Addendum B

NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 18-5261

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

CROSSROADS GRASSROOTS POLICY STRATEGIES,

Intervenor Defendant-Appellant,

v.

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON & NICHOLAS MEZLAK,

Plaintiffs-Appellees,

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia
Case No. 1:16-cv-00259-BAH

PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANT-APPELLANT CROSSROADS GRASSROOTS POLICY STRATEGIES'S EMEREGENCY MOTION FOR A STAY PENDING APPEAL

Having had every one of its arguments rejected below, Defendant-Appellant Crossroads Grassroots Policy Strategies ("Crossroads") now seeks the "extraordinary remedy" of a stay pending its appeal, *Cuomo v. U.S. Nuclear*

Regulatory Comm'n, 772 F.2d 972, 978 (D.C. Cir. 1985) (per curiam), a remedy that will do immeasurable damage to the American people by "depriv[ing] the electorate of donor information that was intended and supposed to be disclosed," Op. 96.[1] Indeed, Crossroads's motion appears calculated to deny voters in the next federal election knowledge about "[t]he sources of a candidate's financial support" before they must cast their ballot. *Buckley v. Valeo*, 424 U.S. 1, 67 (1976).

Crossroads fails, however, to meet the "stringent requirements" for the relief it seeks. *Van Hollen v. FEC*, Nos. 12-5117, 12-5118, 2012 WL 1758569 (D.C. Cir. 2012) (per curiam). It fails to show any likelihood of success in its appeal and, in fact, it cannot do so. Indeed, as the court below held in its thorough and well-reasoned opinion, the FEC regulation limiting disclosure by those making independent expenditures to only campaign contributors who contribute to fund "the reported" independent expenditure—a category so narrowly defined as to be nonexistent, *see* Op. 7, 8 —is inconsistent with the Federal Election Campaign Act's far broader command to report the sources of "all contributions" over $200 and to further identify those who contribute for the purpose of furthering "an" independent expenditure. Op. 53–92. Further, Crossroads fails to show any cognizable and irreparable harm, fails to show its requested relief will not harm appellees Citizens for Responsibility and Ethics in Washington and Nicholas

[1] Crossroads Mot. Add. B.

Mezlak (together "CREW"), and utterly fails to show that the public interest favors a stay. Accordingly, CREW respectfully requests this Court deny Crossroads's motion.[2]

BACKGROUND

In 1979, Congress amended the FECA's reporting provisions for those who make "independent expenditures," FECA Amendments of 1979, Pub. L. 96-187, § 104(c), 93 Stat. 1339, 1354 (1980), defined as communications that expressly advocate for the election or defeat of a federal candidate, 52 U.S.C. § 30101(17). Mirroring the prior statute's requirements for those making independent expenditures,[3] the 1979 Amendments imposed two separate but complementary reporting obligations. First, the amendments imposed parallel reporting obligations for political committees and on others making $250 in independent expenditures, mandating that "[qualifying persons] shall file a statement containing the information required under subsection (b)(3)(A) for *all* contributions received by such person." PL 96-187, § 304(c)(1) (emphasis added) (codified at 52 U.S.C.

[2] Crossroads's request to stay CREW's FECA claim is now moot. Crossroads Mot. 10; FEC Resp. to Mot.

[3] The decision below provides a lengthy discussion of the history of the relevant portions of the FECA. *See* Op. 25–35.

§ 30104(c)(1)). The referenced subsection (b)(3)(A) mandates disclosure of the identities of contributors of more than $200 annually, 52 U.S.C. § 30104(b)(3)(A).[4]

Second, the amendments required those making independent expenditures identify "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." PL 96-187, § 304(c)(2)(C) (emphasis added) (codified at 52 U.S.C. § 30104(c)(2)(C)). Previously, contributors self-reported if they contributed to fund any independent expenditure. Op. 30–32. The amendments shifted that burden on to those making the independent expenditure to "[s]implif[y] reporting without affecting meaningful disclosure." Op. 85 n. 33.

