ORAL ARGUMENT NOT YET SCHEDULED

No. 18-5261

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

CROSSROADS GRASSROOTS POLICY STRATEGIES

Defendant-Appellant,

v.

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON AND NICHOLAS MEZLAK,

Plaintiffs-Appellees,

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia, No. 16-cv-259

BRIEF OF MITCH MCCONNELL, MAJORITY LEADER OF THE UNITED STATES SENATE, AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici*

To counsel's knowledge, the parties, intervenors, and amici appearing before this Court are listed in the brief for appellant Crossroads Grassroots Policy Strategies.

B. Rulings Under Review

An accurate reference to the ruling at issue appears in the brief for appellant Crossroads Grassroots Policy Strategies.

C. Related Cases

This case was previously before this Court on Crossroads' Emergency Motion for Stay. *See CREW v. FEC*, 904 F.3d 1014 (D.C. Cir. 2018) (per curiam). Amicus is not aware of any other related case, as defined by Rule 28.

/s/ Bobby R. Burchfield
Bobby R. Burchfield

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GLOSSARY OF ABBREVIATIONS

BCRA	Bipartisan Campaign Reform Act
Commission	Federal Election Commission
CREW	Citizens for Responsibility and Ethics in Washington
Crossroads	Crossroads Grassroots Policy Strategies
FEC	Federal Election Commission
FECA	Federal Election Campaign Act of 1971, as amended
MAFS	Muslim American Freedom Society
MCFL	*FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986)

STATUTES AND REGULATIONS

The pertinent statutes and regulations are reproduced in an addendum to Appellant's opening brief.

INTEREST OF *AMICUS CURIAE*[1]

Senator Mitch McConnell is the Majority Leader of the United States Senate and the senior United States Senator from the Commonwealth of Kentucky. He is the former Chairman of the National Republican Senatorial Committee, a national political party committee comprising the Republican members of the United States Senate.

Leader McConnell is a respected senior statesman and is recognized as the Senate's most passionate defender of the First Amendment guarantee of unrestricted political speech. As he said on the Senate floor just a few months ago, "[t]his fundamental right [to free speech] is one of our most cherished. It forms the beating heart of our democracy. It sits at the core of our civic identity. Yet, these days, it seems to be coming under an increasing threat all across our country." 163 Cong. Rec. S3678 (daily ed. June 21, 2018) (statement of Sen. McConnell).

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[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or part; no party or counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than Senator McConnell made such a contribution. *See* Fed. R. Civ. P. 29(c); D.C. Cir. R. 29.

The Leader has acquired considerable experience over the last three decades complying with federal and state campaign finance restrictions and legislating on campaign finance issues. For many years, Leader McConnell has participated in litigation challenging restrictions on political speech. For example, he was the lead plaintiff challenging the Bipartisan Campaign Reform Act ("BCRA") in *McConnell v. FEC*, 540 U.S. 93 (2003). In addition, he participated as *amicus* by brief and oral argument in both *Citizens United v. FEC*, 558 U.S. 310 (2010), which overruled *McConnell v. FEC* in part, and in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), which overruled *Buckley v. Valeo*, 424 U.S. 1 (1976), in part. Senator McConnell submits this brief in support of Appellant Crossroads Grassroots Policy Strategies ("Crossroads").

SUMMARY OF ARGUMENT

The Commission's regulation implements 52 U.S.C. § 30104(c) by construing the section as an integrated whole. The regulation requires prompt disclosure of information in a "statement" about who is funding a particular independent expenditure, for or against which candidate, on which dates, by what means, and with how much money. The disclosed information is precisely the information Congress mandated the

Commission to produce in "indices" on "a candidate-by-candidate basis" for publication on "a timely pre-election basis." *Id.* § 30104(c)(3). The Commission's interpretation of Section 30104(c) as an integrated whole is the most reasonable interpretation but, even if not the most reasonable, is at least a permissible interpretation.

To hold that the Commission's interpretation is "unambiguously foreclosed" by the statute, the district court disaggregated the statute into divergent parts. It held that subsection (c)(1) imposes a separate disclosure obligation for "all contributions" to the spending entity, whether or not those contributions were used for independent expenditures. It held that subsection (c)(2)(C) requires a separate disclosure identifying "each person" who contributed more than $250 "for the purpose of furthering [any] independent expenditure." And it held that subsections (c)(2)(A) and (B) require yet a third type of statement focused on particular independent expenditures. By failing to take the full context of the section into account, the district court reached a result that would unnecessarily complicate and proliferate disclosure obligations by persons who make independent expenditures.

