



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**Response of Vice Chair Lindenbaum and Commissioners Broussard and Weintraub  
to Question 51 from the Committee on House Administration**

Vice Chair Lindenbaum and Commissioners Broussard and Weintraub are committed to following the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Crossroads GPS v. CREW*, 971 F.3d 340 (D.C. Cir. 2020).

Commissioners Broussard and Weintraub further submit for reference the [Statement of Reasons](#) they authored regarding the application of the June 8, 2022, Policy Statement.<sup>1</sup>

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<sup>1</sup> See Statement of Reasons of Commissioners Shana M. Broussard and Ellen L. Weintraub, MUR 7516 (Heritage Action for America) (July 7, 2022).



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of

Heritage Action for America

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MUR 7516

**STATEMENT OF REASONS OF COMMISSIONERS  
SHANA M. BROUSSARD AND ELLEN L. WEINTRAUB**

In 2018, a federal district court struck down a Commission regulation permitting groups like Heritage Action for America (“Heritage Action”), a 501(c)(4) nonprofit organization, to skirt donor disclosure rules while making independent expenditures.<sup>1</sup> The decision was a victory for enforcing the law as written by Congress. The Commission issued guidance on the impact of the decision on October 4, 2018.<sup>2</sup> This guidance was issued on a consensus basis, with the input of all then-sitting commissioners. It was thorough and closely followed the requirements of the law as interpreted by the federal courts. It explained who needed to report what, when, and how to do so.

In that guidance, the Commission noted that it would exercise prosecutorial discretion for the quarterly reports due October 15, 2018 and detailed how it would do so.<sup>3</sup> The Commission thus made clear the reporting rules for independent expenditures made on or after September 18, 2018, the effective date of the court’s decision.<sup>4</sup>

<sup>1</sup> *CREW v. Fed. Election Comm’n*, 316 F. Supp. 3d 349 (D.D.C. 2018) (*CREW I*). This decision was later affirmed the D.C. Circuit, *Crossroads GPS v. CREW*, 971 F.3d 340 (D.C. Cir. 2020) (*CREW II*), and the decision went into effect September 18, 2018. *See also* 52 U.S.C. § 30101(17) (defining “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, the candidate’s authorized political committee, or their agents, or a political committee or its agents”).

<sup>2</sup> *See* Press Release, FEC Provides Guidance Following U.S. District Court Decision in *CREW v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018) (Oct. 4, 2018), available at <https://www.fec.gov/updates/fec-provides-guidance-following-us-district-court-decision-crew-v-fec-316-f-supp-3d-349-ddc-2018/>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

MUR 7516 (Heritage Action for America)  
Statement of Reasons of Commissioners Broussard and Weintraub  
Page 2 of 4

This matter turns on whether Heritage Action was required to report its donors when making independent expenditures on or after September 18, 2018. An examination of the Federal Election Campaign Act, as amended (the “Act”) and the related judicial decisions presents a clear answer on that question: Heritage Action *was* required to report its donors. It did not. For that reason, our nonpartisan Office of General Counsel recommended finding reason to believe that Heritage Action violated the law.<sup>5</sup> We agreed and voted to authorize an investigation.<sup>6</sup> Unfortunately, our Republican colleagues voted against moving forward and the Commission once again was unable to enforce the law.<sup>7</sup>

The Act requires a person (other than a political committee) who makes independent expenditures to report certain information about their contributors. The specific statutory requirements are as follows:

- 52 U.S.C. § 30104(c)(1) requires every person (other than a political committee) reporting independent expenditures in excess of \$250 to disclose the information required under section 30104(b)(3)(A) “for *all* contributions received by such person.” (emphasis added)
- 52 U.S.C. § 30104(b)(3)(A) requires the identification of each person (other than a political committee) who makes a contribution to the reporting committee during the reporting period aggregating in excess of \$200 within the calendar year, along with the date and amount of any such contribution.
- 52 U.S.C. § 30104(c)(2)(C) requires that every person reporting independent expenditures must also identify “each person who made a contribution in excess of \$200 . . . which was made for the purpose of furthering *an* independent expenditure.” (emphasis added)

In short, for any reporting period in which anyone (other than a political committee) makes more than \$250 in independent expenditures, section 30104(c)(1) requires that person to report the

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<sup>5</sup> First Gen. Counsel’s Rpt., MUR 7516 at 2 (Heritage Action for America), dated Feb. 19, 2021. OGC recommended moving forward with a reason to believe finding and investigation of Heritage Action’s reported independent expenditures specifically related to the organization’s second and significant tranche of independent expenditures captured on the organization’s 2018 Year-End Report, which disclosed \$1,559,319.71 in independent expenditures without disclosing a single donor. *Id.* at 6.

<sup>6</sup> See Certification, MUR 7516 (Heritage Action for America), dated Apr. 23, 2021.

<sup>7</sup> *Id.* Not satisfied with refusing to enforce the law in this particular matter, the Republican commissioners have put out a statement announcing their intent to continue to defy the court’s decision requiring enhanced disclosure by refusing to enforce the law unless and until the Commission adopts a rule to their liking,. Not surprisingly, they have indicated that such a rule would dramatically narrow the scope of the statute as adopted by Congress and interpreted by the courts. See Pol’y Stmt. of Chairman Allen Dickerson, & Comm’rs Sean J. Cooksey & James E. “Trey” Trainor, III Concerning the Application of 53 U.S.C. § 30104(c) (June 8, 2022), [CREW contributions earmarked political purposes Dickerson Cooksey Trainor 06082022.pdf \(fec.gov\)](https://www.fec.gov/disclosure/crew-contributions-earmarked-political-purposes-dickerson-cooksey-trainor-06082022.pdf).

