Putting Names to Money: Closing Disclosure Loopholes

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Elections create an opportunity for voters to get to know the candidates, but elections also give voters the opportunity to get to know their fellow voters. Campaigns are obligated to disclose the identity of their donors, which can make these donors' political affiliations known to the world. Also, the identity of a donor can adversely affect the recipient's public image and potentially, the election. These disclosure requirements arguably enable stigmatizing candidates and fellow voters for their political ideology, but this is offset by the desire to make elections transparent.

In today's polarized society, the risk of stigma seems greater than in the past—imagine wearing a MAGA hat in San Francisco or an Alexandria Ocasio-Cortez shirt in rural Alabama—but it pales in comparison to the need for transparency in elections. After the 2016 Presidential Election, Democrats and Republicans alike claimed that nefarious actors attempted to influence the election: be it through foreign interference or election fraud. While there are some disclosure requirements that help mitigate such influence, the current requirements have several loopholes that actors use to remain anonymous.

This Note evaluates three of these disclosure loopholes: (1) the 501(c) disclosure exemption for independent expenditures; (2) the internet loophole for certain electioneering communications; and (3) the straw-donor laundering loophole. Throughout this analysis, one theme stands out: the structure of the Federal Election Commission (FEC) has crippled the agency's ability to enforce disclosure laws. Absent unlikely assistance from Congress, the solution lies with the courts.

Recent judicial decisions portend the possibility of meaningful judicial review of FEC inactions. While questions remain about whether FEC decisions based on "prosecutorial discretion" are exempt from judicial review, the Federal Election Commission Act gives the courts authority to review FEC decisions that are contrary to law. This Note concludes by arguing that FEC enforcement decisions are not exempt and should be nullified if they are "contrary to law."

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TABLE OF CONTENTS

INTRODUCTION

During the 1972 Presidential election, Maurice Stans served as Finance Chairman for President Richard Nixon's Committee for the Reelection of the President.[1] On August 1, 1972, the *Washington Post* reported that Stans received a $250,000 cash contribution from President Nixon's reelection campaign, which was partially distributed to the Watergate burglars.[2] In the wake of the Watergate Scandal, Congress amended the Federal Election Campaign Act (FECA), in part, to strengthen disclosure requirements and prevent anonymous, or dark money, in elections.[3] Dark money consists of donations from external donors whose identities are not publicly disclosed.[4]

Despite these attempts at strengthening electoral transparency, since 1974, the three branches of government have compromised transparent elections. First, Congress lost the will to compel political donors to abide by disclosure laws. Incumbent congressional members largely benefit from loose campaign finance disclosure laws, and recent Supreme Court decisions have weakened statutory-based disclosure requirements.[5] Second, from *Buckley v. Valeo* to *Citizens United v. FEC*,[6] the Supreme Court has lifted the gate on unlimited independent expenditures and muddled the differences between express and issue advocacy. Third, the Federal Election Commission's (FEC) duties have substantially changed in the wake of judicial precedents that reshaped the FEC's interpretation of the Federal Election Campaign Act.[7] More globally, the FEC's enabling statute contains a design flaw that requires six appointments that are evenly split between Democrats and Republicans without any tiebreaker.[8] The commission's party-split has resulted in partisan deadlock, especially in light of increased political polarization.[9]

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1. *Maurice Stans; Nixon Cabinet Member, Campaign Scandal Figure*, L.A. TIMES (Apr. 15, 1998, 12:00 AM), http://articles.latimes.com/1998/apr/15/news/mn-39538.

2. *See* Reporting Group, *Super PACs: How We Got Here*, SUNLIGHT FOUND. (Jan. 31, 2012, 6:46 AM), https://sunlightfoundation.com/2012/01/31/super-pacs-how-we-got-here/; *The Watergate Story: Timeline*, WASH. POST, http://www.washingtonpost.com/wp-srv/politics/special/watergate/timeline.html (last visited Apr. 15, 2020).

3. *See* Reporting Group, *supra* note 2; *see also* Lesley Oelsner, *Stans Pleads Guilty to Five Violations of Election Laws in Campaign of 1972*, N.Y. TIMES (Mar. 13, 1975), https://www.nytimes.com/1975/03/13/archives/stans-pleads-guilty-to-five-violations-of-election-laws-in-campaign.html; Mark Stencel, *The Reforms*, WASH. POST (June 13, 1997), https://www.washingtonpost.com/wp-srv/national/longterm/watergate/legacy.htm.

4. *See Dark Money Basics*, OPENSECRETS, https://www.opensecrets.org/dark-money/basics (last visited Apr. 15, 2020).

5. *See infra* notes 57–60 and accompanying text.

6. Buckley v. Valeo, 424 U.S. 1 (1976); Citizens United v. FEC, 558 U.S. 310 (2010).

7. *See, e.g.*, *Citizens United*, 558 U.S. at 310; McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995); *Buckley*, 424 U.S. at 1.

8. 52 U.S.C. § 30106(a)(2)(A) (2018).

9. NBC's investigative task force researched and created a database of past FEC decisions demonstrating that Democrat appointees vote in a party bloc 87% of the time and Republican appointees vote in a party bloc 98% of the time. *See* Tisha Thompson, *Troll Response Brain Sims*, NBC WASH., https://www.nbcwashington.com/investigations/Deadlock-FEC-Commissioners-Say-Theyre-Failing-to-Investigate-Campaign-Violations-394014971.html (last updated Feb. 6, 2019, 10:27 PM); *see also* Dave

This Note analyzes how the failure of the three branches, particularly the Executive, in enforcing electoral transparency have enabled three major loopholes in campaign finance disclosure laws: (1) 501(c) disclosure exemptions for independent expenditures; (2) internet loopholes for certain electioneering communications; and (3) the straw-donor laundering loophole. First, this Note will address the *Center for Responsibility and Ethics in Washington (CREW) v. FEC* ("*CREW I*") decision,[10] which invalidated the FEC's regulation exempting 501(c) organizations from disclosing the identities of its donors. The 501(c) disclosure exemption is a weakness in campaign finance laws, and while *CREW I* deters efforts to funnel dark money into elections, there are still several schemes used to introduce anonymous and untraceable donations. This Note provides insights into how these gaps can be filled.

Second, 501(c) entities are not subject to any disclaimer or disclosure requirements for certain electioneering communications published on the internet. Electioneering communications are public announcements or advertisements that discuss a potential candidate.[11] This Note argues that the FEC should fill this loophole by amending its definition of "electioneering communications" to include "public communications."

Third, this Note analyzes the straw-donor laundering scheme. Many wealthy donors will create an LLC ("straw donor") to funnel contributions to super PACS and 501(c) organizations. This practice allows donors to remain anonymous, avoid disclosure requirements, and exceed contribution limits. The Campaign Legal Center, a non-profit that works to promote transparency in politics, filed several complaints with the FEC alleging straw-donor violations; however, the FEC chose not to investigate these complaints.[12] This trend appears throughout this Note: the FEC repeatedly chooses not to investigate dangerous loopholes that threaten transparency, which then forces the courts to step in and prod the FEC into action. Courts should review the FEC's decision not to investigate under the "contrary to law" standard, but recently, the FEC claimed that decisions based on "prosecutorial discretion" are not subject to judicial review. And in *CREW v. FEC* ("*CREW II*"), the U.S. Court of Appeals for the D.C. Circuit agreed.[13] *CREW II* has generated division within the D.C. Circuit among judges who believe that FEC decisions based on prosecutorial discretion

Levinthal, *Another Massive Problem with U.S. Democracy: The FEC is Broken*, ATLANTIC (Dec. 17, 2013), https://www.theatlantic.com/politics/archive/2013/12/another-massive-problem-with-us-democracy-the-fec-is-broken/282404/; Ann M. Ravel, *Dysfunction and Deadlock at the Federal Election Commission*, N.Y. TIMES (Feb. 20, 2017), https://www.nytimes.com/2017/02/20/opinion/dysfunction-and-deadlock-at-the-federal-election-commission.html.

10. 316 F. Supp. 3d 349 (D.D.C. 2018).

11. *Making Electioneering Communications*, FED. ELECTION COMM'N, https://www.fec.gov/help-candidates-and-committees/other-filers/making-electioneering-communications/ (last visited Apr. 15, 2020).

12. Campaign Legal Ctr. v. FEC, 245 F. Supp. 3d 119 (D.D.C. 2017).

13. CREW v. FEC (*CREW II*), 892 F.3d 434 (D.C. Cir. 2018). Then-Judge Kavanaugh voted in favor of the opinion, which indicates how he will vote if this issue reaches the Supreme Court. *Id.*

are subject to judicial review.[14] Decisions like *CREW v. American Action Network* ("*AAN*") narrowly construe *CREW II* so that judicial review still applies to pretextual uses of "prosecutorial discretion" as a talisman for decisions of law.

