FEDERAL ELECTION COMMISSION

FIRST GENERAL COUNSEL'S REPORT

MUR 7516
DATE COMPLAINT FILED: Oct. 16, 2018
DATE OF NOTIFICATIONS: Oct. 22, 2018
DATE OF LAST RESPONSE: Nov. 27, 2018
DATE ACTIVATED: May 14, 2019

EXPIRATION OF SOL: Aug. 8, 2023
ELECTION CYCLE: 2018

COMPLAINANTS:	Campaign Legal Center Margaret Christ
RESPONDENT:	Heritage Action for America
RELEVANT STATUTES AND REGULATIONS:	52 U.S.C. § 30104(c) 11 C.F.R. § 110.6 11 C.F.R. § 109.10(e)(1)(vi)
INTERNAL REPORTS CHECKED:	Disclosure Reports
FEDERAL AGENCIES CHECKED:	None

I. INTRODUCTION

The Complaint alleges that Heritage Action for America ("Heritage Action") violated 52 U.S.C. § 30104(c) of the Federal Election Campaign Act of 1971, as amended (the "Act"), by failing to report the identities of its donors in connection with certain independent expenditures. The Complaint asserts that Heritage Action's statements on August 8, 2018, concerning its intention to fund specific independent expenditures indicate that donors contributed to Heritage Action for the purpose of furthering its independent expenditures. The Complaint thus alleges that Heritage Action should have disclosed contributors pursuant to the August 3, 2018, decision in *Citizens for Responsibility and Ethics in Washington v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018) ("*CREW I*"), which was later affirmed by the D.C. Circuit on August 21, 2020 ("*CREW*

II").[1] The Complaint also summarizes the Commission's October 4, 2018, guidance concerning reporting obligations for independent expenditures made subsequent to the September 18, 2018, effective date of the *CREW I* decision ("*CREW* Guidance").[2]

Heritage Action announced its planned funding of independent expenditures less than a week after the *CREW I* decision and disseminated the first tranche of these independent expenditures a day before and a day after the effective date of the decision. In the *CREW* Guidance, the Commission stated its intention to exercise prosecutorial discretion with regard to activity shown on quarterly reports due on October 15, 2018, but indicated that its exercise of prosecutorial discretion for failure to report contributors extended only to that quarterly report. Because the first tranche of Heritage Action's independent expenditures was reported on the quarterly report due on October 15, 2018, we are not recommending that the Commission pursue alleged violations relating to the failure to disclose donors on that report. However, because Heritage Action reported a second and significant tranche of independent expenditures during the subsequent reporting period, again without disclosing any donors, we recommend that the Commission find reason to believe that Heritage Action violated 52 U.S.C. § 30104(c) by failing to disclose its donors on reports it filed in the 2018 year-end reporting period.

[1] *Crossroads GPS v. CREW*, 971 F.3d 340 (D.C. Cir. 2020), affirmed the district court's decision striking down the Commission's regulation at 11 C.F.R. § 109.10(e)(1)(vi).

[2] *See* Press Release, FEC Provides Guidance Following U.S. District Court Decision in CREW v. FEC, 316 F. Supp. 3d 349 (D.D.C. 2018) (Oct. 4, 2018), available at https://www.fec.gov/updates/fec-provides-guidance-following-us-district-court-decision-crew-v-fec-316-f-supp-3d-349-ddc-2018/.

II. FACTUAL BACKGROUND

Heritage Action is a social welfare organization organized under Section 501(c)(4) of the Internal Revenue Code.[3] It is affiliated with the Heritage Foundation and describes itself in its mission statement as being founded "with the goal of creating an organization that can take meaningful action to hold members of Congress accountable"[4] and describes how it differs from the Heritage Foundation due to its work to "appl[y] direct pressure to lawmakers so Washington is compelled to adopt conservative policies."[5]

On August 8, 2018, five days after the district court issued the *CREW I* opinion, Heritage Action issued a press release stating its intent to "spend $2.5 million and back 12 candidates this November."[6] Heritage Action's press release as well as press coverage of the announcement of the group's planned spending identified twelve congressional candidates by name and district and stated that the group planned to engage in a "combined digital, print, and TV advertising campaign."[7] The Complaint cites to a news article from the same day describing Heritage Action's communications with donors about the group's planned spending; in that article, Heritage Action Executive Director Tim Chapman stated, "What we're telling donors is, every

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[3] Compl. at 2 (Oct. 16, 2018); Frequently Asked Questions, https://heritageaction.com/about (last visited Sept. 3, 2020) (responding to the question, "Is Your Organization Tax Deductible (Like the Heritage Foundation)?").

[4] Heritage Action's Mission, https://heritageaction.com/about.

[5] Frequently Asked Questions, https://heritageaction.com/about (responding to the question, "I am already a member of Heritage Foundation. Is this the same thing?").

[6] Compl. at 2 (citing Press Release, Heritage Action for America, Heritage Action to spend $2.5 million and back 12 candidates this November (Aug. 8, 2018), https://heritageaction.com/press/heritage-action-to-spend-2-5-million-and-back-12-candidates-this-november ("Press Release"); Katie Glueck, *Conservative DC Group Throws Money to McGrath's Opponent, 11 Other Republicans*, MCCLATCHY (Aug. 8, 2018), https://www.mcclatchydc.com/news/politics-government/article216227855.html ("McClatchy Article")).

[7] *See* Press Release; McClatchy Article.

dollar we raise over our budget we can effectively pour more into these races . . . . We'd have to raise significantly more to get involved in the Senate and presidential [races], but I'm not ruling it out."[8]

On September 19, 2018, Heritage Action filed a 48-Hour Report of independent expenditures with the Commission. That report disclosed that on September 17 and 19, 2018, Heritage Action spent $374,177.20 for independent expenditures ($233,585.20 on September 17, 2020, and $140,592.00 on September 19, 2020) in the form of mailers and digital advertising supporting the same twelve candidates identified in Heritage Action's August 8, 2018, press release.[9] Heritage Action included a statement in the 48-Hour Report "that the independent expenditures disclosed on this report were paid for from general treasury funds and no contributions were made for the purpose of furthering these expenditures."[10] On October 12, 2018, Heritage Action filed its October 2018 Quarterly Report disclosing the same $374,177.20 in independent expenditures.[11] In that report, Heritage Action included a statement, similar to the statement in its 48-Hour Report, "that the independent expenditures disclosed on this report were paid for from general treasury funds and, to the best of my knowledge, information and belief at the time of filing, no reportable contributions were made for the purpose of furthering these expenditures."[12]

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8 Compl. at 7 (citing McClatchy Article).

9 *Id.* at 3 (citing Heritage Action for America, 48-Hour Report of Independent Expenditures at 1, 3-22 (Sept. 19, 2018) ("September 2018 48-Hour Report")).

10 September 2018 48-Hour Report at 2.

11 Heritage Action for America, October Quarterly Report of Independent Expenditures at 1, 3-22 (Oct. 12, 2018) ("October 2018 Quarterly Report").

12 October 2018 Quarterly Report at 2.

Heritage Action also filed 48-Hour Reports on October 3, 2018,[13] October 10, 2018,[14] and October 16, 2018.[15] Each of these reports stated "that the independent expenditures disclosed on this report were paid for from general treasury funds and, to the best of my knowledge, information and belief at the time of filing, no reportable contributions were made for the purpose of furthering these expenditures" and did not disclose any contributors.[16]

Shortly after Heritage Action filed its October Quarterly Report, the Complaint in this matter was filed, alleging that Heritage Action's "progression from solicitations for specific activities to spending that correlates exactly with the solicitations provides reason to believe Heritage Action received contributions for the purpose of furthering the spending, i.e., its independent expenditures."[17] The Complaint contends that the D.C. District Court's decision in *CREW I* made clear that Heritage Action was required to disclose "the identity of all contributors who gave over $200 for the purpose of furthering any of the of the organization's expenditures, 'even when the donor has not expressly directed that the funds be used in the precise manner reported.'"[18]

In its Response, Heritage Action denies the allegations, stating that it was only obligated to disclose donors who had been identified in accordance with the earmarking definition

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[13] Heritage Action for America, 48-Hour Report of Independent Expenditures (Oct. 3, 2018) (disclosing $290,649.27 in independent expenditures).

[14] Heritage Action for America, 48-Hour Report of Independent Expenditures (Oct. 10, 2018) (disclosing $1,124,735.70 in independent expenditures).

[15] Heritage Action for America, 48-Hour Report of Independent Expenditures (Oct. 16, 2018) (disclosing $143,934.74 in independent expenditures).

[16] *Supra*, notes 13-15, and accompanying text.

[17] Compl. at 9.

[18] *Id.* (quoting *CREW I*, 316 F. Supp. 3d at 423).

provided in 11 C.F.R. § 110.6(b)(1).[19] Relying on reports and analyses in certain prior Commission matters addressing earmarking under 11 C.F.R. § 110.6(b)(1), the Response contends that only designations or instructions generated by a donor, as opposed to an organization soliciting donations, can trigger donor disclosure requirements.[20] The Response argues that the Complaint should be dismissed because it presents no evidence of any instructions or statements from Heritage Action's donors on how their contributions should be spent.[21]

Subsequent to its Response, on January 24, 2019, Heritage Action filed a 2018 Year-End Report disclosing $1,559,319.71 in independent expenditures without disclosing a single donor.[22] The 2018 Year-End Report disclosed expenditures supporting the twelve candidates identified in the August 8, 2018, press release as well as an additional candidate, Vincent Ross Spano.[23] Heritage Action did not disclose any donors but stated again, "Please note that the independent expenditures disclosed on this report were paid for from general treasury funds and, to the best of my knowledge, information, and belief at the time of filing, no reportable contributions were made for the purpose of furthering these expenditures."[24]

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19 Resp. at 1-2 (Nov. 27, 2018).

