

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON**)
455 Massachusetts Ave., N.W., Sixth Floor)
Washington, D.C. 20001,)

NICHOLAS MEZLAK)
5707 Forest Ave.)
Parma, OH 44129,)

Plaintiffs,)

v.)

FEDERAL ELECTION COMISSION)
999 E Street, N.W.)
Washington, D.C. 20463,)

Defendant.)

Civil Action No.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

1. This is an action for injunctive and declaratory relief under the Federal Election Campaign Act of 1971 (“FECA” or “the Act”), 52 U.S.C. § 30109(a)(8)(C), and the Administrative Procedure Act, 5 U.S.C. § 706, challenging as arbitrary, capricious, an abuse of discretion, and contrary to law the dismissal by the Federal Election Commission (“FEC” or “Commission”) of an administrative complaint by Citizens for Responsibility and Ethics in Washington (“CREW”) and Nicholas Mezlak (collectively, “Plaintiffs”) against Crossroads Grassroots Policy Strategies (“Crossroads GPS”), Steven Law, Karl Rove, Haley Barbour, and Caleb Crosby for their failure to comply with the FECA’s disclosure requirements for those making independent expenditures. This action further challenges a regulation promulgated by the FEC, 11 C.F.R. § 109.10(e)(1)(vi), as the regulation is arbitrary, capricious, and contrary to

law in violation of 52 U.S.C. § 30109(a)(8)(C) and 5 U.S.C. § 706(2) because it is inconsistent with a provision of the FECA, 52 U.S.C. § 30104(c).

2. In 2012, Crossroads GPS received a contribution in excess of \$3 million that was given for the explicit purpose of aiding the group's support for the election of Josh Mandel in the United States Senate race in Ohio, according to Crossroads GPS and Karl Rove, a long-time political operative who helped found the group and raised the funds from the donor. It is undisputed that Crossroads GPS ran extensive independent expenditure television advertisements in Ohio for that very purpose. Indeed, Crossroads GPS admits that broadcasting independent expenditures was its primary activity in Ohio. Under the law, spending on ads like these must be disclosed to the FEC and, importantly, contributors who paid for them also must be disclosed. Nonetheless, despite admitting that this multi-million dollar contribution was made for the explicit purpose of electing a federal candidate and was used to fund independent expenditures for that same purpose, Crossroads GPS never disclosed the identity of the contributor because, it argues, the contributor did not specifically intend to further a particular independent expenditure in the exact form that Crossroads GPS eventually ran it in the state.

3. Nor did Crossroads GPS disclose any other contributor who paid for those ads. Specifically, Crossroads GPS failed to disclose the identities of donors who, it admits, provided an additional \$1.3 million in "matching" contributions also intended to further Crossroads GPS's activities in Ohio. Again, these activities consisted primarily of the creation and dissemination of independent expenditures.

4. Crossroads GPS also failed to disclose the identities of the other contributors who funded its activities in 2012 Senate races in Ohio, Virginia, Nevada, and Montana; contributors who Crossroads GPS brought to a fundraiser, provided materials for donating to the group,

showed “example” independent expenditure advertisements (nearly all of which were Crossroads GPS’s), and then solicited money, saying their contributions were needed to pay for the rising cost of broadcasting such ads. Crossroads GPS subsequently ran independent expenditure advertisements in those states echoing the claims and arguments made in the example ads shown at the fundraiser. Despite all this, Crossroads GPS failed to disclose these donors to the FEC.

5. The FECA, however, does not countenance such evasion. Voters have a vital interest in knowing the identities of those who pay for independent expenditures in support or opposition to federal candidates, an interest that is not lessened merely because the contributor may not be aware of the exact form of the final independent expenditure. That interest, moreover, is manifested in the FECA. The Act imposed and continues to impose on Crossroads GPS the obligation to disclose the contributors behind its independent expenditures. The FEC’s refusal to enforce that obligation was arbitrary, capricious, an abuse of discretion, and contrary to law, and warrants reversal by this Court.

JURISDICTION AND VENUE

6. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 52 U.S.C. § 30109(a)(8)(A) and 5 U.S.C. § 702. This Court also has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 2201(a), and 2202. Venue lies in this district under 52 U.S.C. § 30109(a)(8)(A) and 28 U.S.C. § 1391(e).

PARTIES

7. Plaintiff CREW is a non-profit, non-partisan corporation organized under Section 501(c)(3) of the Internal Revenue Code.

8. CREW is committed to protecting the rights of citizens to be informed about the activities of government officials, ensuring the integrity of government officials, protecting our

political system against corruption, and reducing the influence of money in politics. CREW works to advance reforms in the areas of campaign finance, lobbying, ethics, and transparency. Further, CREW seeks to ensure that campaign finance laws are properly interpreted, enforced, and implemented.

9. To advance its mission, CREW uses a combination of research, litigation, advocacy, and public education to disseminate information to the public about public officials and their actions, and the outside influences that have been brought to bear on those actions. A core part of this work is examining and exposing the special interests that have influenced our elections and elected officials and using that information to educate voters regarding the integrity of public officials, candidates for public office, the electoral process and our system of government.

10. Toward this end, CREW monitors the activities of those who run for federal office as well as those groups financially supporting candidates for office or advocating for or against their election. CREW regularly reviews campaign finance reports that groups, candidates, and political parties file with the FEC disclosing their expenditures and, in some cases, their contributors. Using the information in those reports, CREW, through its website, press releases, reports, and other methods of distribution, publicizes the role of these individuals and entities in the electoral process and the extent to which they have violated federal campaign finance laws.

11. CREW also files complaints with the FEC when it discovers violations of the FECA. Publicizing violations of the FECA and filing complaints with the FEC serve CREW's mission of keeping the public, and voters in particular, informed about individuals and entities that violate campaign finance laws and deterring future violations of campaign finance laws.

