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,[1]

Defendant-Appellant,

v.

Citizens for Responsibility and Ethics in Washington and Nicholas Mezlak,[2]

Plaintiffs-Appellees,

Federal Election Commission,

Defendant-Appellee.

DEFENDANT-APPELLANT
CROSSROADS GRASSROOTS POLICY STRATEGIES'
EMERGENCY MOTION FOR A STAY PENDING APPEAL

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[1] Crossroads Grassroots Policy Strategies' D.C. Cir. R. 8 and 28 Certificate as to Parties, Rulings, and Related Cases and Fed. R. App. P. 26.1 and D.C. Cir. R. 26.1 Corporate Disclosure Statement are attached as Addendum A.

[2] *Hereinafter*, "CREW."

To prevent irreparable First Amendment injury to itself and its donors, others similarly situated, and the American public, defendant-appellant Crossroads Grassroots Policy Strategies ("Crossroads") moves this Court to stay pending appeal a district court's judgment that, mere weeks before the impending election, invalidates and will shortly vacate a foundational regulation the Federal Election Commission (the "Commission") promulgated without controversy over 38 years ago. Nineteen prior elections have been held under the existing regulation, and there is no compelling reason to throw the clear legal standards it articulates into confusion just prior to a major national election – thereby chilling core First Amendment speech – before there can be orderly appellate review of the substantial legal grounds supporting this long-standing regulation.

The regulation and statute at issue balance First Amendment free speech rights and associational privacy against the burdens of compelled donor disclosure by groups that are not classified under the law as political committees. The Federal Election Campaign Act calls for reporting contributions "made for the purpose of furthering an independent expenditure."[3] 52 U.S.C. § 30104(c)(2)(C). For 38 years, the Commission, through the regulation, has reasonably construed this requirement to apply only where the contribution was earmarked for a

[3] An "independent expenditure" is a communication that expressly advocates the election or defeat of federal candidates.

particular independent expenditure. *See* 11 C.F.R. § 109.10(e)(1)(vi). Now, only weeks before a national election, the district court decided that the statute unambiguously compels much broader reporting of contributions that, in some vague sense, fund an organization's broader "political purposes." The district court refused *Chevron* deference, invalidated the regulation, and directed the Commission to reopen an administrative complaint against Crossroads from 2012, which was the vehicle plaintiff-appellee CREW used to bootstrap its untimely challenge to the regulation. *See* Addendum B.

The district court stayed its vacatur of the regulation for 45 days (i.e., until September 17) to pressure the Commission to promulgate an entirely new interim regulation. The Commission is unlikely to act so swiftly – nor should it, given the sensitive First Amendment issues at stake – and thus the stay serves only to shift much of the disruption closer to the election. Crossroads moved the district court for a stay pending appeal, expedited briefing on its motion, and a decision by August 30, 2018. The district court constructively denied Crossroads' motion by ordering a briefing schedule that extends beyond the requested relief date. *See* Addendum C.

Crossroads and similarly situated entities find themselves in an impossible position. The district court's decision throws into disarray the laws governing core First Amendment speech just prior to a national election. It forces Crossroads and

other organizations to choose between exercising their long-protected free speech rights and thereby incurring severe legal risks – including violating their donors' privacy – or remaining silent. As a result, core political speech is chilled far more than the statute or regulation ever contemplated, causing irreparable harm to groups, donors, and the public.

Crossroads will demonstrate in its merits brief that the district court's judgment is profoundly mistaken. The mere fact that the court required 113 pages to justify its novel construction of the statute undermines its conclusion that the statute is so clear as to not permit any other construction. Moreover, this Court recently rejected the district court's policy arguments in holding that a similar statutory donor reporting regime for "electioneering communications"[4] permits the general approach the Commission implemented in the challenged regulation here. *See Van Hollen v. FEC*, 811 F.3d 486 (D.C. Cir. 2016) ("*Van Hollen II*"). Although the statutory language differs, the policy arguments are the same.