Notwithstanding these unambiguous statutory commands, the FEC issued a regulation that failed to capture the dual reporting requirements Congress imposed. In conducting the rulemaking, the FEC initially published draft regulations which reflected the second reporting obligation—that the maker of the independent expenditure report the identity of those contributing more than $200 "for the purpose of furthering *an* independent expenditure," Op. 38 (quoting 45 Fed. Reg.

[4] While parallel in scope, they are not parallel in duration. *Compare* 11 C.F.R. §§ 102.3, 104.5 *with* 11 C.F.R. § 109.10(b)–(d). Further, all funds donated to a political committee are contributions because political committees are "by definition, campaign related," *Buckley*, 424 U.S. 78, while only donations to those making independent expenditures "for the purpose of influencing elections" are contributions, Op. 55.

5564)—but proposed no regulation reflecting the first reporting obligation. The FEC then issued a final regulation which still omitted the subsection (c)(1) reporting obligation, but now also inexplicably changed the scope of reporting under subsection (c)(2)(C) to require only the reporting of contributions given "for the purpose of furthering *the reported* independent expenditure." *Id.* at 39 (emphasis added); 11 C.F.R. § 109(e)(1)(vi). The rulemaking record reveals no reason for this change. Op. 39.

In its public explanation for the regulation, the FEC issued a single sentence stating that it was intended to "incorporate the changes set forth in 2 U.S.C. [§] [30104](c)(1) and (2) regarding reporting requirements for persons, other than political committee, who make independent expenditures." Op. 39 (quoting 45 Fed. Reg. 14831, 15087) (Mar. 7, 1980)); *see also* 11 C.F.R. § 109(e)(1)(vi). It offered no explanation, or indeed any recognition, of its variance in the language from that of subsection (c)(2)(C) or its omission of subsection (c)(1)'s requirement.

The FEC subsequently interpreted the regulation to require reporting only where a contributor "earmarked contributions for specific expenditures in the precise form set out in a particular report." Op. 80. Accordingly, the FEC has found the regulation did not require reporting of contributions where the reporter knew funds were given to "support the election" of a specific federal candidate,

Op. 102, or where the contributors were solicited after watching "example" independent expenditures, Op. 88.

In an action arising from the application of the invalid regulation to CREW in an administrative proceeding, *see* Op. 47–48, the court below considered the reporting obligations imposed by 52 U.S.C. § 30104(c)(1) and (c)(2)(C) and found they "unambiguously require separate and complementary" reports of contributors and "mandate significantly more disclosure than" 11 C.F.R. § 109.10(e)(1)(vi). Op. 92. Evaluating the factors outlined in *Allied-Signal, Inc. v. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993), the district court further found vacatur was the proper remedy. Op. 93–99. The district court recognized the "regulation has deprived the electorate of donor information that was intended and supposed to be disclosed" and that remand rather than vacatur raised the "significant concern" about the proven "inaction by the FEC to address flaws" in the regulation.[5] Op. 96, 99

ARGUMENT

Crossroads seeks "an extraordinary remedy." *Cuomo*, 772 F.2d at 978. A stay pending appeal is "an intrusion into the ordinary processes of administration and judicial review . . . and accordingly is not a matter of right, even if irreparable

[5] The FEC has known since at least 2011 that the regulation is inconsistent with the statute but has refused to take action. *See* Op. 13–15.

injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009). As a result, Crossroads must meet "stringent requirements," *Van Hollen*, 2012 WL 1758569, at *1, and bears the "heav[y]" burden of justifying the exercise of such an extraordinary remedy, *Landis v. N. Am. Co.*, 299 U.S. 248, 255–56 (1936).

Specifically, Crossroads must "'(1) . . . [make] a strong showing that [it] is likely to succeed on the merits; (2) [show it] will be irreparably injured absent a stay; (3) [show] the stay will [not] substantially injure the other parties; and (4) . . . [show] the public interest lies'" in favor of a stay. *Nken*, 556 U.S. at 426 (citation omitted); *accord Doe 1 v. Trump*, No 17-5267, 2017 WL 6553389, at *1 (D.C. Cir. Dec. 22, 2017); D.C. Cir. R. 8(a)(1). Crossroads fails to show any of these factors favor a stay here.

