NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 18-5261

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

CROSSROADS GRASSROOTS POLICY STRATEGIES,

Defendant-Appellant,

v.

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON AND NICHOLAS MEZLAK,

Plaintiffs-Appellees,

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

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

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amicus curiae* submits this certificate as to parties, rulings, and related cases.

A. PARTIES AND AMICI

Except for the following, all parties and intervenors appearing in this Court are listed in the Brief of Defendant-Appellant: (1) *amicus curiae* the Chamber of Commerce of the United States, which files this *amicus* brief in support of Appellant, (2) *amici curiae* Free Speech Coalition, *et al*. in support of Appellant, and (3) *amicus curiae* Sai, *pro se* and in support of neither party.

B. RULINGS UNDER REVIEW

References to the rulings at issue appear in the Brief for Defendant-Appellant Crossroads Grassroots Policy Strategies.

C. RELATED CASES

This case was previously before this Court on Defendant-Appellant's emergency motion for a stay pending appeal. This Court's resulting decision is titled *CREW v. FEC*, 904 F.3d 1014 (D.C. Cir. 2018) (per curiam) (Henderson, Millett, and Wilkins, JJ.). Counsel for *amicus curiae* is unaware of any related cases within the meaning of Circuit Rule 28(a)(1)(C).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, *amicus curiae* the Chamber of Commerce of the United States of America ("Chamber") makes the following disclosures:

The Chamber is a nonprofit corporation representing the interest of more than three million businesses of all sizes, sectors, and regions. The Chamber has no parent corporation, and no publicly held company owns 10% or more of its stock.

CERTIFICATE OF COUNSEL REGARDING AUTHORITY TO FILE

Pursuant to FRAP 29(a)(2), all parties have consented to the filing of this brief.

Pursuant to D.C. Circuit Rule 29(d), counsel for *amicus curiae* the Chamber of Commerce of the United States of America certifies that it is not aware of any other non-government *amicus* brief addressing the subject of this brief, *i.e.*, the erroneous statutory interpretation of the Federal Election Campaign Act by the district court. As one of the nation's preeminent business associations, *amicus curiae* is particularly well-suited to provide the Court important context on these subjects that will assist it in resolving this case.

TABLE OF CONTENTS

Page

Certificate As To Parties, Rulings, And Related Cases i
Corporate Disclosure Statement ii
Certificate Of Counsel Regarding Authority To File iii
Table Of Authorities v
Glossary ix
Statutes And Regulations 1
Identity And Interest Of *Amicus Curiae* 1
Summary Of Argument 3
Argument 6
I. The FEC's Longstanding Interpretation of Section 434(c) Is Compelled By FECA's Text, Structure, And History...............................6
II. Section 434(c) Must Be Construed To Avoid The Serious First Amendment Concerns That Arise From The District Court's Reading. 14
Conclusion 24
Certificate of Compliance 25
Certificate of Service 26

TABLE OF AUTHORITIES

Page(s)

Cases:

Am. Tradition P'ship, Inc. v. Bullock,
132 S. Ct. 2490 (2012)....................15

American Federation of Labor and Congress of Indus. Organizations v. FEC, 333 F.3d 168 (D.C. Cir. 2003)....................5, 18

Bell Atlantic Tel. Co. v. Fed. Communications Comm'n,
131 F.3d 1044 (D.C. Cir. 1997)....................12

Buckley v. Valeo,
424 U.S. 1 (1976)....................6, 15, 17, 18, 23

Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S,
566 U.S. 399 (2012)....................4, 11, 14

Center for Biological Diversity v. U.S. Dept. of Interior,
563 F.3d 466 (D.C. Cir. 2009)....................9

Chamber of Commerce of United States v. FEC,
69 F.3d 600 (D.C. Cir. 1995)....................18

Citizens United v. FEC,
558 U.S. 310 (2010)....................15, 16, 20, 22, 23

Cohens v. Virginia,
19 U.S. (6 Wheat.) 264 (1821)....................9

Common Cause v. FEC,
842 F.2d 436 (D.C. Cir. 1988)....................6

County of Los Angeles v. Shalala,
192 F.3d 1005 (D.C. Cir. 1999)....................12

CREW v. FEC,
904 F.3d 1014 (D.C. Cir. 2018)....................13

CREW v. FEC,
316 F. Supp. 3d 349 (D.D.C. 2018).................... 4, 6, 9, 10, 19, 20, 22

Davis v. FEC,
554 U.S. 724....................17

Deal v. United States,
508 U.S. 129 (1993)..12

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Const. Trades Council,
485 U.S. 568 (1988)..18