There are also other grounds for challenging the district court's judgment, including that: (1) the district court lacked authority to invalidate the regulation because the Commission had other reasons to dismiss the complaint independent of the regulation's validity; and (2) the district court's solution to the regulatory

[4] Generally, an "electioneering communication" is a broadcast ad that refers to a federal candidate and is targeted to the relevant jurisdiction within certain pre-election windows. *See* 52 U.S.C. § 30104(f)(3).

problem it created – i.e., directing the Commission to promulgate a new regulation in secret within the next 45 days – will further regulate and burden First Amendment rights without public notice and comment.

Citizens pay closest attention to electoral messaging starting after Labor Day, and early voting in some states begins in just two weeks. Every day that passes is another lost opportunity for Crossroads and similar organizations across the political spectrum to exercise their core First Amendment rights. With the district court unwilling to enter a stay expeditiously, Crossroads now respectfully requests that this Court stay the district court's opinion and order pending final appeal as soon as practicable, but in any event no later than 11:00 A.M. on Friday, September 14, 2018.

Pursuant to D.C. Cir. R. 27(f), counsel for Plaintiffs-Appellees were notified by telephone of this motion, which they oppose. Counsel for Defendant-Appellee were notified by telephone of this motion and took no position on it.

I. BACKGROUND

A. The Independent Expenditure Reporting Statute and the Commission's Implementing Regulation.

This case involves a reporting requirement adopted by Congress in 1979 and signed into law on January 8, 1980. The pertinent language from the 1979 Federal Election Campaign Act amendments is as follows (with the key language in italics

and other language to be discussed shortly in bold/underlined):[5]

> **2 U.S.C. 434 REPORTS . . .**
>
> (c)(1) 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)*[6] for all contributions received by such person.
>
> (2) Statements required to be filed by this subsection shall be filed in accordance with subsection (a)(2), and shall include—,
>
> > (A) the information required by subsection (b)(6)(B)(iii),[7] indicating whether **the independent expenditure** is in support of, or in opposition to, the candidate involved;
> >
> > (B) under penalty of perjury, a certification whether or not **such independent expenditure** is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate; and
> >
> > *(C) 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.*

The Commission worked extensively with Congress on these amendments.

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[5] 2 U.S.C. § 434 was subsequently recodified at 52 U.S.C. § 30104.

[6] This provision provides that: "(b) Each report under this section shall disclose . . . (3) the identification of each . . . (A) person (other than a political committee) who makes a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year . . . together with the date and amount of any such contribution."

[7] This provision provides that the report will identify "the full name and mailing address (occupation and the principal place of business, if any) of each person to whom expenditures have been made . . . ."

See Legislative History of Federal Election Campaign Act Amendments of 1979 at 7-8, 10, 20, 39, 150-60 (1983) ("1979 FECA History").[8] One of the Commission's recommendations to Congress was to consolidate pre-1979 reporting requirements that obligated the person making an independent expenditure and the persons "who contribute to the independent expenditure" to separately report their respective expenditures and contributions (the person making the expenditure previously did not report its donors). *Id.* at 451; FEC Form 5 (1978) (attached as Addendum D); Memo. from Orlando B. Potter, Staff Director, Federal Elec. Comm'n (Mar. 29, 1978) at 2, 3 (emphasis added) (attached as Addendum E). Under the 1979 amendments, only the person making an independent expenditure would report the expenditure and the source of funds for it. *See* 1979 FECA History at 25.

Senate committee staff implemented the Commission's legislative recommendation, *see id.* at 78, 101, 103, 123, 145, with the accompanying Summary of Committee Working Draft confirming that the changes required "the person who receives the contributions, and subsequently makes the independent expenditure, [to] report having received the contribution to the Commission" *id*. at 103, 145 (emphasis added). That Congress understood the Section 434(c)(2)(C) reporting requirement to apply only where funds were given to support "the" – i.e., a specific – independent expenditure, rather than for *any* independent expenditures

[8] http://classic.fec.gov/pdf/legislative_hist/legislative_history_1979.pdf.

an organization may make (as the district court mistakenly concluded), logically follows from the legislative history, the surrounding statutory text, and pre-existing reporting practices.

