



FEDERAL ELECTION COMMISSION  
1050 First Street NE  
Washington, DC 20463

April 8, 2019

Mark Langer, Clerk  
U.S. Court of Appeals for the D.C. Circuit  
E. Barrett Prettyman Courthouse  
333 Constitution Ave., NW  
Washington DC 20001

Re: Response to Notice of Supplemental Authority in *Citizens for Responsibility and Ethics in Washington* (“CREW”), *et al. v. Federal Election Commission* (“FEC”), No. 17-5049 (on petition for rehearing en banc)

Dear Mr. Langer:

The recent decision in *CREW v. FEC*, No. 18-cv-76 (D.D.C. Mar. 23, 2019) does not support CREW’s petition. That district court opinion, which reviewed the Commission’s handling of a separate administrative complaint, does not reveal any conflict in this Court’s decisions that would call for en banc review of the panel decision at issue here. Fed. R. App. P. 35(a)(1).

CREW fails to establish that the analysis Judge Contreras reviewed had been “previously declared unlawful.” (Notice at 2.) On this point, CREW cites Judge Contreras’s summary of CREW’s “characteriz[ation]” of certain FEC Commissioners’ reasoning, not the court’s own analysis. (*See* Notice at 1-2 (citing Slip. Op. at 12).) The statement under review involved those Commissioners’ use of a “lifetime-focused test” for determining whether an organization should be regulated as a “political committee.” (Slip Op. at 12.) A prior district judge had concluded that considering an “organization’s full spending history” in this analysis was not “*per se* unreasonable,” but that applying a “rigid” rule looking “*only*” at lifetime spending was unlawful. *See CREW v. FEC*, 209 F. Supp. 3d 77, 94 (D.D.C. 2016). By contrast, Judge Contreras concluded that the record did “not

support” CREW’s argument that the controlling Commissioners had “adopted bright line rules” in this regard. (Slip Op. at 19 & n.14.)

The Court also should not accept CREW’s supposition that certain Commissioners will use the panel decision in bad faith to “immunize” purportedly unlawful analysis from judicial review. (Notice at 2.) The agency action Judge Contreras reviewed was completed in “late-2017” (Slip Op. at 8), before the panel decision, 892 F.3d 434 (D.C. Cir. 2018). Judge Contreras, moreover, concluded that the “Commission fulfilled its statutory responsibility to investigate” but “simply reached a different conclusion than [CREW] preferred.” (Slip. Op. at 22.) The panel similarly concluded that “the Commission routinely enforces the election law violations alleged in CREW’s administrative complaint.” 892 F.3d at 440 n.9. If CREW objects to how Judge Contreras “read” the panel decision or how it might later be applied (Notice at 1), CREW’s arguments are more properly raised on direct appeal in the applicable action.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 8th day of April, 2019, I electronically filed the foregoing Response to Notice of Supplemental Authority with the Clerk of the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system, which will serve all counsel of record.

/s/ Jacob S. Siler

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Attorney

Federal Election Commission