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)

REPLY BRIEF OF DEFENDANT-APPELLANT CROSSROADS GRASSROOTS POLICY STRATEGIES

Thomas J. Josefiak
J. Michael Bayes
HOLTZMAN VOGEL JOSEFIAK
TORCHINSKY PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186
Phone: 540.341.8808

Michael E. Toner
Thomas W. Kirby
Andrew G. Woodson
WILEY REIN LLP
1776 K Street, NW
Washington, D.C. 20006
Phone: 202.719.7000
E-mail: tkirby@wileyrein.com

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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)

SUMMARY OF ARGUMENT

In a dizzying shift of position, Plaintiff/Appellee CREW now bases its argument almost entirely in this appeal on the supposed plain meaning of 52 U.S.C. § 30104(c)(1) ("FECA (c)(1)"). In truth, FECA (c)(1) has far from the plain meaning CREW ascribes, and instead allows ample scope for the FEC's *Chevron* discretion. More fundamentally, however, CREW simply is not entitled to attack the Regulation, 11 C.F.R. § 109.10(e)(1)(vi), based on either FECA (c)(1) or 52 U.S.C. § 30104(c)(2)(c) ("FECA (c)(2)") in this proceeding.

A fundamental principle governing practice in the federal courts and administrative agencies is that you can't get on appeal what you don't ask for below. CREW's judicial and administrative complaints fail this most basic of rules, forcing CREW to seek multiple exceptions from the judiciary to the statute of limitations for Administrative Procedure Act ("APA") challenges and other legal requirements. After evading accountability for its drafting choices and convincing the district court to invalidate the Regulation because it supposedly deprives CREW of Crossroads' 2010 donor data, CREW has abandoned any effort to obtain that data and now labels the entire administrative enforcement proceeding "irrelevant" to the current case. CREW Opposition ("Opp.") at 51. In other words, CREW seeks exactly the type of broad review that the statute of limitations precludes and does so using grounds never presented to the FEC. But this Court's

decision in *Nat'l Conservative Political Action Comm. v. FEC*, 626 F.2d 953, 957 n.8 (D.C. Cir. 1980) (*per curiam*) ("*NCPAC*"), makes clear that playing games with FEC complaints precludes the courts from providing the relief CREW seeks here, as "the administrative remedy must be effectively pursued to finality before the courts will attempt a resolution of the dispute." Nothing CREW has argued warrants a departure from this precedent.

CREW's arguments on the merits fare no better. Contrary to CREW's version of history, the record is clear that the law prior to enactment of the current FECA (c)(1) and FECA (c)(2) did not require an entity making an independent expenditure to disclose its contributors. And in contrast to Crossroads' view of the current statute, CREW's interpretation renders FECA (c)(1) and FECA (c)(2)'s obligations "duplicative" and "overlapping" – the very scenario which this Court has warned against when interpreting congressional enactments.

Just three years ago, this Court rejected arguments that Congress attempted to impose the same type of broad-based reporting that CREW seeks to impose here, *see Van Hollen, Jr. v. FEC*, 811 F.3d 486 (D.C. Cir. 2016), drawing support from the "approach already endorsed by Congress in a related context" for independent expenditures, *id.* at 493. That precedent remains binding here. Accordingly, this Court should reverse the judgment below.

ARGUMENT

I. CREW Mischaracterizes the Campaign Finance Landscape Prior to the 1979 FECA Amendments.

CREW acknowledges (at 6) that the reporting obligations before and after the 1979 FECA Amendments "mirror" each other and were not intended to expand the scope of disclosable information. However, CREW uses a revisionist version of the pre-1979 history to claim that Congress has always required entities making independent expenditures to disclose all of their contributors. But that neither was nor is the law.

As an initial matter, CREW's Opposition repeatedly claims that FECA "subjects non-political committees making [independent expenditures] to the same contributor disclosure obligation that the FECA imposes on political committees." Opp. at 4.[1] This is incorrect; extending political committee-like burdens to non-political committees violates clear judicial precedent describing the reporting obligations that may be imposed on these different types of speakers. *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976). In addition, CREW's assertion ignores that Congress created two distinct reporting regimes: one for political committees – including those making independent expenditures – and a separate, more limited regime for non-political committees that may occasionally make independent

[1] *See also* Opp. at 21, 23, 29, 33-34, 35 n. 13, 43.

expenditures. *See* 2 U.S.C. § 434(b)(13), (e) (1977); *see also id.* § 434(e) (1977) (requiring independent contributors to non-political committees to report funds given for a particular independent expenditure). These latter, event-driven reporting requirements are the only reporting obligations at issue here.

Take for example the famous case of Mr. Harvey Furgatch who paid to run the "Don't let him do it" advertisement against Jimmy Carter in the *New York Times* on October 28, 1980. *FEC v. Furgatch*, 807 F.2d 857, 858 (9th Cir. 1987). Had Mr. Furgatch paid for his advertisement prior to the 1979 Amendments, the FEC's extant reporting forms required that individuals like Mr. Furgatch *and* (hypothetically) any contributors to his independent expenditure had to disclose, *inter alia*, the name "of the Federal Candidate advocated by the Expenditure/Contribution," as well as the "Purpose of [the] Expenditure/Contribution." Letter from I. David Lerman to Carolyn Reed (Oct. 20, 1976), attaching FEC Form 5 – Report of Independent Expenditures or Contributions by Persons, at https://www.fec.gov/files/legal/murs/229.pdf; *see also* Crossroads Br., Addendum A (also containing FEC Form 5).[2] These are very specific reporting obligations tied to a particular communication. Contrary to

[2] In deciding the meaning of the law at *Chevron* step one, courts may freely consult materials related to prior administrative practice. *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 214 (1988); *Abourezk v. Reagan*, 785 F.2d 1043, 1053 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987).

