

No. 18-5261

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

**CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON
AND NICHOLAS MEZLAK,**

Plaintiffs-Appellees,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

CROSSROADS GRASSROOTS POLICY STRATEGIES,

Intervenor Defendant-Appellant.

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

**BRIEF OF SENATORS SHELDON WHITEHOUSE, JON TESTER,
AND RICHARD BLUMENTHAL AS *AMICI CURIAE*
IN SUPPORT OF APPELLEES**

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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 appellees Citizens for Responsibility and Ethics in Washington and Nicholas Mezlak. Counsel understands additional *amici curiae* may appear in this matter.

B. Rulings Under Review

An accurate reference to the ruling at issue appears in the brief for appellees Citizens for Responsibility and Ethics in Washington and Nicholas Mezlak.

C. Related Cases

This case was previously before this Court, which denied Crossroads' Emergency Motion for Stay. *See CREW v. FEC*, 904 F.3d 1014 (D.C. Cir. 2018) (per curiam). This case was also before the Supreme Court of the United States on Crossroads' Emergency Motion for Stay Pending Appeal, which was denied. *Crossroads v. CREW*, 139 S. Ct. 50 (mem.) (Sept. 18, 2018).

/s/ Jennifer R. Cowan

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GLOSSARY OF ABBREVIATIONS

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

STATUTES AND REGULATIONS

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

STATEMENT OF INTEREST OF *AMICI CURIAE*¹

Amici curiae are United States Senators Sheldon Whitehouse of Rhode Island, Jon Tester of Montana, and Richard Blumenthal of Connecticut. As legislators and members of the United States Senate, *amici* have a front-row view of both the virtues of America's constitutional democracy and the hazards of improper influence over its democratic institutions. *Amici* file this brief to provide practical, political, and historical context to the legal arguments in this case.

SUMMARY OF ARGUMENT

There is an elemental tension in government between two classes of citizens. An influencer class occupies itself with favor-seeking from government and desires rules of engagement that make government more susceptible to its influence. The general population, on the other hand, has an abiding interest in a transparent government with the capacity to resist those special-interest influencers. When influencers can wield their power in backrooms rather than the public square, the problem of influence is worsened, both by secrecy and lack of accountability.

¹ All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party, nor any person other than the *amici curiae*, or their counsel, contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

Reconciling this tension in a just way is a basic task of governance.

Congress addressed that tension through the Federal Election Campaign Act (the “FECA”).² The FECA protects the public’s strong interest in a transparent campaign finance system that does not readily yield to secretive special-interest manipulation. As the district court in this case correctly found: “[c]ampaign finance law has long recognized the value of disclosure as a means of enabling the electorate to make informed decisions about candidates, to evaluate political messaging, to deter actual, or the appearance of, corruption, and to aid in enforcement of the ban on foreign contributions, which may result in undue influence on American politicians.”³

In the FECA, Congress set up a reporting system for non-political committees (or “outside organizations”) that make independent expenditures. However, the regulation enacted by the Federal Election Commission (the “FEC”), which requires disclosure only where the contributor seeks to fund a specific expenditure, violates the language and purpose of the statute, and flatly fails to meet real-world tests of today’s political campaigns. The regulation’s deficiencies have become increasingly detrimental because of three developments.

² 52 U.S.C. § 30101 *et seq.*

³ *CREW v. FEC*, 316 F. Supp. 3d 349, 355 (D.D.C. 2018).

First, *Citizens United v. Federal Election Commission*,⁴ dramatically (and wrongly, in *amici's* view) upended the political balance in favor of the influencer class. Groups organized under Section 501(c)(4) of the Internal Revenue Code and other outside organizations have overwhelmed the American election system, into which they have sunk nearly \$4 billion since 2010. It was bad enough that so much power was shifted to those with the means and motive to spend unlimited sums in politics, but the FEC's inadequate regulation means that much of that \$4 billion was contributed anonymously.

Second, the FEC's regulation ignores the realities of modern political campaigns. Fanciful hypotheticals from Appellant about individual contributors notwithstanding, it is exceedingly rare for a contributor to tie a contribution to a specific expenditure. People contribute to candidates and intermediaries because they want outcomes, not because they want to see a particular advertisement aired. The real public interest here is in knowing who funds an organization's spending to support or oppose a candidate or a policy, not in the (in our view) imaginary subset of contributors who want to see a particular advertisement aired on television.

Third, the FEC's regulation provides a gaping loophole through which foreign entities can anonymously influence our elections. This vulnerability has

⁴ 558 U.S. 310 (2010).

received increasing attention from our national security community and Congress since the 2016 election.

The FECA requires more robust disclosures about political spending than the FEC regulation provides. The district court found that the FEC's implementation of the FECA "ignores the requirement in" 52 U.S.C. § 30104(c)(1) and "substantially narrows" 52 U.S.C. § 30104 (c)(2).⁵ The district court therefore declared invalid and vacated FEC regulation 11 C.F.R. § 109.10(e)(1)(vi).⁶ This ruling was not just correct but obvious, and it should be affirmed if the Court concludes that this appeal is within its jurisdiction.

