ORAL ARGUMENT NOT YET SCHEDULED

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 a Final Judgment of the
United States District Court for the District of Columbia,
The Hon. Beryl A. Howell, Chief District Judge
Case No. 1:16-cv-121-BAH

BRIEF OF *AMICUS CURIAE* CAMPAIGN LEGAL CENTER IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

(A) Parties and Amici. Citizens for Responsibility and Ethics in Washington and Nicholas Mezlak (collectively, "CREW") were the plaintiffs in the district court and are appellees in this direct appeal. The Federal Election Commission ("FEC" or "Commission") was the defendant in the district court but did not appeal, and has filed notice that it does not intend to participate before this Court.

The appellant is Crossroads Grassroots Policy Strategies ("Crossroads"), which was an intervenor-defendant in the district court.

No person filed as amicus curiae before the district court. Senate Majority Leader Mitch McConnell; the U.S. Chamber of Commerce; the Institute for Free Speech; and Free Speech Coalition, Free Speech Defense and Education Fund, Citizens United, Citizens United Foundation, DownsizeDC.org, Downsize DC Foundation, National Right to Work Committee, U.S. Constitutional Rights Legal Defense Fund, Gun Owners of America, Inc., Gun Owners Foundation, Public Advocates of the United States, Policy Analysis Center, Conservative Legal Defense and Education Fund, and the Senior Citizens League have filed briefs as amici curiae in support of Intervenor-Defendant Appellant before this Court.

Senators Sheldon Whitehouse, Jon Tester, and Richard Blumenthal have filed as amici curiae in support of Appellees.

(B) Rulings Under Review. The rulings under review are the district court's March 22, 2017 order and accompanying memorandum opinion, ECF Dkt. Nos. 21, 22, and the district court's August 3, 2018 judgment and memorandum opinion, ECF Dkt. Nos. 42, 43, in *CREW v. FEC*, No. 16-cv-00259-BAH (Howell, J.). The March 22, 2017 memorandum opinion is available at 243 F. Supp. 3d 91. The August 3, 2018 memorandum opinion is available at 316 F. Supp. 3d 349. Joint appendix references to both decisions appear in CREW's Certificate as to Parties, Rulings, and Related Cases.

(C) Related Cases. References to previous decisions in this case and related cases appear in CREW's Certificate as to Parties, Rulings, and Related Cases.

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CORPORATE DISCLOSURE STATEMENT
OF AMICUS CURIAE CAMPAIGN LEGAL CENTER

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae Campaign Legal Center makes the following disclosure regarding ITS corporate status:

Campaign Legal Center ("CLC") is a nonprofit, nonpartisan corporation working in the areas of campaign finance reform, voting rights, and media law. CLC has no parent corporation and no publicly held corporation has any form of ownership interest in CLC.

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GLOSSARY OF ABBREVIATIONS

BCRA	Bipartisan Campaign Reform Act
CREW	Citizens for Responsibility and Ethics in Washington
CRP	Center for Responsive Politics
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
IE	Independent Expenditure
IFS	Institute for Free Speech
MCFL	Massachusetts Citizens for Life
SSF	Separate Segregated Fund

STATEMENT OF INTEREST[1]

Amicus curiae Campaign Legal Center ("CLC") is a nonprofit organization dedicated to promoting sound campaign finance reforms and the important democratic principles they advance. CLC regularly participates in litigation to defend campaign finance laws, including *McConnell v. FEC*, 540 U.S. 93 (2003), and *Citizens United v. FEC*, 558 U.S. 310 (2010). All parties have consented to CLC's participation.

SUMMARY OF ARGUMENT

For more than a century, Congress has sought to "shed the light of publicity" on campaign-related spending by requiring disclosure of its sources. *Buckley v. Valeo*, 424 U.S. 1, 81 (1976) (per curiam). To that end, Congress enacted the forerunner of the current "independent expenditure" ("IE") disclosure regime in the Federal Election Campaign Act of 1971 ("FECA"), Pub. L. No. 92-225, 86 Stat. 3 (1972), and the FECA Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

Crossroads now argues that the Federal Election Commission has the authority to ignore this unambiguous statutory directive—as the Commission did in 1980, by adopting an IE disclosure rule, currently codified at 11 C.F.R.

[1] No person, other than amicus, authored this brief in whole or part, or contributed money to fund its preparation or submission.

§ 109.10(e)(1)(vi), that flouts the plain text of the disclosure requirements in 52 U.S.C. § 30104(c)(1) and (c)(2)(C) ("IE disclosure provisions").

As the district court held, this case is properly resolved at step one of the two-step framework in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See CREW v. FEC*, 316 F. Supp. 3d 349, 387, 410-11 (D.D.C. 2018). Whereas *FECA* unambiguously requires disclosure of all contributors of more than $200 to the person making independent expenditures, 52 U.S.C. § 30104(c)(1), and separately, "identification of each person who made a contribution in excess of $200 . . . for the purpose of furthering *an* independent expenditure," *id.* § 30104(c)(2)(C), the *regulation* requires disclosure only of those contributors who state a specific intent to fund a specific ("*the reported*") independent expenditure, 11 C.F.R. § 109.10(e)(1)(vi) (emphases added).

