UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant, CROSSROADS GRASSROOTS POLICY STRATEGIES, Intervenor-Defendant.	)	Civil Action No. 16-00259 (BAH)

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The Plaintiffs, Citizens for Responsibility and Ethics in Washington ("CREW") and Nicholas Mezlak, by their undersigned counsel, respectfully move this Court, pursuant to Federal Rule of Civil Procedure 56, for summary judgment declaring that the failure of the Federal Election Commission ("FEC") to find "reason to believe" that Crossroads Grassroots Policy Strategies ("Crossroads GPS"), Steven Law, Karl Rove, Haley Barbour, and Caleb Crosby violated the Federal Election Campaign Act ("FECA"), 52 U.S.C. § 30101 *et seq.*, was contrary to law, and directing the FEC to conform with such declaration within 30 days consistent with the Court's judgment. Plaintiffs further seek by this motion an order declaring as invalid and vacating 11 C.F.R. § 109.10(e)(1)(vi) as inconsistent with the FECA.

Support for this motion is set forth in the accompanying Memorandum of Points and

Authorities in Support of Plaintiffs' Motion for Summary Judgment and the joint appendix containing copies of those portions of the administrative record that are cited or otherwise relied upon, to be filed no later than January 19, 2018. Plaintiffs' requested relief is set forth in the accompanying Proposed Order. Plaintiffs respectfully request oral argument on this motion.

Dated: September 11, 2017.

Respectfully submitted,

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Plaintiffs,	)	
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FEDERAL ELECTION COMMISSION,	)	
Defendant,	)	
CROSSROADS GRASSROOTS POLICY STRATEGIES,	)	
Intervenor-Defendant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
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INTRODUCTION

This lawsuit challenges the Federal Election Commission's ("FEC") dismissal of the complaint filed by Citizens for Responsibility and Ethics in Washington and Nicholas Mezlak (together "CREW") against Crossroads Grassroots Policy Strategies ("Crossroads GPS"), Steven Law, Karl Rove, Haley Barbour, and Caleb Crosby. The FEC dismissed CREW's complaint despite finding that Crossroads GPS accepted a contribution in excess of $3 million for the purpose of supporting Crossroads GPS's work—primarily consisting of disseminating explicit campaign ads—to elect a Senate candidate in Ohio, accepted over $1 million in matching grants to help Crossroads GPS reach its fundraising goal for its Ohio campaign work, and collected an unknown amount of money from attendees at a Tampa fundraiser who were shown Crossroads GPS's previous ads as "examples" of the type of political activity their contributions would go to fund. Despite collecting all this money and spending significant sums in Ohio and in other Senate races to elect its chosen candidates, Crossroads GPS did not disclose a single cent of its contributions, notwithstanding the Federal Election Campaign Act's ("FECA") requirements for those making independent expenditures to disclose their contributors. 52 U.S.C. § 30104(c).

The FEC reached this remarkable conclusion because it relied on a regulation, 11 C.F.R. § 109.10(e)(1)(vi), adopted in haste long before the heady days of multi-million dollar election campaigns by outside groups, that inexplicably narrowed 52 U.S.C. § 30104(c)(2)(C)'s plain reporting requirement to the point of nullification. Instead of reflecting the statute's obligation to identify contributors who gave for the purpose of furthering "an" independent expenditure, the FEC's regulation only requires disclosing those who contributed for the purpose of furthering "the reported" independent expenditure. The rule has so frustrated the FECA's basic reporting requirements that voters now rarely, if ever, learn the identities of the contributors for

independent expenditure ads subject to this provision.

The regulation, and thus the dismissal of CREW's complaint based on it, is invalid under the Administrative Procedure Act ("APA"). It was adopted without any explanation, it conflicts with the unambiguous terms of the FECA, it frustrates the FECA's goal of ensuring an informed electorate, and it renders disclosure of independent expenditure contributions a nullity.

In addition, the regulation does not even capture the FECA's full reporting obligations for those making independent expenditures, as the FEC recognized below. To ensure voters have a complete picture of the those financially backing candidates, the FECA not only requires the disclosure of individuals giving for the purpose of funding a group's independent expenditures, but it also requires disclosure of "all contributors who annually provide in the aggregate $200 in funds intended to influence elections." *FEC v. Mass. Citizens for Life, Inc. ("MCFL")*, 479 U.S. 238, 262 (1986) (summarizing 52 U.S.C. § 30104(c)(1)). There is no dispute that Crossroads GPS failed to disclose contributions it received during the year prior to its running independent expenditures. Yet the FEC refused to enforce the law—denying CREW and millions of voters vital information—contending that Crossroads GPS may not have had "fair notice" of the text of the statute. Of course, a sophisticated group like Crossroads GPS, capable of affording tens of millions of dollars in election spending, can read a statute: in fact, the group has emphasized from the beginning that it knows the reporting rules better than the FEC.

There is no reason to excuse Crossroads GPS from its reporting obligations under the FECA. The FECA's reporting obligations for independent expenditures serve a vital role in our democracy, yet they have been evaded due to invalid regulation and a feckless FEC. CREW brings this action to correct those errors and to ensure voters are no longer denied the information to which they are rightfully entitled.

STATEMENT OF FACTS

I. Current Statutory and Regulatory Background

A. FECA's Independent Expenditure Disclosure Requirements

The FECA and FEC regulations impose a number of disclosure requirements on persons who make campaign-related expenditures. Relevant to this matter, they impose certain one-time disclosure requirements on groups or individuals that make a particularly explicit form of campaign-related communication. These ads, called "independent expenditures," are expenditures for communications not coordinated with candidates that "expressly advocat[e] the election or defeat of a clearly identified candidate." 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16. "Express advocacy" are communications using phrases like "vote for," "re-elect," "support," or "Smith for Congress," and ads that, "in context, have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)." 11 C.F.R. § 100.22.

Pursuant to the FECA and FEC regulations, anyone spending more than $250 on an independent expenditure must file a report with the Commission. 52 U.S.C. § 30104(c)(1); 11 C.F.R. § 109.10(b). The report must detail a number of items about the communication including, as relevant here, information identifying persons who made contributions to the entity making the independent expenditure. 52 U.S.C. § 30104(c); 11 C.F.R. § 109.10(e). A contribution is a "gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i); *Buckley v. Valeo*, 424 U.S. 1, 78 (1976) (construing "contribution" under FECA to mean "not only contributions made directly or indirectly to a candidate, political party, or campaign committee" but also "contributions made to other organizations or individuals but earmarked for political purposes").

Under the FECA, any person making an independent expenditure must make two disclosures with respect to contributors. First, pursuant to 52 U.S.C. § 30104(c)(2)(C), previously codified as 2 U.S.C. § 434(c)(2)(C), the report must include "the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure." Secondly, pursuant to 52 U.S.C. § 30104(c)(1), the report must also include "the information required under subsection (b)(3)(A) for *all* contributions received by" the person making the independent expenditure. 52 U.S.C. § 30104(c)(1) (emphasis added). In turn, subsection (b)(3)(A) requires "the identification of each . . . person . . . who makes a contribution to the reporting [party] . . . , whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year . . . , together with the date and amount of any such contribution." *Id.* § 30104(b)(3)(A). Notably, subsection (c)(1) does not limit reportable contributions to those given for the purpose of funding independent expenditures—rather, it captures "all" contributions over $200, so long as they were made within a year of the reported expenditure.

Accordingly, the FECA requires disclosure of two different yet complimentary sets of contributions to those making independent expenditures. While both require disclosure of only those making contributions—those giving funds to the reporting entity for the purpose of influencing an election—each subsection captures a slightly different set of contributions that are useful to viewers of independent expenditures. Subsection (c)(1) provides a temporal scope for contribution disclosures: "all contributors who annually provide in the aggregate $200 in funds intended to influence elections." *MCFL*, 479 U.S. at 262. Subsection (c)(2)(C) provides a purposive scope for contribution disclosure: "all persons making contributions over $200 who request that the money be used for independent expenditures." *See id.* Combined, they ensure

voters have a complete picture of the financial backing for the express advocacy aimed at them.

Relevant to this case, however, the FEC has adopted a regulation only encompassing subsection (c)(2)(C) disclosure, and the regulation conflicts with even that provision. According to FEC regulations, any person making an independent expenditure must provide "[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." 11 C.F.R. § 109.10(e)(1)(vi) (emphasis added). Section 109.10(e)(1)(vi) reflects only the purposive scope of disclosure required by 52 U.S.C. § 30104(c)(2), but does not cover the separate disclosure required by 52 U.S.C. § 30104(c)(1). It also materially conflicts with the statute because, while the FECA requires disclosure of all contributions "made for the purpose of furthering *an* independent expenditure," 52 U.S.C. § 30104(c)(2)(C), the FEC regulation requires only the disclosure of a contribution "made for the purpose of furthering *the reported* independent expenditure," 11 C.F.R. § 109(e)(1)(vi). As detailed below, that change in language has effectively eliminated contributor disclosure.

In addition to disclosure of independent expenditures, the FECA also requires other types of disclosure. First, the FECA requires those making electioneering communications—broadcast ads that stop short of express advocacy but clearly identify a federal candidate, are targeted to the candidate's electorate, and air shortly before the candidate's election—to file similar one-time disclosure reports with the FEC also disclosing contributions used to fund such communications. 52 U.S.C. § 30104(f)(3), 11 C.F.R. §§ 100.29, 104.20. Second, the FECA requires certain organizations that engage in extensive politicking, termed "political committees," to file periodic reports with the FEC. 52 U.S.C. §§ 30101(4), 30104(b); 11 C.F.R. §§ 100.5(a), 104.1, 104.3. Political committees may engage in independent expenditures and report those expenditures in

their periodic reports. 11 C.F.R. §§ 104.3(b)(1)(vii), 104.4, 109.10(a). Those reports also disclose the contributors to those political committees and thus disclose the funds used to create the independent expenditures. *Id.* §104.3(a). For a group that does not qualify as a political committee but that nonetheless makes independent expenditures—like Crossroads GPS—the one-time independent expenditure reports are the only information voters will have about who is funding its ads.