CREW's sweeping claims, neither Congress nor the FEC sought disclosure of every person who had provided funds to the individual making the independent expenditure. *See Buckley*, 424 U.S. at 74-75 (explaining that FECA's independent expenditure reporting regime was "[u]nlike the other disclosure provisions [in FECA because it] does not seek the contribution list of any association").

Following the 1979 Amendments, the information reported to the FEC was the same. The only thing that changed was that Mr. Furgatch would report both his independent expenditure and the persons who contributed to that independent expenditure. The persons who contributed no longer had a separate reporting obligation.

To bolster its claim as to FECA (c)(1), CREW contends that the pre-1979 landscape required the maker of an independent expenditure to report both its contributors and the expenditure. But to the contrary, the FEC's pre-1979 regulation only required the maker of the independent expenditure to report "the identification of the person to whom the expenditure was made" – not any contributor information. 11 C.F.R. § 109.2 (1977) (emphasis added); *see also* FEC, *FEC Index of Independent Expenditures by Persons (Groups and Political Committees)*, at 4 (Nov. 1978), at https://www.fec.gov/resources/cms-content/documents/1978_FEC_Index_of_Independent_Expenditures_US_Senate_and_House_Campaigns.PDF (echoing the point in contemporaneous guidance).

Similarly, when the Commission's enforcement matters during this period discussed FECA's independent expenditure reporting requirement, the violation identified was the speaker's failure to report the costs of the communications as independent expenditures – not an alleged contributor reporting deficiency. *See, e.g.*, *Furgatch*, 807 F.2d at 859 (alleging that Mr. Furgatch had "fail[ed] to report his expenditures"); General Counsel's Report, Matter Under Review 352, at 2 (Sept. 9, 1977), at https://classic.fec.gov/disclosure_data/mur/352.pdf; General Counsel's Report, Matter Under Review 689, at 2 (May 5, 1980), at https://www.fec.gov/files/legal/murs/689.pdf.

This result is hardly controversial. Congress recognized in 1979 that existing practice did not require the makers of independent expenditures to disclose their contributors. *See, e.g.*, 1979 FECA Leg. History at 103, at https://transition.fec.gov/pdf/legislative_hist/legislative_history_1979.pdf (stating that the new law would "eliminate" the reporting requirement for independent contributors and require the speaker to report that information "instead").[3] So it is CREW's interpretation that it is the outlier as to the pre-1979 requirements and disclosure practices.

[3] *See also* 1979 FEC Leg. History at 24-25 (embodying same concept).

Indeed, CREW's reading would lead to nonsense. If, as CREW contends, both the contributor and the maker of the independent expenditure were each already reporting the same contribution prior to 1979, why would Congress have used the 1979 FECA Amendments to mandate a "new" reporting requirement for the maker of the independent expenditure that was already one of its existing reporting obligations? *See also infra* at 18-20.

II. CREW Fails to Show That It Was Entitled to Pursue This Matter in Federal Court.

Crossroads' opening brief (at 22-34) laid out significant flaws in CREW's administrative and judicial complaints – as well as other non-*Chevron*-related concerns with this litigation – that should have precluded CREW from obtaining relief in the district court. CREW's Opposition fails to rebut these shortcomings.

A. CREW Fails to Show How Omitting Key Theories from Its Administrative Complaint Is Consistent with Its Obligation to Exhaust Administrative Remedies.

Crossroads' opening brief (at 23-28) detailed CREW's obligation to first present its arguments "forcefully" and with "clarity" to the FEC, underscoring the fundamental rule that "one may not present an argument on appeal without having first raised it below, *i.e.*, in the proceedings from which the litigant appeals." *Murphy Exploration & Prod. Co. v. U.S. Dep't of Interior*, 270 F.3d 957, 958 (D.C. Cir. 2001). CREW's Opposition maintains (at 47) that its arguments can be inferred from a single footnote in the administrative complaint's background

section that failed to mention FECA (c)(1) at all. Tellingly, not once in CREW's recitation did CREW specifically cite FECA (c)(1) or FECA (c)(2) without resorting to brackets or including the citation just outside of the quotation marks. *See* Opp. at 9-12.

CREW contends that several non-footnoted paragraphs foreshadowed CREW's subsequent *Chevron* challenge. *See* JA __ (AR 109 ¶ 44, AR 110 ¶ 50, AR 113 ¶ 60). But they only parroted the Regulation's test – i.e., that the FEC should require disclosure of those who gave "for the purpose of furthering [specific] independent expenditures" – which is <u>not</u> the same standard that CREW uses when describing contributors who should be disclosed pursuant to FECA (c)(1) or (c)(2). *Id.*; *see also id.* at __ [AR 115] (using the same formulation in the conclusion).