The Commission thus rewrote one statutory provision (subsection (c)(2)(C)) and read the other out of existence entirely (subsection (c)(1)). *See* CREW Br. 2-9, 20-35. The resulting rule "blatantly undercuts the congressional goal of fully disclosing the sources of money flowing into federal political campaigns, and thereby suppresses the benefits intended to accrue from disclosure." *CREW v. FEC*, 316 F. Supp. 3d 349, 423 (D.D.C. 2018). And Crossroads and its amici effectively concede that that the regulation requires less disclosure than the statute it purports to implement: Crossroads' entire theory of appellate standing depends

on the "injury" inflicted by the prospect of disclosing what *FECA*, rather than the regulation, requires.

Crossroads advances a tenuous alternative construction of the statute at *Chevron* step one, resorting to extra-textual arguments in an attempt to conjure up ambiguity where there is none. Principally, however, Crossroads focuses on *Chevron*'s second step, and so too will this memorandum. At step two, which the Court need not reach, Crossroads invokes "a host of other considerations" that supposedly justify the rule's departure from Congress's expressed purpose, *e.g.*: the rule "operated without controversy for decades" before this lawsuit; Congress "acquiesced" to the rule by failing to veto it when it was promulgated, or amend it thereafter; and the rule accords with "[i]mportant First Amendment [p]rinciples" by limiting the reach of the statute. Crossroads Br. 20, 50.

These step two arguments are not just irrelevant—the statute is unambiguous—but incorrect. First, even if Crossroads' "acquiescence" arguments could change the plain meaning of the statute or the congressional purpose it reflects, *see CREW*, 316 F. Supp. at 410 n.47, they are founded on an inaccurate history of FECA. Congress has never "ratified" the FEC's unduly narrow IE disclosure rule. And even if it were otherwise possible to "read[] the tea leaves of congressional inaction," *Rapanos v. United States*, 547 U.S. 715, 749 (2006), legislative inaction in this area could only be ascribed to the rule's limited

applicability in the decades between its promulgation and *Citizens United*. Non-committee independent spending was trivial throughout that period, obscuring the conflict between the rule and "the unambiguously expressed intent of Congress." *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013).

The constitutional arguments put forward by Crossroads and its amici are equally irrelevant and wrong. The Commission did not cite First Amendment concerns as a reason for adopting the challenged rule in 1980, nor did it do so in this litigation. More importantly, Crossroads' arguments have been rejected by the Supreme Court, which has repeatedly validated the language and scope of the contributor disclosure required by FECA's IE disclosure provisions. *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) ("*MCFL*"); *Buckley*, 424 U.S. at 60-84.

Lastly, contrary to Crossroads' complaints about the justiciability of this case, the district court properly exercised jurisdiction over CREW's challenge to the regulation. The well-established precedents of this Court permit judicial review of Commission regulations under the APA when the regulations are applied to an administrative complaint. *See Weaver v. Fed. Motor Carrier Safety Admin.*, 744 F.3d 142, 145 (D.C. Cir. 2014); *Shays v. FEC*, 414 F.3d 76, 95-96 (D.C. Cir. 2005). The need for judicial review is also particularly acute in this setting, where the mere existence of the offending regulation precludes the possibility of relief

from the agency, even for clear violations of FECA, and enables groups like Crossroads to permanently withhold the disclosure that FECA demands. *See Shays*, 414 F.3d at 95.

ARGUMENT

I. Crossroads' Congressional Acquiescence Arguments Are Unfounded and Cannot Overcome the Textual Conflict Between the Regulation and the Statute.

From the date of its adoption in 1980, the rule created a major loophole in FECA's IE disclosure regime and frustrated Congress's clearly expressed intent to achieve "full disclosure" of the sources of campaign spending. *Buckley*, 424 U.S. at 78. But because the rule had limited applicability before 2010, these defects largely escaped notice. Congressional inaction over this period signifies, at most, Congress's "unawareness" of the problem, or its "preoccupation" with others. *Zuber v. Allen*, 396 U.S. 168, 185-86 & n.21 (1969).[2] And on its own, the rule's vintage is "a slender reed" upon which to justify the Commission's wholesale revision of the statutory text; "[a]rbitrary agency action becomes no less so by simple dint of repetition." *Judulang v. Holder*, 565 U.S. 42, 61 (2011).

[2] Crossroads' reliance on the Commission's contemporaneous involvement in the legislative process is likewise unavailing: whether or not the agency "understood" the 1979 FECA Amendments, it was not authorized to rewrite them. Even if it had "drafted the [statutory] provisions" itself, "neither antiquity nor contemporaneity with the statute is a condition of [a regulation's] validity." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996).

First, before it was invalidated in *Citizens United*, the longstanding corporate and union expenditure ban, *see* 52 U.S.C. § 30118(a), meant that the universe of "persons" reporting under the rule was largely limited to individuals (*i.e.*, natural persons), and that the overall volume of such spending was trivial. Second, Congress had more urgent concerns about the growth of undisclosed "soft money" and "sham issue advocacy"—activity that had entirely escaped regulation under the campaign finance laws as they existed in the 1980s and 1990s—and these problems monopolized congressional attention in the years preceding its passage of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81. Therefore, congressional "inaction" with respect to a rule of such limited applicability is hardly the "important substantive point" that Crossroads claims. *See* Crossroads Br. 16.

