UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT FEDERAL ELECTION COMMISSION'S AND INTERVENOR DEFENDANT CROSSROADS GRASSROOTS POLICY STRATEGIES'S CROSS-MOTIONS FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Federal Election Commission ("FEC") relied on an invalid regulation to dismiss Citizens for Responsibility and Ethics in Washington's and Nicholas Mezlak's (together, "CREW") complaint against Crossroads Grassroots Policy Strategies ("Crossroads GPS"). The regulation only requires those making independent expenditures to report contributors who gave to further "the reported" expenditure, 11 C.F.R. § 109.10(e)(1)(vi), conflicting with the dual mandates of 52 U.S.C. § 30104(c)(1) and (c)(2)(C) requiring disclosure of all contributions given to further "an" independent expenditure and all contributions received that year. The regulation was also issued without any explanation, or even recognition, of that conflict. Nonetheless, the FEC relied on it to find no reason to believe Crossroads GPS needed to disclose its contributors, despite the undisputed evidence in the record that one contributor gave over $3 million specifically to support Crossroads GPS's work, primarily consisting of airing independent expenditures, to elect Josh Mandel; the group took in another $1.3 million from others for the same work; and that it received more contributions based on "example" ads shown at a fundraiser. Both the regulation and the dismissal below, however, are unlawful and both should be stricken by the Court.

In an attempt to defend the indefensible, the FEC and Crossroads GPS make *ipse dixit* appeals to the agency's expertise, assuring the Court that the issues here are simply too complicated for it to understand. They wildly cast about for even the flimsiest of grounds to try to establish some ambiguity in the statute to support the regulation and the dismissal. When they have no argument on the merits, they challenge CREW's standing. Finally, in a sign that it has no meritorious argument to advance, Crossroads GPS resorts to fabricating evidence.

Their arguments are meritless. First, 11 C.F.R. § 109.10(e)(1)(vi) is unexplained,

conflicts with 52 U.S.C. § 30104(c)(2)(c), and either does not reflect 52 U.S.C. § 30104(c)(1) or conflicts with it. CREW has standing to challenge the regulation under the Administrative Procedure Act ("APA") and the Court can remedy CREW's injury by "vacating the challenged rule." *Shays v. FEC*, 414 F.3d 76, 95 (D.C. Cir. 2005).

Second, the dismissal of CREW's complaint against Crossroads GPS was "contrary to law," under the Federal Election Campaign Act ("FECA"). 52 U.S.C. § 30109(a)(8)(C). The dismissal was based on the invalid regulation, which necessarily means it rested on "an impermissible interpretation of [law]." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). Further, while the controlling commissioners were right that the regulation is "silent" about the "additional" reporting obligations imposed by subsection (c)(1)—an obligation CREW pressed below—it was contrary to law to find no reason to believe Crossroads GPS violated subsection (c)(1) based on trumped up concerns that it lacked fair notice. AR 81. Finally, even assuming the regulation is valid—and it is not—the FEC's failure to find reason to believe was still contrary to law because the FEC admits it imposed a higher standard of review than commanded by the statute.

In sum, because the regulation is invalid, its infirmities are incurable, and its continued existence causes great prejudice to CREW and the public, CREW respectfully requests the Court strike it. Moreover, because the FEC also dismissed CREW's complaint based on the regulation and other unlawful grounds, CREW respectfully requests the Court declare the dismissal was contrary to law.

ARGUMENT

I. The Regulation Exceeds the Scope of the FEC's Authority and Must be Struck

Crossroads GPS was allowed to conceal its contributors from CREW and from voters,

despite Congress's unambiguous command to the contrary, because the FEC relied on an unexplained regulation which narrowed one reporting requirement under the FECA—limiting Congress's command to report contributions given to further "an" independent expenditure to only those given to further "the reported" ad, *compare* 52 U.S.C. § 30104(c)(2)(C) *with* 11 C.F.R. § 109.10(e)(1)(vi)—while remaining silent about another disclosure provision, 52 U.S.C. § 30104(c)(1). The regulation is invalid, however. First, the FEC offered no contemporaneous "persuasive justification" for the regulation, *Shays*, 414 F.3d at 100, and, second, it fails under both prongs of the *Chevron* analysis. Accordingly, it cannot lawfully serve to block CREW's access to the information to which it is rightfully entitled: the identities of Crossroads GPS's contributors subject to disclosure under 52 U.S.C. § 30104(c).

A. Standard of Review

CREW's challenge to the legality of 11 C.F.R. § 109.10(e)(1)(vi) is governed by the APA, 5 U.S.C. § 706(2). Despite the FEC's representations otherwise, this review is "not toothless." *Multicultural Media, Telecomm. & Internet Council v. FCC*, 873 F.3d 932, 937 (D.C. Cir. 2017). Indeed, in determining whether § 109.10(e)(1)(vi) conflicts with the FECA and thus is "not in accordance with law" or "in excess of statutory jurisdiction," 5 U.S.C. § 706(2)(A), (C), the Court applies the familiar *Chevron* framework, *Shays*, 414 F.3d at 96. "[A]t *Chevron* step one [courts] alone are tasked with determining Congress's unambiguous intent" and so courts address that inquiry "without showing the agency any special deference." *Village of Barrington, III v. Surface Tranp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011); *Prime Time Int'l Co. v. Vilsack*, 930 F. Supp. 2d 240, 250 (D.D.C. 2013) (courts review "*Chevron* step 1 independently" and "do not defer to agency determinations of whether or not the statute is ambiguous"). "At *Chevron* step two [courts] defer to the agency's permissible interpretation, but

only if the agency has offered a reasoned explanation for why it chose that interpretation." *Village of Barrington*, 636 F.3d at 660 (emphasis added). Only contemporaneous explanations of the agency can satisfy the agency's obligation at *Chevron* step two. *Council for Urological Interests v. Burwell*, 790 F.3d 212, 222 (D.C. Cir. 2015) (courts only "look to what the agency said at the time of the rulemaking—not to its lawyers' post-hoc rationalizations").[1]

Similarly, the agency's separate duty to "articulate a satisfactory explanation for its action" is not subject to the agency's discretion. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Post-hoc explanations of counsel are insufficient. *N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 860 (D.C. Cir. 2012). So too is a naked appeal to expertise, as that "would in effect be saying that the expertise of the Commission is so great" that when it asserts that expertise, "the controversy is at an end, even though the record does not reveal" how that expertise came to bear. *Baltimore & Ohio R. Co. v. Aberdeen & Rockfish R. Co.*, 393 U.S. 87, 91–92 (1968). Rather, where the agency's "explanation for its determination . . . lacks any coherence, the court owes no deference to [the FEC's] purported expertise because [the court] cannot discern it." *Haselwander v. McHugh*, 774 F.3d 990, 996 (D.C. Cir. 2014).

Here, the agency's sole contemporaneous justification for the regulation is that it "incorporates the changes" in then recently passed FECA amendments. AR 1503. Because that statement provides no coherent explanation for—or indeed even recognition of—the change in disclosure obligations from those required by Congress, it fails to provide a "coherent"

[1] The FEC argues that it may even adopt rules contravening the statute as long as they are "related to the purpose of the enabling legislation," FEC Br. 32 (quoting *Mourning v. Family Publ'n Serv., Inc.*, 411 U.S. 356, 369 (1973)). But the Court's "decisions, *Mourning* included, do not authorize agencies to contravene Congress' will in this manner." *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 92 (2002).

explanation to which the Court could defer. Thus, in this challenge to 11 C.F.R. § 109.10(e)(1)(vi) under the APA, the Court owes the FEC no deference.

B. The Regulation is Unexplained and Inexplicable

The agency's whole explanation for the existence of 11 C.F.R. § 109.10 (then § 109.2) consists of twenty-nine words. AR 1503. It states that the regulation "incorporates the changes set forth at 2 U.S.C. 434(c)(1) and (2)." *Id.* (now codified at 52 U.S.C. § 30104(c)(1) and (2)). The regulation does not explain, however, why the agency altered subsection (c)(2)'s requirement to disclose contributions received for the purpose of furthering "an" independent expenditure, 52 U.S.C. § 30104(c)(2)(C), to one requiring only the disclosure of contributions received for the purpose of furthering "the reported" independent expenditure, 11 C.F.R. § 109.10(e)(1)(vi). Indeed, the explanation does not even recognize this change. Nor does anything in the record explain that alteration—in fact, nothing in the record shows that the Commission was even aware of it. Moreover, there is not even an attempt to explain how the regulation incorporates changes in subsection (c)(1), which requires the disclosure of "all contributions" over $200 received in the prior year. 52 U.S.C. § 30104(b)(3)(A), (c)(1). The FEC's utter lack of explanation for the regulation provides no "rational connection between the facts found and the choice made," *State Farm*, 463 U.S. at 43, nor "persuasive justification for the provisions challenged," *Shays*, 414 F.3d at 100. It is no explanation, never mind an "adequate[e]" one. *Public Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993).

Neither the FEC nor Crossroads GPS seriously dispute this. Nowhere in either party's defense of this regulation do they rely on the agency's actual contemporaneous explanation. The FEC cites it merely once in background, FEC Br. 7, and never mentions it again. Crossroads GPS's reliance is similarly sparse. CGPS Br. 13, 50. Instead, they rely on "post hoc

explanations," but those cannot satisfy the FEC's duty to have provided a contemporaneous justification as a matter of law. *N. Air Cargo*, 674 F.3d at 860. The agency's failure to provide an "adequat[e]" or "persuasive" justification at the time of the rule's adoption renders it invalid. *Public Citizen*, 988 F.2d at 197; *Shays*, 414 F.3d at 100.

Nor do the FEC's and Crossroads GPS's post-hoc explanations justify the regulation, even if they were properly before the Court. The statute is neither absurd as written nor raises serious or constitutionally cognizable risks of confusion.

The FEC and Crossroads GPS primarily contend that it would have been absurd for Congress to have meant what it said when it required disclosure of contributions given for the purpose of furthering "an" independent expenditure. FEC Br. 36–37, CGPS Br. 40–41. Yet it is plainly not absurd for Congress to have required the creator of an independent expenditure to report all of their contributions used to fund any and all of its independent expenditures. By doing so, Congress would ensure that voters actually learned the identity of those funding the ads and thus were "fully informed," *Buckley v. Valeo*, 424 U.S. 1, 76 (1976), whereas under the current regulation, voters are essentially denied any insight into "[t]he sources of a candidate's financial support," *id.* at 67. *See* CREW Br. 15–17; *infra* p. 19.

That is particularly apparent when subsection (c)(2)(C) is read in connection with subsections (c)(1) and (b)(3)(A). Just as Congress now regulates two forms of electoral communications—one based on inferred purpose (i.e., independent expenditures) and another based on timing (i.e., electioneering communications)—Congress required disclosure of two sets of contributions when it amended § 30104(c): one group would be reported based on the purpose they gave (subsection (c)(2)(C)), and another would be reported based on when they gave (subsection (c)(1)). Further, just as Congress wanted voters to know the identities of all

contributors to a political committee and not only those contributors who gave to fund the particular political communication that may relate to the particular election in which the voter participates, Congress similarly wanted viewers of independent expenditures to understand the full scope of the ad's financial support (without subjecting the ads' makers to full political committee burdens like continuous reporting).