CREW claims (at 48) that questions regarding exhaustion before the FEC are governed by an "abuse of discretion" standard. *See id.* (citing *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243 (D.C. Cir. 2004)). But the "question whether a particular administrative pursuit satisfies the exhaustion requirement is a legal question which [courts] review *de novo*." *Koch v. White*, 744 F.3d 162, 164 & n.3 (D.C. Cir. 2014); *see also Brooks v. Dist. Hosp. Partners, L.P.*, 606 F.3d 800, 807 (D.C. Cir. 2010); *Artis v. Bernanke*, 630 F.3d 1031, 1034 (D.C. Cir. 2011).

Here, it is undisputed that FECA's enforcement regime – the mechanism CREW used to sidestep the six-year statute of limitations period and obtain judicial review of the Regulation – contains "as specific [an exhaustion] mandate as one can imagine." *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996). And because this type of "jurisdictional exhaustion requirement never may be excused by a court," *Munsell v. Dep't of Agric.*, 509 F.3d 572, 579 (D.C. Cir. 2007); *see also Avocados Plus*, 370 F.3d at 1247, CREW's other arguments and authorities (at 48-49) are irrelevant; exhaustion is required. *Cf. Ass'n of Am. Physicians v. FDA*, 358 F. App'x 179, 180–81 (D.C. Cir. 2009) (explaining that, even when applying the APA, "exhaustion applies . . . '[when] required by statute or by agency rule as a prerequisite to judicial review'") (quoting *Darby v. Cisneros*, 509 U.S. 137 (1993)).

CREW tries (at 49) to avoid settled law by recasting this case as an APA-only proceeding independent of the FECA. As an initial matter, CREW's effort to do so is highly disingenuous as to FECA (c)(1), which the district court held was not an APA claim. *See* JA __ [Doc. 22 at 22]. But even if CREW could convert its remaining claims into an APA-only challenge, CREW would still have to demonstrate that its actions warranted excuse. *See M2Z Networks, Inc. v. FCC*, 558 F.3d 554, 558 (D.C. Cir. 2009). But the sole "excuse" CREW claims – i.e., futility – applies "in only the most exceptional circumstances." *Commc'ns*

Workers of Am. v. Am. Tel. & Tel. Co., 40 F.3d 426, 432 (D.C. Cir. 1994). To qualify, the plaintiff must produce "a very convincing record" – using more than just "a single adverse decision by an agency," *Qwest Corp. v. F.C.C.*, 482 F.3d 471, 477 (D.C. Cir. 2007) – that "it is certain that [its] claim will be denied," *Boivin v. U.S. Airways, Inc.*, 446 F.3d 148, 157 (D.C. Cir. 2006).

CREW fails to meet its burden. For one, two FEC commissioners who voted on the 2011 rulemaking petition had left the agency and were replaced by two other commissioners around the time CREW filed the amended administrative complaint and may have viewed the statute differently in a non-enforcement setting. *Compare* FEC, *In the Matter of Draft Notice of Proposed Rulemaking for Independent Expenditure Reporting by Persons Other Than Political Committees*, Agenda Document No. 11-74, at https://sers.fec.gov/fosers/showpdf.htm?docid=114906 *with* Dave Levinthal, *White House Nominates New FEC Commissioners*, Ctr. For Public Integrity (June 21, 2013), at https://publicintegrity.org/2013/06/21/12881/white-house-nominates-new-fec-commissioners. Moreover, CREW and its amici purport to demonstrate that the Regulation is invalid based on data from recent election cycles. *See* Opp. at 8-9, 42; Br. of Senators Sheldon Whitehouse, Jon Tester, and Richard Blumenthal As Amicus Curiae in Support of Appellees at 14-15 (collecting recent spending data). While this recent data is not properly before this Court, CREW

should have presented this material to the FEC in a rulemaking petition. *See, e.g.*, *Edison Elec. Inst. v. I.C.C.*, 969 F.2d 1221, 1230 (D.C. Cir. 1992).

CREW's other authorities miss the mark for other reasons. *Darby* applies to the exhaustion of administrative remedies in the sense of requiring a prospective plaintiff to file for reconsideration before the agency. *See* 509 U.S. at 149. It is "wholly inapposite" as to the "waiver of claims," which is what CREW did before the administrative agency here. *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 562 (D.C. Cir. 2002); *see also Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1149–50 (D.C. Cir. 2005); *Nat'l Min. Ass'n v. Dep't of Labor*, 292 F.3d 849, 874 (D.C. Cir. 2002).

CREW relies heavily on a truly unusual decision, *AT&T Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), in which the agency had already lost on the underlying substantive issue and was employing bad-faith gamesmanship to force delay. *See id.* at 732, 735. Neither factor is present here. Moreover, the question of the regulation's validity was presented explicitly to the agency in the administrative proceeding. *See id.* at 730 ("AT&T contended [in an administrative filing that] [i]f the Fourth Report were a substantive rule . . . it was invalid . . . because it exceeded the FCC's statutory authority").

CREW asserts in a footnote (at 49 n.22) that a litigant has less obligation to articulate its legal theories outside the APA's statute of limitations period than if

challenge is timely. This argument is baseless. The single authority CREW cites does not adopt a different standard, much less one that would incentivize litigants to postpone a challenge until after the six-year limitations period.

B. CREW Concedes That Its Judicial Complaint Failed to Appropriately Challenge FECA (c)(1).

Crossroads' opening brief (at 28-31) detailed how CREW's judicial complaint did not ask the district court to invalidate the regulation as to FECA (c)(1). Instead, the only relief CREW sought vis-à-vis FECA (c)(1) was an order that the FEC acted contrary to law in dismissing a single, now-abandoned administrative complaint against Crossroads.

