as amended (the "Act") requires persons, other than political committees, to report independent expenditures that exceed $250 during a calendar year.[46] Such a report must include, among other information, "the identification of 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."[47] The Commission's implementing regulation provides that an independent expenditure report must 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."[48]

Relying on the language of the Commission's regulation, the Response argues that Crossroads must only disclose the identity of those donors who make a contribution intending that those funds be used to further a specific advertisement:

> At a minimum, a donor who is subject to disclosure under Section 109.10(e)(1)(vi) must know what advertisement he or she is funding. A donation made for the far more general purpose of funding unspecified advertisements in a handful of states at some later date does not satisfy the contribution be made "for the purpose of furthering *the reported independent expenditure*."[49]

This Office previously addressed the scope of disclosure required under Section 434(c) of the Act and Section 109.10(e)(1)(vi) of the Commission's implementing regulations in

---

[46] *Id.* § 434(c)(1); 11 C.F.R. § 109.10(b).

[47] 2 U.S.C. § 434(c)(2)(C) (emphasis added).

[48] 11 C.F.R. § 109.10(e)(1)(vi) (emphasis added). In 2011, Rep. Chris Van Hollen petitioned the Commission to revise section 109.10(e)(1)(vi), arguing that it "requires disclosure only of those contributors who state a specific intent to fund a specific ('the reported') independent expenditure." Rep. Chris Van Hollen, Petition for Rulemaking at 3 (Apr. 21, 2011) ("Van Hollen Petition"). In response, this Office submitted to the Commission a draft notice of proposed rulemaking proposing to amend section 109.10(e)(1)(vi). The proposal would have required disclosure of all contributors who make a contribution for the purpose of furthering "an" independent expenditure. *See* Draft Notice of Proposed Rulemaking for Independent Expenditure Reporting at 7 (Dec. 15, 2011) ("Draft Notice"). The Commission did not approve the proposal for publication in the *Federal Register*.

[49] Resp. at 20 (emphasis in original).

In that matter, the Commission approved our recommendation not to open a matter where there was no information that a 501(c)(4) organization received "donations tied to a specific independent expenditure."[50] We concluded that Section 434(c) may reasonably be construed to require disclosure of the identity of certain contributors regardless of whether the contributor made a contribution to further a specific independent expenditure. Nonetheless, we explained that the regulatory language of section 109.10(e)(1)(vi) "appears to require an express link between the receipt and the independent expenditure."[51] Nothing in the record before the Commission indicated that a donor had made a contribution for the purpose of funding the reported independent expenditure or otherwise triggering disclosure under Section 434(c).[52] Acknowledging the difficulty of resolving the question through an enforcement action and given the lack of information suggesting had received a contribution that would require disclosure under any construction of Section 434(c), this Office recommended that the Commission not open a matter, and the Commission approved that recommendation.[53]

50

51 *Id.* As we further explained, paragraph (c)(1) of the same provision of the Act may impose additional reporting obligations — namely, that every person (other than a political committee) who makes independent expenditures in excess of $250 must file a report identifying each person who, for the purpose of influencing a federal election, made a contribution to that person in excess of $200 in a calendar year, regardless of whether the contribution was made for the purpose of furthering an independent expenditure. *See id.* at 7-8 (citing *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986)).

52 *Id.* at 3-5, 11. In its disclosure reports filed with the Commission, the respondent in had identified two contributors who had made contributions — of $3,500 and $500, respectively — to further the independent expenditures that were the subjects of its reports. *See id.* at 3, 6. With respect to the remaining independent expenditures in question, argued in the enforcement proceeding that it used general treasury funds to pay for its independent expenditures and asserted that it would be impossible to identify other individuals who donated funds tied to any specific independent expenditure. *Id.* at 3.

53

Here, although Rove contends that the donor subsequently contributed a different amount not tied to any stated purpose,[54] the initial discussion concerning the proposed contribution — "I really like Josh Mandel . . . . I'll give ya 3 million . . . ." — was at least specific enough that Rove understood that the donor proposed to make a contribution to Crossroads for it to use to support the election of Josh Mandel.[55] Nonetheless, a donor's general purpose to support an organization in its efforts to further the election of a particular federal candidate does not itself indicate that the donor's purpose was to further "the reported independent expenditure" — the requisite regulatory test.

The record also fails to support a reasonable inference that any persons made contributions in response to the matching challenge for the purpose of furthering the ten reported independent expenditures in Ohio. The Complaint alleges that Crossroads spent $6.4 million in independent expenditures opposing Senator Brown in the Ohio Senate race. Even if true, however, that fact would not advance the claim that, as a result of the matching challenge, Crossroads received funds from a donor for the purpose of furthering Crossroads' reported independent expenditures in Ohio.

The Complaint also alleges that Crossroads failed to disclose the identities of persons who attended the August 30, 2012, fundraiser and made contributions relating to the 14 television advertisements shown at the fundraiser in connection with the 32 independent

---

[54] *See* Rove Aff. ¶ 14.

[55] *See* Rove Aff. ¶ 10. Consistent with the position of this Office in litigation concerning similar regulatory language, when considering the donor's purpose under 11 C.F.R. § 109.10(e)(1)(vi), we construe the available record using objective standards and in light of all the circumstances. *Cf.* FEC Mem. of P.&A. in Supp. of Mot. for Summ. J. at 33, *Van Hollen v. FEC*, Civ. No. 00766 (Aug. 1, 2011) (contending that similar regulatory language concerning disclosure of identity of donors for electioneering communications "does not rely solely on statements (public or private) by donors, but applies objective standards to determine which donations meet the regulatory standard."); FEC Resp. to Pl.'s Supplemental Mem. at 2, *Van Hollen v. FEC*, Civ. No. 00766 (Apr. 29, 2013) (same). Because the test is an objective one, the stated purpose of the donor may be a relevant fact, but it is not necessarily dispositive.

expenditures Crossroads reported for Virginia, Montana, and Nevada. Crossroads represents that none of the contributions received at the event were for the purpose of furthering those communications.[56] Moreover, Crossroads explains that 13 of the advertisements were broadcast and fully paid for before August 30, 2012, and that the 14th never aired, which further tends to support Crossroads' assertion that it did not receive contributions for the purpose of furthering those communications. Consequently, there is no basis to conclude on these facts that Crossroads received contributions from individuals at the fundraiser for the purpose of furthering Crossroads' reported independent expenditures in Virginia, Montana, and Nevada as alleged.

We therefore recommend that the Commission find no reason to believe that Crossroads violated 2 U.S.C. § 434(c)(2) or 11 C.F.R. § 109.10(e)(1)(vi) when it filed independent expenditure reports without identifying any donors who contributed to Crossroads with the purpose of furthering the reported independent expenditures.[57]

Finally, as we have explained, Section 434(c)(1) of the Act may impose additional reporting obligations for certain contributions made for the purpose of influencing a federal election generally.[58] The Commission's regulation at 11 C.F.R. § 109.10(e) is silent concerning

---

[56] Resp. at 5, 6, 19.

[57] Although we conclude that the record before the Commission does not indicate that Crossroads violated the regulatory standard for disclosure of donors in connection with its independent expenditure reporting, we note that 2 U.S.C. § 434(c)(2) specifically mandates disclosure of the identity of those who contribute for the purpose of furthering "an independent expenditure," an arguably more expansive approach. *See* First Gen. Counsel's Rpt. at 2, The Commission promulgated 11 C.F.R. § 109.10(e)(1)(vi) specifically to address Section 434(c), however, and thus it constitutes the Commission's controlling interpretation of the statutory provision it implements. *See* Reporting of Independent Expenditures by Persons Other Than a Political Committee, 45 Fed. Reg. 15,087 (Mar. 7, 1980) (stating that 11 C.F.R § 109.2 [subsequently renumbered 109.10] "has been amended to incorporate the changes set forth at 2 U.S.C. § 434(c)(1) and (2)"). Accordingly, our recommendation that the Commission find no reason to believe Crossroads violated the independent expenditure reporting regulation at 11 C.F.R. § 109.10(e)(1)(vi) applies with equal force to the alleged violation of the independent expenditure reporting provision it implements at 2 U.S.C. § 434(c)(2).

[58]

any such additional reporting requirement. Because the record here does not suggest a basis to find a violation of the regulatory standard at 11 C.F.R. § 109.10(e)(1)(vi) under its plain terms, a Respondent could raise equitable concerns about whether a filer has fair notice of the requisite level of disclosure required by law if the Commission attempted to impose liability under Section 434(c)(1).[59] Accordingly, to the extent that the facts here may also give rise to a claim that Crossroads allegedly violated 2 U.S.C. § 434(c)(1),[60] we recommend that the Commission dismiss that allegation as a prudential matter in the exercise of its prosecutorial discretion.[61]

* * *

For the foregoing reasons, we recommend that the Commission find no reason to believe that Crossroads violated 2 U.S.C. § 434(c)(2) and 11 C.F.R. § 109.10(e)(1)(vi), dismiss the allegation that Crossroads violated 2 U.S.C. § 434(c)(1), and close the file in this matter.

IV. RECOMMENDATIONS

1. Find no reason to believe that Crossroads Grassroots Policy Strategies violated 2 U.S.C. § 434(c)(2) and 11 C.F.R. § 109.10(e)(1)(vi);
2. Dismiss in the exercise of prosecutorial discretion the allegation that Crossroads Grassroots Policy Strategies violated 2 U.S.C. § 434(c)(1);
3. Close the file as to Steven Law, Karl Rove, Haley Barbour and Caleb Crosby.
4. Approve the attached Factual and Legal Analysis;
5. Approve the appropriate letters; and

---

[59] *Id.* at 10 ("In short, although certain disclosures appear to be required by the Act and *MCFL*, the Commission regulations concerning the disclosure requirements of the Act for QNCs can reasonably be interpreted as too narrow to provide sufficient notice to QNCs regarding what they must disclose.");

[60] *See* Compl. at 4-5 & n.1 (reciting language of disclosure obligations under Sections 434(c)(1) and (c)(2) and asserting that Commission's regulatory interpretation "fails to give full effect to these provisions").

[61] *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

6. Close the file.

Date: 3/7/14

Daniel A. Petalas
Associate General Counsel

Mark Shonkwiler
Assistant General Counsel

Jin Lee
Attorney

Attachment C

[Proposed] Answer and Affirmative Defense of Intervenor-Defendant Crossroads GPS,

CREW v. FEC (Civil Action No. 1:16-cv-00259-BAH) (April 26, 2016)

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 1401 New York Ave., NW Ste. 1200 Washington, DC 20005, Proposed Intervenor-Defendant.	Civil Action No. 1:16-cv-00259-BAH

[PROPOSED] ANSWER AND AFFIRMATIVE DEFENSE OF INTERVENOR-DEFENDANT CROSSROADS GRASSROOTS POLICY STRATEGIES

By leave of the Court, Crossroads Grassroots Policy Strategies ("Crossroads GPS") intervenes in this action as a party Defendant, and submits this Answer, denying each allegation of the Complaint except to the extent expressly admitted below:

1. Admitted that Plaintiffs have filed an action challenging the Federal Election Commission's ("FEC" or Commission") dismissal of an administrative complaint filed by Plaintiffs and the FEC's promulgation of the regulation at 11 C.F.R. § 109.10(e)(1)(vi). To the extent that Paragraph 1 contains Plaintiffs' characterizations and conclusions of law, no response is required. To the extent any response is required, Plaintiffs' characterizations and conclusions of law are denied.

2. Admitted that Crossroads GPS received funds in excess of $3 million from a donor in 2012. Admitted that Karl Rove is an unpaid, informal advisor to Crossroads GPS.

Admitted that Crossroads GPS sponsored independent expenditure television advertisements in Ohio in 2012. Admitted that Crossroads GPS did not report the identity of donors on independent expenditure reports filed with the FEC. Denied that Crossroads GPS was required to disclose donors on any independent expenditure reports filed with the FEC. To the extent that Paragraph 2 contains Plaintiffs' characterizations and conclusions of law, no response is required. To the extent any response is required, Plaintiffs' characterizations and conclusions of law are denied.

3. Admitted that Crossroads GPS received approximately $1.3 million in "matching" funds from donors for its unspecified general use in Ohio, and that Crossroads GPS did not report the identity of any of those donors on independent expenditure reports filed with the FEC. Denied that Crossroads GPS was required to disclose any donors on any independent expenditure reports filed with the FEC. To the extent that Paragraph 3 contains Plaintiffs' characterizations and conclusions of law, no response is required. To the extent any response is required, Plaintiffs' characterizations and conclusions of law are denied.

4. Admitted that Crossroads GPS did not report the identity of any of its other donors on independent expenditure reports filed with the FEC. Denied that Crossroads GPS was required to disclose donors on any independent expenditure reports filed with the FEC. Denied that independent expenditure advertisements distributed subsequent to the event at issue [duplicated] the example advertisements shown at the event. Denied that Crossroads GPS brought contributors to a fundraiser held on August 30, 2012, provided materials for donating to the group, showed example independent expenditure advertisements to these donors, and then solicited funds from these donors for the purpose of funding particular independent expenditure advertisements. To the extent that Paragraph 4 contains Plaintiffs' characterizations and

conclusions of law, no response is required. To the extent any response is required, Plaintiffs' characterizations and conclusions of law are denied.

5. Paragraph 5 sets forth Plaintiffs' opinions and characterizations and conclusions of law to which no response is required. To the extent any response is required, these allegations are denied.

6. Admitted that venue in this district is proper pursuant to 52 U.S.C. § 30109(a)(8)(A) and 28 U.S.C. § 1391(e). Otherwise denied.

7. Admitted that Plaintiff operates pursuant to Section 501(c)(3) of the Internal Revenue Code.

8 – 10. Crossroads GPS lacks sufficient information to admit or deny CREW's generalized descriptions of itself and its purposes, nor is any response to these descriptions required.

11. Admitted that Plaintiff files complaints with the FEC. Crossroads GPS lacks sufficient information to admit or deny CREW's generalized descriptions of itself and its purposes, nor is any response to these descriptions required.

12 – 13. Crossroads GPS lacks sufficient information to admit or deny CREW's generalized descriptions of itself and its purposes, nor is any response to these descriptions required.

14 – 15. Crossroads GPS lacks sufficient information to admit or deny CREW's descriptions of its publications, nor is any response to these descriptions required.

16. Denied that Crossroads GPS refuses to comply with FEC's reporting and disclosure requirements. Crossroads GPS lacks sufficient information to admit or deny CREW's

generalized descriptions of itself and its purposes, nor is any response required. To the extent a response to these allegations is required, they are denied.

17. Crossroads GPS lacks sufficient information about Plaintiff Nicholas Mezlak to admit or deny the factual representations regarding Mr. Mezlak set forth in Paragraph 17. To the extent that Paragraph 17 contains Plaintiffs' characterizations and conclusions of law, no response is required. To the extent any response is required, Plaintiffs' characterizations and conclusions of law are denied.

18. Paragraph 18 contains Plaintiffs' characterizations and conclusions of law to which no response is required. To the extent any response is required, these allegations are denied.

19-34. FECA's statutory provisions, the Code of Federal Regulations, and the FEC's policy statements speak for themselves and require no response.

35-39. Admitted.

40. Denied that Crossroads GPS held a fundraiser at the Tampa Club in Tampa, Florida on August 30, 2012.

41. Admitted that a news media report indicates there were "about70" attendees at the August 30, 2012 event hosted by American Crossroads. The rest of Paragraph 41 contains Plaintiffs' characterizations of attendees, to which no response is required.

42. Admitted.

43. Admitted that a news media report attributed the quoted statements and recollections to Mr. Rove. Admitted that Mr. Rove affirmed in an affidavit that was included with Crossroads GPS's response to CREW's administrative complaint filed in FEC Matter Under Review 6696, and which Plaintiffs have attached to their Complaint in this instant matter as

Exhibit I, that the news media reporter's account of Mr. Rove's statements was substantially accurate.

44. Crossroads GPS's reports filed with the FEC speak for themselves and require no response.

45. Denied that Crossroads GPS's independent expenditure reports filed with the FEC failed to disclose the names of any donors that were required to be disclosed by relevant FEC regulations and precedent. Crossroads GPS's independent expenditure reports filed with the FEC speak for themselves and require no response.

46. American Crossroads' reports filed with the FEC speak for themselves and require no response.

47. Admitted that fourteen television advertisements were shown to attendees at the August 30, 2012 event hosted by American Crossroads. Admitted that eleven advertisements had previously been paid for and publicly distributed by Crossroads GPS. Admitted that two advertisements had previously been paid for and publicly distributed by American Crossroads. Admitted that one advertisement had previously been paid for by American Crossroads and shown to a focus group, but not publicly distributed. To the extent that Paragraph 47 contains Plaintiffs' characterizations of those advertisements, no response is required. To the extent any response is required, Plaintiffs' characterizations are denied.

48. Crossroads GPS's advertisements speak for themselves and require no response. To the extent any response is required, Crossroads GPS denies that this paragraph fully and accurately conveys the content of the referenced advertisements.

49. Generally denied. Admitted that American Crossroads officials orally solicited contributions from attendees at the August 30, 2012, event.

50. Admitted that a news media report attributed the quoted material to Mr. Barbour. Plaintiffs' characterizations of those statements attributed to Mr. Barbour require no response.

51. Denied that Mr. Law and Mr. Barbour used the name "American Crossroads" to refer to both American Crossroad and Crossroads GPS. Admitted that Mr. Law and Mr. Barbour solicited contributions to American Crossroads at the August 30, 2012 event. Crossroads GPS's advertising in Florida and related press release attached as Exhibit D to Plaintiffs' Complaint speak for themselves and require no response. To the extent that Paragraph 51 contains Plaintiffs' characterizations and speculation about the event that appear to derive from a third-party news report attached to Plaintiffs' Complaint as Exhibit G, and which require no response To the extent any response is required, Plaintiffs' characterizations and speculation are denied.

52. Denied that advertising aired by Crossroads GPS duplicated the example advertisements shown at the August 30, 2012, meeting. Crossroads GPS's advertising and FEC filings speak for themselves and no response is required. Paragraph 52 contains Plaintiffs' characterizations of Crossroads GPS's advertisements, to which no response is required.

53. Denied that Crossroads GPS's independent expenditure reports filed with the FEC failed to disclose the names of any donors that were required to be disclosed by relevant FEC regulations and precedent. Crossroads GPS' independent expenditure reports filed with the FEC speak for themselves and require no response.

54. Admitted.

55. Admitted that Plaintiff filed an administrative complaint against Crossroads GPS with the FEC on November 14, 2012. The content of Plaintiffs' administrative complaint filed with the FEC speaks for itself and no response is required. To the extent any response is

required, Crossroads GPS generally denies the substantive allegations set forth in Plaintiffs' administrative complaint.

56-61. Admitted that Crossroads GPS filed a response to Plaintiffs' administrative complaint with the FEC on January 17, 2013, and that this response included an affidavit signed by Mr. Rove. Plaintiffs' characterizations of Crossroads GPS's FEC response and Mr. Rove's affidavit require no response. To the extent any response is required, Plaintiffs' characterizations of Crossroads GPS's response are denied to the extent that those characterizations vary from Crossroads GPS's response.

62. Admitted that American Crossroads paid for and distributed advertising in connection with the U.S. Senate races in Montana and Florida, as well as in Wisconsin, Indiana, and Nebraska, subsequent to the August 30, 2012 meeting. Admitted that American Crossroads did not report spending any money on advertising subsequent to the August 30 meeting in connection with the U.S. Senate races in Massachusetts, Nevada, Ohio, or Virginia. Admitted that, subsequent to the August 30, 2012 meeting, Crossroads GPS paid for and distributed independent expenditures in connection with the U.S. Senate races in Massachusetts, Nevada, Ohio, and Virginia, as well as in North Dakota, Wisconsin, Montana, Indiana, Maine, and New Mexico.

63. Admitted.

64-69. Admitted that the FEC's Office of General Counsel issued a First General Counsel's Report that is date-stamped March 7, 2014. This First General Counsel's Report speaks for itself, and Plaintiffs' characterizations of the Report require no response. To the extent any response is required, Plaintiffs' characterizations of the First General Counsel's

Report are denied to the extent that those characterizations vary from First General Counsel's Report itself.

70-71. Admitted that the FEC voted on the recommendations made by the Office of General Counsel in the First General Counsel's Report. The official FEC records regarding the FEC's votes speak for themselves and require no response.

72. Admitted that the controlling Commissioners have not issued a Statement of Reasons in connection with MUR 6696.

[Paragraph numbers 73 through 109 are omitted in the Complaint.]

110. Crossroads GPS incorporates its responses in all preceding paragraphs as if fully set forth herein.

111. Denied.

112. Admitted that the three Commissioners who voted against finding reason to believe that Crossroads GPS violated the law have not issued a separate Statement of Reasons. Denied that these Commissioners failed to provide an explanation for their vote(s). Denied that the Office of General Counsel's First General Counsel's Report is insufficient to justify dismissal of the enforcement matter.

113-116. Denied.

117. Crossroads GPS incorporates its responses in all preceding paragraphs as if fully set forth herein.

118. Admitted that the three Commissioners who voted against finding reason to believe that Crossroads GPS violated the law have issued no separate Statement of Reasons. Denied that these Commissioners failed to provide an explanation for their vote(s). Denied that

the Office of General Counsel's First General Counsel's Report is insufficient to justify dismissal of the enforcement matter.

119-124. The First General Counsel's Report, Code of Federal Regulations, and FECA speak for themselves. To the extent these Paragraphs contain Plaintiffs' characterizations and conclusions of law, no response is required. To the extent any response is required, Plaintiffs' characterizations and conclusions of law are denied.

125. Crossroads GPS incorporates its responses in all preceding paragraphs as if fully set forth herein.

126. Admitted that the three Commissioners who voted against finding reason to believe that Crossroads GPS violated the law have issued no separate Statement of Reasons. Denied that these Commissioners failed to provide an explanation for their vote(s). Denied that the Office of General Counsel's First General Counsel's Report is insufficient to justify dismissal of the enforcement matter.

127-130. The First General Counsel's Report, Code of Federal Regulations, FECA, and Crossroads GPS's response to the administrative complaint speak for themselves. To the extent these Paragraphs contain Plaintiffs' characterizations and conclusions of law, no response is required. To the extent any response is required, Plaintiffs' characterizations and conclusions of law are denied.

131. Denied.

AFFIRMATIVE DEFENSES

1. The Administrative Procedure Act ("APA") does not provide an avenue for relief where other adequate bases for relief from administrative action are available. Because the FECA otherwise provides relief from improper dismissal, no APA remedy is available here.

2. Plaintiffs' challenge to the FEC's promulgation of 11 C.F.R. § 109.10(e)(1)(vi), which was promulgated on March 7, 1980 (and was numbered 11 C.F.R. § 109.2 at the time), is time-barred under 28 U.S.C. § 2401(a).

WHEREFORE, Crossroads Grassroots Policy Strategies requests that the complaint be dismissed with prejudice and that the Court award it all other lawful and proper relief.

/s/ Thomas W. Kirby
Michael E. Toner (D.C. Bar No. 439707)
E-mail: mtoner@wileyrein.com
Thomas W. Kirby (D.C. Bar No. 915231)
E-mail: tkirby@wileyrein.com
Eric Wang (D.C. Bar. No. 974038)
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
Tel.: 202.719.7000
Fax: 202.719.7049

Counsel for Crossroads Grassroots Policy Strategies

April 15, 2016

Attachment D

Crossroads GPS's Opposition to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgement,

CREW v. FEC (Civil Action No. 1:16-cv-00259-BAH) (Oct. 23, 2017)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

CROSSROADS GRASSROOTS POLICY STRATEGIES' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

Intervenor-Defendant Crossroads Grassroots Policy Strategies ("CGPS") moves this Court for an order (1) granting its Cross-Motion for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure and Local Rule 7(h) and dismissing the Plaintiffs' complaint with prejudice, and (2) denying Plaintiff's Motion for Summary Judgment (Dkt. No. 27).

In support of this motion, CGPS files (1) a Memorandum of Points and Authorities in Support of Its Opposition to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment, and (2) a Proposed Order. CGPS requests oral argument on this motion.

Respectfully submitted,

/s/ Thomas W. Kirby

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

Counsel for Crossroads Grassroots Policy Strategies

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

October 23, 2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

LIST OF ABBREVIATIONS

BCRA – Bipartisan Campaign Reform Act of 2002 (Pub. L. 107–155)

CGPS – Crossroads Grassroots Policy Strategies

CREW – Citizens for Responsibility and Ethics in Washington

EC – electioneering communication

FEC – Federal Election Commission

FECA – Federal Election Campaign Act of 1971, as amended (52 U.S.C. § 30101 *et seq.*)

FGCR – First General Counsel's Report

IE – independent expenditure

INTRODUCTION

The Federal Election Campaign Act of 1971, as amended ("FECA"), sets forth a "First-Amendment-sensitive regime" with "enormous subtleties and complexities." *Common Cause v. FEC*, 842 F.2d 436, 445 (D.C. Cir. 1988). The FECA vests the Federal Election Commission ("FEC" or "Commission") with "primary and substantial responsibility for administering and enforcing" that statute. *Buckley v. Valeo*, 424 U.S. 1, 109 (1976).

Citizens for Responsibility and Ethics in Washington ("CREW") attempts with this lawsuit to short-circuit the FEC's rulemaking process, which is the vehicle best-suited for sorting through the FECA's subtleties and complexities. CREW could have filed a rulemaking petition with the six-member, bipartisan FEC to amend the agency's independent expenditure ("IE") reporting regulation, which CREW contends here is deficient. Had the FEC not acted on such a petition, CREW could have sought review of that decision in this Court.