Nor can the FEC's or Crossroads GPS's concerns that a donor may be mistakenly associated with particular independent expenditures justify the limitation on disclosure. First, reducing the disclosure required under subsection (c)(2)(C) would not eliminate the purportedly confusing disclosure because the creator of an independent expenditure must report all contributions received within the year under subsection (c)(1), regardless of the particular race the contributor sought to influence. Second, the confusion defendants fear is also present with political committees, which must report all of their contributors, even if those contributors did not intend to impact the specific election in which a voter might interact with the political committee. 52 U.S.C. § 30104(b)(3)(A). Yet the law still requires it. Third, for groups that only "occasionally" engage in political activity and thus don't register as political committees, *FEC v. Mass. Right to Life* ("*MCFL*"), 479 U.S. 238, 262 (1986), the risk of confusion is exceedingly slight. Such a group would run only a very small number of independent expenditures, all sharing an ideological view. While the risk of confusion may be greater for Crossroads GPS—which "filed more than 100 different independent expenditure reports in the two-year 2012 election cycle," FEC Br. 37—similar groups will likely be required to report as political committees anyway. *Cf.* AR 199 (statement of two FEC commissioners that "[t]his Commission should acknowledge the obvious [and] deem Crossroads GPS a political committee"). Certainly, Congress could reasonably think voters have a legitimate interest in understanding the financial

backing of organizations so "extensive[ly]" involved in elections. *MCFL*, 479 U.S. at 262.

Fourth, it is unconstitutional for the FEC to limit disclosure based on its belief that the recipients of the information will reach—in the FEC's view—incorrect or undesired conclusions. *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 769–70 (1976). The government may not limit recipients' access to information by citing "the advantages of their being kept in ignorance." *Id.* Rather, "information is not in itself harmful," and "the best means" of addressing any confusion "is to open the channels of communication rather than to close them." *Id.* If a contributor is concerned about being mistakenly associated with all of her beneficiary's independent expenditures, the solution is for either to engage in *more* speech, not less. Either the contributor or Crossroads GPS can publicly declare that a reported contribution was intended to fund a different race or ad. But what neither Crossroads GPS nor the FEC may do is to deny CREW and others the information that Congress has entitled them out of the belief that they won't reach the "right" conclusion.

While the FEC and Crossroads GPS may think Congress chose too much disclosure, their disagreements with the statute cannot justify departing from it. *Shays v. FEC*, 528 F.3d 914, 919 (D.C. Cir. 2008) (agency may not frustrate policy adopted by Congress).[2] Their post-hoc attempts to justify the FEC's narrowing of disclosure required under the FECA are neither "persuasive" nor "adequate[]." *Public Citizen*, 988 F.2d at 197; *Shays*, 414 F.3d at 100. Nor, indeed, are they even relevant, *Council for Urological Interests*, 790 F.3d at 222, and the FEC's failure to offer a contemporaneous explanation renders 11 C.F.R. § 109.10(e)(1)(vi) invalid.

[2] While the FEC and Crossroads GPS argue that statute is too ambiguous and therefore the need for clarity explains the regulation, the statute is not ambiguous for the reasons addressed below.

C. The Regulation Conflicts with Subsection (c)(2)(C)

While the FEC's failure to offer a contemporaneous explanation is enough to render the rule invalid, its conflict with the statute is also an irreparable infirmity. The FEC contends that the regulation is a reasonable interpretation of 52 U.S.C. § 30104(c)(2)(C) and thus can be saved by a new explanation on remand. Nevertheless, despite the FEC's and Crossroads GPS's attempts, neither comes close to showing that the subsection is ambiguous, nor do either show that the regulation is reasonable. Accordingly, the regulation fails both *Chevron* steps.

1. The Regulation Fails Chevron *Step One*

In amending the FECA, Congress "spoke[] directly" about the scope of contributions that were to be reported under the second prong of the new reporting regime, *Shays*, 414 F.3d at 96: all contributions given for the purpose of furthering "an" independent expenditure, 52 U.S.C. § 30104(c)(2)(C); *MCFL*, 479 U.S. at 262. Accordingly, there is no ambiguity for the FEC to address, and the FEC's and Crossroads GPS's attempts to manufacture one are meritless.

With respect to subsection (c)(2)(C), the FEC asserts the use of "an" in the statute is inherently ambiguous, and that it was therefore acceptable for the agency to change Congress's reporting scope from contributions supporting "an" independent expenditure to "the reported" independent expenditure. Yet Congress's choice "to employ the indefinite article does not imply that 'Congress has explicitly left a gap for the agency to fill.'" *Mylan Pharm., Inc. v. Shalala*, 81 F. Supp. 2d 30, 37 (D.D.C. 2000).

The FEC's authority purporting to show the use of "an" is ambiguous actually demonstrates the contrary. In *McFadden v. United States*, the Court recognized that "[w]hen used as an indefinite article, 'a' means 'some undermined and unspecified particular.'" 135 S. Ct. 2298, 2304 (2015) (quoting Webster's New Int'l Dictionary). But it did not then find that

that term was ambiguous—indeed it said the statute was "unambiguous." *Id.* at 2307. It went on to find that, under the plain meaning of "a," a statute barring a person from knowingly possessing "a controlled substance" barred that person from knowingly possessing *any* controlled substance. *Id.* Crossroads GPS's authority is even more explicit, treating a statute's use of "any" and "a" as synonymous. *N.H. Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 72 (1st Cir. 2006) (treating statute's reference to "any motor carrier" and "an air carrier" as synonymous, recognizing "'[a]ny' means 'one . . . of whatever kind,' and 'an' means 'one'"). Notably, Crossroads GPS admits that CREW's reading would be compelled if the statute required reporting contributions for "any independent expenditures." CGPS Br. 40–41. The cited authority proves that that is exactly what the statute already requires.

The other authority cited by the FEC and Crossroads GPS is similarly unhelpful to them. Crossroads GPS cites cases that merely show that the word modified by the indefinite article may be ambiguous, allowing an agency to interpret the scope of the category. *See Foo v. Tillerson*, 244 F. Supp. 3d 17, 23 (D.D.C. 2017) ("an individual" may or may not cover estates); *Abbott GmbH & Co. KG v. Yeda Research and Dev. Co., Ltd.*, 516 F. Supp. 2d 1, 6 (D.D.C. 2007) ("a protein" may or may not cover "mutein"). There is no dispute here, however, that "independent expenditure" is unambiguous or that Crossroads GPS's ads fall within it.[3]

[3] Nor is *United States v. Hagler* instructive. 700 F.3d 1091 (7th Cir. 2012). There, the court interpreted a statute providing that, "[i]n a case in which DNA implicates *an* identified person," a statute of limitations shall not preclude prosecution until a period after "the implication of *the* person." *Id.* at 1096–97 (emphasis added). The defendant attempted to argue that, because the first use of "person" was indefinite, the clock began to run whenever any person was identified, even if it was not the person being prosecuted. *Id.* at 1097. The court reasonably rejected that, noting that the subsequent use of "the" meant that a single specific individual must first be identified before the clock began running on *that* person's prosecution. No similar provision is in the FECA. Notably, the court would have reached the exact same result had the statute

Indeed, Congress's intentional choice of language can be seen from the fact that Congress explicitly chose to use different articles in other sections of the same provision. In subsection (c)(2)(A), Congress required the reporting entity identify whether "the independent expenditure" supports or opposes the referenced candidate. Clearly then, the reporting entity must separately report for each independent expenditure whether that specific independent expenditure was either in support of or in opposition to the referenced candidate. Yet Congress explicitly chose *not* to use the definite article with respect to subsection (c)(2)(C). In that subsection, Congress chose the indefinite, and "Congress knew the difference between '[the]' and '[an]' and used the words advisedly." *Pillsbury v. United Eng'g Co.*, 342 U.S. 197, 199 (1952).

The FEC nevertheless argues that ambiguity exists because it is "unclear where and when that information should be reported under plaintiffs' interpretation" of § 30104(c)(2)(c). FEC Br. 37. Yet those questions are addressed in a separate section of the statue: 52 U.S.C. § 30104(g)(2)(A), (B) (requiring reporting within 48 or 24 hours of an independent expenditure), and by FEC regulations, 11 C.F.R. § 109.10(b) (requiring quarterly reports). When reports are filed, 52 U.S.C. § 30104(c)(2)(C) specifies one type of information they must contain: the identity of all contributors who gave to further an independent expenditure.

The FEC maintains that it would be absurd for each 24 or 48 hour report to list contributors who may not have given to fund that specific ad, or who gave some time ago. It argues that it would be absurd for Crossroads GPS's contributors to be reported, even if Crossroads GPS had not run ads similar to the "examples" shown at the fundraiser but ran "ads for completely different races and took completely different positions." FEC Br. 38. But those

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provided that "[i]n a case in which DNA implicates [any] person," the statute of limitations shall not preclude prosecution until a period after "the implication of the person." *Id.* at 1096.

concerns have no basis in the text of the FECA; in fact, they are plainly irrelevant to the reporting regime imposed by Congress. The exact same situation could happen when someone donates to a political committee, yet there is no dispute that that person must be reported. Indeed, such a situation demonstrates the wisdom of Congress's selection. Voters would know the sources of the funds used to pay for the independent expenditures, even if the maker switched the candidate or issue addressed. Any contributors concerned about being associated with an issue or candidate are free to publicly correct that perception, or they can limit their contributions to groups that focus on one election or issue. What the FEC may not do, however, is to reduce the information available to the public because it believes voters should not be allowed to reach their own conclusions. *Va. State Bd. of Pharm.*, 425 U.S. at 769–70; *cf.* FEC Br. 44 (arguing voters are better off ignorant).

Simply put, there no absurdity in interpreting Congress to have meant what it said. Congress could clearly have foreseen the likelihood that requiring specific earmarking in relation to a single ad would result in a dearth of reporting. Indeed, such a concern about explicit earmarking would be well placed: it is exactly what has happened. CREW Br. 15–17.

For its part, Crossroads GPS resorts to misstating the historical record to imply that Congress simply misspoke and what it *meant* to do was to limit or eliminate contributor disclosure. Crossroads GPS's citations to history, however, show no such thing. While one of the goals of the 1979 amendments indeed was reducing the "burden" of "reporting requirements," Legislative History of Federal Election Campaign Act Amendments of 1979 at 449 (1983), http://bit.ly/2BopE8F ("FECA 1979 History"), those reductions related to candidates and political committees, *see id.* (noting burden of reporting regulations and amendments' aim to "reduce the number of candidate reports in a 2-year election cycle from a maximum of 24 to 8");

see also id. at 451 (summarizing changes in reporting obligations). The sole changes relating to independent expenditures were to shift the burden of reporting from contributors to those making the expenditures, to raise the expenditure reporting threshold from $100 to $250, and to raise the contribution reporting threshold from $100 to $200. *Id.* at 449, 451, 458. There is no evidence Congress sought to limit the type of contributions that would be reported to the public. Indeed, it is clear Congress sought to continue the reporting of the identities of those "persons who make contributions in excess of $200 to a person making independent expenditures," without any qualification. *Id.* at 458. In sum, despite Crossroads GPS's fabrications, the history shows that Congress did not intend to "affect[] meaningful disclosure" of contributions funding independent expenditures. *Id.* at 103.

Without any authority to show that Congress did not mean "an" when it said so, the FEC and Crossroads GPS turn to authority discussing a different provision of the FECA that does not use the same language. In *Van Hollen v. FEC*, the D.C. Circuit addressed the ambiguity of 52 U.S.C. § 30104(f)(2), which relates to reporting of electioneering communications. 811 F.3d 486, 492 (D.C. Cir. 2016). The statute there did not define the scope of contributions that were required to be disclosed, providing only that "contributors who contributed" were to be reported. *Id.* (quoting § 30104(f)(2)). Without a scope of reporting specified, the D.C. Circuit found that the use of "contributor" and "contributed" were ambiguous, potentially referring to all contributions or perhaps referring only to contributions for electioneering communications. *Id.* at 491 (citing *Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108, 111 (D.C. Cir. 2012)). Thus it found the FEC had authority, under *Chevron*, to interpret the law to apply only to contributions earmarked for electioneering communications. *Id.* at 492.

In contrast, Congress expressly stated the scope of contributor reporting required for

independent expenditures. It expressly stated that all contributions "given for the purpose of furthering an independent expenditure" must be reported (in addition to all contributions received that year, regardless of earmarking, under the other reporting provision). 52 U.S.C. § 30104(c)(2)(C). Unlike in *Van Hollen*, in the statute before the Court here, there is no unspecified scope because Congress "spoke[] directly" about the issue. *Shays*, 414 F.3d at 96.

