UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant, CROSSROADS GRASSROOTS POLICY STRATEGIES, Intervenor-Defendant.	Civil Action No. 1:16-cv-00259-BAH **ORAL ARGUMENT REQUESTED** CROSS-MOTION FOR SUMMARY JUDGMENT

CROSSROADS GRASSROOTS POLICY STRATEGIES' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

Intervenor-Defendant Crossroads Grassroots Policy Strategies ("CGPS") moves this Court for an order (1) granting its Cross-Motion for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure and Local Rule 7(h) and dismissing the Plaintiffs' complaint with prejudice, and (2) denying Plaintiff's Motion for Summary Judgment (Dkt. No. 27).

In support of this motion, CGPS files (1) a Memorandum of Points and Authorities in Support of Its Opposition to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment, and (2) a Proposed Order. CGPS requests oral argument on this motion.

Respectfully submitted,

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CROSSROADS GRASSROOTS POLICY STRATEGIES' MEMORANDUM IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

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LIST OF ABBREVIATIONS

BCRA – Bipartisan Campaign Reform Act of 2002 (Pub. L. 107–155)

CGPS – Crossroads Grassroots Policy Strategies

CREW – Citizens for Responsibility and Ethics in Washington

EC – electioneering communication

FEC – Federal Election Commission

FECA – Federal Election Campaign Act of 1971, as amended (52 U.S.C. § 30101 *et seq.*)

FGCR – First General Counsel's Report

IE – independent expenditure

INTRODUCTION

The Federal Election Campaign Act of 1971, as amended ("FECA"), sets forth a "First-Amendment-sensitive regime" with "enormous subtleties and complexities." *Common Cause v. FEC*, 842 F.2d 436, 445 (D.C. Cir. 1988). The FECA vests the Federal Election Commission ("FEC" or "Commission") with "primary and substantial responsibility for administering and enforcing" that statute. *Buckley v. Valeo*, 424 U.S. 1, 109 (1976).

Citizens for Responsibility and Ethics in Washington ("CREW") attempts with this lawsuit to short-circuit the FEC's rulemaking process, which is the vehicle best-suited for sorting through the FECA's subtleties and complexities. CREW could have filed a rulemaking petition with the six-member, bipartisan FEC to amend the agency's independent expenditure ("IE") reporting regulation, which CREW contends here is deficient. Had the FEC not acted on such a petition, CREW could have sought review of that decision in this Court.

But CREW did not file a rulemaking petition. Instead, CREW asks this Court to use the enforcement process to repeal a 37-year-old regulation – widely relied on by advocacy groups across the ideological spectrum – without any notice to or comment by the public, and largely based on CREW's unilateral assertions about recent campaign finance developments. In so doing, CREW asks this Court to retroactively apply a new legal rule to subject Crossroads Grassroots Policy Strategies ("CGPS") to the burdens of enforcement and sanction, even though CGPS fully complied with and relied upon a longstanding FEC regulation and Commission practice.

This Court applies a highly deferential standard of review in deciding whether the FEC's dismissal of an administrative complaint was "contrary to law." 52 U.S.C. § 30109(a)(8)(C). The career staff in the FEC's Office of General Counsel and the Commission, through its controlling bloc of commissioners, confirmed that CGPS complied with the FEC's IE reporting

regulation. On such a clear factual record, this Court must defer to the agency's more-than-reasonable determination to dismiss this matter and reject CREW's Claim One here.

There are many legal and policy reasons why this Court should refuse CREW's two follow-on requests to substitute this enforcement matter for an administrative rulemaking. Most fundamental, however, is CGPS's compliance with the Commission's controlling regulation that has been in effect for decades. By law, that compliance precludes further enforcement, regardless of whether the regulation is deemed valid. This moots CREW's Claims Two and Three, which present (mistaken) statutory challenges to the validity of the regulation and do not affect the lawfulness of the FEC's dismissal of the administrative complaint.

Even if the Court were to consider CREW's challenges to the regulation in the context of this ongoing litigation, the ultimate result would be the same. The regulation is consistent with the statutory text and is a rational means of implementing congressional intent, doubly so given the great deference owed to the FEC on such matters. For their part, CREW's baseless complaints about the rulemaking procedures followed by the Commission 37 years ago come too late. CREW's challenges to the regulation thus would fail if they mattered here, which they do not.

SUMMARY OF THE ARGUMENT

CREW's Claim One alleges CGPS failed to comply with 11 C.F.R. § 109.10(e)(1)(vi), which required CGPS to report its spending for each express advocacy IE and identify any contributions to CGPS "for the purpose of furthering the reported independent expenditure." CREW's FEC submission asserted that CGPS received contributions intended for political purposes or to assist certain candidates. But CREW offered no evidence that any such funds were earmarked for a particular IE, or even for IEs generally. To the contrary, the administrative record before the FEC made clear that the donors at issue left CGPS free to spend as it chose,

whether for issue advocacy, IEs, polling, voter registration and get-out-the-vote drives, or other activities. Under the plain language of the Commission's regulation as it has been construed for 37 years, such donations are not "for the purpose of furthering the reported independent expenditure." *Id.* (emphasis added). Thus, the FEC's professional staff appropriately found no FECA violation on these facts, and the controlling commissioners reasonably accepted that conclusion. Indeed, even the commissioners who voted to pursue enforcement did so on the basis of an alternative theory not raised in CREW's administrative complaint, and did not articulate any disagreements with their colleagues' or the staff's reasoning for dismissing.

By statute and basic fairness, CGPS's compliance with the Commission's regulation protected it from any enforcement proceeding and made dismissal of the administrative complaint mandatory. Recognizing the risk that uncertain laws may impermissibly chill core First Amendment speech, the FECA provides the following explicit, statutory "protection for good faith reliance upon rules or regulations":

> Notwithstanding any other provision of law, 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 or by chapter 95 or chapter 96 of title 26.

52 U.S.C. § 30111(e). Moreover, even if there were no specific statutory reliance provision, there is abundant authority that principles of fair notice, which have particular force in protecting the exercise of core First Amendment rights, preclude enforcement against a respondent who complied with applicable agency regulations and guidance. If CREW wants to challenge the FEC regulation, it must use rulemaking procedures of prospective effect, which it has not done.

CREW's complaint before this Court suffers from a wide range of other flaws, most notably that CREW failed to exhaust its administrative remedies and, in large part, abandoned its

present Claims Two and Three in the FEC proceedings below. Each of CREW's five counts in its administrative complaint asserted that CGPS failed to report earmarked contributions as required by the Commission's regulation, and no count alleged that CGPS failed to identify donors under the broadest level of donor reporting CREW now claims FECA section 30104(c)(1) requires. This matters. The FECA requires any enforcement action be taken only "on the basis of the complaint," and judicial review of complaint-generated matters must be limited to "the original complaint." *Id.* § 30109(a)(1), (a)(8)(C). Because CREW's administrative complaint failed to raise these issues against CGPS, CREW's present Claims Two and Three are not properly before this Court.

CREW's Claim Two, which facially challenges the regulation's validity and not merely its application to this case, also is time-barred. Furthermore, CREW lacks standing to bring Claim Two. Its claimed standing relies on the theory that further enforcement in this matter could compel CGPS to identify its donors, and that CREW would find this information useful. But even if this Court were to find the FEC's regulation invalid, CGPS's compliance with the regulation still is an absolute bar against enforcement. Therefore, CREW's purported injury (that it lacks information about CGPS's donors) is not redressable – a prerequisite for standing.

CREW's Claim Three, which challenges the FEC's dismissal of any claim that CGPS may have violated FECA section 30104(c)(1), also fails to meet the high bar for judicial deference to agencies' exercise of their prosecutorial discretion. This is especially so where the agency's dismissal was based not on any claim that CREW specifically asserted against CGPS, but rather on a theoretical issue that FEC staff incorporated into their analysis *sua sponte*.

Finally, even if the Court were to reach the merits of CREW's Claims Two and Three, and it should not, each claim would fail. CREW's present Claim Two is that Section

30104(c)(2)(C)'s requirement to identify support for "an independent expenditure" plainly means "any" independent expenditure, such that contributions earmarked for unknown future independent advocacy trigger reporting. CREW does not explain, however, why Congress did not say "any" if that is what it meant. CREW does not grapple with relevant authority that "an" often is equivalent to "one." CREW does not mention, much less explain away, the fact that Congress made no objection when the FEC submitted the regulation for congressional review in 1980 – which is strong evidence that the Commission accurately discerned congressional intent. CREW also fails to adequately rebut *Van Hollen v. FEC*, 811 F.3d 486 (D.C. Cir. 2016), which recently approved the FEC's parallel earmarking-based reporting regime for electioneering communications, and that was modeled on the IE regulation challenged here. Nor does CREW give fair weight to the FEC's interpretative leeway under *Chevron.*

CREW's present Claim Three rests on FECA section 30104(c)(1), the provision CREW failed to prosecute in the underlying administrative proceeding. CREW now reads that section to require any entity that reports any IE – even one concerning a narrow topic in an isolated area of the country – to report all "contributions made for the purpose of influencing a federal election generally," CREW Motion for Summary Judgment ("MSJ") Brief (Doc 27) at 34, 49, even if a contribution had absolutely no relation to the reported IE or election at issue. Not only is this an erroneous reading of the statute's substantive requirement, but as *Van Hollen* recognized, CREW's approach would burden the reporting entity's speech, while doing more to obscure than illuminate who is actually supporting any reported advocacy.

Congress never intended the FECA to require speakers to convey such misleading information. Back in 1980, the FEC understood Congress to create only a limited reporting burden – those who funded express advocacy IEs for or against identified federal candidates

were to identify themselves, and financial support earmarked for a specific IE had to be reported. Conversely, the FEC understood Congress not to require reporting of those funders who generally supported a reporting entity but did not link their support to particular express advocacy public communications. The FEC could have confidence in its assessment because the law was based on the agency's own legislative recommendation to Congress.

The FEC embodied that understanding in its implementing regulation, and Congress expressed no concern in the statutory review process established precisely to identify regulatory deviations from legislative intent. The Commission's understanding was reasonable at the time and was arguably compelled by the First Amendment. Thus, when the FEC later implemented a parallel reporting regime for electioneering communications, it similarly narrowed the scope of contributor identification. If CREW believes more recent campaign finance experience shows circumstances have changed, it must, at minimum, squarely present that claim and supporting data to the FEC in a rulemaking proceeding that allows for public comment and a broad-based evaluation of recent data. What CREW cannot be permitted to do is hijack an administrative enforcement proceeding in which CGPS's compliance with the Commission's governing regulation, whether valid or invalid, requires dismissal.

STATEMENT OF FACTS

I. CROSSROADS GRASSROOTS POLICY STRATEGIES

CGPS was founded in 2010 with the mission of educating, equipping, and engaging American citizens to take action on important economic and legislative issues. The Internal Revenue Service ("IRS") has issued a determination letter to CGPS recognizing it as a Section 501(c)(4) social welfare organization under the Internal Revenue Code ("IRC"). Like many 501(c)(4) entities, CGPS has a legally distinct affiliated entity, American Crossroads, which is organized as a political organization under Section 527 of the IRC and is registered with the FEC

as a "super PAC." *See* IRS, 2000 Exempt Orgs. Continuing Professional Educ. Text, Affiliations Among Political, Lobbying, and Educational Organizations, *available at* https://www.irs.gov/pub/irs-tege/eotopics00.pdf.

CGPS works to advance its mission by conducting issue research, holding events with policymakers, and engaging and inviting citizens to participate in grassroots advocacy on pending legislative issues through advertising, mailings, e-mails, and web-based advocacy tools. Many of the public policy issues that 501(c)(4) entities like CGPS seek to affect are largely determined by elected officials. Not surprisingly, therefore, some of CGPS's public communications have advocated for or against elected officials and candidates based on whether their positions are favorable or inimical to CGPS's preferred public policy outcomes. *See* IRS, Rev. Ruls. 2004-6 and 1981-95; 26 C.F.R. § 1.501(c)(4)-1(a)(2).

