No. 18A274

IN THE

Supreme Court of the United States

CROSSROADS GRASSROOTS POLICY STRATEGIES,

Applicant,

v.

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON & NICHOLAS MEZLAK,

and

FEDERAL ELECTION COMMISSION,

Respondents.

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

RESPONSE IN OPPOSITION TO EMEREGENCY APPLICATION TO CHIEF JUSTICE ROBERTS, CIRCUIT JUSTICE FOR THE DISTRICT OF COLUMBIA, FOR A STAY PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, respondent Citizens for Responsibility and Ethics in Washington states that it does have not a parent corporation and that no publicly-held companies hold 10% or more of its stock.

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INTRODUCTION

Having had every one of its arguments rejected below, including its requests to indefinitely stay the order vacating a regulation, Applicant Crossroads Grassroots Policy Strategies ("Crossroads") now seeks relief appropriate in only "extraordinary cases." *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980). Crossroads asks this Court to grant a stay pending its appeal to the D.C. Circuit and, presumably, review by this Court, of the considered judgment below of Chief Judge Beryl A. Howell; a request that both the D.C. Circuit and Judge Howell have now wholly rejected. At the heart of Crossroads's request is its desire to avoid compliance with its unambiguous disclosure obligations under the Federal Election Campaign Act ("FECA"), a request that, if granted, would 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] Crossroads's application appears calculated to deny voters in the next federal election knowledge about "[t]he sources of a candidate's financial support" before they cast their ballots. *Buckley v. Valeo*, 424 U.S. 1, 67 (1976).

Crossroads fails, however, to meet its "heavy burden" of justifying the "extraordinary" relief it seeks here: a stay by this Court while the matter is pending on review in the circuit court below. *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975); *see also Pasadena City Bd. of Ed. v. Spangler*, 423 U.S. 1335, 1336 (1975) ("Ordinarily a stay application to a Circuit Justice on a matter currently before a Court of Appeals

[1] Crossroads Appl. Add. B; *CREW v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018).

is rarely granted."). Indeed, Crossroads's burden is particularly high here, where (a) the district court expressly considered its request to delay relief and crafted its own limited stay based on a careful balance of the facts, and then rejected Crossroads's request to extend that stay, and (b) the D.C. Circuit likewise rejected Crossroads's stay request because Crossroads "fails every prong of the showing required," *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (lower court's finding that a "stay is unwarranted is entitled to considerable deference").

Crossroads does not overcome that deference and cannot meet its heavy burden. It first fails to show "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari" or "a fair prospect that a majority of the court will vote to reverse the judgment below." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). As the district court below held in its thorough and well-reasoned opinion, the Federal Election Commission ("FEC") regulation that was struck and that Crossroads seeks to preserve is plainly inconsistent with the disclosure required by the FECA. Op. 53–92. The regulation limits 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* 11 C.F.R. § 109.10(e)(1)(vi); Op. 7, 8. The FECA, however, far more broadly commands disclosure of the sources of "all contributions" over $200, 52 U.S.C. § 30104(c)(1), as well the identification of those who contribute for the purpose of furthering "an" independent expenditure, *id.*

§ 30104(c)(2)(C); *accord FEC v. Mass. Citizens for Life*, 479 U.S. 238, 262 (1986) ("*MCFL*").

Recognizing the statute and regulation impose inconsistent requirements, Crossroads requests this emergency relief for the very purpose of using the narrow regulation to avoid the disclosure mandated by the FECA. Crossroads then resorts to attacking straw men and blatant misquotations in an attempt to mislead this Court about its likelihood of success. Despite these tactics, Crossroads cannot make out a "fair prospect" that the Court will ignore the FECA's clear text to save the invalid regulation.

Crossroads further fails to show any cognizable and "irreparable harm" from a lack of a stay, *Hollingsworth*, 558 U.S. at 190, because Crossroads's self-censorship to avoid constitutional disclosure obligations is not a cognizable injury, particularly where that censorship is wholly unrelated to the decision below. Crossroads also fails to show that the "balance [of] equities" between "the relative harms to [it]" and respondents Citizens for Responsibility and Ethics in Washington and Nicholas Mezlak (together "CREW"), "as well as the interests of the public at large," favors a stay. *Rostker*, 448 U.S. at 1308. Accordingly, CREW respectfully requests this Court deny Crossroads's application.

STATEMENT OF THE CASE

A. The FECA's Unambiguous Reporting Requirements

The FECA imposes two separate but complementary disclosure obligations on groups that are not political committees who make more than $250 in "independent

expenditures," 52 U.S.C. § 30104(c), defined as communications that expressly advocate for the election or defeat of a federal candidate, 52 U.S.C. § 30101(17).

First, the FECA requires:

> Every person (other than a political committee) 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.**

52 U.S.C. § 30104(c)(1). Subsection (b) governs the contents of disclosure reports political committees must file, and subsection (b)(3)(A) covers the scope of contributors that must be disclosed.[2] By the explicit cross-reference to subsection (b)(3)(A), subsection (c)(1) subjects non-political committees making independent expenditures to the same obligation to disclose contributors that it imposes on political committees. Specifically, they must both disclose "the identification of each . . . person (other than a political committee) who makes a contribution . . . whose contributions have an aggregate amount or value in excess of $200 within the calendar year . . . , together with the date and amount of any such contribution." 52 U.S.C. § 30104(b)(3)(A).[3]

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[2] The FECA defines a political committee as a group that "receives contributions" or "makes expenditures" over $1,000 in a calendar year, 52 U.S.C. § 30101(4), and this Court has further limited their application to groups with the "major purpose" of influencing elections, *Buckley*, 424 U.S. at 79.