I. THE 501(C) PROBLEM

In the 2016 Presidential Election, candidates and outside groups raised over $2.4 billion.[15] Outside groups for Hillary Clinton and Donald Trump raised over forty percent as much cash as their political committees.[16] Beyond the immense amount of money spent, there is a question as to what and who make up these outside groups.

Outside groups include political action committees (PACs), political party committees, super PACs, and 501(c) "dark money" organizations.[17] A political party committee represents the political party associated with the candidate, such as the Democratic National Committee or Republican National Committee.[18] PACs are committees established by the candidate but not authorized by the candidate to accept contributions or make expenditures.[19] PACs directly contribute to a candidate's campaign, whereas super PACs do not.[20] Super PACs may only make independent expenditures as opposed to direct contributions.[21] In 2010, the D.C. Circuit held that contribution limits on independent expenditure-only groups violated the First Amendment, thereby giving birth to super PACs.[22] Unlike "dark money organizations," a super PAC must disclose each of its donors because super PACs spend strictly to influence the outcome of elections.[23]

The most controversial of these outside groups are "dark money" organizations.[24] Dark money organizations are certain groups of donors that,

14. *See* Campaign Legal Ctr. & Democracy 21 v. FEC (*Democracy 21*), 952 F.3d 352 (D.C. Cir. 2020) (Edwards, J., concurring); *see also* CREW v. American Action Network (*AAN*), 410 F. Supp. 3d 1 (D.D.C. 2019).

15. *2016 Presidential Race*, OPENSECRETS (Nov. 27, 2017), https://www.opensecrets.org/pres16; *Also-Rans: 2016 Presidential Race*, OPENSECRETS (Nov. 27, 2017), https://www.opensecrets.org/pres16/also-rans (encompassing all candidates who ran in the general and primary election).

16. *2016 Presidential Race*, *supra* note 15. Hillary Clinton's political committees raised $563,756,928 and outside groups raised $231,118,680. Donald Trump's political committees raised $333,127,164 and outside groups raised $135,719,703. *Id.*

17. *Outside Spending*, OPENSECRETS, https://www.opensecrets.org/outsidespending/ (last visited Apr. 15, 2020).

18. GREG J. SCOTT & ZAINAB S. SMITH, FED. ELECTION COMM'N, FEDERAL ELECTION COMMISSION CAMPAIGN GUIDE: POLITICAL PARTY COMMITTEES 1 (2013), https://www.fec.gov/resources/cms-content/documents/partygui.pdf.

19. *Types of Nonconnected PACs*, FED. ELECTION COMM'N, https://www.fec.gov/help-candidates-and-committees/registering-pac/types-nonconnected-pacs/.

20. *Id.*

21. *Id.*

22. SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010).

23. Kim Barker & Marian Wang, *Super-PACs and Dark Money: ProPublica's Guide to the New World of Campaign Finance*, PROPUBLICA (July 11, 2011, 12:38 PM), https://www.propublica.org/article/super-pacs-propublicas-guide-to-the-new-world-of-campaign-finance.

24. *Dark Money*, OPENSECRETS, https://www.opensecrets.org/dark-money/ (last visited Apr. 15, 2020).

until recently, were exempt from several campaign finance disclosure requirements, which meant that they could spend an infinite amount of money on political campaigns without disclosing their donors.[25] In the 2016 presidential election, dark money groups raised $181.78 million.[26] In other words, the public received $181.78 million worth of election-related information distributed by people who could be anyone: a neighbor, a board of directors, an issue advocacy group, a Nazi sympathizer, or even a foreign national.

Under 11 C.F.R. § 109.10, a 501(c) organization must disclose the identity of its contributors only if the contribution "was made for the purpose of furthering the reported independent expenditure."[27] This means that a business could be organized as a 501(c)(4) organization with an alleged social welfare purpose, like education, to avoid disclosure. A 501(c)(4) could then collect donations from employees of the business or other individuals who know the 501(c)(4)'s true purpose (advocating for the business) without having to disclose the donors' identities. Unless the contributor specifically earmarks the contribution for express advocacy,[28] the 501(c)(4) would not be required to disclose the identity of the contributor.[29]

Before *CREW I*, an entity could protect its donors' identities through a surprisingly simple process.[30] To avoid disclosure, the entity would first register with the Internal Revenue Service as a 501(c)(4),[31] 501(c)(5),[32] or 501(c)(6) organization.[33]

Theoretically, so long as 51% of the 501(c)(4)'s expenditures are reported for social welfare purposes, as opposed to "campaign activities," the organization can continue to operate as 501(c)(4) and hide the identity of its donors.[34] Politically active social welfare organizations often operate under "educational" purposes. For example, an educational purpose can include

25. 11 C.F.R. § 109.10 (2020).

26. *Political Nonprofits (Dark Money),* OPENSECRETS, https://www.opensecrets.org/outsidespending/nonprof_summ.php?cycle=2018&type=type.

27. 11 C.F.R. § 109.10.

28. Such as a specific independent expenditure.

29. JOHN FRANCIS REILLY & BARBARA A. BRAIG ALLEN, POLITICAL CAMPAIGN AND LOBBYING ACTIVITIES OF IRC 501(C)(4), (C)(5), AND (C)(6) ORGANIZATIONS, at L-3 (2003), https://www.irs.gov/pub/irs-tege/eotopicl03.pdf. The regulation adopts the language in *Buckley*, where the Court first defined express advocacy. Buckley v. Valeo, 424 U.S. 1, 44 n.52 (1976). The FEC considers any language using phrases such as "vote for the President," "re-elect your Congressman," "vote Pro-Life," or "Nixon's the one," as examples of express advocacy for the election or defeat of a candidate. 11 C.F.R. § 100.22 (1995). Thus, unless individuals donate to a 501(c)(4) with the express purpose of funding an independent expenditure, 11 C.F.R. § 109.10 permits a 501(c)(4) to serve as a shell to protect the identity of its individual donors.

30. 316 F. Supp. 3d 349 (D.D.C. 2018).

31. 26 I.R.C. § 501(c)(4) (2018) (defining these organizations as social welfare organizations dedicated to pursuing charitable, educational, or recreational ends).

32. § 501(c)(5) (defining these entities as labor unions).

33. § 501(c)(6) (defining these entities as trade associations including the American Bar Association, American Medical Association, and American Bankers Association).

34. *See* Richard Briffault, *Super PACS*, 96 MINN. L. REV. 1644, 1648–49 (2012); Miriam Galston, *When Statutory Regimes Collide: Will* Citizens United *and* Wisconsin Right to Life *Make Federal Tax Regulation of Campaign Activity Unconstitutional?*, 13 U. PA. J. CONST. L. 867, 876 (2011).

informing the public on certain ballot measures, political candidates, and other contentious issues.[35]

The following example is illustrative. John Smith runs against incumbent Jane Node for the United States Senate. Jane benefits from longstanding financial supporters that have helped her win prior races. However, certain special interest groups, like pharmaceutical companies, do not like Jane Node's policies. A pharmaceutical company approaches John to offer financial support for his candidacy. The company understands that its support might hurt John's public image. Additionally, federal campaign finance laws cap individual/corporate contributions to campaigns at $2800, and this pharmaceutical company plans on contributing much more money.[36] To anonymously contribute funds to John's campaign without contribution caps, the pharmaceutical company hires a lawyer to create a 501(c)(4) social welfare organization called "Americans for Advanced Medicine" (AFAM). AFAM's social welfare mission statement states that, "AFAM will work at the federal, state, and local level to mobilize patients to support legislation to help enable advances in medicine." As a 501(c)(4), AFAM can engage in an unlimited amount of lobbying, provided that the lobbying serves AFAM's social welfare mission.[37] Under § 109.10, AFAM does not have to disclose the identity of its contributors, unless a contributor earmarks her contribution for a specific independent expenditure.[38] Section 109.10 enables the pharmaceutical company to donate a large sum to AFAM, who then can spend that money on various independent expenditures, such as fliers, advertisements, and public outreach.

Prior to *CREW I*, AFAM did not have to disclose the pharmaceutical companies' identities because these companies did not expressly agree that the funds would be used for the specific independent expenditures (advertisement, fliers, commercials, etc.).[39] However, in *CREW I*, the D.C. District Court directed the FEC to expose the human sponsors of dark money organizations.[40] However, donors—aided by the FEC's structural deficiencies—have developed workarounds to avoid this disclosure mandate by using multiple 501(c) shell organizations to preserve anonymity, exploiting weak internet disclosure laws that do not cover certain electioneering communications, and donating through LLCs that protect shareholder identities.

35. *See Dark Money Basics*, *supra* note 4.

36. *Contribution Limits*: *Contribution Limits for 2019-2020 Federal Elections*, FED. ELECTION COMM'N, https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits/ (last visited Apr. 15, 2020).