ARGUMENT

I. The Court Should Consider This Case in the Context of the Struggle Between Special Interests and the Public Interest.

A. Secrecy Strengthens the Power of the Influencer Class.

This case should be viewed in the context of the age-old contest in government between powerful influencers who seek to bend government to their will and a general public that counts on government to protect itself, and them, from the influencers. As stated above, this contest pits one class of individuals, which seeks to influence and obtain favors from the government through anonymous spending rather than public persuasion and therefore wants rules that

⁵ *CREW*, 316 F. Supp. 3d at 394.

⁶ *Id.* at 411.

make government susceptible to hidden influence, against a second class consisting of the general population, which wants a government that can resist the influence of special interests.⁷

The influencer class operating most powerfully in politics today includes corporations, corporate trade associations, corporate-funded “think tanks,” billionaires with vast fortunes garnered through corporate success, trusts of billionaire families, and an array of front groups designed to obscure the sources of their funding (and which also obscure whether the sources are domestic or

⁷ This is a centuries-old tension. See David Hume, 3 *The Philosophical Works of David Hume* 298-99 (1st ed. 1826) (“[w]here the riches are in few hands, these must enjoy all the power and will readily conspire to lay the whole burden on the poor, and oppress them still farther, to the discouragement of all industry.”); Andrew Jackson, *1832 Veto Message Regarding the Bank of the United States* (July 10, 1832), http://avalon.law.yale.edu/19th_century/ajveto01.asp (“It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purposes . . . to make the richer and the potent more powerful, the humble members of society . . . who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of the Government.”); Niccolo Machiavelli, *The Prince*, ch. IX, 62 (1532) (“[O]ne cannot by fair dealing, and without injury to others, satisfy the nobles, but you can satisfy the people, for their object is more righteous than that of the nobles, the latter wishing to oppress, whilst the former only desire not to be oppressed.”); Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws*, Book V, 63 (1748) (“To men of overgrown estates, everything which does not contribute to advance their power and honour is considered by them as an injury.”); Theodore Roosevelt, *New Nationalism Speech* (1910) (“[T]he United States must effectively control the mighty commercial forces which they have called into being The absence of effective State, and especially, national, restraint upon unfair money-getting has tended to create a small class of enormously wealthy and economically powerful men, whose chief object is to hold and increase their power.”).

foreign). The front groups themselves present a novel assortment of donor-assisted funds like Donors Trust, entities organized under section 501(c)(4) of the tax code, and shell corporations.

This massive, multi-tentacled apparatus deploys its powers and pressures to advance the interests of the influencer class, which are no proxy for the interests of the broad public.⁸ The influencers harm the public not only because they have distinct interests and goals that diverge from those of the general population, but because the power the influence apparatus wields is destructive of our democratic institutions.⁹

⁸ See Benjamin I. Page, Larry M. Bartels, & Jason Seawright, *Democracy and the Policy Preferences of Wealthy Americans*, 11 *Pers. on Pol.* 1, 54, 61 (2013) (summarizing results of a study finding that wealthy Americans are much more concerned about budget deficits and much less concerned about health care, social welfare programs and financial regulation than other Americans).

⁹ See Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America*, 70-123 (2012) (explaining that the country's policymakers respond almost exclusively to the preferences of the economically advantaged); Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress – and a Plan to Stop It*, 143-47 (2011) (noting that dependency on donors causes Congress to spend more time on issues that matter to their funders than to the general public); see also Larry M. Bartels, *Economic Inequality and Political Representation*, Princeton Univ. Dep't. of Pol. 4 (2005), <http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=33B7AA4E26A0F19D5A08B7AF9069E25F?doi=10.1.1.172.7597&rep=rep1&type=pdf> (“I find that senators in [the late 1980s and early 1990s] were vastly more responsive to the views of affluent constituents than to constituents of modest means.”).

While the general public wants a robust, functioning democracy that honors the wishes of the people, the influencers want political power for themselves — and that quest for power is enhanced by the ability to deploy the tools of influence outside of public view.

As members of the Senate, we see this quest for power and secrecy in the unrelenting opposition of influencers and their front groups to transparency legislation.¹⁰ It is apt that a bipartisan group of former elected officials trying to stem the corrupting power of dark money in our democracy calls itself Issue One.¹¹ Corruption and abuse of power in elections — enabled and enhanced by secrecy — makes corruption and abuse of power possible across the whole spectrum of issues refereed by government. It is the evil that spawns other evils.

¹⁰ See, e.g., Russ Choma, *Koch Industries, Business Groups Lobby Against Donor Disclosure*, OpenSecrets.org (Apr. 25, 2013), <https://www.opensecrets.org/news/2013/04/koch-industries-and-business-groups>; see also U.S. Chamber of Commerce, *U.S. Chamber: DISCLOSE Act is Partisan Effort to Silence Critics and Gain Political Advantage* (May 19, 2010), <https://www.uschamber.com/press-release/us-chamber-disclose-act-partisan-effort-silence-critics-and-gain-political-advantage>; U.S. Chamber of Commerce, *Multi-industry Letter Opposing H.R. 5175 (the “DISCLOSE Act,” or “Schumer – Van Hollen”)*, (May 19, 2010), <https://www.uschamber.com/letter/multi-industry-letter-opposing-hr-5175-disclose-act-or-schumer-van-hollen>.