Consistent with the authorities above, the Commission's implementing regulation required independent expenditure reports to identify "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." 11 C.F.R. § 109.10(e)(1)(vi) (emphasis added).

The Commission adopted this rule text on March 7, 1980, explaining that it "incorporate[s]" both "[52] USC [§ 30104](c)(1) and (2)." *Id.* AR1503 (emphasis added). (In contrast to the district court, the Commission understood and read (c)(1) as a preamble explaining who had to file the report.) The agency transmitted the rule to Congress for its review under a special congressional disapproval provision. *Id.* Now codified at 52 U.S.C. § 30111(d), Congress had already used this provision several times to disapprove Commission regulations, including shortly before the agency transmitted the independent expenditure reporting rule to Congress. *See* S. Res. 236, 96th Cong. (1979); H.R. Res. 780, 94th Cong. (1975); S. Res. 275, 94th Cong. (1975). Congress did not disapprove the Commission's rule, and it went into effect on April 1, 1980. Joint App'x Part 2 (Dkt. No. 38-1) AR 1543, 1553.

Over the next 38 years, the Commission consistently interpreted the independent expenditure reporting requirement under the statute and implementing regulation as requiring only the identification of donors who gave for the purpose of furthering the reported independent expenditure. *See* Crossroads' Cross-Mot. for S.J. Exh. A (Dkt. No. 28-1)); Joint App'x Part 1 (Dkt. No. 38) AR173. Congress has amended the independent expenditure reporting statute six times since 1980, but it has never overridden the Commission's decades-long interpretation.

B. The Administrative Complaint.

This case arose from an administrative complaint CREW filed with the Commission in 2012. CREW alleged Crossroads violated the reporting statute and accompanying Commission regulation when Crossroads reported independent expenditures in 2012 without identifying donors. Joint App'x Part 1 AR1-52, 98-159; AR 109, 110, 112, 114 (Amend. Admin. Compl. ¶¶ 44, 50, 54, 57, 62).

After reviewing CREW's administrative complaint and Crossroads' response, the agency's Office of General Counsel recommended the Commission find no reason to believe that Crossroads violated the law. Joint App'x Part 1 AR164-177. As the recommendation explained, even if, as CREW alleged, Crossroads had received funds for a "general purpose to support . . . its efforts to further the election of a particular federal candidate," this "does not itself indicate

that the donor's purpose was to further 'the reported independent expenditure' – the requisite regulatory test" described in 11 C.F.R. § 109.10(e)(1)(vi). *Id.* AR174.

CREW's administrative complaint did not clearly allege Crossroads had violated 52 U.S.C. § 30104(c)(1), and, consequently, Crossroads' response did not address this claim. Nonetheless, the General Counsel's report suggested *sua sponte* that, "to the extent the question is presented on these facts, we recommend that the Commission dismiss in the exercise of prosecutorial discretion" any allegation involving section 30104(c)(1) due to "equitable concerns," "fair notice" defenses, and prior Commission precedent dismissing a theory that section 30104(c)(1) required broader reporting of donors than the regulation. *Id.* AR165-66, 172-73, 175-76 (citing *Heckler v. Chaney*, 470 U.S. 821 (1985)).

The commissioners divided 3-3 on proceeding with enforcement and closed the case. *See id.* AR193-194. Even the commissioners who voted to proceed with enforcement did not embrace the district court's novel statutory interpretation or express dissatisfaction with the regulation at issue. *See id*. AR198-199.

