UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*,	
Plaintiffs,	Civ. No. 16-259 (BAH)
v.	
FEDERAL ELECTION COMMISSION,	
Defendant,	
CROSSROADS GRASSROOTS POLICY STRATEGIES,	MOTION FOR SUMMARY JUDGMENT
Intervenor-Defendant.	

FEDERAL ELECTION COMMISSION'S
MOTION FOR SUMMARY JUDGMENT

Defendant Federal Election Commission ("Commission") hereby moves this Court for an order granting summary judgment to the Commission pursuant to Federal Rule of Civil Procedure 56 and Local Rule 7(h). As demonstrated in the accompanying memorandum of points and authorities, the Commission did not act contrary to law in dismissing plaintiffs' administrative complaint. A proposed order is attached to the Commission's memorandum.

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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.	Civ. No. 16-259 (BAH) MEMORANDUM AS TO SUMMARY JUDGMENT

FEDERAL ELECTION COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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The Federal Election Commission ("Commission" or "FEC") acted lawfully when it dismissed the administrative complaint filed by plaintiffs Citizens for Responsibility and Ethics in Washington ("CREW") and Nicholas Mezlak. That administrative complaint alleged that Crossroads Grassroots Policy Strategies ("Crossroads GPS") and several associated individuals filed reports with the FEC of independent expenditures, which expressly advocate the election or defeat of federal candidates, that improperly did not disclose the identities of contributors to Crossroads GPS. After reviewing the facts and arguments presented both by the administrative complainants and respondents, however, a controlling group of Commissioners determined that there was no reason to believe the respondents had violated the provision of the Federal Election Campaign Act ("FECA" or "Act") or the FEC's implementing regulation governing the disclosure of such identities. The controlling Commissioners also decided, as an exercise of prosecutorial discretion, not to pursue another allegation regarding a possible disclosure obligation because that allegation rested upon a novel statutory interpretation arguably inconsistent with the agency's regulations and therefore could raise equitable concerns about fair notice. Plaintiffs now challenge the Commission's decisions pursuant to FEC's judicial review provision at 52 U.S.C. § 30109(a)(8). Plaintiffs also challenge the Commission's dismissal of the administrative complaint on the grounds that the applicable FEC regulation is invalid and unlawful under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. (Compl. for Injunctive and Declaratory Relief ("Compl.") ¶¶ 117-24 (Doc. No. 1)).

The Court should reject plaintiffs' claims that it was unlawful not to find reason to believe Crossroads GPS violated the Commission's reporting regulation or the statutory provision it interprets. Both the statute and the regulation specify that contributors need only be identified if their contributions to a group like Crossroads GPS, which is not registered with the

FEC as a political committee, were made "for the purpose of furthering" an independent expenditure. The administrative complaint did not provide evidence of that critical factor. Rather, plaintiffs simply compared a press article about Crossroads GPS's fundraising to the group's independent expenditure reports and then alleged that some contributions must have been made for that purpose. But such speculation does not show that the contributions had the specific purpose of supporting an independent expenditure, and the respondents provided information indicating that the contributions did not in fact have that specific purpose. To the extent the statute can be interpreted to require more disclosure than the FEC's longstanding regulation implementing it, respondents were entitled to rely in good faith on the regulation. It was thus reasonable for the Commission not to launch an investigation into the respondents here.

The Court should also reject plaintiffs' argument that it was contrary to law to exercise the FEC's broad prosecutorial discretion not to pursue an investigation based on a novel interpretation of a different provision of FECA—an interpretation that is at odds with the FEC's past enforcement practices and the expectations of reporting entities like Crossroads GPS, and is one that plaintiffs did not even raise in their administrative complaint. Plaintiffs now argue that it is "clear on the face of the statute" that groups like Crossroads GPS that make independent expenditures have a separate obligation to report *all* of their contributors above a certain level. (Mem. of P. & A. in Supp. of Pls.' Mot. for Summ. J. ("Pls.' Mem.") at 41 (Doc. No. 27)). But it was reasonable for the FEC not to proceed against these respondents due to equitable concerns that they did not have fair notice that the statute would be interpreted and applied in that manner.

Lastly, the Court should reject plaintiffs' argument that the Commission's regulation is in conflict with the statute under the analysis of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The statutory provision that the FEC's regulation

implements is ambiguous, and the regulation reasonably clarifies the meaning of the statute consistent with Congressional intent. While plaintiffs may wish that the Commission had interpreted the statute in a different manner to obtain more disclosure, it is not the role of the Court to substitute its own interpretation for that of the Commission as long as the FEC's interpretation is reasonable.

The Court should grant summary judgment to the Commission.

BACKGROUND

I. THE PARTIES

The FEC is a six-member federal independent agency with "exclusive jurisdiction" to administer, interpret, and civilly enforce FECA. *See generally* 52 U.S.C. §§ 30106, 30107. Congress authorized the FEC to "formulate policy" with respect to FECA, *id.* § 30106(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA]," *id.* §§ 30107(a)(8), 30111(a)(8); and to investigate possible violations of the Act, *id.* § 30109(a)(1)-(2). The FEC has exclusive jurisdiction to initiate civil enforcement actions for violations of the Act in the United States district courts. *Id.* §§ 30106(b)(1), 30109(a)(6).

Plaintiff CREW "is a non-profit, non-partisan corporation organized under Section 501(c)(3) of the Internal Revenue Code." (Compl. ¶ 7.) Among other things, CREW "monitors the activities of those who run for federal office as well as those groups financially supporting candidates for office or advocating for or against their election" and "files complaints with the FEC when it discovers violations of the FECA." (*Id.* ¶¶ 10-11.) Plaintiff Nicholas Mezlak states that he is "a citizen of the United States and a resident of the state of Ohio." (*Id.* ¶ 17.)

II. STATUTORY AND REGULATORY BACKGROUND

A. FECA's Requirements for Independent Expenditure Reporting by Persons That Are Not Political Committees

FECA creates a comprehensive structure of disclosure requirements that vary depending upon who is reporting to the FEC and what activities the reporting entity has engaged in. Political committees, which have the major purpose of electing federal candidates, *Buckley v. Valeo*, 424 U.S. 1, 79 (1976), are required to report detailed information to the Commission on a regular basis regardless of their specific activities. *See* 52 U.S.C. § 30104(a). By contrast, groups that have not registered as (or otherwise been found by the FEC to be) political committees, such as Crossroads GPS, do not have such broad, regular disclosure requirements, but are required to file event-driven reports with the FEC if they engage in certain election-related spending such as independent expenditures, 52 U.S.C. § 30104(c), or electioneering communications, 52 U.S.C. § 30104(f). An independent expenditure is a communication made without coordination with a candidate, campaign, or political party that "expressly advocat[es] the election or defeat of a clearly identified candidate." 52 U.S.C. § 30101(17)(A).

The provision at issue in this case, 52 U.S.C. § 30104(c), involves the disclosure requirements for persons that are not political committees and that make independent expenditures.[1] FECA states that independent expenditure reports of such persons 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*." 52 U.S.C. § 30104(c)(2)(C) (emphasis added). Therefore, unlike political committees, which are generally required to report the identities of *all* their contributors who gave over $200 in a

[1] "Person" as used in the statute includes both individuals and organizations like Crossroads GPS. 52 U.S.C. § 30101(11).

calendar year (52 U.S.C. § 30104(b)(3)(A)), groups that are not political committees are required under section 30104(c)(2)(C) only to identify a *subset* of contributors – those that gave for the purpose of furthering an independent expenditure. There is no requirement under that provision of FECA that such groups identify those that have contributed for some other purpose or for no particular purpose at all. The statute does not specify whether "an independent expenditure" refers to the specific independent expenditure that the group is reporting, or if it encompasses contributions that were made for the purpose of furthering independent expenditures in a general sense, but not any independent expenditure in particular.

Another portion of 52 U.S.C. § 30104(c) also addresses reporting by groups that are not political committees but that make independent expenditures. That subpart states that "[e]very person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year shall file a statement containing the information required under subsection (b)(3)(A) of this section for all contributions received by such person." 52 U.S.C. § 30104(c)(1). Subsection (b)(3)(A), in turn, describes how to report contributor information.[2] Section 30104(c)(1) may be read simply to specify the situations when such groups are required to file reports with the FEC (if they make at least $250 in independent expenditures during a calendar year), while section 30104(c)(2) describes what information should be included in those reports. *See* 52 U.S.C. § 30104(c)(2) ("Statements required to be filed by this subsection . . . shall include . . ."). However, the second half of section 30104(c)(1) might also be read to require such groups to include a comprehensive list of all contributors, whether their contributions were made for the purpose of furthering an independent expenditure

[2] Political committees must identify anyone "who makes a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office) . . . ." 52 U.S.C. § 30104(b)(3)(A).

or not, whenever the reporting requirement is triggered. In essence, this interpretation would require all groups that are not political committees but that meet the $250 independent-expenditure-spending threshold in a calendar year to identify all their contributors in the same manner that political committees do, but also to go beyond what is required of political committees, by separately identifying contributors that gave for the purpose of furthering an independent expenditure in accord with subsection 30104(c)(2)(C), as discussed above.

The provisions of FECA discussed above were originally promulgated as part of the 1979 amendments to FECA, and although they have been recodified, their language has remained unaltered since that time. *See* Pub. L. 96-187, 93 Stat. 1339 (Jan. 8, 1980) (amending provision then codified at 2 U.S.C. § 434(c)(2) (now 52 U.S.C. § 30104(c)(2)). Before the passage of the 1979 amendments, contributors to entities other than political committees and candidates were responsible for reporting their own contributions to the FEC. *See* 2 U.S.C. § 434(e) (1976). The 1979 amendments changed disclosure to the current system in which the responsibility for reporting contributions is left solely to the recipients of those contributions. The independent expenditure reporting provisions discussed above were among those new provisions.

B. The Commission's Regulation Implementing FECA's Requirements for Independent Expenditure Reporting by Persons That Are Not Political Committees

The Commission promulgated a number of new and amended regulations in response to the 1979 Amendments. The passage of these regulations moved forward in an expedited process, as Congress had directed the FEC to transmit regulations to them in less than two months time. *See* 45 Fed. Reg. 15080 (Mar. 7, 1980) (AR1496) (noting that the 1979 Amendments passed on January 8, 1980 and the Commission was required to transmit regulations prior to February 29, 1980). The Commission noticed draft regulations (AR1056-

1080), received comments from the public (AR1081, 1213-1222, 1227-1261), and published the final versions of the regulations, with an explanation and justification (AR1495-1542).