[3] Apart from the scope of contributor disclosure, the FECA imposes more rigorous burdens on political committees than on others making independent expenditures, including disclosure of all disbursements, 52 U.S.C. § 30104(b)(4); continuous reporting, *id.* § 30104(a)(4); and certain recordkeeping and organizational burdens, *id.* § 30102. Further, all funds donated to a political committee are contributions

Second, the FECA also requires groups that are not political committees to identify certain of those contributors:

> Statements required to be filed by this subsection shall be filed in accordance with subsection (a)(2), and 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.**

52 U.S.C. § 30104(c)(2)(C) (emphasis added).

As this Court itself held, these provisions require non-political committees making $250 worth of independent expenditures "to identify all contributors who annually provide in the aggregate $200 in funds intended to influence elections . . . [and] to identify all persons making contributions over $200 who request that the money be used for independent expenditures." *MCFL*, 479 U.S. at 262.[4] As with all disclosure provisions of the FECA, these complementary reporting obligations serve a number of compelling interests, including "providing the electorate with information about the sources of election-related spending" and "deter[ing] actual corruption and avoid[ing] the appearance of corruption." *McCutcheon v. FEC*, 572 U.S. 185, 223 (2014) (Roberts, C.J.) (internal quotation marks and citations omitted).

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because political committees are "by definition, campaign related," *Buckley*, 424 U.S. at 79, while only donations to those making independent expenditures "intended to influence elections" are contributions, Op. 55.

[4] While § 30104 was not at the center of the dispute in *MCFL*, the Court's understanding about the scope of the obligations it imposed was necessary to its conclusion that the government had available "less restrictive" means than the ban at issue and that still satisfied its interests. *Id.*

The complimentary reporting obligations mirror the FECA's prior dual reporting obligations for independent expenditures. First, the prior statutory language required those making independent expenditures to "file with the Commission . . . a statement containing . . . the information required of a candidate or political committee receiving . . . a contribution [in excess of $100]." 2 U.S.C. § 434(e)(1) (1976). The 1979 FECA Amendments made this incorporation of political committee reporting obligations even more explicit by identifying exactly what information the reporting entity should identify. Second, unlike the current statute, the FECA then imposed an obligation on contributors to self-report, requiring that any person "who makes contributions . . . , other than by contribution to a political committee or candidate, in an aggregate amount in excess of $100 during a calendar year shall file . . . a statement containing the information required of a person who makes a contribution in excess of $100 to a candidate or political committee." *Id.* In so doing, the prior statute imposed a duty on those making contributions to report "contributions to independent expenditures" without exception. *See* Crossroads Add. D at 3. In the 1979 FECA Amendments, Congress shifted the latter reporting obligation onto the person making the independent expenditure to "[s]implif[y] reporting without affecting meaningful disclosure." *Hearing Before the S. Comm. on Rules & Admin. to Amend the Federal Election Campaign Act of 1971, as Amended, & for Other Purposes*, 96th Cong. 139 (July 13, 1979), https://bit.ly/2BopE8F.[5]

[5] The district court's decision provides a lengthy discussion of the history of the

B. The Regulation's Conflicting Requirement

Notwithstanding the FECA's unambiguous statutory commands, the FEC regulation implementing these provisions fails to capture the dual reporting requirements Congress imposed. The regulation in question, 11 C.F.R. § 109.10(e)(1)(vi) completely ignores the reporting requirement of subsection (c)(1) and inexplicably and "sharply narrows" the reporting requirement under subsection (c)(2)(C), mandating that non-political committees making independent expenditures merely "identi[fy] 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." *Id.* (emphasis added); D.C. Cir. Stay Op. 1. The FEC has 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"—*i.e.*, an "express link between the receipt and independent expenditure" was deemed required. Op. 13, 80. Accordingly, the FEC has found the regulation did not require disclosure 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. As a result, the regulation produces almost no reporting about the "sources of election-related spending." *McCutcheon*, 572 U.S. at 223; *see, e.g.*, Op. 8 (showing Crossroads aired over $17 million in independent expenditures but reported "0" in contributions).

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relevant portions of the FECA. *See* Op. 25–35

The FEC never issued an explanation for its abandonment of subsection (c)(1)'s reporting requirement or its narrowing of subsection (c)(2)(C) . Rather, its entire public explanation for the regulation comprised a single sentence: "This section has been amended to incorporate the changes set forth in [52] U.S.C. [§] [30104](c)(1) and (2) regarding reporting requirements for persons, other than a political committee, who make independent expenditures." Op. 39 (quoting 45 Fed. Reg. 15080, 15087 (Mar. 7, 1980)). The rulemaking record also shows no reason for the regulation's divergence from the FECA or, in fact, that the agency was even aware of this divergence. Rather, it shows that the FEC first proposed a regulation reflecting the language of subsection (c)(2)(C), but inexplicably changed that language to the final form without prompting or discussion. See Op. 38–39.

