IN THE SUPREME COURT OF THE UNITED STATES

No. _____

Crossroads Grassroots Policy Strategies,

Defendant-Petitioner,

v.

Citizens for Responsibility and Ethics in Washington and Nicholas Mezlak,

Plaintiffs-Respondents,

Federal Election Commission,

Defendant-Respondent,

EMERGENCY APPLICATION TO CHIEF JUSTICE ROBERTS, CIRCUIT JUSTICE FOR THE DISTRICT OF COLUMBIA CIRCUIT, FOR A STAY PENDING APPEAL

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

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TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE DISTRICT OF COLUMBIA CIRCUIT:

Summary and Request for Immediate Relief[1]

Crossroads Grassroots Policy Strategies ("Crossroads") respectfully requests a stay pending appeal of a federal district court decision that, mere weeks before the impending election, invalidates and will shortly vacate a foundational Federal Election Commission ("FEC" or "Commission") regulation promulgated without controversy over 38 years ago. The FEC regulation implements a federal election law provision that balances First Amendment privacy for donors and groups – including Section 501(c)(4) nonprofit organizations like Crossroads – that are not political committees but engage in limited activities that address matters of public concern near elections. Nineteen prior elections have been held under the existing regulation, and there is no compelling reason to hastily throw the clear reporting

[1] Crossroads Grassroots Policy Strategies' S. Ct. R. 26.2 Corporate Disclosure Statement is provided in Addendum A. All parties below have been informed of this motion and served either by hand or electronically. Plaintiffs below, Citizens for Responsibility and Ethics in Washington and Nicholas Mezlak (collectively, "CREW"), opposed preliminary relief below and are expected to oppose relief in this Court as well. As a defendant below, the Federal Election Commission ("FEC" or "Commission") supported Crossroads' arguments, although internal disputes between the commissioners are apparently preventing the agency from participating in any appellate proceedings. *See, e.g.*, FEC Chair Caroline C. Hunter and Commissioner Matthew S. Petersen, *Statement on CREW v. FEC*, No. 16-cv-259 (Sept. 6, 2018) (*Hunter-Petersen Statement*"), at https://www.fec.gov/resources/cms-content/documents/Statement_of_Chair_Hunter_and_Commissioner_Petersen_in_CREW_v._FEC.pdf.

standards it provides to donors and speakers into confusion just prior to a national election – thereby chilling core First Amendment speech and association.

When entering its August 3 judgment, the district court recognized that vacating the FEC regulation could have a potentially "chaotic" effect on the upcoming elections, as "entities engaged in independent expenditures might have inadequate guidance." *See* Addendum B (opinion and order of August 3, 2018) at 96-98. As a result, the court stayed its vacatur, but only for 45 days (i.e., until September 17, 2018). It expressed the hope that, during the 45 days, the Commission might adopt interim replacement regulations. However, the court had no basis for expecting the FEC could act so swiftly, and two of the four FEC commissioners just explained that institutional constraints, including a mandatory 30-day congressional review period, as well as their own conviction that the existing regulations are valid and will be vindicated on Crossroads' appeal, meant that no such interim regulation would be adopted to address the mounting uncertainty they described.

On August 24, Crossroads moved the district court to extend the stay pending appeal, but the district court has not yet ruled. When time became short, on August 31, Crossroads moved the Court of Appeals for the D.C. Circuit for a stay pending appeal by 11:00 A.M. today, but it also has not yet ruled. With the

vacatur set to take effect on September 17, Crossroads now presents this motion for a stay to protect the pending election.

The FEC regulation and statutory provisions at issue balance First Amendment free speech rights and associational privacy interests against the burdens of compelled donor disclosure by groups that are not classified under the law as political committees. The Federal Election Campaign Act of 1971, as amended ("FECA") calls for reporting contributions "made for the purpose of furthering an independent expenditure."[2] 52 U.S.C. § 30104(c)(2)(C). For 38 years, the Commission, through the regulation, has reasonably construed this requirement to apply where the contribution was earmarked for a particular independent expenditure – i.e., the expenditure being reported. *See* 11 C.F.R. § 109.10(e)(1)(vi). Now, 38 years later and only weeks before a national election, the district court decided that the relevant statutory language unambiguously compels the reporting of a much larger universe of contributions that, in some vague sense, fund an organization's broader "political purposes," whatever that may mean. In a complex, policy-driven analysis over 100 pages, the district court concluded that the provision at issue, and most notably its word "an," had such a plain meaning as to defeat *Chevron* deference. Accordingly, it invalidated and

[2] An "independent expenditure" is a communication that expressly advocates the election or defeat of federal candidates. *See* 52 U.S.C. § 30101(17).

vacated the long-standing regulation and directed the Commission to reopen an administrative complaint against Crossroads from 2012, one the Commission had dismissed based in part on Crossroads' compliance with the regulation. (The challenge to that dismissal was the vehicle CREW used to bootstrap its long-since-expired challenge to the regulation. *See* Addendum B.)