37. 11 C.F.R. § 109.10(e)(vi) (2020).

38. *See* 11 C.F.R. § 109.10; 11 C.F.R. § 104.20(c)(9).

39. CREW v. FEC (*CREW I*), 316 F. Supp. 3d 349, 422 (D.D.C. 2018).

40. *Id*.

A. ADDRESSING THE 501(C) PROBLEM IN INDEPENDENT EXPENDITURES: *CREW I*

In *CREW I*, CREW brought suit against the FEC and Crossroads Grassroots Policy Strategies, a 501(c)(4) organization.[41] Initially, CREW filed an administrative complaint against Crossroads alleging that Crossroads accepted a $3 million contribution to support its work, without disclosing the contribution in violation of 52 U.S.C. § 30104(c)(2)(C).[42] The statute states that "[s]tatements required to be filed by this subsection . . . shall include . . . the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering *an* independent expenditure."[43]

The FEC dismissed CREW's complaint, relying on 11 C.F.R. section 109.10(e)(1)(vi), which states that a 501(c) must disclose "[t]he identification of each person who made a contribution in excess of $200 to the person filing such report, which contribution was made for the purpose of furthering *the* reported independent expenditure."[44] The FEC's reading of § 109.10 narrowed FECA by requiring a 501(c) organization to disclose the identity of its contributors who donated for the purpose of furthering "the reported" independent expenditure, as opposed to "an" independent expenditure.[45]

Crossroads and the FEC maintained that § 109.10 only compelled Crossroads to disclose the identity of its donor if the donor specifically contributed to Crossroads for a specific independent expenditure, as opposed to independent expenditures generally.[46] The district court disagreed and struck down the FEC's regulation, holding that FECA requires 501(c) organizations to disclose the identity of individuals contributing to further independent expenditures that expressly advocate for the election or defeat of a candidate for federal office, without regard to whether the donor contributed to fund a specific independent expenditure.[47]

The court applied *Chevron*'s first step and determined that § 109.10(e)(1)(vi) conflicted with FECA's unambiguous language.[48] FECA specifically states that a group must disclose a donor's identity where the contribution is "made for the purpose of furthering *an* independent expenditure."[49] The court held that "'an independent expenditure' means . . . an unspecified one."[50] The defendants argued that the statute was ambiguous—specifically that the use of "*an* independent expenditure" begs the question

41. *Id*. at 364.
42. *Id*. at 357–59.
43. 52 U.S.C. § 30104(c)(2)(C) (2018) (emphasis added).
44. 11 C.F.R. § 109.10(e)(vi) (emphasis added).
45. *Id*.
46. *CREW I*, 316 F. Supp. 3d at 390–91.
47. *Id*.
48. *Id*.
49. 52 U.S.C. § 30104(c)(2)(C) (2018) (emphasis added).
50. *CREW I*, 316 F. Supp. 3d at 390.

"which [independent expenditure]?"[51] However, the court noted that "an" is an intentionally indefinite word that is not designed to be limited in scope.[52] If Congress wanted a narrower scope, it could have used the challenged regulation's language, like "*the* reported independent expenditure" as opposed to "*an* independent expenditure."[53] The court determined that indefinite words such as "an" can be used to intentionally and unambiguously provide an indefinite scope.[54] In doing so, the court found that the FEC's regulatory language directly conflicted with FECA's statutory language. The court invalidated the FEC's regulation and ordered the FEC to provide disclosure guidance in light of the court's decision.

The district court's decision regarding the use of "an" was a correct interpretation of FECA. Even Crossroads conceded that the definition of "an" depended on the context.[55] Moreover, the district court relied on the proposition that, when applying the first step of *Chevron*, generality does not necessarily indicate ambiguity.[56] However, in its motion to stay, Crossroads argued that the D.C. Circuit rejected a similar construction of general terms, such as "an," by relying on legislative history and congressional inaction.[57]

Crossroads's argument suggested that it wanted the D.C. Circuit to focus primarily on *Chevron* step one. However, in response to Crossroads's application for an emergency stay pending appeal, the D.C. Circuit rejected Crossroads's *Chevron* step one argument as resting on "(debatable) legislative history and post-enactment congressional inaction."[58] The court cited multiple Supreme Court decisions that declined to resort to legislative history when a statute contained clear language.[59] The court also relied on Supreme Court decisions that declined to consider congressional acquiescence in the absence of ambiguous language.[60] Although Crossroads had a higher burden of proof given the emergency stay posture, even on appeal it is unlikely that the D.C. Circuit will accept Crossroads's *Chevron* argument.

CREW I is burdensome for agencies and 501(c) organizations, but the decision is critical for political transparency. *CREW I* will force the FEC to develop intricate regulations to manage the influx of donor identification

51. *Id*. at 403 (emphasis added).

52. *Id*.

53. *Id*.

54. *Id*. at 403–04.

55. *Id.* at 404.

56. *Id*. at 405 (citing *Mylan Pharm., Inc. v. Shalala*, 81 F. Supp. 2d 30, 37 (D.D.C. 2000) (rejecting the approach to *Chevron* step one analysis that "confuses generality for ambiguity").

57. *See* Crossroads Grassroots Policy Strategies' Reply to Plaintiff's Opposition to the Motion for a Stay Pending Appeal at 4–5, CREW I, 316 F. Supp. 3d 349 (D.C.C. 2018) (No. 1:16-cv-00259-BAH).

58. CREW v. FEC, 904 F.3d 1014, 1017 (D.C. Cir. 2018).

59. *Id*.

60. *Id*.

disclosures.[61] Though 501(c) organizations will have to make new and significant disclosures,[62] this burden does not outweigh the value of political transparency. Even the Supreme Court has affirmed that "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[63]

Crossroads is one of many politically motivated nonprofits that utilized the FEC's § 109.10 regulatory loophole to avoid disclosures—spending nearly $71 million on independent expenditures in the two years post *Citizens United*.[64] Section 109.10 substantially interfered with transparency, and given that disclosure is arguably the "least restrictive means" of dealing with dark money in campaigns, courts are likely to support disclosure requirements.[65] In fact, in response to Crossroads's emergency motion for a stay pending appeal, the D.C. Circuit cited Justice Kennedy's quote in *Citizens United* when it concluded that the "the interest in anonymity does not, for purposes of an exceptional stay, outweigh [*CREW I*] . . . and the public's countervailing interests in receiving important voting information and in transparency."[66] This suggests that it is unlikely that Crossroads's arguments will succeed on appeal to the D.C. Circuit.

However, Crossroads may find support from the United State Supreme Court. On September 15, 2018, Crossroads successfully petitioned a stay from Chief Justice Roberts.[67] Three days later, the Supreme Court vacated Chief Justice Roberts' stay.[68] Both the stay and order to vacate lack any reasoning, which makes it difficult to glean anything from the Court's back and forth.

Some scholars speculate that the Court may hear the decision if the D.C. Circuit upholds the district court's.[69] Given some of the conservative Justices' hostility towards campaign finance disclosure laws, it is not unreasonable to believe that the Court may reverse a decision affirming the district court's

61. Federal Election Commission's Memorandum of Points and Authorities in Support of Its Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment at 35, CREW I, 316 F. Supp. 3d 349 (D.D.C. 2018).

62. *Id*.

63. Citizens United v. FEC, 558 U.S. 310, 371 (2010).

64. FEC MUR 6596 (Crossroads GPS), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 4 (May 13, 2019), https://eqs.fec.gov/eqsdocsMUR/6596_2.pdf.

65. Buckley v. Valeo, 424 U.S. 1, 68 (1976) ("[D]isclosure requirements certainly in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist.").