The independent expenditure disclosure regulation, then located at 11 C.F.R. § 109.2, was among the provisions modified as a result of the 1979 Amendments. *See* 45 Fed. Reg. 15080, 15087 (Mar. 7, 1980) (AR1503). The process was uncontroversial. The regulation contains language almost identical to 52 U.S.C. § 30104(c)(2)(C), and it requires persons that are not political committees but that make independent expenditures to identify "each person who made a contribution in excess of $200 to the person filing the report, which contribution was made for the purpose of furthering the reported independent expenditure." *See* 11 C.F.R. § 109.10(e)(1)(vi). None of the commenters during the notice period commented on that particular provision. The Commission's explanation for the regulation was as follows:

> *§ 109.2 Reporting of independent expenditures by persons other than a political committee.*
>
> 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.

(AR1503.) The regulation has not been changed substantively since it was promulgated in 1980.[3] In practice, the regulation requires groups that engage in the minimum level of independent expenditures to file the FEC's "Form 5" (https://www.fec.gov/resources/cms-content/documents/fecfrm5.pdf) in any quarter in which they make independent expenditures, as

[3] In 2003, the regulation was moved from section 109.2 to section 109.10 and slightly modified to make clear when and how those reports should be filed. FEC, Bipartisan Campaign Reform Act of 2002 Reporting, 68 Fed. Reg. 404, 415 (Jan. 3, 2003). The modifications that were made in 2003 are not at issue in this case.

well as more frequently if they reach certain dollar thresholds shortly before an election. Form 5 Instructions at 1, https://www.fec.gov/resources/cms-content/documents/fecfrm5i.pdf.

III. ADMINISTRATIVE PROCEEDINGS FOR MATTER UNDER REVIEW 6696

FECA permits any person to file an administrative complaint with the FEC alleging a violation of the Act. 52 U.S.C. § 30109(a)(1); *see also* 11 C.F.R. § 111.4. In November 2012, plaintiff CREW and two individuals filed an administrative complaint against Crossroads GPS and associated individuals alleging that Crossroads GPS had unlawfully failed to disclose contributors in violation of 52 U.S.C. § 30104 and 11 C.F.R. §§ 109.10(b)-(e). (AR1-AR52.)[4] The administrative complaint relied upon a press account by a reporter who had attended a fundraiser at which Senate campaign advertisements were shown to attendees and contributions were allegedly solicited for both Crossroads GPS and a political committee registered with the FEC called American Crossroads. (AR104-105.)

The administrative complaint described three categories of contributors that the complainants alleged Crossroads GPS had unlawfully failed to disclose. First, the complaint alleged, based on the press account, that Karl Rove, who described himself as an "uncompensated advisor" to Crossroads GPS and American Crossroads (AR94), had stated that he had received a phone call from an "unnamed out-of-state donor" who indicated he would pledge $3 million for a "matching challenge" to help raise $6 million for Ohio Senate candidate Josh Mandel. (AR103-104.) Based on these facts, the administrative complaint alleged that Crossroads GPS had violated the disclosure statute and regulation by not identifying the unnamed donor. (AR108-112.) Second, based on the same facts, the administrative complaint alleged that Crossroads GPS had violated the disclosure requirements of FECA and the FEC

[4] The administrative complaint was later supplemented to substitute plaintiff Nicholas Mezlak for one of the individual complainants. (AR98-159.)

regulation by not identifying any contributors that were part of the "matching challenge" described by Rove at the fundraiser and helped pay for the over $6 million in independent expenditures Crossroads GPS reportedly made in that Ohio Senate race. (AR108-112.) Third, based on the press account, the administrative complaint alleged that Crossroads GPS had violated FECA and the FEC regulation by not identifying any contributors that responded to the solicitations at the fundraiser and contributed to Crossroads GPS after having viewed the advertisements shown there. (AR 112-113.) In addition to these allegations against Crossroads GPS, the administrative complaint made related allegations against several individuals associated with Crossroads GPS. (AR 108-115.) The administrative complaint did not allege that any respondent had failed to disclose information pursuant to 52 U.S.C. § 30104(c)(1).

Crossroads GPS and the other respondents responded to the administrative complaint on January 17, 2013, and included an affidavit from Karl Rove. (AR73-95.) The response argued that Crossroads GPS was not obligated to identify its contributors. In particular, the response stated that Crossroads GPS was not required to identify the "unnamed out-of-state donor" because there was no evidence that "demonstrates that any contribution was made for the purpose of funding any particular advertisements, advertisements in general, or that the donor had any knowledge of any particular Crossroads GPS efforts." (AR85.) Crossroads GPS also stated that it was not obligated to identify any of the "matching fund" contributors because they did not make those contributions for the purpose of "furthering the independent expenditures Crossroads GPS made in the Ohio Senate race" and there "is no evidence presented regarding any donor's intent." (AR90.) Similarly, the response stated that Crossroads GPS was not legally obligated to disclose contributors that had responded to solicitations at the fundraiser because

"Crossroads GPS **did not** solicit or receive, at any time, any contributions 'for the purpose of . . . broadcasting other ads in those races.'" (AR92 (quoting AR14).)

After reviewing an administrative complaint and any responses filed by the respondents, the Commission considers whether there is "reason to believe" that FECA has been violated. 52 U.S.C. § 30109(a)(2). If at least four of the FEC's six Commissioners vote to find such reason to believe, the Commission may investigate the alleged violation; otherwise, the Commission dismisses the administrative complaint. *Id.* §§ 30106(c), 30109(a)(2).

In this case, the Commission's Office of General Counsel provided the Commission with a First General Counsel's Report that recommended a finding of "no reason to believe" that Crossroads GPS had violated the regulation at 11 C.F.R. § 109.10(e)(1)(vi) or the statutory provision that is currently codified at 52 U.S.C. § 30104(c)(2)(C). With respect to the "unnamed out-of-state donor," the Office of General Counsel recommended a finding of "no reason to believe" because "a 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' – the requisite regulatory test." (AR 174.) With respect to any contributors that might have participated in the "matching challenge," the Office of General Counsel recommended no reason to believe because the mere fact that Crossroads GPS spent more than $6 million in independent expenditures in the Ohio Senate race "would not advance the claim that, as a result of the matching challenge, Crossroads received funds from a donor for the purpose of furthering Crossroads' reported independent expenditures in Ohio." (*Id.*) As for the alleged failure to identify contributors who saw advertisements at the fundraiser, the Office of General Counsel likewise recommended a finding of no reason to

believe because, among other reasons, "Crossroads represents that none of the contributions received at the event were for the purpose of furthering those communications." (AR175.)

Lastly, the Office of General Counsel discussed 52 U.S.C. § 30104(c)(1), which could be read to require groups that are not political committees but that make independent expenditures to disclose *all* contributors, not just those made for the purpose of furthering independent expenditures. (AR175-176.) This alternative statutory interpretation had not been raised in the administrative complaint, which had only argued that Crossroads GPS violated the law by failing to disclose contributions made for the purpose of furthering independent expenditures. (AR108-115.) Nonetheless, in the interest of providing comprehensive legal advice, the FEC's Office of General Counsel raised the issue, without taking a position as to whether 52 U.S.C. § 30104(c)(1) actually imposed such a requirement. (AR176.) But that Office ultimately recommended that the Commission exercise its prosecutorial discretion and not pursue that legal theory here, explaining that doing so "could raise equitable concerns about whether a filer has fair notice of the requisite level of disclosure required by law," due to the fact that the Commission's regulation does not itself impose such a disclosure requirement and the Commission has not previously interpreted the statute in that manner. (*Id.*)

The Commission voted on the matter on November 17, 2015, splitting 3-3 on each of the recommendations of the Office of General Counsel, as well as on an additional motion to find that Crossroads GPS should be deemed a political committee. (AR 193.) As a result of the split votes, the Commission closed the file in the matter and dismissed the administrative complaint. (AR 195.) The three Commissioners that voted in favor of the recommendations of the Office of General Counsel, who made up the controlling group because their position prevailed, did not issue a separate Statement of Reasons for their vote, and therefore the Office

of General Counsel's First General Counsel's Report serves as the basis for judicial review. *See FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("*NRSC*"), 966 F.2d 1471, 1476 (D.C. Cir. 1992) (Commissioners that voted to dismiss "constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did."); *FEC v. Democratic Senatorial Campaign Comm.* ("*DSCC*"), 454 U.S. 27, 38 & n.19 (1981) (staff report may provide a basis for the Commission's action).

IV. PLAINTIFFS' LAWSUIT AGAINST THE COMMISSION

FECA provides administrative complainants with a cause of action for judicial review if the Commission determines that no violation has occurred or decides to dismiss the administrative complaint for some other reason. *See* 52 U.S.C. § 30109(a)(8)(A) (detailing procedure and scope of judicial review of administrative dismissal). Judicial review is also available for FEC dismissals resulting from 3-3 votes. *NRSC*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("[A split vote] dismissal, like any other, is judicially reviewable under [§ 30109(a)(8)].").

Following the dismissal of plaintiffs' administrative complaint, they brought this lawsuit, which asserts three claims. Count I contends that the Commission's failure to find reason to believe that Crossroads GPS violated the Commission's independent-expenditure disclosure regulation at 11 C.F.R. § 109.10(e)(1)(vi) was arbitrary, capricious, an abuse of discretion, and contrary to law. (Compl. ¶ 116.) Count II argues that 52 U.S.C. § 30104(c)(2)(C) actually requires greater disclosure of contributors than the Commission's regulation, and therefore the FEC acted contrary to law by finding no reason to believe that Crossroad GPS violated the statute when it did not report the identity of its contributors. (Compl. ¶ 124.) This Count thus claims that the dismissal applying the regulation is contrary to law because the regulation is inconsistent with the statute, and plaintiffs seek to have the Court declare "that 11 C.F.R. §

109.10(e)(1)(vi) is contrary to law, arbitrary and capricious, and invalid." (Compl. Requested Relief ¶ 3). Plaintiffs, in addition to relying on section 30109(a)(8), bring their challenge to the interpretation of the regulation in the agency's dismissal pursuant to the APA. (*See id.* ¶ 124 (citing 5 U.S.C. § 706.) Lastly, Claim III asserts that 52 U.S.C. § 30104(c)(1) should be interpreted such that groups that are not political committees but that make at least $250 in independent expenditures annually are required to identify all persons who made contributions for the purpose of influencing a federal election generally, whether or not those contributions were made to further independent expenditures. (Compl. ¶ 127.) As a result, plaintiffs argue that the FEC acted contrary to law by exercising its prosecutorial discretion to dismiss the allegation that Crossroads GPS violated 52 U.S.C. § 30104(c)(1).