FEC v. Furgatch,
807 F.2d 857 (9th Cir. 1987) 9

FEC v. Mass. Citizens for Life, Inc.,
479 U.S. 238 (1986)...9, 15

FEC v. Wisconsin Right To Life, Inc.,
551 U.S. 449 (2007)..15

Garrison v. Louisiana,
379 U.S. 64 (1964)..15

Johnson v. Transportation Agency,
480 U.S. 616 (1987)..13

Kennedy for President Committee v. FEC,
734 F.2d 1558 (D.C. Cir. 1984)..6

McConnell v. FEC,
540 U.S. 93 ....7, 15, 16

McCutcheon v. FEC,
134 S. Ct. 1434 (2014)..23

McIntyre v. Ohio Elections Comm'n,
514 U.S. 334 (1995)...17, 18

N.Y. Times Co. v. Sullivan,
376 U.S. 254 (1964)..23

NAACP v. Button,
371 U.S. 415 (1963)..23

NAACP v. State of Alabama ex rel. Patterson,
357 U.S. 449 (1958)...16, 17

National Ass'n of Home Builders v. Defenders of Wildlife,
551 U.S. 644 (2007)..10

Petit v. U.S. Dept. of Educ.,
675 F.3d 769 (D.C. Cir. 2012)....12

Republican Party of Minn. v. White,
536 U.S. 765 (2002)....15

Richmond Newspapers v. Virginia,
448 U.S. 555 (1980)....14

Schenck v. Pro-Choice Network,
519 U.S. 357 (1997)....14

Stewart v. National Shopmen Pension Fund,
730 F.2d 1552 (D.C. Cir. 1984)....7

Stop This Insanity Inc. Employee Leadership Fund v. FEC,
761 F.3d 10 (D.C. Cir. 2014)....15, 16

Texas Dep't of Housing & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.,
135 S. Ct. 2507 (2015)....13

TRW Inc. v. Andrews,
534 U.S. 19 (2001)....10

United States Nat'l Bank v. Indep. Ins. Agents of Am., Inc.,
508 U.S. 439 (1993)....12

Van Hollen, Jr. v. FEC,
811 F.3d 486 (D.C. Cir. 2016)....5, 16, 19, 20, 21, 22

Weber v. Heaney,
995 F.2d 872 (8th Cir. 1993)....4, 14

Williams v. Taylor,
529 U.S. 362 (2000)....10

Wis. Right to Life, Inc. v. FEC,
546 U.S. 410 (2006)....15

Yates v. United States,
135 S. Ct. 1074 (2015)....12

Young v. Community Nutrition Inst.,
476 U.S. 974 (1986)....14

Statutes & Other Authorities:

U.S. Const., amend. I....5, 14, 15, 16, 18

52 U.S.C. § 30101(17) 22

52 U.S.C. § 30103(a) 9

52 U.S.C. § 30103(b) 9

52 U.S.C. § 30104 10

52 U.S.C. § 30104(b)(3)(A) 8, 10

52 U.S.C. § 30104(b)(6)(B)(iii) 8

52 U.S.C. § 30104(c) 3, 4, 6, 7, 8, 9, 13, 14, 18, 19, 22, 23

52 U.S.C. § 30104(c)(1) 3, 7, 8, 9, 10, 14, 20

52 U.S.C. § 30104(c)(2) 3, 4, 9, 10, 11

52 U.S.C. § 30104(c)(2)(A) 8, 11

52 U.S.C. § 30104(c)(2)(B) 8, 9, 11

52 U.S.C. § 30104(c)(2)(C) 3, 8, 9, 10, 11, 12, 14

52 U.S.C. § 30104(f)(1) 9

52 U.S.C. § 30104(f)(2) 9

52 U.S.C. § 30111(d) 13, 14

11 C.F.R. § 109.10(e)(1)(vi) 3

Associated Press, *Mozilla CEO Resignation Raises Free-Speech Issues*,
USA Today (April 4, 2014) 21

D.C. Circuit R. 29(b) 1

Fed. R. App. P. 29(a)(3) 2

Fed. R. App. P. 29(a)(4)(E) 1

Kristiano Ang, *Should Consumers Boycott L.L. Bean Over A Political Donation?,* Marketwatch (Jan. 14, 2017) 21

GLOSSARY

BCRA means Bipartisan Campaign Reform Act.

Chamber means Chamber of Commerce of the United States of America.

CREW means Citizens for Responsibility and Ethics in Washington.

FEC means the Federal Election Commission.

FECA means Federal Election Campaign Act.

STATUTES AND REGULATIONS

All applicable statutes and regulations are reproduced in Defendant-Appellant's Brief.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber"), submits this brief in support of Defendant-Appellants, Crossroads GPS.[1] The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber advocates for its members' interests before Congress, the executive branch, and the courts, and it regularly files *amicus curiae* briefs in cases raising issues of importance to the business community.