CREW could not have been clearer in explaining its goal to the district court: "[b]y means of this suit, Plaintiffs seek not only an order reversing the FEC's unlawful dismissal of Plaintiffs' complaint—a remedy all parties agree is available under the FECA—but also seeks an order enjoining enforcement of 11 C.F.R. § 109.10(e)(1)(vi) as unlawful and contradictory to the FECA, and ordering the FEC to enforce 52 U.S.C. § 30104<u>(c)(2)</u> in all pending and future cases brought before it raising similar questions about the disclosure of contributors to independent expenditures." Pl. Memo. in Opp'n to Def. FEC's and Crossroads GPS's Mtn. to Dismiss, *CREW v. FEC*, Civ. A. No. 1:16-cv-259, Dkt. No. 18 at 12 (filed June 13, 2016) (emphasis added). Tellingly absent from CREW's request is any mention of prospective, injunctive relief as to FECA (c)(1).

And the reason that remedy is not requested is that CREW had not previously pressed a theory of FECA (c)(1) invalidity.

CREW responds (at 44-46) to Crossroads' discussion of the pleadings in four ways:

- An out-of-the-gate admission that FECA (c)(1) "was not a focus of CREW's complaint" before the district court, Opp. at 45;
- A claim that, "by necessity," CREW's FECA(c)(1) argument must somehow have been included in its briefing below – but again, not in the complaint, *id.*;
- An effort to blame Crossroads for "finely slic[ing]" CREW's own judicial complaint, *id.*, even though CREW made the decision to divide the complaint into three separate claims that requested different relief as to FECA (c)(1) and FECA (c)(2);
- As a last resort, seeking refuge in the district court's "'broad discretion' . . . to craft equitable relief," *id.* at 46 – even if CREW never requested it as to a specific statutory provision.

A volume of precedent says this entire line of reasoning is flawed. *See, e.g.*, *Boykin v. Fenty*, 650 F. App'x 42, 44 (D.C. Cir. 2016) (*per curiam*) (affirming dismissal of complaint that "fails to contain allegations making out [a legal] theory"); *Am. Message Ctrs. v. FCC*, 50 F.3d 35, 41 (D.C. Cir. 1995) (stating same).

CREW's citation to *Califano v. Yamasaki*, 442 U.S. 682, 701–02 (1979), does not advance its cause, as a decision to certify a nationwide class action is both

literally and figuratively far removed from this case. *Id.* at 702 (discussing injunctive relief vis-à-vis concerns over "the geographical extent of the plaintiff class"). Similarly, the question whether a district court has "broad discretion" to issue a nationwide injunction, *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1408 (D.C. Cir. 1998), says nothing about whether a district court can issue relief as to provision other than those requested by the parties. CREW's arguments fundamentally ignore the fact that "courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick v. Oklahoma*, 413 U.S. 601, 610–11 (1973).

C. CREW Fails to Establish That It Has Standing to Pursue the Claims Below for Other Reasons.

Crossroads (at 31-34) articulated five reasons why this Court must not allow CREW to hijack a dead-on-arrival appeal of a FECA enforcement decision and to convert that case into a vehicle for attacking the Regulation outside the APA's six-year statute of limitations. As to most of these five points, CREW has little to say. *See* Opp. at 50 (offering only one-sentences responses). And what little CREW does offer is easily refuted.

First, CREW claims that its decision to abandon pursuit of its FECA administrative enforcement complaint should have no bearing on its APA challenge. Not so. In a case CREW never even attempts to distinguish, *NCPAC*, this Court held that complainants' "failure to prosecute their administrative action

completely undercuts their argument that they have exhausted their administrative remedies." 626 F.2d at 955, 957 n.8. In such a situation, where a party is making "less than a good-faith effort to [prosecute its complaint], courts will [not] attempt a resolution of the dispute." *Id.* And this make sense. The running of the statute of limitations does not allow an agency to inflict a substantively unlawful injury, and a party may assert invalidity to remedy such an injury. But where the supposed injury cannot be corrected – e.g., where the Crossroads 2010 donor data cannot be obtained – the APA's limitations period does not vanish and permit the full equivalent of timely judicial review. *See Weaver v. Fed. Motor Carrier Safety Admin.*, 744 F.3d 142, 145 (D.C. Cir. 2014).

Second, CREW claims that its enforcement case was not doomed *ab initio* because FECA's good-faith reliance provision requires answers to factual questions about Crossroads' reliance on the Regulation. But that is not how the statute works. 52 U.S.C. § 30111(e) is unequivocal that a party "may undertake any conduct permitted by the challenged regulations without fear of penalty, even if that conduct violates campaign statutes." *Shays v. FEC*, 414 F.3d 76, 84 (D.C. Cir. 2005). Put simply, no factual inquiry of the sort CREW envisions here is required. Indeed, the factual questions raised in the two cases CREW cites were: whether a party can rely upon staff guidance rather than a rule, *FEC v. O'Donnell*, 209 F. Supp. 3d 727, 743 n.12 (D. Del. 2016), and whether the respondent

correctly interpreted the underlying regulation, *LaRouche v. FEC*, 28 F.3d 137, 142 (D.C. Cir. 1994). Neither question exists here. Indeed, prior to this litigation CREW held the same view of the independent expenditure reporting regime as Crossroads does. *See* CREW, *Comments in Response to Advance Notice of Proposed Rulemaking on Earmarking, Affiliation, Joint Fundraising, Disclosure, and Other Issues* at 3-4 (Jan. 15, 2015), at http://sers.fec.gov/fosers/showpdf.htm?docid=312990.