II. INDEPENDENT EXPENDITURES UNDER THE FECA AND FEC REGULATIONS

When public communications "expressly advocate" the election or defeat of a candidate and are not coordinated with any candidate or political party, they are regulated as "independent expenditures" ("IEs") under the FECA. 52 U.S.C. § 30101(17). "To insure that the reach of [the IE reporting requirement] is not impermissibly broad," the Supreme Court construes "express advocacy" narrowly only to cover language "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Buckley*, 424 U.S. at 80, 44 n.52, and 80 n.108; *see also* 11 C.F.R. § 100.22 (defining "expressly advocating").

IEs are subject to reporting requirements. As the judiciary has recognized, *see FEC v. Furgatch*, 807 F.2d 857, 859 n.2 (9th Cir. 1987), FECA section 30104(c)(1) – i.e., the "Coverage Provision" – defines the scope of who is covered by the IE reporting requirement, while section 30104(c)(2)(C) – i.e., the "Content Provision" – defines, with respect to contributor information,

the content of what is required to be reported. In line with that structure, the FEC has promulgated comprehensive and detailed regulations for when and how IE reports must be filed and what those reports must include. *See* 11 C.F.R. § 109.10. Of particular relevance here, the Content Provision requires IE reports to include "[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." *Id.* § 109.10(e)(1)(vi).

Under the FECA, the FEC also has the authority "to develop such prescribed forms . . . as are necessary to carry out the provisions of this Act." 52 U.S.C. § 30107(a)(8). The Commission has prescribed Form 5 for persons other than political committees to use to report their IEs. FEC, Form 5 (rev. Sept. 2013), *at* https://transition.fec.gov/pdf/forms/fecfrm5.pdf. The instructions for Form 5 require filers to report the sources of "each contribution over $200 that was made for the purpose of furthering the independent expenditures" being reported. FEC, Instructions for Preparing FEC Form 5 (rev. Sept. 2013), *at* https://www.fec.gov/resources/cms-content/documents/fecfrm5i.pdf. The reporting forms are submitted to Congress for review prior to taking effect. *See* 52 U.S.C. § 30111(d)(1).

III. HISTORY OF THE FEC'S IE REGULATION

A. Congress Enacts the FEC's IE Recommendations in Its 1979 FECA Amendments

In the wake of *Buckley*, Congress enacted a number of significant reforms to the FECA, including provisions affecting the reporting of IEs. *See* Pub. L. 94–283 (1976). Between 1976 and 1979, the FECA required "[e]very person (other than a political committee or candidate) who makes contributions or independent expenditures expressly advocating the election or defeat of a clearly identified candidate" to file a statement with the FEC containing certain contributor and expenditure information, as appropriate. *Id.* (codified as 2 U.S.C. § 434(e)(1), and later

renumbered as 52 U.S.C. § 434(c)(1)). Paragraph (2) of the same subsection required two specific pieces of information be included in these IE reports: (A) information about the expenditure (e.g., which candidate was supported or opposed); and (B) a certification that the expenditure was made independent of a candidate's campaign. *Id.*

"During implementation of the 1976 Amendments, the FEC kept a continually updated list of apparent statutory omissions, inadequacies and other problems" with the law, which was converted into an annual set of legislative recommendations to Congress. *Legislative History of Federal Election Campaign Act Amendments of 1979* at 10 (1983) ("1979 FECA History"), *available at* http://classic.fec.gov/pdf/legislative_hist/legislative_history_1979.pdf. In July 1979, the Senate Committee on Rules and Administration convened a hearing to consider, in the words of Chairman Claiborne Pell, "some long-overdue amendments to the [FECA]." *Id.* at 7. Chief among them were the FEC's legislative recommendations, which built upon recent Commission experience and made "valuable suggestions for simplifying the [FECA]'s reporting requirements and improving its administration." *Id.* The FEC's Chairman and Vice-Chairman testified at the Committee hearing and were accompanied by the Commission's Staff Director and General Counsel. *Id.* at 8, 20, 39. The FEC's representatives pledged their agency's readiness to assist the Committee and its staff in revising the FECA and remained substantively engaged with the Committee following the hearing. *Id.* at 10, 150-60.

As relevant here, the FEC recommended abolishing the requirement for contributors to file their own reports if they gave to sponsors of IEs, and instead requiring that "persons who file independent expenditure reports . . . report the sources of any contributions in excess of $100 which is donated with a view toward bringing about an independent expenditure." *Id.* at 25. Following the hearing, Committee staff circulated draft legislative language that included

revisions to the FECA's IE reporting provisions. *See id.* at 62-100, 108-142, 451. The language required persons filing IE reports to identify "each person who has made a contribution of more than $200 to the person filing such statement, which was made for the purpose of furthering an independent expenditure." *Id.* at 78, 123. This gloss on the overall IE reporting statute was incorporated as subsection (C) to 2 U.S.C. § 434(e)(2).[1] The accompanying *Summary of Committee Working Draft* confirmed that this change was an "FEC legislative recommendation," *id.* at 101, 103, 145, that required "the person who receives the contributions, and subsequently makes the independent expenditure, [to] report having received the contribution to the Commission." *Id.* at 103, 145 (emphasis added).

The Committee approved the draft language unanimously and reported S. 1757 favorably to the Senate floor. *See id.* at 450, 463. The Committee report accompanying the Senate bill explained the rationale and import of the IE-related changes as follows:

- "[R]eporting requirements under the existing act have [generally] been viewed by most reporting entities as unduly burdensome [and] going beyond legitimate disclosure to actively discourage participating in the electoral process";
- The existing independent expenditure reporting requirements, in particular, were "burdens[ome]";
- The Senate bill, S. 1757, "includes certain legislative recommendations from the Federal Election Commission's 1978 annual report, which are intended to remedy statutory omissions and address other technical problems in the operation of the current law"; and
- The proposed law would require "the person who receives the contribution, and subsequently makes the independent expenditure, [to] report having received that

[1] The statute is reproduced in its entirety on pages 38-40, *infra*.

> contribution to the Commission."

Id. at 449, 458 (emphasis added).

Materially similar IE reporting requirements were incorporated into the House's campaign finance legislation, H.R. Res. 5010, which was introduced shortly after the Senate hearing and ultimately signed into law by President Carter on January 8, 1980. *See id.* at 187, 558, 573. In urging his colleagues to approve the final bill, Chairman Pell explained the IE-related provisions on the Senate floor as follows:

> Reporting requirements in the bill generally simplify existing law by reducing the amount of information to be included in reports. . . . The reporting threshold for independent expenditures is also raised to $250 and only the person making the independent expenditure must report this.

Id. at 549.

Pursuant to a special congressional review provision, *see infra* at 13, H.R. Res. 5010 also required the FEC to "transmit to the Congress proposed rules and regulations necessary for the purpose of implementing the [law]" prior to February 29, 1980. *Id.* at 562. This deadline was barely more than 50 days after the bill was signed into law. *See id.* at 562, 573.

B. The FEC Implements the Statutory Language

The FEC moved quickly on the implementing regulations. On January 4, 1980, the FEC's Staff Director circulated a memorandum to the Commission, noting that the legislative "changes themselves present relatively few novel problems or difficult questions of statutory interpretation." AR1002. Given the short deadline set by Congress, the Staff Director recommended including an earlier-than-normal draft of the regulations in the Notice of Proposed Rulemaking ("NPRM") to "provide a vehicle for assuring that all concerned [including Commission staff] can focus on the central problems of implementation." AR1003.

The Commission formally took up the impact of the new law at its January 10 and 17

meetings. AR1025-32, 1048-52. On January 23, the NPRM was published in the Federal Register. AR1057. Consistent with the legislative history, the NPRM explained that the "proposed regulations would, among other things, reduce recordkeeping and reporting requirements." *Id.* The NPRM also advised potential commenters that "the draft regulations that are being published in this notice . . . have not been approved by the Commission." *Id.*

On January 30 and 31, the FEC called a special meeting to conduct a "section-by-section review of the proposed changes for 11 CFR." AR1051, AR1083. Shortly afterwards, the Commission received feedback on the NPRM, with only one commenter addressing the IE reporting requirements. In addition to suggesting an edit to the IE rules, which the Commission implemented, the commenter praised the NPRM's language as going "a long way to reducing and simplifying the recordkeeping and reporting requirements of the [FECA]," and observing that Congress had "accepted the logic" inherent in the FEC's legislative recommendations. AR 1228. Neither this commenter, nor anyone else, claimed that the Commission had overlooked a separate, broader reporting obligation under 2 U.S.C. § 434(c)(1).

On February 19, Commission staff circulated "proposed regulations" to the FEC commissioners. AR1337. The accompanying memorandum explained that the changes from the staff's NPRM language were the "result of the Commission's discussion of the proposed regulations" over the past month. *Id.* The proposed regulations first explained (in section 104.4) that Part 109 was meant to comprehensively address all of the IE reporting requirements applicable to persons other than political committees. AR1416. Section 109.2 was then relabeled "Reporting of Independent Expenditures by Persons Other Than a Political Committee" and included a few adjustments to the NPRM's preliminary regulatory text. AR1444. Most importantly, the preliminary contributor reporting requirement changed from

identifying each person whose contribution "was made for the purpose of furthering an independent expenditure" to each person whose "contribution was made for the purpose of furthering the reported independent expenditure." *Compare* AR1075 *with* AR1444.

The Commission voted to adopt these proposed regulations at its February 21 meeting. AR1494. The FEC published its explanation and justification for the new rules on March 7, 1980, *see* AR1496-1542, and explained the IE contributor reporting provision as follows:

> 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 (emphasis added). Thus, the regulation implemented both the Coverage and Content Provisions that CREW cites here.

C. Congress Did Not Use Its Special Oversight Powers to Reject the FEC Rule, and the FEC Has Adhered to the Approved Regulation for 37 Years.

The FECA requires that all proposed FEC regulations be transmitted to Congress for review before they take legal effect. This special congressional review process had been used several times before the agency's 1980 IE reporting rulemaking, including just a few months before to disapprove the FEC's candidate debates regulation. *See* S. Res. 236, 96th Cong. (1979).[2]

Consistent with the statutory deadline, the FEC's IE reporting regulations were transmitted to Congress on February 28, 1980. AR1496. Congress did not disapprove the regulations during the requisite 15-day legislative review period, and the regulations took effect on April 1, 1980. AR1543, 1553. No party subsequently challenged the regulations within the six-year statute of limitations period available for doing so. *See* 28 U.S.C. § 2401(a).

[2] The House and Senate rejected FEC regulations on several earlier occasions as well. *See* H.R. Res. 780, 94th Cong. (1975); S. Res. 275, 94th Cong. (1975).

Over the past 37 years, the Commission and its staff have consistently interpreted the IE contributor reporting requirement under the statute and the FEC's regulations. *See* FEC, Campaign Guide for Corporations and Labor Organizations (Jan. 2007), *infra* at 28; FEC, Campaign Guide for Corporations and Labor Organizations (Aug. 1997) at 24 (Exh. A) (instructing IE reports to identify "each person who contributed more than $200 for the purpose of making the independent expenditures" being reported); FEC Matter Under Review ("MUR") 6696, First General Counsel's Report, *infra* at 21.

IV. THE FEC IMPLEMENTS PARALLEL EARMARKING-BASED DONOR REPORTING FOR ELECTIONEERING COMMUNICATIONS.

In 2002, Congress passed, and the President signed, the Bipartisan Campaign Reform Act ("BCRA"), amending the FECA. Pub. L. 107–155. Of relevance here, BCRA regulates certain speech in close proximity to elections that does not contain express advocacy in a manner similar to how the FECA regulates IEs. However, Congress did not attempt to reach this speech by expanding the definition of express advocacy. Instead, it adopted a parallel system to regulate so-called "electioneering communications" ("ECs"), defined in terms of timing, reference to candidates, and distribution media. *See* 52 U.S.C. § 30104(f)(3). Among other things, BCRA required reporting of some funding sources for ECs. *Id.* § 30104(f)(2)(F).