The Chamber has a strong interest in this case. The district court's decision reversed more than three decades of settled FEC policy—long ratified by Congress—that provided clear guidance as to when advocacy organizations that are not political committees had to report information about their contributors. Under

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E) & D.C. Circuit R. 29(b), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

that regulation, a contribution needed to be disclosed only when it was earmarked for a specific independent expenditure expressly advocating the election or defeat of a particular candidate. In the decision below, however, the district court held that the Federal Election Campaign Act (FECA) requires disclosure of a far broader range of donors, upending a reading of the statute that had prevailed for nineteen federal election cycles.

If allowed to stand, the district court's misinterpretation of FECA will have a significant impact on the business community. The Chamber is an active participant in the political process, representing its members' interests in a variety of ways during federal congressional elections. And the Chamber's members often donate to advocacy groups that share their interests without necessarily supporting *every* election-related communication those groups may make. Under the district court's broad disclosure rule, however, a company may have its contribution disclosed as supporting a particular message that the contributor never intended to (and does not) endorse. The only way to avoid this misattribution or excessive disclosure is to refrain from supporting political advocacy organizations at all—a chilling of First Amendment activity that is detrimental to the public and the interest of healthy democratic debate. Due to the significant impact the district court's decision will have on the business community, *amicus curiae* believes that its perspective will assist the Court in resolving this case. *See* Fed. R. App. P. 29(a)(3).

SUMMARY OF ARGUMENT

The merits issue presented by this case is whether the FEC's longstanding regulation regarding disclosure of contributions to advocacy organizations other than political committees, 11 C.F.R. § 109.10(e)(1)(vi), is inconsistent with the statutory disclosure requirements in section 434(c) of FECA (now codified at 52 U.S.C. § 30104(c)). The district court held that FECA unambiguously imposed a greater disclosure obligation than provided in the FEC's regulations. To the contrary, however, the text, structure, and history of the relevant section of FECA support the opposite conclusion: Congress intended only that contributions earmarked for a *particular* independent expenditure needed to be disclosed. And were there any doubt on this score, the First Amendment's protection of political and anonymous speech would require the narrower reading of the statute that the FEC has endorsed for decades.

First, the district court's statutory interpretation failed to account for the broader context of section 434(c), instead interpreting the provisions of subsections (c)(1) and (c)(2)(C) in isolation. In doing so, the court ignored the structure of the statute, which describes the general reporting requirement in subsection (c)(1) but then further specifies the *contents* of the required report—including the mandated disclosures—in subsection (c)(2). The court then compounded that error by reading subsection (c)(2) to require disclosure of most contributors who donate to an

organization to fund *any* independent expenditure, not just those who earmark funds for a *particular* expenditure.

The district court based its expansive interpretation of the statute on the ground that subsection (c)(2) requires disclosure of those who contribute "for the purpose of furthering *an* independent expenditure," rather than "*the* independent expenditure." *Citizens for Responsibility and Ethics in Washington v. FEC*, 316 F.Supp.3d 349, 389-90 (D.D.C. 2018) (*CREW*). But the word "an" is susceptible to multiple meanings, and "context matters" in deciding which interpretation should prevail. *Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 413-14 (2012). Here, the district court failed to account for the surrounding references in the text of FECA that indicate Congress intended the disclosure obligation to be tied to a particular contribution.

Further confirming the FEC's longstanding interpretation of the statute, Congress itself reviewed the FEC's regulation when it was first promulgated nearly 30 years ago and declined to exercise its authority to revoke the regulation. Since that time, Congress has repeatedly amended various provisions of FECA without taking any action to alter or expand the disclosure requirements of section 434(c). This is "persuasive evidence" that Congress did not intend for the statute to bear the meaning ascribed to it by the district court. *Weber v. Heaney*, 995 F.2d 872, 877 (8th Cir. 1993).

Second, even if the district court's reading were a permissible interpretation of the text, the canon of constitutional avoidance would require this Court to adopt the FEC's narrower reading. Campaign finance laws—including disclosure provisions—operate in an area fraught with First Amendment concerns. Both this Court and the Supreme Court have emphasized the potential harms to our system of self-government that arise when anonymous political speech is prohibited, *see, e.g.*, *Van Hollen, Jr. v. FEC*, 811 F.3d 486, 488 (D.C. Cir. 2016), and both courts have employed the doctrine of constitutional avoidance in interpreting FECA and its regulations.

