RECORD NO. 18-5261

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The

United States Court of Appeals

For The District of Columbia Circuit

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON; NICHOLAS MEZLAK,

Plaintiffs - Appellees,

v.

FEDERAL ELECTION COMMISSION,

Defendant – Appellee,

CROSSROADS GRASSROOTS POLICY STRATEGIES,

Intervenor Defendant - Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Appellees Citizens for Responsibility and Ethics in Washington and Nicholas Mezlak hereby certify as follows:

A. Parties and Amici. Intervenor-Defendant Appellant is Crossroads Grassroots Policies Strategies ("Crossroads"). Plaintiffs-Appellees are Citizens for Responsibility and Ethics in Washington ("CREW"), a non-profit corporation, and Nicholas Mezlak. The Federal Election Commission was the defendant below but did not appeal and has filed notice that it does not intend to file a brief in this matter. There were no amici *curiae* in the district court. Senate Majority Leader Mitch McConnell; the U.S. Chamber of Commerce; the Institute for Free Speech; and Free Speech Coalition, Free Speech Defense and Education Fund, Citizens United, Citizens United Foundation, DownsideDC.org, Downsize DC Foundation, National Right to Work Committee, U.S. Constitutional Rights Legal Defense Fund, Gun Owners of America, Inc., Gun Owners Foundation, Public Advocates of the United States, Policy Analysis Center, Conservative Legal Defense and Education Fund, and the Senior Citizens League have filed briefs as amicus curiae on behalf of Appellant. Appellees understand additional amici curiae may appear in this matter.

B. Rulings Under Review. The rulings under review are the district court's March 22, 2017 order and accompanying memorandum opinion, ECF Dkt.

Nos. 21, 22, and the district court's August 3, 2018 judgment and memorandum opinion, ECF Dkt. Nos. 42, 43, in *CREW v. FEC*, No. 16-cv-00259-BAH (Howell, J.). The March 22, 2017 memorandum opinion is available at 243 F. Supp. 3d 91 and is reprinted in the Joint Appendix ("JA") at JA077–98. The March 22, 2017 order is printed in the JA at JA075–76. The August 3, 2018 memorandum opinion is available at 316 F. Supp. 3d 349 and reprinted in the JA at JA369–481. The August 3, 2018 judgment is reprinted in the JA at JA367–68.

C. Related Cases. This case was previously before this Court, which issued a per curiam opinion denying Crossroads's request for an emergency stay pending appeal of the district court's judgment. *See CREW v. FEC*, 904 F.3d 1014 (D.C. Cir. 2018) (per curiam) (Henderson, Millet, and Wilkins, JJ.). This case was also before the United States Supreme Court on Crossroads's emergency motion for a stay pending appeal, which similarly denied Crossroads's request. *See Crossroads v. CREW*, 139 S. Ct. 50 (Mem) (Sept. 18, 2018).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, plaintiff-appellee Citizens for Responsibility and Ethics in Washington ("CREW") submits its corporate disclosure statement.

(a) CREW has no parent company, and no publicly-held company has a ten percent or greater ownership interest in CREW.

(b) CREW is a non-profit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Among its principal activities, CREW files complaints with the Federal Election Commission to ensure enforcement of federal campaign finance laws and to ensure its and voters' access to information about campaign financing, including financing of independent expenditures, to which CREW and voters are legally entitled. CREW disseminates, through its website and other media, information it learns in the process of those complaints to the wider public.

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APA	Administrative Procedure Act
BCRA	Bipartisan Campaign Reform Act of 2002
CREW	Citizens for Responsibility and Ethics in Washington and Nicholas Mezlak
Crossroads	Crossroads Grassroots Policy Strategies
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
IE	Independent Expenditure
JA	Joint Appendix
OGC	Federal Election Commission's Office of General Counsel

STATEMENT OF JURISDICTION

As discussed further below, this Court lacks jurisdiction over this appeal because the sole appellant here, Crossroads, suffered no concrete and non-mooted injury traceable to the judgment below. The district court, however, possessed jurisdiction under 5 U.S.C. § 706, 28 U.S.C. § 1331, and 52 U.S.C. § 30109(a)(8)(A).

STATEMENT OF ISSUES PRESENTED

(1) Whether 52 U.S.C. § 30104(c)(1) and (c)(2)(C), which respectively require a person making qualifying IEs to disclose the source of "*all* contributions" aggregating over $200 each year, and to identify the contributions given "for the purpose of furthering *an* independent expenditure," *id.* (emphasis added), unambiguously impose complementary disclosure obligations conflicting with 11 C.F.R. § 109.10(e)(1)(vi)'s requirement to only disclose contributions given "for the purpose of furthering *the reported* independent expenditure," *id.* (emphasis added)?

(2) Whether the district court erred in finding 11 C.F.R. § 109.10(e)(1)(vi) was not a reasonable interpretation of 52 U.S.C. § 30104(c)(1) and (c)(2)(C) where the FEC failed to explain or even recognize the divergence between the regulation and the statute's dual commands?

(3) Whether the district court abused its discretion in finding that CREW exhausted administrative remedies before seeking suit by identifying in the FEC proceedings below the conflict between the statute's two subsections and the regulation, and that such presentation was futile in any event, given the FEC's refusal to address the conflict despite knowing of it for at least seven years?

(4) Whether the FEC's application of the regulation to CREW gave CREW standing to seek judicial review within six years?

(5) Whether Crossroads has standing to bring this appeal where Crossroads faces no risk of enforcement for past IEs, and where it has and had no concrete plans to make future IEs?

STATUTES AND REGULATIONS

This litigation involves the FECA, 52 U.S.C. § 30104, and 11 C.F.R. § 109.10, both reproduced in the Addendum.

STATEMENT OF THE CASE

I. The FECA's Unambiguous Reporting Requirements

Groups and individuals that engage in election-related activities are subjected to disclosure obligations under the FECA. Groups that engage in extensive campaigning, called "political committees," are subject to continuous reporting, organizational, and record keeping requirements. 52 U.S.C. §§ 30102,

30103, 30104.[1] Those who are less extensively involved are subjected to fewer requirements and report if and when they engage in federal election activity. *See, e.g.*, 52 U.S.C. § 30104(c), (f). Nonetheless, to ensure voters "know[] who is speaking about a candidate and who is funding that speech," *SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010) (en banc), the FECA guarantees the public robust disclosure from these entities.

Relevant here, the FECA imposes two separate but complementary contribution disclosure obligations on anyone making more than $250 in "independent expenditures," 52 U.S.C. § 30104(c)(1), defined as communications that expressly advocate for the election or defeat of a federal candidate, 52 U.S.C. § 30101(17).

First, the FECA requires:

> 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.**

52 U.S.C. § 30104(c)(1) (emphasis added). The referenced subsection (b) governs disclosure reports for political committees, and subsection (b)(3)(A) covers the

[1] Political committees are groups with "contributions" or "expenditures" over $1,000 a year, 52 U.S.C. § 30101(4), and are under the control of a candidate or have a "major purpose" of influencing elections, *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

scope of contributors they must disclose. By the explicit cross-reference to subsection (b)(3)(A), subsection (c)(1) subjects non-political committees making IEs to the same contributor disclosure obligation that the FECA imposes on political committees. Specifically, the cross-reference requires an IE maker to:

> **[I]dentif[y]** . . . **each** . . . **person** (other than a political committee) **who makes a contribution** . . . whose contribution or contributions have an aggregate amount or value **in excess of $200 within the calendar year** . . . , **together with the date and amount of any such contribution**.

52 U.S.C. § 30104(b)(3)(A) (emphasis added).[2]

Second, the FECA further requires IE makers to identify in the statement required by subsection (c)(1) certain of those contributors:

> Statements required to be filed by this subsection shall be filed in accordance with subsection (a)(2), and **shall include** . . . **the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering *an* independent expenditure.**

52 U.S.C. § 30104(c)(2)(C) (emphasis added).

Each subsection requires the reporting of a "contribution," which the FECA defines as a thing of value given "for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A). Thus, as used in the FECA, the terms

[2] Though the obligation is the same for political committees and IE makers, the effective result is not. All funds donated to a political committee are contributions because political committees are "by definition, campaign related," *Buckley*, 424 U.S. at 79, while only donations to IE makers intended to influence elections are contributions, 52 U.S.C. § 30101(8)(A).

"contribution" and donation are not synonymous: "contribution" covers only transfers intended to influence an election.[3]

As the Supreme Court held in construing these provisions, they respectively require non-political committees making more than $250 in IEs "to identify all contributors who annually provide in the aggregate $200 in funds intended to influence elections . . . , and . . . to identify all persons making contributions over $200 who request that the money be used for independent expenditures." *FEC v. Mass. Citizens for Life ("MCFL")*, 479 U.S. 238, 262 (1986). As with all FECA disclosure, these provisions serve compelling state interests including "providing the electorate with information about the sources of election-related spending" and "deter[ing] actual corruption and avoid[ing] the appearance of corruption." *McCutcheon v. FEC*, 572 U.S. 185, 223 (2014); *Citizens United v. FEC*, 558 U.S. 310, 369 (2010) (voters have compelling interest in knowing "the funding sources" for campaign ads); *MCFL*, 479 U.S. at 262; *Buckley*, 424 U.S. at 66–67, 76 (voters have compelling interest in being "fully informed" about "[t]he sources of a candidate's financial support"); *see also SpeechNow.org*, 599 F.3d at 698; *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 n.3 (D.D.C. 2011) (Kavanaugh, J. for three-

[3] The FECA regulates several activities that influence an election, including funding IEs, electioneering communications, partisan voter drives, candidates, parties, and political committees. *See, e.g.*, 52 U.S.C. § 30101(8)(A), (9)(B)(ii), 20, § 30104(b), (f).

judge District Court) (disclosure furthers "the government's interest [ ] in preventing foreign influence over U.S. elections").

The complementary reporting obligations mirror the FECA's pre-1979 dual reporting obligations for IEs.[4] First, as with today's subsection (c)(1), the prior language required those making IEs to "file with the Commission . . . a statement containing . . . the information required of a candidate or political committee receiving . . . a contribution [in excess of $100]." 2 U.S.C. § 434(e)(1) (1976). The "information required" was the identity of qualifying contributors, as well as the date and amount of the contribution. *Id.* § 434(b)(2). Second, in a variant of today's subsection (c)(2), the pre-1979 FECA required a *contributor* who gave to a non-political committee to also "file . . . a statement containing the information required of a person who makes a contribution in excess of $100 to a candidate or political committee." *Id.* § 434(e)(1). The information required was again the contributor's identity, and the date and amount of the contribution. *Id.* § 434(b)(2). Thus, a contributor intending to support an IE by a non-political committee—any IE—was required to self-report even if the recipient never made an IE or ran a different IE from the type intended by the contributor. The 1979 amendments shifted that second reporting burden to the recipient of the contribution to

[4] The district court's opinion provides a lengthy discussion of the history of the relevant portion of the FECA. JA393–403.

"[s]implif[y] reporting without affecting meaningful disclosure." Legislative History of [FECA] Amendments of 1979, 103 (1983), https://bit.ly/2BopE8F ("FECA 1979 History").

II. The Regulation's Conflicting Requirement

Congress directed the FEC to write new regulations reflecting the voluminous changes to the FECA contained in the 1979 amendments and gave the agency only two months to do so. FECA Amendments of 1979, Pub. L. 96-187 § 303, 93 Stat. 1339 (1980). In its haste, the FEC adopted a regulation purporting to implement subsections (c)(1) and (c)(2)(C) but that in fact failed to capture the dual requirements Congress imposed. That regulation, 11 C.F.R. § 109.10(e)(1)(vi), completely ignored the reporting requirement of subsection (c)(1), and "sharply narrow[ed]" the reporting requirement under subsection (c)(2)(C), *CREW v. FEC*, 904 F.3d 1014, 1016 (D.C. Cir. 2018) (per curiam). In contrast to the statute, the regulation required only that the IE maker:

> [I]denti[fy] each person who made a contribution in excess of $200 to the person filing such report, **which contribution was made for the purpose of furthering *the reported* independent expenditure**.

11 C.F.R. § 109.10(e)(1)(vi) (emphasis added).

The FEC interpreted the regulation to require reporting only where a contributor "earmarked contributions for specific expenditures in the precise form set out in a particular report"—i.e., an "express link between the receipt and the

independent expenditure." JA268, JA448. Accordingly, per the regulation, an IE maker need not disclose contributions given to "further the election of a particular federal candidate" and in fact used to make IEs to support that candidate's election, JA269, nor disclose contributors who were solicited after watching "exampl[e]" IEs to fund IEs that made nearly identical attacks on the same candidates as in the examples, JA188–89, JA191–94, JA201–04, JA269–70. As a result, the regulation produced almost no reporting about the "sources of election-related spending." *McCutcheon*, 572 U.S. at 223; *see, e.g.*, JA041 (Crossroads aired over $50 million in IEs in 2012 but reported "0" in contributions).

The FEC never issued an explanation for its abandonment of subsection (c)(1)'s disclosure requirement or its narrowing of subsection (c)(2)(C). Rather, its entire explanation for the regulation comprised a single sentence: "This section has been amended to incorporate the changes set forth in [52] U.S.C. [§] [30104](c)(1) and (2) regarding reporting requirements for persons, other than a political committee, who make independent expenditures." JA327. The rulemaking record also shows no reason for the regulation's divergence from the FECA or, in fact, that the agency was even aware of this divergence. Rather, it shows that the FEC first proposed a regulation reflecting the language of subsection (c)(2)(C), but inexplicably changed that language to the final form without prompting or discussion. *See* JA406–08.