C. The District Court's Opinion.

CREW filed a complaint with the district court for judicial review of the agency's dismissal under 52 U.S.C. § 30109(a)(8). The district court held that the challenged regulation conflicts with the language of both 52 U.S.C. § 30104(c)(1) and (c)(2)(C), and therefore was invalid under "step one" of *Chevron U.S.A., Inc.*

v. *Natural Resources Defense Council, Inc.* ("*Chevron*") 467 U.S. 837 (1984). Op. at 53. While the court recognized a "[non-] trivial concern" that "entities engaged in independent expenditures might have inadequate guidance" in the final weeks before Election Day, Op. at 98, the district court nonetheless invalidated and vacated the regulation, staying the latter for 45 days.

Remarkably, the court also held that Crossroads could be liable for relying on the regulation as it stood in 2012 – six years before the court found it to be invalid. Accordingly, the court also remanded the underlying administrative complaint to the Commission, which then dismissed it again. *See* FEC's Response to Mot. for Stay Pending Appeal (Dkt. No. 50).

II. ANALYSIS OF THE STAY FACTORS

D.C. Cir. Rule 8(a)(1) sets forth four factors for evaluating a motion to stay pending appeal: (1) the likelihood the movant will prevail on the merits; (2) the prospect of irreparable injury to the movant if relief is withheld; (3) the possibility of harm to other parties if relief is granted; and (4) the public interest. Here, each factor supports a stay.[9]

[9] At the very least, where, as here, the other criteria support a stay, a stay is warranted under this first factor because there are "serious legal questions going to the merits" in the district court's decision that are "a fair ground of litigation and thus for more deliberative investigation." *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986).

A. Crossroads Is Likely to Prevail on the Merits.

1. The District Court Misconstrued the Reporting Statute.

In the "Background" section above, Crossroads previewed some of its arguments that the district court fundamentally misconstrued a statute and regulation in place for nearly four decades. *Cf. STOP Hillary PAC v. FEC*, 166 F. Supp. 3d 643, 647 (E.D. Va. 2015) (disapproving a challenge to a 35-year-old Commission regulation). Most glaringly, the district court's analysis asserted the supposed "broad disclosure goals of Congress" in enacting the reporting requirements, Op. at 77, and assumed "Congress expressly intended broad disclosure for not-political committees," *id.* at 88. However, in *Center for Individual Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012) ("*Van Hollen I*"), and *Van Hollen II*, 811 F.3d 486, this Court upheld a similar Commission regulation for reporting non-political committee organizations' donors and rejected the district court's conclusion "that anything less than maximal disclosure is subversive" of the statute and that "unbounded disclosure" is always required. 811 F.3d at 494, 494 n.4. This Court criticized a "district court's invocation of such a sweeping disclosure purpose," and found the law "does not require disclosure at all costs; it limits disclosure in a number of ways." *Id.* at 811 F.3d at 494–95. Had the district court adhered to *Van Hollen I and II* and properly considered "the

conflicting privacy interests that hang in the balance," *id.* at 494, it would have upheld the Commission's regulation here under *Chevron,* 467 U.S. at 843.

The district court also attempted to establish congressional clarity under *Chevron* step one by subordinating the clear legislative history to policy arguments articulated (anachronistically) after *Citizens United v. FEC*, 558 U.S. 310 (2010), to conclude that the agency had too narrowly construed the statute decades earlier. The court also freely invoked the statute's "gist" in order to circumvent the law's plain text. Op. at 69. And the varying standards the court used to describe the information Congress supposedly intended to be reported – e.g., contributions "earmarked for political purposes," "intended to influence elections," etc. – only underscores that Congress "has not directly addressed the precise question at issue" in the manner the district court suggested. *Chevron*, 467 U.S. at 843.

In short, the *contemporaneous* legislative authorities confirm the strength of Crossroads' arguments that the Commission's regulation implements both the plain text and congressional intent far more faithfully than the district court's improvised new standard.

