ORAL ARGUMENT HELD ON SEPTEMBER 13, 2019

No. 18-5261

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Crossroads Grassroots Policy Strategies,

Defendant-Appellant,

v.

Citizens for Responsibility and Ethics in Washington and Nicholas Mezlak,

Plaintiffs-Appellees,

Federal Election Commission,

Defendant-Appellee.

---

*On Appeal from the United States District Court for the District of Columbia
Civ. A. No. 16-259 (Hon. Beryl A. Howell)*

**SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANT
CROSSROADS GRASSROOTS POLICY STRATEGIES**

Thomas J. Josefiak
J. Michael Bayes
HOLTZMAN VOGEL JOSEFIAK
TORCHINSKY PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186
Phone: 540.341.8808

Michael E. Toner
Thomas W. Kirby
Andrew G. Woodson
Jeremy J. Broggi
WILEY REIN LLP
1776 K Street, NW
Washington, D.C. 20006
Phone: 202.719.7000
E-mail: tkirby@wileyrein.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

GLOSSARY

CREW	Citizens for Responsibility and Ethics in Washington
Crossroads	Crossroads Grassroots Policy Strategies
FEC	Federal Election Commission
FECA	The Federal Election Campaign Act of 1971, as amended

STATEMENT

The Court ordered supplemental briefing on the following:

> (1) Whether the language of 11 C.F.R. § 109.10(e)(1)(vi) requires the intervenor-defendant appellant to disclose the identities of the individuals that the administrative complaint sought, and whether the Federal Election Commission's contrary interpretation of § 109.10(e)(1)(vi) falls outside "the outer bounds of permissible interpretation"?
>
> (2) Once the statute of limitations for challenging a regulation passes, a party may challenge its validity if the agency applies the regulation against the party. Does the nature of this exception to the statute of limitations imply that a party is entitled to vacatur of a regulation only to the extent vacatur is (compared to other possible remedies) necessary to remedy the injury that application of the regulation caused or causes the party?

Order 1 (Oct. 24, 2019), Doc. 1812320 (citations omitted).

These questions arise from independent expenditure reports filed by Crossroads in 2012. CREW filed an FEC complaint to obtain the names of contributors it believes Crossroads should have disclosed on these reports. JA143-49.

The FEC dismissed CREW's complaint because the applicable regulation does not require disclosure of any contributor's name unless his "contribution was made for the purpose of furthering the reported independent expenditure," 11 C.F.R. § 109.10(e)(1)(vi) (hereinafter "the Regulation"), and because there was "no reason to believe" that Crossroads received any contributions earmarked for the purpose of furthering a particular reported independent expenditure, First General Counsel's Report 2 (JA260).

CREW sought review in district court. CREW argued dismissal was "contrary to law" because the FEC "ignored" alleged evidence connecting specific contributions to the reported independent expenditures and because the FEC did not consider whether there might be an alternative disclosure obligation applicable to Crossroads. JA384. CREW also attacked the Regulation facially for allegedly narrowing FECA's reporting obligation. JA384. CREW did not dispute the FEC's interpretation of the Regulation.

Only CREW's attack on the facial validity of the Regulation remains in this appeal. In briefing and at oral argument, Crossroads explained that this Court's review of the Regulation is barred because, among other things, CREW did not challenge the Regulation before the FEC, and because the statute of limitations ran in 1986. Crossroads Br. 22-34. Crossroads further explained that the Regulation should be upheld on the merits because it (1) conforms to the text, structure, purpose, and history of FECA, and (2) prevents First Amendment injury that could result from broad application of the statute. Crossroads Br. 34-52.

SUMMARY OF ARGUMENT

1. The FEC properly interpreted the Regulation. The plain text compels the conclusion that disclosure of individual contributors on independent expenditure

reports filed with the FEC is required "if, and only if, that donor's contribution 'was made for the purpose of furthering *the* reported independent expenditure.'" *CREW v. FEC*, 904 F.3d 1014, 1016 (D.C. Cir. 2018). And even if that interpretation were not compelled by the Regulation's text, it would still fall within "the outer bounds of permissible interpretation," *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019), because the Regulation uses terms of art that narrow its scope and which are designed to protect constitutional interests affecting freedom of association and to prevent misleading disclosures that could harm the public.