Those important First Amendment interests are directly implicated here, and the district court's broad reading of the disclosure provision presents "serious constitutional difficulties." *American Federation of Labor and Congress of Indus. Organizations v. FEC*, 333 F.3d 168, 184 (D.C. Cir. 2003) (Henderson, J., concurring). Most importantly, the district court's view of FECA would force contributors to advocacy organizations to be associated with election-related messages they neither approved nor supported, and might well disagree with. The only way to avoid such disclosures would be to decline to contribute at all, and the net effect would be to significantly chill protected speech. The district court's ruling also creates confusion for organizations that engage in other forms of advocacy—for example, lobbying and grassroots organizing—in addition to independent

expenditures. The better reading of the statute—and the one the FEC had followed for decades before the district court's decision—more closely ties disclosed contributors to their actual intended message, thus minimizing the resulting constitutional harms and providing a workable and easily understandable rule for contributors and advocacy organizations alike. This Court should reverse the decision below.

ARGUMENT

I. The FEC's Longstanding Interpretation Of Section 434(c) Is Compelled By FECA's Text, Structure, And History.

The district court concluded that "the unambiguous language" of FECA section 434(c) "plainly requires broader disclosure than just those donors making contributions for the purposes of funding the independent expenditures made by the reporting entity." *CREW*, 316 F.Supp.3d at 367, 389. As a result, the court invalidated the FEC's related regulation. *Id.* at 367. This Court should reverse that decision. Under this Court's traditional approach to statutory interpretation, section 434(c) is better read to *compel* the FEC's interpretation.

A. FECA's substantive and procedural obligations are indisputably "labyrinthine" and "complex," *Kennedy for President Committee v. FEC*, 734 F.2d 1558, 1566 (D.C. Cir. 1984) (Starr, J., dissenting), and the statute contains "enormous subtleties and complexities," *Common Cause v. FEC*, 842 F.2d 436, 445 (D.C. Cir. 1988). *See also Buckley v. Valeo*, 424 U.S. 1, 83 (1976) (per curiam)

(referring to FECA as "complex legislation"); *McConnell v. FEC*, 540 U.S. 93, 264 (Scalia, J., concurring in part and dissenting in part) (opining that "[t]he federal election campaign laws, [are] . . . so voluminous, so detailed, so complex, that no ordinary citizen dare run for office"). It is thus "important to read each section of this complex statute in its proper context." *Stewart v. National Shopmen Pension Fund*, 730 F.2d 1552, 1561, (D.C. Cir. 1984).

A careful and contextual reading of section 434(c) confirms that it requires disclosure of contributors to advocacy groups other than political committees only when the relevant contribution is earmarked for a *particular* independent expenditure. The district court's contrary holding misconstrued two provisions of the statute to create overlapping disclosure obligations that are far broader than the statutory language can support.

The district court's errors begin with its decision to interpret section 434(c)(1) in isolation. That provision imposes a filing requirement on any person or association that is not a "political committee," that "makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year." 52 U.S.C. § 30104(c)(1). Section 434(c)(1) also provides the *baseline* for the contents of the report that such organizations must file: "a statement containing the information required under subsection (b)(3)(A) for all contributions received by such person." *Id.* That provision, in turn, requires political committees to report "the identification

of each . . . 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. . . together with the date and amount of any such contribution." 52 U.S.C. § 30104(b)(3)(A).

If subsection (c)(1) were the end of section 434(c), the district court's decision might be persuasive. But the following subsections go on to *modify* the baseline reporting requirement of subsection (c)(1): "Statements required to be filed by this subsection shall be filed in accordance with subsection (a)(2), and *shall include*" the following:

- Information about the recipient of expenditures on behalf of a candidate or political committee, "indicating whether *the* independent expenditure is in support of, or in opposition to, the candidate involved," 52 U.S.C. § 30104(c)(2)(A) (citing 52 U.S.C. § 30104 (b)(6)(B)(iii)) (emphasis added);

- 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," *id.* § 30104(c)(2)(B) (emphasis added); and

- "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." *Id.* § 30104(c)(2)(C).

These provisions necessarily alter the contents of the report required by (c)(1). Subsection (c)(2)(A) requires additional information about expenditures to be

included in the report; subsection (c)(2)(B) requires that it include a particular certification; and subsection (c)(2)(C) specifies that only those persons who made a contribution "for the purpose of furthering an independent expenditure" need to be identified. As Appellant explains, this structure is similar to that used in other FECA provisions. *See* Appellant Br. 38 (citing 52 U.S.C. § 30103(a)-(b); § 30104(f)(1)-(2)). The Ninth Circuit has explicitly recognized that "[s]ection 434(c)(1) requires that any person making an 'independent expenditure' greater than $250 file a statement with the FEC," while "[t]he contents of the statement are specified in 434(c)(2)." *FEC v. Furgatch*, 807 F.2d 857, 859 n.2 (9th Cir. 1987).[2]

The district court disagreed, holding that subsection (c)(1) creates its own broad disclosure requirement independent of the disclosure required by (c)(2). *CREW*, 316 F.Supp.3d at 389. But that makes little sense. Under this reading—as the district court conceded—the contributors who must be disclosed in subsection (c)(2)(C) "are a subset of those contributors required to be identified in subsection (c)(1)." *Id*. The Supreme Court has "cautioned against reading a text in a way that

