NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 18-5261

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Crossroads Grassroots Policy Strategies,

Defendant-Appellant,

v.

Citizens for Responsibility and Ethics in Washington and Nicholas Mezlak,

Plaintiffs-Appellees,

Federal Election Commission,

Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia
Civ. A. No. 16-259 (Hon. Beryl A. Howell)

OPENING BRIEF OF DEFENDANT-APPELLANT CROSSROADS GRASSROOTS POLICY STRATEGIES

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CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Appellant Crossroads Grassroots Policy Strategies provides the following information in accordance with D.C. Circuit Rules 26.1 and 28(a)(1):

A) Parties and Amici

The appellant is Crossroads Grassroots Policy Strategies ("Crossroads"), which was an intervenor-defendant in the district court. Pursuant to Circuit Rule 26.1, Crossroads certifies that no publicly held company has a ten-percent-or-greater ownership interest in Crossroads and that Crossroads has no parent companies as defined in the Circuit Rule. Crossroads is a non-partisan, non-profit § 501(c)(4) organization that educates, equips, and engages American citizens on important economic and legislative issues.

Citizens for Responsibility and Ethics in Washington and Nicholas Mezlak (collectively, "CREW"), which were plaintiffs in the district court, are appellees. The Federal Election Commission was a defendant in the district court. Counsel for the Commission has previously confirmed that the Commission did not have the sufficient number of affirmative votes to authorize an appeal and therefore is an appellee.

No amicus curiae appeared in the district court. Crossroads understands that one or more parties may appear as an amicus in this appeal.

B) Rulings Under Review

The rulings under review are the August 3, 2018 judgment of the district court (Docket Nos. 42 (order) and 43 (memorandum opinion)), entered by the Honorable Beryl A. Howell in Civil Action No. 16-cv-00259-BAH, along with the court's March 22, 2017 order and memorandum opinion (Docket Nos. 21 and 22 respectfully). The August 3, 2018 opinion is available at 316 F.Supp.3d 349 and located on page 396 of the Joint Appendix. The March 22, 2017 opinion is available at 243 F.Supp.3d 91 and located on page 77 of the Joint Appendix. The orders are not published in the Federal Supplement but are available in the Joint Appendix on pages 75 and 367.

C) Related Cases

This case was previously before this Court on Crossroads' emergency motion for a stay pending appeal. This Court's resulting decision is titled *CREW v. FEC*, 904 F.3d 1014 (D.C. Cir. 2018) (per curiam) (Henderson, Millett, and Wilkins, JJ.). Crossroads is not aware of any other related case, as defined by Circuit Rule 28.

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GLOSSARY

APA	Administration Procedure Act
BCRA	Bipartisan Campaign Reform Act of 2002
CREW	Citizens for Responsibility and Ethics in Washington
Crossroads	Crossroads Grassroots Policy Strategies
FEC	Federal Election Commission
FECA	Federal Election Campaign Act of 1971, as amended
FECA (c)(1)	52 U.S.C. § 30104(c)(1)
FECA (c)(2)(C)	52 U.S.C. § 30104(c)(2)(C)
Form	FEC Form 5
JA	Joint Appendix
Regulation	11 C.F.R. § 109.10(e)(1)(vi)

JURISDICTIONAL STATEMENT

This is a timely appeal, pursuant to 28 U.S.C. § 1291, of judgments of the United States District Court for the District of Columbia entered March 22, 2017 and August 3, 2018. *See* JA482. The district court exercised federal question jurisdiction under 28 U.S.C. § 1331 over claims asserted under 5 U.S.C. § 706 (the Administrative Procedure Act ("APA")), and 52 U.S.C. § 30109(a)(8) (the Federal Election Campaign Act of 1971, as amended ("FECA")).

The jurisdiction of both this Court, and the district court, are contested by the parties. Defendant-Appellant Crossroads Grassroots Policy Strategies ("Crossroads") respectfully disagrees that Plaintiffs-Appellees Nicholas Mezlak and Citizens for Responsibility and Ethics in Washington (collectively, "CREW") could pursue its claims before the district court, or take this appeal, for the reasons articulated *infra* at 22-34. In short, CREW failed to raise the core issues of this appeal in its underlying administrative and judicial complaints, and CREW has abandoned its administrative enforcement complaint, which was CREW's sole means of evading the APA's six-year statute of limitations.

For its part, CREW moved to dismiss on October 15, 2018, claiming that Crossroads lacked standing to appeal because CREW had abandoned its administrative complaint and Crossroads had stopped relying on the regulation. In briefing, CREW pointedly did not claim the appeal was moot. On December 14,

2018, the motions panel referred the standing issue to the merits panel. *See* ECF No. 1764258.

As Crossroads explains *infra* at 9-10, Crossroads has standing to appeal the district court's judgment invalidating the FEC's regulation because Crossroads historically relied upon that regulation to facilitate core electoral speech and preserve associational privacy, and Crossroads will resume such speech if the legal cloud over the regulation is removed. Moreover, at the outset of this litigation – which is when standing is assessed – Crossroads still was relying on the regulation as one defense to CREW's then-pending administrative complaint.

THE ISSUES PRESENTED

(1) Whether a party can collaterally attack a 37-year-old regulation by filing an administrative enforcement complaint where, *inter alia*, the regulation's validity was not directly challenged in the administrative proceedings below, was immaterial to resolution of the complaint, and the party subsequently abandoned its administrative enforcement efforts.

(2) Whether, consistent with Circuit precedent, CREW has met its "heavy burden" of showing that 52 U.S.C. § 30104(c), which establishes the reporting requirements for non-political committees that make independent expenditures, "unambiguously forecloses" the FEC's regulation at 11 C.F.R. § 109.10(e)(1)(vi)

at step one of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

(3) Whether 11 C.F.R. § 109.10(e)(1)(vi) follows from a reasonable interpretation of the FECA, under the second step of *Chevron*.

(4) Whether CREW may challenge 11 C.F.R. § 109.10(e)(1)(vi) as arbitrary and capricious under the APA.

(5) Whether the judgments below should be vacated and this appeal dismissed for lack of Article III jurisdiction.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are reproduced in an addendum to this brief.

STATEMENT OF THE CASE

I. The Evolution of the FECA's Limited Reporting Regime for Independent Expenditures.

Spending for candidate advocacy that is not coordinated with any candidate or political party is termed an "independent expenditure." 52 U.S.C. § 30101(17). Because independent expenditures implicate core First Amendment rights of speech and association, the FECA provision subjecting independent expenditures to mandatory reporting is construed narrowly to burden only "express advocacy" – i.e., speech that uses terms such as "vote for", "elect," or "defeat." *Buckley v.*

Valeo, 424 U.S. 1, 44 n.52, 80 & n.108 (1976); *see also* 11 C.F.R. § 100.22 (defining "expressly advocating").

Following *Buckley*, the FECA's independent expenditure reporting requirements were limited to identifying particular expenditures and contributions given to fund those expenditures. *See* Memo. from Orlando B. Potter, Staff Director, Federal Elec. Comm'n (Mar. 29, 1978) at 2, 3 ("Potter Memo.");[1] *Legislative History of Federal Election Campaign Act Amendments of 1979* at 451 (1983), at http://classic.fec.gov/pdf/legislative_hist/legislative_history_1979.pdf ("1979 FECA History"). Two entities were required to report when an independent expenditure was made: (1) the speaker reported its independent expenditure, and (2) other persons "who contribute to the independent expenditure would disclose the contribution (i.e., payee, particulars, date, amount and candidate)" on a separately-filed contributor report. *Id.* at 2, 3 (emphasis added); *see also* as 2 U.S.C. § 434(e)(2) (1976); 1979 FECA History at 451.

During this post-*Buckley* period, the FEC also advocated for the statutory changes to simplify and improve the FECA's reporting provisions that form the heart of this case. *See* 1979 FECA History at 10. In July 1979, the Senate

[1] This memorandum, and the minutes from the FEC's meeting where the pre-1979 independent expenditure reporting options were discussed, are included as part of the Addendum to this brief. These materials were also attached as an addendum to Crossroads' earlier motion for emergency relief before this Court, available on PACER as Addendum E to ECF Docket No. 1748559.

Committee on Rules and Administration ("Committee") conducted a hearing on the FEC's proposals. *See id.* at 7. The FEC Chair and Vice-Chair testified, accompanied by key staff, and FEC personnel remained engaged with the Committee following the hearing. *See id.* at 8, 10, 20, 39, 150-60. One FEC recommendation was to require that all reporting be done by the speaker, whose reports would include "the sources of any contributions . . . donated with a view toward bringing about an independent expenditure." *Id.* at 24-25.

Committee staff soon circulated a draft to implement the "FEC legislative recommendation[s]." *Id.* at 101, 103, 145. The legislation first revised the introductory subsection, then codified at 2 U.S.C. § 434(e)(1), which identified who must file the independent expenditure report and at what monetary threshold such a filing became necessary. *See, e.g.*, *id.* at 145 (explaining that the purpose of the 1979 amendment was to eliminate the separate contributor report and raise the reporting threshold from $100 to $250 per year). These changes did not expand the substantive reporting obligations, were subsequently codified at 2 U.S.C. § 434(c)(1), and are hereinafter referred to as "FECA (c)(1)." *See id.*

As also recommended by the FEC, the Committee staff draft eliminated reporting by contributors and required the person making the independent expenditure to identify "each person who has made a contribution of more than $200 to the person filing such statement, which was made for the purpose of

furthering an independent expenditure." *Id.* at 78, 123. This provision became subsection (C) to 2 U.S.C. § 434(c)(2) ("FECA (c)(2)(C)"). Committee staff explained this revision required "the person who receives the contribution and subsequently makes the independent expenditure [to] report having received that contribution." *Id.* at 103, 145 (emphasis added). The FEC's combined proposals were enacted as part of H.R. Res. 5010, signed into law by President Carter on January 8, 1980. *See id.* at 187, 558, 573.