2. Vacatur of the Regulation is not appropriate in this case. This Court has recognized a narrow, as-applied exception to the applicable six-year statute of limitations. But that as-applied exception can provide only as-applied relief. Accordingly, if the Court were to examine the Regulation through the exception and were to determine that the Regulation is invalid—and to be clear, the Court should do neither—reversal of the district court's decision would still be required because as-applied relief is limited to, at most, vacatur of the FEC decision applying the Regulation. *See, e.g.*, *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1083 (D.C. Cir. 2017) (vacating 2014 order that applied "unlawful" 2006 rule while leaving 2006 rule in place), *cert. denied*, 138 S. Ct. 1043 (2018); *Oppenheim v. Campbell*, 571 F.2d 660, 663 (D.C. Cir. 1978) (reversing district court's vacatur of

1945 rule that "incorrect[ly] interpret[ed]" the authorizing statute and vacating 1975 decision applying that rule).

But the Court should not review the Regulation. There is no as-applied decision left in this case because CREW abandoned its challenge to the FEC's dismissal decision. And even if it had not, the as-applied exception is inappropriate because CREW is not the object of any enforcement action, and because CREW did not challenge the validity of the Regulation before the FEC. Finally, unlike the cases that developed the exception, here there are other means for CREW to obtain judicial review of the Regulation, so there is no reason to permit CREW to evade the statute of limitations.

ARGUMENT

I. The FEC's Dismissal Of CREW's Administrative Complaint Reflects The Best Interpretation Of The Regulation.

The FEC dismissed CREW's administrative complaint because there was "no reason to believe" that Crossroads received any contributions earmarked for the purpose of furthering a particular reported independent expenditure. First General Counsel's Report 2 (JA260). The FEC explained that result was required because the Regulation mandates reporting of contributor names only where there is "an express link" between "a contribution" and "a specific independent expenditure." *Id.* at 10 (JA268).

The FEC properly interpreted the Regulation. The Regulation requires "[e]very person who is not a political committee" to report "independent expenditures." 11 C.F.R. § 109.10(b). The report for "each expenditure" "shall include" the "amount, date, and purpose" of that expenditure and the "identification of each person who made a contribution in excess of $200 to the person filing such report, *which contribution was made for the purpose of furthering the reported independent expenditure*." *Id.* § 109.10(e)(1)(iii), (vi) (emphasis added). The Regulation's use of the definite article compels the interpretation that it requires disclosure of a person on a specific report "if, and only if, that donor's contribution 'was made for the purpose of furthering *the* reported independent expenditure.'" *CREW*, 904 F.3d at 1016.

In addition to employing the definite article, the Regulation incorporates terms of art that have been given narrow constructions by the Supreme Court. The reporting obligation is triggered by "independent expenditures." 11 C.F.R. §§ 109.10(b), 109.10(e)(1)(vi). In the framework of campaign-finance regulation, "expenditure" reaches "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley v. Valeo*, 424 U.S. 1, 80 (1976) (footnote omitted). Similarly, a "contribution," 11 C.F.R. § 109.10(e)(1)(vi), must be "connected with a candidate or his campaign," *Buckley*, 424 U.S. at 78. These objective, narrow constructions are necessary to ensure that ambiguity does not chill protected speech. *See id.* at 23-59, 74-82. And the Regulation's retention of terms that *Buckley* gave narrowing constructions confirms that the Regulation reaches only contributions that support specific independent expenditures.

The Regulation's structure also confirms the FEC's interpretation. The Regulation requires separate reports for "each expenditure." 11 C.F.R. § 109.10(e)(1)(iii). Each report must state whether the specific public communication "was in support of, or in opposition to" the identified candidate. *Id.* § 109.10(e)(1)(iv). Furthermore, each report must be filed "the day" or "the second day" following the date on which the funded communication was "publicly distributed." *Id.* § 109.10(c), (d). The Regulation thus contemplates near real-time disclosure as each communication is aired, not after-the-fact reports aggregating all communications funded by an organization. Under that system, listing a donor on a particular independent expenditure report when that donor gave to the communications program in general risks "penalties for perjury." *Id.* § 109.10(e)(2). The Regulation's structure thus confirms that an express link is required.