66. CREW v. FEC, 904 F.3d 1014, 1019 (2018).

67. Order, Crossroads Grassroots Policy Strategies v. CREW, 139 S. Ct. 5 (2018).

68. Crossroads Grassroots Policy Strategies v. CREW, 139 S. Ct. 50 (2018).

69. *See* Michelle Ye Hee Lee & Roberts Barnes, *Political Nonprofits Must Now Name Many of Their Donors Under Ruling After Supreme Court Declines to Intervene*, CHI. TRIB. (Sept. 18, 2018, 6:55 PM), https://www.chicagotribune.com/nation-world/ct-political-nonprofits-donors-20180918-story.html; Dave Levinthal & Sarah Kleiner, *Supreme Court Lets Stand a Decision Requiring "Dark Money" Disclosure*, ATLANTIC (Sept. 18, 2018), https://www.theatlantic.com/politics/archive/2018/09/supreme-court-lets-stand-a-decision-requiring-dark-money-disclosure/570670/; Tim L. Peckinpaugh et al. *"Dark Money" Gets a Little Light:* CREW v. FEC *and Its Implications for the 2018 Midterms*, K&L GATES (Sept. 26, 2018), http://www.klgates.com/dark-money-gets-a-little-light-crew-v-fec-and-its-implications-for-the-2018-midterms-09-26-2018/.

decision. After all, in *Citizens United*, Justice Thomas authored a dissenting opinion that argued that the Bipartisan Campaign Reform Act's (BCRA) disclosure requirements were unconstitutional.[70] After Justice Gorsuch voted in line with Justice Thomas in a campaign finance case,[71] election law expert Professor Richard Hasen speculated that Justice Gorsuch could be "as conservative as Justice Thomas is in these cases."[72] Justice Gorsuch's vote with Justice Thomas may indicate a shared view on campaign finance laws, including disclosure laws. Justice Kavanaugh also expressed some hostility towards campaign finance disclosure laws. In *Independence Institute v. FEC*, then Judge Kavanaugh held that a 501(c)(3) organization's complaint arguing that portions of BCRA disclosure laws were unconstitutional contained enough merit to be entitled to a three-judge tribunal.[73] Justice Kavanugh's decision reveals a belief that at least some application of campaign finance disclosure laws may be unconstitutional. However, Justice Gorsuch and Justice Kavanaugh's appointments provide another wrinkle. Both of the newly appointed Justices have expressed opposition to *Chevron* deference.[74] Thus, Crossroads's stronger argument—ambiguity in the statute—may fall on deaf ears.[75]

In response to *CREW I*, the FEC issued a press release on October 14, 2018, providing guidance for future quarterly reports.[76] All contributions received

70. Citizens United v. FEC, 558 U.S. 310, 480 (2010) (Thomas, J., concurring in part, dissenting in part).

71. Republican Party of La. v. FEC, 137 S. Ct. 2178 (2017).

72. Paul Blumenthal, *Neil Gorsuch Shows His Hand on Money in Politics As Court Turns Down Big Case*, HUFFINGTON POST (May 22, 2017, 1:38 PM), https://www.huffpost.com/entry/neil-gorsuch-campaign-finance_n_59231990e4b034684b0e7c63 (interviewing campaign finance expert Richard Hasen).

73. Indep. Inst. v. FEC, 816 F.3d 113, 115–16 (D.C. Cir. 2016).

74. Pema Levy, *How Brett Kavanaugh Could Cripple the Next Democratic President*, MOTHER JONES (July 24, 2018), https://www.motherjones.com/politics/2018/07/brett-kavanaugh-supreme-court-chevron-deference/ (excepting portions of Justice Kavanaugh's speech at the University of Notre Dame regarding the *Chevron* doctrine); Eric Citron, *The Roots and Limits of Gorsuch's Views on* Chevron *Deference*, SCOTUSBLOG (Mar. 17, 2017, 11:26 AM), http://www.scotusblog.com/2017/03/roots-limits-gorsuchs-views-chevron-deference/.

75. Policy arguments would be a substantial factor in the Court's analysis. Crossroads would likely argue that disclosure requirements unduly injure the First Amendment rights of 501(c) non-political organizations. Specifically, Crossroads may compare itself to the petitioner in *McIntyre v. Ohio Elections Comm'n*, who suffered a First Amendment injury when Ohio prohibited her from anonymously distributing leaflets to oppose a ballot proposition. 514 U.S. 334, 337 (1995). In *McIntyre*, the Court held that the "interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry." *Id*. at 342. The Court held that Ohio's interest in preventing libel and fraud was unfounded because ballot propositions do not present a substantial risk of libel or fraud. *Id*. at 351–52. Since Ohio could not demonstrate a sufficient state interest, the Court struck down Ohio's disclosure law. *Id*. at 353, 357. Crossroads's reliance on *McIntyre* would be misplaced. Unlike the facts in *McIntyre*, Crossroads and other 501(c) organizations make independent expenditures with the purpose of influencing elections. *See* FEC MUR 6596 (Crossroads GPS), *supra* note 64. As *McIntyre* demonstrates, the government has a much stronger informational interest in the context of elections as opposed to ballot referendums—the risk of *quid pro quo* corruption is much higher in an election than an initiative or referendum. 514 U.S. at 356. Thus, it is unlikely that Crossroads's policy argument will persuade the Court since independent expenditures exist for the purpose of influencing elections as opposed to influencing initiatives.

76. Press Release, Fed. Election Comm'n, FEC Provides Guidance Following U.S. District Court Decision in CREW v. FEC, 316 F. Supp. 3d 349 (D.D.C. 2018) (Oct. 4, 2018), https://www.fec.gov/updates/fec-provides-guidance-following-us-district-court-decision-crew-v-fec-316-f-supp-3d-349-ddc-2018/.

between August 4 and September 18 require a disclosure including the identity of the person who made any contributions in excess of $250 and who did so with the purpose of furthering any independent expenditure.[77]

Returning to the facts in the aforementioned hypothetical, under this policy, AFAM would be required to disclose the identity of its pharmaceutical company contributor because the pharmaceutical company contributed with the purpose of helping John get elected. Theoretically, this helps eliminate disingenuous 501(c) organizations that are created solely for the purpose of helping candidates get elected without disclosing the identities of the candidate's financial supporters. While *CREW I* is an important step towards eliminating dark money in elections, as I will discuss next, it stops short of a robust transparency directive.

B. THE AFTERMATH OF *CREW I*

As discussed, *CREW I* makes it difficult for 501(c) organizations to spend money on independent expenditures without disclosing their donors' identities. Campaign finance advocates, including FEC Commissioner Ellen Weintraub, praised the decision stating, "[t]his is a real victory for transparency. As a result, the American people will be better informed about who's paying for the ads they're seeing this election season."[78] Still, some argue that *CREW I* falls short of illuminating dark money donors by pointing to disclosure loophole scheme like the 501(c) shell game.[79] The following subpart demonstrates that the commentators are only partially correct because dark money groups cannot use the 501(c) shell game to hide their identities after *CREW I*.

While *CREW I* compels 501(c) organizations to disclose the identity of its donors who help contribute and fund any independent expenditure, the aforementioned commentators believe that *CREW I* does not apply to a 501(c) contributing to another 501(c) or super PAC—also known as the 501(c) shell game.[80] Take the Center to Protect Patient Rights. From 2008 to 2012, the Center to Protect Patient Rights, a conservative 501(c)(4) organization, spent $94,631,765 in grants to political organizations.[81] One such grant included a $4

77. *Id*.

78. Dave Levinthal & Sarah Kleiner, *"Dark Money" in Politics Is About to Get Lighter*, CTR. FOR PUB. INTEGRITY (Sept. 18, 2018), https://www.publicintegrity.org/2018/09/18/22264/dark-money-politics-about-get-lighter.

79. *See* Rick Hasen, *Just How Much Will the Crossroads Ruling Change Disclosure Rules for 2018? Probably Not as Much as You Think*, ELECTION L. BLOG (Sept. 20, 2018, 7:28 AM), https://electionlawblog.org/?p=101234 (arguing that dark money groups can still run issue advertisements and funnel money through 501(c) organizations in order to remain anonymous); Tim L. Peckinpaugh, et al., *supra* note 69; Trevor Potter, Opinion, *Supreme Court Leaves in Place Decision that Will Shine a Light on Dark Money*, HILL (Sept. 21, 2018, 4:00 PM), https://thehill.com/opinion/judiciary/407795-supreme-court-leaves-in-place-decision-that-will-shine-a-light-on-dark (noting that neither Congress nor the FEC have required disclosures for all electioneering communications).

80. *See* sources cited *supra* note 79.

81. *Follow the Shadow of Dark Money*, OPENSECRETS, https://www.opensecrets.org/dark-money/shadow-infographic.php (last visited Apr. 15, 2020).

million grant to another conservative 501(c)(4) organization, Americans for Tax Reform.[82] Americans for Tax Reform, an "educational" tax organization, spent $15.8 million on independent expenditures throughout the 2012 election cycle.[83] Commentators suggest that the Center to Protect Patient Rights could arguably protect the identities of its donors, as long as it does not spend money directly on independent expenditures, and instead donates to super PACs or other organization who would create the independent expenditures.

Contrary to the commentators' belief, *CREW I* prevents dark money donors from hiding their identities by laundering their contributions through a 501(c) to a super PAC or 501(c) organization. Rather than relying on who uses the money for the independent expenditure (such as a super PAC or 501(c)), *CREW I* relies on the donor's *intent* to trigger a disclosure requirement. So long as "the contributions were made for political purposes to influence any election," the 501(c) must disclose the donor's identity.[84] *CREW I* bars the 501(c) shell game in the context of independent expenditures. The court came to this conclusion after reviewing Subsection 30104(c)(1) of the Federal Election Campaign Act, which states "[e]very person . . . who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year shall file a statement containing the information required under subsection (b)(3)(A) for all contributions received by such person."[85] Subsection 30104(b)(3)(A) states that each report must disclose:

> *[T]he identification of each . . . person . . . who makes a contribution to the reporting committee* during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year . . . or in any lesser amount if the reporting committee should so elect, together with the date and amount of any such contribution.[86]

The D.C. District Court concluded that Subsection 30104(c)(1) encompasses contributions by individuals or groups to a 501(c) that are then routed to organizations such as super PACs.[87] The court explicitly stated that "subsection (c)(1) covers contributions used for other political purposes in support or opposition to federal candidates by the [501(c)] organization for contributions directly to . . . super PACs."[88] Thus, dark money donors cannot hide their identities by laundering their contributions through a 501(c) to a super PAC or 501(c) organization.