B. Enforcement

The FECA places preliminary responsibility for enforcing federal campaign finance laws, including disclosure requirements, with the FEC. 52 U.S.C. § 30106. Third parties, however, may file a complaint with the FEC if they identify a violation of the statute. 52 U.S.C. § 30109(a)(1). After a response from the alleged violator and a report from the FEC's Office of General Counsel ("OGC"), the six commissioners of the FEC then vote on whether they find "reason to believe" a violation "may" have occurred. *Id.* § 30109(a)(2); FEC, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545, 12545 (Mar. 16, 2007). The "reason to believe" standard is very low; it asks only whether a violation "may" have occurred based on the "credibl[e] alleg[ations]" of the complaint. 72 Fed. Reg. at 12545. If four commissioners find reason to believe, the OGC will investigate and then make a recommendation whether there is probable cause. 52 U.S.C. § 30109(a)(2), (3). If four commissioners find probable cause, the FEC must then seek conciliation with the respondents; if the FEC is "unable" to reach a conciliation agreement, the FEC may pursue a civil action in court. *Id.* § 30109(a)(4)(A), (6)(A).

If the FEC does not pursue enforcement, the FECA empowers the complainant to "bring, in the name of such complainant, a civil action to remedy the violation involved in the original

complaint." *Id.* § 30109(a)(8)(C). The complainant may only bring that action, however, if, after presenting its complaint to the FEC, the FEC fails to enforce, the complainant receives a judicial declaration that the failure to enforce permits activity "contrary to law," and then the FEC fails to "conform" with the declaration within thirty days. *Id.*

II. History of the Challenged Regulation

The regulation at issue in this case, 11 C.F.R. § 109.10(e)(1)(vi), went into effect on April 1, 1980. AR 1553. The regulation was part of several new rules that were needed due to amendments to the FECA passed by Congress in the previous year. AR 1002. Indeed, the regulations were needed in a very short time frame: the President signed the amendments into law on January 8, 1980, *see* Legislative History of Federal Election Campaign Act Amendments of 1979 at 573 (1983) ("1979 FECA History"), https://transition.fec.gov/pdf/legislative_history/legislative_history_1979.pdf, and Congress directed the FEC to draft new rules and regulations by February 29, 1980, Federal Election Campaign Act Amendments of 1979, Pub. L. 96-187 § 303 (1980); AR 1002. As described below, however, that quick turnaround led the FEC to make errors in drafting. In order to understand those errors, a review of the FECA's contribution disclosure rules prior to the 1979 amendments and the impact of the 1979 amendments on them is helpful.

A. FECA Prior to the 1979 Amendments

The 1979 FECA amendments made significant changes to existing campaign finance laws. In relevant part, the law changed the reporting obligations for contributions funding independent expenditures. Prior to 1980, those making contributions had to file their own reports with the FEC. 2 U.S.C. § 434(e)(1) (1976) ("Every person . . . who makes contributions . . . in excess of $100 during a calendar year shall file with the Commission . . . a statement.

Contribution was defined then as it is now: a thing of value given "for the purpose of influencing" an election. *Compare* 2 U.S.C. § 431(e) (1976) *with* 52 U.S.C. § 30101(8)(A)(i).

The contributor would have to report to the FEC the same information that a political committee or candidate would report about a contribution they received. 2 U.S.C. § 434(e) (1976) (report must contain "the information required of a person who makes contributions in excess of $100 to a candidate or political committee and the information required of a candidate or political committee receiving such contribution"). Specifically, the report provided "the full name and mailing address (occupation and the principal place of business, if any) of each person who made one or more contributions . . . within the calendar year in aggregate amount or value in excess of $100, together with the amount and date of such contributions." *Id.* § 434(b). The only exclusion for self-reporting contributions were contributions made to "a political committee or candidate." *Id.* § 434(e).

In addition to these self-reports by contributors, those making independent expenditures were also required to file reports. *Id.* Those reports similarly required disclosure of the same information political committees and candidates were required to disclose: the identities of anyone making over $100 in contributions to the reporting party in a calendar year, along with the amount and dates of such contributions. *Id.* § 434(b). Consequently, where contributions were made to someone making independent expenditures, the Commission would receive two reports describing the same contribution.

Although the total amount of independent expenditures reported in the 1979–80 election cycle was relatively small—about $16 million, of which non-political committee independent

expenditures were but a fraction,[1] compared to $1.4 billion spent in the 2016 cycle[2]—Congress decided to eliminate this double reporting requirement. 1979 FECA History 458.

B. The 1979 FECA Amendments

On January 8, 1980, President Carter signed into law Public Law 96-187, enacting a number of changes to the FECA. In relevant part, the amendments eliminated the double reporting requirement for contributions that went to individuals making independent expenditures. *See* Pub. L. 96-187 § 104. Indeed, the new law eliminated the need for those making contributions to report at all. Rather, the law set forth the current regime for reporting: contributors would not report, but those making independent expenditures would report two sets of contributions they receive. Those making independent expenditures would provide (1) "the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure," *id.* § 104(c)(2)(C) (currently codified at 52 U.S.C. § 30104(C)(2)(C)), and would also provide (2) "the information required under subsection (b)(3)(A) for all contributions received by such

[1] *See* FEC, Independent Expenditures, 1979–1980, https://www.fec.gov/data/independent-expenditures/?data_type=processed&cycle=1980&is_notice=false&max_date=08%2F14%2F2017. While the FEC data is not easily filtered to show only independent expenditures by non-political committees, a brief review of the data shows significant independent expenditures by political committees. For example, Americans for an Effective Presidency, a registered political committee, reported spending about $1.3 million on independent expenditures. The National Congressional Club, also a registered political committee, reported about $4.6 million in independent expenditures. The largest non-political committee spender appears to have been Cecil Haden, who reported about $600,000 in independent expenditures, apparently from his own money. It is unknown how much of the money spent on independent expenditures by non-political committees in the 1979-80 election cycle came from contributions from third parties.

[2] OpenSecrets.org, Total Outside Spending by Election Cycle, Excluding Party Committees, https://www.opensecrets.org/outsidespending/cycle_tots.php?cycle=2016&view=A&chart=N#viewpt.

person," *i.e.*, "the identification of each person . . . . who makes a contribution . . . whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year," *id.* at § 104 (currently codified at 52 U.S.C. § 30104(b)(3)(A), (c)(1)).

Although the amendment shifted the burden of reporting, the amendment was intended only to "[s]implif[y] reporting without affecting meaningful disclosure." 1979 FECA History 103 (Senate Committee on Rules and Administration summary of working draft). The hope was that by transferring the responsibility of reporting from the contributor to the recipient, and reducing the frequency of other reporting requirements in the legislation, the "amendments would . . . alleviate the reporting burdens and reduce by somewhere between one-quarter and one-third the files required to be processed and stored by the Commission." *Id.* at 451 (S. Rep. No. 96-319). Nonetheless, Congress understood that while contributors would no longer report, "the person who receives the contribution and subsequently makes the independent expenditure would [still] report having received that contribution to the Commission." *Id.* at 458 (same).

C. The FEC's Rulemaking Process

In response to the changes to the FECA, the FEC started a rulemaking process to update its regulations. AR 1002. Congress gave the FEC only a short window to craft the new regulations, however, requiring that the new provisions be transmitted to it by February 29, 1980, only two months after the law went into effect. *Id.*; Pub. L. 96-187 § 303. Accordingly, the OGC proposed shortening the time for comment and including a draft set of regulations with its public notice. AR 1003. The Commission agreed to do so on January 10, 1980. AR 1031.

Notably, however, the FEC's OGC memoranda to the Commission outlining the changes in the law did not mention changes to the reporting requirements for contributions to those making independent expenditures. *See* AR 1002–09, 1025–32, 1035–41, 1048–52. In fact, the

record is bereft of any discussion of the changes to the relevant provision of the FECA.

Nonetheless, on January 23, 1980, the FEC published proposed rules in the Federal Register. AR 1056–80 (45 Fed. Reg. 5297, 5546–69). With respect to the FECA's reporting of contributions to those making independent expenditures, the agency proposed changes to 11 C.F.R. § 109.2, then the relevant section of the regulations. AR 1075. Mirroring the language of the new § 434(c)(2)(C), the regulations proposed that those making independent expenditures would report "the identification of each person who made a contribution in excess of $200 to the person filing the statement which was made for the purpose of furthering *an* independent expenditure." *Id.* (emphasis added). Notably absent, however, was any provision reflecting subsection (c)(1)'s requirement that the report also disclose the information under subsection (b)(3)(A) for "all" contributions, 2 U.S.C. § 434(c)(1) (1982), specifically the identities of all contributions within the year, *id.* § 434(b)(3)(A). In fact, the record contains no indication that the FEC was even aware of that provision.

The FEC received a number of comments in response to its proposed rulemaking. AR 1213–61. None of the comments related to the proposed § 109.2, however. The sole comment to even address independent expenditure reporting related to a proposed § 109.5 which, apparently inadvertently, was carried over from the old rules requiring contributors to self-report. AR 1228; *see also* AR 1075 (publishing proposed § 109.5 requiring self-reporting of "contribution[s] for the purpose of expressly advocating the election or defeat of a clearly identified candidate"). The commenter noted that the FECA amendments "no longer require[d] the contributor to report separately from those making the independent expenditures," AR 1228, and recommended "striking [§] 109.5 entirely from the proposed regulations." *Id.* The commenter, however, did not address § 109.2.

Shortly after receiving these comments, the FEC circulated a new draft of the regulations to the Commission. AR 1262–1335. In line with the comment, the draft deleted the requirement that contributors report their own contributions. *See* AR 1331. The draft also included a reworked version of § 109.2, however. AR 1330–31.

Relevant here, the reworked version contained a small but significant change in the new draft: one key difference reflected in the substitution of one word for two others. With respect to reporting contributions, the language had mysteriously changed from the previous draft—that all contributions made "for the purpose of furthering *an* independent expenditure" be disclosed, AR 1075, reflecting the language in the FECA—to a new version that required only the identity of each person whose contribution was "made for the purpose of furthering *the reported* independent expenditure." AR 1330 (emphasis added); *accord* AR 1444. There was no explanation given for the change. It was not apparently brought to the Commission's attention. No comment suggested or requested that change, and there is no indication the FEC was aware that it had altered the disclosure requirement from the language in 2 U.S.C. § 434(c)(2)(C).