As amended by BCRA, the FECA requires sponsors of ECs that do not use a segregated bank account to report "all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement" during the calendar year in which the report is filed. 52 U.S.C. § 30104(f)(2)(F). However, the Commission's implementing regulation narrowed the EC reports' donor identification requirement due to concerns over "the significant burden" on corporations (including non-profit corporations) and labor unions who might have to report "the identities of the vast numbers of customers, investors, or members, who have provided funds for

purposes entirely unrelated to the making of ECs." FEC, Explanation and Justification for Final Rule on Electioneering Communications (*hereinafter*, "ECs E&J"), 72 Fed. Reg. 72,899 (Dec. 26, 2007). Specifically, the FEC's EC reporting regulation requires only the identification of persons who gave "for the purpose of furthering electioneering communications." 11 C.F.R. § 104.20(c)(9). The Commission explained that the relevant language from the EC provision was "drawn from the reporting requirements that apply to independent expenditures" and cited both 2 U.S.C. § 434(c)(2)(C) (52 U.S.C. § 30104(c)(2)(C)) and 11 C.F.R. § 109.10(e)(1)(vi), the IE reporting regulation at issue here.[3] ECs E&J, 72 Fed. Reg. at 72,911 n.22. The D.C. Circuit recently upheld the FEC's EC donor identification regulation as rational and consistent with legislative intent. *Van Hollen*, 811 F.3d 486.

V. THE AUGUST 30, 2012, EVENT AND CGPS'S 2012 ACTIVITIES

On August 30, 2012, American Crossroads hosted an informational meeting in Tampa to provide an update to various persons interested in the super PAC's activities.[4] While attendees were orally encouraged to support the work of American Crossroads, and were provided information on how they could contribute to the organization (as well as given separate donor information sheets for CGPS), the event was not specifically structured as a "fundraiser" (e.g., no stipulated ticket price, no listed donor "hosts," no demand for specific commitments), as CREW

[3] In an enforcement matter, the controlling group of FEC commissioners (*see FEC v. NRSC*, 966 F.2d 1471, 1476 (D.C. Cir. 1992)) determined that the EC reporting regulation is parallel to the IE reporting regulation, requiring the identification of donors "only if such donations are made for the purpose of furthering the electioneering communication that is the subject of the report." FEC Matter Under Review ("MUR") 6002 (Freedom's Watch), Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn at 5, *available at* http://eqs.fec.gov/eqsdocsMUR/10044274536.pdf.

[4] CREW's MSJ Brief (Doc 27 at 20) alleges "Crossroads GPS officials" took certain actions at this meeting under the name of "American Crossroads," which "they evidently used [] to mean both American Crossroads and Crossroads GPS." CREW cites nothing more than the unsubstantiated allegations in its own administrative complaint and complaint for judicial review for these naked claims, and there is no evidence in the administrative record to support these contentions.

has asserted. *See* Rove Aff. ¶ 2, AR094; CREW MSJ Brief (Doc 27) at 18; CGPS Answer ¶ 49. [5]

As part of the informational update, American Crossroads showed two independent expenditure ads that it had already aired and paid for earlier in the year, as well as another focus group advertisement not intended for public distribution. CGPS Resp. to Admin. Compl., AR077-78. American Crossroads also showed eleven of CGPS's ads, also already aired and paid for. *Id.*[6] Notwithstanding CREW's mischaracterization of all of these ads as "independent expenditures," ten of the eleven CGPS ads shown were not IEs and were not reported to the FEC as IEs because they did not contain express advocacy. *Compare* CREW MSJ Brief (Doc 27) at 45 *with* CGPS Resp. to Admin. Compl., AR077-78.[7] Moreover, while CREW mischaracterizes CGPS's response as having "admitted" these ads were "'examples' of the activities raised funds would support," in fact neither American Crossroads nor CGPS solicited attendees to help fund the specific ads shown, or even substantially similar ads. *Compare* CREW MSJ Brief (Doc 27) at 45 and 19 *with* CGPS Resp. to Admin. Compl., AR078 and CGPS Answer ¶ 47.[8] Rather, the purpose of showing the ads was merely to demonstrate the quality and range of the two entities'

[5] CREW also contends that, "by failure to respond," CGPS admitted CREW's allegation that "[CGPS] held a fundraiser . . . in conjunction with American Crossroads." CREW MSJ Brief (Doc 27) at 18. In fact, CGPS denied it "held [the] fundraiser" in question. CGPS Answer ¶ 40.

[6] YouTube links to the ads were provided in CGPS's response to the administrative complaint. AR077-78.

[7] CGPS's "Investigation" ad, which opposed Nevada U.S. Senate candidate Shelley Berkley, was the only IE among the eleven CGPS ads shown at the August 30 meeting, and an IE report was properly filed with the FEC for that ad. *See* CGPS Resp. to Admin. Compl., AR078; *see also* AR151, 153. In its administrative complaint, CREW also: (1) made conclusory allegations about "independent expenditures broadcasting the advertisements shown at the [August 30 meeting] or broadcasting other ads in the Ohio, Virginia, Montana, and Nevada Senate races"; and (2) cited the IE reporting requirements in alleging CGPS failed to report donors who gave "for the purpose of broadcasting the advertisements shown at the August 30, 2012 [meeting] or broadcasting other ads in those races." CREW Amend. Admin. Compl. ¶¶ 59, 62-64, AR113-14 (emphasis added); *see also* CREW MSJ Brief (Doc 27) at 1 (alleging the FEC made a "finding" that CGPS's work "primarily consist[ed] of disseminating explicit campaign ads."). Contrary to CREW's contention, the FEC never determined whether the ads shown at the August 30 meeting were IEs. First General Counsel's Report, AR174-75 (discussing the "television advertisements shown at" the event and "those communications").

[8] CGPS also has not admitted that "attendees were solicited for contributions . . . to broadcast advertisements like those the attendees had just watched," as CREW erroneously contends. *Compare* CREW MSJ Brief (Doc 27) at 20 *with* CGPS Answer ¶ 49.

activities, and to add excitement to an otherwise straightforward political briefing.

During the August 30 meeting, Karl Rove, an unpaid adviser to American Crossroads and CGPS, also recounted a $3 million matching challenge offered by a donor for CGPS's activities in Ohio. Mr. Rove's conversation with that donor did not entail: (1) "any discussion of any particular television advertisements, or television advertisements in general"; (2) any specific details "of any actual or hypothetical television advertisements"; (3) any "specific efforts"; (4) "any specific methods of communications"; (5) "any discussion of independent expenditures"; or (6) the spending of funds "in any particular manner or on any particular or specific projects or efforts." Rove Aff. ¶¶ 3-10, AR094-95.

Later in 2012, and relevant to this matter, CGPS sponsored and properly reported 32 IEs disseminated in connection with the U.S. Senate races in Montana, Nevada, Ohio, and Virginia. CREW Am. Admin. Compl. ¶ 60, AR113; Compl. ¶ 53. The donor whose $3 million matching challenge Mr. Rove mentioned at the August 30 meeting ended up making a larger contribution "that was not in any way earmarked for any particular use." Rove Aff. ¶ 14, AR095.

VI. FEC ENFORCEMENT

Upon receiving a written complaint alleging a FECA violation, the FEC must give the respondent notice and the opportunity to file a written response demonstrating that "no action should be taken . . . on the basis of the complaint." 52 U.S.C. § 30109(a)(1). If, on the basis of the complaint and the response, at least four commissioners find there is "reason to believe that a person has committed, or is about to commit," a violation, the FEC must notify the respondent and may open an investigation. *Id.* § 30109(a)(2). The FECA and the FEC's regulations and publications spell out subsequent enforcement procedures.

The FEC shall find "reason to believe" only "where the available evidence in the matter is at least sufficient to warrant conducting an investigation, and where the seriousness of the

alleged violation warrants either further investigation or immediate conciliation." FEC, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545 (Mar. 16, 2007). That standard is not met unless all the facts justify "a reasonable inference that a violation has occurred." *Id.* at 12,546. And "evidence provided in the response" may defeat inferences that otherwise might be drawn. FEC MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Comm.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 2 (internal citations omitted), *available at* http://eqs.fec.gov/eqsdocsMUR/0000263B.pdf.

VII. THE UNDERLYING FEC ADMINISTRATIVE PROCEEDINGS

CREW filed an administrative complaint with the FEC on November 15, 2012, in connection with CGPS's 2012 IEs in Montana, Nevada, Ohio, and Virginia and the August 30, 2012, meeting. AR001-018. CREW filed an amended complaint on April 24, 2013, which substituted the individual named complainant and narrowed CREW's legal theory in one material respect (*see* note 12, *infra*). AR098-117; CREW MSJ Brief (Doc 27) at 23.

Regarding CGPS's FEC reports for the Ohio IEs, CREW's amended complaint alleged:

(1) CGPS violated 2 U.S.C. § 434 (now 52 U.S.C. § 30104) and 11 C.F.R. § 109.10(b)-(e) by failing to identify the donor who offered the $3 million matching challenge, which CREW alleged "was for the purpose of furthering those independent expenditures" ("Count I"), CREW Am. Admin. Compl. ¶ 44, AR109 (emphasis added);

(2) CGPS violated 2 U.S.C. § 434 (52 U.S.C. § 30104) and 11 C.F.R. § 109.10(b)-(e) by failing to identify the donors who gave in response to the matching challenge "for the purpose of furthering the independent expenditures CGPS made in the Ohio Senate race" ("Count II"), *id.* ¶¶ 46, 50, AR110 (emphasis added); and

(3) CGPS, its officers, and Mr. Rove violated 18 U.S.C. § 371 (criminal conspiracy to

defraud the federal government) by failing to report the donor who made the $3 million matching donation, and the donors who responded to the matching challenge, "for the purpose of furthering the independent expenditures [CGPS] made in the Ohio Senate race" ("Count III"), *id.* ¶¶ 52-53, AR111 (emphasis added).[9]

Regarding the August 30 meeting, CREW's amended complaint further alleged that:

(4) Attendees at the meeting gave "contributions" to CGPS "with the intention that the money be spent on independent expenditures broadcasting the advertisements shown at the fundraiser or broadcasting other ads in the Ohio, Virginia, Montana, and Nevada Senate races," and that CGPS's IE reports failed to identify "any of the persons who made contributions for the purpose of broadcasting the advertisements" in violation of 2 U.S.C. § 434 (52 U.S.C. § 30104) and 11 C.F.R. §§ 109.10(b)-(e) ("Count IV"), *id.* ¶¶ 59-60, AR113 (emphasis added); and

(5) CGPS, its officers, and Mr. Rove violated 18 U.S.C. § 371 by failing to "identify the persons who made contributions for the purpose of broadcasting the advertisements shown at the August 30, 2012 [meeting] or broadcasting other ads in those races" ("Count V"), *id.* ¶ 62, AR113 (emphasis added).

Notably, CREW's administrative complaint did not claim: (a) that CGPS violated 52 U.S.C. § 30104(c)(1) by failing to identify on its IE reports "all contributors" who had given more than $200 to CGPS during the calendar year; or (b) that the FEC's IE reporting regulation was invalid. *See* CREW Am. Admin. Compl., AR098-117, *compare id. with* CREW MSJ Brief (Doc 27) at 28-40, 42 and Compl. ¶ 124 and Requested Relief ¶ 3.[10]

[9] CREW abandoned its 18 U.S.C. § 371 criminal conspiracy allegations in its complaint for judicial review. Even if those allegations were properly before this Court, they are without merit to the same extent the underlying alleged violations of the FEC regulation and the FECA are without merit.