Indeed, the regulation at issue in *Van Hollen* only supports the fact that Congress spoke clearly in § 30104(c)(2)(C). Confronted with an ambiguous statutory provision in § 30104(f), the FEC decided to clarify it by unambiguously commanding those making electioneering communications to report the identities of contributions "given for the purpose of furthering electioneering communications." 11 C.F.R. § 104.20(c)(9). That rule was expressly modeled on the language contained in subsection (c)(2)(C). *Van Hollen*, 811 F.3d at 493.[4] Clearly, the FEC did not then believe subsection (c)(2)(C)'s formulation was hopelessly obtuse when it decided to use it as the model for its clarification of subsection (f)(2). Notably, the FEC understood "the purpose of furthering an independent expenditure" was equivalent in scope to "the purpose of furthering electioneering communications," conflicting with the agency's position here that the same language is not equivalent to "the purpose of furthering independent expenditures."

The FEC's and Crossroads GPS's strained protests aside, subsection (c)(2)(C) is unambiguous. That is why the Supreme Court had no trouble pinpointing what those making independent expenditures must report. They must, the Court said, disclose (among other things) "all persons making contributions over $200 who request that the money be used for independent expenditures." *MCFL*, 479 U.S. at 262. The FEC and Crossroads GPS attempt to sideline

[4] While three commissioners interpreted that rule to be the equivalent of 11 C.F.R. § 109.10(e)(1)(vi), CGPS Br. 11 n.3, that view has never been adopted by the FEC.

MCFL, but end up simply misleading the Court. They argue that the relevant discussion was not in the majority opinion. They are wrong. While Justice Brennan (correctly) interpreted the reporting obligations in a section of the opinion only joined by three other Justices, *see id.* at 252, he restated those obligations again in a later section joined by four Justices, *see id.* at 262. Both sections recognize the dual reporting obligation imposed by the statute and the fact that subsection (c)(2)(C) requires reporting of contributions given to further independent expenditures, without any limitation to those earmarked to a single specific ad.[5]

Nor is *MCFL*'s construction *dicta*, as the FEC and Crossroads GPS urge. FEC Br. 27, CGPS Br. 50. Rather, it is part of the case's holding. The question before the Court in *MCFL* was whether the Constitution permitted prohibition of a nonprofit corporation's independent expenditures due to its corporate form, even if it could still pay for the ads from a separate segregated fund. *MCFL*, 479 U.S. at 241. In analyzing the question, the Court applied strict scrutiny and thus decided whether other options were "less restrictive" than the ban and yet still fulfilled the government's interests in combating corruption. *Id.* at 256, 262. In finding that there were, the Court expressly relied on the fact that, because of the reporting requirements for contributions for independent expenditures as it interpreted them, "[t]he state interest in disclosure . . . can be met in a manner less restrictive than" the ban and the requirement that the group form a separate segregated fund. *Id.* at 262. In other words, the Court's consideration and

[5] Indeed, even if subsection (c)(2)(C) were ambiguous—and it is not—the Court's construction of it in *MCFL* would remove any ambiguity within which the FEC might operate. Though an agency may diverge from a lower court's interpretation of a statute, *see Nat'l Cable & Telecom. Ass'n v. Brand X*, 545 U.S. 967, 982 (2005), it may not do so when the Supreme Court interprets a statute, *id.* at 1003 (Stevens, J., concurring). Accordingly, the FEC is required to apply subsection (c)(2)(C) as Congress wrote it.

reliance on the sufficiency of reporting under § 30104(c) as it understood it was "necessary to [the opinion's] result" striking the ban. *Seminole Tribe of Fl. v. Florida*, 517 U.S. 44, 67 (1996). Accordingly, that construction of § 30104(c) is squarely within the holding of *MCFL*.[6]

In sum, the statute is unambiguous. Congress "spoke[] directly" about the scope of contributor reporting required under subsection (c)(2)(C). *Shays*, 414 F.3d at 96. Since there is no gap left for the FEC to fill, and 11 C.F.R. § 109.10(e)(1)(vi) requires less disclosure than the statute, as the FEC concedes, FEC Br. 37, the regulation is invalid.

2. The Regulation Fails Chevron *Step Two*

Even if the statute was ambiguous—and it is not—11 C.F.R. § 109.10(e)(1)(vi) would still be invalid because it does not represent a "reasonable" interpretation of subsection (c)(2)(C). *Shays*, 528 F.3d at 919. As noted above, the FEC provided no contemporaneous justification for its departure from the express language of the statute and only its contemporaneous explanation can satisfy its obligation at *Chevron* step two. *Council for Urological Interests*, 790 F.3d at 222. That alone renders the regulation invalid. But the regulation is invalid under step two for two additional reasons: it frustrates the purposes of the FECA and creates redundancies with other provisions of the law. The FEC's and Crossroads GPS's post-hoc attempts to save the regulation do not eliminate these problems, even if they could be considered by this Court.

[6] The two authorities cited by Crossroads GPS also do not show that *MCFL*'s construction of § 30104(c) is dicta. CGPS Br. 50. Justice Rehnquist's dissent does not call the Court's construction of § 434(c) (now § 30104(c)) "dicta"—as Crossroads GPS represents—but rather he calls the "three-part test" contained at pages 630–31 dicta. *MCFL*, 497 U.S. at 271. The test to which Justice Rehnquist referred was the one crafted to identify qualified nonprofit organizations: corporations that, even before *Citizens United*, 558 U.S. 310 (2010), could engage in independent expenditures. *See MCFL*, 479 U.S. at 264, 107 S. Ct. 616, at 630–31 (setting forth three characteristics to qualify for exemption). *Vote Choice, Inc. v. Di Stefano*, is similarly inapposite. 814 F. Supp. 186, 191 & n.12 (D.R.I. 1992) (similarly calling three-part test "dicta").

a. The Regulation Frustrates Congress's Purpose in Disclosure

In providing for disclosure under the FECA, Congress sought to "provide[] the electorate with information as to where political campaign money comes from," *Buckley*, 424 U.S. at 67, "inform[] the public about various candidates' supporters," *McConnell v. FEC*, 540 U.S. 93, 201 (2003), and let "citizens . . . see whether elected officials are 'in the pocket' of so-called moneyed interests," *Citizens United*, 558 U.S. at 370, among other things. To do that, the public needs to know where money used to fund independent expenditures is coming from, even if that money is not earmarked for a specific ad. Yet the FEC regulation "frustrate[s] the policy that Congress sought to implement," letting contributors "evade—almost completely"—disclosure. *Shays*, 528 F.3d at 919. Accordingly, the regulation fails *Chevron* step two.

The FEC and Crossroads GPS contend the regulation is a reasonable construction of the statute. They both first note that "no legislation pursues its purposes at all costs," FEC Br. 41, CGPS Br. 46, relying on *Van Hollen* and its recognition that legislation necessarily reflects a "balance [of] competing values." 811 F.3d at 501. But as CREW demonstrates in its opening brief, the FEC has allowed contributors to almost completely evade disclosure, CREW Br. 15–17, and there is no "balance" where the agency's construction of the statute gives little-to-no weight to the value of disclosure and decimates the law's purpose. Nor is the competing interest *Van Hollen* identified even impacted by enforcing the law as Congress wrote it. In that case, the D.C. Circuit found a countervailing interest in preventing disclosure of all those "who contribute to a union or corporation's general treasury" but who do not support the organization's electoral work. 811 F.3d at 497. But a person who donates money to a corporation or union without "the purpose of influencing any election for Federal office" has not made a "contribution" under the FECA, 52 U.S.C. § 30101(8), never mind one given for the purpose of furthering an independent

expenditure. Thus, one who "donates $5,000 to the American Cancer Society (ACS), eager to fund the ongoing search for a cure" is not a contributor to ACS's independent expenditures (if it were to run one) under any reading of § 30101(c)(2)(C) (or (c)(1) for that matter) and thus would not be disclosed. *Cf. Van Hollen*, 811 F.3d at 497. Moreover, Congress already balanced these interests and expressly tailored the scope of disclosure to include all those who gave to further "an" independent expenditure (as well as all giving more than $200 annually, under subsection (c)(1)). The FEC may disagree with that tailoring, but it may not change it.

With regard to the statute's disclosure purpose, the FEC does not dispute CREW's representations that its rule has totally frustrated the law. Rather, it argues that the relevant data is not properly before the Court. *See* FEC Br. 47–48. The FEC is wrong, however, because the data comes from public records that inform the Court about the proper meaning of subsection (c)(2)(C), and the Court is "unrestricted" in what it may consider to "determin[e] the content or applicability of a rule of domestic law." FED. R. EVID. 201 (cmmt); *see also Sanders v. Kerry*, 180 F. Supp. 3d 35, 41(D.D.C. 2016) (court may take judicial notice of public records).[7] The FEC's attempt to close the Court's eyes to the results of its regulation is understandable—the regulation has utterly decimated independent expenditure contributor reporting.

Crossroads GPS argues that reporting under the regulation is actually significant, citing the Center for Responsive Politics ("CRP") statistic that between 7.2% and 29.7% of contributions for reported non-political committee spending (i.e., sums spent on independent

[7] Additionally, the data shows how the regulation is frustrating the purpose of the statute, which requires looking to the (either likely or actual) consequences of a regulation, which necessarily requires considering information beyond the record. *See Shays*, 528 F.3d at 925 (considering evidence offered at oral argument to decide whether regulation frustrates statute). The evidence also shows the FEC "failed to examine all relevant factors" in its rulemaking, and thus may be considered by the Court. *Oceana, Inc. v. Locke*, 674 F. Supp. 2d 39, 45 (D.D.C. 2009).

expenditures and electioneering communications) are reported. CGPS Br. 46 (citing CRP, Outside Spending by Disclosure, Excluding Party Committees, http://bit.ly/1AzZeKb). That is wrong and Crossroads GPS is misleadingly citing CRP's data. The 7.2% and 29.7% of spending that CPR labels "some disclosure" refers to the total spending by organizations that either report $5,000 in contributions or contributions equal to 5% of their total expenditures, as well as political committees that receive at least $5,000 in contributions, or contributions equal to 5% of their spending, from dark money groups. *See* CRP, Outside Spending. In other words, if Crossroads GPS reported only 5% of its contributors, the entirety of its more than $70 million in independent expenditures would be treated as "some disclosure." Because of this, and because CRP's "some disclosure" category also includes spending by political committees that receive some money from dark money groups, there is no connection between the cited statistics and the amount of contributions reported under 11 C.F.R. § 109.10(e)(1)(vi).

Indeed, based on CRP's data, tax exempt 501(c) groups like Crossroads GPS spent about $300.9 million in 2012 on independent expenditures. CRP, 2012 Outside Spending, by Group, http://bit.ly/2nm87vU. Of those groups, reported contributions used to fund independent expenditures amounted to only about $8 million, or about 2.7%. *Id.* That hardly demonstrates the robust disclosure of contributions. *Cf.* CGPS Br. 46 & n.28. And even that figure is significantly over inclusive as CRP's 501c groups include unions that must disclose political activity under laws other than 11 C.F.R. § 109.10(e)(1)(vi). *See id.* (AFSCME reported $4.6 million in fully disclosed independent expenditures); Dep't of Labor, Labor Org. Annual Financial Reports, 68 Fed. Reg. 58,374, 58,397 (Oct. 9, 2003) (creating schedule 16).

In sum, there is effectively no disclosure of contributions to fund independent expenditures by non-political committee organizations like Crossroads GPS under the FEC's

current regulatory regime. Because the regulation allows regulated parties to "evade—almost completely"—disclosure mandated by subsection (c)(2)(C), it "frustrate[s] the policy that Congress sought to implement" and must be struck. *Shays*, 528 F.3d at 919.

b. The Regulation Creates Redundancy

As CREW noted in its opening brief, the FEC's requirement of a direct link between the contribution and the independent expenditure, coupled with its finding that the undisputed facts below do not establish that link, effectively means that the FEC requires an individual to "make" an independent expenditure before they could qualify as a contributor under 11 C.F.R. § 109.10(e)(1)(vi). That makes the regulation redundant to other reporting requirements, and it thus fails *Chevron* step two. *Shays v. FEC*, 337 F. Supp. 2d 28, 77 (D.D.C. 2004). Neither the FEC nor Crossroads GPS adequately refute this redundancy.