But CREW did not file a rulemaking petition. Instead, CREW asks this Court to use the enforcement process to repeal a 37-year-old regulation – widely relied on by advocacy groups across the ideological spectrum – without any notice to or comment by the public, and largely based on CREW's unilateral assertions about recent campaign finance developments. In so doing, CREW asks this Court to retroactively apply a new legal rule to subject Crossroads Grassroots Policy Strategies ("CGPS") to the burdens of enforcement and sanction, even though CGPS fully complied with and relied upon a longstanding FEC regulation and Commission practice.

This Court applies a highly deferential standard of review in deciding whether the FEC's dismissal of an administrative complaint was "contrary to law." 52 U.S.C. § 30109(a)(8)(C). The career staff in the FEC's Office of General Counsel and the Commission, through its controlling bloc of commissioners, confirmed that CGPS complied with the FEC's IE reporting

regulation. On such a clear factual record, this Court must defer to the agency's more-than-reasonable determination to dismiss this matter and reject CREW's Claim One here.

There are many legal and policy reasons why this Court should refuse CREW's two follow-on requests to substitute this enforcement matter for an administrative rulemaking. Most fundamental, however, is CGPS's compliance with the Commission's controlling regulation that has been in effect for decades. By law, that compliance precludes further enforcement, regardless of whether the regulation is deemed valid. This moots CREW's Claims Two and Three, which present (mistaken) statutory challenges to the validity of the regulation and do not affect the lawfulness of the FEC's dismissal of the administrative complaint.

Even if the Court were to consider CREW's challenges to the regulation in the context of this ongoing litigation, the ultimate result would be the same. The regulation is consistent with the statutory text and is a rational means of implementing congressional intent, doubly so given the great deference owed to the FEC on such matters. For their part, CREW's baseless complaints about the rulemaking procedures followed by the Commission 37 years ago come too late. CREW's challenges to the regulation thus would fail if they mattered here, which they do not.

SUMMARY OF THE ARGUMENT

CREW's Claim One alleges CGPS failed to comply with 11 C.F.R. § 109.10(e)(1)(vi), which required CGPS to report its spending for each express advocacy IE and identify any contributions to CGPS "for the purpose of furthering the reported independent expenditure." CREW's FEC submission asserted that CGPS received contributions intended for political purposes or to assist certain candidates. But CREW offered no evidence that any such funds were earmarked for a particular IE, or even for IEs generally. To the contrary, the administrative record before the FEC made clear that the donors at issue left CGPS free to spend as it chose,

whether for issue advocacy, IEs, polling, voter registration and get-out-the-vote drives, or other activities. Under the plain language of the Commission's regulation as it has been construed for 37 years, such donations are not "for the purpose of furthering the reported independent expenditure." *Id.* (emphasis added). Thus, the FEC's professional staff appropriately found no FECA violation on these facts, and the controlling commissioners reasonably accepted that conclusion. Indeed, even the commissioners who voted to pursue enforcement did so on the basis of an alternative theory not raised in CREW's administrative complaint, and did not articulate any disagreements with their colleagues' or the staff's reasoning for dismissing.

By statute and basic fairness, CGPS's compliance with the Commission's regulation protected it from any enforcement proceeding and made dismissal of the administrative complaint mandatory. Recognizing the risk that uncertain laws may impermissibly chill core First Amendment speech, the FECA provides the following explicit, statutory "protection for good faith reliance upon rules or regulations":

> Notwithstanding any other provision of law, 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 or by chapter 95 or chapter 96 of title 26.

52 U.S.C. § 30111(e). Moreover, even if there were no specific statutory reliance provision, there is abundant authority that principles of fair notice, which have particular force in protecting the exercise of core First Amendment rights, preclude enforcement against a respondent who complied with applicable agency regulations and guidance. If CREW wants to challenge the FEC regulation, it must use rulemaking procedures of prospective effect, which it has not done.

CREW's complaint before this Court suffers from a wide range of other flaws, most notably that CREW failed to exhaust its administrative remedies and, in large part, abandoned its

present Claims Two and Three in the FEC proceedings below. Each of CREW's five counts in its administrative complaint asserted that CGPS failed to report earmarked contributions as required by the Commission's regulation, and no count alleged that CGPS failed to identify donors under the broadest level of donor reporting CREW now claims FECA section 30104(c)(1) requires. This matters. The FECA requires any enforcement action be taken only "on the basis of the complaint," and judicial review of complaint-generated matters must be limited to "the original complaint." *Id.* § 30109(a)(1), (a)(8)(C). Because CREW's administrative complaint failed to raise these issues against CGPS, CREW's present Claims Two and Three are not properly before this Court.

CREW's Claim Two, which facially challenges the regulation's validity and not merely its application to this case, also is time-barred. Furthermore, CREW lacks standing to bring Claim Two. Its claimed standing relies on the theory that further enforcement in this matter could compel CGPS to identify its donors, and that CREW would find this information useful. But even if this Court were to find the FEC's regulation invalid, CGPS's compliance with the regulation still is an absolute bar against enforcement. Therefore, CREW's purported injury (that it lacks information about CGPS's donors) is not redressable – a prerequisite for standing.

CREW's Claim Three, which challenges the FEC's dismissal of any claim that CGPS may have violated FECA section 30104(c)(1), also fails to meet the high bar for judicial deference to agencies' exercise of their prosecutorial discretion. This is especially so where the agency's dismissal was based not on any claim that CREW specifically asserted against CGPS, but rather on a theoretical issue that FEC staff incorporated into their analysis *sua sponte*.

Finally, even if the Court were to reach the merits of CREW's Claims Two and Three, and it should not, each claim would fail. CREW's present Claim Two is that Section

30104(c)(2)(C)'s requirement to identify support for "an independent expenditure" plainly means "any" independent expenditure, such that contributions earmarked for unknown future independent advocacy trigger reporting. CREW does not explain, however, why Congress did not say "any" if that is what it meant. CREW does not grapple with relevant authority that "an" often is equivalent to "one." CREW does not mention, much less explain away, the fact that Congress made no objection when the FEC submitted the regulation for congressional review in 1980 – which is strong evidence that the Commission accurately discerned congressional intent. CREW also fails to adequately rebut *Van Hollen v. FEC*, 811 F.3d 486 (D.C. Cir. 2016), which recently approved the FEC's parallel earmarking-based reporting regime for electioneering communications, and that was modeled on the IE regulation challenged here. Nor does CREW give fair weight to the FEC's interpretative leeway under *Chevron.*

CREW's present Claim Three rests on FECA section 30104(c)(1), the provision CREW failed to prosecute in the underlying administrative proceeding. CREW now reads that section to require any entity that reports any IE – even one concerning a narrow topic in an isolated area of the country – to report all "contributions made for the purpose of influencing a federal election generally," CREW Motion for Summary Judgment ("MSJ") Brief (Doc 27) at 34, 49, even if a contribution had absolutely no relation to the reported IE or election at issue. Not only is this an erroneous reading of the statute's substantive requirement, but as *Van Hollen* recognized, CREW's approach would burden the reporting entity's speech, while doing more to obscure than illuminate who is actually supporting any reported advocacy.

Congress never intended the FECA to require speakers to convey such misleading information. Back in 1980, the FEC understood Congress to create only a limited reporting burden – those who funded express advocacy IEs for or against identified federal candidates

were to identify themselves, and financial support earmarked for a specific IE had to be reported. Conversely, the FEC understood Congress not to require reporting of those funders who generally supported a reporting entity but did not link their support to particular express advocacy public communications. The FEC could have confidence in its assessment because the law was based on the agency's own legislative recommendation to Congress.

The FEC embodied that understanding in its implementing regulation, and Congress expressed no concern in the statutory review process established precisely to identify regulatory deviations from legislative intent. The Commission's understanding was reasonable at the time and was arguably compelled by the First Amendment. Thus, when the FEC later implemented a parallel reporting regime for electioneering communications, it similarly narrowed the scope of contributor identification. If CREW believes more recent campaign finance experience shows circumstances have changed, it must, at minimum, squarely present that claim and supporting data to the FEC in a rulemaking proceeding that allows for public comment and a broad-based evaluation of recent data. What CREW cannot be permitted to do is hijack an administrative enforcement proceeding in which CGPS's compliance with the Commission's governing regulation, whether valid or invalid, requires dismissal.

STATEMENT OF FACTS

I. CROSSROADS GRASSROOTS POLICY STRATEGIES

CGPS was founded in 2010 with the mission of educating, equipping, and engaging American citizens to take action on important economic and legislative issues. The Internal Revenue Service ("IRS") has issued a determination letter to CGPS recognizing it as a Section 501(c)(4) social welfare organization under the Internal Revenue Code ("IRC"). Like many 501(c)(4) entities, CGPS has a legally distinct affiliated entity, American Crossroads, which is organized as a political organization under Section 527 of the IRC and is registered with the FEC

as a "super PAC." *See* IRS, 2000 Exempt Orgs. Continuing Professional Educ. Text, Affiliations Among Political, Lobbying, and Educational Organizations, *available at* https://www.irs.gov/pub/irs-tege/eotopics00.pdf.

CGPS works to advance its mission by conducting issue research, holding events with policymakers, and engaging and inviting citizens to participate in grassroots advocacy on pending legislative issues through advertising, mailings, e-mails, and web-based advocacy tools. Many of the public policy issues that 501(c)(4) entities like CGPS seek to affect are largely determined by elected officials. Not surprisingly, therefore, some of CGPS's public communications have advocated for or against elected officials and candidates based on whether their positions are favorable or inimical to CGPS's preferred public policy outcomes. *See* IRS, Rev. Ruls. 2004-6 and 1981-95; 26 C.F.R. § 1.501(c)(4)-1(a)(2).

II. INDEPENDENT EXPENDITURES UNDER THE FECA AND FEC REGULATIONS

When public communications "expressly advocate" the election or defeat of a candidate and are not coordinated with any candidate or political party, they are regulated as "independent expenditures" ("IEs") under the FECA. 52 U.S.C. § 30101(17). "To insure that the reach of [the IE reporting requirement] is not impermissibly broad," the Supreme Court construes "express advocacy" narrowly only to cover language "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Buckley*, 424 U.S. at 80, 44 n.52, and 80 n.108; *see also* 11 C.F.R. § 100.22 (defining "expressly advocating").

IEs are subject to reporting requirements. As the judiciary has recognized, *see FEC v. Furgatch*, 807 F.2d 857, 859 n.2 (9th Cir. 1987), FECA section 30104(c)(1) – i.e., the "Coverage Provision" – defines the scope of who is covered by the IE reporting requirement, while section 30104(c)(2)(C) – i.e., the "Content Provision" – defines, with respect to contributor information,

the content of what is required to be reported. In line with that structure, the FEC has promulgated comprehensive and detailed regulations for when and how IE reports must be filed and what those reports must include. *See* 11 C.F.R. § 109.10. Of particular relevance here, the Content Provision requires IE reports 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." *Id.* § 109.10(e)(1)(vi).

Under the FECA, the FEC also has the authority "to develop such prescribed forms . . . as are necessary to carry out the provisions of this Act." 52 U.S.C. § 30107(a)(8). The Commission has prescribed Form 5 for persons other than political committees to use to report their IEs. FEC, Form 5 (rev. Sept. 2013), *at* https://transition.fec.gov/pdf/forms/fecfrm5.pdf. The instructions for Form 5 require filers to report the sources of "each contribution over $200 that was made for the purpose of furthering the independent expenditures" being reported. FEC, Instructions for Preparing FEC Form 5 (rev. Sept. 2013), *at* https://www.fec.gov/resources/cms-content/documents/fecfrm5i.pdf. The reporting forms are submitted to Congress for review prior to taking effect. *See* 52 U.S.C. § 30111(d)(1).

III. HISTORY OF THE FEC'S IE REGULATION

A. Congress Enacts the FEC's IE Recommendations in Its 1979 FECA Amendments

In the wake of *Buckley*, Congress enacted a number of significant reforms to the FECA, including provisions affecting the reporting of IEs. *See* Pub. L. 94–283 (1976). Between 1976 and 1979, the FECA required "[e]very person (other than a political committee or candidate) who makes contributions or independent expenditures expressly advocating the election or defeat of a clearly identified candidate" to file a statement with the FEC containing certain contributor and expenditure information, as appropriate. *Id.* (codified as 2 U.S.C. § 434(e)(1), and later

renumbered as 52 U.S.C. § 434(c)(1)). Paragraph (2) of the same subsection required two specific pieces of information be included in these IE reports: (A) information about the expenditure (e.g., which candidate was supported or opposed); and (B) a certification that the expenditure was made independent of a candidate's campaign. *Id.*

"During implementation of the 1976 Amendments, the FEC kept a continually updated list of apparent statutory omissions, inadequacies and other problems" with the law, which was converted into an annual set of legislative recommendations to Congress. *Legislative History of Federal Election Campaign Act Amendments of 1979* at 10 (1983) ("1979 FECA History"), *available at* http://classic.fec.gov/pdf/legislative_hist/legislative_history_1979.pdf. In July 1979, the Senate Committee on Rules and Administration convened a hearing to consider, in the words of Chairman Claiborne Pell, "some long-overdue amendments to the [FECA]." *Id.* at 7. Chief among them were the FEC's legislative recommendations, which built upon recent Commission experience and made "valuable suggestions for simplifying the [FECA]'s reporting requirements and improving its administration." *Id.* The FEC's Chairman and Vice-Chairman testified at the Committee hearing and were accompanied by the Commission's Staff Director and General Counsel. *Id.* at 8, 20, 39. The FEC's representatives pledged their agency's readiness to assist the Committee and its staff in revising the FECA and remained substantively engaged with the Committee following the hearing. *Id.* at 10, 150-60.

As relevant here, the FEC recommended abolishing the requirement for contributors to file their own reports if they gave to sponsors of IEs, and instead requiring that "persons who file independent expenditure reports . . . report the sources of any contributions in excess of $100 which is donated with a view toward bringing about an independent expenditure." *Id.* at 25. Following the hearing, Committee staff circulated draft legislative language that included

revisions to the FECA's IE reporting provisions. *See id.* at 62-100, 108-142, 451. The language required persons filing IE reports to identify "each person who has made a contribution of more than $200 to the person filing such statement, which was made for the purpose of furthering an independent expenditure." *Id.* at 78, 123. This gloss on the overall IE reporting statute was incorporated as subsection (C) to 2 U.S.C. § 434(e)(2).[1] The accompanying *Summary of Committee Working Draft* confirmed that this change was an "FEC legislative recommendation," *id.* at 101, 103, 145, that required "the person who receives the contributions, and subsequently makes the independent expenditure, [to] report having received the contribution to the Commission." *Id.* at 103, 145 (emphasis added).

The Committee approved the draft language unanimously and reported S. 1757 favorably to the Senate floor. *See id.* at 450, 463. The Committee report accompanying the Senate bill explained the rationale and import of the IE-related changes as follows:

- "[R]eporting requirements under the existing act have [generally] been viewed by most reporting entities as unduly burdensome [and] going beyond legitimate disclosure to actively discourage participating in the electoral process";
- The existing independent expenditure reporting requirements, in particular, were "burdens[ome]";
- The Senate bill, S. 1757, "includes certain legislative recommendations from the Federal Election Commission's 1978 annual report, which are intended to remedy statutory omissions and address other technical problems in the operation of the current law"; and
- The proposed law would require "the person who receives the contribution, and subsequently makes the independent expenditure, [to] report having received that

[1] The statute is reproduced in its entirety on pages 38-40, *infra*.

> contribution to the Commission."

Id. at 449, 458 (emphasis added).

Materially similar IE reporting requirements were incorporated into the House's campaign finance legislation, H.R. Res. 5010, which was introduced shortly after the Senate hearing and ultimately signed into law by President Carter on January 8, 1980. *See id.* at 187, 558, 573. In urging his colleagues to approve the final bill, Chairman Pell explained the IE-related provisions on the Senate floor as follows:

> Reporting requirements in the bill generally simplify existing law by reducing the amount of information to be included in reports. . . . The reporting threshold for independent expenditures is also raised to $250 and only the person making the independent expenditure must report this.

Id. at 549.

Pursuant to a special congressional review provision, *see infra* at 13, H.R. Res. 5010 also required the FEC to "transmit to the Congress proposed rules and regulations necessary for the purpose of implementing the [law]" prior to February 29, 1980. *Id.* at 562. This deadline was barely more than 50 days after the bill was signed into law. *See id.* at 562, 573.

B. The FEC Implements the Statutory Language

The FEC moved quickly on the implementing regulations. On January 4, 1980, the FEC's Staff Director circulated a memorandum to the Commission, noting that the legislative "changes themselves present relatively few novel problems or difficult questions of statutory interpretation." AR1002. Given the short deadline set by Congress, the Staff Director recommended including an earlier-than-normal draft of the regulations in the Notice of Proposed Rulemaking ("NPRM") to "provide a vehicle for assuring that all concerned [including Commission staff] can focus on the central problems of implementation." AR1003.

The Commission formally took up the impact of the new law at its January 10 and 17

meetings. AR1025-32, 1048-52. On January 23, the NPRM was published in the Federal Register. AR1057. Consistent with the legislative history, the NPRM explained that the "proposed regulations would, among other things, reduce recordkeeping and reporting requirements." *Id.* The NPRM also advised potential commenters that "the draft regulations that are being published in this notice . . . have not been approved by the Commission." *Id.*

On January 30 and 31, the FEC called a special meeting to conduct a "section-by-section review of the proposed changes for 11 CFR." AR1051, AR1083. Shortly afterwards, the Commission received feedback on the NPRM, with only one commenter addressing the IE reporting requirements. In addition to suggesting an edit to the IE rules, which the Commission implemented, the commenter praised the NPRM's language as going "a long way to reducing and simplifying the recordkeeping and reporting requirements of the [FECA]," and observing that Congress had "accepted the logic" inherent in the FEC's legislative recommendations. AR 1228. Neither this commenter, nor anyone else, claimed that the Commission had overlooked a separate, broader reporting obligation under 2 U.S.C. § 434(c)(1).

On February 19, Commission staff circulated "proposed regulations" to the FEC commissioners. AR1337. The accompanying memorandum explained that the changes from the staff's NPRM language were the "result of the Commission's discussion of the proposed regulations" over the past month. *Id.* The proposed regulations first explained (in section 104.4) that Part 109 was meant to comprehensively address all of the IE reporting requirements applicable to persons other than political committees. AR1416. Section 109.2 was then relabeled "Reporting of Independent Expenditures by Persons Other Than a Political Committee" and included a few adjustments to the NPRM's preliminary regulatory text. AR1444. Most importantly, the preliminary contributor reporting requirement changed from

identifying each person whose contribution "was made for the purpose of furthering an independent expenditure" to each person whose "contribution was made for the purpose of furthering the reported independent expenditure." *Compare* AR1075 *with* AR1444.

The Commission voted to adopt these proposed regulations at its February 21 meeting. AR1494. The FEC published its explanation and justification for the new rules on March 7, 1980, *see* AR1496-1542, and explained the IE contributor reporting provision as follows:

> This section has been amended to incorporate the changes set forth at 2 USC 434(c)(1) and (2) regarding reporting requirements for persons, other than a political committee, who make independent expenditures.

AR1503 (emphasis added). Thus, the regulation implemented both the Coverage and Content Provisions that CREW cites here.

C. Congress Did Not Use Its Special Oversight Powers to Reject the FEC Rule, and the FEC Has Adhered to the Approved Regulation for 37 Years.

The FECA requires that all proposed FEC regulations be transmitted to Congress for review before they take legal effect. This special congressional review process had been used several times before the agency's 1980 IE reporting rulemaking, including just a few months before to disapprove the FEC's candidate debates regulation. *See* S. Res. 236, 96th Cong. (1979).[2]

Consistent with the statutory deadline, the FEC's IE reporting regulations were transmitted to Congress on February 28, 1980. AR1496. Congress did not disapprove the regulations during the requisite 15-day legislative review period, and the regulations took effect on April 1, 1980. AR1543, 1553. No party subsequently challenged the regulations within the six-year statute of limitations period available for doing so. *See* 28 U.S.C. § 2401(a).

[2] The House and Senate rejected FEC regulations on several earlier occasions as well. *See* H.R. Res. 780, 94th Cong. (1975); S. Res. 275, 94th Cong. (1975).

Over the past 37 years, the Commission and its staff have consistently interpreted the IE contributor reporting requirement under the statute and the FEC's regulations. *See* FEC, Campaign Guide for Corporations and Labor Organizations (Jan. 2007), *infra* at 28; FEC, Campaign Guide for Corporations and Labor Organizations (Aug. 1997) at 24 (Exh. A) (instructing IE reports to identify "each person who contributed more than $200 for the purpose of making the independent expenditures" being reported); FEC Matter Under Review ("MUR") 6696, First General Counsel's Report, *infra* at 21.

IV. THE FEC IMPLEMENTS PARALLEL EARMARKING-BASED DONOR REPORTING FOR ELECTIONEERING COMMUNICATIONS.

In 2002, Congress passed, and the President signed, the Bipartisan Campaign Reform Act ("BCRA"), amending the FECA. Pub. L. 107–155. Of relevance here, BCRA regulates certain speech in close proximity to elections that does not contain express advocacy in a manner similar to how the FECA regulates IEs. However, Congress did not attempt to reach this speech by expanding the definition of express advocacy. Instead, it adopted a parallel system to regulate so-called "electioneering communications" ("ECs"), defined in terms of timing, reference to candidates, and distribution media. *See* 52 U.S.C. § 30104(f)(3). Among other things, BCRA required reporting of some funding sources for ECs. *Id.* § 30104(f)(2)(F).

As amended by BCRA, the FECA requires sponsors of ECs that do not use a segregated bank account to report "all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement" during the calendar year in which the report is filed. 52 U.S.C. § 30104(f)(2)(F). However, the Commission's implementing regulation narrowed the EC reports' donor identification requirement due to concerns over "the significant burden" on corporations (including non-profit corporations) and labor unions who might have to report "the identities of the vast numbers of customers, investors, or members, who have provided funds for

purposes entirely unrelated to the making of ECs." FEC, Explanation and Justification for Final Rule on Electioneering Communications (*hereinafter*, "ECs E&J"), 72 Fed. Reg. 72,899 (Dec. 26, 2007). Specifically, the FEC's EC reporting regulation requires only the identification of persons who gave "for the purpose of furthering electioneering communications." 11 C.F.R. § 104.20(c)(9). The Commission explained that the relevant language from the EC provision was "drawn from the reporting requirements that apply to independent expenditures" and cited both 2 U.S.C. § 434(c)(2)(C) (52 U.S.C. § 30104(c)(2)(C)) and 11 C.F.R. § 109.10(e)(1)(vi), the IE reporting regulation at issue here.[3] ECs E&J, 72 Fed. Reg. at 72,911 n.22. The D.C. Circuit recently upheld the FEC's EC donor identification regulation as rational and consistent with legislative intent. *Van Hollen*, 811 F.3d 486.

V. THE AUGUST 30, 2012, EVENT AND CGPS'S 2012 ACTIVITIES

On August 30, 2012, American Crossroads hosted an informational meeting in Tampa to provide an update to various persons interested in the super PAC's activities.[4] While attendees were orally encouraged to support the work of American Crossroads, and were provided information on how they could contribute to the organization (as well as given separate donor information sheets for CGPS), the event was not specifically structured as a "fundraiser" (e.g., no stipulated ticket price, no listed donor "hosts," no demand for specific commitments), as CREW

[3] In an enforcement matter, the controlling group of FEC commissioners (*see FEC v. NRSC*, 966 F.2d 1471, 1476 (D.C. Cir. 1992)) determined that the EC reporting regulation is parallel to the IE reporting regulation, requiring the identification of donors "only if such donations are made for the purpose of furthering the electioneering communication that is the subject of the report." FEC Matter Under Review ("MUR") 6002 (Freedom's Watch), Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn at 5, *available at* http://eqs.fec.gov/eqsdocsMUR/10044274536.pdf.

[4] CREW's MSJ Brief (Doc 27 at 20) alleges "Crossroads GPS officials" took certain actions at this meeting under the name of "American Crossroads," which "they evidently used [] to mean both American Crossroads and Crossroads GPS." CREW cites nothing more than the unsubstantiated allegations in its own administrative complaint and complaint for judicial review for these naked claims, and there is no evidence in the administrative record to support these contentions.

has asserted. *See* Rove Aff. ¶ 2, AR094; CREW MSJ Brief (Doc 27) at 18; CGPS Answer ¶ 49. [5]

As part of the informational update, American Crossroads showed two independent expenditure ads that it had already aired and paid for earlier in the year, as well as another focus group advertisement not intended for public distribution. CGPS Resp. to Admin. Compl., AR077-78. American Crossroads also showed eleven of CGPS's ads, also already aired and paid for. *Id.*[6] Notwithstanding CREW's mischaracterization of all of these ads as "independent expenditures," ten of the eleven CGPS ads shown were not IEs and were not reported to the FEC as IEs because they did not contain express advocacy. *Compare* CREW MSJ Brief (Doc 27) at 45 *with* CGPS Resp. to Admin. Compl., AR077-78.[7] Moreover, while CREW mischaracterizes CGPS's response as having "admitted" these ads were "'examples' of the activities raised funds would support," in fact neither American Crossroads nor CGPS solicited attendees to help fund the specific ads shown, or even substantially similar ads. *Compare* CREW MSJ Brief (Doc 27) at 45 and 19 *with* CGPS Resp. to Admin. Compl., AR078 and CGPS Answer ¶ 47.[8] Rather, the purpose of showing the ads was merely to demonstrate the quality and range of the two entities'

[5] CREW also contends that, "by failure to respond," CGPS admitted CREW's allegation that "[CGPS] held a fundraiser . . . in conjunction with American Crossroads." CREW MSJ Brief (Doc 27) at 18. In fact, CGPS denied it "held [the] fundraiser" in question. CGPS Answer ¶ 40.

[6] YouTube links to the ads were provided in CGPS's response to the administrative complaint. AR077-78.