A. The longstanding ban on the use of corporate and union treasury funds for independent expenditures masked the regulation's defects.

In *Buckley*, the Supreme Court upheld provisions of FECA that required "[e]very person" making a minimum amount of "expenditures" to disclose, among other things, the name and address of each person who made one or more "contributions" in a calendar year of at least $100. 424 U.S. at 74-84; *see also id.* at 157-58, 160 (quoting former version of 2 U.S.C. § 434(b), (e)). Fearing that the definition of "expenditure" was potentially vague, the Court narrowly construed the term to reach "only funds used for communications that expressly advocate the

election or defeat of a clearly identified candidate," *id*. at 79-80, using "express words of advocacy" such as "vote for," "vote against," and "elect," *id*. at 44 n.52. As a result, these disclosure requirements had very limited reach. Not only were they circumscribed by the "express advocacy" test, but they also had no application to corporations or labor unions, which had long been prohibited from using treasury funds to make expenditures in connection with any federal election. *See* Tillman Act, ch. 420, 34 Stat. 864 (1907); War Labor Disputes Act, ch. 144, § 9, 57 Stat. 167 (1943); Taft-Hartley Act, ch. 120, § 304, 61 Stat. 159 (1947).

Even after *MCFL* authorized a narrowly defined subgroup of corporations to make expenditures, the IE disclosure provisions had limited applicability. Ten years after *Buckley*, the Supreme Court was asked to reconsider the corporate expenditure ban as applied to an incorporated advocacy organization. *MCFL*, 479 U.S. at 241. It held that the prohibition could not be applied to nonprofit corporations like MCFL that were organized for the purpose of promoting political ideas rather than for business purposes and that raised their funds only from individuals. *Id.* at 263-64.[3]

[3] The FEC later adopted a regulation to implement the ruling, terming organizations that met the exception's narrow requirements "Qualified Nonprofit Corporations," or "QNCs." FEC, Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35292, 35296-35302 (July 6, 1995).

Notably, while creating this carve-out from the corporate expenditure ban, the Court validated the IE disclosure regime at issue here, juxtaposing the IE disclosure provisions that would apply to MCFL "[i]f it were not incorporated," *i.e.*, "those specified by § 434(c)," with the "more extensive requirements and more stringent restrictions" applicable to political committees. *Id.* at 252-54 (plurality op.).[4] The *MCFL* Court's understanding of the contributor disclosure requirements in subsections (c)(1) and (c)(2)(C) mirrors the district court's here.[5] And on the basis of that understanding, it dismissed the FEC's concerns that relaxing the corporate expenditure prohibition for groups like MCFL "would open

[4] Justice O'Connor did not join Part III-A of the decision, but neither did she disagree with the substance or characterization of the IE disclosure requirements. *See id.* at 266 (O'Connor, J., concurring in part and concurring in the judgment); *see also* CREW Br. 25 n.7.

[5] As described in *MCFL*, any unincorporated non-committee "person" spending more than $250 on IEs was required to "identify all contributors who contribute in a given year over $200 in the aggregate in funds to influence elections, § 434(c)(1); . . . [and] any persons who make contributions over $200 that are earmarked for the purpose of furthering independent expenditures, § 434(c)(2)(C)." *Id.* at 252. Because MCFL was incorporated, it was required to "establish a 'separate segregated fund' [SSF] if it wishe[d] to engage in any independent spending," *id.* at 253, and its SSF would be subject to "several [political committee] requirements *in addition to those mentioned*" in § 434(c) for independent spenders, *see id.* at 253-54 (exhaustively surveying committee registration, recordkeeping, and reporting requirements in then-sections 431, 432, and 433 *without repeating* requirement cross-referenced in subsection (c)(1) to identify all contributors above $200 [§ 431(b)(3)(A)]) (emphasis added).

the door to massive undisclosed political spending by similar entities, and to their use as conduits for undisclosed spending by business corporations and unions":

> We see no such danger. Even if § 441b is inapplicable, an independent expenditure of as little as $250 by MCFL will trigger the disclosure provisions of § 434(c). As a result, MCFL will be required to identify all contributors who annually provide in the aggregate $200 in funds intended to influence elections . . . and will be bound to identify all persons making contributions over $200 who request that the money be used for independent expenditures.

Id. at 262. The Court concluded that these IE disclosure provisions "provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of contributions." *Id.*

Although *MCFL* freed a narrowly defined group of nonprofit corporations to make IEs, the corporate expenditure prohibition remained intact—albeit in a narrower form—so there was still very little independent spending reported to the FEC by "persons other than political committees."[6] Throughout this period, non-committee IEs also comprised a minute fraction of campaign spending overall (and of IEs specifically), and most were made by individuals, for whom contributor

[6] In 2000, when the Commission implemented an electronic filing requirement for filers raising or spending above $50,000, it described the total number of non-committee IE filers as "very small"; the number above the threshold was smaller still. FEC, Electronic Filing of Reports by Political Committees, 65 Fed. Reg. 38415, 38418 (2000) (noting that "[t]he effect of the final rules" on "individuals or [MCFL corporations]" making IEs "will be small because historical data show that the number of these other filings is very small," and only a few exceeded $50,000 in any given cycle).

disclosure is largely inapplicable.[7] The great majority of IE spending reported to the FEC was by political committees—*e.g.*, parties,[8] PACs, and SSFs—which are required to disclose all of their receipts and disbursements. 52 U.S.C. §§ 30101, 30102, 30103.