The FEC maintains there is no redundancy because one who responds to a solicitation for a "particular independent expenditure" would be reported under the regulation, though they would not make the independent expenditure. FEC Br. 46. Here, however, the FEC found that individuals were solicited after viewing "example" ads, but that they *still* did not qualify under the rule. AR 77–78. Nor was it enough that their contributions were used to create ads parroting the example ads, *see* CREW Br. 19–21 & nn. 12–14, because the funds raised didn't "further[] those [example] communications," AR 187. Clearly, then, what the FEC means by a solicitation to fund a "particular independent expenditure" is a solicitation to fund an ad in its exact final form, with no alterations between the solicitation and airing. Only then, under the FEC's reading, would the contributor be subject to disclosure under 11 C.F.R. § 109.10(e)(1)(vi).

But under that reading, the contributor would be "making" the independent expenditure, as the FEC has already found. The FEC addressed this situation in an advisory opinion request

by Votervoter, a company that allowed individuals to fund already existing ads. FEC, AO 2008-10 (Oct. 24, 2008), http://bit.ly/2AITSaa. The FEC found that, in that situation, the company would not be the one who makes the independent expenditure; rather, it would be the person providing the funds who did so. Accordingly, one who funds a specific independent expenditure in fact makes the ad and thus has to report it. Limiting contributor disclosure to the same situation, as the FEC does in the regulation, renders contributor reporting redundant.

For its part, Crossroads GPS happily embraces this redundancy, arguing that only contributions that are the equivalent of expenditures are of any interest to voters. But its authority does not support this narrow understanding of the value of contributor reporting. While *Buckley* noted the importance of reporting "earmarked" contributions, the earmarking it spoke of was "earmark[ing] for political purposes"—*i.e.*, intending to influence elections—*not* earmarking for a single specific use. *Buckley*, 424 U.S. at 80. Moreover, it is clear that the FECA is not concerned solely with contributions earmarked to particular uses: there is no dispute that political committee contributions need not be earmarked to their final use in order to be reported (and that, by referencing this requirement, subsection (c)(1) imposes a similar unconstrained reporting requirement on those making independent expenditures).[8]

c. Neither the FEC's Participation in Drafting the Statute, nor Congress's Inaction on the Regulation, Satisfy the FEC's *Chevron* Burden

Unable to show any reasoned basis for the regulation, Crossroads GPS argues that none need be shown because the FEC made legislative recommendations that eventually turned into

[8] Nor is the MUR identified by Crossroads GPS instructive. CGPS Br. 48. That MUR—at least in the unredacted portion—only addressed whether a corporation could make an expenditure as a separate entity from its owner, *see* General Counsel's Report 34, MUR 4313 (Lugar for President), http://bit.ly/2Bpmvpn, an issue not relevant here.

the 1979 FECA amendments and because Congress did not veto 11 C.F.R. § 109.10(e)(1)(vi) when it was sent for review. CGPS Br. 42–45. But neither fact satisfies the FEC's burden here.

First, with respect to the FEC's legislative recommendations, there is no evidence that the FEC recommended limiting reporting to only those contributions given to further "the reported" independent expenditure, or that it understood the language eventually adopted by subsection (c)(2)(C) to be limited to that reporting. Rather, the FEC only suggested that the threshold for reporting be raised from $100 to $250 and that contributors not be required to report themselves. FECA 1979 History 24–25. Indeed, rather than seeking to greatly limit the reporting of contributions, the FEC recommended reporting continue to disclose "a contribution to a person . . . who makes an independent expenditure" without limitation. *Id.* Nothing in the FEC recommendations or other legislative history supports a reading of subsection (c)(2)(C) that is limited to contributions given to further only the reported expenditure.[9]

With regard to congressional inaction after the regulation was submitted to it for review, the Supreme Court has "oft-expressed skepticism toward reading the tea leaves of congressional inaction." *Rapanos v. United States.*, 547 U.S. 715, 749 (2006). "It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the [agency's] statutory interpretation." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994). "Congressional inaction cannot amend a duly enacted statute." *Id.*; *accord Ashton v. Pierce*, 716 F.2d 56, 63 (D.C. Cir. 1983)

[9] Nor can 11 C.F.R. § 109.10(e)(1)(vi)'s existence be bootstrapped into its own justification merely by pointing out that it was adopted soon after the amendment was passed. "[W]hen a statute speaks in language which leaves no doubt of the intent of Congress, contemporaneous administrative construction, if contrary to the terms of the statute, is merely erroneous, and has no effect except to call for correction. It cannot be relied upon as an accepted interpretation of the law." *Shearman v. Comm'r of Internal Revenue*, 66 F.2d 256, 257 (2d Cir. 1933).

("Congress cannot by its silence ratify an administrative interpretation that is contrary to the plain meaning of the Act."). Accordingly, without "overwhelming evidence that Congress considered and failed to act upon the precise issue before the court," congressional inaction "is not probative." *Bismullah v. Gates*, 551 F.3d 1068, 1074 (D.C. Cir. 2009). Here, there is no such evidence and Congress's inaction lacks probative value, particularly where 11 C.F.R. § 109.10 was one of over a hundred regulations spanning thirty pages sent to Congress to review.

Nor does Crossroads GPS's citation to later amendments or failed bills demonstrate congressional ratification. CGPS Br. 44 & n.26.[10] In none of the various pieces of legislation Crossroads GPS cites did Congress reconsider the wording of § 30104(c) in light of the FEC's regulation. While Crossroads GPS would make much of Congress's decision not to revisit the contributor reporting requirements, "a court cannot assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the [administrative] statutory interpretation." *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001). The DISCLOSE Act is similarly uninstructive, as "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *Central Bank*, 511 U.S. at 187.

* * *

In sum, the FEC failed to provide any contemporaneous justification for 11 C.F.R. § 109.10(e)(1)(vi) that could explain its divergence from the clear congressional command contained in subsection (c)(2)(C) that contributions given for the purpose of furthering an independent expenditure be reported. Neither the FEC's nor Crossroads GPS's untimely and

[10] Indeed, Crossroads GPS relies on irrelevant legislative action such as the FECA's renumbering, Pub. L. 107-155, § 103(a), § 201(a), 212, 304(b), 306, 308(b), 501, 503 (Mar. 27, 2002), and the adoption of electronic filing, Pub. L. 106-346, § 101(a) (Sept. 29, 1999). The other legislation it cites is similarly irrelevant.

inadmissible explanations cure this problem. Accordingly, the regulation fails *Chevron* step two and is thus invalid.

D. The Regulation is "Silent" as to Subsection (c)(1) Reporting, but if the Regulation Implements it, the Regulation Conflicts with the Statute

While 11 C.F.R. § 109.10(e)(1)(vi) was purportedly intended to "incorporate" the changes in 52 U.S.C. § 30104(c)(1), AR 1503, the commissioners below understood the regulation is in fact "silent" about the disclosure required by subsection (c)(1). The commissioners are correct: the regulation does not incorporate subsection (c)(1)'s reporting obligations and therefore groups like Crossroads GPS cannot comply with the law merely by complying with the regulation.[11] While Crossroads GPS asserts that CREW and others have taken the position that the regulation "implements" subsection (c)(1), Crossroads GPS merely fabricates evidence and engages in highly misleading quotations. Of course, if the regulation attempts to implement subsection (c)(1), as was the FEC's position at adoption, AR 1503, then it conflicts with the clear language of the statute and is invalid. And while both defendants attempt to argue subsection (c)(1) is sufficiently ambiguous that the regulation *could* implement it, their attempts to manufacture ambiguity are meritless.

First, Crossroads GPS asserts that CREW has previously taken the position that the regulation accurately incorporates all of the reporting provisions under § 30104(c), asserting CREW stated the regulation implemented "both contributor disclosure provisions of the statute." CGPS Br. 28–29. But what CREW actually said was that the regulation "*directly conflicts* with both contributor disclosure provisions of the statute," CREW, Comments in Response to

[11] Notably, the FEC does dispute the commissioners' conclusion that the regulation cannot be understood to be a reasonable interpretation of subsection (c)(1). *See* FEC Br. 34–45 (arguing regulation is reasonable interpretation of subsection (c)(2)(C), but silent as to subsection (c)(1)).

Advance Notice of Proposed Rulemaking on Earmarking, Affiliation, Joint Fundraising, Disclosure, and Other Issues 3–4 (Jan. 15, 2015), http://bit.ly/2iqo42t (emphasis added). CREW recognized the statute provides two separate reporting obligations, the first of which is "to identify each person who made contributions of more than $200 in the calendar year, the date of the contribution, and the amount." *Id.* at 3. That is in addition to the disclosure mandated by subsection (c)(2)(C). *Id.*[12] Despite Crossroads GPS's misleading representation, CREW was neither confused by subsection (c)(1) nor believed the regulation faithfully implemented it.

Second, both the FEC and Crossroads GPS attempt to generate some ambiguity in subsection (c)(1) to at least create the possibility that the regulation might be a reasonable interpretation of it. But their attempts fail. Their cited case law is inapposite and does not overcome *MCFL*. Their textual arguments are meritless, and they fail to show the statute is absurd as written. Simply put, there is no ambiguity about what subsection (c)(1) requires and, given that, there is no way to conclude that 11 C.F.R. § 109.10(e)(1)(vi) is consistent with it.

Defendants rely on a footnote in a Ninth Circuit opinion to argue that courts have held that subsection (c)(1) only says who is to file reports and that it does not impose any content requirement on what those reports must include. FEC Br. 27, CGPS Br. 7–8, 50. But their sole support for that is footnote in the background section of a case that does not even say that subsection (c)(1) does not also contain a content requirement. *See FEC v. Furgatch*, 807 F.2d 857, 859 n.2 (9th Cir. 1987). Indeed, 52 U.S.C. § 30104(c)'s disclosure requirements were

[12] Congressman Van Hollen, Democracy 21, and the Campaign Legal Center similarly understood the FECA to impose two separate contributor reporting obligations on those making independent expenditures, and understood that 11 C.F.R. § 109.10(e)(1)(vi) did not accord with them. *See* Van Hollen, Pet. for Rulemaking ¶¶ 4, 6, 7 (Apr. 21, 2011), http://bit.ly/2AmPsTo (noting FECA imposes "two overlapping contribution disclosure requirements" and the regulation is "manifestly inconsistent with the statute['s]" subsections (c)(1) and (c)(2)).

entirely irrelevant to the question before the court: whether the ads in question amounted to express advocacy. *Id.* at 860. *MCFL*, on the other hand, was not only a Supreme Court decision rather than an out-of-circuit case, but also held that subsection (c)(1) imposed its own obligation to disclose "all contributors who annually provide in the aggregate $200 in funds intended to influence elections." *MCFL*, 479 U.S. at 262. That language is no dicta in a minority opinion—it is part of the holding of the Court. *See supra* p. 15. *MCFL* is the binding authority here and shows subsection (c)(1) unambiguously requires reporting all those who contribute more than $200 annually, apart from subsection (c)(2)(C)'s additional disclosure requirement.

Indeed, the FEC's own precedent regarding subsection (c)(1) confirm it agrees with *MCFL*. The agency has previously enforced subsection (c)(1) as a standalone reporting obligation. General Counsel's Report 2, 5, MUR 5303 (Perot Petition Committee), Aug. 4, 1992, http://bit.ly/2jyw3qM (noting subsection (c)(1) "requires that every person . . . who makes independent expenditures in excess of $250 during a calendar year shall file a statement containing the information required under § 434(b)(3)(A) for all contributions received by such person"; recommending reason to believe respondent violated subsection (c)(1)); *see also id.* at Certification, Aug. 25, 2002 (voting 5-1 in favor of finding reason to believe respondent violated subsection (c)(1)). That prior judgement is correct.