Nonetheless, prior to *Citizens United*, 558 U.S. 310, the regulation's divergence from the statute had little effect because there were very few IEs by non-political committees. *See* OpenSecrets.org, Total Outside Spending by Election Cycle, Excluding Party Committees, https://bit.ly/2OuygS0. That changed when *Citizens United* permitted corporate and union IEs. *Id.* Because of the regulation, however, the explosion in IEs following *Citizens United* was not accompanied by parallel disclosure: despite millions being spent on IEs by non-political committees, virtually no contributions were reported. JA100–02. This divergence brought new attention to 11 C.F.R. § 109.10(e)(1)(vi), leading then-Congressman Van Hollen to petition for a rulemaking change in 2011 to bring the regulation into compliance with the statute. *See* JA267 & n.48. Even though the FEC staff acknowledged that the regulation conflicted with the statute, no action was taken. *Id.*

III. The Administrative Proceeding and Litigation Below

The present action arises from the application of the invalid regulation to CREW in an administrative proceeding where CREW alleged that Crossroads violated 52 U.S.C. § 30104(c)(1), (c)(2)(C) (then 2 U.S.C. § 434(c)(1) and (c)(2)(C)), and 11 C.F.R. § 109.10(e)(1)(vi). JA199–00, JA207–08, JA211.[5]

[5] Citations are to CREW's amended administrative complaint. The cited portions also appear in CREW's original administrative complaint. JA134–85.

CREW explained that, under subsection (c)(1), individuals making qualified IEs must "identif[y] each person . . . who makes contributions totaling more than $200 in a calendar year to the person making the independent expenditure." JA199 ¶ 14. CREW also explained that, under subsection (c)(2)(C), such individuals must further "identify each person who made a contribution in excess of $200 to the person filing the report 'which was made for the purpose of furthering an independent expenditure.'" *Id.* ¶ 15. Finally, CREW explained 11 C.F.R. § 109.10(e)(1)(vi) required disclosure of contributions given "for the purpose of furthering the reported" IE. JA200 ¶ 16.

CREW's complaint alleged that Crossroads violated each of these provisions when it received but did not disclose a multi-million dollar contribution to aid the election of a federal candidate, accepted millions more in "matching" contributions for the same purpose, and collected more contributions from individuals who were first shown example IEs of the type their money would fund. JA201–13. As CREW alleged the contributions met even the narrow test imposed under 11 C.F.R. § 109.10(e)(1)(vi)—and thus necessarily the broader tests of subsections (c)(1) and (c)(2)(C)—CREW asserted Crossroads's failures violated "2 U.S.C. § 434," without limitation to subsection, "and 11 C.F.R. §§ 109.10(b)-(e)." JA207 ¶44, JA208 ¶ 50, JA211 ¶ 60. CREW requested the FEC order disclosure of these contributions. JA213.

In addition, though the FEC could not strike the invalid regulation in the enforcement proceeding triggered by CREW's complaint, and despite the recent commitment of three commissioners to not correct the regulation's invalidity, JA267 & n.48, CREW also complained that the regulation "did not give full effect to [§ 30104's] provisions" of subsections (c)(1) and (c)(2). JA200 ¶ 16 & n.1.[6] CREW therefore requested the agency look through the regulation to the underlying statute to find violations of subsections (c)(1) and (c)(2), effectively treating the regulation as invalid.

Crossroads responded to CREW's allegations, including to CREW's allegation that the regulation failed to give effect to either subsection (c)(1) or (c)(2)(C). JA190 (arguing the regulation "incorporates" both subsections (c)(1) and (c)(2)(C), and that "CREW's Suggestion That the Regulation Does Not 'Give Full Effect' to the Act Is Irrelevant").

The FEC staff reviewed all of CREW's allegations and recognized that the regulation was in conflict with the statute. *See* JA267–68 & n.51, JA270–71 & n.57. Specifically, the OGC acknowledged the regulation was "silent concerning [subsection (c)(1)'s] additional reporting requirement," and was in conflict with subsection (c)(2)(C)'s "arguably more expansive approach." *Id.* Nevertheless,

[6] Rather than mere "background," Crossroads Br. 25, this language is contained in the complaint's discussion of the applicable law, which set out the entire legal basis for CREW's allegations, *see* JA199–200.

finding the regulation governed the FEC's interpretation of the statute, the OGC recommending dismissing each of CREW's claims. *Id.* The OGC first applied the regulation to CREW's subsection (c)(2)(C) claim, finding the regulation "constitutes the Commission's controlling interpretation" of subsection (c)(2)(C). JA270 n.57. Next, it applied the regulation to CREW's subsection (c)(1) claim, concluding the regulation's existence would mean Crossroads "could raise equitable concerns" justifying dismissing the subsection (c)(1) claim as a matter of prosecutorial discretion. JA270–71. Finally, it found that the facts did not establish an "express link" between the contribution and a specific reported IE sufficient to show a violation of 11 C.F.R. § 109.10(e)(1)(vi). JA268–70. The Commission deadlocked on the OGC's recommendation, leading to dismissal of CREW's complaint. JA285–86, JA288.

CREW sought review of that dismissal under the FECA, 52 U.S.C. § 30109(a)(8)(A), and challenged the regulation's validity under the APA. JA012–71. Crossroads intervened below to protect its interest in defending its favorable FEC judgment. *See Crossroads v. FEC*, 788 F.3d 312 (D.C. Cir. 2015) (respondent may intervene to defend FECA claim). Both Crossroads and the FEC moved to dismiss CREW's claims, but the district court rejected the motions except insofar as CREW asserted APA claims that were duplicative of its FECA claims. JA096. Nonetheless, because the "FECA has no provisions governing judicial review of

regulations," JA097 (quoting *Perot v. FEC*, 97 F.3d 553, 560 (D.C. Cir. 1996)), the district court found CREW's challenge to the validity of 11 C.F.R. § 109.10(e)(1)(vi) could proceed under the APA. JA098. Further, the court held that because the regulation had been applied to CREW in the administrative proceeding, CREW's legal challenge to the validity of the regulation was timely and satisfied Article III. JA091–93 & nn.5, 6 (citing *Weaver v. Fed. Motor Carrier Safety Admin.*, 744 F.3d 142, 145 (D.C. Cir. 2014)).

The district court subsequently granted summary judgment to CREW on its FECA and APA claims. With respect to the APA claim, the district court rejected the FEC's and Crossroads's defenses that subsections (c)(1) and (c)(2)(C) together imposed only a single disclosure obligation that was inherently ambiguous, and that the regulation was a valid application of each subsection. JA104–05, JA107–111, JA124. Rather, it found that 52 U.S.C. § 30104(c)(1) and (c)(2)(C) "unambiguously require separate and complementary" reports of contributors and "mandate significantly more disclosure than" 11 C.F.R. § 109.10(e)(1)(vi). JA460. In doing so, it relied on the plain text of the statute, which was supported by the statutory structure, statutory history, and the fact that the Supreme Court had construed 52 U.S.C. § 30104(c)(1) and (c)(2)(C) in the same way. JA421–33. The remainder of the district court's opinion was largely devoted to rejecting the FEC's and Crossroads's numerous "unsupported" arguments, including challenges to

CREW's standing, exhaustion of its APA claim, and CREW's FECA claim. *See* JA411–20 nn.30–32, JA433–60, JA467–80. Finally, the district court deemed vacatur the proper remedy. JA461–67 (applying *Allied-Signal Inc. v. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)). The court nonetheless stayed the order for 45 days to permit the FEC to craft interim rules to address the timing of filing, but not to limit disclosure mandated by the FECA. JA456–57, JA467.

IV. Post-Judgment Proceedings

The district court's judgment remanded the FECA claim back to the FEC. JA480. On remand, the FEC found all of the relevant funds donated to Crossroads were contributions that should have been disclosed under subsection (c)(1) and the funds solicited after watching example IEs should have been disclosed under subsection (c)(2)(C), but it concluded that dismissal was still warranted because Crossroads relied on the regulation. First General Counsel's Report 12–17, MUR 6696R (Crossroads) (Aug. 24, 2018), https://bit.ly/2OoygTC. CREW did not seek judicial review of the new dismissal decision, and the time for such review expired on October 27, 2018. 52 U.S.C. § 30109(a)(8)(B); *Spannaus v. FEC*, 990 F.2d 643, 645 (D.C. Cir. 1993).

Crossroads thereafter sought an indefinite stay of the district court's judgment before both the district court and this Court. Both courts rejected

Crossroads's request. *See CREW v. FEC*, 904 F.3d 1014 (D.C. Cir. 2018) (per curiam); *CREW v. FEC*, No. 16-cv-00259, Minute Order (Sept. 15, 2008). Specifically, this Court held Crossroads had failed to "demonstrate *any* 'likelihood' of success" in reviving the invalidated regulation because "the regulation squeezes the Act's explicit disclosure obligation beyond what the plain statutory text can bear," *CREW*, 904 F.3d at 1017 (emphasis added):

> In particular, the regulation shrinks the statutory duty to disclose contributions intended for "an expenditure" down to only those donations intended to support "the" specific "reported independent expenditure." 11 C.F.R. § 109.10(e)(1)(vi). In doing so, the Commission's regulation confines the reporting obligation to only that small subset of donors who not only earmark their contributions for a particular cause or candidate for the specific purpose of influencing the outcome of an identified election, but also pick the script of an independent expenditure that matches the actual form reported. Thus, the regulation empties Subsection (c)(1)'s disclosure obligation of a large portion of its intended operation.

Id. In so holding, the Court rejected many of the arguments Crossroads raises here—including the age of the regulation, and "(debatable) legislative history and post-enactment congressional action"—deeming such matters irrelevant because "the 'text alone is enough to resolve the case.'" *Id.* at 1018 (quoting *Pereira v. Sessions*, 138 S. Ct. 2105, 2114 (2018)). The Court also rejected Crossroads's arguments—repeated here—that CREW lacked standing below, that CREW's challenge was untimely, and that the FEC's post-judgment dismissal of CREW's FECA claim affected CREW's standing. *Id.*; Crossroads Br. 31–35. The Court

further questioned whether the judgment below caused any non-speculative injury to Crossroads. *CREW*, 904 F.3d at 1019 (noting Crossroads failed to "identify any actual independent expenditures it has made this quarter or had intended to make in the coming months that are deterred by the [district court] order").

The Supreme Court likewise rejected Crossroads's request to it to stay this case. *Crossroads v. CREW*, 139 S. Ct. 50 (Mem) (Sept. 18, 2018).

The FEC shortly thereafter issued guidance on 52 U.S.C. § 30104(c)(1) and (c)(2)(C). FEC provides guidance following U.S. District Court decision in *CREW v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018) (Oct. 4, 2018) ("FEC Guidance"), https://bit.ly/2yKmqxt. The FEC stated that it would not enforce subsections (c)(1) or (c)(2)(C) against any IE made prior to September 18, 2018. *Id.*

SUMMARY OF THE ARGUMENT

On the merits, the "'text alone is enough to resolve the case.'" *CREW*, 904 F.3d at 1018 (quoting *Pereira*, 138 S. Ct. at 2114). The FECA unambiguously requires any person making more than $250 in "independent expenditures"—i.e., explicit campaign ads—to disclose, among other things, two categories of information about the sources of their funds. First, they must disclose the same information political committees must disclose about their contributors: the identity of each person who "makes a contribution . . . in excess of $200 within a calendar year . . . , together with the date and amount of any such contribution." 52

U.S.C. § 30104(b)(3)(A) (incorporated by reference in 52 U.S.C. § 30104(c)(1)). Second, they must further "identi[fy] . . . each person who made a contribution in excess of $200 . . . for the purpose of furthering an independent expenditure." 52 U.S.C. § 30104(c)(2)(C). As the Supreme Court recognized thirty years ago, these dual "reporting obligations provide precisely the information necessary to monitor . . . independent spending activity and [the] receipt of contributions" to prevent "undisclosed political spending" and the use of "conduits." *MCFL*, 479 U.S. at 262.

The FEC regulation purporting to incorporate these provisions "sharply narrow[ed] the obligation . . . to disclose significant donations to support independent expenditures specifically intended to influence the outcome of a federal election." *CREW*, 904 F.3d at 1016. Rather than require disclosure of "*all* contributions" over $200 and further identification of contributions intended to further "*an* independent expenditure," 52 U.S.C. § 30104(c)(1), (c)(2)(C) (emphasis added), the regulation required only the reporting of contributions "for the purpose of furthering *the reported* independent expenditure," 11 C.F.R. § 109.10(e)(1)(vi) (emphasis added).

This regulation—adopted in haste after Congress's wholesale revision of the FECA—severely limited voters' access to the information Congress intended to be disclosed. For example, the regulation meant an organization would not report

funds it knew were provided "to be used in some manner that would aid the election" of a federal candidate, despite the recipient then spending millions on IEs to support that very same candidate. JA023 ¶ 44, JA044, JA073 ¶44, JA192 ¶10, JA194, JA262, JA269. Similarly, the regulation meant an organization would not disclose contributors who gave it funds after watching "exampl[e]" IEs and knew their contributions were to pay for the increasing cost of airing such ads, despite the organization then spending millions on ads mirroring the example ads and attacking or supporting the same candidates. JA025–27 ¶¶ 52–53, JA074 ¶¶ 52–53, JA188–89. Indeed, almost *no* contributions have been reported by those making IEs for as long as 11 C.F.R. § 109.10(e)(1)(vi) has been on the books. JA100–02 & nn.7–9.

Given this stark contradiction, the district court below correctly found that the regulation conflicted with the plain terms of the FECA and struck the regulation. JA480. This Court agreed, finding "the regulation squeezes the Act's explicit disclosure obligation beyond what the statutory text can bear." *CREW*, 904 F.3d at 1017.