[7] CGPS's "Investigation" ad, which opposed Nevada U.S. Senate candidate Shelley Berkley, was the only IE among the eleven CGPS ads shown at the August 30 meeting, and an IE report was properly filed with the FEC for that ad. *See* CGPS Resp. to Admin. Compl., AR078; *see also* AR151, 153. In its administrative complaint, CREW also: (1) made conclusory allegations about "independent expenditures broadcasting the advertisements shown at the [August 30 meeting] or broadcasting other ads in the Ohio, Virginia, Montana, and Nevada Senate races"; and (2) cited the IE reporting requirements in alleging CGPS failed to report donors who gave "for the purpose of broadcasting the advertisements shown at the August 30, 2012 [meeting] or broadcasting other ads in those races." CREW Amend. Admin. Compl. ¶¶ 59, 62-64, AR113-14 (emphasis added); *see also* CREW MSJ Brief (Doc 27) at 1 (alleging the FEC made a "finding" that CGPS's work "primarily consist[ed] of disseminating explicit campaign ads."). Contrary to CREW's contention, the FEC never determined whether the ads shown at the August 30 meeting were IEs. First General Counsel's Report, AR174-75 (discussing the "television advertisements shown at" the event and "those communications").

[8] CGPS also has not admitted that "attendees were solicited for contributions . . . to broadcast advertisements like those the attendees had just watched," as CREW erroneously contends. *Compare* CREW MSJ Brief (Doc 27) at 20 *with* CGPS Answer ¶ 49.

activities, and to add excitement to an otherwise straightforward political briefing.

During the August 30 meeting, Karl Rove, an unpaid adviser to American Crossroads and CGPS, also recounted a $3 million matching challenge offered by a donor for CGPS's activities in Ohio. Mr. Rove's conversation with that donor did not entail: (1) "any discussion of any particular television advertisements, or television advertisements in general"; (2) any specific details "of any actual or hypothetical television advertisements"; (3) any "specific efforts"; (4) "any specific methods of communications"; (5) "any discussion of independent expenditures"; or (6) the spending of funds "in any particular manner or on any particular or specific projects or efforts." Rove Aff. ¶¶ 3-10, AR094-95.

Later in 2012, and relevant to this matter, CGPS sponsored and properly reported 32 IEs disseminated in connection with the U.S. Senate races in Montana, Nevada, Ohio, and Virginia. CREW Am. Admin. Compl. ¶ 60, AR113; Compl. ¶ 53. The donor whose $3 million matching challenge Mr. Rove mentioned at the August 30 meeting ended up making a larger contribution "that was not in any way earmarked for any particular use." Rove Aff. ¶ 14, AR095.

VI. FEC ENFORCEMENT

Upon receiving a written complaint alleging a FECA violation, the FEC must give the respondent notice and the opportunity to file a written response demonstrating that "no action should be taken . . . on the basis of the complaint." 52 U.S.C. § 30109(a)(1). If, on the basis of the complaint and the response, at least four commissioners find there is "reason to believe that a person has committed, or is about to commit," a violation, the FEC must notify the respondent and may open an investigation. *Id.* § 30109(a)(2). The FECA and the FEC's regulations and publications spell out subsequent enforcement procedures.

The FEC shall find "reason to believe" only "where the available evidence in the matter is at least sufficient to warrant conducting an investigation, and where the seriousness of the

alleged violation warrants either further investigation or immediate conciliation." FEC, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545 (Mar. 16, 2007). That standard is not met unless all the facts justify "a reasonable inference that a violation has occurred." *Id.* at 12,546. And "evidence provided in the response" may defeat inferences that otherwise might be drawn. FEC MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Comm.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 2 (internal citations omitted), *available at* http://eqs.fec.gov/eqsdocsMUR/0000263B.pdf.

VII. THE UNDERLYING FEC ADMINISTRATIVE PROCEEDINGS

CREW filed an administrative complaint with the FEC on November 15, 2012, in connection with CGPS's 2012 IEs in Montana, Nevada, Ohio, and Virginia and the August 30, 2012, meeting. AR001-018. CREW filed an amended complaint on April 24, 2013, which substituted the individual named complainant and narrowed CREW's legal theory in one material respect (*see* note 12, *infra*). AR098-117; CREW MSJ Brief (Doc 27) at 23.

Regarding CGPS's FEC reports for the Ohio IEs, CREW's amended complaint alleged:

(1) CGPS violated 2 U.S.C. § 434 (now 52 U.S.C. § 30104) and 11 C.F.R. § 109.10(b)-(e) by failing to identify the donor who offered the $3 million matching challenge, which CREW alleged "was for the purpose of furthering those independent expenditures" ("Count I"), CREW Am. Admin. Compl. ¶ 44, AR109 (emphasis added);

(2) CGPS violated 2 U.S.C. § 434 (52 U.S.C. § 30104) and 11 C.F.R. § 109.10(b)-(e) by failing to identify the donors who gave in response to the matching challenge "for the purpose of furthering the independent expenditures CGPS made in the Ohio Senate race" ("Count II"), *id.* ¶¶ 46, 50, AR110 (emphasis added); and

(3) CGPS, its officers, and Mr. Rove violated 18 U.S.C. § 371 (criminal conspiracy to

defraud the federal government) by failing to report the donor who made the $3 million matching donation, and the donors who responded to the matching challenge, "for the purpose of furthering the independent expenditures [CGPS] made in the Ohio Senate race" ("Count III"), *id.* ¶¶ 52-53, AR111 (emphasis added).[9]

Regarding the August 30 meeting, CREW's amended complaint further alleged that:

(4) Attendees at the meeting gave "contributions" to CGPS "with the intention that the money be spent on independent expenditures broadcasting the advertisements shown at the fundraiser or broadcasting other ads in the Ohio, Virginia, Montana, and Nevada Senate races," and that CGPS's IE reports failed to identify "any of the persons who made contributions for the purpose of broadcasting the advertisements" in violation of 2 U.S.C. § 434 (52 U.S.C. § 30104) and 11 C.F.R. §§ 109.10(b)-(e) ("Count IV"), *id.* ¶¶ 59-60, AR113 (emphasis added); and

(5) CGPS, its officers, and Mr. Rove violated 18 U.S.C. § 371 by failing to "identify the persons who made contributions for the purpose of broadcasting the advertisements shown at the August 30, 2012 [meeting] or broadcasting other ads in those races" ("Count V"), *id.* ¶ 62, AR113 (emphasis added).

Notably, CREW's administrative complaint did not claim: (a) that CGPS violated 52 U.S.C. § 30104(c)(1) by failing to identify on its IE reports "all contributors" who had given more than $200 to CGPS during the calendar year; or (b) that the FEC's IE reporting regulation was invalid. *See* CREW Am. Admin. Compl., AR098-117, *compare id. with* CREW MSJ Brief (Doc 27) at 28-40, 42 and Compl. ¶ 124 and Requested Relief ¶ 3.[10]

[9] CREW abandoned its 18 U.S.C. § 371 criminal conspiracy allegations in its complaint for judicial review. Even if those allegations were properly before this Court, they are without merit to the same extent the underlying alleged violations of the FEC regulation and the FECA are without merit.

[10] While CREW recited in passing the language from 52 U.S.C. § 30101(c)(1), CREW did not specifically allege that CGPS had violated this provision, whether by reference to the provision's statutory designation or its substance. *Compare* CREW Am. Admin. Compl. ¶ 14, AR101 with *id.* ¶¶ 40-67, AR108-115.

CGPS filed a response with the FEC refuting all of the allegations in CREW's administrative complaint and not addressing any additional allegations omitted in the complaint. AR073-095.[11] After considering CREW's administrative complaint and CGPS's response, the FEC's Office of General Counsel issued its "First General Counsel's Report" ("FGCR"), recommending that the Commission find no reason to believe that CGPS had violated 2 U.S.C. § 434(c)(2) (52 U.S.C. § 30104(c)(2)) and 11 C.F.R. § 109.10(e)(1)(vi). AR165.

According to the FGCR, even if the CGPS donor who made the $3 million matching challenge had a "general purpose to support an organization in its efforts to further the election of a particular federal candidate" (i.e., in Ohio), that "does not itself indicate that the donor's purpose was to further 'the reported independent expenditure' – the requisite regulatory test," or that other donors responding to the matching challenge had given for such purpose. AR174. With respect to the IEs in other states addressed at the August 30 meeting, the FGCR endorsed CGPS's explanation that "it did not receive contributions for the purpose of furthering those communications" shown at the meeting because those communications had already been aired and fully paid for, and another one had never aired. AR175. "Consequently, there is no basis to conclude on these facts that [CGPS] received contributions from individuals . . . for the purpose of furthering [CGPS's] reported independent expenditures" in those other states. *Id.*

As to whether FECA section 30104(c)(1) required a broader level of contributor identification than the Commission's IE reporting regulation, the FEC's staff perceived no clear claim in CREW's administrative complaint to this effect. Rather, the staff addressed this issue in the hypothetical: "[T]o the extent the question is presented on these facts, we recommend that the

[11] Because CREW's amended administrative complaint contained no new substantive allegations, CGPS responded to the amended complaint merely by reiterating its previous response. AR162-63.

Commission dismiss in the exercise of prosecutorial discretion" any allegation involving section 30104(c)(1). AR165-66.[12] The staff cited a prior matter in which the Commission dismissed a claim that the FECA compelled broader IE reporting than the FEC's regulation required, AR172-73, and reasoned that CGPS could raise "equitable concerns" and "fair notice" claims "if the Commission attempted to impose liability under Section [30104](c)(1)." AR175-76. Accordingly, the staff recommended a dismissal on this hypothetical theory in the Commission's prosecutorial discretion. AR176 (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).

The commissioners divided 3-3 on whether to pursue or, as recommended by the FGCR, dismiss the administrative complaint. AR193-194. Because the FECA requires an affirmative vote of four commissioners to proceed in an enforcement action, this vote constituted a formal Commission decision not to proceed that resulted in dismissal of the administrative complaint. *See* 52 U.S.C. § 30106(c).

Due to the 3-3 vote, the commissioners who voted to dismiss CREW's administrative complaint "constitute a controlling group for purposes of the decision," and "their rationale necessarily states the agency's reasons for acting as it did" on review. *NRSC*, 966 F.2d at 1476. More specifically, because these commissioners followed the recommendations in the FGCR, they did not issue their own statement of reasons. Therefore, the FGCR "provides the basis for the Commission's action." *FEC v. DSCC*, 454 U.S. 27, 38 n.19 (1981).

Two of the dissenting commissioners who disagreed with the Commission's dismissal of the administrative complaint wrote a statement of reasons supporting their own theory that CGPS

[12] Footnote 60 of the FGCR merely characterizes CREW's original administrative complaint as "reciting language of disclosure obligations under Sections 434(c)(1) and (c)(2)," but did not suggest that CREW was alleging CGPS had violated the latter. AR176. Moreover, CREW's amended administrative complaint, which is the one that should have governed the Commission's decision and the one that is properly before this Court, revised CREW's theory to focus specifically on the contributor reporting requirements under subparagraph (c)(2). *Compare* CREW Am. Admin. Compl. at 5 n.1, AR102 *with* CREW Admin. Compl. at 4 n.1, AR004.

should have been regulated as a political committee. AR198-99. Notably, however, no commissioner disputed any of the staff's recommendations or reasoning with respect to dismissal of the IE reporting claim. *See id.*

Dissatisfied with the FEC's resolution of the matter, CREW filed the instant complaint for judicial review under 52 U.S.C. § 30109(a)(8).

ARGUMENT

I. STANDARD OF REVIEW

Although the FECA permits some review of the FEC's dismissal of a complaint, that judicial scrutiny must be "[h]ighly deferential," *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005), and "limited" in its breadth, *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 315 (D.C. Cir. 2015). To that end, "the FEC is entitled, and indeed required, to make subjective evaluation of claims" under the "reason to believe" standard, and "to weigh the evidence before it and make credibility determinations in reaching its ultimate decision." *Buchanan v. FEC*, 112 F. Supp. 2d 58, 72 (D.D.C. 2000) (quoting and citing *Orloski v. FEC*, 795 F.2d 156, 168 (D.C. Cir. 1986)). In this respect, the Commission's role is not subject to the constraints a district court faces in deciding a motion to dismiss a civil complaint. Rather, it is more analogous to a decision by a prosecutor on whether to present a matter to a grand jury.

Courts "may set aside the FEC's dismissal of a complaint only if its action was 'contrary to law,' . . . e.g., 'arbitrary or capricious, or an abuse of discretion,'" *Hagelin*, 411 F.3d at 242, and "judges . . . owe large deference to a Commission disposition so long as the FEC (or its General Counsel) supplied reasonable grounds for reaching (or recommending) the disposition," *DCCC v. FEC*, 831 F.2d 1131, 1134 (D.C. Cir. 1987). "As long as the FEC presents a coherent and reasonable explanation of that decision, it must be upheld." *Buchanan v. FEC*, 112 F. Supp. 2d 58, 72 (D.D.C. 2000) (citing *Carter/Mondale Presidential Comm., Inc. v. FEC*, 775 F.2d

1182, 1185 (D.C. Cir. 1985)).

Courts also apply an "extremely deferential standard" of review when the Commission dismisses a case in its prosecutorial discretion. *CREW v. FEC*, 236 F. Supp. 3d 378, 390 (D.D.C. 2017) (quoting *LaBotz v. FEC*, 61 F. Supp. 3d 21, 33 (D.D.C. 2014)). This "is an area where the decision is 'generally committed to an agency's absolute discretion,'" since it "is not for the judiciary to ride roughshod over agency procedures or sit as a board of superintend[e]nce directing where limited agency resources will be devoted." *Id.* (quoting *LaBotz*, 61 F. Supp. 3d at 33-34 and *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986)) (emphasis added).

In all instances, the "burden of proof is on . . . the party challenging agency action." *Tierney v. FEC*, 538 F. Supp. 2d 99, 103 (D.D.C. 2008), *aff'd*, No. 08-5134, 2008 WL 5516511 (D.C. Cir. Sept. 12, 2008).

II. THE FEC PROPERLY DISMISSED CREW'S FIRST CLAIM THAT CGPS VIOLATED 11 C.F.R. § 109.10(e)(1)(vi).

CGPS is entitled to summary judgment on CREW's Claim One, which alleges the FEC was required to find reason to believe that CGPS violated 11 C.F.R. § 109.10(e)(1)(vi) by failing to report any contributions "for the purpose of furthering the reported independent expenditure[s]" at issue. CREW failed to present facts in the underlying administrative proceeding showing such a purpose. In fact, CGPS presented evidence negating any such purpose, and the FEC's informed evaluation of the facts receives an extremely high level of judicial deference.

CREW summarizes the factual allegations of its administrative complaint relating to its Claim One on pages 44-45 of its MSJ Brief (Doc 27). However, much of CREW's recitation consists of its own inaccurate and selective characterization of the administrative record. CREW omits that Mr. Rove's affidavit swears that the donor who initially offered the $3 million match

that CREW emphasizes actually ended up making a donation "that was not in any way earmarked for any particular use" – even for use in Ohio. Rove Aff. ¶ 14, AR095. Mr. Rove also specifically attested that the $1.3 million raised in matching donations "were not solicited for a particular purpose other than for general use in Ohio" and were not "for the purposes of aiding the election of Josh Mandel," as CREW erroneously contends. *Compare id.* ¶ 13, AR095 *with* CREW MSJ Brief (Doc 27) at 44. Moreover, as discussed *supra*, ten of the 11 CGPS ads that were shown at the August 30 meeting were issue ads and not IEs, as CREW mischaracterizes them, and CGPS has not "admitted" that these ads were "'examples' of the activities raised funds would support," as CREW speciously contends. *Compare* CGPS Response to CREW Admin. Compl., AR078 *with* CREW MSJ Brief (Doc 27) at 45.

Strikingly, CREW's administrative complaint never clearly alleged CGPS solicited donors to fund any advertisements whatsoever (regardless of whether they were IEs, or whether they were disseminated in the four states at issue or elsewhere). Rather, CREW resorted to a vague and unsupported allegation that the solicitations were "apparently to pay" for the advertisements at issue. CREW Am. Admin. Compl. ¶ 28, AR 105 (emphasis added). But in the "Democracy Now" segment that CREW relies on, the reporter who attended the August 30 meeting described the materials that were distributed along with donation forms as merely "explaining what the missions are of both organizations" (referring to American Crossroads and CGPS). CREW Am. Admin. Compl. Exh. C (6:02-6:20), *available at* https://youtu.be/RZsudD4O3i8.

Moreover, even assuming *arguendo*, as CREW alleges, that donors gave to CGPS "for the purpose[] of aiding the election of Josh Mandel," CREW MSJ Brief (Doc 27) at 44, that does not lead to the conclusion, or even an inference, that they gave "for the purpose of furthering the

reported independent expenditure[s]" in question here, *see* 11 C.F.R. § 109.10(e)(1)(vi). CGPS submits that the facts before the Commission clearly negated such a purpose. Certainly, the facts were not so compelling that the FEC's decision can be condemned as contrary to law, which is the standard CREW must meet here.

III. THE COURT SHOULD DISPOSE OF CREW'S CLAIMS TWO AND THREE WITHOUT RULING ON THEIR MERITS.

Because CGPS's compliance with the FEC's IE reporting regulation is dispositive, whether or not the regulation is valid, this Court need not and should not rule on the merits of CREW's Claims Two and Three. *See Air Courier Conf. of Am. v. Am. Postal Workers Union, AFL-CIO*, 498 U.S. 517, 531 (1991) (Stevens, J., concurring) ("Faithful adherence to the doctrine of judicial restraint provides a fully adequate justification for deciding this case on the best and narrowest ground available."); *see also PDK Labs., Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring) ("if it is not necessary to decide more, it is necessary not to decide more"). That is even more so here because CREW's claims also are time-barred, not properly before this court, and otherwise precluded by the FEC's prosecutorial discretion.

A. CGPS Was Entitled to Rely on the FEC's IE Reporting Regulation.

As discussed more fully below, 11 C.F.R. § 109.10(e)(1)(vi) validly implements the FECA. But even if the regulation were invalid, CGPS was entitled to rely on it under both the FECA and well-established principles of due process and administrative law. Therefore, this Court should dismiss CREW's Claims Two and Three as unnecessary to decide.

1. *The FECA Specifically Protects Those Relying on the FEC's Regulations From Any Sanctions or Enforcement Proceedings.*

The FECA provides that:

> *Scope of protection for good faith reliance upon rules or regulations.* Notwithstanding any other provision of law, 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 or by chapter 95 or chapter 96 of title 26.

52 U.S.C. § 30111(e) (emphasis added). As the legislative history further explains, "[a] person who relies upon [the FEC's] regulations in good faith will not be subject to subsequent enforcement action." 1979 FECA History at 208.

Thus, the FECA permits the public to "undertake any conduct permitted by the challenged regulations without fear of penalty, even if that conduct violates campaign statutes." *Shays v. FEC* ("*Shays I*"), 414 F.3d 76, 84 (D.C. Cir. 2005) (emphasis added). The "good faith reliance" statute is unequivocal: compliance with FEC regulations removes "certain conduct from any risk of enforcement" and "establish[es] 'legal rights' to engage in that conduct." *Id.* at 95 (emphasis added). This precludes the full range of FECA-authorized sanctions that CREW seeks, including "equitable remedies" requiring CGPS to retroactively file amended IE reports. *Compare* CREW MSJ Brief (Doc 27) at 43 *with* 52 U.S.C. §§ 30111(e) (prohibiting "any sanction provided by this Act" for reliance on FEC regulations) and 30109(6)(A), (B) (otherwise permitting an "injunction, restraining order, or any other appropriate order" for violations). This is especially so where CREW's desired relief would violate the associational privacy rights of CGPS and its donors, who relied on the FEC's regulation with the understanding that they would not be publicly identified thereunder. As the Supreme Court has recognized, campaign finance reporting requirements – like the IE reporting scheme here – pose "not insignificant burdens on individual rights," "deter some individuals who otherwise might contribute," and "expose contributors to harassment or retaliation." *Buckley*, 424 U.S. at 68; *see also Van Hollen*, 811 F.3d at 499-500.

2. CGPS Was Entitled to Rely on the FEC's Regulation Under Principles of Due Process and Administrative Law.

The FECA's protection for those complying with FEC regulations also tracks "[t]raditional concepts of due process incorporated into administrative law," which "preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule." *Affum v. U.S.*, 566 F.3d 1150, 1163 (D.C. Cir. 2009) (quoting *PMD Produce Brokerage Corp. v. USDA*, 234 F.3d 48, 52 (D.C. Cir. 2000)). This notice may be in form of the rule text itself "and other public statements issued by the agency." *Id.* (quoting *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000)).

Even where a party relies on an agency's regulation and "a court [subsequently] determines that the regulation is invalid," the judicial decision requires "nonretroactive application" where the decision "will work an injustice or hardship" or "establish[es] a new principle of law, either by overruling clear past precedent . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Teich v. FDA*, 751 F. Supp. 243, 249 (D.C. Cir. 1990) (quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 355 (1971)) (emphasis added). More generally, "prior notice is required where a private party justifiably relies upon an agency's past practice and is substantially affected by a change in that practice." *Nat'l Conservative Pol. Action Comm. v. FEC*, 626 F.2d 953, 959 (D.C. Cir. 1980). These principles apply with special force where the relevant conduct is core First Amendment free speech and association. To avoid chilling such highly protected activity, the law must provide clear advance notice before burdens may be imposed. *Marks v. U.S.*, 430 U.S. 188, 196 (1977); *Buckley*, 424 U.S. at 77.

Here, CREW concedes the FEC's regulation in question has been in effect for more than 37 years. Compl. ¶ 120; CREW MSJ Brief (Doc 27) at 7. During that time, CREW has not

identified any precedent where the FEC interpreted or applied the regulation under the "more expansive approach" CREW advocates here. Compl. ¶ 122. In fact, as discussed above, the agency previously considered an enforcement matter involving the identical issue that CREW presents here, and the FEC dismissed the matter. AR172-3. The FEC's reporting instructions and guidance – which are legally significant – also have consistently described IE reports as only requiring identification of contributions "made for the purpose of furthering the independent expenditures" being reported, FEC, Instructions for Preparing FEC Form 5, *supra*, or contributions "for the purpose of making the independent expenditures" being reported, FEC, Campaign Guide for Corporations and Labor Organizations (Jan. 2007) at 36, *available at* https://transition.fec.gov/pdf/colagui.pdf.[13]

Indeed, CREW itself previously conceded the limited scope and dispositive effect of the Commission's regulation. In response to a broad-based FEC request for public comments, CREW sharply critiqued the narrow scope of the FEC's IE reporting regulation. According to CREW, "under the Commission's regulations, the identity of a contributor who gives to the organization for the broad purpose of influencing a federal election, or even the specific purpose of making independent expenditures, need not be disclosed." CREW, Comments in Response to Advance Notice of Proposed Rulemaking on Earmarking, Affiliation, Joint Fundraising, Disclosure, and Other Issues (Jan. 15, 2015) at 3-4, *available at* http://sers.fec.gov/fosers/showpdf.htm?docid=312990.

In the same proceeding, CREW also (1) acknowledged that the Commission's IE

[13] The FEC guide provides CGPS with yet an additional protection against any sanctions. Under the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 601 note, reliance by a "small entity" on an agency's designated "small entity compliance guide" "may be considered as evidence of the reasonableness or appropriateness of any proposed fines, penalties, or damages." The FEC has designated its guide as a "small entity compliance guide." FEC, Campaign Guide for Corporations and Labor Organizations at ii. As a non-profit entity, CGPS meets the definition of a "small entity." 5 U.S.C. § 601(6), (4).

reporting regulation implemented "both contributor disclosure provisions of the statute" (i.e., the Coverage and Content Provisions); and (2) did not suggest that the agency could require more reporting of donors simply by ignoring the regulation and enforcing the two FECA provisions according to CREW's own (mistaken) interpretation of them. *See id*. at 2-5. As CREW discusses in its MSJ Brief (Doc 27 at 15-16), in a rulemaking petition filed on behalf of then-Representative Chris Van Hollen, campaign finance attorneys at Democracy 21 and the Campaign Legal Center also characterized the FEC's IE reporting regulation as being limited in scope and dispositive in effect. Rep. Van Hollen Petition for Rulemaking to Revise and Amend Regulations Relating to Disclosure of Independent Expenditures (Apr. 21, 2011) at 4, *available at* http://classic.fec.gov/pdf/nprm/citizensunited/van_hollen.pdf. (Notably, CREW did not participate in any way in this rulemaking petition, which further underscores why CREW should not be permitted to convert this enforcement action into a rulemaking proceeding. *See* FEC, Reg 2011-01 Independent Expenditure Reporting, *at* http://sers.fec.gov/fosers/ruledata.htm?ruleNumber=REG%202011-01.)

As CREW also notes, dozens of 501(c) organizations spent tens of millions of dollars on IEs during the 2010 election cycle, and hundreds of millions of dollars "during each of the 2012, 2014, and 2016 election cycles . . . but they did not identify a single contributor or report a single dollar in outside contributions." CREW MSJ Brief (Doc 27) at 15-16. Yet, CREW has not identified a single precedent where an organization relying on the FEC's IE reporting regulation has been found to have violated the law – either by the FEC or by a reviewing court.

In the instant matter, CGPS also responded to four form letters from the FEC's Reports Analysis Division asking for confirmation that no contributors had to be identified on the IE reports at issue here. AR149-154. These inquiries are routinely sent by the agency for

"additional clarification" on reports. FEC, Request for Additional Information (RFAI), *at* https://www.fec.gov/help-candidates-and-committees/request-additional-information. Citing the regulation, CGPS explained that "no contributions or donations accepted by [CGPS] were solicited or received for the purpose of furthering the reported independent expenditures." AR153. The FEC never disputed CGPS's responses or demanded that CGPS amend its filings in the manner CREW urges. *See PMD Produce Brokerage Corp.*, 234 F.3d at 53 (noting that "pre-enforcement efforts" may indicate an agency's interpretation of the relevant law).