CREW I determined that FECA precludes the 501(c) shell game when the donor's goal is to influence a federal election.[89] Commentators argue that the

82. Michelle Merlin, *Dick Morris' Super PAC Spends $1.7 M on Conservative Website*, OPENSECRETS (Dec. 7, 2012), https://www.opensecrets.org/news/2012/12/super-pac-for-america/.

83. *Id*.

84. CREW I, 316 F. Supp. 3d 349, 423 (D.D.C. 2018).

85. 52 U.S.C. § 30104(c)(1) (2018).

86. 52 U.S.C. § 30104(b)(3) (emphasis added).

87. *Id*.

88. *Id*. at 392.

89. *Id*.

district court's decision does not cover two additional loopholes commonly used to avoid campaign finance disclosure requirements.[90] First, commentators note that a 501(c) organization does not have to disclose a donation that is used for the purpose of advocating a specific issue (issue advocacy), as opposed to influencing an election (express advocacy).[91] The *CREW I* court speculated in dicta that a 501(c) organization may not be required to disclose issue advocacy contributions, "[d]onations to [501(c)s] . . . may also be used to engage in issue advocacy, as opposed to express advocacy. Donors for issue advocacy may not need to be disclosed."[92] Second, commentators believe that donors can circumvent *CREW I* by funneling their money from an LLC into a 501(c) because it is almost impossible to figure out who created and financed the LLC.[93] This loophole is often called the "straw-donor" loophole.[94] While *CREW I* did not directly address this loophole, the D.C. Circuit recently held that such corporations and LLCs are subject to the prohibition against straw donors.[95] But the D.C. Circuit did not compel the FEC to immediately enforce the prohibition on the subject corporation because it was "'an issue of first impression' in light of the *Citizens United* and *SpeechNow* rulings . . . ."[96] The straw-donor loophole serves as another example of the FEC's unwillingness to promote transparency in campaign finance.

II. 501(C)S IN ELECTIONEERING COMMUNICATIONS AND ISSUE ADVOCACY

CREW I does not address 501(c) disclosure requirements in the context of issue advocacy; in fact, the court intentionally left that issue open.[97] Today, many commentators argue that 501(c)s will avoid disclosure requirements by using precise language that avoids triggering independent expenditure or electioneering communication laws.[98] Moreover, while FEC regulations address electioneering communications distributed via broadcast, cable, or satellite channels, the FEC has not addressed electioneering communications on the internet. The FEC recently took steps to require disclaimers on internet

90. *See, e.g.*, *Follow the Shadow of Dark Money*, *supra* note 81; Michelle Ye Hee Lee, *Political Nonprofits Seek Answers After Court Decision Targeting "Dark Money*,*"* WASH. POST (Sept. 21, 2018, 3:14 PM), https://www.washingtonpost.com/politics/political-nonprofits-seek-answers-after-court-decision-targeting-dark-money/2018/09/21/444692f6-bd3f-11e8-8792-78719177250f_story.html?utm_term=.2ebe669dfa79.

91. *See Follow the Shadow of Dark Money*, *supra* note 81.

92. CREW I, 316 F. Supp. 3d 349, 423 n.38 (D.D.C. 2018).

93. Lee, *supra* note 90.

94. *See, e.g.*, Jordan Muller, *Here's What You Need to Know About Shell Companies and Foreign Election spending*, OPENSECRETS (June 28, 2018), https://www.opensecrets.org/news/2018/06/shell-companies-foreign-election-spending/.

95. Democracy 21 v. FEC, 952 F.3d 352, 357 (D.C. Cir. 2020) ("The controlling commissioners did not dispute that § 30122 applies to closely held corporations and corporate LLCs. We agree that it does." (citation omitted)).

96. *Id*. (citation omitted).

97. *CREW I*, 316 F. Supp. 3d at 423 n.38.

98. *See* Karl Evers-Hillstrom, *Shining a Light on 'Dark Money' and Online Ad Spending*, OPENSECRETS (Mar. 14, 2019, 11:53 AM) https://www.opensecrets.org/news/2019/03/shining-a-light-on-dark-money-ssw/.

advertisements, but it has not proposed a rule requiring disclosures for internet advertisements.[99] Since PACs and super PACs must disclose the identities of their donors, a disclaimer requirement will help direct viewers to these organizations' disclosure statements that identify individual donors supporting online electioneering communications.[100] However, the same cannot be said for a 501(c) organization because, as discussed earlier, it is not subject to disclosure requirements unless it is for an independent expenditure.[101] The FEC should expand the definition of electioneering communications to include internet advertisements, thereby requiring disclosures for all internet-based advertisements, not just independent expenditures.[102]

A. 501(C) PROBLEM IN ISSUE ADVOCACY

CREW I does not address internet disclosure loopholes that, when coupled with the 501(c) problem, threaten electoral transparency. In order to understand how internet disclosures laws threaten electoral transparency, it's worth pausing to provide context on the differences between issue vs. express advocacy, and electioneering communications versus independent expenditures.

In *Buckley v. Valeo,* the Court distinguished issue advocacy and express advocacy.[103] Express advocacy is defined as expenditures for "the advocacy of the election nor defeat of candidates for federal offices,"[104] whereas issue advocacy comprises "expenditures not containing explicit words urging action in the election."[105] The Court concluded that Congress could not regulate issue advocacy in the same way it regulates express (campaign) advocacy because it would result in an impermissible burden on First Amendment rights.[106] But twenty-seven years later the Court abandoned this distinction in *McConnell v. FEC*, holding that *Buckley* did not prohibit Congress from regulating issue advocacy the same as express advocacy.[107] In *McConnell*, the Court considered the constitutionality of the BCRA, which imposed disclosure requirements for

99. *See* Internet Communication Disclaimers and Definition of "Public Communication," 83 Fed. Reg. 12864 (proposed Mar. 26, 2018) (codified at 11 C.F.R. § 110, 111 (2020)). A disclaimer often appears on the bottom of an advertisement and states who paid for the advertisement. A disclosure is made to the governing agency—the FEC—and states who paid for the advertisement. In other words, disclaimers appear on advertisements, while disclosures do not.

100. 11 C.F.R. § 104.3(a)(4) (2020); 11 CFR § 104.20(b).

101. 11 C.F.R. § 104.3(a)(4); 11 CFR § 104.20(b).

102. *States Expand Definition of Electioneering Communications to Guard Against Corruption*, BRENNAN CTR. FOR JUSTICE (Feb. 7, 2013) (explaining that states, *unlike* the federal government, have taken steps to expand the definition of "electioneering communications" to include internet advertisements).

103. Buckley v. Valeo, 424 U.S. 1, 42 (1976)

104. *Id*. at 205–06.

105. *See* Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. REV. 265, 267 (2000) (citing *Buckley*, 424 U.S. at 43–44).

106. *Buckley*, 424 U.S. at 79–80.

107. 540 U.S. 93, 190, 194 (2003).

"electioneering communications."[108] BCRA's disclosure provision regulates electioneering communications, which encompasses some forms of issue advocacy.[109] Electioneering communications include any broadcast, cable, or satellite communication.[110] BCRA requires the disclosure of contributions for electioneering communications, which are advertisements that clearly identify an electoral candidate within sixty days before a general election and thirty days before a primary election.[111] Congress enacted the electioneering communication provision because organizations exploited the *Buckley* issue versus express advocacy distinction, creating advertisements that were essentially express advocacy but lacked the "magic words" required by *Buckley* to be categorized as such.[112] Thus, in *McDonnell*, the Court concluded that Congress could enact a provision, like the electioneering communications provision, to regulate forms of issue advocacy.[113]

Citizens United affirmed *McConnell* when it rejected the argument that "disclosure requirements must be limited to speech that is the functional equivalent of express advocacy."[114] Yet, organizations can bypass the BCRA's requirements by running advertisements outside the thirty- or sixty-day time frame or by not clearly identifying a candidate. But there's another glaring exemption these organizations can exploit that neither the FEC nor BCRA cover—the internet.