20 *Id.* at 2-3 (citing Factual & Legal Analysis at 6, n.4, MUR 5732 (Matt Brown for U.S. Senate); First General Counsel's Report at 11, MUR 6221 (Transfund); MUR 4831/5274 (Nixon); First General Counsel's Report at 7-8, MUR 5520 (Billy Tauzin Congressional Committee); First General Counsel's Report at 8-9, MUR 5125 (Paul Perry for Congress)).

21 *Id.* at 3.

22 Heritage Action for America, 2018 Year-End Report at 1-2 (Jan. 24, 2019).

23 *Id.* at 3-18.

24 *Id.* at 2.

III. LEGAL ANALYSIS

A. Independent Expenditure Reporting

An "independent expenditure" is an expenditure made by any person for a communication that (1) expressly advocates for the election or defeat of a clearly identified candidate, and (2) is not coordinated with the candidate, her authorized committee, her agents, or a political party committee or its agents.[25] The Act requires persons other than political committees to report their independent expenditures aggregating over $250 in a calendar year.[26] Persons, other than political committees, must disclose certain information about their disbursements for independent expenditures (including the name and address of each person who receives disbursements aggregating over $200 in connection with an independent expenditure), and indicate the candidates the independent expenditures support or oppose.[27]

In addition, the Act requires persons, other than political committees, reporting independent expenditures to report certain information about their receipts. Under 52 U.S.C. § 30104(c)(1), a person, other than a political committee, reporting independent expenditures must disclose the information required under section 30104(b)(3)(A) "for all contributions received by such person."[28] Section 30104(b)(3)(A) requires identification of each "person (other than a political committee) who makes a contribution to the reporting committee during

[25] 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16.

[26] 52 U.S.C. § 30104(c)(1).

[27] 52 U.S.C. § 30104(c)(2)(A) (incorporating requirements of 52 U.S.C. § 30104(b)(6)(B)(iii)).

[28] 52 U.S.C. § 30104(b)(3)(A).

the reporting period [aggregating] in excess of $200 within the calendar year."[29] Furthermore, under 52 U.S.C. § 30104(c)(2)(C), a person, other than a political committee, reporting independent expenditures must also identify "each person who made a contribution in excess of $200 . . . which was made for the purpose of furthering *an* independent expenditure."[30]

The Commission's implementing regulation at 11 C.F.R. § 109.10(e)(1)(vi) required "[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."[31] On August 3, 2018, the District Court for the District of Columbia vacated 11 C.F.R. § 109.10(e)(1)(vi) because it conflicted with 52 U.S.C. § 30104(c)(1) and (c)(2)(C).[32] After a brief stay, the vacatur of this regulation took effect on September 18, 2018.[33]

In the *CREW I* opinion, the court clarified that 52 U.S.C. § 30104(c)(1) and (c)(2)(C) "unambiguously require separate and complementary requirements to identify individuals who contribute over $200 to reporting non-political committees and mandate significantly more disclosure than that required by the challenged regulation."[34] In analyzing the statute, the district court reasoned that, "allowing not-political committees to mask donors, who otherwise are subject to disclosure under subsection (c)(1), facilitates the role of these organizations as pass-

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[29] 52 U.S.C. § 30104(b)(3)(A), (c)(1); *see also* 52 U.S.C. § 30101(13) (defining "identification" to include name, address, and, for individuals, occupation and employer).

[30] 52 U.S.C. § 30104(c)(2)(C) (emphasis added).

[31] 11 C.F.R. § 109.10(e)(1)(vi) (emphasis added).

[32] *CREW I*, 316 F. Supp. 3d at 357.

[33] *See CREW* Guidance.

[34] *CREW I*, 316 F. Supp. 3d at 410.

throughs, enabling donors to contribute to super PACs without being identified by routing their contributions through affiliated 501(c)(4) organizations or other types of not-political committees" and observed that the disclosure of donors pursuant to subsection (c)(1) was designed to reach beyond those whose donations were simply used for independent expenditures and to also reach donors whose funds were utilized for other political efforts such as contributions to candidates, political committees, or super PACs.[35] The district court, linking its conclusions to its analysis of the Supreme Court's decisions in *Buckley v. Valeo* and *FEC v. Massachusetts Citizens for Life* ("*MCFL*"), further determined that:

> Subsection (c)(1) plainly requires broader disclosure than just those donors making contributions for the purposes of funding the independent expenditures made by the reporting entity. Instead, subsection (c)(1) applies to "*all* contributions received by such" reporting not-political committee and, as construed by the Supreme Court in *Buckley*, a decade earlier than *MCFL*, requires disclosure of donors of over $200 annually making contributions "earmarked for political purposes," which contributions are "intended to influence elections"[36]

As a result, the district court concluded that a person other than a political committee who makes independent expenditures in excess of $250 "triggers the obligation to identify those donors funding the organization's political purposes of influencing federal elections that is similar to the donor identification obligation applicable to political committees."[37]

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[35] *CREW I*, 316 F. Supp. 3d at 380-381 (discussing how some 501(c)(4) organizations and super PACs are "closely connected" to each other and stating that "the donors covered in subsection (c)(1) contributed to not-political committees to support political efforts in connection with federal elections, which contributions may be used by the not-political committee, in some cases, to contribute directly to candidates or political committees, including to fund super PACs").

[36] *CREW I*, 316 F. Supp. 3d at 389 (quoting *Buckley v. Valeo*, 424 U.S. 1, 80 (1976); *FEC v. Mass. Citizens for Life* ("*MCFL*"), 479 U.S. 238, 262 (1986)) (emphasis in original).

[37] *Id.* at 389; *see also id.* at 388 (noting that the incorporation of 52 U.S.C. § 30104(b)(3)(A) in 52 U.S.C. § 30104(c)(1) "makes clear that these disclosure obligations for contributors are closely aligned").

Although the district court found that donors who wish to *only* fund administrative and non-political expenditures may do so without being disclosed,[38] it also held that "those donors funding the not-political committee's political activities to influence a federal election — by, for example, making contributions to candidates, political committees, or political parties or by financing independent expenditures — must be identified to inform the electorate on the sources of funding of participants in the electoral process."[39] The court left open the question of how a person other than a political committee would fulfill its obligation to identify the subset of its donors who provided funds intended to influence elections but considered the necessary data to be readily available to these groups, explaining that "[n]ot-political committees likely keep close track of their donors, the donors' articulated funding interests, if any, and their contribution history."[40] The court also considered the donation of funds available for both general and political purposes to require disclosure, stating that "the public has an interest in knowing who is speaking about a candidate and who is funding that speech, no matter whether the contributions were made towards administrative expenses or independent expenditures."[41]

Following the *CREW I* decision, the Commission issued guidance on October 4, 2018, concerning filing obligations for persons other than political committees making independent

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[38] *CREW I*, 316 F. Supp. 3d at 398 ("The differences in disclosure requirements for not-political committees . . . stems from a recognition that such entities, unlike political committees, may have non-political goals or missions . . . with the required disclosure targeted only at those donors who want to fund political activities to influence federal elections or independent expenditures."); *see also id.* at 393 (observing that a not-political committee "would not have to report contributions made exclusively for administrative expenses") (quoting *Speechnow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010)); and *id.* at 400-01 (noting the ability to only fund administrative expenses without identification).

[39] *Id.* at 401.

[40] *Id.* at 413.

[41] *Id.* at 394 (quoting *SpeechNow.org*, 599 F.3d at 698).

expenditures. The *CREW* Guidance stated that for independent expenditures made on or after September 18, 2018, by persons other than political committees, the Commission will enforce the statute "[i]n accordance with the district court's interpretation of the reporting requirements at 52 U.S.C. § 30104(c)(1) and (c)(2)(C)."[42] The guidance quoted portions of the *CREW I* opinion setting forth those interpretations, including that section (c)(1) requires reporting of "*all* contributions received" and disclosure of donors making contributions over $200 annually "earmarked for political purposes" and, thus, "intended to influence elections."[43] Because the *CREW I* decision was issued in the middle of the October 2018 reporting period, the guidance stated that, "in the interests of fairness," persons, other than political committees, making reportable independent expenditures on or after September 18, 2018, to be reported on the October 2018 quarterly reports must report the information required by 52 U.S.C. § 30104(c)(1) and (c)(2)(C) only "[f]or contributions received between Aug. 4, 2018 (the date after the district court's opinion) and Sept. 30, 2018 (the end of the reporting period)."[44] The *CREW* Guidance also stated that the Commission would "exercise its prosecutorial discretion for the quarterly reports due Oct. 15, 2018."[45]

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42 *CREW Guidance*, section 4.

43 *Id.* (quoting *CREW I*, 316 F. Supp. 3d at 389) (emphasis in original); *see supra*, note 36 and accompanying text (quoting the corresponding portion of the *CREW I* opinion).

44 *CREW Guidance*, section 3 (further explaining that this includes "the identification of each person whose contribution or contributions to the reporting person had an aggregate amount or value in excess of $200 within calendar year 2018, together with the date and amount of any such contribution(s); and the identification of each of these persons whose contribution(s) in excess of $200 to the reporting person was made for the purpose of furthering any independent expenditure").