A. Crossroads Fails to Make a Strong Showing of a Likelihood of Success on Appeal

1. The District Court Rightfully Rejected Crossroads's Suggestions to Ignore the Clear Statutory Text

Crossroads's motion immediately falters because, rather than make a strong showing of a likelihood of success in reversing the district court's well-reasoned decision below, it resorts to misconstruing the court's analysis to attack straw men, while ignoring the reasoning the district court actually gave.

Below, Crossroads argued that the regulation was valid because the agency and the court were free to ignore the plain text of the FECA, which requires those making independent expenditures (1) disclose "all contributions" over $200 annually in the same manner that political committees do, and (2) identify contributors who intended to fund "an independent expenditure." 52 U.S.C. § 30104(c)(1), (c)(2)(C). Crossroads argued that the FECA "does not require disclosure at all costs," Crossroads Mot. 11 (quoting *Van Hollen v. FEC*, 811 F.3d 486, 494–95 (D.C. Cir. 2012)), and that the FEC could thus ignore the disclosure Congress had commanded to supplant it with a narrower focus. The district court rightfully rejected that argument. Op. 77.

Now Crossroads remarkably tries to argue that it was the district court that relied on an over-expansive purposive analysis at the cost of the text. Crossroads Mot. 11. But even a cursory reading of the district court's opinion shows it found the statute was unambiguous based on the text itself, the structure of the FECA, the statutory history, and contemporary dictionary definitions. Op. at 53–60.[6] The district court further recognized that the Supreme Court had also previously

[6] Crossroads faults the district court for recognizing the FECA commands the same "broad disclosure" from those making independent expenditures as from political committees. Crossroads Mot. 11. But the court did so to reject defendants' suggestion that it ignore the unambiguous text of subsection (c)(1), which expressly incorporates by reference the reporting obligations of political committees under subsection (b)(3)(A). *See* Op. 76–77, 88.

interpreted the relevant statutory sections to provide "two donor requirements" that included the obligation to "identify all contributors who annually provide" $200 "to influence elections," and that "the Supreme Court's unequivocal description of this statutory section is probative of what the plain text says." Op. 60–62 (discussing *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 262 (1986)).

Crossroads also insists that "contribution" is vague because it is defined in the statute as funds "intended to influence elections" and by the Supreme Court as funds "earmarked for political purposes," and therefore the FEC could ignore subsection (c)(1). Crossroads Mot. 12. Even if there were some ambiguity as to what a contribution is (and there is not[7]), Congress still commanded the same disclosure of "all" contributors that it imposes on political committees, which alone invalidates the regulation. *See City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296 (2013). Further, it was the Supreme Court that defined funds "intended to influence elections" to include funds "earmarked for political purposes," *Buckley*, 424 U.S. at 78, which it did to render the statute *not* vague, *see id.*; *Mott v. FEC*,

[7] Both the FECA and FEC implementing regulations contain long explanations of what is and is not a contribution. *See* 52 U.S.C. § 30101(8)(a)(1)–(b)(xiv); 11 C.F.R. §§ 100.71–94. The mere fact there may be "close cases" on the facts does not mean the definition is vague. *United States v. Williams*, 553 U.S. 285, 305–06 (2008).

494 F. Supp. 131, 136 (D.D.C. 1980) (recognizing *Buckley* interpreted "contribution" to eliminate vagueness).[8]

2. The District Court Had Jurisdiction Below

Crossroads also tries to resuscitate a twice-rejected argument that CREW lacked standing to challenge the regulation. Crossroads Mot. 12–15. As the district court properly held, the FEC "applied" the regulation to CREW in dismissing CREW's administrative complaint, depriving CREW of access to information to which it is legally entitled. Op. 47–48 (citing *Weaver v. Fed. Motor Carrier Safety Admin.*, 744 F.3d 142, 145 (D.C. Cir. 2014)); *AT&T Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992)); *see also* Op. 17 (discussing prior denial of motion to dismiss on same grounds). As before, Crossroads bootstraps irrelevant issues—whether the FEC could lawfully dismiss CREW's complaint on remand as time-barred or because Crossroads relied on the regulation, and whether prosecutorial discretion blocked CREW's FECA claim—on to its attack on CREW's standing.