¹¹ *Our Story*, Issue One, <https://www.issueone.org/about> (last visited April 21, 2019).

The harms of non-disclosure include alienation of a public that sees masquerade organizations dominating their political space. That is a grave enough concern, but at least the public sees the masquerade activity taking place, even if it may not know who is behind the mask. When front groups with saccharine names akin to “Americans for Peace and Puppies and Prosperity” flood the airwaves and internet with advertisements opposing a candidate, that election spending at least reveals itself. Opaque and disturbing as it may be, the advertisement is seen, and presents a target for researchers, journalists and regulators to investigate.

More treacherously, the ability to engage in unlimited political spending — and especially unlimited *anonymous* political spending — necessarily confers the dreadful power on big influencers to achieve their goals through threats or promises of that spending. Private threats and promises will be unseen, exponentially expanding the danger of corruption. If the threats or promises are unsuccessful in achieving the desired effect, the masked influencers can pour money into an election anonymously, even funding harmful attacks entirely unrelated to their actual policy issue while hiding behind fake personas. If the threats or promises are successful, the masked influencers reap the bonus of not actually having to spend the money. Thus, secrecy moves the balance of power yet further toward big influencers, as well as abetting a very unhealthy political environment.

Secrecy in spending dramatically exacerbates the power to threaten and promise. A candidate could well conclude that he or she could withstand the attacks of an *identified* influencer, indeed perhaps even turning those attacks to advantage. A candidate could dare to call the bluff of an *identified* influencer, doubting that the influencer would in its own name actually make good on the threat. And a candidate could conclude that an *identified* influencer's attacks would be moderated by some fear of blowback against false or vile advertisements launched in the influencer's own name.

Add secrecy, and all that changes. From the shelter of secrecy, hiding behind the mask of "Americans for Peace and Puppies and Prosperity," the influencer can deliver his blow in a manner that is completely unrelated to the actual issue at stake and without reputational consequence. Secrecy weaponizes influencers.

In particular, anonymity has turned political advertising deeply negative and frequently false, as the blowback from vile false accusations lands nowhere real.¹²

¹² See, e.g., *High Percent of Presidential Ad Dollars of Top Four 501(c)(4)s Backed Ads Containing Deception, Annenberg Study Finds*, Annenberg Pub. Pol'y Ctr. (June 20, 2012), <https://www.annenbergpublicpolicycenter.org/high-percent-of-presidential-ad-dollars-of-top-four-501c4s-backed-ads-containing-deception-annenberg-study-finds> ("[F]rom December 1, 2011 through June 1, 2012, 85% of the dollars spent on presidential ads by four top-spending third-party groups . . . were spent on ads containing at least one claim ruled deceptive by fact-checkers . . .").

Restoring public opprobrium to its role as a restraint on poisonous political advertising would alone be a good and sufficient reason to rid our polity of anonymous election spending. But the case against anonymity is far stronger than that, when the dangers of corruption or collapsed public confidence are considered.

B. The FECA Balances the Special Interests of the Influencer Class and the Public Interest Through Public Disclosure.

The FECA's legislative history makes clear that the Act was predicated on the "principle of public disclosure" because voters are entitled to know who is spending money to elect candidates to federal office.¹³ Similarly, in *Buckley v. Valeo*,¹⁴ the Supreme Court recognized three substantial governmental interests that are vindicated by the FECA's disclosure requirements: (1) to "provide[] the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office"; (2) to "deter actual corruption and avoid the appearance of

¹³ S. Rep. No. 93-689, at 2 (1974) ("The Act of 1971 was predicated upon the principle of public disclosure, that timely and complete disclosure of receipts and expenditures would result in the exercise of prudence by candidates and their committees and that excessive expenditures would incur the displeasure of the electorate who would or could demonstrate indignation at the polls."). See also *Hearings Before the S. Comm. on Rules & Admin. To Amend the Federal Election Campaign Act of 1971, as Amended, & for Other Purposes*, 94th Cong. 1-2, at 77-78 (Feb. 18, 1976) (Statement of Sen. Edward Kennedy) ("I think we have every right to expect that, any time individuals are spending money, we are entitled to very clear notice as to who is spending, how much is being spent, and who receives the benefit.").

¹⁴ 424 U.S. 1 (1976).

corruption by exposing large contributions and expenditures to the light of publicity”; and, (3) to provide “an essential means of gathering the data necessary to detect violations of contribution limitations”¹⁵

The Supreme Court further noted in *Buckley* that although such disclosure may impose “not insignificant” burdens, “disclosure requirements certainly in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress [has] found to exist.”¹⁶ Indeed, even Senator Mitch McConnell, who has submitted an amicus brief in support of Appellant, has supported public disclosure, once remarking, “[m]oney is essential in politics, and not something that we should feel squeamish about, provided the donations are limited and disclosed, everyone knows who’s supporting everyone else.”¹⁷ At bottom, the benefits of disclosure are clear and well-established. In the words of Justice Scalia:

Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously . . . and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected

¹⁵ *Id.* at 66-68.