Nonetheless, prior to this Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), the regulation's divergence from the statute had little effect because there were very few non-political committee independent expenditures. OpenSecrets.org, Total Outside Spending by Election Cycle, Excluding Party Committees, https://bit.ly/2OuygS0. With the explosion in independent expenditures after *Citizens United*, however, new attention was paid to 11 C.F.R. § 109.10(e)(1)(vi), leading then-Congressman Van Hollen to petition for a rulemaking change in 2011 to bring the regulation into compliance with the statute. *See* Op. 13–14. Even though the FEC staff acknowledged that the regulation conflicted with the statute, no action was taken. *Id.*

C. The Administrative Proceeding and Litigation Below

The present action arises from the application of the invalid regulation to CREW in an administrative proceeding where CREW alleged that Crossroads violated 52 U.S.C. § 30104(c)(1), (c)(2)(C), and 11 C.F.R. § 109.10(e)(1)(vi). Op. 47–48; *see also* Crossroads Add. I ¶¶ 14–16, 41, 47 (CREW's administrative complaint). CREW's complaint asserted that Crossroads received a multi-million dollar contribution for the known purpose of "aid[ing] the election of" a federal candidate, accepted millions more in "matching" contributions for the same purpose, and collected more contributions from individuals who were first shown "example" independent expenditures that their contributions could go toward funding. Op. 5–8, 88.[6]

The FEC staff also reviewed all of CREW's allegations and recognized that the regulation was in conflict with the statute. *See* Op. 12–15. Specifically, the FEC Office of General Counsel ("OGC") recognized that the regulation was "silent concerning [the] additional reporting requirement" of subsection (c)(1), and was in conflict with subsection (c)(2)(C)'s "arguably more expansive approach." *Id.* Nevertheless, finding itself bound by the FEC's interpretation of the statute as expressed in the regulation, the OGC recommending dismissing CREW's complaint

[6] Crossroads responded to CREW's allegations, including—contrary to its assertion to the Court here, *see* Crossroads Appl. 11—CREW's allegation that Crossroads violated subsection (c)(1). *See* Crossroads Appl. Add. I ¶ 16 n.1 (alleging regulation fails to give "full effect to these provisions," including subsection (c)(1)); Crossroads, Response to MUR 6696, at 11 (Jan. 17, 2013) https://bit.ly/2xfpUHq (arguing "CREW's Suggestion That the Regulation Does Not 'Give Full Effect' to the Act Is Irrelevant").

because it found the facts failed to establish an "express link" between the contribution and a final specific independent expenditure. Op. 13.[7] By a divided three-to-three vote, the Commission deadlocked on the OGC's recommendation, leading to dismissal of CREW's complaint. Op. 15.

CREW sought review of that dismissal under 52 U.S.C. § 30109(a)(8)(A) and challenged the regulation's validity under the Administrative Procedure Act. Op. 16. The district court, after considering the reporting obligations imposed by 52 U.S.C. § 30104(c)(1) and (c)(2)(C), 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. In doing so, it relied on the plain text of the statute, which was supported by the statutory structure, statutory history, and the fact that the Supreme Court had also construed 52 U.S.C. § 30104(c)(1) and (c)(2)(C) to impose two separate reporting obligations: one to disclose "all contributors" over $200 annually and another to identify all contributions "used for independent expenditures." Op. 53–65. The remainder of the district court's opinion was largely devoted to rejecting the FEC's and Crossroads's numerous "unsupported" arguments, including various challenges to the court's jurisdiction, and considering CREW's FECA claim. *See* Op. 43–51, 65–92, 99–112.

The district court also gave considered thought to the appropriate remedy for CREW's challenge to the regulation, weighing defendants' arguments in favor of an

[7] The OGC also stated that the existence of the regulation, which it assumed was valid, could mean that Crossroads could raise "equitable concerns" about a failure to report under subsection (c)(1). Op. 15.

indefinite stay by way of remand to the agency. Op. 93–99. 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 found vacatur was the proper remedy. 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 addressed the "significant concern" about the proven "inaction by the FEC to address flaws" in the regulation. Op. 96, 99; *see also* Op. 13–15 (noting the FEC has known since at least 2011 that the regulation is inconsistent with the statute but has refused to take action). Further, the district court rejected Crossroads's suggestions that vacatur would be "chaotic"—in contradiction to Crossroad's false representation here, *see* Crossroads Appl. 2—finding that "the fact that not-political committees have been permitted to under-disclose by virtue of the flawed challenged regulation and may now have to increase their contributor disclosures to meet statutory requirements is not a consequence that, in the Court's view, is so disruptive or chaotic that vacatur should be avoided." Op. 96.

Nonetheless, responding to the FEC's arguments "that the timing of filing the requisite disclosure statements to fulfill statutory disclosure obligations may be complex" because it is not clear whether an organization like Crossroads that makes large numbers of independent expenditures would have to resubmit every one of their contributors with each report or whether it could simply update a previous report with new contributors, the Court found that "that regulatory guidance from the FEC on this timing issue would be helpful." Op. 88. Accordingly, it stayed its

judgment for 45 days. Op. 99. The district court, however, expressly asserted it did not stay its decision to give the FEC time to craft a new regulation to "ignore, narrow or misconstrue a statute in order to save reporting entities from a statutory disclosure regime viewed by the FEC as 'cumbersome and confusing,' or 'duplicative.'" Op. 88–89 (quoting FEC's Opp'n at 37).

D. Post-Judgement Proceedings

As a result of the district court's judgment on CREW's FECA claim, the administrative proceeding was remanded back to the FEC for further action within thirty days. Op. 112. On remand, the FEC once again dismissed, this time finding reason to believe Crossroads violated the law, but concluding that dismissal was warranted because Crossroads could have reasonably relied on the regulation. First General Counsel's Report 15, MUR 6696R (Crossroads) (Aug. 24, 2018), https://bit.ly/2OoygTC.