Until *Citizens United*, non-committee IEs reported under 11 C.F.R. § 109.10(e)(1)(vi) thus remained a vanishingly small piece of the pie. So it is hardly surprising that Congress failed to correct, or perhaps even to notice, the inconsistency between the IE disclosure regulation and the statute. Instead, the "giant loophole" after *MCFL* was that corporations, unions, and others "could expend hundreds of millions of dollars in unregulated funds on broadcasts that

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[7] *See, e.g.*, Press Release, FEC, *FEC Study Shows Independent Expenditures Top $16 Million* (Nov. 29, 1981), https://classic.fec.gov/press/archive/1981/19811129_IEActivity.pdf (summarizing IEs in 1979-80 cycle by 105 PACs ($14.1 million), 33 individuals ($1.2 million), and 80 other groups ($0.7 million); Press Release, FEC, *FEC Reports 1983-84 Independent Spending Activity* (Oct. 4, 1985), https://classic.fec.gov/press/archive/1985/19851004_RevIndepSpend.pdf (noting IEs by 155 PACs, 24 individuals and 24 other groups); FEC, *1987-88 Election Cycle Data Summary Press Releases*, https://classic.fec.gov/press/summaries/1988/ElectionCycle/1988DataTitle.shtml#IE88 ($20.77 million in IEs by PACs and just under $650,000 in IEs by individuals and other groups in 1987-88); FEC, *1989-90 Independent Expenditure 24-Month Data Summaries (Jan. 1, 1989 – Dec. 30, 1990)*, https://classic.fec.gov/press/summaries/1990/ElectionCycle/24m_IE.shtml ($5.21 million in PAC IEs and just under $500,000 from individuals and others).

[8] *See, e.g.*, Michael J. Malbin & Brendan Glavin, *CFI's Guide to Money in Federal Elections*, Campaign Finance Institute, at 21 (2018), http://www.cfinst.org/pdf/federal/2016Report/CFIGuide_MoneyinFederalElections.pdf ("[N]on-party IEs made up only a small portion of federal campaign spending from 1974 through 2010.").

appeared 'functionally identical' to ordinary campaign advertising" by avoiding the so-called "magic words" of express advocacy. *Shays*, 414 F.3d at 107. This is where Congress turned its attention during the extended reform effort that culminated in the passage of BCRA.

B. BCRA was focused on closing the soft-money loophole and reining in "sham issue advocacy," not on revisiting a disclosure law with very limited applicability at that time.

In the decades after *Buckley*, Congress determined that FECA's disclosure requirements for independent spenders remained vulnerable to evasion—not because they failed to require non-committee spenders to disclose their contributors, but because they enabled most spenders to escape regulation entirely by avoiding words of express advocacy. Even the *Buckley* Court recognized this risk. *See FEC v. Furgatch*, 807 F.2d 857, 862 (9th Cir. 1987) (noting *Buckley*'s recognition "that efforts had been made in the past to avoid disclosure requirements by the routing of campaign contributions through unregulated independent advertising").

By the late 1990s, Congress could no longer ignore the "two perceived evils" then plaguing the federal campaign finance system: "the corrupting influence of large, unregulated donations called 'soft money,' and the use of 'issue ads' purportedly aimed at influencing people's policy views but actually directed at swaying their views of candidates." *Shays v. FEC*, 528 F.3d 914, 916 (D.C. Cir.

2008). Congress concluded that the campaign finance system had suffered a "meltdown," and responded by enacting BCRA. *See Shays*, 414 F.3d at 81-82.

In passing BCRA, Congress was focused on bringing these two kinds of activity into FECA's regulatory ambit, not on securing contributor disclosure from the relative handful of non-committee, non-individual "persons" who were then permitted to make independent expenditures. The immediate concern was that groups were spending millions on *non*-express advocacy campaign ads calculated to have the same electoral effect as IEs without triggering *any* regulation under FECA—to the tune of more than $500 million by the 2000 elections. *McConnell*, 540 U.S. at 127-28 & n.20.

BCRA did not implicitly "ratify" the regulation in BCRA, *see* Crossroads Br. 45-49, simply because it defined a new category of election-related expenditures and subjected them to new disclosure provisions without addressing IE disclosure. To combat "sham issue ads," Congress created a new category of campaign spending, called "electioneering communications": broadcast, cable, or satellite communications made shortly before an election that refer to a clearly identified federal candidate and, for House and Senate candidates, are geographically targeted to the relevant electorate. *See* 52 U.S.C. § 30104(f)(3). But the fact that Congress left the IE disclosure rule untouched proves nothing, and indeed, "it is not surprising that Congress failed to take a close look at the FEC's

independent expenditure disclosure rule, which at the time was little more than federal campaign finance law's equivalent of a dark corner in a dusty attic." Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the "Dark Money" Election*, 27 Notre Dame J.L. Ethics & Pub. Pol'y 383, 439 (2013).