2. The District Court Lacked Authority to Invalidate the Regulation.

The regulation at issue here was promulgated decades ago – i.e., outside the six-year statute of limitations for Administrative Procedure Act challenges. *See* 28 U.S.C. § 2401. Nevertheless, the district court allowed CREW to challenge the

regulation on the theory that "*those affected* may challenge that application on the grounds that it conflicts with the statute from which its authority derives." *CREW v. Fed. Elec. Comm'n*, 243 F. Supp. 3d 91, 101 (D.D.C. 2017) (citation omitted). But CREW was not "affected" by the regulation's alleged invalidity at all.

First, 52 U.S.C. § 30111(e) specifically provides that "any person who relies upon any rule or regulation prescribed by the Commission . . . and who acts in good faith in accordance with such rule or regulation shall not, as a result of such act, be subject to any sanction provided by this Act." The statute "establish[es] 'legal rights' to engage in that conduct" and categorically removes "any risk of enforcement," even "if that conduct violates campaign statutes." *Shays v. FEC* ("*Shays I*"), 414 F.3d 76, 84, 95 (D.C. Cir. 2005) (emphasis added). Thus, when Crossroads acted in compliance with an existing Commission regulation, the regulation's validity or invalidity affected neither the Commission's obligation to dismiss the enforcement case nor the ultimate outcome for CREW.[10]

Second, in *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018), this Court held that Commission dismissals of enforcement cases based on prosecutorial discretion are generally "not subject to judicial review for abuse of discretion." *Id.* at 441.

[10] Even aside from 52 U.S.C. § 30111(e), the regulation's validity would be irrelevant: Under general principles of administrative law "any individual who relied on . . . [a regulation] prior to the date of [a] decision [invalidating it] can properly assert it as a defense to a charge that he otherwise violated the [statute]." *Joseph v. U.S. Civil Serv. Comm'n*, 554 F.2d 1140, 1157 (D.C. Cir. 1977). .

Here again, the regulation's validity had no effect on CREW because the Commission grounded its dismissal on reasons other than the regulation's validity (e.g., concerns about fair notice, etc.).

The district court attempted to side-step this Court's clear precedent by erroneously invoking two exceptions. The first "exception" – i.e., the assertion that the Commission "intentionally 'abdicated'" its responsibilities, Op. at 110 – has never been endorsed by the Supreme Court, *see Heckler*, 470 U.S. at 844 n.4. In fact, the Commission has enforced the independent expenditure donor reporting requirement against a number of organizations in just the past few years alone. *See, e.g.*, Conciliation Agreements, MUR 7085 (State Tea Party Express) (Sept. 21, 2016); MUR 6816 (Americans for Job Security) (June 21, 2016), (The 60 Plus Association, Inc.) (July 7, 2016), (American Future Fund) (June 21, 2016). The district court offered nothing to justify finding that the Commission so abdicated enforcement as to deprive it of prosecutorial discretion.

The district court also argued that the Commission's dismissal was reviewable because the agency's failure to pursue enforcement was "primarily" based upon a supposedly errant interpretation of the underlying statute. Op. at 110. This exception applies only if an agency's dismissal is based "*entirely*" on misreading the statute. *CREW*, 892 F.3d at 441-42 & n.11 (emphasis added) (rejecting "carving reviewable legal rulings out from the middle of non-reviewable

actions"). Here, as the district court acknowledged, the Commission dismissed the case on non-reviewable prosecutorial discretion considerations apart from the agency's statutory interpretation. *See* Op. at 105.

And third, there is a five-year statute of limitations for campaign finance violations. *See* 28 U.S.C. § 2462. Because that deadline expired before the district court's remand to the Commission, this case would have been dismissed regardless of the regulation's validity.

B. Absent a Stay, Crossroads and the Public Will Be Irreparably Harmed.

The second and fourth factors of the stay analysis also are satisfied here.