45 *Id.*

On August 21, 2020, the D.C. Circuit affirmed the district court's decision in its *CREW II* opinion, holding that "[section 30104](c)(1) unambiguously requires an entity making over $250 in IEs to disclose the name of any contributor whose contributions during the relevant reporting period total $200, along with the date and amount of each contribution."[46] The D.C. Circuit further held that "[section 30104](c)(2)(C) is naturally read to cover contributions intended to support any IE made by recipient."[47] As such, the D.C. Circuit upheld the district court's decision to vacate 11 C.F.R. § 109.10(e)(1)(vi), finding that the regulation "disregards (c)(1)'s requirement that IE makers disclose each donation from contributors who give more than $200"and "impermissibly narrows (c)(2)(C)'s requirement that contributors be identified if their donations are 'made for the purpose of furthering *an* independent expenditure'" by requiring disclosure only of donations linked to a particular independent expenditure.[48] The D.C. Circuit also explained that the invalidation of 11 C.F.R. § 109.10(e)(1)(vi) meant that a person other than a political committee who made IE's "will be required, as a result of the district court's judgment, to disclose nearly all contributions it receives during any reporting period in which it makes IEs."[49]

B. The Commission Should Find Reason to Believe that Heritage Action Failed to Report Certain Contributors

Heritage Action disclosed over $1,933,496 for independent expenditures during the 2018 general election, including $1,811,736.87 in independent expenditures supporting the same

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46 *CREW II*, 971 F.3d at 354.

47 *Id.*

48 *Id.* at 350-51.

49 *Id.* at 347.

twelve candidates that Heritage Action announced both to donors and the general public that it planned to support. Heritage Action's October 2018 Quarterly Report disclosed $374,177.20 in independent expenditures supporting those twelve candidates but did not include any donor information.[50] Heritage Action's 2018 Year-End Report disclosed $1,559,319.71 in independent expenditures, including $1,437,559.67 in independent expenditures supporting those same twelve candidates, but did not disclose any donor information.[51] These disclosures were made shortly after Heritage Action made public statements encouraging potential donors to provide them with additional funding to pay for independent expenditures, indicating a close nexus between donor solicitations and contributions received for political purposes.[52]

Heritage Action argues that the reference to the term "earmarked" in the *CREW* Guidance indicates that it was required to disclose only those contributions that contain a donor-generated designation, instruction, or encumbrance, per the definition of "earmarked" at 11 C.F.R. § 110.6.[53] This argument misconceives the relevance of the regulatory earmarking definition in section 110.6, which concerns contributions made to candidate committees through an intermediary or conduit, in seeking to apply it to activity outside of that context, such as to the

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50 *Supra*, notes 11 and 12, and accompanying text.

51 *Supra*, note 22, and accompanying text.

52 *See* Compl. at 2 (citing McClatchy article); *cf. FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995) (holding that a non-political committee's solicitation was for "contributions," and thus subject to disclaimer requirements for solicitations under the provision now codified at 52 U.S.C. § 30120, because it left "no doubt that the funds contributed would be used to advocate President Reagan's defeat at the polls, not simply to criticize his policies during the election year"); Supplemental Explanation and Justification for the Regulations on Political Committee Status, 72 Fed. Reg. 5595, 5604 (Feb. 7, 2007) (explaining that, for purposes of the $1,000 "contribution" threshold for determining political committee status, "if any of the [organization's] solicitations clearly indicated that the funds received would be used to support or defeat a Federal candidate, then the funds received were given for the purpose of influencing a Federal election and therefore constituted 'contributions'") (internal quotation marks omitted).

53 *See* Resp. at 2-3 (citing Factual & Legal analyses and reports in prior matters applying that definition).

scope of reporting requirements for contributions received by persons other than political committees. While section 110.6 applies to contributions earmarked to candidates and their authorized committees, it has no bearing on independent expenditure reporting by persons other than political committees like Heritage Action.[54]

Commission regulations do not define "earmarked for political purposes," as that phrase was used in *Buckley* and quoted in both *CREW I* and the *CREW* Guidance and, later, in *CREW II*. Commission regulations define the term "earmarked" for the purpose of section 110.6's regulation of "contributions . . . earmarked or otherwise directed to the candidate through an intermediary" as "a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee."[55] This definition relates to the requirements of 52 U.S.C. § 30116(a)(8), which includes within a contributor's contribution limits those contributions made to a candidate through an intermediary or conduit.[56] The Commission has declined to extend the application of 11 C.F.R. § 110.6 beyond the statutory provision it implements, *i.e.*, the limits applicable to

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[54] *See, e.g.*, Affiliated Committees, Transfers, Prohibited Contributions, Annual Contribution Limitations and Earmarked Contributions, 54 Fed. Reg. 34098, 34105 (Aug. 17, 1989) ("Earmark E&J") (explaining that section 110.6 is "limited to contributions earmarked to candidates and their authorized committees, and thus should not be extended to include contributions earmarked to other types of political committees").

[55] 11 C.F.R. § 110.6(a), (b)(1); *see also* Advisory Op. 2019-01 at 3 (It Starts Today) ("AO 2019-01").

[56] AO 2019-01 at 3 (citing 52 U.S.C. §30116(a)(8); 11 C.F.R. § 110.6(a)).

contributions to candidates and their authorized committees when made through conduits or intermediaries.[57]

In *CREW I*, the district court did not reference the definition of "earmarked" at 11 C.F.R. § 110.6 when it quoted *Buckley*'s use of the phrase "earmarked for political purposes."[58] Instead, the court observed that "[n]o parameters are set in § 30104(c)(1) that the contributions be earmarked for a specific or single political purpose so long as the purpose is in connection with a federal election and, thus, this disclosure requirement is analogous to the requirements applicable to political committees."[59] Similarly, the D.C. Circuit, in rejecting an argument that *Buckley* "imposed a narrowing construction" on the term "contribution" for purposes of section 30104(c), found that "*Buckley* stated more broadly that the term [contribution] covers any donation 'earmarked for political purposes.' To the same effect, . . . *MCFL* similarly read the term 'contribution' as used in subsection 30104(c) to cover 'funds intended to influence elections.'"[60] Thus, the courts' analyses of the phrase "earmarked for political purposes" appear to focus broadly on the intention to influence federal elections rather than a specific mechanism or procedure for earmarking, as urged by Heritage Action.

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[57] Earmark E&J, 54 Fed. Reg. at, 34105 (explaining application of rule to only candidate committees and further explaining that other political committees must still comply with requirements as to the forwarding of contributions and the reporting of the original contributor).

[58] *CREW I*, 316 F. Supp. 3d at 376.

[59] *Id.* (quoting *Buckley*, 424 U.S. at 80); *and see id.* at 389 (equating *Buckley*'s "earmarked for political purposes" with *MCFL*'s "intended to influence elections").

[60] *CREW II*, 971 F.3d at 353 (quoting *Buckley*, 424 U.S. at 78; *MCFL*, 479 U.S. at 262). The *CREW II* opinion also does not reference the regulation at 11 C.F.R. § 110.6.

Further, to apply the earmarking definition at 11 C.F.R § 110.6 in order to reject donor disclosure under 52 U.S.C § 30104(c), as suggested by Respondent, would appear to contravene the D.C. Circuit's observation that the now-invalidated 11 C.F.R. § 109.10(e)(1)(vi) was problematic because it allowed entities subject to the rule to "serve as a kind of pass-through, non-disclosure vehicle" and was therefore inconsistent with the disclosure aims of the Act.[61] And all of the earmarking MURs that the Response cites involve allegations of excessive contributions and do not pertain to general disclosure obligations.[62] Finally, importing a regulatory definition that pertains to contribution limits is inapposite in this context, given that Heritage Action as a not-political committee may receive unlimited donations from individuals and corporations. As such, accepting the Response's contention that the definition of earmarking in 11 C.F.R. § 110.6 controls the disclosure of donors to persons other than political committees

[61] *CREW II*, 971 F.3d at 344-345 (explaining how the vacated rule was partially responsible for why "a significant amount of IE spending now comes from organizations that do not disclose their contributors"). Concerns regarding the lack of disclosure under the now-vacated 11 C.F.R. § 109.10(e)(1)(vi) and the importance of achieving comprehensive disclosure were also addressed at length by the district court. *CREW I*¸ 316 F. Supp. 3d at 380-381 ("Absent enforcement of subsection (c)(1), super PACs disclose the identities of contributing not-political committees, but the latter do not disclose the original contributors, subverting the FECA's broad disclosure regime"); *id.* at 414 ("The congressional goal with enactment of the predecessor statute to 52 U.S.C. § 30104(c) was "to achieve 'total disclosure' by reaching 'every kind of political activity' in order to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible." (quoting *Buckley*, 424 U.S. at 76.)); *id.* at 423 (noting that contributions made for political purposes to influence any election for federal office "may, in fact, be intended to fund the not-political committee's own contributions and be routed to candidates, political parties, or political committees, such as super PACs").