The new law directed the FEC to transmit proposed implementing regulations to Congress within 50 days. *See id.* at 562, 563. Accordingly, the FEC called for expedited public comment on proposed regulations developed by FEC staff. *See* JA305. The Commission then conducted a two-day "section-by section review." *See* JA299, 309. On February 19, FEC staff revised the proposed regulations to reflect "the Commission's discussion of the proposed regulations" during the preceding month and to comprehensively address all FECA reporting requirements except those directed at political committees. *See* JA312, 313. The proposal included the regulation at issue here in its present form. *See* JA306, 314.

On February 21, 1980, the FEC approved the proposed regulations and transmitted them to Congress for the special review mandated by the FECA. *See* 52 U.S.C. § 30111(d); JA317. The FEC's accompanying Explanation and Justification explained that the regulation at issue here, 11 C.F.R.

§ 109.10(e)(1)(vi) (hereinafter the "Regulation"), "incorporate[s] the changes set forth at 2 USC 434(c)(1) and (2) regarding reporting requirements for persons, other than a political committee, who make independent expenditures." JA327. The FEC's explanation further reiterated that the new regulations were comprehensive with respect to "persons other than a political committee." *Id.* And importantly, the Regulation then was in its present form. It did not require speakers to report all of their contributions generally but specifically limited disclosure to contributions given to support the independent expenditure being reported.

Congressional review was not *pro forma*. In fact, Congress had previously disapproved several FEC regulations. *See, e.g.*, S. Res. 236, 96th Cong. (1979); H.R. Res. 780, 94th Cong. (1975); S. Res. 275, 94th Cong. (1975). In this case, however, there was no such disapproval. The Regulation took effect in its present form with no contemporaneous judicial review.

The FECA also required the FEC to submit proposed reporting forms to Congress for prior review. *See* 52 U.S.C. § 30111(d)(1). The submitted form has paralleled the Regulation, providing for disclosure only of contributions given to support the reported expenditure. *See, e.g.*, FEC, *Instructions for Preparing FEC Form 5* (rev. Sept. 2013), *at* https://www.fec.gov/resources/cms-content/documents/fecfrm5i.pdf ("Form"). Congress did not object to the form.

As indicated above, participants in this process sometimes referred to "an" independent expenditure and sometimes to "the" expenditure. The terms were used interchangeably and there is no indication that anyone at the time perceived any difference in meaning.

For the next 37 years, the FEC Regulation and corresponding Form have required reporting of contributions made to support "the" particular express advocacy independent expenditure being reported – not all funds an organization has received, nor even funds given to support an organization's independent expenditures generally. During those decades, Congress has been active with respect to reporting obligations, amending the statute in 1995, 1999, 2000, 2002, 2004, and 2007.[2] Indeed, Congress even "ordered the FEC to rewrite its regulations" regarding coordinated communications during this period, a provision directly relevant to independent expenditures. *Shays v FEC*, 414 F.3d 76, 97-98 (D.C. Cir. 2005) ("*Shays I*"). Yet Congress did not express any dissatisfaction with the Regulation.

Notably, in 2002 Congress adopted reporting requirements for certain non-express advocacy spending close to elections – i.e., for so-called "electioneering

[2] *See* Pub. L. 104-79, §§ 1(a), 3(b), 109 Stat. 791, 792 (1995); Pub. L. 106-58, Title VI, §§ 639(a), 641(a), 113 Stat. 430, 476, 477 (1999); Pub. L. 106-346, § 101(a) [Title V, § 502(a), (c)], 114 Stat. 1356, 1356A-49 (2000); Pub. L. 107-155, Title I, § 103(a), Title II, §§ 201(a), 212, Title III, §§ 304(b), 306, 308(b), Title V, §§ 501, 503, 116 Stat. 81, 87, 88, 93, 99, 102, 104, 114, 115 (2002); Pub. L. 108-199, Div. F, Title VI, § 641, 118 Stat. 359 (2004); Pub. L. 110-81, Title II, § 204(a), 121 Stat. 735, 744 (2007).

communications." Pub. L. No. 107–155, 116 Stat. 81 (2002); 52 U.S.C. § 30104(f)(3). In adopting implementing regulations, the FEC tailored the electioneering communication reporting requirements to align in ways similar to the requirements applicable to independent expenditures. *Electioneering Communications*, 72 Fed. Reg. 72,899 72,911 n.22 (Dec. 26, 2007). When a district court ruled the FEC's electioneering communications regulation was unlawfully narrow, this Court reversed, holding the FEC's regulation was fully consistent with the new statutory text. *See Van Hollen v. FEC*, 811 F.3d 486 (D.C. Cir. 2016).

II. Crossroads' Historic and Future Reliance on the Regulation

Crossroads is a Section 501(c)(4) non-profit organization founded in 2010 to educate, equip, and engage American citizens on important economic and legislative issues. *See* JA484 [¶¶ 1-2]. One tool Crossroads has used is express candidate advocacy in the form of independent expenditures, amounting to more than $100 million in recent election cycles. *See id.* [¶ 3]; FEC *Independent Expenditures*, at https://www.fec.gov/data/independent-expenditures/?data_type=processed&committee_id=C90011719&is_notice=true.

Crossroads tailors its speech to comply with the FEC's reporting requirements. When Crossroads engaged in express advocacy, it relied on the Regulation to assure donor privacy and did not seek contributions to support

specific independent expenditures. Crossroads' reliance on the Regulation has been important to Crossroads' donors and its ability to raise funds. It has allowed Crossroads to advocate freely and flexibly without concern that its advocacy will incorrectly be attributed to particular donors.

Recently, groups such as CREW have argued that the FECA demands broader disclosure. For example, in 2013 CREW filed the administrative complaint against Crossroads that led to this appeal. Some judges (e.g., the district court in *Van Hollen*) showed a receptiveness to broadening the scope of independent organizations' donor reporting obligations. Accordingly, for the time being, Crossroads has chosen to pursue its mission without making independent expenditures. However, Crossroads has attested that, once the legal cloud over the Regulation is lifted, Crossroads will once again rely on it. *See* JA485-486 [¶ 10].

III. CREW's Administrative Complaint Against Crossroads and the FEC's First Dismissal.

The FECA and FEC regulations allow any entity to file an administrative enforcement complaint. However, because the enforcement process itself targets and burdens core speech and association, pleading standards are demanding. A valid complaint must be sworn under penalty of perjury, be accompanied by all supporting documents, and clearly recite facts showing the supposed violation. *See* 52 U.S.C. § 30109(a)(1); FEC Reg. §§ 111.4-.6. Initial review focuses on the complaint, and the responding party is guaranteed an opportunity to present

evidence and arguments showing that no enforcement action should be taken "on the basis of a complaint." *See id.*

On November 15, 2012, CREW filed an administrative complaint against Crossroads. Because CREW abandoned its complaint after the FEC's second dismissal (on remand from the District Court), which now is unreviewable, *see* 52 U.S.C. § 30109(a)(8)(B), many of the details of the underlying administrative action are not important to this appeal. However, because CREW's only arguable, cognizable injury and standing flow from its administrative complaint, some aspects merit attention.

In its administrative complaint, CREW asserted Crossroads failed to disclose contributions earmarked for several specific examples of express advocacy, purportedly violating the Regulation.[3] Crossroads responded with evidence that the supposed violation arose from a factual misunderstanding and demonstrated that it had fully complied with the Regulation.

The operative counts of CREW's administrative complaint did not claim the Regulation was invalid or that FECA (c)(1) contained a separate reporting

[3] *See, e.g.*, JA207 [¶ 44] (Crossroads' reports failed to identify "the person who made $3 million in contributions for the purpose of furthering those independent expenditures"), JA213 (Crossroads failed to report "each person who made a contribution . . . for the purpose of furthering the reported independent expenditures"). Note that CREW's original complaint was superseded by an amended complaint filed on April 24, 2013, and – accordingly – all citations herein are to this amended filing.

requirement that the Regulation failed to implement.[4] Crossroads' response addressed the violations alleged by CREW in its complaint.

The FEC's Office of General Counsel then prepared a memorandum to the agency's Commissioners that determined Crossroads had complied with the Regulation and settled practice, and confirmed that "there were no facts suggesting that a donor made a contribution for the purpose of furthering a specific communication." First General Counsel's Report, MUR 6696R, at 8 (Aug. 24, 2018) https://www.fec.gov/files/legal/murs/6696/6696R_2.pdf ("Gen. Counsel's Rept. on Remand") (summarizing the conclusions from the original report). The Office of General Counsel observed in passing that FECA (c)(1) might be read to require more, but said it would be inequitable to consider such a claim and did not discuss the legal merits. *See* JA270-271.[5] More broadly, the memorandum recommended invoking prosecutorial discretion rather than attack Crossroads for relying on the longstanding Regulation and settled practice. *See* JA261, 271.

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[4] CREW's amended complaint recited in passing the language from FECA (c)(1), but did not allege that Crossroads had violated this provision, whether by reference to the provision's statutory designation or its substance. *Compare* JA199 [¶14] *with* JA206-213 [¶¶ 40-67]. And though CREW observed in *a footnote* to its legal introduction that the Regulation fails to give full effect to 52 U.S.C. 30104(c)(2)(C), CREW did not advance the footnoted thought in the operative counts of its complaint.

[5] In fact, having researched the issue further, the FEC subsequently told the district court that the agency has "never issued any . . . guidance suggesting that it intend[s] to enforce 52 U.S.C. § 30104(c)(1) as a standalone reporting requirement." JA112-113.