1. Absent a Stay, the District Court's Decision Will Continue Causing Major Disruption to the 2018 Elections.

The extremely abbreviated schedule the district court set for Commission action is already creating significant disruption to Crossroads and others just weeks before the November elections. That is why "[c]ourt orders affecting elections" are particularly disfavored during pre-election periods, *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) – especially during the "45 days prior to an election," *Right to Life of Mich., Inc. v. Miller*, 23 F. Supp. 2d 766, 767, 769-70 (W.D. Mich. 1998) – as this is when the public actually "begins to concentrate on elections" and speech has a "chance of persuading voters," *Citizens United*, 558 U.S. at 327, 334. And as "an election draws closer, that risk will [only] increase," *STOP Hillary PAC*, 166

F. Supp. 3d at 647, particularly since over 40% of all ballots in the last election were cast prior to Election Day, U.S. Election Assistance Comm'n, *The Election Administration and Voting Survey: 2016 Comprehensive Report* at 8.[11]

The district court's ruling here is precisely the type of status-quo-shattering judicial order that is "harm[ful] to the public interest," *Respect Maine PAC v. McKee*, 62 F.3d 13, 16 (1st Cir. 2010), invites "chaos" for those "who have relied on the challenged provisions," *id.*, disrupts "the significant interest the public has in the smooth functioning of an election, *McComish v. Brewer*, No. CV-08-1550, 2008 WL 4629337, at *12 (D. Ariz. Oct. 17, 2008), and renders political actors "unable to deliver their message to voters as planned," *id.* *See also Lair v. Bullock*, 697 F.3d 1200, 1202 (9th Cir. 2012) (granting stay of campaign finance order pending appeal citing, *inter alia*, "the imminent nature of the election" and the "importan[ce of] not [] disturb[ing] long-established expectations" during the pre-election period). Indeed, the United States Supreme Court granted a stay pending appeal when a lower court altered the status quo by imposing burdens on "independent expenditure groups." *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 733, 739 (2011).

The public interest in avoiding disruption is even greater when the "established system for regulating political contributions and expenditures" is

[11] https://www.eac.gov/assets/1/6/2016_EAVS_Comprehensive_Report.pdf.

upset and a "short time frame . . . and the delays inherent in lawmaking [make it] almost certain no amended regulatory scheme could be implemented before the general election in November." *Catholic Leadership Coal. of Texas v. Reisman*, No. A-12-CA-566, 2012 WL 12873174, at *2 (W.D. Tex. July 20, 2012), *aff'd*, 473 F. App'x 402 (5th Cir. 2012). Such concern is particularly salient here given the district court's own "[non-]trivial concern" that "entities engaged in independent expenditures might have inadequate guidance" because of its vacatur decision. Op. at 98.

Not only does the district court's decision place a "considerable burden [and potential] risk[]" on speakers, who may well "choose simply to abstain from protected speech," but it also harms "society as a whole, which is deprived of an uninhibited marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). This is exactly what happened in *Van Hollen I*, when a district judge in this Circuit invalidated a similar Commission donor reporting regulation for "electioneering communications." After the district court's initial ruling, groups like Crossroads effectively stopped making electioneering communications. *See, e.g.*, Law Aff. ¶ 12 (attached as Addendum F). As Commission data show, only 11 electioneering communication reports were filed between the district court's March 30, 2012 decision and the D.C. Circuit's September 18, 2012 reversal, as compared to the 33 such reports that were filed in 2012 preceding the district court's ruling and the 67

reports in connection with the November election that were filed following the D.C. Circuit's reversal. *Compare* FEC Form 9 filings, Apr. 1, 2012, through Sep. 18, 2012[12] *with* FEC Form 9 filings, Jan. 1, 2012, through Mar. 30, 2012,[13] and Sep. 18, 2012, through Nov. 6, 2012.[14]

The district court acknowledged its decision will have widespread impact and stayed vacatur of the regulation for 45 days, ostensibly "to ensure that not-political committees benefit from regulatory guidance." Op. at 99. Yet the existing stay provides little comfort in that (a) it effectively expires halfway between August 3 and the November 6 general election; and (b) the Court's order otherwise "declared [the regulation] to be invalid," Order at 2, which calls into question whether "the invalidated regulation provides any real protection and guidance to would-be speakers during this 45-day stay period," Inst. for Free Speech, *Court Ruling on Independent Expenditures Creates New Risks for Groups* (Aug. 23, 2018).[15] Moreover, after the 45-day stay ends, a quarterly disclosure report will be due on October 15 that covers independent expenditures made

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12 https://www.fec.gov/data/filings/?data_type=processed&min_receipt_date=04%2F01%2F2012&max_receipt_date=09%2F18%2F2012&form_type=F9.