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[2] The district court rejected *Furgatch*'s holding in favor of dicta from *FEC v. Mass. Citizens for Life, Inc. ("MCFL")*, 479 U.S. 238, 262 (1986). But *MCFL*'s brief discussion of section 434(c) was recognized at the time as unnecessary to the Court's holding, *see* 479 U.S. at 271 (Rehnquist, J., concurring in part and dissenting in part), and it has long been held that dicta, even from the Supreme Court, is not binding. *Center for Biological Diversity v. U.S. Dept. of Interior*, 563 F.3d 466, 481(D.C. Cir. 2009) (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)). This may explain why *Furgatch*, which post-dates *MCFL*, did not feel constrained to accept its reading of section 434. This Court should not do so either.

makes part of it redundant." *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 669 (2007) (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)). There is certainly no reason to assume that Congress would intend such overlap within a single subsection of section 434. The district court's decision failed to heed the "cardinal principle" requiring courts to "give effect" to "every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000). The way to do so here is to read section 434 as this Court and the Ninth Circuit have done: subsection (c)(1) sets out the reporting obligation for persons who are not political committees, and subsection (c)(2) governs the *content* of such reports.[3]

The district court's second interpretive error was its myopic focus on the article "an" in subsection (c)(2)(C). In the district court's view, by providing for disclosure of contributions "made for the purpose of furthering *an* independent expenditure," subsection (c)(2)(C) cannot be limited to only contributions earmarked for a *particular* independent expenditure. *See CREW*, 316 F.Supp.3d at 390-91 ("[u]se of the indefinite article 'an' before 'independent expenditure' indicates a broader coverage" than the FEC's interpretation). This reading again eschews a

[3] This does not render the cross-reference in subsection (c)(1) meaningless; by incorporating the requirements of 52 U.S.C. § 30104(b)(3)(A), it ensures that any disclosure that is required by (c)(2) includes the "date and amount" of the contribution.

properly contextual reading of the statute and expands its scope far beyond that intended by Congress.

To begin, the district court was incorrect to conclude that "an" in subsection (c)(2)(C) should be accorded an indefinite meaning. As a matter of ordinary usage, the word is often used in the particular sense. As the Supreme Court has explained:

> Suppose your child explains her mediocre grade on a college exam by saying that she "did not read an assigned text." You would infer that she failed to read a specific book, not that she read nothing at all on the syllabus. And suppose a lawyer friend laments that in her last trial, she "did not prove an element of the offense." You would grasp that she is speaking not of all the elements, but of a particular one. The examples could go on and on, but the point is simple enough: When it comes to the meaning of "[]an," context matters.

Caraco, 566 U.S. at 414. Here, the context of subsection (c)(2) establishes that the statute is referring to contributions that support a *particular* expenditure. Subsection (c)(2)(C) itself requires disclosure of donors who make a contribution "for the purpose of furthering an independent expenditure"—*i.e.*, a singular expenditure. And subsection (c)(2) refers on two other occasions to "the expenditure" or "such expenditure." S*ee* 52 U.S.C. § 30104(c)(2)(A), (B); Appellant Br. 37. These other references underscore that Congress intended the obligation imposed by subsection (c)(2)(C) to be tied to contributions that fund a *specific* independent expenditure, not *every* independent expenditure.

By ignoring this broader statutory context, the district court's reading of subsection (c)(2)(C) contravened the "fundamental principle of statutory

construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132, (1993). This Court has often warned that "to prevent statutory interpretation from degenerating into an exercise in solipsism, 'we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law.'" *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1014 (D.C. Cir. 1999) (quoting *United States Nat'l Bank v. Indep. Ins. Agents of Am., Inc*., 508 U.S. 439, 455 (1993)). "The literal language of a provision taken out of context cannot provide conclusive proof of congressional intent, any more than a word can have meaning without context to illuminate its use." *Bell Atlantic Tel. Co. v. Fed. Communications Comm'n*, 131 F.3d 1044, 1047 (D.C. Cir. 1997); *see also Petit v. U.S. Dept. of Educ*., 675 F.3d 769, 781 (D.C. Cir. 2012). In sum, the "plainness or ambiguity of statutory language is determined not only by reference to the language itself, but also by the specific context in which that language is used, and the broader context of the statute as a whole." *Yates v. United States*, 135 S.Ct. 1074, 1081-82 (2015) (cleaned up).