CREW contends that the Coverage Provision, 52 U.S.C. § 30104(c)(1) imposes a broader donor identification requirement that is "[s]eparate and distinct from" the FEC's IE reporting regulation, and that "[t]he appearance of [this] requirement in the 'plain language' of the statute gives 'fair notice' to regulated parties." CREW MSJ Brief (Doc 27) at 39 (quoting *Freeman United Coal Min. Co. v. Fed. Mine Safety and Health Review Comm'n*, 108 F.3d 358, 362 (D.C. Cir. 1997)). But as even CREW's parenthetical for *Freeman* reveals, that opinion was addressing the "plain language" of an agency regulation, and not the conflict that allegedly exists here between a regulation and a purportedly broader statute. Here, CREW: (1) concedes – consistent with the FEC's own explanation of the rule – that the regulation construes both the Coverage and Content Provisions;[14] and (2) never identifies a single instance where the FEC interpreted the Coverage Provision as creating a separate reporting obligation. Thus, *Freeman* actually supports CGPS's position.

CREW further contends that this "case is not among the 'very limited set of cases' in which courts have found lack of required notice." CREW MSJ Brief (Doc 27) at 40 (citing

[14] Per CREW's administrative complaint, "FEC regulations interpret these provisions" – referring to 52 U.S.C. § 30104(c)(2)(C) and (c)(1) – to require reporting of each contribution that "was made for the purpose of furthering the reported independent expenditure." CREW Am. Admin. Comp. ¶¶ 14-16, AR101-02 (emphasis added); CREW Admin. Compl. ¶¶ 14-16, AR004 (emphasis added).

Suburban Air Freight, Inc. v. Transp. Sec. Admin, 716 F.3d 679, 684 (D.C. Cir. 2013)). However, CREW's authority for this proposition also supports CGPS's position. In *Suburban Air Freight*, the court held that the agency regulation at issue "made clear" the appellant's obligations, and that the appellant "ma[de] no argument that [the agency] previously interpreted those provisions differently, let alone that the company relied on any such interpretation." 716 F.3d at 684. But that describes exactly the situation here: CREW concedes 11 C.F.R. § 109.21(e)(1)(vi) is clear that only "contributions given for the purpose of furthering 'the reported' independent expenditure" must be reported. CREW MSJ Brief (Doc 27) at 28. The FEC previously has not interpreted the regulation in a manner broader than its plain text, and CGPS relied on this longstanding Commission interpretation.

Finally, of course, the FECA has an express provision making compliance with a regulation a bar to further enforcement action. That provision and the First Amendment are powerful considerations not present in the cases CREW discusses.

3. CGPS's Reliance on 11 C.F.R. § 109.10(e)(1)(vi) Precludes CREW's Claims Two and Three and Any Enforcement in This Matter.

Regardless of whether, as CREW alleges, the FEC regulation at issue is unduly permissive and contrary to the FECA, the statute (52 U.S.C. § 30111(e)) and traditional principles of due process and administrative law present an absolute bar against any sanction, penalty, or enforcement action against CGPS where it reasonably relied on the Commission's regulation. In fact, it is CREW's position in this matter that is impermissible. Had the FEC completely and abruptly, and without any advance public notice, reversed its longstanding interpretation and application of the regulation at issue, the agency would have acted arbitrarily and capriciously. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016).[15]

[15] CREW misrepresents *Barnett v. Weinberger*, 818 F.2d 953, 954 (D.C. Cir. 1987) as holding that an "agency

Therefore, this Court should dispose of CREW's Claims Two and Three, which are premised entirely on two statutory provisions that are both implemented by the FEC's regulation.

B. CREW's Administrative Complaint Did Not Allege the FEC's Regulation Is Invalid or That CGPS Violated Subsection 30104(c)(1), and These New Theories Are Not Properly Before This Court.

The Court also should dispose of CREW's Claims Two and Three because CREW did not clearly raise – indeed, it abandoned – these issues in its administrative complaint. Here, once again, both the FECA and traditional principles of administrative law preclude CREW's claims.

The FECA provides that "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party" may seek judicial review. 52 U.S.C. § 30109(a)(8)(A) (emphasis added). If the court "declare[s] that the dismissal of the complaint or the failure to act is contrary to law" and the FEC fails to conform with such declaration, the complainant may then bring another suit "to remedy the violation involved in the original complaint." *Id.* § 30109(a)(8)(C) (emphasis added).[16] Furthermore, the FECA requires that respondents have an opportunity to submit a written response to administrative complaints, which necessarily encompasses responding to the applicable legal theories contained in the administrative complaint. *Id.* § 30109(a)(1).

Here, CREW's administrative complaint never once specifically alleged, as CREW does now, that CGPS violated the law by relying on an invalid FEC regulation, or that CGPS had

---

decision premised on [an] invalid regulation at odds with [the] statute was arbitrary." CREW MSJ Brief (Doc 27) at 39. The court in *Barnett* did not determine the regulations at issue were "invalid"; rather the issue was whether the regulations, "either as written or applied," were contrary to the statute. *Barnett*, 818 F.2d at 959, 970 (emphasis added). In addition, the agency's "'findings' of adjudicative facts that [were] not supported by substantial evidence" played a large part in the court's enjoining the agency's action. *Id.* at 971. Moreover, the issue in *Barnett* was whether it was proper for an agency to apply its regulation to discontinue future benefits to a member of the public. *Id.* at 954-55. By contrast, the issue here is whether it was proper for CGPS to rely on an agency regulation for activities conducted long before the regulation was challenged.

[16] The term "original complaint" here distinguishes the administrative complaint from a later judicial complaint for review. For present purposes, CREW's amended FEC complaint is the relevant "original complaint."

violated the Coverage Provision, 52 U.S.C. § 30104(c)(1), by not reporting "all contributors who provide more than $200 annually to the group." *See supra* at 18-19 and CREW Am. Admin. Compl., AR108-115.[17] As to section 30104(c)(1) specifically, the FEC staff's FGCR also did not interpret CREW's administrative complaint as alleging a violation of this provision. Rather, the FGCR merely said that, "to the extent that the facts here may also give rise to a claim that Crossroads allegedly violated" 52 U.S.C. § 30104(c)(1), that claim would properly be dismissed as a matter of prosecutorial discretion. AR165-66, 176 (emphasis added). In other words, the FGCR addressed a hypothetical that CREW never specifically alleged in its administrative complaint.

CREW's addition of these new legal theories in its complaint filed in this Court not only conflicts with the limited scope of judicial review permitted by the FECA, but it also violates the basic doctrine of exhaustion of administrative remedies. Under this doctrine, parties in an administrative proceeding must "give the agency a fair and full opportunity to adjudicate their claims," and "do[] so properly (so that the agency addresses the issues on the merits)." *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002), cert. denied, 537 U.S. 949 (2002) (emphasis in the original). A plaintiff may not "proceed to federal court after having raised claims in only a cursory manner," or "permute 'mere[] background information' in an [administrative] complaint into a separately actionable legal claim." *Vasser v. McDonald*, 228 F. Supp. 3d 1, 17 (D.D.C. 2016) (quoting *Lyles v. District of Columbia*, 777 F. Supp. 2d 128, 137 (D.D.C. 2011)). Including only a "vague reference" to an issue, "[d]espite the opportunity to specifically raise the [issue] as a separate

[17] The general references in CREW's administrative complaint to "2 U.S.C. § 434" cannot fairly be understood as specifically alleging that CGPS violated 52 U.S.C. § 30104(c)(1), especially in light of CREW's actual characterization of the alleged violations. *See* CREW Am. Admin. Compl., "Count I," ¶ 44; "Count II," ¶ 50; "Count III," ¶ 53; "Count IV," ¶ 60; "Count V," ¶ 62, AR110-114.

claim . . . [a]fter listing five different claims" is insufficient. *Id.* Relatedly, CREW's additional legal theories violate the "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." *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1297 (D.C. Cir. 2004); *see also Wallaesa v. FAA*, 824 F.3d 1071, 1078 (D.C. Cir. 2016).

Although the FEC staff's FGCR raised the speculative issue of liability under the Coverage Provision, 52 U.S.C. § 30104(c)(1), the report merely recommended a dismissal in the agency's prosecutorial discretion due to the "equitable concerns" about "fair notice" that CGPS could raise concerning this novel enforcement theory. AR176. The FGCR did not address the substantive merits of this theory. Moreover, because CREW failed to allege such a violation in any one of the five separate "counts" of its administrative complaint, AR108-115, CGPS's response thereto also did not address any alleged violation of the Coverage Provision, AR083-84. CGPS also did not have an opportunity to address this new theory when it was first presented to the Commission in the FGCR. *See* FEC, Guidebook for Complainants and Respondents on the FEC Enforcement Process (May 2012) at 10-12, *available at* https://transition.fec.gov/em/respondent_guide.pdf (explaining that, after respondents file a response, the General Counsel's office issues its report and then the Commission votes on the General Counsel's recommendations).

Additionally, while the FECA authorizes the FEC to open certain enforcement matters *sua sponte*, 52 U.S.C. § 30109(a)(1), (2), the FECA does not permit complainants to seek judicial review of internally generated matters. *Compare id. with id.* § 30109(a)(8). Thus, to the extent the FEC staff's FGCR, on its own, raised the hypothetical issue of whether CGPS may have violated 52 U.S.C. § 30104(c)(1), the agency's dismissal on that issue is not reviewable.

For all of these reasons, CREW's Claims Two and Three are not properly before this Court.

C. CREW's Facial Challenge to the Regulation's Validity Is Time-Barred, and an As-Applied Challenge Would Not Redress CREW's Claimed Injury.

In addition to the reasons just discussed, this Court should dispose of CREW's Claim Two – which seeks a declaratory order that "11 C.F.R. 109.10(e)(1)(vi) is unlawful and invalid" on its face – because the claim is time-barred. Compl. ¶ 124; *see also id.*, Requested Relief ¶ 3. Moreover, although this Court has held that CREW's challenge to the FEC's application of the supposedly invalid regulation is not time-barred, Memo. Op. (Mar. 22, 2017) at 15, such a claim cannot redress CREW's injury, since compliance with the regulation justifies dismissal of CREW's complaint, whether or not the regulation is valid.

Although 28 U.S.C. § 2401(a) establishes a six-year statute of limitations in this matter for judicial review of the regulation's validity, *NLRB Union v. FLRA*, 834 F.2d 191 (D.C. Cir. 1987) recognized "a limited number of exceptions." *See* Memo. Op. (Mar. 22, 2017) at 12-13; *Raton Gas Transmission Co. v. FERC*, 852 F.2d 612, 615 (D.C. Cir. 1988) (explaining *NLRB Union*). *NLRB Union* held that, outside of the statute of limitations, "a party who possesses standing may challenge regulations directly on the ground that the issuing agency acted in excess of its statutory authority in promulgating them. A challenge of this sort might be raised, for example, by way of defense in an enforcement proceeding." 834 F.2d at 195 (emphasis added). The point is that the running of the statute of limitations should not prevent a party from redressing a new and recent injury.

This Court also has noted the D.C. Circuit's holding in *Weaver v. Fed. Motor Safety Admin.*, 744 F.3d 142 (D.C. Cir. 2014). Memo. Op. (Mar. 22, 2017) at 16. As *Weaver* explained:

> Where Congress imposes a statute of limitations on challenges to a regulation, running from a regulation's issuance, facial challenges to the rule or the procedures by which it was promulgated are barred. But when an agency seeks to apply the rule, those affected may challenge that application on the grounds that it "conflicts with the statute from which its authority derives."

744 F.3d 142 at 145 (emphasis added) (internal citations omitted) (quoting *Nat'l Air Transp. Ass'n v. McArtor*, 866 F.2d 483, 487 (D.C. Cir. 1989)).[18] In short, the time bar does not subject a party to a new injury that violates the substantive command of the law.

CREW's problem is that the FECA makes compliance with the FEC regulation a complete defense, regardless of the regulation's validity. So even if the dismissal of CREW's complaint injured CREW by depriving it of desired information, the injury did not flow from the validity or invalidity of the FEC's regulation. Moreover, declaring the rule invalid would not and could not redress that injury: even if the regulation were invalidated, the dismissal would stand.

CREW may wish to invalidate the regulation so that it will not provide a defense to future respondents. But a "plaintiff must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. et al. v. Cuno et al.*, 547 U.S. 332, 335 (2006). And an essential element of standing is that success on the claim will redress the plaintiff's claimed injury. *Lujan v. Defenders of Wildlife, et al.*, 504 U.S. 555, 561-62 (1992). CREW's broader claim that invalidating the regulation will allow it to obtain information in the future is precisely the type of "facial challenge" that the statute of limitations bars. *P&V Enterprises, et al. v. U.S. Army Corps of Engineers, et al.*, 466 F. Supp. 2d 134, 136 (D.D.C. 2006).

---

[18] *See also Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038, 1040 (D.C. Cir. 1997) ("we permit both constitutional and statutory challenges to an agency's application or reconsideration of a previously promulgated rule, even if the period for review of the initial rulemaking has expired.") (collecting authority) (emphasis added); *Tripoli Rocketry Assoc. v. U.S. BATF*, 2002 U.S. Dist. LEXIS 27588 at *16 (D.D.C. June 24, 2002) (plaintiff's "substantive challenge" to an agency regulation was "not time barred because it attacks [the agency's] 'noncompliance with the substantive provisions of federal law as applied to plaintiffs.'") (emphasis added).

CREW's position also is untenable to the extent it relies on procedural arguments, because a "petitioner's contention that a regulation suffers from some procedural infirmity . . . will not be heard outside of the statutory limitations period." *NLRB Union*, 834 F.2d at 196. Here, CREW argues that the FEC adopted the IE reporting regulation at issue without an adequate contemporaneous explanation for it. CREW MSJ Brief (Doc 27) at 28-30. This is an attack on the regulation's procedural validity and is not properly before this court outside of the six-year statute of limitations for reviewing the rule's promulgation.

D. The FEC's *Heckler* Dismissal of the Agency Staff's Self-Initiated Hypothetical Theory That CGPS May Have Violated Subsection 30104(c)(1) Was Rational Under the "Extremely Deferential Standard" of Judicial Review.

CREW's Claim Three – that CGPS may have failed to report a broader universe of donors supposedly required by the Coverage Provision, 52 U.S.C. § 30104(c)(1) – fails on multiple grounds. As noted above, because CREW did not plainly present that claim to the FEC, it failed to exhaust its administrative remedies. The Commission staff's comment that, if such a claim had been made, it would be subject to dismissal as a matter of prosecutorial discretion under *Heckler v. Chaney*, 470 U.S. 821 (1985), does not excuse this failure, doubly so since the FECA does not authorize private complainants to seek review of FEC staff-originated issues. And, beyond all this, on the facts here CREW cannot begin to overcome the great deference accorded such a highly discretionary ruling.

The "extremely deferential standard" of judicial review that protects the FEC's exercise of prosecutorial discretion, *CREW*, 236 F. Supp. 3d at 390, is even more deferential in matters involving "novel legal issues," where prosecution would invite great risk of litigation by the respondent, *id.* at 391, 393.[19] This is such a novel case. The FEC, to CGPS's knowledge, has

[19] Despite the weight of authorities supporting the FEC's broad prosecutorial discretion, CREW has appealed this ruling to the D.C. Circuit. *See CREW v. FEC*, No. 17-5049.

never previously adopted CREW's position on identifying donors on IE reports, whether in enforcement matters or in the agency's guidance documents. Thus, the FGCR more than reasonably and rationally concluded that CGPS "could raise equitable concerns," as it does now, "about whether [it had] fair notice of the requisite level of disclosure" commanded by an out-of-context reading of the Coverage Provision. Therefore, the commissioners who voted on this basis to dismiss the agency staff's self-initiated hypothetical claim, and to avoid the high litigation risk of proceeding under this theory, had more than a reasonable and rational basis for exercising the agency's prosecutorial discretion. Under the "extremely deferential standard" of judicial review, *CREW*, 236 F. Supp. 3d at 390, this Court should not disturb that decision.

IV. THE CONTENT PROVISION SPECIFIES TAILORED IE REPORTING, AND THE FEC'S REGULATION IS A REASONABLE INTERPRETATION OF THAT REQUIREMENT.

For all the reasons just discussed, this Court need not and should not reach the merits of CREW's argument that the FEC's IE reporting regulation is inconsistent with the FECA. But if the issue were reached, the two-step process contained in *Chevron, USA, Inc. v. NRDC*, 467 U.S. 837 (1984), requires CREW to establish either that (i) the statutory text clearly forecloses the regulation, or if not, (ii) the regulation is irrational in light of the statute's purpose. *See Shays I*, 414 F.3d at 96. CREW can establish neither, particularly given the high level of deference afforded FEC interpretations of the FECA. *See, e.g.*, *Orloski*, 795 F.2d at 164.

A. *Chevron* Step 1: Congress Tailored the FECA to Require Ad-Based Identification of Contributors.

The pertinent statutory language is as follows (with the key language in italics and other language to be discussed shortly in bold/underlined):

> **2 U.S.C. 434 REPORTS . . .**
>
> (c)(1) Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar

year shall file a statement containing the information required under subsection (b)(3)(A)[20] for all contributions received by such person.

(2) Statements required to be filed by this subsection shall be filed in accordance with subsection (a)(2), and shall include—,

> (A) the information required by subsection (b)(6)(B)(iii),[21] indicating whether **the independent expenditure** is in support of, or in opposition to, the candidate involved;
>
> (B) under penalty of perjury, a certification whether or not **such**[22] **independent expenditure** is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate; and
>
> *(C) the identification of 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.*

Any independent expenditure (including those described in subsection (b)(6)(B)(iii)) aggregating $1,000 or more made after the 20th day, but more than 24 hours, before any election shall be reported within 24 hours after such independent expenditure is made. Such statement shall be filed with the Clerk, the Secretary, or the Commission and the Secretary of State and shall contain the information required by subsection (b)(6)(B)(iii) indicating whether **the independent expenditure** is in support of, or in opposition to, the candidate involved.

(3) The Commission shall be responsible for expeditiously preparing indices which set forth, on a candidate-by-candidate basis, **all independent expenditures separately**, including those reported under subsection (b)(6)(B)(iii), made by or

---

[20] This provision provides that: "(b) Each report under this section shall disclose . . . (3) the identification of each . . . (A) person (other than a political committee) who makes a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year, or in any lesser amount if the reporting committee should so elect, together with the date and amount of any such contribution."

[21] This provision provides that the report will disclose "the full name and mailing address (occupation and the principal place of business, if any) of each person to whom expenditures have been made by such committee or on behalf of such committee or candidate within the calendar year in an aggregate amount or value in excess of $100, the amount, date, and purpose of each such expenditure and the name and address of, and office sought by, each candidate on whose behalf such expenditure was made."

[22] *See King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (defining "such" as "That or those; having just been mentioned"); *United States v. Ashurov*, 726 F.3d 395, 398 (3d Cir. 2013) (explaining that "such" means "of the character, quality, or extent previously indicated or implied"); *In re Lehman Bros. Mortg.-Backed Sec. Litig.*, 650 F.3d 167, 176–77 (2d Cir. 2011) (citing Webster's Third New International Dictionary's definition of "such" as "something 'previously characterized or specified'").

> for each candidate, **as reported under this subsection**, and for periodically publishing such indices on a timely pre-election basis."

For the reasons explained below, the best (and, at the very least, a permissible) reading of the statute is that the Content Provision, 52 U.S.C. § 30104(c)(2), only requires reporting of those contributors who gave for the purpose of furthering the reported independent expenditure.

To begin, the term "'an' means 'one,'" *New Hampshire Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 72 (1st Cir. 2006), *aff'd*, 552 U.S. 364 (2008) (citing Merriam Webster's Collegiate Dictionary at 40, 53 (10th ed. 2001)), which is the "normal" reading of such an indefinite article, *Abbott GmbH & Co. KG v. Yeda Research & Dev. Co.*, 516 F. Supp. 2d 1, 6 (D.D.C. 2007) (quotation omitted). This is particularly true where the modified term is singular, as "independent expenditure" is here. *See United States v. Hagler*, 700 F.3d 1091, 1097 (7th Cir. 2012).

Moreover, in determining the meaning of "an," "context matters." *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 413-14 (2012) (interpreting "not an" language to mean "not a particular one"). Here, the FECA's structure and history support the FEC's reading of the statute. For example, as discussed above, *see supra* at 10, the *Summary of Committee Working Draft* and the Senate Committee's report confirm that the statute targets reporting of contributions received for "the independent expenditure." (Emphasis added.) Furthermore, where "the rest of the statute is written using definite articles," it indicates specificity of the modified item. *Hagler*, 700 F.3d at 1097. Here, the two paragraphs above and two paragraphs below the relevant provision all contain terms underscoring that IE contribution reporting relates to funds designated for a particular advertisement.

If, as CREW maintains, Congress intended a broader level of contributor-related reporting for IEs, it easily could have said so, beginning with a reference to giving "for the

purpose of furthering **any** independent expenditure**s**." But Congress did not do that. Instead, it required earmarking to support "an expenditure." If that language does not compel the FEC's reading of the statute – and CGPS submits that it does[23] – it certainly permits such a reading, given the FEC's broad *Chevron* discretion.

B. *Chevron* Step 2: The FEC's Regulatory Construction Is Within the Range of Permissible Options.

That leaves the issue of rationality.[24] CREW argues it is irrational for the FEC's IE reporting regulation to include an earmarking principle under which no contributor is identified unless the contribution is earmarked for a particular IE. But the D.C. Circuit rejected precisely that argument with respect to the parallel FEC regulation containing an earmarking principle for identifying EC funders:

> [T]he FEC's purpose requirement regulates electioneering communication disclosures in precisely the same way BCRA itself regulates express advocacy disclosures. . . . The FEC was concerned [in the EC context] that some individuals who contribute to a union or corporation's general treasury may not support that entity's electioneering communications, and a robust disclosure rule would thus mislead voters as to who really supports the communications. . . . It's hard to escape the intuitive logic behind this rationale.

Van Hollen, 811 F.3d at 497.

Here, as in *Van Hollen*, the FEC regulation's earmarking component avoids misleading reporting and, at the same time, avoids imposing reporting burdens on core political speech that are not clearly necessary. Take, for example, an Alaska donor who helps fund an environmental conservation group's IEs attacking an Alaska congressional candidate's support for drilling in the Arctic National Wildlife Refuge. Under the FEC's regulation, that donor is not identified on

[23] CREW's MSJ Brief (Doc 27 at 31) also agrees that "use of a definite article" – e.g., "the" – "would mean that the contribution must be related to a specific independent expenditure."

[24] *Cf. Foo v. Tillerson*, 244 F. Supp. 3d 17 (D.D.C. 2017) (upholding the State Department's interpretation of "an individual" under *Chevron* Step Two when Congress did not provide an explicit definition).

the group's FEC reports for an IE promoting an Arkansas U.S. Senate candidate's opposition to fracking in the Fayetteville Shale. Similarly, a Long Island property developer who contributes to a national trade association's voter turnout efforts for a New York congressional candidate is not identified on the organization's FEC reports for an IE opposing a California congressional candidate's position on federal public transit funding.

Five further considerations show that the FEC's regulation is consistent with legislative intent:

1. The FEC Was Heavily Involved in the Statute's Drafting.

Administrative interpretations of statutes are "especially persuasive" where either "the agency participated in developing the provision," *Miller v. Youakim*, 440 U.S. 125, 144 (1979), or where there is "a contemporaneous construction of a statute by those charged with the responsibility of setting its machinery in motion," *United Transp. Union v. Lewis*, 711 F.2d 233, 242 (D.C. Cir. 1983). As to the former, courts attach "'great weight' to agency representations to Congress when the administrators 'participated in drafting and directly made known their views to Congress in committee hearings,'" since this forms "part of the legislative background" of the new law. *Moore v. District of Columbia*, 907 F.2d 165, 176 (D.C. Cir. 1990) (quoting *Zuber v. Allen*, 396 U.S. 168, 192 (1969)). As to the latter, contemporaneous constructions are important because the agency "may possess an internal history in the form of documents or 'handed-down oral tradition' that casts light on the meaning of a difficult phrase or provision." Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 368 (1986). Indeed, a contemporaneous construction "might . . . 'carry the day against doubts that might exist from a reading of the bare words of a statute.'" *United Airlines, Inc. v. Brien*, 588 F.3d 158, 172 (2d Cir. 2009) (quoting *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 414 (1993)). The presence of both factors here together means deference principles apply with "even

greater force." *Middle South Energy, Inc. v. F.E.R.C.*, 747 F.2d 763, 769 (D.C. Cir. 1984).

As explained above, the statute upon which the FEC regulation is based was explicitly identified as an FEC legislative recommendation, and FEC commissioners and staff worked closely with Congress to develop the provision. *See supra* at 9-10. When it came time to implement the statute by regulation, which Congress mandated be done quickly, the Commission could do so expeditiously because the FEC knew precisely what it had asked Congress to enact.

Nor should the FEC's efficiency be confused with carelessness in the agency's rulemaking. After the bill was signed into law, the Commission held four meetings to discuss these issues, including a section-by-section discussion of the proposed regulations themselves. *See supra* at 11-13. In the end, and consistent with the legislative history that expressed an interest in reducing IE-related reporting burdens and also requiring reporting of contributions for "the" independent expenditure, the FEC promulgated its regulation narrowly, contemporaneously, and appropriately.[25]

2. For 37 Years, Congress Has Not Disagreed With the FEC's Contemporaneous Interpretation of the Statute, but Has Ratified It.