There is accordingly no special significance to divine from the fact that "Congress did not express any dissatisfaction with the Regulation" when it passed BCRA. Crossroads Br. 8. In all of BCRA's voluminous legislative history, there are scant references to the IE disclosure provision, and none to the FEC's rule interpreting it. *See* Potter & Morgan, *supra*, at 436. To the extent Congress had concerns about the adequacy of disclosure requirements in connection with independent spending, they revolved around *Buckley*'s narrow "express advocacy" construction of the term "expenditure," which had enabled the wholesale evasion of disclosure provisions. Moreover, by closing the soft-money loophole and expanding the kinds of communications covered by the corporate expenditure prohibition, BCRA's drafters hoped to channel more corporate electioneering activity back into fully transparent SSFs. BCRA's transparency-related reforms were thus focused on the areas of most acute concern, and hardly amount to "'overwhelming evidence' that Congress considered and failed to act upon" the Commission's faulty IE disclosure rule. *Rapanos*, 547 U.S. at 750.

C. *Citizens United* exposed the rule's inconsistency with FECA and heightened its adverse effects on the statutory disclosure regime.

Citizens United exposed what had long been hiding in plain sight: the Commission's rule and the statute have stood in irreconcilable conflict since 1980. In the years before the rule was promulgated in 1980, "the sources of 98.3% of the funds spent on independent expenditures were disclosed." Potter & Morgan, *supra*, at 426 & n.234. As soon as the rule took effect, that figure dropped to zero. *Id.* But because the amount of non-committee independent spending was small in absolute terms, the system-wide effects traceable to the rule were likely minimal. As long as the corporate/union expenditure prohibition was in place, the conflict remained obscure.

Before *Citizens United*, therefore, Congress had no reason to attend to the unduly narrow scope of contributor disclosure required under the rule. Instead, between 1976 and 2001, its concern was that the Supreme Court's narrow "express advocacy" gloss on the term "expenditure" had enabled organizations of all kinds to spend lavishly on candidate-focused campaign ads that were not subject to any disclosure at all. With BCRA, Congress focused on bringing that spending into the light. *See infra* Part I.B; *see also McConnell*, 540 U.S. at 196-97 (upholding BCRA disclosure requirements as measure to prevent organizations from avoiding "the scrutiny of the voting public" by "hiding behind dubious and misleading names").

Now, in the wake of *Citizens United*, there is more outside spending coursing through the campaign finance system than ever before—much of it once again, thanks to the FEC's IE disclosure rule, coming from groups "hiding behind dubious and misleading names" and disclosing no contributors. The effects of the decision were immediately apparent: the amount of independent spending by outside groups quadrupled between the 2006 and 2010 elections.[9] Much of the spending was anonymous, and estimates suggest that since *Citizens United*, the FEC rule has kept as much as $769 million of IEs in the dark.[10]

This is a long way from the campaign finance system envisioned by the Supreme Court in *Citizens United*, which hinged on the "pair[ing]" of "corporate independent expenditures with effective disclosure." 558 U.S. at 370. As the Court emphasized, "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at 371. The

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[9] Spencer MacColl, *Citizens United Decision Profoundly Affects Political Landscape*, Ctr. For Responsive Politics ("CRP") (May 5, 2011), http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html.

[10] *CLC Analysis: FEC Rule Kept As Much As $769 Million In Political Spending In The Dark* (Oct. 4, 2018), https://campaignlegal.org/update/clc-analysis-fec-rule-kept-much-769-million-political-spending-dark; *see also* CRP, *Political Nonprofits (Dark Money)*, https://www.opensecrets.org/outsidespending/nonprof_summ.php ("[S]pending by organizations that do not disclose their donors has increased from less than $5.2 million in 2006 to well over $300 million in the 2012 presidential cycle and more than $174 million in the 2014 midterms.").

Commission's unduly narrow rule impedes that goal, and frustrates Congress's clear purpose—as unambiguously expressed in FECA's text, structure, and history—of securing complete disclosure of the sources of campaign-related spending.

II. Invoking the First Amendment Does Not Save the Regulation.

In addition to its arguments pertaining to the statutory text and history, Crossroads implies that constitutional avoidance justifies the facially invalid regulation. Crossroads Br. 50-53. Made more explicit by its amici, this theory suggests that FECA's IE disclosure provisions, absent the narrowing construction of the regulation, would be unconstitutionally overbroad and vague. Crossroads Br. 52 (suggesting a broad reading of FECA "would lead to . . . the imposition of reporting burdens on core political speech that are not clearly necessary"). But even if this rationale had been asserted by the FEC in the 1980 rulemaking or this litigation—and it was not—its underlying premise is wrong. Neither FECA's IE disclosure provisions, nor the statutory terms upon which they rest, are constitutionally suspect; on the contrary, it is well settled that this law vindicates the electorate's compelling interest in knowing "where political campaign money comes from." *Buckley*, 424 U.S. at 66.