12. CREW is hindered in carrying out its core programmatic activities when those individuals and entities that attempt to influence elections and elected officials are able to keep their identities hidden. Likewise, the FEC's refusal to properly administer the campaign finance laws, particularly the FECA's reporting requirements, hinders CREW in its programmatic activity, as compliance with those reporting requirements often provides CREW with the only source of information about those individuals and groups funding the political process. As a result of the FEC's refusal to enforce the FECA's disclosure provisions, organizations like Crossroads GPS have been able to pour vast amounts of "dark" or anonymous money into the political system without revealing the source of that money. This deprives CREW of information critical to advancing its ongoing mission of educating the public to ensure the public continues to have a vital voice in our political process and government decisions.

13. A part of CREW's work in carrying out its central mission focuses on so-called "pay-to-play" schemes. Toward that end, CREW looks for correlations between donations to the campaign of a member of Congress or candidate and that member's subsequent congressional activities, including advocating for policies and legislation that serve the interests of the member's donors. Information that an individual or entity made a large-dollar contribution may be very revealing about the influences that donor has brought to bear on the member post-election. Without information about the individuals and entities funding the political activities of organizations like Crossroads GPS, CREW is stymied in fulfilling its central mission.

14. As an example, in May 2013, CREW issued a report, *Rise of the Machines*, detailing the growing political influence of high-frequency traders in Washington. CREW's analysis was based in large part on the lobbying and campaign contribution records of 48 companies specializing in high frequency trading. That data revealed that between the 2008 and

2012 election cycles, the campaign contributions of these firms increased by 673 percent, from \$2.1 million during the 2008 election cycle to \$16.1 million during the 2012 cycle. CREW was able to obtain this information because of the disclosure requirements to which the organizations receiving those contributions—federal candidates, party committees, PACs, and super PACs—are subject under the FECA.

15. As another example, CREW published *Stealth Donors*, a December 2012 report on donors who gave more than \$1,000,000 to super PACs trying to influence the 2012 election. The report revealed a dozen donors with policy or business interests that depended on the outcome of the elections, but whose efforts to sway voters largely were out of the public view. CREW obtained the information used in this report from information the FECA requires political committees to disclose.

16. For an organization like Crossroads GPS that refuses to comply with the FECA's disclosure requirements and report contributors who fund its independent expenditures, CREW has no access to information detailing the sources of the money it is using for this political activity. As a result, CREW is harmed when the FEC fails to properly administer the FECA, particularly the statute's reporting requirements, thereby limiting CREW's ability to obtain and review campaign finance information.

17. Plaintiff Nicholas Mezlak is a citizen of the United States and a resident of the state of Ohio. Mr. Mezlak was registered to vote in Ohio in 2012 and remains a registered voter in Ohio. As a registered voter, Mr. Mezlak is entitled to receive all the information the FECA requires those making independent expenditures to report publicly. He is further entitled to the FEC's proper administration of the provisions of the FECA. Mr. Mezlak is harmed in exercising

his right to an informed vote when a person fails to disclose the contributors for his or her spending on independent expenditures in a timely fashion, as the FECA requires.

18. When Plaintiffs file complaints against violators of the FECA, they rely on the FEC, as the exclusive civil enforcement authority, to comply strictly with the FECA when making its enforcement decisions. *See* 52 U.S.C. § 30107(e). Plaintiffs are harmed and are “aggrieved” parties when the FEC dismisses their complaints contrary to the FECA, refuses to enforce the FECA’s mandatory disclosure requirements, or otherwise acts contrary to the requirements of the FECA. *See* 52 U.S.C. § 30109(a)(8)(C).

19. Defendant FEC is the federal agency established by Congress to oversee the administration and civil enforcement of the FECA. *See* 52 U.S.C. §§ 30106, 30106(b)(1).

STATUTORY AND REGULATORY FRAMEWORK

Independent Expenditure Disclosure

20. The FECA and FEC regulations impose a number of disclosure and other requirements on those making independent expenditures.

21. The FECA and FEC regulations define an “independent expenditure” as “an expenditure by a person . . . expressly advocating the election or defeat of a clearly identified candidate . . . that is not made in concert or cooperation with or at the request or suggestion of such candidate” 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16.¹

¹ FEC regulations define “expressly advocating” as “any communication that—(a) Uses phrases such as ‘vote for the President,’ ‘re-elect your Congressman,’ ‘support the Democratic nominee,’ [etc.] . . . or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s) . . . or (b) When taken as a whole and with limited reference to external events, such as proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one more clearly identified candidate(s) because—(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

22. Under the FECA and FEC regulations, every person who is not a political committee must file a report with the FEC disclosing spending on independent expenditures if the person spends more than \$250 in a calendar year on them. 52 U.S.C. § 30104(c)(1); 11 C.F.R. § 109.10. The term “person” includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons. 52 U.S.C. § 30101(11).

23. The FECA and FEC regulations require every person who is not a political committee who makes independent expenditures totaling more than \$250 in a calendar year to file quarterly reports regarding the expenditures. 52 U.S.C. § 30104(c)(1); 11 C.F.R. § 109.10(b).

24. The FECA and FEC regulations also require a person who makes independent expenditures totaling \$10,000 or more on a given election in a calendar year up to the 20th day before the date of the election to file a report regarding the expenditures with the FEC within 48 hours. 52 U.S.C. § 30104(g)(2)(A); 11 C.F.R. § 109.10(c). The FECA and FEC regulations further require a person who makes independent expenditures totaling \$1,000 or more on a given election after the 20th day before the election, but more than 24 hours before the day of the election, to file a report describing the expenditures with the FEC within 24 hours. 52 U.S.C. § 30104(g)(1)(A); 11 C.F.R. § 109.10(d).