B. Even setting aside the district court's failure to read subsection (c)(2)(C)'s disclosure provision in its proper context, there is good reason to doubt that Congress intended the disclosure requirement to be as broad as the district court's interpretation. FECA requires the FEC to transmit its regulations and

reporting forms to Congress for review before they take effect, *see* 52 U.S.C. § 30111(d), and the Commission did so. Yet Congress declined to alter the FEC's reading of its statutory language in 1980, or any time since—even though it has revised the independent expenditure statute multiple times. *See* Appellant Br. 6-7 (collecting authorities).

Setting aside any question of deference, the specific process for congressional review of FEC regulations casts doubt on the district court's conclusion about Congress's intent in enacting section 434(c). In denying a stay pending appeal, the motions panel dismissed the significance of this point, citing dissenting opinions from cases addressing congressional acquiescence generally that do not involve the particular review process for FEC interpretations. *See CREW v. FEC*, 904 F.3d 1014, 1018 (D.C. Cir. 2018) (citing *Texas Dep't of Housing & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.,* 135 S.Ct. 2507, 2540 (2015) (Alito, J., dissenting) and *Johnson v. Transportation Agency*, 480 U.S. 616, 672-67 (1987) (Scalia, J., dissenting)).

The Chamber does not disagree with the panel's general observation that "the suggestion of congressional acquiescence cannot change the plain meaning of enacted text," 904 F.3d at 1018. Here, however, a proper and contextual reading of the statutory text is *consistent* with the regulation. *See supra* 6-12. The lack of any objection from Congress at the time or in the ensuing 30-plus years is further support for that analysis. As the Eighth Circuit noted after finding that the plain text of a

statutory provision supported the FEC's interpretation, "congressional failure to revise or repeal the agency's interpretation" after it was presented pursuant to § 30111(d) "is persuasive evidence that the interpretation is the one intended by Congress." *Weber*, 995 F.2d at 877 (quoting *Young v. Community Nutrition Inst.*, 476 U.S. 974, 983 (1986)).

In sum, the district court's opinion failed to read the statutory provision as a whole, or to account for the structure and particular language used in subsections (c)(1) and (c)(2)(C). In this highly complex statutory scheme, "context matters," *Caraco*, 566 U.S. at 414, and that context supports the FEC's longstanding reading of the statute. The district court's invalidation of the regulation should be reversed for this reason alone.

II. Section 434(c) Must Be Construed To Avoid The Serious First Amendment Concerns That Arise From The District Court's Reading.

Regulations of political speech go to the heart of the First Amendment's protections. Speech "on matters of public concern" is one of the "classic forms of speech that lie at the heart of the First Amendment." *Schenck v. Pro-Choice Network,* 519 U.S. 357, 377 (1997). Uninhibited debate on important policy issues—and, necessarily, the elections that help decide how the government will address those issues—"has a *structural* role to play in securing and fostering our republican system of self-government." *Richmond Newspapers v. Virginia,* 448 U.S. 555, 587 (1980). The right to speak freely "concerning public affairs is more than self expression; it

is the essence of self-government." *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964).

Because "[p]olitical participation is integral to our democratic government ... limitations on political contributions and expenditures 'operate in an area of the most fundamental First Amendment activities.'" *Stop This Insanity Inc. Employee Leadership Fund v. FEC*, 761 F.3d 10, 13 (D.C. Cir. 2014) (quoting *Buckley,* 424 U.S. at 14). The government must show that the burdens on political speech are both necessary and narrowly tailored to satisfy a compelling government interest. *See Citizens United v. FEC*, 558 U.S. 310, 340 (2010); *FEC v. Wisconsin Right To Life, Inc.,* 551 U.S. 449, 464 (2007).

In the context of regulating elections, the Supreme Court has tolerated greater interference with political speech than the First Amendment ought to allow. *See Buckley*, 424 U.S. 1; *McConnell*, 540 U.S. 93.[4] In particular, it has held that "[l]imits on direct contributions to candidates to avoid corruption or the appearance of corruption … are tolerated" within certain parameters. *Stop This Insanity, Inc.*, 761 F.3d at 13. But "limits on independent expenditures, which do not implicate the

[4] The Chamber has consistently taken the position that the freedom of speech deserves the same rigorous protection in the context of elections that it does in other contexts. *See, e.g.*, *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (*amicus*); *Citizens United v. FEC*, 558 U.S. 310 (2010) (*amicus*); *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) (*amicus*); *McConnell v. FEC*, 540 U.S. 93 (2003) (party); *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (*amicus*); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*amicus*).

anticorruption rationale, are subjected to the highest form of scrutiny and are generally unconstitutional." *Id.* (citing *Citizens United*, 558 U.S. at 357).