The Commission debated the new regulations on February 21, 1980. AR 1479, 1486–94. There was no apparent discussion related to the proposed § 109.2. The record is devoid of any evidence that the Commission considered or was even aware in the divergence of language between the proposed rule and the statutory text. Nor does the record contain any indication that the Commission considered or was even aware of the fact that the FECA required disclosure of a second set of contributions, a requirement totally absent from the proposed rules. The proposed rules were approved on that same day. AR 1494.

On March 7, 1980, the FEC published an explanation and justification for the new rules. AR 1496–1542 (45 Fed Reg. 14831, 15080–126). The entire explanation given for the new

§ 109.2 was:

> This section has been amended to incorporate the changes set forth at 2 USC 434(c)(1) and (2) regarding reporting requirements for persons, other than a political committee, who make independent expenditures.

AR 1503. The paragraph did not recognize, never mind attempt to explain or justify, the change in language from 2 U.S.C. § 434(c)(2)(C)'s requirement to report contributions made for the purpose of furthering "an" independent expenditure to § 109.2's requirement to report only those contributions made for the purpose of furthering "the reported" independent expenditure. Nor did the paragraph recognize that 2 U.S.C. § 434(c)(1) required reporting of "all contributions" made within the year or attempt to explain or justify why the regulation did not reflect that requirement. The explanation further failed recognize that the FECA amendments were intended to not "affect[] meaningful disclosure" from the prior law, 1979 FECA History 103, which had required all contributions to be reported.

On April 1, 1980, the new regulations went into effect. AR 1553. On January 3, 2003, the FEC reorganized its regulations in response to the Bipartisan Campaign Reform Act of 2002 ("BCRA"), moving the old 11 C.F.R. § 109.2 to 11 C.F.R. § 109.10, without changing the relevant language. *See* FEC, Coordinated and Independent Expenditures, 68 Fed. Reg. 421-01, 432 (Jan. 3, 2003) (noting "[t]he Commission is reorganizing 11 C.F.R. part 109"); FEC, Coordinated and Independent Expenditures, 67 Fed. Reg. 60042-01, 60046 (Sept. 24, 2002) (stating "[p]aragraph (a) of pre-BCRA 11 CFR 109.2 would be moved to proposed paragraphs (b) and (c) of section 109.10").

D. Impact of the Rule

As noted above, the total amounts of money spent on independent expenditures in the

election cycle before the 1980 election was relatively small—about $16 million in total.[3] The amounts attributable to non-political committee independent expenditures was a small fraction of that. Accordingly, the impact of the new FEC regulation was very small, at least initially.

Prior to *Citizens United v. FEC*, 558 U.S. 310 (2010), corporations and unions could not spend any money from their general treasuries on independent expenditures. *See* 2 U.S.C. § 441b (2010); *see also* FEC, Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, 79 Fed. Reg. 62797-02, 62799 (Oct. 21, 2014). Non-political committee independent expenditures therefore were made by individuals or small non-profit ideological organizations. *See MCFL*, 479 U.S. at 263–64; 79 Fed. Reg. at 62810. With the source of these independent expenditures constrained to individuals or certain nonprofits, total reported independent expenditures continued to be relatively modest. Even including political committee funded independent expenditures, the amounts spent on independent expenditures in an election cycle amounted to only $64 million in 2006.[4] That changed, however, with a pair of decisions that opened the doors for corporate and union politicking: first, *FEC v. Wisc. Right to Life*, 551 U.S. 449 (2007), which allowed for corporate and union funded electioneering communications, and then *Citizens United* in 2010, which allowed for corporate and union funded independent expenditures. In the first presidential election cycle following *Citizens United*, independent expenditures reached $1 billion. OpenSecrets.org, Total Outside Spending. They exceeded $1.4 billion in 2016. *Id.*

While those numbers include independent expenditures by political committees, the ability of non-political committee corporations and unions to spend on independent expenditures

[3] *See supra* note 1.
[4] *See* OpenSecrets.org, Total Outside Spending, *supra* note 2.

after *Citizens United* allowed such groups to spend increasing amounts on elections, all without reporting their contributors. Before 2008, when only small-non profit corporations could engage in politicking, outside spending without disclosure of the source of the funds used was relatively nonexistent.[5] In the 2008 election cycle, however, after the Court allowed corporate and union funded electioneering communications, undisclosed political spending jumped to $102.4 million from $5.1 million the election cycle before.[6] In the 2010 cycle, when *Citizens United* allowed these dark money groups to spend money on independent expenditures, that total jumped again to $138.7 million. *Id.* And in the 2012 cycle, the first presidential election cycle in which dark money groups could spend freely during the entire two-year period, undisclosed election spending rocketed to $311.3 million. *Id.*

With the explosion in spending by groups that, as non-political committees, did not have to routinely disclose their donors, the need for contributor disclosure contained in the one-time reports for independent expenditures has become paramount. Unfortunately, the total inadequacy of the FEC regulation about independent expenditures has also been exposed.

For example, in the 2010 elections, some thirty-one dark money section 501(c) organizations made independent expenditures, yet none disclosed even a single donor. *See* Petition for Rulemaking to Revise and Amend Regulations Relating to Disclosure of Independent Expenditures ¶ 10 (Apr. 21, 2010), http://sers.fec.gov/fosers/showpdf.htm?docid=61143 (assertions based on data from OpenSecrets.org, in turn based on reported FEC data). Those organizations include seven groups which collectively spent a total of about $46.7 million,

[5] OpenSecrets.org, Outside Spending by Nondisclosing Groups, Cycle Totals, Excluding Party Committees, https://www.opensecrets.org/outsidespending/disclosure.php.
[6] *See id.* These totals include both sums spent on electioneering communications and independent expenditures.

yet reported not a single dollar in contributions or any of their donors. *Id.*

Nor was 2010 an anomaly. A review of FEC data shows the same lack of reporting when one looks to the top seven organizations from each of the subsequent two-year election cycles. In those cycles, the top seven spenders collectively spent about $205 million, $110 million, and $126 million during each of the 2012, 2014, and 2016 election cycles respectively, but they did not identify a single contributor or report a single dollar in outside contributions.[7] An exhaustive review of those spending less, but by no means small amounts, on independent expenditures would likely reveal few additional contributions.[8] For example, of the about $7 million in independent expenditures by political nonprofits in 2017–18 cycle so far, only a single $500 contribution has been disclosed.[9]

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[7] Data is available on the FEC website at http://classic.fec.gov/fecviewer/CandidateCommitteeDetail.do and can be accessed by searching the respective groups and choosing their "independent expenditure" reports. The organizations in question and the years in which they were in the top seven spenders on independent expenditures were Crossroads GPS (2012, 2014), Americans for Prosperity (2012, 2016), U.S. Chamber of Commerce (2012, 2014, 2016), American Future Fund (2012, 2016), Americans for Job Security (2012), Americans for Tax Reform (2012), American Action Network (2012, 2014, 2016), NRA Institute for Legislative Action (2014, 2016), Patriot Majority USA (2014), League of Conservation Voters (2014), Kentucky Opportunity Coalition (2014), 45 Committee (2016), and Majority Forward (2016). All but one of these organizations reported "$0" in contributions for their independent expenditures. The sole exception was Americans for Tax Reform, which reported $15,348,283 in contributions in 2012 from "Americans for Tax Reform (General Treasury Funds)." *See* FEC Form 5, Schedule 5-A, Americans for Tax Reform (Jan. 20, 2013), http://docquery.fec.gov/cgi-bin/fecimg/?13940054021. Cleary, a transfer from the organization's general treasury fund is not the sort of transaction that the reporting obligation was intended to disclose.

[8] *See, e.g.*, League of Conservation Voters (reporting $10,828,055 in independent expenditures in 2012 and $0 in contributions), Ending Spending (reporting $4,023,835 in independent expenditures in 2014 and $0 in contributions), Environmental Defense Action Fund (reporting $4,285,828 in independent expenditures in 2016 and $0 in contributions).

[9] *See* OpenSecrets.org, Political Nonprofits, Top Election Spenders, https://www.opensecrets.org/outsidespending/nonprof_elec.php?cycle=2018. FEC data is available at http://classic.fec.gov/fecviewer/CandidateCommitteeDetail.do and by searching the reporting party's name. The only significant difference in reporting data is for 45 Committee,

One of the largest abusers of the FEC's regulation after *Citizens United* was Crossroads GPS, the respondent below and the intervener-defendant here. In 2012, the group reported spending $70,968,864 on independent expenditures, but reported $0 in contributions, meaning that it disclosed none of its contributors.[10] In 2014, the group reported spending $26,015,171 in independent expenditures, but again reported $0 in contributions.[11] The lack of contributor reporting caught the FEC's eye, which sent requests for Crossroads GPS to complete its reporting. *See, e.g.*, AR 44. Crossroads GPS responded by stating that its failure to report contributors was no mistake, citing the language of 11 C.F.R. § 109.10(e)(1)(vi). *See* AR 47–48 ("No contributions accepted by Crossroads [GPS] were solicited or received 'for the purposes of furthering the reported independent expenditure'. . . . The omission of contributor information on future reports should not be assumed to be an oversight.").

III. The Administrative Proceedings Below

The proceedings below began when CREW filed a complaint with the FEC on November

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which OpenSecrets reports as having spent $743,704 on independent expenditures, but FEC reports only show $371,852. *See* FEC Form 5, July Quarterly Report, 45 Committee (July 30, 2017), http://docquery.fec.gov/pdf/537/201707309069855537/201707309069855537.pdf. The only reported contribution is a $500 contribution to Planned Parenthood Action Fund from a PAC subject to its own disclosure obligations. FEC Form 5, Schedule 5-A, July Quarterly Report, Planned Parenthood Action Fund (July 14, 2017) http://docquery.fec.gov/cgi-bin/fecimg/?201707149066633944.

[10] *See* Compl. Ex. A, FEC Form 5, Year-End Report, Crossroads GPS (Jan. 31, 2012), http://docquery.fec.gov/cgi-bin/fecimg?_13940087782+0 (covering Oct. 1, 2012 to Dec. 31, 2012); Compl. Ex. B, FEC Form 5, Oct. Quarterly Report, Crossroads GPS (Oct. 1, 2012), http://docquery.fec.gov/cgi-bin/fecimg?_12954433250+0 (covering July 1, 2012 to Sept. 30, 2012); *see also* AR 131.