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[8] Crossroads also improperly introduces evidence not presented below. *See* Crossroads Mot. 6 & Add. D, E. Regardless, Crossroads's nonsensical underlining of the word "the" everywhere it can find it in the historical record does not somehow imply that Congress must have meant to use "the" and not "an" in 52 U.S.C. § 30104(c)(2)(C). *See id.* The district court properly rejected this absurd form of statutory interpretation. *See* Op. 83–86 & n.45. "Congress knew the difference between '[the]' and '[an]' and used the words advisedly." *Pillsbury v. United Eng'g Co.*, 342 U.S. 197, 199 (1952). Nor does the form Crossroads cites help it: it required contributors to report, even if the eventual independent expenditure differed in form and content. *See* Crossroads Mot., Add. E; *cf.* Op. 80.

Crossroads Mot. 13–15. Yet Crossroads continues to miss the point. It is because the regulation blocks CREW's access to information, whether directly or because groups like Crossroads can rely on it to block FEC enforcement, that CREW is injured by the regulation. CREW's past and future lack of access will be remedied when the regulation is struck.[9]

In short, Crossroads provides no grounds to think it has any possibility of success on the merits of its appeal, never mind a "strong showing" of likely success. *Nken*, 556 U.S. at 426; *Van Hollen*, 2012 WL 1758569, at *1 (Rogers, J.).

B. Crossroads Fails to Show Any Irreparable Injury

To justify the extraordinary remedy of a stay, a showing of irreparable harm is crucial, *see Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985), even if insufficient, *Nken*, 556 U.S. at 427 ("A stay . . . is not a matter of right, even if irreparable injury might otherwise result to the appellant."). The harm must be both "certain and great; it must be actual and not theoretical," and where the harm has not yet occurred, the burden is even higher: the movant must "pro[ve] . . . the harm is certain to occur in the near future" and the "harm will directly result" from

[9] The issues Crossroads raises go only to the possibility of relief on CREW's FECA claim, which is now moot, and have no bearing on CREW's APA claim against the regulation. Crossroads is also wrong that those issues barred CREW's FECA claim, as the court explained below. Op. 109–110 & n.57.

the decision below. *Wis. Gas*, 758 F.2d at 674. Crossroads proves no such harm here.

Indeed, in its entire argument supposedly devoted to the irreparable harm it will face, Crossroads never mentions anything that will actually happen *to it*. *See* Crossroads Mot. 15–22. Rather, it misleadingly conflates the second (irreparable harm) and fourth (public interest) factors, then exclusively focuses on what it asserts is the public's interest.

At best, Crossroads speculates that groups like it "will be forced to decide whether to refrain from speaking at all pending appeal or risk exposing their donors." Crossroads Mot. 21.[10] Yet this Court has already found that the risk of disclosure of donors for those engaging in campaign advocacy is not "an irreparabl[e] injur[y]" because disclosures do not "prevent [the movant] from speaking." *Van Hollen*, 2012 WL 1758569, at *1, *3 (Rogers, J.). Indeed, that case considered and rejected an identical request from an intervening defendant to

[10] Crossroads notably does not state that it intends to run any independent expenditures before the 2018 elections. Indeed, Crossroads has not run any such ads since 2014. *See* FEC, Independent Expenditures, Crossroads Grassroots Policy Strategies (last visited Sept. 3, 2018), https://bit.ly/2wN08dz (showing Crossroads's last independent expenditure was October 31, 2014). There is no reason, therefore, to think the independent expenditure reporting rules will apply to Crossroads. *Cf.* Crossroads Mot., Add. F, ¶ 10 (Aff. of Steven Law) (asserting Crossroads "would like to maintain the ability" to make anonymous independent expenditures, but not that it actually intends and has concrete plans to do so).

stay a district court order invalidating an FEC regulation, which the intervenors argued would require them to file disclosures. *Id.* at *2–3.