Consistent with this approach, the Supreme Court has also held that the First Amendment tolerates limited disclosure requirements. At least facially, such laws complement substantive restrictions on campaign speech by advancing the "important state interests" of "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell*, 540 U.S. at 196. But that does not suggest that *all* election-related disclosure laws can satisfy constitutional scrutiny. Indeed, this Court has recognized that "what has made this area of election law so challenging is that these two values"—speech and disclosure—"exist in unmistakable tension." *Van Hollen*, 811 F.3d 486, 488 (D.C. Cir. 2016). This is because "[d]isclosure chills speech." *Id.*

This point is beyond dispute. In numerous other contexts, the Supreme Court has emphasized the constitutional value in robust protection of anonymous political speech. In *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449 (1958), for example, the Court upheld the NAACP's First Amendment right to protect the anonymity of its members. Disclosure would have imposed "a substantial restraint upon the exercise by [the NAACP's] members of their right to freedom of association." *Id.* at 462. Though the decision emphasized "that on past occasions

revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility," *id*., the Court more broadly recognized the "deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have," *id.* at 466.

Similarly, in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), the Court held that Ohio's ban on distribution of anonymous campaign literature was unconstitutional because "the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry." *Id*. at 342. It did not matter that the law targeted only "unsigned documents designed to influence voters in an election," *id.* at 344, because "the category of speech regulated by the Ohio statute occupies the core of the protection afforded by the First Amendment," *id*. at 346.

Those constitutional concerns apply with full force to FECA's disclosure requirements; indeed, the Supreme Court has "repeatedly" recognized that election-related disclosure requirements "seriously infringe" political advocacy. *Davis v. FEC*, 554 U.S. 724, 744 (quoting *Buckley*, 424 U.S. at 64-65). Would-be donors have many legitimate reasons to insist on anonymity—"fear of economic or official retaliation," "concern about social ostracism," the assurance "that readers will not prejudge [a] message simply because they do not like its proponent," or "merely

[the] desire to preserve as much of one's privacy as possible." *McIntyre*, 514 U.S. at 341-42.

Because FECA's "sole purpose" is the creation of a regime that "regulate[s] core constitutionally protected activity — 'the behavior of individuals and groups only insofar as they act, speak and associate for political purposes,'" *AFL-CIO*, 333 F.3d at 170 (D.C. Cir. 2003), the cannon of constitutional avoidance plays a particularly important role when interpreting the statute. Indeed, *Buckley* itself employed the canon when interpreting FECA to avoid unnecessary imposition on political activity, 424 U.S. at 43-44, and this Court has repeatedly emphasized the importance of avoiding First Amendment problems when applying FECA's provisions and related regulations. *See, e.g.*, *Chamber of Commerce of United States v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995) (rejecting FEC's interpretation of FECA that presented "serious constitutional difficulties"); *AFL-CIO*, 333 F.3d at 179 (same). Under the avoidance cannon, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 575 (1988).

Here, the district court's expansive interpretation of section 434(c) raises "serious constitutional problems" that can be avoided by limiting the disclosure

requirement to contributions earmarked for a particular independent expenditure. Most obviously, the district court's reading requires the identification of donors who may have contributed with the expectation that the funds would be used by the agency to engage in its own "advocacy for or against the election of a federal candidate, *even when the donor has not expressly directed that the funds be used in the precise manner reported*." *CREW*, 316 F.Supp.3d at 423 (emphasis added).

That holding opens up a world of potentially misleading disclosures. A person may contribute funds to an association's general efforts to elect Democrats in Ohio, aware that the organization will make independent expenditures. But the donor would not necessarily support an ad that suggests a Republican betrayed her country by supporting the Iraq War. Or a donor may believe it important to support a union's independent expenditures in New York but may have no knowledge, let alone approve of, advertisements the union runs in Arkansas. In these cases, a "robust disclosure rule would thus mislead voters as to who really supports the communications." *Van Hollen,* 811 F.3d at 497.

The district court's reading of section 434(c) also creates confusion for contributors and organizations as to when disclosure is required. The district court's decision requires disclosure of contributors whose contributions are earmarked for "political purposes," *CREW*, 316 F.Supp.3d at 401, as well as those who contribute

"for the purpose of furthering" independent expenditures generally, *id.* at 405.[5] This fosters confusion for both contributors and the advocacy organizations they wish to support. Many advocacy groups engage in multiple forms of advocacy—for example, grass-roots organizing and lobbying—in addition to independent expenditures. If a donor to the Sierra Club gives a contribution to "support our efforts in 2020," is that sufficient to require disclosure under subsection (c)(1)? Or what if a contributor mentions seeing a prior ad, writes a letter encouraging the advocacy organization to "keep it up!," and includes a $300 check? Is that sufficient earmarking for future independent expenditures? Requiring disclosure in the many borderline cases that arise greatly increases the risk of misattribution and is likely to cause contributors to curtail their support and advocacy groups to curtail their activities to avoid running afoul of the district court's novel rule.

