No. 18-5261

In the
United States Court of Appeals
for the District of Columbia Circuit

CROSSROADS GRASSROOTS POLICY STRATEGIES,
Defendant-Appellant,
v.
CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *ET AL.*,
Plaintiffs-Appellees,

On Appeal from the
United States District Court for
the District of Columbia

Brief *Amicus Curiae* of 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 Advocate of the United States, Policy Analysis Center, Conservative Legal Defense and Education Fund, and The Senior Citizens League in Support of Defendant-Appellant and Reversal

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and *Amici*

Except for the following, all parties, intervenors, and *amici curiae* appearing before the district court below and this Court are listed in the Briefs for the parties: *amici curiae* 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 Advocate of the United States, Policy Analysis Center, Conservative Legal Defense and Education Fund, and The Senior Citizens League.

Ruling under Review

References to the ruling at issue appear in the Appellant's Brief.

Related Cases

Counsel adopt and incorporate by reference parties' statements with respect to related cases.

CORPORATE DISCLOSURE STATEMENT

The *amici curiae* herein, 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 Advocate of the United States, Policy Analysis Center, Conservative Legal Defense and Education Fund, and The Senior Citizens League, through their undersigned counsel, submit this Corporate Disclosure Statement pursuant to Rules 26.1(b) and 29(c) of the Federal Rules of Appellate Procedure, and Rule 26.1 of the Rules of the United States Court of Appeals for the District of Columbia Circuit.

These *amici curiae* are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them.

These *amici curiae* are represented herein by Herbert W. Titus, counsel of record, Jeremiah L. Morgan, William J. Olson, and Robert J. Olson, of William J. Olson, P.C., 370 Maple Avenue West, Suite 4, Vienna, Virginia 22180-5615. J. Mark Brewer, of Brewer, Pritchard & Buckley, P.C., 770 South Post Oak Lane, Houston, Texas 77056, and James N. Clymer, of Clymer Bodene, P.C.,

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GLOSSARY OF ABBREVIATIONS

CREW	Citizens for Responsibility and Ethics in Washington
Crossroads	Crossroads Grassroots Policy Strategies
FEC	Federal Election Commission
IE	Independent Expenditure
IRC	Internal Revenue Code

INTEREST OF *AMICI CURIAE*[1]

The *amici curiae* are nonprofit organizations, exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Free Speech Coalition and Free Speech Defense and Education Fund are associations of nonprofit organizations engaged in the public policy process and for-profit firms who assist those nonprofit organizations in the exercise of constitutional rights by nonprofit organizations. Each *amici* is dedicated, *inter alia*, to the correct construction, interpretation, and application of the law.

STATEMENT OF THE CASE

This case began as a complaint filed by Appellee Citizens for Responsibility and Ethics in Washington ("CREW") with Appellee Federal Election Commission ("FEC") against Appellant Crossroads Grassroots Policy Strategies ("Crossroads") for failure to disclose the identity of donors not required to be identified under law. However, this case has morphed to the point that the district court invalidated an FEC regulation that had been in place for 37 years.

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[1] All parties have consented to the filing of this brief *amicus curiae*. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

Under that FEC regulation, if a corporation that is not a political committee makes an independent expenditure — uncoordinated express advocacy for or against a federal candidate — over $250, it is required to file an FEC Form 5, which reports information about the independent expenditure, and also requires information about certain donors who gave to the organization for the purpose of supporting that specific independent expenditure.

The district court vacated part of an FEC longstanding regulation, ruling that the statute requires information about donors if they made donations to a program which included independent expenditure's even without any understanding that the funds be used on **any** particular independent expenditure. What this decision could mean is unclear, and now nonprofit organizations that make an independent expenditure run the risk of violating an uncertain reporting requirement, or over-reporting confidential donor information out of an abundance of caution for fear of how a donation solicitation **might** be read, or they might choose to cease engaging in any independent expenditures whatsoever.