[11] *See* Am. FEC Form 5, Year-End Report, Crossroads GPS (Jan. 26, 2015), http://docquery.fec.gov/cgi-bin/fecimg?_15950084003+0 (covering Oct. 1, 2014 to Dec. 31, 2014); FEC Form 5, Oct. Quarterly Report, Crossroads GPS (Oct. 15, 2014), http://docquery.fec.gov/pdf/987/14978122987/14978122987.pdf (covering July 1, 2014 to Sept. 30, 2014).

15, 2012 alleging that Crossroads GPS and its agents failed to reports contributions for independent expenditures, as required by law. AR 1–17.

A. CREW's Substantiated Allegations

In its administrative complaint, CREW alleged, based on reporting by an individual present, that on August 30, 2012, Crossroads GPS held a fundraiser at the Tampa Club in Tampa, Florida. AR 103 (citing Sheelah Kolhatkar, *Exclusive: Inside Karl Rove's Billionaire Fundraiser*, Bloomberg Businessweek, Aug. 31, 2012); *see also* AR 122–25. The fundraiser was held in conjunction with American Crossroads, an independent expenditure-only political committee associated with Crossroads GPS. *See* AR 94, 96, 103, 166; Compl. ¶ 40; Crossroads GPS Answer ("CGPS An.") ¶ 40 (admission by failure to respond); *see also* FED. R. CIV. P. 8(c)(6) (failure to deny allegation is admission). Separate forms were handed out to the attendees at the fundraiser for making donations to either Crossroads GPS or American Crossroads, with instructions to wire money to each organization. AR 103; Compl. ¶ 40; CGPS An. ¶ 40. Approximately 70 high-earning and powerful donors attended. AR 103; Compl. ¶ 41, CGPS An. ¶ 41.

During the fundraiser, Karl Rove, the individual who helped found Crossroads GPS and helped with fundraising, AR 103; Compl. ¶ 37; CGPS An. ¶¶ 35–39, briefed attendees on fifteen active Senate races, AR 103; Compl. ¶42, CGPS An. ¶ 42. One of the races Mr. Rove analyzed was the Ohio Senate race between Senator Sherrod Brown (D-OH) and his Republican challenger, Ohio Treasurer Josh Mandel. AR 94, 96, 103; Compl. ¶ 42, CGPS An. ¶ 42.

Regarding that race, Mr. Rove recounted a call he received from an unnamed out-of-state donor. AR 94, 96, 103–04; Compl. ¶ 43; CGPS An. ¶ 43. According to Mr. Rove:

> [The donor] told him, "I really like Josh Mandel." The donor, Rove

> said, had asked him what his budget was in the state; Rove told him $6 million. "I'll give ya $3 million, matching challenge," Rove said the donor told him. Bob Castellini, owner of the Cincinnati Reds, is helping raise the other $3 million for that one.

AR 94, 96, 103–04, 174; Compl. ¶ 43; CGPS An. ¶ 43.

Crossroads GPS would eventually report spending $6,363,711 in independent expenditures in 2012 opposing Senator Brown. AR 104, 170; Compl. ¶ 44, Ex. A; CGPS An. ¶ 44. The ten reports Crossroads GPS filed for these independent expenditures did not disclose the identity of the donor, who according to Mr. Rove, pledged $3 million in contributions for the Ohio Senate race, nor the names of any other donor who contributed "matching funds." AR 104, 159; Compl. ¶ 45, Exs. A, B; CGPS An. ¶ 45. American Crossroads, for its part, did not report spending any money on the Ohio race. AR 104; Compl. ¶ 46; CGPS An. ¶46.

During the Tampa fundraiser, Crossroads GPS also showed fourteen television ads to the attendees as "examples" of ads the attendees' contributions would be used to fund. AR 77–78, 104, 174; Compl. ¶ 47; CGPS An. ¶ 47. The ads targeted Democratic Senate candidates in Virginia, Ohio, Montana, Florida, Massachusetts, and Nevada. AR 77–78, 174; Compl. ¶ 47. Eleven of the advertisements were produced by Crossroads GPS. Compl. ¶ 47; CGPS An. ¶ 47.

Among these "example" ads was an ad attacking Senator Brown for voting with Obama "95 percent of the time," for "cut[ting] . . . Medicare spending," and for "ad[ding] a new tax on Ohio manufacturers." AR 77–78; Compl. ¶ 48, Ex. C at 9; CGPS An. ¶ 48; Crossroads GPS, "Cheap" OH (July 3, 2012), https://www.youtube.com/watch?v=4crbHaIdJE4. Another ad attacked Nevada Representative Shelley Berkley (D-Nev.) in her run for the Nevada Senate seat, citing CREW's report finding her to be "amongst Washington's most corrupt," accusing her of "enrich[ing] . . . herself," calling her own ads "untrue," and arguing that "Shelley Berkley is

everything that's wrong with Washington." AR 78; Compl. ¶ 48, Ex. C at 15; CGPS An. ¶ 48; *see also* Crossroads GPS, "Investigation" NV (Aug. 3, 2012), https://www.youtube.com/watch?v=6bk4e0CU-H0. Another ad attacked Virginia Senator Tim Kaine (D-Va.) for supporting a cut to "defense spending" that could "cost Virginia 200,000 jobs." AR 77; Compl. ¶ 48, Ex. C at 13–14; CGPS An. ¶ 48; *see also* Crossroads GPS, "Cost" VA (Aug. 15, 2012), https://www.youtube.com/watch?v=3sLwpr9DrNk.t.

The attendees were then solicited for contributions, and Crossroads GPS officials stressed that additional sums were needed because advertising rates were increasing, making it more costly for Crossroads GPS to broadcast advertisements like those the attendees had just watched. AR 105; Compl. ¶ 49; CGPS An. ¶ 49.

While the fundraisers apparently used the name "American Crossroads" in their fundraising pitches, they evidently used it to mean both American Crossroads and Crossroads GPS. AR 105–106; Compl. ¶ 51. One fundraiser told the attendees that "American Crossroads" was two-thirds of the way to reaching its $300 million fundraising goal, but the spokesman for both Crossroads GPS and American Crossroads acknowledged the $300 million goal was the combined budgets for both groups. AR 105; Compl. ¶ 51. In addition, eleven of the fourteen ads shown to the attendees before they were solicited were produced by Crossroads GPS, and it subsequently made independent expenditures in five of the six races for which ads were shown. AR 77–78, 105–06; Compl. ¶ 51, Ex. A at 77, 80, 83, 84, 86. In the sixth race, in Florida, Crossroads GPS broadcast an "issue ad" just before the fundraiser that was not reported to the FEC. *See* AR 105–06; Compl. ¶ 51, Ex. D. American Crossroads, on the other hand, ran independent expenditures in only two of the six identified races, Montana and Florida. Compl. ¶ 62; CGPS An. ¶ 62.

Many of those independent expenditures were broadcast ads that mirrored the "example" ads shown to the contributors at the August 30 fundraiser. For example, like one of the ads shown to the contributors, Crossroads GPS's ads attacked Senator Brown for voting with Obama "95 percent of the time," creating a "new tax" on "Ohio manufacturers," and "cut[ting]" "Medicare spending."[12] Further, like an ad shown to the contributors, Crossroads GPS's ads attacked Rep. Berkley as having been named (by CREW) as amongst the "most corrupt politicians" in Washington, accusing her of "enriching herself," calling her own ads "false," and asserting "Shelley Berkley [is] everything that's wrong with Washington."[13] Crossroads GPS also ran an ad attacking Senator Kaine that, like the ad shown to the contributors at the August 30 meeting, accused the senator of supporting a cut to "defense" that would cost "200,000 Virginia jobs."[14]

In addition to the ten reports disclosing independent expenditures in the Ohio race, Crossroads GPS filed more than 32 reports disclosing independent expenditures for broadcast ads in the Virginia, Montana, and Nevada Senate races subsequent to the fundraiser, and reported spending upwards of $17 million on those independent expenditures. AR 106; Compl. ¶ 53, Exs.

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[12] Compl. ¶ 52, Ex. A at 55–56, 79, Ex. B at 8, 21, Ex. C at 4, 5–6, Ex. E, Ex. F; CGPS An. ¶ 52; *see also* Crossroads GPS, "Football" OH (Sept. 11, 2012), https://www.youtube.com/watch?v=RsvtT5rI7ZM; Crossroads GPS, "When" OH (Sept. 26, 2012), https://www.youtube.com/watch?v=_lRfaaqpe2U; Crossroads GPS, "Dragging" OH (Oct. 23, 2012), https://www.youtube.com/watch?v=_rFLQOT8oj0; Crossroads GPS, "Down" OH (Oct. 30, 2012), https://www.youtube.com/watch?v=19W9JO7wD-4.

[13] Compl. ¶ 52, Ex. A at 55, Ex. B. at 6, 13, Ex. C at 10; CGPS An. ¶ 52; *see also* Crossroads GPS, "Laughable" NV (Sept. 11, 2012), https://www.youtube.com/watch?v=vCjBIw3V4Vw; Crossroads GPS, "Shameful" NV (Sept. 18, 2012), https://www.youtube.com/watch?v=y4jf3yU0WY4; Crossroads GPS, "Favorite" NV (Oct. 23, 2012), https://www.youtube.com/watch?v=CTCN6cJ93E8.

[14] Compl. ¶ 52, Ex. B at 7, Ex. C at 10–11; CGPS An. ¶ 52; *see also* Crossroads GPS, "Questionable" VA (Sept. 11, 2012), https://www.youtube.com/watch?v=Am9Mq4DpQ-Q.

A, B; CGPS An. ¶ 53. The reports failed to disclose the names of any of the donors who contributed to Crossroads GPS, including those who contributed for the purpose of furthering Crossroads GPS's independent expenditures, and even those who specifically contributed for the purpose of furthering the reported independent expenditures. *See* AR 106; Compl. ¶53, Ex. A at 1, Ex. B at 1; CGPS An. ¶ 53.