Nevertheless, Crossroads brings the instant appeal seeking to rewrite the FECA and reimpose the invalid regulation. Both the court below and this Court have already rejected Crossroads's various attempts to introduce ambiguity in the statute, and its efforts are no more persuasive on the third try. Crossroads therefore

raises a scattershot of arguments to say the district court below should never have reached the merits, but those arguments are also unavailing. This Court already found CREW had standing below and that CREW's claim was timely, *see CREW*, 904 F.3d at 1018—a decision twice reached by the district court, JA088–98, JA411–19. Crossroads also fails to show the district court abused its discretion in finding CREW had exhausted any administrative remedies and that, even had it not, such exhaustion was futile.

Crossroads, in contrast, lacks standing to bring this appeal. Crossroads ceased making IEs in 2014, years before the judgment below. It has no concrete plans to make more IEs and had none at the time of the judgment. Crossroads's sole standing to intervene below was to defend against reopening the FEC enforcement action against it that was the subject of CREW's then pending FECA claim; but any appeal based on that threat was mooted when the FEC dismissed that claim on remand from the district court. Crossroads shows no risk of enforcement against it arising from its other past IEs—the last of which is almost five years old. Accordingly, though this Court should affirm the judgment below if it were presented an appeal within its jurisdiction, the Court should dismiss this appeal because Crossroads does not bring one.

ARGUMENT

I. Standard of Review

This Court reviews the district court's summary judgment under the APA, its application of the *Chevron* doctrine, and its determination of jurisdiction *de novo*. *Paralyzed Veterans of Am. v. U.S. Dep't of Trans.*, 909 F.3d 438, 443 (D.C. Cir. 2018); *Novicki v. Cook*, 946 F.2d 938, 941 (D.C. Cir. 1991). This Court reviews the district court's determinations about non-jurisdictional administrative exhaustion for abuse of discretion. *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1251 (D.C. Cir. 2004). Similarly, challenges to the scope of equitable relief awarded are subject to the district court's "broad discretion." *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1408 (D.C. Cir. 1998).

II. The Regulation Conflicts with the FECA

This case concerns whether an FEC regulation, 11 C.F.R. § 109.10(e)(1)(vi), conflicts with the dual contributor reporting obligations imposed by 52 U.S.C. § 30104(c)(1) and (c)(2)(C). Under *Chevron*, the regulation is invalid if it either (1) conflicts with the unambiguous meaning of the statute or (2) is not a "permissible construction" of an ambiguous statute. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). The regulation here fails the first step, which resolves the case, but would also fail the second step even if the statute was assumed to be ambiguous.

A. The Statutory Text Alone Proves the Regulation is Invalid

The regulation in question here cannot be reconciled with the text of 52 U.S.C. § 30104(c)(1) and (c)(2)(C); thus, the regulation must fail. Rather than limit disclosure to contributions tied to a single specific "reported independent expenditure," 11 C.F.R. § 109.10(e)(1)(vi), the plain text of 52 U.S.C. § 30104(c)(1) and (c)(2)(C) require far greater disclosure.

Subsection (c)(1) not only sets out the activity that triggers the obligation to file a statement (contrary to Crossroads's cabined reading, *see* Crossroads Br. 5, 37–38), but also lays out information that must be included in that statement:

> [A] statement *containing the information* required under subsection (b)(3)(A) *for all contributions* received by such person.

52 U.S.C. § 30104(c)(1) (emphasis added). Unambiguously, subsection (c)(1) mandates the disclosure of "information," and, by explicit cross-reference to subsection (b)(3)(A), imposes on IE makers the *same* obligation to disclose contributors that the FECA imposes on political committees (while not incorporating all other obligations imposed on political committees). Specifically, the "information required" to be disclosed under subsection (b)(3)(A) is the identity of each "person (other than a political committee) who makes a contribution . . . , whose contribution or contributions have an aggregate amount in excess of $200 with the calendar year . . . , together with the date and amount of any such contribution."

Subsection (c)(2) then provides additional requirements for the statement or statements to be made by those making IEs, as well as the manner of filing. *See* 52 U.S.C. § 30104(c)(2) ("Statements required to be filed under this subsection shall be filed in accordance with subsection (a)(2), and shall include—"). Subsection (c)(2)(A) requires information about the IE itself—who received the payment, the date, time and amount of the payment, information about the candidate, etc. 52 U.S.C. § 30104(c)(2)(A) (incorporating by reference 52 U.S.C. § 30104(b)(6)(B)(iii)). Subsection (c)(2)(B) requires a certification that the reported IE is in fact independent. 52 U.S.C. § 30104(c)(2)(B). Subsection (c)(2)(C)—the subsection relevant here—then requires additional contributor information that is to be included in the statement required by subsection (c)(1):

> [T]he identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure.

52 U.S.C. § 30104(c)(2)(C). This additional contribution disclosure requirement "speaks clearly to the precise question at issue" about the type of contributions to be identified under it: those given for the purpose of furthering "an" independent expenditure. *Barnhart v. Walton*, 535 U.S. 212, 217–218 (2002) ("[Courts] must give effect to the unambiguously expressed intent of Congress.").

The plain text of subsections (c)(1) and (c)(2)(C) thus flatly contradict the excessively narrow focus of reporting in 11 C.F.R. § 109.10(e)(1)(vi) on only

contributions intended to further "the reported independent expenditure." Nowhere in the regulation is subsection (c)(1)'s mandate to disclose all contributions over $200 a year regardless of whether they were to further an IE or not—just like political committees do. Nor does the regulation reflect the scope of contributions to be identified under subsection (c)(2)(C), a scope on which Congress "has directly spoken." *Shays v. FEC*, 414 F.3d 76, 105 (D.C. Cir. 2005). Rather than requiring an "express link" between a contribution and the specific and particular reported IE, JA268, Congress explicitly required only that the contributor intend to further "an independent expenditure," regardless of whether it is the IE eventually made and reported, 52 U.S.C. § 30104(c)(2)(C).

The distinction in disclosure obligations is evident from the facts of the administrative proceeding below. Funds given expressly to "aid the election" of a federal candidate indisputably are "contributions" that must be disclosed under subsection (c)(1), but the FEC found the regulation did not require their disclosure. JA192. Similarly, funds solicited after viewing "exampl[e]" IEs are indisputably funds intended to further "an independent expenditure," but the FEC found the regulation did not require their disclosure. JA189. Indeed, Crossroads and its amici are before this Court because they understand the regulation required far less disclosure than required under either subsections (c)(1) or (c)(2)(C). *See* Crossroads Br. 10; *see also e.g.* U.S. Chamber Amicus Br. 18–19, ECF No.

1779164 (praising the regulation for "limiting the disclosure requirement" of the FECA).

While "traditional tools of statutory construction" are available to assist a court in interpreting a statute to determine whether it is ambiguous, *Chevron*, 467 U.S. at 843 n.9, courts do not reach for those tools when the "plain text of the statute" dictates its meaning, *Pereira*, 138 S. Ct. at 2114; *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."); *Central Bank of Denver, N.A., v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994) ("Congressional inaction cannot amend a duly enacted statute."). When "the text is clear," courts do "not consider . . . extra-textual evidence." *NLRB v. SW General, Inc.*, 137 S. Ct. 929, 942 (2017).

Both the court below and this Court were correct in finding that the "text alone is enough to resolve th[is] case." *CREW*, 904 F.3d at 1018; JA421–33. Similarly, the Supreme Court was correct in *MCFL* to recognize the statute's plain reading. *MCFL*, 479 U.S. at 262. There, the Court recognized that a group that did not qualify as a political committee would nonetheless be subject to contributor reporting under both 52 U.S.C. § 30104(c)(1) and (c)(2)(C). The Court said these "disclosure provisions"—plural—require disclosure of, first, "all contributors who annually provide in the aggregate $200 in funds intended to influence elections" and, second, "all persons making contributions over $200 who request that the

money be used for independent expenditures." *Id.* at 262.[7] The Court expressed no difficulty in reading the statute, nor did it appeal to any extraneous evidence to wrest this interpretation from the text. Rather, the Court gave the text its plain meaning because its plain meaning was evident.

Nor is this mere "dicta." Crossroads Br. 40 n.12.[8] Rather, in *MCFL*, the Court confronted the question of whether a nonprofit organization could be constitutionally banned from making its own IEs and required to form a political committee instead. 479 U. S. at 241. The government argued that the ban and

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[7] In an earlier portion of the opinion only joined by three other justices, Justice Brennan made this distinction even more explicit:

> Section [30104](c) provides that any such person that during the year makes independent expenditures exceeding $250 must: (1) identify all contributors who contribute in a given year over $200 in the aggregate to funds to influence elections, § [30104](c)(1), . . . and (3) identify any persons who make contributions over $200 that are earmarked for the purpose of furthering independent expenditures, § [30104](c)(2)(C).

MCFL, 479 U.S. at 252. Though that portion did not enjoy a majority of the Court, Justice O'Connor, who joined the other portions, did not take issue with Justice Brennan's description of subsections (c)(1) and (c)(2). Rather, she explained she did not join this portion of the opinion because she differed with Justice Brennan on the source of the burden on the petitioner. *See id.* at 266 (O'Connor, J., concurring in part and concurring in the judgment).

[8] Crossroads states the platitude that non-essential parts of *MCFL* are dicta. *Id.* But *MCFL*'s discussion of subsections (c)(1) and (c)(2)(C) were essential, and Crossroads's authority only notes that *MCFL*'s three-part test for qualifying nonprofit organizations was dicta. *MCFL*, 479 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) (same)).

political committee requirement were necessary to protect compelling state interests in disclosure. *Id.* at 262. The Court rejected that argument, finding the disclosure imposed by subsections (c)(1) and (c)(2)(C) on IE makers were "less restrictive" but still adequate to combat corruption and prevent conduits of undisclosed spending. *Id.* Thus, the Court's understanding of the scope of disclosure imposed by the subsections were "necessary to [the Court's] result," and thus its discussion of the subsections is part of the Court's holding. *Seminole Tribe of Fl. v. Florida*, 517 U.S. 44, 67 (1996).

In short, the Supreme Court, this Court, and the district court have all recognized that Congress spoke plainly in subsections (c)(1) and (c)(2)(C): those making qualifying IEs must disclose the source of all contributions over $200 per year and must further identify the contributions given for the purpose of furthering IEs. The regulation conflicted with that plain language and thus was invalid.

B. Crossroads's Attempts to Manufacture Ambiguity Fail

Despite this plain text, Crossroads recycles failed arguments to attempt to introduce some ambiguity. But as this Court found, because the text is clear, courts do not consider the type of arguments Crossroads advances. *CREW*, 904 F.3d at 1018. Nonetheless, even if considered, they do not support the weight Crossroads places on them.

1. Crossroads asserts ambiguity arises from the district court's discussion of the scope of "contributions" to be disclosed under subsection (c)(1), *see* Crossroads Br. 17, but simply garbles the opinion below. It is both true that subsection (c)(1)'s disclosure is not "unbounded"—it mandates only disclosure of "contributions" (funds given for the purpose of influencing an election) and not donations, and limits reporting to contributions over $200 a year—and that subsection (c)(1) does not impose *additional* boundaries on the type of contributions to be disclosed by requiring that the funds be "earmarked for a specific or single political purpose." JA404, JA423. For example, funds given to aid the election of a federal candidate are "contributions" under the Act, even though the funds were not earmarked to any particular means to do so.

2. Crossroads next argues subsection (c)'s headings demonstrate that subsection (c)(1) is limited to ordering "filings" while subsection (c)(2)(C) provides the "contents" of those filings, Crossroads Br. 38, but the "heading of a section cannot limit the plain meaning of the text." *Hays v. Sebelius*, 589 F.3d 1279, 1282 (D.C. Cir. 2009). Nor does Crossroads's argument work: Crossroads admits subsection (c)(1) is not limited to a "filing" requirement, but also requires that filing contain certain information. Crossroads Br. 38–39. Similarly, subsection (c)(2) is not limited to the "contents" of the statement, but also lays out the manner of filing. 52 U.S.C. § 30104(c)(2) (statements to be filed "in accordance with

subsection (a)(2)"). Rather, the subsection's heading describes the items contained *in toto*.

3. Crossroads oddly argues that a plain reading of the statute delinks subsections (c)(1) and (c)(2)(C), leaving (c)(2)(C) without an "affirmative statement that the [IE] maker do anything." Crossroads Br. 39. But subsection (c)(2) starts by linking the information therein required with the "[s]tatements required to be filed by this subsection," i.e., subsection (c), which includes subsection (c)(1). 52 U.S.C. § 30104(c). Subsection (c)(2) thus unambiguously requires *additional* information be included in the statements mandated by subsection (c)(1).

4. Crossroads next asserts that *Van Hollen v. FEC*, 811 F.3d 486, 493 (D.C. Cir. 2016), read ambiguity into the FECA's IE reporting requirements, Crossroads Br. 39–40, but *Van Hollen* did no such thing. *Van Hollen* concerned a different statutory disclosure provision, 52 U.S.C. § 30104(f), relating to a different type of communication, which was not linked to political committee disclosure, *cf. id.* § 30104(c)(1), and did not directly speak to the scope of contributions to be disclosed, *cf. id.* § 30104(c)(1), (c)(2)(C). The case did not concern IE reporting, did not discuss subsection (c)(1), and only noted that the FEC's proposed regulation for electioneering communications—adopted to fill a hole unanticipated by Congress and created when the Supreme Court invalidated part of BCRA—

worked "in precisely the same way" as "§ 30104(c)(2)(C)." *Van Hollen*, 811 F.3d at 490, 493. Notably, the proposed regulation required disclosure of any contribution "made for the purpose of furthering electioneering communications." *Van Hollen*, 811 F.3d at 488. That indeed mirrors subsection (c)(2)(C)—both cover contributions intended to further any of the covered communications, without needing to tie them to the reported communication. It expressly does not mirror 11 C.F.R. § 109.10(e)(1)(vi).[9]

5. Crossroads's other authority, *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), is similarly uninstructive. *Cf.* Crossroads Br. 40. That out-of-circuit case considered whether a certain communication was an IE, *Furgatch*, 807 F.2d at 858, and only in a footnote in background did the opinion touch on IE reporting—an issue not relevant to that case. *Id.* at 859 n.2. *Furgatch* was silent on subsection (c)(1)'s requirement that statements "contain the information" required by subsection (b)(3)(A), and it merely quoted subsection (c)(2)(C).