Therefore, this *amicus* brief focuses on whether 11 C.F.R. § 109.10(e)(1)(vi) is an appropriate interpretation of 52 U.S.C. § 30104(c).

ARGUMENT

I. THE FEC'S REGULATION SHOULD NOT BE VACATED.

A. *Chevron* Deference

Despite criticism from academics, practitioners, and jurists, the *Chevron*[2] Doctrine remains entrenched in this Circuit even more so than in others.[3] For example, Justice Kennedy recently observed that "it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision."[4] Indeed, there is at least one petition for certiorari pending before the U.S. Supreme Court asking that Court to reconsider *Chevron* altogether.[5]

Nevertheless, at the moment, *Chevron* continues to provide the controlling structure for reviewing many agency regulations. This Court may consider it

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[2] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[3] *See* A. Gluck & R. Posner, Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals, 131 HARV. L. REV. 1298, 1312, 1348-50 (Mar. 2018).

[4] Pereira v. Sessions, 138 S.Ct. 2105, 2121 (2018) (Kennedy, J., concurring).

[5] *See* United Parcel Service v. Postal Regulatory Commission, Supreme Court No. 18-853.

beyond its power to reject that analytical doctrine, and thus Appellant was correct to argue from that doctrine. Nevertheless, the district court's decision demonstrated that whoever performs the analysis of a statute, the wrong result can be reached. If courts use *Chevron* simply to defer to agency interpretations, they have failed in their duty to say what the law is. On the other hand, if a court so desires, it can say it is applying *Chevron* while actually pursuing its own policy goal, as the lower court did here. In any event, the statute at issue in this case is unambiguous, and contrary to the district court's conclusion, the regulation is not inconsistent with it.

B. The Statutory Language Supports the Regulation.

The district court's decision to vacate the regulation at issue in this case was predicated on its view that 52 U.S.C. § 30104(c) contains separate reporting requirements in paragraph (1) and paragraph (2) of subsection (c). This threshold mistake tainted everything that followed. Although the district court complained that the FEC's regulation "falls short in two distinct ways," if the court had not split the reporting requirements of (1) and (2), it could not have concluded that subsection (c)(2) requires broader donor reporting than what the regulation required.

The district court claimed that it was applying traditional methods of statutory interpretation,[6] but it erred when it concluded that (c) contains two separate reporting requirements. As Appellant explained, subsection (c) is structured with one filing requirement: "FECA (c)(2) then logically provides the contents of what such reports filed pursuant to FECA (c)(1) must contain." Appellant's Brief at 38. This view is supported by the plain reading of subsection (c), but the following analysis even more clearly confirms this view.

Subsection (c)(2) states that "Statements required to be filed **by this subsection** … shall include…." (Emphasis added.) If the reference to "this subsection" means paragraph (2), then the district court could have been correct that it contains a different reporting requirement than paragraph (1). However, if the reference to "this subsection" is to subsection (c), then it includes both paragraphs and there is no way the district court can be correct.

Federal statutes are generally structured with sections being the main division point. For example, this case involves section 30104 of Title 52. Below that point, sections are generally divided into subsections which are marked by lower case letters — (a), (b), (c), etc. *See* M.D. Bellis, "Statutory Structure and

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[6] *See* CREW v. FEC, 316 F. Supp. 3d 349, 391 (D.D.C. 2018) (where the district court purported to apply "one of the most basic interpretive canons").

Legislative Drafting Conventions: A Primer for Judges," Federal Judicial Center (2008) at 8. Below that level, "subsections divide into paragraphs. Paragraphs may have subparagraphs…." *Id*. at 9. Subparagraphs can be divided into clauses and subclauses. *See id*.

The district court's lack of precision on the nomenclature of statutory structure is evident throughout its opinion. First, it never considered whether "this subsection" actually was referring to in subsection (c)(2). Second, the district court incorrectly noted that "§ 30104(c) only has a general heading with no subsection headings at all." CREW at 396. Clearly (c) itself is a subsection, and the district court meant to say that (c) had no **paragraph** headings.