25. Each of these reports must disclose the recipient of the independent expenditure; the date, amount, and purpose of any such independent expenditure; whether such independent expenditure is in support of, or in opposition to, a candidate; the name and office sought by such

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.” 11 C.F.R. § 100.22.

candidate; and a certification that the expenditure was made without coordination with the candidate. 52 U.S.C. § 30104(c)(2)(A) (incorporating reporting requirements of 52 U.S.C. § 30104(b)(6)(B)(iii)); 11 C.F.R. § 109.10(e).

26. Pursuant to one provision of the FECA, these reports must also identify each “person (other than a political committee) who makes a contribution to the reporting committee during the reporting period, whose contributions have an aggregate amount or value in excess of \$200 within the calendar year . . . , together with the date and amount of any such contribution.” 52 U.S.C. § 30104(c)(1) (incorporating reporting requirements of 52 U.S.C. § 30104(b)(3)(A)).

27. A separate provision of the FECA requires that these reports must disclose “the identification of each person who made a contribution in excess of \$200 to the person filing such statement which was made for the purpose of furthering *an* independent expenditure.” 52 U.S.C. § 30104(c)(2)(C) (emphasis added).

28. Pursuant to FEC regulations, these reports must identify “each person who made a contribution in excess of \$200 to the person filing such report, which contribution was made for the purpose of furthering *the reported* independent expenditure.” 11 C.F.R. § 109.10(e)(1)(vi) (emphasis added).

Enforcement

29. Under the FECA, any person who believes there has been a violation of the Act may file a sworn complaint with the FEC. 52 U.S.C. § 30109(a)(1). Based on the complaint, the response from the person alleged to have violated the Act, and any recommendation of the Office of General Counsel (“OGC”), the FEC may then vote on whether there is “reason to believe” a violation of the FECA has occurred. 52 U.S.C. § 30109(a)(2). A “reason to believe” exists where a complaint “credibly alleges” a violation of the FECA “may have occurred.” FEC,

Statement of Policy Regarding Commission Action in Matters at the Initial State in the Enforcement Process, 72 Fed. Reg. 12545, 12545 (Mar. 16, 2007). If the FEC finds there is “reason to believe” a violation of the FECA has occurred, the FEC must notify the respondents of that finding and “shall make an investigation of such alleged violation.” 52 U.S.C. § 30109(a)(2).

30. After the investigation, the OGC may recommend the FEC vote on whether there is “probable cause” to believe the FECA has been violated. 52 U.S.C. § 30109(a)(3). The OGC must notify the respondents of any such recommendation and provide them with a brief stating the position of the OGC on the legal and factual issues presented, to which the respondents may reply. *Id.*

31. Upon consideration of these briefs, the FEC may then determine whether there is “probable cause” to believe a violation of the FECA has occurred. 52 U.S.C. § 30109(a)(4)(A)(i). If the FEC finds probable cause to believe a violation of the FECA has occurred, the FEC must attempt for at least 30 days, but not more than 90 days, to resolve the matter “by informal methods of conference, conciliation and persuasion,” *id.*, a process that does not involve the complainant.

32. If the FEC is unable to settle the matter through informal methods, it may institute a civil action for legal and equitable relief in the appropriate United States district court. 52 U.S.C. § 30109(a)(6)(A). In any action instituted by the FEC, a district court may grant injunctive relief as well as impose monetary penalties. 52 U.S.C. § 30109(a)(6)(B)–(C).

33. If at any stage of the proceedings the FEC dismisses a complaint, any “party aggrieved” may seek judicial review of that dismissal in the United States District Court for the District of Columbia. 52 U.S.C. § 30109(a)(8)(A). All petitions from the dismissal of a

complaint by the FEC must be filed “within 60 days after the date of the dismissal.” 52 U.S.C. § 30109(a)(8)(B).

34. The district court reviewing the FEC’s dismissal of a complaint may declare the FEC’s actions “contrary to law.” 52 U.S.C. § 30109(a)(8)(C). The court also may order the FEC “to conform with such declaration within 30 days.” *Id.* If the FEC fails to abide by the court’s order, the FECA provides the complainant with a private right of action, brought in the complainants’ own name, “to remedy the violation involved in the original complaint.” *Id.*

FACTUAL BACKGROUND

35. Crossroads GPS is a tax-exempt organization established in June 2010, organized under Section 501(c)(4) of the Internal Revenue Code, and based in Washington, D.C.

36. Steven Law is the President and Chief Executive Officer of Crossroads GPS.

37. Karl Rove helped found Crossroads GPS and raises funds for the organization.

38. Haley Barbour raised funds for Crossroads GPS in 2012.

39. Caleb Crosby is an employee or agent of Crossroads GPS and signed independent expenditures disclosure forms on behalf of Crossroads GPS.

Crossroads GPS’s Independent Expenditures

40. On August 30, 2012, Crossroads GPS held a fundraiser at the Tampa Club in Tampa, Florida. The fundraiser was held in conjunction with American Crossroads, an independent expenditure-only political committee closely associated with Crossroads GPS. Separate forms were handed out to attendees at the fundraiser for making donations to either Crossroads GPS or American Crossroads, with instructions on how to wire money to each organization.

41. Approximately 70 high-earning and powerful donors, including hedge fund billionaires and investors, attended the fundraiser.

42. During the fundraiser, Mr. Rove briefed the attendees on fifteen active Senate races. One of the elections Mr. Rove analyzed was the Ohio Senate race between Senator Sherrod Brown (D-OH) and his Republican challenger, Ohio Treasurer Josh Mandel.

43. Mr. Rove stated he received a call from an unnamed out-of-state donor regarding the race. According to Mr. Rove:

[The donor] told him, “I really like Josh Mandel.” The donor, Rove said, had asked him what his budget was in the state; Rove told him \$6 million. “I’ll give ya \$3 million, matching challenge,” Rove said the donor told him. Bob Castellini, owner of the Cincinnati Reds, is helping raise the other \$3 million for that one.