Third, without providing any explanation, CREW claims (at 50) that the FEC's decision to adopt an "invalid regulation" allows it to avoid this Court's recent decision that FEC dismissals based on prosecutorial discretion are generally unreviewable. *See CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018). But this categorical assertion finds no basis in *CREW* itself, and in any event, the dismissal here was based in part on fair notice concerns, which renders the decision unreviewable. *See* Crossroads Br. at 33; *CREW*, 892 F.3d at 442 (explaining that the "law of this circuit rejects the notion of carving reviewable legal rulings out from the middle of non-reviewable actions") (internal quotation omitted). Moreover, CREW admits that its failure to challenge the FEC's remand dismissal moots any claim to Crossroads' 2010 donor data.

Fourth, FECA's five-year statute of limitations applies to both monetary and equitable remedies. *See FEC v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996); *FEC*

v. Nat'l Right to Work Comm., Inc., 916 F. Supp. 10, 14 (D.D.C. 1996). Thus, the statute of limitations would have barred CREW and the FEC from seeking injunctive relief against Crossroads.

Fifth, CREW does not and cannot dispute that it failed to participate in the 2011 FEC rulemaking. Instead, CREW concludes the relevant discussion by stating (at 51) that "the viability of CREW's FECA claim was and is irrelevant to its APA claim." (Emphasis added.) But a baseless (and now abandoned) FECA challenge cannot eliminate the statute of limitations and allow sweeping APA review. That sentiment is precisely why this Court must reject this lawsuit in its entirety. To do otherwise would effectively read the statute of limitations out of the APA altogether.

III. CREW's Substantive Arguments Fail Along with Its Push to Keep Other, Highly Relevant Interpretive Authorities from this Court.

A. CREW Fails to Show the Statute "Unambiguously Forecloses" the FEC's Interpretations of FECA (c)(1) and FECA (c)(2).

Crossroads' opening brief detailed (at 35-53) why the Regulation comports with FECA (c)(1) and (c)(2) under both *Chevron* step one and two. CREW offers a different reading of the statutory language that is inconsistent with the precedent of this and other courts, the lack of congressional disapproval of the Regulation despite a clear mechanism for doing so, and nearly four decades of consistent application of the Regulation by the FEC. But even were the Court to find some

validity in CREW's reading of the statute – and it should not – this Court should hold the statutory language unclear and defer to the agency's reasonable interpretation at step two.

As Crossroads and its supporting amici have explained, FECA (c)(1) must be read with an eye toward the entirety of subsection (c). The requirement that a person "who makes an independent expenditure [exceeding $250] shall file a statement containing the information required under subsection (b)(3)(A) of this section for all contributions received by such person" defines who must file, at what threshold, and what types of information (e.g., date and amount) must be included about each of the contributions required to be disclosed in FECA (c)(2).

CREW's alternative interpretation of FECA (c)(1) has serious flaws. Compare, for example, CREW's construction of FECA (c)(1) – taken straight from its Opposition brief – with the language of FECA (c)(2):

> **CREW's FECA (c)(1):**
> The identity of each person who makes a contribution whose contribution or contributions have an aggregate amount in excess of $200 within the calendar year, together with the date and amount of any such contribution.[4]
>
> **FECA (c)(2)(C):**
> The identification of each person who made a contribution in excess of $200 to the person filing such

[4] For simplicity, this excerpt removes CREW's ellipses and parenthetical, and also corrects a typographical error to the word "within."

> statement which was made for the purpose of furthering an independent expenditure.

Opp. at 21-22; 52 U.S.C. § 30104(c)(2)(C). As the district court observed, CREW's gloss on the two provisions rendered the two sections entirely "duplicative" of each other by creating "overlapping" obligations. JA __ [Doc. 43 at 71]; *see also id.* __ [at 72] (explaining that FECA (c)(2) requiring reporting a "subset of those donors" already disclosed under FECA (c)(1)).

The district court should have seen duplicativeness as a red flag rather than a green light. This Court has "repeatedly counseled [that] an interpretation[] which essentially deprives one provision of its meaning and effect so that another provision can be read as broadly as its language will permit[] is inconsistent with the Congress's intent as well as our *Chevron* analysis." *Nat'l Ass'n of Mfrs. v. U.S. Dep't of Interior*, 134 F.3d 1095, 1107 (D.C. Cir. 1998). Indeed, it is "a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted).[5] Where, as here, "two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional

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[5] *See also Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 632 (2018); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *Heckler v. Chaney*, 470 U.S. 821, 829 (1985); *United States v. Marsh*, 829 F.3d 705, 710 (D.C. Cir. 2016); *Battle v. FAA*, 393 F.3d 1330, 1335 (D.C. Cir. 2005); *Van Ee v. E.P.A.*, 202 F.3d 296, 302 (D.C. Cir. 2000); *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997.

intention to the contrary, to regard each as effective." *Pittsburgh & Lake Erie R. Co. v. Ry. Labor Executives' Ass'n*, 491 U.S. 490, 510 (1989). At minimum, an "overlapping [set of provisions] militates against finding unambiguous congressional intent" under step one. *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 698 (D.C. Cir. 2014).