Thus, the reference in (c)(2) to reports "required to be filed by this subsection," refers to subsection (c), not to paragraph (2). Only one report — not two different reports — is required by subsection (c). This analysis supports appellant's argument that (c)(1) is the general requirement of the report, and (c)(2) is a specification of the contents of the report required by (c)(1). *See* Appellant's Brief at 38-39.

Further, subsection (c)(3) requires the FEC to prepare and publish indices of independent expenditures that are made and reported to the FEC. Applying

the district court's reading of subsection (c), paragraph (3) too could be said to contain a third and separate reporting requirement for independent expenditures because it mentions the information "as reported under this subsection." However, only by reading paragraph (3) as referring to a single reporting requirement under subsection (c) does paragraph (3) make sense.

Lastly, the requirement that the FEC prepare the indices "on a candidate-by-candidate basis" only makes sense when understood if the reporting requirement is one which includes information for donors who have earmarked their donation to support a particular independent expenditure. The district court's ruling presumably would require that the names of donors who donate to a non-political committee if the solicitation even generally mentions the organization doing independent expenditures among many types of activities. If so, then the FEC's statutory duty to publicly report on a candidate-by-candidate basis would be made impossible to fulfill.

C. Changes to FECA by Court Decisions Provide Further Reason to Uphold the Regulation.

Appellant correctly points out that the regulation at issue in this case had been in effect since 1980 and was in effect until the district court struck it down

last year. *See* Appellant's Brief at 8. Yet the legal environment has changed with the Citizens United decision, as Appellant pointed out:

> The district court also attempted to establish congressional clarity under *Chevron* step one by subordinating the clear legislative history to policy arguments articulated (anachronistically) **after *Citizens United v. FEC***, 558 U.S. 310 (2010). But such post-promulgation developments do not bear on whether the FEC correctly interpreted the statute in 1980, particularly since **most of the spending today is by groups that were unable to make independent expenditures in 1980**. [Appellant's Brief at 42 n.13 (emphasis added).]

Indeed, before the Supreme Court's decision in Citizens United, all for-profit corporations and most nonprofit corporations were prohibited from making independent expenditures. As explained in Citizens United, "First Amendment standards … 'must give the benefit of any doubt to protecting rather than stifling speech.'" Citizens United at 327.

Here, the district court concluded that the statute was resolved at *Chevron* step one, which requires the court to determine that "Congress has directly addressed the precise question at issue." *See* CREW at 386. However, when the statute under consideration here was enacted, nonprofit corporations were banned from making independent expenditures from their general corporate treasury funds.

This means that most of the reporting covered by § 30104(c) and affected by the district court's ruling was not even contemplated by Congress because those types of independent expenditures by nonprofit corporations were prohibited which receive contributions from donors. Thus, this case does not fit cleanly within the framework of *Chevron* because Congress cannot be said to have spoken to the issue of nonprofit corporation reporting of independent expenditures.

II. THE COURT BELOW BASED ITS DECISION ON A TENDENTIOUS AND CONFUSED FIRST AMENDMENT FRAMEWORK, THEREBY UNDERMINING THE CREDIBILITY OF ITS STATUTORY ANALYSIS.

A. A Conflict Between Two "Values."

Chief Judge Beryl A. Howell viewed the case before her as a contest between two "values." CREW at 355. On the one side was "the protection of speech [a] fundamental value safeguarded under the First Amendment." *Id.* Against that constitutional "value" she pitted the "value of disclosure." *Id.*

Like Goliath of old, the chief judge tailored her decision to ensure that the giant — the "value of disclosure" — was fully armed to:

- "enabl[e] the electorate to make informed decisions about candidates";
- "evaluate political messaging";

- "deter actual, or the appearance of, corruption"; and
- "aid in enforcement of the ban on foreign contributions, which may result in undue influence on American politicians." [*Id.*]

In contrast, the David in this battle — the lesser "First Amendment value" — was denied even his sling, the chief judge having dismissed any and all First Amendment objections to government-compelled disclosure as being "'the least restrictive means of curbing the evils of campaign ignorance and corruption.'" *Id.*, quoting Buckley v. Valeo, 424 U.S. 1, 68 (1976).