The FEC moved to dismiss plaintiffs' challenge to its regulation under the APA (Claim II), arguing that the claim was time-barred. (FEC's Partial Mot. to Dismiss (Doc. No. 12). The Court disagreed, finding that "when an agency applies a regulation to dismiss an administrative complaint, the party whose complaint was dismissed may challenge the regulation after the statute of limitations has expired on the ground that the regulation conflicts with the statute from which it derives." *CREW v. FEC*, 243 F. Supp. 3d 91, 101 (D.D.C. 2017). The Court also granted a motion by defendant-intervenor Crossroads GPS to dismiss claims under the APA from plaintiffs' Counts I and III, but the Court denied the same motion as to Count II. *Id.* at 105. Because the APA challenge arises in the context of a dismissal under FECA, "[i]n the event that the plaintiffs ultimately prevail on their APA challenge to the regulation, however, the Court would remand this action to the FEC for reconsideration of the plaintiffs' administrative complaint in light of the Court's opinion." *Id.* (citing 52 U.S.C. § 30109(a)(8)(C).

The parties have now filed cross-motions for summary judgment.

ARGUMENT

I. THE COMMISSION'S PROMULGATION OF REGULATIONS AND ITS DISMISSAL OF ADMINISTRATIVE COMPLAINTS ARE ENTITLED TO JUDICIAL DEFERENCE

Judicial review of both the Commission's 2015 administrative complaint dismissal and its 1980 rulemaking are highly deferential. This Court may set aside an administrative dismissal order of the Commission only if it is "contrary to law," a high standard. 52 U.S.C. § 30109(a)(8)(C). The Commission receives even greater deference in judicial review of its decision not to proceed with an enforcement case in an exercise of its prosecutorial discretion, such as Claim III of the complaint in this case. *See infra* pp. 28-29. Review of plaintiffs' challenge to the Commission's regulation under the APA is also "highly deferential." *See infra* pp. 31-34 (quoting *Sierra Club v. EPA*, 353 F.3d 976, 978 (D.C. Cir. 2004)). In both contexts, the Court has the limited role of reviewing the Commission's decision-making based on the administrative record, so the Court's review must be based upon the record that was before the agency during its rulemaking. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

The Supreme Court has explained that the Commission "is precisely the type of agency to which deference should presumptively be afforded." *DSCC*, 454 U.S. at 39. That judicial deference is based upon Congress's delegation of discretion to an agency to implement a statute. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-41 (1996). Such deference is appropriate when "Congress has expressly delegated to [an agency] the authority to prescribe regulations containing such classifications, differentiations, or other provisions as, in the judgment of the [agency], are necessary or proper to effectuate the purposes of [the authorizing statute], to prevent circumvention or evasion thereof, or to facilitate compliance therewith." *Household*

Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 238-39 (2004) (internal quotation marks omitted). And "Congress has legislated in no uncertain terms with respect to FEC dominion over the election law." *Common Cause v. Schmitt*, 512 F. Supp. 489, 502 (D.D.C. 1980) (three-judge court), *aff'd mem.*, 455 U.S. 129 (1982). Indeed, the Commission's "express authorization to elucidate statutory policy in administering FECA 'implies that Congress intended the FEC … to resolve any ambiguities in statutory language,'" and so "'the FEC's interpretation of the Act should be accorded considerable deference.'" *United States v. Kanchanalak*, 192 F.3d 1037, 1049 (D.C. Cir. 1999) (citation omitted).

The Commission's decisions are particularly appropriate for judicial deference because the FEC is "[u]nique among federal administrative agencies" in that "its sole purpose [is] the regulation of core constitutionally protected activity — 'the behavior of individuals and groups only insofar as they act, speak and associate for political purposes.'" *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003) (quoting *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981)). "The [Federal Election] Commission has been vested with a wide discretion in order to guarantee that it will be sensitive to the great trust imposed in it to not overstep its authority by interfering unduly in the conduct of elections." *In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538, 545 (D.C. Cir. 1980). "Deference is particularly appropriate in the context of the FECA, which explicitly relies on the bipartisan Commission as its primary enforcer." *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988).

II. THE COMMISSION'S DISPOSITION OF THE ADMINISTRATIVE COMPLAINT WAS LAWFUL

In considering plaintiffs' administrative complaint, the Commission reasonably and lawfully exercised its discretion. The Commission's lack of consensus to find "reason to believe" that Crossroads GPS had violated either 11 C.F.R. § 109.10(e)(1)(vi) or 52 U.S.C.

§ 30104(c)(2)(C) was justified by the speculative nature of the allegations, most notably the absence of any evidence of contributions that were made "for the purpose of furthering" Crossroads GPS's independent expenditures. The Commission's dismissal of the allegation that Crossroads GPS violated 52 U.S.C. § 30104(c)(1) was permissible in light of the concern that the statute had not previously been applied to require such additional disclosure and it would present fairness concerns to do so against an entity like Crossroads that reasonably believed it was acting consistently with the law. Thus, the Commission did not act "contrary to law" in this matter.

A. FEC Dismissals Must Be Affirmed Unless They Are "Contrary to Law"

This Court may set aside the Commission's dismissal order only if it is "contrary to law." 52 U.S.C. § 30109(a)(8)(C). Under that standard, the Commission's decision to dismiss cannot be disturbed unless it was based on "an impermissible interpretation of the Act" or was otherwise "arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). This standard simply requires that the Commission's decision was "sufficiently reasonable to be accepted." *DSCC*, 454 U.S. at 39. The Commission's decision need not be "the only reasonable one or even the" decision "the [C]ourt would have reached" on its own "if the question initially had arisen in a judicial proceeding." *Id.* Instead, the contrary-to-law standard is "[h]ighly deferential" to the Commission's decision. *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005) (internal quotation marks omitted); *see also Orloski*, 795 F.2d at 167 (noting that the contrary-to-law standard is "extremely deferential" to the agency's decision (internal quotation marks omitted)).[5]

[5] In addition, although "an agency is required to adequately explain its decision" in such a matter, it need not do so with perfect precision. *Van Hollen v. FEC*, 811 F.3d 486, 496-97 (D.C. Cir. 2016). "It is enough that a reviewing court can reasonably discern the agency's analytical path," *id.* at 497, even if the decision is "of 'less than ideal clarity.'" *Nader v. FEC*,

B. It Was Reasonable, Based on the Facts Presented, Not to Find Reason to Believe That Crossroads GPS Violated 11 C.F.R. § 109.10(e)(1)(vi)

The controlling group of Commissioners reasonably determined, based on the evidence presented, that there was no reason to believe Crossroads GPS received any of the alleged contributions for the purpose of furthering any of the independent expenditures it made. Plaintiffs claim that the Commission acted unlawfully by failing to find reason to believe that Crossroads GPS violated 11 C.F.R. § 109.10(e)(1)(vi). But that regulation requires reporting only of "[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). There was evidence that donors intended to support certain candidates, but as noted in the First General Counsel's Report, "a 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'— the requisite regulatory test." (AR174.)

Plaintiffs point to three factual elements that they assert establish a reason to believe that Crossroads was in violation of the regulation (Pls.' Mem. at 44-45), but even if correct, none of those would establish that contributions here were made for the purpose of furthering any specific reported independent expenditure. The first point plaintiffs make is that "Crossroads GPS took at least $3 million 'to use to support the election of [Ohio Senate candidate] Josh Mandel.'" (Pls.' Mem. at 44 (quoting AR174).) Karl Rove did confirm in an affidavit that the donor of these funds "intended the funds to be used in some manner that would aid the election of Josh Mandel" (AR95 ¶ 10), but Rove also explained that his conversations with the donor did

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823 F. Supp. 2d 53, 58 (D.D.C. 2011) (quoting *Common Cause v. FEC*, 906 F.2d 705, 706 (D.C. Cir. 1990)).

not include discussion of "any particular television advertisements, or television advertisements in general" (AR94 ¶ 6); "specific efforts that would or could be made by Crossroads GPS" (AR94 ¶ 7); "spending the donor's funds on any specific methods of communication" (AR94 ¶ 8); "independent expenditures" (AR94 ¶ 9); or spending of the pledged funds "in any particular manner or on any particular or specific efforts or projects" (AR95 ¶ 10). Rove also clarified that the donor did not actually donate $3 million, but instead "subsequently contributed a larger amount to Crossroads GPS that was not in any way earmarked for any particular use." (AR95 ¶ 14.) The mere fact that a contribution was made to help a particular candidate is not evidence that it was made for the purpose of furthering a reported independent expenditure. Plaintiffs may prefer that the regulation require more disclosure, but it does not.

The second factual element plaintiffs identify is that Crossroads GPS received an additional $1.3 million in matching donations to aid the election of Josh Mandel (Pls.' Mem. at 44-45), but this point suffers from the same infirmity. As the Office of General Counsel noted, "that fact would not advance the claim that, as a result of the matching challenge, Crossroads received funds from a donor for the purpose of furthering Crossroads' reported independent expenditures in Ohio." (AR174.) It therefore provides no evidence that the regulation required Crossroads GPS to disclose the identity of those contributors.

Plaintiffs' third factual point is that attendees at the 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." (Pls.' Mem. at 45.) But the fact that "example" TV advertisements were shown at a fundraiser does not indicate that contributions received were made for the purpose of furthering independent expenditures actually made. In fact, the administrative respondents indicated that all of the advertisements

shown at the fundraiser had already been fully paid for and aired by the day of the fundraiser, with the exception of one that never aired. (AR77-78, AR175.) In any case, as the First General Counsel's Report stated, "there is no basis to conclude on these facts that Crossroads received contributions from individuals at the fundraiser for the purpose of furthering Crossroads' reported independent expenditures in Virginia, Montana, and Nevada as alleged." (AR175.)

Plaintiffs' arguments seem to reflect a view that if a group like Crossroads GPS tells potential contributors that it is going to support certain candidates, provides some examples of how it might do so, and makes independent expenditures, 11 C.F.R. § 109.10(e)(1)(vi) requires the identities of the contributors to be reported. But the regulation plainly requires more of a link between the contributions and the expenditures, and it was reasonable for the controlling group of Commissioners to determine that the facts identified in the administrative complaint were insufficient to find reason to believe that Crossroads GPS had violated the regulation.

