RECORD NO. 18-5261

ORAL ARGUMENT WAS HELD ON SEPTEMBER 13, 2019

In The

United States Court of Appeals

For The District of Columbia Circuit

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON; NICHOLAS MEZLAK,

Plaintiffs - Appellees,

v.

FEDERAL ELECTION COMMISSION,

Defendant – Appellee,

CROSSROADS GRASSROOTS POLICY STRATEGIES,

Intervenor Defendant - Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF OF APPELLEES

Stuart McPhail
Adam J. Rappaport
CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON
1101 K Street, NW, Suite 201
Washington, DC 20005
(202) 408-5565

Counsel for Plaintiffs - Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

GLOSSARY

CREW	Citizens for Responsibility and Ethics in Washington and Nicholas Mezlak
Crossroads	Crossroads Grassroots Policy Strategies
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
IE	Independent Expenditure
JA	Joint Appendix
OGC	Federal Election Commission's Office of General Counsel

INTRODUCTION

CREW hereby responds to the Court's October 24, 2019 Order for supplemental briefing on two questions:

(1) Whether the language of 11 C.F.R. § 109.10(e)(1)(vi) requires intervenor-defendant appellant to disclose the identities of the individuals that the administrative complaint sought, and whether the [FEC]'s contrary interpretation of § 109.10(e)(1)(vi) falls outside "the outer bounds of permissible interpretation." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019).

(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. *See Weaver v. Fed. Motor Carrier Safety Admin.*, 744 F.3d 142, 145 (D.C. Cir. 2014) ("[W]hen an agency seeks to apply the rule, those affected may challenge that application on the grounds that it conflicts with the statute from which its authority derives." (quotation omitted)). 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?

With regards to the first question, the FEC's interpretation of 11 C.F.R. § 109.10(e)(1)(vi) to require an "express link," JA268, fell "outside the outer

bounds of permissible interpretation," *Kisor*, 139 S. Ct. at 2416, because it rendered the provisions duplicative to FECA provisions for expenditure-maker disclosure, JA565. Nonetheless, an FEC interpretation within those bounds would not require disclosure of all of Crossroads's contributors that CREW identified in its administrative complaint. For example, there is no evidence in the record that the contributor who gave to "aid the election of" a federal candidate, JA192, exhibited the required additional intent to earmark the funds to "the reported" IEs Crossroads eventually ran.

With regard to the second question, CREW's post-application challenge to the regulation does not limit the remedy available to CREW. Regardless of whether a petitioner seeks review within the first six years of a regulation's enactment or within six years of its application, the petitioner may obtain facial relief. *See, e.g.*, *AT&T v. FCC*, 978 F.2d 727, 737 (D.C. Cir. 1992) (vacating rule). A decision to the contrary "limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity." *Nat'l Labor Relations Bd. Union v. FLRA*, 834 F.2d 191, 196 (D.C. Cir. 1987); *see also Koretoff v. Vilsack*, 707 F.3d 394, 401 (D.C. Cir. 2013) (Williams, J., concurring) (explaining cost in limiting relief outside of initial six-year review period). Rather, the scope of relief depends on whether those "remedies are necessary to resolve a claim that has been preserved," and facial

relief is justified where the case "implicates the facial validity" of a law. *Citizens United v. FEC*, 558 U.S. 310, 331 (2010); *see also id.* at 375 (Roberts, C.J., concurring) ("Because it is necessary to reach Citizens United's broader argument that *Austin* should be overruled, the debate over whether to consider this claim on an as-applied or facial basis strikes me a largely beside the point."). Here, CREW's claims implicate the regulation's validity. If in resolving CREW's claims the Court finds the regulation conflicts with the FECA, facial invalidation is proper.

ARGUMENT

Question (1): The OGC's Interpretation was Impermissible, But a Permissible Interpretation Would Still Exclude Contributors CREW Identified

The OGC concluded that 11 C.F.R. § 109.10(e)(1)(vi)'s mandate to disclose contributions given to further "the reported [IE]" did not cover contributors CREW identified because it interpreted that mandate to cover only contributions "express[ly] link[ed]" to "a specific [IE]." JA 268; *see also* JA580 (an intent to fund "the exact form of the reported expenditure"). That interpretation, however, was impermissible because it rendered the regulation redundant to provisions requiring the disclosure of expenditure makers. *See* 11 C.F.R. § 109.10(e)(1)(i); *see also Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 664, 668–69 (2007) (rejecting interpretation that would render regulation "redundant"); JA565. A person directing funds at a "specific" IE makes the expenditure. *Compare* 11 C.F.R. § 110.11(b)(3) (person(s) who "paid for the communication"

made it), *with* 11 C.F.R. § 110.1(b)(6) (a contributor "relinquish[es] control" of funds). Thus, any contributor who met the OGC's interpretation of § 109(e)(1)(vi) would already report as an IE maker.