[10] While CREW recited in passing the language from 52 U.S.C. § 30101(c)(1), CREW did not specifically allege that CGPS had violated this provision, whether by reference to the provision's statutory designation or its substance. *Compare* CREW Am. Admin. Compl. ¶ 14, AR101 with *id.* ¶¶ 40-67, AR108-115.

CGPS filed a response with the FEC refuting all of the allegations in CREW's administrative complaint and not addressing any additional allegations omitted in the complaint. AR073-095.[11] After considering CREW's administrative complaint and CGPS's response, the FEC's Office of General Counsel issued its "First General Counsel's Report" ("FGCR"), recommending that the Commission find no reason to believe that CGPS had violated 2 U.S.C. § 434(c)(2) (52 U.S.C. § 30104(c)(2)) and 11 C.F.R. § 109.10(e)(1)(vi). AR165.

According to the FGCR, even if the CGPS donor who made the $3 million matching challenge had a "general purpose to support an organization in its efforts to further the election of a particular federal candidate" (i.e., in Ohio), that "does not itself indicate that the donor's purpose was to further 'the reported independent expenditure' – the requisite regulatory test," or that other donors responding to the matching challenge had given for such purpose. AR174. With respect to the IEs in other states addressed at the August 30 meeting, the FGCR endorsed CGPS's explanation that "it did not receive contributions for the purpose of furthering those communications" shown at the meeting because those communications had already been aired and fully paid for, and another one had never aired. AR175. "Consequently, there is no basis to conclude on these facts that [CGPS] received contributions from individuals . . . for the purpose of furthering [CGPS's] reported independent expenditures" in those other states. *Id.*

As to whether FECA section 30104(c)(1) required a broader level of contributor identification than the Commission's IE reporting regulation, the FEC's staff perceived no clear claim in CREW's administrative complaint to this effect. Rather, the staff addressed this issue in the hypothetical: "[T]o the extent the question is presented on these facts, we recommend that the

[11] Because CREW's amended administrative complaint contained no new substantive allegations, CGPS responded to the amended complaint merely by reiterating its previous response. AR162-63.

Commission dismiss in the exercise of prosecutorial discretion" any allegation involving section 30104(c)(1). AR165-66.[12] The staff cited a prior matter in which the Commission dismissed a claim that the FECA compelled broader IE reporting than the FEC's regulation required, AR172-73, and reasoned that CGPS could raise "equitable concerns" and "fair notice" claims "if the Commission attempted to impose liability under Section [30104](c)(1)." AR175-76. Accordingly, the staff recommended a dismissal on this hypothetical theory in the Commission's prosecutorial discretion. AR176 (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).

The commissioners divided 3-3 on whether to pursue or, as recommended by the FGCR, dismiss the administrative complaint. AR193-194. Because the FECA requires an affirmative vote of four commissioners to proceed in an enforcement action, this vote constituted a formal Commission decision not to proceed that resulted in dismissal of the administrative complaint. *See* 52 U.S.C. § 30106(c).

Due to the 3-3 vote, the commissioners who voted to dismiss CREW's administrative complaint "constitute a controlling group for purposes of the decision," and "their rationale necessarily states the agency's reasons for acting as it did" on review. *NRSC*, 966 F.2d at 1476. More specifically, because these commissioners followed the recommendations in the FGCR, they did not issue their own statement of reasons. Therefore, the FGCR "provides the basis for the Commission's action." *FEC v. DSCC*, 454 U.S. 27, 38 n.19 (1981).

Two of the dissenting commissioners who disagreed with the Commission's dismissal of the administrative complaint wrote a statement of reasons supporting their own theory that CGPS

[12] Footnote 60 of the FGCR merely characterizes CREW's original administrative complaint as "reciting language of disclosure obligations under Sections 434(c)(1) and (c)(2)," but did not suggest that CREW was alleging CGPS had violated the latter. AR176. Moreover, CREW's amended administrative complaint, which is the one that should have governed the Commission's decision and the one that is properly before this Court, revised CREW's theory to focus specifically on the contributor reporting requirements under subparagraph (c)(2). *Compare* CREW Am. Admin. Compl. at 5 n.1, AR102 *with* CREW Admin. Compl. at 4 n.1, AR004.

should have been regulated as a political committee. AR198-99. Notably, however, no commissioner disputed any of the staff's recommendations or reasoning with respect to dismissal of the IE reporting claim. *See id.*

Dissatisfied with the FEC's resolution of the matter, CREW filed the instant complaint for judicial review under 52 U.S.C. § 30109(a)(8).

ARGUMENT

I. STANDARD OF REVIEW

Although the FECA permits some review of the FEC's dismissal of a complaint, that judicial scrutiny must be "[h]ighly deferential," *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005), and "limited" in its breadth, *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 315 (D.C. Cir. 2015). To that end, "the FEC is entitled, and indeed required, to make subjective evaluation of claims" under the "reason to believe" standard, and "to weigh the evidence before it and make credibility determinations in reaching its ultimate decision." *Buchanan v. FEC*, 112 F. Supp. 2d 58, 72 (D.D.C. 2000) (quoting and citing *Orloski v. FEC*, 795 F.2d 156, 168 (D.C. Cir. 1986)). In this respect, the Commission's role is not subject to the constraints a district court faces in deciding a motion to dismiss a civil complaint. Rather, it is more analogous to a decision by a prosecutor on whether to present a matter to a grand jury.

Courts "may set aside the FEC's dismissal of a complaint only if its action was 'contrary to law,' . . . e.g., 'arbitrary or capricious, or an abuse of discretion,'" *Hagelin*, 411 F.3d at 242, and "judges . . . owe large deference to a Commission disposition so long as the FEC (or its General Counsel) supplied reasonable grounds for reaching (or recommending) the disposition," *DCCC v. FEC*, 831 F.2d 1131, 1134 (D.C. Cir. 1987). "As long as the FEC presents a coherent and reasonable explanation of that decision, it must be upheld." *Buchanan v. FEC*, 112 F. Supp. 2d 58, 72 (D.D.C. 2000) (citing *Carter/Mondale Presidential Comm., Inc. v. FEC*, 775 F.2d

1182, 1185 (D.C. Cir. 1985)).

Courts also apply an "extremely deferential standard" of review when the Commission dismisses a case in its prosecutorial discretion. *CREW v. FEC*, 236 F. Supp. 3d 378, 390 (D.D.C. 2017) (quoting *LaBotz v. FEC*, 61 F. Supp. 3d 21, 33 (D.D.C. 2014)). This "is an area where the decision is 'generally committed to an agency's absolute discretion,'" since it "is not for the judiciary to ride roughshod over agency procedures or sit as a board of superintend[e]nce directing where limited agency resources will be devoted." *Id.* (quoting *LaBotz*, 61 F. Supp. 3d at 33-34 and *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986)) (emphasis added).

In all instances, the "burden of proof is on . . . the party challenging agency action." *Tierney v. FEC*, 538 F. Supp. 2d 99, 103 (D.D.C. 2008), *aff'd*, No. 08-5134, 2008 WL 5516511 (D.C. Cir. Sept. 12, 2008).

II. THE FEC PROPERLY DISMISSED CREW'S FIRST CLAIM THAT CGPS VIOLATED 11 C.F.R. § 109.10(e)(1)(vi).

CGPS is entitled to summary judgment on CREW's Claim One, which alleges the FEC was required to find reason to believe that CGPS violated 11 C.F.R. § 109.10(e)(1)(vi) by failing to report any contributions "for the purpose of furthering the reported independent expenditure[s]" at issue. CREW failed to present facts in the underlying administrative proceeding showing such a purpose. In fact, CGPS presented evidence negating any such purpose, and the FEC's informed evaluation of the facts receives an extremely high level of judicial deference.

CREW summarizes the factual allegations of its administrative complaint relating to its Claim One on pages 44-45 of its MSJ Brief (Doc 27). However, much of CREW's recitation consists of its own inaccurate and selective characterization of the administrative record. CREW omits that Mr. Rove's affidavit swears that the donor who initially offered the $3 million match

that CREW emphasizes actually ended up making a donation "that was not in any way earmarked for any particular use" – even for use in Ohio. Rove Aff. ¶ 14, AR095. Mr. Rove also specifically attested that the $1.3 million raised in matching donations "were not solicited for a particular purpose other than for general use in Ohio" and were not "for the purposes of aiding the election of Josh Mandel," as CREW erroneously contends. *Compare id.* ¶ 13, AR095 *with* CREW MSJ Brief (Doc 27) at 44. Moreover, as discussed *supra*, ten of the 11 CGPS ads that were shown at the August 30 meeting were issue ads and not IEs, as CREW mischaracterizes them, and CGPS has not "admitted" that these ads were "'examples' of the activities raised funds would support," as CREW speciously contends. *Compare* CGPS Response to CREW Admin. Compl., AR078 *with* CREW MSJ Brief (Doc 27) at 45.

Strikingly, CREW's administrative complaint never clearly alleged CGPS solicited donors to fund any advertisements whatsoever (regardless of whether they were IEs, or whether they were disseminated in the four states at issue or elsewhere). Rather, CREW resorted to a vague and unsupported allegation that the solicitations were "apparently to pay" for the advertisements at issue. CREW Am. Admin. Compl. ¶ 28, AR 105 (emphasis added). But in the "Democracy Now" segment that CREW relies on, the reporter who attended the August 30 meeting described the materials that were distributed along with donation forms as merely "explaining what the missions are of both organizations" (referring to American Crossroads and CGPS). CREW Am. Admin. Compl. Exh. C (6:02-6:20), *available at* https://youtu.be/RZsudD4O3i8.

Moreover, even assuming *arguendo*, as CREW alleges, that donors gave to CGPS "for the purpose[] of aiding the election of Josh Mandel," CREW MSJ Brief (Doc 27) at 44, that does not lead to the conclusion, or even an inference, that they gave "for the purpose of furthering the

reported independent expenditure[s]" in question here, *see* 11 C.F.R. § 109.10(e)(1)(vi). CGPS submits that the facts before the Commission clearly negated such a purpose. Certainly, the facts were not so compelling that the FEC's decision can be condemned as contrary to law, which is the standard CREW must meet here.

III. THE COURT SHOULD DISPOSE OF CREW'S CLAIMS TWO AND THREE WITHOUT RULING ON THEIR MERITS.

Because CGPS's compliance with the FEC's IE reporting regulation is dispositive, whether or not the regulation is valid, this Court need not and should not rule on the merits of CREW's Claims Two and Three. *See Air Courier Conf. of Am. v. Am. Postal Workers Union, AFL-CIO*, 498 U.S. 517, 531 (1991) (Stevens, J., concurring) ("Faithful adherence to the doctrine of judicial restraint provides a fully adequate justification for deciding this case on the best and narrowest ground available."); *see also PDK Labs., Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring) ("if it is not necessary to decide more, it is necessary not to decide more"). That is even more so here because CREW's claims also are time-barred, not properly before this court, and otherwise precluded by the FEC's prosecutorial discretion.

A. CGPS Was Entitled to Rely on the FEC's IE Reporting Regulation.

As discussed more fully below, 11 C.F.R. § 109.10(e)(1)(vi) validly implements the FECA. But even if the regulation were invalid, CGPS was entitled to rely on it under both the FECA and well-established principles of due process and administrative law. Therefore, this Court should dismiss CREW's Claims Two and Three as unnecessary to decide.

1. *The FECA Specifically Protects Those Relying on the FEC's Regulations From Any Sanctions or Enforcement Proceedings.*

The FECA provides that:

> *Scope of protection for good faith reliance upon rules or regulations.* Notwithstanding any other provision of law, 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 or by chapter 95 or chapter 96 of title 26.

52 U.S.C. § 30111(e) (emphasis added). As the legislative history further explains, "[a] person who relies upon [the FEC's] regulations in good faith will not be subject to subsequent enforcement action." 1979 FECA History at 208.