Crossroads and similarly situated entities now find themselves in an impossible position. The district court's arbitrarily truncated stay 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 potentially 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 shows below – and will further demonstrate in its merits brief – that the district court's judgment is profoundly mistaken and fundamentally misreads the statute and the relevant legislative and regulatory environment. The mere fact that the court required 113 pages to justify its novel construction of the relevant statutory subsections only underscores how far away its ruling landed

from the statutory text. There are numerous other grounds for challenging the district court's judgment:

- Relying on this Court's precedents, the D.C. Circuit recently rejected the district court's policy arguments in holding that a similar statutory donor reporting regime for "electioneering communications"[3] 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;
- The district court lacked jurisdiction to invalidate the regulation because the Commission had – and did – dismiss the administrative enforcement complaint for reasons independent of the regulation's validity; and
- The district court's solution to the regulatory problem it created – i.e., hoping the Commission would promulgate a new regulation within 45 days, without any public notice and comment, to take effect without

[3] 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).

the prior congressional review mandated by 52 U.S.C. § 30111(d) – burdens crucial First Amendment rights.

This case also is one that the Court likely would hear on the merits. This Court has wrestled with attempts to regulate core political speech and association, particularly by groups that are not political committees. Moreover, the district court's decision implicates important issues of administrative law, including the deference owed an agency charged with the constitutionally sensitive task of regulating speech. In interpreting a similar FEC regulation in 2016, Judges Brown, Sentelle, and Randolph wrote that there is an "unmistakable tension that exists in campaign finance law between speech rights and disclosure rules," and that "the Supreme Court's track record of expanding who may speak while simultaneously blessing robust disclosure rules has set these two values on an ineluctable collision course." *Van Hollen II*, 811 F.3d at 488, 499. Rather than let this "Court's campaign finance jurisprudence" remain in a "fragile" state of affairs, *id.* at 501, Crossroads respectfully believes that this Court should and would take this case to provide greater clarity concerning these issues of fundamental importance to our democratic process.

* * *

Citizens pay closest attention to electoral messaging starting after Labor Day, and early voting for the November mid-term election begins in some states in

a matter of days. With neither the district court nor the D.C. Circuit willing (to this point) to enter a stay pending appeal, 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 Monday, September 17, 2018 – to ensure that neither core political speech nor the 2018 electoral process are further disrupted.

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):[4]

> **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)*[5] for all contributions received by such person.

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[4] 2 U.S.C. § 434 was subsequently recodified at 52 U.S.C. § 30104.

[5] 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."

(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),[6] 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. *See* Legislative History of Federal Election Campaign Act Amendments of 1979 at 7-8, 10, 20, 39, 150-60 (1983) ("1979 FECA History").[7] 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 C);

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[6] 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 . . . ."

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

Memo. from Orlando B. Potter, Staff Director, Federal Elec. Comm'n (Mar. 29, 1978) at 2, 3 (emphasis added) (attached as Addendum D). 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 contribution[s], 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 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. At the very least, *Chevron* allows such a reading.

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)." Joint App'x Part 2, (Dkt. No. 38-1) AR1503 (emphasis added) (attached as Addendum E). (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, AR 1543, 1553 (attached as Addendum F).

Over the next 38 years, the Commission's regulation remained constant. *See* Crossroads' Cross-Mot. for S.J. Ex. A (Dkt. No. 28-1) (attached as Addendum G); Joint App'x Part 1 (Dkt. No. 38) AR173 (attached as Addendum H). Although Congress amended the independent expenditure reporting statute six times, 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) (attached as Addendum I).

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 (attached as Addendum H). As the General Counsel's 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 FEC commissioners divided 3-3 on proceeding with enforcement and closed the case. Joint App'x Part 1, AR193-94 (attached as Addendum J). 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*. AR198-99.

C. The District Court's Opinion and the FEC's Response.

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. In reaching its conclusions, the district court's opinion placed particular emphasis on post-*Citizens United* spending trends. *See, e.g.*, Op. at 3, 41-43. Notably, 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 based on the General Counsel's recommendation. *See* FEC's Response to Mot. for Stay Pending Appeal (Dkt. No. 50) (attached as Addendum K); *Hunter-Petersen Statement*. While the statute arguably allows CREW to file another lawsuit challenging the dismissal, *see* 52 U.S.C. § 30109(a)(8)(A), CREW has not done so and represents that its "FECA claim is now moot," CREW D.C. Cir. Opp. at 3 n.2.

In the wake of the district court's opinion, two of the four FEC commissioners expressed their concerns that the district court's decision was "deeply flawed" and contained "serious errors," while also sounding alarm bells that "the court's decision is already causing confusion" when "independent political speech is at its peak." *Hunter-Petersen Statement*. They also made clear that the Commission would not and could not solve the problem through the interim regulation approach. *Id.*

D. Crossroads' Efforts to Obtain a Stay Pending Appeal.

On August 24, 2018, Crossroads filed a notice of appeal and moved the district court for a stay pending appeal. Due to the impending September 17, 2018 lapse of the court's stay on its vacatur of the regulation and the imminent start of early voting in many states, Crossroads moved the court for expedited briefing and

a decision on its motion to stay by August 30, 2018, so that entities making independent expenditures in connection with the upcoming elections could have sufficient time to adjust their First Amendment activities accordingly. The district court constructively denied Crossroads GPS's motions on August 28, 2018, by ordering a briefing schedule that extended well beyond the requested relief date.