6. Crossroads next argues that subsection (c)(2)(C)'s use of an indefinite article, "an," is inherently ambiguous (an argument with no bearing on subsection (c)(1)). Crossroads Br. 40–41. "Simply because Congress chose to employ the

[9] While three FEC commissioners erroneously interpreted the electioneering communication regulation to be limited to contributions for a specific reported electioneering communication, http://eqs.fec.gov/eqsdocsMUR/10044274536.pdf, that interpretation has never been adopted by the FEC and was not before the court in *Van Hollen*.

indefinite article," however, "does not imply that 'Congress has explicitly left a gap for the agency to fill.'" *Mylan Pharm., Inc. v. Shalala*, 81 F. Supp. 2d 30, 37 (D.D.C. 2000) (quoting *Chevron*, 467 U.S. at 843). Crossroads argues that "an" means "one,"—which is not disputed—but then simply asserts without basis that it must mean a *particular* one, i.e., the one reported IE and none other. Crossroads Br. 40–41. Crossroads relies on *Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S*, 566 U.S. 399 (2012), but the Court there interpreted a very different phrase: "not an," *id.* at 413. "[N]ot an" presents unique interpretative complexities, as it could be satisfied either by negating any one of a set (i.e., "not a particular one") or by negating all of the set (i.e., "not any"). *See id.* "An," when used in the positive, however, does not present those complexities: it is satisfied whenever one of the identified set is present. Oxford English Dictionary 4 (2d ed. 1989) (defining "an" to mean "one, some, any"); *see also SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018) (looking to OED to define "any"); *United States v. Hagler*, 700 F.3d 1091, 1096–97 (7th Cir. 2012) (noting "'an' generally implies the possibility of a larger number than just one"; but finding statute's use of "the person" limited prosecution of the specific defendant); *N.H. Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 72 (1st Cir. 2006) (recognizing "an" and "any" are synonymous when used in the positive); *Mylan*, 81 F. Supp. 2d at 37 ("'[A] court' may refer to a district court, an appellate court, one of the two, or both."); JA425–26 (citing

contemporary dictionaries). Nor does it matter that Congress could have chosen a synonym like "any" to reach the same result. *See SAS Inst.*, 138 S. Ct. at 1355 (court is "not to supplant [Congress's] commands with others it may prefer").

Crossroads similarly points to legislative history and the use of definite articles at times therein to describe different obligations, but that simply shows that "Congress knew the difference between '[the]' and '[an]' and used the words advisedly." *Pillsbury v. United Eng'g Co.*, 342 U.S. 197, 199 (1952).[10] Indeed, the statute itself demonstrates this, limiting reporting of the candidate identified to "*the* independent expenditure" (i.e., each statement must identify the candidate identified in each IE), 52 U.S.C. § 30104(c)(2)(A) (emphasis added), but requiring reporting of contributions given to further "*an* independent expenditure," 52 U.S.C. § 30104(c)(2)(C) (emphasis added).

Crossroads then falls back on administrative history to try to cast ambiguity on subsection (c)(2)(C), pointing to a pre-1979 form which required contributors to report the candidate whose election the contribution sought to influence.

[10] Contrary to Crossroads's misreading, Crossroads Br. 41, the legislative history shows only that Congress intended to shift the disclosure from contributors to the IE makers, who make "the independent expenditure" that is reported and who must now report "the contribution[s]" they receive. FECA 1979 History 103. At no point in that history did the FEC propose or Congress endorse limiting reporting to only contributions given to further a single particular IE.

Crossroads Br. 42.[11] The form, of course, cannot overcome the clear statutory text of either the current FECA or the pre-1979 FECA. Nor is it in conflict with either that prior text or the current subsection (c)(2)(C). In accordance with the pre-1979 FECA, the contributor did not tie their contribution to some reported IE: rather, they reported whenever they made their contribution regardless of whether the IE they contemplated was ever made, and they had to report the candidate they sought to support even if it differed from the reported IE. *See, e.g.*, Crossroads Add. 7a; *see also* 2 U.S.C. § 434(e) (1976) ("Every person . . . who makes contributions . . . shall file . . . a statement containing the information required of a person who makes a contribution . . . to a candidate or political committee."). Crossroads also seeks to limit the "information required" language in the pre-1979 statute to only the "date, amount" of the contribution, Crossroads Br. 42, just as it does with the current subsection (c)(1), *id.* 38–39. That would have led to a nonsensical result: a contributor would only report the date and amount of a contribution but would not

[11] These materials were not included in the administrative record and not identified by the FEC as a justification for the regulation—either in its 1980 explanation or in the litigation below. *See* Crossroads Br. Add. 6a. The materials, even assuming their authenticity, *but see* Fed. R. Evid. 901, are outside the scope of review here as they were not in the administrative record and Crossroads fails to show supplementation is appropriate. *See Camp v. Pitts*, 411 U.S. 138, 141–42 (1973); *Council for Urological Interests v. Burwell*, 790 F.3d 212, 222 (D.C. Cir. 2015); *Forest Cnty. Potawatomi Cmmty v. United States*, 270 F. Supp. 3d 174, 183 (D.D.C. 2017). Nor did any party submit them to the district court. *U.S. ex rel. Oliver v. Philip Morris USA Inc.*, 763 F.3d 36, 44 (D.C. Cir. 2014).

otherwise identify themselves. Rather, the pre-1979 form, like today's subsection (c)(2)(C), required disclosure of a contribution, including the contributor's identity as well as the date and amount, regardless of the IE it intended to further.

7. Crossroads's amici provide it no help. One amicus notes that the activity triggering reporting under § 30104(c) is the making of an IE, which the amicus says implies that the reportable contributions must similarly be limited. *See* McConnell Amicus Br. 19, ECF No. 1778186. When first drafted, however, the relevant triggering activity was *not* limited to IEs but rather included any "expenditures." *See* 2 U.S.C. § 435 (1970).[12] It was the Supreme Court that limited the expenditure trigger to IEs alone. *See Buckley*, 424 U.S. at 78–80. Congress then ratified that change in the 1976 amendments, FECA Amendments of 1976, Pub. L. 94-283, § 104(d), 90 Stat. 475 (1976), but left the obligation triggered as the *same* one imposed on political committees: to disclose *all* contributions over $200. There is no dispute that political committees must report contributions even if those funds are not intended to support IEs, and by explicit cross-reference, subsection (c)(1) imposes the same obligation on IE makers.

[12] Further, at that time, making a "contribution" also triggered a reporting requirement. 2 U.S.C. § 434(e) (1976). *Buckley* did not limit that trigger to contributions for IEs. *See Buckley*, 424 U.S. at 78 (including funds earmarked for any "political purpose"). The 1979 amendments removed this an independent trigger for reporting.

Crossroads's amici further argue that subsection (c)(3) requires all information in IE disclosure statements to be segregable on a candidate-by-candidate basis, including the reported contributions. McConnell Amicus Br. 29–30. But that is not so, because the indices do not list the IE maker's contributors. *See, e.g.*, FEC Index of Independent Expenditures, 1979-1980 (Nov. 1981), https://bit.ly/2OtkOie; FEC, Independent Expenditures Supporting/Opposing 2008 Presidential Campaigns by Candidate Through November 6, 2018, https://bit.ly/2YtTsxe. Thus, nothing in subsection (c)(3) requires that the reported contributions be attributable on an IE-by-IE basis. The same amicus also attempts to generate ambiguity from the FECA's references to "statements" and "reports," McConnell Amicus Br. 20, but that argument fails because subsection (c)(1) incorporates "the information required under subsection (b)(3)(A)," 52 U.S.C. § 30104(c)(1), regardless of the method used to submit it to FEC.

Finally, several amici argue that constitutional avoidance requires the Court read ambiguity into the statute where there is none. "[C]onstitutional avoidance," however, "has no role to play" when the text is clear. *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014). Moreover, there is no constitutional problem to avoid: subsections (c)(1) and (c)(2)(C) merely mandate contribution disclosure by those making IEs, and courts have found disclosure of such election-related funds is constitutional, even if not limited to contributions to fund IEs. *See Citizens United*,

558 U.S. at 370 (upholding disclosure of contributions); *McConnell v. FEC*, 540 U.S. 93, 200 (2003) (same); *Buckley*, 424 U.S. at 66–67 (same); *SpeechNow.org*, 599 F.3d at 698 (same). Indeed, the Court relied on the constitutionality of subsections (c)(1) and (c)(2)(C) to strike down a different burden on IE makers. *See MCFL*, 479 U.S. at 262. Accordingly, there is no constitutional concern that could justify 11 C.F.R. § 109.10(e)(1)(vi)'s departure from the plain text.[13]

In sum, subsections (c)(1) and (c)(2)(C) are unambiguous. Nothing in Crossroads's or its amici's arguments give cause for this Court to depart from its prior finding that the "text alone is enough to resolve th[is] case." *CREW*, 904 F.3d at 1018. The regulation fails under *Chevron* step one, and the district court was therefore correct to strike it as invalid.

C. Even if There Were Ambiguity, The Regulation Was Not a Permissible Construction

For the reasons stated above, the Court need not proceed to the second step of *Chevron*. Nonetheless, even if the statute were deemed to be ambiguous, the

[13] Nor does the definition of "contribution" create any constitutional avoidance issues when incorporated into subsection (c)(1). First, regardless of the definition, the FECA unambiguously imposes the *same* contribution reporting requirements on IE-makers as political committees, meaning the regulation failed under *any* definition of contribution. Second, the existence of "close cases" on the facts does not mean the definition is vague. *United States v. Williams*, 553 U.S. 285, 305–06 (2008). Third, *Buckley* itself interpreted contribution to *remove* any vagueness concerns, and found the term was constitutionally unambiguous without being limited to funds intended to further IEs. *Buckley*, 424 U.S. at 78.

district court correctly found that 11 C.F.R. § 109.10(e)(1)(vi) also fails *Chevron*'s second step. JA460 n.48.[14]

Under *Chevron*'s second step, courts determine "whether the agency's interpretation is reasonable," *Shays*, 414 F.3d at 96, "look[ing] to what the agency said at the time of the rulemaking—not to its lawyers' post-hoc rationalizations" to make that determination, *Burwell*, 790 F.3d at 222.

Disregarding this rule, Crossroads relies on arguments not advanced in the FEC's terse explanation for 11 C.F.R. § 109.10(e)(1)(vi). That is perhaps understandable as the entirety of the FEC's explanation is contained in twenty-nine words that does not even recognize, never mind explain, the regulation's divergence from the statute. JA327. Nonetheless, Crossroads's arguments remain improper because they were not the reason contemporaneously given by the FEC. *Burwell*, 790 F.3d at 222. They also fail to explain the divergence.

Crossroads implies that the FEC need not have explained the regulation because it was heavily involved in the legislative process. Crossroads Br. 43. Yet

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[14] The district court's holding also rendered the regulation independently invalid for its failure to "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Shays v. FEC*, 528 F.3d 914, 931–32 (D.C. Cir. 2008). A failure to explain is a substantive error that may be reviewed after an agency applies the regulation to a party. *See, e.g.*, *U.S. Telecomm. Assoc. v. FCC*, 825 F.3d 674, 701 (D.C. Cir. 2016) (challenge to agency's "fail[ure] to adequately explain" action is "substantive challenge[]").

Crossroads points to nothing in that involvement where the FEC recommended eliminating political committee-like contributor disclosure for those making IEs, despite the earlier statute's imposition of those obligations. *See* 2 U.S.C. § 434(e) (1976). Nor does Crossroads point to any evidence that the FEC recommended narrowing the contributor self-reporting obligation to the point of oblivion by requiring an explicit link between the contribution and a reported IE. That is because no such recommendation is in the record. *See Zuber v. Allen*, 396 U.S. 168, 193 (1969) (rejecting agency interpretation despite involvement in legislative drafting where agency "failed to communicate [its] understanding to the drafters"). Rather the FEC merely proposed shifting the contributor self-reporting obligation to the IE makers, FECA 1979 History 24–25, which then would apply in addition to the IE maker reporting obligation already in then-subsection (e)(1). Congress ratified *that* recommendation by dropping the contributor self-reporting obligation from then-subsection (e)(1) (now subsection (c)(1)) and moving it to a new subsection, (c)(2)(C). Congress changed nothing else about the contributor reporting obligations relevant here. Indeed, *had* the FEC recommended either eliminating subsection (c)(1) reporting or severely limiting subsection (c)(2)(C) reporting as in 11 C.F.R. § 109.10(e)(1)(vi), then Congress expressly *rejected*

those suggestions because it explicitly retained subsection (c)(1) reporting and spoke directly on the scope of reporting required in subsection (c)(2)(C).[15]

Crossroads next relies on Congressional inaction since 1979, Crossroads Br. 45, but it does not show Congress thereby ratified 11 C.F.R. § 109.10(e)(1)(vi). First, "Congress cannot by its silence ratify an administrative interpretation that is contrary to the plain meaning of the Act." *Ashton v. Pierce*, 716 F.2d 56, 63 (D.C. Cir. 1983). Second, Crossroads fails to show "overwhelming evidence that Congress considered and failed to act upon the precise issue before the court" to make Congressional inaction even "probative." *Bismullah v. Gates*, 551 F.3d 1068, 1074 (D.C. Cir. 2009). Crossroads and its amici can only point to congressional consideration of *other* aspects of campaign finance, for example, debates about BCRA, which did not change the scope of IE reporting, *see* Crossroads Br. 8 n.2; *id.* at 47 (citing 145 Cong. Rec. S12734, S12753 (Oct. 18, 1999) (discussing regulation of non-IE "issue advocacy"); 143 Cong. Rec. S10485, S10486 (Oct. 7, 1997) (addressing disclosure by 501(c)(4) groups); 143 Cong. Rec. S10661 (Oct. 8, 1997) (addressing reporting obligations of political committees)), or bills creating

[15] Crossroads tries to bootstrap the post-enactment regulation into the FEC's "contemporaneous construction," Crossroads Br. 44, but the regulation's language appears nowhere in the contemporaneous recommendations, *see also Shearman v. Comm'r of Internal Revenue*, 66 F.2d 256, 257 (2d Cir. 1933) ("[C]ontemporaneous agency construction, if contrary to the terms of the statute, is merely erroneous, and has no effect except to call for correction.").

electronic filing and addressing similarly irrelevant issues, *id.* at 8 n.2. That hardly amounts to "overwhelming evidence that Congress considered and failed to act upon the precise issue" of contributor disclosure triggered by IEs under subsections (c)(1) and (c)(2)(C). *Bismullah*, 551 F.3d at 1074.