Because the district court erred in holding that the Commission's regulation is foreclosed by the statute, Majority Leader McConnell supports the request of appellant Crossroads GPS that the ruling be reversed and the regulation reinstated.

INTRODUCTION

Sweeping aside four decades of uncontroversial history, as well as contemporaneous and repeated congressional reviews, the lower court invalidated portions of 11 C.F.R. § 109.10(e) as contrary to the Federal Election Campaign Act ("FECA") Amendments of 1979. By reading the statutory provisions in isolation, however, the district court failed to appreciate the interrelationships among FECA's independent expenditure disclosure provisions. The Federal Election Commission understood these statutory interrelationships and forged a regulatory regime that has repeatedly passed review by Congress and has also passed the test of time. A careful review of the entire statutory structure, set forth below, demonstrates the lower court's errors. Accordingly, the decision below must be reversed and the regulation at issue upheld as an appropriate exercise of regulatory discretion.

BACKGROUND

This case concerns a challenge to a regulation adopted by the Commission in 1980 to implement certain amendments to the FECA adopted by Congress in 1979. Because Plaintiffs, Citizens for Responsibility and Ethics in Washington and Nicolas Mezlak (together "CREW"), have withdrawn their administrative complaint, the focus of this case is now directly on the validity of the Commission's regulation.

A. The Statutory Provisions

Under FECA and Commission regulations, "political committees" are subject to extensive and regular reporting obligations. Since the "primary purpose" of political committees is either to elect a specific candidate or to engage in federal election-related activities, *Citizens for Responsibility and Ethics in Washington v. FEC*, 316 F. Supp. 3d 349, 368 (D.D.C. 2018) *("CREW")*, all their contributions and expenditures are subject to regulation and regular reporting. *See*, *e.g.*, 52 U.S.C. § 30104(a)(4)(A) (quarterly report option) and (B) (monthly report option).

The parties agree that Crossroads is not a "political committee," and thus is not subject to these same regular reporting requirements. Rather, it is a social welfare organization qualified under section

501(c)(4) of the Internal Revenue Code. *CREW*, 316 F. Supp. 3d at 356 n.1. No formal structure is necessary to make an independent expenditure, and the First Amendment protects the right of all domestic individuals, persons, and entities to engage in independent express advocacy.[2] Indeed, social welfare organizations like Crossroads, fully taxable corporations, labor unions, partnerships, and even informal groups of individuals now regularly make independent expenditures. It is difficult to capture the scope of non-political entities that make independent expenditures in a single phrase, but this brief will refer to them as "independent spenders."[3]

Many independent spenders collect money through their business operations, dues, or donations that are not subject to the FECA source

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[2] *See e.g., Citizens United*, 558 U.S. at 365 (for profit corporations may make independent expenditures from corporate treasury funds); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259 (1986) ("MCFL")(non-profit corporation may make independent expenditures under certain conditions notwithstanding its corporate form).

[3] This Court referred to entities that make independent expenditures, but that are not political committees, as "independent expenditure committees." *CREW v. FEC*, 904 F.3d 1014, 1016 (D.C. Cir. 2018) (per curiam). The district court referred to them as "not-political committees." *CREW*, 316 F.Supp.3d at 368. Neither term is precise, since individuals, groups, corporations, or other entities making independent expenditures may not be "committees" of any sort. *See* Brief of Crossroads GPS at 18 n.6 ("Crossroads Br.").

and amount restrictions. Such independent spenders are not allowed to make contributions to candidate committees, political party committees, or political committees, and those political entities are not allowed to receive money from such independent spenders.[4]

Disclosure obligations for independent spenders who are not political committees are set forth in statutory provisions and regulations different from those governing political committees. *See* 52 U.S.C. § 30104(c). *See also* 11 C.F.R. § 104.4(a) (distinguishing independent expenditure disclosures by political committees from those by persons who are not political committees). An independent spender must disclose under FECA only when it makes an independent expenditure; unless and until it does so, it has no disclosure obligation under FECA whatsoever. If, however, an independent spender makes independent expenditures "in excess of $250 during a calendar year," it becomes subject to a unique reporting regime. *See* 52 U.S.C. § 30104(c)(1).

The FECA provision directly at issue in this case is not the only provision of FECA that addresses independent expenditure disclosure, however. If the independent spender makes one or more independent

[4] *See* 52 U.S.C. §§ 30116(f), 30118(a); 11 C.F.R. § 114.2(a), (d)

expenditures exceeding $10,000 more than 20 days before an election, it must file a statement as to each expenditure within 48 hours. *See* 52 U.S.C. § 30104(g)(2); 11 C.F.R. § 109.10(c). If the independent spender makes one or more independent expenditures exceeding $1,000 within 20 days of an election, it must file a statement as to each expenditure within 24 hours. *See* 52 U.S.C. § 30104(g)(1); 11 C.F.R. § 109.10(d). For each calendar year in which it makes independent expenditures exceeding $200, the independent spender also becomes subject to the same regular disclosure schedule as an authorized House or Senate committee, 52 U.S.C. § 30104(c)(2) (incorporating 52 U.S.C. § 30104(a)(2)), although the content of the disclosures is different.

