FEDERAL ELECTION COMMISSION
1050 FIRST STREET, N.E.
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 7516
Heritage Action for America	)	
	)	

STATEMENT OF REASONS OF CHAIRMAN ALLEN J. DICKERSON AND COMMISSIONERS SEAN J. COOKSEY AND JAMES E. "TREY" TRAINOR, III

We voted to dismiss, as an exercise of prosecutorial discretion, the allegation in this matter that Heritage Action for America ("Heritage") improperly reported certain independent expenditures by not including donor information. Pursuant to governing law, we provide this statement to explain our reasoning.[1]

I. BACKGROUND

The complaint in this matter, filed on October 16, 2018, alleged that Heritage, a 501(c)(4) social welfare organization, violated 52 U.S.C. § 30104(c) by failing to include on its reports the identities of the donors whose funds were used to pay for certain independent expenditures that Heritage reported having disseminated in September and October 2018. In support of this allegation, the complaint pointed 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*") announcing a new rule for when such disclosure is statutorily required.

The *CREW I* case arose from an administrative complaint filed with the Federal Election Commission ("FEC" or "Commission") on November 14, 2012, alleging that the Federal Election Campaign Act of 1971, as amended (the "Act") requires disclosure of donors who contribute to an

[1] *See Dem. Cong. Campaign Comm. v. Fed. Election Comm'n*, 831 F.2d 1131, 1135 (D.C. Cir. 1987) ("*DCCC*") (establishing requirement that "[t]he Commission or the individual Commissioners" must provide a statement of reasons why the agency "rejected or failed to follow the General Counsel's recommendation"); *Common Cause v. Fed. Election Comm'n*, 842 F.2d 436, 449 (D.C. Cir. 1988) ("A statement of reasons…is necessary to allow meaningful judicial review of the Commission's decision not to proceed"); *see also id.* at 451 (R.B. Ginsburg, J., dissenting in part and concurring in part) ("I concur in part III of the court's opinion holding the *DCCC* rule applicable, prospectively, to all Commission dismissal orders based on tie votes when the dismissal is contrary to the recommendation of the FEC General Counsel"); *Nat'l Republican Senatorial Comm. v. Fed. Election Comm'n*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("We further held that, to make judicial review a meaningful exercise, the three Commissioners who voted to dismiss must provide a statement of their reasons for so voting. Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did") (citation omitted); *Campaign Legal Ctr. & Democracy 21 v. Fed. Election Comm'n*, 952 F.3d 352, 355 (D.C. Cir. 2020).

entity for the purpose of furthering *an* independent expenditure, and that the Commission's narrower interpretation in the regulation at 11 C.F.R. § 109.10(e)(1)(vi) (requiring disclosure only when the donation is made for the purpose of furthering *a specific* independent expenditure) was contrary to law.[2] The Commission deadlocked on the underlying legal issue of the scope of the disclosure requirement, and three years after it was filed, the complaint was dismissed.

In March 2016, the administrative case having closed and the file having gone public, the complainant then exercised its right under 52 U.S.C. § 30109(a)(8)(A) to seek judicial review of the FEC's dismissal of the case. Upon review, the Court found the Commission's regulation at 11 C.F.R. § 109.10(e)(1)(vi) was invalid, and therefore the dismissal of the complaint in reliance upon that regulation was contrary to law, and remanded the administrative case back to the FEC.[3]

The Commission declined to appeal the decision. Two months after reconsidering the matter, on October 4, 2018, the Commission issued a press release (the so-called "CREW guidance") announcing that it would no longer enforce the vacated regulation and "offer[ing] guidance to the public on how to proceed consistent with the district court's decision."[4] The press release quoted portions of the *CREW I* opinion, including the Court's holding that the Act requires disclosure of donors making contributions "earmarked for political purposes" and, thus, "intended to influence elections." The Commission, however, was silent as to the meaning of those terms used by the Court in its decision but not specifically defined in the Act or Commission regulations. Finally, the Commission announced that the new rule would apply to activity undertaken on or after September 18, 2018. However, the Commission did not commence a formal rulemaking to implement the *CREW I* decision (and the vacated regulation remains on the books).[5]