The chief judge's analysis was both simplistic and erroneous. The Buckley Court never laid down such an across-the-board demand for forced donor disclosures, having acknowledged that First Amendment concerns that arose out of the:

- "public disclosure of contributions to candidates and political parties [which] will deter some individuals who otherwise might contribute;" and
- "disclosure may even expose contributors to harassment or retaliation." and, thus, "compelled disclosure … cannot be justified by a mere showing of some legitimate governmental interests." [Buckley at 64 and 68.]

Thus, for example, in Buckley, the Court did not summarily dismiss the First Amendment claim that, as applied to minor party and independent candidates, the forced disclosure and reporting requirement could, in some case, be

unconstitutionally burdensome, even given the strong governmental interests in protecting against government corruption and enlightening the electorate. In other words, the judicial task after Buckley was one of balancing, weighing on the one hand the government's interests in electoral integrity and transparency, and on the other hand, the free flow of information in the marketplace of ideas.

B. A Forced Disclosure Mandate.

To achieve her desired result, the chief judge asserted that Congress's "mandated disclosures" remained under Buckley a foursquare effort "(i) to achieve **total disclosure** (ii) by reaching **every** kind of **political activity** (iii) in order to insure that the voters are **fully informed** and (iv) to achieve through **publicity** the **maximum deterrence** to corruption and undue influence possible." CREW at 356 (internal quotations omitted) (emphasis added). The chief judge prejudged the case, having obviously designed a larger framework within which to interpret the statutes and regulations at issue. "This case," she wrote, "concerns the requisite disclosures about contributors that organizations making independent expenditures, in support of or opposition to particular candidates for federal office, must make, when those organizations are **not political** committees controlled by, or operating in coordination with, candidates or national political

parties." *Id.* (emphasis added). If subjected to analysis within the framework of the "total disclosure" and "fully informed" Buckley standard, as stated by the chief judge, then only the CREW view is permissible because only the CREW view requires maximum disclosure of donors to a not-political committee. In contrast, the FEC and Crossroads view would not measure up to the "total disclosure" standard because the FEC view does not require disclosure unless the donor earmarked his donation as one for an independent expenditure to support or oppose a candidate for federal office.

Additionally, the chief judge tossed into the mix the danger of "foreign influence over U.S. elections," such that "Congress has heard the warning that 'holes in the campaign finance disclosure rules allow dark money organizations to spend on politics without revealing their donors, potentially hiding foreign sources of funds.'" *Id.* at 356. To illustrate why this is so, the chief judge opined that "an important aspect of this **statutory disclosure regime** is to further 'the government's interest … in preventing foreign influence over U.S. elections.'" *Id.* at 356 (emphasis added). That goal would not be possible unless the CREW view of the disclosure mandate is adopted and enforced by the FEC.

C. The CREW Disclosure Mandate Threatens First Amendment Principles.

Although the chief judge acknowledged in the opening paragraph of her opinion that this case implicates the "protection of speech [as] a fundamental value safeguarded under the First Amendment," she virtually ignores any of those safeguards. CREW at 355. Instead, she offers in support of the constitutionality of the CREW "statutorily mandated disclosures" the quotation from Buckley, that it is constitutionally permissible for Congress to "achieve 'total disclosure' by reaching 'every kind of political activity' in order to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible." CREW at 356. The chief judge's offer should not be accepted by this Court.