As of now, neither the FEC's regulations nor the BCRA include internet advertisements within their definitions of electioneering communications.[115] This means that organizations like 501(c)s and super PACs are not subject to disclosure or disclaimer requirements if they circulate their electioneering communication on the internet.[116] Because organizations are not subject to disclaimer requirements for internet advertisements, it is difficult for interested parties to determine who or what funded a particular internet advertisement. At

108. *Id*. at 194–95. Electioneering communications are distinguishable from independent expenditures in that independent expenditures require "an expenditure by a person . . . expressly advocating the election or defeat of a clearly identified candidate." 52 U.S.C. § 30101(17) (2018).

109. *See* Carrie E. Miller, *Parting the Dark Money Sea: Exposing Politically Active Tax-Exempt Groups Through FEC-IRS Hybrid Enforcement,* 57 WM. & MARY L. REV. 341, 351 (2015).

110. 52 U.S.C. § 30104(f)(1) (2018).

111. *See* 52 U.S.C. § 30104(f)(3).

112. *See States Expand Definition of Electioneering Communications to Guard Against Corruption*, *supra* note 102.

113. 540 U.S. at 190, 194.

114. 558 U.S. 310, 369 (2010).

115. *See* Matt Corley, *Is Big-Spending Non-Profit One Nation Exploiting the Online Ad Loophole?*, CITIZENS FOR RESP. & ETHICS IN WASH. (Oct. 17, 2016), https://www.citizensforethics.org/big-spending-non-profit-one-nation-exploiting-online-ad-loophole/; Megan Janetsky, *Low Transparency, Low Regulation Online Political Ads Skyrocket*, OPENSECRETS (Mar. 7, 2018), https://www.opensecrets.org/news/2018/03/low-transparency-low-regulation-online-political-ads-skyrocket/; *Public Hearings on Internet Disclaimers*, FED. ELECTION COMM'N (July 18, 2018), https://www.fec.gov/updates/public-hearing-internet-disclaimers-2018/.

116. Peter Overby, *Federal Election Commission Might Make Disclaimers Mandatory for Online Political Ads*, NAT'L PUB. RADIO (June 28, 2018, 4:31 PM), https://www.npr.org/2018/06/28/624416612/federal-election-commission-might-make-disclaimers-mandatory-for-online-politica.

least super PACs and political committees must disclose the identities of all their donors (as long as they contribute more than $200), so while a person may not know an advertisement's creator or its contributors, that person will know the identity of a super PAC or political committee's donors.[117] But, again, 501(c) organizations are not required to disclose these donors.[118] Therefore, unlike disclosure requirements for independent expenditures, which require a disclosure for any contributions made to influence an election, online issue advocacy messages do not fall within electioneering communications' disclosure requirements.[119]

Returning to the example in Part I, after *CREW I*, AFAM can no longer hide the identity of its donors that want to expressly advocate the election or defeat of Jane Node. But imagine that instead of creating independent expenditure advertisements, AFAM's donors contribute for the purpose of "persuading voters to change Jane Node's stance on the Affordable Care Act." The election is twenty-nine days away and AFAM wants to roll out advertisements that clearly identify Jane Node. Under subsection 30104(f), AFAM cannot hide its donors' identities because its advertisements will clearly identify Jane Node within thirty days of the election.[120] However, subsection 30104(f) only applies to "broadcast, cable, or satellite" communications.[121] AFAM can create an internet advertisement that states, "Tell Jane Node that the Affordable Care Act is not what the public wants," and, unlike a super PAC or political committee, a 501(c)(4) does not have to disclose its source of funding unless it falls within 30104(c)'s independent expenditure requirements.

To improve transparency, the FEC must close this internet loophole—particularly given the IRS's recent decision to eliminate its own disclosure regulations.[122] Up until recently, the FEC required 501(c) organizations to provide the IRS with the identity of any donor who donated $5000 or more on the 501(c) organizations' tax returns.[123] Although the IRS redacted the donors' identities, the agency, on several occasions, failed to redact all the names.[124] The possibility of a failed redaction arguably deterred large donors from donating to dark money groups. Treasury Secretary Steven Mnuchin responded to this anxiety in July 2018 by eliminating this disclosure requirement for 501(c)(4) and 501(c)(6) organizations.[125] Secretary Mnuchin stated that the decision constitutes "significant reform to protect personal information."[126] However, the

117. 11 C.F.R. § 104.3(a)(4) (2020); 11 CFR § 104.20(b).

118. *See supra* Part I.

119. *See* Levinthal & Kleiner, *supra* note 78.

120. 52 U.S.C. § 30104(f) (2018); 11 CFR § 100.29 (2020).

121. 52 U.S.C. § 30104(f).

122. Peter Overby, *Dark Money Groups Get a Little Darker, Thanks to IRS*, NAT'L PUB. RADIO (July 17, 2018, 4:44 PM), https://www.npr.org/2018/07/17/629823953/dark-money-groups-get-a-little-darker-thanks-to-irs.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

Secretary's decision emboldens 501(c) organizations. In 2014, internet advertisements made up less than 1% ($71 million) of political ad spending.[127] By the 2018 midterms digital advertising increased to $600 million.[128] If the IRS no longer requires 501(c)(4) disclosures, it behooves the FEC to step in and institute a regulation requiring disclosures.

B. SOLVING THE 501(C) INTERNET LOOPHOLE

The internet loophole may not survive much longer. On March 26, 2018, the FEC published a notice of proposed rulemaking.[129] The proposed rule would require internet advertisements to contain a disclaimer that identified the advertisement's creator.[130] Disclaimers are different from disclosures. Disclaimers provide the identity of the advertisement's major donors on the actual advertisement; whereas disclosures are publicly submitted to the supervising agency, the FEC, but and are not listed on the actual advertisement. While the FEC's proposed rule does not include disclosures, it symbolizes a shift in the FEC's focus to internet-based political activity. In fact, the FEC created a new term called "public communications" that encompasses "communications placed for a fee on another person's website."[131] By implementing this proposed rule, the FEC acknowledges the importance of political transparency on the internet.

The FEC can close the internet loophole by adopting a regulation that expands the definition of "electioneering communication" to include its newly proposed term "public communications."[132] The FEC's current regulatory proposal defines "public communications" as, "a communication by means of any . . . general public political advertising. . . . [t]he term *general public political advertising* shall not include communications over the Internet, except for the communications placed for a fee on another person's Web site."[133] Congress gave the FEC the authority to make or amend rules as "necessary to carry out the provisions" of Congress's statute.[134] The FEC should amend its electioneering communication definition to state: "Electioneering communication means any broadcast, cable, satellite or *public communication*

127. Janetsky, *supra* note 115.

128. *2018 Political Digital Advertising Report*, TECH FOR CAMPAIGNS, https://www.techforcampaigns.org/2018-political-digital-advertising-report (last visited Apr. 15, 2020). There are a couple of important and interesting things to note about this source. First, it only sampled sixty campaigns in the election cycle to conclude that these campaigns spent $600 million on digital advertising, which suggests that the amounts are much higher. *Id.* Second, over 90% of political advertisements were delivered to mobile phones rather than desktop devices. *Id.*

129. *Public Hearing on Internet Disclaimers*, FED. ELECTION COMM'N (July 18, 2018), https://www.fec.gov/updates/public-hearing-internet-disclaimers-2018/.

130. Internet Communication Disclaimers and Definition of "Public Communication," 83 Fed. Reg. 12864 (proposed Mar. 26, 2018) (codified at 11 C.F.R. § 110, 111 (2020)).

131. For a current definition, see 11 C.F.R. § 100.26 (2020).

132. *Public Hearing on Internet Disclaimers*, *supra* note 129.

133. 11 C.F.R. § 100.26.

134. 52 U.S.C. § 30107(a)(8) (2018).

as defined in 11 C.F.R. § 100.26." By ratifying this new definition, all public communications, including paid internet activity, will be subject to the same disclosure laws as electioneering communications. Since electioneering communication disclosure requirements force all persons, including 501(c)s, to disclose the identity of their contributors, 501(c) donors would be subject to the spotlight. Utilizing this pathway, the FEC could eliminate the possibility of an internet loophole for electioneering communications.

III. THE LLC TO 501(C) STRAW-DONOR INDEPENDENT EXPENDITURE LOOPHOLE

The commentators who claimed that *CREW I* would not completely eliminate dark money in elections were not entirely wrong.[135] During the 2016 presidential election, Donald Trump's political committee raised $10.6 million from LLCs.[136] Individuals set up these LLCs to hide their identity.[137] Theoretically, a foreign agent could set up an LLC, incorporate it in Delaware, and make contributions to super PACs and political committees without the public learning that the money came from a foreign source.[138] FECA permits the FEC to investigate these "straw-donor" violations, but the commission often fails to garner enough votes to commence an investigation.[139] In order to compel the FEC to investigate straw-donor violations, courts must conclude that the FEC's decision not to investigate an alleged straw-donor violation was contrary to law.[140]

A. CREATING A SHELL LLC TO PROTECT THE DONOR'S IDENTITY

Delaware's corporate law protects the identity of an LLC founder or managing member.[141] Many individuals use LLCs as shells to contribute to super PACs and 501(c) organizations.[142] Some non-profits, like the Campaign Legal Center (CLC), promote political transparency by filing complaints with the FEC

135. *See* sources cited *supra* note 79.