Thus, the FECA permits the public to "undertake any conduct permitted by the challenged regulations without fear of penalty, even if that conduct violates campaign statutes." *Shays v. FEC* ("*Shays I*"), 414 F.3d 76, 84 (D.C. Cir. 2005) (emphasis added). The "good faith reliance" statute is unequivocal: compliance with FEC regulations removes "certain conduct from any risk of enforcement" and "establish[es] 'legal rights' to engage in that conduct." *Id.* at 95 (emphasis added). This precludes the full range of FECA-authorized sanctions that CREW seeks, including "equitable remedies" requiring CGPS to retroactively file amended IE reports. *Compare* CREW MSJ Brief (Doc 27) at 43 *with* 52 U.S.C. §§ 30111(e) (prohibiting "any sanction provided by this Act" for reliance on FEC regulations) and 30109(6)(A), (B) (otherwise permitting an "injunction, restraining order, or any other appropriate order" for violations). This is especially so where CREW's desired relief would violate the associational privacy rights of CGPS and its donors, who relied on the FEC's regulation with the understanding that they would not be publicly identified thereunder. As the Supreme Court has recognized, campaign finance reporting requirements – like the IE reporting scheme here – pose "not insignificant burdens on individual rights," "deter some individuals who otherwise might contribute," and "expose contributors to harassment or retaliation." *Buckley*, 424 U.S. at 68; *see also Van Hollen*, 811 F.3d at 499-500.

2. CGPS Was Entitled to Rely on the FEC's Regulation Under Principles of Due Process and Administrative Law.

The FECA's protection for those complying with FEC regulations also tracks "[t]raditional concepts of due process incorporated into administrative law," which "preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule." *Affum v. U.S.*, 566 F.3d 1150, 1163 (D.C. Cir. 2009) (quoting *PMD Produce Brokerage Corp. v. USDA*, 234 F.3d 48, 52 (D.C. Cir. 2000)). This notice may be in form of the rule text itself "and other public statements issued by the agency." *Id.* (quoting *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000)).

Even where a party relies on an agency's regulation and "a court [subsequently] determines that the regulation is invalid," the judicial decision requires "nonretroactive application" where the decision "will work an injustice or hardship" or "establish[es] a new principle of law, either by overruling clear past precedent . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Teich v. FDA*, 751 F. Supp. 243, 249 (D.C. Cir. 1990) (quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 355 (1971)) (emphasis added). More generally, "prior notice is required where a private party justifiably relies upon an agency's past practice and is substantially affected by a change in that practice." *Nat'l Conservative Pol. Action Comm. v. FEC*, 626 F.2d 953, 959 (D.C. Cir. 1980). These principles apply with special force where the relevant conduct is core First Amendment free speech and association. To avoid chilling such highly protected activity, the law must provide clear advance notice before burdens may be imposed. *Marks v. U.S.*, 430 U.S. 188, 196 (1977); *Buckley*, 424 U.S. at 77.

Here, CREW concedes the FEC's regulation in question has been in effect for more than 37 years. Compl. ¶ 120; CREW MSJ Brief (Doc 27) at 7. During that time, CREW has not

identified any precedent where the FEC interpreted or applied the regulation under the "more expansive approach" CREW advocates here. Compl. ¶ 122. In fact, as discussed above, the agency previously considered an enforcement matter involving the identical issue that CREW presents here, and the FEC dismissed the matter. AR172-3. The FEC's reporting instructions and guidance – which are legally significant – also have consistently described IE reports as only requiring identification of contributions "made for the purpose of furthering the independent expenditures" being reported, FEC, Instructions for Preparing FEC Form 5, *supra*, or contributions "for the purpose of making the independent expenditures" being reported, FEC, Campaign Guide for Corporations and Labor Organizations (Jan. 2007) at 36, *available at* https://transition.fec.gov/pdf/colagui.pdf.[13]

Indeed, CREW itself previously conceded the limited scope and dispositive effect of the Commission's regulation. In response to a broad-based FEC request for public comments, CREW sharply critiqued the narrow scope of the FEC's IE reporting regulation. According to CREW, "under the Commission's regulations, the identity of a contributor who gives to the organization for the broad purpose of influencing a federal election, or even the specific purpose of making independent expenditures, need not be disclosed." CREW, Comments in Response to Advance Notice of Proposed Rulemaking on Earmarking, Affiliation, Joint Fundraising, Disclosure, and Other Issues (Jan. 15, 2015) at 3-4, *available at* http://sers.fec.gov/fosers/showpdf.htm?docid=312990.

In the same proceeding, CREW also (1) acknowledged that the Commission's IE

[13] The FEC guide provides CGPS with yet an additional protection against any sanctions. Under the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 601 note, reliance by a "small entity" on an agency's designated "small entity compliance guide" "may be considered as evidence of the reasonableness or appropriateness of any proposed fines, penalties, or damages." The FEC has designated its guide as a "small entity compliance guide." FEC, Campaign Guide for Corporations and Labor Organizations at ii. As a non-profit entity, CGPS meets the definition of a "small entity." 5 U.S.C. § 601(6), (4).

reporting regulation implemented "both contributor disclosure provisions of the statute" (i.e., the Coverage and Content Provisions); and (2) did not suggest that the agency could require more reporting of donors simply by ignoring the regulation and enforcing the two FECA provisions according to CREW's own (mistaken) interpretation of them. *See id*. at 2-5. As CREW discusses in its MSJ Brief (Doc 27 at 15-16), in a rulemaking petition filed on behalf of then-Representative Chris Van Hollen, campaign finance attorneys at Democracy 21 and the Campaign Legal Center also characterized the FEC's IE reporting regulation as being limited in scope and dispositive in effect. Rep. Van Hollen Petition for Rulemaking to Revise and Amend Regulations Relating to Disclosure of Independent Expenditures (Apr. 21, 2011) at 4, *available at* http://classic.fec.gov/pdf/nprm/citizensunited/van_hollen.pdf. (Notably, CREW did not participate in any way in this rulemaking petition, which further underscores why CREW should not be permitted to convert this enforcement action into a rulemaking proceeding. *See* FEC, Reg 2011-01 Independent Expenditure Reporting, *at* http://sers.fec.gov/fosers/ruledata.htm?ruleNumber=REG%202011-01.)

As CREW also notes, dozens of 501(c) organizations spent tens of millions of dollars on IEs during the 2010 election cycle, and hundreds of millions of dollars "during each of the 2012, 2014, and 2016 election cycles . . . but they did not identify a single contributor or report a single dollar in outside contributions." CREW MSJ Brief (Doc 27) at 15-16. Yet, CREW has not identified a single precedent where an organization relying on the FEC's IE reporting regulation has been found to have violated the law – either by the FEC or by a reviewing court.

In the instant matter, CGPS also responded to four form letters from the FEC's Reports Analysis Division asking for confirmation that no contributors had to be identified on the IE reports at issue here. AR149-154. These inquiries are routinely sent by the agency for

"additional clarification" on reports. FEC, Request for Additional Information (RFAI), *at* https://www.fec.gov/help-candidates-and-committees/request-additional-information. Citing the regulation, CGPS explained that "no contributions or donations accepted by [CGPS] were solicited or received for the purpose of furthering the reported independent expenditures." AR153. The FEC never disputed CGPS's responses or demanded that CGPS amend its filings in the manner CREW urges. *See PMD Produce Brokerage Corp.*, 234 F.3d at 53 (noting that "pre-enforcement efforts" may indicate an agency's interpretation of the relevant law).

CREW contends that the Coverage Provision, 52 U.S.C. § 30104(c)(1) imposes a broader donor identification requirement that is "[s]eparate and distinct from" the FEC's IE reporting regulation, and that "[t]he appearance of [this] requirement in the 'plain language' of the statute gives 'fair notice' to regulated parties." CREW MSJ Brief (Doc 27) at 39 (quoting *Freeman United Coal Min. Co. v. Fed. Mine Safety and Health Review Comm'n*, 108 F.3d 358, 362 (D.C. Cir. 1997)). But as even CREW's parenthetical for *Freeman* reveals, that opinion was addressing the "plain language" of an agency regulation, and not the conflict that allegedly exists here between a regulation and a purportedly broader statute. Here, CREW: (1) concedes – consistent with the FEC's own explanation of the rule – that the regulation construes both the Coverage and Content Provisions;[14] and (2) never identifies a single instance where the FEC interpreted the Coverage Provision as creating a separate reporting obligation. Thus, *Freeman* actually supports CGPS's position.

CREW further contends that this "case is not among the 'very limited set of cases' in which courts have found lack of required notice." CREW MSJ Brief (Doc 27) at 40 (citing

[14] Per CREW's administrative complaint, "FEC regulations interpret these provisions" – referring to 52 U.S.C. § 30104(c)(2)(C) and (c)(1) – to require reporting of each contribution that "was made for the purpose of furthering the reported independent expenditure." CREW Am. Admin. Comp. ¶¶ 14-16, AR101-02 (emphasis added); CREW Admin. Compl. ¶¶ 14-16, AR004 (emphasis added).

Suburban Air Freight, Inc. v. Transp. Sec. Admin, 716 F.3d 679, 684 (D.C. Cir. 2013)). However, CREW's authority for this proposition also supports CGPS's position. In *Suburban Air Freight*, the court held that the agency regulation at issue "made clear" the appellant's obligations, and that the appellant "ma[de] no argument that [the agency] previously interpreted those provisions differently, let alone that the company relied on any such interpretation." 716 F.3d at 684. But that describes exactly the situation here: CREW concedes 11 C.F.R. § 109.21(e)(1)(vi) is clear that only "contributions given for the purpose of furthering 'the reported' independent expenditure" must be reported. CREW MSJ Brief (Doc 27) at 28. The FEC previously has not interpreted the regulation in a manner broader than its plain text, and CGPS relied on this longstanding Commission interpretation.

Finally, of course, the FECA has an express provision making compliance with a regulation a bar to further enforcement action. That provision and the First Amendment are powerful considerations not present in the cases CREW discusses.

3. CGPS's Reliance on 11 C.F.R. § 109.10(e)(1)(vi) Precludes CREW's Claims Two and Three and Any Enforcement in This Matter.

Regardless of whether, as CREW alleges, the FEC regulation at issue is unduly permissive and contrary to the FECA, the statute (52 U.S.C. § 30111(e)) and traditional principles of due process and administrative law present an absolute bar against any sanction, penalty, or enforcement action against CGPS where it reasonably relied on the Commission's regulation. In fact, it is CREW's position in this matter that is impermissible. Had the FEC completely and abruptly, and without any advance public notice, reversed its longstanding interpretation and application of the regulation at issue, the agency would have acted arbitrarily and capriciously. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016).[15]

[15] CREW misrepresents *Barnett v. Weinberger*, 818 F.2d 953, 954 (D.C. Cir. 1987) as holding that an "agency

Therefore, this Court should dispose of CREW's Claims Two and Three, which are premised entirely on two statutory provisions that are both implemented by the FEC's regulation.

B. CREW's Administrative Complaint Did Not Allege the FEC's Regulation Is Invalid or That CGPS Violated Subsection 30104(c)(1), and These New Theories Are Not Properly Before This Court.

The Court also should dispose of CREW's Claims Two and Three because CREW did not clearly raise – indeed, it abandoned – these issues in its administrative complaint. Here, once again, both the FECA and traditional principles of administrative law preclude CREW's claims.

The FECA provides that "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party" may seek judicial review. 52 U.S.C. § 30109(a)(8)(A) (emphasis added). If the court "declare[s] that the dismissal of the complaint or the failure to act is contrary to law" and the FEC fails to conform with such declaration, the complainant may then bring another suit "to remedy the violation involved in the original complaint." *Id.* § 30109(a)(8)(C) (emphasis added).[16] Furthermore, the FECA requires that respondents have an opportunity to submit a written response to administrative complaints, which necessarily encompasses responding to the applicable legal theories contained in the administrative complaint. *Id.* § 30109(a)(1).