A. Crossroads' First Amendment argument is nothing more than a post hoc rationalization for the rule.

At no point has the Commission cited the First Amendment as a reason for adopting the challenged rule. The FEC's explanation for the 1980 rule did not articulate any constitutional concerns. AR 1503 (45 Fed. Reg. 14831, 15087) (Mar. 7, 1980)). Nor was there anything in the rulemaking record raising First Amendment or donor privacy issues. *Id.*; *see also* AR 1330-31 (Memorandum from Charles N. Steele & Patricia Ann Fiori to the Comm'n through Orlando B. Potter 68-69 (Feb. 11, 1980)); *CREW*, 316 F. Supp. 3d at 378-80. Even in this litigation, the Commission has not made this case. To be sure, it has suggested that its rule provides additional guidance to the regulated community. *See, e.g.*, FEC Summ. J. Mem. 43 (Doc. 30) ("Had the FEC promulgated a rule with language identical to the statute, or not promulgated one at all, a group . . . might not understand as clearly what contributors to include on its reports."). But this is a far cry from a claim that the statute is unconstitutionally vague or overbroad in the rule's absence. A court generally may not uphold an agency rule on grounds the agency did not itself articulate. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency."); *see also Ass'n of*

Civilian Technicians v. FLRA, 269 F.3d 1112, 1117 (D.C. Cir. 2001) ("Agency decisions must generally be affirmed on the grounds stated in them.").

Amici supporting Crossroads—39 years after the adoption of the challenged rule—now attempt to fill in the gaps, arguing that "carefully constructed Commission regulations" like 11 C.F.R. § 109.10(e)(1)(vi) are the only things "keep[ing] these unconstitutional statutes from collapsing in on themselves." Inst. for Free Speech ("IFS") Br. 7; *see also* McConnell Br. 33-34; Chamber Br. 18-20. But even if this constitutional rationale had been asserted in this case by the Commission, rather than non-parties, the Court cannot credit a post hoc litigation position that does not reflect the actual basis for the agency's decision. *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigation position would be entirely inappropriate.").

Nor is it clear exactly how these constitutional arguments, assuming they were properly presented, should bear upon the *Chevron* analysis here. Crossroads suggests that constitutional concerns are relevant to an inquiry under *Chevron* step two as to whether the regulation was a reasonable construction of an ambiguous statute. Crossroads Br. 43-53. But Crossroads does not explain how its First Amendment arguments change the analysis at *Chevron* step one, where

congressional intent is unambiguous,[11] nor does it argue that the challenged rule is the *only* constitutional way to construe the statute.

Indeed, none of the First Amendment arguments asserted by Crossroads or its amici seek to defend the validity of the rule as much as they attempt to relitigate the constitutionality of FECA's IE disclosure provisions. *See* IFS Br. 8 (arguing FECA demonstrates "an unconstitutional Congressional intent"). The correct vehicle for that endeavor is a direct constitutional challenge to FECA, not an administrative review action seeking to reinstate an allegedly invalid regulation;

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[11] Crossroads attempts to bolster its constitutional avoidance argument by citing *Van Hollen* as supposedly authorizing the FEC to consider, in rulemaking, "the conflicting privacy interests that hang in the balance." Crossroads Br. 51. But unlike in *Van Hollen*, the Commission did not base 11 C.F.R. § 109.10(e)(1)(vi) on constitutional or privacy considerations, nor defend it on these grounds. *See Van Hollen v. FEC*, 811 F.3d 486, 498, 499 (D.C. Cir. 2016) (noting that FEC's explanation for "electioneering communications" disclosure rule cited "individual donor privacy" concerns). This Court cannot consider rationales for challenged agency action that the agency itself has not claimed.

Further, insofar as *Van Hollen* can be read as allowing—but not requiring—the FEC to take constitutional considerations into account in interpreting FECA, *Van Hollen* arrived at that point only after concluding that the operative statutory provisions were ambiguous. *Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108, 110 (D.C. Cir. 2012) (noting effect of intervening Supreme Court decisions on potential scope of statutory electioneering communications disclosure provisions). Having determined that *Chevron* step one review was not appropriate, *Van Hollen* instead considered "whether the rule survives step two and *State Farm*'s 'arbitrary and capricious' test." 811 F.3d at 488-89. Here, the district court correctly found that FECA's IE disclosure provisions are unambiguous, so *Van Hollen*'s *Chevron* step two analysis and dicta about First Amendment privacy concerns do not apply.

Crossroads is free to file the former, if and when it develops concrete plans to make IEs potentially subject to disclosure under 52 U.S.C. § 30104(c).[12] *See* CREW Mot. to Dismiss 3-4.

B. Crossroads' constitutional arguments are inconsistent with Supreme Court precedent.

The crux of the First Amendment arguments asserted by Crossroads and its amici is that the rule is reasonable because it had the effect of curing the constitutional defects of FECA's IE disclosure provisions, and in particular, their reliance on the "vaguely-worded" statutory term "contribution." Crossroads Br. 53. But *Buckley* addressed and rejected the contention that FECA's definition of "contribution" was impermissibly vague.