44. Crossroads GPS reported spending \$6,363,711 in independent expenditures in 2012 opposing Senator Brown. Crossroads GPS, FEC Form 5, 2012 Year-End Report at 79, January 31, 2013 (attached as Exhibit A).

45. Crossroads GPS filed ten reports disclosing these independent expenditures. The reports did not, however, disclose the donor who, according to Mr. Rove, pledged to give \$3 million in contributions for the Ohio Senate race, or the names of any of the donors who contributed the “matching” contributions. *See* Ex. A at 1; Crossroads GPS, FEC Form 5, 2012 October Quarterly Report at 1, October 15, 2012 (attached as Exhibit B). Indeed, the reports failed to disclose the names of any of the donors who contributed to Crossroads GPS, including those who contributed for the purpose of furthering Crossroads GPS’s independent expenditures and those who specifically contributed for the purpose of furthering these reported independent expenditures.

46. American Crossroads, on the other hand, did not report spending any money on the Ohio Senate race.

47. During the Tampa fundraiser, Crossroads GPS showed fourteen television ads to the attendees. They included ads targeting Democratic Senate candidates in Virginia, Ohio, Montana, Florida, Massachusetts, and Nevada. At least eleven of the ads were produced by Crossroads GPS. Only two of the ads were produced by American Crossroads.

48. For example, among the ads shown was an ad attacking Senator Brown for voting with Obama “95 percent of the time,” for “cut[ing] . . . Medicare spending,” and for “add[ing] a new tax on Ohio manufacturers.” *See* Democracy 21, Crossroads GPS Television Ads 8 (attached as Exhibit C); *see also* Crossroads GPS, “Cheap” OH Rev (July 3, 2012), *available at* <https://www.youtube.com/watch?v=4crbHaIdJE4>. Another ad attacked Nevada Representative Shelley Berkley (D-Nev.) in her run for the Nevada Senate seat, citing CREW’s report finding her to be “amongst Washington’s most corrupt,” accusing her of “enrich[ing] . . . herself,” calling her own ads “untrue,” and arguing that “Shelly Berkley is everything that’s wrong with Washington.” *See* Ex. C at 15; *see also* Crossroads GPS, “Investigation” NV (Aug. 3, 2012), *available at* <https://www.youtube.com/watch?v=6bk4e0CU-H0>. Another ad attacked Virginia Senator Tim Kaine (D-Va.) for supporting a cut to “defense spending” that could “cost Virginia 200,000 jobs.” *See* Ex. C at 13–14; *see also* Crossroads GPS, “Cost” VA (Aug. 15, 2002), *available at* <https://www.youtube.com/watch?v=3sLwpr9DrNk>.

49. Immediately after the ads were shown, the fundraising began in earnest. Crossroads GPS officials solicited the attendees for additional contributions, noting that additional sums were needed because advertising rates were increasing, making it more costly for Crossroads GPS to broadcast advertisements like those the attendees had just watched.

50. Mr. Barbour made the final pitch for money. “You all give so unbelievably generously,” Mr. Barbour said, “[b]ut you know what, I don’t have any compunction about looking you in the eye and asking for more.”

51. While Mr. Law and Mr. Barbour apparently used the name “American Crossroads” in their fundraising pitches, they evidently used it to mean both American Crossroads and Crossroads GPS. Mr. Law told the attendees that “American Crossroads” was two-thirds of the way to reaching its \$300 million fundraising goal, but the spokesman for both Crossroads GPS and American Crossroads acknowledged the \$300 million goal was the combined budgets for both groups. In addition, eleven of the fourteen ads shown to the attendees before they were solicited were produced by Crossroads GPS, and it subsequently made independent expenditures in five of the six races for which ads were shown. *See* Ex. A at 77, 80, 83, 84, 86. In the sixth race, in Florida, Crossroads GPS broadcast an “issue ad” just before the fundraiser that was not reported to the FEC. *See* Press Release, Crossroads GPS, Crossroads GPS Launches \$4.2 Million Issue Advocacy Push in Four State, August 23, 2012 (attached as Exhibit D).

52. Many of those independent expenditure were broadcast ads that mirrored the ads shown to the contributors at the August 30 meeting. For example, like one of the ads shown to the contributors, Crossroads GPS’s ads attacked Senator Brown for voting with Obama “95 percent of the time,” creating a “new tax” on “Ohio manufacturers,” and “cut[ting]” “Medicare spending.”² Further, like an ad shown to the contributors, Crossroads GPS’s ads attacked

² *See* Ex. A at 55–56, 79 (Crossroads GPS’s filings with FEC detailing independent expenditures against Senator Brown); Ex. B. at 8, 21 (same); Ex. C at 4, 5–6 (transcript of Crossroads GPS’s ads “When” and “Football”); Bridge Project, Crossroads GPS: “Dragging” (Oct. 23, 2012) (attached as Exhibit E) (transcript of Crossroads GPS’s ad “Dragging”); Bridge Project,

Representative Berkley as having been named by CREW as amongst the “most corrupt politicians” in Washington, accusing her of “enriching herself,” calling her own ads “false,” and asserting “Shelly Berkley [is] everything that’s wrong with Washington.”³ Crossroads GPS also ran an ad attacking Senator Kaine that, like the ad shown to the contributors at the August 30 meeting, accused the Senator of supporting a cut to “defense” that would cost “200,000 Virginia jobs.”⁴