First, as for "**total disclosure**," even the Buckley Court conceded that disclosure could not be applied to minor parties or independent candidates if they make a credible showing of "threats, harassment, or reprisals from either Government officials or private parties." Buckley at 74. Indeed, six years after Buckley, the Supreme Court found Ohio disclosure requirements unconstitutional as applied to a minor party which had historically been subjected to harassment

by both the government and private parties. *See* Brown v. Socialist Workers '74 Campaign Comm. (Ohio), 459 US. 87, 88 (1982).

Since Citizens United v. FEC, 558 U.S. 310 (2010), nonprofit corporations have been free to use treasury funds to pay for independent expenditures expressly advocating for or against the election of a candidate. Dissenting from the Citizens United majority decision, which upheld the disclosure requirements imposed on nonprofit organizations that engage in independent expenditures, Justice Thomas warned that "upholding [the disclosure requirements] will ultimately prove as misguided…." *Id.* at 480. Reciting examples of retaliation against supporters of California's Proposition 8, Justice Thomas noted that "[m]any supporters (or their customers) suffered property damage, or threats of physical violence or death, as a result" of the required disclosure, and the use of such information by opponents of Proposition 8. *Id.* at 481. Thus, he asserted, it is a "fallacy … that '[d]isclaimer and disclosure requirements … impose no ceiling on campaign-related activities.'" *Id.* at 483. "Now more than ever, [disclosure requirements] will chill protected speech because — as California voters can attest — 'the advent of the Internet' enables 'prompt disclosure of expenditures,' which 'provide[s]' political opponents 'with

the information needed' to intimidate and retaliate against their foes.'" *Id*. at 484. He concluded quite aptly "I cannot endorse a view of the First Amendment that subjects citizens of this Nation to death threats, ruined careers, damaged or defaced property, or pre-emptive and threatening warning letters as the price for engaging in 'core political speech, the "primary object of First Amendment protection."'" *Id*. at 485.

That was 2010. The risk faced by those who participate in the political arena has not improved. If anything, the political climate is worsened. The Internet is the battleground, and information is the ammunition. The battle lines are drawn and maintained by tribalism and guilt by association. The Chief Judge's high-sounding rhetoric of "total disclosure" disregards the real threat of forced disclosure of organizations like Crossroads and its donors.

Second, as for "reaching **every kind** of **political** activity," the Supreme Court has already foreclosed the position of the chief judge, having distinguished laws banning the distribution of anonymous political campaign literature from laws "mandating disclosure of campaign-related expenditures." *See* McIntyre v. Ohio Elections Commission, 514 U.S. 334, 353 (1995). Relying primarily upon Talley v. California, 362 U.S. 60 (1960), the McIntyre Court found an Ohio law

punishing the circulation of a political handbill without including the name and address of the sponsor to be a violation of the First Amendment principle of anonymity. *See* McIntyre at 341-43.

Writing for the majority, Justice Stevens surveyed the history of the freedoms of speech and of the press, concluding that the decision whether to disclose the identity of the author, the publisher, the distributor — of anyone else associated with the circulation of the political flier is vested by the First Amendment to the author, with the sole power to decide whether to "go public" or withhold his identity. As Justice Stevens put it: "[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *Id.* at 342. And for good and sufficient reason, Justice Stevens continued:

> Anonymity … provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of political rhetoric, where "the identity of the speaker is an important component of many attempts to persuade,"… the most effective advocates have sometimes opted for anonymity. [*Id.* at 342-43.]

Finally, Justice Stevens observed that "the [anonymous] speech in which Mrs. McIntyre engaged — handing out leaflets in the advocacy of a politically controversial viewpoint — is the essence of First Amendment [and] [n]o form of speech is entitled to greater constitutional protection…." *Id.* at 347.

Third, as for ensuring that voters are **"fully informed,"** the Supreme Court once again has foiled the chief judge's totalitarian view of the First Amendment's marketplace of ideas. Only two years before Buckley, the Court decided Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), striking down a Florida "right of reply" statute that provided if any candidate for political office is assailed regarding his personal character or official record by a newspaper, the candidate has the right to demand that the newspaper provide the candidate access to that paper without charge in as conspicuous a place and manner. In a unanimous decision, the Court rejected the argument that, because the Miami Herald "had become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion," the right to reply statute was essential to preserve the "the First Amendment interest of the public in being informed." *Id.* at 249, 251.