The broader reading also intrudes upon the privacy of individuals who want to support an organization's independent expenditures. Overly broad "disclosure requirements enable private citizens and elected officials to implement political strategies specifically calculated to curtail campaign-related activity and prevent the lawful, peaceful exercise of First Amendment rights." *Van Hollen*, 811 F.3d at 500 (quoting *Citizens United*, 558 U.S. at 483 (Thomas, J., dissenting)). "Disclosure also

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[5] The FEC subsequently issued guidance tracking the district court's order. *See* http://www.fec.gov/updates/fec-provides-guidance-following-us-district-court-decision-crew-v-fec-316-f-supp-3d-349-ddc-2018/.

makes it easier to see who has not done his bit for the incumbents, so that arms may be twisted and pockets tapped." *Majors*, 361 F.3d at 356 (Easterbrook, J., dubitante). In an era of easily accessible information, there is no shortage of examples of individuals—and sometimes uninvolved third parties—who were targeted for retaliation based on their contributions to groups engaged in political advocacy. *See, e.g.*, Associated Press, *Mozilla CEO Resignation Raises Free-Speech Issues*, USA Today (April 4, 2014), available at https://bit.ly/2j2aIW9; Kristiano Ang, *Should Consumers Boycott L.L. Bean Over A Political Donation?,* Marketwatch (Jan. 14, 2017), available at https://on.mktw.net/2Oc22fb (noting boycott of retailer because of heiress's support for President Trump).

A more pernicious effect of the district court's maximalist interpretation of FECA is to discourage participation in any political activity at all. Faced with the choice of being held individually responsible for *all* independent expenditures an organization may make, or simply the loss of privacy associated with the amount and recipient of one's contributions, *see Van Hollen*, 811 F.3d at 501, individuals are far less likely to contribute in the first place to associations that engage in *any* independent expenditures. Indeed, the pernicious effect is that those who cannot afford election-law specialists and corporate structures are most harmed: "such requirements 'have their real bite when flushing small groups, political clubs, or

solitary speakers into the limelight, or reducing them to silence.'" *Id.* (quoting *Majors*, 361 F.3d at 358 (Easterbrook, J., dubitante)).

The district court paid these issues no mind, instead justifying its expansive reading of section 434(c) as compelled by "the congressional goal of fully disclosing the sources of money flowing into federal political campaigns," and "the benefits intended to accrue from disclosure, including informing the electorate, deterring corruption, and enforcing bans on foreign contributions being used to buy access and influence to American political officials." *CREW*, 316 F.Supp.3d at 423. But this Court in *Van Hollen* cautioned against taking precisely this type of one-sided view of FECA's disclosure requirements. The Court emphasized that "the art of statutory construction has moved beyond this particularly results-oriented brand of purposivism[,]" and that "[s]tatutes are hardly, if ever, singular in purpose." *Van Hollen*, 811 F.3d at 494-95. And, like the Bipartisan Campaign Reform Act ("BCRA") there, FECA seeks "to achieve a variety of ends in a way that reflects the give-and-take of the legislative process" and it "does *not* require disclosure at all costs." *Id.*

Moreover, the disclosure provision at issue here is specific to "independent expenditures"—*i.e.*, advocacy that is *not* coordinated with any candidate or political party. 52 U.S.C. § 30101(17). In *Citizens United*, the Supreme Court squarely held that "independent expenditures, including those made by corporations, do not give

rise to corruption or the appearance of corruption." *Id.,* 558 U.S. at 357. Nor did it find that the speculative possibility of foreign contributions could justify limits on independent expenditures. *Id.* at 361-62. And, although *Citizens United* upheld an as-applied challenge to BCRA's disclosure requirements—which feature markedly higher thresholds than section 434(c)—nothing in that decision suggests that *all* disclosure requirements are constitutional. Given their imposition on constitutionally protected speech, disclosure requirements must be subjected to an exacting narrow-tailoring requirement. After all, "[i]n the First Amendment context, fit matters." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1456-57 (2014); *see Buckley*, 424 U.S. at 64 ("[C]ompelled disclosure … cannot be justified by a mere showing of some legitimate governmental interest.").

In light of these serious constitutional concerns, the language of section 434(c) must be interpreted to avoid the First Amendment problems inherent in the district court's reading of the disclosure requirements at issue. Simply put, the freedoms of speech and association are "delicate and vulnerable" and "need breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963). Careful and contextual interpretation is essential to protecting our "'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Buckley*, 424 U.S. at 14 (1976) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

CONCLUSION

This Court should reverse the judgment of the district court and remand the case for further proceedings.

Date: March 18, 2019

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d), because this brief contains 5439 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1).

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that, on March 18, 2019, I electronically filed the foregoing *Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of Appellants* with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

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