Nevertheless, the regulation by its terms is narrow. Its use of "the reported" directs the disclosure obligation at a narrower category of contributions than the FECA subsection (c)(2)(C)'s indefinite article "an," and a far narrower category than subsections (c)(1)'s expansive article "all." "The" is "a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an.'" *Am. Bus Ass'n v. Slater*, 231 F.3d 1, 4–5 (D.C. Cir. 2000); *see also Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1240 (D.C Cir. 2007) ("different terms" are "intended … to have different meanings"). The "literal interpretation" of "'the' narrows the class of [IEs] … to those specific [IEs]" identified earlier in the regulation, *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 895 F.3d 90, 99 (D.C. Cir. 2018); *accord United States v. Manafort*, 897 F.3d 340, 347 (D.C. Cir. 2018); *United States v. Wilcox*, 487 F.3d 1163, 1177 (D.C. Cir. 2007), i.e., the expenditure for which the report is submitted, *see* 11 C.F.R. § 109.10(e)(1)(ii)–(v), even if a contributor need not intend to further the IE "in the precise manner reported." JA565, JA579–80; *cf. FEC v. Mass. Citizens for Life ("MCFL")*, 479 U.S. 238, 262 (1986) (contributor intends to further an IE when contributor "request[s] that the money be used for [IEs]").

Here, the regulation does not unambiguously cover at least one transfer CREW identified: the transfer to "aid the election of Josh Mandel." JA192.[1] While that transfer was clearly a "contribution" that should have been disclosed under the FECA, 52 U.S.C. §§ 30101(8); 30104(c)(1), there is no evidence in the record of further earmarking towards any type of IE. An intent to influence an election cannot be enough to trigger § 109.10(e)(1)(vi) as that would render the further limitation that the transfer intend to further "the reported" IE "superfluous." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *see also* JA513.[2]

Further, although commissioners could infer a general intent to further some kind of IE from Crossroads's significant history of IEs and Crossroads's later use of the funds on IEs to aid Mandel's election, JA507; First General Counsel's Report 13–14, MUR 6696R (Crossroads) (Aug. 24, 2018), https://bit.ly/2OoygTC; *but see Multimax, Inc. v. FAA*, 231 F.3d 882, 887 (D.C. Cir. 2000) (agency's decision on inferences of fact upheld if "reasonably defensible"), the regulation would still require more: that the contributor intend to further the IE eventually

[1] CREW also sought disclosure of all unidentified persons "who made a contribution … for the purpose of furthering [Crossroads's] reported [IEs]," and such other relief as the FEC deemed appropriate, not excluding broader disclosure. JA213.

[2] CREW alleged there was "reason to believe" the transfers violated 11 C.F.R. § 109.10(e)(1)(vi) because an FEC investigation could uncover additional facts that tied the contributions to the IEs Crossroads eventually ran to help Mandel. As the FEC did not investigate, there are no additional facts.

reported, *cf. MCFL*, 479 U.S. at 262 (a contributor intends to further an IE when he "request[s] money be used for [IEs]"). By tying earmarking to "the reported" IE rather than merely "an" IE, the regulation requires more specific intent than furthering an IE of any kind. *Cf.* JA588 (contributors intended to further ads like "examples" viewed). Further, certain Commissioners remain committed to excluding the contributors CREW identified from the regulation's reach. *See* Statement on *CREW v. FEC*, No. 16-cv-259, Chair Caroline C. Hunter and Comm'r Matthew S. Petersen 3 (Sept. 6, 2018), https://bit.ly/2Pz1K4K.

In short, even rejecting the OGC's strict interpretation, 11 C.F.R. § 109.10(e)(1)(vi) does not unambiguously require disclosure of all contributors identified in CREW's administrative complaint.