The FEC Commissioners divided three-to-three on whether to find reason to believe a violation had occurred. Because four affirmative votes were required to proceed to the next step in the FECA's enforcement process, the Commissioners then unanimously voted to dismiss the complaint. The FEC Office of General Counsel staff memorandum became the controlling Commissioners' statement of reasons for voting to dismiss. *See, e.g.*, *FEC v. DSCC*, 454 U.S. 27, 39 n.19 (1981) ("*DSCC*"); *FEC v. NRSC*, 966 F.2d 1471, 1476 (D.C. Cir. 1992).

IV. CREW's District Court Complaint and the Court's March 22, 2017 Ruling.

The FECA permits a private complainant with standing to bring suit for an order declaring an FEC dismissal "contrary to law" and requiring conforming action by the FEC. 52 U.S.C. § 30109(a)(8). CREW filed such a FECA action, joining with it an APA challenge to the Regulation. Crossroads intervened as a co-defendant with the FEC.

CREW's judicial complaint included three counts:

Claim 1 asserted that the record compelled a finding of reason to believe Crossroads had violated the Regulation or, at minimum, the FEC failed to provide an adequate explanation for not so finding. *See* JA033-035 [¶¶ 110-116].

Claim 2 asserted that, even if Crossroads complied with the Regulation, it did not make the broader disclosures supposedly mandated by § 30104(c)(2). *See* JA035-036 [¶¶ 117-124]. Stated differently, CREW alleged the FEC unlawfully

failed to find Crossroads violated 52 U.S.C. § 30104(c)(2) because it only applied the Regulation. *See* JA036 [¶¶ 122-123].

Claim 3 asserted that the FEC staff memorandum had recognized the possibility that FECA (c)(1) compelled broader reporting than FECA (c)(2), but the FEC had arbitrarily and unlawfully dismissed without analyzing the potential violation, merely commenting in passing that retroactive assertion of such a novel theory would raise equitable concerns over fair notice. *See* JA036-038 [¶¶ 125-131].

The FEC moved to dismiss Claim 2's challenge to the validity of the regulation on grounds that the six-year statute of limitations for such review had expired. Crossroads joined in the limitations challenge and also moved to dismiss all APA claims because the availability of FECA review precluded APA review.

On March 22, 2017, the district court, JA088-093, recognized that the six-year statute of limitations limits judicial review of regulations but held an exception applied to the extent CREW claimed injury from the application of a substantively invalid Regulation. It ruled (JA096-097) that, because "Counts I and III advance garden-variety challenges to the FEC's dismissal," they did not permit an APA claim. However, because Count II complained of injury "predicated on an 'unlawful and invalid' regulation," the court ruled (JA097) it could support an APA claim. Thus, it ruled "Crossroads GPS's Supplemental Motion to Dismiss is

denied insofar as the plaintiffs may challenge the validity and lawfulness of [the Regulation] under the APA, as raised in Count II. Crossroads GPS's motion is granted in all other respects." JA098. CREW did not cross-appeal from this decision.

Significantly, Count II does not allege the FEC applied the Regulation in violation of FECA (c)(1). Its caption speaks only of FECA (c)(2), and its paragraph 120 alleges that the FEC applied the Regulation "in a way that conflicts with § 30104(c)(2)." JA035 [¶ 120]. In other words, CREW sought a declaration "that 11 C.F.R. § 109.10(e)(1)(vi) is unlawful and invalid" only as it interprets FECA (c)(2). With respect to FECA (c)(1), CREW sought "solely 'an order reversing the FEC's unlawful dismissal of [the plaintiffs'] complaint,'" not a finding the Regulation was invalid in interpreting FECA (c)(1). JA096 (emphasis added); *compare* JA035-036 [¶¶ 119-121, 122, 124] *with* JA038 [¶ 131].

V. Further Proceedings Before the District Court and Appellate Courts.

On August 3, 2018, following cross-motions for summary judgment, the district court rejected Crossroads' and the FEC's other procedural challenges to CREW's lawsuit, vacated the challenged regulation at *Chevron* step one, and remanded the administrative enforcement complaint to the agency for further proceedings. *See* JA372, 390, 420.

The district court again acknowledged that CREW's regulatory challenge fell outside the ordinary statute of limitations for such actions. JA416 [n.30]. Nevertheless, the court allowed the challenge to proceed, "regardless of whether enforcement against Crossroads . . . is available on remand," because the administrative complaint put Crossroads' reporting obligations at issue. *Id.*

On the substantive question, the district court found that "the regulation's implementation of the FECA Amendments of 1979 clearly ignore[d] the requirement in subsection (c)(1) and substantially narrow[ed] subsection (c)(2)" beyond the bounds permitted by the statute. JA433. While the district court's opinion was lengthy, it relegated discussion of some important substantive points – such as congressional acquiescence in the FEC's interpretation – to footnotes. *See* JA459 [n.47]; *see also* JA460 [n.48] (concluding that the challenged regulation was defective under the arbitrary and capricious standard).

The district court's ruling contained an important ambiguity, describing the information required to be disclosed by FECA (c)(1) in several different ways. At one point the court ruled CREW was "incorrect [in asserting] that the reporting of contributors under subsection (c)(1) is 'unbounded.'" *CREW v. FEC*, 316 F. Supp. 349, 388–89 (D.D.C. 2018). Elsewhere, the court said that "[n]o parameters are set in § 30104(c)(1) that the contributions be earmarked for a specific or single political purpose so long as the purpose is in connection with a federal election

and, thus, this disclosure requirement is analogous to the requirements applicable to political committees." *Id.* at 376. But political committees generally must disclose every dollar they receive, regardless of the purpose for which the money is given. *See id.* Without acknowledging its own inconsistent rulings, the district court still recognized the "[non-] trivial concern" that "entities engaged in independent expenditures might have inadequate guidance" on this issue. JA466.

With the 2018 midterm election fast-approaching, Crossroads asked this Court for an emergency stay pending appeal on August 31, 2018. *See* ECF No. 1748550. Although the Court recognized that Crossroads' abbreviated merits arguments showed "some promise," the motions panel held they did not meet the high standard for obtaining emergency relief. ECF No. 1750838 at 4.[6] On September 15, 2018, Chief Justice Roberts stayed the district court's ruling, *see Crossroads v. CREW*, 139 S. Ct. 5 (2018), but the full Supreme Court lifted the stay on September 18, 2018, *see Crossroads v. CREW*, No. 18A274, 139 S.Ct. 50 (2018). The FEC was unable to participate in any of the appellate proceedings because a commissioner blocked the agency from appealing the district court's

[6] In its opinion, this Court referred to Crossroads and similar organizations that make independent expenditures as "independent committees." *See, e.g.*, ECF No. 1750838. Respectfully, however, Crossroads is not a "committee," which is a term of art under the FECA. *Compare* 52 U.S.C. § 30101(4) (defining a "political committee") *with id.* § 30104(c) (explaining the reporting requirements for "[e]very person other than a political committee") (emphasis added) (internal parenthesis omitted). *See also CREW v. FEC*, 316 F. Supp. 3d 349, 368 (D.D.C. 2018) (explaining "[a]t issue in this case are the disclosure requirements imposed on persons 'other than political committees' ('not-political committees') that make independent expenditures").

ruling, apparently against the recommendation of the FEC's Office of General Counsel. *See* Chair Caroline C. Hunter and Commissioner Matthew S. Petersen, *Statement on* CREW v. FEC, No. 16-CV-259 at 1, 3 (Sept. 6, 2018), at https://www.fec.gov/resources/cms-content/documents/Statement_of_Chair_Hunter_and_Commissioner_Petersen_in_CREW_v._FEC.pdf.

VI. CREW's Standing Motion and Its Abandonment of Its Administrative Complaint.

As noted in the Jurisdictional Statement, CREW then moved to dismiss, asserting Crossroads lacked standing to appeal. CREW argued that, in recent years, Crossroads had not relied on the invalidated Regulation. CREW also claimed that Crossroads no longer needed the Regulation as a defense because, on remand, the FEC had dismissed – for a second time – CREW's administrative complaint as a matter of prosecutorial discretion and that CREW was not further pursuing the administrative action. *See generally* Gen. Counsel's Rept. on Remand at 14-17. Crossroads responded that it had stopped relying on the Regulation only while it was under a legal cloud and would resume reliance when this appeal dissipated that cloud. Moreover, at the time the Crossroads litigation commenced – the critical moment for standing – the administrative complaint still was live, so Crossroads also had a live defensive interest in the Regulation's validity as one justification for its conduct.

SUMMARY OF THE ARGUMENT

This appeal arises from a severe case of mission creep. CREW started out with a garden-variety administrative complaint seeking sanctions from the FEC against one organization: Crossroads. But when the agency dismissed its administrative complaint, CREW sought judicial review of the dismissal under the FECA and used that as an excuse to mount an untimely APA challenge to a regulation promulgated nearly four decades ago. Now, CREW has abandoned its administrative complaint – after a dismissal on remand that did not turn on the validity of the Regulation – which has left only the district court's APA invalidation of the Regulation at issue. In essence, this proceeding has become the standalone, facial APA attack that CREW did not present to the FEC and could not lawfully have pursued in the district court.

The district court's APA ruling is wrong. The FECA's language certainly permits – and likely compels – the construction adopted in the FEC Regulation. The FEC's Regulation is supported not only by conventional *Chevron* deference, but also by a host of other considerations: the FEC proposed and thus surely understood the underlying 1979 Amendments to the FECA; the FEC worked closely with the relevant House and Senate committees during the legislative process; the FEC Regulation and implementing Form both were subjected to and survived special congressional review; the Regulation then operated without

controversy for decades while Congress repeatedly reviewed and amended the FECA; Congress ratified the Regulation by adopting a comparable reporting provision to which the FEC gave a comparable construction approved by this Court; CREW relies on supposed recent campaign finance developments that were not before the FEC when it adopted the Regulation and cannot affect its lawfulness; and the broader reporting of contributions not earmarked for specific advocacy sought by CREW would do as much to confuse as to illuminate voters.