In support of its decision, Chief Justice Warren Burger wrote:

> [T]he Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors…. Ths choice of material to go into a newspaper, and the decisions made as to limitations on the … content of the paper, and treatment of public issues and public officials – whether fair or unfair – constitute the exercise of editorial control and judgment. [*Id*. at 258.]

Fourth, as for achieving the **"maximum deterrence"** to "corruption and undue influence," the chief judge contradicts her earlier assertion that "disclosure has been upheld as 'the least restrictive means of curbing he evils of campaign ignorance and corruption.'" CREW at 355-56. If "disclosure is a less restrictive alternative to more comprehensive regulations of speech," as the chief judge has written, then by definition, "publicity" cannot "achieve … the maximum deterrence to corruption and undue influence possible." *Id*.

III. IN A CONSTITUTIONAL REPUBLIC, THE PEOPLE MUST BE FREE TO CRITICIZE THE GOVERNMENT AND TRY TO OUST INCUMBENT POLITICIANS FROM OFFICE WITHOUT THE THREAT OF RETALIATION.

Section II of this *amicus* brief addresses how the district court's unlimited faith in the power of disclosure to protect the nation from all manner of supposed evil tainted her view of the statute. That same faith is expressed by most of our nation's political elites, but it is badly misplaced. Although it is true that a handful of quotations carefully selected from a handful of Supreme Court

decisions support forced disclosure in some situations, compelled disclosure is a dangerous tool in the hands of those in power who often use it in order to maintain themselves in power. It certainly neither grounded in the U.S. Constitution, nor in the values embraced by and practices of the Founders and Framers, nor in any high-minded legislative goals. For these reasons, this Court must be mindful of the damage done to the nation by forced disclosure laws. Consider first the matter of motivation of those who enact such laws.

A. Campaign Finance Laws Are Bad Enough When Written by Incumbents for Incumbents, but Should Never Be Re-written by Judges Selected by Incumbents to Protect Incumbents.

It would be a mistake of the first order to assume that incumbent members of Congress who draft and support campaign finance bills do so without any consideration of the effect that such bills, if enacted, would have on their ability to gain re-election. Quite naturally, incumbents do not want to make it easier for challengers to defeat them at the polls, and thus it is reasonable to presume generally that campaign finance legislation favors incumbents and disfavors challengers. Indeed, campaign finance laws contribute mightily to ensuring that unless they make a major mistake, incumbents generally are re-elected to office

again and again. *See generally* James Miller, Monopoly Politics (Hoover Inst. Press: 1999).[7]

Consider first the basic requirement that campaigns are required to disclose the name, address, and occupation of contributors to their campaigns, as well as the date and amount of the contribution. When a challenger learns from a campaign finance report that a businessman in his district has given money to an incumbent, that information provides him little to no useful information. In theory, the challenger could seek support from that donor for himself, as insurance for the donor to preserve access in the statistically unlikely event that the challenger were to win, such sales are difficult to make. On the other hand, when an incumbent learns that a businessman in his district has given money to a challenger, the Congressman or his finance chairman can call the donor and

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[7] The website OpenSecrets.org gathered data on Congressional re-election rates from 1964 to 2018, and concluded: "Few things in life are more predictable than the chances of an incumbent member of the U.S. House of Representatives winning reelection. With wide name recognition, and usually an **insurmountable advantage** in campaign cash, House incumbents typically have little trouble holding onto their seats….