On August 24, three weeks after the district court's decision and almost halfway through the 45 day stay of the vacatur, Crossroads first moved for a stay of judgment, demanding the district court reconsider the limited stay it provided and grant Crossroads relief within six calendar days. When the district court did not comply with Crossroads's demand, Crossroads filed an emergency request to stay in the D.C. Circuit. On September 15, 2018, both the district court and the Court of Appeals rejected Crossroads's requests for a stay. Order, *CREW v. FEC*, No. 18-5261 (D.C. Cir. Sept. 15, 2018) (hereinafter, "D.C. Cir. Stay Op.") (attached as Add. A); *see also* Minute Order, *CREW v. FEC*, No. 16-cv-259-BAH (D.D.C. Sept. 15, 2018) (denying Crossroads's motion for a stay).

ARGUMENT

"Stays pending appeal to this Court are granted only in extraordinary circumstances." *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers). "Relief from a single Justice is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below–both on the merits and on the proper interim disposition of the case–are correct." *Rostker*, 448 U.S. at 1308.

> In a case like the present one, this can be accomplished only if a four-part showing is made. First, it must be established that there is a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. Second, the applicant must persuade [the Justice] that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. . . . Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay. And fourth, in a close case it may be appropriate to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.

Id. (internal quotation marks and citations omitted).

A. Crossroads Fails to Overcome the Deference Owed to the Lower Courts' Denial of Its Stay

As an initial matter, Crossroads application should be rejected because it cannot overcome the deference owed to the lower courts' decisions to reject its request for a stay. The district court considered the same arguments Crossroads raises here for a stay and found them insufficient to delay vacatur of the regulation for any longer than 45 days after its decision. Op. 93–99. The D.C. Circuit found that "Crossroads'[s] motion for a stay fails every prong of the showing required to obtain the extraordinary relief of a say pending appeal. D.C. Cir. Stay Op. 3; *see*

also Minute Order, *CREW*, No. 16-cv-259-BAH (denying Crossroads's motion for a stay).

"Justices have . . . weighed heavily the fact that the lower court refused to stay its order pending appeal, indicating that it was not sufficiently persuaded of the existence of potentially irreparable harm as a result of enforcement of its judgment in the interim." *Whalen*, 423 U.S. at 1317. For example, Justice Jackson noted that it was his "almost invariable practice to refuse stays which the Court of Appeals or its judges have denied" because "they are closer to the facts, have heard the merits fully argued, and because [he] ha[d] confidence that they would grant stays in worthy cases." *Breswick & Co. v. U.S.*, 75 S. Ct. 912, 915 n* (1955) (Harlan, J.) (quoting *United States ex rel. Knauff v. McGrath*, 96 Cong. Rec. A3751 (1949)); *see also id.* at 915 ("A single Justice may also be expected to give due regard to a lower court's denial of a stay."). Here, the lower court judges have unanimously agreed Crossroads does not deserve the stay it requests.

The D.C. Circuit issued an order the day after Crossroads filed its application here rejecting *in toto* Crossroads's emergency motion for a stay of the district court opinion below. First, the D.C. Circuit found that Crossroads "is unable to demonstrate *any* 'likelihood' of success, and certainly not a 'substantial' one." D.C. Cir. Stay Op. 4 (emphasis added). The D.C. Circuit found that Crossroads ignored the plain text of the FECA by "rel[ying] on (debatable) legislative history and post-enactment congressional inaction." *Id.* But it recognized that here, "text alone is enough to resolve th[e] case." *Id.* (quoting *Pereira v. Sessions*, 138 S. Ct. 2105, 2114

(2018)); *see also id.* (recognizing "congressional acquiescence cannot change the plain meaning of enacted text"). The D.C. Circuit similarly found the age of the regulation could not save it, noting that, "unlike fine wines, regulations that so materially rewrite and recast plain statutory text do not improve with age." *Id.*

The D.C. Circuit also found CREW had standing below and its challenge was timely, and found Crossroads's mootness argument "is wrong chronologically since it post-dates the decision under review and, in any event, the dismissal on remand actually indicates that the regulation is *continuing* to deprive [CREW] of the information it seeks and certainly is capable of repetition." *Id.* at 5. The D.C. Circuit further found Crossroads's asserted injuries were neither "certain and great," nor "actual and not theoretical." *Id.* Finally, the D.C. Circuit found CREW's and the public's interest outweighed Crossroads's, stating "where the complained-of disclosure covers only those who donate *for the intended purpose of influencing an election*, the interest in anonymity does not, for purposes of an exceptional stay, outweigh [CREW's] and the public's countervailing interests in receiving importing voting information and in transparency." *Id.* at 6.

Further, district court Chief Judge Howell, who considered over four hundred pages of briefing on the merits by the parties,[8] as well as over eight-hundred pages of record, and rendered two thorough and well-reasoned decisions totaling 135 pages on CREW's standing and the merits below, both rejected

[8] The district court also had the benefit of the arguments of the FEC, which appeared in the district court and has not participated in briefing here.

Crossroads's request to remand-but-not-vacate, *see* Op; *CREW v. FEC*, 243 F. Supp. 3d 91 (D.D.C. 2017), and Crossroads's request to stay, *see* Minute Order, *CREW*, No. 16-cv-259-BAH. Crossroads provides no reason for this Court to disturb the considered judgment of the courts below.[9]

B. Crossroads Fails to Show a Reasonable Probability of Certiorari or a Fair Prospect of Success Before This Court

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

Turning to the factors themselves, Crossroads's application 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.