The Court should reject that request again here. The disclosure Crossroads fears "could" happen has been upheld against First Amendment challenge in numerous cases, even where it does chill speech. *See Citizens United v. FEC*, 558 U.S. 310, 370 (2010) (holding disclosure laws were warranted despite "chill [to] donations to an organization"); *McConnell v. FEC*, 540 U.S. 93, 690–92 (2003); *Buckley*, 424 U.S. at 68. Even the loss of contributors for fear of disclosure does not render the regulation unconstitutional. *Buckley*, 424 U.S. at 68 (recognizing "public disclosure of contributions . . . will deter some individuals who otherwise might contribute" but nonetheless "appear[s] to be the least restrictive means of curbing the evils of campaign ignorance and corruption"); *United States v. Fin. Comm. to Re-Elect the President*, 507 F.2d 1194, 1200 (D.C. Cir. 1974) (speculation of chill to donors insufficient to warrant relief). As Crossroads cannot "show that their First Amendment interests are . . . in fact being impaired" by the application of the statute, it cannot establish irreparable injury from such application. *See Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006).

Crossroads attempts to convert its noninjury into an irreparable injury by suggesting that it might stop making independent expenditures due to the court's

ruling, inferring that the statute would therefore cause it First Amendment injury. Crossroads Mot. 21. But "self-censorship resulting from a statute is not enough to render [a law] unconstitutional." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 60 (1989); *accord Am. Library Ass'n v. Reno*, 33 F.3d 78, 87 (D.C. Cir. 1994). Crossroads may believe it is "chill[ed]," Crossroads Mot. 1, but "subjective chill" is not a substitute for proof of "specific present objective harm or a threat of specific future harm," *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972).

In sum, Crossroads fails to prove any irreparable injury will certainly befall it because of the Court's decision. Rather, it merely recognizes that it will be required to report its contributors, consistent with its First Amendment rights. That, however, is not an injury that could warrant the requested stay.

C. A Stay Would Substantially Harm CREW

The regulation at issue here has deprived CREW of information to which it is legally entitled: the identities of those who contributed to those making independent expenditures. *See FEC v. Akins*, 524 U.S. 11, 24–25 (1998) (lack of access to information is an injury); *Shays v. FEC*, 528 F.3d 914, 923 (D.C. Cir. 2008) (same). CREW further needs access to such information to carry out its mission to "protect[] the rights of citizens to be informed about the activities of government officials, ensuring the integrity of government officials, protecting our political system against corruption, and reducing the influence of money in

politics." Op. 5. The continued existence of the regulation will continue to injure CREW. *Van Hollen*, 2012 WL 1758569, at *1 (Rogers, J.). Indeed, Crossroads brings this motion for the very purpose of denying CREW and others access to the information to which they are legal entitled. Crossroads Mot. 21.

Crossroads asserts, however, that because CREW has suffered this injury before, the court below lacked jurisdiction. Crossroads Mot. 22. Yet Crossroads cites nothing for that principle.[11] Rather, CREW is entitled to know the contributors behind every qualifying independent expenditure, and CREW's deprivation of such information for past communications does nothing to mitigate the injury to CREW from every new independent expenditure report that omits the information required by 52 U.S.C. § 30104(c)(1) and (c)(2)(C), including those that would be issued during any extended stay here.

Finally, Crossroads asserts the lack of a stay would harm the FEC—an argument it has no standing to make. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Moreover, the fact that the FEC has neither appealed the judgment nor sought a stay demonstrates that it does not share Crossroads's view. *See* FEC Resp. to Mot.

[11] Similarly, that CREW did not submit a comment in one public request for a rulemaking does not undercut CREW's injury. *See* Op. 14 n.8. Crossroads cites nothing that would render CREW's standing conditional on prior participation in such a proceeding. At any rate, CREW submitted comments to the FEC about the regulation's invalidity at other times, Op. 105 n.54, including by means of the administrative complaint below.

D. The Public Interest Strongly Favors Denying the Stay

Finally, the public interest here weighs heavily against a stay. The public interest is a "uniquely important consideration" in evaluating a request for the extraordinary remedy of a stay pending appeal. *Nat'l Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 616 (D.C. Cir. 1980). A long line of cases show the public's interest is in knowing "who is speaking about a candidate and who is funding that speech." *SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010).