"Senate races still overwhelmingly favor the incumbent, but not by as reliable a margin as House races. Big swings in the national mood can sometimes topple long time office-holders, as happened with the Reagan revolution in 1980. Even so, years like that are an exception." "Reelection Rates Over the Years," OpenSecrets.org (emphasis added).

suggest that the donor has made a grievous mistake, which could adversely affect his business interests, unless it is rectified by an equal or greater contribution to the incumbent. Incumbents can steer federal contracts and other benefits away from donors to challengers, and as federal spending spirals out of control, more and more businesses have come to depend on the government for a significant portion of their revenue. Moreover, the very fact that a contribution to a challenger will become publicly known causes businessmen either to make a contribution to a challenger at a level below the $200 reporting requirement, or make no contribution at all. Simply put, incumbents have power to use the donor information required to be made public in FEC reports; challengers do not.

The new mandatory disclosure requirement which the district court would impose on donors to organizations which are not political committees — such as those organizations exempt from federal income taxation under Internal Revenue Code section 501(c)(4) — would have much less justification than the disclosure requirements for contributions to candidate committees. The Supreme Court has viewed that the risk of corruption from undisclosed donors to candidates to outweigh the harm. But with independent expenditures, there is **no risk of**

corruption because the money is not contributed to the campaign committee and cannot be coordinated with the candidate or the campaign. And because the money is being spent by a non-political committee, where most of its activities are not in the electoral area, the supposed threat of corruption is even more remote.

Yet Congress does not want to be perceived as having rigged the electoral process so tightly that the People come to conclude that the problem is not the risk of donors corrupting Congress, but rather that Congress already is corrupt. Balancing its desire for re-election with its desire not to be perceived as unfair, one can surmise Congress went as far as it felt comfortable in mandating donor disclosure for independent expenditures. Although the language of earmarking is not used by Congress, the only statutorily mandated disclosure for donations to non-political committees is where donations are clearly given to fund an independent expenditure for or against a particular candidate. That type of mandated disclosure should be the outer limit of what is required by the FEC, as it has been for nearly 40 years. So there is no reason to assume, as the district court did, that Congress had really intended to go further and require the disclosure of all donors to a non-political committee's independent expenditures.

If Congress had actually intended that result, but the FEC misunderstood it, Congress has now had 30 years to clarify the matter — and, at the same time, take the political heat for imposing this further pro-incumbent "reform."[8] When such a new disclosure requirement is imposed by a district judge, the damage that it does to the Republic is even worse than if Congress imposed it. Although the People can oust a Congressman or Senator or President who rigs the system to his own advantage, the People cannot vote out the district judge who re-writes statutes to protect incumbents against challengers. The People rightly should and do have disdain for federal judges who, after being appointed by a politician in

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[8] Although the district court clearly asserted that the FEC regulation was inconsistent with the provision in the Federal Election Campaign Act, since the remedy was to vacate and remand the regulation, it is not at all clear what level of disclosure would be imposed by the FEC, or found acceptable to the district court. For example, suppose an Internal Revenue Code section 501(c)(4) organization — a non-political committee — supporting the "Green New Deal" were to send out fundraising letters explaining its educational programs, its conferences, its website, its lobbying efforts, and were then to mention that it planned to run unspecified independent expenditures supporting future candidates who embraced the Green New Deal, would the name and address of every donor over the dollar threshold need to be publicly reported? If so, it would have one of two effects. Either the confidentiality of the donors would be compromised, or the organization would choose never to fund an independent expenditure. This, of course, may be the desire of CREW, and perhaps the district court, but it is not clear that the vitality of our constitutional republic would be enhanced by such a violation of principles of anonymity.

the Presidency, and confirmed by politicians in the Senate, then issues decisions giving additional tools to incumbent Senators who seek to gain re-election.

B. The Framers Embraced and Practiced Anonymity in Politics.

It is also a mistake to believe that campaign finance disclosure is The American Way — in the tradition of the Founders of the Nation and the Framers of our Constitution. Although the Progressive Era brought with it the Tillman Act of 1907 which banned contributions by corporations and federally chartered banks, and a few other restrictions in the following years, it was not until 180 years into our nation's history that such mandatory disclosure was embraced. Incumbents who favor disclosure, and those who do their bidding such as CREW, would have people believe that the opposite of disclosure is secrecy, "dark money,"[9] and corruption. The opposite of disclosure, however, is Anonymity — a political tradition with a long pedigree in both England and America.