MUR 7516 (Heritage Action for America)  
Statement of Reasons of Commissioners Broussard and Weintraub  
Page 3 of 4

names of those who gave more than \$200 in that reporting period and the dates and amounts of those contributions. That requirement holds “regardless of any connection to IEs eventually made.”<sup>8</sup> In addition, section 30104(c)(2)(C) requires the identification of any person who contributed more than \$200 for the purpose of furthering *any* independent expenditure.

The Commission’s regulation at 11 C.F.R. § 109.10(e)(1)(vi), however, impermissibly narrowed the scope of the statute’s mandated disclosure by requiring only “[t]he identification of each person who made a contribution in excess of \$200 to the person filing such report,” when the “contribution was made for the purpose of furthering *the reported* independent expenditure.”<sup>9</sup>

On August 3, 2018, the District Court for the District of Columbia vacated 11 C.F.R. § 109.10(e)(1)(vi) because it conflicted with 52 U.S.C. § 30104(c)(1) and (c)(2)(C). Specifically, the Court observed that “those donors funding the not-political committee’s political activities to influence a federal election—by, for example, making contributions to candidates, political committees, or political parties or by financing independent expenditures—must be identified to inform the electorate on the sources of funding of participants in the electoral process.”<sup>10</sup> After a brief stay, the vacatur of this regulation took effect on September 18, 2018. In affirming the district court’s ruling in 2020, the D.C. Circuit noted that groups (like Heritage Action) making independent expenditures would “be required, as a result of the district court’s judgment, to disclose nearly all contributions it receives during any reporting period in which it makes [independent expenditures].”<sup>11</sup>

Throughout the 2018 election cycle, Heritage Action publicly shared its plan to make independent expenditures. In fact, Heritage announced its plan to fund independent expenditures less than a week *after* the *CREW* decision.<sup>12</sup>

While Heritage Action could have continued on with their spending strategy following the *CREW* decision and complied with the law by simply disclosing its donors pursuant to the statutory requirement, it appears to have remained on course with the same spending and non-disclosure strategy. The record shows that on August 8, 2018, five days after the district court issued the *CREW* decision, Heritage Action issued a press release stating its intent to “spend \$2.5 million and back 12 candidates this November.”<sup>13</sup> Heritage Action’s press release, as well as press coverage of the announcement of the group’s planned spending, identified the twelve congressional candidates by name and district and stated that the group planned to engage in a “combined digital,

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<sup>8</sup> *CREW II*, 971 F.3d at 350-51.

<sup>9</sup> 11 C.F.R. § 109.10(e)(1)(vi) (vacated) (emphasis added).

<sup>10</sup> First Gen. Counsel’s Rpt. at 10 (citing *CREW I*, 316 F. Supp. 3d at 401).

<sup>11</sup> *CREW II*, 971 F.3d at 347.

<sup>12</sup> See First Gen. Counsel’s Rpt. at 2.

<sup>13</sup> *Id.* at 3 (citing Press Release, Heritage Action for America, Heritage Action to spend \$2.5 million and back 12 candidates this November (Aug. 8, 2018), <https://heritageaction.com/press/heritage-action-to-spend-2-5-million-and-back-12-candidates-this-november>)).

MUR 7516 (Heritage Action for America)  
Statement of Reasons of Commissioners Broussard and Weintraub  
Page 4 of 4

print, and TV advertising campaign.”<sup>14</sup> Heritage Action Executive Director Tim Chapman stated on the same day as the press release, “What we’re telling donors is, every dollar we raise over our budget we can effectively pour more into these races.”<sup>15</sup> Heritage Action told their donors that the money it was raising would be used to fund independent expenditures on behalf of a specific group of candidates. And to give credit where credit is due, Heritage Action kept its promise.

Heritage Action disclosed over \$1,933,496 for independent expenditures during the 2018 general election. Nearly 94% of those independent expenditures supported the same twelve candidates Heritage Action had announced it planned to support.<sup>16</sup> The disclosure reports for this activity did not include any donor information.

The law is clear today, and it was clear when the funds in question were spent: The D.C. Circuit held that the law requires IE-makers to disclose “nearly all” contributions received during a reporting period when IEs were made. Heritage Action disclosed none. And once again, Republican FEC commissioners have deprived the American people of information about the sources of political spending, information that Congress and the courts have determined the public is entitled to know.

July 7, 2022

Date



Shana M. Broussard  
Commissioner

July 7, 2022

Date



Ellen L. Weintraub  
Commissioner

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.* (citing Katie Glueck, *Conservative DC Group Throws Money to McGrath’s Opponent, 11 Other Republicans*, MCCLATCHY (Aug. 8, 2018), <https://www.mcclatchydc.com/news/politics-government/article216227855.html>)).

<sup>16</sup> This included \$1,811,736.87 in independent expenditures supporting the same twelve candidates, with \$374,177.20 in independent expenditures supporting those twelve candidates reported on the October 2018 Quarterly Report and \$1,437,559.67 in independent expenditures supporting those same twelve candidates reported on Heritage Action’s 2018 Year-End Report. First Gen. Counsels Rpt. at 12. Neither report contained any donor information.