Buckley reviewed whether the federal definitions of "expenditure" and "contribution" were unconstitutionally vague and overbroad because both definitions relied on the operative phrase "for the purpose of influencing any election for Federal office." *Id*. at 79; *see also* 52 U.S.C. § 30101(8)(A)(i) (defining "contribution"); *id.* § 30101(9)(A)(i) (defining "expenditure"). Amicus

[12] Even if the FEC had claimed that constitutional considerations had originally motivated its adoption of the regulation, its analysis of judicial decisions and "constitutional question[s]" would receive no deference. *J.J. Cassone Bakery, Inc. v. NLRB*, 554 F.3d 1041, 1044 (D.C. Cir. 2009); *CREW v. FEC*, 209 F. Supp. 3d 77, 87 (D.D.C. 2016). This is an "area of presumed judicial, rather than administrative, competence." *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002).

IFS contends that the "*Buckley* Court facially narrowed [both] those provisions to cordon their reach," IFS Br. 6, but this is wrong: the Court's "cordoned" this phrase only in the context of *independent expenditures*. There, it concluded that "for the purpose of influencing" language was vague because it potentially "encompass[ed] both issue discussion and advocacy of a political result." 424 U.S. at 79. Consequently, where the actor was not a "political committee," the Court narrowly construed the term "expenditure" to reach only "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 79-80.

But the Court simultaneously found that this phrase "presents fewer problems in connection with the *definition of a contribution* because of the limiting connotation created by the general understanding of what constitutes a political contribution." *Id.* at 24 (emphasis added). Instead of imposing an "express advocacy" construction on "contribution," the Court merely clarified that a contribution includes: (1) "contributions made directly or indirectly to a candidate, political party, or campaign committee," and (2) "contributions made to other organizations or individuals but *earmarked for political purposes*." *Id*. at 78 (emphasis added). In light of this "general understanding" of what constitutes a political contribution, the FECA provision defining contributions was neither vague nor overbroad and the limiting construction of "express advocacy" was

unnecessary. It follows that FECA's IE disclosure provisions, insofar as they rely upon the definition of contribution, are equally permissible.

Although the Supreme Court endorsed this aspect of the IE disclosure provisions, Crossroads and its amici conjure up a procession of potentially unconstitutional or confusing disclosures that they believe the statute, particularly section 30104(c)(1), would require absent the challenged rule. But the district court rejected the suggestion that subsection (c)(1) was "unbounded" without the narrowing gloss of the regulation, reasoning that that its contributor disclosure requirement covered only "all *contributions* received," 52 U.S.C. § 30104(c)(1), and "contributions," by definition, were only those donations made "for the purpose of influencing any election for Federal office," *id.* § 30101(8)(A)(i), and "earmarked for political purposes." *See CREW*, 316 F. Supp. 3d at 388-89 (emphasis added) (citing *Buckley*, 424 U.S. at 80). Crossroads cannot tenably claim that a "New York resident who . . . gives to an animal welfare organization to lobby the local city council" will be disclosed when that organization "run[s] an independent expenditure against a California candidate." Crossroads Br. 52. Only those donations made "for the purpose of influencing any election for Federal office" and "earmarked for political purposes" —a construction endorsed in *Buckley*—would trigger the statutory disclosure requirement in 52 U.S.C. § 30104(c)(1).

III. The District Court Properly Exercised Jurisdiction Over CREW's Challenge to the Regulation.

Crossroads strives to insulate this facially invalid regulation from judicial review by leveling assorted attacks against the justiciability of CREW's claim. None has merit. Well-established circuit precedent allows for judicial review of Commission regulations under the APA when the regulations are applied to an administrative complaint. *See Weaver*, 744 F.3d at 145; *Shays*, 414 F.3d at 96. Judicial review is particularly appropriate in a context like this one, where the offending regulation would otherwise be applied to dismiss FEC administrative complaints involving clear statutory violations. *See Shays*, 414 F.3d at 95. If the rule were revived as Crossroads demands, FECA's safe harbor provision would perpetually insulate non-disclosing groups from their obligation to conform with the statutory requirements. In the meantime, elections would come and go, spenders like Crossroads would continue to withhold the "meaningful disclosure" Congress prescribed, and voters would remain in the dark. Legislative History of [FECA] Amendments of 1979 at 139 (1983), http://classic.fec.gov/pdf/legislative_hist/legislative_history_1979.pdf ("1979 FECA History").

First, Crossroads incorrectly asserts that the district court lacked jurisdiction to consider CREW's APA claim, and that this Court likewise cannot adjudicate this dispute, because the Commission did not evaluate the lawfulness of the regulation first. Crossroads Br. 22, 32-34. This Court has long recognized that a

"purely legal" question, like the interpretive one presented here, is "presumptively suitable to judicial review." *Shays*, 414 F.3d at 95 (quoting *AT&T Corp. v. FCC*, 349 F.3d 692, 699 (D.C. Cir. 2003)); *Chamber of Commerce v. FEC*, 69 F.3d 600, 604 (D.C. Cir. 1995). And "[i]t is well established that a rule may be reviewed when it is applied in an adjudication—an agency need not explicitly reassess the validity of a rule to subject the rule to challenge on review." *AT&T Co. v. FCC*, 978 F.2d 727, 734 (D.C. Cir. 1992); *see also Shays*, 414 F.3d at 95-96.