136. Ashley Balcerzak, *Surge in LLC Contributions Brings More Mystery About True Donors*, OPENSECRETS (Apr. 27, 2017), https://www.opensecrets.org/news/2017/04/surge-in-llc-contributions-more-mystery/.

137. *Id*.

138. The U.S. Attorney's Office for the Southern District of New York indicted Lev Parnas and Igor Fruman for this precise type of straw-donor scheme. Press Release, U.S. Attorney's Office for the S. Dist. of N.Y., Lev Parnas and Igor Fruman Charged with Conspiring to Violate Straw and Foreign Donor Bans (Oct. 10, 2019) [hereinafter Parnas and Frugman Indictment], https://www.justice.gov/usao-sdny/pr/lev-parnas-and-igor-fruman-charged-conspiring-violate-straw-and-foreign-donor-bans.

139. *See, e.g.*, Campaign Legal Ctr. v. FEC, 312 F. Supp. 3d 153, 153 (D.D.C. 2017).

140. Orloski v. FEC, 795 F.2d 156, 161 (D.C. Cir. 1986).

141. Libby Watson, *Why Are There so Many Anonymous Companies in Delaware?*, SUNLIGHT FOUND. (Apr. 6, 2016, 12:59 PM), https://sunlightfoundation.com/2016/04/06/why-are-there-so-many-anonymous-corporations-in-delaware/.

142. *See* Rebecca Ballhaus, *New Path for Masking PAC Donors*, WALL ST. J. (Feb. 3, 2016, 11:48 PM), https://www.wsj.com/articles/new-path-for-masking-super-pac-donors-1454546712; *see also* Parnas and Frugman Indictment, *supra* note 138.

alleging that anonymous donors use LLCs to circumvent disclosure requirements.[143] These situations are known as "straw-donor" cases, and are illegal under FECA.[144] However, up until *Campaign Legal Center & Democracy 21 v. FEC* ("*Democracy 21*"),[145] courts have historically applied the straw-donor statutory provisions to individuals who make donations in the name of another individual, not LLCs.[146] FECA prohibits individuals from using someone else's name to donate to a political campaign.[147] FECA also prohibits the recipient from accepting a donation that they know is from a different individual.[148] If an LLC donates to a super PAC or 501(c) organization for the purpose of influencing an election, the super PAC or 501(c) can only disclose the name of the LLC because states like Delaware protect the identities of the individuals behind the LLC.[149] Therefore, individual donors can hide their identities by laundering their donations through a shell LLC.

Circling back to the example in Part I, imagine a donor wants to create an independent expenditure that denounces Jane Node, but the donor does not want their name on the advertisement. After learning about the recent *CREW I* decision, the donor decides to funnel their money through a shell LLC to a super PAC. The donor creates "Accountability LLC" and leaves $1 million in its general treasury fund. Accountability LLC then donates a large sum to AFAM's sister super PAC, Citizens Against Archaic Medicine (CAAM). In accordance with FECA and the FEC's regulations, CAAM discloses that Accountability LLC donated a large sum, but CAAM does not disclose the wealthy donor's name. The donor achieved their goal of anonymously spreading their message. Thus, the FEC and public only know that Accountability LLC made the donation, not the actual identity of the human donor.

B. COMPELLING THE FEC TO INVESTIGATE STRAW-DONOR VIOLATIONS

Under FECA, the FEC has the authority to investigate and determine if an individual violated FECA's straw-donor laws.[150] Many commentators criticize the FEC for routinely failing to probe straw-donor complaints due to political

143. *CLC v. FEC (Straw Donors)*, CAMPAIGN LEGAL CTR., https://campaignlegal.org/cases-actions/clc-v-fec-straw-donor (last updated June 6, 2018).

144. Democracy 21 v. FEC, 952 F.3d 352, 357 (D.C. Cir. 2020); Alex Glorioso, *An FEC Warning on LLC Gifts to Super PACs?,* OPENSECRETS (Apr. 4, 2016), https://www.opensecrets.org/news/2016/04/an-fec-warning-on-llc-gifts-to-super-pacs/ (citing the statements from commissioners stating that "closely held corporations and corporate LLCs may be considered straw donors" in violation of the law).

145. 952 F.3d 352 (D.C. Cir. 2020).

146. 52 U.S.C. § 30122 (2018); *see* United States v. Whittemore, 776 F.3d 1074, 1079 (9th Cir. 2015); Campaign Legal Ctr. v. FEC, 245 F. Supp. 3d 119, 129 (D.D.C. 2017) (arguing in favor of treating shell LLCs as straw donors).

147. 52 U.S.C. § 30122.

148. *Id*.

149. *See* Watson, *supra* note 141. *But see* Peter J. Henning, *Is This the End of the Anonymous Shell Companies? Not Too Fast*, N.Y. TIMES (July 11, 2019), https://www.nytimes.com/2019/07/11/business/dealbook/llc-shell-companies-money-laundering.html.

150. 52 U.S.C. § 30122.

deadlock.[151] Until recently, the FEC has never initiated an enforcement action in response to a complaint alleging that someone is using an LLC as a straw donor,[152] despite the Department of Justice's belief that an LLC can be used as a straw donor.[153] On March 13, 2020, the D.C. Circuit concluded that corporations are subject to FECA's straw-donor prohibition.

In 2016, CLC filed a complaint with the FEC alleging that Richard Stephenson, a wealthy investment banker, in tandem with two other people, made more than $12 million in contributions to a super PAC called Freedom Works for America.[154] The FEC's general counsel recommended that the FEC investigate the case.[155] Instead of deferring to the FEC's general counsel, three members of the FEC concluded that the agency should not investigate the complaint.[156] Since the remaining commissioners could not get the necessary four votes to order an investigation, the FEC closed CLC's case.[157] Once again, the FEC deadlocked on partisan grounds—seemingly never-ending pattern in which Democrat appointees vote with fellow Democrat and Republican appointees vote with fellow Republicans.[158]

In response to the deadlock, CLC sued, arguing that FECA entitles the public to election-related information.[159] The FEC filed a motion to dismiss on the theory that CLC had not suffered an injury.[160] The district court disagreed, concluding that FECA gives CLC the right to "truthful information regarding campaign contributions and expenditures."[161] Thus, the FEC's motion to dismiss failed because a failure to provide information satisfies the "particularized injury" requirement of standing.[162]

Campaign Legal Center provides two significant takeaways. First, courts can still actively compel the FEC to investigate disclosure violations. In a subsequent decision, the D.C. District gave CLC the opportunity to demonstrate that the FEC's decision to preclude straw-donor violation investigations constituted arbitrary and capricious conduct that is contrary to FECA.[163] While the court ultimately held that the FEC's decision did not amount to conduct that was contrary to law,[164] the court's refusal to dismiss the claim for lack of injury

151. *See* Anthony J. Gaughan, *Trump, Twitter, and the Russians: The Growing Obsolescence of Federal Campaign Finance Law*, 27 S. CAL. INTERDISC. L.J. 79, 112 (2017).

152. *See* Campaign Legal Ctr. v. FEC, 312 F. Supp. 3d 153, 158 (D.D.C. 2017) (citation omitted).

153. *See, e.g.*, Parnas and Frugman Indictment, *supra* note 138.

154. Campaign Legal Ctr. v. FEC, 245 F. Supp. 3d 119, 126–27 (D.D.C. 2017).

155. *Id*. at 127.

156. *Id*. at 123.

157. *Id*.

158. In fact, a recent investigation determined that Democrat appointees voted together 87% of the time, while Republican appointees voted as a bloc 98% of the time. Thompson, *supra* note 9.

159. *Campaign Legal Ctr.*, 245 F. Supp. 3d at 123.

160. *Id*.

161. *Id*. at 127 (internal quotation marks omitted) (quoting All. for Democracy v. FEC, 362 F. Supp. 2d 138, 144 (D.D.C. 2005)).

162. *Id*. at 129.

163. *See, e.g.*, *Campaign Legal Ctr.*, 312 F. Supp. 3d at 161.

164. *Id.* at 161.

demonstrates the court's understanding that LLC straw-donor schemes can cause an injury to the public. This case provides a roadmap to organizations like CLC to engage the FEC on the merits of these disputes—a costly endeavor that may prompt an agency to settle and provide some amount of information rather than spend time and money in court.