Congressional "failure to revise or repeal the [FEC's regulatory] interpretation is persuasive evidence that the interpretation is the one intended by Congress," *Weber v Heaney*, 995 F.2d 872, 877 (8th Cir. 1993) (quoting *Young v. Community Nutrition Inst.*, 476 U.S. 974, 983 (1986)), and "strongly implies that the regulations accurately reflect congressional intent," *FEC v. Ted Haley Congressional Comm.*, 852 F.2d 1111, 1114 (9th Cir. 1988) (quoting *Grove*

[25] CREW makes much of the change between the draft regulations expeditiously prepared by FEC staff as part of the 1980 NPRM, on the one hand, and the final regulations promulgated by the Commission, on the other. However, the NPRM itself noted that the regulatory text printed therein was preliminary and had "not been approved by the Commission." *See supra* at 12. Moreover, the preliminary rules used the same "an" language as the statute, which, as discussed above, was Congress' way of referencing contributions provided to fund a particular expenditure. The "the" language ultimately used in the final rule simply gave the public clearer notice of what Congress intended.

City College v. Bell, 465 U.S. 555, 568 (1974)). This is particularly true when Congress did not use the special, FECA-specific review provision to reject the regulation here.

Congress built into the FECA a provision permitting the legislative branch to immediately reject FEC regulations before they go into effect. Under 52 U.S.C. § 30111, "the FEC must submit a proposed regulation and an accompanying statement to both the House and the Senate. If neither house disapproves the proposed regulation within [the preset time period], the FEC may issue it." *Weber*, 995 F.2d at 876-77. Courts "normally accord considerable deference to the Commission . . . [where] Congress took no action to disapprove the regulation when the agency submitted it for review pursuant to [the FECA's special provision]." *AFL-CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003) (internal quotation omitted).

Here, the FEC transmitted the regulation to Congress on February 28, 1980. Consistent with the congressional review timeline, the FEC waited 15 days before making the regulation effective. *See supra* at 13. Congress did not object to the IE reporting regulation during this period, thus bestowing considerable legitimacy on the agency's interpretation.

Congress also has ratified the regulation in other ways. Congress amended the statute containing the IE reporting requirements (2 U.S.C. § 434) in 1995, 1999, 2000, 2002, 2004, and 2007.[26] BCRA and the Honest Leadership and Open Government Act of 2007, Pub.L. 110-81, in particular, made significant changes to the statute. Indeed, the BCRA "ordered the FEC to rewrite its regulations" on another provision relevant to IEs. *Shays I*, 414 F.3d at 97-98. Yet in no instance did Congress revise or reject the FEC's IE contributor reporting requirements. Given

[26] *See* Pub. L. 104-79, §§ 1(a), 3(b), Dec. 28, 1995, 109 Stat. 791, 792; Pub. L. 106-58, Title VI, §§ 639(a), 641(a), Sept. 29, 1999, 113 Stat. 476, 477; Pub. L. 106-346, § 101(a) [Title V, § 502(a), (c)], Oct. 23, 2000, 114 Stat. 1356, 1356A-49; Pub. L. 107-155, Title I, § 103(a), Title II, §§ 201(a), 212, Title III, §§ 304(b), 306, 308(b), Title V, §§ 501, 503, Mar. 27, 2002, 116 Stat. 87, 88, 93, 99, 102, 104, 114, 115; Pub. L. 108-199, Div. F, Title VI, § 641, Jan. 23, 2004, 118 Stat. 359; Pub. L. 110-81, Title II, § 204(a), Sept. 14, 2007, 121 Stat. 744.)

this record, it "would be inappropriate to overturn an interpretation that Congress has acquiesced in for [] years, during which it has closely reviewed the statutory scheme under question." *Action on Smoking and Health v. C.A.B.*, 699 F.2d 1209, 1215 (D.C. Cir. 1983). *See also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 155-56 (2000) (cataloging the affirmative legislative "actions by Congress over the past 35 years" as having "effectively ratified" an agency's position). Instead, CREW should turn its attention toward advocating for one or more of the bills before Congress in recent years that would establish new reporting requirements for 501(c) organizations making IEs. *See, e.g.*, H.R. Res. 5175, 111th Cong. § 211 (2010) (the "Democracy is Strengthened by Casting Light on Spending in Elections Act" or "DISCLOSE Act").[27]

3. The FEC's Interpretation of the Statute Has Remained Consistent for Nearly Four Decades.

At Step Two, courts also accord "great weight to the longstanding interpretation placed on a statute by an agency charged with its administration." *Creekstone Farms Premium Beef, L.L.C. v. Dept. of Agriculture*, 539 F.3d 492, 500 (D.C. Cir. 2008). Here, the FEC's interpretation of the FECA's IE contributor identification provision is entitled to great deference because the agency itself has maintained its interpretation of the statute – without change – for 37 years. *See supra* at 14. Moreover, when the public was given an opportunity to submit comments on significant revisions to the IE reporting requirements that took effect in 2003 – including revisions to 11 C.F.R. § 109.2(e) – "[t]he Commission received no comments on [the IE contributor reporting] section" and left 109.2(e)(1)(vi) unchanged. FEC, Bipartisan Campaign Reform Act of 2002 Reporting, 68 Fed. Reg. 404, 415 (Jan. 3, 2003).

[27] Notably, Congress declined to enact the DISCLOSE Act and has otherwise refused to impose additional IE donor reporting requirements.

4. The FEC's Regulation Accords With Expressed Congressional Intent.

"The general purpose of the 1979 amendments to the FECA . . . was to simplify reporting and administrative procedures." *Common Cause*, 842 F.2d at 444. The FEC regulation at issue here is consistent with that legislative goal. Furthermore, as explained above (*see supra* at 10, 38-41), Congress intended that contributor reporting be tied to contributions for "the" expenditure.

CREW's MSJ Brief (Doc 27 at 33-34) attempts to convert the 1979 FECA amendments into a "disclosure at all costs" directive. But this type of dogmatic voyeurism was soundly rejected just last year in *Van Hollen*, where the court observed that "[j]ust because *one* of [the FECA's] purposes (even *chief* purposes) was broader disclosure does not mean that anything less than maximal disclosure is subversive." 811 F.3d at 494–95 (emphasis in the original). Moreover, it is simply not true that the FEC's regulation has "effectively resulted in *no* disclosure of contributions used to fund independent expenditures." CREW MSJ Brief (Doc 27) at 34 (emphasis in the original). According to the Center for Responsive Politics (using FEC data), the percentage of "outside spending" by organizations that have publicly reported some of their donors in recent years has ranged between 7.2% (in 2010) to 29.7% (in 2012). Ctr. for Responsive Politics ("CRP"), "Outside Spending by Disclosure, Excluding Party Committees," *at* https://www.opensecrets.org/outsidespending/disclosure.php.[28] Thus, reporting is occurring under the statue precisely as Congress intended.

[28] CRP uses the term "outside spending" to refer to both IEs and ECs, although the vast majority of CRP's "outside spending" statistics pertain to IEs. *See* CRP, "Outside Spending," *at* https://www.opensecrets.org/outsidespending/. Organizations engaged in "outside spending" that report some of their donors is a distinct category from organizations that publicly report all of their donors (i.e., political committees, or "PACs"). *See id.* and CRP, "Outside Spending by Disclosure, Excluding Party Committees," *supra*. For its part, in 2016 alone the FEC identified millions of dollars in contributions requiring reporting under the IE regulation. *See* Conciliation Agreements, MUR 7085 (State Tea Party Express) (Sept. 21, 2016), MUR 6816 (Americans for Job Security) (June 21, 2016), MUR 6816 (The 60 Plus Association, Inc.) (July 7, 2016), MUR 6816 (American Future Fund) (June 21, 2016).

5. The FEC's Interpretation Does Not Render Any Other Provision Superfluous.

CREW also contends that 11 C.F.R. § 109.10(e)(1)(vi) renders the FECA's and regulation's requirements to separately report an IE's sponsor and its contributors "redundant," by "requir[ing] such a close connection between the contributor and the independent expenditure that the contributor would in fact be the maker of the independent expenditure itself." CREW MSJ Brief (Doc 27) at 35. This is a strained construction of the FEC's regulation, at best, and it is not the Commission's position.

CREW acknowledges the FGCR "did not elaborate" to provide support for CREW's illogical reading of the regulation. *Id.* Rather, CREW resorts to treating the report as a Rorschach test that "appears" or "apparently" supports CREW's contrivance that donors are not reportable under the regulation unless their funds "go directly from the contributor to pay for the ad," and not if "they were routed through [an organization's] 'general treasury.'" *Id.* In fact, the FGCR suggests no such thing, and merely posits that "an express link" must exist "between the receipt and the independent expenditure" to trigger contributor reporting. AR173.

In practice, this requisite nexus between a contributor's purposes and the reported IE simply means that contributors who earmark their funds for a particular IE are identified as the sources of funding, and are publicly linked to the entity sponsoring the IE. This concept of tailoring reporting only to contributors of "earmarked" funds has been recognized by more than 40 years of campaign finance jurisprudence, *see Van Hollen*, 811 F.3d at 489 (quoting *Buckley*, 424 U.S. at 80), and is fully consistent with the core purposes of the FECA's reporting regime to "provide[] the electorate with information 'as to where political campaign money comes from'" and to "expos[e] large contributions and expenditures to the light of publicity." *Buckley*, 424 U.S. at 66-67. This approach also is consistent with FEC precedent. For example, the FEC General Counsel's office previously has concluded that an incorporated entity "took on a legal

identity separate from that" of its apparent sole funder, "and was subject to regulation as such" for the purposes of the IE reporting requirements. FEC MUR 4313 (Lugar for President), First General Counsel's Report at 34, *available at* http://eqs.fec.gov/eqsdocsMUR/0000018F.pdf.

Ultimately, CREW's reading of the regulation as conflating the contributors for an IE with the maker of the IE is not how the FEC has interpreted its own regulation, and courts "must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

C. CREW's Procedural Objections to the FEC IE Contributor Reporting Regulation Are Irrelevant and, in Any Event, Erroneous.

On its face, the Commission's regulation reasonably construes the statute, and that is confirmed by the regulation's survival of congressional review. Because CREW's challenge – to the extent it is permissible at all – is limited to a claim that the regulation is substantively invalid, those considerations are determinative.

Moreover, CREW identifies nothing in the FEC's 1980 rulemaking record that shows the Commission's regulation was arbitrary at the time. Indeed, the FEC's legislative recommendations, the language of the NPRM, and the final explanation and justification easily surpass the high bar for challenging a regulation procedurally. *See Van Hollen*, 811 F.3d at 496–97. CREW further complains that the campaign finance experience since 1980 has shown that the regulation defeats the intended scope of reporting. That is doubtful for the reasons the FEC gave with respect to the EC reporting regulation approved in *Van Hollen.* Beyond that, however, FEC action cannot be condemned as arbitrary or capricious based on facts that emerged later. *See CREW*, 209 F. Supp. 3d at 88. If CREW wants to rely on post-1980 experience, it must petition the agency to initiate a rulemaking.

V. SUBSECTION 30104(C)(1) DOES NOT MANDATE "ADDITIONAL" REPORTING.

CREW's MSJ Brief (at 39-44) contends that the Coverage Provision imposes "additional" reporting obligations independent of the Content Provision. But this argument is inconsistent with the FECA's structure and conflicts with judicial precedent.

The Coverage Provision is easily and naturally read as a generalized opening statement requiring persons that make IEs to report certain information. Then, following the outlay of this general rule, the Content Provision logically provides the contents of what the reports under the Coverage Provision must contain – i.e., an indication of whether the IE is in support of/opposition to a candidate, a certification that the IE was made independent of a candidate's campaign, and certain information about contributors. Indeed, the Content Provision opens with the phrase: "[s]tatements required to be filed by this subsection," which can only be interpreted as a gloss on what the preceding subsection means. *Cf.* 52 U.S.C. § 30104(f) ("*Disclosure of electioneering communications*"), (f)(1) ("*Statement required*"), (f)(2) ("*Contents of Statement*"). The Coverage Provision's introductory requirement that the statement contain "the information required under subsection (b)(3)(A) for all contributions received by such person" simply means that any information about contributors to be disclosed, pursuant to the Content Provision, must include "the date and amount of any such contribution." (Emphasis added.)

CREW's reading of the statute would frustrate congressional intent by decreasing the information reported. The Coverage Provision contains an affirmative reporting obligation – i.e., "Every person . . . shall file a statement." The Content Provision, however, does not actually contain an affirmative statement that the IE maker do anything. Without linking the two provisions together, there would be no requirement that an IE maker file a certification that the IE was independent of a candidate's campaign, for example. That would effectively read out of the statute certain information that Congress clearly wanted to have filed with the Commission.

CGPS's reading of the statute also accords with judicial precedent. "Section 434(c)(1) requires that any person making an 'independent expenditure' greater than $250 file a statement with the FEC. The contents of the statement are specified in 434(c)(2)." *Furgatch*, 807 F.2d at 859 n.2.

CREW cites the earlier decision in *FEC v. Massachusetts Citizens for Life* ("*MCFL*"), 479 U.S. 238 (1986), for the proposition the Coverage and Content Provisions constitute separate reporting obligations. But CREW fails to mention that Justice Brennan – who delivered the Court's opinion – was not speaking for the Court on the IE reporting point, as five justices were unwilling to sign on to that part of his opinion. *See id.* at 241. Moreover, as both the Chief Justice and other courts have observed, the non-essential portions of *MCFL* are dicta. *See, e.g.*, *id*. at 271 (Rehnquist, J., concurring and dissenting); *Vote Choice, Inc. v. Di Stefano*, 814 F. Supp. 186, 191 n.12 (D.R.I. 1992).

The FEC correctly concluded that the FECA required all non-political committee IE makers to only file one report, and the Commission used its regulations in 11 CFR Part 109 to implement that requirement. *See* AR1416, 1503. This decision was consistent with the FECA's plain language. Moreover, even if there were any statutory ambiguity, this Court should – consistent with abundant judicial authority – defer to the FEC's 37 years of consistent reading, implementation, and enforcement of the Coverage Provision.

CONCLUSION

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

Respectfully submitted,

/s/ Thomas W. Kirby

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

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

Counsel for Crossroads Grassroots Policy Strategies

October 23, 2017

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

EXHIBIT A

CAMPAIGN GUIDE

FOR CORPORATIONS AND LABOR ORGANIZATIONS

Nonprofit Status
The corporation is a social welfare organization as described in 26 U.S.C. §501(c)(4). 114.10(c)(5).

Express Purpose
The corporation's organic documents, authorized agents or actual activities must indicate that its only purpose is issue advocacy, election influencing activity or research, training or educational activities tied to the corporation's political goals. 114.10(b) and 114.10(c)(1).

Business Activities
The corporation cannot engage in business activities. Business activities include the provision of goods, services, advertising or promotional activity that results in income to the corporation, other than in the form of membership dues or donations. Note, however, that if fundraising activities are expressly described as a request for donations to be used for political purposes, such as supporting or opposing candidates, they are not business activities. 114.10(b)(3) and (c)(2).[4]

Shareholder/Disincentives to Disassociate
A corporation cannot have shareholders or persons, other than employees and creditors, who:
- Have an equitable interest in the corporation or are otherwise affiliated in a way that would allow them to make a claim on the organization's assets or earnings; or
- Receive a benefit that they lose if they end their affiliation with the corporation or cannot obtain unless they become affiliated, e.g., credit cards, insurance policies, savings plans, education or business information (except that education and business information may be provided to enable the recipient to help promote the group's political ideas). These types of benefits are disincentives for individuals to disassociate themselves from the organization. 114.10(c)(3).

4. *In May 1997 the U.S. Court of Appeals (8th Cir.) upheld the district court in* Minnesota Citizens Concerned for Life (MCCL) v. FEC, *ruling that the QNC Exception regulations conflict with the 8th Circuit's prior decision in* Day v. Holahan, *which is controlling law in that circuit. In Day the court struck down a state law with requirements similar to those in the QNC Exception regulations. The courts found that the "no business activity" requirement violated MCCL's First Amendment rights. In July 1997, the 8th Circuit denied the Commission's petition for rehearing and suggestion for rehearing en banc of the MCCL case.*

Relationship with Business Corporations and Labor Organizations
The corporation was not established by a corporation or a labor organization, does not accept direct or indirect donations from such organizations and, if unable to demonstrate that it has not accepted such donations, has a written policy against accepting donations from them. 114.10(c)(4).[5]

Certification of QNC Status

If a QNC makes independent expenditures that aggregate in excess of $250 in a calendar year, it must certify that it is eligible for QNC status and report the independent expenditures (see below). Certification may be made by filing FEC Form 5, or by submitting a letter, by the due date of the first independent expenditure report. The form or letter must contain the following information:
- Name and address of the corporation;
- Signature and printed name of the individual filing the qualifying statement; and
- A statement certifying that the corporation meets the above five qualifications of a QNC. 114.10(e)(1).

Filing Reports

A QNC must report the independent expenditures that exceed $250 on FEC Form 5 or in a signed statement with the appropriate authority. 114.10(e)(2) and 109.2.

Content
The report (or statement) must include:
- The reporting person's name, mailing address, occupation and employer (if any);
- The name and mailing address of the person to whom the expenditure was made;
- The amount, date and purpose of each expenditure;
- A statement as to whether the expenditure(s) was in support of or in opposition to a candidate and the candidate's name and office sought;
- A notarized certification under penalty of perjury as to whether the expenditure met the standards of "independence" (see Independent Expenditures, p. 22); and
- The identification of each person who contributed more than $200 for the purpose of making the independent expenditures. 109.2(a).

When to File
The report is due at the end of the reporting period (see pp. 26-28) during which independent expenditures aggregating in excess of $250 are made and at the end of each reporting period thereafter in which additional independent expenditures are made. 114.10(e)(2) and 109.2(a)(2).

Last Minute Expenditures

There are special reporting requirements for independent expenditures made after the 20th day but more than 24 hours before the day of the election. See page 41. 109.2(b).

Contributions Prohibited

Despite this exception for independent expenditures, the QNC is still prohibited from making monetary or in-kind contributions in connection with federal elections. 114.10(d)(2).

5. *Exception and Caution: Although a 501(c)(4) corporation may accept donations from a 501(c)(3) corporation, it must use that donation in a manner that is consistent with the 501(c)(3)'s tax exempt purpose, which, under the Internal Revenue Code, is never to make independent expenditures in support of, or in opposition to, any candidate. Tax exempt corporations are urged to consult with the Internal Revenue Code and Regulations.*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

[PROPOSED] ORDER

Upon consideration of Plaintiffs' Motion for Summary Judgment, Defendant Federal Election Commission's Cross-Motion for Summary Judgment, Intervenor-Defendant Crossroads Grassroots Policy Strategies' Cross-Motion for Summary Judgment, and all memoranda and other materials submitted in support of and in opposition to both motions,

IT IS HEREBY ORDERED that Plaintiffs' Motion for Summary Judgment is **DENIED** and that the Motions for Summary Judgment of Defendant Federal Election Commission and Intervenor-Defendant Crossroads Grassroots Policy Strategies are **GRANTED**.

IT IS FURTHER ORDERED that **JUDGMENT** shall be entered for defendants.

This is a final appealable order. *See* Fed. R. App. P. 4(a).

DATED: _____ _____

Beryl A. Howell
United States District Judge

NAMES OF PERSONS TO BE SERVED WITH PROPOSED ORDER UPON ENTRY

In accordance with LCvR 7(k), listed below are the names and addresses of the attorneys and parties entitled to be notified of the proposed order's entry:

Lisa J. Stevenson
Kevin Deeley
Harry Jacobs Summers
Seth E. Nesin
Federal Election Commission
Office of General Counsel
999 E Street, NW
Washington, DC 20463

Michael E. Toner
Thomas W. Kirby
Andrew G. Woodson
Eric Wang
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006

Stuart C. McPhail
Adam J. Rappaport
Citizens for Responsibility and Ethics in Washington
455 Massachusetts Avenue, NW
Sixth Floor
Washington, DC 20001

Attachment E

FEC's Memorandum of Points and Authorities in Support of its Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, CREW v. FEC (Civil Action No. 1:16-cv-00259-BAH) (Oct. 23, 2017)

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) MEMORANDUM AS TO SUMMARY JUDGMENT

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

October 23, 2017

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Miscellaneous

The Federal Election Commission ("Commission" or "FEC") acted lawfully when it dismissed the administrative complaint filed by plaintiffs Citizens for Responsibility and Ethics in Washington ("CREW") and Nicholas Mezlak. That administrative complaint alleged that Crossroads Grassroots Policy Strategies ("Crossroads GPS") and several associated individuals filed reports with the FEC of independent expenditures, which expressly advocate the election or defeat of federal candidates, that improperly did not disclose the identities of contributors to Crossroads GPS. After reviewing the facts and arguments presented both by the administrative complainants and respondents, however, a controlling group of Commissioners determined that there was no reason to believe the respondents had violated the provision of the Federal Election Campaign Act ("FECA" or "Act") or the FEC's implementing regulation governing the disclosure of such identities. The controlling Commissioners also decided, as an exercise of prosecutorial discretion, not to pursue another allegation regarding a possible disclosure obligation because that allegation rested upon a novel statutory interpretation arguably inconsistent with the agency's regulations and therefore could raise equitable concerns about fair notice. Plaintiffs now challenge the Commission's decisions pursuant to FEC's judicial review provision at 52 U.S.C. § 30109(a)(8). Plaintiffs also challenge the Commission's dismissal of the administrative complaint on the grounds that the applicable FEC regulation is invalid and unlawful under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. (Compl. for Injunctive and Declaratory Relief ("Compl.") ¶¶ 117-24 (Doc. No. 1)).

The Court should reject plaintiffs' claims that it was unlawful not to find reason to believe Crossroads GPS violated the Commission's reporting regulation or the statutory provision it interprets. Both the statute and the regulation specify that contributors need only be identified if their contributions to a group like Crossroads GPS, which is not registered with the

FEC as a political committee, were made "for the purpose of furthering" an independent expenditure. The administrative complaint did not provide evidence of that critical factor. Rather, plaintiffs simply compared a press article about Crossroads GPS's fundraising to the group's independent expenditure reports and then alleged that some contributions must have been made for that purpose. But such speculation does not show that the contributions had the specific purpose of supporting an independent expenditure, and the respondents provided information indicating that the contributions did not in fact have that specific purpose. To the extent the statute can be interpreted to require more disclosure than the FEC's longstanding regulation implementing it, respondents were entitled to rely in good faith on the regulation. It was thus reasonable for the Commission not to launch an investigation into the respondents here.

The Court should also reject plaintiffs' argument that it was contrary to law to exercise the FEC's broad prosecutorial discretion not to pursue an investigation based on a novel interpretation of a different provision of FECA—an interpretation that is at odds with the FEC's past enforcement practices and the expectations of reporting entities like Crossroads GPS, and is one that plaintiffs did not even raise in their administrative complaint. Plaintiffs now argue that it is "clear on the face of the statute" that groups like Crossroads GPS that make independent expenditures have a separate obligation to report *all* of their contributors above a certain level. (Mem. of P. & A. in Supp. of Pls.' Mot. for Summ. J. ("Pls.' Mem.") at 41 (Doc. No. 27)). But it was reasonable for the FEC not to proceed against these respondents due to equitable concerns that they did not have fair notice that the statute would be interpreted and applied in that manner.

Lastly, the Court should reject plaintiffs' argument that the Commission's regulation is in conflict with the statute under the analysis of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The statutory provision that the FEC's regulation

implements is ambiguous, and the regulation reasonably clarifies the meaning of the statute consistent with Congressional intent. While plaintiffs may wish that the Commission had interpreted the statute in a different manner to obtain more disclosure, it is not the role of the Court to substitute its own interpretation for that of the Commission as long as the FEC's interpretation is reasonable.

The Court should grant summary judgment to the Commission.

BACKGROUND

I. THE PARTIES

The FEC is a six-member federal independent agency with "exclusive jurisdiction" to administer, interpret, and civilly enforce FECA. *See generally* 52 U.S.C. §§ 30106, 30107. Congress authorized the FEC to "formulate policy" with respect to FECA, *id.* § 30106(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA]," *id.* §§ 30107(a)(8), 30111(a)(8); and to investigate possible violations of the Act, *id.* § 30109(a)(1)-(2). The FEC has exclusive jurisdiction to initiate civil enforcement actions for violations of the Act in the United States district courts. *Id.* §§ 30106(b)(1), 30109(a)(6).

Plaintiff CREW "is a non-profit, non-partisan corporation organized under Section 501(c)(3) of the Internal Revenue Code." (Compl. ¶ 7.) Among other things, CREW "monitors the activities of those who run for federal office as well as those groups financially supporting candidates for office or advocating for or against their election" and "files complaints with the FEC when it discovers violations of the FECA." (*Id.* ¶¶ 10-11.) Plaintiff Nicholas Mezlak states that he is "a citizen of the United States and a resident of the state of Ohio." (*Id.* ¶ 17.)

II. STATUTORY AND REGULATORY BACKGROUND

A. FECA's Requirements for Independent Expenditure Reporting by Persons That Are Not Political Committees

FECA creates a comprehensive structure of disclosure requirements that vary depending upon who is reporting to the FEC and what activities the reporting entity has engaged in. Political committees, which have the major purpose of electing federal candidates, *Buckley v. Valeo*, 424 U.S. 1, 79 (1976), are required to report detailed information to the Commission on a regular basis regardless of their specific activities. *See* 52 U.S.C. § 30104(a). By contrast, groups that have not registered as (or otherwise been found by the FEC to be) political committees, such as Crossroads GPS, do not have such broad, regular disclosure requirements, but are required to file event-driven reports with the FEC if they engage in certain election-related spending such as independent expenditures, 52 U.S.C. § 30104(c), or electioneering communications, 52 U.S.C. § 30104(f). An independent expenditure is a communication made without coordination with a candidate, campaign, or political party that "expressly advocat[es] the election or defeat of a clearly identified candidate." 52 U.S.C. § 30101(17)(A).