"Campaign finance law has long recognized the value of disclosure as a means of enabling the electorate to make informed decisions about candidates, to evaluate political messaging, to deter actual, or the appearance of, corruption, and to aid in enforcement of the ban on foreign contributions, which may result in undue influence on American politicians." Op. 1–3 (citing *Citizens United*, 558 U.S. at 366–71; *Buckley*, 424 U.S. at 64–68; *SpeechNow.org*, 599 F.3d at 689; *Bluman v. FEC*, 800 F. Supp. 2d 281, 283, 288 n.3 (D.D.C. 2011) (Kavanaugh, J.)). The statutory provisions at issue here are squarely "part of Congress' efforts to achieve 'total disclosure' by reaching 'every kind of political activity' in order to ensure that voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible.'" *Buckley*, 424 U.S. at 76 (quoting S. Rep. No. 229, 92d Cong., 2d Sess. at 57 (1971)).

Standing against these overwhelming interests, Crossroads contends that the public also has an interest in anonymous and unaccountable speech, and that disclosure might reduce the amount of speech created. Crossroads Mot. 17. Congress, however, considered those interests and decided they weighed in favor disclosing of "all contributions" over $200. 52 U.S.C. § 30104(c)(1). Thus, the FECA itself reflects the public's overwhelming interest in disclosure. *Cuomo*, 772 F.2d at 978 (the views of "Congress, the elected representatives of the entire nation," are "another sense by which the public interest should be gauged").

The stay requested by Crossroads would severely undermine the public's interest in disclosure, depriving the public of knowledge about the sources of huge sums spent in our elections. *See* Outside Spending by Disclosure, Excluding Party Committees, OpenSecrets.org (last visited Sept. 10, 2018), https://bit.ly/1AzZeKb ($57 million spent on election without disclosure in the 2018 election cycle so far). When foreign powers are interfering in our elections, that deprivation is particularly worrisome. *See, e.g.*, Senate Select Committee on Intelligence, The Intelligence Community Assessment: Assessing Russian Activities and Intentions in Recent U.S. Elections (July 3, 2018), https://bit.ly/2u1i6GP (finding Russia engaged in covert attempts to influence recent U.S. elections through funding campaign communications). Indeed, the stay Crossroads requests would almost certainly deprive voters in the next federal election of information that Congress

determined was essential for them to have. A stay here would only serve to do immeasurable damage to the public, putting the very "free functioning of our national institutions" at risk. *Buckley*, 424 U.S. at 66. That is why this Court denied a stay pending appeal of another decision upholding the public's interest in campaign finance disclosure. *Van Hollen*, 2012 WL 1758569, at *3 (Rogers, J).

Unable to show that the public has an interest in knowing *less* about who is funding their candidates, Crossroads argues that courts should hesitate to change election procedures shortly before an election, lest it result in "voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006). That principle has no application here. First, Crossroads fails to show how a change that will result in *more* information being made available to voters could result in voter "confusion." *Cf. id.* at 5; *STOP Hillary PAC v. FEC*, 166 F. Supp. 3d 643, 647–49 (E.D. Va. 2015) (refusing to enjoin provision designed to "alleviate the constant public confusion surrounding Political Action Committees" by preventing non-authorized PACs from using candidate names in their titles). Second, the change in law effected by the district court's decision does not serve to upset expectations, leaving parties at a comparative disadvantage. Unlike the candidates in *Lair v. Bullock*, 697 F.3d 1200 (9th Cir. 2012), Crossroads has not been placed at a fundraising disadvantage, finding itself needing to unexpectedly play catchup in the final weeks before an election against an

opposing candidate who received a surprising windfall, *id.* at 1214. Rather, Crossroads is still free to spend as much as it previously had planned on independent expenditures. *Cf. Respect Maine PAC v. McKee*, 622 F.3d 13, 16 (1st Cir. 2010) (rejecting challenge that would deprive candidates of public matching funds within the "final weeks before an election"), *McComish v. Brewer*, No. cv-08-1550-PHX-ROS, 2008 WL 4629337, at *10 (D. Ariz. Oct. 17, 2008) (same).[12]