[62] *See* Factual & Legal Analysis at 1, MUR 5732 (Matt Brown for U.S. Senate) (addressing whether a Committee "arranged for its donors to contribute to these State Parties . . . as part of an effort to circumvent the contribution limits set forth in the Federal Election Campaign Act"); First General Counsel's Report at 2, MUR 6221 (Transfund) (addressing whether a committee received excessive contributions in the form of an earmarked contribution); MUR 4831/5274 (Nixon) (addressing a tallying and excessive contribution scheme between the Missouri Democratic State Committee and the U.S. Senate campaign of Jeremiah Nixon); First General Counsel's Report at 6-7, MUR 5520 (Billy Tauzin Congressional Committee) (addressing whether an outgoing congressman's donation of excess campaign funds to the Republican Party of Louisiana was actually an earmarked excessive contribution to his son's campaign); First General Counsel's Report at 8-9, MUR 5125 (Paul Perry for Congress) (addressing whether a contribution from a political action committee to the Indiana Democratic Party was actually earmarked for a candidate).

pursuant to 52 U.S.C. § 30104(c)(1) and (2)(C) would be contrary to Commission precedent and the reasoning set forth in the *CREW* decisions for vacating that regulation.

Instead, the Commission's guidance and the *CREW* decisions direct entities like Heritage Action to comply with the plain language of 52 U.S.C. § 30104(c)(1) and (2)(C) — *i.e.*, to report all contributors "whose contributions during the relevant reporting period total $200"[63] and to further identify "whether a disclosed 'contribution' was intended to support IEs or instead aimed only at supporting the recipient's other election-related activities."[64] Although the decisions provide the reporting entity discretion to determine how to ascertain those donations that need to be disclosed, such discretion must be consistent with the underlying "requirement that IE makers disclose each donation from contributors who give more than $200, regardless of any connection to IEs eventually made" and the further requirement that a subset of these contributors "be identified if their donations are 'made for the purpose of furthering *an* independent expenditure.'"[65]

Similarly, the Response's contention that general treasury funds may be used for independent expenditures without disclosing any underlying contributors to the general treasury fund runs counter to the analyses in the *CREW* opinions, which require the disclosure of funds made available for political purposes, even when those funds are also available for other

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63 *CREW II*, 971 F.3d at 354.

64 *Id.* at 356.

65 *CREW II*, 971 F.3d at 351; *see also CREW I*, 316 F. Supp. 3d at 423 (finding that the vacated regulation "impermissibly narrows the mandated disclosure in 52 U.S.C. § 30104(c)(2)(C), which requires the identification of such donors contributing for the purpose of furthering the not-political committee's own express advocacy for or against the election of a federal candidate, even when the donor has not expressly directed that the funds be used in the precise manner reported); *id.* at 413 (noting that "Not-political committees likely keep close track of their donors, the donors' articulated funding interests, if any, and their contribution history"); *CREW* Guidance at Section 4.

purposes.[66] Allowing otherwise would sanction the use of general treasury accounts to mask otherwise impermissible contributions, such as foreign contributions, by the person making independent expenditures.[67]

Heritage Action's statements on its 2018 October Quarterly and Year-end filings that it paid for more than $1.5 million of independent expenditures from general treasury funds do not address whether Heritage Action received contributions over $200 requiring disclosure under subsection (c)(1), nor do they address whether any donors made contributions for the purpose of funding any independent expenditure, which would require disclosure of additional information under subsection (c)(2)(C).[68] With respect to the disclosure of donors required under subsection (c)(1), the court in *CREW II* found that "[Section 30104](c)(1) unambiguously requires an entity making over $250 in IEs to disclose the name of any contributor whose contributions during the relevant reporting period total $200, along with the date and amount of each contribution."[69]

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66 *CREW II*, 971 F.3d at 354 ("[Section 30104]](c)(1) unambiguously requires an entity making over $250 in IEs to disclose the name of any contributor whose contributions during the relevant reporting period total $200, along with the date and amount of each contribution"); *id.* at 347 ("[Appellant, a 501(c)(4) organization,] will be required, as a result of the district court's judgment, to disclose nearly all contributions it receives during any reporting period in which it makes IEs."); *CREW I*, 316 F. Supp. 3d at 423 (requiring disclosure under 52 U.S.C. § 30104(c)(2)(C) "even when the donor has not expressly directed that the funds be used in the precise manner reported").

67 *See CREW I*, 316 F. Supp. 3d at 368 (observing that the "regulatory mechanisms" of section 30104 "are designed to deter corruption, prevent particular individuals or organizations from having an undue influence on federal elections, and assist in enforcement of laws prohibiting foreign contributions in federal elections, while also protecting the protecting the exercise of political speech so crucial to the functioning of this country's vibrant democracy" (citing *Citizens United v. FEC*, 558 U.S.310, 366-67 (2010); *Buckley*, 424 U.S. at 66-68)).

68 *Supra*, notes. 11, 12, and 22, and accompanying text.

69 *CREW II*, 971 F.3d at 354. *See also CREW I*, 316 F. Supp. 3d at 413 ("donors to [501(c)(4)] organization's political efforts in federal campaign and independent expenditure activities are required to be disclosed"); *see also id.* at 380 ("[T]he donors covered in subsection (c)(1) contributed to not-political committees to support political efforts in connection with federal elections, which contributions may be used by the not-political committee, in some cases, to contribute directly to candidates, or political committees, including to fund super PACs.").

Heritage Action's characterization of its funding account as "general treasury funds" does not require the Commission to treat those funds as having been donated for "general programs"[70] and, conversely, does not relieve Heritage Action's obligation to disclose contributions so characterized. Neither of the *CREW* opinions nor the *CREW* Guidance indicate that the Act exempts contributions held in general treasury funds from disclosure.[71]

With respect to the additional disclosure of political donors who also donated for the purpose of funding independent expenditures, Respondent states that no "contributions were made for the purpose of furthering *these* expenditures."[72] By using the definite article "these" to support its failure to disclose donors, Heritage Action appears to be invoking the regulatory reporting regime that the district court vacated. As articulated in the *CREW* opinions, subsection (c)(2)(C) requires disclosure of donations made for *any* independent expenditure, not particular ones.[73]

Further, the Response contends that a donation made in response to a reporting entity's explicit solicitation for donations for independent expenditures cannot be considered

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[70] *See CREW I*, 316 F. Supp. 3d at 413 (distinguishing donations for an organization's "general programs" from those for an "organization's political efforts in federal campaign and independent expenditure activities," the latter of which are reportable contributions under section 30104(c)).

[71] *See CREW II*, 971 F.3d at 347 (reasoning that the appellant organization will be required "to disclose nearly all contributions it receives during any reporting period in which it makes IEs"); *CREW I*, 316 F. Supp. 3d at 376 ("No parameters are set in § 30104(c)(1) that the contributions be earmarked for a specific or single political purpose so long as the purpose is in connection with a federal election and, this, this disclosure requirement is analogous to the requirements applicable to political committees.").

[72] *See, e.g.*, October 2018 Quarterly Report at 2 (emphasis added).

[73] *See CREW II*, 971 F.3d at 354 ("[Section 30104](c)(2)(C) is naturally read to cover contributions intended to support any IE made by recipient"); *CREW I*, 316 F. Supp. 3d at 423 (requiring disclosure under section 30104(c)(2)(C) "even when the donor has not expressly directed that the funds be used in the precise manner reported"); *see also CREW* Guidance at 2 (reiterating the need to identify contributions made "for the purpose of furthering any independent expenditure").

"earmarked" absent an additional designation generated by the donor.[74] Heritage Action does not affirmatively state in its Response or in its filings with the Commission that it has not received contributions so designated for independent expenditures but instead argues that the Complaint has not alleged the presence of such earmarked contributions.[75] Heritage Action's Executive Director's statements to the press, such as that "what we're telling donors is, every dollar we raise over budget we can effectively pour more into these races,"[76] indicate that at least some donors so solicited gave money to Heritage Action for the purposes described in those solicitations and public statements, that is, to fund independent expenditures that Heritage Action had stated that it intended to run. Moreover, this argument again seeks to apply section 110.6 to another context and ignores that no explicit designation is required in order for a donor's contribution to be reportable, under section 30104(c)(1) if the donor's contributions aggregate over $200, and also under section (c)(2)(C) if the contributions were intended to support independent expenditures.[77]

Given Heritage Action's reporting of a significant amount of independent expenditures following the *CREW* decision, Heritage Action's public statements regarding its intent to fund independent expenditures to support specific candidates, its spending on independent expenditures to support those same candidates, and the absence of any disclosure of donors, the available information indicates that, in accordance with the *CREW* Guidance, Heritage Action should have disclosed donors whose funds were contributed for political purposes. Had Heritage

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74 Resp. at 3.

75 *Id.* (citing First General Counsel's Report at 8-9, MUR 5125 (Paul Perry for Congress) (addressing earmarking under 11 C.F.R. § 110.6)).

76 Compl. at 2 (citing McClatchy article).

77 *CREW II*, 971 F.3d at 354*; CREW I*, 316 F. Supp. 3d at 423.

Action's conduct at issue been limited to failing to identify contributors concerning its $374,177.20 of independent expenditures made on September 17 and 19, 2018, on its October quarterly filings, we would, consistent with the *CREW* Guidance, recommend that the entire matter be dismissed as a matter of prosecutorial discretion. However, based on its 2018 year-end filings, the record indicates that Heritage Action continued to raise and spend significant amounts of funds for political purposes without disclosing its donors well after it was on notice of its disclosure requirements following the *CREW I* decision. As a result of Heritage Action's 2018 year-end filings, we recommend that the Commission find reason to believe that Heritage Action violated 52 U.S.C. § 30104(c)(1) by failing to disclose donors who contributed at least $200 and (c)(2)(C) by failing to disclose the identification of donors who contributed for the purpose of funding an independent expenditure.