The provision at issue in this case, 52 U.S.C. § 30104(c), involves the disclosure requirements for persons that are not political committees and that make independent expenditures.[1] FECA states that independent expenditure reports of such persons must include "the identification of 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). Therefore, unlike political committees, which are generally required to report the identities of *all* their contributors who gave over $200 in a

[1] "Person" as used in the statute includes both individuals and organizations like Crossroads GPS. 52 U.S.C. § 30101(11).

calendar year (52 U.S.C. § 30104(b)(3)(A)), groups that are not political committees are required under section 30104(c)(2)(C) only to identify a *subset* of contributors – those that gave for the purpose of furthering an independent expenditure. There is no requirement under that provision of FECA that such groups identify those that have contributed for some other purpose or for no particular purpose at all. The statute does not specify whether "an independent expenditure" refers to the specific independent expenditure that the group is reporting, or if it encompasses contributions that were made for the purpose of furthering independent expenditures in a general sense, but not any independent expenditure in particular.

Another portion of 52 U.S.C. § 30104(c) also addresses reporting by groups that are not political committees but that make independent expenditures. That subpart states that "[e]very person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year shall file a statement containing the information required under subsection (b)(3)(A) of this section for all contributions received by such person." 52 U.S.C. § 30104(c)(1). Subsection (b)(3)(A), in turn, describes how to report contributor information.[2] Section 30104(c)(1) may be read simply to specify the situations when such groups are required to file reports with the FEC (if they make at least $250 in independent expenditures during a calendar year), while section 30104(c)(2) describes what information should be included in those reports. *See* 52 U.S.C. § 30104(c)(2) ("Statements required to be filed by this subsection . . . shall include . . ."). However, the second half of section 30104(c)(1) might also be read to require such groups to include a comprehensive list of all contributors, whether their contributions were made for the purpose of furthering an independent expenditure

[2] Political committees must identify anyone "who makes a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office) . . . ." 52 U.S.C. § 30104(b)(3)(A).

or not, whenever the reporting requirement is triggered. In essence, this interpretation would require all groups that are not political committees but that meet the $250 independent-expenditure-spending threshold in a calendar year to identify all their contributors in the same manner that political committees do, but also to go beyond what is required of political committees, by separately identifying contributors that gave for the purpose of furthering an independent expenditure in accord with subsection 30104(c)(2)(C), as discussed above.

The provisions of FECA discussed above were originally promulgated as part of the 1979 amendments to FECA, and although they have been recodified, their language has remained unaltered since that time. *See* Pub. L. 96-187, 93 Stat. 1339 (Jan. 8, 1980) (amending provision then codified at 2 U.S.C. § 434(c)(2) (now 52 U.S.C. § 30104(c)(2)). Before the passage of the 1979 amendments, contributors to entities other than political committees and candidates were responsible for reporting their own contributions to the FEC. *See* 2 U.S.C. § 434(e) (1976). The 1979 amendments changed disclosure to the current system in which the responsibility for reporting contributions is left solely to the recipients of those contributions. The independent expenditure reporting provisions discussed above were among those new provisions.

B. The Commission's Regulation Implementing FECA's Requirements for Independent Expenditure Reporting by Persons That Are Not Political Committees

The Commission promulgated a number of new and amended regulations in response to the 1979 Amendments. The passage of these regulations moved forward in an expedited process, as Congress had directed the FEC to transmit regulations to them in less than two months time. *See* 45 Fed. Reg. 15080 (Mar. 7, 1980) (AR1496) (noting that the 1979 Amendments passed on January 8, 1980 and the Commission was required to transmit regulations prior to February 29, 1980). The Commission noticed draft regulations (AR1056-

1080), received comments from the public (AR1081, 1213-1222, 1227-1261), and published the final versions of the regulations, with an explanation and justification (AR1495-1542).

The independent expenditure disclosure regulation, then located at 11 C.F.R. § 109.2, was among the provisions modified as a result of the 1979 Amendments. *See* 45 Fed. Reg. 15080, 15087 (Mar. 7, 1980) (AR1503). The process was uncontroversial. The regulation contains language almost identical to 52 U.S.C. § 30104(c)(2)(C), and it requires persons that are not political committees but that make independent expenditures to identify "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." *See* 11 C.F.R. § 109.10(e)(1)(vi). None of the commenters during the notice period commented on that particular provision. The Commission's explanation for the regulation was as follows:

> *§ 109.2 Reporting of independent expenditures by persons other than a political committee.*
>
> This section has been amended to incorporate the changes set forth at 2 USC 434(c) (1) and (2) regarding reporting requirements for persons, other than a political committee, who make independent expenditures.

(AR1503.) The regulation has not been changed substantively since it was promulgated in 1980.[3] In practice, the regulation requires groups that engage in the minimum level of independent expenditures to file the FEC's "Form 5" (https://www.fec.gov/resources/cms-content/documents/fecfrm5.pdf) in any quarter in which they make independent expenditures, as

[3] In 2003, the regulation was moved from section 109.2 to section 109.10 and slightly modified to make clear when and how those reports should be filed. FEC, Bipartisan Campaign Reform Act of 2002 Reporting, 68 Fed. Reg. 404, 415 (Jan. 3, 2003). The modifications that were made in 2003 are not at issue in this case.

well as more frequently if they reach certain dollar thresholds shortly before an election. Form 5 Instructions at 1, https://www.fec.gov/resources/cms-content/documents/fecfrm5i.pdf.

III. ADMINISTRATIVE PROCEEDINGS FOR MATTER UNDER REVIEW 6696

FECA permits any person to file an administrative complaint with the FEC alleging a violation of the Act. 52 U.S.C. § 30109(a)(1); *see also* 11 C.F.R. § 111.4. In November 2012, plaintiff CREW and two individuals filed an administrative complaint against Crossroads GPS and associated individuals alleging that Crossroads GPS had unlawfully failed to disclose contributors in violation of 52 U.S.C. § 30104 and 11 C.F.R. §§ 109.10(b)-(e). (AR1-AR52.)[4] The administrative complaint relied upon a press account by a reporter who had attended a fundraiser at which Senate campaign advertisements were shown to attendees and contributions were allegedly solicited for both Crossroads GPS and a political committee registered with the FEC called American Crossroads. (AR104-105.)

The administrative complaint described three categories of contributors that the complainants alleged Crossroads GPS had unlawfully failed to disclose. First, the complaint alleged, based on the press account, that Karl Rove, who described himself as an "uncompensated advisor" to Crossroads GPS and American Crossroads (AR94), had stated that he had received a phone call from an "unnamed out-of-state donor" who indicated he would pledge $3 million for a "matching challenge" to help raise $6 million for Ohio Senate candidate Josh Mandel. (AR103-104.) Based on these facts, the administrative complaint alleged that Crossroads GPS had violated the disclosure statute and regulation by not identifying the unnamed donor. (AR108-112.) Second, based on the same facts, the administrative complaint alleged that Crossroads GPS had violated the disclosure requirements of FECA and the FEC

[4] The administrative complaint was later supplemented to substitute plaintiff Nicholas Mezlak for one of the individual complainants. (AR98-159.)

regulation by not identifying any contributors that were part of the "matching challenge" described by Rove at the fundraiser and helped pay for the over $6 million in independent expenditures Crossroads GPS reportedly made in that Ohio Senate race. (AR108-112.) Third, based on the press account, the administrative complaint alleged that Crossroads GPS had violated FECA and the FEC regulation by not identifying any contributors that responded to the solicitations at the fundraiser and contributed to Crossroads GPS after having viewed the advertisements shown there. (AR 112-113.) In addition to these allegations against Crossroads GPS, the administrative complaint made related allegations against several individuals associated with Crossroads GPS. (AR 108-115.) The administrative complaint did not allege that any respondent had failed to disclose information pursuant to 52 U.S.C. § 30104(c)(1).

Crossroads GPS and the other respondents responded to the administrative complaint on January 17, 2013, and included an affidavit from Karl Rove. (AR73-95.) The response argued that Crossroads GPS was not obligated to identify its contributors. In particular, the response stated that Crossroads GPS was not required to identify the "unnamed out-of-state donor" because there was no evidence that "demonstrates that any contribution was made for the purpose of funding any particular advertisements, advertisements in general, or that the donor had any knowledge of any particular Crossroads GPS efforts." (AR85.) Crossroads GPS also stated that it was not obligated to identify any of the "matching fund" contributors because they did not make those contributions for the purpose of "furthering the independent expenditures Crossroads GPS made in the Ohio Senate race" and there "is no evidence presented regarding any donor's intent." (AR90.) Similarly, the response stated that Crossroads GPS was not legally obligated to disclose contributors that had responded to solicitations at the fundraiser because

"Crossroads GPS **did not** solicit or receive, at any time, any contributions 'for the purpose of . . . broadcasting other ads in those races.'" (AR92 (quoting AR14).)

After reviewing an administrative complaint and any responses filed by the respondents, the Commission considers whether there is "reason to believe" that FECA has been violated. 52 U.S.C. § 30109(a)(2). If at least four of the FEC's six Commissioners vote to find such reason to believe, the Commission may investigate the alleged violation; otherwise, the Commission dismisses the administrative complaint. *Id.* §§ 30106(c), 30109(a)(2).

In this case, the Commission's Office of General Counsel provided the Commission with a First General Counsel's Report that recommended a finding of "no reason to believe" that 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). With respect to the "unnamed out-of-state donor," the Office of General Counsel recommended a finding of "no reason to believe" because "a donor's general purpose to support an organization in its efforts to further the election of a particular federal candidate does not itself indicate that the donor's purpose was to further 'the reported independent expenditure' – the requisite regulatory test." (AR 174.) With respect to any contributors that might have participated in the "matching challenge," the Office of General Counsel recommended no reason to believe because the mere fact that Crossroads GPS spent more than $6 million in independent expenditures in the Ohio Senate race "would not advance the claim that, as a result of the matching challenge, Crossroads received funds from a donor for the purpose of furthering Crossroads' reported independent expenditures in Ohio." (*Id.*) As for the alleged failure to identify contributors who saw advertisements at the fundraiser, the Office of General Counsel likewise recommended a finding of no reason to

believe because, among other reasons, "Crossroads represents that none of the contributions received at the event were for the purpose of furthering those communications." (AR175.)

Lastly, the Office of General Counsel discussed 52 U.S.C. § 30104(c)(1), which could be read to require groups that are not political committees but that make independent expenditures to disclose *all* contributors, not just those made for the purpose of furthering independent expenditures. (AR175-176.) This alternative statutory interpretation had not been raised in the administrative complaint, which had only argued that Crossroads GPS violated the law by failing to disclose contributions made for the purpose of furthering independent expenditures. (AR108-115.) Nonetheless, in the interest of providing comprehensive legal advice, the FEC's Office of General Counsel raised the issue, without taking a position as to whether 52 U.S.C. § 30104(c)(1) actually imposed such a requirement. (AR176.) But that Office ultimately recommended that the Commission exercise its prosecutorial discretion and not pursue that legal theory here, explaining that doing so "could raise equitable concerns about whether a filer has fair notice of the requisite level of disclosure required by law," due to the fact that the Commission's regulation does not itself impose such a disclosure requirement and the Commission has not previously interpreted the statute in that manner. (*Id.*)

The Commission voted on the matter on November 17, 2015, splitting 3-3 on each of the recommendations of the Office of General Counsel, as well as on an additional motion to find that Crossroads GPS should be deemed a political committee. (AR 193.) As a result of the split votes, the Commission closed the file in the matter and dismissed the administrative complaint. (AR 195.) The three Commissioners that voted in favor of the recommendations of the Office of General Counsel, who made up the controlling group because their position prevailed, did not issue a separate Statement of Reasons for their vote, and therefore the Office

of General Counsel's First General Counsel's Report serves as the basis for judicial review. *See FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("*NRSC*"), 966 F.2d 1471, 1476 (D.C. Cir. 1992) (Commissioners that voted to dismiss "constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did."); *FEC v. Democratic Senatorial Campaign Comm.* ("*DSCC*"), 454 U.S. 27, 38 & n.19 (1981) (staff report may provide a basis for the Commission's action).

IV. PLAINTIFFS' LAWSUIT AGAINST THE COMMISSION

FECA provides administrative complainants with a cause of action for judicial review if the Commission determines that no violation has occurred or decides to dismiss the administrative complaint for some other reason. *See* 52 U.S.C. § 30109(a)(8)(A) (detailing procedure and scope of judicial review of administrative dismissal). Judicial review is also available for FEC dismissals resulting from 3-3 votes. *NRSC*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("[A split vote] dismissal, like any other, is judicially reviewable under [§ 30109(a)(8)].").

Following the dismissal of plaintiffs' administrative complaint, they brought this lawsuit, which asserts three claims. Count I contends that the Commission's failure to find reason to believe that Crossroads GPS violated the Commission's independent-expenditure disclosure regulation at 11 C.F.R. § 109.10(e)(1)(vi) was arbitrary, capricious, an abuse of discretion, and contrary to law. (Compl. ¶ 116.) Count II argues that 52 U.S.C. § 30104(c)(2)(C) actually requires greater disclosure of contributors than the Commission's regulation, and therefore the FEC acted contrary to law by finding no reason to believe that Crossroad GPS violated the statute when it did not report the identity of its contributors. (Compl. ¶ 124.) This Count thus claims that the dismissal applying the regulation is contrary to law because the regulation is inconsistent with the statute, and plaintiffs seek to have the Court declare "that 11 C.F.R. §

109.10(e)(1)(vi) is contrary to law, arbitrary and capricious, and invalid." (Compl. Requested Relief ¶ 3). Plaintiffs, in addition to relying on section 30109(a)(8), bring their challenge to the interpretation of the regulation in the agency's dismissal pursuant to the APA. (*See id.* ¶ 124 (citing 5 U.S.C. § 706.) Lastly, Claim III asserts that 52 U.S.C. § 30104(c)(1) should be interpreted such that groups that are not political committees but that make at least $250 in independent expenditures annually are required to identify all persons who made contributions for the purpose of influencing a federal election generally, whether or not those contributions were made to further independent expenditures. (Compl. ¶ 127.) As a result, plaintiffs argue that the FEC acted contrary to law by exercising its prosecutorial discretion to dismiss the allegation that Crossroads GPS violated 52 U.S.C. § 30104(c)(1).

The FEC moved to dismiss plaintiffs' challenge to its regulation under the APA (Claim II), arguing that the claim was time-barred. (FEC's Partial Mot. to Dismiss (Doc. No. 12). The Court disagreed, finding that "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). The Court also granted a motion by defendant-intervenor Crossroads GPS to dismiss claims under the APA from plaintiffs' Counts I and III, but the Court denied the same motion as to Count II. *Id.* at 105. Because the APA challenge arises in the context of a dismissal under FECA, "[i]n the event that the plaintiffs ultimately prevail on their APA challenge to the regulation, however, the Court would remand this action to the FEC for reconsideration of the plaintiffs' administrative complaint in light of the Court's opinion." *Id.* (citing 52 U.S.C. § 30109(a)(8)(C).

The parties have now filed cross-motions for summary judgment.

ARGUMENT

I. THE COMMISSION'S PROMULGATION OF REGULATIONS AND ITS DISMISSAL OF ADMINISTRATIVE COMPLAINTS ARE ENTITLED TO JUDICIAL DEFERENCE

Judicial review of both the Commission's 2015 administrative complaint dismissal and its 1980 rulemaking are highly deferential. This Court may set aside an administrative dismissal order of the Commission only if it is "contrary to law," a high standard. 52 U.S.C. § 30109(a)(8)(C). The Commission receives even greater deference in judicial review of its decision not to proceed with an enforcement case in an exercise of its prosecutorial discretion, such as Claim III of the complaint in this case. *See infra* pp. 28-29. Review of plaintiffs' challenge to the Commission's regulation under the APA is also "highly deferential." *See infra* pp. 31-34 (quoting *Sierra Club v. EPA*, 353 F.3d 976, 978 (D.C. Cir. 2004)). In both contexts, the Court has the limited role of reviewing the Commission's decision-making based on the administrative record, so the Court's review must be based upon the record that was before the agency during its rulemaking. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

The Supreme Court has explained that the Commission "is precisely the type of agency to which deference should presumptively be afforded." *DSCC*, 454 U.S. at 39. That judicial deference is based upon Congress's delegation of discretion to an agency to implement a statute. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-41 (1996). Such deference is appropriate when "Congress has expressly delegated to [an agency] the authority to prescribe regulations containing such classifications, differentiations, or other provisions as, in the judgment of the [agency], are necessary or proper to effectuate the purposes of [the authorizing statute], to prevent circumvention or evasion thereof, or to facilitate compliance therewith." *Household*

Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 238-39 (2004) (internal quotation marks omitted). And "Congress has legislated in no uncertain terms with respect to FEC dominion over the election law." *Common Cause v. Schmitt*, 512 F. Supp. 489, 502 (D.D.C. 1980) (three-judge court), *aff'd mem.*, 455 U.S. 129 (1982). Indeed, the Commission's "express authorization to elucidate statutory policy in administering FECA 'implies that Congress intended the FEC … to resolve any ambiguities in statutory language,'" and so "'the FEC's interpretation of the Act should be accorded considerable deference.'" *United States v. Kanchanalak*, 192 F.3d 1037, 1049 (D.C. Cir. 1999) (citation omitted).

The Commission's decisions are particularly appropriate for judicial deference because the FEC is "[u]nique among federal administrative agencies" in that "its sole purpose [is] the regulation of core constitutionally protected activity — 'the behavior of individuals and groups only insofar as they act, speak and associate for political purposes.'" *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003) (quoting *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981)). "The [Federal Election] Commission has been vested with a wide discretion in order to guarantee that it will be sensitive to the great trust imposed in it to not overstep its authority by interfering unduly in the conduct of elections." *In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538, 545 (D.C. Cir. 1980). "Deference is particularly appropriate in the context of the FECA, which explicitly relies on the bipartisan Commission as its primary enforcer." *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988).

II. THE COMMISSION'S DISPOSITION OF THE ADMINISTRATIVE COMPLAINT WAS LAWFUL

In considering plaintiffs' administrative complaint, the Commission reasonably and lawfully exercised its discretion. The Commission's lack of consensus to find "reason to believe" that Crossroads GPS had violated either 11 C.F.R. § 109.10(e)(1)(vi) or 52 U.S.C.

§ 30104(c)(2)(C) was justified by the speculative nature of the allegations, most notably the absence of any evidence of contributions that were made "for the purpose of furthering" Crossroads GPS's independent expenditures. The Commission's dismissal of the allegation that Crossroads GPS violated 52 U.S.C. § 30104(c)(1) was permissible in light of the concern that the statute had not previously been applied to require such additional disclosure and it would present fairness concerns to do so against an entity like Crossroads that reasonably believed it was acting consistently with the law. Thus, the Commission did not act "contrary to law" in this matter.

A. FEC Dismissals Must Be Affirmed Unless They Are "Contrary to Law"

This Court may set aside the Commission's dismissal order only if it is "contrary to law." 52 U.S.C. § 30109(a)(8)(C). Under that standard, the Commission's decision to dismiss cannot be disturbed unless it was based on "an impermissible interpretation of the Act" or was otherwise "arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). This standard simply requires that the Commission's decision was "sufficiently reasonable to be accepted." *DSCC*, 454 U.S. at 39. The Commission's decision need not be "the only reasonable one or even the" decision "the [C]ourt would have reached" on its own "if the question initially had arisen in a judicial proceeding." *Id.* Instead, the contrary-to-law standard is "[h]ighly deferential" to the Commission's decision. *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005) (internal quotation marks omitted); *see also Orloski*, 795 F.2d at 167 (noting that the contrary-to-law standard is "extremely deferential" to the agency's decision (internal quotation marks omitted)).[5]

[5] In addition, although "an agency is required to adequately explain its decision" in such a matter, it need not do so with perfect precision. *Van Hollen v. FEC*, 811 F.3d 486, 496-97 (D.C. Cir. 2016). "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*,

B. It Was Reasonable, Based on the Facts Presented, Not to Find Reason to Believe That Crossroads GPS Violated 11 C.F.R. § 109.10(e)(1)(vi)

The controlling group of Commissioners reasonably determined, based on the evidence presented, that there was no reason to believe Crossroads GPS received any of the alleged contributions for the purpose of furthering any of the independent expenditures it made. Plaintiffs claim that the Commission acted unlawfully by failing to find reason to believe that Crossroads GPS violated 11 C.F.R. § 109.10(e)(1)(vi). But that regulation requires reporting only of "[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). There was evidence that donors intended to support certain candidates, but as noted in the First General Counsel's Report, "a donor's general purpose to support an organization in its efforts to further the election of a particular federal candidate does not itself indicate that the donor's purpose was to further 'the reported independent expenditure'— the requisite regulatory test." (AR174.)

Plaintiffs point to three factual elements that they assert establish a reason to believe that Crossroads was in violation of the regulation (Pls.' Mem. at 44-45), but even if correct, none of those would establish that contributions here were made for the purpose of furthering any specific reported independent expenditure. The first point plaintiffs make is that "Crossroads GPS took at least $3 million 'to use to support the election of [Ohio Senate candidate] Josh Mandel.'" (Pls.' Mem. at 44 (quoting AR174).) Karl Rove did confirm in an affidavit that the donor of these funds "intended the funds to be used in some manner that would aid the election of Josh Mandel" (AR95 ¶ 10), but Rove also explained that his conversations with the donor did

---

823 F. Supp. 2d 53, 58 (D.D.C. 2011) (quoting *Common Cause v. FEC*, 906 F.2d 705, 706 (D.C. Cir. 1990)).

not include discussion of "any particular television advertisements, or television advertisements in general" (AR94 ¶ 6); "specific efforts that would or could be made by Crossroads GPS" (AR94 ¶ 7); "spending the donor's funds on any specific methods of communication" (AR94 ¶ 8); "independent expenditures" (AR94 ¶ 9); or spending of the pledged funds "in any particular manner or on any particular or specific efforts or projects" (AR95 ¶ 10). Rove also clarified that the donor did not actually donate $3 million, but instead "subsequently contributed a larger amount to Crossroads GPS that was not in any way earmarked for any particular use." (AR95 ¶ 14.) The mere fact that a contribution was made to help a particular candidate is not evidence that it was made for the purpose of furthering a reported independent expenditure. Plaintiffs may prefer that the regulation require more disclosure, but it does not.

The second factual element plaintiffs identify is that Crossroads GPS received an additional $1.3 million in matching donations to aid the election of Josh Mandel (Pls.' Mem. at 44-45), but this point suffers from the same infirmity. As the Office of General Counsel noted, "that fact would not advance the claim that, as a result of the matching challenge, Crossroads received funds from a donor for the purpose of furthering Crossroads' reported independent expenditures in Ohio." (AR174.) It therefore provides no evidence that the regulation required Crossroads GPS to disclose the identity of those contributors.

Plaintiffs' third factual point is that attendees at the fundraiser "were shown independent expenditures, which the respondents admitted were used as 'examples' of the activities raised funds would support and which mirrored the ads that eventually ran." (Pls.' Mem. at 45.) But the fact that "example" TV advertisements were shown at a fundraiser does not indicate that contributions received were made for the purpose of furthering independent expenditures actually made. In fact, the administrative respondents indicated that all of the advertisements

shown at the fundraiser had already been fully paid for and aired by the day of the fundraiser, with the exception of one that never aired. (AR77-78, AR175.) In any case, as the First General Counsel's Report stated, "there is no basis to conclude on these facts that Crossroads received contributions from individuals at the fundraiser for the purpose of furthering Crossroads' reported independent expenditures in Virginia, Montana, and Nevada as alleged." (AR175.)

Plaintiffs' arguments seem to reflect a view that if a group like Crossroads GPS tells potential contributors that it is going to support certain candidates, provides some examples of how it might do so, and makes independent expenditures, 11 C.F.R. § 109.10(e)(1)(vi) requires the identities of the contributors to be reported. But the regulation plainly requires more of a link between the contributions and the expenditures, and it was reasonable for the controlling group of Commissioners to determine that the facts identified in the administrative complaint were insufficient to find reason to believe that Crossroads GPS had violated the regulation.

C. It Was Reasonable, Based on the Facts Presented, Not to Find Reason to Believe That Crossroads GPS Violated 52 U.S.C. § 30104(c)(2)(C)

Plaintiffs claim that the Commission's dismissal of the alleged statutory violation was contrary to FECA even if respondents' conduct did not violate the regulation (Pls.' Mem. at 38-39), but that is incorrect. Plaintiffs argue at length that there was reason to believe Crossroads GPS violated the allegedly greater disclosure requirements of 52 U.S.C. § 30104(c)(2)(C), asserting that the FEC's regulation actually conflicts with the language in FECA. Plaintiffs emphasize that the statute requires contributors to be identified if their contributions are made for the purpose of furthering "'*an*' independent expenditure," whereas the regulation states contributors should be identified if contributions are made for the purpose of furthering "'*the reported*' independent expenditure." (Pls.' Mem. at 30-33, 38-39 (emphasis added) (comparing 52 U.S.C. § 30104(c)(2)(C) with 11 C.F.R. § 109.10(e)(1)(vi)).) The First General Counsel's

Report addressed the distinction between the statutory and regulatory language, explaining that while the statutory language is "an arguably more expansive approach," the regulation "constitutes the Commission's controlling interpretation of the statutory provision it implements." (AR175 n.57.) As discussed *supra* pp. 14-15, the Commission is entitled to great deference in this task and its regulation is a reasonable interpretation of the statute's ambiguous language. Therefore, the FEC acted lawfully by dismissing the statutory allegations in the administrative complaint.