Here, CREW's administrative complaint never once specifically alleged, as CREW does now, that CGPS violated the law by relying on an invalid FEC regulation, or that CGPS had

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decision premised on [an] invalid regulation at odds with [the] statute was arbitrary." CREW MSJ Brief (Doc 27) at 39. The court in *Barnett* did not determine the regulations at issue were "invalid"; rather the issue was whether the regulations, "either as written or applied," were contrary to the statute. *Barnett*, 818 F.2d at 959, 970 (emphasis added). In addition, the agency's "'findings' of adjudicative facts that [were] not supported by substantial evidence" played a large part in the court's enjoining the agency's action. *Id.* at 971. Moreover, the issue in *Barnett* was whether it was proper for an agency to apply its regulation to discontinue future benefits to a member of the public. *Id.* at 954-55. By contrast, the issue here is whether it was proper for CGPS to rely on an agency regulation for activities conducted long before the regulation was challenged.

[16] The term "original complaint" here distinguishes the administrative complaint from a later judicial complaint for review. For present purposes, CREW's amended FEC complaint is the relevant "original complaint."

violated the Coverage Provision, 52 U.S.C. § 30104(c)(1), by not reporting "all contributors who provide more than $200 annually to the group." *See supra* at 18-19 and CREW Am. Admin. Compl., AR108-115.[17] As to section 30104(c)(1) specifically, the FEC staff's FGCR also did not interpret CREW's administrative complaint as alleging a violation of this provision. Rather, the FGCR merely said that, "to the extent that the facts here may also give rise to a claim that Crossroads allegedly violated" 52 U.S.C. § 30104(c)(1), that claim would properly be dismissed as a matter of prosecutorial discretion. AR165-66, 176 (emphasis added). In other words, the FGCR addressed a hypothetical that CREW never specifically alleged in its administrative complaint.

CREW's addition of these new legal theories in its complaint filed in this Court not only conflicts with the limited scope of judicial review permitted by the FECA, but it also violates the basic doctrine of exhaustion of administrative remedies. Under this doctrine, parties in an administrative proceeding must "give the agency a fair and full opportunity to adjudicate their claims," and "do[] so properly (so that the agency addresses the issues on the merits)." *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002), cert. denied, 537 U.S. 949 (2002) (emphasis in the original). A plaintiff may not "proceed to federal court after having raised claims in only a cursory manner," or "permute 'mere[] background information' in an [administrative] complaint into a separately actionable legal claim." *Vasser v. McDonald*, 228 F. Supp. 3d 1, 17 (D.D.C. 2016) (quoting *Lyles v. District of Columbia*, 777 F. Supp. 2d 128, 137 (D.D.C. 2011)). Including only a "vague reference" to an issue, "[d]espite the opportunity to specifically raise the [issue] as a separate

[17] The general references in CREW's administrative complaint to "2 U.S.C. § 434" cannot fairly be understood as specifically alleging that CGPS violated 52 U.S.C. § 30104(c)(1), especially in light of CREW's actual characterization of the alleged violations. *See* CREW Am. Admin. Compl., "Count I," ¶ 44; "Count II," ¶ 50; "Count III," ¶ 53; "Count IV," ¶ 60; "Count V," ¶ 62, AR110-114.

claim . . . [a]fter listing five different claims" is insufficient. *Id.* Relatedly, CREW's additional legal theories violate the "hard and fast rule of administrative law, rooted in simple fairness, that issues not raised before an agency are waived and will not be considered by a court on review." *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1297 (D.C. Cir. 2004); *see also Wallaesa v. FAA*, 824 F.3d 1071, 1078 (D.C. Cir. 2016).

Although the FEC staff's FGCR raised the speculative issue of liability under the Coverage Provision, 52 U.S.C. § 30104(c)(1), the report merely recommended a dismissal in the agency's prosecutorial discretion due to the "equitable concerns" about "fair notice" that CGPS could raise concerning this novel enforcement theory. AR176. The FGCR did not address the substantive merits of this theory. Moreover, because CREW failed to allege such a violation in any one of the five separate "counts" of its administrative complaint, AR108-115, CGPS's response thereto also did not address any alleged violation of the Coverage Provision, AR083-84. CGPS also did not have an opportunity to address this new theory when it was first presented to the Commission in the FGCR. *See* FEC, Guidebook for Complainants and Respondents on the FEC Enforcement Process (May 2012) at 10-12, *available at* https://transition.fec.gov/em/respondent_guide.pdf (explaining that, after respondents file a response, the General Counsel's office issues its report and then the Commission votes on the General Counsel's recommendations).

Additionally, while the FECA authorizes the FEC to open certain enforcement matters *sua sponte*, 52 U.S.C. § 30109(a)(1), (2), the FECA does not permit complainants to seek judicial review of internally generated matters. *Compare id. with id.* § 30109(a)(8). Thus, to the extent the FEC staff's FGCR, on its own, raised the hypothetical issue of whether CGPS may have violated 52 U.S.C. § 30104(c)(1), the agency's dismissal on that issue is not reviewable.

For all of these reasons, CREW's Claims Two and Three are not properly before this Court.

C. CREW's Facial Challenge to the Regulation's Validity Is Time-Barred, and an As-Applied Challenge Would Not Redress CREW's Claimed Injury.

In addition to the reasons just discussed, this Court should dispose of CREW's Claim Two – which seeks a declaratory order that "11 C.F.R. 109.10(e)(1)(vi) is unlawful and invalid" on its face – because the claim is time-barred. Compl. ¶ 124; *see also id.*, Requested Relief ¶ 3. Moreover, although this Court has held that CREW's challenge to the FEC's application of the supposedly invalid regulation is not time-barred, Memo. Op. (Mar. 22, 2017) at 15, such a claim cannot redress CREW's injury, since compliance with the regulation justifies dismissal of CREW's complaint, whether or not the regulation is valid.

Although 28 U.S.C. § 2401(a) establishes a six-year statute of limitations in this matter for judicial review of the regulation's validity, *NLRB Union v. FLRA*, 834 F.2d 191 (D.C. Cir. 1987) recognized "a limited number of exceptions." *See* Memo. Op. (Mar. 22, 2017) at 12-13; *Raton Gas Transmission Co. v. FERC*, 852 F.2d 612, 615 (D.C. Cir. 1988) (explaining *NLRB Union*). *NLRB Union* held that, outside of the statute of limitations, "a party who possesses standing may challenge regulations directly on the ground that the issuing agency acted in excess of its statutory authority in promulgating them. A challenge of this sort might be raised, for example, by way of defense in an enforcement proceeding." 834 F.2d at 195 (emphasis added). The point is that the running of the statute of limitations should not prevent a party from redressing a new and recent injury.

This Court also has noted the D.C. Circuit's holding in *Weaver v. Fed. Motor Safety Admin.*, 744 F.3d 142 (D.C. Cir. 2014). Memo. Op. (Mar. 22, 2017) at 16. As *Weaver* explained:

> Where Congress imposes a statute of limitations on challenges to a regulation, running from a regulation's issuance, facial challenges to the rule or the procedures by which it was promulgated are barred. But when an agency seeks to apply the rule, those affected may challenge that application on the grounds that it "conflicts with the statute from which its authority derives."

744 F.3d 142 at 145 (emphasis added) (internal citations omitted) (quoting *Nat'l Air Transp. Ass'n v. McArtor*, 866 F.2d 483, 487 (D.C. Cir. 1989)).[18] In short, the time bar does not subject a party to a new injury that violates the substantive command of the law.

CREW's problem is that the FECA makes compliance with the FEC regulation a complete defense, regardless of the regulation's validity. So even if the dismissal of CREW's complaint injured CREW by depriving it of desired information, the injury did not flow from the validity or invalidity of the FEC's regulation. Moreover, declaring the rule invalid would not and could not redress that injury: even if the regulation were invalidated, the dismissal would stand.

CREW may wish to invalidate the regulation so that it will not provide a defense to future respondents. But a "plaintiff must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. et al. v. Cuno et al.*, 547 U.S. 332, 335 (2006). And an essential element of standing is that success on the claim will redress the plaintiff's claimed injury. *Lujan v. Defenders of Wildlife, et al.*, 504 U.S. 555, 561-62 (1992). CREW's broader claim that invalidating the regulation will allow it to obtain information in the future is precisely the type of "facial challenge" that the statute of limitations bars. *P&V Enterprises, et al. v. U.S. Army Corps of Engineers, et al.*, 466 F. Supp. 2d 134, 136 (D.D.C. 2006).

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[18] *See also Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038, 1040 (D.C. Cir. 1997) ("we permit both constitutional and statutory challenges to an agency's application or reconsideration of a previously promulgated rule, even if the period for review of the initial rulemaking has expired.") (collecting authority) (emphasis added); *Tripoli Rocketry Assoc. v. U.S. BATF*, 2002 U.S. Dist. LEXIS 27588 at *16 (D.D.C. June 24, 2002) (plaintiff's "substantive challenge" to an agency regulation was "not time barred because it attacks [the agency's] 'noncompliance with the substantive provisions of federal law as applied to plaintiffs.'") (emphasis added).

CREW's position also is untenable to the extent it relies on procedural arguments, because a "petitioner's contention that a regulation suffers from some procedural infirmity . . . will not be heard outside of the statutory limitations period." *NLRB Union*, 834 F.2d at 196. Here, CREW argues that the FEC adopted the IE reporting regulation at issue without an adequate contemporaneous explanation for it. CREW MSJ Brief (Doc 27) at 28-30. This is an attack on the regulation's procedural validity and is not properly before this court outside of the six-year statute of limitations for reviewing the rule's promulgation.

D. The FEC's *Heckler* Dismissal of the Agency Staff's Self-Initiated Hypothetical Theory That CGPS May Have Violated Subsection 30104(c)(1) Was Rational Under the "Extremely Deferential Standard" of Judicial Review.

CREW's Claim Three – that CGPS may have failed to report a broader universe of donors supposedly required by the Coverage Provision, 52 U.S.C. § 30104(c)(1) – fails on multiple grounds. As noted above, because CREW did not plainly present that claim to the FEC, it failed to exhaust its administrative remedies. The Commission staff's comment that, if such a claim had been made, it would be subject to dismissal as a matter of prosecutorial discretion under *Heckler v. Chaney*, 470 U.S. 821 (1985), does not excuse this failure, doubly so since the FECA does not authorize private complainants to seek review of FEC staff-originated issues. And, beyond all this, on the facts here CREW cannot begin to overcome the great deference accorded such a highly discretionary ruling.

The "extremely deferential standard" of judicial review that protects the FEC's exercise of prosecutorial discretion, *CREW*, 236 F. Supp. 3d at 390, is even more deferential in matters involving "novel legal issues," where prosecution would invite great risk of litigation by the respondent, *id.* at 391, 393.[19] This is such a novel case. The FEC, to CGPS's knowledge, has

[19] Despite the weight of authorities supporting the FEC's broad prosecutorial discretion, CREW has appealed this ruling to the D.C. Circuit. *See CREW v. FEC*, No. 17-5049.

never previously adopted CREW's position on identifying donors on IE reports, whether in enforcement matters or in the agency's guidance documents. Thus, the FGCR more than reasonably and rationally concluded that CGPS "could raise equitable concerns," as it does now, "about whether [it had] fair notice of the requisite level of disclosure" commanded by an out-of-context reading of the Coverage Provision. Therefore, the commissioners who voted on this basis to dismiss the agency staff's self-initiated hypothetical claim, and to avoid the high litigation risk of proceeding under this theory, had more than a reasonable and rational basis for exercising the agency's prosecutorial discretion. Under the "extremely deferential standard" of judicial review, *CREW*, 236 F. Supp. 3d at 390, this Court should not disturb that decision.

IV. THE CONTENT PROVISION SPECIFIES TAILORED IE REPORTING, AND THE FEC'S REGULATION IS A REASONABLE INTERPRETATION OF THAT REQUIREMENT.