53. In addition to the ten reports disclosing independent expenditures in the Ohio race, Crossroads GPS filed more than 32 reports disclosing independent expenditures for broadcast ads in the Virginia, Montana, and Nevada Senate races subsequent to the fundraiser, and reported spending upwards of \$17 million on those independent expenditures. *See* Ex. A at 3–6, 12, 14–16, 22–23, 32–35, 44, 52–53, 55–57, 65–66, 77–81, 83–84; Ex. B at 6–8, 12–15, 17, 19–21. The reports failed to disclose the names of any of the donors who contributed to Crossroads GPS, including those who contributed for the purpose of furthering Crossroads GPS’s independent

Crossroads GPS: “Down” (Oct. 30, 2012) (attached as Exhibit F) (transcript of Crossroads GPS’s ad “Down”). The video of the ads is also available online. *See* Crossroads GPS, “Football” OH (Sept. 11, 2012), *available at* <https://www.youtube.com/watch?v=RsvtT5rI7ZM>; Crossroads GPS, “When” OH (Sept. 26, 2012), *available at* https://www.youtube.com/watch?v=_IRfaaqpe2U; Crossroads GPS, “Dragging” OH (Oct. 23, 2012), *available at* https://www.youtube.com/watch?v=_rFLQOT8oj0; Crossroads GPS, “Down” OH (Oct. 30, 2012), *available at* <https://www.youtube.com/watch?v=19W9JO7wD-4>.

³ *See* Ex. A at 55 (Crossroads GPS’s filing with the FEC detailing its independent expenditures against Representative Berkley); Ex. B. at 6, 13 (same); Ex. C at 10 (transcript of Crossroads GPS’s ads “Shameful” and “Laughable”); *see also* Crossroads GPS, “Laughable” NV (Sept. 11, 2012), *available at* <https://www.youtube.com/watch?v=vCjBIw3V4Vw>; Crossroads GPS, “Shameful” NV (Sept. 18, 2012), *available at* <https://www.youtube.com/watch?v=y4jf3yU0WY4>; Crossroads GPS, “Favorite” NV (Oct. 23, 2012), *available at* <https://www.youtube.com/watch?v=CTCN6cJ93E8>.

⁴ *See* Ex. B at 7 (Crossroads GPS’s filing with the FEC detailing its independent expenditures against Senator Kaine); Ex. C at 10–11 (transcript of Crossroads GPS’s ad “Questionable”); *see also* Crossroads GPS, “Questionable” VA (Sept. 11, 2012), *available at* <https://www.youtube.com/watch?v=Am9Mq4DpQ-Q>.

expenditures and those who specifically contributed for the purpose of furthering the reported independent expenditures. *See* Ex. A at 1; Ex. B at 1.

54. The candidate supported by Crossroads GPS's activities in Nevada, Dean Heller, won the election to the United States Senate. Senator Heller remains a United States Senator. He will be up for reelection in 2018.

Administrative Proceedings

55. On November 14, 2012, plaintiff CREW filed a complaint with the FEC against Crossroads GPS for violations of the FECA ("MUR 6696"). The complaint also named Melanie Sloan and Jessica Markley as complainants. Based on the reporting of an eyewitness at the August 30, 2012 meeting,⁵ the complaint alleged that Crossroads GPS failed to disclose the contributors for its independent expenditures as required by 2 U.S.C. § 434 (now codified as 52 U.S.C. § 30104) and 11 C.F.R. § 109.10(b)–(e). In particular, the complaint alleged Crossroads GPS failed to disclose the contributor who pledged to contribute \$3 million to Crossroads GPS to aid in the election of Josh Mandel by funding Crossroads GPS's independent expenditures in Ohio, failed to disclose the contributors who made matching donations for the same purpose, and failed to disclose the contributors at the August 30 meeting who contributed to Crossroads GPS, including those who contributed to further its independent expenditures in the Ohio, Virginia, Montana, and Nevada Senate races. The complaint further alleged that Mr. Rove, Mr. Law, and Mr. Crosby, and Mr. Barbour unlawfully conspired to violate the FECA and defraud the FEC by knowingly and willfully failing to disclose the above-mentioned contributors.

⁵ *See* Sheelah Kolhatkar, Exclusive: Inside Karl Rove's Billionaire Fundraiser, *Bloomberg Businessweek*, Aug. 31, 2012 (attached as Exhibit G) Sheelah Kolhatkar, Exclusive: How Karl Rove's Super PAC Plays the Senate, *Bloomberg Businessweek*, Sept. 4, 2012 (attached as Exhibit H); Democracy Now, Interview with Sheelah Kolhatkar, Sept. 5, 2012, available at <https://www.youtube.com/watch?v=RZsudD4O3i8>.

56. On January 17, 2013, Crossroads GPS, Mr. Rove, Mr. Barbour, Mr. Law, and Mr. Crosby responded to Plaintiffs' complaint. Mr. Rove also submitted an affidavit in support of the response. Aff. of Karl Rove (attached as Exhibit I). With regard to the \$3 million pledged donation, Mr. Rove admitted that the conversation had indeed taken place and that Plaintiffs' description of the conversation was "substantially accurate." *Id.* ¶ 3. According to the response, the particular conversation occurred months before the August 30 meeting; which would also be months before many of the ads shown at the August 30 meeting were, according to Crossroads GPS, "paid for and aired." Mr. Rove stated that the conversation did not discuss the details of any particular independent expenditure advertisement. Further, according to the response, the contributor actually contributed *more* than \$3 million to Crossroads GPS, although neither the response nor Mr. Rove identified the specific amount. *See id.* ¶ 14.

57. Critically, Crossroads GPS admitted that the contribution was for the purpose of "aid[ing] the election of Josh Mandel" in the Ohio Senate race. *Id.* ¶ 10.

58. With regard to the matching challenge for the Ohio race, the response asserted that it only generated \$1.3 million. Nonetheless, the response admitted that these sums were contributed for the purpose of furthering Crossroads GPS's activities in Ohio.