But even if the regulation were invalid, the Commission would still not be in a position to proceed against Crossroads GPS for an independent statutory violation. First, any such enforcement proceeding would likely not be able to surmount the hurdle of Crossroads GPS interposing the defense that it had exhibited good faith reliance on that regulation. Congress placed a "safe harbor" provision in FECA, titled "*Scope of protection for good faith reliance upon rules or regulations*," stating 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). Here, if there is no reason to believe that Crossroads GPS violated the regulation, then under 52 U.S.C. § 30111(e) the Commission could not reasonably pursue Crossroads GPS for failing to comply with the terms of the statute it implements. There has been no indication here that Crossroads GPS did not rely in good faith on the regulation. And the report providing the basis for the controlling group's dismissal cited the equitable concerns underlying the safe harbor. (*See* AR176 ("Because the record here does not suggest a basis to find a violation of the regulatory standard at 11 C.F.R. § 109.10(e)(1)(vi) under its plain terms, a Respondent could raise equitable concerns about

whether a filer has fair notice of the requisite level of disclosure required by law if the Commission attempted to impose liability under Section [30104(c)(1)].").) Indeed, that principle underlies any decision not to go forward when proceeding would involve revisiting a longstanding interpretive regulation. The controlling group was reasonable in declining to revisit a regulatory interpretation through an enforcement proceeding against Crossroads GPS.

This Court therefore need not further consider any of plaintiffs' claims. Because the controlling group reasonably found no reason to believe that Crossroads GPS violated the regulation, they also reasonably took a lack of notice into account on any contrary interpretations in light of FECA's safe harbor provision. *See Shays v. FEC*, 414 F.3d 76, 95 (D.C. Cir. 2005) ("good-faith reliance on FEC regulations affords a defense against FEC sanction" (citing 2 U.S.C. § 438(e), now codified as 52 U.S.C. § 30111(e)); *McConnell v. FEC*, 251 F. Supp. 2d 176, 261–64 (D.D.C. 2003) ("as long as Plaintiffs abide by the regulations in good faith, they will not be subject to sanctions under FECA.") The Commission can reasonably decline to proceed with an understanding that "sanction" is not just limited to monetary sanctions, but also extends to the injunctive and declaratory relief sought by plaintiffs here. *See* Factual and Legal Analysis, FEC Matter Under Review 7101 at 12 n.45, https://www.fec.gov/files/legal/murs/current/119538.pdf (concluding that "sanction" in the advisory opinion context extends to forms of equitable relief that might be sought in a later enforcement action); *Alabama v. North Carolina*, 560 U.S. 330, 340-41 (2010) (noting that "the imposition of a nonmonetary obligation" can be "one kind of 'sanction'"); *United States v. Alabama*, 691 F.3d 1269, 1289 (11th Cir. 2012) ("A sanction is commonly understood to be 'a restrictive measure used to punish a specific action or to prevent some future activity.'").

Courts reviewing other similar federal statutes have concluded that Congress's intent when passing such provisions is to prevent exactly what plaintiffs have urged the Commission to do here, namely, to pursue statutory violations that are not encompassed by the statute. These laws provide the public with security that they will not be subject to sanction so long as they comply with an agency's guidance. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 428–29 (1990) (citing numerous such safe harbor statutes). For example, the Truth in Lending Act includes just such a provision to "promote reliance upon Federal Reserve pronouncements" and to "relieve the creditor of the burden of choosing 'between the Board's construction of the Act and the creditor's own assessment of how a court may interpret the Act.'" *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566–67 (1980). That provision "signals an unmistakable congressional decision to treat administrative rulemaking and interpretation under [Truth in Lending Act] as authoritative." *Id.* at 567-78. The safe harbor laws also protect the public against unexpected changes in agency positions, because "an agency must also be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, (2009)); *see also Encino Motorcars*, 136 S. Ct. at 2128 n.2 (Ginsburg, J., concurring) ("an affirmative defense in the Fair Labor Standards Act (FLSA) protects regulated parties against retroactive liability for actions taken in good-faith reliance on superseded agency guidance, 29 U.S.C. § 259(a)."). 52 U.S.C. § 30111(e) serves the same interests by assuring participants in election activity that they will not be subject to unexpected and unpredictable sanctions by relying on the Commission's regulations.

Moreover, even in the absence of the disclosure regulation, plaintiffs have not shown that there was sufficient evidence to find reason to believe respondents violated the statutory

disclosure requirement at 52 U.S.C. § 30104(c)(2)(C). The evidence plaintiffs have cited does not show that the contributions Crossroads GPS actually reported were made to further "an independent expenditure," but only that potential contributors were given information about the types of activities the group might conduct in order to support certain candidates. That does not establish the nexus between contribution and expenditure that the statute itself requires.

D. 52 U.S.C. § 30104(c)(1) Is an Ambiguous Statutory Provision and Therefore the Commission Properly Exercised Prosecutorial Discretion in Dismissing an Allegation That Crossroads GPS Violated It

Claim Three of plaintiffs' judicial Complaint asserts that the FEC acted contrary to law when it dismissed any allegation that Crossroads GPS violated 52 U.S.C. § 30104(c)(1) by not identifying *all* contributors of more than $200 in its independent expenditure reports. It is far from clear that Congress intended 52 U.S.C. § 30104(c)(1) to impose additional reporting requirements on groups that are not political committees but that engage in independent expenditures. However, even if the statute can be read in the manner that plaintiffs suggest, the Commission has wide discretion to exercise its prosecutorial authority to dismiss claims even in situations where there was an arguable violation of law. In this instance, where there is a significant question whether 52 U.S.C. § 30104(c)(1) even imposes the requirements that plaintiffs suggest and there is no record of FEC enforcement of that statutory provision in the manner sought by plaintiffs here, the controlling group acted well within its authority in deciding not to pursue an investigation against Crossroads GPS for the alleged violation. Furthermore, the "safe harbor" justification discussed above applies equally here – as long as Crossroads GPS was acting in good faith reliance on the regulation that has governed the disclosure at issue for decades, the FEC reasonably decided not to move forward against the group on a theory that another part of the statute requires more disclosure than the regulation.

1. Congress's Intent When Passing 52 U.S.C. § 30104(c)(1) Is Unclear

Plaintiffs argue that 52 U.S.C. § 30104(c)(1) requires the identification of all contributors over $200 and that that interpretation is "clear on the face of the statute" (Pls.' Mem. at 41), but plaintiffs' own administrative complaint *did not make that claim*, even though CREW is by any measure an experienced reader of FECA. (*See, e.g.*, Compl. ¶ 8 (stating that CREW's mission includes "seek[ing] to ensure that campaign finance laws are properly interpreted, enforced, and implemented").) Rather, the sole legal theory in the administrative complaint was that Crossroads GPS was required to identify only those contributors that gave for the purpose of furthering independent expenditures, a theory that the complainants recited in 26 different paragraphs.[6] The Commission should not be found to have acted "contrary to law" for failing to pursue an allegation not even presented by CREW in the administrative complaint.[7]

In any case, the likely reason that the administrative complaint failed to argue that additional disclosure was required under 52 U.S.C. § 30104(c)(1) is that the meaning of that particular provision is unclear. The ambiguity of this provision is evident in the title of the entire

---

[6] (*See* Amended Administrative Compl., AR 98-115 ¶ 31 ("None of the reports disclosed the names of any of the donors who made contributions for the purpose of broadcasting the advertisements shown to attendees at the fundraiser, or broadcasting other ads in those races."); ¶ 32 ("Crossroads GPS is aware of its obligations under the FECA and FEC regulations to disclose the names of its donors who made contributions for the purpose of broadcasting specific advertisements."); ¶¶ 33, 36-40, 44-46, 50-54, 57, 59, 60-64, 66-67; Conclusion (FEC should "order Crossroads GPS to correct these violations by amending the relevant independent expenditure disclosure reports to identify and make public each person who made a contribution in excess of $200 made for the purpose of furthering the reported independent expenditures.").)

[7] Indeed, the failure of plaintiffs to press their current interpretation of 52 U.S.C. § 30104(c)(1) in the administrative proceeding suggests that plaintiffs may not even have standing to bring the claim in this proceeding. 52 U.S.C. § 30109(a)(8) permits "[a]ny party aggrieved by an order of the Commission dismissing a complaint" to seek judicial review of that order in this district. But plaintiffs can hardly be considered "aggrieved" that the FEC dismissed an allegation that they did not even make. For that reason, the Court could grant summary judgment to the Commission on this claim on that ground alone and limit its substantive judicial review to alleged violations that were actually presented to the agency by plaintiffs.

subsection, the cross-reference in the provision, and the provision's uncertain relation to FECA's reporting requirements as a whole. Plaintiffs' appeal to the supposed plain language of the statute and to dicta from a non-controlling opinion of the Supreme Court are unavailing.

There are three provisions in the subsection dealing with the reporting of independent expenditures by those other than political committees. The first part, the subject of disagreement here, begins with a description of who must file independent expenditure statements. 52 U.S.C. § 30104(c)(1) ("Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year shall file a statement . . . ."). The second and third subsections are, respectively, about the contents of such statements and about indices that the FEC must prepare from those statements. *See* 52 U.S.C. § 30104(c)(2) ("Statements required to be filed by this subsection . . . shall include . . .**"**); 52 U.S.C. § 30104(c)(3) ("The Commission shall be responsible for expeditiously preparing indices . . ."). The structure of the subsection therefore matches the title of the subsection, which is "*Statements by other than political committees; filing; contents; indices of expenditures*." 52 U.S.C. § 30104(c). Under this reading, "Statements by other than political committees" refers to the subsection as a whole, while the three parts bracketed by semicolons refer to each individual provision. But section 30104(c)(1) also specifies that the filed statements should "contain[] the information required under subsection (b)(3)(A) of this section for all contributions received by such person." 52 U.S.C. § 30104(c)(1). Interpreting this part of section 30104(c)(1) as a provision about the content of independent expenditures appears to conflict with the language in the title, but interpreting 30104(c)(1) as solely about "filing," as the title suggests, arguably fails to give meaning to all of the words of the statute.

In addition, the provision's cross-reference stating that reports should "contain[] the information required under subsection (b)(3)(A)" is ambiguous. It is not clear that this cross-reference creates an additional content requirement because subsection (b)(3)(A), which deals with the content of reports filed by political committees, includes language that is inapplicable to filers that are *not* political committees. The provision directs that statements should include contributions "to the reporting committee during the reporting period." But independent expenditure statement filers under 52 U.S.C. § 30104(c) are often not "committees"; they may be individuals, corporations, or labor unions. Arguably, they are not "reporting" under the statute, because the law requires them to file independent expenditure or electioneering communication "statements," not "reports." *Compare id.* § 30104(a)(1) ("Each treasurer of a political committee shall file reports . . .") *with id.* § 30104(c)(1) ("Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year shall file a statement . . ."). And unlike political committees that file reports at scheduled intervals for reporting periods, such filers have no "reporting period."

The structure of 52 U.S.C. § 30104(c) deepens the ambiguity. Section 30104(c)(1) states that filers that are not political committees and that spend over $250 in independent expenditures "shall file *a* statement containing the information required under subsection (b)(3)(A)." 52 U.S.C. § 30104(c)(1) (emphasis added). But the following provision indicates that "[s]tatements required to be filed by this subsection . . . shall include" information that is dissimilar from what is required under subparagraph (b)(3)(A). 52 U.S.C. § 30104(c)(2). If Congress's intent was that a single statement would be filed, it is unclear whether the content of that statement should be what is listed in 52 U.S.C. § 30104(b)(3)(A) or in 52 U.S.C. § 30104(c)(1). But if Congress intended that two different statements would be filed, it should not have said that filers "shall file

a statement." And if the directive to "file a statement" is read to only apply to a statement containing the information in section 30104(c)(1), then there is no provision in the statute directing the filing of the statement contemplated in section 30104(c)(2).

Plaintiffs make several arguments that section 30104(c)(1) is a clear stand-alone disclosure requirement, but each of these arguments is flawed. As discussed above, the argument that such a reading is dictated by the plain language of the statute is untrue — reading the statute in that manner conflicts with the language and structure of other parts of the statute. Plaintiffs also rely on *FEC v. Massachusetts Citizens for Life, Inc.* ("*MCFL*"), 479 U.S. 238 (1986), for the proposition that the Supreme Court has interpreted section 30104(c)(1) as requiring the identification of all contributors. Justice Brennan's opinion in *MCFL* does contain a single sentence that appears to assume that the statute should be read in that manner, but that sentence was not essential to the holding of the case and in any event it was in a portion of the opinion only signed by four justices. *MCFL*, 479 U.S. at 262. Moreover, the very next year the Ninth Circuit interpreted section 30104(c)(1) in the opposite manner, and the Supreme Court denied certiorari. *See FEC v. Furgatch*, 807 F.2d 857, 859 n.2 (9th Cir. 1987) (stating that the contents of the statement contemplated by (c)(1) are specified in (c)(2)), *cert. denied*, 484 U.S. 850 (1987). That reading is consistent with the ensuing 30 years of FECA enforcement.

Plaintiffs also claim that, although the language of (c)(1) and (c)(2) suggest statements need to be filed with different information, this "paired reporting is sensible" because it provides the public both with general information about all contributors and specific information about those contributions made to further independent expenditures. (Pls.' Mem. at 40.) But plaintiffs make no attempt to explain why Congress would require this type of "paired reporting" for those that make independent expenditures other than political committees, but not for political

committees, which are also capable of making independent expenditures. In fact, the statute states explicitly that political committees have a duty to report independent expenditures (*see* 52 U.S.C. § 30104(g)(1)(A), (2)(A)), but that when they do so, the content of that statement need only "contain the information required by subsection (b)(6)(B)(iii)," a subsection that requires disbursement, not contributor information. 52 U.S.C. § 30104(g)(3)(B).

In light of these issues, it is reasonable for the controlling group of FEC Commissioners to interpret 52 U.S.C. § 30104(c)(1) not to establish an anomalous, stand-alone reporting requirement for persons that are not political committees, over and above the clear event-driven reporting of 52 U.S.C. § 30104(c)(2). And to the extent the Commission's regulation at 11 C.F.R. § 109.10(e) was an implementation of both statutory provisions, that construction of arguably competing statutory commands — which may be debatable but has not been revised — is entitled to deference under step two of the *Chevron* framework. 467 U.S. at 842, 844.

2. The Commission Properly Exercised Discretion in Dismissing the Allegation of a Violation of 52 U.S.C. § 30104(c)(1)

The FEC is afforded great deference in judicial review of decisions not to proceed with enforcement cases as exercises of prosecutorial discretion. *Heckler v. Cheney*, 470 U.S. 821, 831 (1985) ("[A]n agency's decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion."); *see also La Botz v. FEC*, 61 F. Supp. 3d 21, 33 (D.D.C. 2014) ("The prosecutorial discretion afforded to the FEC is considerable." (internal quotation marks omitted)). This is so because the "agency is in a unique — and authoritative — position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way." *In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991). Such "budget flexibility as Congress has allowed the agency is not for [the courts] to hijack." *Id.* Courts have repeatedly applied these principles in affirming particular FEC decisions not to pursue

enforcement of FECA. *See Nader v. FEC*, 823 F. Supp. 2d at 65 ("[T]he Court believes that the FEC is in a better position to evaluate its own resources and the probability of investigatory difficulties than is [the plaintiff]."), *vacated on other grounds*, 725 F.3d 226 (D.C. Cir. 2013); *Stark v. FEC*, 683 F. Supp. 836, 840 (D.D.C. 1988) ("[I]t is . . . surely committed to the Commission's discretion to determine where and when to commit its investigative resources.") (citing *Heckler*, 470 U.S. at 831-32). Indeed, the FEC retains prosecutorial discretion to dismiss an administrative complaint even if it identifies a violation, because the "FEC is not required to pursue every potential violation of FECA." *La Botz*, 61 F. Supp. 3d at 35; *CREW. v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007) ("The Supreme Court in *Akins* recognized that the Commission, like other Executive agencies, retains prosecutorial discretion.").

In this case, the FEC exercised its prosecutorial discretion and dismissed the 52 U.S.C. § 30104(c)(1) allegation due to concerns that a "[r]espondent could raise equitable concerns about whether a filer has fair notice of the requisite level of disclosure required by law." (AR176.) "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (setting aside orders against TV stations due to FCC's lack of fair notice about its new interpretation of an indecency law). In an administrative proceeding, the Constitution's due process clause requires that the agency provide the "precision and guidance [that] are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Friedman v. Sebelius*, 686 F.3d 813, 831 (D.C. Cir. 2012) (quoting *Fox*, 567 U.S. at 254).

The concern about a lack of fair notice here is clearly reasonable. The Commission had promulgated a regulation more than thirty years earlier that provided guidance to persons other than political committees about their reporting obligations. The agency never issued any

additional guidance suggesting that it intended to enforce 52 U.S.C. § 30104(c)(1) as a stand-alone reporting requirement going forward. It was clearly reasonable for the controlling group of FEC Commissioners to determine that the lack of enforcement of 52 U.S.C. § 30104(c)(1) as a separate reporting requirement, along with the absence of any other guidance since 1980 suggesting that the FEC would interpret the statute in that manner, "fail[ed] to provide a person of ordinary intelligence fair notice of what is prohibited" if section 30104(c)(1) were used as a basis for enforcement as CREW seeks. *Fox*, 567 U.S. at 254 (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)). Thus, it was reasonable to exercise prosecutorial discretion here.

Plaintiffs attempt to distinguish these "fair notice" cases by asserting that Crossroads GPS had fair notice because the rule is "plainly stated in the statute" (Pls.' Mem. at 43) and because Crossroads GPS stated in the administrative proceeding that it "is fully aware of its FEC reporting and disclosure obligations" (*id*. at 42 (quoting AR81). But as described *supra* pp. 23-28, the idea that 52 U.S.C. § 30104(c)(1) requires disclosure of all contributors is far from "plainly stated." And Crossroads GPS's statements of familiarity with the reporting requirements are not evidence that it agreed with plaintiffs' novel interpretation of FECA.

Because there are competing demands on the FEC's resources, it is not contrary to law for the agency to focus its law enforcement resources on other claims. *Akins v. FEC*, 736 F. Supp. 2d 9, 22 (D.D.C. 2010) ("Absent evidence that the Commission's investigation was so inadequate as to constitute an abuse of discretion, it is not this Court's place to direct the Commission how to expend its resources, and it is certainly not the plaintiffs'."). And given the ambiguous state of the law here, pursuing such a claim against Crossroads GPS would very likely have led to lengthy and uncertain litigation over the proper reading of the statute. *See CREW v. FEC*, 236 F. Supp. 3d 378, 394 (D.D.C. 2017) (granting summary judgment to FEC for

its exercise of prosecutorial discretion because "[t]he FEC had a rational basis for concluding that 'novel legal issues' existed in this case, and that resolving them in this forum would have been a 'pyrrhic' exercise fraught with litigation risk"). The Commission reasonably chose to focus its resources elsewhere.

III. 11 C.F.R. § 109.10(E)(1)(VI) PROVIDED A REASONABLE BASIS FOR DISMISSAL AS A VALID REGULATION UNDER THE APA AND *CHEVRON*

The FEC regulation that plaintiffs have challenged is a reasonable rule that hews closely to the language of the statute, resolves ambiguities, and provides clear guidance to filers about what their reporting responsibilities are under FECA. The Commission adopted the regulation in 1980 after a notice-and-comment period in which no commenters said anything about this issue. Under the highly deferential standard of review, this regulation satisfies the APA and the two-step analysis of *Chevron*. The statutory language at 52 U.S.C. § 30104(c) is ambiguous and cannot be resolved at *Chevron* step one, but consistent with *Chevron* step two, the Commission's regulation reasonably attempts to resolve that ambiguity in a way that is consistent with Congressional intent and provides clear guidance to filers. The controlling group's reliance on the regulation in its dismissal decision thus did not violate the APA.

A. The Commission's Dismissal Should Be Affirmed Under the APA Unless the Challenged Regulation Is Arbitrary, Capricious, or in Excess of Statutory Jurisdiction

When reviewing a challenge to agency action under the APA, the "district court sits as an appellate tribunal" and the "entire case on review is a question of law." *Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1225-26 (D.C. Cir. 1993). Under the APA, the Court may set aside 11 C.F.R. § 109.10(e)(1)(vi) only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. §§ 706(2)(A) & (C).

The standard for judicial review in an APA challenge is "highly deferential," *Sierra Club*, 353 F.3d at 978 (D.C. Cir. 2004), and so the scope of review is narrow, s*ee Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In fact, the arbitrary and capricious standard "presumes the validity of agency action." *Volpe*, 401 U.S. at 415; *see Cellco P'ship v. FCC*, 357 F.3d 88, 93-94 (D.C. Cir. 2004). The Court is "not to substitute its judgment for that of the agency," but instead is to satisfy itself that the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (citation and internal quotation marks omitted). Where the empowering provision of a statute authorizes the agency to "make . . . such rules [. . .] as are necessary to carry out the provisions of this Act," as FECA does in 52 U.S.C. § 30107(a)(8), the "validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 369 (1973) (citation omitted). And when, as here, an agency has made a determination that falls within its area of special expertise, deference is at its zenith. *See Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983).

Because plaintiffs here challenge a regulation that interprets a statute the FEC administers, the Court reviews the regulation not only under the APA but also under the two-step *Chevron* framework. The Court looks first to determine "whether Congress has directly spoken to the precise question at issue," and if it has, "the [C]ourt, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. In this step-one analysis, "the term 'precise question at issue' [is] to be interpreted tightly." *See Cent. States Motor Freight Bureau v. ICC*, 924 F.2d 1099, 1104 (D.C. Cir. 1991). Only if "an accepted

canon of construction illustrates that Congress had a *specific* intent on the issue in question" can the case "be disposed of under the first prong of *Chevron*." *Mich. Citizens for an Indep. Press v. Thornburgh*, 868 F.2d 1285, 1292-93 (D.C. Cir. 1989) (emphasis in original).

If Congress has not "directly spoken to the precise question at issue," the Court proceeds to the second step of *Chevron* analysis. At that stage, the Court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 842, 844.[8] Instead, the Court is to "defer to the agency's interpretation as long as it is 'based on a permissible construction of the statute.'" *Bluewater Network v. EPA*, 372 F.3d 404, 410 (D.C. Cir. 2004) (quoting *Chevron*, 467 U.S. at 843. The "interpretation need not be the best or most natural one by grammatical or other standards . . . . [r]ather[, it] need be only reasonable to warrant deference." *Pauley v BethEnergy Mines, Inc.*, 501 U.S. 680, 702 (1991) (citations omitted). "[U]nder *Chevron*, courts are bound to uphold an agency interpretation as long as it is reasonable — regardless whether there may be other reasonable, or even more reasonable, views." *FEC v. National Rifle Ass'n of Am.*, 254 F.3d 173, 187 (D.C. Cir. 2001) (quoting *Serono Labs, Inc. v. Shalala*, 158 F.3d 1313, 1321 (D.C. Cir. 1998)). A "permissible" construction means only "a construction that is 'rational and consistent with the statute.'" *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *NLRB v. Food & Commercial Workers*, 484 U.S. 112, 123 (1987)). If "the statute is ambiguous, then *Chevron* step two implicitly precludes courts picking and choosing among various canons

[8] This step overlaps with the arbitrary and capricious standard of the APA, *Chamber of Commerce of the U.S. v. FEC*, 76 F.3d 1234, 1235 (D.C. Cir. 1996), because the question of whether an agency's interpretation of a statute is unreasonable is "close analytically to the issue whether an agency's actions under a statute are unreasonable," *Gen. Instrument Corp. v. FCC.*, 213 F.3d 724, 732 (D.C. Cir. 2000).

of construction to reject reasonable *agency* interpretations." *Halverson v. Slater*, 129 F.3d 180, 184 (D.C. Cir. 1997) (citation and internal quotation marks omitted; emphasis in original).

B. There Are Significant Ambiguities in the Statute Governing Independent Expenditure Reporting by Persons Other Than Political Committees

52 U.S.C. § 30104(c)(2)(C) is ambiguous and the FEC was entitled to clarify it through 11 C.F.R. § 109.10(e)(1)(vi). Under the first step of *Chevron* analysis, "the court examines whether the statute speaks 'directly … to the precise question at issue.'" *Kanchanalak*, 192 F.3d at 1047 (citation omitted). If so, the court must give effect to the clearly expressed intent of Congress. *Chevron*, 467 U.S. at 842. However, "[i]f the statute 'has not directly addressed the precise question at issue,' then the agency's construction, if reasonable, should be honored." *Kanchanalak*, 192 F.3d at 1047 (citation omitted).

This statute does not directly address the question at issue here. The precise question is the circumstances in which a person other than a political committee must identify its contributors when it reports independent expenditures to the FEC. Because FECA is ambiguous on this question, as explained in the next two subsections, Congress did not clearly express its intent and the FEC had the authority to promulgate a regulation addressing that ambiguity.

1. It Is Unclear What Congress Meant by "for the Purpose of Furthering an Independent Expenditure"

Before examining the language of the statutory provision at issue for ambiguity, it is first helpful to look holistically at the overall structure of 52 U.S.C. § 30104. The first subsection, 52 U.S.C. § 30104(a), describes how and when political committees make their regular disclosure reports to the FEC. Depending upon the type of political committee involved, the amount of money raised, and whether it is an election year, committees are required to file regular reports at specific times, either monthly or quarterly, with additional pre-election and post-election reports.

52 U.S.C. §§ 30104(a)(2), (3), (4). Section 30104(b) describes what must be disclosed in those reports. Among other things, political committees must disclose the identity of each contributor who contributes more than $200 and "who makes a contribution to the reporting committee during the reporting period." 52 U.S.C. § 30104(b)(3)(A).

52 U.S.C. § 30104(c) describes the filing of reports by persons that are *not* registered as political committees, like Crossroads GPS, and that "make[] independent expenditures in an aggregate amount or value in excess of $250 during a calendar year." Unlike the routine scheduled reporting required of political committees, the statutory provision governing such other groups does not contain any specific reporting schedule or periods. Rather, the reports filed by such other groups engaged in independent expenditures are triggered by particular events. For example, such a group that "makes or contracts to make independent expenditures aggregating $1,000" within a 20-day period before an election must file an "initial report" within 24 hours after making or contracting to make those expenditures, and must file additional reports within 24 hours for each set of independent expenditures made during that time period that aggregate over $1,000. 52 U.S.C. §§ 30104(g)(1)(A), (B). A person that "makes or contracts to make independent expenditures aggregating $10,000 or more" at any time leading up to the 20-day pre-election period must file an "initial report" within 48 hours of making or contracting to make those expenditures, and must file additional reports within 48 hours for each set of independent expenditures made before the 20-day pre-election period that aggregate over $10,000. 52 U.S.C. § 30104(g)(2)(A), (B). The FEC has established one reporting requirement for such groups that is not immediately triggered by an event: Under 11 C.F.R. § 109.10(b), a person other than a political committee that makes more than $250 in independent expenditures must file a quarterly report in any quarter in which it has made such expenditures.