The district court rendered its considered judgment that the FECA provides two unambiguous and complementary reporting obligations for non-political committees making independent expenditures: (1) to disclose "all contributions" over $200 annually in the same manner that political committees do, and (2) to identify contributors who intended to fund "an independent expenditure." Op. 53–60, 65; *see also MCFL*, 479 U.S. at 262. Its primary reasoning was straightforward: the text explicitly calls for such disclosure. *See also* D.C. Cir. Stay Op. at 4 (holding "text alone" resolves this case).

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[9] Crossroads also waited three weeks from that decision before asking to extend the stay. Crossroads's "failure to act with greater dispatch tends to blunt [its] claim of urgency and counsels against the grant of a stay." *Ruckelshaus*, 463 U.S. at 1318.

The district court found that the plain reading of subsection (c)(1) was supported by the fact that the FECA expressly incorporates by reference the contributor reporting obligations imposed on political committees, making "clear that these disclosure obligations for contributors are closely aligned." Op. 54. This incorporation, the district court noted, was reflected in prior versions of the FECA, and that Congress's only changes to this requirement over the years were to make it more explicit. Op. 55 n.35.

The district court also recognized that, with respect to subsection (c)(2)(C), Congress expressly provided the particular scope of the subset of contributors that must be further identified: those intending to support "an independent expenditure." Op. 56–58. The district court held that the word "an" must be given its "plain and ordinary meaning," which, as shown by contemporary dictionaries and context, is "one, some, any." *Id.* That meaning, the district court concluded, is more expansive than "a particular, specified independent expenditure," and extends to a contribution "without regard to the actual reported form of the express advocacy funded by the expenditure." Op. 59.

The district court further recognized that the Supreme Court itself ascribed the exact same reading to these provisions more than thirty years ago. Op. 55–56 (discussing *MCFL*, 479 U.S. at 262); *id.* at 60–61 (same). Accordingly, the district court found the regulation—which did not require either type of disclosure, but

rather limited contributor reporting to such an extent that contributors were rarely if ever reported—conflicted with the statute. Op. 92.[10]

The district court also devoted significant consideration to the FEC's and Crossroads's numerous arguments suggesting that both the agency and the court could ignore the plain text, finding their arguments "[u]nsupported." *See* Op. 65–91; *see also* D.C. Cir. Stay Op. 4 (noting "district court's opinion spent just twelve pages analyzing the plain text of two interrelated statutory provisions . . ." and "[t]he balance of the opinion is devoted to background sections, dismantling Crossroads'[s] and the [FEC's] varied efforts to manufacture ambiguity, and disposing of other issues in the case"). Among those rejected arguments was Crossroads's claim that the FEC (and the court) could ignore the text of the statute because the FECA "does not require disclosure at all costs," Op. 77 (discussing Crossroads's argument based on *Van Hollen v. FEC*, 811 F.3d 486, 494–95 (D.C. Cir. 2016)), thus permitting the FEC to narrow the disclosure Congress mandated, *see* Crossroads Appl. 29 (arguing for Crossroads's preferred policy of limited-to-no disclosure).

Nonetheless, Crossroads now mischaracterizes the district court's decision below and remarkably accuses it of engaging in an over-expansive purposive analysis at the cost of the text. Crossroads Appl. 16. But even a cursory reading of

[10] The district court also found the regulation was "arbitrary and capricious" because the single-sentence explanation provided "wholly fails to explain how subsection (c)(1) is implemented or provide justification for narrowing the disclosure of subsection (c)(2)(C)." Op. 92 n.48.

the district court's opinion shows that Crossroads's characterization is wrong. Indeed, the portions Crossroads quotes stem not from any purposive-driven approach, but rather from the district court's rejection of the defendants' suggestion that the FEC and the court should ignore 52 U.S.C. § 30104(c)(1) solely to advance their unsupported assumption that the statute simply could not have meant to impose parallel reporting obligations. *Compare* Crossroad Appl. 16 *with* Op. 77 (responding to defendants' argument that "Congress did not intend for not-political committees to be regulated in the same way as political committees"); *id.* at 87–88 (responding to defendants' argument that "the event-driven independent expenditure reports filed by [not-political committees] are intended to provide information only about the reported expenditure, not a wider range of activity").

Crossroads also insists the district court "discounted the legislative history." Crossroads Appl. 17. Not so. The district court opinion includes a lengthy discussion of the legislative history, *see* Op. 25–35, and it found that history confirmed the "unambiguous" nature of the statutory sections, Op. 53. Crossroads contests this by oddly relying on the fact that the historical record uses a definite article at times to refer to various items. *See* Crossroads Appl. 8–9 (underlining the word "the" in several texts). Crossroads points to nothing, however, to dispute the fact that the prior versions of the FECA also imposed a duty on those making independent expenditures to disclose the same information about contributors that political committees disclosed, and on contributors to report if they gave to fund any independent expenditure. *See* 2 U.S.C § 434(e)(1) (1976). Nor does the use of "the"

anywhere else in the record alter the fact that, with respect to subsection (c)(1), and (c)(2)(C), Congress expressly rejected such an express link between the independent expenditure triggering the report and the contribution. "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). At any rate, where, as here, the statutory text is unambiguous, there is no need to consider legislative history or other extra-textual evidence. *See NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 942 (2017) (Roberts, C.J.) ("The [statutory] text is clear, so we need not consider this extra-textual evidence."); *accord* D.C. Cir. Stay Op. 4.