Nor is there some special 'inaction means ratification' rule that applies to the FECA. *Cf.* Crossroads Br. 46 n.15. Even with respect to the FECA, "post-enactment congressional inaction" has little probative use. *CREW*, 904 F.3d at 1018; *see also AFL-CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003) ("Congress's failure to act obviously cannot be viewed as a clear expression of intent."); *Shays v. FEC*, 337 F. Supp. 2d 28, 60–61 (D.D.C. 2004) (rejecting congressional ratification of FEC regulation), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005).[16] While FEC regulations and forms go to Congress to review, there is still no evidence Congress expressly considered 11 C.F.R. § 109.10(e)(1)(vi), recognized the conflict, and then adopted it. *Cf. Bismullah*, 551 F.3d at 1074. Indeed, it is highly unlikely Congress did so given that 11 C.F.R. § 109.10(e)(1)(vi) came to Congress as part

[16] The cases cited by Crossroads only used congressional inaction to support an interpretation otherwise found reasonable by the court. *See e.g.*, *FEC v. DSCC*, 454 U.S. 27, 32–35 (1981) (holding courts are "final authorities on issue of statutory construction"; noting agency's position was supported by legislative history); *FEC v. Ted Haley Cong. Comm.*, 852 F.2d 1111, 1114–16 (9th Cir. 1988) (finding statute had no "plain meaning," and regulation ensured statute would not be rendered "meaningless" by evasion); *NCPAC v. FEC*, 626 F.2d 953, 956 & n.7 (D.C. Cir. 1980) (finding nothing in text of statute contrary to regulation, and noting congressional inaction was only "further evidence" of plain reading).

of a full rewrite of all FEC regulations, consisting of over a hundred regulations spanning forty pages, JA319–66, and at a time long before *Citizens United* when non-political party IEs were relatively non-existent. In contrast, when Congress finally did become aware of the conflict, members of Congress sought to remedy it through legislative action. *See, e.g.*, H.R. 5175, 111th Cong. (2010); S. 3628, 111th Cong. (2010). That bill passed the House but failed due to a Senate filibuster by a single vote. 156 Cong. Rec. H4828 (June 24, 2010); 156 Cong. Rec. S7388 (Sept. 23, 2010). While "failed legislative proposals are particularly dangerous ground on which to rest an interpretation of a prior statute," *Central Bank*, 511 U.S. at 187, that action hardly shows a Congress fully in agreement with 11 C.F.R. § 109.10(e)(1)(vi).

For the same reason, the age of the regulation cannot save it from invalidity. Though it had little impact in its first three decades of existence, shortly after it had real impact in the wake of the *Citizens United* decision, affected parties began to take notice. Congress sought to amend the statute, a rulemaking petition was filed, and CREW began this challenge.[17]

[17] Crossroads asserts that no party submitted comment relating to 11 C.F.R. § 109.10(e)(1)(vi) during the 2003 rulemaking relating to BCRA. Crossroads Br. 50. That is because that rulemaking, and the BCRA itself, did not impact the scope of IE reporting. *See* 68 Fed. Reg. 404, 415 (Jan. 3, 2003) (renumbering 11 C.F.R. §109.10 but not altering disclosure).

Nor do Crossroads's belabored congressional purpose arguments justify 11 C.F.R. § 109.10(e)(1)(vi). Crossroads places inordinate weight on the 1979 Amendments' purpose to "simplify reporting and administrative procedures" to conclude those Amendments intended to effectively *eliminate* contributor reporting. Crossroads Br. 50. Rather, as is clear from the history, the amendments simplified reporting by shifting the contributors self-reporting obligation to the IE maker, but otherwise left the IE maker's previous obligations in place and did not otherwise impact the information to be reported.

In contrast, limiting contributor disclosure to the point of non-existence did not further the FECA's purpose of providing "total disclosure." *Buckley*, 424 U.S. at 76. Rather, the regulation "frustrate[ed] the policy that Congress sought to implement" because it allowed contributors and IE makers to "evade—almost completely—" the FECA's disclosure obligations. *Shays*, 528 F.3d at 925 (affirming striking of regulation); *see also Zuber*, 396 U.S. at 193 (rejecting interpretation by agency involved in drafting where interpretation frustrated statute's purpose). As noted, under the regulation, almost no contributor was ever reported, despite the millions spent on IEs post-*Citizens United.* JA100–02. Indeed, the facts below make plain the frustration of the statute's purpose. Despite Crossroads spending millions on IEs, viewers never learned the identity of anyone who was behind Crossroads and the "sources of [its] election-related spending."

McCutcheon, 572 U.S. at 223; *Citizens United*, 558 U.S. at 369 (FECA serves purpose of informing public about "the funding sources for the ads" speaking about a candidate); *SpeechNow.org*, 599 F.3d at 698 (public has interest in knowing not only who is making an IE, but also "who is funding that speech").

Crossroads's red-herrings about over-disclosure also would not justify the regulation. "[I]ndividuals who contribute to a union or corporation's general treasury" or give to "an animal welfare organization to lobby the local city council for a shelter" but lack a purpose to influence elections, Crossroads Br. 51–52, are not making "contributions" under the Act and are not reported. The regulation is not needed to protect them.[18] Crossroads further worries that a contributor intending to attack one candidate in Alaska may be identified in a report for an IE triggered by the recipient's attack on another candidate in Arkansas. Crossroads Br. 52. But that is exactly what happens when a contributor gives to a political committee—the committee reports the contribution regardless of whether it ever spends funds on the Alaska race at all. By expressly incorporating the FECA's

[18] *Van Hollen* was concerned about these donors being captured by a rule that required reporting of all "donations." *See* 811 F.3d at 488, *see also* 11 C.F.R. § 104.20(c)(7). Subsections (c)(1) and (c)(2)(C)'s focus on "contributions" does not raise that concern.

political committee contributor requirements, the FECA contemplates the exact same result with respect to those making IEs.[19]

Indeed, the facts here amply demonstrate the hazard of reporting only contributions tied to a specific IE: nothing is disclosed. Rather, contributions are far more likely to be targeted to "aid[ing] the election" of a federal candidate, but remain ambivalent about how that support is offered, JA192, JA194; or they give money after seeing the recipient's "exampl[e]" IEs, but don't have a fully formed idea about the exact nature of the IE that should eventually run, JA189. Congress sensibly wanted those contributions disclosed and wrote the FECA to expressly mandate that.

Indeed, by tying the contributor so closely to the IE, the regulation created redundancy in the FECA. That's because a contributor who intends to fund a specific IE that is reported is not a contributor at all: they have not "relinquish[ed] control over the contribution." 11 C.F.R. § 110.1(b)(6). Rather, anyone funding a specific IE has in fact "mad[e]" the IE, since one "makes" an IE by "pay[ing]" for it. 52 U.S.C. §§ 30101(9)(A), (17), 30104(c)(1); *see also* FEC, AO 2008-10 (Oct. 24, 2008), http://bit.ly/2AITSaa (one who funds a specific IE, even if created by third-party, has "made" the IE).

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[19] Moreover, the agency's sole constitutional means to address confusion is to "open the channels of communication rather than close them." *See Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

In sum, subsections (c)(1) and (c)(2)(C) are not ambiguous about what contributor information must be reported, but even if they were, Crossroads fails to offer a contemporaneous justification by the agency to show that the regulation is a reasonable interpretation of any ambiguity that exists.

D. The District Court Properly Invalidated 11 C.F.R. § 109.10(e)(1)(vi)

Though somewhat cryptic, Crossroads appears to attack the scope of the district court's injunction invalidating 11 C.F.R. § 109.10(e)(1)(vi) because, Crossroads asserts, "CREW only alleged that '11 C.F.R. § 109.101(e)(1)(vi) is unlawful and invalid [as to FECA (c)(2)].'" Crossroads Br. 30 (alterations in original). Crossroads's attacks are factually inaccurate, illogical, and fail to show the district court abused its broad discretion.

First, as demonstrated by the alterations in Crossroads's quotes, CREW's attack on the validity of the regulation was not limited to its conflict with subsection (c)(2)(C). Rather, CREW alleged the regulation "conflicts with the [reporting obligations] imposed by the statute *under the FECA*" and therefore is "unlawful and invalid." JA036 (emphasis added), *accord* JA013, JA038. Of course, because the FEC had already admitted below that the regulation conflicted with subsection (c)(1), that issue was not a focus of CREW's complaint. But Crossroads and the FEC put that issue squarely before the district court when, as part of their defense, they argued that the regulation *did* accurately reflect both

subsections (c)(1) and (c)(2)(C). *See* JA104–05, JA107–11, JA124. Indeed, by asserting that Crossroads violated subsection (c)(1), JA036–38 ¶¶ 125–31, CREW by necessity claimed that (a) the regulation was silent as to subsection (c)(1) and thus not an agency interpretation of that subsection, or (b) the regulation was an interpretation of subsection (c)(1) but was invalid. That's what CREW argued below. JA115–21.

Crossroads's attempt to finely slice the invalidation is also illogical: the regulation is either valid or not. It cannot be invalid as to subsection (c)(2)(C) but valid as to subsection (c)(1). Indeed, the only way for the regulation not to directly conflict with subsection (c)(1) is if the regulation was not intended to cover subsection (c)(1) reporting. That was the FEC's position in the administrative proceeding below and a position vehemently contested by Crossroads because it results in the same ruling on the matter: that subsection (c)(1) applies on its own force and the regulation is not a valid interpretation of it.[20]

Lastly, Crossroads fails to show any fault in the "broad discretion" of the district court to craft equitable relief. *Nat'l Min.*, 145 F.3d at 1408. The district

[20] Crossroads incorrectly asserts that the district court dismissed any challenge to the validity of the regulation beyond its conflict with 52 U.S.C. § 30104(c)(2)(C). Crossroads Br. 30. Even assuming a validity claim could be limited to a conflict with only one subsection, that is not what the court found. Rather, it found CREW could pursue its claim seeking to declare the regulation "unlawful and invalid," period. JA097.

court was "well within its discretion in finding that the complaint placed the [defendants] on notice" that CREW was attacking the validity of 11 C.F.R. § 109.10(e)(1)(vi) under both subsections (c)(1) and (c)(2). *Id.* The scope of the injunctive relief "is dictated by the extent of the violation established," *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979), not from some tortured reading of the pleadings. The district court properly declared the regulation was in conflict with both subsections (c)(1) and (c)(2)(C) and struck it as invalid based on the conflict demonstrated below.

III. CREW Exhausted Administrative Remedies Though It Need Not Have, and Its Attempt at Exhaustion was Futile

Crossroads spends much of its briefing trying to keep the validity of the regulation out of the courts, relying on a strained reading of the administrative proceedings and its assertion that CREW just should not be able to challenge the regulation outside of notice-and-comment rulemaking. Crossroads's arguments are again wrong on the facts, however, and meritless even if they were accurate.

First, Crossroads simply ignores the fact that CREW's administrative complaint alleged subsection (c)(1) imposed a distinct disclosure obligation from subsection (c)(2)(C). In fact, CREW alleged that:

> The FECA requires every person (other than a political committee) who expends more than $250 on independent expenditures during a calendar year to file reports with the FEC identifying each person (other than a political committee) who makes contributions totaling more than $200 in a calendar year to the person making independent

> expenditures. 2 U.S.C. § 434(c)(1) (referencing 2 U.S.C. § 434(b)(3)(A)).

JA199 ¶ 14.[21] Then, after laying out subsection (c)(2)(C), CREW alleged that "FEC regulations interpret these provisions"—plural—in 11 C.F.R. § 109.10(e)(1)(vi), while noting that the regulation "fails to give full effect to these provisions"—again, plural. JA200 ¶ 16 & n.1. Rather than confining the issues to a footnote in "background," Crossroads Br. 25, CREW squarely laid out the conflict between the regulation and the statute, and then asked the FEC to enforce both provisions of the FECA independently from the regulation. JA207 ¶ 44, JA208 ¶ 50, JA211 ¶ 60) (alleging Crossroads "violated 2 U.S.C. § 434 and 11 C.F.R. § 109.10(e)(1)(vi)"). CREW's complaint was more than adequate to alert the FEC and Crossroads to the issue, as both addressed the validity of the regulation in their responses. JA190, JA270 n.57. Given that record, it was eminently reasonable, and surely not an "abuse of discretion," *Avocados Plus*, 370 F.3d at 1250, for the district court to conclude that CREW exhausted any administrative remedies as to the validity of the regulation. JA416–19 (finding CREW provided the FEC "the opportunity to consider the matter, make its ruling, and state the reasons for its actions," citing *Coburn v. McHugh*, 679 F.3d 924, 931 (D.C. Cir. 2012)).