¹⁶ *Id.* at 68.

¹⁷ Interview with Senator Mitch McConnell, N.P.R. Talk of the Nation (2003), audio included in *Sen. McConnell: Political Donations Are Free Speech*, N.P.R. Morning Edition (June 18, 2012), <https://www.npr.org/2012/06/18/155263978/sen-mcconnell-political-donations-are-free-speech>.

from the accountability of criticism. This does not resemble the Home of the Brave.¹⁸

By contrast, the FEC's disclosure regulation for outside groups stands on a nonsensical distinction, contradicts the FECA's clear statutory requirements, undermines congressional intent, raises the risk of corruption, and contributes to the putrescence of today's political campaigns. The FECA requires two types of contributor disclosures by non-political committee outside spenders: first, that outside organizations must disclose all contributors who contributed more than \$200 in a year;¹⁹ and second, that they identify all contributors who contributed "for the purpose of furthering an independent expenditure."²⁰ The FEC regulation fails to implement this standard.

The FEC's regulation has never followed the text of the FECA, nor has it appropriately met the public purpose of the law. That failure is more flagrant now, following *Citizens United*, when independent expenditures have risen to unprecedented levels, anonymous money floods our politics, and secret threats and promises are perversely enabled. In this new political environment of unlimited money, the regulation has become not just illegal but poisonous; and because

¹⁸ *John Doe No. 1 v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring).

¹⁹ 52 U.S.C. § 30104(c)(1).

²⁰ *Id.* § 30104(c)(2)(C).

specific contributions are almost never tied to a particular independent expenditure,²¹ it is also nonsensical.

Fixing the problem of anonymous unlimited election spending will reduce the imbalance of influence, the corrosion of our democracy, and the prospect of fraud and corruption. The FECA's disclosure requirements balance fairly the interests of the influencer class and the general public, and regulations that properly enforce those requirements will help repair public confidence in our democracy.

²¹ Michael S. Kang, *The End of Campaign Finance Law*, 98 Va. L. Rev. 1, 40-41 (2012) (“What has happened since *Citizens United* . . . is not new regulation – it is the rollback of existing regulation. Instead of a hydraulics of campaign finance regulation, we are seeing a reverse hydraulics of campaign finance deregulation First, independent expenditures exploded upward in 2010 by more than 300 percent compared to the previous midterm elections in 2006. They increased from less than \$75 million total in 2006 to roughly \$300 million in 2010. Second, independent expenditures by outside groups in particular increased dramatically.”); Karl Evers-Hillstrom et al., *A Look at the Impact of Citizens United on its 9th Anniversary*, OpenSecrets.org, (Jan. 21, 2019) <https://www.opensecrets.org/news/2019/01/citizens-united> (“In the election cycles following *Citizens United*, the balance of power has shifted more and more toward outside spending groups such as super PACs and ‘dark money’ political nonprofits, unleashing unprecedented amounts of money toward political advertisements meant to influence voters. The immediate result of the ruling was a massive uptick in spending from outside groups in the 2010 midterms. But it didn’t end there Unburdened by contribution limits, it didn’t take long for super PACs to surpass national party committees as the top outside spending groups.”).

II. ***After Citizens United*, a Disclosure Regulation That Reflects the FECA Is More Important Than Ever.**

Citizens United revolutionized outside groups' role in, and influence on, American elections. Before *Citizens United*, corporations, unions, and other organized associations were prohibited from spending general treasury funds on independent expenditures.²² *Citizens United* permitted unlimited political spending by these entities, dramatically tilting America's political balance in favor of the influencers. The effect of this tilt was made worse, further shifting power to the influencers, by the immediate emergence of dark money channels to anonymize the unlimited spending.

After *Citizens United*, spending exploded. From 2010 to the present, 501(c)(4) organizations have spent over \$730 million on political expenditures, compared to \$103 million the previous decade.²³ Political expenditures from undisclosed sources in the 2012 general election alone topped \$312 million,²⁴ and Appellant Crossroads GPS itself spent nearly \$100 million from 2012 to 2014

²² *Citizens United*, 558 U.S. at 320; see also 2 U.S.C. § 441(b) (2000).

²³ *Outside Spending*, OpenSecrets.org, <https://www.opensecrets.org/outsidespending/index.php?type=A&filter=N> (last visited Apr. 21, 2019).

²⁴ *Dark Money Basics*, OpenSecrets.org, <https://www.opensecrets.org/dark-money/basics> (last visited Apr. 21, 2019).

without disclosing a single contributor.²⁵ While the amount of spending is immense, the number of outside groups doing the bulk of the spending is not. In 2016 alone, just ninety-five 501(c)(4) and 501(c)(6) trade associations made independent expenditures of \$50,000 or more, totaling more than \$185 million.²⁶ The 10 largest of those spenders were responsible for 77% of this total, and the top three spenders were responsible for nearly half.²⁷ Our most powerful forces now hide from open debate by virtue of having interposed a one-way mirror between themselves and the public square.