The two statutory provisions at issue in this case fall within 52 U.S.C. § 30104(c), which states in full (with bold italics added):

> (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) of this section, made by or for each candidate, as reported under this subsection, and for periodically publishing such indices on a timely pre-election basis.

The word choices by Congress in this provision are significant. *First*, "contribution" is a defined term in FECA meaning anything of value given "for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A). Independent spenders may now make expenditures from a broader range of funds than just "contributions," including funds from dues, business operations, and other monies not

received for the purpose of influencing a federal election.[5] *Second*, to describe the disclosure obligation of independent spenders, these provisions use the term "statement" rather than "report." FECA uses the term "report" to describe the disclosures required of political committees. *See, e.g.,* § 30104(a) (concerning "reports" of political committees); § 30104(b) (describing content of "reports"). In contrast, Congress generally (but not unfailingly) used "statement" to describe the disclosure obligations of independent spenders. *See*, *e.g.,* §§ 30104(c), (d).

The cross-references within Section 30104(c) are also significant, Section 30104(c)(1) requires the filing of a "statement" containing "the information required under subsection (b)(3)(A)." Section 30104(b)(3)(A) sets forth one element of political committee reports, and requires the reporting committee to identify each contributor of more than *$250*, together with the date and amount of the contribution. In contrast, Section 30104(c)(2) says that "[s]tatements required to be filed by this subsection"—that is 30104(c)—"shall include" information set forth in (c)(2)(A), (B), and (C). Section 30104(c)(2)(A) requires "the information

[5] *Cf. Citizens United*, 558 U.S. at 365 (2010) (holding that prohibitions on corporations using treasury funds for independent expenditures were contrary to First Amendment).

required by subsection (b)(6)(B)(iii)," which requires detailed disclosures regarding specific independent expenditures by political committees. Section 30104(c)(2)(B) requires a certification of no coordination. Most important for present purposes, Section 30104(c)(2)(C) requires "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*."

The evident purpose of requiring disclosure of independent expenditures within 24 or 48 hours of the time they are made is to let the public know immediately and precisely *who* is advocating the election or defeat of *which specific* candidate, in *what* manner, and with *how much money*. Thus, the focus of the disclosure regime is, necessarily, on *specific* independent expenditures and on the date, amount, location, candidate, and contributors related to each specific expenditure. Subsection 30104(c)(3) confirms this purpose by requiring the Commission "expeditiously" to prepare and publish "indices" setting forth the independent expenditures made by or for "each candidate."

B. The Regulations

In its expedited effort to comply with the congressional mandate to implement these requirements, the Commission promulgated a number of regulations addressing independent expenditures, including the one at issue here, 11 C.F.R. § 109.10(e). *See especially id.* § 109.10(c), (d) (24- and 48-hour disclosures). These regulations also use "statement" rather than "report" to refer to disclosures by independent spenders, and set forth a cohesive disclosure regime. Because the 24- and 48-hour statements are triggered by specific independent expenditures, section 109.10(e) of the regulations requires the reports to be specific to those independent expenditures. The statements, on FEC Form 5, must identify the independent spender; the person (*e.g.*, the television station) receiving the expenditure, the amount, date, and purpose of the expenditure; whether it was made in support of or in opposition to a federal candidate; a verified certification that it was made independently; and "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." 11 C.F.R. § 109.10(e)(1)(vi)

In addition to this immediate reporting, Commission regulations also require parallel quarterly disclosures on FEC Form 5 "for any quarterly period during which any such independent expenditures that aggregate in excess of $250 are made." 11 C.F.R. § 109.10(b).

ARGUMENT

To invalidate the regulation, CREW must show that the statute unambiguously precludes the Commission's interpretation of the statute. Put a different way, the regulation survives in either of two circumstances: (a) the regulation is consistent with the plain language of the statute, or (b) the statute is ambiguous and the regulation represents a reasonable, even if not the best, interpretation of the statute.

The statute addresses a number of complexities and an evolving landscape of independent expenditures. The regulation reflects a straightforward interpretation of the pertinent provisions, considered within the broad framework of FECA and its effort to require disclosure of independent expenditures by entities other than political committees without subjecting those independent spenders to excessive regulation.