Next, both the FEC and Crossroads GPS make a number of exceedingly weak textual arguments in an attempt to manufacture some ambiguity in the text, but each fails. The FEC argues that the three subsections of 52 U.S.C. § 30104(c) should be read to correspond with the three title subheadings: "filing; contents; indices of expenditures," FEC Br. 25; *see also* CGPS Br. 49 (relying on *other* sections' titles), but "the title of a statute and the heading of a section cannot limit the plain meaning of the text." *Bhd. of R.R. Trainmen v. B. & O. R. Co.*, 331 U.S.

519, 528-29 (1947); *accord Hays v. Sebelius*, 589 F.3d 1279, 1282 (D.C. Cir. 2009). Subsection (c)(1) plainly requires the filing "contain[]" certain information, 52 U.S.C. § 30104(c)(1), and the heading "cannot undo or limit that which the text makes plain." *Bhd.*, 311 U.S. at 528–29.[13] For the same reason, subsection (c)(1) cannot be read to simply state who must report, but say nothing about what they must report, as the FEC suggest. FEC Br. 25. Nor is subsection (c)(1)'s reference to "a statement" (singular) confusing, as the FEC contends. FEC Br. 26. The FEC recognizes the clause's requirement to file "a statement" requires filing at least one statement and perhaps more. FEC Br. 35 (describing 24 and 48 hour reports, and quarterly reports). Subsection (c)(2) confirms that reading, noting subsection (c)(1) may require the filing of "Statements," plural. 52 U.S.C. § 30104(c)(2) (emphasis added). After a qualifying expenditure, subsection (c)(1) requires a statement to be filed *and* that it include the information in subsection (b)(3)(a), together with the information required in subsection (c)(2)(C).[14] Any other reading ignores statutory text, which a court may not do. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (court may not interpret statute in way that treats text as "superfluous, void, or insignificant").

The FEC next argues that subsection (b)(3)(A)'s terminology is confusing because it incorporates terms specific to political committees. FEC Br. 26 (noting subsection refers to "reporting committee" and "report"). That is of course because subsection (b)(3)(A) is contained

[13] Nor does their interpretation even work under their theory. Under their reading, subsection (c)(2) would provide only the "contents" of the statement (the second title subheading, purportedly corresponding to the scope of the second subsection), but subsection (c)(2) also provides the manner of filing such statements. 52 U.S.C. § 30104(c)(2)(A) (providing statements "shall be filed in accordance with subsection (a)(2)").

[14] Notably, 11 C.F.R. § 109.10(b) uses the same "a . . . statement" language, showing the FEC did not find it confusing. Further, even if there were some ambiguity about how many statements must identify the annual contributions, that would not justify a construction which requires the filing of *no* statements containing the information in subsection (b)(3)(A).

in a section relating to political committee reporting. 52 U.S.C. § 30104(b). By explicitly incorporating those same reporting requirements for non-political committees, the statute clearly mandates those making independent expenditures to disclose the "information. . . for all contributions" that political committees are to report under subsection (b)(3)(A): *i.e.*, their identities, with the date and amount of the contributions.[15] And while Crossroads GPS gerrymanders this cross-reference to only incorporate subsection (b)(3)(A)'s requirement to report the date and amount of contributions, CGPS Br. 49, subsection (b)(3)(A) is not limited to reporting date and amount information for contributions; it also requires disclosing the identities of those giving more than $200 annually. 52 U.S.C. § 30104(b)(3)(A), *MCFL*, 479 U.S. at 262.

Reading subsection (c)(1) to require the reporting of all the information about contributors required by subsection (b)(3)(a)—their identities, together with the date and amount of their contributions—also accords with the history of FECA before the 1979 amendments. Previously, the law required those making independent expenditures "to file . . . a statement containing the information required of a person who makes a contribution in excess of $100 to a candidate or political committee and the information required of a candidate or political committee receiving such contribution." *See* 2 U.S.C. § 434(e) (1976). That information was "the full name and mailing address (occupation and the principal place of business, if any) of each person who has made one or more contributions . . . within the calendar year in aggregate amount or value in excess of $100, together with the amount and date of such contributions." *Id.*

[15] Moreover, the FEC's adamancy that "statements" and "reports" are fundamentally distinct, FEC Br. 26, is belied by its own regulation, which requires disclosure of contributions for the "reported" independent expenditure. 11 C.F.R. § 109.10(e)(1)(vi). Under the argument advanced here, no contribution to a non-political committee could qualify because no such independent expenditure would ever be "reported." Rather, it would be filed in a "statement."

§ 434(b)(2).[16] The old 2 U.S.C. § 434(e) became the new § 434(c) (and later § 30104(c)) in the 1979 amendments. FECA 1979 History 397. There is no indication Congress sought to alter this reporting requirement; rather, Congress intended the amendments to not "affect[] meaningful disclosure." *Id.* at 103. While the reference to political committee reporting was replaced with a reference to a subsection, the mandate remained the same: those making independent expenditures must report the same information about their contributors that political committees report (while their reporting, unlike political committees, would not be continuous).

Finally, the defendants argue that reading subsection (c)(1) to mean what it says would lead to absurdities and would be redundant to disclosure under subsection (c)(2)(C). FEC Br. 25, 27–28. The sections are not redundant. Rather, they target two complimentary sets of contributors, one based on the purpose of the contribution (52 U.S.C. § 30104(c)(2)(c)), and one based on when the contribution was made (*id.* § 30104(c)(1)). That pairing is similar to the paired reporting mechanism Congress eventually adopted to capture political ads: one set of ads would be defined by their purpose (independent expenditures), and another defined by time (electioneering communications). And like the paired reporting for political ads, the paired contributor reporting requirement would ensure contributor reporting is not underinclusive and voters know the full scope of the financial backing behind a campaign ad.[17]

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[16] There were no other contributor reporting requirements, *see* FECA 1979 History 230, so reading this reference as Crossroads GPS does to incorporate only the "date and amount" disclosure requirement would mean that the identities of contributors were never disclosed. That is clearly absurd as the point of disclosure is to know *who* is contributing. *Buckley*, 424 U.S. at 67 (disclosure to inform voters "where" money originates); *accord McConnell*, 540 U.S. at 201.

[17] The FEC wonders why Congress would require dual reporting for those making independent expenditures but not for political committees. FEC Br. 27–28. Dual reporting is unnecessary for political committees because they must already report *all* contributions they receive between their formation and their termination. *See* 52 U.S.C. § 30104(a).

In addition, far from it being absurd to require those making event-driven disclosures to report contributions based on a time period, Congress modeled its reporting requirement for electioneering communications on that same annual structure. *See* 52 U.S.C. § 30104(f)(2)(E), (F) (mandating disclosure of contributors who gave over $1,000 between "the first day of the preceding calendar year" and the date of the communication).[18] Congress saw nothing absurd in event-driven disclosure triggering disclosure of contributions received that year.[19]

Simply put, no honest attempt can be made to reconcile the regulation with what is required by Congress under subsection (c)(1). That is why the FEC does not even attempt to do so here, instead merely arguing that the subsection (c)(1) is ambiguous without arguing 11 C.F.R. § 109.10(e)(1)(vi) reasonably interprets it. The regulation plainly fails to incorporate the reporting obligations under subsection (c)(1). Either the regulation must be understood not to speak to it at all—the FEC's position below—or to be in conflict with it. It thus must be struck.

[18] While the FEC chose to limit this disclosure for corporate and union funded electioneering communications, *see* 11 C.F.R. § 104.20(c)(9), Congress chose a broad disclosure regime, one that remains in effect for those making these ads who are neither corporations nor unions.

[19] The *Van Hollen* decision found that this section of the FECA was ambiguous and allowed the FEC to narrow its application. Nonetheless, while the statute's reference to "contributions" was ambiguous in subsection (f), it is not ambiguous in subsection (c)(1), and no party suggests *Van Hollen* is relevant to the Court's analysis of subsection (c)(1). There are a number of distinctions that make clear Congress intended "contribution" in subsection (c)(1) to the fullest breadth under the FECA. 52 U.S.C. § 30101(8) (any transfer "for the purpose of influencing any election"). First, Congress included no earmarking limitation in either subsections (c)(1) or (b)(3)(A), while it expressly included such a limitation in subsection (c)(2)(C) in the same legislation. Congress's choice to limit the scope of contributions covered by subsection (c)(2)(C) while refraining from doing that with respect to subsection (c)(1) reporting in the exact same bill demonstrates "Congress knew the difference" between the limited and unlimited terms and "used the words advisedly." *Pillsbury*, 342 U.S. at 199. Second, Congress made this unbounded contributor disclosure requirement under subsection (c)(1) clear by explicitly incorporating the reporting obligations imposed on political committees, which (indisputably) must report all of their contributions without regard to earmarking.

E. CREW has Standing to Challenge the Regulation

With no legitimate defense of 11 C.F.R. § 109.10(e)(1)(vi) on the merits, defendants argue that this Court should not even hear CREW's challenge, despite this Court's decision earlier this year finding CREW's challenge was properly before the Court. The Court should again reject their arguments because CREW has standing to challenge the regulation.

1. The Regulation was "Applied" to CREW so CREW May Challenge It

The Court already dispensed with one argument: that CREW may not challenge the regulation here because the challenge stems from a decision in an enforcement proceeding to dismiss CREW's complaint. "[T]he plaintiffs are plainly 'affected' by the FEC's reliance on 11 C.F.R. § 109.10(e)(1)(vi) in dismissing the plaintiffs' administrative complaint—regardless of the plaintiffs' degree of involvement in the administrative process—because, the plaintiffs allege, they were denied access to information to which they were lawfully entitled about who funded certain of Crossroads GPS's independent expenditures." Mem. Op. 16 (Mar. 22, 2017) ECF No. 22 (quoting *Weaver v. Fed. Motor Carrier Safety Admin.*, 744 F.3d 142, 145 (D.C. Cir. 2014)). Accordingly, CREW has standing to challenge the regulation here.

Nevertheless, both the FEC and Crossroads GPS argue that CREW's sole relief is to petition the FEC for rulemaking. FEC Br. 48, CGPS Br. 48. That is plainly not the case, as the Court recognized in its decision on the defendants' motions to dismiss. Mem. Op. 17 n.6 (noting rulemaking is a second avenue to challenge rule, but that plaintiffs are not limited to it). "[N]othing . . . prevents [CREW] from pursuing its claim in a second forum, *i.e.*, apart from the original rulemaking." *Murphy Expl. and Prod. Co. v. U.S. Dep't of Interior*, 270 F.3d 957, 958–59 (D.C. Cir. 2001), *on reh'g from* 252 F.3d 473, 478 (D.C. Cir. 2001) (plaintiff could object to rule applied to it even if did not participate in rulemaking). "[A] forum is available to a party

when a rule is brought before this court for review of . . . [agency] action applying it." *Murphy Expl.*, 270 F.3d at 958. That result is the only sensible one: "because 'administrative rules and regulations are capable of continuing application,' were [courts] to limit review to the adoption of the rule without further judicial relief at the time of its application, [courts] 'would effectively deny many parties ultimately affected by a rule an opportunity to question its validity.'" *Id.* at 958–59 (quoting *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958)).[20]

CREW has suffered and continues to suffer injury the application of 11 C.F.R. § 109.10(e)(1)(vi). CREW is denied information to which Congress has entitled it, causing injury, *FEC v. Akins*, 524 U.S. 11, 21 (1998), and CREW's constitutional right to receive information is violated by the FEC when it censors CREW's receipt of speech constitutionally compelled by Congress, *see Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas. This freedom (of speech and press) . . . necessarily protects the right to receive."); *Lamont v. Postmaster General*, 381 U.S. 301, 306–07 (1965) ("[j]ust as the licensing or taxing authorities in the *Lovell*, *Thomas*, and *Murdock* cases sought to control the flow of ideas to the public, so here federal agencies regulate the flow of [information]"; holding such regulation violated plaintiff's First Amendment rights to receive speech). CREW may protect its rights here.