Based on these allegations, CREW alleged Crossroads GPS and certain of its agents violated 2 U.S.C. § 434 (now 52 U.S.C. § 30104) and 11 C.F.R. § 109.10(b)–(e). AR 108–15.

B. The FEC's Proceedings

The FEC denoted CREW's complaint MUR 6696. AR 1, 55. On November 28, 2012, the FEC forwarded CREW's complaint to the respondents, including intervenor-defendant Crossroads GPS. AR 57–66. On January 17, 2013, counsel for Crossroads GPS and its agents submitted a response characterizing CREW's complaint as a "stunt," and took issue with some of the reporting, but largely conceded the factual allegations CREW made. AR 73–93.

The response included a signed affidavit of Mr. Rove, admitting the allegations about his conversation with the donor regarding the Ohio Senate race were "substantially accurate." AR 94–97. Critically, Mr. Rove conceded that "[i]t was his understanding . . . that the donor intended the funds to be used in some manner that would aid the election of Josh Mandel." *Id.* Crossroads GPS further admitted that the donor had indeed contributed to Crossroads GPS an amount exceeding $3 million, and that the matching challenge generated an additional $1.3 million in contributions for Crossroads GPS's electoral work in Ohio. *Id.*

With respect to the Tampa fundraiser, the response contended that the fundraiser was hosted by American Crossroads, not Crossroad GPS. AR 82, 96. Nonetheless, the response did not dispute facts that render their assertion that no funds were raised for Crossroads GPS

incredulous: (1) that at the fundraiser, Rove recounted a conversation with a donor about "Crossroads GPS efforts in Ohio" and the donor's offer to "donate funds toward Crossroads GPS's budget in the State of Ohio," AR 96; (2) that Crossroads GPS ran independent expenditures in Ohio but American Crossroads did not report spending any money in that election, AR 104; (3) the vast majority of the "example" ads shown were from Crossroads GPS, not American Crossroads, AR 77–78; (4) that forms handed to attendees provided instructions on how to donate to Crossroads GPS, *see* AR 103; and (5) that after the fundraiser, Crossroads GPS ran ads in each of the six races for which examples were shown (with five of the six constituting independent expenditures), whereas American Crossroads did not, AR 105–06; Compl. ¶¶ 51, 62, Ex. A at 77, 80, 83, 84, 86; CGPS An. ¶ 62. Each of these facts contradicts Crossroads GPS's claim that the fundraiser was for American Crossroads' benefit alone. Indeed, the respondents did not even dispute that Crossroads GPS raised money at the fundraiser.

On April 24, 2013, CREW filed an amended complaint with the FEC, substituting Nicholas Mezlak as a named complainant for Jessica Markley. AR 98–117. In response, respondents reiterated their previous reply. AR 162–63.

On March 7, 2014, the FEC's OGC issued its First General Counsel's Report on CREW's complaint (the "Report"). AR 164–177. The Report found that the contributor who pledged the $3 million of which Mr. Rove spoke at the August 30, 2012 fundraiser "proposed to make a contribution to Crossroads [GPS] for it to use to support the election of Josh Mandel." AR 174. Nonetheless, the Report concluded that the "donor's general purpose to support an organization in its efforts to further the election of a particular federal candidate does not itself indicate that the donor's purpose was to further 'the reported independent expenditure,'" and therefore it did not establish the "express link between the receipt and the independent expenditure" required by

11 C.F.R. § 109.10(e)(1)(vi). AR 173–74. The Report further concluded that no reasonable inference could be drawn to support even a reason to believe that the matching contributors gave for the purpose of furthering any of Crossroads GPS's ten reported independent expenditures in Ohio. AR 174. And the Report concluded that there was "no basis" to conclude that Crossroads GPS received contributions from the attendees at the August 30, 2012 meeting for the purpose of furthering any of the independent expenditures Crossroads GPS reported in Virginia, Montana, and Nevada. AR 175. Accordingly, the OGC recommended finding no reason to believe Crossroads GPS violated 11 C.F.R. § 109.10(e)(1)(vi). AR 176.

The Report acknowledged, however, that the disclosure requirements imposed by 11 C.F.R. § 109.10(e)(1)(vi) conflicted with statutory requirements imposed by the FECA, which "may reasonably be construed to require disclosure of the identity of certain contributors regardless of whether the contributor made a contribution to further a specific independent expenditure." AR 173. The OGC recognized that the statutory provision in question, 2 U.S.C. § 434(c)(2)(C) (now 52 U.S.C. § 30104(c)(2)(C)), required "an arguably more expansive approach" than embodied in 11 C.F.R. § 109.10(e)(1)(vi) because the statute requires reporting any contribution given for the purpose of furthering "an" independent expenditure, but the regulation requires reporting only contributions given for the purpose of furthering "the reported" independent expenditure. AR 175. Nonetheless, the OGC concluded that the regulation constituted "the Commission's controlling interpretation of the statutory provision." *Id.* Accordingly, the OGC found its conclusion that there was no reason to believe Crossroads GPS violated 11 C.F.R. § 109.10(e)(1)(vi) foreclosed the claim that Crossroad GPS violated 52 U.S.C. § 30104(c)(2)(C). *Id.*

With regard to the disclosure provisions of 2 U.S.C. § 434(c)(1) (now 52 U.S.C.

§ 30104(c)(1)), however, the OGC recognized that the statutory provision "impose[d] additional reporting obligations for certain contributions made for the purpose of influencing a federal election generally." AR 175. The OGC recognized that 11 C.F.R. § 109.10 was "silent concerning any such additional reporting requirement." AR 175–76. Accordingly, the OGC did not conclude that its recommendations as to 11 C.F.R. § 109.10 resolved the question of whether Crossroads GPS violated § 30104(c)(1). AR 176. Indeed, it recognized "that the facts here may also give rise to a claim that Crossroads [GPS] allegedly violated [52] U.S.C. § [30104](c)(1)." *Id.* Nonetheless, the OGC recommended that the Commission dismiss such an allegation on the basis of prosecutorial discretion because "a Respondent could raise equitable concerns about whether a filer has fair notice of the requisite level of disclosure required by law if the Commission attempted to impose liability under Section [30104](c)(1)." *Id.*

Consequently, the OGC recommended finding no reason to believe Crossroads GPS violated 52 U.S.C. § 30104(c)(2)(C) and 11 C.F.R. § 109.10(e)(1)(vi), and recommended dismissing the allegation Crossroads GPS violated 52 U.S.C. § 30104(c)(1) on the grounds of a supposed lack of fair notice. AR 176. The OGC recommended closing the file on the other respondents. *Id.*

After the OGC issued its Report, the Commission voted on its recommendations on November 17, 2015. AR 193. The Commission deadlocked three-to-three on the question of whether to find reason to believe that Crossroads GPS violated 52 U.S.C. § 30104(c)(2)(C) and 11 C.F.R. § 109.10(e)(1)(vi), and deadlocked on whether to exercise its prosecutorial discretion to ignore Crossroads GPS's violation of 52 U.S.C. § 30104(c)(1). *Id.* The Commission also deadlocked on whether to close the file on Mr. Law, Mr. Rove, Mr. Barbour, and Mr. Crosby. *Id.* Subsequently, on December 17, 2015, as a result of the deadlock, the Commission voted six-

to-zero to close the file on MUR 6696, dismissing Plaintiffs' complaint. AR 195.

The three commissioners who voted against finding reason to believe Crossroads GPS violated the FECA and the FEC regulation did not issue a Statement of Reasons explaining their vote. Commissioners Anne M. Ravel and Ellen L. Weintraub, who both voted to find reason to believe Crossroads GPS failed to report contributors as required by law, issued their own Statement of Reasons. AR 198–99.

On February 16, 2016, within sixty days of the date of dismissal, CREW filed this action.

ARGUMENT

I. Jurisdiction

The action arises under the FECA, 52 U.S.C. § 30101 *et seq*. and the APA, 5 U.S.C. §§ 551-706. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 and venue is appropriate under 28 U.S.C. § 1391(e). Plaintiffs have standing pursuant to *FEC v. Akins*, 524 U.S. 11 (1998), because they have not received information to which they are legally entitled under the FECA, *id.* at 21; Compl. ¶¶ 7–18; *see also* Mem. Op. 16–17 & n.5, ECF No. 22.

II. Standard of Review

This action raises two separate but related questions: (1) whether 11 C.F.R. § 109.10(e)(1)(vi) conflicts with the FECA or is otherwise arbitrary and capricious in violation of the APA, 5 U.S.C. § 706, and (2) whether the FEC's dismissal of CREW's complaint against Crossroads GPS permitted activity "contrary to law" in violation of the FECA, 52 U.S.C. § 30109(a)(8)(C).

With respect to the first question, a court examines the regulation "under the two-step analysis" set forth in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), to determine whether the regulation is a valid interpretation of the statute. *Shays v. FEC*, 414 F.3d 76, 96 (D.C. Cir.

2005). Under that analysis, the court asks whether the statute is ambiguous, and if it is, the court asks "whether the agency's interpretation is reasonable." *Id.* "At the same time, because the regulation[] reflect[s] final agency action under the APA, [the court] ask[s] whether [it is] 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* If an agency "fail[s] to present an adequate basis and explanation" for a rule, the rule is arbitrary and capricious in violation of the APA. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 34 (1983). An agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* at 43. The court looks to the "contemporaneous justification" for the rule and must ignore all "post-hoc" explanations. *N. Air. Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 860 (D.C. Cir. 2012); *accord Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962); *Williams Gas Processing – Gulf Coast Co., L.P. v. FERC*, 373 F.3d 1335, 1345 (D.C. Cir. 2004) ("It is axiomatic that [a court] may uphold agency orders based only on reasoning that is fairly stated by the agency in the order under review . . . ; 'post hoc rationalizations by agency counsel will not suffice.'" (citing *SEC v.Chenery Corp.*, 318 U.S. 80, 88 (1943))).