The FEC's interpretation also serves the fundamental First Amendment interests at stake in "every action the FEC takes." *Van Hollen, Jr. v. FEC*, 811 F.3d 486, 499 (D.C. Cir. 2016). Requiring an express link between contributions and specific expenditures respects expressive association and associational privacy. An individual might give to an organization because she supports its mission or communications generally yet have no knowledge of or interest in a particular communication she did not specifically approve—let alone an expectation that her name would be publicly associated with it. *See id.* at 500 (recognizing First Amendment harm where "an American Cancer Society donor who supports cancer research but not ACS's political communications must decide whether a cancer cure or her associational rights are more important to her"); *Janus v. AFSCME*, 138 S. Ct. 2448, 2463 (2018) (recognizing the "right to eschew association for expressive purposes"). Similarly, inadequately tailored disclosures could harm the public by "mislead[ing] voters as to who really supports the communications." *Van Hollen*, 811 F.3d at 497; *see* Crossroads Br. 51-52. It therefore is reasonable for the FEC to require an express link.

Because the Regulation "means what it means," *Kisor*, 139 S. Ct. at 2415, the FEC's construction is within "the outer bounds of permissible interpretation," *id.* at 2416. In addition, because CREW did not dispute the FEC's reading of the Regulation below, that argument is forfeited. *See Keepseagle v. Vilsack*, 815 F.3d 28, 36 (D.C. Cir. 2016).

II. The As-Applied Exception To The Statute Of Limitations Does Not Permit Vacatur Of The Regulation And Is Inapplicable Here.

A. The As-Applied Exception Does Not Permit Vacatur.

Direct attack on the facial validity of an FEC rule is "barred unless the complaint is filed within six years" of the rule's promulgation. 28 U.S.C. § 2401(a). This "jurisdictional" limitation, *Washington All. of Tech. Workers v. DHS*, 892 F.3d 332, 342 (D.C. Cir. 2018), is "strictly" enforced, *Spannaus v. DOJ*, 824 F.2d 52, 55 (D.C. Cir. 1987).

This Court has recognized a narrow, as-applied exception. "[W]hen an agency seeks to *apply the rule*" after the time for direct, facial challenge has run, "those affected may challenge *that application* on the grounds that it 'conflicts with the statute from which its authority derives.'" *Weaver v. Fed. Motor Carrier Safety Admin.*, 744 F.3d 142, 145 (D.C. Cir. 2014) (emphases added). The as-applied nature of the exception limits "the breadth of the remedy employed by the Court." *Edwards v. D.C.*, 755 F.3d 996, 1001 (D.C. Cir. 2014) (citation omitted). When this Court concludes under the exception that a regulation conflicts with its authorizing statute, it leaves the regulation in place and, at most, vacates the agency decision applying the rule.[1]

[1] As with any order, the decision to vacate requires balancing "the seriousness of the order's deficiencies" against "the disruptive consequences of an interim change." *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150-51 (D.C. Cir. 1993).

Two decisions are illustrative. In *Bais Yaakov*, 852 F.3d at 1078, several companies challenged a 2014 FCC order applying a 2006 FCC rule on the ground that the rule violated the statute. The time for direct challenge to the rule had run so only the order applying the rule was before the Court. *See id.* at 1081. Accordingly, although the Court concluded the rule was "unlawful," it "vacate[d]" only "that [2014] Order" which "applied that 2006 Rule." *Id.* at 1083.[2] Similarly, in *Oppenheim*, 571 F.2d at 660, the Court considered an appeal from a district court order vacating a 1945 Civil Service Commission rule supporting the agency's denial of an employment claim. This Court agreed the 1945 rule "incorrect[ly] interpret[ed]" the authorizing statute but found review barred by the same statute of limitations at issue here. *Id.* at 663. Accordingly, this Court reinstated the 1945 rule and vacated the 1975 agency decision applying that rule. *Id.* *See also, e.g.*, *Trailways, Inc. v. ICC*, 727 F.2d 1284, 1293 (D.C. Cir. 1984) ("rather than vacating the Commission's rule, we may address the problem urged upon us by vacating instead the result reached in the adjudication"); *Koi Nation of N. Cal. v. DOI*, 361 F. Supp. 3d 14, 41, 51 (D.D.C. 2019) (vacating application not rule where rule "invalidly narrowed" statute), *appeal dismissed*, No. 19-5069, 2019 WL 5394631 (D.C. Cir. Oct. 3, 2019).

---

[2] The FCC subsequently removed the unlawful provision. *See Rules & Regulations Implementing the Telephone Consumer Protection Act*, 33 FCC Rcd. 11179 (2018).