2. CREW Presented its Challenge Below, Though it Need Not Have

Crossroads GPS also argues that CREW may not challenge the regulation here because it

[20] Nor would a petition for rulemaking be an adequate forum for CREW to protect its rights. The FEC in its discretion can refuse to engage in rulemaking, subject to only the most deferential review by a court. *Prof. Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1220-21, 1223 (D.C. Cir. 1983) (court will overturn agency's refusal to engage in rulemaking "only in the rarest and most compelling of circumstances").

purportedly "did not clearly raise—indeed, it abandoned—these issues in its administrative complaint." CGPS Br. 32. Once again, Crossroads GPS misstates the facts.

CREW's administrative complaint plainly stated that the "FEC's interpretation of [52 U.S.C. § 30104(c)(1) and (c)(2)(C) by means of 11 C.F.R. § 109.10(e)(1)(vi)] fails to give full effect to these provisions." AR 4, 102. Indeed, Crossroads GPS responded to that claim. AR 83–84 ("One should *not* simply accept CREW's argument that the statute and corresponding regulation are inconsistent."). CREW presented the FEC with the "opportunity to consider the matter, make its ruling, and state the reasons for its action," and CREW thus may bring its claim here. *Coburn v. McHugh*, 679 F.3d 924, 931 (D.C. Cir. 2012).

Moreover, CREW did not have to present its challenge to the validity of the regulation to the FEC. "It is well established that a rule may be reviewed when it is applied in an adjudication—an agency need not explicitly reassess the validity of a rule to subject the rule to challenge on review." *AT&T Co. v. FCC*, 978 F.2d 727, 734 (D.C. Cir. 1992) (rejecting agency's argument that failure to question validity of regulation below deprived court of jurisdiction to consider it); *accord Murphy Expl.*, 270 F.3d at 134–35 (holding plaintiff could challenge legality of rule even if it did not challenge rule before agency); *see also Darby v. Disneros*, 509 U.S. 137, 154 (1993) (holding "[c]ourts are not free to impose an exhaustion requirement as a rule of judicial administration" under the APA). CREW's challenge to the regulation is properly before the Court.[21]

[21] Issue-exhaustion also does not apply where the appealing party was not involved in a trial-like proceeding below. *Sims v. Apfel*, 530 U.S. 103, 110 (2000) (where "administrative proceeding is not adversarial, . . . the reasons for a court to require issue exhaustion are much weaker"); Mem. Op. at 15 (quoting FEC's submission that plaintiff is "technically 'not a party to the

3. The Court Can Remedy CREW's Injury

Crossroads GPS further argues that CREW's challenge is improper because the Court can provide no remedy to CREW's injury. In essence, Crossroads GPS argues that (a) it has an absolute defense to enforcement, precluding any chance of remedy to CREW's FECA claim on remand, and (b) without the ability to remedy that injury on remand, CREW may not challenge the regulation here. Both of Crossroads GPS's contentions are meritless.

a. The Court's Remedy of CREW's APA Injury is Distinct from its Remedy for CREW's FECA Injury

Taking the second contention first, Crossroads GPS fundamentally mistakes the nature of review for CREW's challenge to the regulation. CREW's challenge sounds in the APA, not the FECA. *See* Comp. ¶ 124. CREW therefore need not show that the FEC's decision on CREW's administrative complaint was contrary to law to prevail. Rather, CREW need merely to show that it suffers an injury caused by the regulation remediable by the court and that the regulation is in excess of the agency's authority or otherwise unlawful. 5 U.S.C. § 706. CREW has done that.

As the Court previously found, CREW was injured by the regulation when it was applied to its administrative complaint below. Mem. Op. 16. Because of the existence of an invalid regulation, CREW is being denied information to which Congress entitled it. Notably, the injury is all the more pronounced if Crossroads GPS's argument that it is absolutely immune from enforcement on remand is right. CREW would be absolutely barred from receiving information to which it has a right by reason of this invalid and unlawful regulation. And the regulation's

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proceeding'"); *see also Avocado Plus Inc. v. Veneman*, 370 F.3d 1243, 1248–51 (D.C. Cir. 2004) ("exhaustion is non-jurisdictional" unless statute specifies otherwise and is "intensely practical"). Further "[Plaintiffs] may bypass the administrative process where exhaustion would be futile or inadequate," *Honig v. Doe*, 484 U.S. 305, 327 (1988), such as here where the Commission already rejected a request to fix the regulation, Certification, Dec. 15, 2011, http://bit.ly/2kcjSDI.

existence also injures CREW by censoring CREW's access to information about other creators of independent expenditures in violation of its First Amendment rights.

Nevertheless, Crossroads GPS argues that these injuries are not remediable because CREW is limited to bringing an as-applied challenge stemming from the administrative review below. CGPS Br. 35. Crossroads GPS is again mistaken. The D.C. Circuit has made clear that where a plaintiff brings an as-applied challenge, it may also bring a facial challenge to a regulation. *See AT&T*, 978 F.2d at 240 (facially vacating agency rule); *see also P&V Enter. v. U.S. Army Corps of Eng'rs*, 466 F. Supp. 2d 134, 142 (D.D.C. 2006) (noting "a facial challenge to a regulation can be brought outside § 2401(a)'s limitations period when it is accompanied by an as-applied challenge"), *aff'd* 516 F.3d 1021 (D.C. Cir. 2008).

Crossroads GPS's argument relies on the statement in *Weaver* that, outside of the original six-year time period, a "facial challenges to the rule or the procedures by which it was promulgated are barred." CGPS Br. 36 (quoting 744 F.3d at 145). But *Weaver* cites *NRDC v. NRC* for that proposition, and that case dealt with a plaintiff's attempt to facially challenge a rule outside of the six-year time limit *without* alleging any application of the rule to it. *See Weaver*, 744 F.3d at 364 (citing *NRDC v. NRC*, 666 F.2d 595, 601–02 (D.C. Cir. 1981)). In contrast, *Weaver* noted that, where a rule had been applied to a plaintiff, the plaintiff could challenge the rule on the grounds that it "conflicts with the statute from which its authority derives": *i.e.*, a facial challenge. 744 F.3d at 145. That is precisely the situation here.

Finally, Crossroads GPS argues that, at least with respect to the FEC's failure to adequately explain 11 C.F.R. § 109.10(e)(1)(vi), any such challenge is a procedural challenge that is barred by the statute of limitations. CGPS Br. 37. But such a challenge is not a challenge to procedure, rather, it is a challenge to the legality of the rule itself. *See, e.g.*, *US Telecomm.*

Assoc. v. FCC, 825 F.3d 674, 701 (D.C. Cir. 2016) (challenge to agency's "fail[ure] to adequately explain why it reclassified" is "substantive challenge[]"); *George E. Warren Corp. v. EPA*, 159 F.3d 616, 620 (D.C. Cir. 1998) (describing challenge asserting regulation is arbitrary and capricious as substantive challenge, distinct from procedural challenge related to consideration of late-filed comments); *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 78 (D.D.C. 2007) ("[T]he 2006 rule is substantively infirm because the Secretary failed to provide a reasoned explanation."). Indeed, because only the agency's contemporaneous justifications can satisfy its burdens on *Chevron* step two, *Council for Urological Interests*, 790 F.3d at 222, the FEC's failure to explain bears directly on the regulation's substantially inconsistency with the statute.[22]

Simply put, "[w]here an agency rule causes the injury, as here, the redressability requirement may be satisfied by vacating the challenged rule." *Shays*, 414 F.3d at 95. CREW need not show enforcement on remand is available. Nonetheless, despite Crossroads GPS's contentions, enforcement on remand is available.

b. Relief is Available Against Crossroads GPS on Remand

Crossroads GPS also is wrong that the FEC may not pursue enforcement against it on remand. Even if "FEC might reach the same result" and dismiss CREW's complaint against Crossroads FEC on remand, CREW's injury is fairly traceable to the invalidity of the regulation and the court may "redress [CREW's] injury in fact." *Akins*, 524 U.S. at 25.

Crossroads GPS nonetheless argues that redress is not possible because the FEC *must* dismiss on remand. But none of Crossroads GPS's purported defenses absolutely preclude

[22] In contrast, procedural challenges are those that challenge the agency's failure to follow some procedure required by the APA or other statute. *See, e.g.*, *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1207–08 (D.C Cir. 1996) (describing procedures required by APA that give rise to a procedural challenge, *e.g.*, failure to issue a notice, publish, etc.).

enforcement on remand. Crossroads GPS claims that 52 U.S.C. § 30111(e) provides a defense to enforcement if a respondent relies in "good faith" on a regulation, but that defense is not likely to be available here. First, as a defense, the burden to prove it will fall on Crossroads GPS. *Dixon v. United States*, 548 U.S. 1, 9 (2006). Second, "good faith" is a factual question, and there are significant reasons to believe Crossroads GPS's reliance is not in good faith. *FEC v. O'Donnell*, 209 F. Supp. 3d 727, 742 (D. Del. 2016) (candidate's "good faith" was question of fact); *see also FEC v. Craig for U.S. Senate*, 816 F.3d 829, 849 (D.C. Cir. 2016) (failure to request AO on regulatory question demonstrated lack of good faith reliance), *aff'g* 70 F. Supp. 3d 82, 98-99 (D.D.C. 2014) (evidence defendant knew activities "might not comport" with law shows lack of good faith reliance). Here, Crossroads GPS had actual notice that the regulation did not capture the reporting obligations required under the FECA. The FEC sent Crossroads GPS notices that it was failing to comply with its reporting obligations, AR 42, and Crossroads GPS affirmatively stated that it "is fully aware of its FEC reporting and disclosure obligations . . . [and] has never failed to report contributions required to be reported under *the Act* and FEC regulations." AR 81 (emphasis added). *MCFL* further gave notice to Crossroads GPS that its reporting obligations were more than what it understood 11 C.F.R. § 109.10(e)(1)(vi) required. 479 U.S. at 262. The petition for rulemaking filed in 2011—only one year before its expenditures at issue here—noting the conflict between the regulation and the statute also gave Crossroads GPS notice of the invalidity of the regulation. *See* Van Hollen, Pet. for Rulemaking. Finally, one of Crossroads GPS's lawyers could have simply read the statute, which would have shown it could not rely on the regulation. *Swift & Courtney & Beecher Co. v. United States*, 105 U.S. 691, 695 (1881)

(parties could not rely on agency rule contravening statute).[23] At the very least, no reasonable person could think 11 C.F.R. § 109.10(e)(1)(vi) incorporates § 30104(c)(1)'s requirements to report all contributions over $200 receive in the year.

Moreover, even if Crossroads GPS could prove good faith reliance, that would not bar all relief against the organization. *See Larouche v. FEC*, 28 F.3d 137, 142 (D.C. Cir. 1994) (holding bar on "sanctions" does not bar equitable remedy of disgorging improperly received funds). The FECA provides the FEC authority to pursue a number of remedies and is not limited to the "sanctions" from which 52 U.S.C. § 30111(e) provides protection. *See* 52 U.S.C. § 30109(a)(6)(A), (B). Notably, the FEC does not agree that § 30111(e) provides an absolute bar; rather, it argues only that the commissioners "can reasonably decline to proceed" in light of that possible "understanding" of the safe harbor. FEC Br. 21.