Question (2): Challenging a Regulation After Application Does Not Limit Available Remedies

"When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual is proscribed." *NMA v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998); *accord Humane Soc. v. Zinke*, 865 F.3d 585, 614 (D.C. Cir. 2017). That ordinary result of vacatur applies regardless of whether the challenge is brought within the first six years of the regulation's enactment, *see NMA*, 145

F.3d at 1410, or within six years of its application to the plaintiff, *see AT&T*, 978 F.2d at 737 ("vacat[ing]" regulation applied to plaintiff).[3]

Both types of challenges can put the validity of the regulation before the Court, and a post-application challenge "does not foreclose subsequent examination of a rule properly brought before [the] court." *Functional Music v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958); *accord Koretoff*, 707 F.3d at 401 facial review available in post-application challenges); *Weaver*, 744 F.3d at 145 ("[T]hose affected may challenge that application on the grounds that it 'conflicts with the statute from which its authority derives.'"); *P&V Enter. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1026 (D.C. Cir. 2008) (plaintiff "would be able to challenge the rule" if applied). Indeed, "limiting the right of review of the underlying rule would deny many parties ultimately affected by a rule, an opportunity to question its validity," *Functional Music*, 274 F.2d at 546—like, for example, CREW, which did not exist at the time of the pertinent regulation's adoption. Moreover, an injurious application (existing or imminent) is necessary for either type of challenge, *see Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 915 (D.C. Cir. 2015) (rejecting enactment challenge by party not injured by regulation); it is not unique to post-application challenges.

[3] The court below awarded this ordinary relief. JA499. A reversal would require this Court to find "an abuse of discretion" on the part of the district court. *Doe v. Mattis*, 928 F.3d 1, 7 (D.C. Cir. 2019).

Here, moreover, facial invalidation of § 109.10(e)(1)(vi) is necessary to remedy CREW's injuries. Although CREW identified two sets of specific contributors in its complaint to satisfy its burden to submit a factual predicate to raise a reason to believe Crossroads was violating the FECA, *see* 52 U.S.C. § 30109(a)(2), the application of the regulation deprived CREW of the identities *all* contributors the FECA required Crossroads to disclose (and which it did not). Indeed, the regulation deprived CREW of *all* contributors to *all* IE filers that the FECA required disclosed, "depriving [CREW] of information to which [CREW] is entitled." *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock*, 783 F.2d 237, 247 (D.C. Cir. 1985) (permitting challenge to agency interpretation of law that not only deprived enforcement in one case, but deprived plaintiff of information in other matters too); *see also AT&T*, 978 F.2d at 729 (identifying harm rule caused to plaintiff by parties other than the respondent); *FEC v. Akins*, 524 U.S. 11, 21 (1998) (denial of information is a cognizable injury). Thus, a remedy to CREW's injuries must cure this broad loss of information.

Nevertheless, with regards to the validity of a law or regulation, the scope of the remedy—whether invalidation is facial or as-applied—does not depend on the pleadings or injury, but what is "necessary to resolve a claim that has been preserved." *Citizens United*, 558 U.S. at 331. Where the Court's reasoning for

awarding relief puts a law "itself in doubt," the relief is facial. *Id*; *see also id.* at 376 (Roberts, C. J., concurring) ("Whether the claim or the defense prevails is the question before us. Given the nature of the claim and defense, it makes no difference of any substance whether this case is resolved by invalidating the statute on its face or only as applied to Citizens United. … [T]he consequences of the Court's decision are the same."). In other words, if this Court finds the regulation was unlawfully applied to CREW because the regulation is inconsistent with the statute, that reasoning compels a facial remedy.

Here, there is "no set of circumstances" under which the regulation can validly apply to exclude contributors the FECA requires disclosed. *Sherley v. Sebelius*, 644 F.3d 388, 397 (D.C. Cir. 2011); *but see NMA*, 145 F.3d at 1407–08 (recognizing courts have invalidated regulations under *Chevron* without evaluating whether every application of regulation would be beyond statutory authority). The sole effect of § 109.10(e)(1)(vi) is to exclude contributors from disclosure—indeed it has excluded nearly all such contributors, JA041, JA100–02—despite the FECA's mandate to disclose "all contributors" and those "who request that the money be used for [IEs]." *MCFL*, 479 U.S. at 262. Because there is no valid application of the regulation to exclude any of the contributors the FECA requires to be reported, there is "no set of circumstances" in which 11 C.F.R. § 109.10(e)(1)(vi) is valid and the district court properly struck the regulation.