13 https://www.fec.gov/data/filings/?data_type=processed&min_receipt_date=01%2F01%2F2012&max_receipt_date=03%2F30%2F2012&form_type=F9.

14 https://www.fec.gov/data/filings/?data_type=processed&min_receipt_date=09%2F18%2F2012&max_receipt_date=11%2F06%2F2012&form_type=F9.

15 https://www.ifs.org/2018/08/23/court-ruling-on-independent-expenditures-creates-new-risks-for-groups/.

during the stay period, making it unclear what donor reporting rule will apply for that report. *See* 11 C.F.R. § 109.10(b).

This uncertainty is not theoretical. While one prominent law firm has concluded that, during the existing 45-day stay, "organizations engaging in independent expenditure activity can continue to file reports as they have in the past," Ezra Reese & Shanna Reulbach, *Court Opens Door to Expanded Disclosure for Nonprofits Making Independent Expenditures in Federal Campaigns* (Aug. 8, 2018),[16] CREW's Executive Director has threatened legal action against those who rely upon the existing regulation during the current 45-day period:

> Major donors are now on notice that if they contribute to politically active 501(c)(4) organizations, their contributions will have to be disclosed, and if they are not, CREW will pursue enforcement cases with the FEC and, if necessary, in court.

Press Release, *CREW Scores Major Court Victory Against Dark Money* (Aug. 4, 2018).[17] This demonstrable confusion and uncertainty falls far short of the "fullest and most urgent" protections the First Amendment demands when the public debates the qualifications of political candidates. *Bennett*, 564 U.S. at 734, 739.

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16 https://www.perkinscoie.com/en/news-insights/court-opens-door-to-expanded-disclosure-for-nonprofits-making.html.

17 https://www.citizensforethics.org/press-release/crew-scores-major-court-victory-against-dark-money/.

2. The District Court's Interim Rulemaking Remedy Conflicts with Standard Administrative Practices.

The district court recognized that vacating the regulation and directing the Commission to promulgate a new rule was a "complex" task that required detailed analysis and consideration of numerous reporting scenarios. Op. at 88-89, 104 n.53. Yet, instead of following standard practices, it tasked the Commission with secretly and "hastily cobbling together an alternative, interim set of regulations [that can well be] harmful to the public interest." *Emily's List v. FEC*, 362 F. Supp. 2d 43, 59 (D.D.C. 2005), *aff'd*, 170 F. App'x 719 (D.C. Cir. 2005).

Not only is the Court's vacatur inconsistent with multiple past decisions invalidating Commission regulations, *see, e.g.*, *Shays I*, 337 F. Supp. 2d 28, 130 (D. D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005); *Shays v. FEC*, 508 F. Supp. 2d 10, 71 (D.D.C. 2007), *aff'd in part*, *rev'd in part and remanded*, 528 F.3d 914 (D.C. Cir. 2008); *Shays v. FEC*, No. 06-cv-01247 (D.D.C. Aug. 26, 2008), but it denies the public the standard notice and comment procedures that are particularly crucial when regulations burden First Amendment rights. *See, e.g., Am. Bus. Ass'n v. United States*, 627 F.2d 525, 528 (D.C. Cir. 1980), *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1028 (D.C. Cir. 1978).