Crossroads GPS's appeal to due process is even less of a barrier to enforcement. A lack of fair notice bars only criminal or criminal-like sanctions: it does not bar equitable enforcement requiring an organization to come into compliance with the law. *GE v. EPA*, 53 F.3d 1324, 1329–30 (D.C. Cir. 1995) (lack of "fair notice" is no defense in "non-penal context"). Moreover, for the same reasons Crossroads GPS had notice sufficient to render its reliance on 11 C.F.R. § 109.10(e)(1)(vi) not in good faith, it had notice that satisfied any due process concerns. *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059–62 (D.C. Cir. 2007) (finding statute provided fair notice, even if agency did not provide notice of requirements itself); *see also Tiech v. FDA*, 751

[23] Crossroads GPS oddly argues that only the plain language of regulations can give fair notice. CGPS Br. 30. Clearly, however, the plain language of a statute can also give fair notice. *Nat'l Ass'n of Mfrs v. Taylor*, 549 F. Supp. 2d 33, 67 (D.D.C. 2008) (finding statute provides "fair notice of the type of activities encompassed by the section's disclosure threshold").

F. Supp. 243, 249 (D.D.C. 1990) ("While . . . one is entitled to assume a government agency's regulations are valid , . . . one must also realize that it might have to suffer the consequences if a court determines that the regulation is invalid.").[24]

In sum, "[Crossroads GPS] cites no 'authoritative policy or rule of the FEC that would bar equitable enforcement' of [CREW's] claim. Nor has the FEC admitted to such a practice or addressed this issue in its briefing . . . . That is fatal to [Crossroads GPS's] standing argument." *CREW v. FEC*, 209 F. Supp. 3d 77, 85 n.3 (D.D.C. 2016).

F. The Proper Remedy is to Strike the Invalid Regulation

Finally, the FEC argues that, if 11 C.F.R. § 109.10(e)(1)(vi) is invalid, the Court should remand the issue to the FEC to decide what to do about it. "[W]hen a reviewing court determines that agency regulations are unlawful," however, "the ordinary result is that the rules are vacated." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998); *Shays*, 528 F.3d at 921, 932 (striking regulations where "Commission has provided no persuasive justification for" the provisions challenged); *Shays*, 414 F.3d at 100–02 (same); *Aragon v. Tillerson*, 240 F. Supp. 3d 99, 109 (D.D.C. 2017) (Howell, J.) ("[W]hen an agency fails to provide a reasoned explanation, or where the record belies the agency's conclusion, the court must undo its action.").

Here, as discussed above, the regulation conflicts with the unambiguous terms of the FECA and has frustrated its purpose. No additional explanation or other action by the FEC can remedy that conflict. There is no "serious possibility that the [agency] on remand could explain

[24] *Tiech* noted an exception to this rule: where a "new principle of law. . . overrule[s] clear past precedent" or was not "foreshadowed." 751 F. Supp.at 249. Neither is true here: no clear past precedent is overruled, and 11 C.F.R. § 109.10(e)(1)(vi)'s infirmities were foreshadowed by the petition for rulemaking, judicial precedent, and the clear text of the statute itself.

[its regulation] in a manner that is consistent with the statute," and thus there is no need to remand. *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 756 (D.C. Cir. 2002); *see also Allied-Signal, Inc. v. U.S. NRC*, 988 F.2d 146, 150 (D.C. Cir. 1993) (remand unnecessary where regulation suffers "serious[] . . . deficiencies"); *United Mine Workers of Am., Int'l Union v. Dole*, 870 F.2d 662, 673 (D.C. Cir. 1989) ("This is not a case in which the court is easily able to find a lawful basis for the regulations but unable to uphold the regulations because the agency itself has rested on other, unreasonable, grounds.").

Nor is there a serious risk of "disruptive consequences" if the Court vacates the rule. *Allied-Signal*, 988 F.2d at 150. Organizations like Crossroads GPS are already obliged to follow the FECA's disclosure requirements. At the very least, their contributors must be reported under subsection (c)(1) with or without the regulation (since the regulation does not implement it). Further, these organizations already reported much of this information to the IRS, so gathering it is no great burden. 26 C.F.R. § 1.6033-2(a)(2)(ii)(f). In contrast, the continued existence of the rule is "quite disruptive" to CREW's, and the American people's, interests. The 2018 election is quickly approaching and there have already been significant independent expenditures this year. If the regulation stays on the books, the FEC will continue to fail to enforce the law as enacted and voters will continue to be denied access to vital information needed to exercise their franchise. The rule should be struck.

If, however, the Court remands this regulation to the FEC, CREW requests the Court enter an explicit timetable for a new explanation and clarify that only a rationale adopted by at least four commissioners will suffice. Under the FECA, four commissioners are needed to enact a rule. 52 U.S.C. § 30106(c). Accordingly, only four commissioners can provide a binding statement of the agency explaining the rule. *Council for Urological Interests*, 790 F.3d

at 222 (court may only "look to what the *agency* said" to justify a regulation (emphasis added)). Further, the FEC has suffered from significant lethargy in accomplishing even the most minor of tasks. *See* Steven T. Walther, Assessment of Commission Act on Enforcement Matters Waiting Reason-to-Believe Consideration (Nov. 15, 2017), http://bit.ly/2zT3NKg. The Court should set a clear and expeditious deadline, such as two weeks, for the FEC to return.[25]

II. The FEC's Dismissal of CREW's Complaint Was Contrary to Law

The second matter before this Court is the propriety of the FEC's dismissal of CREW's complaint against Crossroads GPS. Because the FEC's dismissal rests on impermissible constructions of law and arbitrary and capricious analyses of facts, the dismissal of each and every claim raised in CREW's complaint is contrary to law and warrants reversal.

A. Standard of Review

Under the FECA, the Court may reverse the FEC's dismissal if it finds the agency's failure to find reason to believe, the basis for its dismissal, was "contrary to law." 52 U.S.C. § 30109(a)(8)(C); *see Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc) (finding dismissal contrary to law where FEC's reason to believe analysis was flawed), *vacated on other grounds* 524 U.S. 11; *CREW*, 209 F. Supp. 3d at 93 (same). To determine that, the court asks whether "(1) the FEC dismissed the complaint as a result of an impermissible interpretation of the [law], or (2) if the FEC's dismissal of the complaint, under a permissible interpretation of the [law], was arbitrary or capricious, or an abuse of discretion." *Orloski*, 795 F.2d at 161. Where there is a three-three split preventing the agency from finding reason to believe, the court reviews the reasoning of the commissioners who refused to find reason to believe. *FEC v. Nat'l Rep.*

[25] Remand should also be limited only to explaining those portions of the rule that the Court finds could conform with the clear terms of the statute: *i.e.*, the Court should declare that subsection (c)(1) imposes additional reporting obligations beyond 11 C.F.R. § 109.10(e)(1)(vi).

Sen. Comm., 966 F.2d 1471, 1476 (D.C. Cir. 1992). If they relied on the recommendation of the FEC's Office of General Counsel ("OGC"), as they did here, the Court reviews the General Counsel's reasoning. *FEC v. Dem. Sen. Campaign Comm.*, 454 U.S. 27, 45 n.19 (1981).

While acknowledging this standard, both the FEC and Crossroads GPS misrepresent the task here as one that reduces the Court to a mere rubber stamp. Far from being "highly deferential," *cf.* FEC Br. 14, CGPS Br. 22, a court reviewing the FEC's failure to enforce may, at times, give no deference to the agency's rationale. *See Akins*, 101 F.3d at 740 (court would not defer to FEC's legal interpretation upon which dismissal was based); *CREW*, 209 F. Supp. 3d at 87 (on review of nonenforcement action, "the Court will not afford deference").

The first question the Court asks is whether the dismissal was based on "an impermissible interpretation of [law]." *Orloski*, 795 F.2d at 161. While the court may defer to the agency's interpretation where deference is warranted under *Chevron*, *id.* at 161, here, for the reasons discussed above, *supra* pp. 9–30, *Chevron* deference is unavailable. Indeed, *Chevron* deference is not available at all on this FECA claim because the court is only reviewing the statement of three commissioners, not the statement of the FEC. "A statement of reasons [of three commissioners] [is] not be binding legal precedent or authority for future cases." *Common Cause v. FEC*, 842 F.2d 436, 449 n.32 (D.C. Cir. 1988); *see also* 52 U.S.C. § 30106(c) (four commissioners needed to exercise agency powers). But only agency statements with "force of law" warrant *Chevron* deference. *United States v. Mead Corp.*, 533 U.S. 218, 221–23, 233–34 (2001) (agency decision has force of law when it binds third parties). Because the OGC's

statement, adopted by only three commissioners, lacks force of law, review is *de novo*.[26]

The second question is whether the agency's analysis, even if it contains no legal error, is nonetheless arbitrary or capricious. While that review is deferential, *Orloski*, 795 F.2d at 167, the agency must still provide a "reasonable explanation of the specific analysis and evidence upon which the Agency relied." *Bluewater Network v. EPA*, 370 F.3d 1, 21 (D.C. Cir. 2004).

Finally, the agency's citation to its prosecutorial discretion does not alter this review. If the agency makes a legal error in the course of exercising its prosecutorial discretion, then the dismissal is still contrary to law. *McLane Co., Inc. v. EEOC*, 137 S. Ct. 1159, 1168 n.3 (2017) (finding an "abuse its discretion" where ruling is based "on an erroneous view of the law"); *Akins*, 524 U.S. at 25 ("[T]hose adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground."). In addition, as the FECA provides that the FEC "shall make an investigation" of any complaint for which there is reason to believe, 52 U.S.C. § 30109(a)(2), it is "contrary to law" for the FEC not to investigate unless it lawfully finds no reason to believe a violation occurred. *See Akins*, 524 U.S. at 26 (finding agency's discretion in nonenforcement action was irrelevant to Court's analysis as statute specifically provided for review of nonenforcement). Accordingly, if the Court finds the FEC's decision on the merits was contrary to law, then the FEC's dismissal is

[26] *See also Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 57 (2011) (*Chevron* deference only justified where agency decision has "force of law" with "binding" effect); *Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1137 (D.C. Cir. 2014) ("non-precedential nature of" agency action "conclusively confirms" action did not carry "the force of law"; holding action must be "binding [as to] . . . third parties" and not merely "conclusive" as to parties; denying *Chevron* deference).While the D.C. Circuit held that deference to a three-vote decision not to enforce was appropriate, *In re Sealed Case*, 223 F.3d 775, 780 (D.C. Cir. 2000), that case predates *Mead*'s clarification that *Chevron* deference is available only for agency statements with force of law.

contrary to law even if it exercised its prosecutorial discretion.[27]

B. The Dismissal of CREW's Subsection (c)(2)(C) Claim was Contrary to Law

In dismissing CREW's allegation that Crossroads GPS violated 52 U.S.C. § 30104(c)(2)(C) by not disclosing contributors who gave to further an independent expenditure, the OGC relied exclusively on 11 C.F.R. § 109.10(e)(1)(vi). AR 187. For the reasons stated above, however, 11 C.F.R. § 109.10(e)(1)(vi) conflicts with the requirements imposed by subsection (c)(2)(C) and is invalid. Thus, the FEC's dismissal of CREW's subsection (c)(2)(C) claim rests on an "impermissible interpretation" of law, *Orloski*, 795 F.2d at 161: that subsection (c)(2)(C) just requires the disclosure of contributions given to further "the reported" expenditure. The dismissal was thus contrary to law. *Id.*; *see also Barnett v. Weinberger*, 818 F.2d 953, 954 (D.C. Cir. 1987) (agency decision "rest[ing] wholly upon . . . regulations which as interpreted are fatally at odds with the statutory directive they purport to implement" was arbitrary).