Citizens United presumed that a regime of “effective disclosure” would “provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”²⁸ That presumption of “effective disclosure” irreconcilably conflicts with the spending secrecy fomented by the FEC’s failure to require adequate outside spending disclosures. Among the collateral harms of unlimited spending, worsened by unlimited *secret* spending, are the justifiable perception that

²⁵ Plaintiff’s Motion for Summary Judgment at 17, *CREW v. FEC*, 316 F. Supp. 3d 349 (D.D.C. Sept. 11, 2017) (No. 16-00259).

²⁶ *Political Nonprofits: Top Election Spenders*, OpenSecrets.org, https://www.opensecrets.org/outsidespending/nonprof_elec.php?cycle=2016 (last visited Apr. 21, 2019).

²⁷ *Id.*

²⁸ *Citizens United*, 558 U.S. at 370.

politicians are beholden to the donor class rather than to their constituents, and the problem of private threats and promises. Unlimited *secret* election spending creates added potential for actual corruption and denies the voting public a true understanding of who and what is at work in their democracy. To address these concerns, meaningful and thoroughgoing political spending disclosure must actually be required, or American democracy will continue sliding into a bog of anonymity-fueled corruption.

A. The FEC's Regulation Is Divorced from the Way Modern Campaigns Work.

As elected officials, we are intimately familiar with the realities of campaigns and fundraising. Collectively, we have run in eight federal campaigns, and raised and spent tens of millions of dollars. We can report from experience that campaigns can be fast-moving and dynamic, and unforeseen events often change the themes and messages at a moment's notice. Our campaigns, just like political committees, political parties, and outside organizations, do not tie fundraising to any specific expenditure.²⁹ Instead, organizations fundraise, and contributors donate, to support the broad, overarching electoral mission of the organization or the campaign; for example, helping elect candidates who support

²⁹ *Amici* are aware of no dollar pledged to us that was intended to support a particular advertisement or expenditure.

or oppose abortion rights, or helping to support or defeat a specific candidate.³⁰ In modern campaigns, it is neither practical nor useful to fundraise for specific electioneering expenditures. Money is fungible; no such link is real or enforceable; and it is not practical to tie up funding that way. Nor would most contributors care one whit. It is nonsense.

Contributors give to candidates and outside spending organizations because they want outcomes, not to see a specific advertisement. It is virtually impossible for contributors to know which specific advertisement their donation funds. In fact, none of the five highest spending political nonprofits even gives contributors the option to earmark a donation to a specific advertisement on their public websites.³¹

³⁰ On rare occasions a candidate may ask contributors to help get an advertisement on the air, but there is no practical, legal, or accounting link between that solicitation and the expenditure; it is just a marketing device to cut through the clutter of election noise and raise money.

³¹ See Majority Forward, <http://www.majorityforward.com>; U.S. Chamber of Commerce, <http://www.uschamber.com>; Americans for Prosperity, <http://www.americansforprosperity.org>; Patriot Majority, <http://www.patriotmajority.org>; EDF Action, <http://www.edfaction.org> (all last visited Apr. 21, 2019). Options to earmark were similarly absent from available records leading up to the 2018 midterm elections. *Majority Forward*, Wayback Machine Internet Archive (Aug. 19, 2018), <https://web.archive.org/web/20180819001458/http://www.majorityforward.com>; *Americans for Prosperity*, Wayback Machine Internet Archive (Oct. 5, 2018), <https://web.archive.org/web/20180305005456/https://secure.americansforprosperity.org/donate>; *Patriot Majority*, Wayback Machine Internet Archive (Apr.

Moreover, no public interest is served by limiting disclosure to who funds a particular advertisement. The real public interest is in knowing who is behind the massive independent expenditures supporting or opposing candidates and driving election outcomes — in knowing who the players on the political stage are, so their motives and interests can be identified and evaluated.

Under the current regulatory regime, high-dollar independent expenditures without identifiable sources are having real electoral effects in ways that undermine rather than promote open debate. Consider a candidate who is privately threatened with millions of dollars of anonymously funded independent expenditures against him should he take a particular policy position. If the candidate then makes a policy decision as a result of that threat, he has been compromised and becomes a walking failure of open public debate because his position has been changed behind the scenes without any public discussion or change in actual public opinion.

Outside groups funded by anonymous sources can bombard opposition candidates with false negative advertisements — unrelated to any actual policy issue — before serious public debate really begins (the political equivalent of

30, 2017), <https://web.archive.org/web/20170430185935/http://www.patriotmajority.org/donate>.

strafing an enemy's air fleet while it is still on the ground).³² Or similar massive attacks on candidates just before Election Day can leave no time for a response.³³ Barrages of anonymous false election artillery do not contribute to informed elections.

The fundamental purposes of disclosure are to guard against corruption and to help voters make informed choices. By allowing millions of dollars to be spent anonymously to influence elections and candidates, the FEC's improperly narrow regulation fails at both goals.