59. Further, with regard to its activities in Ohio, the response stated that Crossroads GPS "spent over \$10 million on television advertising in Ohio in 2012 that mentioned one or both of the two candidates in the Senate race." The response stated that, in addition to its independent expenditures, Crossroads GPS broadcast electioneering communications and disclosed those communications to the FEC. It further stated that the group broadcast "issue and policy advocacy ads" and that it did not disclose any of those ads. The response, however, did not dispute Plaintiffs' allegation that Crossroads GPS spent \$6,363,711 on independent

expenditures “opposing Senator Brown’s re-election,” a sum, according to the response, representing “over half” of Crossroads GPS’s spending on the Ohio race. Nor did the response dispute that the contribution in excess of \$3 million dollars and intended to support the election Josh Mandel was used to fund Crossroads GPS’s independent expenditures. Nor does the response explain, given that the significant majority of Crossroads GPS’s activities in Ohio consisted of making independent expenditures, for what purpose a contributor to Crossroads GPS’s activities in the State would have made a contribution if not to further the group’s independent expenditures.

60. With regard to the August 30, 2012 meeting, the response admitted that the attendees were shown fourteen independent expenditure advertisements, eleven of which were produced by Crossroads GPS. The response disputed Plaintiffs’ allegation that the attendees were solicited for the purpose of funding the specific ads they were shown, stating that most of those particular ads “had already been paid for and aired.” Nonetheless, the response admitted that the ads were shown as “*examples* of advertisements for which American Crossroads (in two cases) and Crossroads GPS (in eleven cases)” produced and aired. Further, while the response asserted that Crossroads GPS neither solicited nor received contributions for the purpose of broadcasting the ads Crossroads GPS was later to run, it did so only after defining that purpose in the narrowest and most cramped terms. According to Crossroads GPS, a donor may only contribute for the “purpose of furthering” an advertisement where the specific advertisement is already in existence at the time of the contribution in the exact form that it will air and the contributor intends to further that exact and specific advertisement, or where the donor exercises final editorial control over “developing” and “creating” it. The response notably did not dispute that Crossroads GPS solicited and received contributions for the purpose of paying the higher

advertising rates needed to air future advertisements like the “examples” the attendees had just seen, ads which Crossroads GPS indisputably ran, where such editorial control was absent. Indeed, in an example of admission by omission, Mr. Rove asserted that only “[s]ome of the persons in attendance” did not donate to Crossroads GPS after viewing the ads. Ex. I ¶ 2 (emphasis added).

61. The response further asserted that, at the August 30 meeting, Mr. Law and Mr. Barbour “made separate, general solicitations of funds for American Crossroads, and *not* Crossroads GPS.” The response does not explain, however, why, at a fundraiser ostensibly for American Crossroads and definitively not for Crossroads GPS, eleven of the fourteen advertisements shown to donors were produced and aired by Crossroads GPS. Nor does the response dispute Plaintiffs’ allegation that forms were handed out to attendees with instructions on how to contribute to Crossroads GPS.

62. After the August 30, 2012 meeting, American Crossroads ran ads in the Montana and Florida races. American Crossroads did not, however, report spending any money on ads after the August 30 meeting for any of the other four races for which contributors were shown “example” advertisements. In contrast, as noted above, Crossroads GPS did.

63. On April 24, 2013, CREW submitted a supplement to its complaint removing Jessica Markley as a named complainant and adding plaintiff Nicholas Mezlak.

64. On March 7, 2014, the OGC issued its First General Counsel’s Report on Plaintiffs’ complaint (the “Report”). The Report found that the contributor who pledged the \$3 million of which Mr. Rove spoke at the August 30, 2012 meeting “proposed to make a contribution to Crossroads [GPS] for it to use to support the election of Josh Mandel.” Nonetheless, the Report concluded that the “donor’s general purpose to support an organization

in its efforts to further the election of a particular federal candidate does not itself indicate that the donor's purpose was to further "the reported independent expenditure," the standard imposed by 11 C.F.R. § 109.10(e)(1)(vi). The Report further concluded that no reasonable inference could be drawn to support even a reason to believe that the matching contributors gave for the purpose of furthering any of Crossroads GPS's ten reported independent expenditures in Ohio. And the Report concluded that there was "no basis" to conclude that Crossroads GPS received contributions from the attendees at the August 30, 2012 meeting for the purpose of furthering any of the independent expenditures Crossroads GPS reported in Virginia, Montana, and Nevada. Accordingly, the OGC recommended finding no reason to believe Crossroads GPS violated 11 C.F.R. § 109.10(e)(1)(vi).

65. The Report acknowledged, however, that the disclosure requirements imposed by 11 C.F.R. § 109.10 conflicted with statutory requirements imposed by the FECA, which "may reasonably be construed to require disclosure of the identity of certain contributors regardless of whether the contributor made a contribution to further a specific independent expenditure."

66. With regard to the disclosure provisions of 2 U.S.C. § 434(c)(2) (now codified as 52 U.S.C. § 30104(c)(2)), the OGC recognized that it required "an arguably more expansive approach" than embodied in 11 C.F.R. § 109.10(e)(1)(vi). Whereas the regulation requires disclosure of only those contributors who contributed "for the purpose of furthering *the reported* independent expenditure," *see* 11 C.F.R. § 109.10(e)(1)(vi) (emphasis added), Congress ordered those making independent expenditures disclose contributors who donated "for the purpose of furthering *an* independent expenditure," *see* 52 U.S.C. § 30104(c)(2) (emphasis added). Nonetheless, the OGC concluded that the regulation constituted "the Commission's controlling

interpretation of the statutory provision,” and thus the OGC concluded that its recommendations as to 11 C.F.R. § 109.10(e)(1)(vi) applied equally to 52 U.S.C. § 30104(c)(2).