The 85 essays written by Alexander Hamilton, James Madison, and John Jay (later Chief Justice) in support of the ratification of the Constitution, later

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[9] The district court used this negative term to explain its decision. *See* CREW at 356.

assembled as The Federalist Papers, were published anonymously, under a pseudonym.

> **It was common in the eighteenth century, in England as in the American colonies, to publish political essays under a classical pseudonym** in order to identify with a Roman statesman — particularly a republican — and conceal one's identify. *The Federalist* essays were all signed "Publius," a reference to Publius Valerius Publicola, the legendary Roman statesman and general of the sixth century…. [George W. Carey & James McClellan, edts., The Federalist (Liberty Fund: 2001) at xlv-xlvi (emphasis added).]

Indeed, there might not be an Article III under which the district court exercises its authority, or a First Amendment for the district court to interpret, if The Federalist Papers were not written in response to arguments against ratification of the Constitution which also were made pseudonymously, by persons using names like "Cato" (a writer generally believed to be New York Governor George Clinton). *Id*. at xliii.[10]

Interestingly, the use of "Cato" during the ratification period followed its use as a pseudonym by John Trenchard and Thomas Gordon who attacked the British government in London papers from 1720 to 1723.

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[10] The Federalist Papers is not an outlier. A rich collection of 76 articles on a wide variety of political topics from 1760 to 1805 has been assembled, perhaps 10 percent of which were Anonymous or Pseudonymous. *See* Charles S. Hyneman & Donald S. Lutz, American Political Writing During the Founding Era 1760-1805 (Liberty Press: 1983).

> The immediate occasion of the letters was the bursting of the South Sea Bubble, which had precipitated a financial crisis of huge proportions [taking the position] that the crisis was due in large part to the machinations of the officers of the South Sea Company, who had **connived with members of the government and of the royal court to bilk the public**.... [Ronald Hamowy, edt. Cato's Letters, (Liberty Fund: 1995) at xx (emphasis added).]

One can readily see why both pseudonymous "Cato's" might have voluntarily chosen anonymity over government compelled disclosure. Although laws mandating disclosure of the identity of those critical of incumbents is offered by incumbents as a way to guard against future corruption, it is often the exposure of government's existing corruption that those incumbents seek to prevent.

One could say that a distinction could be made between publishing anonymous attacks on a corrupt government, on the one hand, and criticizing an incumbent in an independent expenditure on the other, but the distinction would only appeal to those who are part of the nation's ruling elite seeking to perpetuate that elite. That argument likely would not appeal to either Madison, Hamilton, Jay or even Thomas Paine who wrote his widely influential pamphlet attacking British rule, Common Sense, under the pseudonym "An Englishman." Truly, anonymity has a long and distinguished pedigree which must be protected. A person who seeks to change government may voluntarily choose to identify

himself to his audience if the penalty that the government could inflict on him is modest, but he may prefer anonymity if he fears severe retribution from the government.

In sum, the government, which is to say incumbents, does not like voluntary choice when they could be the object of criticism, so they choose coerced disclosure to tamp down the fires of discontent. Campaign finance disclosure laws enacted by incumbents to protect incumbents, even if they have been viewed as constitutionally permissible by earlier federal courts, are bad enough. These coercive laws must not be expanded upon by unelected judges who have no appreciation for the American way — Anonymity.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.*, in Support of Defendant-Appellant and Reversal complies with the type-volume limitation of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure, because this brief contains 5,663 words, excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 17.0.0.336 in 14-point CG Times.

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Dated: March 18, 2019

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.*, in Support of Defendant-Appellant and Reversal, was made, this 18th day of March 2019, by the Court's Case Management/Electronic Case Files system upon the attorneys for the parties.

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