3. The District Court's Decision Endangers Donors' and Organizations' Associational Privacy.

While the district court focuses on "provid[ing] members of the public with the information that they need to participate as an informed electorate," Op. at 97, it completely ignores the "significant" individual and associational privacy interests at stake for donors and organizations, *see Van Hollen II*, 811 F.3d at 499-501. Specifically, the district court's decision could require donors to be reported involuntarily under either subsection 30104(c)(1) or (c)(2)(C), even though such donors reasonably expected their giving would remain private – and even though the D.C. Circuit could uphold the current Commission regulation on appeal. In other words, the decision below, if not stayed, likely will create a situation where "[t]he egg has been scrambled and there is no apparent way to restore the status quo ante." Op. at 97 (brackets in the original) (internal citation and quotation marks omitted). This is precisely the type of situation courts find "effectively unreviewable," *In re Sealed Case*, 237 F.3d 657, 665 (D.C. Cir. 2001), and justifying injunctive relief, *see Securities Industry and Financial Markets Ass'n v. Garfield*, 469 F. Supp. 2d 25, 41-42 (D. Conn. 2007) (noting that disclosure cannot be undone in the modern information age). And in many situations, Crossroads and similarly situated organizations will be forced to decide whether to refrain from speaking at all pending appeal or risk exposing their donors – an irreparable harm that can never be redressed in the event that Crossroads' appeal succeeds.

See also Perry v. Schwarzenegger, 591 F.3d 1126, 1131–32 (9th Cir. 2009) (granting stay pending appeal where disclosure of confidential campaign information was sought).

The district court downplays the effect of its order by observing that Section 501(c) organizations are required to report their donors to the Internal Revenue Service (at least through 2018). Op. at 95. But the court ignores that the donor information on organizations' tax filings is reported on a strictly confidential basis, *see* 26 U.S.C. § 6104(d)(3)(A), and severe criminal penalties apply to their unauthorized release, *id.* § 7213. In fact, the Internal Revenue Service recently abolished the donor reporting requirement for most organizations because even when such information is reported confidentially, it unduly compromises donors' privacy. *See* IRS, Rev. Proc. 2018-38.

C. A Stay Will Not "Substantially Harm" CREW, But the Absence of One Could Harm the Commission.

Although a stay of the decision below would reduce the harm to Crossroads and the general public, a stay would not harm CREW in any meaningful – much less *substantial* – way. This election cycle is no different than the preceding nineteen that were conducted largely free of CREW's recently discovered grievances. Moreover, CREW failed to participate in a 2011 Commission rulemaking proceeding that proposed the very changes CREW now seeks in the

challenged regulation, further undermining CREW's need for immediate relief. *See* Rep. Van Hollen Petition for Rulemaking (Apr. 21, 2011) at 4.[18]

In contrast to CREW, declining to grant a stay would divert the Commission away from providing guidance and enforcing the law in the remaining days before the election, with the risk that such efforts will be interrupted or completely undone by a successful appeal. Moreover, while the district court dismissed the agency's concerns that a vacatur could result in "inadequate guidance" for speakers ahead of the 2018 elections, Op. at 98, this Court has held that a government agency "is in a better position than the court to assess the disruptive effect of vacating [a rule]." *Chamber of Commerce v. SEC*, 443 F.3d 890, 909 (D.C. Cir. 2006). The district court's decision contravenes this important principle.

IV. CONCLUSION

The district court's ruling is unprecedented and its timing extraordinary. Rather than force Crossroads and similarly situated organizations to choose between sacrificing their core First Amendment speech rights just prior to a major national election and their donors' associational and privacy rights – neither of which can be restored if Crossroads prevails on appeal – this Court should stay the district court's ruling pending appeal.

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18 http://classic.fec.gov/pdf/nprm/citizensunited/van_hollen.pdf.

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Respectfully submitted,

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I hereby certify, on this 31st day of August, 2018, that:

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CERTIFICATE OF SERVICE

I certify that on August 31, 2018, one copy of the Defendant/Appellant's Emergency Motion for a Stay Pending Appeal was filed and served electronically upon the following counsel of record:

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