Even if the statute could have more than one meaning, the meaning reflected in the regulations is at least a reasonable one, if not the most reasonable one.

To invalidate the regulation, the district court adopted an interpretation of subsection (c)(1) that makes it a stand-alone disclosure obligation, rather than an integral part of subsection (c) as a whole. The district court committed the same error with regard to subsection (c)(2)(C), again reading it as a standalone disclosure obligation—apart from not only (c)(1) but also from (c)(2)(A) and (B)—to require disclosures that are not sensible in the overall context. As explained below, the district court reached this result by ignoring the unifying term in both subsections (c)(1) and (c)(2)—"statement."

I. CROSSROADS HAS STANDING TO APPEAL.

CREW's motion to dismiss the appeal calls into question whether the district court's ruling has injured Crossroads in a legally cognizable way. *See Liberty Mut. Ins. Co. v. Travelers Indem. Co.*, 78 F.3d 639, 642 (D.C. Cir. 1996).[6] When a law burdening expressive rights also empowers

[6] Notably CREW argues lack of appellate standing, which would deprive this Court of jurisdiction to decide the appeal but leave the district court's order in place, rather than mootness, which would require that the

the government to punish a violation of the law, the presumption of enforcement establishes imminent injury-in-fact. *U.S. Telecom Ass'n v. FCC*, 825 F.3d 675, 739 (D.C. Cir. 2016).

Indeed, this court found appellate standing on markedly similar facts in *Act Now to Stop War & End Racism Coalition v. Dist. Of Columbia ("ANSWER II")*, 589 F.3d 433, 435 (D.C. Cir. 2009). In that case, the plaintiff organization, Muslim American Society Freedom Foundation ("MASF"), challenged a District of Columbia sign-posting ordinance on First Amendment grounds. *See id.* at 433. The district court held MASF lacked standing to sue because it had not alleged any plans to violate the law. *See id.* at 435. But this court reversed. *See id.* It recognized that MASF's desire to post signs for longer than the ordinance allowed amounted to "a credible statement … of intent to commit violative acts." *Id.* (citations omitted). And it further recognized

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district court's order be vacated and thus nullified. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 38–41 (1950).

that the District's past efforts to enforce the ordinance against MASF established an imminent threat of enforcement. *See id.*

So too here. For years, Crossroads operated under a regulatory regime that included 11 C.F.R. § 109.10(e)(1)(vi). It hopes to continue operating in that manner after resolution of this lawsuit. *See* App. at __ (Law Affidavit at 2). Doing so in defiance of the district court's order would, however, invite liability for civil penalties and injunctive relief under FECA. *See* 52 U.S.C. § 30109. Thus, because Crossroads intends to resume operations that would, at present, violate the law as interpreted by the district court, *see* App. at __ (Law Affidavit at 5), it need not actually violate the law to establish an imminent injury-in-fact. *See ANSWER II*, 589 F.3d at 435. Accordingly, Crossroads has standing to appeal the order.

II. THE REGULATION REPRESENTS THE BEST, OR AT LEAST A REASONABLE, INTERPRETATION OF THE STATUTE.

This Court is familiar with the two-step process for reviewing agency regulations set forth in *Chevron USA Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). First, the Court must ask "whether Congress has directly spoken to the precise question at issue." *Id.* at 842.

Second, if Congress has not "directly addressed the precise question at issue," then the Court must determine "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Only if CREW can show that FECA "'*unambiguously forecloses*' [the Commission's] interpretation" can it prevail at *Chevron* step one. *Associated Builders & Contractors, Inc. v. Shiu*, 773 F.3d 257, 262 (D.C. Cir. 2014) (citation omitted) (emphasis added).

We begin by explaining how the district court failed to take account of the statute's full context, and then overstepped the appropriate bounds of judicial review. Then, we show that the Commission avoided that error and set forth an accurate interpretation of the statute in its regulation. And finally, we show that, even if the statute were ambiguous, the Commission's interpretation is at least a reasonable interpretation.

A. By Failing To Read Subsection 30104(c) in Proper Context, the District Court Misconstrued It.

The district court read the components of Section 30104(c) as divisible parts rather than as a unified whole. By doing so, it interpreted the provision as requiring at least three different types of independent expenditure disclosures: a first, general statement disclosing "all contributions" received by the spender, to comply with subsection (c)(1);

a second, more limited statement disclosing all "contribution[s] . . . made for the purpose of furthering an independent expenditure," to comply with subsection (c)(2)(C); and yet a third statement disclosing details about individual independent expenditures, to comply with subsections (c)(2)(A) and (B). *CREW*, 316 F. Supp. 3d at 395–403 (regarding (c)(1); 403–06 (regarding distinctions between (c)(1) and (c)(2)(C), and between (c)(2)(C) and (c)(2)(A) and (B)). This interpretation is erroneous.