Moreover, even if FECA (c)(1) imposed a reporting obligation as CREW contends, the plain meaning of the law would not be as broad as CREW asserts. To the contrary, FECA (c)(1) would require reporting only of contributions earmarked for express advocacy. This is so because, focusing on the situation as it existed when FECA (c)(1) was adopted and the Regulation was promulgated:

- FECA (c)(1) is expressly limited to entities "other than a political committee;"
- The provision only is triggered by "contributions received" by such a non-political entity;
- A donation is a FECA-regulated "contribution" only if it is made for the purpose of influencing an election.
- All activities of a political committee are presumptively political, so all donations to a political committee are regulated contributions. *See generally Buckley*, 424 U.S. at 20-21, 60-68.
- However, a group that is not a political committee acts for the purposes of influencing an election only if it spends for express advocacy. *Id.* at 80.

Thus, under *Buckley*'s clear requirements, FECA (c)(1) applies only to donations that are earmarked for express advocacy spending. *See id.* at 76-81.

When read through the prism of *Buckley*, any reporting obligation imposed by FECA (c)(1) would be fully consistent with the Regulation. Such a reading also would be fully consistent with FECA (c)(2), as that provision likewise specifies that earmarking must be for particular express advocacy – i.e. "for the purpose of furthering an independent expenditure" – to trigger disclosure.

CREW's arguments as to FECA (c)(2) fare no better. Crossroads already explained (at 40) that the normal meaning of "an" is one. Surprisingly, CREW agrees (at 30) that it is "not disputed" that "'an' means 'one,'" meaning that FECA (c)(2) should be read as requiring disclosure of a person who contributes "for the purpose of furthering [one] independent expenditure." That is clearly not the same as giving for furthering independent expenditures generally (i.e., a person who gives to support two or more independent expenditures need not be disclosed under CREW's agreed-upon definition). This concession should end the debate in Crossroads' favor.

Even if it did not, CREW's authorities fail to show that Congress employed the term "an" with such unmistakable clarity that it "unambiguously forecloses" the FEC's interpretation. *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017). Indeed, the best authority CREW musters says that use of the indefinite article "generally implies the possibility of a larger number than just one." Opp. at 31 (citing *United States v, Hagler*, 700 F.3d 1091, 1096-97 (7th Cir. 2012))

(emphasis added). In other words, not only does CREW concede that there are some instances where "an" clearly means just one, but even where it can mean more than one, the underlying statute may routinely have more than one possible meaning.

CREW also musters a series of other attacks to Crossroads' *Chevron* analysis, with a particular focus (at 23) on keeping this Court from looking at materials courts routinely utilize when reviewing a statute at step one. To be sure, the focus on the inquiry at this phase is on the statutory text. But even at step one, courts "consider the provisions at issue in context, using traditional tools of statutory construction and legislative history," *AFL-CIO v. FEC*, 333 F.3d 168, 172–73 (D.C. Cir. 2003) (emphasis added), and reviewing "past administrative practice for any light these sources may shed on congressional intent," *Abourezk*, 785 F.2d at 1053; *see also Sturgeon v. Frost*, 139 S. Ct. 1066, 1084 (2019) (approving use of context at *Chevron* step one).[6]

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[6] In its request to narrow this Court's review, CREW oddly relies upon cases that support Crossroads' position. *See, e.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2110 (2018) (observing that "[t]he plain text, the statutory context, and common sense" are all relevant at *Chevron* step one); *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994) (explaining that because "willful" is "a word of many meanings, . . . its construction [is] often . . . influenced by its context") (internal quotation marks omitted). *See also Mylan Pharm., Inc. v. Shalala*, 81 F. Supp. 2d 30, 37 (D.D.C. 2000) (reviewing, in another case cited by CREW, the "design of the statute as a whole" at *Chevron* step one).

To that end, CREW (at 27-28) asks this Court to discount FECA's statutory subheadings, but these "'supply clues' as to what Congress intended," *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018) (citing *Yates v. United States*, 135 S. Ct. 1074, 1083 (2015) (plurality), and can "tug[] strongly in favor of a narrower reading" than the plain text might otherwise suggest, *Yates*, 135 S. Ct. at 1083 – even at *Chevron* step one.[7] And as Crossroads' opening brief explained (at 38 & n.11), the headers here track the contents of subsections 52 U.S.C. § 30104(c)(1), (2), and (3).

Finally, CREW pushes this Court (at 28-29) to disregard its own post-*MCFL* precedent, *Van Hollen*, because that decision "did not discuss [FECA] (c)(1)." But this omission only underscores Crossroads' main point. In that case, then-Representative Chris Van Hollen argued that the FEC's electioneering communications regulation should require corporations to "identify 'all' contributors who contributed over $1,000 during the reporting period[without limiting disclosure to] those who transmitted funds accompanied by an express statement that the contribution was intended for the purpose of funding electioneering contributions." *Van Hollen v. FEC*, 851 F. Supp. 2d 69, 80

[7] *See also United States v. Lauderdale Cty., Miss.*, 914 F.3d 960, 965–66 (5th Cir. 2019); *CREW v. FEC*, 299 F. Supp. 3d 83, 96–97 (D.D.C. 2018), *appeal dismissed*, No. 18-5136, 2018 WL 5115542 (D.C. Cir. Sept. 19, 2018); *Cellco P'ship v. FCC*, 357 F.3d 88, 100 (D.C. Cir. 2004).