Second, and more generally, both *CREW I* and *Campaign Legal Center* demonstrate that the FEC will consistently fail to address dark money issues. The FEC's partisan gridlock makes it an inefficient government agency, especially since, at the time of this publication, only three of six seats are filled.[165] Four are needed in order to have a quorum.[166] In 2016, former Commissioner Ann Ravel resigned from the FEC and explained she did so, in part, because of the FEC's absolute failure to address dark money issues.[167] In her resignation letter, former Commissioner Ravel admonished the FEC stating, "Disclosure laws need to be strengthened . . . and Commissioners who will carry out the mandates of the law should be appointed to the expired terms at the FEC."[168] If the FEC keeps failing to carry out its statutory mandate, it will be up to the courts to use administrative law doctrines to correct the agency's failures.

But within the D.C. Circuit, the courts are split as to whether they must review the FEC's decision. In *CREW II*, the majority balked at the suggestion that the judiciary should interfere and/or overrule the FEC's prosecutorial discretion.[169] "[I]f an action is committed to the agency's discretion under APA § 701(a)(2)—as agency enforcement decisions are—there can be no judicial review for abuse of discretion, or otherwise."[170] This remains a contested decision amongst D.C. Circuit judges. Recently, in *Democracy 21*, Judge Edwards echoed Judge Pillard's dissent in *Crew II* by rebuking the idea that courts could not review exercises of the FEC's prosecutorial discretion.[171] Judge Edwards acknowledged that exercises of prosecutorial discretion are typically unreviewable, per the Supreme Court's decision in *Heckler v. Chaney*, but raised the Court's caveat in *FEC v. Atkins*.[172] In *Atkins* the Court also recognized that exercises of prosecutorial discretion are unreviewable, but concluded that "[FECA] explicitly indicates the contrary. . . . [Respondents] may bring this petition for a declaration that the FEC's dismissal of their

165. Shane Goldmacher, *The Federal Election Commission Needs 4 of 6 Members to Enforce the Law. It Now Has 3*, N.Y. TIMES (Aug. 26, 2019), https://www.nytimes.com/2019/08/26/us/politics/federal-election-commission.html.

166. 52 U.S.C. § 30106(a) (2018).

167. Ann Ravel, *Departing the Federal Election Commission*, MEDIUM (Feb. 19, 2017), https://medium.com/@AnnMRavel/departing-the-federal-election-commission-fee0ae9d63a1 (quoting from former Commissioner Ravel's resignation letter to President Donald Trump).

168. *Id*.

169. *See generally* CREW II, 892 F.3d 434, 434 (D.C. Cir. 2018) (holding that the courts cannot review the FEC's decision not to investigate a potential campaign finance violation if the FEC's decision rests on the basis of prosecutorial discretion).

170. *Id*. at 441.

171. Democracy 21 v. FEC, 952 F.3d 352, 357 (D.C. Cir. 2020) (Edwards, J., concurring).

172. *Id.* at 360–61.

complaint was unlawful."[173] To conclude otherwise would enable the FEC to use "prosecutorial discretion" as a pretextual talisman to drive away inconvenient judicial review. FECA even contains a provision authorizing judicial review. Also known as the citizen-suit provision, 52 U.S.C. § 30109(a)(8)(C) states that a district court:

> In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.[174]

This provision suggests that Congress implicitly authorized courts to review an agency's decision not to undertake an enforcement action even if its decision was based on an exercise of prosecutorial discretion. If the court determines that the FEC's decision was contrary to law, then it will give the FEC a chance to conform its decision to the law before authorizing a private citizen to file a private right of action. Until recently the courts had never permitted a citizen suit since FECA's passage in 1976.[175]

In *CREW v. American Action Network* (*AAN*), the D.C. District Court held that CREW could proceed with their citizen suit against AAN.[176] A citizen-suit is permissible if the FEC fails to abide by a court order finding a dismissal of a complaint "contrary to law" based on an erroneous interpretation of FECA.[177] CREW filed a complaint with the FEC claiming that AAN operated as an unregistered political committee.[178] The FEC dismissed the complaint twice on the grounds that AAN had not violated FECA, and after each dismissal, the district court reversed and remanded to the FEC with instructions.[179] Because the FEC repeatedly failed to comply with the court's instructions, CREW filed a citizen-suit against AAN in the D.C. District Court, which circumvented the FEC's review.[180] AAN moved to dismiss CREW's lawsuit, under the theory that the D.C. Circuit prohibited judicial review of the FEC's prosecutorial discretion.[181]

The court determined that the FEC's rejection of CREW's complaint was not an exercise of prosecutorial discretion because the FEC based its decision on an interpretation of FECA, which qualifies for judicial review.[182] The court noted that the FEC's occasional reference to prosecutorial discretion cannot

173. 524 U.S. 11, 26 (1998).

174. *CREW II*, 892 F.3d. at 437 (alterations in original) (quoting 52 U.S.C. § 30109(a)(8)(C) (2018)).

175. Kenneth P. Doyle, *Watchdog Allowed to Sue on Donor Disclosure After FEC Won't Act*, BLOOMBERG GOV'T (Oct. 1, 2019), https://about.bgov.com/news/watchdog-allowed-to-sue-on-donor-disclosure-after-fec-wont-act/.

176. No. 18-cv-945 (CRC), 2019 WL 4750248, at *1 (D.D.C. 2019).

177. *Id*. at *17.

178. *Id*. at *3.

179. *Id*. at *17.

180. *Id*.

181. *Id*. at *8–9.

182. *Id*. at *8–9.

outweigh an administrative opinion grounded almost solely in legal arguments—substance matters more than form.[183] Because the FEC's dismissals were based on legal arguments rather than prosecutorial discretion, the court could review the FEC's decisions, remand with instructions, and, if the FEC did not abide by the instructions, permit CREW to file a citizen suit.[184]

AAN is an important step toward political transparency. First, the court's dissatisfaction with the FEC's deadlock suggests that courts may, where possible, transfer some of the FEC's authority to citizen-suits. This sentiment is reflected Judge Cooper's glib remark that "[t]he Federal Election Commission is the only government agency that does exactly what Congress designed it to do: nothing."[185] Second, while a court's authority to review decisions based on FEC prosecutorial discretion remains up-in-the-air, *AAN* reflects the courts' ability to parse through the FEC's pretextual use of prosecutorial discretion to bar judicial review. Third, *AAN* presents an opportunity for dissatisfied FEC Commissioners to circumvent partisan deadlock. *AAN* includes an analysis of the FEC's genuine motivations for dismissing CREW's complaint, rather than simply deferring to pretextual "prosecutorial discretion" justification.[186] Commissioners that have expressed dissatisfaction with their colleagues' decision not to vote in favor of an enforcement action could sign on to these decisions and articulate legal, as opposed to discretionary, reasons for not initiating enforcement actions. Even under *CREW II*, the legal basis for rejecting an enforcement action would trigger the district court's authority to review such decisions to ascertain (1) whether the FEC's proclaimed discretionary reasons for not initiating an action are genuine, and (2) whether the FEC's interpretation of FECA is contrary to law. The courts' increased role in litigating FEC enforcement matters may prompt Congress to pass legislation to remove the FEC's design defect and promote transparency in our elections.

CONCLUSION

Anonymous spending continues to permeate elections in the United States. Instead of combating dark money in federal elections, the FEC remains paralyzed and divided. The FEC also continues to misinterpret and misapply FECA's mandate, demonstrated by the recent cases *CREW I*, *Campaign Legal Center,* and *AAN*. Two years after foreign intelligence reports demonstrated that foreign actors relied heavily on the internet in federal elections, the FEC proposed a rule to require disclaimers—but not disclosures—on digital political

183. *Id*. at *11.

184. *Id*. at *12.

185. *Id*. at *1. The court goes on to correct one thing that the quote mischaracterizes: Congress did not actually design the FEC to do nothing.

186. *Id*. at *11.

advertisements.[187] The FEC's proposed rule is a step in the right direction but does not go far enough.

To combat dark money, the FEC must address internet disclosure loopholes and investigate straw-donor schemes. The FEC can address the internet disclosure loophole by promulgating a regulation that expands the definition of electioneering communications to include public communications. To combat straw-donor schemes, the solution is simpler. The FEC should investigate potential violations of 52 U.S.C. § 30122. It is unlikely that the FEC will address these issues in the near future—it does not even have enough commissioners for a quorum. The courts and transparency interest groups must hold the FEC accountable, even when the FEC asserts prosecutorial discretion as a basis for choosing not to authorize enforcement actions. *CREW I, Campaign Legal Center,* and *AAN* demonstrate that this remains a viable option.

187. Nicholas Fandos & Kevin Roose, *Facebook Identifies an Active Political Influence Campaign Using Fake Accounts*, N.Y. TIMES (July 31, 2018), https://www.nytimes.com/2018/07/31/us/politics/facebook-political-campaign-midterms.html.

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