In construing subsection (c)(1) to require free-standing reporting of "all contributions" required by the independent spender, the district court confronted a number of obstacles. The first obstacle was the term "all contributions." It recognized that FECA defines "contribution" as including only those monies given "for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i). Since independent spenders "may include social welfare organizations" which "may have non-political primary missions," *CREW*, 316 F. Supp. 3d at 400, "donors . . . who want to fund only the organization's administrative expenses or not-political activities, may do so without being identified." *Id.* at 400–01. But the court left unsaid what to do about donations from donors who do not specify how the spender must use their donations.

The district court next suggested that Section 30104(c)(1) requires independent spenders to disclose all monies received for the purpose of "making contributions to candidates, political committees, or political parties." *Id.* at 401. This construction is odd for three reasons. First, Section 30104(c) is plainly structured to address reporting of *independent expenditures* by independent spenders, not *contributions* from independent spenders *to* political committees. Second, independent spenders frequently hold unregulated money—earnings from operations, donations in amounts exceeding the FECA contribution limits, union dues, and so forth. For this reason, many independent spenders are not allowed to make "contributions" to political parties, candidates, or committees. (*See* p. 7 n.4, above). Finally, in those rare situations in which independent spenders may be allowed to make "contributions" to candidates, parties, or other political committees, FECA imposes the obligation to report contributions from non-political committees on the *recipient*, *not* on the *contributor*. *See* 52 U.S.C. § 30104(a), (b); 11 C.F.R. §§ 104.1 and 104.3.

The district court's interpretation of (c)(1) as a free-standing disclosure requirement also confronts subsection (c)(1)'s cross reference

to subsection (b)(3)(A). Subsection (c)(1) applies to independent spenders and (b)(3)A) applies to political committees. Subsection (c)(1) requires a "statement" and (b)(3)(A) specifies one element of a "report." Although recognizing that (b)(3)(A) did not quite mesh with (c)(1), the district court nevertheless concluded that "the *gist*" of (b)(3)(A) "*appears easily applicable*" to independent spenders, 316 F. Supp. 3d at 397 (emphasis added), that "the cross-reference to subsection (b)(3)(A) is *viable*" when applied to independent spenders, *id.,* and that (c)(2) imposes "*similar* disclosure requirements as those imposed on political committees" by (b)(3)(A). *Id.* "Gist," "viable," and "similar" are not words reflecting plain meaning; they are words reflecting interpretation of a cross reference that does not quite match the referring provision. Nevertheless, the district court muscled through the mis-match by imposing its own gloss on how the two provisions should work together.

The district court next turned to Section 30104(c)(2), which says "[s]tatements required to be filed" by Section 30104(c) "shall include" three categories of information on *specific* independent expenditures. Section 30104(c)(2)(A) requires the independent committee's statement to contain information required by Section 30104(b)(6)(B)(iii), which

relates to specific expenditures: it requires identification of the person receiving the disbursement (e.g., the television station), a statement of the date, amount, and purpose of the expenditure, whether the expenditure is in support or opposition to any candidate and if so which candidate, and an affirmation that the expenditure was not made in cooperation, consultation, or concert with" any candidate. Next, Section 30104(c)(2)(B) requires a statement under penalty of perjury whether "the independent expenditure is made in cooperation, consultation, or concert" with any candidate. And finally, section 30104(c)(2)(C) requires the identification of "each person who made a contribution in excess of $200" to the reporting committee "*for the purpose of furthering an independent expenditure*." (emphasis added).

Although the district court recognized (correctly) that (c)(2)(A) and (B) require disclosure of specific independent expenditures, it determined that they "stand in stark contrast to the third paragraph (C)," which it construed as more generally applicable. 316 F. Supp. 3d at 406. Thus, the district court believed that (c)(1) requires disclosure of "all contributions" (as modified by the district court), whereas (c)(2)(C) requires disclosure of the more limited group of contributions over $250

"made for the purpose of furthering [any] independent expenditure." Under the district court's interpretation, (c)(1) does not correlate to (c)(2)(C), and neither of those provisions correlate to (c)(2)(A) or (B). The court did not explain how the divergent information required by its interpretation would allow the Commission to issue the indices required by subsection (c)(3). In short, the district court's reading is not a natural reading of Section 30104(c) as a whole.