For all the reasons just discussed, this Court need not and should not reach the merits of CREW's argument that the FEC's IE reporting regulation is inconsistent with the FECA. But if the issue were reached, the two-step process contained in *Chevron, USA, Inc. v. NRDC*, 467 U.S. 837 (1984), requires CREW to establish either that (i) the statutory text clearly forecloses the regulation, or if not, (ii) the regulation is irrational in light of the statute's purpose. *See Shays I*, 414 F.3d at 96. CREW can establish neither, particularly given the high level of deference afforded FEC interpretations of the FECA. *See, e.g.*, *Orloski*, 795 F.2d at 164.

A. *Chevron* Step 1: Congress Tailored the FECA to Require Ad-Based Identification of Contributors.

The pertinent statutory language is as follows (with the key language in italics and other language to be discussed shortly in bold/underlined):

> **2 U.S.C. 434 REPORTS . . .**
>
> (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 containing the information required under subsection (b)(3)(A)[20] for all contributions received by such person.

(2) Statements required to be filed by this subsection shall be filed in accordance with subsection (a)(2), and shall include—,

> (A) the information required by subsection (b)(6)(B)(iii),[21] indicating whether **the independent expenditure** is in support of, or in opposition to, the candidate involved;
>
> (B) under penalty of perjury, a certification whether or not **such**[22] **independent expenditure** is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate; and
>
> *(C) 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.*

Any independent expenditure (including those described in subsection (b)(6)(B)(iii)) aggregating $1,000 or more made after the 20th day, but more than 24 hours, before any election shall be reported within 24 hours after such independent expenditure is made. Such statement shall be filed with the Clerk, the Secretary, or the Commission and the Secretary of State and shall contain the information required by subsection (b)(6)(B)(iii) indicating whether **the independent expenditure** is in support of, or in opposition to, the candidate involved.

(3) The Commission shall be responsible for expeditiously preparing indices which set forth, on a candidate-by-candidate basis, **all independent expenditures separately**, including those reported under subsection (b)(6)(B)(iii), made by or

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[20] This provision provides that: "(b) Each report under this section shall disclose . . . (3) the identification of each . . . (A) person (other than a political committee) 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 in any lesser amount if the reporting committee should so elect, together with the date and amount of any such contribution."

[21] This provision provides that the report will disclose "the full name and mailing address (occupation and the principal place of business, if any) of each person to whom expenditures have been made by such committee or on behalf of such committee or candidate within the calendar year in an aggregate amount or value in excess of $100, the amount, date, and purpose of each such expenditure and the name and address of, and office sought by, each candidate on whose behalf such expenditure was made."

[22] *See King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (defining "such" as "That or those; having just been mentioned"); *United States v. Ashurov*, 726 F.3d 395, 398 (3d Cir. 2013) (explaining that "such" means "of the character, quality, or extent previously indicated or implied"); *In re Lehman Bros. Mortg.-Backed Sec. Litig.*, 650 F.3d 167, 176–77 (2d Cir. 2011) (citing Webster's Third New International Dictionary's definition of "such" as "something 'previously characterized or specified'").

> for each candidate, **as reported under this subsection**, and for periodically publishing such indices on a timely pre-election basis."

For the reasons explained below, the best (and, at the very least, a permissible) reading of the statute is that the Content Provision, 52 U.S.C. § 30104(c)(2), only requires reporting of those contributors who gave for the purpose of furthering the reported independent expenditure.

To begin, the term "'an' means 'one,'" *New Hampshire Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 72 (1st Cir. 2006), *aff'd*, 552 U.S. 364 (2008) (citing Merriam Webster's Collegiate Dictionary at 40, 53 (10th ed. 2001)), which is the "normal" reading of such an indefinite article, *Abbott GmbH & Co. KG v. Yeda Research & Dev. Co.*, 516 F. Supp. 2d 1, 6 (D.D.C. 2007) (quotation omitted). This is particularly true where the modified term is singular, as "independent expenditure" is here. *See United States v. Hagler*, 700 F.3d 1091, 1097 (7th Cir. 2012).

Moreover, in determining the meaning of "an," "context matters." *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 413-14 (2012) (interpreting "not an" language to mean "not a particular one"). Here, the FECA's structure and history support the FEC's reading of the statute. For example, as discussed above, *see supra* at 10, the *Summary of Committee Working Draft* and the Senate Committee's report confirm that the statute targets reporting of contributions received for "the independent expenditure." (Emphasis added.) Furthermore, where "the rest of the statute is written using definite articles," it indicates specificity of the modified item. *Hagler*, 700 F.3d at 1097. Here, the two paragraphs above and two paragraphs below the relevant provision all contain terms underscoring that IE contribution reporting relates to funds designated for a particular advertisement.

If, as CREW maintains, Congress intended a broader level of contributor-related reporting for IEs, it easily could have said so, beginning with a reference to giving "for the

purpose of furthering **any** independent expenditure**s**." But Congress did not do that. Instead, it required earmarking to support "an expenditure." If that language does not compel the FEC's reading of the statute – and CGPS submits that it does[23] – it certainly permits such a reading, given the FEC's broad *Chevron* discretion.

B. *Chevron* Step 2: The FEC's Regulatory Construction Is Within the Range of Permissible Options.

That leaves the issue of rationality.[24] CREW argues it is irrational for the FEC's IE reporting regulation to include an earmarking principle under which no contributor is identified unless the contribution is earmarked for a particular IE. But the D.C. Circuit rejected precisely that argument with respect to the parallel FEC regulation containing an earmarking principle for identifying EC funders:

> [T]he FEC's purpose requirement regulates electioneering communication disclosures in precisely the same way BCRA itself regulates express advocacy disclosures. . . . The FEC was concerned [in the EC context] that some individuals who contribute to a union or corporation's general treasury may not support that entity's electioneering communications, and a robust disclosure rule would thus mislead voters as to who really supports the communications. . . . It's hard to escape the intuitive logic behind this rationale.

Van Hollen, 811 F.3d at 497.

Here, as in *Van Hollen*, the FEC regulation's earmarking component avoids misleading reporting and, at the same time, avoids imposing reporting burdens on core political speech that are not clearly necessary. Take, for example, an Alaska donor who helps fund an environmental conservation group's IEs attacking an Alaska congressional candidate's support for drilling in the Arctic National Wildlife Refuge. Under the FEC's regulation, that donor is not identified on

[23] CREW's MSJ Brief (Doc 27 at 31) also agrees that "use of a definite article" – e.g., "the" – "would mean that the contribution must be related to a specific independent expenditure."

[24] *Cf. Foo v. Tillerson*, 244 F. Supp. 3d 17 (D.D.C. 2017) (upholding the State Department's interpretation of "an individual" under *Chevron* Step Two when Congress did not provide an explicit definition).

the group's FEC reports for an IE promoting an Arkansas U.S. Senate candidate's opposition to fracking in the Fayetteville Shale. Similarly, a Long Island property developer who contributes to a national trade association's voter turnout efforts for a New York congressional candidate is not identified on the organization's FEC reports for an IE opposing a California congressional candidate's position on federal public transit funding.

Five further considerations show that the FEC's regulation is consistent with legislative intent:

1. The FEC Was Heavily Involved in the Statute's Drafting.

Administrative interpretations of statutes are "especially persuasive" where either "the agency participated in developing the provision," *Miller v. Youakim*, 440 U.S. 125, 144 (1979), or where there is "a contemporaneous construction of a statute by those charged with the responsibility of setting its machinery in motion," *United Transp. Union v. Lewis*, 711 F.2d 233, 242 (D.C. Cir. 1983). As to the former, courts attach "'great weight' to agency representations to Congress when the administrators 'participated in drafting and directly made known their views to Congress in committee hearings,'" since this forms "part of the legislative background" of the new law. *Moore v. District of Columbia*, 907 F.2d 165, 176 (D.C. Cir. 1990) (quoting *Zuber v. Allen*, 396 U.S. 168, 192 (1969)). As to the latter, contemporaneous constructions are important because the agency "may possess an internal history in the form of documents or 'handed-down oral tradition' that casts light on the meaning of a difficult phrase or provision." Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 368 (1986). Indeed, a contemporaneous construction "might . . . 'carry the day against doubts that might exist from a reading of the bare words of a statute.'" *United Airlines, Inc. v. Brien*, 588 F.3d 158, 172 (2d Cir. 2009) (quoting *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 414 (1993)). The presence of both factors here together means deference principles apply with "even

greater force." *Middle South Energy, Inc. v. F.E.R.C.*, 747 F.2d 763, 769 (D.C. Cir. 1984).

As explained above, the statute upon which the FEC regulation is based was explicitly identified as an FEC legislative recommendation, and FEC commissioners and staff worked closely with Congress to develop the provision. *See supra* at 9-10. When it came time to implement the statute by regulation, which Congress mandated be done quickly, the Commission could do so expeditiously because the FEC knew precisely what it had asked Congress to enact.

Nor should the FEC's efficiency be confused with carelessness in the agency's rulemaking. After the bill was signed into law, the Commission held four meetings to discuss these issues, including a section-by-section discussion of the proposed regulations themselves. *See supra* at 11-13. In the end, and consistent with the legislative history that expressed an interest in reducing IE-related reporting burdens and also requiring reporting of contributions for "the" independent expenditure, the FEC promulgated its regulation narrowly, contemporaneously, and appropriately.[25]

2. For 37 Years, Congress Has Not Disagreed With the FEC's Contemporaneous Interpretation of the Statute, but Has Ratified It.

Congressional "failure to revise or repeal the [FEC's regulatory] interpretation is persuasive evidence that the interpretation is the one intended by Congress," *Weber v Heaney*, 995 F.2d 872, 877 (8th Cir. 1993) (quoting *Young v. Community Nutrition Inst.*, 476 U.S. 974, 983 (1986)), and "strongly implies that the regulations accurately reflect congressional intent," *FEC v. Ted Haley Congressional Comm.*, 852 F.2d 1111, 1114 (9th Cir. 1988) (quoting *Grove*

[25] CREW makes much of the change between the draft regulations expeditiously prepared by FEC staff as part of the 1980 NPRM, on the one hand, and the final regulations promulgated by the Commission, on the other. However, the NPRM itself noted that the regulatory text printed therein was preliminary and had "not been approved by the Commission." *See supra* at 12. Moreover, the preliminary rules used the same "an" language as the statute, which, as discussed above, was Congress' way of referencing contributions provided to fund a particular expenditure. The "the" language ultimately used in the final rule simply gave the public clearer notice of what Congress intended.

City College v. Bell, 465 U.S. 555, 568 (1974)). This is particularly true when Congress did not use the special, FECA-specific review provision to reject the regulation here.

Congress built into the FECA a provision permitting the legislative branch to immediately reject FEC regulations before they go into effect. Under 52 U.S.C. § 30111, "the FEC must submit a proposed regulation and an accompanying statement to both the House and the Senate. If neither house disapproves the proposed regulation within [the preset time period], the FEC may issue it." *Weber*, 995 F.2d at 876-77. Courts "normally accord considerable deference to the Commission . . . [where] Congress took no action to disapprove the regulation when the agency submitted it for review pursuant to [the FECA's special provision]." *AFL-CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003) (internal quotation omitted).

Here, the FEC transmitted the regulation to Congress on February 28, 1980. Consistent with the congressional review timeline, the FEC waited 15 days before making the regulation effective. *See supra* at 13. Congress did not object to the IE reporting regulation during this period, thus bestowing considerable legitimacy on the agency's interpretation.