C. It Was Reasonable, Based on the Facts Presented, Not to Find Reason to Believe That Crossroads GPS Violated 52 U.S.C. § 30104(c)(2)(C)

Plaintiffs claim that the Commission's dismissal of the alleged statutory violation was contrary to FECA even if respondents' conduct did not violate the regulation (Pls.' Mem. at 38-39), but that is incorrect. Plaintiffs argue at length that there was reason to believe Crossroads GPS violated the allegedly greater disclosure requirements of 52 U.S.C. § 30104(c)(2)(C), asserting that the FEC's regulation actually conflicts with the language in FECA. Plaintiffs emphasize that the statute requires contributors to be identified if their contributions are made for the purpose of furthering "'*an*' independent expenditure," whereas the regulation states contributors should be identified if contributions are made for the purpose of furthering "'*the reported*' independent expenditure." (Pls.' Mem. at 30-33, 38-39 (emphasis added) (comparing 52 U.S.C. § 30104(c)(2)(C) with 11 C.F.R. § 109.10(e)(1)(vi)).) The First General Counsel's

Report addressed the distinction between the statutory and regulatory language, explaining that while the statutory language is "an arguably more expansive approach," the regulation "constitutes the Commission's controlling interpretation of the statutory provision it implements." (AR175 n.57.) As discussed *supra* pp. 14-15, the Commission is entitled to great deference in this task and its regulation is a reasonable interpretation of the statute's ambiguous language. Therefore, the FEC acted lawfully by dismissing the statutory allegations in the administrative complaint.

But even if the regulation were invalid, the Commission would still not be in a position to proceed against Crossroads GPS for an independent statutory violation. First, any such enforcement proceeding would likely not be able to surmount the hurdle of Crossroads GPS interposing the defense that it had exhibited good faith reliance on that regulation. Congress placed a "safe harbor" provision in FECA, titled "*Scope of protection for good faith reliance upon rules or regulations*," stating that "any person who relies upon any rule or regulation prescribed by the Commission in accordance with the provisions of this section and who acts in good faith in accordance with such rule or regulation shall not, as a result of such act, be subject to any sanction provided by this Act." 52 U.S.C. § 30111(e). Here, if there is no reason to believe that Crossroads GPS violated the regulation, then under 52 U.S.C. § 30111(e) the Commission could not reasonably pursue Crossroads GPS for failing to comply with the terms of the statute it implements. There has been no indication here that Crossroads GPS did not rely in good faith on the regulation. And the report providing the basis for the controlling group's dismissal cited the equitable concerns underlying the safe harbor. (*See* AR176 ("Because the record here does not suggest a basis to find a violation of the regulatory standard at 11 C.F.R. § 109.10(e)(1)(vi) under its plain terms, 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)].").) Indeed, that principle underlies any decision not to go forward when proceeding would involve revisiting a longstanding interpretive regulation. The controlling group was reasonable in declining to revisit a regulatory interpretation through an enforcement proceeding against Crossroads GPS.

This Court therefore need not further consider any of plaintiffs' claims. Because the controlling group reasonably found no reason to believe that Crossroads GPS violated the regulation, they also reasonably took a lack of notice into account on any contrary interpretations in light of FECA's safe harbor provision. *See Shays v. FEC*, 414 F.3d 76, 95 (D.C. Cir. 2005) ("good-faith reliance on FEC regulations affords a defense against FEC sanction" (citing 2 U.S.C. § 438(e), now codified as 52 U.S.C. § 30111(e)); *McConnell v. FEC*, 251 F. Supp. 2d 176, 261–64 (D.D.C. 2003) ("as long as Plaintiffs abide by the regulations in good faith, they will not be subject to sanctions under FECA.") The Commission can reasonably decline to proceed with an understanding that "sanction" is not just limited to monetary sanctions, but also extends to the injunctive and declaratory relief sought by plaintiffs here. *See* Factual and Legal Analysis, FEC Matter Under Review 7101 at 12 n.45, https://www.fec.gov/files/legal/murs/current/119538.pdf (concluding that "sanction" in the advisory opinion context extends to forms of equitable relief that might be sought in a later enforcement action); *Alabama v. North Carolina*, 560 U.S. 330, 340-41 (2010) (noting that "the imposition of a nonmonetary obligation" can be "one kind of 'sanction'"); *United States v. Alabama*, 691 F.3d 1269, 1289 (11th Cir. 2012) ("A sanction is commonly understood to be 'a restrictive measure used to punish a specific action or to prevent some future activity.'").

Courts reviewing other similar federal statutes have concluded that Congress's intent when passing such provisions is to prevent exactly what plaintiffs have urged the Commission to do here, namely, to pursue statutory violations that are not encompassed by the statute. These laws provide the public with security that they will not be subject to sanction so long as they comply with an agency's guidance. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 428–29 (1990) (citing numerous such safe harbor statutes). For example, the Truth in Lending Act includes just such a provision to "promote reliance upon Federal Reserve pronouncements" and to "relieve the creditor of the burden of choosing 'between the Board's construction of the Act and the creditor's own assessment of how a court may interpret the Act.'" *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566–67 (1980). That provision "signals an unmistakable congressional decision to treat administrative rulemaking and interpretation under [Truth in Lending Act] as authoritative." *Id.* at 567-78. The safe harbor laws also protect the public against unexpected changes in agency positions, because "an agency must also be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, (2009)); *see also Encino Motorcars*, 136 S. Ct. at 2128 n.2 (Ginsburg, J., concurring) ("an affirmative defense in the Fair Labor Standards Act (FLSA) protects regulated parties against retroactive liability for actions taken in good-faith reliance on superseded agency guidance, 29 U.S.C. § 259(a)."). 52 U.S.C. § 30111(e) serves the same interests by assuring participants in election activity that they will not be subject to unexpected and unpredictable sanctions by relying on the Commission's regulations.

Moreover, even in the absence of the disclosure regulation, plaintiffs have not shown that there was sufficient evidence to find reason to believe respondents violated the statutory

disclosure requirement at 52 U.S.C. § 30104(c)(2)(C). The evidence plaintiffs have cited does not show that the contributions Crossroads GPS actually reported were made to further "an independent expenditure," but only that potential contributors were given information about the types of activities the group might conduct in order to support certain candidates. That does not establish the nexus between contribution and expenditure that the statute itself requires.

D. 52 U.S.C. § 30104(c)(1) Is an Ambiguous Statutory Provision and Therefore the Commission Properly Exercised Prosecutorial Discretion in Dismissing an Allegation That Crossroads GPS Violated It

Claim Three of plaintiffs' judicial Complaint asserts that the FEC acted contrary to law when it dismissed any allegation that Crossroads GPS violated 52 U.S.C. § 30104(c)(1) by not identifying *all* contributors of more than $200 in its independent expenditure reports. It is far from clear that Congress intended 52 U.S.C. § 30104(c)(1) to impose additional reporting requirements on groups that are not political committees but that engage in independent expenditures. However, even if the statute can be read in the manner that plaintiffs suggest, the Commission has wide discretion to exercise its prosecutorial authority to dismiss claims even in situations where there was an arguable violation of law. In this instance, where there is a significant question whether 52 U.S.C. § 30104(c)(1) even imposes the requirements that plaintiffs suggest and there is no record of FEC enforcement of that statutory provision in the manner sought by plaintiffs here, the controlling group acted well within its authority in deciding not to pursue an investigation against Crossroads GPS for the alleged violation. Furthermore, the "safe harbor" justification discussed above applies equally here – as long as Crossroads GPS was acting in good faith reliance on the regulation that has governed the disclosure at issue for decades, the FEC reasonably decided not to move forward against the group on a theory that another part of the statute requires more disclosure than the regulation.

1. Congress's Intent When Passing 52 U.S.C. § 30104(c)(1) Is Unclear

Plaintiffs argue that 52 U.S.C. § 30104(c)(1) requires the identification of all contributors over $200 and that that interpretation is "clear on the face of the statute" (Pls.' Mem. at 41), but plaintiffs' own administrative complaint *did not make that claim*, even though CREW is by any measure an experienced reader of FECA. (*See, e.g.*, Compl. ¶ 8 (stating that CREW's mission includes "seek[ing] to ensure that campaign finance laws are properly interpreted, enforced, and implemented").) Rather, the sole legal theory in the administrative complaint was that Crossroads GPS was required to identify only those contributors that gave for the purpose of furthering independent expenditures, a theory that the complainants recited in 26 different paragraphs.[6] The Commission should not be found to have acted "contrary to law" for failing to pursue an allegation not even presented by CREW in the administrative complaint.[7]

In any case, the likely reason that the administrative complaint failed to argue that additional disclosure was required under 52 U.S.C. § 30104(c)(1) is that the meaning of that particular provision is unclear. The ambiguity of this provision is evident in the title of the entire

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[6] (*See* Amended Administrative Compl., AR 98-115 ¶ 31 ("None of the reports disclosed the names of any of the donors who made contributions for the purpose of broadcasting the advertisements shown to attendees at the fundraiser, or broadcasting other ads in those races."); ¶ 32 ("Crossroads GPS is aware of its obligations under the FECA and FEC regulations to disclose the names of its donors who made contributions for the purpose of broadcasting specific advertisements."); ¶¶ 33, 36-40, 44-46, 50-54, 57, 59, 60-64, 66-67; Conclusion (FEC should "order Crossroads GPS to correct these violations by amending the relevant independent expenditure disclosure reports to identify and make public each person who made a contribution in excess of $200 made for the purpose of furthering the reported independent expenditures.").)

[7] Indeed, the failure of plaintiffs to press their current interpretation of 52 U.S.C. § 30104(c)(1) in the administrative proceeding suggests that plaintiffs may not even have standing to bring the claim in this proceeding. 52 U.S.C. § 30109(a)(8) permits "[a]ny party aggrieved by an order of the Commission dismissing a complaint" to seek judicial review of that order in this district. But plaintiffs can hardly be considered "aggrieved" that the FEC dismissed an allegation that they did not even make. For that reason, the Court could grant summary judgment to the Commission on this claim on that ground alone and limit its substantive judicial review to alleged violations that were actually presented to the agency by plaintiffs.

subsection, the cross-reference in the provision, and the provision's uncertain relation to FECA's reporting requirements as a whole. Plaintiffs' appeal to the supposed plain language of the statute and to dicta from a non-controlling opinion of the Supreme Court are unavailing.