67. With regard to the disclosure provisions of 2 U.S.C. § 434(c)(1) (now codified as 52 U.S.C. § 30104(c)(1)), however, the OGC recognized that the statutory provision “impose[d] additional reporting obligations for certain contributions made for the purpose of influencing a federal election generally.” The OGC recognized that 11 C.F.R. § 109.10 was “silent concerning any such additional reporting requirement.” Accordingly, the OGC did not conclude that its recommendations as to 11 C.F.R. § 109.10 resolved the question of whether Crossroads GPS violated Section 30104(c)(1). Indeed, it recognized “that the facts here may also give rise to a claim that Crossroads [GPS] allegedly violated [52] U.S.C. § [30104](c)(1).” Nonetheless, it recommended that the Commission dismiss such an allegation on the basis of prosecutorial discretion because “a Respondent could raise equitable concerns about whether a filer has fair notice of the requisite level of disclosure required by law if the Commission attempted to impose liability under Section [30104](c)(1).”

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

69. Finally, the OGC recommended closing the file as to Mr. Law, Mr. Rove, Mr. Barbour, and Mr. Crosby.

70. After the OGC issued its Report, the Commission voted on its recommendations on November 17, 2015. The Commission deadlocked three-to-three on the question of whether to find reason to believe that Crossroads GPS violated 52 U.S.C. § 30104(c)(1), 52 U.S.C.

§ 30104(c)(2), and 11 C.F.R. § 109.10(e)(1)(vi). The Commission also deadlocked on whether to close the file on Mr. Law, Mr. Rove, Mr. Barbour, and Mr. Crosby.

71. Subsequently, on December 17, 2015, as a result of the deadlock, the Commission voted six-to-zero to close the file on MUR 6696, dismissing Plaintiffs' complaint.

72. The three commissioners who voted against finding reason to believe Crossroads GPS violated the FECA and the FEC regulation, thus preventing any further action on Plaintiffs' complaint, did not issue a Statement of Reasons explaining their vote.

PLAINTIFF'S CLAIMS FOR RELIEF

CLAIM ONE

The FEC's Failure to Find Reason to Believe Crossroads GPS violated 11 C.F.R. § 109.10 was Arbitrary, Capricious, an Abuse of Discretion, and Contrary to Law

110. Plaintiffs re-allege and incorporate by reference all preceding paragraphs as fully set forth herein.

111. The FEC's dismissal of the complaint was arbitrary, capricious, an abuse of discretion, and contrary to law in violation of 52 U.S.C. § 30109(a)(8)(C) and 5 U.S.C. § 706 because it rested on an arbitrary and capricious application of 11 C.F.R. § 109.10(e)(1)(vi).

112. The three commissioners who voted against finding a reason to believe Crossroads GPS violated 11 C.F.R. § 109.10(e)(1)(vi)—whose votes deadlocked the commission, preventing further action on Plaintiffs' complaint, and thus were controlling—failed to provide any explanation for their vote. To the extent the OGC Report explains the controlling commissioners' vote, however, the explanation is insufficient to justify dismissal.

113. The evidence before the Commission provided a reason to believe that Crossroads GPS accepted contributions made for the purpose of airing its independent expenditures in Ohio, Virginia, Montana, and Nevada. The OGC unreasonably credited Crossroads GPS's response

and, in particular, the affidavit of Mr. Rove, in violation of the FEC's prior guidance that a reason to believe exists so long as a complaint "credibly alleges" a violation has occurred. 72 Fed. Reg. at 12545. The OGC accepted without question the conclusory and self-serving assertions of Mr. Rove over the specific allegations by Plaintiffs, supported by the description of the August 30, 2012 meeting by an eyewitness. Indeed, the OGC apparently rejected Plaintiffs' allegations even where they were not disputed by Crossroads GPS and Mr. Rove.

114. Moreover, the OGC arbitrarily and capriciously concluded there was not even a reason to believe Crossroads GPS accepted contributions made for the purpose of furthering its reported independent expenditures, a conclusion belied by the record. That undisputed record shows that: (a) a contributor provided more than \$3 million for the purpose of aiding Crossroads GPS's activities in electing Josh Mandel and defeating Senator Brown, the significant majority of which activities consisted of the making and distribution of independent expenditure; (b) an additional \$1.3 million in contributions were made to support Crossroads GPS's activities in Ohio, the significant majority of which consisted of the making and distribution of independent expenditures to defeat Senator Brown; and (c) attendees at the August 30, 2012 meeting were shown eleven "example" independent expenditures that were produced and broadcast by Crossroads GPS, Crossroads GPS solicited those attendees for contributions to pay for the higher advertising rates to air such ads, and Crossroads GPS received contributions from all but "some" of the attendees to air independent expenditures in Ohio, Virginia, Montana, and Nevada that echoed the claims and arguments made in the ads shown at the August 30 meeting.

115. The OGC failed to explain why this record did not give rise to even a reason to believe that Crossroads GPS failed to disclose contributors as required by 11 C.F.R. § 109.10(e)(1)(vi).

116. Plaintiffs are therefore entitled to relief in the form of a declaratory order that defendant FEC is in violation of its statutory responsibilities under 52 U.S.C. § 30109(a)(8) and 5 U.S.C. § 706 and has acted arbitrary or capriciously, abused its discretion, or acted contrary to law in dismissing MUR 6696.

CLAIM TWO

The FEC's Failure to Find Reason to Believe that Crossroads GPS violated 52 U.S.C. § 30104(c)(2) was Arbitrary, Capricious, an Abuse of Discretion, and Contrary to Law

117. Plaintiffs re-allege and incorporate by reference all preceding paragraphs as fully set forth herein.

118. The three commissioners who voted against finding a reason to believe Crossroads GPS violated 52 U.S.C. § 30104(c)(2)—whose votes deadlocked the commission, preventing further action on Plaintiffs' complaint, and thus were controlling—failed to provide any explanation for their vote. To the extent the OGC Report explains the controlling commissioners' vote, however, the explanation is insufficient to justify dismissal.