B. The FEC's Regulation Undermines the FECA's Ban on Foreign Spending.

While the FECA clearly prohibits foreign nationals from engaging in election spending,³⁴ the FEC regulation makes it virtually impossible to prevent, or

³² See, e.g., Andrea Drusch & National Journal, *AFP Launches TV Ads Against Ted Strickland. Are They the Start of Another Big Campaign?*, The Atlantic (Aug. 18, 2015), <https://www.theatlantic.com/politics/archive/2015/08/afp-launches-tv-ads-against-ted-strickland-are-they-the-start-of-another-big-campaign/435378>.

³³ See, e.g., *Independent Expenditures*, FEC, https://www.fec.gov/data/independent-expenditures/?data_type=processed&is_notice=true&committee_id=C90016098 (showing the 199 independent expenditures made by Majority Forward between October 30, 2018 and November 6, 2018).

³⁴ 52 U.S.C. § 30121; *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.C. Cir. 2011) (“[T]he United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process.”), *aff'd* 565 U.S. 1104 (2012) (mem.).

even detect, foreign money flowing through non-disclosing outside organizations into our political system.³⁵ The FECA's prohibition of foreign participation in elections requires at a minimum an effective disclosure regime.

The 2016 election demonstrates that foreign influence through undisclosed political donations is not an abstract fear, but a real danger.³⁶ The same dark money channels that are available to the influencers are also available to foreign nationals.³⁷

³⁵ Memorandum from Vice Chair Ellen L. Weintraub to the FEC, Proposal to Launch Rulemaking To Ensure That U.S. Political Spending Is Free from Foreign Influence 4 (Sept. 9, 2016), https://www.fec.gov/resources/cms-content/documents/2018-05_ELW_Rulemaking_Proposal_to_Combat_Foreign_Election_Influence.pdf (“The proliferation of dark money groups in the wake of *Citizens United* has made it impossible to know the sources of all the funds flooding into our political system.”).

³⁶ See David Petraeus & Sheldon Whitehouse, *Putin and Other Authoritarians' Corruption Is a Weapon – And a Weakness*, Wash. Post (Mar. 8, 2019), <https://www.washingtonpost.com/opinions/2019/03/08/putin-other-authoritarians-corruption-is-weapon-weakness> (“In particular, the United States should make it more difficult for kleptocrats, and their agents, to secretly move money through the rule-of-law world, whether by opening bank accounts, transferring funds or hiding assets behind shell corporations. Failure to close loopholes in these areas is an invitation to foreign interference in America's democracy and a threat to national sovereignty. Congress should tighten campaign-finance laws to improve transparency given that U.S. elections are clearly being targeted for manipulation by great-power competitors.”).

³⁷ Although the FEC's deficient regulation enables most such contributions to be hidden, tax and criminal investigations have illuminated some examples of foreign nationals engaging in electoral spending: (1) Russian nationals provided contributions to one of the largest and most active 501(c)(4)

The Senate has probed foreign influence on a bipartisan basis,³⁸ and experts have testified that “[i]t is critical that we effectively enforce the campaign finance laws,”³⁹ and that “strengthening financial transparency requirements” is key to protecting U.S. interests.⁴⁰ With an interconnected global financial system, “illicit

organizations, see Greg Gordon & Peter Stone, *Russia Investigators Likely Got Access to NRA’s Tax Filings, Secret Donors*, McClatchy (July 2, 2018), <https://www.mcclatchydc.com/news/politics-government/article214075459.html>; and, (2) a Mexican businessman made illegal political contributions to candidates in a mayoral campaign in an effort to buy influence, see U.S. Dep’t of Just., *Mexican Businessman Jose Susumo Azano Matsura Sentenced for Trying to Buy Himself a Mayor* (Oct. 27, 2017), <https://www.justice.gov/usao-sdca/pr/mexican-businessman-jose-susumo-azano-matsura-sentenced-trying-buy-himself-mayor>. Indeed, some of the most politically active trade associations openly admit to taking foreign money and ask the public to “trust us” that they properly segregate that money. Ian Vandewalker & Lawrence Norden, *Getting Foreign Funds Out of America’s Elections*, Brennan Ctr. for Just. 14 (2018), https://www.brennancenter.org/sites/default/files/publications/Getting%20Foreign%20Funds%20Out%20of%20America%27s%20Elections.%20Final_April9.pdf.

³⁸ See, e.g., *The Modus Operandi and Toolbox of Russia and Other Autocracies for Undermining Democracies Throughout the World: Hearing Before the Subcomm. On Crime and Terrorism of the S. Comm. on the Judiciary*, 115th Cong. (Mar. 15, 2017), <https://www.judiciary.senate.gov/meetings/the-modus-operandi-and-toolbox-of-russia-and-other-autocracies-for-undermining-democracies-throughout-the-world>.

³⁹ *Id.* at 6 (statement of Kenneth L. Wainstein, Partner, Cadwalader, Wickersham & Taft LLP).