[21] Crossroads incorrectly states CREW's entire discussion of subsection (c)(1) is limited to its mandate of quarterly reports. *See* Crossroads Br. 27 (quoting JA200 ¶ 17).

Moreover, the district court recognized CREW's attempt at exhaustion—while made—was also futile, and thus CREW need not have exhausted at all. JA416 n. 30 (citing *Ass'n of Flight Attendants v. Chao-CWA*, 493 F.3d 155, 159 (D.C. Cir. 2007) (courts may excuse exhaustion where it is futile)). As the district court noted, three commissioners blocked a rulemaking to revise 11 C.F.R. § 109.10(e)(1)(vi) to conform with the FECA, despite the fact that their own OGC recognized the regulation conflicted with the statute. *Id.*; *see also* JA267 & n.48. Indeed, Crossroads cites a letter from two of those commissioners further committing themselves to the invalid regulation. Crossroads Br. 18.

Furthermore, even without these findings, there is simply no need to exhaust administrative remedies to challenge the validity of a rule. *See AT&T Co. v. FCC*, 978 F.2d 727, 734 (D.C. Cir. 1992); *Murphy Expl. and Prod. Co. v. U.S. Dep't of Interior*, 270 F.3d 957, 958–59 (D.C. Cir. 2001) (holding plaintiff could challenge legality of rule even if it did not challenge rule before agency); *see also Darby v. Disneros*, 509 U.S. 137, 154 (1993) (holding "[c]ourts are not free to impose an exhaustion requirement" to APA claims). *AT&T* is particularly instructive. There, the plaintiff filed an administrative complaint that did not mention the relevant regulation at all. 978 F.2d at 730. Rather, the respondent raised it in defense, and the agency relied on it in dismissing the complaint. *Id.* at 730–31. Nonetheless, the

plaintiff was still able to challenge that regulation in court simply because the regulation was applied to it. *Id.* at 734.[22]

Crossroads confuses the issue by relying on the FECA's exhaustion requirements applicable to judicial review of a dismissal of an administrative complaint. Crossroads Br. 24. Crossroads simply asserts the same statutory requirements apply to challenge to a regulation's validity under the APA, but it cites nothing for that conclusion. Rather, Crossroads ignores the fact that "[t]he FECA has no provisions governing judicial review of regulations, so an action challenging its implementing regulations should be brought under the [APA]." *Perot*, 97 F.3d at 560.

In short, Crossroads fails to show the district court abused its discretion in finding that CREW exhausted its remedies, even though it was futile, and despite the fact exhaustion is unnecessary for this APA claim.

IV. CREW Had Standing Below

Crossroads also challenges CREW's standing to seek APA relief below, asserting CREW's injuries were not remedial because Crossroads was immune from enforcement and because CREW did not challenge the regulation within six

[22] Crossroads's authority relates to a challenge in the initial review period after rulemaking, *see* Crossroads Br. 23–24, not to a challenge after application. *See NLRB Union v. FLRA*, 834 F.2d 191, 196 (D.C. Cir. 1987) (requiring exhaustion would "effectively deny many parties ultimately affected by a rule an opportunity to question its validity").

years of its adoption. These arguments have now been rejected three times and should again be rejected.

To start, Crossroads did not enjoy immunity from enforcement. First, the viability of a 52 U.S.C. § 30111(e) defense depends on facts that are in dispute here and does not block all remedies. *See Larouche v. FEC*, 28 F.3d 137, 142 (D.C. Cir. 1994); *FEC v. O'Donnell*, 209 F. Supp. 3d 727, 743 (D. Del. 2016); JA474–75. Second, *CREW* v. *FEC*, 892 F.3d 434 (D.C. Cir. 2018), does not apply where the dismissal was non-discretionary, or where the FEC has abdicated enforcement by adopting an invalid regulation. JA270–71 & n.57, JA475–78. Third, the statute of limitations did not bar the FEC from seeking equitable relief. *See FEC v. Christian Coal.*, 965 F. Supp. 66, 71 (D.D.C. 1997). Fourth, Crossroads's repeated assertion that CREW's purported abandonment of its FECA claim *after* judgment defeated its standing *before* judgment remains "wrong chronologically." *CREW*, 904 F.3d at 1018.

More importantly, the viability of CREW's FECA claim was and is irrelevant to its APA claim. CREW's APA claim arises from the fact that the regulation was "applied" to it. *AT&T*, 978 F.2d at 734. While Crossroads would prefer CREW pursue a rulemaking, Crossroads Br. 34, "[n]othing . . . prevents [CREW] from pursuing its claim in a second forum;" *i.e.,* though this lawsuit. *Murphy Expl.*, 270 F.3d at 958–59. The regulation's existence and its application

to CREW violated CREW's right to receive information, causing CREW injury, regardless of whether CREW could have brought a successful FECA claim. *See FEC v. Akins*, 524 U.S. 11, 21 (1998); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). Nor was redress limited to the FECA claim. Rather, "[w]here an agency rule causes the injury, as here, the redressability requirement may be satisfied by vacating the challenged rule." *Shays*, 414 F.3d at 95. That is precisely what the district court did, remedying CREW's injury not only from Crossroads's failure to disclose, but from all IE-makers who failed and would fail to disclose due to the regulation.

For the same reason, CREW's claim was timely. *Weaver*, 744 F.3d at 145; *AT&T*, 978 F.2d at 734 n.7; *NLRB Union*, 834 F.2d at 195. CREW brought a facial challenge to the regulation within six years of its application to CREW. *P&V Enter. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1026 (D.C. Cir. 2008). CREW need not show the application was "material," *cf.* Crossroads Br. 31 (introducing term without any authority), but the application clearly was: the regulation was the sole reason given to dismiss both of CREW's subsection (c)(1) and (c)(2)(C) claims. *See* JA270–71 & n.57.

V. Crossroads, However, Does Not Have Standing To Bring This Appeal

In contrast to CREW, Crossroads does not have standing to bring this appeal. Appellants must establish Article III standing to appeal. *Hollingsworth v.*

Perry, 570 U.S. 693, 715 (2013). To do so, appellants must establish that the *judgment* below caused them injury. *Liberty Mut. Ins. Co. v. Travelers Indem. Co.*, 78 F.3d 639, 642 (D.C. Cir. 1996).[23] Crossroads has not done that.

First, Crossroads intervened below to defend its first FECA dismissal. *See Crossroads GPS v. FEC*, 788 F.3d 312 (D.C. Cir. 2015). Any interest Crossroads had in defending that action, however, was mooted when the FEC dismissed CREW's claims on remand.[24] Crossroads has demonstrated "no material risk of enforcement" from the FEC over its other IEs, *Matthew A. Goldstein, PLLC v. U.S. Dep't of State*, 851 F.3d 1, 5 (D.C. Cir. 2017), particularly where the FEC has adopted an express policy of not seeking enforcement for any IE before September 18, 2018 and Crossroads ceased making IEs in 2014.[25] *See* FEC Guidance.

That leaves the purported chill from the judgment on Crossroads's future IEs. But Crossroads fails to demonstrate any "concrete plans" to have engaged in IEs at the time of judgment which could have been chilled by it. *Summers v. Earth*

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[23] Because an appellant's injury must stem from the judgment, the time to determine an appellant's standing is not the commencement of litigation. *Cf.* Crossroads Br. 19.

[24] Contrary to one amicus, even a moot appeal would not require vacating the judgment below. Crossroads's interest was mooted by the FEC's dismissal on new grounds, not the "unilateral action of the party who prevailed," *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994), and the APA claim is not on appeal because the real party in interest who is bound the injunction, the FEC, "declined to pursue its appeal," *id.* at 25–26.

[25] *See* FEC, Independent Expenditures (last visited Mar. 27, 2019), https://bit.ly/2N5Xjyc.

Island Inst., 555 U.S. 488, 496 (2009). Indeed, Crossroads now admits that it ceased all plans to make IEs *four years before* the judgment. Crossroads Br. 10. Crossroads's worry about a "legal cloud" is no more than a "speculative" fear of a future event, not a "certainly impending" injury. *Clapper v. Amnesty Int'l, USA*, 568 U.S. 398, 401 (2013); *see also Nader v. FEC*, 725 F.3d 226, 229 (D.C. Cir 2013) (no standing for candidate who did not have concrete plans to run for office); *Am. Library Ass'n v. Barr*, 956 F.2d 1178, 1194 (D.C. Cir. 1992) ("[S]ubjective 'chill' alone will not suffice to confer standing on a litigant bringing a pre-enforcement facial challenge to a statute allegedly infringing on the freedom of speech."); *cf. ANSWER Coal. v. DC*, 589 F.3d 433, 435–36 (D.C. Cir. 2009) (plaintiffs facing pending "enforcement action" for speech and who currently suffered viewpoint discrimination had standing on motion to dismiss); *see also ANSWER Coal. v. DC*, 798 F. Supp. 2d 134, 143 (D.D.C. 2011) (noting plaintiff submitted "specific postering campaigns" that violated statute). Nor does Crossroads even now identify an untimely but concrete plan to make an IE—likely because the record shows Crossroads has terminated its electioneering to take advantage of another organization's tax-exempt status. Robert Maguire, One Nation rising: Rove-linked group goes from no revenue to more than $10 million in 2015, OPENSECRETS NEWS (Nov. 17, 2016), https://bit.ly/2fJebqp; Josh Israel,

Karl Rove's Outside Spending Groups Migrate To New Dark Money Outfit, THINKPROGRESS (Aug. 11, 2016), https://bit.ly/2Ccvy0z.

While Crossroads desires to "resume making independent expenditures" without disclosure "some day," the impairment of that desire is not an Article III injury. Law Aff. ¶ 10, ECF 1757141; *Summers*, 555 U.S. at 496. Crossroads shows no concrete injury traceable to the judgment below, so the appeal must be dismissed for lack of jurisdiction.

CONCLUSION

CREW respectfully requests this Court dismiss the instant appeal as Crossroads lacks standing to bring it. Alternatively, if this Court finds this appeal is properly within its jurisdiction, CREW respectfully requests this Court affirm judgment of the district court below.

Respectfully submitted,

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Dated: May 29, 2019

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 29th day of May, 2019, I caused this Brief of Appellees to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

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ADDENDUM

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52 U.S.C. § 30104

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DISCLOSURE OF FEDERAL CAMPAIGN FUNDS

§ 30104. Reporting Requirements

(a) Receipts and disbursements by treasurers of political committees; filing requirements

(1) Each treasurer of a political committee shall file reports of receipts and disbursements in accordance with the provisions of this subsection. The treasurer shall sign each such report.

(2) If the political committee is the principal campaign committee of a candidate for the House of Representatives or for the Senate—

(A) in any calendar year during which there is1 regularly scheduled election for which such candidate is seeking election, or nomination for election, the treasurer shall file the following reports:

(i) a pre-election report, which shall be filed no later than the 12th day before (or posted by any of the following: registered mail, certified mail, priority mail having a delivery confirmation, or express mail having a delivery confirmation, or delivered to an overnight delivery service with an on-line tracking system, if posted or delivered no later than the 15th day before) any election in which such candidate is seeking election, or nomination for election, and which shall be complete as of the 20th day before such election;

(ii) a post-general election report, which shall be filed no later than the 30th day after any general election in which such candidate has sought election, and which shall be complete as of the 20th day after such general election; and

(iii) additional quarterly reports, which shall be filed no later than the 15th day after the last day of each calendar quarter, and which shall be complete as of the last day of each calendar quarter: except that the report for the quarter ending December 31 shall be filed no later than January 31 of the following calendar year; and

(B) in any other calendar year the treasurer shall file quarterly reports, which shall be filed not later than the 15th day after the last day of each calendar quarter, and which shall be complete as of the last day of each calendar quarter, except that the report for the quarter ending December 31 shall be filed not later than January 31 of the following calendar year.

(3) If the committee is the principal campaign committee of a candidate for the office of President—

(A) in any calendar year during which a general election is held to fill such office—

(i) the treasurer shall file monthly reports if such committee has on January 1 of such year, received contributions aggregating $100,000 or made expenditures aggregating $100,000 or anticipates receiving contributions aggregating $100,000 or more or making expenditures aggregating $100,000 or more during such year: such monthly reports shall be filed no later than the 20th day after the last day of each month and shall be complete as of the last day of the month, except that, in lieu of filing the report otherwise due in November and December, a pre-general election report shall be filed in accordance with paragraph (2)(A)(i), a post-general election report shall be filed in accordance with paragraph (2)(A)(ii), and a year end report shall be filed no later than January 31 of the following calendar year;

(ii) the treasurer of the other principal campaign committees of a candidate for the office of President shall file a pre-election report or reports in accordance with paragraph (2)(A)(i), a post-general election report in accordance with paragraph (2)(A)(ii),

and quarterly reports in accordance with paragraph (2)(A)(iii); and

(iii) if at any time during the election year a committee filing under paragraph (3)(A)(ii) receives contributions in excess of $100,000 or makes expenditures in excess of $100,000, the treasurer shall begin filing monthly reports under paragraph (3)(A)(i) at the next reporting period; and

(B) in any other calendar year, the treasurer shall file either—

(i) monthly reports, which shall be filed no later than the 20th day after the last day of each month and shall be complete as of the last day of the month; or

(ii) quarterly reports, which shall be filed no later than the 15th day after the last day of each calendar quarter and which shall be complete as of the last day of each calendar quarter.