Thus, because political committees by their very nature are primarily concerned with influencing federal elections, Congress requires them to follow a routine pattern of disclosure, with specific reporting periods in which both contributions and expenditures are disclosed. By contrast, FECA requires entities that are not political committees to make disclosures only if and when they engage in particular spending levels of independent expenditures, and it does not set regular reporting periods for them. Rather, the deadlines for those reports are triggered by the specific act of making independent expenditures that reach those threshold amounts in the aggregate. Because of the $1,000 and $10,000 reporting thresholds, the aggregate reports can be filed at irregular intervals, and they can potentially include multiple independent expenditures over a period of time. The different reporting structures indicate that Congress wanted regular, comprehensive disclosure from political committees, but believed that event-driven disclosure was sufficient for the independent expenditures of groups that are not political committees.

Understanding these contrasting structures is critical to understanding the ambiguity in the statutory disclosure provision at the heart of this case. The relevant question is whether there is ambiguity in the indefinite article "an" within the requirement that entities other than political committees report "the identification of 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.) Plaintiffs insist that "the use of the indefinite clearly covers the full category of independent expenditures the reporting party has created or may create." (Pls.' Mem. at 31-32.) But an indefinite article does not indicate that a full category is covered; rather, it only indicates "[s]ome undetermined or unspecified particular." *McFadden v. United States*, 135 S. Ct. 2298, 2304 (2015) (quoting *Webster's New International Dictionary* 1 (2d ed. 1954).) Because one or more independent expenditures may

be reported in a single statement, it is reasonable to interpret "an independent expenditure" as a reference to any one of the independent expenditures reported in a particular filing with the FEC.

Interpreting "an" as simply referring to an unspecified independent expenditure from a particular report to the FEC is preferable in some ways to the interpretation plaintiffs favor. Plaintiffs propose that "an" should refer to "all contributions given for the purpose of furthering any independent expenditure, regardless of whether the contribution was given for the purpose of reporting the particular independent expenditure reported" (Pls.' Mem. at 33), but that construction creates as many questions as it resolves. As noted above, independent expenditure statements are unlike political committee reports, for which the statute creates specific reporting periods and requires a political committee to report all of the expenditures they make and contributions they receive during that specific reporting period. 52 U.S.C. § 30104(a)(2)-(4). There are no such regular reporting periods for independent expenditure reports. So assuming a group that is not a political committee receives a contribution for the purpose of furthering an independent expenditure, it is unclear where and when that information should be reported under plaintiffs' interpretation. The language of the statute suggests that all such reports "shall include" (52 U.S.C. § 30104(c)(2)) "the identification of *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" (*id.* § 30104(c)(2)(C) (emphasis added)). Taken literally, this would create the odd result that an organization like Crossroads GPS, which filed more than 100 different independent expenditure reports in the two-year 2012 election cycle, would need to include on each report a recitation of all the contributors that had ever contributed to it for the purpose of furthering independent expenditures, possibly for its entire existence. It would be cumbersome and confusing to the public to provide such duplicative information. In addition,

plaintiffs' interpretation could generate misleading information about particular contributions. For example, if a contributor gave a contribution with specific instructions to use it to further independent expenditures in a Ohio U.S. Senate race, but not in a Nevada Senate race, that contribution would nonetheless have to be reported on an independent expenditure form that reports spending in Nevada.

Further problems with plaintiffs' interpretation relating to timing are evident in light of their allegation that Crossroads GPS should have identified contributors who attended its fundraiser and watched "example" videos of independent expenditure ads. According to information from Crossroads GPS, 13 of the 14 advertisements that were shown at the fundraiser had already been broadcast and fully paid for before the fundraiser even took place. (AR78.) As a result, the independent expenditure statements for those 13 advertisements would have already been filed without the contributor information sought by plaintiffs. But if Crossroads GPS decided to run independent expenditures the next day that were for completely different races and took completely different positions from the ones taken in the ads shown at the fundraiser, the contributors at the fundraiser would be listed as having contributed in furtherance of those advertisements that they had never seen or had any awareness of. The only remaining advertisement shown at the fundraiser was apparently never broadcast at all. If a contributor had donated with the specific intention of paying for that advertisement that never ultimately aired, it is not clear which form or forms should identify that contributor.

In short, while Congress intended the regular reports filed by a political committee to display all of that committee's activities during a certain period, the event-driven independent-expenditure reports filed by other entities are intended to provide information only about the reported expenditure, not a wider range of activity. It is therefore reasonable, at a minimum, to

interpret the statutory term "an" to envision a match between the independent expenditure(s) reported in a statement and the contributors listed on that same statement. Because each independent expenditure statement is a stand-alone document that details one or more independent expenditures, the word "an" can be read to refer to any of the independent expenditures *that are described in the actual report*. Interpreting "an" in that manner eliminates the concern about cumbersome and confusing duplicative filings of contributor information over and over again on each statement. And it eliminates the concern that a contributor would be identified on a report of an independent expenditure that she did not make her contribution in furtherance of or even specifically instructed that her contribution not be used for. Because multiple independent expenditures can be described in a single report, reading the word "an" in this way preserves the match between the contributors listed on an independent expenditure statement and the independent expenditures that are the reason for filing that statement.

In *Van Hollen v. FEC*, 811 F.3d 486 (D.C. Cir. 2016), the D.C. Circuit evaluated a comparable event-driven FEC disclosure regulation and concluded that even statutory language that might appear clear on its face nonetheless contained ambiguities that could reasonably be resolved by the Commission in promulgating a regulation. In *Van Hollen*, the plaintiff challenged a disclosure regulation promulgated by the FEC that dealt with the reporting of electioneering communications. "Electioneering communication[s]" are communications that do not qualify as independent expenditures under the statute but do "refer[ ] to a clearly identified candidate" and are "made within 60 days before a general [election]" or "30 days before a primary [election]." 52 U.S.C. §§ 30104(f)(3)(A)(i), (B)(ii). The statute at issue in that case, now codified at 52 U.S.C. § 30104(f), states that reports to the FEC about electioneering communications not made from a segregated fund must include "the names and addresses of *all*

contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date." 52 U.S.C. § 30104(f)(2)(F) (emphasis added). The Commission later promulgated a regulation to govern disclosure by a category of reporting entities (corporations and unions) that, like the reporting entities at issue here, were not political committees, and that Congress had not originally envisioned making such communications at all, but which gained the right to do so after a Supreme Court opinion. *Van Hollen*, 811 F.3d at 490–91 ("The FEC was now left to decide how BCRA's disclosure requirements should apply to a class of speakers Congress never expected would have anything to disclose.")

Although the statutory language directed reporting of "all contributors who contributed," the Commission regulation interpreted the contributor reporting requirement to apply, for that category of entities, only to contributions "made for the purpose of furthering electioneering communications." 11 C.F.R. § 104.20(c)(9). That regulation was challenged as being in direct conflict with the language of the statute, but the D.C. Circuit held that the Commission had the authority to promulgate an interpretive rule because the panel "[did] not find that 'Congress had an intention on the precise question at issue." *Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108, 111 (D.C. Cir. 2012) (quoting *Chevron*, 467 U.S. at 843 n. 9). The same principle applies here, where there is no indication Congress had a clear intent about who should appear on an FEC report identifying those 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.) Plaintiffs try to distinguish *Van Hollen* in light of the different genesis of the regulation at issue (Pls.' Mem. at

32-33), but the key point is that context can render ambiguous even statutory text that may seem straightforward when viewed narrowly, and that is the case with section 30104(c)(2)(C).

2. Congress's General Desire for Disclosure on Other Subjects Does Not Mean It Intended to Mandate the Specific Disclosure Plaintiffs Favor

FECA does not require the FEC to maximize disclosure in all contexts. Indeed, it is wrong to "assume[] that Congress's *primary* goal was *ipso facto* its only goal," because '"no legislation pursues its purposes at all costs.'" *Student Loan Mktg. Ass'n v. Riley*, 104 F.3d 397, 408 (D.C. Cir. 1997) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (emphasis added)). "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez*, 480 U.S. at 526 (emphasis in original). Here, as in *Riley*, 104 F.3d at 408, there is "no evidence that [FECA] was the product of monomaniacs." *See also Office of Workers Comp. v. Newport News*, 514 U.S. 122, 135 (1995) (Supreme Court has dismissed "the proposition that the statute at hand should be liberally construed to achieve its purposes" as the "last redoubt of losing causes.")

The Court in *Van Hollen v. FEC* rejected an argument that is virtually identical to the one plaintiffs now make about the statute's independent expenditure reporting, holding that it was reasonable for the FEC to interpret the statute's electioneering communications disclosure provision to refer only to those contributions made for the purpose of furthering electioneering communications, despite the absence of that specific language in the statute. 811 F.3d at 501-02. The Court of Appeals explained that although some might prefer the statute to be interpreted to require more disclosure, the Commission's purpose-driven regulation — which was based in part on 52 U.S.C. § 30104(c)(2)(C), the same statutory provision at issue here — had reasonably

balanced FECA's interests in disclosure with the needs of regulated entities. *Id.* at 499 ("And the FEC's concerns about the competing interests in privacy and disclosure were legitimate."). The Commission's "tailoring was an able attempt to balance the competing values that lie at the heart of campaign finance law." *Id.* at 501.

Moreover, the very statutory provision on which plaintiffs here rely shows that Congress did not intend to pursue maximum disclosure at the expense of all other interests. The requirement at issue — that entities other than political committees identify those who gave a contribution "which was made for the purpose of furthering an independent expenditure," 52 U.S.C. § 30104(c)(2)(C) — contains undisputed *limits* on contributor disclosure, with its event-driven and dollar-amount parameters, as discussed above. Had Congress been solely interested in providing the public with the greatest amount of information about the sources of funding used by such entities, it could have drafted the statute in a manner similar to the requirement that political committees identify all their contributors on a regular basis. It did not do so.

C. The Commission's Regulation Passes *Chevron* Step 2 Because It Reasonably Requires Disclosure Consistent with Congress's Statutory Directive

Under *Chevron* step two, "courts are bound to uphold an agency interpretation as long as it is reasonable — regardless of whether there may be other reasonable, or even more reasonable, views." *Nat'l Rifle Ass'n*, 254 F.3d at 187. Agencies "must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 157 (2000) (quoting *State Farm*, 463 U.S. at 42). 11 C.F.R. § 109.10(e)(1)(vi) is a reasonable interpretation of FECA's reporting requirements for entities that are not political committees but that make independent expenditures.

1. The Commission's Clarification That Contributions Be Disclosed If They Are for the Purpose of "the Reported" Independent Expenditure Is a Reasonable Statutory Interpretation

The language of 11 C.F.R. § 109.10(e)(1)(vi) is virtually identical to the statutory language of 52 U.S.C. § 30104(c)(2)(C). The statute directs non-political committees to include on their independent expenditure reports "the identification of 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 requires "[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 argue that the substitution of "the reported" for "an" causes conflict with the regulation, but the change simply clarifies ambiguity in the statute. *See supra* pp. 34-41.

a. The Commission's Decision to Substitute "the Reported" for "An" Was a Reasonable Interpretation That Provides Greater Guidance to Regulated Entities and Reduces the Chance of Misleading the Public About Political Spending

In light of the ambiguity of the word "an" in the statute, *see supra* pp. 34-41, the Commission's decision to substitute "the reported" in the regulation was a useful clarification, consistent with the intent of Congress, which sought to enhance the ability of the regulated community to comply with the law. Plaintiffs suggest that this modest alteration created a significant disconnect between the regulation and statute, but it is unclear whether it has even resulted in any significant difference in the amount of disclosure of contributors.

Had the FEC promulgated a rule with language identical to the statute, or not promulgated one at all, a group like Crossroads GPS making independent expenditures might not understand as clearly what contributors to include on its reports. It would not be unreasonable

for such a group to read 52 U.S.C. § 30104(c)(2)(C) as requiring the disclosure of contributors who gave for the purpose of furthering the independent expenditures listed on its FEC Form 5, nor would it be unreasonable for that filer to interpret the statute as requiring reporting of contributors who gave for the purpose of furthering any of the group's independent expenditures. The Commission's choice to resolve the ambiguity in favor of only reporting contributors that gave to further a particular independent expenditure retains the close connection that Congress appears to have intended between the independent expenditures reported and the contributors reported on that same FEC form. Under the statute, groups other than political committees do not file reports merely because they have received contributions, but only after they have used the contributions to pay for independent expenditures. And the statute does not provide for general reporting periods for such groups; rather, it provides that reports be filed within 24 or 48 hours after an independent expenditure is made.

Because a single organization can make independent expenditures in many different elections and with varying content, the Commission's regulatory approach also results in the reporting of contributor data that is more likely to reflect accurate information. A contributor that gave for the purpose of furthering an expenditure for a Senate candidate in one state with a pro-business message might be dismayed to learn that his contribution was reported publicly on a form detailing an expenditure for another candidate with a message regarding a hot-button social issue. To the extent that the public used that information to learn which contributors were supporting particular candidates and messages, removing a specific link between contribution and expenditure would in some respects diminish the value of the information.

Plaintiffs argue (Pls.' Mem. at 28-30) that the Commission's choice has meaningfully reduced the amount of disclosure in recent years, but that is not a proper subject of review here,

as explained *infra* pp. 47-49. But even if it were, plaintiffs have failed to produce evidence of it. A contributor that wishes to remain anonymous by making sure his contribution was not made for the purpose of a particular independent expenditure could just as easily make sure his contribution was not made for the purpose of any independent expenditure. For example, even though the report providing the Commission's reasoning in this case analyzed Crossroads GPS's compliance using the regulatory language rather than the statutory language, it is not clear that Crossroads GPS would have been legally required to file the contributor information sought by plaintiffs even if 52 U.S.C. § 30104(c)(2)(C) were read in the expansive manner urged by plaintiffs. For example, Karl Rove's affidavit submitted in response to the administrative complaint stated that the contribution from the donor that pledged $3 million "was not in any way earmarked for any particular use" (AR95 ¶ 10) and prior discussions with that contributor included no mention of television advertisements or any other specific communication efforts (AR94-95 ¶¶ 6-10). To the extent that plaintiffs believe there is inadequate reporting, they would appear to be primarily taking issue with the link that 52 U.S.C. § 30104(c)(2)(C) requires between contributions and independent expenditures, not the implementing regulation.

In this context, plaintiffs rely on misleading characterizations of certain statements by the FEC's Office of General Counsel. The First General Counsel's Report provided comprehensive legal advice to the Commission for its consideration, including discussion of different legal options and approaches. However, plaintiffs wrongly characterize that Report as having "acknowledged . . . that the disclosure requirements imposed by 11 C.F.R. § 109.10(e)(1)(vi) conflicted with statutory requirements imposed by FECA." (Pls.' Mem. at 24.) The Office of General Counsel did no such thing, but merely presented the Commission with possible legal approaches to the issue. The Office of General Counsel never even took a position about the best

manner to read the statute, noting only that the statute "may reasonably be construed" in a particular way. (AR173.) Similarly, the Office of General Counsel did not "recognize[]" that the statute and regulation were in conflict due to the presence of 52 U.S.C. § 30104(c)(1). (Pls.' Mem. at 24.) Rather, it simply noted that it was *possible* to read them as being in conflict, without taking any position as to the correct interpretation of the statute. (AR175 (statute takes "an *arguably* more expansive approach" than the regulation (emphasis added)).)

b. The Commission's Regulation Does Not Make the Statute Redundant

Plaintiffs argue that 11 C.F.R. § 109.10(e)(1)(vi) is unreasonable because it "makes subsection (c)(2)(C) redundant to other disclosure provisions of the FECA and FEC regulations" (Pls.' Mem at 34-35; *see generally id.* at 34-38), but plaintiffs' criticism is based on an apparent misreading of the regulation. Plaintiffs wrongly claim that "the FEC's construction of 52 U.S.C. § 30104(c)(2)(C) via 11 C.F.R. § 109.10(e)(1)(vi) would require such a close connection between the contributor and the independent expenditure that the contributor would in fact be the maker of the independent expenditure itself" (Pls.' Mem. at 35), suggesting that a contributor must actually control an independent expenditure in order for identification to be required (*id.* at 34-38). But a contribution can be made "for the purpose of furthering the reported independent expenditure" in a variety of ways that would not turn the contributor into the maker of an independent expenditure. A contributor might do so simply by responding to a solicitation or by earmarking a contribution. If, for example, a group solicits contributions for the purpose of making a particular independent expenditure, the contributor of any contribution over $200 made in response to that solicitation would need to be reported. Even without a solicitation, a contributor could indicate that she wanted her contribution to be used to pay for a particular

advertisement, and that contribution would need to be reported. In both of these scenarios, the maker of the independent expenditure retains control of the funds and the ad itself.

2. The Court Should Not Consider Evidence That Post-Dates the Commission's 1980 Rulemaking

a. Review of the Regulation Is Limited to the Administrative Record That Existed When the FEC Issued the Regulation

Plaintiffs rely on evidence about independent expenditure disclosure that post-dates the Commission's 1980 rulemaking (*see, e.g.*, Pls.' Mem. at 13-17, 33-34 & 34 n.15), but the "focal point of judicial review" of a federal agency's decision in a rulemaking challenged under the APA "should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 141-142 (1973) (per curiam). *See also, e.g.*, *Volpe*, 401 U.S. at 420 ("review is to be based on the full administrative record that was before the [agency] at the time [it] made [its] decision" (footnote omitted)). "To review more than the information before the [decision-maker] at the time she made her decision risks our requiring administrators to be prescient . . . ." *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 793 (D.C. Cir. 1984); *see also Vermont Yankee Nuclear Power Corp. v. Nat'l Res. Defense Council, Inc.*, 435 U.S. 519, 554-55 (1978) (internal quotation marks and citation omitted). "'Were courts cavalierly to supplement the record, they would be tempted to second-guess agency decisions in the belief that they were better informed than the administrators empowered by Congress and appointed by the President.'" *Amfac Resorts, L.L.C. v. Dep't. of Interior*, 143 F. Supp. 2d 7, 11 (D.D.C. 2001) (quoting *Deukmejian v. NRC*, 751 F.2d 1287, 1325-26 (D.C. Cir. 1984), *aff'd in relevant parts sub nom. San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26 (D.C. Cir. 1986) (en banc)).

Plaintiffs argue in a footnote that it is proper for the Court to consider material outside the record in certain circumstances (Pls.' Mem. at 34 n.15), but none of the cases cited suggests that the Court can consider evidence about unforeseeable events that took place long after the Commission acted. This use of later evidence is precisely what is prohibited in a challenge of this type. *See IMS, P.C. v. Alvarez*, 129 F.3d 618, 624 (D.C. Cir. 1997); *Boswell*, 749 F.2d at 793. A "judicial venture outside the record . . . can never, under *Camp v. Pitts*, examine the propriety of the decision itself." *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 286 (D.C. Cir. 1981) (footnote omitted).[9] If plaintiffs believe that later events call for revisiting the challenged regulation, the proper recourse is to submit a rulemaking petition to the FEC. *See Reytblatt v. U.S. Nuclear Regulatory Comm'n*, 105 F.3d 715, 723 (D.C. Cir. 1997).

b. Plaintiffs' Complaints Here Are Largely the Result of Changes in the Legal Landscape That Were Unforeseeable in 1980

As plaintiffs themselves note with regard to the non-record evidence they present here, "the impact of the new FEC regulation was very small, at least initially" and "[b]efore 2008, when only small non-profit corporations could engage in politicking, outside spending without disclosure of the source of the funds used was relatively nonexistent." (Pls.' Mem. at 14, 15.) When the FEC issued its rule, corporations and unions were barred from making independent expenditures or electioneering communications that contained express advocacy or its functional equivalent. *See FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 469-70 (2007). Only after *Citizens United v. FEC* held that corporations had a constitutional right to finance such communications with their general treasury funds did the FEC's regulation apply to the vast

[9] S*ee also Nat'l Treasury Employees Union v. Hove*, 840 F. Supp. 165, 169 (D.D.C. 1994) ("consideration of outside evidence to determine the correctness or wisdom of the agency's decisions is not permitted"); *Nat'l Park and Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 11 n.2 (D.D.C. 1999) (refusing to consider extra-record and post-decisional evidence); *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 105 n.2 (D.D.C. 1995) (same).

number of independent expenditures by groups other than political committees that it does today. 558 U.S. 310, 365 (2010). Such changes were unforeseeable when the FEC promulgated its regulation and the agency is not required to be "prescient." *Boswell*, 749 F.2d at 792. The regulation reasonably interpreted the statute, as the law and binding precedent existed in 1980.

IV. THE PROPER REMEDY FOR ANY FINDING THAT THE FEC ERRED BY DISMISSING THE ADMINISTRATIVE COMPLAINT OR THAT THE REGULATION IS UNLAWFUL WOULD BE REMAND TO THE COMMISSION

If the Court determined that the FEC acted unlawfully in dismissing plaintiffs' administrative complaint, the proper remedy would be to "direct the Commission to conform with such declaration within 30 days." 52 U.S.C. § 30109(a)(8)(C). Plaintiffs suggest that if the Court finds the FEC acted unlawfully, it could authorize CREW to file a "citizen suit" against Crossroads GPS. (Pls.' Mem. at 43-44.) But FECA only authorizes that remedy if the Commission first fails to obey a court's order on remand. 52 U.S.C. § 30109(a)(8)(C). Plaintiffs also seek to have 11 C.F.R. § 109.10(e)(1)(vi) vacated, but they have not brought a freestanding challenge to it. They have only brought a claim ("Claim Two") in connection with that regulation alleging that "The FEC's Failure to Find Reason to Believe that Crossroads GPS Violated 52 U.S.C. § 30104(c)(2) was Arbitrary, Capricious, an Abuse of Discretion, and Contrary to Law." (Compl., text above ¶ 117.) And they have only been deemed to have brought a challenge to the regulation that is not time-barred because they raised the claim in that context of being "affected" by the FEC's dismissal. *CREW*, 243 F. Supp. 3d at 101. Indeed, the Court has already held that "[i]n the event that the plaintiffs ultimately prevail on their APA challenge to the regulation, . . . the Court would remand this action to the FEC for reconsideration of the plaintiffs' administrative complaint in light of the Court's opinion." *Id.* at 105. Plaintiffs make no effort to explain why that holding is no longer applicable.

In addition, even if this case had not arisen in the context of an enforcement dismissal, if the Court determined that 11 C.F.R. § 109.10(e)(1)(vi) was unlawful, the appropriate remedy would be a remand, not the unusual remedy of vacating the regulation, as plaintiffs urge. (Pls.' Mem. at 45.) "The decision whether to vacate depends on [1] 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and [2] the disruptive consequences of an interim change that may itself be changed.'" *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (quoting *Int'l Union, United Mine Workers v. Fed. Mine Safety and Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990)). The 2018 elections are approaching and, if there were no regulation for any significant time, entities engaged in independent expenditures might have inadequate guidance. It would therefore be advisable to remand to the FEC to give it the opportunity to reconsider the regulation and either compile an administrative record to support it or to amend it.[10]

CONCLUSION

Because the Commission acted lawfully in dismissing plaintiffs' administrative complaint, and because 11 C.F.R. § 109.10(e)(1)(vi) is not contrary to law, the Court should grant summary judgment to the Commission and deny plaintiffs' motion for relief.

[10] Remand would also be the appropriate remedy if the Court accepted plaintiffs' arguments that the FEC had inadequately explained its regulation. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); *see also*, *e.g.*, *Camp*, 411 U.S. at 142-143 (proper remedy is remand, not *de novo* hearing, to obtain from agency additional explanation of its reasons when there is "such failure to explain administrative action as to frustrate effective judicial review"). Doing so would permit the Commission to more fully explain the existing regulation. *See Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009) ("When an agency may be able readily to cure a defect in its explanation of a decision, the [required analysis of the seriousness of the deficiencies of the agency's action] counsels remand without vacatur."); *accord WorldCom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002) (remand without vacatur appropriate where "non-trivial likelihood" that agency would be able to justify rule on remand).

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

October 23, 2017

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) [PROPOSED] ORDER

[PROPOSED] ORDER

Upon consideration of the motions for summary judgment filed by plaintiffs Citizen for Responsibility and Ethics in Washington and Nicholas Mezlak and defendant Federal Election Commission, including all memoranda, oppositions and replies, it is hereby

ORDERED that the Federal Election Commission's Motion for Summary Judgment is GRANTED, and it is further

ORDERED that Citizen for Responsibility and Ethics in Washington and Nicholas Mezlak's Motion for Summary Judgment is DENIED.

Dated: _____

_____
Honorable Beryl A. Howell
United States District Court Chief Judge

Attachment F

Crossroads GPS's Reply Memorandum in Support of its Cross-Motion for Summary Judgment,

CREW v. FEC (Civil Action No. 1:16-cv-00259-BAH) (Jan. 22, 2018)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

LIST OF ABBREVIATIONS

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

158-59.

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

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

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

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

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

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

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

iii. The regulation is not redundant.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

intent of Congress").

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

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

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

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

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

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

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

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

and unconstitutionally vague and overbroad reporting of donor information.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

/s/ Thomas W. Kirby

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

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

Counsel for Crossroads Grassroots Policy Strategies

January 22, 2018

Attachment G

FEC's Reply in Support of its Motion for Summary Judgment,

CREW v. FEC (Civil Action No. 1:16-cv-00259-BAH) (Jan. 24, 2018)

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