IV. INVESTIGATION

The proposed investigation will seek to determine the extent to which Heritage Action had reportable donors who donated funds that were available for political purposes pursuant to the requirements of 52 U.S.C. § 30104(c)(1) and also whether that group of donors contained a subset of donors who donated for the purpose of funding an independent expenditure, pursuant to the requirements of 52 U.S.C. § 30104(c)(2). We will seek information concerning Heritage Action's donors, its solicitations to potential donors to learn what it told donors about how it intended to use the funds it received, and any documents received from its donors relevant to the use of those funds. Although we plan to utilize informal investigative methods, we recommend that the Commission authorize the use of compulsory process in the event the parties do not cooperate in providing this information.

V. RECOMMENDATIONS

1. Find reason to believe that Heritage Action for America violated 52 U.S.C. § 30104(c)(1) by failing to disclose donors who contributed for political purposes;

2. Find reason to believe that Heritage Action for America violated 52 U.S.C. § 30104(c)(2)(C) by failing to further identify the donors who donated for the purpose of funding an independent expenditure;

3. Authorize the use of compulsory process;

4. Approve the attached Factual and Legal Analysis;

5. Approve the appropriate letters.

Lisa J. Stevenson
Acting General Counsel

February 19, 2021
Date

Charles Kitcher
Charles Kitcher
Acting Associate General Counsel for Enforcement

Lynn Tran
Lynn Y. Tran
Assistant General Counsel

Adrienne C. Baranowicz
Adrienne C. Baranowicz
Attorney

Attachment:
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Heritage Action for America MUR 7516

I. INTRODUCTION

The Complaint alleges that Heritage Action for America ("Heritage Action") violated 52 U.S.C. § 30104(c) of the Federal Election Campaign Act of 1971, as amended (the "Act"), by failing to report the identities of its donors in connection with certain independent expenditures. The Complaint asserts that Heritage Action's statements on August 8, 2018, concerning its intention to fund specific independent expenditures indicate that donors contributed to Heritage Action for the purpose of furthering its independent expenditures. The Complaint thus alleges that Heritage Action should have disclosed contributors pursuant to the August 3, 2018, decision in *Citizens for Responsibility and Ethics in Washington v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018) ("*CREW I*"), which was later affirmed by the D.C. Circuit on August 21, 2020 ("*CREW II*").[1] The Complaint also summarizes the Commission's October 4, 2018, guidance concerning reporting obligations for independent expenditures made subsequent to the September 18, 2018, effective date of the *CREW I* decision ("*CREW* Guidance").[2]

Heritage Action announced its planned funding of independent expenditures less than a week after the *CREW I* decision and disseminated the first tranche of these independent expenditures a day before and a day after the effective date of the decision. In the *CREW*

[1] *Crossroads GPS v. CREW*, 971 F.3d 340 (D.C. Cir. 2020), affirmed the district court's decision striking down the Commission's regulation at 11 C.F.R. § 109.10(e)(1)(vi).

[2] *See* Press Release, FEC Provides Guidance Following U.S. District Court Decision in CREW v. FEC, 316 F. Supp. 3d 349 (D.D.C. 2018) (Oct. 4, 2018), available at https://www.fec.gov/updates/fec-provides-guidance-following-us-district-court-decision-crew-v-fec-316-f-supp-3d-349-ddc-2018/.

Guidance, the Commission stated its intention to exercise prosecutorial discretion with regard to activity shown on quarterly reports due on October 15, 2018, but indicated that its exercise of prosecutorial discretion for failure to report contributors extended only to that quarterly report. Heritage Action reported a second and significant tranche of independent expenditures during the subsequent reporting period without disclosing any donors. Accordingly, the Commission finds reason to believe that Heritage Action violated 52 U.S.C. § 30104(c) by failing to disclose its donors on reports it filed in the 2018 year-end reporting period.

II. FACTUAL BACKGROUND

Heritage Action is a social welfare organization organized under Section 501(c)(4) of the Internal Revenue Code.[3] It is affiliated with the Heritage Foundation and describes itself in its mission statement as being founded "with the goal of creating an organization that can take meaningful action to hold members of Congress accountable"[4] and describes how it differs from the Heritage Foundation due to its work to "appl[y] direct pressure to lawmakers so Washington is compelled to adopt conservative policies."[5]

On August 8, 2018, five days after the district court issued the *CREW I* opinion, Heritage Action issued a press release stating its intent to "spend $2.5 million and back 12 candidates this

[3] Compl. at 2 (Oct. 16, 2018); Frequently Asked Questions, https://heritageaction.com/about (last visited Sept. 3, 2020) (responding to the question, "Is Your Organization Tax Deductible (Like the Heritage Foundation)?").

[4] Heritage Action's Mission, https://heritageaction.com/about.

[5] Frequently Asked Questions, https://heritageaction.com/about (responding to the question, "I am already a member of Heritage Foundation. Is this the same thing?").

November."[6] Heritage Action's press release as well as press coverage of the announcement of the group's planned spending identified twelve congressional candidates by name and district and stated that the group planned to engage in a "combined digital, print, and TV advertising campaign."[7] The Complaint cites to a news article from the same day describing Heritage Action's communications with donors about the group's planned spending; in that article, Heritage Action Executive Director Tim Chapman stated, "What we're telling donors is, every dollar we raise over our budget we can effectively pour more into these races . . . . We'd have to raise significantly more to get involved in the Senate and presidential [races], but I'm not ruling it out."[8]

On September 19, 2018, Heritage Action filed a 48-Hour Report of independent expenditures with the Commission. That report disclosed that on September 17 and 19, 2018, Heritage Action spent $374,177.20 for independent expenditures ($233,585.20 on September 17, 2020, and $140,592.00 on September 19, 2020) in the form of mailers and digital advertising supporting the same twelve candidates identified in Heritage Action's August 8, 2018, press release.[9] Heritage Action included a statement in the 48-Hour Report "that the independent expenditures disclosed on this report were paid for from general treasury funds and no

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[6] Compl. at 2 (citing Press Release, Heritage Action for America, Heritage Action to spend $2.5 million and back 12 candidates this November (Aug. 8, 2018), https://heritageaction.com/press/heritage-action-to-spend-2-5-million-and-back-12-candidates-this-november ("Press Release"); Katie Glueck, *Conservative DC Group Throws Money to McGrath's Opponent, 11 Other Republicans*, MCCLATCHY (Aug. 8, 2018), https://www.mcclatchydc.com/news/politics-government/article216227855.html ("McClatchy Article")).

[7] *See* Press Release; McClatchy Article.

[8] Compl. at 7 (citing McClatchy Article).

[9] *Id.* at 3 (citing Heritage Action for America, 48-Hour Report of Independent Expenditures at 1, 3-22 (Sept. 19, 2018) ("September 2018 48-Hour Report")).

contributions were made for the purpose of furthering these expenditures."[10] On October 12, 2018, Heritage Action filed its October 2018 Quarterly Report disclosing the same $374,177.20 in independent expenditures.[11] In that report, Heritage Action included a statement, similar to the statement in its 48-Hour Report, "that the independent expenditures disclosed on this report were paid for from general treasury funds and, to the best of my knowledge, information and belief at the time of filing, no reportable contributions were made for the purpose of furthering these expenditures."[12]

Heritage Action also filed 48-Hour Reports on October 3, 2018,[13] October 10, 2018,[14] and October 16, 2018.[15] Each of these reports stated "that the independent expenditures disclosed on this report were paid for from general treasury funds and, to the best of my knowledge, information and belief at the time of filing, no reportable contributions were made for the purpose of furthering these expenditures" and did not disclose any contributors.[16]

Shortly after Heritage Action filed its October Quarterly Report, the Complaint in this matter was filed, alleging that Heritage Action's "progression from solicitations for specific

[10] September 2018 48-Hour Report at 2.

[11] Heritage Action for America, October Quarterly Report of Independent Expenditures at 1, 3-22 (Oct. 12, 2018) ("October 2018 Quarterly Report").

[12] October 2018 Quarterly Report at 2.

[13] Heritage Action for America, 48-Hour Report of Independent Expenditures (Oct. 3, 2018) (disclosing $290,649.27 in independent expenditures).

[14] Heritage Action for America, 48-Hour Report of Independent Expenditures (Oct. 10, 2018) (disclosing $1,124,735.70 in independent expenditures).

[15] Heritage Action for America, 48-Hour Report of Independent Expenditures (Oct. 16, 2018) (disclosing $143,934.74 in independent expenditures).

[16] *Supra*, notes 13-15, and accompanying text.

activities to spending that correlates exactly with the solicitations provides reason to believe Heritage Action received contributions for the purpose of furthering the spending, i.e., its independent expenditures."[17] The Complaint contends that the D.C. District Court's decision in *CREW I* made clear that Heritage Action was required to disclose "the identity of all contributors who gave over $200 for the purpose of furthering any of the of the organization's expenditures, 'even when the donor has not expressly directed that the funds be used in the precise manner reported.'"[18]

In its Response, Heritage Action denies the allegations, stating that it was only obligated to disclose donors who had been identified in accordance with the earmarking definition provided in 11 C.F.R. § 110.6(b)(1).[19] Relying on reports and analyses in certain prior Commission matters addressing earmarking under 11 C.F.R. § 110.6(b)(1), the Response contends that only designations or instructions generated by a donor, as opposed to an organization soliciting donations, can trigger donor disclosure requirements.[20] The Response argues that the Complaint should be dismissed because it presents no evidence of any instructions or statements from Heritage Action's donors on how their contributions should be spent.[21]

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17 Compl. at 9.

18 *Id.* (quoting *CREW I*, 316 F. Supp. 3d at 423).