As shown below, a reading that unifies subsections (c)(1) and (c)(2) is more consistent with the mandate in (c)(2) that "[s]tatements required to be filed by this subsection . . . shall include" the information in (c)(2)(A), (B), and (C). In the district court's reading, the statements required by (c)(1) do *not* include the information required by (c)(2)(A), (B), and (C), and the statements required by (c)(2)(C) do *not* include the information required by (c)(2)(A) and (B). Read as a whole, 52 U.S.C. § 30104(c) requires an independent spender to file a "statement" disclosing the specified information for each independent expenditure.

B. The Commission Construed Section 30104(c) With Reference to Proper Context.

In contrast to the district court's atomized reading of the statute, the Commission read the disclosure provisions as part of an integrated whole.

The text provides the proper starting point for this analysis. *See S. Calif. Edison Co. v. FERC*, 195 F.3d 17, 23 (D.C. Cir. 1999). The court "should not confine itself to examining … particular statutory provision[s] in isolation." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)). "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Brown & Williamson Tobacco*, 529 U.S. at 133 (citations omitted). "'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the

provisions of the whole law.'" *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 895 F.3d 90, 97 (D.C. Cir. 2018) (citations omitted).

1. The Regulation Follows the Mandate for a "Statement" in (c)(1) and (c)(2).

The Commission's regulation requires persons other than political committees to file a statement when they make an independent expenditure, as required by subsection (c)(1), and requires each such statement to have the content set forth in subsection (c)(2), which focuses on particular independent expenditures. As shown (pp. 11–13 above), the regulation requires the independent spender to disclose, for each expenditure, the spender's name; the name of the recipient of the expenditure; amount, date, and purpose of the expenditure; whether it was intended to support or oppose a candidate, and if so which one; a certification on non-coordination; and "identification of each person who made a contribution in excess of $200 . . . for the purpose of furthering *the reported independent expenditure*." This reading of the statute achieves what the district court's reading does not: it unifies all elements of Section 30104(c) into an integrated whole, with each provision accounted for, and it

also collects in a statement all information necessary for publication of the indices required by (c)(3) on a timely basis.

The Commission's reading is not only sensible, but more faithful to the "two over-arching goals" of the 1979 amendments to FECA, which the district court summarized as "(1) [t]o simplify reporting requirements for candidates and committees under [FECA], and (2) to encourage grass roots participation in Federal election campaigns." *CREW*, 316 F. Supp. 3d at 375. Proliferation of statements with overlapping but inconsistent information would not serve those goals.

2. Subsection 30104(c)(2)(C) Confirms the Commission's Reading.

Subsection (c)(2)(C) requires "the persons submitting *such statement*" to disclose each person who made a contribution over $200 "for the purpose of furthering *an independent expenditure*." *Id.* § 30104(c)(2)(C) (emphasis added). Subsection (c)(2)(C) confirms the Commission's interpretation, and further rebuts the district court's. To begin, it falls within the same subsection as two provisions that plainly refer to specific independent expenditures. The district court recognized that (c)(2)(A) uses "*the* independent expenditure," and that (c)(2)(B) uses "*such* independent expenditure," but believed that these usages of the singular "stand in stark

contrast to the third paragraph (C), which uses the indefinite article 'an' to modify 'independent expenditure.'" *See* 316 F. Supp. 3d at 406. According to the district court, subsection (c)(2)(C) requires disclosure of any and all contributions made for the purpose of furthering *any* independent expenditure. As shown (pp. 20–21 above), the district court's interpretation requires a *different* statement than required by (c)(1) ("all contributions") and a *different* statement than required by (c)(2)(A and B) (which focus on specific expenditures).

What the lower court missed, however, was that (c)(2)(C) also refers to "the person filing *such statement*"—a plain reference back to the same term in (c)(1) and (c)(2). The most direct interpretation, if not the only one, is that (c)(2)(C) instructs the independent committee filing *a statement* regarding *a particular independent expenditure* in compliance with subsection (c)(2)(A) and (c)(2)(B), to include *in that statement* the identity of persons who contributed "for the purpose of furthering an independent expenditure" being disclosed in the statement. It makes perfect sense to require an independent spender to include in its statement disclosing an independent expenditure supporting candidate Jones in Nebraska a list of all contributors who supported *that* specific independent expenditure. It

does not, we respectfully submit, make sense for that statement also to identify a donor who specifically supported an expenditure (disclosed in a different statement) opposing candidate Smith in New York. Such a disclosure inaccurately suggests that all disclosed donors support Smith, and thus would confuse rather than enlighten the public. *Cf. Van Hollen, Jr. v. FEC*, 811 F.3d 486, 497 (D.C. Cir. 2016) (Republican donor to the American Cancer Society should not be identified as a supporter of advertisements critical of Republican lawmakers).