(4) All political committees other than authorized committees of a candidate shall file either—

(A)

(i) quarterly reports, in a calendar year in which a regularly scheduled general election is held, which shall be filed no later than the 15th day after the last day of each calendar quarter: except that the report for the quarter ending on December 31 of such calendar year shall be filed no later than January 31 of the following calendar year;

(ii) a pre-election report, which shall be filed no later than the 12th day before (or posted by any of the following: registered mail, certified mail, priority mail having a delivery confirmation, or express mail having a delivery confirmation, or delivered to an overnight delivery service with an on-line tracking system, if posted or delivered no later than the 15th day before) any election in which the committee makes a contribution to or expenditure on behalf of a candidate in such election, and which shall be complete as of the 20th day before the election;

(iii) a post-general election report, which shall be filed no later than the 30th day after the general election and which shall be complete as of the 20th day after such general election; and

(iv) in any other calendar year, a report covering the period beginning January 1 and ending June 30, which shall be filed no later than July 31 and a report covering the period beginning July 1 and ending December 31, which shall be filed no later than January 31 of the following calendar year; or

(B) monthly reports in all calendar years which shall be filed no later than the 20th day after the last day of the month and shall be complete as of the last day of the month, except that, in lieu of filing the reports otherwise due in November and December of any year in which a regularly scheduled general election is held, a pre-general election report shall be filed in accordance with paragraph (2)(A)(i), a post-general election report shall be filed in accordance with paragraph (2)(A)(ii), and a year end report shall be filed no later than January 31 of the following calendar year.

Notwithstanding the preceding sentence, a national committee of a political party shall file the reports required under subparagraph (B).

(5) If a designation, report, or statement filed pursuant to this Act (other than under paragraph (2)(A)(i) or (4)(A)(ii) or subsection (g)(1)) is sent by registered mail, certified mail, priority mail having a delivery confirmation, or express mail having a delivery confirmation, the United States postmark shall be considered the date of filing the designation, report or statement. If a designation, report or statement filed pursuant to this Act (other than under paragraph (2)(A)(i) or (4)(A)(ii), or subsection (g)(1)) is sent by an overnight delivery service with an on-line tracking system, the date on the proof of delivery to the delivery service shall be considered the date of filing of the designation, report, or statement.

(6)

(A) The principal campaign committee of a candidate shall notify the Secretary or the Commission, and the Secretary of State, as

appropriate, in writing, of any contribution of $1,000 or more received by any authorized committee of such candidate after the 20th day, but more than 48 hours before, any election. This notification shall be made within 48 hours after the receipt of such contribution and shall include the name of the candidate and the office sought by the candidate, the identification of the contributor, and the date of receipt and amount of the contribution.

(B) Notification of expenditure from personal funds

(i) Definition of expenditure from personal funds

In this subparagraph, the term "expenditure from personal funds" means--

(I) an expenditure made by a candidate using personal funds; and

(II) a contribution or loan made by a candidate using personal funds or a loan secured using such funds to the candidate's authorized committee.

(ii) Declaration of intent

Not later than the date that is 15 days after the date on which an individual becomes a candidate for the office of Senator, the candidate shall file a declaration stating the total amount of expenditures from personal funds that the candidate intends to make, or to obligate to make, with respect to the election that will exceed the State-by-State competitive and fair campaign formula with—

(I) the Commission; and

(II) each candidate in the same election.

(iii) Initial notification

Not later than 24 hours after a candidate described in clause (ii) makes or obligates to make an aggregate amount of expenditures from personal funds in excess of 2 times the

threshold amount in connection with any election, the candidate shall file a notification with—

(I) the Commission; and

(II) each candidate in the same election.

(iv) Additional notification

After a candidate files an initial notification under clause (iii), the candidate shall file an additional notification each time expenditures from personal funds are made or obligated to be made in an aggregate amount that exceed2 $10,000 with—

(I) the Commission; and

(II) each candidate in the same election.

Such notification shall be filed not later than 24 hours after the expenditure is made.

(v) Contents

A notification under clause (iii) or (iv) shall include—

(I) the name of the candidate and the office sought by the candidate;

(II) the date and amount of each expenditure; and

(III) the total amount of expenditures from personal funds that the candidate has made, or obligated to make, with respect to an election as of the date of the expenditure that is the subject of the notification.

(C) Notification of disposal of excess contributions

In the next regularly scheduled report after the date of the election for which a candidate seeks nomination for election to, or election to, Federal office, the candidate or the candidate's authorized

committee shall submit to the Commission a report indicating the source and amount of any excess contributions (as determined under paragraph (1) of section 30116(i) of this title) and the manner in which the candidate or the candidate's authorized committee used such funds.

(D) Enforcement

For provisions providing for the enforcement of the reporting requirements under this paragraph, see section 30109 of this title.

(E) The notification required under this paragraph shall be in addition to all other reporting requirements under this Act.

(7) The reports required to be filed by this subsection shall be cumulative during the calendar year to which they relate, but where there has been no change in an item reported in a previous report during such year, only the amount need be carried forward.

(8) The requirement for a political committee to file a quarterly report under paragraph (2)(A)(iii) or paragraph (4)(A)(i) shall be waived if such committee is required to file a pre-election report under paragraph (2)(A)(i), or paragraph (4)(A)(ii) during the period beginning on the 5th day after the close of the calendar quarter and ending on the 15th day after the close of the calendar quarter.

(9) The Commission shall set filing dates for reports to be filed by principal campaign committees of candidates seeking election, or nomination for election, in special elections and political committees filing under paragraph (4)(A) which make contributions to or expenditures on behalf of a candidate or candidates in special elections. The Commission shall require no more than one pre-election report for each election and one post-election report for the election which fills the vacancy. The Commission may waive any reporting obligation of committees required to file for special elections if any report required by paragraph (2) or (4) is required to be filed within 10 days of a report required under this subsection. The Commission shall establish the reporting dates within 5 days of the setting of such election and shall publish such dates and notify the

principal campaign committees of all candidates in such election of the reporting dates.

(10) The treasurer of a committee supporting a candidate for the office of Vice President (other than the nominee of a political party) shall file reports in accordance with paragraph (3).

(11)

(A) The Commission shall promulgate a regulation under which a person required to file a designation, statement, or report under this Act—

(i) is required to maintain and file a designation, statement, or report for any calendar year in electronic form accessible by computers if the person has, or has reason to expect to have, aggregate contributions or expenditures in excess of a threshold amount determined by the Commission; and

(ii) may maintain and file a designation, statement, or report in electronic form or an alternative form if not required to do so under the regulation promulgated under clause (i).

(B) The Commission shall make a designation, statement, report, or notification that is filed with the Commission under this Act available for inspection by the public in the offices of the Commission and accessible to the public on the Internet not later than 48 hours (or not later than 24 hours in the case of a designation, statement, report, or notification filed electronically) after receipt by the Commission.

(C) In promulgating a regulation under this paragraph, the Commission shall provide methods (other than requiring a signature on the document being filed) for verifying designations, statements, and reports covered by the regulation. Any document verified under any of the methods shall be treated for all purposes (including penalties for perjury) in the same manner as a document verified by signature.

(D) As used in this paragraph, the term "report" means, with respect to the Commission, a report, designation, or statement required by this Act to be filed with the Commission.

(12) Software for filing of reports

(A) In general

The Commission shall—

(i) promulgate standards to be used by vendors to develop software that—

(I) permits candidates to easily record information concerning receipts and disbursements required to be reported under this Act at the time of the receipt or disbursement;

(II) allows the information recorded under subclause (I) to be transmitted immediately to the Commission; and

(III) allows the Commission to post the information on the Internet immediately upon receipt; and

(ii) make a copy of software that meets the standards promulgated under clause (i) available to each person required to file a designation, statement, or report in electronic form under this Act.

(B) Additional information

To the extent feasible, the Commission shall require vendors to include in the software developed under the standards under subparagraph (A) the ability for any person to file any designation, statement, or report required under this Act in electronic form.

(C) Required use

Notwithstanding any provision of this Act relating to times for filing reports, each candidate for Federal office (or that candidate's authorized committee) shall use software that meets the standards

promulgated under this paragraph once such software is made available to such candidate.

(D) Required posting

The Commission shall, as soon as practicable, post on the Internet any information received under this paragraph.

(b) Contents of reports

Each report under this section shall disclose—

(1) the amount of cash on hand at the beginning of the reporting period;

(2) for the reporting period and the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), the total amount of all receipts, and the total amount of all receipts in the following categories:

(A) contributions from persons other than political committees;

(B) for an authorized committee, contributions from the candidate;

(C) contributions from political party committees;

(D) contributions from other political committees;

(E) for an authorized committee, transfers from other authorized committees of the same candidate;

(F) transfers from affiliated committees and, where the reporting committee is a political party committee, transfers from other political party committees, regardless of whether such committees are affiliated;

(G) for an authorized committee, loans made by or guaranteed by the candidate;

(H) all other loans;

(I) rebates, refunds, and other offsets to operating expenditures;

(J) dividends, interest, and other forms of receipts; and

(K) for an authorized committee of a candidate for the office of President, Federal funds received under chapter 95 and chapter 96 of Title 26;

(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 election cycle, in the case of an authorized committee of a candidate for Federal office), or in any lesser amount if the reporting committee should so elect, together with the date and amount of any such contribution;

(B) political committee which makes a contribution to the reporting committee during the reporting period, together with the date and amount of any such contribution;

(C) authorized committee which makes a transfer to the reporting committee;

(D) affiliated committee which makes a transfer to the reporting committee during the reporting period and, where the reporting committee is a political party committee, each transfer of funds to the reporting committee from another political party committee, regardless of whether such committees are affiliated, together with the date and amount of such transfer;

(E) person who makes a loan to the reporting committee during the reporting period, together with the identification of any endorser or guarantor of such loan, and the date and amount or value of such loan;

(F) person who provides a rebate, refund, or other offset to operating expenditures to the reporting committee in an aggregate amount or value in excess of $200 within the calendar year (or election cycle,

in the case of an authorized committee of a candidate for Federal office), together with the date and amount of such receipt; and

(G) person who provides any dividend, interest, or other receipt to the reporting committee in an aggregate value or amount in excess of $200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), together with the date and amount of any such receipt;

(4) for the reporting period and the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), the total amount of all disbursements, and all disbursements in the following categories:

(A) expenditures made to meet candidate or committee operating expenses;

(B) for authorized committees, transfers to other committees authorized by the same candidate;

(C) transfers to affiliated committees and, where the reporting committee is a political party committee, transfers to other political party committees, regardless of whether they are affiliated;

(D) for an authorized committee, repayment of loans made by or guaranteed by the candidate;

(E) repayment of all other loans;

(F) contribution refunds and other offsets to contributions;

(G) for an authorized committee, any other disbursements;

(H) for any political committee other than an authorized committee—

(i) contributions made to other political committees;

(ii) loans made by the reporting committees;

(iii) independent expenditures;

(iv) expenditures made under section 30116(d) of this title; and

(v) any other disbursements; and

(I) for an authorized committee of a candidate for the office of President, disbursements not subject to the limitation of section 30116(b) of this title;

(5) the name and address of each--

(A) person to whom an expenditure in an aggregate amount or value in excess of $200 within the calendar year is made by the reporting committee to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure;

(B) authorized committee to which a transfer is made by the reporting committee;

(C) affiliated committee to which a transfer is made by the reporting committee during the reporting period and, where the reporting committee is a political party committee, each transfer of funds by the reporting committee to another political party committee, regardless of whether such committees are affiliated, together with the date and amount of such transfers;

(D) person who receives a loan repayment from the reporting committee during the reporting period, together with the date and amount of such loan repayment; and

(E) person who receives a contribution refund or other offset to contributions from the reporting committee where such contribution was reported under paragraph (3)(A) of this subsection, together with the date and amount of such disbursement;

(6)

(A) for an authorized committee, the name and address of each person who has received any disbursement not disclosed under paragraph

(5) in an aggregate amount or value in excess of $200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), together with the date and amount of any such disbursement;

(B) for any other political committee, the name and address of each—

(i) political committee which has received a contribution from the reporting committee during the reporting period, together with the date and amount of any such contribution;

(ii) person who has received a loan from the reporting committee during the reporting period, together with the date and amount of such loan;

(iii) person who receives any disbursement during the reporting period in an aggregate amount or value in excess of $200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), in connection with an independent expenditure by the reporting committee, together with the date, amount, and purpose of any such independent expenditure and a statement which indicates whether such independent expenditure is in support of, or in opposition to, a candidate, as well as the name and office sought by such candidate, and a certification, under penalty of perjury, 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 committee;

(iv) person who receives any expenditure from the reporting committee during the reporting period in connection with an expenditure under section 30116(d) of this title, together with the date, amount, and purpose of any such expenditure as well as the name of, and office sought by, the candidate on whose behalf the expenditure is made; and

(v) person who has received any disbursement not otherwise disclosed in this paragraph or paragraph (5) in an aggregate amount or value in excess of $200 within the calendar year (or

election cycle, in the case of an authorized committee of a candidate for Federal office), from the reporting committee within the reporting period, together with the date, amount, and purpose of any such disbursement;

(7) the total sum of all contributions to such political committee, together with the total contributions less offsets to contributions and the total sum of all operating expenditures made by such political committee, together with total operating expenditures less offsets to operating expenditures, for both the reporting period and the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office); and

(8) the amount and nature of outstanding debts and obligations owed by or to such political committee; and where such debts and obligations are settled for less than their reported amount or value, a statement as to the circumstances and conditions under which such debts or obligations were extinguished and the consideration therefor.