19 Resp. at 1-2 (Nov. 27, 2018).

20 *Id.* at 2-3 (citing Factual & Legal Analysis at 6, n.4, MUR 5732 (Matt Brown for U.S. Senate); First General Counsel's Report at 11, MUR 6221 (Transfund); MUR 4831/5274 (Nixon); First General Counsel's Report at 7-8, MUR 5520 (Billy Tauzin Congressional Committee); First General Counsel's Report at 8-9, MUR 5125 (Paul Perry for Congress)).

21 *Id.* at 3.

Subsequent to its Response, on January 24, 2019, Heritage Action filed a 2018 Year-End Report disclosing $1,559,319.71 in independent expenditures without disclosing a single donor.[22] The 2018 Year-End Report disclosed expenditures supporting the twelve candidates identified in the August 8, 2018, press release as well as an additional candidate, Vincent Ross Spano.[23] Heritage Action did not disclose any donors but stated again, "Please note that the independent expenditures disclosed on this report were paid for from general treasury funds and, to the best of my knowledge, information, and belief at the time of filing, no reportable contributions were made for the purpose of furthering these expenditures."[24]

III. LEGAL ANALYSIS

A. Independent Expenditure Reporting

An "independent expenditure" is an expenditure made by any person for a communication that (1) expressly advocates for the election or defeat of a clearly identified candidate, and (2) is not coordinated with the candidate, her authorized committee, her agents, or a political party committee or its agents.[25] The Act requires persons other than political committees to report their independent expenditures aggregating over $250 in a calendar year.[26] Persons, other than political committees, must disclose certain information about their disbursements for independent expenditures (including the name and address of each person who receives disbursements aggregating over $200 in connection with an independent expenditure),

22 Heritage Action for America, 2018 Year-End Report at 1-2 (Jan. 24, 2019).

23 *Id.* at 3-18.

24 *Id.* at 2.

25 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16.

26 52 U.S.C. § 30104(c)(1).

and indicate the candidates the independent expenditures support or oppose.[27]

In addition, the Act requires persons, other than political committees, reporting independent expenditures to report certain information about their receipts. Under 52 U.S.C. § 30104(c)(1), a person, other than a political committee, reporting independent expenditures must disclose the information required under section 30104(b)(3)(A) "for all contributions received by such person."[28] Section 30104(b)(3)(A) requires identification of each "person (other than a political committee) who makes a contribution to the reporting committee during the reporting period [aggregating] in excess of $200 within the calendar year."[29] Furthermore, under 52 U.S.C. § 30104(c)(2)(C), a person, other than a political committee, reporting independent expenditures must also identify "each person who made a contribution in excess of $200 . . . which was made for the purpose of furthering *an* independent expenditure."[30]

The Commission's implementing regulation at 11 C.F.R. § 109.10(e)(1)(vi) required "[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."[31] On August 3, 2018, the District Court for the District of Columbia

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27 52 U.S.C. § 30104(c)(2)(A) (incorporating requirements of 52 U.S.C. § 30104(b)(6)(B)(iii)).

28 52 U.S.C. § 30104(b)(3)(A).

29 52 U.S.C. § 30104(b)(3)(A), (c)(1); *see also* 52 U.S.C. § 30101(13) (defining "identification" to include name, address, and, for individuals, occupation and employer).

30 52 U.S.C. § 30104(c)(2)(C) (emphasis added).

31 11 C.F.R. § 109.10(e)(1)(vi) (emphasis added).

vacated 11 C.F.R. § 109.10(e)(1)(vi) because it conflicted with 52 U.S.C. § 30104(c)(1) and (c)(2)(C).[32] After a brief stay, the vacatur of this regulation took effect on September 18, 2018.[33]

In the *CREW I* opinion, the court clarified that 52 U.S.C. § 30104(c)(1) and (c)(2)(C) "unambiguously require separate and complementary requirements to identify individuals who contribute over $200 to reporting non-political committees and mandate significantly more disclosure than that required by the challenged regulation."[34] In analyzing the statute, the district court reasoned that, "allowing not-political committees to mask donors, who otherwise are subject to disclosure under subsection (c)(1), facilitates the role of these organizations as pass-throughs, enabling donors to contribute to super PACs without being identified by routing their contributions through affiliated 501(c)(4) organizations or other types of not-political committees" and observed that the disclosure of donors pursuant to subsection (c)(1) was designed to reach beyond those whose donations were simply used for independent expenditures and to also reach donors whose funds were utilized for other political efforts such as contributions to candidates, political committees, or super PACs.[35] The district court, linking its conclusions to its analysis of the Supreme Court's decisions in *Buckley v. Valeo* and *FEC v. Massachusetts Citizens for Life* ("*MCFL*"), further determined that:

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[32] *CREW I*, 316 F. Supp. 3d at 357.

[33] *See CREW* Guidance.

[34] *CREW I*, 316 F. Supp. 3d at 410.

[35] *CREW I*, 316 F. Supp. 3d at 380-381 (discussing how some 501(c)(4) organizations and super PACs are "closely connected" to each other and stating that "the donors covered in subsection (c)(1) contributed to not-political committees to support political efforts in connection with federal elections, which contributions may be used by the not-political committee, in some cases, to contribute directly to candidates or political committees, including to fund super PACs").

> Subsection (c)(1) plainly requires broader disclosure than just those donors making contributions for the purposes of funding the independent expenditures made by the reporting entity. Instead, subsection (c)(1) applies to "*all* contributions received by such" reporting not-political committee and, as construed by the Supreme Court in *Buckley*, a decade earlier than *MCFL*, requires disclosure of donors of over $200 annually making contributions "earmarked for political purposes," which contributions are "intended to influence elections"[36]

As a result, the district court concluded that a person other than a political committee who makes independent expenditures in excess of $250 "triggers the obligation to identify those donors funding the organization's political purposes of influencing federal elections that is similar to the donor identification obligation applicable to political committees."[37]

Although the district court found that donors who wish to *only* fund administrative and non-political expenditures may do so without being disclosed,[38] it also held that "those donors funding the not-political committee's political activities to influence a federal election — by, for example, making contributions to candidates, political committees, or political parties or by financing independent expenditures — must be identified to inform the electorate on the sources of funding of participants in the electoral process."[39] The court left open the question of how a

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[36] *CREW I*, 316 F. Supp. 3d at 389 (quoting *Buckley v. Valeo*, 424 U.S. 1, 80 (1976); *FEC v. Mass. Citizens for Life* ("*MCFL*"), 479 U.S. 238, 262 (1986)) (emphasis in original).

[37] *Id.* at 389; *see also id.* at 388 (noting that the incorporation of 52 U.S.C. § 30104(b)(3)(A) in 52 U.S.C. § 30104(c)(1) "makes clear that these disclosure obligations for contributors are closely aligned").

[38] *CREW I*, 316 F. Supp. 3d at 398 ("The differences in disclosure requirements for not-political committees . . . stems from a recognition that such entities, unlike political committees, may have non-political goals or missions . . . with the required disclosure targeted only at those donors who want to fund political activities to influence federal elections or independent expenditures."); *see also id.* at 393 (observing that a not-political committee "would not have to report contributions made exclusively for administrative expenses") (quoting *Speechnow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010)); and *id.* at 400-01 (noting the ability to only fund administrative expenses without identification).

[39] *Id.* at 401.

person other than a political committee would fulfill its obligation to identify the subset of its donors who provided funds intended to influence elections but considered the necessary data to be readily available to these groups, explaining that "[n]ot-political committees likely keep close track of their donors, the donors' articulated funding interests, if any, and their contribution history."[40] The court also considered the donation of funds available for both general and political purposes to require disclosure, stating that "the public has an interest in knowing who is speaking about a candidate and who is funding that speech, no matter whether the contributions were made towards administrative expenses or independent expenditures."[41]

Following the *CREW I* decision, the Commission issued guidance on October 4, 2018, concerning filing obligations for persons other than political committees making independent expenditures. The *CREW* Guidance stated that for independent expenditures made on or after September 18, 2018, by persons other than political committees, the Commission will enforce the statute "[i]n accordance with the district court's interpretation of the reporting requirements at 52 U.S.C. § 30104(c)(1) and (c)(2)(C)."[42] The guidance quoted portions of the *CREW I* opinion setting forth those interpretations, including that section (c)(1) requires reporting of "*all* contributions received" and disclosure of donors making contributions over $200 annually "earmarked for political purposes" and, thus, "intended to influence elections."[43] Because the *CREW I* decision was issued in the middle of the October 2018 reporting period, the guidance

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[40] *Id.* at 413.

[41] *Id.* at 394 (quoting *SpeechNow.org*, 599 F.3d at 698).

[42] *CREW Guidance*, section 4.

