September 6, 2018

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

STATEMENT ON *CREW v. FEC*, NO. 16-CV-259

CHAIR CAROLINE C. HUNTER AND
COMMISSIONER MATTHEW S. PETERSEN

On August 3, 2018, the U.S. District Court for the District of Columbia struck down a Commission regulation (11 C.F.R. § 109.10(e)(1)(vi)) that has been in effect since the Carter administration. The court also concluded that the Commission erred by relying on that longstanding regulation to dismiss an administrative complaint from the 2012 election cycle against Crossroads GPS. On remand, we again voted to dismiss the complaint, as recommended by the Commission's Office of General Counsel ("OGC"). Regardless of whether Crossroads GPS might have violated the statute under the court's strained interpretation, Crossroads GPS was entitled to rely in good faith on a regulation duly promulgated by this agency in 1980.[1]

We also voted to appeal the court's deeply flawed decision, and support making public OGC's memorandum explaining whether the Commission should appeal. Four Commissioners must agree to an appeal, however, even when, as here, there is compelling evidence of serious errors by the court. In this case, the court ordered an expedited rulemaking in the heat of the current election cycle; overran circuit precedent on judicial deference to the Commission's exercise of prosecutorial discretion in enforcement matters; conjured several reporting standards, which are not easily interpreted or internally consistent;[2] erased a controlling statute of

[1] In making our position clear, we do not intend to reargue the merits of the underlying MUR. Instead, this statement serves only to explain why we disagree with a number of conclusions in the court's decision.

[2] The court described the reporting requirement as applying to "all contributions received,' . . . which contributions, by definition, are intended to 'influenc[e] any election for Federal office'" (Citizens for Responsibility and Ethics in Washington v. FEC, No. 16-cv-259, 2018 WL 3719268 at *16 (D.D.C. Aug. 3, 2018)); "'all contributions' intended to influence federal elections (with the Buckley gloss of 'earmarked for political purposes')" (id); "'all contributions,' . . . as defined in 52 U.S.C. § 30101(8), with Buckley's gloss" (id. at *19); "all contributions received . . . and, as construed by the Supreme Court in Buckley, . . . 'earmarked for political purposes,' . . .which contributions are 'intended to influence elections'" (id. at *26); "donors funding the organization's political purposes of influencing federal elections" (id. at *26); "contributions used for other political purposes in support or opposition to federal candidates by the organization for contributions directly to candidates, candidate committees, political party committees, or super PACs" (id. at *28); "contributors of funds for political purposes to influence elections for federal office" (id. at *32); "donors contributing . . . for political purposes to influence any federal election" (id. at *34); "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 expressly advocating for or against the election of a candidate" (id. at *34); "donors contributing to fund those organization's political efforts in federal campaign and independent

limitations; and assailed a safe harbor explicitly established by Congress for those relying on Commission regulations.

But perhaps the single most erroneous conclusion in the opinion was that the challenged regulation conflicts with an "unambiguous" statute. The regulation requires any person (other than a political committee) who spends more than $250 on an independent expenditure to report certain information about the source of the money used to make the independent expenditure. This regulation implements two different provisions of the Federal Election Campaign Act of 1971, as amended (the "Act"), both of which cross-reference other provisions of the Act. These provisions are at times inconsistent with each other, and at other times overlap. Given the ambiguity, the court should have upheld the Commission's regulation as a reasonable interpretation of the Act. But the court never even reached that question. Instead, the court spent 113 pages explaining why its reading of the Act is the *only* correct reading, and how the Commission's regulation, for nearly 40 years, got it wrong.

In fact, the regulation functioned with little fanfare until after the Supreme Court's decision in *Citizens United v. FEC* expanded the pool of persons entitled to make independent expenditures. Court decisions following *Citizens United* led to the creation of Super PACs and concerns about so-called "dark money," and the 2016 election elevated concerns about foreign influence in U.S. elections. The district court referred repeatedly to these post-*Citizens United* concerns before concluding that the challenged regulation did not correctly implement the Act.[3]

The court's solution was to vacate the regulation, giving the Commission 45 days to come up with new regulations before the vacatur goes into effect (on September 17, 2018). In other words, the court ordered a new independent expenditure reporting regime to be formulated, adopted, effective, and, presumably, enforced against persons who are not political committees, whose major purpose is not electoral activity but who nonetheless choose to exercise their First Amendment rights by making independent expenditures, starting just two months before the November midterm elections, when independent political speech is at its peak. Further complicating matters is the fact that, under the Act, new regulations must be before Congress for 30 legislative days before they go into effect. Thus, the Commission would have had to promulgate new regulations *before* the court issued its opinion for the regulations to be effective by September 17, 2018.

In the meantime, the court's decision is already causing confusion. Even though the vacatur has not yet gone into effect, members of the public are in doubt as to whether they can rely on the challenged regulation because the court declared it legally invalid.

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expenditure activities" (id. at *43); "donors . . . when the contributions were made for political purposes to influence any election for federal office, or at the request or authorization of a candidate or the candidate's agent" (id. at *50).

[3] While the Supreme Court's decision in *Citizens United* ushered in a sea change in campaign finance law, concerns about the potential effects of that change do not permit courts or Commissioners to undermine the decision.

Although Crossroads GPS has appealed the court's decision, the Commission needs four affirmative votes to appeal. Nevertheless, were we to appeal, we would explain to the appellate court that the Commission had a very good reason to write the regulation the way it did 40 years ago: to adopt a clear, administrable standard that reasonably interprets the Act and is consistent with both the First Amendment and governing case law.[4]

[4] In fact, just days before adopting the challenged regulation, the Commission was soundly defeated in federal court and publicly criticized for its "insensitivity to First Amendment values" in construing the Act's reporting requirement for persons other than political committees that make independent expenditures. *See FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45, 53 (2d Cir. 1980) (en banc) (Kaufman, C.J., concurring).