The Supreme Court's decision in *Caraco Pharm. Labs., Ltd. V. Novo Nordisk A/S*, 566 U.S. 399 (2012), supports this construction. In *Caraco*, the Court considered whether a statute allowed the generic drug manufacturer to bring a counterclaim "'on the ground that the *patent does not claim … **an*** approved method of using the drug.'" *Id*. at 413 (quoting 21 U.S.C. § 355(j)(5)(C)(ii)(I)) (emphasis added). After carefully reviewing the statutory context, the Court held that the provision allows a generic drug manufacturer to file a counterclaim to correct an Orange Book listing if the patent holder claims methods that are not, in fact, covered by its patent, even if the patentee *also does* claim "at least one method that is approved." In other words, the statute permits a counterclaim if patentee

claims a method that is *not* approved, even if the patentee also claims another method that *is* approved. *Id.* at 412. "Truth be told, the answer to the general question 'What does 'not an' mean?' is 'It depends'": The meaning of the phrase turns on its context." *Id.* at 413. *Cf. King v. Burwell*, 135 S. Ct. 2480, 2495 (2015) ("strong" arguments about "plain meaning" "turn[] out to be untenable in light of [the statute] as a whole."') (citation omitted).

In short, it would add more confusion than clarity to the information about independent expenditures available to the public to have a "statement" disclosing the identity of persons responsible for "all contributions" (subsection (c)(1)), another disclosing the identity of persons responsible for any contribution "in excess of $200 which was made for the purpose of furthering [any] independent expenditure" (subsection (c)(2)(C)), and yet additional statements disclosing for each expenditure the candidate being supported or opposed and certifying no coordination (subsection (c)(2)(A) and (B)). As in *Caraco*, the statutory context avoids this untoward result. Taking context and the statutory purpose into account, "an independent expenditure" in subsection (c)(2)(C) more likely means *the*

independent expenditure being disclosed in the statements discussed in subsections (c)(2)(A) and (B).

3. Subsection 30104(c)(3) Further Confirms the Commission's Interpretation.

The final subsection, (c)(3), supports the focus on disclosing information concerning particular independent expenditures. It charges the Commission with "expeditiously preparing . . . and periodically publishing" "indices" based on the information "reported under this subsection." *Id.* § 30104(c)(3). Those indices must list "*all independent expenditures* . . . as reported under [the] subsection" "on a *candidate-by-candidate* basis." *Id.* (emphasis added).

Notably absent from (c)(3), however, is any broader command to publish a list of persons who have *generally* funded the activities of the filers, or who have *generally* supported the making of independent expenditures. Indeed, statements that disclose all funders—general and specific—of independent expenditures would complicate if not undermine the Commission's mandate to report the expenditures on a candidate-by-candidate basis, and would confuse rather than enlighten the voting public.

C. Even If Not the Best Interpretation, the Commission's Reading Passes *Chevron* Step Two.

Even if the statute does not unambiguously *support* the interpretation embodied in the regulation, it certainly does not unambiguously foreclose that interpretation. The Court will defer to the administrative interpretation so long as it is "based on a *permissible* construction of the statute." *Chevron*, 467 U.S. at 843 (emphasis added); *see Mylan Labs., Inc. v. Thompson*, 389 F.3d 1272, 1280 (D.C. Cir. 2004). It does not matter that "the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). Deference is due "regardless whether there may be other reasonable, or even more reasonable, views." *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1321 (D.C. Cir. 1998). In fact, the *central point* of *Chevron* is that "a court may not substitute its own construction of a statutory provision for a reasonable" agency interpretation. *Chevron*, 467 U.S. at 844; *see*, *e.g.*, *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

In the event the Court proceeds to *Chevron* step two, the Commission's regulation is easily defensible for the reasons set forth above. It unifies Section 30104(c) as a cohesive whole, better achieves

the congressional purpose of simplifying reporting and promoting grass roots participation, and provides the information needed for the indices required by (c)(3). As in *Van Hollen*, which upheld a regulation governing disclosure of donors supporting electioneering communications, the Commission's interpretation is "more than just a permissible construction [of the statute]; it's a persuasive one." 811 F.3d at 493.

The Commission's regulation draws the subsection together in relative harmony, and is consistent with the extensive regulatory scheme. The reasonableness of an agency's regulation "depends, in part, 'on [its] "fit" with the statutory language, as well as its conformity to statutory purposes.'" *Good Fortune Shipping SA v. Comm'r of Internal Revenue Serv.*, 897 F.3d 256, 262 (D.C. Cir. 2018) (quoting *Goldstein v. SEC*, 451 F.3d 873, 881 (D.C. Cir. 2006)). A regulation that is "rational and consistent with the statute" should thus be upheld. *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1497 (D.C. Cir. 1988) (quoting *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112 (1987)). That is the case here.