But this Court need not reach the APA merits. Instead, as one would expect from a matter that emerged in this haphazard way, the APA ruling should be vacated for a series of procedural and even jurisdictional reasons. To begin with, CREW failed to exhaust its administrative remedies. Some of its APA claims were never presented to the FEC at all; others were merely hinted at in an isolated footnote. Moreover, CREW no longer has a cognizable interest traceable to application of the Regulation. The now-final FEC dismissal does not turn on the validity of the Regulation, but on the imprudence of pursuing sanctions against Crossroads for complying with a long-standing regulation, valid or not. Moreover, nothing in this appeal can affect the finality of that dismissal. Instead, CREW is pursuing the type of generalized prospective facial challenge that the statute of limitations forbids.

Ironically, CREW challenged Crossroads' standing to bring this appeal, a challenge the motions panel deferred to merits briefing. CREW asserts that its abandonment of its administrative complaint deprives Crossroads of any defensive interest in the Regulation and that Crossroads no longer relies on the Regulation. Crossroads has demonstrated, however, that it has a history of relying extensively on the Regulation; it ceased that reliance only when the Regulation came under a legal cloud; and it wishes to resume reliance when that legal cloud is dissipated. These interests, unconstrained by any statute of limitations since Crossroads is a defendant, are sufficient in themselves. Moreover, CREW pointedly has declined to assume the burden of asserting mootness, carefully limiting its challenge to standing. Yet standing is assessed at the outset of litigation, and the remanded FEC complaint remained live at that time. In short, Crossroads has standing. Its immediate interests can be vindicated by vacating the judgments below and then dismissing this appeal. But so long as the judgments below continue to impair the Regulation, Crossroads can and will pursue this appeal.

STANDARD OF REVIEW

This Court reviews a district court's decisions to determine jurisdiction and to grant summary judgment *de novo*. *See Paralyzed Veterans of Am. v. U.S. Dep't of Trans.*, 909 F.3d 438, 443 (D.C. Cir. 2018); *Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 385 (D.C. Cir. 2018).

ARGUMENT

I. CREW Is Not Entitled to Challenge the FEC's Regulation.

CREW is not entitled to pursue a challenge to the Regulation for three distinct reasons: (1) its administrative complaint, in the first instance, did not squarely present to the FEC CREW's claims that either FECA (c)(1) or (c)(2) contradicted the Regulation, or even that FECA (c)(1) was at issue in this case; (2) CREW's judicial complaint failed to allege the Regulation was inconsistent with (c)(1); and (3) due to the FEC's reliance on prosecutorial discretion, the Regulation's validity was immaterial to resolution of CREW's now-abandoned administrative complaint. These basic flaws in CREW's administrative complaint mean that this Court may – and should – vacate the district court's opinion without reaching all, or at the very least most, of the *Chevron* questions discussed in Part II. Indeed, this Court has already rejected a prior CREW enforcement effort where the underlying administrative complaint failed to allege the form of relief CREW ultimately sought in federal court. *See CREW v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007).

A. CREW Failed to Properly Challenge the Regulation's Implementation of 30104(c) During the Administrative Proceedings Before the FEC.

A "hard and fast rule of administrative law, rooted in simple fairness, [is] that issues not raised before an agency are waived and will not be considered by a court on review." *Nuclear Energy Inst., Inc. v. Envtl. Prot. Agency*, 373 F.3d

1251, 1297–98 (D.C. Cir. 2004) (*per curiam*). In fact, there is an almost "absolute bar against raising new issues—factual or legal—on appeal in the administrative context," *Nat'l Wildlife Fed'n v. E.P.A.*, 286 F.3d 554, 562 (D.C. Cir. 2002), *supplemented sub nom. In re Kagan*, 351 F.3d 1157 (D.C. Cir. 2003) (emphasis added).

There is "no exception [to these principles] for lawsuits alleging that an agency has exceeded its statutory authority or committed a procedural error," *Koretoff v. Vilsack*, 841 F. Supp. 2d 1, 5 (D.D.C. 2012), *aff'd*, 707 F.3d 394 (D.C. Cir. 2013); *see also Nuclear Energy Inst., Inc.*, 373 F.3d at 1297–98, particularly since agencies "have no obligation to anticipate every conceivable argument about why they might lack . . . statutory authority" to "issue a particular regulation," *Koretoff*, 707 F.3d at 398.

To exhaust a claim, it must be presented "forcefully," *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 655–56 (D.C. Cir. 2011), so that it "alerts the agency to the [parties'] position and contentions," *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764–65 (2004) (internal quotation and citation omitted). The "question . . . is not simply whether [an issue] was raised in some fashion, but whether it was raised with sufficient precision, clarity, and emphasis to give the agency a fair opportunity to address it." *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 602 (D.C. Cir. 2015).

These principles apply with particular force to FECA matters. "'Congress specifically mandate[d that] exhaustion is required'" before courts may intervene under 52 U.S.C. § 30109(a)(8), *Perot v. FEC*, 97 F.3d 553, 558–59 (D.C. Cir. 1996) (quoting *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992)), and Congress explicitly limited such judicial review "to remedy[ing] the violation involved in the original complaint." 52 U.S.C. § 30109(a)(8)(C) (emphasis added). Moreover, where "an appeal follows adversarial administrative proceedings in which parties are expected to present issues material to their case," *Wallaesa v. Fed. Aviation Admin.*, 824 F.3d 1071, 1078 (D.C. Cir. 2016), "the rationale for requiring issue exhaustion is at its greatest," *Sims v. Apfel*, 530 U.S. 103, 110 (2000). Because the FECA contemplates an adversarial process, and this process is set up to minimize speech burdens by providing respondents with an opportunity to have a complaint dismissed at an early stage of the enforcement process, *see* 52 U.S.C. § 30109(a)(1), the exhaustion requirement unquestionably has "special force," *Wallaesa*, 824 F.3d at 1078.

In this case, CREW failed to exhaust its remedies through its administrative complaint by: (1) not squarely challenging the validity of the Regulation, as implementing FECA (c)(1) or (c)(2)(C); and (2) not alleging that Crossroads violated FECA (c)(1) at all.

As to the first point, none of the administrative complaint's five "counts"

alleging violations of the law contended the regulation was invalid. *Compare* JA200, 136-137 *with* JA206-213, 143-149. Indeed, the complaint's opening paragraph spoke only of the need for "an immediate investigation and enforcement action against Crossroads" for campaign finance violations, not that CREW was seeking to invalidate the regulation or to have the regulation declared *ultra vires*. JA196.

CREW made a passing comment in a footnote in the background section of the administrative complaint that the underlying regulation "fails to give full effect [to FECA (c)(2)(C)]." JA200. But discussing a potential issue "as background," without asserting the agency action "was unlawful in its 'Discussion,'" *Coburn v. McHugh*, 679 F.3d 924, 929-30 (D.C. Cir. 2012), does not transform a statement into "a separately actionable legal claim," *Vasser v. McDonald*, 228 F. Supp. 3d 1, 17 (D.D.C. 2016). Indeed, a plaintiff may not proceed to court by merely referencing a "general legal issue," *Koretoff*, 707 F.3d at 398, or dropping a "scattered reference[]" to a theory in an agency filing, *Nat'l Ass'n of Mfrs. v. U.S. Dep't of Interior*, 134 F.3d 1095, 1111 (D.C. Cir. 1998).

Notably, this Court has even halted a prior FEC enforcement matter where the complainant referenced a particular issue in just one of thirteen paragraphs of its administrative complaint. *See Common Cause v. FEC*, 108 F.3d 413, 418 (D.C. Cir. 1997). If this Court determined that the allegation in Common Cause's

pleading was "nominal at best" and warranted dismissal, *see id.*, this Court should have no trouble dismissing CREW's claims here, as the administrative complaint devoted even less space to articulating a claim to the type of relief CREW now seeks. *See also CREW v. FEC*, 475 F.3d at 340-41; *Judicial Watch, Inc. v. FEC*, 180 F.3d 277, 278 (D.C. Cir. 1999) (applying the *Common Cause* framework).

CREW likewise failed to fairly – much less forcefully – signal in its administrative complaint that FECA (c)(1) imposed a substantive donor reporting requirement at all. In fact, it did not cite this provision in any of the claims it alleged against Crossroads. *Compare* JA199, 137 *with* JA206-213, 143-149. Instead, CREW principally described FECA (c)(1) as a coverage provision that provides an overview of what activity triggers the independent expenditure reporting requirement generally: 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. 2 U.S.C. § 434(c)(1); 11 C.F.R. § 109.10(b)." JA200, 138 (emphasis added). But this language, which said nothing about the enhanced disclosure CREW now seeks to impose through this litigation, did not place Crossroads or the FEC on notice that CREW intended to pursue a claim as to FECA (c)(1). Indeed, CREW's administrative request for relief negated reliance on FECA (c)(1) by seeking only the scope of disclosure encompassed by the

Regulation:

> [CREW requests] that the FEC conduct an investigation into these allegations, declare the respondents to have violated the FECA and applicable FEC regulations, order Crossroads GPS to correct these violations by amending the relevant independent expenditure disclosure reports to identify and make public each person who made a contribution in excess of $200 made for the purpose of furthering the reported independent expenditures.

JA213(emphasis added).