⁴⁰ *Id.* at 5 (statement of Heather C. Conley, Sr. Vice President for Europe, Eurasia and the Arctic, Ctr. for Strategic and Int’l Studies).

finance operate[s] in a financial gray zone that is a clear and present danger to U.S. national security.”⁴¹

Disclosure would help alleviate these concerns about illicit foreign participation in election funding, but the FEC “has not taken any steps to increase its ability to identify or detect political spending by foreign sources[; . . . it has] passed no rules, issued no policy statements, nor set any significant enforcement precedent since 2016 that would allow [it] to better identify or detect political spending by foreign sources.”⁴² Affirming the district court’s decision below would help prevent the secret flow of foreign money into our political system.

III. The FEC’s Ineffective Regulation Contributes to the Public’s Declining Faith in Our Democracy.

The FEC’s failure to adopt appropriate regulations to require the disclosures required by the FECA, despite the obvious need and broad public support,⁴³

⁴¹ Heather A. Conley et al. *The Kremlin Playbook 2: The Enablers*, Ctr. Strategic & Int’l Studies 6 (2019), https://csis-prod.s3.amazonaws.com/s3fs-public/publication/190326_KP2.pdf.

⁴² Letter from Ellen L. Weintraub, Vice Chair, FEC to U.S. Senator Amy Klobuchar (Sept. 20, 2018), https://www.fec.gov/resources/cms-content/documents/2018-09-20_ELW_Reply_to_Klobuchar_Letter.pdf.

⁴³ *Americans’ Views on Money in Politics*, N.Y. Times & CBS News (June 2, 2015), <https://www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html> (reporting that 75% of Americans believe that outside groups should be required to publicly disclose contributors).

exemplifies its ineffectiveness in carrying out the clear mandate of Congress in enacting the FECA. Although the FEC was established as an independent regulatory agency made up of six Commissioners to enforce and administer federal campaign finance laws, it has suffered in recent years from repeated deadlocks that have blocked any action.⁴⁴ That this issue has ended up in this Court is symptomatic of the deadlock at the FEC. When CREW first brought its complaint to the FEC, the FEC's own Office of General Counsel raised a concern that its regulations were not fully implementing 52 U.S.C. § 30104(c)(1) and 52 U.S.C. § 30104(c)(2)(C).⁴⁵ Yet the FEC could not bring itself to act. The dysfunction of the agency over the last decade has resulted in a dramatic decrease in enforcement actions and virtually no agency action to address the unresolved consequences of *Citizens United*.⁴⁶

⁴⁴ Ann. M. Ravel, *Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp*, Off. of Comm'r. Ann Ravel, FEC (Feb. 2017), https://classic.fec.gov/members/ravel/ravelreport_feb2017.pdf.

⁴⁵ *CREW v. FEC*, 316 F. Supp. 3d at 361-63.

⁴⁶ See, e.g., Ann Ravel, *Dysfunction and Deadlock at the Federal Election Commission*, N.Y. Times (Feb. 20, 2017), <https://nyti.ms/2lZMIaI>; Trevor Potter, *Money, Politics, and the Crippling of the FEC: A Symposium on the Federal Election Commission's Arguable Inability to Effectively Regulate Money in American Elections 2* (Apr. 2017), <http://campaignlegal.org/sites/default/files/Trevor%20Potter%20ALR%20Symposium%20FEC%20speech%20Apr.%203%202017.pdf>.

We believe the deadlock is deliberate: a regulatory capture egged on by the very forces of influence that benefit from the deadlock. But it is not necessary to agree with our assessment of the cause in order to appreciate the need for a solution.

As elected officials, we consistently hear concerns about money in politics from constituents, and survey data shows that Americans see the increase in secret money in elections as an indicator that our government is corrupted and unrepresentative of ordinary citizens. 88% of Americans think it is important to reduce the influence of big donors on the federal government.⁴⁷ 84% of Americans think money has too much influence in politics.⁴⁸ 75% of U.S. adults perceived corruption as “widespread” in the country’s government.⁴⁹ 72% think that this is a country where people who give a lot of money to elected officials have more influence than others.⁵⁰ 65% of Americans named money in politics as having “a

⁴⁷ Steven Kull et al., *Americans Evaluate Campaign Finance Reform: A Survey of Voters Nationwide*, Univ. Md. Program for Pub. Consultation 4 (2018), http://www.publicconsultation.org/wp-content/uploads/2018/05/Campaign_Finance_Report.pdf.

⁴⁸ *Americans’ Views on Money in Politics*, *supra* note 43.

⁴⁹ *75% in U.S. See Widespread Government Corruption*, Gallup (Sept. 19, 2015), <https://news.gallup.com/poll/185759/widespread-government-corruption.aspx>.