(D.D.C.), *rev'd*, 694 F.3d 108 (D.C. Cir. 2012). In other words, then-Representative Van Hollen sought to impose the same type of broad-based reporting that CREW argues FECA (c)(1) requires.

In response, this Court unequivocally held that FECA regulates the reporting requirements for non-political committees that make independent expenditures in "precisely the same way" FECA regulates electioneering communications, 811 F.3d at 493, and in fact that "Congress codified the very [same] approach" for each.[8] Thus, when this Court identified the full panoply of reporting requirements potentially at issue in *Van Hollen*, citing to FECA (c)(2) but not to FECA (c)(1), it made clear that this latter provision was inoperative and did not in any way require disclosure of an organization's contributors. This Court should not reverse itself on this point now.

B. CREW Fails to Explain Why Other Criteria That Courts Have Routinely Relied Upon Are Irrelevant Here.

Crossroads also articulated (at 43-53) numerous other arguments why the FEC correctly interpreted the statutory language. CREW responds with a hodgepodge of errant assertions.

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[8] As CREW recognizes (at 29 n.9), a group of three commissioners previously explained that reporting is required for electioneering communications only where funds are provided for a specific reported communication. This statement by a controlling group of commissioners represents the views of the Commission. *See FEC v. NRSC*, 966 F.2d 1471, 1476 (D.C. Cir. 1992).

Much of what CREW has to say is addressed via a proper understanding of the pre-1979 FECA legislative history. *See supra* at 3-7. Citing *Zuber v. Allen*, 396 U.S. 168, 193 (1969), CREW (at 37) argues that courts may discount an agency's role in the legislative drafting process in some instances. But *Zuber* was based on different circumstances; here, there was actually a "comprehensive review" of the independent expenditure reporting requirements that involved FEC personnel's views. 396 U.S. at 193. Indeed, in direct contrast to CREW's nay-saying, the Supreme Court recently reaffirmed that courts should pay "special attention" to a governmental entity's views when it helped draft the statutory language. *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1060 (2019).

CREW also seeks (at 39) to discount the doctrine of congressional acquiescence, claiming it "has little probative use." But the Supreme Court and other appellate courts have relied on this principle, particularly in FECA cases, as an interpretive tool to give "considerable deference," *AFL-CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003), since acquiescence "strongly implies that the regulation[] accurately reflect[s] congressional intent," *FEC v. Ted Haley Cong. Comm.*, 852 F.2d 1111, 1114 (9th Cir. 1988); *see also FEC v. DSCC*, 454 U.S. 27, 34 (1981). Acquiescence also is particularly appropriate where there is "congressional familiarity with the administrative interpretation at issue," *Cape Cod Hosp. v. Sebelius*, 630 F.3d 203, 214 (D.C. Cir. 2011), such as exists when

Congress reenacts one of the very provisions at issue, *see* H.R. 2356, 107th Cong. (1st Sess. 2001), or is legislating in an area that Members of Congress have personal experience with every election cycle. And CREW's claim that the Regulation's near-four-decade existence is irrelevant conflicts with *Abourezk*, 785 F.2d at 1054–55 (labelling a 34-year-old administrative construction as "a significant indicator of the legislature's will"), and even CREW notes (at 39) that Congress considered "disclosure by 501(c)(4) groups" – the very issue here – during this period.[9]

Finally, CREW tries to downplay the constitutional and related concerns caused by the over-disclosure resulting from its erroneous interpretation of FECA. But the concerns here are real. In 2018, for example, a co-owner of the San Francisco Giants was publicly attacked because – unbeknownst to him – an organization he contributed to made a racially charged independent expenditure in Arkansas. *See* Jesse Yomtov, *Giants Co-owner Charles Johnson Tries to Step Back from Super PAC Behind Racially Charged Ad*, USA Today, Oct. 19, 2018, at https://www.usatoday.com/story/sports/mlb/2018/10/19/charles-johnson-giants-racist-advertisement/1701611002/. By tailoring the independent expenditure-

[9] The Campaign Legal Center, as amicus, argues generally that the independent expenditure reporting requirements were not a source of congressional interest prior to cases like *Citizens United*. But if that is true, this Court has already held in similar circumstances that Congress could not have spoken at *Chevron* step one and should proceed to analyze the matter under step two. *See Van Hollen*, 694 F.3d at 110.

related reporting obligations to contributors who gave to fund specific advertisements, Congress avoided these problems as to non-political committee entities that only occasionally participate in the political process.

IV. Crossroads Has Standing to Pursue This Appeal

In its opening brief, Crossroads (at 9-10, 19) detailed why it has standing to pursue this appeal. CREW responds (at 52-53) by claiming that Crossroads faces "'no material risk of enforcement' from the FEC." This claim really is one of mootness rather than standing, an issue upon which CREW carries a "heavy burden" of proof. *Honeywell Int'l., Inc. v. Nuclear Regulatory Comm'n*, 628 F.3d 568, 576 (D.C. Cir. 2010). To that end, a case is not moot if a court's decision merely will – as here – "have a more-than-speculative chance of affecting [the non-moving party] in the future." *Clarke v. U.S.*, 915 F.2d 699, 701 (D.C. Cir. 1990) (*en banc*); *see also Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016).