CREW's suggestions that FEC's Office of General Counsel perceived a claim under FECA (c)(1) are unfounded. The Office of General Counsel's memorandum explained that the issue had arisen in a *different*, unidentified enforcement matter and said that, "to the extent that the facts here may also give rise to a claim that Crossroads allegedly violated" FECA (c)(1), that unmade hypothetical claim would properly be dismissed as a matter of prosecutorial discretion. JA260-261, 271 (emphasis added). This is not a case in which an agency *sua sponte* raised and gave full consideration to an issue.

In sum, this Court should vacate the ruling invalidating the Regulation because CREW failed to comply with the most basic of procedural steps: to present its arguments to the agency in the first instance. *See Nat'l Conservative Political Action Comm. v. FEC*, 626 F.2d 953, 957 (D.C. Cir. 1980) ("*NCPAC*").

B. The District Court Correctly Rejected CREW's APA Challenge to the FEC's Implementation of FECA (c)(1), But Then Later Erred by Permitting Such a Challenge to Proceed.

CREW's judicial complaint also precludes relief, at least as to CREW's attempt to challenge the FEC's implementation of FECA (c)(1). In relevant part, CREW's complaint before the district court provided as follows:

> **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
>
> * * *
>
> 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 11C.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.
>
> * * *
>
> 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
>
> * * *
>
> 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 arbitrarily or capriciously, abused its discretion, or acted contrary to law in dismissing MUR 6696.

See JA035-036, 038 [¶¶ 120-121, 124, 131] (emphasis added and omitted).

As the FEC explained in its initial Explanation and Justification for the Regulation, 11 C.F.R. § 109.10(e)(1)(vi) "incorporate[s] the changes set forth at 2 USC 434(c)(1) and (2) regarding reporting requirements for persons, other than a political committee, who make independent expenditures." JA327. Yet, as the underscored language above in CREW's judicial complaint makes clear, CREW did not challenge the regulation's implementation of 52 U.S.C. 30104(c)(1). Instead, CREW only alleged that "11 C.F.R. § 109.10(e)(1)(vi) is unlawful and invalid [as to FECA (c)(2)]." JA036 [¶ 121].

In its March 22, 2017 opinion ruling on CREW's motion to dismiss, the district court correctly identified this issue and narrowed CREW's attempt to

expand the complaint's scope. Specifically, the court recognized that CREW's Claim Three "advance[d only a] garden-variety challenge[] to the FEC's dismissal of the plaintiffs' administrative complaint," and that "plaintiffs seek solely 'an order reversing the FEC's unlawful dismissal of [the plaintiffs'] complaint.'" JA096; *see also* JA097 (explaining that Claim II differs from Claim III "by alleging that the FEC's dismissal of the plaintiffs' administrative complaint was improper because the dismissal was predicated on an 'unlawful and invalid' regulation, *i.e.*, 11 C.F.R. § 109.10(e)(1)(vi)"). Accordingly, because the FECA's remedies were adequate to address the dismissal, the district court held that the portion of Claim III "seeking relief under the APA [is] dismissed." Put another way, CREW could "challenge the validity and lawfulness of 11 C.F.R. § 109.10(e)(1)(vi) under the APA, as raised in Count II." JA098. But outside the specific context of the underlying enforcement complaint, CREW could not obtain any relief from the court as to FECA (c)(1), as the "FECA has no provisions governing judicial review of regulations, so an action challenging its implementing regulations [must] be brought under the judicial review provisions of the [APA]." *Perot*, 97 F.3d at 560–61. CREW did not cross-appeal this ruling.

When the FEC on remand dismissed the FECA (c)(1) claim as a matter of prosecutorial discretion, CREW acquiesced and abandoned its pursuit of the enforcement complaint. As a result, this action cannot remedy CREW's claimed

injury, i.e. the donor information that Crossroads supposedly was required to report.

C. CREW Cannot Challenge a Regulation Outside the Statute of Limitations in an Enforcement Proceeding Where the Validity of the Agency's Rule Was Immaterial to Resolution of the Matter.

The running of a statute of limitations on judicial review precludes "facial challenges to the rule or the procedures by which it was promulgated," but when the agency thereafter "seeks to apply the rule, those affected may challenge that application on the grounds that it conflicts with the statute." *Weaver v. Fed. Motor Carrier Safety Admin.*, 744 F.3d 142, 145 (D.C. Cir. 2014) (collecting authority) (emphasis added and citation omitted). Because the six-year period for reviewing the Regulation expired decades ago, *see* 28 U.S.C. § 2401, CREW never was entitled to attack the Regulation as facially contrary to FECA (c)(2). At most, CREW *might* be able to challenge the application of the Regulation to the extent necessary to protect its claimed right to Crossroads' donor information. *But see Am. Scholastic TV Programming Found. v. F.C.C.*, 46 F.3d 1173, 1178 n.2 (D.C. Cir. 1995) (untimely regulatory challenges should generally be entertained only "when raised as a defense to an agency enforcement action") (emphasis added). But even if CREW has a theoretical ability to use the FEC's enforcement process to attack regulations outside the statute of limitations, that principle cannot sustain CREW's litigation here.

First, and most straightforwardly, CREW abandoned its administrative enforcement complaint once the FEC made clear that the dismissal did not turn on the validity of the Regulation. A party's "failure to prosecute their [FEC] administrative action completely undercuts their argument that they have exhausted their administrative remedies." *NCPAC*, 626 F.2d at 957 n.8. This is particularly true here given that CREW's judicial complaint couched its request for relief not in the regulatory abstract, but rather in terms of whether the "FEC's failure to find reason to believe Crossroads . . . violated [the law] was arbitrary, capricious, an abuse of discretion, and contrary to law." JA033 (internal capitalization omitted).

Second, 52 U.S.C. § 30111(e) provides that "any person who relies upon any rule or regulation prescribed by the Commission . . . and who acts in good faith in accordance with such rule or regulation shall not, as a result of such act, be subject to any sanction provided by this Act." The statute "establish[es] 'legal rights' to engage in that conduct" and categorically removes "any risk of enforcement," even "if that conduct violates campaign statutes." *Shays I*, 414 F.3d at 84, 95 (emphasis added). Thus, when Crossroads acted in compliance with an existing FEC regulation, the regulation's validity or invalidity affected neither the Commission's

obligation to dismiss the enforcement case nor the ultimate outcome for CREW.[7]

Third, in *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018), this Court held that FEC dismissals of enforcement cases based on prosecutorial discretion are generally "not subject to judicial review for abuse of discretion." *Id.* at 441. Here again, the regulation's validity had no effect on CREW because the FEC grounded its discretionary dismissal on reasons other than the regulation's validity (e.g., concerns about fair notice, etc.).

Fourth, there is a five-year statute of limitations for campaign finance violations. *See* 28 U.S.C. § 2462. Because that deadline expired before the district court's remand to the FEC, this case would have been dismissed regardless of the regulation's validity.

And fifth, CREW's misuse of the enforcement process could have been avoided had it participated in a rulemaking petition filed on behalf of then-Representative Chris Van Hollen, where campaign finance attorneys at Democracy 21 and the Campaign Legal Center characterized the FEC's independent expenditure reporting regulation as being limited in scope and dispositive in effect. *See* Rep. Chris Van Hollen, *Petition for Rulemaking to*

[7] Even aside from 52 U.S.C. § 30111(e), the regulation's validity would still be irrelevant: Under general principles of administrative law "any individual who relied on . . . [a regulation] prior to the date of [a] decision [invalidating it] can properly assert it as a defense to a charge that he otherwise violated the [statute]." *Joseph v. U.S. Civil Serv. Comm'n*, 554 F.2d 1140, 1157 (D.C. Cir. 1977).

Revise and Amend Regulations Relating to Disclosure of Independent Expenditures at 4 (Apr. 21, 2011), available at http://classic.fec.gov/pdf/nprm/citizensunited/van_hollen.pdf. That CREW failed to participate in these proceeding further underscores why its challenge should not be allowed to proceed here. *Cf. NCPAC*, 626 F.2d at 957 (dismissing challenge to validity of regulation after noting party failed to participate in rulemaking).

At bottom, because CREW's challenge to the validity of the underlying regulation is integral to and inseparable from its administrative complaint against Crossroads, the FEC's dismissal of the administrative enforcement complaint – and CREW's failure to challenge that second dismissal in court – necessitates dismissal of CREW's regulatory challenge as well.

II. The Regulation Is Valid Under *Chevron* Steps One and Two.

For all the reasons just discussed, this Court should not and need not reach the merits of CREW's arguments that the Regulation is inconsistent with the FECA. But if the issue were reached, the Regulation would be vindicated.

Chevron, USA, Inc. v. NRDC, 467 U.S. 837 (1984), requires CREW to establish either that (i) the statutory text unambiguously foreclosed the Regulation or, if not, (ii) that the Regulation was highly irrational in light of the statute's purpose. *See Shays I*, 414 F.3d at 96. CREW can establish neither, particularly given the high level of deference afforded FEC interpretations of the FECA, *see,*

e.g., *Orloski v. FEC*, 795 F.2d 156, 164 (D.C. Cir. 1986), and the fact that Congress "already endorsed" the FEC's approach to the reporting of independent expenditures, *Van Hollen*, 811 F.3d at 493.

A. *Chevron* Step 1: Congress Tailored the FECA to Require Ad-Based Identification of Contributors, Not the Wholesale Reporting of an Organization's Entire Donor List.