⁵⁰ *The Public, the Political System and American Democracy*, Pew Research Ctr., 26 (2018), <https://www.people-press.org/wp-content/uploads/sites/4/2018/04/4-26-2018-Democracy-release-1.pdf>.

lot” of blame for the dysfunction of our political system; in fact, this was the most common response when asked what is “causing dysfunction in the U.S. political system.”⁵¹ The second most frequent answer, at 56%, was “wealthy political donors.”⁵²

Studies show that this belief is well founded: statistically there is no correlation between what the public wants and what the public gets; instead, the correlation is with what wealthy interests want. One Princeton University study found that, “senators are more responsive to the opinions of affluent constituents than of middle-class constituents — and totally unresponsive to the opinions of poor constituents.”⁵³ More specifically, the study found, “the views of constituents in the upper third of the income distribution received about 50% more weight than those in the middle third (with even larger disparities on specific salient roll call votes), while the views of constituents in the bottom third of the income distribution received no weight at all in the voting decisions of their senators.”⁵⁴ In

⁵¹ John Wagner & Scott Clement, *‘It’s Just Messed Up’: Most Think Political Divisions as Bad as Vietnam Era, New Poll Shows*, Wash. Post (Oct. 28, 2017), https://www.washingtonpost.com/graphics/2017/national/democracy-poll/?utm_term=.4cd32a4f6bcc.

⁵² *Id.*

⁵³ Larry Bartels, *supra* note 9, at 20.

⁵⁴ *Id.* at 4.

our assessment, the forces of unlimited anonymous spending are the pinnacle of this dysfunctional correlation.

The FEC regulation at issue, 11 C.F.R. § 109.10, has contributed to our elections becoming awash in secret, influencer money. It has allowed a network of powerful organizations to spend tens, or even hundreds, of millions of dollars to influence elections while hiding their contributors from the public. This has contributed to the public's disintegrating faith in American democracy, contrary to the highest purposes of the FECA. When the American public sees the spectacle of ever-increasing campaign spending from anonymous "independent" groups, it feels the untoward changes in our democracy.

Proponents of the regulation spin hypotheticals of average citizens giving to an outside group for a specific expenditure and becoming ensnared in disclosure reports and publicly shamed for advertisements they never intended to support. This is, respectfully, a red herring. It is the influencers spending millions of dollars to have their way in politics, not regular citizens giving small donations, who are of concern to the general public.⁵⁵ And it is no small concern, as those big anonymous spenders are warping American political debate and exerting improper influence over political outcomes. Americans deserve to know is who is donating

⁵⁵ *Donor Demographics*, OpenSecrets.org, <https://www.opensecrets.org/overview/donordemographics.php> (reporting that only 0.48% of the public donates more than \$200 to a political campaign).

these large sums of money to influence our government, and what the favor or disfavor of these organizations says about the candidates. The remote and unrealistic prospect of deterring a \$201 contributor is a mask obscuring the proper focus: massive, immediate, anonymous, corrupting, special-interest funding that is facilitated by the current regulation.⁵⁶

Americans are very clear about what is ailing our democracy.

Unconstrained campaign spending has given a small set of influencers a disproportionate voice in American politics, distorting political outcomes and causing millions of ordinary Americans to lose faith in their government. This widespread lack of confidence in our country's governing institutions should be a matter of concern to the courts.⁵⁷

⁵⁶ Further, the hypotheticals run afoul of their own premise. If these hypothetical individuals were donating \$201 only to support a particular independent expenditure of interest, then their donations should have been reported anyway under the current regulation. If they did not earmark their contribution to a particular advertisement, but expected their funds would be used for any of the organization's election spending, then they are at no risk of a disclosure that somehow falsely misrepresents their beliefs. The true issue in front of this Court is whether the FECA allows undisclosed influencers to spend millions without filing any report of their contributions, as this regulation currently permits.

⁵⁷ In the past, it has been. *See, e.g., Trist v. Child*, 88 U.S. 441, 451 (1874) (“If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous.”); *Marshall v.*

The FECA, as enacted by Congress, protects against real and consequential harms. But the FEC's regulation does not reflect the plain language of the law, nor does it serve its purposes. The FEC, in its initial deficient regulation and in its unwillingness to revisit the regulation after *Citizens United*, has done a tremendous disservice to the American public, eroding our citizens' ability to trust in the fairness of their elections and elected leaders. Indeed, the FEC's failure may be both symptom and cause.

Accordingly, this Court should uphold the lower court's order and thereby urge the FEC to draft a new regulation that requires the disclosures Congress originally directed.

Baltimore & Ohio Railroad, Co., 57 U.S. 314 335 (1853) (“Any attempts to deceive persons entrusted with the high functions of legislation, by secret combinations, or to create or bring into operation undue influences of any kind, have all the injurious effects of a direct fraud on the public.”); *see also Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990) (“[c]orporate wealth can unfairly influence elections”).

IV. Conclusion.

For the foregoing reasons, if the Court finds that Crossroads has standing to bring the instant appeal, the decision of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 29(a)(5) and 32(a)(7), the undersigned certifies that this brief has been prepared in a proportionally spaced typeface, Times New Roman, in 14-point font. According to the word processing system used to prepare the brief, Microsoft Word 2010, it contains 6,494 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that, on April 24, 2019, a true and correct copy of the foregoing document was filed with the Clerk of the United States Court of Appeals for the District of Columbia via the Court's CM/ECF system. Counsel for all parties will be served electronically by the Court's CM/ECF system.

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