There are three provisions in the subsection dealing with the reporting of independent expenditures by those other than political committees. The first part, the subject of disagreement here, begins with a description of who must file independent expenditure statements. 52 U.S.C. § 30104(c)(1) ("Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year shall file a statement . . . ."). The second and third subsections are, respectively, about the contents of such statements and about indices that the FEC must prepare from those statements. *See* 52 U.S.C. § 30104(c)(2) ("Statements required to be filed by this subsection . . . shall include . . .**"**); 52 U.S.C. § 30104(c)(3) ("The Commission shall be responsible for expeditiously preparing indices . . ."). The structure of the subsection therefore matches the title of the subsection, which is "*Statements by other than political committees; filing; contents; indices of expenditures*." 52 U.S.C. § 30104(c). Under this reading, "Statements by other than political committees" refers to the subsection as a whole, while the three parts bracketed by semicolons refer to each individual provision. But section 30104(c)(1) also specifies that the filed statements should "contain[] the information required under subsection (b)(3)(A) of this section for all contributions received by such person." 52 U.S.C. § 30104(c)(1). Interpreting this part of section 30104(c)(1) as a provision about the content of independent expenditures appears to conflict with the language in the title, but interpreting 30104(c)(1) as solely about "filing," as the title suggests, arguably fails to give meaning to all of the words of the statute.

In addition, the provision's cross-reference stating that reports should "contain[] the information required under subsection (b)(3)(A)" is ambiguous. It is not clear that this cross-reference creates an additional content requirement because subsection (b)(3)(A), which deals with the content of reports filed by political committees, includes language that is inapplicable to filers that are *not* political committees. The provision directs that statements should include contributions "to the reporting committee during the reporting period." But independent expenditure statement filers under 52 U.S.C. § 30104(c) are often not "committees"; they may be individuals, corporations, or labor unions. Arguably, they are not "reporting" under the statute, because the law requires them to file independent expenditure or electioneering communication "statements," not "reports." *Compare id.* § 30104(a)(1) ("Each treasurer of a political committee shall file reports . . .") *with id.* § 30104(c)(1) ("Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year shall file a statement . . ."). And unlike political committees that file reports at scheduled intervals for reporting periods, such filers have no "reporting period."

The structure of 52 U.S.C. § 30104(c) deepens the ambiguity. Section 30104(c)(1) states that filers that are not political committees and that spend over $250 in independent expenditures "shall file *a* statement containing the information required under subsection (b)(3)(A)." 52 U.S.C. § 30104(c)(1) (emphasis added). But the following provision indicates that "[s]tatements required to be filed by this subsection . . . shall include" information that is dissimilar from what is required under subparagraph (b)(3)(A). 52 U.S.C. § 30104(c)(2). If Congress's intent was that a single statement would be filed, it is unclear whether the content of that statement should be what is listed in 52 U.S.C. § 30104(b)(3)(A) or in 52 U.S.C. § 30104(c)(1). But if Congress intended that two different statements would be filed, it should not have said that filers "shall file

a statement." And if the directive to "file a statement" is read to only apply to a statement containing the information in section 30104(c)(1), then there is no provision in the statute directing the filing of the statement contemplated in section 30104(c)(2).

Plaintiffs make several arguments that section 30104(c)(1) is a clear stand-alone disclosure requirement, but each of these arguments is flawed. As discussed above, the argument that such a reading is dictated by the plain language of the statute is untrue — reading the statute in that manner conflicts with the language and structure of other parts of the statute. Plaintiffs also rely on *FEC v. Massachusetts Citizens for Life, Inc*. ("*MCFL*"), 479 U.S. 238 (1986), for the proposition that the Supreme Court has interpreted section 30104(c)(1) as requiring the identification of all contributors. Justice Brennan's opinion in *MCFL* does contain a single sentence that appears to assume that the statute should be read in that manner, but that sentence was not essential to the holding of the case and in any event it was in a portion of the opinion only signed by four justices. *MCFL*, 479 U.S. at 262. Moreover, the very next year the Ninth Circuit interpreted section 30104(c)(1) in the opposite manner, and the Supreme Court denied certiorari. *See FEC v. Furgatch*, 807 F.2d 857, 859 n.2 (9th Cir. 1987) (stating that the contents of the statement contemplated by (c)(1) are specified in (c)(2)), *cert. denied*, 484 U.S. 850 (1987). That reading is consistent with the ensuing 30 years of FECA enforcement.

Plaintiffs also claim that, although the language of (c)(1) and (c)(2) suggest statements need to be filed with different information, this "paired reporting is sensible" because it provides the public both with general information about all contributors and specific information about those contributions made to further independent expenditures. (Pls.' Mem. at 40.) But plaintiffs make no attempt to explain why Congress would require this type of "paired reporting" for those that make independent expenditures other than political committees, but not for political

committees, which are also capable of making independent expenditures. In fact, the statute states explicitly that political committees have a duty to report independent expenditures (*see* 52 U.S.C. § 30104(g)(1)(A), (2)(A)), but that when they do so, the content of that statement need only "contain the information required by subsection (b)(6)(B)(iii)," a subsection that requires disbursement, not contributor information. 52 U.S.C. § 30104(g)(3)(B).

In light of these issues, it is reasonable for the controlling group of FEC Commissioners to interpret 52 U.S.C. § 30104(c)(1) not to establish an anomalous, stand-alone reporting requirement for persons that are not political committees, over and above the clear event-driven reporting of 52 U.S.C. § 30104(c)(2). And to the extent the Commission's regulation at 11 C.F.R. § 109.10(e) was an implementation of both statutory provisions, that construction of arguably competing statutory commands — which may be debatable but has not been revised — is entitled to deference under step two of the *Chevron* framework. 467 U.S. at 842, 844.

2. The Commission Properly Exercised Discretion in Dismissing the Allegation of a Violation of 52 U.S.C. § 30104(c)(1)

The FEC is afforded great deference in judicial review of decisions not to proceed with enforcement cases as exercises of prosecutorial discretion. *Heckler v. Cheney*, 470 U.S. 821, 831 (1985) ("[A]n agency's decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion."); *see also La Botz v. FEC*, 61 F. Supp. 3d 21, 33 (D.D.C. 2014) ("The prosecutorial discretion afforded to the FEC is considerable." (internal quotation marks omitted)). This is so because the "agency is in a unique — and authoritative — position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way." *In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991). Such "budget flexibility as Congress has allowed the agency is not for [the courts] to hijack." *Id.* Courts have repeatedly applied these principles in affirming particular FEC decisions not to pursue

enforcement of FECA. *See Nader v. FEC*, 823 F. Supp. 2d at 65 ("[T]he Court believes that the FEC is in a better position to evaluate its own resources and the probability of investigatory difficulties than is [the plaintiff]."), *vacated on other grounds*, 725 F.3d 226 (D.C. Cir. 2013); *Stark v. FEC*, 683 F. Supp. 836, 840 (D.D.C. 1988) ("[I]t is . . . surely committed to the Commission's discretion to determine where and when to commit its investigative resources.") (citing *Heckler*, 470 U.S. at 831-32). Indeed, the FEC retains prosecutorial discretion to dismiss an administrative complaint even if it identifies a violation, because the "FEC is not required to pursue every potential violation of FECA." *La Botz*, 61 F. Supp. 3d at 35; *CREW. v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007) ("The Supreme Court in *Akins* recognized that the Commission, like other Executive agencies, retains prosecutorial discretion.").

In this case, the FEC exercised its prosecutorial discretion and dismissed the 52 U.S.C. § 30104(c)(1) allegation due to concerns that a "[r]espondent could raise equitable concerns about whether a filer has fair notice of the requisite level of disclosure required by law." (AR176.) "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (setting aside orders against TV stations due to FCC's lack of fair notice about its new interpretation of an indecency law). In an administrative proceeding, the Constitution's due process clause requires that the agency provide the "precision and guidance [that] are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Friedman v. Sebelius*, 686 F.3d 813, 831 (D.C. Cir. 2012) (quoting *Fox*, 567 U.S. at 254).

The concern about a lack of fair notice here is clearly reasonable. The Commission had promulgated a regulation more than thirty years earlier that provided guidance to persons other than political committees about their reporting obligations. The agency never issued any

additional guidance suggesting that it intended to enforce 52 U.S.C. § 30104(c)(1) as a stand-alone reporting requirement going forward. It was clearly reasonable for the controlling group of FEC Commissioners to determine that the lack of enforcement of 52 U.S.C. § 30104(c)(1) as a separate reporting requirement, along with the absence of any other guidance since 1980 suggesting that the FEC would interpret the statute in that manner, "fail[ed] to provide a person of ordinary intelligence fair notice of what is prohibited" if section 30104(c)(1) were used as a basis for enforcement as CREW seeks. *Fox*, 567 U.S. at 254 (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)). Thus, it was reasonable to exercise prosecutorial discretion here.

Plaintiffs attempt to distinguish these "fair notice" cases by asserting that Crossroads GPS had fair notice because the rule is "plainly stated in the statute" (Pls.' Mem. at 43) and because Crossroads GPS stated in the administrative proceeding that it "is fully aware of its FEC reporting and disclosure obligations" (*id*. at 42 (quoting AR81). But as described *supra* pp. 23-28, the idea that 52 U.S.C. § 30104(c)(1) requires disclosure of all contributors is far from "plainly stated." And Crossroads GPS's statements of familiarity with the reporting requirements are not evidence that it agreed with plaintiffs' novel interpretation of FECA.

Because there are competing demands on the FEC's resources, it is not contrary to law for the agency to focus its law enforcement resources on other claims. *Akins v. FEC*, 736 F. Supp. 2d 9, 22 (D.D.C. 2010) ("Absent evidence that the Commission's investigation was so inadequate as to constitute an abuse of discretion, it is not this Court's place to direct the Commission how to expend its resources, and it is certainly not the plaintiffs'."). And given the ambiguous state of the law here, pursuing such a claim against Crossroads GPS would very likely have led to lengthy and uncertain litigation over the proper reading of the statute. *See CREW v. FEC*, 236 F. Supp. 3d 378, 394 (D.D.C. 2017) (granting summary judgment to FEC for

its exercise of prosecutorial discretion because "[t]he FEC had a rational basis for concluding that 'novel legal issues' existed in this case, and that resolving them in this forum would have been a 'pyrrhic' exercise fraught with litigation risk"). The Commission reasonably chose to focus its resources elsewhere.

III. 11 C.F.R. § 109.10(E)(1)(VI) PROVIDED A REASONABLE BASIS FOR DISMISSAL AS A VALID REGULATION UNDER THE APA AND *CHEVRON*

The FEC regulation that plaintiffs have challenged is a reasonable rule that hews closely to the language of the statute, resolves ambiguities, and provides clear guidance to filers about what their reporting responsibilities are under FECA. The Commission adopted the regulation in 1980 after a notice-and-comment period in which no commenters said anything about this issue. Under the highly deferential standard of review, this regulation satisfies the APA and the two-step analysis of *Chevron*. The statutory language at 52 U.S.C. § 30104(c) is ambiguous and cannot be resolved at *Chevron* step one, but consistent with *Chevron* step two, the Commission's regulation reasonably attempts to resolve that ambiguity in a way that is consistent with Congressional intent and provides clear guidance to filers. The controlling group's reliance on the regulation in its dismissal decision thus did not violate the APA.