Moreover, the district court's judgment, rendered many months before the upcoming mid-term election, did not impact an "impending" election. *Purcell*, 549 U.S. at 5 (characterizing election within five weeks of decision as impending); *see also Lair*, 697 F.3d 1200 (refusing to issue order within three weeks of election); *McKee*, 622 F.3d at 16 (refusing to enjoin matching funds within four weeks of election); *Catholic Leadership Coal. of Tex. v. Reisman*, 2012 WL 12873174 (W.D. Tex. July 20, 2012) (refusing to invalidate entire political committee regulatory structure eleven days before election). Crossroads ignores the fact that the decision below came out months before an election, and focuses instead on when the court's 45-day stay expires. Crossroads Mot. 18. Yet, given that *Purcell*'s concern was with upset expectations, it is absurd to treat the end of the

[12] Crossroads cites *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011), for the proposition that burdens on independent expenditure groups support a stay. But the Court there justified the stay based not on any need to avoid impacting an impending election, but rather on the plaintiffs' likelihood of success on their First Amendment claim. *See id.* at 728.

district court's 45-day stay as the operative date. Voters and regulated parties had notice no later than August 3 (and likely well before then, *see, e.g.*, Op. 107) that the regulation was invalid and that independent expenditure reports must meet the requirements of 52 U.S.C. § 30104(c)(1) and (c)(2)(C).

Courts have been willing to make rulings impacting disclosure substantially similar to the district court's decision at times far closer to elections. For example, in *Van Hollen*, the district court invalidated an FEC regulation limiting disclosure within four days of three elections; *see Van Hollen v. FEC*, 851 F. Supp. 2d 69 (D.D.C. Mar. 30, 2012); FEC, 2012 Presidential Primary Dates and Candidate Filing Deadlines for Ballot Access (June 18, 2012), https://bit.ly/2PDkZXF ("FEC 2012 Election Dates") (showing elections on April 3, 2012), and within twenty-five days of five more elections, *see id.* (showing elections on April 24, 2012). And this Court refused to stay that decision, issuing its own decision on May 14, 2012, within days of six more primary elections. *Van Hollen*, 2012 WL 1758569; FEC 2012 Election Dates (showing elections on May 29 and June 5, 2012). Finally, this Court reversed the district court and altered reporting requirements on September 18, 2012, *Ctr. for Individual Freedom v. FEC*, 694 F.3d 108 (D.C. Cir. 2012), within the sixty-day window for electioneering communications for the 2012 general election, *see* FEC 2012 Election Dates. This Court had no concern

with issuing these decisions impacting campaign disclosure, notwithstanding their proximity to elections.

Simply put, the relief Crossroads seeks—the indefinite violation of voters' statutory right to information critical to the operation of our democracy, a right they now expect to finally be realized—would do immense damage to the public interest. That alone is sufficient for the Court to deny Crossroads's motion. *See Nat'l Ass'n of Farmworkers Orgs.*, 628 F.2d at 616 (court may "withhold relief in furtherance of the public interest").

* * *

In sum, Crossroads has failed to carry its heavy burden here to meet the "stringent requirements" for a stay pending appeal. *Van Hollen*, 2012 WL 1758569, at *1.

E. Vacatur was the Appropriate Remedy, and This Motion is Not the Proper Vehicle to Seek Reconsideration of that Remedy

Not only did the district court below exhaustively review the case on the merits, it also carefully and thoroughly determined the appropriate remedy. Op. 93–99. Crossroads here improperly seeks to alter that remedy by obtaining a remand by default through an indeterminate stay of the decision. *Cf.* Fed. R. Civ. P. 60. Yet the court below properly analyzed the appropriate factors under *Allied-Signal, Inc.*, 988 F.2d at 150–51, finding they "militat[e] strongly in favor of vacatur," Op. 94. Crossroads provides no reason to second guess that decision.