Congress also has ratified the regulation in other ways. Congress amended the statute containing the IE reporting requirements (2 U.S.C. § 434) in 1995, 1999, 2000, 2002, 2004, and 2007.[26] BCRA and the Honest Leadership and Open Government Act of 2007, Pub.L. 110-81, in particular, made significant changes to the statute. Indeed, the BCRA "ordered the FEC to rewrite its regulations" on another provision relevant to IEs. *Shays I*, 414 F.3d at 97-98. Yet in no instance did Congress revise or reject the FEC's IE contributor reporting requirements. Given

[26] *See* Pub. L. 104-79, §§ 1(a), 3(b), Dec. 28, 1995, 109 Stat. 791, 792; Pub. L. 106-58, Title VI, §§ 639(a), 641(a), Sept. 29, 1999, 113 Stat. 476, 477; Pub. L. 106-346, § 101(a) [Title V, § 502(a), (c)], Oct. 23, 2000, 114 Stat. 1356, 1356A-49; Pub. L. 107-155, Title I, § 103(a), Title II, §§ 201(a), 212, Title III, §§ 304(b), 306, 308(b), Title V, §§ 501, 503, Mar. 27, 2002, 116 Stat. 87, 88, 93, 99, 102, 104, 114, 115; Pub. L. 108-199, Div. F, Title VI, § 641, Jan. 23, 2004, 118 Stat. 359; Pub. L. 110-81, Title II, § 204(a), Sept. 14, 2007, 121 Stat. 744.)

this record, it "would be inappropriate to overturn an interpretation that Congress has acquiesced in for [] years, during which it has closely reviewed the statutory scheme under question." *Action on Smoking and Health v. C.A.B.*, 699 F.2d 1209, 1215 (D.C. Cir. 1983). *See also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 155-56 (2000) (cataloging the affirmative legislative "actions by Congress over the past 35 years" as having "effectively ratified" an agency's position). Instead, CREW should turn its attention toward advocating for one or more of the bills before Congress in recent years that would establish new reporting requirements for 501(c) organizations making IEs. *See, e.g.*, H.R. Res. 5175, 111th Cong. § 211 (2010) (the "Democracy is Strengthened by Casting Light on Spending in Elections Act" or "DISCLOSE Act").[27]

3. The FEC's Interpretation of the Statute Has Remained Consistent for Nearly Four Decades.

At Step Two, courts also accord "great weight to the longstanding interpretation placed on a statute by an agency charged with its administration." *Creekstone Farms Premium Beef, L.L.C. v. Dept. of Agriculture*, 539 F.3d 492, 500 (D.C. Cir. 2008). Here, the FEC's interpretation of the FECA's IE contributor identification provision is entitled to great deference because the agency itself has maintained its interpretation of the statute – without change – for 37 years. *See supra* at 14. Moreover, when the public was given an opportunity to submit comments on significant revisions to the IE reporting requirements that took effect in 2003 – including revisions to 11 C.F.R. § 109.2(e) – "[t]he Commission received no comments on [the IE contributor reporting] section" and left 109.2(e)(1)(vi) unchanged. FEC, Bipartisan Campaign Reform Act of 2002 Reporting, 68 Fed. Reg. 404, 415 (Jan. 3, 2003).

[27] Notably, Congress declined to enact the DISCLOSE Act and has otherwise refused to impose additional IE donor reporting requirements.

4. The FEC's Regulation Accords With Expressed Congressional Intent.

"The general purpose of the 1979 amendments to the FECA . . . was to simplify reporting and administrative procedures." *Common Cause*, 842 F.2d at 444. The FEC regulation at issue here is consistent with that legislative goal. Furthermore, as explained above (*see supra* at 10, 38-41), Congress intended that contributor reporting be tied to contributions for "the" expenditure.

CREW's MSJ Brief (Doc 27 at 33-34) attempts to convert the 1979 FECA amendments into a "disclosure at all costs" directive. But this type of dogmatic voyeurism was soundly rejected just last year in *Van Hollen*, where the court observed that "[j]ust because *one* of [the FECA's] purposes (even *chief* purposes) was broader disclosure does not mean that anything less than maximal disclosure is subversive." 811 F.3d at 494–95 (emphasis in the original). Moreover, it is simply not true that the FEC's regulation has "effectively resulted in *no* disclosure of contributions used to fund independent expenditures." CREW MSJ Brief (Doc 27) at 34 (emphasis in the original). According to the Center for Responsive Politics (using FEC data), the percentage of "outside spending" by organizations that have publicly reported some of their donors in recent years has ranged between 7.2% (in 2010) to 29.7% (in 2012). Ctr. for Responsive Politics ("CRP"), "Outside Spending by Disclosure, Excluding Party Committees," *at* https://www.opensecrets.org/outsidespending/disclosure.php.[28] Thus, reporting is occurring under the statue precisely as Congress intended.

[28] CRP uses the term "outside spending" to refer to both IEs and ECs, although the vast majority of CRP's "outside spending" statistics pertain to IEs. *See* CRP, "Outside Spending," *at* https://www.opensecrets.org/outsidespending/. Organizations engaged in "outside spending" that report some of their donors is a distinct category from organizations that publicly report all of their donors (i.e., political committees, or "PACs"). *See id.* and CRP, "Outside Spending by Disclosure, Excluding Party Committees," *supra*. For its part, in 2016 alone the FEC identified millions of dollars in contributions requiring reporting under the IE regulation. *See* Conciliation Agreements, MUR 7085 (State Tea Party Express) (Sept. 21, 2016), MUR 6816 (Americans for Job Security) (June 21, 2016), MUR 6816 (The 60 Plus Association, Inc.) (July 7, 2016), MUR 6816 (American Future Fund) (June 21, 2016).

5. The FEC's Interpretation Does Not Render Any Other Provision Superfluous.

CREW also contends that 11 C.F.R. § 109.10(e)(1)(vi) renders the FECA's and regulation's requirements to separately report an IE's sponsor and its contributors "redundant," by "requir[ing] 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." CREW MSJ Brief (Doc 27) at 35. This is a strained construction of the FEC's regulation, at best, and it is not the Commission's position.

CREW acknowledges the FGCR "did not elaborate" to provide support for CREW's illogical reading of the regulation. *Id.* Rather, CREW resorts to treating the report as a Rorschach test that "appears" or "apparently" supports CREW's contrivance that donors are not reportable under the regulation unless their funds "go directly from the contributor to pay for the ad," and not if "they were routed through [an organization's] 'general treasury.'" *Id.* In fact, the FGCR suggests no such thing, and merely posits that "an express link" must exist "between the receipt and the independent expenditure" to trigger contributor reporting. AR173.

In practice, this requisite nexus between a contributor's purposes and the reported IE simply means that contributors who earmark their funds for a particular IE are identified as the sources of funding, and are publicly linked to the entity sponsoring the IE. This concept of tailoring reporting only to contributors of "earmarked" funds has been recognized by more than 40 years of campaign finance jurisprudence, *see Van Hollen*, 811 F.3d at 489 (quoting *Buckley*, 424 U.S. at 80), and is fully consistent with the core purposes of the FECA's reporting regime to "provide[] the electorate with information 'as to where political campaign money comes from'" and to "expos[e] large contributions and expenditures to the light of publicity." *Buckley*, 424 U.S. at 66-67. This approach also is consistent with FEC precedent. For example, the FEC General Counsel's office previously has concluded that an incorporated entity "took on a legal

identity separate from that" of its apparent sole funder, "and was subject to regulation as such" for the purposes of the IE reporting requirements. FEC MUR 4313 (Lugar for President), First General Counsel's Report at 34, *available at* http://eqs.fec.gov/eqsdocsMUR/0000018F.pdf.

Ultimately, CREW's reading of the regulation as conflating the contributors for an IE with the maker of the IE is not how the FEC has interpreted its own regulation, and courts "must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

C. CREW's Procedural Objections to the FEC IE Contributor Reporting Regulation Are Irrelevant and, in Any Event, Erroneous.

On its face, the Commission's regulation reasonably construes the statute, and that is confirmed by the regulation's survival of congressional review. Because CREW's challenge – to the extent it is permissible at all – is limited to a claim that the regulation is substantively invalid, those considerations are determinative.

Moreover, CREW identifies nothing in the FEC's 1980 rulemaking record that shows the Commission's regulation was arbitrary at the time. Indeed, the FEC's legislative recommendations, the language of the NPRM, and the final explanation and justification easily surpass the high bar for challenging a regulation procedurally. *See Van Hollen*, 811 F.3d at 496–97. CREW further complains that the campaign finance experience since 1980 has shown that the regulation defeats the intended scope of reporting. That is doubtful for the reasons the FEC gave with respect to the EC reporting regulation approved in *Van Hollen.* Beyond that, however, FEC action cannot be condemned as arbitrary or capricious based on facts that emerged later. *See CREW*, 209 F. Supp. 3d at 88. If CREW wants to rely on post-1980 experience, it must petition the agency to initiate a rulemaking.

V. SUBSECTION 30104(C)(1) DOES NOT MANDATE "ADDITIONAL" REPORTING.

CREW's MSJ Brief (at 39-44) contends that the Coverage Provision imposes "additional" reporting obligations independent of the Content Provision. But this argument is inconsistent with the FECA's structure and conflicts with judicial precedent.

The Coverage Provision is easily and naturally read as a generalized opening statement requiring persons that make IEs to report certain information. Then, following the outlay of this general rule, the Content Provision logically provides the contents of what the reports under the Coverage Provision must contain – i.e., an indication of whether the IE is in support of/opposition to a candidate, a certification that the IE was made independent of a candidate's campaign, and certain information about contributors. Indeed, the Content Provision opens with the phrase: "[s]tatements required to be filed by this subsection," which can only be interpreted as a gloss on what the preceding subsection means. *Cf.* 52 U.S.C. § 30104(f) ("*Disclosure of electioneering communications*"), (f)(1) ("*Statement required*"), (f)(2) ("*Contents of Statement*"). The Coverage Provision's introductory requirement that the statement contain "the information required under subsection (b)(3)(A) for all contributions received by such person" simply means that any information about contributors to be disclosed, pursuant to the Content Provision, must include "the date and amount of any such contribution." (Emphasis added.)

CREW's reading of the statute would frustrate congressional intent by decreasing the information reported. The Coverage Provision contains an affirmative reporting obligation – i.e., "Every person . . . shall file a statement." The Content Provision, however, does not actually contain an affirmative statement that the IE maker do anything. Without linking the two provisions together, there would be no requirement that an IE maker file a certification that the IE was independent of a candidate's campaign, for example. That would effectively read out of the statute certain information that Congress clearly wanted to have filed with the Commission.

CGPS's reading of the statute also accords with judicial precedent. "Section 434(c)(1) requires that any person making an 'independent expenditure' greater than $250 file a statement with the FEC. The contents of the statement are specified in 434(c)(2)." *Furgatch*, 807 F.2d at 859 n.2.

CREW cites the earlier decision in *FEC v. Massachusetts Citizens for Life* ("*MCFL*"), 479 U.S. 238 (1986), for the proposition the Coverage and Content Provisions constitute separate reporting obligations. But CREW fails to mention that Justice Brennan – who delivered the Court's opinion – was not speaking for the Court on the IE reporting point, as five justices were unwilling to sign on to that part of his opinion. *See id.* at 241. Moreover, as both the Chief Justice and other courts have observed, the non-essential portions of *MCFL* are dicta. *See, e.g.*, *id*. at 271 (Rehnquist, J., concurring and dissenting); *Vote Choice, Inc. v. Di Stefano*, 814 F. Supp. 186, 191 n.12 (D.R.I. 1992).

The FEC correctly concluded that the FECA required all non-political committee IE makers to only file one report, and the Commission used its regulations in 11 CFR Part 109 to implement that requirement. *See* AR1416, 1503. This decision was consistent with the FECA's plain language. Moreover, even if there were any statutory ambiguity, this Court should – consistent with abundant judicial authority – defer to the FEC's 37 years of consistent reading, implementation, and enforcement of the Coverage Provision.

CONCLUSION

For the foregoing reasons, CGPS respectfully requests this Court deny CREW's Motion for Summary Judgment and grant CGPS's Cross-Motion for Summary Judgment.

Respectfully submitted,

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