With respect to the second question, whether the FEC's dismissal permits activity "contrary to law," the court asks whether "(1) the FEC dismissed the complaint as a result of impermissible interpretations of the [law], or (2) if the FEC's dismissal of the complaint, under permissible interpretations of the [law], was arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). In deciding that question, the court reviews the contemporary rationale provided by the commissioners who voted against proceeding with the investigation, as their reasoning provides the explanation for the failure to act, even where the commissioners preventing enforcement do not represent a majority of the commission and

thus do not have the authority to exercise agency power or make statements of law. *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992); *Common Cause v. FEC*, 842 F.2d 436, 449 n.32 (D.C. Cir. 1988). Where these controlling commissioners do not provide their own statement of reasons but instead adopt the recommendations of the OGC, the court reviews the reasoning provided the OGC. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 45 n.19 (1981) (reviewing OGC's report to determine if agency action contrary to law where agency followed OGC's recommendation).

III. 11 C.F.R. § 109.10(e)(1)(vi) is Unexplained, Inexplicable, and Invalid

The FEC's dismissal of CREW's complaint relied heavily on the fact that 11 C.F.R. § 109.10(e)(1)(vi) only requires those making independent expenditures to report contributions given for the purpose of furthering "the reported" independent expenditure, even though 52 U.S.C. § 30104(c)(2)(C) requires a broader set of contributions to be reported. AR 186. The regulation, however, is invalid because it fails both prongs of the applicable analysis: (1) it is arbitrary and capricious because it was issued without any explanation, and (2) it fails under *Chevron* because it conflicts with the unambiguous terms of § 30104(c)(2)(C), and it is unreasonable because it both frustrates the statute's purposes to the point of nullifying the law and renders the law redundant.

A. The Regulation Cannot Be Valid Because the FEC Failed to Explain Its Narrowing of Disclosure Required by the Statute

The FEC adopted 11 C.F.R. § 109.10(e)(1)(vi) without explaining—or indeed even acknowledging—that the regulation materially altered the reporting obligations for those who make independent expenditures, drastically limiting the information that is made available to voters. As a result, the regulation is arbitrary and capricious, and cannot be valid.

"[W]hen an agency fails to provide a reasoned explanation, or where the record belies the agency's conclusion, the court must undo its action." *Aragon v. Tillerson*, 240 F. Supp. 3d 99, *6 (D.D.C. 2017) (Howell, J.) (internal quotation marks omitted). "The requirement that agency action not be arbitrary or capricious includes a requirement that the agency adequately explain its result." *Public Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993); *see also Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 34. Failing to do so renders the regulations invalid. Thus, for example, in *Shays*, where "the Commission offered no persuasive justification for the provisions challenged," the D.C. Circuit invalidated the FEC regulations at issue. 414 F.3d at 100–02; *see also Shays v. FEC*, 528 F.3d 914, 921, 932 (D.C. Cir. 2008) (noting after prior judgment, FEC engaged in new rulemaking to reissue regulation with additional explanation; reviewing and striking reissued regulations that still lacked a persuasive justification); *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("[W]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated." (internal quotation marks and citation omitted)); *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 78 (D.D.C. 2010) (finding "set aside means 'to annul or vacate'" in APA (quoting Black's Law Dictionary (8th ed. 2004)).

Congress amended the FECA in 1979 to do away with the need for contributors to self-report, and to instead shift the burden onto those making independent expenditures, "without affecting meaningful disclosure." 1979 FECA History at 103. With respect to one of the two categories Congress required those making independent expenditures to report, the law required the disclosure of all contributions given "for the purpose of furthering *an* independent expenditure." 52 U.S.C. § 30104(c)(2)(C) (emphasis added). In fact, the FEC recognized that requirement when it first proposed regulations after the amendments, drafting a rule requiring

those making independent expenditures to report all contributions given "for the purpose of furthering *an* independent expenditure." AR 1075 (emphasis added).

Nonetheless, despite receiving no comments from the public about that proposed language, and despite there being no discussion at the FEC about the language, the FEC inexplicably changed the language to require only the reporting of contributions given "for the purpose of furthering *the reported* independent expenditure." AR 1330 (emphasis added). As the OGC recognized below, the regulation adopted by the FEC is far narrower than the statute. AR 173. Whereas the statute requires "disclosure of certain contributors regardless of whether the contributor made a contribution to further a specific independent expenditure," the regulation requires "an express link between the receipt and the independent expenditure." *Id.*

When the FEC finally issued its explanation and justification, it said only that regulation "incorporate[ed] the changes" in the legislation, but it did not provide a "cogent explanation"—nor indeed any explanation or even acknowledgment—of the regulation's diversion from the statute. AR 1503; *Shays*, 414 F.3d at 100. Indeed, the record is devoid of any evidence showing the commissioners were even aware of this change in language or gave it any thoughtful consideration.

The FEC's total lack of explanation for its departure from the statutory text, and indeed the complete lack of any apparent awareness of that divergence, renders the rule irreparably arbitrary and capricious. Accordingly, "the court must undo [the FEC's] action" by declaring the rule invalid. *Aragon*, 240 F. Supp. 3d at *6.

B. The Regulation Conflicts with the Unambiguous Terms of the FECA

In addition to the regulation being invalid because it has no explanation, the rule's language cannot be reconciled with the statute under either step of the *Chevron* analysis. The

regulation fails step one of the *Chevron* analysis because the FECA's use of the indefinite article "an" is unambiguous and leaves no room for the agency to narrow the statute. It also fails *Chevron*'s step-two because the regulation frustrates the FECA's purposes by essentially nullifying disclosure of contributions for independent expenditures under 52 U.S.C. § 30104(c)(2)(C). Finally, the regulation, as interpreted, conflicts with other statutory and regulatory reporting requirements.

1. The Regulation Fails* Chevron *Step-One

Subsection (c)(2)(C) unambiguously calls on those creating independent expenditures to report contributions they received for the purpose of furthering "an" independent expenditure, not merely "the" specific independent expenditure reported. Accordingly, the regulation clearly fails under *Chevron* step-one. *Barnhart v. Walton*, 535 U.S. 212, 217–218 (2002) ("[I]f the statute speaks clearly to the precise question at issue, we must give effect to the unambiguously expressed intent of Congress." (internal quotation marks omitted)); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."); *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996) ("[F]or the EPA to avoid a literal interpretation at *Chevron* step one, it must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it.").

The use of the indefinite "an" is unambiguous. While a definite article would mean that the contribution must be related to a specific independent expenditure, the use of the indefinite clearly covers the full category of independent expenditures the reporting party has created or

may create. Courts understand that when Congress distinguishes between indefinite and definite articles, it does so with purpose. For example, in *Mylan Pharmaceuticals, Inc. v. Shalala*, a court in this district held that a statute's use of the indefinite "a" was not ambiguous under *Chevron* and did not allow the agency to substitute the indefinite for a definite article. 81 F. Supp. 2d 30, 37 (D.D.C. 2000). According to the court, "[t]he use of the indefinite article 'a' plainly connotes that 'a court' may refer to a district court, an appellate court, one of the two, or both." *Id.* "Simply because Congress chose to employ the indefinite article does not imply that 'Congress has explicitly left a gap for the agency to fill.'" *Id.* (quoting *Chevron*, 467 U.S. at 843). Because there is no ambiguity in the statute for the FEC to fill, the FEC could not substitute the definite language "the reported" independent expenditure for the statute's indefinite "an" independent expenditure which would disclose significantly more contributions.

While the FEC may attempt to rely on the D.C. Circuit's recent decision in *Van Hollen v. FEC*, 811 F.3d 486 (D.C. Cir. 2016), to argue that it has authority to interpret and limit reporting obligations, *Van Hollen* stands for no such thing. In *Van Hollen*, the D.C. Circuit considered a challenge to a new rule by the FEC that proscribed electioneering communications reporting for corporations and unions. *Id.* at 491 (quoting 11 C.F.R. § 104.20(c)(9)). The regulation was needed because corporations and unions only recently gained the authority to create electioneering communications. *Id.* at 490–93 (discussing impact of *Wisconsin Right to Life*, 551 U.S. at 482). While the statute required those making electioneering communications to report all contributions they received unless they were funded by a segregated fund, *see id.* at 492 (discussing 52 U.S.C. § 30104(f)(2)(E), (F)), the FEC interpreted the words "contributor" and "contributed" in the statute to imply an additional purposive requirement tied to funding electioneering communications. *Id.* at 497–01. The court upheld that interpretation under

Chevron, noting the unqualified use of "contributor" and "contribution" in the statute was ambiguous. *Id.* at 495.

Here, however, there was no unexpected situation created by a court decision that left the FEC with a gap filling role. Congress explicitly adopted the rule that addressed the reporting requirements for independent expenditures and expressly stated the purpose that would qualify (with respect to this provision of the statute): that the contributor give for the purpose of furthering *an* independent expenditure. 52 U.S.C. § 30104(c)(2)(C).

In sum, the FECA is not ambiguous as to the nature of the contributions to be reported under subsection (c)(2)(C): all contributions given for the purpose of furthering an independent expenditure, regardless of whether the contribution was given for the purpose of reporting the particular independent expenditure reported. Because Congress "has directly spoken to the precise question at issue," *Shays*, 414 F.3d at 105, the FEC may not alter the law.

2. The Regulation Fails* Chevron *Step-Two

Even if the statute were ambiguous (and it is not), the regulation also fails under *Chevron*'s second step: that the "agency's interpretation [be] reasonable." *Shays*, 528 F.3d at 919. The FEC's rule has frustrated the FECA's purpose by effectively nullifying disclosure of contributions for independent expenditures. Further, the proposed rule renders the disclosure provision of subsection (c)(2)(C) redundant to other portions of the FECA.

a. <u>The Rule Frustrates the FECA's Disclosure Purposes</u>

First, the FEC's construction limiting disclosure to those contributions given for the "purpose of furthering the reported independent expenditure" is unreasonable because it has frustrated the purpose of subsection (c)(2)(C): to ensure voters are informed about contributions used to fund independent expenditures. 1979 FECA History 103. Congress and the Supreme

Court have recognized disclosure of these contributions serves a vital purpose in our democracy, preserving the "free functioning of our national institutions." *Buckley*, 424 U.S. at 66–67; *accord Citizens United*, 558 U.S. at 370 (disclosure allows "citizens [to] see whether elected officials are 'in the pocket' of so-called moneyed interests"); *McConnell v. FEC*, 540 U.S. 93, 201 (2003) (disclosure "perform[s] an important function in informing the public about various candidates' supporters").