CREW's challenge to the regulation was ripe for review because neither the court nor the agency would "benefit from postponing review until the policy in question has sufficiently 'crystallized' by taking on a more definite form." *AT&T Corp.*, 349 F.3d at 699-700 (citation omitted). And as in *Shays*, no further "'crystallization' of the disputed policies will ever occur" because "conduct protected by the [FECA] safe harbors will *never* be subject to enforcement proceedings." 414 F.3d at 95 (citation omitted). This is precisely why this Court has said that judicial review under FECA is insufficient for evaluating the validity of Commission regulations. *Id.* at 96. Crossroads admits as much in explaining that the Commission can dismiss a complaint on the basis of the safe harbor provision without evaluating whether the regulation is lawful. Crossroads Br. 33. This Court permits APA suits in these circumstances to ensure that FECA regulations are not permanently shielded from review. *Id.*; *see also AT&T Corp.*, 349 F.3d at 700.

Moreover, because CREW challenged the validity of the rule after it was applied in the dismissal of its complaint, its claim is not foreclosed by the usual statute of limitations for bringing a standalone facial challenge to an administrative regulation. *See Weaver*, 744 F.3d at 145; *see also Genuine Parts Co. v. EPA*, 890 F.3d 304, 315-16 (D.C. Cir. 2018); *Murphy Expl. & Prod. Co. v. U.S. Dep't of Interior*, 270 F.3d 957, 958-59 (D.C. Cir. 2001). Simply put, CREW's challenge to the regulation was properly brought, reviewed, and decided by the district court.

Judicial review is particularly appropriate in this context, where the overriding purpose of the statutory regime is to ensure broad disclosure. FECA requires contributor disclosure from independent spenders because Congress intended "to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption." *Buckley*, 424 U.S. at 76; *see also Citizens United*, 558 U.S. at 366-71; 1979 FECA History at 139 (describing the 1979 amendments to the IE disclosure provisions as aimed at "[s]implif[ying] reporting without affecting meaningful disclosure").

Nor was CREW's claim precluded because it failed to comment on a 2011 rulemaking petition that the Commission could not even agree to take up.[13] *See*

[13] FEC Open Meeting Minutes at 4-5 (Dec. 15, 2011), https://sers.fec.gov/fosers/showpdf.htm?docid=114910; Rep. Van Hollen, *Petition for Rulemaking to Revise and Amend Regulations Relating to Disclosure of Independent Expenditures* (Apr. 21, 2011), https://sers.fec.gov/fosers/showpdf.htm?docid=61143.

Crossroads Br. 34. Postponing review to allow the Commission to conduct a rulemaking likely means postponing it forever. Even if the Commission agreed to *initiate* a rulemaking, recent history suggests that the prospects it will actually adopt a new rule are very slim[14]—and accordingly, any future challenge to the rule's validity would arrive in substantially the same form as CREW's. Punting the question to the Commission would all but ensure that outside spenders would continue to flout the statute and shield the identities of their contributors, secure in the virtual guarantee of the agency's "dysfunction and deadlock."[15] Meanwhile, the public would be less able to make informed choices at the ballot box because it would be deprived of the disclosure that Congress required—disclosure that has become increasingly necessary to illuminate the sources of independent spending since *Citizens United*. *See supra Part I*. Given the futility of further administrative proceedings, the district court's intervention was warranted. *Cf. Ass'n of Flight Attendants-CWA v. Chao*, 493 F.3d 155, 159 (D.C. Cir. 2007).[16]

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[14] *See generally, e.g.*, Issue One, *Busted and Broke: Why the Federal Election Commission Doesn't Work* (Apr. 23, 2019), https://www.issueone.org/wp-content/uploads/2019/04/FEC-REPORT-2019.pdf.

[15] Office of Comm'r Ann M. Ravel, FEC, *Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp* (2017), https://www.fec.gov/resources/about-fec/commissioners/ravel/statements/ravelreport_feb2017.pdf.

[16] As this Court explained in *Shays*, the Commission may never reach a regulation's validity given FECA's safe harbor provision, making judicial rulings on the validity of Commission regulations particularly vital to the public interest.

CONCLUSION

This Court should deny Crossroads' request to vacate the judgments of the district court below, and if it reaches the merits of this case, it should affirm.

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414 F.3d at 95; *cf. United States v. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26-27 (1994) ("Judicial precedents are presumptively correct and valuable to the legal community as a whole[,] . . . and should stand unless a court concludes that the public interest would be served by vacatur."); *Chamber of Commerce v. EPA*, 642 F.3d 192, 211 (D.C. Cir. 2011) (declining to vacate agency action where vacatur would be "akin to vacating a district court decision that was not appealed by either of the principal parties but rather by an intervenor whose particular interest in the matter had evaporated").

As this Court recognized in denying Crossroads' emergency motion to stay the district court's ruling, the Commission's routine dismissals of complaints like CREW's "continu[es] to deprive [them] of the information [they] seek and certainly is capable of repetition." Stay Order at 5. Vacating the ruling below would simply prolong this dispute—inviting another challenge to the unlawful regulation in precisely the same posture.

Dated: April 24, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6405 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 Office Word 2007 in Times New Roman 14 point font.

/s/ Tara Malloy
Tara Malloy

Dated: April 24, 2019

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2019, I electronically filed the BRIEF *AMICUS CURIAE* with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all counsel required to be served.

I further certify that I will also cause the requisite number of paper copies of the brief to be filed with the Clerk.

/s/ Tara Malloy
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