Crossroads also insists that the term "contribution" is vague because it is defined in the statute as funds "for the purpose of influencing any election" and by the Supreme Court as funds "earmarked for political purposes," and therefore the FEC could ignore subsection (c)(1). Crossroads Appl. 17. Even if there were some ambiguity as to what a contribution is (and there is not[11]), 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 this Court that defined "contribution" 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*, 494 F.

[11] 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)(i)–(B)(xiv); 11 C.F.R. §§ 100.51–94. 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).

Supp. 131, 136 (D.D.C. 1980) (recognizing *Buckley* interpreted "contribution" to eliminate vagueness); *see also* Op. 55 (adopting definition of "contribution" provided in Buckley).[12]

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 Appl. 17–21. 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, 737 (D.C. Cir. 1992), *cert. denied*, 509 U.S. 913 (1993), *CREW*, 243 F. Supp. 3d at 101 (finding statute of limitations did not bar CREW's claim); *see also FEC v. Akins*, 524 U.S. 11, 24–25 (1998) (plaintiff deprived of information to which it is legally entitled may challenge denial). The D.C. Circuit has now agreed with the district court's opinion. D.C. Cir. Stay Op. 4–5. As before, Crossroads

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[12] Crossroads's concerns about the clarity of the FECA's definition of "contribution" also are irrelevant to the question on which it would need to succeed here: whether 11 C.F.R. § 109.10(e)(1)(vi) comports with the disclosure required by the FECA, which requires "all contributions," however they are defined, to be disclosed, rather than only those that were earmarked for a specific ad in its final form. The regulation at issue did not purport to define what is and is not a contribution, *compare* 11 C.F.R. § 109.10(e)(1)(vi) *with* 11 C.F.R. §§ 100.71–94, and the FEC did not explain its promulgation of the regulation based on any desire to address any vagueness concerns in the definition of "contribution." Nothing in Crossroads's argument event attempts to show the regulation is consistent with the statute rather than merely reflect Crossroads's own objections to the statutory reporting obligations.

bootstraps irrelevant issues—whether the FEC could lawfully dismiss CREW's complaint on remand, and whether prosecutorial discretion blocked CREW's FECA claim—on to its attack on CREW's standing. Crossroads Appl. 20. 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 to that information will be remedied when the regulation is struck.[13]

Nor is Crossroads correct in claiming that the mooting of its appeal of CREW's FECA claim has any bearing on the district court's jurisdiction to vacate the regulation. Crossroads Appl. 18–19 (citing *Cierco v. Mnuchin*, 857 F.3d 407, 417 (D.C. Cir. 2017)). First, Crossroads's argument is "wrong chronologically." D.C. Cir. Stay Op. 5. The mooting of Crossroads's appeal *after* judgment can hardly retroactively deprive the district court of jurisdiction *before* judgment. *Id.*[14]

Second, even if CREW's as-applied challenge to the statute was moot because the FEC has again dismissed CREW's administrative complaint on remand, the district court had jurisdiction over CREW's facial challenge. *See Better Gov't Ass'n*

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[13] The issues Crossroads raises go only to the possibility of relief on CREW's FECA claim. Even if meritorious—and they are not—they have no bearing on CREW's APA claim against the regulation that is now the sole subject of any appeal.

[14] As it does several times, Crossroads resorts to gross misquotation, claiming CREW asserted below its "FECA claim is now moot." Crossroads Appl. 13. CREW actually stated that "*Crossroads's request to stay* CREW's FECA claim is now moot." CREW D.C. Cir. Opp. at 3 n.2 (emphasis added) (attached as Add. B). Crossroads's lack of candor with this Court alone warrants denial of its application. *McGraw-Hill v. Proctor & Gamble*, 515 U.S. 1309, 1310–11 (1995).

v. Dep't of State, 780 F.2d 86, 90–91 (D.C. Cir. 1986) (holding that while "the appellants' challenge to the standard *as applied to their specific fee waiver requests* is, in fact, moot," there is, "however, no question that the appellants' other arguments concerning the facial validity of the DOJ guidelines and the interior regulation are *not* moot") (citing *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 121–22 (1974)).

CREW's injuries from the regulation are also far from moot. First, the regulation was again applied to CREW's complaint. *See* First General Counsel's Report 15, MUR 6696R (Crossroads). "[T]he dismissal on remand actually indicates that the regulation is continuing to deprive [CREW] of the information it seeks." D.C. Cir. Stay Op. 5. Second, there are "concrete application[s] that threaten[] imminent harm to [CREW]'s interests" if the regulation remains in effect. *Cierco*, 857 F.3d at 416 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009)). Despite Crossroads's claim that groups are refraining from making independent expenditures due to uncertainty after the district court decision, the facts show millions in independent expenditures continue to be made. *See* FEC, Independent Expenditures (last visited Sept. 12, 2018), https://bit.ly/2MphFgB. However, due to the stay, the reports still fail to disclose contributions, *see, e.g.*, Americans for Prosperity, Form 5 (Aug. 31, 2018), https://bit.ly/2N6Xnhf (reporting "0" in contributions), and each report injures CREW by depriving it of the information to which it legally entitled, *Akins*, 524 U.S. at 20–25. CREW's claim against the

regulation is therefore very much live. D.C. Cir. Stay Op. 5 (further noting CREW's injury "certainly is capable of repetition").