As described above, 11 C.F.R. § 109.10(e)(1)(vi)'s narrow language has effectively resulted in *no* disclosure of contributions used to fund independent expenditures. *See supra* Statement of Facts II.D.[15] "In applying *Chevron*'s second step and the APA, [courts] must reject administrative constructions of [a] statute . . . that frustrate the policy that Congress sought to implement." *Shays*, 528 F.3d at 919. Where a rule allows a regulated party to "evade—almost completely" the statutory requirements, the rule is invalid. *Id.* at 925. Nor can it be said that the FEC is merely balancing Congress's purpose in disclosure against "conflicting privacy interests that hang in the balance," *Van Hollen*, 811 F.3d at 494: a rule which eviscerates the only purpose for the statutory text's existence hardly strikes a reasonable balance.

b. The Rule Renders Subsection (c)(2)(C) Contributor Disclosure Redundant

Second, the rule is unreasonable as interpreted because it makes subsection (c)(2)(C)

[15] The Court may consider this material, even where outside the record, because this material is relevant to the proper legal interpretation of the FECA, FED. R. EVID. 201 notes ("In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion."), the material shows whether the regulation "frustrates Congress's goal," *Shays*, 528 F.3d at 925 (looking to evidence offered at oral argument to determine if regulation frustrated BCRA); and the material shows "whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds of decision," *Nat'l Treasury Emps. Union v. Hove*, 840 F. Supp. 165, 168 (D.D.C. 1994), *aff'd*, 53 F.3d 1289 (D.C. Cir. 1995); *accord Oceana, Inc. v. Locke*, 674 F. Supp. 2d 39, 45 (D.D.C. 2009) (court may take notice of extra-record evidence to see if agency "failed to examine all relevant factors").

redundant to other disclosure provisions of the FECA and FEC regulations. Specifically, the section's disclosure would be redundant to the FECA's disclosure obligations for those making independent expenditures. *See* 52 U.S.C. § 30104(c)(1); 11 C.F.R. § 109.10(b). A "cardinal rule of statutory interpretation [is] that no provision should be construed to be entirely redundant." *Kungys v. United States*, 485 U.S. 759, 778 (1988); *Shays v. FEC*, 337 F. Supp. 2d 28, 77 (D.D.C. 2004) (finding FEC's interpretation failed *Chevron* step-two when it rendered a term "superfluous" to others). Yet the FEC's construction of 52 U.S.C. § 30104(c)(2)(C) via 11 C.F.R. § 109.10(e)(1)(vi) would require such a close connection between the contributor and the independent expenditure that the contributor would in fact be the maker of the independent expenditure itself.

In interpreting § 109.10(e)(1)(vi) below, the OGC said that an "express link" was required between the contributor and the reported independent expenditure. AR 173. Although the OGC did not elaborate on this direct link, it appears from its discussion that, to qualify as a contribution that must be disclosed under its interpretation: (1) the contributor must have more than a "general purpose to support an organization in its efforts to further the election of a particular federal candidate," AR 174; (2) the contributor's funds cannot be directed through some intermediary "general treasury fund[]" on the way to paying for the ad but must, presumably, go directly from the contributor to pay for the ad, *see* AR 173 (discussing case finding that funds were not contributed for the purpose of furthering the reported independent expenditure where they were routed through a "general treasury"); and (3) it is not enough for the contributor to see an "example" ad and to choose to contribute funds to create other similar but not-yet-created ads. AR 78, 174–75. Although the OGC did not expressly adopt the interpretation proffered by Crossroads GPS, the OGC apparently agrees that a contributor "must

know the advertisement he or she is funding." AR 172. In other words, to qualify as a contribution that furthers the reported independent expenditure, a contributor must either choose to fund a single specific ad, shown in advance to the contributor in its final form, or must retain so much editorial control over the production that the donor knows the exact communication that the contribution is going to fund.

A person with such control of the use of his funds, however, would not be a contributor to the group airing the ad, but would rather be "mak[ing]" the independent expenditure and thus have to report it himself. 11 C.F.R. § 109.10(b). It is clear from FEC regulations and precedent that the person who "makes" a particular independent expenditure is the person or persons who pays for it in its final form. FEC, AO 2008-10 (Votervoter.com) (Oct. 24, 2008) (finding company engaged in "bona fide commercial activity" that causes independent expenditure to air nonetheless does not "mak[e]" the ad because it does not pay for it). That is why the FECA and FEC regulations for disclaimers on ads, designed to let viewers know who makes the ad, require the ad to identify who "paid for the communication." 52 U.S.C. § 30120(a)(3); 11 C.F.R. § 110.11(b). It is irrelevant that the ad may pass through the hands of other persons afterwards: an ad will often pass through a broker and a television station before airing, but those persons would merely be conduits carrying out the decision made by the person making the ad. *See* AO 2008-10. If a person decides to fund the production and airing of a specific independent expenditure, that person "makes" the independent expenditure. That person must then disclose their identity by filing a report with the FEC describing the independent expenditure; there is no need for her to be identified as a contributor to one of the conduit parties.

Conversely, an individual who contributes for the purpose of furthering the reported independent expenditure would not be a "contributor" as that term is defined by FEC regulations.

That is because a contribution is "made when the contributor relinquishes control over the contribution." 11 C.F.R. § 110.1(b)(6). If a person retained ultimate control over the end use of her money by identifying the single specific expenditure it will be used to fund, she has not made a contribution because she has not "relinquishe[d] control" of the funds. *Id.* Rather, that person made the expenditure itself.

A similar principle is at work in the FECA and FEC regulations for reporting contributions to candidate committees and political parties. Both the statute and FEC regulations require tracking and reporting the party who "makes" a contribution to one of these groups. 52 U.S.C. § 30104(b)(3)(A), (B); 11 C.F.R. § 104.3; *accord* 11 C.F.R. § 110.1(a), (b)(1) ("making contributions" and "make contributions"); 11 C.F.R. § 109.10(e)(1)(vi) (requiring reporting of one who "made a contribution"). But the law does not merely look to the last person in possession of the money before it goes into the pockets of the candidate or party; rather, it looks to who directed the funds to the specific end. If person A gives money to person B with instructions that the money is go to fund the specific and identifiable candidate C, it is person A who "makes" the contribution, not person B. The person through which the funds pass in that situation is a mere conduit; they are not the "true source" of the contributions. *FEC v. Hsia*, 176 F.3d 517, 524 (D.C. Cir. 1999) (finding violation of FECA where report identified as the contributor and not the true source who directed where the funds would go). Thus, if a person gives money to a third party but "know[s] the [candidate or committee] he or she is funding" with that money, the former is the one "mak[ing]" a contribution to that candidate. *Cf.* AR 172.

It is no accident that the FECA and FEC regulations use the same language to identify the source of an independent expenditure as they use to identify the source of a contribution: both look to the identity of the person who "makes" the transaction. *Compare* 52 U.S.C.

§ 30104(b)(3)(A) *with id.* § 30104(c)(1). Both look to the true source of the transfer: the person exercising control with respect to where the money is spent. If a person controls the selection of the recipient of funds, then that person "makes the contribution." But if one controls the final expenditure the funds are used to create, then that person makes the expenditure.

By limiting the requirement to report contributions to those who give for the purpose of furthering a specific identified independent expenditure, the FEC makes the contributor disclosure provision redundant to provisions requiring those making independent expenditures disclose themselves. Clearly Congress could not have intended for its reporting requirement under subsection (c)(2)(C) to merely capture individuals who must also make their own reports under the FECA for making independent expenditures.

Simply put, the regulation cannot be reconciled with the language or purpose of 52 U.S.C. § 30104(c)(2)(C). It fails under both *Chevron* steps one and two. Accordingly, the rule is invalid and must be stricken. *See Shays*, 414 F.3d at 105–10 (invaliding regulation that failed under *Chevron*'s step one or two); *Nat'l Mining Ass'n*, 145 F.3d at 1409 (vacating agency regulation after finding agency's interpretation of statute on which regulation depended failed *Chevron* analysis).

IV. The FEC's Dismissal of the Subsection (c)(2)(C) Violation was Contrary to Law

The FEC refused to find reason to believe Crossroads GPS violated 52 U.S.C. § 30104(c)(2)(C) solely because it found 11 C.F.R. § 109.10(e)(1)(vi) "constitutes the Commission's controlling interpretation of the statutory provision." AR 175. Because the regulation was invalid for reasons stated above, the FEC's dismissal was based on an impermissible interpretation of law, and thus the dismissal is contrary to law. *Orloski*, 795 F.2d at 161; *CREW v. FEC*, 209 F. Supp. 3d 77, 93 (D.D.C. 2016) (setting aside dismissal where FEC

"based its decision upon an improper legal ground"); *see also Barnett v. Weinberger*, 818 F.2d 953, 954 (D.C. Cir. 1987) (holding agency decision premised on invalid regulation at odds with statute was arbitrary).[16]

V. Subsection (c)(1) Imposes "Additional" Disclosure Obligations and the FEC's Failure to Enforce was Contrary to Law

Separate and distinct from the reporting obligations contained in 52 U.S.C. § 30104(c)(2)(C) and misinterpreted by the FEC in 11 C.F.R. § 109.10(e)(1)(vi) is the reporting obligation contained in 52 U.S.C. § 30104(c)(1). That provision requires a person making an independent expenditure to report "the information required under subsection (b)(3)(A) for all contributions received by such person." 52 U.S.C. § 30104(c)(1). The referenced subsection, which provides reporting obligations for political committees, requires "the identification of each person . . . who makes a contribution to the reporting [party] . . . , whose contributions have an aggregate amount or value in excess of $200 with the calendar year . . . together with the date and amount of any such contribution." *Id.* § 30104(b)(3)(A). As the Supreme Court recognized in *MCFL*, the provision plainly requires those making independent expenditures "to identify all contributors who annually provide in the aggregate $200 in funds intended to influence elections." 479 U.S. at 262. The appearance of the requirement in the "plain language" of the statute gives "fair notice" to regulated parties. *Freeman United Coal Min. Co. v. Fed. Mine Safety and Health Review Comm'n*, 108 F.3d 358, 362 (D.C. Cir. 1997) ("Accordingly, regulations will be found to satisfy due process so long as they are sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and

[16] Unconstrained by the unlawful regulation, the FEC would very likely have found a violation of subsection (c)(2)(C). *See* AR 174.

the objectives the regulations are meant to achieve, would have fair warning of what the regulations require."). The case is not among the "the very limited set of cases" in which courts have found lack of required notice. *Suburban Air Freight, Inc. v. Transp. Sec. Admin*, 716 F.3d 679, 684 (D.C. Cir. 2013).