[43] *Id.* (quoting *CREW I*, 316 F. Supp. 3d at 389) (emphasis in original); *see supra*, note 36 and accompanying text (quoting the corresponding portion of the *CREW I* opinion).

stated that, "in the interests of fairness," persons, other than political committees, making reportable independent expenditures on or after September 18, 2018, to be reported on the October 2018 quarterly reports must report the information required by 52 U.S.C. § 30104(c)(1) and (c)(2)(C) only "[f]or contributions received between Aug. 4, 2018 (the date after the district court's opinion) and Sept. 30, 2018 (the end of the reporting period)."[44] The *CREW* Guidance also stated that the Commission would "exercise its prosecutorial discretion for the quarterly reports due Oct. 15, 2018."[45]

On August 21, 2020, the D.C. Circuit affirmed the district court's decision in its *CREW II* opinion, holding that "[section 30104](c)(1) unambiguously requires an entity making over $250 in IEs to disclose the name of any contributor whose contributions during the relevant reporting period total $200, along with the date and amount of each contribution."[46] The D.C. Circuit further held that "[section 30104](c)(2)(C) is naturally read to cover contributions intended to support any IE made by recipient."[47] As such, the D.C. Circuit upheld the district court's decision to vacate 11 C.F.R. § 109.10(e)(1)(vi), finding that the regulation "disregards (c)(1)'s requirement that IE makers disclose each donation from contributors who give more than $200"and "impermissibly narrows (c)(2)(C)'s requirement that contributors be identified if their

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44 *CREW Guidance*, section 3 (further explaining that this includes "the identification of each person whose contribution or contributions to the reporting person had an aggregate amount or value in excess of $200 within calendar year 2018, together with the date and amount of any such contribution(s); and the identification of each of these persons whose contribution(s) in excess of $200 to the reporting person was made for the purpose of furthering any independent expenditure").

45 *Id.*

46 *CREW II*, 971 F.3d at 354.

47 *Id.*

donations are 'made for the purpose of furthering *an* independent expenditure'" by requiring disclosure only of donations linked to a particular independent expenditure.[48] The D.C. Circuit also explained that the invalidation of 11 C.F.R. § 109.10(e)(1)(vi) meant that a person other than a political committee who made IE's "will be required, as a result of the district court's judgment, to disclose nearly all contributions it receives during any reporting period in which it makes IEs."[49]

B. There is Reason to Believe that Heritage Action Failed to Report Certain Contributors

Heritage Action disclosed over $1,933,496 for independent expenditures during the 2018 general election, including $1,811,736.87 in independent expenditures supporting the same twelve candidates that Heritage Action announced both to donors and the general public that it planned to support. Heritage Action's October 2018 Quarterly Report disclosed $374,177.20 in independent expenditures supporting those twelve candidates but did not include any donor information.[50] Heritage Action's 2018 Year-End Report disclosed $1,559,319.71 in independent expenditures, including $1,437,559.67 in independent expenditures supporting those same twelve candidates, but did not disclose any donor information.[51] These disclosures were made shortly after Heritage Action made public statements encouraging potential donors to provide

48 *Id.* at 350-51.

49 *Id.* at 347.

50 *Supra*, notes 11 and 12, and accompanying text.

51 *Supra*, note 22, and accompanying text.

them with additional funding to pay for independent expenditures, indicating a close nexus between donor solicitations and contributions received for political purposes.[52]

Heritage Action argues that the reference to the term "earmarked" in the *CREW* Guidance indicates that it was required to disclose only those contributions that contain a donor-generated designation, instruction, or encumbrance, per the definition of "earmarked" at 11 C.F.R. § 110.6.[53] This argument misconceives the relevance of the regulatory earmarking definition in section 110.6, which concerns contributions made to candidate committees through an intermediary or conduit, in seeking to apply it to activity outside of that context, such as to the scope of reporting requirements for contributions received by persons other than political committees. While section 110.6 applies to contributions earmarked to candidates and their authorized committees, it has no bearing on independent expenditure reporting by persons other than political committees like Heritage Action.[54]

Commission regulations do not define "earmarked for political purposes," as that phrase was used in *Buckley* and quoted in both *CREW I* and the *CREW* Guidance and, later, in *CREW II*.

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[52] *See* Compl. at 2 (citing McClatchy article); *cf. FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995) (holding that a non-political committee's solicitation was for "contributions," and thus subject to disclaimer requirements for solicitations under the provision now codified at 52 U.S.C. § 30120, because it left "no doubt that the funds contributed would be used to advocate President Reagan's defeat at the polls, not simply to criticize his policies during the election year"); Supplemental Explanation and Justification for the Regulations on Political Committee Status, 72 Fed. Reg. 5595, 5604 (Feb. 7, 2007) (explaining that, for purposes of the $1,000 "contribution" threshold for determining political committee status, "if any of the [organization's] solicitations clearly indicated that the funds received would be used to support or defeat a Federal candidate, then the funds received were given for the purpose of influencing a Federal election and therefore constituted 'contributions'") (internal quotation marks omitted).

[53] *See* Resp. at 2-3 (citing Factual & Legal analyses and reports in prior matters applying that definition).

[54] *See, e.g.*, Affiliated Committees, Transfers, Prohibited Contributions, Annual Contribution Limitations and Earmarked Contributions, 54 Fed. Reg. 34098, 34105 (Aug. 17, 1989) ("Earmark E&J") (explaining that section 110.6 is "limited to contributions earmarked to candidates and their authorized committees, and thus should not be extended to include contributions earmarked to other types of political committees").

Commission regulations define the term "earmarked" for the purpose of section 110.6's regulation of "contributions . . . earmarked or otherwise directed to the candidate through an intermediary" as "a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee."[55] This definition relates to the requirements of 52 U.S.C. § 30116(a)(8), which includes within a contributor's contribution limits those contributions made to a candidate through an intermediary or conduit.[56] The Commission has declined to extend the application of 11 C.F.R. § 110.6 beyond the statutory provision it implements, *i.e.*, the limits applicable to contributions to candidates and their authorized committees when made through conduits or intermediaries.[57]

In *CREW I*, the district court did not reference the definition of "earmarked" at 11 C.F.R. § 110.6 when it quoted *Buckley*'s use of the phrase "earmarked for political purposes."[58] Instead, the court observed that "[n]o parameters are set in § 30104(c)(1) that the contributions be earmarked for a specific or single political purpose so long as the purpose is in connection with a federal election and, thus, this disclosure requirement is analogous to the requirements

[55] 11 C.F.R. § 110.6(a), (b)(1); *see also* Advisory Op. 2019-01 at 3 (It Starts Today) ("AO 2019-01").

[56] AO 2019-01 at 3 (citing 52 U.S.C. §30116(a)(8); 11 C.F.R. § 110.6(a)).

[57] Earmark E&J, 54 Fed. Reg. at, 34105 (explaining application of rule to only candidate committees and further explaining that other political committees must still comply with requirements as to the forwarding of contributions and the reporting of the original contributor).

[58] *CREW I*, 316 F. Supp. 3d at 376.

applicable to political committees."[59] Similarly, the D.C. Circuit, in rejecting an argument that *Buckley* "imposed a narrowing construction" on the term "contribution" for purposes of section 30104(c), found that "*Buckley* stated more broadly that the term [contribution] covers any donation 'earmarked for political purposes.' To the same effect, . . . *MCFL* similarly read the term 'contribution' as used in subsection 30104(c) to cover 'funds intended to influence elections.'"[60] Thus, the courts' analyses of the phrase "earmarked for political purposes" appear to focus broadly on the intention to influence federal elections rather than a specific mechanism or procedure for earmarking, as urged by Heritage Action.

Further, to apply the earmarking definition at 11 C.F.R § 110.6 in order to reject donor disclosure under 52 U.S.C § 30104(c), as suggested by Respondent, would appear to contravene the D.C. Circuit's observation that the now-invalidated 11 C.F.R. § 109.10(e)(1)(vi) was problematic because it allowed entities subject to the rule to "serve as a kind of pass-through, non-disclosure vehicle" and was therefore inconsistent with the disclosure aims of the Act.[61] And all of the earmarking MURs that the Response cites involve allegations of excessive

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[59] *Id.* (quoting *Buckley*, 424 U.S. at 80); *and see id.* at 389 (equating *Buckley*'s "earmarked for political purposes" with *MCFL*'s "intended to influence elections").

[60] *CREW II*, 971 F.3d at 353 (quoting *Buckley*, 424 U.S. at 78; *MCFL*, 479 U.S. at 262). The *CREW II* opinion also does not reference the regulation at 11 C.F.R. § 110.6.

[61] *CREW II*, 971 F.3d at 344-345 (explaining how the vacated rule was partially responsible for why "a significant amount of IE spending now comes from organizations that do not disclose their contributors"). Concerns regarding the lack of disclosure under the now-vacated 11 C.F.R. § 109.10(e)(1)(vi) and the importance of achieving comprehensive disclosure were also addressed at length by the district court. *CREW I*, 316 F. Supp. 3d at 380-381 ("Absent enforcement of subsection (c)(1), super PACs disclose the identities of contributing not-political committees, but the latter do not disclose the original contributors, subverting the FECA's broad disclosure regime"); *id.* at 414 ("The congressional goal with enactment of the predecessor statute to 52 U.S.C. § 30104(c) was "to achieve 'total disclosure' by reaching 'every kind of political activity' in order to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible." (quoting *Buckley*, 424 U.S. at 76.)); *id.* at 423 (noting that contributions made for political purposes to influence any election for federal office "may, in fact, be intended to fund the not-political committee's own contributions and be routed to candidates, political parties, or political committees, such as super PACs").

contributions and do not pertain to general disclosure obligations.[62] Finally, importing a regulatory definition that pertains to contribution limits is inapposite in this context, given that Heritage Action as a not-political committee may receive unlimited donations from individuals and corporations. As such, accepting the Response's contention that the definition of earmarking in 11 C.F.R. § 110.6 controls the disclosure of donors to persons other than political committees pursuant to 52 U.S.C. § 30104(c)(1) and (2)(C) would be contrary to Commission precedent and the reasoning set forth in the *CREW* decisions for vacating that regulation.