In contrast, Crossroads standing here is at best highly questionable. *See* D.C. Cir. Stay Op. 6. As noted, Crossroads received full relief already. Moreover, Crossroads does not identify any concrete risk of future harm. It merely asserts that it "would like to maintain the ability to continue making independent expenditures." Crossroads Appl. Add. L (Aff. of Steven Law) ¶ 10. But "[s]uch 'some day' intentions—without any description of concrete plans . . . —do not support a finding of 'actual or imminent' injury that our cases require." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992); D.C. Cir. Stay Op. 6 ("Crossroads [does not] identify an actual independent expenditures it has made this quarter or had intended to make in the coming months that are deterred by the order."). Where there are "serious question[s]" about the movant's standing, that alone justifies denying the stay. *Bailey v. Patterson*, 368 U.S. 346, 346 (1961).

In short, Crossroads provides no grounds to think it has a "reasonable probability that four Justices" will grant certiorari, never mind a "fair prospect that a majority of the Court will vote to reverse the judgment below." *Hollingsworth*, 558 U.S. at 190. Accordingly, Crossroads's application fails.

C. Crossroads Fails to Show Any Irreparable Injury

To justify the extraordinary remedy of a stay, "there must be a demonstration that irreparable harm is likely to result." *Rostker*, 448 U.S. at 1308. "An applicant's likelihood of success on the merits need not be considered . . . if the applicant fails to show irreparable injury from the denial of a stay." *Ruckelshaus,*

463 U.S. at 1317. Crossroads proves no such injury here. D.C. Cir. Stay Op. 5 (holding Crossroads's purported injuries are neither "certain and great," nor "actual and not theoretical").

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 Appl. 21–30. Rather, it attempts to rely on potential harms to the public or other groups that wish to make independent expenditures.

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 Appl. 29–30. Disclosure, however, "do[es] not prevent anyone from speaking." *Doe v. Reed*, 561 U.S. 186, 196 (2010) (Roberts, C.J.); D.C. Cir. Stay Op. 6 ("Nothing in the district court's order prohibits the making of independent expenditures."). Moreover, the disclosure that Crossroads fears has been upheld against First Amendment challenge in numerous cases, even where it does chill speech. *See Citizens United*, 558 U.S. at 368–71; *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 create a First Amendment injury where disclosure is constitutional. *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"). As Crossroads cannot "show that their First Amendment interests are either threatened or in fact being impaired" by 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) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (finding irreparable harm only because First Amendment freedoms were "in fact being impaired")).

Crossroads tries to convert its noninjury into an irreparable injury by suggesting that it might stop making independent expenditures due to the court's ruling. Crossroads Appl. 27 (asserting Crossroads is "deterred") (quoting Add. L (Aff. Law) ¶ 10). 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). Crossroads may believe it is "chill[ed]," Crossroads Appl. 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). Moreover, Crossroads's current lack of independent expenditures is not caused by the district court order: it ceased making independent expenditures in 2014. *See* FEC, Independent Expenditures, Crossroads Grassroots Policy Strategies (last visited Sept. 15, 2018), https://bit.ly/2wN08dz (showing Crossroads's last independent expenditure was October 31, 2014). In fact, public reporting indicates that Crossroads has essentially terminated its political operations, with its leadership transferring activities to a new nonprofit. *See* Robert Maguire, One Nation rising: Rove-linked group goes from no revenue to more than $10 million in 2015, OpenSecrets News (Nov. 17, 2016), https://bit.ly/2fJebqp; *see also* Crossroads Appl. Add L (Law Aff.) ¶ 10 (asserting only that Crossroads "would like to maintain" the

ability to hide its contributors, but not identifying any concrete plans to create independent expenditures). The decision below does no irreparable injury to Crossroads because it has no current application to Crossroads. *See* D.C. Cir. Stay Op. 6

In sum, Crossroads fails to prove any irreparable injury will certainly befall it because of the district 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.

D. The Equities Strongly Disfavor a Stay, Which Would Substantial Harm CREW and the Public

Crossroads's lack of injury also does not "clearly exceed" the harm its stay will impose on CREW and the public. *Barnes v. E-Systems. Group Hosp. Medical & Surgical Ins. Plan*, 501 U.S. 1301, 1305 (1991); *see also Rostker*, 448 U.S. at 1308. Accordingly, the balance of equities favors denying its application.

First, 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 Akins*, 524 U.S. at 24–25 (lack of access to information is an injury). 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 continues to injure CREW, depriving CREW of its access to information to which it is entitled. *See*

D.C. Cir. Stay Op. 5 (regulation is "continuing" to injure CREW). Indeed, Crossroads brings this application for the very purpose of denying CREW and the public access to the information to which they are entitled and to prevent them from discussing that information with others. Crossroads Appl. 29.

Crossroads asserts, however, that because CREW has suffered this injury before, the court below lacked jurisdiction. Crossroads Appl. 33. Yet the authority it cites hardly supports that claim. CREW does not solely seek remedy for some long-past wrong, *cf. U.S.P.S. v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 481 U.S. 1301, 1303 (1987) (finding employee harm suffered three years earlier could not prevent stay), nor is CREW's injury solely the result of some inaction on its part long ago, *cf. Lucas v. Townsend*, 486 U.S. 1301, 1305 (1988) (respondent injury was self-caused).[15] Rather, CREW is injured each time a report is made 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.[16]

Second, the public interest here weighs heavily against a stay. A long line of decisions from this Court show the public's interest is in being "fully informed about

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[15] That CREW did not submit a comment in one public request for a rulemaking does not undercut CREW's injury, as Crossroads suggests. *See* Op. 33. CREW's standing is not conditioned on its 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.