CREW faces a "heavy burden" at step one. *Coal. for Common Sense in Gov't Procurement v. United States*, 707 F.3d 311, 316 (D.C. Cir. 2013). CREW cannot merely offer a better reading of the statute, *Associated Builders & Contractors, Inc. v. Shiu*, 773 F.3d 257, 262–63 (D.C. Cir. 2014), or even show the FEC's reading was "improbable," *Delaware Dep't of Nat. Res. & Envtl. Control v. EPA*, 895 F.3d 90, 99 (D.C. Cir. 2018). Instead, CREW must show from the entire statute and its text, structure, and legislative history, using all traditional tools of construction, that Congress spoke to the precise issue and "unambiguously foreclosed the agency's statutory interpretation." *Vill. of Barrington, Ill.*, 636 F.3d at 659 (internal quotation marks and citation omitted); *Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 781–82 (D.C. Cir. 2012); *Shays I*, 414 F.3d at 105; *Lindeen v. SEC*, 825 F.3d 646, 653 (D.C. Cir. 2016).

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

> **2 U.S.C. 434 REPORTS . . .**
> (c)(1) Every person (other than a political committee) who makes

> independent expenditures in an aggregate amount or value in excess of $250 during a calendar year *shall file a statement containing the information required under subsection (b)(3)(A)*[8] for all contributions received by such person.
>
> (2) Statements required to be filed by this subsection shall be filed in accordance with subsection (a)(2), and shall include—,
>
> > (A) the information required by subsection (b)(6)(B)(iii),[9] indicating whether **the independent expenditure** is in support of, or in opposition to, the candidate involved;
> >
> > (B) under penalty of perjury, a certification whether or not **such**[10] **independent expenditure** is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate; and
> >
> > *(C) the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure.*

[8] This provision provides that: "(b) Each report under this section shall disclose . . . (3) the identification of each . . . (A) person (other than a political committee) who makes a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year, or in any lesser amount if the reporting committee should so elect, together with the date and amount of any such contribution."

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

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

> Any independent expenditure (including those described in subsection (b)(6)(B)(iii)) aggregating $1,000 or more made after the 20th day, but more than 24 hours, before any election shall be reported within 24 hours after such independent expenditure is made. Such statement shall be filed with the Clerk, the Secretary, or the Commission and the Secretary of State and shall contain the information required by subsection (b)(6)(B)(iii) indicating whether **the independent expenditure** is in support of, or in opposition to, the candidate involved.
>
> (3) The Commission shall be responsible for expeditiously preparing indices which set forth, on a candidate-by-candidate basis, **all independent expenditures separately**, including those reported under subsection (b)(6)(B)(iii), made by or for each candidate, **as reported under this subsection**, and for periodically publishing such indices on a timely pre-election basis."

FECA (c)(1) is naturally read as a generalized opening statement requiring persons that make independent expenditures exceeding a particular monetary threshold to file a report with the government. FECA (c)(2) then logically provides the contents of what such reports filed pursuant to FECA (c)(1) must contain. This reading is consistent with the overall introductory header to subsection (c), which equates subsection (c)(1) as "filing," (c)(2) as "content," and (c)(3) as "indices of expenditures."[11] This breakdown of coverage vs. contents is

[11] The "filing; contents; indices of expenditures" language is preceded in the header by the words "Statements by other than political committees." (Emphasis added.) But this introductory clause does not describe (c)(1)-(3) specifically, but rather contrasts (c)(1) as a whole with subsection (a)'s "Receipts and disbursements by treasurers of political committees." (Emphasis added.) *Cf.* 52 U.S.C. § 30104(f) ("*Disclosure of electioneering communications*"), (f)(1) ("*Statement required*"), (f)(2) ("*Contents of Statement*").

also consistent with how other FECA provisions are arranged. *See, e.g.*, 52 U.S.C. § 30103(a) (explaining who must file a statement of organization and when it must be filed) & (b) (outlining the contents of such statement), § 30104(f)(1) (explaining who must file an electioneering communications report and when it must be filed), (f)(2) (outlining the contents of such report).

CREW claims that FECA (c)(1)'s reference to subsection (b)(3)(A) imposes reporting obligations beyond those articulated in FECA (c)(2). But this reading is inconsistent with the FECA's structure and conflicts with judicial precedent. FECA (c)(1)'s introductory requirement that the statement contain "the information required under subsection (b)(3)(A) for all contributions received by such person" simply means that any information about contributors to be disclosed, pursuant to FECA (c)(2), must include "the date and amount of any such contribution." These two elements, which were historically a part of the FEC's Independent Expenditure Reporting form, *see supra* at 4, are not otherwise required to be disclosed by the language of FECA (c)(2), a provision that contemplates only a list of contributors who gave more than $200.

CREW's reading of the statute would also frustrate congressional intent by decreasing the information reported. FECA (c)(1) contains an affirmative reporting obligation – i.e., "Every person . . . shall file a statement" – but FECA (c)(2) does not actually contain an affirmative statement that the

independent expenditure maker do anything. Without linking the two provisions together, there would be no requirement that an independent expenditure maker file a certification that the independent expenditure was independent of a candidate's campaign, for example. That would effectively read out of the statute certain information that Congress clearly wanted to have filed with the FEC.

Crossroads' reading of the statute also accords with judicial precedent. Indeed, in reviewing and approving the FEC's regulation of electioneering communications – which required disclosure not of all donors, but rather only those who gave "for the purpose of furthering electioneering communications" – this Court determined that this electioneering communications law works "in precisely the same way BCRA itself regulates express advocacy disclosures." *Van Hollen*, 811 F.3d at 493; *see also id.* at 495. For its part, the Ninth Circuit has explained the interaction of the two provisions as follows: "Section 434(c)(1) requires that any person making an 'independent expenditure' greater than $250 file a statement with the FEC. The contents of the statement are specified in 434(c)(2)." *FEC v. Furgatch*, 807 F.2d 857, 859 n.2 (9th Cir. 1986) (emphasis added).[12]

[12] A comment in *FEC v. Massachusetts Citizens for Life* ("*MCFL*"), 479 U.S. 238 (1986), could be read to suggest that FECA (c)(1) & (c)(2) constitute separate reporting obligations. But as the district court recognized, this language was peripheral to *MCFL*'s main discussion, [Op. at 61]. In any event, *Furgatch* did not treat the comment as binding, and both the Chief Justice and other courts have observed that the non-essential portions of *MCFL* are dicta. *See, e.g.*, *MCFL*, 479

To prevail on its interpretative theory regarding (c)(2)(C), CREW must show that Congress chose an indefinite article – "an" – to convey a concept with such unmistakable clarity that the FEC's explicit rulemaking authority and discretion were displaced. But to the contrary, "'an' means 'one,'" *New Hampshire Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 72 (1st Cir. 2006), *aff'd*, 552 U.S. 364 (2008) (citing Merriam Webster's Collegiate Dictionary at 40, 53 (10th ed. 2001)), which is the "normal" reading of such an indefinite article, *Abbott GmbH & Co. KG v. Yeda Research & Dev. Co.*, 516 F. Supp. 2d 1, 6 n.10 (D.D.C. 2007) (quotation omitted), *aff'd*, 857 F.3d 1341 (Fed. Cir. 2016). This is particularly true where the modified term is singular, as "independent expenditure" is here. *See United States v. Hagler*, 700 F.3d 1091, 1097 (7th Cir. 2012).

Moreover, in determining the meaning of "an," "context matters." *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 413-14 (2012) (interpreting "not an" language to mean "not a particular one"). Here, the FECA's structure and history support the FEC's reading of the statute. For example, as discussed above, *see supra* at 5-6, the *Summary of Committee Working Draft* and the Senate Committee's report confirm that the statute targets reporting of contributions received for "the independent expenditure." (Emphasis added.) Furthermore, where "the rest of the statute is written using definite articles," it indicates

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U.S. at 271 (Rehnquist, J., concurring and dissenting); *Vote Choice, Inc. v. Di Stefano*, 814 F. Supp. 186, 191 n.12 (D.R.I. 1992).

specificity of the modified item. *Hagler*, 700 F.3d at 1097. Here, the two paragraphs above and two paragraphs below the relevant provision all contain terms underscoring that independent expenditure contribution reporting relates to funds designated for a particular advertisement.

If, as CREW maintains, Congress intended a broader level of contributor-related reporting for independent expenditures, it easily could have said so, beginning with a reference to giving "for the purpose of furthering **any** independent expenditure**s**." But Congress did not do that. Instead, it required earmarking to support "an expenditure." If that language does not compel the FEC's reading of the statute – and Crossroads submits that it does – it certainly permits such a reading, given the FEC's broad *Chevron* discretion.[13]

Other textual arguments support Crossroads' position, particularly given that the 1979 Amendments to the FECA did not substantively expand the information to be reported. For example, the congressionally reviewed and approved reporting form the FEC used prior to 1979 required identification of the candidate and office that the contribution supported. *See supra* at 4. It would not have been possible for supporters who gave to another to influence federal elections generally – or

[13] The district court also attempted to establish congressional clarity under *Chevron* step one by subordinating the clear legislative history to policy arguments articulated (anachronistically) after *Citizens United v. FEC*, 558 U.S. 310 (2010). But such post-promulgation developments do not bear on whether the FEC correctly interpreted the statute in 1980, particularly since most of the spending today is by groups that were unable to make independent expenditures in 1980.

even for independent expenditures generally – to know what candidate to list on that form unless the form required earmarking. Moreover, the law prior to the 1979 Amendments spoke of contributors filing a statement "containing the information required of a person who makes a contribution . . . ." 2 U.S.C. § 434(e)(1) (1976). The "information required" language, terminology that also appears post-1979, does not mean that all contributions must be disclosed. Rather, it means that of those contributions that must already be disclosed, certain types of information (e.g., date, amount) must be reported for those contributions.