The FEC argues nonetheless that its dismissal might not have been contrary to law because the FEC might dismiss on remand due to Crossroads GPS's possible appeal to the safe harbor provision in 52 U.S.C. § 30111(e). FEC Br. 20. But the Court does not review possible rationales the agency *might* give for dismissal on remand; it reviews the reasons actually given. *N. Air Cargo*, 674 F.3d at 860. Furthermore, neither the safe harbor nor the FEC's other post-

[27] This is not to say that the agency has no prosecutorial discretion. Rather, if the Court finds the dismissal is contrary to law, the agency retains discretion. If the agency does not proceed, CREW will have the authority to bring its own suit to protect its own rights. 52 U.S.C. § 30109(a)(8)(C) (providing that if the FEC fails to conform with court order, then a "complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint"). The agency retains its discretion to control its resources and priorities; that discretion simply has no bearing on the question on review here.

hoc concern about the sufficiency of the evidence would justify dismissal below.[28]

The FEC's concerns about the sufficiency of the evidence, FEC Br. 22–23—even if that issue were before the Court—rests on an impermissible interpretation of the FECA's "reason to believe" standard. That standard is quite low, satisfied so long as there are "credibl[e] allegat[ions]" that a violation "may have occurred." FEC, Statement of Policy Regarding Commission Action in Matters at the Initial Stage of Enforcement Process, 72 Fed. Reg. 12,545, 125,45 (Mar. 16, 2007). Here, the evidence is more than sufficient to meet this standard. There is no dispute Crossroads GPS accepted contributions to support its work to elect Josh Mandel, AR 174, and that that work consisted primarily, if not exclusively, of running independent expenditures, AR 80. Indeed, the group's work in the previous election cycle consistently focused on the dissemination of independent expenditures. *See* FEC, 2010 Committee Information, Crossroads GPS, http://bit.ly/2kclxcq ($15.4 million in independent expenditures in 2010); Crossroads GPS, 2010 Form 990, http://bit.ly/2AlyCnO ($15 million given to other organizations to run independent expenditures in 2010). Accordingly, anyone contributing to Crossroads GPS's work would expect their funds to further an independent expenditure.[29] Also, contributors at the fundraiser were shown "example" ads and then solicited to help pay for the rising costs of airing such ads. AR 78, 124. These facts clearly give rise to the possibility that contributors "may" have given to Crossroads GPS to further an independent expenditure and that

[28] While the FEC implies that it raised equitable concerns with respect to subsection (c)(2)(C), FEC Br. 20–21, the record shows it did not, and that the concern was raised in support of its decision not "to impose liability under *Section 434(c)(1)*" alone. AR 176 (emphasis added).
[29] Crossroads GPS's assertion to the FEC that it's spending on independent expenditures for Mandel consisted of only "a bit over half" of its total spending on the race, AR 80, appears false or at least highly misleading. It points to its electioneering communications in Ohio, but those ads targeted President Obama, not Mandel or his opponent. *See, e.g.*, Crossroads GPS, Form 9 (Feb. 23, 2012), http://bit.ly/2kd8nMg.

Crossroads GPS violated the law by not reporting them.

For its part, Crossroads GPS argues that the Court should not even address the FEC's dismissal of CREW's subsection (c)(2)(C) claim because there is no remedy for the wrongful dismissal due to Crossroads GPS's reliance on the regulation. For the reasons stated above, Crossroads GPS's reliance on 11 C.F.R. § 109.10(e)(1)(vi) does not preclude a remedy of its violation of subsection (c)(2)(C). *See supra* p. 38. Nor does the possibility of dismissal on remand due to such reliance stop the Court from adjudicating whether the reasons actually given by the agency below for failing to find reason to believe were contrary to law. *Akins*, 524 U.S. at 25 (reviewing agency's reason to believe finding despite likelihood of dismissal on remand).

C. The Dismissal of CREW's Subsection (c)(1) Claim was Contrary to Law

As shown in CREW's opening brief, 52 U.S.C. § 30104(c)(1) imposes an "additional" reporting disclosure obligation separate from subsection (c)(2)(C). As the OGC recognized in a statement adopted by the controlling commissioners, 11 C.F.R. § 109.10(e)(1)(vi) is "silent" as to subsection (c)(1). AR 188. Thus, the FEC's position on review here is that the regulation does not incorporate subsection (c)(1)'s reporting obligations.[30] The question before the Court is therefore whether it was contrary to law for the agency to find no reason to believe Crossroads GPS violated subsection (c)(1) in light of that concession. It was and the agency's equitable concerns in pursuing enforcement does not alter that conclusion.

Before turning to the merits, both Crossroads GPS and the FEC challenge CREW's standing to advance its subsection (c)(1) argument. Their challenge is meritless, however. First,

[30] Notably, while Crossroads GPS's argues that 11 C.F.R. § 109.10(e)(1)(vi) reflects the agency's interpretation of subsection (c)(1), the FEC does not adopt that position here. *See* FEC Br. 28 (noting only "to the extent the Commission's regulation at 11 C.F.R. § 109.10(e)(1)(vi) was an implementation of both statutory provisions" it might deserve deference).

while they argue that CREW failed to exhaust this argument below, FEC Br. 24 n.7, CGPS Br. 34, exhaustion does not apply to judicial review of an administrative action where CREW's role is limited to submitting a complaint. *See Sims*, 530 U.S. at 110 (holding exhaustion is inappropriate if no trial-like procedure below). Second, far from failing to press its interpretation of subsection (c)(1) below, CREW plainly alleged that "[t]he FECA requires" those making independent expenditures "to file reports with the FEC identifying each person . . . who makes contributions totaling more than $200 in a calendar year to the person making the independent expenditure. 2 U.S.C. § 434(c)(1) (referencing 2 U.S.C. § 434(b)(3)(A))." AR 4, 101. CREW also alleged that 52 U.S.C. § 30104(c)(2)(C) was a second and "further" requirement, independent of subsection (c)(1). AR 4, 101. And CREW noted that the regulation "fails to give full effect to these [statutory] provisions." AR 5, 102.

Nonetheless Crossroads GPS argues that, because CREW alleged Crossroads GPS received contributions that were given to further the reported independent expenditures, CREW somehow did not allege violations of both statutory provisions. CGPS Br. 32–33 & n.17. But that is absurd. Any contribution Crossroads GPS received to further the reported independent expenditure would have to be reported under the regulation *and* both statutory provisions. In other words, Crossroads GPS violated each statutory provision and the regulation by failing to report. And that is exactly what CREW alleged below: that by failing to report the individual contributing to support Josh Mandel, by failing to report the matching contributions, and by failing to report the contributions received at the fundraiser, "Crossroads GPS violated 2 U.S.C. § 434 *and* 11 C.F.R. § 109.10(b)–(e)." AR 11, 12, 15, 109, 110, 113 (emphasis added). Both Crossroads GPS and the FEC understood CREW's allegations because both specifically addressed CREW's claims under the regulation and under both statutory provisions. AR 83

(Crossroads GPS's response that, because the regulation incorporates both "2 U.S.C. 434 (c)(1) and (2)," its violation of the statute was irrelevant); AR 164 (recognizing alleged violations "of 2 U.S.C. § 434 and 11 C.F.R. § 109.10(b)–(e)"); AR 167 (same); AR 168 (same); AR 175 (addressing subsection (c)(2) claim); AR 175–76 (addressing subsection (c)(1) claim); AR 176 (providing recommendations on 11 C.F.R. § 109.10(e)(1)(vi), 2 U.S.C. § 434(c)(2), and 2 U.S.C. § 434(c)(1) claims). Clearly, CREW pressed its allegations below sufficiently to insure "the [agency had] an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Coburn*, 679 F.3d at 931. CREW may present the issues here.

On the merits, the reason OGC gave to dismiss CREW's subsection (c)(1) claim was not that Crossroads GPS complied with its disclosure obligations. Any such conclusion would clearly be absurd—it is indisputable Crossroads GPS received contributions within the year of its independent expenditures and that it failed to report those contributions in violation of 52 U.S.C. § 30104(c)(1). *See, e.g.*, AR 95. Rather, the basis for the agency's refusal to find reason to believe was only that Crossroads GPS "could raise equitable concerns about whether [it] ha[d] fair notice of the requisite level of disclosure required by law." AR 176. The agency therefore exercised its "prosecutorial discretion" to dismiss the complaint. *Id.* But that does not render the FEC's failure to find reason to believe a violation occurred not "contrary to law."

A lawful exercise of prosecutorial discretion must be based on "reasonable ground[s]." *Nader v. FEC*, 823 F. Supp. 2d 53, 65 (D.D.C. 2011). The justification given here was "equitable concerns" about a lack of "fair notice." AR 176. The purported lack of notice cannot provide a reasonable ground to dismiss, however, because Crossroads GPS had fair notice and, even if it did not, enforcement against Crossroads GPS would still be available.

For the same reasons Crossroads GPS had notice that 11 C.F.R. § 109.10(e)(1)(vi) was

invalid, the group also had both actual and constructive notice of its disclosure obligation under the plain text of 52 U.S.C. § 30104(c)(1). *See supra* p. 37. *MCFL* declared the group must "identify all contributors who annually provide in the aggregate $200 in funds intended to influence elections." 479 U.S. at 262; *see also id.* at 252 (Brennan J., Op.) (explicitly citing § 30104(c)(1) for this rule). The FEC had previously enforced subsection (c)(1) as a stand-alone disclosure obligation. *See* General Counsel's Report 2, 5, MUR 5303. In addition, Congressman Van Hollen's petition for rulemaking filed shortly before Crossroads GPS solicited funds and ran ads gave further notice. *See* Pet. for Rulemaking ¶¶ 4, 6, 7. With such extensive notice, any attempt by Crossroads GPS to argue lack of fair notice would be frivolous.

Moreover, even if Crossroads GPS somehow could convince a court it lacked fair notice, that would not preclude enforcement. A lack of fair notice does not preclude all remedies under either the Due Process clause or 52 U.S.C. § 30111(e). *See supra* p. 38. Crossroads GPS could at least be ordered to bring itself into compliance with the law and disclose its contributors.

Finally, even if the agency provided a reasonable ground for its prosecutorial discretion, that would not render the dismissal not "contrary to law." That is because the FECA requires the FEC to investigate every complaint unless it fails to find reason to believe a violation occurred. 52 U.S.C. § 30109(a)(2). The FEC's equitable concerns have no rational connection to its decision to find no reason to believe a violation occurred. That decision is concerned solely with the merits of the underlying complaint. *See Akins*, 524 U.S. at 26. Accordingly, because there is no "rational connection" between the agency's prudential decision and its decision on the merits of the complaint, it is arbitrary and capricious for the agency to rely on that discretion in an attempt to justify its failure to find reason to believe here. *State Farm*, 463 U.S. at 43.

D. The Dismissal of CREW's § 109.10(e)(1)(vi) Claim was Contrary to Law

Finally, even assuming 11 C.F.R. § 109.10(e)(1)(vi) is a valid regulation, it was still contrary to law for the agency to find no reason to believe Crossroads GPS violated it. That is because the reason to believe standard is a low one that only asks whether there are "credibl[e] alleg[ations]" that a violation "may" have occurred, 72 Fed. Reg. at 12545 and there clearly are allegations sufficient here to pass this low bar. CREW Br. 44–45, *supra* p. 45

In response, the FEC argues that CREW failed to "establish" that the contributors had the specific intent to further a single reported independent expenditure. FEC Br. 17. But that is not the standard the FEC imposes for review *before* an investigation is made. 72 Fed. Reg. at 12,545 (stating reason to believe exists where "the available evidence in the matter is at least sufficient to warrant conducting an investigation"). The FEC's argument merely proves that it used the wrong standard below and thus dismissed based on "impermissible interpretations of [law]." *Orloski*, 795 F.2d at 161; *see also Huerta v. Ducote*, 792 F.3d 144, 153 (D.C. Cir. 2015) ("[A] heightened pleading standard that depart[s] so severely from regulatory text and precedent . . . [must] be vacated as arbitrary and capricious.").

Here, for the reasons there is enough evidence to find reason to believe Crossroads GPS violated subsection (c)(2)(C), *see supra* p. 45, there is enough evidence to a "reason to believe" a violation of 11 C.F.R. § 109.10(e)(1)(vi) "may" have occurred. Thus, it was contrary to law for the FEC to dismiss CREW's allegations Crossroads GPS violated 11 C.F.R. § 109.10(e)(1)(vi).

CONCLUSION

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

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Respectfully submitted,

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