The OGC recognized that subsection (c)(1) "impose[s] additional reporting obligations" to subsection (c)(2)(C) "for certain contributions made for the purpose of influencing a federal election generally" that is not covered by the regulation. AR 175. The OGC was correct, as the Supreme Court recognized in *MCFL*, that the FECA provides two separate reporting obligations for those making independent expenditures: they must "(1) identify all contributors who contribute in a given year over $200 in the aggregate in funds to influence elections, § [30104](c)(1); . . . and ([2]) identify any persons who make contributions over $200 that are earmarked for the purpose of furthering independent expenditures, § [30104](c)(2)(C)." 479 U.S. at 242.[17]

This paired reporting is sensible. Under the FECA, voters would have access to two categories of information. First, they would know who contributed significant funds to the organization for the purpose of creating independent expenditures. Second, to ensure that voters have a full picture of the financial backing behind the group creating an ad and to ensure sources of funds are not excluded due to various wink-and-nod schemes, voters would know who

[17] The OGC recognized that 11 C.F.R § 109.10(e)(1)(vi) was in no way a construction of or attempt to apply 52 U.S.C. § 30104(c)(1). AR 175–76 (noting the regulation is "silent concerning any such additional reporting"). Accordingly, it is not the agency's position that the regulation reflects the amendments to subsection (c)(1), despite the explanation and justification asserting the regulation "incorporate[d] the changes set forth at 2 USC 434(c)(1) and (2)." AR 1503. The agency's current position is correct: in no way could the regulation be deemed a valid interpretation of subsection (c)(1) which expressly places a temporal focus on the contributions and omits the purposive language contained in subsection (c)(2)(C).

provided significant amounts to the organization to fund its political work within a relatively confined yet useful time-period before the ad ran.

Nonetheless, despite the existence of this distinct reporting provision and the inescapable conclusion that Crossroads GPS has not complied with it, the FEC refused to find reason to believe below because "a Respondent could raise equitable concerns about whether a filer has fair notice of the requisite level of disclosure required by law if the Commission attempted to impose liability under Section [30104](c)(1)." AR 176. The conclusion, however, is erroneous and does not justify dismissal.

The fact that the FECA imposes two contribution-disclosure obligations is clear on the face of the statute. There is no dispute that those making independent expenditures know they must report information about the expenditures and their contributions under 52 U.S.C. § 30104(c)(1). Any reader would plainly see that the statute requires reporting information under subsection (b)(3)(A) for "all contributions" and that the referenced section requires disclosing all contributions received within the year. The reader would also be aware that this is a separate requirement, under a separate subsection of the statute, from the requirement to report contributions provided "for the purpose of furthering an independent expenditure." 52 U.S.C. § 30104(c)(2)(C). They would also know that subsection (c)(1)'s requirement is plainly different than subsection (c)(2)(C)'s, as the former does not have the latter's "for the purpose of" limiting language. That is why the Court in *MCFL* recognized without any difficulty that a person making independent expenditures would have to report two sets of contributors: those giving more than $200 annually for any political purpose, and those giving more than $200 to further independent expenditures. 479 U.S. at 242, 262. The statute "provides a person of ordinary intelligence fair notice of what is" required. *Holder v. Humanitarian Law Project*, 561 U.S. 1,

18–19 (2010) ("[A] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."); *United States v. Williams*, 553 U.S. 285, 306 (2008) (finding "[c]lose cases can be imagined under virtually any statute" but they do not render statute so vague as to deny fair notice); *Grayned v. City of Rockford*, 408 U.S. 104, 108–14 (1972) ("[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," but "we can never expect mathematical certainty from our language"; noting judicial constructions of statute may provide clarity missing from text sufficient to provide "fair warning").

The fact that 11 C.F.R. § 109.10(e)(1)(vi) does not construe or apply subsection (c)(1) also does not relieve a party from the obligations of the statute. "Adoption of a regulation that does not implement the statute in its full extent does not erase the statutory requirement." *McConnell*, 540 U.S. at 322 (Kennedy, J., concurring in part and dissenting in part). Parties are still obliged to follow the dictates of the FECA, even if the FEC has not incorporated those requirements into its regulations.

Moreover, even if a hypothetical respondent might have a case for lack of notice, Crossroads GPS had actual notice of its reporting obligations. As it continually asserted to the FEC, Crossroads GPS "understands the applicable reporting" requirements of the law. AR 48. "Crossroads GPS is fully aware of its FEC reporting and disclosure obligations . . . [and] has never failed to report contributions required to be reported under the Act and FEC regulations." AR 81. By Crossroads GPS's own admission, therefore, it was aware of its obligation under subsection (c)(1) to report all contributors who provide more than $200 annually to the group, but consciously chose to ignore that obligation.

Nor is this a case where a fair notice argument would apply. While courts have said that regulated entities must receive fair notice of a new regulatory policy before they may be sanctioned, *see FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 246–48, 254 (2012) (finding television stations could not be sanctioned for fleeting expletives where they had no fair notice of a change in FCC policy from agency precedent and stated policy permitting fleeting uses), those situations arise where the agency has a declared interpretation of a statute or rule or sets a policy and then changes course, *id.* at 254, not where there is a rule plainly stated in the statute. Moreover, even if Crossroads GPS could argue that it lacked sufficient fair notice to allow for a sanction, the FEC would still be free to impose equitable remedies to address CREW's and voters' injuries stemming from the lack of knowledge of who is financially backing candidates and elected officials. While fair notice may be a legitimate defense to the FECA's criminal penalties, *see* 52 U.S.C. § 30109(a)(6), (d) (providing for civil and criminal penalties for knowing and willful violations), or to "sufficiently grave" criminal-like sanctions, *Satellite Broadcasting Co., Inv. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987), it is no defense to providing voters with information to which they are entitled. *See also GE v. EPA*, 53 F.3d 1324, 1330–31 (D.C. Cir. 1995) (noting that "fair notice" precedent did not resolve agency enforcement in "non-penal context" and that the agency could still require group to comply if it withheld punishment).

Finally, the OGC did not find that Crossroads GPS *would* have a valid claim for lack of fair notice that would prohibit enforcement; rather, it found that Crossroads GPS "could raise" such an argument, and therefore decided to dismiss "as a prudential matter in the exercise of its prosecutorial discretion." AR 176. The FEC, however, must "suppl[y] reasonable grounds" for its prosecutorial discretion, *Nader v. FEC*, 823 F. Supp. 2d 53, 65 (D.D.C. 2011), which the OGC did not do here for reasons outlined above. Further, if the only concern the FEC has is that

it does not wish to enforce the law against Crossroads GPS because it does not wish to spend the resources to contest a fair notice defense, then the FECA provides for a ready back up: the FECA authorizes a citizen suit by CREW. *See* 52 U.S.C. § 30109(a)(8)(C) (permitting "the complainant [to] bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint"). That suit would not expend any of the FEC's resources. But before CREW can bring that suit, the Court must find the FEC's dismissal will permit activity "contrary to law." *See id.* (proscribing a citizen suit after FEC fails to conform with court order declaring previous dismissal was contrary to law).

In short, 52 U.S.C. § 30104(c)(1) imposes a distinct reporting requirement separate from the requirement of subsection (c)(2)(C). The requirement is plainly stated on the face of the statute. There is no credible dispute that there is reason to believe Crossroads GPS has failed to comply with that obligation. Accordingly, the dismissal of CREW's complaint for Crossroads GPS's violation of subsection (c)(1) was contrary to law.

VI. The FEC's Failure to Find Reason to Believe 11 C.F.R. § 109.10(e)(1)(vi) May Have Been Violated was Contrary to Law

Lastly, even assuming 11 C.F.R. § 109.10(e)(1)(vi) was a valid regulation that reasonably interpreted 52 U.S.C. § 30104(c)(1) or (c)(2)(C), the FEC's failure to find reason to believe that Crossroads GPS may have violated it was still contrary to law. CREW identified a number of facts in its complaint, admitted to by respondents, that established that Crossroads GPS took at least $3 million "to use to support the election of Josh Mandel." AR 174. CREW further identified facts in its complaint, admitted to by respondents, to indicate that Crossroads GPS received another $1.3 million in "matching" donations, money which was raised to "match[]" the $3 million given for the purposes of aiding the election of Josh Mandel and to fill out the rest

Crossroads GPS's $6 million budget for Ohio. AR 96–97, 103–04. CREW further alleged that the attendees at the Tampa fundraiser were shown independent expenditures, which the respondents admitted were used as "examples" of the activities raised funds would support and which mirrored the ads that eventually ran. AR 77–78, 104–05.

In light of these factual allegations, substantiated by the respondents, there was more than a "reason to believe" Crossroads GPS "may have" violated the FECA by accepting contributions given for the purpose of furthering the reported independent expenditures. 72 Fed. Reg. at 12545 (discussing reason to believe standard under 52 U.S.C. § 30109(a)(2)). "[T]he available evidence in the matter is at least sufficient to warrant conducting an investigation." *Id.* Here, even a short investigation into any communications between Mr. Rove and the unnamed donor could reveal the contributor knew the uses of his funds. Similarly, the FEC could probe the intentions behind the various contributors of the matching funds and the attendees at the Tampa fundraiser to gather more evidence about any promises the fundraisers may have made. Since there is nothing to rule out the possibility that the donors gave for the purpose of furthering the reported independent expenditures and because CREW credibly alleged sufficient facts to give reason to believe the rule may have been violated, the FEC's dismissal of CREW's complaint about Crossroads GPS's violations of 11 C.F.R. § 109.10(e)(1)(vi) was similarly contrary to law.

CONCLUSION

For the reasons stated above, CREW respectfully requests this Court grant it summary judgment, declare the dismissal below was contrary to law, and declare invalid and vacate 11 C.F.R. § 109.10(e)(1)(vi).

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Respectfully submitted,

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