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

That leaves the issue of whether the FEC's decision was "reasonable." *Ne. Hosp. Corp. v. Sebelius*, 657 F.3d 1, 4–5 (D.C. Cir. 2011).[14] Four considerations in addition to the statutory text show that the FEC's regulation is consistent with legislative intent:

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

Administrative interpretations of statutes are "especially persuasive" where either "the agency participated in developing the provision," *Miller v. Youakim*, 440 U.S. 125, 144 (1979), or where there is "a contemporaneous construction of a statute by those charged with the responsibility of setting its machinery in motion,"

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

United Transp. Union v. Lewis, 711 F.2d 233, 242 (D.C. Cir. 1983). As to the former, courts attach "'great weight' to agency representations to Congress when the administrators 'participated in drafting and directly made known their views to Congress in committee hearings,'" since this forms "part of the legislative background" of the new law. *Moore v. District of Columbia*, 907 F.2d 165, 176 (D.C. Cir. 1990) (quoting *Zuber v. Allen*, 396 U.S. 168, 192 (1969)). As to the latter, contemporaneous constructions are important because the agency "may possess an internal history in the form of documents or 'handed-down oral tradition' that casts light on the meaning of a difficult phrase or provision." Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 368 (1986). Such a "contemporaneous construction" may even "carry the day against doubts that might exist from a reading of the bare words of a statute." *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 414 (1993). The presence of both factors here together means deference principles apply with "even greater force." *Middle S. Energy, Inc. v. F.E.R.C.*, 747 F.2d 763, 769 (D.C. Cir. 1984).

As explained above, the statute upon which the Regulation was based was explicitly identified as an FEC legislative recommendation. *See supra* at 5. In fact, the FEC Commissioners and staff worked closely with Congress to develop the provision, and it is well known that Congress routinely "respects and relies on

the Commission's testimony and recommendations." Daniel Zenkel, *Presidential "Draft" Committees and the Federal Election Campaign Act*, 84 Colum. L. Rev. 198, 213-14, n.102 (1984).

Thus, when it came time to implement the statute by regulation, which Congress mandated be done quickly, the FEC could do so expeditiously because the agency knew precisely what it had asked Congress to enact. Nothing in the legislative or administrative history suggests that Congress and the FEC discussed expanding the scope of the reporting requirements in the manner CREW – nearly four decades later – now seeks to impose. This is precisely the type of situation where "a court should [side in] favor of the administrative construction." *Zuber*, 396 U.S. at 192.

2. Congress Has Not Disagreed with the FEC's Contemporaneous Interpretation of the Statute, But Rather Has Ratified It.

Because Congress repeatedly has amended the FECA – a statute that regulates matters of direct concern to elected Members, its "failure to revise or repeal the [FEC's regulatory] interpretation is persuasive evidence that the interpretation is the one intended by Congress," *Weber v Heaney*, 995 F.2d 872, 877 (8th Cir. 1993) (quoting *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 983 (1986)), and "strongly implies that the regulations accurately reflect congressional intent," *FEC v. Ted Haley Cong. Comm.*, 852 F.2d 1111, 1114 (9th Cir. 1988) (quoting *Grove City Coll. v. Bell*, 465 U.S. 555, 568 (1974)); *see also Black*

Citizens for a Fair Media v. F.C.C., 719 F.2d 407, 429 (D.C. Cir. 1983). Use of this foundational canon of construction has repeatedly been reaffirmed by the Supreme Court, including just last term. *See Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1762 (2018) (collecting authority); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.6 (1982) (collecting authority); *see also Owens v. Republic of Sudan*, 864 F.3d 751, 777–78 (D.C. Cir. 2017). This principle has added weight given that Congress did not use the special, FECA-specific review provision to reject the regulation here.[15]

Reflecting Congress's strong interest in regulation of federal elections, 52 U.S.C. § 30111 provides "the FEC must submit a proposed regulation and an accompanying statement to both the House and the Senate. If neither house disapproves the proposed regulation within [the preset time period], the FEC may issue it." *Weber*, 995 F.2d at 876-77. Courts "normally accord considerable

[15] The district court's congressional acquiescence analysis, which consisted of a single footnote, did not address the FECA-specific process. *See* JA459 [n.47]. Moreover, and respectfully, not only did both of the cases the motions panel cited for this point also fail to deal with the special FECA review provision, but the language the panel cited disapproving of congressional acquiescence was taken from dissenting opinions. *See* ECF No. 1750838 at 4 (citing *Texas Dep't of Housing & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S.Ct. 2507, 2540, (2015) (Alito, J., dissenting); *see Johnson v. Transportation Agency*, 480 U.S. 616, 672-673, (1987) (Scalia, J., dissenting). In other words, the majority opinions in both of these cases actually support Crossroads' position. *See Texas Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2520 (explaining that when Congress amends a law "without altering the text of [the relevant provision], it implicitly adopted [existing] construction of the statute") (internal quotations omitted); *Johnson*, 480 U.S. 616 at 629 n.7, 671 (observing that where "Congress has not amended the statute to reject [a] construction," an entity "therefore may assume that [its] interpretation was correct").

deference to the Commission . . . [where] Congress took no action to disapprove the regulation when the agency submitted it for review pursuant to [the FECA's special provision]." *AFL-CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003) (internal quotation omitted).

Here, the FEC transmitted the regulation to Congress on February 28, 1980. Consistent with the congressional review timeline, the FEC waited 15 days before making the regulation effective. *See supra* at 6-7. Congress did not object to the independent expenditure reporting regulation during this period, thus bestowing considerable legitimacy on the agency's interpretation. *See DSCC*, 454 U.S. at 34-35 (citing the absence of congressional disapproval in approvingly discussing the FEC's regulation); *NCPAC*, 626 F.2d at 956 & n.7 (same).[16] Indeed, this Court has previously described the FEC's independent expenditure reporting regulation as "already endorsed by Congress." *Van Hollen*, 811 F.3d at 493. The same is true of the Independent Expenditure Reporting Form, which also was transmitted to Congress for review and not disapproved. *See supra* at 7-8.

Congress also has ratified the regulation in other ways. During the nearly 40 years the Regulation has been in effect, Congress has repeatedly debated

[16] *See also FEC v. Ted Haley Cong. Comm.*, 852 F.2d 1111, 1114–15 (9th Cir. 1988) (noting that the process suggests FEC regulations not rejected are consistent with Congressional intent); *Teper v. Miller*, 82 F.3d 989, 996 (11th Cir. 1996) (Kravitch, J.); *United States v. Sun-Diamond Growers of California*, 941 F. Supp. 1277, 1279–80 (D.D.C. 1996) (same); *Weber v. Heaney*, 793 F. Supp. 1438, 1452 (D. Minn. 1992), *aff'd*, 995 F.2d 872 (8th Cir. 1993) (same).

independent expenditures and the reporting thereof. *See, e.g.*, 145 Cong. Rec. S12734, S12753 (Oct. 18, 1999) (Sen. Murray) (discussing the "right to know who is funding these so-called 'independent expenditures'"); 143 Cong. Rec. S10485, S10486 (Oct. 7, 1997) (Sen. Torricelli Amdt., No. 1308, to the Bipartisan Campaign Reform Act of 1997); 143 Cong. Rec. S10661 (Oct. 8, 1997) (Sen. Murray Amdt. No. 1316 to the Bipartisan Campaign Reform Act of 1997)). Congress has also amended the statute containing the independent expenditure reporting requirements (2 U.S.C. § 434) in 1995, 1999, 2000, 2002, 2004, and 2007, *see supra* at 8 & n.2, with BCRA and the Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735 (2001), in particular, making significant changes to the statute. Indeed, the BCRA "ordered the FEC to rewrite its regulations" on another provision relevant to independent expenditures. *Shays I*, 414 F.3d at 97-98. Yet in none of these instances did Congress actually revise or reject the FEC's independent expenditure contributor reporting requirements. Given this record, and the fact that the FEC's regulation operated as a "presumptive default" rule that Congress legislated against during this period, *United States v. Wilson*, 290 F.3d 347, 357 (D.C. Cir. 2002), it "would be inappropriate to overturn an interpretation that Congress has acquiesced in for [so many] years," *Action on Smoking and Health v. C.A.B.*, 699 F.2d 1209, 1215 (D.C. Cir. 1983). *See also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120,

155-56 (2000) (cataloging the affirmative legislative "actions by Congress over the past 35 years" as having "effectively ratified" an agency's position); *Abourezk v. Reagan*, 785 F.2d 1043, 1054–55 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987) (explaining that 34 years of congressional acquiescence is "a significant indicator of the legislature's will").

Instead, CREW should turn its attention toward advocating for one or more of the bills before Congress in recent years that would establish new reporting requirements for 501(c) organizations making independent expenditures. *See, e.g.*, H.R. Res. 5175, 111th Cong. § 211 (2010) (the "Democracy is Strengthened by Casting Light on Spending in Elections Act" or "DISCLOSE Act"). Notably, Congress declined to enact the DISCLOSE Act and has otherwise refused to impose additional independent expenditure donor reporting requirements.

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

At step two, courts also accord "great weight to the longstanding interpretation placed on a statute by an agency charged with its administration." *Creekstone Farms Premium Beef, L.L.C. v. Dep't of Agric.*, 539 F.3d 492, 500 (D.C. Cir. 2008). This is particularly true for the FEC, which "is precisely the type of agency to which deference should presumptively be afforded," *DSCC*, 454 U.S. at 37; *see also Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005) (noting same), and where that agency's "consistent course of decision-making . . . is deserving of

deference from the Court unless clearly repugnant to the provisions of the [FECA]." *NCPAC*, 626 F.2d at 957. This principle applies even where, unlike the present case, the agency's interpretation may "not be the best or most natural one by grammatical or other standards." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 702 (1991).