(c) Statements by other than political committees; filing; contents; indices of expenditures

(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.

(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.

(d) Filing by facsimile device or electronic mail

(1) Any person who is required to file a statement under subsection (c) or (g) of this section, except statements required to be filed electronically pursuant to subsection (a)(11)(A)(i) may file the statement by facsimile device or electronic mail, in accordance with such regulations as the Commission may promulgate.

(2) The Commission shall make a document which is filed electronically with the Commission pursuant to this paragraph accessible to the public on the Internet not later than 24 hours after the document is received by the Commission.

(3) In promulgating a regulation under this paragraph, the Commission shall provide methods (other than requiring a signature on the document being filed) for verifying the documents covered by the regulation. Any document verified under any of the methods shall be treated for all purposes (including penalties for perjury) in the same manner as a document verified by signature.

(e) Political committees

(1) National and congressional political committees

The national committee of a political party, any national congressional campaign committee of a political party, and any subordinate committee of either, shall report all receipts and disbursements during the reporting period.

(2) Other political committees to which section 30125 of this title applies

(A) In general

In addition to any other reporting requirements applicable under this Act, a political committee (not described in paragraph (1)) to which section 30125(b)(1) of this title applies shall report all receipts and disbursements made for activities described in section 30101(20)(A) of this title, unless the aggregate amount of such receipts and disbursements during the calendar year is less than $5,000.

(B) Specific disclosure by State and local parties of certain non-Federal amounts permitted to be spent on Federal election activity

Each report by a political committee under subparagraph (A) of receipts and disbursements made for activities described in section 30101(20)(A) of this title shall include a disclosure of all receipts and disbursements described in section 30125(b)(2)(A) and (B) of this title.

(3) Itemization

If a political committee has receipts or disbursements to which this subsection applies from or to any person aggregating in excess of $200 for any calendar year, the political committee shall separately itemize its reporting for such person in the same manner as required in paragraphs (3)(A), (5), and (6) of subsection (b).

(4) Reporting periods

Reports required to be filed under this subsection shall be filed for the same time periods required for political committees under subsection (a)(4)(B).

(f) Disclosure of electioneering communications

(1) Statement required

Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement containing the information described in paragraph (2).

(2) Contents of statement

Each statement required to be filed under this subsection shall be made under penalty of perjury and shall contain the following information:

(A) The identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement.

(B) The principal place of business of the person making the disbursement, if not an individual.

(C) The amount of each disbursement of more than $200 during the period covered by the statement and the identification of the person to whom the disbursement was made.

(D) The elections to which the electioneering communications pertain and the names (if known) of the candidates identified or to be identified.

(E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8) directly to this account for electioneering communications, the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. Nothing in this subparagraph is to be construed as a prohibition on the use of funds in such a segregated account for a purpose other than electioneering communications.

(F) If the disbursements were paid out of funds not described in subparagraph (E), the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.

(3) Electioneering communication

For purposes of this subsection—

(A) In general

(i) The term "electioneering communication" means any broadcast, cable, or satellite communication which—

(I) refers to a clearly identified candidate for Federal office;

(II) is made within—

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

(ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to

vote for or against a specific candidate. Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations.

(B) Exceptions

The term "electioneering communication" does not include—

(i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) a communication which constitutes an expenditure or an independent expenditure under this Act;

(iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(iv) any other communication exempted under such regulations as the Commission may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 30101(20)(A)(iii) of this title.

(C) Targeting to relevant electorate

For purposes of this paragraph, a communication which refers to a clearly identified candidate for Federal office is "targeted to the relevant electorate" if the communication can be received by 50,000 or more persons—

(i) in the district the candidate seeks to represent, in the case of a candidate for Representative in, or Delegate or Resident Commissioner to, the Congress; or

(ii) in the State the candidate seeks to represent, in the case of a candidate for Senator.

(4) Disclosure date

For purposes of this subsection, the term "disclosure date" means—

(A) the first date during any calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000; and

(B) any other date during such calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000 since the most recent disclosure date for such calendar year.

(5) Contracts to disburse

For purposes of this subsection, a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement.

(6) Coordination with other requirements

Any requirement to report under this subsection shall be in addition to any other reporting requirement under this Act.

(7) Coordination with Title 26

Nothing in this subsection may be construed to establish, modify, or otherwise affect the definition of political activities or electioneering activities (including the definition of participating in, intervening in, or influencing or attempting to influence a political campaign on behalf of or in opposition to any candidate for public office) for purposes of Title 26.

(g) Time for reporting certain expenditures

(1) Expenditures aggregating $1,000

(A) Initial report

A person (including a political committee) that makes or contracts to make independent expenditures aggregating $1,000 or more after the 20th day, but more than 24 hours, before the date of an election shall file a report describing the expenditures within 24 hours.

(B) Additional reports

After a person files a report under subparagraph (A), the person shall file an additional report within 24 hours after each time the person makes or contracts to make independent expenditures aggregating an additional $1,000 with respect to the same election as that to which the initial report relates.

(2) Expenditures aggregating $10,000

(A) Initial report

A person (including a political committee) that makes or contracts to make independent expenditures aggregating $10,000 or more at any time up to and including the 20th day before the date of an election shall file a report describing the expenditures within 48 hours.

(B) Additional reports

After a person files a report under subparagraph (A), the person shall file an additional report within 48 hours after each time the person makes or contracts to make independent expenditures aggregating an additional $10,000 with respect to the same election as that to which the initial report relates.

(3) Place of filing; contents

A report under this subsection—

(A) shall be filed with the Commission; and

(B) shall contain the information required by subsection (b)(6)(B)(iii), including the name of each candidate whom an expenditure is intended to support or oppose.

(4) Time of filing for expenditures aggregating $1,000

Notwithstanding subsection (a)(5), the time at which the statement under paragraph (1) is received by the Commission or any other recipient to whom the notification is required to be sent shall be considered the time of filing of the statement with the recipient.

(h) Reports from Inaugural Committees

The Federal Election Commission shall make any report filed by an Inaugural Committee under section 510 of Title 36 accessible to the public at the offices of the Commission and on the Internet not later than 48 hours after the report is received by the Commission.

(i) Disclosure of bundled contributions

(1) Required disclosure

Each committee described in paragraph (6) shall include in the first report required to be filed under this section after each covered period (as defined in paragraph (2)) a separate schedule setting forth the name, address, and employer of each person reasonably known by the committee to be a person described in paragraph (7) who provided 2 or more bundled contributions to the committee in an aggregate amount greater than the applicable threshold (as defined in paragraph (3)) during the covered period, and the aggregate amount of the bundled contributions provided by each such person during the covered period.

(2) Covered period

In this subsection, a "covered period" means, with respect to a committee—

(A) the period beginning January 1 and ending June 30 of each year;

(B) the period beginning July 1 and ending December 31 of each year; and

(C) any reporting period applicable to the committee under this section during which any person described in paragraph (7) provided 2 or more bundled contributions to the committee in an aggregate amount greater than the applicable threshold.

(3) Applicable threshold

(A) In general

In this subsection, the "applicable threshold" is $15,000, except that in determining whether the amount of bundled contributions provided to a committee by a person described in paragraph (7) exceeds the applicable threshold, there shall be excluded any contribution made to the committee by the person or the person's spouse.

(B) Indexing

In any calendar year after 2007, section 30116(c)(1)(B) of this title shall apply to the amount applicable under subparagraph (A) in the same manner as such section applies to the limitations established under subsections (a)(1)(A), (a)(1)(B), (a)(3), and (h) of such section, except that for purposes of applying such section to the amount applicable under subparagraph (A), the "base period" shall be 2006.

(4) Public availability

The Commission shall ensure that, to the greatest extent practicable—

(A) information required to be disclosed under this subsection is publicly available through the Commission website in a manner that is searchable, sortable, and downloadable; and

(B) the Commission's public database containing information disclosed under this subsection is linked electronically to the websites

maintained by the Secretary of the Senate and the Clerk of the House of Representatives containing information filed pursuant to the Lobbying Disclosure Act of 1995.

(5) Regulations

Not later than 6 months after September 14, 2007, the Commission shall promulgate regulations to implement this subsection. Under such regulations, the Commission—

(A) may, notwithstanding paragraphs (1) and (2), provide for quarterly filing of the schedule described in paragraph (1) by a committee which files reports under this section more frequently than on a quarterly basis;

(B) shall provide guidance to committees with respect to whether a person is reasonably known by a committee to be a person described in paragraph (7), which shall include a requirement that committees consult the websites maintained by the Secretary of the Senate and the Clerk of the House of Representatives containing information filed pursuant to the Lobbying Disclosure Act of 1995;

(C) may not exempt the activity of a person described in paragraph (7) from disclosure under this subsection on the grounds that the person is authorized to engage in fundraising for the committee or any other similar grounds; and

(D) shall provide for the broadest possible disclosure of activities described in this subsection by persons described in paragraph (7) that is consistent with this subsection.

(6) Committees described

A committee described in this paragraph is an authorized committee of a candidate, a leadership PAC, or a political party committee.

(7) Persons described

A person described in this paragraph is any person, who, at the time a contribution is forwarded to a committee as described in paragraph

(8)(A)(i) or is received by a committee as described in paragraph (8)(A)(ii), is—

(A) a current registrant under section 4(a) of the Lobbying Disclosure Act of 1995;

(B) an individual who is listed on a current registration filed under section 4(b)(6) of such Act or a current report under section 5(b)(2)(C) of such Act; or

(C) a political committee established or controlled by such a registrant or individual.

(8) Definitions

For purposes of this subsection, the following definitions apply:

(A) Bundled contribution

The term "bundled contribution" means, with respect to a committee described in paragraph (6) and a person described in paragraph (7), a contribution (subject to the applicable threshold) which is—

(i) forwarded from the contributor or contributors to the committee by the person; or

(ii) received by the committee from a contributor or contributors, but credited by the committee or candidate involved (or, in the case of a leadership PAC, by the individual referred to in subparagraph (B) involved) to the person through records, designations, or other means of recognizing that a certain amount of money has been raised by the person.

(B) Leadership PAC

The term "leadership PAC" means, with respect to a candidate for election to Federal office or an individual holding Federal office, a political committee that is directly or indirectly established, financed, maintained or controlled by the candidate or the

individual but which is not an authorized committee of the candidate or individual and which is not affiliated with an authorized committee of the candidate or individual, except that such term does not include a political committee of a political party.

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

(a) Political committees, including political party committees, must report independent expenditures under 11 CFR 104.4.

(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.

(c) For each election in which a person who is not a political committee makes independent expenditures, the person shall aggregate its independent expenditures made in each calendar year to determine its reporting obligation. When such a person makes independent expenditures aggregating $ 10,000 or more for an election in any calendar year, up to and including the 20th day before an election, the person must report the independent expenditures on FEC Form 5, or by signed statement if the person is not otherwise required to file electronically under 11 CFR 104.18. The person making the independent expenditures aggregating $ 10,000 or more must ensure that the Commission receives the report or statement by 11:59 p.m. Eastern Standard/Daylight Time on the second day following the date on which a communication is publicly distributed or otherwise publicly disseminated. Each time subsequent independent expenditures relating to the same election aggregate an additional $ 10,000 or more, the person making the independent expenditures must ensure that the Commission receives a new 48-hour report of the subsequent independent expenditures. Each 48-hour report must contain the information required by paragraph (e)(1) of this section.

(d) Every person making, after the 20th day, but more than 24 hours before 12:01 a.m. of the day of an election, independent expenditures aggregating $ 1,000 or more with respect to a given election must report those independent expenditures and ensure that the Commission receives the report or signed statement by 11:59 p.m. Eastern Standard/Daylight Time on the day following the date on which a communication is publicly distributed or otherwise publicly disseminated. Each time subsequent independent expenditures relating to the same election aggregate $ 1,000 or more, the person making the independent expenditures must ensure that the Commission receives a new 24-hour report of the subsequent independent expenditures. (See 11 CFR 104.4(f) for aggregation.) Such report or statement shall contain the information required by paragraph (e) of this section.

(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:

(i) The reporting person's name, mailing address, occupation, and the name of his or her employer, if any;

(ii) The identification (name and mailing address) of the person to whom the expenditure was made;

(iii) The amount, date, and purpose of each expenditure;

(iv) [Effective until Mar. 31, 2019.] A statement that indicates whether such expenditure was in support of, or in opposition to a candidate, together with the candidate's name and office sought;

(iv) [Effective Mar. 31, 2019.] A statement that indicates whether such expenditure was in support of, or in opposition to a candidate, together with the candidate's name and office sought; if the expenditure meets the criteria set forth in 11 CFR 104.3(b)(3)(vii)(C), memo text must be used to indicate the states in which the communication is distributed, as prescribed in that section;

(v) A verified certification under penalty of perjury as to whether such expenditure was made in cooperation, consultation, or concert with, or at the request or suggestion of a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents; and

(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.

(2) Verification of independent expenditure statements and reports. Every person shall verify reports and statements of independent expenditures filed pursuant to the requirements of this section by one of the methods stated in paragraph (e)(2)(i) or (ii) of this section. Any report or statement verified under either of these methods shall be treated for all purposes (including penalties for perjury) in the same manner as a document verified by signature.

(i) For reports or statements filed on paper (e.g., by hand-delivery, U.S. Mail, or facsimile machine), the person who made the independent expenditure shall certify, under penalty of perjury, the independence of the expenditure by handwritten signature immediately following the certification required by paragraph (e)(1)(v) of this section.

(ii) For reports or statements filed by electronic mail, the person who made the independent expenditure shall certify, under penalty of perjury, the independence of the expenditure by typing the treasurer's name immediately following the certification required by paragraph (e)(1)(v) of this section.