A. The Commission's Dismissal Should Be Affirmed Under the APA Unless the Challenged Regulation Is Arbitrary, Capricious, or in Excess of Statutory Jurisdiction

When reviewing a challenge to agency action under the APA, the "district court sits as an appellate tribunal" and the "entire case on review is a question of law." *Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1225-26 (D.C. Cir. 1993). Under the APA, the Court may set aside 11 C.F.R. § 109.10(e)(1)(vi) only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. §§ 706(2)(A) & (C).

The standard for judicial review in an APA challenge is "highly deferential," *Sierra Club*, 353 F.3d at 978 (D.C. Cir. 2004), and so the scope of review is narrow, s*ee Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In fact, the arbitrary and capricious standard "presumes the validity of agency action." *Volpe*, 401 U.S. at 415; *see Cellco P'ship v. FCC*, 357 F.3d 88, 93-94 (D.C. Cir. 2004). The Court is "not to substitute its judgment for that of the agency," but instead is to satisfy itself that the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (citation and internal quotation marks omitted). Where the empowering provision of a statute authorizes the agency to "make . . . such rules [. . .] as are necessary to carry out the provisions of this Act," as FECA does in 52 U.S.C. § 30107(a)(8), the "validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 369 (1973) (citation omitted). And when, as here, an agency has made a determination that falls within its area of special expertise, deference is at its zenith. *See Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983).

Because plaintiffs here challenge a regulation that interprets a statute the FEC administers, the Court reviews the regulation not only under the APA but also under the two-step *Chevron* framework. The Court looks first to determine "whether Congress has directly spoken to the precise question at issue," and if it has, "the [C]ourt, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. In this step-one analysis, "the term 'precise question at issue' [is] to be interpreted tightly." *See Cent. States Motor Freight Bureau v. ICC*, 924 F.2d 1099, 1104 (D.C. Cir. 1991). Only if "an accepted

canon of construction illustrates that Congress had a *specific* intent on the issue in question" can the case "be disposed of under the first prong of *Chevron*." *Mich. Citizens for an Indep. Press v. Thornburgh*, 868 F.2d 1285, 1292-93 (D.C. Cir. 1989) (emphasis in original).

If Congress has not "directly spoken to the precise question at issue," the Court proceeds to the second step of *Chevron* analysis. At that stage, the Court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 842, 844.[8] Instead, the Court is to "defer to the agency's interpretation as long as it is 'based on a permissible construction of the statute.'" *Bluewater Network v. EPA*, 372 F.3d 404, 410 (D.C. Cir. 2004) (quoting *Chevron*, 467 U.S. at 843. The "interpretation need not be the best or most natural one by grammatical or other standards . . . . [r]ather[, it] need be only reasonable to warrant deference." *Pauley v BethEnergy Mines, Inc.*, 501 U.S. 680, 702 (1991) (citations omitted). "[U]nder *Chevron*, courts are bound to uphold an agency interpretation as long as it is reasonable — regardless whether there may be other reasonable, or even more reasonable, views." *FEC v. National Rifle Ass'n of Am.*, 254 F.3d 173, 187 (D.C. Cir. 2001) (quoting *Serono Labs, Inc. v. Shalala*, 158 F.3d 1313, 1321 (D.C. Cir. 1998)). A "permissible" construction means only "a construction that is 'rational and consistent with the statute.'" *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *NLRB v. Food & Commercial Workers*, 484 U.S. 112, 123 (1987)). If "the statute is ambiguous, then *Chevron* step two implicitly precludes courts picking and choosing among various canons

[8] This step overlaps with the arbitrary and capricious standard of the APA, *Chamber of Commerce of the U.S. v. FEC*, 76 F.3d 1234, 1235 (D.C. Cir. 1996), because the question of whether an agency's interpretation of a statute is unreasonable is "close analytically to the issue whether an agency's actions under a statute are unreasonable," *Gen. Instrument Corp. v. FCC.*, 213 F.3d 724, 732 (D.C. Cir. 2000).

of construction to reject reasonable *agency* interpretations." *Halverson v. Slater*, 129 F.3d 180, 184 (D.C. Cir. 1997) (citation and internal quotation marks omitted; emphasis in original).

B. There Are Significant Ambiguities in the Statute Governing Independent Expenditure Reporting by Persons Other Than Political Committees

52 U.S.C. § 30104(c)(2)(C) is ambiguous and the FEC was entitled to clarify it through 11 C.F.R. § 109.10(e)(1)(vi). Under the first step of *Chevron* analysis, "the court examines whether the statute speaks 'directly … to the precise question at issue.'" *Kanchanalak*, 192 F.3d at 1047 (citation omitted). If so, the court must give effect to the clearly expressed intent of Congress. *Chevron*, 467 U.S. at 842. However, "[i]f the statute 'has not directly addressed the precise question at issue,' then the agency's construction, if reasonable, should be honored." *Kanchanalak*, 192 F.3d at 1047 (citation omitted).

This statute does not directly address the question at issue here. The precise question is the circumstances in which a person other than a political committee must identify its contributors when it reports independent expenditures to the FEC. Because FECA is ambiguous on this question, as explained in the next two subsections, Congress did not clearly express its intent and the FEC had the authority to promulgate a regulation addressing that ambiguity.

1. It Is Unclear What Congress Meant by "for the Purpose of Furthering an Independent Expenditure"

Before examining the language of the statutory provision at issue for ambiguity, it is first helpful to look holistically at the overall structure of 52 U.S.C. § 30104. The first subsection, 52 U.S.C. § 30104(a), describes how and when political committees make their regular disclosure reports to the FEC. Depending upon the type of political committee involved, the amount of money raised, and whether it is an election year, committees are required to file regular reports at specific times, either monthly or quarterly, with additional pre-election and post-election reports.

52 U.S.C. §§ 30104(a)(2), (3), (4). Section 30104(b) describes what must be disclosed in those reports. Among other things, political committees must disclose the identity of each contributor who contributes more than $200 and "who makes a contribution to the reporting committee during the reporting period." 52 U.S.C. § 30104(b)(3)(A).

52 U.S.C. § 30104(c) describes the filing of reports by persons that are *not* registered as political committees, like Crossroads GPS, and that "make[] independent expenditures in an aggregate amount or value in excess of $250 during a calendar year." Unlike the routine scheduled reporting required of political committees, the statutory provision governing such other groups does not contain any specific reporting schedule or periods. Rather, the reports filed by such other groups engaged in independent expenditures are triggered by particular events. For example, such a group that "makes or contracts to make independent expenditures aggregating $1,000" within a 20-day period before an election must file an "initial report" within 24 hours after making or contracting to make those expenditures, and must file additional reports within 24 hours for each set of independent expenditures made during that time period that aggregate over $1,000. 52 U.S.C. §§ 30104(g)(1)(A), (B). A person that "makes or contracts to make independent expenditures aggregating $10,000 or more" at any time leading up to the 20-day pre-election period must file an "initial report" within 48 hours of making or contracting to make those expenditures, and must file additional reports within 48 hours for each set of independent expenditures made before the 20-day pre-election period that aggregate over $10,000. 52 U.S.C. § 30104(g)(2)(A), (B). The FEC has established one reporting requirement for such groups that is not immediately triggered by an event: Under 11 C.F.R. § 109.10(b), a person other than a political committee that makes more than $250 in independent expenditures must file a quarterly report in any quarter in which it has made such expenditures.

Thus, because political committees by their very nature are primarily concerned with influencing federal elections, Congress requires them to follow a routine pattern of disclosure, with specific reporting periods in which both contributions and expenditures are disclosed. By contrast, FECA requires entities that are not political committees to make disclosures only if and when they engage in particular spending levels of independent expenditures, and it does not set regular reporting periods for them. Rather, the deadlines for those reports are triggered by the specific act of making independent expenditures that reach those threshold amounts in the aggregate. Because of the $1,000 and $10,000 reporting thresholds, the aggregate reports can be filed at irregular intervals, and they can potentially include multiple independent expenditures over a period of time. The different reporting structures indicate that Congress wanted regular, comprehensive disclosure from political committees, but believed that event-driven disclosure was sufficient for the independent expenditures of groups that are not political committees.

Understanding these contrasting structures is critical to understanding the ambiguity in the statutory disclosure provision at the heart of this case. The relevant question is whether there is ambiguity in the indefinite article "an" within the requirement that entities other than political committees report "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." 52 U.S.C. § 30104(c)(2)(C) (emphasis added.) Plaintiffs insist that "the use of the indefinite clearly covers the full category of independent expenditures the reporting party has created or may create." (Pls.' Mem. at 31-32.) But an indefinite article does not indicate that a full category is covered; rather, it only indicates "[s]ome undetermined or unspecified particular." *McFadden v. United States*, 135 S. Ct. 2298, 2304 (2015) (quoting *Webster's New International Dictionary* 1 (2d ed. 1954).) Because one or more independent expenditures may

be reported in a single statement, it is reasonable to interpret "an independent expenditure" as a reference to any one of the independent expenditures reported in a particular filing with the FEC.

Interpreting "an" as simply referring to an unspecified independent expenditure from a particular report to the FEC is preferable in some ways to the interpretation plaintiffs favor. Plaintiffs propose that "an" should refer to "all contributions given for the purpose of furthering any independent expenditure, regardless of whether the contribution was given for the purpose of reporting the particular independent expenditure reported" (Pls.' Mem. at 33), but that construction creates as many questions as it resolves. As noted above, independent expenditure statements are unlike political committee reports, for which the statute creates specific reporting periods and requires a political committee to report all of the expenditures they make and contributions they receive during that specific reporting period. 52 U.S.C. § 30104(a)(2)-(4). There are no such regular reporting periods for independent expenditure reports. So assuming a group that is not a political committee receives a contribution for the purpose of furthering an independent expenditure, it is unclear where and when that information should be reported under plaintiffs' interpretation. The language of the statute suggests that all such reports "shall include" (52 U.S.C. § 30104(c)(2)) "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.* § 30104(c)(2)(C) (emphasis added)). Taken literally, this would create the odd result that an organization like Crossroads GPS, which filed more than 100 different independent expenditure reports in the two-year 2012 election cycle, would need to include on each report a recitation of all the contributors that had ever contributed to it for the purpose of furthering independent expenditures, possibly for its entire existence. It would be cumbersome and confusing to the public to provide such duplicative information. In addition,

plaintiffs' interpretation could generate misleading information about particular contributions. For example, if a contributor gave a contribution with specific instructions to use it to further independent expenditures in a Ohio U.S. Senate race, but not in a Nevada Senate race, that contribution would nonetheless have to be reported on an independent expenditure form that reports spending in Nevada.