Instead, the Commission's guidance and the *CREW* decisions direct entities like Heritage Action to comply with the plain language of 52 U.S.C. § 30104(c)(1) and (2)(C) — *i.e.*, to report all contributors "whose contributions during the relevant reporting period total $200"[63] and to further identify "whether a disclosed 'contribution' was intended to support IEs or instead aimed only at supporting the recipient's other election-related activities."[64] Although the decisions provide the reporting entity discretion to determine how to ascertain those donations that need to be disclosed, such discretion must be consistent with the underlying "requirement that IE makers disclose each donation from contributors who give more than $200, regardless of any connection

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62 *See* Factual & Legal Analysis at 1, MUR 5732 (Matt Brown for U.S. Senate) (addressing whether a Committee "arranged for its donors to contribute to these State Parties . . . as part of an effort to circumvent the contribution limits set forth in the Federal Election Campaign Act"); First General Counsel's Report at 2, MUR 6221 (Transfund) (addressing whether a committee received excessive contributions in the form of an earmarked contribution); MUR 4831/5274 (Nixon) (addressing a tallying and excessive contribution scheme between the Missouri Democratic State Committee and the U.S. Senate campaign of Jeremiah Nixon); First General Counsel's Report at 6-7, MUR 5520 (Billy Tauzin Congressional Committee) (addressing whether an outgoing congressman's donation of excess campaign funds to the Republican Party of Louisiana was actually an earmarked excessive contribution to his son's campaign); First General Counsel's Report at 8-9, MUR 5125 (Paul Perry for Congress) (addressing whether a contribution from a political action committee to the Indiana Democratic Party was actually earmarked for a candidate).

63 *CREW II*, 971 F.3d at 354.

64 *Id.* at 356.

to IEs eventually made" and the further requirement that a subset of these contributors "be identified if their donations are 'made for the purpose of furthering *an* independent expenditure.'"[65]

Similarly, the Response's contention that general treasury funds may be used for independent expenditures without disclosing any underlying contributors to the general treasury fund runs counter to the analyses in the *CREW* opinions, which require the disclosure of funds made available for political purposes, even when those funds are also available for other purposes.[66] Allowing otherwise would sanction the use of general treasury accounts to mask otherwise impermissible contributions, such as foreign contributions, by the person making independent expenditures.[67]

Heritage Action's statements on its 2018 October Quarterly and Year-end filings that it paid for more than $1.5 million of independent expenditures from general treasury funds do not

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65 *CREW II*, 971 F.3d at 351; *see also CREW I*, 316 F. Supp. 3d at 423 (finding that the vacated regulation "impermissibly narrows the mandated disclosure in 52 U.S.C. § 30104(c)(2)(C), which requires the identification of such donors contributing for the purpose of furthering the not-political committee's own express advocacy for or against the election of a federal candidate, even when the donor has not expressly directed that the funds be used in the precise manner reported); *id.* at 413 (noting that "Not-political committees likely keep close track of their donors, the donors' articulated funding interests, if any, and their contribution history"); *CREW* Guidance at Section 4.

66 *CREW II*, 971 F.3d at 354 ("[Section 30104]](c)(1) unambiguously requires an entity making over $250 in IEs to disclose the name of any contributor whose contributions during the relevant reporting period total $200, along with the date and amount of each contribution"); *id.* at 347 ("[Appellant, a 501(c)(4) organization,] will be required, as a result of the district court's judgment, to disclose nearly all contributions it receives during any reporting period in which it makes IEs."); *CREW I*, 316 F. Supp. 3d at 423 (requiring disclosure under 52 U.S.C. § 30104(c)(2)(C) "even when the donor has not expressly directed that the funds be used in the precise manner reported").

67 *See CREW I*, 316 F. Supp. 3d at 368 (observing that the "regulatory mechanisms" of section 30104 "are designed to deter corruption, prevent particular individuals or organizations from having an undue influence on federal elections, and assist in enforcement of laws prohibiting foreign contributions in federal elections, while also protecting the protecting the exercise of political speech so crucial to the functioning of this country's vibrant democracy" (citing *Citizens United v. FEC*, 558 U.S.310, 366-67 (2010); *Buckley*, 424 U.S. at 66-68)).

address whether Heritage Action received contributions over $200 requiring disclosure under subsection (c)(1), nor do they address whether any donors made contributions for the purpose of funding any independent expenditure, which would require disclosure of additional information under subsection (c)(2)(C).[68] With respect to the disclosure of donors required under subsection (c)(1), the court in *CREW II* found that "[Section 30104](c)(1) unambiguously requires an entity making over $250 in IEs to disclose the name of any contributor whose contributions during the relevant reporting period total $200, along with the date and amount of each contribution."[69] Heritage Action's characterization of its funding account as "general treasury funds" does not require the Commission to treat those funds as having been donated for "general programs"[70] and, conversely, does not relieve Heritage Action's obligation to disclose contributions so characterized. Neither of the *CREW* opinions nor the *CREW* Guidance indicate that the Act exempts contributions held in general treasury funds from disclosure.[71]

With respect to the additional disclosure of political donors who also donated for the purpose of funding independent expenditures, Respondent states that no "contributions were

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[68] *Supra*, notes. 11, 12, and 22, and accompanying text.

[69] *CREW II*, 971 F.3d at 354. *See also CREW I*, 316 F. Supp. 3d at 413 ("donors to [501(c)(4)] organization's political efforts in federal campaign and independent expenditure activities are required to be disclosed"); *see also id.* at 380 ("[T]he donors covered in subsection (c)(1) contributed to not-political committees to support political efforts in connection with federal elections, which contributions may be used by the not-political committee, in some cases, to contribute directly to candidates, or political committees, including to fund super PACs.").

[70] *See CREW I*, 316 F. Supp. 3d at 413 (distinguishing donations for an organization's "general programs" from those for an "organization's political efforts in federal campaign and independent expenditure activities," the latter of which are reportable contributions under section 30104(c)).

[71] *See CREW II*, 971 F.3d at 347 (reasoning that the appellant organization will be required "to disclose nearly all contributions it receives during any reporting period in which it makes IEs"); *CREW I*, 316 F. Supp. 3d at 376 ("No parameters are set in § 30104(c)(1) that the contributions be earmarked for a specific or single political purpose so long as the purpose is in connection with a federal election and, this, this disclosure requirement is analogous to the requirements applicable to political committees.").

made for the purpose of furthering *these* expenditures."[72] By using the definite article "these" to support its failure to disclose donors, Heritage Action appears to be invoking the regulatory reporting regime that the district court vacated. As articulated in the *CREW* opinions, subsection (c)(2)(C) requires disclosure of donations made for *any* independent expenditure, not particular ones.[73]

Further, the Response contends that a donation made in response to a reporting entity's explicit solicitation for donations for independent expenditures cannot be considered "earmarked" absent an additional designation generated by the donor.[74] Heritage Action does not affirmatively state in its Response or in its filings with the Commission that it has not received contributions so designated for independent expenditures but instead argues that the Complaint has not alleged the presence of such earmarked contributions.[75] Heritage Action's Executive Director's statements to the press, such as that "what we're telling donors is, every dollar we raise over budget we can effectively pour more into these races,"[76] indicate that at least some donors so solicited gave money to Heritage Action for the purposes described in those solicitations and public statements, that is, to fund independent expenditures that Heritage Action

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[72] *See, e.g.*, October 2018 Quarterly Report at 2 (emphasis added).

[73] *See CREW II*, 971 F.3d at 354 ("[Section 30104](c)(2)(C) is naturally read to cover contributions intended to support any IE made by recipient"); *CREW I*, 316 F. Supp. 3d at 423 (requiring disclosure under section 30104(c)(2)(C) "even when the donor has not expressly directed that the funds be used in the precise manner reported"); *see also CREW* Guidance at 2 (reiterating the need to identify contributions made "for the purpose of furthering any independent expenditure").

[74] Resp. at 3.

[75] *Id.* (citing First General Counsel's Report at 8-9, MUR 5125 (Paul Perry for Congress) (addressing earmarking under 11 C.F.R. § 110.6)).

[76] Compl. at 2 (citing McClatchy article).

had stated that it intended to run. Moreover, this argument again seeks to apply section 110.6 to another context and ignores that no explicit designation is required in order for a donor's contribution to be reportable, under section 30104(c)(1) if the donor's contributions aggregate over $200, and also under section (c)(2)(C) if the contributions were intended to support independent expenditures.[77]

Given Heritage Action's reporting of a significant amount of independent expenditures following the *CREW* decision, Heritage Action's public statements regarding its intent to fund independent expenditures to support specific candidates, its spending on independent expenditures to support those same candidates, and the absence of any disclosure of donors, the available information indicates that, in accordance with the *CREW* Guidance, Heritage Action should have disclosed donors whose funds were contributed for political purposes. Had Heritage Action's conduct at issue been limited to failing to identify contributors concerning its $374,177.20 of independent expenditures made on September 17 and 19, 2018, on its October quarterly filings, we would, consistent with the *CREW* Guidance, exercise prosecutorial discretion and dismiss the entire matter. However, based on its 2018 year-end filings, the record indicates that Heritage Action continued to raise and spend significant amounts of funds for political purposes without disclosing its donors well after it was on notice of its disclosure requirements following the *CREW I* decision. As a result of Heritage Action's 2018 year-end filings, the Commission finds reason to believe that Heritage Action violated 52 U.S.C. § 30104(c)(1) by failing to disclose donors who contributed at least $200 and (c)(2)(C) by failing

[77] *CREW II*, 971 F.3d at 354*; CREW I*, 316 F. Supp. 3d at 423.

to disclose the identification of donors who contributed for the purpose of funding an independent expenditure.