Sherley, 644 F.3d at 397; *see also Koretoff*, 707 F.3d at 401 (facial invalidity justified where regulation fails "*Chevron*'s 'first step'").[4]

A decision to the contrary would simply waste judicial resources. "Even if considered in as-applied terms, a holding in this case" that the regulation is inconsistent with the FECA "would mean that any other [recipient] raising the same challenge would also win." *Citizens United*, 558 U.S. at 376 (Roberts, C.J., concurring). Any future court in this Circuit—where any challenge can be brought—will follow this Court's conclusion on the validity of the regulation. "Regardless of whether [this Court] label[s] [CREW's] claim a 'facial' or 'as-applied' challenge, the consequences of the Court's decision are the same." *Id.* The only difference is the expense of additional judicial resources in the follow-on suits, and the attendant delay in violation of the plaintiffs' right to "prompt disclosure." *Id.* at 370; *see also id.* at 334; *Koretoff*, 707 F.3d at 401 (hardship from delay supports facial invalidity).

Additionally, the "uncertainty" caused by less-than facial relief supports consideration of the facial validity of the regulation. *Citizens United*, 558 U.S. at

[4] Moreover, the regulation impacts a "'substantial' amount," *see Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003), of the speech CREW has a "right to receive," *Stanley v. Georgia*, 394 U.S. 557, 562 (1969), and so is invalid. *See also Rosenberg v. Rector & Visitors of the Uni. of Va.*, 515 U.S. 819, 829 (1995) (rights attach to speech resulting from choice of government).

333. A decision that only the contributors to Crossroads identified by CREW could not be lawfully excluded from reporting by the regulation would provide regulated parties little guidance on what, if any, contributors could be excluded.

In short, nothing in the nature of this litigation limits the remedies the district court could provide from those that it could provide in a challenge brought within the first six years of the rule's existence. Facial vacatur is the ordinary relief to regulations that conflict with a statute in either challenge, as 11 C.F.R. § 109.10(e)(1)(vi) is here. Moreover, such facial relief is necessary to remedy CREW's injuries that stem not only from lack of disclosure of the identified contributors, but from all other contributors the FECA requires disclosed.

CONCLUSION

CREW respectfully submits the above responses to the questions of the Court. CREW's claims could not be remedied except by the facial invalidation of 11 C.F.R. § 109.10(e)(1)(vi), as the district court did properly below. Accordingly, CREW respectfully reiterates its request that the Court affirm the district court's judgment or, alternatively, dismiss Crossroads's appeal for lack of standing.

Respectfully submitted,

/s/ Stuart McPhail
STUART C. McPHAIL
smcphail@citizensforethics.org
(D.C. Bar. No. 1032529)
ADAM J. RAPPAPORT
arappaport@citizensforethics.org
(D.C. Bar No. 479866)
Citizens for Responsibility and Ethics in Washington
1101 K Street, N.W., Suite 201
Washington, D.C. 20005
Telephone: (202) 408-5565
Fax: (202) 588-5020

Counsel for Citizens for Responsibility and Ethics in Washington and Nicholas Mezlak

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of this Court's October 24, 2019 order because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1):

   [X] this document contains 2,598 words, or

   [ ] this brief uses a monospaced typeface and contains [*state the number of*] lines of text.

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. P. 32(a)(6) because:

   [X] this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14pt Times New Roman; or

   [ ] this document has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

Dated: 11/18/2019

/s/Stuart McPhail
STUART C. McPHAIL
Counsel for Appellees

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 18th day of November, 2019, I caused this Supplemental Brief of Appellees to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Thomas W. Kirby
Michael Eugene Toner
Andrew Gillum Woodson
WILEY REIN, LLP
1776 K Street, NW
Washington, D.C. 20006-2359
202-716-7000

Counsel for Appellant

Kevin Andrew Deeley
Seth Edward Nesin
Harry Jacobs Summers
FEDERAL ELECTION COMMISSION
1050 First Street, NE
Washington, D.C. 20463
(202) 694-1650

Counsel for Non-Appearing Appellee

/s/ Stuart McPhail
STUART C. McPHAIL
Counsel for Appellees