Further problems with plaintiffs' interpretation relating to timing are evident in light of their allegation that Crossroads GPS should have identified contributors who attended its fundraiser and watched "example" videos of independent expenditure ads. According to information from Crossroads GPS, 13 of the 14 advertisements that were shown at the fundraiser had already been broadcast and fully paid for before the fundraiser even took place. (AR78.) As a result, the independent expenditure statements for those 13 advertisements would have already been filed without the contributor information sought by plaintiffs. But if Crossroads GPS decided to run independent expenditures the next day that were for completely different races and took completely different positions from the ones taken in the ads shown at the fundraiser, the contributors at the fundraiser would be listed as having contributed in furtherance of those advertisements that they had never seen or had any awareness of. The only remaining advertisement shown at the fundraiser was apparently never broadcast at all. If a contributor had donated with the specific intention of paying for that advertisement that never ultimately aired, it is not clear which form or forms should identify that contributor.

In short, while Congress intended the regular reports filed by a political committee to display all of that committee's activities during a certain period, the event-driven independent-expenditure reports filed by other entities are intended to provide information only about the reported expenditure, not a wider range of activity. It is therefore reasonable, at a minimum, to

interpret the statutory term "an" to envision a match between the independent expenditure(s) reported in a statement and the contributors listed on that same statement. Because each independent expenditure statement is a stand-alone document that details one or more independent expenditures, the word "an" can be read to refer to any of the independent expenditures *that are described in the actual report*. Interpreting "an" in that manner eliminates the concern about cumbersome and confusing duplicative filings of contributor information over and over again on each statement. And it eliminates the concern that a contributor would be identified on a report of an independent expenditure that she did not make her contribution in furtherance of or even specifically instructed that her contribution not be used for. Because multiple independent expenditures can be described in a single report, reading the word "an" in this way preserves the match between the contributors listed on an independent expenditure statement and the independent expenditures that are the reason for filing that statement.

In *Van Hollen v. FEC*, 811 F.3d 486 (D.C. Cir. 2016), the D.C. Circuit evaluated a comparable event-driven FEC disclosure regulation and concluded that even statutory language that might appear clear on its face nonetheless contained ambiguities that could reasonably be resolved by the Commission in promulgating a regulation. In *Van Hollen*, the plaintiff challenged a disclosure regulation promulgated by the FEC that dealt with the reporting of electioneering communications. "Electioneering communication[s]" are communications that do not qualify as independent expenditures under the statute but do "refer[ ] to a clearly identified candidate" and are "made within 60 days before a general [election]" or "30 days before a primary [election]." 52 U.S.C. §§ 30104(f)(3)(A)(i), (B)(ii). The statute at issue in that case, now codified at 52 U.S.C. § 30104(f), states that reports to the FEC about electioneering communications not made from a segregated fund must include "the names and addresses of *all*

contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date." 52 U.S.C. § 30104(f)(2)(F) (emphasis added). The Commission later promulgated a regulation to govern disclosure by a category of reporting entities (corporations and unions) that, like the reporting entities at issue here, were not political committees, and that Congress had not originally envisioned making such communications at all, but which gained the right to do so after a Supreme Court opinion. *Van Hollen*, 811 F.3d at 490–91 ("The FEC was now left to decide how BCRA's disclosure requirements should apply to a class of speakers Congress never expected would have anything to disclose.")

Although the statutory language directed reporting of "all contributors who contributed," the Commission regulation interpreted the contributor reporting requirement to apply, for that category of entities, only to contributions "made for the purpose of furthering electioneering communications." 11 C.F.R. § 104.20(c)(9). That regulation was challenged as being in direct conflict with the language of the statute, but the D.C. Circuit held that the Commission had the authority to promulgate an interpretive rule because the panel "[did] not find that 'Congress had an intention on the precise question at issue." *Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108, 111 (D.C. Cir. 2012) (quoting *Chevron*, 467 U.S. at 843 n. 9). The same principle applies here, where there is no indication Congress had a clear intent about who should appear on an FEC report identifying those 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." 52 U.S.C. § 30104(c)(2)(C) (emphasis added.) Plaintiffs try to distinguish *Van Hollen* in light of the different genesis of the regulation at issue (Pls.' Mem. at

32-33), but the key point is that context can render ambiguous even statutory text that may seem straightforward when viewed narrowly, and that is the case with section 30104(c)(2)(C).

2. Congress's General Desire for Disclosure on Other Subjects Does Not Mean It Intended to Mandate the Specific Disclosure Plaintiffs Favor

FECA does not require the FEC to maximize disclosure in all contexts. Indeed, it is wrong to "assume[] that Congress's *primary* goal was *ipso facto* its only goal," because '"no legislation pursues its purposes at all costs.'" *Student Loan Mktg. Ass'n v. Riley*, 104 F.3d 397, 408 (D.C. Cir. 1997) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (emphasis added)). "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez*, 480 U.S. at 526 (emphasis in original). Here, as in *Riley*, 104 F.3d at 408, there is "no evidence that [FECA] was the product of monomaniacs." *See also Office of Workers Comp. v. Newport News*, 514 U.S. 122, 135 (1995) (Supreme Court has dismissed "the proposition that the statute at hand should be liberally construed to achieve its purposes" as the "last redoubt of losing causes.")

The Court in *Van Hollen v. FEC* rejected an argument that is virtually identical to the one plaintiffs now make about the statute's independent expenditure reporting, holding that it was reasonable for the FEC to interpret the statute's electioneering communications disclosure provision to refer only to those contributions made for the purpose of furthering electioneering communications, despite the absence of that specific language in the statute. 811 F.3d at 501-02. The Court of Appeals explained that although some might prefer the statute to be interpreted to require more disclosure, the Commission's purpose-driven regulation — which was based in part on 52 U.S.C. § 30104(c)(2)(C), the same statutory provision at issue here — had reasonably

balanced FECA's interests in disclosure with the needs of regulated entities. *Id.* at 499 ("And the FEC's concerns about the competing interests in privacy and disclosure were legitimate."). The Commission's "tailoring was an able attempt to balance the competing values that lie at the heart of campaign finance law." *Id.* at 501.

Moreover, the very statutory provision on which plaintiffs here rely shows that Congress did not intend to pursue maximum disclosure at the expense of all other interests. The requirement at issue — that entities other than political committees identify those who gave a contribution "which was made for the purpose of furthering an independent expenditure," 52 U.S.C. § 30104(c)(2)(C) — contains undisputed *limits* on contributor disclosure, with its event-driven and dollar-amount parameters, as discussed above. Had Congress been solely interested in providing the public with the greatest amount of information about the sources of funding used by such entities, it could have drafted the statute in a manner similar to the requirement that political committees identify all their contributors on a regular basis. It did not do so.

C. The Commission's Regulation Passes *Chevron* Step 2 Because It Reasonably Requires Disclosure Consistent with Congress's Statutory Directive

Under *Chevron* step two, "courts are bound to uphold an agency interpretation as long as it is reasonable — regardless of whether there may be other reasonable, or even more reasonable, views." *Nat'l Rifle Ass'n*, 254 F.3d at 187. Agencies "must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 157 (2000) (quoting *State Farm*, 463 U.S. at 42). 11 C.F.R. § 109.10(e)(1)(vi) is a reasonable interpretation of FECA's reporting requirements for entities that are not political committees but that make independent expenditures.

1. The Commission's Clarification That Contributions Be Disclosed If They Are for the Purpose of "the Reported" Independent Expenditure Is a Reasonable Statutory Interpretation

The language of 11 C.F.R. § 109.10(e)(1)(vi) is virtually identical to the statutory language of 52 U.S.C. § 30104(c)(2)(C). The statute directs non-political committees to include on their independent expenditure reports "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*." 52 U.S.C. § 30104(c)(2)(C) (emphasis added). The regulation requires "[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). Plaintiffs argue that the substitution of "the reported" for "an" causes conflict with the regulation, but the change simply clarifies ambiguity in the statute. *See supra* pp. 34-41.

a. The Commission's Decision to Substitute "the Reported" for "An" Was a Reasonable Interpretation That Provides Greater Guidance to Regulated Entities and Reduces the Chance of Misleading the Public About Political Spending

In light of the ambiguity of the word "an" in the statute, *see supra* pp. 34-41, the Commission's decision to substitute "the reported" in the regulation was a useful clarification, consistent with the intent of Congress, which sought to enhance the ability of the regulated community to comply with the law. Plaintiffs suggest that this modest alteration created a significant disconnect between the regulation and statute, but it is unclear whether it has even resulted in any significant difference in the amount of disclosure of contributors.

Had the FEC promulgated a rule with language identical to the statute, or not promulgated one at all, a group like Crossroads GPS making independent expenditures might not understand as clearly what contributors to include on its reports. It would not be unreasonable

for such a group to read 52 U.S.C. § 30104(c)(2)(C) as requiring the disclosure of contributors who gave for the purpose of furthering the independent expenditures listed on its FEC Form 5, nor would it be unreasonable for that filer to interpret the statute as requiring reporting of contributors who gave for the purpose of furthering any of the group's independent expenditures. The Commission's choice to resolve the ambiguity in favor of only reporting contributors that gave to further a particular independent expenditure retains the close connection that Congress appears to have intended between the independent expenditures reported and the contributors reported on that same FEC form. Under the statute, groups other than political committees do not file reports merely because they have received contributions, but only after they have used the contributions to pay for independent expenditures. And the statute does not provide for general reporting periods for such groups; rather, it provides that reports be filed within 24 or 48 hours after an independent expenditure is made.

Because a single organization can make independent expenditures in many different elections and with varying content, the Commission's regulatory approach also results in the reporting of contributor data that is more likely to reflect accurate information. A contributor that gave for the purpose of furthering an expenditure for a Senate candidate in one state with a pro-business message might be dismayed to learn that his contribution was reported publicly on a form detailing an expenditure for another candidate with a message regarding a hot-button social issue. To the extent that the public used that information to learn which contributors were supporting particular candidates and messages, removing a specific link between contribution and expenditure would in some respects diminish the value of the information.