119. The OGC recognized that the reporting obligations embodied in 11 C.F.R. § 109.10(e)(1)(vi) conflict with the reporting obligations imposed by Congress under 52 U.S.C. § 30104(c)(2). Indeed, the regulation is inconsistent with the plain language of the statute and clearly frustrates Congress's intent to require disclosure in situations where contributions were made for the purpose of furthering independent expenditures, even if the purpose was not to further a specific independent expenditure exactly as the ad was aired and reported to the FEC.

120. The FEC provided no explanation for drafting 11 C.F.R. § 109.10(e)(1)(vi) in a way that conflicts with 52 U.S.C. § 30104(c)(2). *See* FEC, Amendments to Federal Election Campaign Act of 1971, 45 Fed. Reg. 15080, 15087 (Mar. 7, 1980) (discussing amendment to 11

C.F.R. § 109.2, now codified at 11 C.F.R. § 109.10; stating amendment to “incorporate changes” to statute, but not explaining difference in language between statute and regulation).

121. Because 11 C.F.R. § 109.10(e)(1)(vi) imposes a reporting obligation that conflicts with the one imposed by statute under the FECA, 11 C.F.R. § 109.10(e)(1)(vi) is unlawful and invalid.

122. The OGC did not conduct an evaluation of whether Crossroads GPS violated 52 U.S.C. § 30104(c)(2) independent of its investigation with regard to 11 C.F.R. § 109.10(e)(1)(vi) even though the OGC recognized that Section 30104(c)(2) embodied a “more expansive approach” than the regulation. Rather, the OGC recommended finding no reason to believe Crossroads GPS violated 52 U.S.C. § 30104(c)(2) solely on the basis on its finding as to 11 C.F.R. § 109.10(e)(1)(vi).

123. Because 11 C.F.R. § 109.10(e)(1)(vi) is without force and conflicts with the FECA, the OGC’s reliance on the standards imposed by that statute are arbitrary, capricious, an abuse of discretion, and contrary to law.

124. Plaintiffs are therefore entitled to relief in the form of a declaratory order that defendant FEC is in violation of its statutory responsibilities under 52 U.S.C. § 30109(a)(8) and 5 U.S.C. § 706, that the FEC has acted arbitrary or capriciously, abused its discretion, or acted contrary to law in dismissing MUR 6696, and that 11 C.F.R. § 109.10(e)(1)(vi) is unlawful and invalid.

CLAIM THREE

The FEC’s Failure to Find Reason to Believe that Crossroads GPS violated 52 U.S.C. § 30104(c)(1) was Arbitrary, Capricious, an Abuse of Discretion, and Contrary to Law

125. Plaintiffs re-allege and incorporate by reference all preceding paragraphs as fully set forth herein.

126. The three commissioners who voted against finding a reason to believe Crossroads GPS violated 52 U.S.C. § 30104(c)(1)—whose votes deadlocked the commission, preventing further action on Plaintiffs’ complaint, and thus were controlling—failed to provide any explanation for their vote. To the extent the OGC Report explains the controlling commissioners’ vote, however, the explanation is insufficient to justify dismissal.

127. The OGC recognized that, apart from any reporting obligations imposed by 52 U.S.C. § 30104(c)(2) and 11 C.F.R. § 109.10(e)(1)(vi), 52 U.S.C. § 30104(c)(1) imposes a separate obligation on those making independent expenditures to disclose “contributions made for the purpose of influencing a federal election generally.”

128. Crossroads GPS admitted that it accepted a contribution in excess of \$3 million for the purpose of influencing the Ohio Senate election. The OGC therefore found that the contribution was made for the purpose of “support[ing] the election of Josh Mandel” in that race.

129. Nonetheless, the OGC recommended dismissing the allegation on the belief that Crossroads GPS “could” raise a defense that it did not have “fair notice” of the disclosure requirements. It made that recommendation despite the fact that (a) the disclosure requirements are plainly stated in the federal statute; (b) Crossroads GPS is a sophisticated party who has asserted that it is “fully aware of its FEC reporting and disclosure obligations”; (c) the FEC’s enforcement of the provisions are civil in nature; (d) Plaintiffs and other voters continue to have a valid and important interests in the disclosure of the contributors to Crossroads GPS and to its independent expenditures; (e) the doctrine that a law may lapse from lack of recent enforcement, known as “desuetude,” is not recognized in federal law; and (f) the FEC can craft whatever remedy it chooses to impose in a way to alleviate any equitable concerns it has, including by allowing Crossroads GPS to remedy its violation by disclosing its contributors now.

130. The OGC gave no consideration to these, or to any other, facts before refusing to find reason to believe Crossroads GPS violated Section 30104(c)(1).

131. Plaintiffs are therefore entitled to relief in the form of a declaratory order that defendant FEC is in violation of its statutory responsibilities under 52 U.S.C. § 30109(a)(8) and 5 U.S.C. § 706 and has acted arbitrary or capriciously, abused its discretion, or acted contrary to law in dismissing MUR 6696.

REQUESTED RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

- (1) Declare that the FEC's dismissal of MUR 6696 was arbitrary, capricious, an abuse of discretion, and contrary to law;
- (2) Order the FEC to conform to such declaration within 30 days pursuant to 52 U.S.C. § 30109(a)(8)(C);
- (3) Declare that 11 C.F.R. § 109.10(e)(1)(vi) is contrary to law, arbitrary and capricious, and invalid;
- (4) Award Plaintiffs their costs, expenses, and reasonable attorneys' fees in this action; and
- (5) Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,



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