[16] In addition, the facts show that any attempt by CREW to seek remedy for its injury through requested rulemaking would be futile. *See* Op. 13–14, 49 n.30, 99; *see also* Crossroads Appl. 13 (quoting commitment by two commissioners to not correct the regulation).

the person or group who is speaking" on election-related matters. *Citizens United*, 558 U.S. at 368; *id.* at 369 (holding "the public has an interest in knowing who is speaking about a candidate shortly before an election" that extends to "the funding sources for the ads"). The public's interest in disclosure includes knowing "where political campaign money comes from and how it is spent" in order to know the "sources of a candidate's financial support," and "deter[ing] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Buckley*, 424 U.S. at 66–68. Disclosure also protects the public's "interest . . . in preventing foreign influence over U.S. elections." *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 n.3 (D.D.C. 2011) (Kavanaugh, J., for a three-judge District Court).

The stay requested by Crossroads would severely undermine these interests, depriving the public of knowledge about the sources of huge sums spent in our elections. *See* OpenSecrets.org, Outside Spending by Disclosure, Excluding Party Committees (last visited Sept. 15, 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).

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 Appl. 24. Congress, however, considered those interests and decided they weighed in favor disclosing of "all contributions" over $200. 52 U.S.C. § 30104(c)(1); *see also Buckley*, 424 U.S. at 68 (recognizing Congress enacted FECA because protect public interests in disclosure outweigh risk "public disclosure of contributions . . . will deter some individuals who otherwise might contribute").[17]

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"). 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

[17] Crossroads's concern is also not being borne out. *See supra* at p. 23.

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). As this Court recognized, disclosure of funding sources "does not result in a cash windfall to [one's] opponent. *Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 743 (2011) (Roberts, C.J.) (enjoining matching grant program in part because it was *not* a disclosure regime).

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 3 (characterizing election within five weeks of decision as impending); *see also Lair*, 697 F.3d 1202 (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*, No. A-12-CA-566-SS, 2012 WL 12873174, at *2 (W.D. Tex. July 20, 2012) (refusing to invalidate entire political committee regulatory structure eleven days before election). This Court has also issued weighty decisions impacting campaign finance regimes in the summer before an election without any order to stay its decision until after an election. *See Reed,* 561 U.S. at 246 (upholding public disclosure of referendum signatories in summer before 2010 elections); *Davis v. FEC*, 554 U.S. 724, 743–44 (2008) (invalidating

"Millionaire's Amendment" and attendant disclosure rule in summer before election); *Randall v. Sorrell*, 548 U.S. 230, 253 (2006) (invalidating state campaign finance regime in summer before election). Crossroads ignores the fact that the decision below similarly was issued months before an election, and focuses instead on when the court's 45-day stay expires. Crossroads Appl. 25. Yet, given that *Purcell*'s concern was with upset expectations, it is absurd to treat the end of the 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).

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 the agency does not share Crossroads's view. *See* Crossroads Appl. Add. K.[18]

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 harm to the public. The balance of equities is tilted decidedly against the grant of a stay here.

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[18] Crossroads contends that two commissioners nonetheless would have preferred an appeal. Two commissioners, however, do not speak for the FEC, 52 U.S.C. § 30106(c), particularly where an equal number of commissioners apparently believe the district court was right.

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In sum, Crossroads has failed to carry its "heavy burden" here for the "extraordinary" relief it seeks. *Whalen*, 423 U.S. at 1316.

E. Vacatur was the Appropriate Remedy, and This Application 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 Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982) (district court's equitable remedy reviewed 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 Appl. 28. Courts have 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 could lawfully take on remand is to vacate the offending regulation. *See City of Arlington*, 569 U.S. at 296 ("If the intent of Congress is clear, that is the end of the

matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

Further, the district court properly found the risk of "disruptive consequences" favored vacatur, Op. 95, notwithstanding Crossroads's fear of "chaos," Crossroads Appl. 22. 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. 96. 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 also carefully crafted a limited stay of 45 days to allow the FEC to issue "interim regulations that comport with the statutory disclosure requirement of 52 U.S.C. § 30104(c)," Op. 99—rules which are not subject to the 30 day congressional submission requirement, *cf.* Crossroads Appl. 2; *see, e.g.*, FEC, Definition of Federal Election Activity, Interim Final Rule, 71 Fed. Reg. 14357 (Mar. 22, 2006) (interim rule made "effective March 24," two days after publication). But the district court did not suggest the FEC needed those days to "ignore, narrow or misconstrue" the statute's reporting obligations—and therefore there is no need for a longer stay to provide time for groups like Crossroads make comments in a rulemaking about their disagreement with Congress's mandated disclosure. *Cf.* Crossroads Appl. 27–28. Moreover, the district court's fear of undue delay by the

FEC has proven true: the agency apparently has not even started the process to provide the limited guidance contemplated by the district court. Rather, the indefinite stay Crossroads seeks would simply mean the regulations are never corrected and voters are to be forever denied the information for which they have been far too long deprived.

The district court properly weighed all the relevant interests and rendered appropriate and moderate relief. Crossroads fails to demonstrate the district court abused its discretion in doing so.

Dated: Sept. 15, 2018.

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CERTIFICATE OF SERVICE

I certify that on September 15, 2018, one copy of CREW's RESPONSE IN OPPOSITION TO EMEREGENCY APPLICATION TO CHIEF JUSTICE ROBERTS, CIRCUIT JUSTICE FOR THE DISTRICT OF COLUMBIA, FOR A STAY PENDING APPEAL, was sent electronically and on the following business day were mailed to each of the following:

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