Plaintiffs argue (Pls.' Mem. at 28-30) that the Commission's choice has meaningfully reduced the amount of disclosure in recent years, but that is not a proper subject of review here,

as explained *infra* pp. 47-49. But even if it were, plaintiffs have failed to produce evidence of it. A contributor that wishes to remain anonymous by making sure his contribution was not made for the purpose of a particular independent expenditure could just as easily make sure his contribution was not made for the purpose of any independent expenditure. For example, even though the report providing the Commission's reasoning in this case analyzed Crossroads GPS's compliance using the regulatory language rather than the statutory language, it is not clear that Crossroads GPS would have been legally required to file the contributor information sought by plaintiffs even if 52 U.S.C. § 30104(c)(2)(C) were read in the expansive manner urged by plaintiffs. For example, Karl Rove's affidavit submitted in response to the administrative complaint stated that the contribution from the donor that pledged $3 million "was not in any way earmarked for any particular use" (AR95 ¶ 10) and prior discussions with that contributor included no mention of television advertisements or any other specific communication efforts (AR94-95 ¶¶ 6-10). To the extent that plaintiffs believe there is inadequate reporting, they would appear to be primarily taking issue with the link that 52 U.S.C. § 30104(c)(2)(C) requires between contributions and independent expenditures, not the implementing regulation.

In this context, plaintiffs rely on misleading characterizations of certain statements by the FEC's Office of General Counsel. The First General Counsel's Report provided comprehensive legal advice to the Commission for its consideration, including discussion of different legal options and approaches. However, plaintiffs wrongly characterize that Report as having "acknowledged . . . that the disclosure requirements imposed by 11 C.F.R. § 109.10(e)(1)(vi) conflicted with statutory requirements imposed by FECA." (Pls.' Mem. at 24.) The Office of General Counsel did no such thing, but merely presented the Commission with possible legal approaches to the issue. The Office of General Counsel never even took a position about the best

manner to read the statute, noting only that the statute "may reasonably be construed" in a particular way. (AR173.) Similarly, the Office of General Counsel did not "recognize[]" that the statute and regulation were in conflict due to the presence of 52 U.S.C. § 30104(c)(1). (Pls.' Mem. at 24.) Rather, it simply noted that it was *possible* to read them as being in conflict, without taking any position as to the correct interpretation of the statute. (AR175 (statute takes "an *arguably* more expansive approach" than the regulation (emphasis added)).)

b. The Commission's Regulation Does Not Make the Statute Redundant

Plaintiffs argue that 11 C.F.R. § 109.10(e)(1)(vi) is unreasonable because it "makes subsection (c)(2)(C) redundant to other disclosure provisions of the FECA and FEC regulations" (Pls.' Mem at 34-35; *see generally id.* at 34-38), but plaintiffs' criticism is based on an apparent misreading of the regulation. Plaintiffs wrongly claim that "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" (Pls.' Mem. at 35), suggesting that a contributor must actually control an independent expenditure in order for identification to be required (*id.* at 34-38). But a contribution can be made "for the purpose of furthering the reported independent expenditure" in a variety of ways that would not turn the contributor into the maker of an independent expenditure. A contributor might do so simply by responding to a solicitation or by earmarking a contribution. If, for example, a group solicits contributions for the purpose of making a particular independent expenditure, the contributor of any contribution over $200 made in response to that solicitation would need to be reported. Even without a solicitation, a contributor could indicate that she wanted her contribution to be used to pay for a particular

advertisement, and that contribution would need to be reported. In both of these scenarios, the maker of the independent expenditure retains control of the funds and the ad itself.

2. The Court Should Not Consider Evidence That Post-Dates the Commission's 1980 Rulemaking

a. Review of the Regulation Is Limited to the Administrative Record That Existed When the FEC Issued the Regulation

Plaintiffs rely on evidence about independent expenditure disclosure that post-dates the Commission's 1980 rulemaking (*see, e.g.*, Pls.' Mem. at 13-17, 33-34 & 34 n.15), but the "focal point of judicial review" of a federal agency's decision in a rulemaking challenged under the APA "should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 141-142 (1973) (per curiam). *See also, e.g.*, *Volpe*, 401 U.S. at 420 ("review is to be based on the full administrative record that was before the [agency] at the time [it] made [its] decision" (footnote omitted)). "To review more than the information before the [decision-maker] at the time she made her decision risks our requiring administrators to be prescient . . . ." *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 793 (D.C. Cir. 1984); *see also Vermont Yankee Nuclear Power Corp. v. Nat'l Res. Defense Council, Inc.*, 435 U.S. 519, 554-55 (1978) (internal quotation marks and citation omitted). "'Were courts cavalierly to supplement the record, they would be tempted to second-guess agency decisions in the belief that they were better informed than the administrators empowered by Congress and appointed by the President.'" *Amfac Resorts, L.L.C. v. Dep't. of Interior*, 143 F. Supp. 2d 7, 11 (D.D.C. 2001) (quoting *Deukmejian v. NRC*, 751 F.2d 1287, 1325-26 (D.C. Cir. 1984), *aff'd in relevant parts sub nom. San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26 (D.C. Cir. 1986) (en banc)).

Plaintiffs argue in a footnote that it is proper for the Court to consider material outside the record in certain circumstances (Pls.' Mem. at 34 n.15), but none of the cases cited suggests that the Court can consider evidence about unforeseeable events that took place long after the Commission acted. This use of later evidence is precisely what is prohibited in a challenge of this type. *See IMS, P.C. v. Alvarez*, 129 F.3d 618, 624 (D.C. Cir. 1997); *Boswell*, 749 F.2d at 793. A "judicial venture outside the record . . . can never, under *Camp v. Pitts*, examine the propriety of the decision itself." *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 286 (D.C. Cir. 1981) (footnote omitted).[9] If plaintiffs believe that later events call for revisiting the challenged regulation, the proper recourse is to submit a rulemaking petition to the FEC. *See Reytblatt v. U.S. Nuclear Regulatory Comm'n*, 105 F.3d 715, 723 (D.C. Cir. 1997).

b. Plaintiffs' Complaints Here Are Largely the Result of Changes in the Legal Landscape That Were Unforeseeable in 1980

As plaintiffs themselves note with regard to the non-record evidence they present here, "the impact of the new FEC regulation was very small, at least initially" and "[b]efore 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." (Pls.' Mem. at 14, 15.) When the FEC issued its rule, corporations and unions were barred from making independent expenditures or electioneering communications that contained express advocacy or its functional equivalent. *See FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 469-70 (2007). Only after *Citizens United v. FEC* held that corporations had a constitutional right to finance such communications with their general treasury funds did the FEC's regulation apply to the vast

[9] S*ee also Nat'l Treasury Employees Union v. Hove*, 840 F. Supp. 165, 169 (D.D.C. 1994) ("consideration of outside evidence to determine the correctness or wisdom of the agency's decisions is not permitted"); *Nat'l Park and Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 11 n.2 (D.D.C. 1999) (refusing to consider extra-record and post-decisional evidence); *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 105 n.2 (D.D.C. 1995) (same).

number of independent expenditures by groups other than political committees that it does today. 558 U.S. 310, 365 (2010). Such changes were unforeseeable when the FEC promulgated its regulation and the agency is not required to be "prescient." *Boswell*, 749 F.2d at 792. The regulation reasonably interpreted the statute, as the law and binding precedent existed in 1980.

IV. THE PROPER REMEDY FOR ANY FINDING THAT THE FEC ERRED BY DISMISSING THE ADMINISTRATIVE COMPLAINT OR THAT THE REGULATION IS UNLAWFUL WOULD BE REMAND TO THE COMMISSION

If the Court determined that the FEC acted unlawfully in dismissing plaintiffs' administrative complaint, the proper remedy would be to "direct the Commission to conform with such declaration within 30 days." 52 U.S.C. § 30109(a)(8)(C). Plaintiffs suggest that if the Court finds the FEC acted unlawfully, it could authorize CREW to file a "citizen suit" against Crossroads GPS. (Pls.' Mem. at 43-44.) But FECA only authorizes that remedy if the Commission first fails to obey a court's order on remand. 52 U.S.C. § 30109(a)(8)(C). Plaintiffs also seek to have 11 C.F.R. § 109.10(e)(1)(vi) vacated, but they have not brought a freestanding challenge to it. They have only brought a claim ("Claim Two") in connection with that regulation alleging that "The FEC's Failure to Find Reason to Believe that Crossroads GPS Violated 52 U.S.C. § 30104(c)(2) was Arbitrary, Capricious, an Abuse of Discretion, and Contrary to Law." (Compl., text above ¶ 117.) And they have only been deemed to have brought a challenge to the regulation that is not time-barred because they raised the claim in that context of being "affected" by the FEC's dismissal. *CREW*, 243 F. Supp. 3d at 101. Indeed, the Court has already held that "[i]n the event that the plaintiffs ultimately prevail on their APA challenge to the regulation, . . . the Court would remand this action to the FEC for reconsideration of the plaintiffs' administrative complaint in light of the Court's opinion." *Id.* at 105. Plaintiffs make no effort to explain why that holding is no longer applicable.

In addition, even if this case had not arisen in the context of an enforcement dismissal, if the Court determined that 11 C.F.R. § 109.10(e)(1)(vi) was unlawful, the appropriate remedy would be a remand, not the unusual remedy of vacating the regulation, as plaintiffs urge. (Pls.' Mem. at 45.) "The decision whether to vacate depends on [1] 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and [2] the disruptive consequences of an interim change that may itself be changed.'" *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (quoting *Int'l Union, United Mine Workers v. Fed. Mine Safety and Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990)). The 2018 elections are approaching and, if there were no regulation for any significant time, entities engaged in independent expenditures might have inadequate guidance. It would therefore be advisable to remand to the FEC to give it the opportunity to reconsider the regulation and either compile an administrative record to support it or to amend it.[10]

CONCLUSION

Because the Commission acted lawfully in dismissing plaintiffs' administrative complaint, and because 11 C.F.R. § 109.10(e)(1)(vi) is not contrary to law, the Court should grant summary judgment to the Commission and deny plaintiffs' motion for relief.

[10] Remand would also be the appropriate remedy if the Court accepted plaintiffs' arguments that the FEC had inadequately explained its regulation. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); *see also, e.g., Camp*, 411 U.S. at 142-143 (proper remedy is remand, not *de novo* hearing, to obtain from agency additional explanation of its reasons when there is "such failure to explain administrative action as to frustrate effective judicial review"). Doing so would permit the Commission to more fully explain the existing regulation. *See Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009) ("When an agency may be able readily to cure a defect in its explanation of a decision, the [required analysis of the seriousness of the deficiencies of the agency's action] counsels remand without vacatur."); *accord WorldCom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002) (remand without vacatur appropriate where "non-trivial likelihood" that agency would be able to justify rule on remand).

Respectfully submitted,

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