The activity at issue in this matter occurred in two tranches, overlapping the effective date of the CREW guidance. On September 19, 2018, Heritage filed a 48-Hour Report of independent expenditures with the Commission disclosing that on September 17 and 19, 2018, Heritage spent $374,177.20 for independent expenditures. Heritage 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." This statement reflected a common practice by which entities notified the Commission that they were not required to disclose the identity of the donors whose funds were used to pay for the independent

[2] This same issue was the subject of a rulemaking petition filed with the Commission by then-Congressman Chris Van Hollen in 2011, the disposition of which the Commission had been unable to agree upon in December 2011, but the consideration of which also raised the issue of the sufficiency of the Commission's regulations implementing 52 U.S.C. § 30104(c)(1), reporting obligations for certain contributions made for the purpose of influencing a federal election generally.

[3] On remand to the FEC, OGC recommended that the Commission dismiss the complaint as an exercise of its prosecutorial discretion on the grounds that the respondent apparently relied on the vacated regulation, and "for a number of prudential reasons," including whether the respondent "had notice of what standard would apply to its reporting." MUR 6696R (Crossroads GPS), First General Counsel's Report (Aug. 24, 2018) at 16. However, the Commission was divided on whether to adopt that recommendation and closed the file without providing any further guidance. *Id*. Certification dated Aug. 28, 2018.

[4] *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/.

[5] On August 21, 2020, the D.C. Circuit affirmed the district court's decision in its *CREW II* decision. 971 F.3d. 340 (D.C. Cir. 2020).

expenditures. On October 12, 2018, Heritage filed its October 2018 Quarterly Report disclosing the same $374,177.20 in independent expenditures and noting that "no reportable contributions were made for the purpose of furthering these expenditures." Heritage also filed 48-Hour Reports on October 3, 2018, October 10, 2018, and October 16, 2018, disclosing additional spending on independent expenditures, and containing similar statements regarding the purposes for which the contributions used to fund these expenditures were made, and on January 24, 2019, filed its 2018 Year-End Report disclosing $1,559,319.71 in independent expenditures, and noting that "no reportable contributions were made for the purpose of furthering these expenditures." No evidence contradicting Heritage's statements was presented to the Commission.

In this matter, then, the question before the Commission was whether Heritage was required to disclose the identify of the donors whose funds were used to pay for the independent expenditures disseminated in September and October 2018. The complaint alleged that it was, pursuant to the Court's decision in *CREW I*, because the "progression from solicitations for specific activities to spending that correlates exactly with the solicitations provides reason to believe Heritage [] received contributions for the purpose of furthering spending, i.e., its independent expenditures."[6] Heritage asserted that its reporting complied with the statute, and the Commission's CREW guidance, informed by the Commission's regulatory definition of "earmarked."[7] The Office of General Counsel recommended that the Commission find reason to believe that Heritage violated 52 U.S.C. § 30104(c)(1) by failing to disclose donors who contributed for political purposes, find reason to believe that Heritage 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, and authorize an investigation into Heritage's donors including using compulsory process.[8] As explained below, we could not support this course of action, and instead voted to dismiss this matter as an exercise of prosecutorial discretion.[9]

II. PROCEEDING WITH ENFORCEMENT WOULD HAVE BEEN A POOR USE OF AGENCY RESOURCES

At the heart of this matter is First Amendment protected activity that took place at a time when the meaning of the provision of the law at issue was in flux, in a matter which came before the Commission as part of a tremendous enforcement backlog. For these reasons, we voted to dismiss this matter as an exercise of prosecutorial discretion.[10]

[6] MUR 7516, Compl at 9.

[7] "Earmarked" means a "designation, instruction or encumbrance." 11 C.F.R. § 110.6(b)(1).

[8] OGC recommended dismissal as a matter of prosecutorial discretion of the allegations as to the reporting of the independent expenditures made on September 17 and 19, 2018, "consistent with the CREW Guidance." We agreed with this recommendation.

[9] MUR 7516 (Heritage Action), Certification dated April 6, 2021. The Commission was divided 3-3 over whether to proceed with the case. A separate motion to close the file failed by a vote of 3-3. On January 11, 2022, a second separate motion to close the file again failed by a vote of 3-3. The matter was subsequently placed on the executive session agendas for March 23 and 25, 2021, January 11 and 13, February 15 and 17, March 8, 10, 22, and 24, April 5, 7, and 26, 2022 but was held over in each case by a commissioner. Although a vote to close the file is customarily the administrative means by which the Commission ends a matter, it is not statutorily required to bring a matter to a close.