The district court cited *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992). There, the Court vacated a 1992 FCC order and a 1983 FCC order. But that case was unusual because the FCC had originally defended the 1983 order by claiming it was not a rule but an "enforcement policy" "immune from review." *Id.* at 730. When, in 1992, the agency changed positions and claimed that the 1983 order was "a substantive rule" that could be applied without review because the limitations period had run, *id.* at 734, the Court rejected that "administrative law shell game[ ]" and treated the 1983 order as if it had been issued with the 1992 order, *id.* at 732; *see id.* at 734 & n.7. *Cf. MCI Telecommc'ns Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (vacating 1985 decision based upon same 1983 order but leaving 1983 order in place).

Here, there are no such unusual circumstances, so the ordinary constraints apply. Accordingly, if the Court were to examine the Regulation through the as-applied exception and determine that the Regulation is invalid—and the Court should do neither—reversal of the district court's decision vacating the Regulation would still be required because as-applied relief is limited to, at most, vacatur of the FEC decision applying the Regulation. *See Bais Yaakov*, 852 F.3d at 1083; *Oppenheim*, 571 F.2d at 663. The district court's vacatur of the Regulation must be reversed on this ground alone.

B. The As-Applied Exception Is Inapplicable.

The district court should also be reversed because this is not an appropriate case to employ the as-applied exception. To begin, CREW abandoned its challenge to the FEC decision applying the Regulation following remand from the district court, *see* FEC Response 1-2 (filed Sept. 7, 2018), Doc. 1749558, so there is no longer any basis for reviewing the Regulation as-applied.

Next, the best reading of this Court's precedents is that the exception permits only "defendants in enforcement actions to argue that the agency's interpretation of the statute is wrong." *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2062 (2019) (Kavanaugh, J., concurring). The language in some cases arguably is broader but the holdings appear "universally" to involve instances where a regulation was used "against a party" in an enforcement action. Tr. Oral Arg. 14. And CREW has cited no case purporting to authorize review where, as here, the *complaining party sought to enforce a regulation* in an administrative complaint and then, on appeal, *sought invalidation of that same regulation*.

Finally, there is no need for the exception in this case because there is no risk that "limiting the right of review of the underlying rule would effectively deny" CREW "an opportunity to question its validity." *See Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958). CREW may challenge the Regulation (or any other) by filing a petition for rulemaking and seeking review of the FEC's decision.

Here, another party started, then abandoned, that process. *See* FEC Partial Mot. Dismiss 7-8 (Dkt. No. 12). That procedure has, in other cases, caused the FEC to amend its regulations. *See, e.g.*, Methods of Allocation Between Federal and Non-Federal Accounts, 55 Fed. Reg. 26058-01 (1990). In addition, CREW might properly bring an as-applied challenge where the Regulation is applied to CREW and CREW challenges the authority for the Regulation before the FEC—something it did not do in this case. Crossroads Br. 22-27. CREW should not be permitted to evade the statute of limitations when there are other avenues for seeking judicial review.

CONCLUSION

The Court should reverse the judgment of the district court.

Respectfully submitted,

/s/ Thomas W. Kirby

Michael E. Toner (Bar No. 439707)
E-mail: mtoner@wileyrein.com
Thomas W. Kirby (Bar No. 915231)
E-mail: tkirby@wileyrein.com
Andrew G. Woodson (Bar No. 494062)
E-mail: awoodson@wileyrein.com
Jeremy J. Broggi (Bar No. 61260)
E-mail: jbroggi@wileyrein.com

WILEY REIN LLP
1776 K St., NW
Washington, D.C. 20006

202.719.7000

Thomas J. Josefiak
E-mail: tjosefiak@holtzmanlaw.net
J. Michael Bayes (Bar No. 501845)
E-mail: mbayes@holtzmanlaw.net

HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186

540.341.8808

Dated: November 18, 2019

Counsel for Defendant-Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify, on November 18, 2019, that:

1. This document complies with the word limit under the Court's October 24, 2019 Order because, excluding the parts of the document exempted by Fed. R. App. 32(f), this document contains 2,599 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. 32(a)(6) because this document was prepared in a proportionally spaced typeface using Microsoft Word 2016 in a 14-point Times New Roman font.

/s/ Thomas W. Kirby
Thomas W. Kirby

CERTIFICATE OF SERVICE

I certify that on November 18, 2019, a true and correct copy of this Supplemental Brief was filed and served electronically upon counsel of record registered with the Court's CM/ECF system.

/s/ Thomas W. Kirby
Thomas W. Kirby