See Stand Up for California! v. U.S. Dep't of Interior, 879 F.3d 1177, 1190 (D.C. Cir. 2018) (reviewing district court's equitable remedy for "abuse of discretion").

Contrary to Crossroads's suggestion, the FEC does not enjoy a special right among agencies to keep invalid regulations on the books. Crossroads Mot. 20. This Court has recognized the "common remedy when [courts] find a rule is invalid is to vacate," even for the FEC. *Humane Soc'y of U.S. v. Zinke*, 865 F.3d 585, 614 (D.C. Cir. 2017); *see also Emily's List v. FEC*, 581 F.3d 1, 25 (D.C. Cir. 2009); *Shays v. FEC*, 414 F.3d 76, 95, 100–02 (D.C. Cir. 2005). Indeed, given the regulation is inconsistent with the statute, remand would be illogical: the only action the FEC can lawfully take on remand is to vacate the offending regulation. *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009) ("[A] fundamental flaw . . . requires vacatur of the rule."); *N.J. v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008) (regulation conflicting with statute's "plain text" of "requires vacation"); *Fox Television Stations, Inc. v. FCC*, 293 F.3d 537, 541 (D.C. Cir. 2002).

Further, the district court properly found the risk of "disruptive consequences" favored vacatur, Op. 95, notwithstanding Crossroads's fears of "chaos," Crossroads Mot. 16. The district court reviewed defendants' arguments, noted the lack of any evidence of the purported disruption and the strong evidence none would result, Op. 95–96, and compared that to the disruption to elections

from the continued denial of essential information for voters by allowing the regulation to stand, Op. 97. Further, the district court recognized that remand here would be an empty reward as the FEC has proven that it will "drag[] its feet" in correcting the error. Op. 98 & n.52. The district court did not abuse its discretion in awarding vacatur as a remedy.[13]

Dated: Sept. 10, 2018.

Respectfully submitted,

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Attorneys for Citizens for Responsibility and Ethics in Washington and Nicholas Mezlak

[13] Crossroads's motion also fails to comply with Fed. R. App. P. 8(a)(2)(A) because the district court has not "failed to afford the relief requested." In fact, the briefing on it has not even completed.

CERTIFICATE OF COMPLIANCE

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Dated: September 10, 2018

/s/ Stuart C. McPhail
Counsel for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on September 10th, 2018, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

/s/ Stuart McPhail
Stuart C. McPhail

NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 18-5261

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

CROSSROADS GRASSROOTS POLICY STRATEGIES,

Intervenor Defendant-Appellant,

v.

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON & NICHOLAS MEZLAK,

Plaintiffs-Appellees,

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia
Case No. 1:16-cv-00259-BAH

CITIZENS FOR RESPONSIBILTY AND ETHICS IN WASHINGTON'S
CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rules 8(a)(4) and 26.1, Plaintiff-Appellee Citizens for Responsibility and Ethics in Washington ("CREW") provides the following corporate disclosure statement. CREW is a nonprofit 501(c)(3) tax-exempt

corporation. CREW's mission is to work for honest, open, and truthful government by bringing legal actions, conducting research, and educating the public. CREW has no parent company and no publicly held company has a 10% or more ownership interest in CREW.

Dated: Sept. 10, 2018.

Respectfully submitted,

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PLAINTIFF-APPELLEES' CERTIFICATE OF COUNSEL AS TO PARTIES, AMICI, AND RELATED CASES

Pursuant to Local Rule 8(a)(4) and 27(a)(4), Plaintiffs-Appellants provide the following certificate as to parties, amici curiae, and related cases. The Appellant is Crossroads Grassroots Policies Strategies, the intervening defendant

below. Appellees are Citizens for Responsibility and Ethics in Washington and Nicholas Mezlak, the plaintiffs below, and the Federal Election Commission, the defendant below. No amici appeared in the district court and no amici have appeared yet in this Court.

This matter has not previously been before this Court or any other court. Plaintiffs-Appellees are unaware of any related case pending in this Court or any other court.

Dated: Sept. 10, 2018.

Respectfully submitted,

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/s/ Stuart McPhail
Stuart C. McPhail