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

When the Court in *CREW I* vacated the Commission's long-standing disclosure regulation, mere months before a heated midterm election, the impact was seismic. And like the aftermath of a volcano, it took time for the regulatory dust to settle after the eruption ceased. Although the Court's decision in *CREW II* affirming the lower court's decision vacating the regulation brought some clarity, that decision came years after the conduct at issue in this matter, and even then did not answer all the outstanding questions about the application of the statutory provision at issue. For example, what does it mean to give "for a political purpose," a phrase central to the Court's interpretation of the statutory provision at issue in this matter?[11] As the U.S. Court of Appeals for the Second Circuit determined upon reviewing a campaign finance question in 1995, the phrase "political purposes" brings about significant "'hazards of uncertainty'… because the phrase…could encompass all the 'issue-advocacy activities' engaged in by many educational, charitable, scientific, and even religious nonprofits, even when their activities are not 'unambiguously related to the campaign of a particular federal candidate.'"[12]

And the questions do not stop there. What evidence is required to show that a donor gave for a political purpose – is it enough that a solicitation mentions the entity's political activity but does not specify what any particular funds will be used for, or must a donor affirmatively earmark that their funds may or must not be used for political purposes? How does the Supreme Court's acknowledgement that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application" shape what it means to "intend to influence elections?"[13] And, crucially, in the absence of new regulatory language, how is the Commission to interpret a judicial opinion that clearly invalidated a portion of our regulations, but of necessity opined upon facts clearly distinguishable from those in this matter?

The Commission's 2018 CREW guidance—issued not in the pages of the Federal Register, but in a brief press release, although better than silence, was far from the picture of clarity, and was not issued until months after the decision and weeks after the activity at issue in this matter. Yet, by merely repeating select quotations from the opinion, the guidance could not answer the thorny questions posed by the court's holding. Nor could it substitute for proper rulemaking that might address the underlying legal complexities raised by the underlying judicial opinions.

Without agreement on a rule of law, which it was apparent to us was the situation here, an investigation would have amounted to nothing more than an official intrusion into the respondent's records to satisfy our curiosity. And even if the Commission could have agreed in this case on a rule for when donor disclosure for independent expenditures is required, as a matter of procedural

[11] If a pencil is used for filing out an FEC form, is it administrative, but if it's used for planning an independent expenditure is it a political pencil?
[12] *Fed. Election Comm'n v. Survival Educ. Fund*, 65 F.3d 285, 294, 295 (2d Cir. 1995) (quoting *Buckley v. Valeo*, 424 U.S. 1, 80 (1976) (*per curiam*).
[13] *Buckley*, 424 U.S. at 42.

due process, we would have declined the invitation to engage in after-the-fact rulemaking via the enforcement process.[14]

Moreover, when this matter came before the Commission, the statute of limitations was fast approaching and the Commission faced an enforcement backlog (involving many cases of straightforward violations of the Act) arising from a prolonged period when the Commission lacked a quorum, and opening an investigation here would have only taken our attention, time, and resources away from resolving those matters.

III. CONCLUSION

For the foregoing reasons, we voted to dismiss this matter as an exercise of prosecutorial discretion,[15] and to close the file.

May 13, 2022
Date

Allen Dickerson
Chairman

May 13, 2022
Date

Sean J. Cooksey
Commissioner

May 13, 2022
Date

James E. "Trey" Trainor, III
Commissioner

[14] Indeed, FECA prohibits us from doing so. 52 U.S.C. § 30108(b) ("Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of Title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 30111(d) of this title").

[15] We have voted to dismiss other enforcement matters on the same or substantially similar grounds. *See e.g.*, MUR 7181 (Independent Women's Voice) Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III (Mar. 18, 2021) (voting to dismiss on the grounds of, *inter alia,* "limited resources"), MUR 7330 (Mia Love, *et al*.) Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III (Oct. 27, 2021) (voting to dismiss where the Commission failed to issue a clear rule and amid disagreement among Commissioners about what such a rule should be).