III. THE REPORTING FRAMEWORK SET FORTH IN THE REGULATIONS HAS BEEN REPEATEDLY ACCEPTED BY CONGRESS, HAS STOOD THE TEST OF TIME, AND APPROPRIATELY BALANCES IMPORTANT INTERESTS.

A. The Commission's Regulation Has Withstood Repeated Congressional Reviews and the Test of Time.

This court has given "particular[]" weight to campaign finance regulations that have cleared legislative review. *See Am. Fed'n of Labor & Cong. of Indus. Organizations v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003). As shown in the brief of Crossroads (Br. at 41–43), the Commission was intimately involved in drafting this statute, acted promptly after enactment of the statute to draft the regulations, and then immediately submitted the regulation for review in 1980. Since 1980, this subsection and the Commission's regulations have survived *seven* revisions to the overarching section. *See* Pub. L. No. 99-514, § 2, 100 Stat. 2085 (1986); Pub. L. No. 104-79, §§ 1(a), 3(b), 109 Stat. 791, 792 (1995); Pub. L. No. 106-58, Title VI, §§ 639(a), 641(a), 113 Stat. 430, 476, 477 (1999); Pub. L. No. 106-346, § 101(a), 114 Stat. 1356, 1356A-49 (2000); Pub. L. No. 107-155, §§ 103(a), 201(a), 212, 304(b), 306, 308(b), 501, 503, 116 Stat. 81, 87, 88, 93, 99, 102, 104, 114, 115 (2002); Pub. L. No. 108-199, § 641, 118 Stat. 3 (2004); Pub. L. No. 110-81, § 204(a), 121 Stat. 735, 744 (2007). History therefore confirms that the Commission's

interpretation of the statute is *at least* reasonable, if not spot-on. The survival of the regulation through numerous campaign finance law amendments provides "persuasive evidence that the interpretation is the one intended by Congress." *Doris Day Animal League v. Veneman*, 315 F.3d 297, 300 (D.C. Cir. 2003) (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986)). Each of these factors supports deference to the Commission.

Although the courts will not always "[p]resum[e] ratification based on congressional inaction," they may do so when they have "some evidence of" or some "reason to assume … congressional familiarity with" the regulation at issue. *Cape Cod Hosp. v. Sebelius*, 630 F.3d 203, 214 (D.C. Cir. 2011) (quoting *Pub. Citizen, Inc. v. HHS*, 332 F.3d 654, 669 (D.C. Cir. 2003)). In this case, the court may assume congressional familiarity by virtue of the fact that this regulation is part of the rulebook that regulates spending during *congressional campaigns*.

B. The Commission's Regulation Balances Competing Interests Regarding Political Speech.

Finally, the Commission's regulation strikes an adequate balance between the competing interests of transparency and privacy, which are always at play in the realm of elections law. "[A]n agency's 'reasonable

accommodation of conflicting policies . . . committed to [its] care by statute' should control" absent evidence of *contrary* legislative intent. *Spectrum Pharm., Inc. v. Burwell*, 824 F.3d 1062, 1068 (D.C. Cir. 2016) (quoting *Chevron*, 467 U.S. at 845).

In the context of campaign finance law, the public's interest in transparency has always competed with the individual interest in private participation. As this Court observed in a very similar context, unfettered political speech and robust disclosure rules are on an "ineluctable collision course." *Van Hollen,* 811 F.3d at 488. To a point, disclosures help educate the voting public and deter corruption, but an inordinate disclosure burden imposes undue expense, exposes speakers to retribution, and dampens public discussion. This Court said it best in *Van Hollen*: "[j]ust because *one* of [the statute's] purposes (even *chief* purposes) was broader disclosure does not mean that anything less than maximal disclosure is subversive." *Id.* at 494. CREW's desire to stretch the statute to impose greater disclosure burdens cannot justify invalidating a regulation that has worked well for almost four decades.

CONCLUSION

For the reasons set forth above and in the brief for Crossroads, Senate Majority Leader Mitch McConnell urges the court to reverse the order below and remand the case with instructions to reinstate the regulation.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, I hereby certify:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,465 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook font.

/s/ *Bobby R. Burchfield*
Bobby R. Burchfield

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that I have on this day, March 18, 2019, served a copy of the foregoing document electronically through the Court's CM/ECF system on all registered counsel.

/s/ *Bobby R. Burchfield*
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