Moreover, as to CREW's specific arguments, "enforcement policy interpretations" – like the press release the FEC issued following the district court's decision – "are not binding regulations" that necessarily prevent enforcement, *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 383 F.3d 1047, 1048 (D.C. Cir. 2004) (*per curiam*) (*en banc*), and in any event, this would not prevent a third-party group from ultimately filing its own lawsuit in federal court – something CREW has already done. *See CREW v. Am. Action Network*, Civ. No.

1:18-cv-945 (D.D.C.); *see also Nat. Res. Def. Council, Inc. v. U.S.E.P.A.*, 859 F.2d 156, 210 n.131 (D.C. Cir. 1988) (finding that agency's non-prosecutorial promise was irrelevant in face of potential for private enforcement action). And if CREW's arguments (at 50) are to be believed – and they should not be – then there is no statute of limitations on these third-party litigation efforts.

CREW also contends that Crossroads' injury is speculative, but CREW's aggression in pursuing this lawsuit and its administrative enforcement action underscore that the threat to Crossroads' First Amendment rights is real. Crossroads also has a documented history of spending on independent expenditures and has stated its "intention to resume making independent expenditures" if it prevails on appeal. Dkt. No. 1757141, ¶10 (Oct. 25, 2018). That is sufficient to establish standing. CREW's authorities, like *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009), generally relate to whether the parties had standing at the outset of the litigation in district court and are therefore irrelevant here.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the district court below.

Dated: May 8, 2019

Respectfully submitted,

/s/ Thomas W. Kirby

Thomas J. Josefiak
E-mail: tjosefiak@holtzmanlaw.net
J. Michael Bayes (Bar No. 501845)
E-mail: mbayes@holtzmanlaw.net

HOLTZMAN VOGEL JOSEFIAK
TORCHINSKY PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186

540.341.8808

Michael E. Toner (Bar No. 439707)
E-mail: mtoner@wileyrein.com
Thomas W. Kirby (Bar No. 915231)
E-mail: tkirby@wileyrein.com
Andrew G. Woodson (Bar No. 494062)
E-mail: awoodson@wileyrein.com

WILEY REIN LLP
1776 K St., NW
Washington, D.C. 20006

202.719.7000

Counsel for Defendant-Appellant

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/s/ Thomas W. Kirby
Thomas W. Kirby

CERTIFICATE OF SERVICE

I certify that on May 8, 2019, one copy of the Defendant/Appellant's Reply Brief was filed and served electronically upon the following counsel of record:

Kevin Deeley (kdeeley@fec.gov)
Harry Jacob Summers (hsummers@fec.gov)
Seth E. Nesin (snesin@fec.gov)
Federal Election Commission
Office of General Counsel
1050 First Street, NE
Washington, DC 20463

Stuart C. McPhail (smcphail@citizensforethics.org)
Adam J. Rappaport (arappaport@citizensforethics.org)
Nikhel S. Sus (nsus@citizensforethics.org)
Citizens for Responsibility and Ethics in Washington
455 Massachusetts Avenue, N.W.
6th Floor
Washington, DC 20001

/s/ Thomas W. Kirby
Thomas W. Kirby

Addendum

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2 U.S.C. § 434(b)(13) (1977)

* * *

(b) *Contents of reports.* Each report under this section shall disclose . . .

(9) the identification 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 . . .

(13) in the case of an independent expenditure in excess of $100 by a political committee, other than an authorized committee of a candidate, expressly advocating the election or defeat of a clearly identified candidate, through a separate schedule (a) any information required by paragraph (9) stated in a manner which indicates whether the independent expenditure involved is in support of, or in opposition to, a 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. . . .

* * *

11 C.F.R § 109.2 (1977)

* * *

Reporting of independent expenditures.

(a) Every political committee making an independent expenditure shall report on Schedule E each such expenditure or contribution to the Commission, Clerk, or Secretary, as appropriate.

(1) The report shall contain, for each expenditure in excess of $100, the identification of the person to whom it was made, the amount and date of the expenditure, the name of the candidate with respect to whom the expenditure was

made and the office the candidate seeks, and whether the expenditure was in support, of or in opposition to that candidate

(2) This information shall be filed on Schedule E as part of a report (monthly, quarterly, pre-election, post-election, or annual) covering any period in which any independent expenditure exceeding $100 is made. Schedule E shall also include the total of all expenditures of $100 or less.

(3) Political committees not required to report under § 104.1(c) shall nonetheless report each independent expenditure in excess of $100 on Schedule E at the time the report for that period would have been filed.

(b) Every other person who makes independent expenditures aggregating in excess of $100 during a calendar year shall file a report with the Commission on FEC Form 5.

(1) The report shall contain the reporting person's identification, occupation, and principal place of business, if any, the identification of the person to whom the expenditure was made, the amount and date of the expenditure, the candidate's name and the office the candidate seeks, and whether the expenditure was in support of or in opposition to that candidate.

(2) The report shall be filed at the end of the reporting period (quarterly, pre-election, post-election, annual) during which the expenditure is made and in any reporting period thereafter in which additional independent expenditures are made.

(c) Independent expenditures by any person or any political committee 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 expenditures pursuant to § 104.4(e).