Here, the FEC's interpretation has been maintained – without change – for 37 years. *See supra* at 13 n.5. And an agency's consistent interpretation of a statute for just half that time "does indeed warrant deference." *Bhd. of R.R. Signalmen v. Surface Transp. Bd.*, 638 F.3d 807, 815 (D.C. Cir. 2011). Moreover, when the public was given an opportunity to submit comments on significant revisions to the independent expenditure reporting requirements that took effect in 2003 – including revisions to 11 C.F.R. § 109.2(e) – "[t]he Commission received no comments on [the independent expenditure contributor reporting] section" and left 109.2(e)(1)(vi) unchanged. *Bipartisan Campaign Reform Act of 2002 Reporting*, 68 Fed. Reg. 404, 415 (Jan. 3, 2003). All of this suggests that the FEC's interpretation was the correct one and, in any event, warrants this Court's deference.

4. The FEC's Regulation Accords with Expressed Congressional Intent and Important First Amendment Principles.

"The general purpose of the 1979 amendments to the FECA . . . was to simplify reporting and administrative procedures," *Common Cause*, 842 F.2d 436,

444 (D.C. Cir. 1988), and to eliminate the separate reporting requirements for those contributing to a specific expenditure – not to expand the types of information reported. The FEC regulation at issue here is consistent with that legislative goal. Furthermore, as explained above (*see supra* at 4-6), Congress intended contributor reporting to be tied to contributions for "the" expenditure.

CREW attempted below to convert the 1979 FECA amendments into a "disclosure at all costs" directive. But this type of dogmatic voyeurism was soundly rejected in *Van Hollen*, where this Court observed that "[j]ust because *one* of [the FECA's] purposes (even *chief* purposes) was broader disclosure does not mean that anything less than maximal disclosure is subversive." 811 F.3d at 494–95 (emphasis in the original). The law, this Court held, "does not require disclosure at all costs; it limits disclosure in a number of ways." *Id.* Had the district court below adhered to *Van Hollen* and properly considered "the conflicting privacy interests that hang in the balance," *id.* at 494, it would have upheld the Commission's regulation here under *Chevron*. As *Van Hollen* illustrates, not every FECA provision must be interpreted to require the maximum disclosure theoretically possible.[17]

[17] CREW's own filings in this case concede that the public interest fails to support the broad-based donor disclosures it seeks, particularly under its interpretation of FECA (c)(1). For example, CREW explained, that voters "have a vital interest in knowing the identities of those [contributors] who pay for independent expenditures" or, expressed similarly, "the contributors behind [an organization's] independent expenditures." JA014 [¶ 5] (emphasis added). That is not the same as requiring reporting of an organization's full list of donors.

Relatedly, CREW argued below that it was irrational for the FEC's independent expenditure reporting regulation to include an earmarking principle under which no contributor is identified unless the contribution is earmarked for a particular independent expenditure. The D.C. Circuit, however, rejected precisely this argument with respect to the parallel FEC regulation containing an earmarking principle for identifying funders of electioneering communications. There, the Court observed that it was "hard to escape the intuitive logic behind [the] rationale" that "some individuals who contribute to a union or corporation's general treasury may not support that entity's electioneering communications, and a robust disclosure rule would thus mislead voters as to who really supports the communications." *Van Hollen*, 811 F.3d at 497.

The same holds true here, as CREW's reading would lead to misleading reporting and the imposition of reporting burdens on core political speech that are not clearly necessary. Take, for example, an Alaska donor who helps fund an environmental conservation group's independent expenditures attacking an Alaska congressional candidate's support for drilling in the Arctic National Wildlife Refuge. Under the FEC's regulation, that donor is not identified on the group's FEC reports for an independent expenditure promoting an Arkansas U.S. Senate candidate's opposition to fracking in the Fayetteville Shale. Similarly, a New York resident who sees a television ad featuring homeless puppies and gives to an

animal welfare organization to lobby the local city council for a shelter is not disclosed when that organization uses some of its funds to run an independent expenditure against a California candidate who supports the continued use of elephants in circuses. Thus, it makes sense that Congress – and this Court – would want to carefully tailor the reporting requirements to avoid these and other types of "constitutional difficulties." *Chamber of Commerce of United States v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995); *see also RNC v. FEC*, 76 F.3d 400, 409 (D.C. Cir. 1996) (same); *Van Hollen*, 811 F.3d at 497 (discussing an example involving the American Cancer Society). Such tailoring also avoids problems – like those the district court's opinion created – when trying to define the vaguely-worded term "contribution." *See, e.g.*, *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995); *supra* at 17.

III. CREW Cannot Challenge Alleged Procedural Defects in a Regulation Decades After Its Promulgation and, in Any Event, Those Claims Lack Merit.

CREW cannot challenge any procedural defects in the regulation because it is outside the six-year statute of limitations period. Only substantive complaints are permissible at this stage. *See, e.g.*, *JEM Broad. Co. v. FCC*, 22 F.3d 320, 325 (D.C. Cir. 1994). This makes sense. Where a party promptly challenges an agency's explanation, for example, personnel with direct knowledge of the

rulemaking procedure often can provide a quick remedy. But 37 years later, that is not possible.

Even if it were not time-barred, CREW's claim that the FEC failed to adequately explain and justify the regulation falls wide of the mark. All that is required is "that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision." *Jost v. Surface Transp. Bd.*, 194 F.3d 79, 85 (D.C. Cir. 1999) (internal citation and quotation marks omitted). There is no "word count; a short explanation can be a reasoned explanation." *Multicultural Media, Telecom & Internet Council v. FCC*, 873 F.3d 932, 939 (D.C. Cir. 2017) (internal citation and quotation marks omitted).

Here, the bipartisan FEC did not feel obliged to write an exhaustive treatise explaining its decision to follow congressional intent. Instead, given the legislative history and the integral role the FEC played in recommending the statutory revisions to Congress and assisting with the legislative drafting, *see supra* at 4-5, all that was necessary was for the FEC to state that the regulatory revisions "incorporate the changes set forth at 2 USC 434(c)(1) and (2)" that it helped enact into law, *see* JA327. In other words, the FEC wrote the Regulation as it did because that is what the new law meant.

CONCLUSION

CREW should not be allowed to exploit its abandoned administrative complaint to maintain an unexhausted and untimely challenge to the longstanding Regulation. Instead, this appeal should be remanded with instructions to vacate the judgments and dismiss. Alternatively, if this Court reaches the merits, it should reverse the district court judgments and uphold the Regulation as fully lawful, thus permitting Crossroads to resume its historical reliance.

Dated: March 11, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

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2 U.S.C. § 434 (1976)

* * *

(e)(1) Every person (other than a political committee or candidate) who makes contributions or independent expenditures expressly advocating the election or defeat of a clearly identified candidate, other than by contribution to a political committee or candidate, in an aggregate amount in excess of $100 during a calendar year, shall file with the Commission, on a form prepared by the Commission, 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 a contribution.

(2) Statements required by this subsection shall be filed on the dates on which reports by political committees are filed. Such statements shall include (A) the information required by subsection (b)(9), stated in a manner indicating whether the contribution or independent expenditure is in support of, or opposition to, the candidate; and (B) under penalty of perjury, a certification whether such independent expenditure is made in cooperation, consultation, or concert with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate. Any independent expenditure, including those described in subsection (b)(13), of $1,000 or more made after the fifteenth day, but more than 24 hours, before any election shall be reported within 24 hours of such independent expenditure.

* * *

2 U.S.C. § 434 (1980)

* * *

(c)(1) Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year shall file a statement containing the information required under subsection (b)(3)(A) for all contributions received by such person.

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

(A) the information required by subsection (b)(6)(B)(iii), indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved;

(B) under penalty of perjury, a certification whether or not such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate; and

(C) the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure.

* * *

52 U.S.C. § 30109. Enforcement

(a) Administrative and judicial practice and procedure

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of Title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of Title 18. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of Title 26, the Commission shall, through its chairman or vice chairman, notify the person of the

alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

* * *

(8)(A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

* * *

52 U.S.C. § 30111. Administrative provisions

* * *

(d) Rules, regulations, or forms; issuance, procedures applicable, etc.

(1) Before prescribing any rule, regulation, or form under this section or any other provision of this Act, the Commission shall transmit a statement with respect to such rule, regulation, or form to the Senate and the House of Representatives, in accordance with this subsection. Such statement shall set forth the proposed rule, regulation, or form, and shall contain a detailed explanation and justification of it.

(2) If either House of the Congress does not disapprove by resolution any proposed rule or regulation submitted by the Commission under this section within 30 legislative days after the date of the receipt of such proposed rule or regulation or

within 10 legislative days after the date of receipt of such proposed form, the Commission may prescribe such rule, regulation, or form.

* * *

(e) Scope of protection for good faith reliance upon rules or regulations Notwithstanding any other provision of law, any person who relies upon any rule or regulation prescribed by the Commission in accordance with the provisions of this section and who acts in good faith in accordance with such rule or regulation shall not, as a result of such act, be subject to any sanction provided by this Act or by chapter 95 or chapter 96 of Title 26.

* * *

11 C.F.R. § 109.10 How do political committees and other persons report independent expenditures?

* * *

(b) Every person that is not a political committee and that makes independent expenditures aggregating in excess of $250 with respect to a given election in a calendar year shall file a verified statement or report on FEC Form 5 in accordance with 11 CFR 104.4(e) containing the information required by paragraph (e) of this section. Every person filing a report or statement under this section shall do so in accordance with the quarterly reporting schedule specified in 11 CFR 104.5(a)(1)(i) and (ii) and shall file a report or statement for any quarterly period during which any such independent expenditures that aggregate in excess of $250 are made and in any quarterly reporting period thereafter in which additional independent expenditures are made.

* * *

(e) Content of verified reports and statements and verification of reports and statements.

(1) Contents of verified reports and statement. If a signed report or statement is submitted, the report or statement shall include:

* * *

(vi) The identification of each person who made a contribution in excess of $200 to the person filing such report, which contribution was made for the purpose of furthering the reported independent expenditure.