Crossroads filed its Emergency Motion for a Stay Pending Appeal with the U.S. Court of Appeals for the District of Columbia Circuit on August 31, 2018 and requested relief by 11:00 A.M. on September 14, 2018. The court ordered expedited briefing on the motion, CREW filed its Opposition to Crossroads GPS's motion on September 10, 2018, and Crossroads GPS filed its reply thereto on September 12, 2018. The D.C. Circuit has not yet ruled on this motion.

II. ANALYSIS OF THE STAY FACTORS

In seeking a stay from a single Justice, the applicant must demonstrate: (1) "a 'fair prospect' that the Court will reverse the decision below," (2) "a 'likelihood that irreparable harm [will] result from the denial of a stay,'" and (3) "a 'reasonable probability' that this Court will grant certiorari." *Teva Pharmaceuticals USA, Inc., et al. v. Sandoz, Inc.*, 572 U.S. 1301 (2014) (Roberts, C.J.) (quoting *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J.)); *see also Stroup v. Willcox*, 549 U.S. 1501 (2006) (Roberts, C.J.); *Barnes v. E-Systems, Inc.*, 501 U.S. 1301, 1302 (1991) (Scalia, J.). In "a close case," it also "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." *Karcher v. Daggett*, 455 U.S. 1303, 1306 (1982) (Brennan, J.) (quoting *Rostker v. Goldberg*, 448 U.S. 1306 (1980) (Brennan J., in chambers)). Applying these principles, this Court has granted a number of stays in election-related matters, including those involving publicity for those involved with an issue campaign, *see Hollingsworth v. Perry*, 558 U.S. 183, 195 (2010) (*per curiam*), and where an entity would be "forever denied any opportunity to finance communication to the statewide electorate of its views in support of" a matter on the November ballot, *City of Boston v. Anderson*, 439 U.S. 1389, 1389–91 (1978) (Brennan, J., in chambers).[8]

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 FEC regulation in place for nearly four decades. *See also FEC v. DSCC*, 454 U.S. 27, 34 (1981) (relying upon lack of congressional disapproval during the special 30-

[8] *See also Tennant v. Jefferson Cty. Comm'n*, 567 U.S. 758, 763 (2012) (per curiam) (noting stay); *Perry v. Perez*, 565 U.S. 1090 (2011); *Growe v. Emison*, 507 U.S. 25, 31 (1993) (noting stay); *Wis. Elections Bd. v. Republican Party of Wis.*, 467 U.S. 1232 (1984) (Stevens, J.); *Karcher v. Daggett*, 455 U.S. 1303 (1982) (Brennan, J.); *Wise v. Lipscomb*, 434 U.S. 1329 (1977) (Powell, J.); *Hill v. Stone*, *et al.*, 416 U.S. 963 (1974) (Powell, J.); *Republican State Cent. Comm. of Arizona v. Ripon Soc'y Inc.*, 409 U.S. 1222, 1227 (1972) (Rehnquist, J., in chambers); *O'Brien v. Brown*, 409 U.S. 1 (1972) (per curiam); *Rockefeller v. Socialist Workers Party*, 400 U.S. 1201 (1970) (Harlan, J.).

day regulatory review process as evidence of congressional agreement with FEC regulation); *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, relying upon this Court's jurisprudence, in *Center for Individual Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012) ("*Van Hollen I*"), and *Van Hollen II*, the D.C. Circuit upheld a similar Commission regulation for reporting non-political committee organizations' donors and rejected the type of approach the district court adopted – "that anything less than maximal disclosure is subversive" of the statute and that "unbounded disclosure" is always required. 811 F.3d at 494 & n.4. The D.C. Circuit 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 494–95. Had the district court adhered to this Court's principles, as embodied in *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 at issue here under *Chevron,* 467 U.S. at 843.

To clarify the statutory provision, the district court discounted the legislative history and instead embraced 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 purported "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, along with implied ratification, 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 Jurisdiction to Invalidate the Regulation.

The regulation at issue was promulgated decades ago – i.e., outside the six-year statute of limitations for Administrative Procedure Act challenges. *See* 28 U.S.C. § 2401. Despite the rule that a party generally forfeits "an opportunity to challenge an agency rulemaking on a ground that was not first presented to the agency" during the rulemaking process, *Koretoff v. Vilsack*, 707 F.3d 394, 397

(D.C. Cir. 2013), 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 in the way that warrants granting an exception to the six-year time limit: untimely regulatory challenges should be entertained "when raised as a defense to an agency enforcement action," *Am. Scholastic TV Programming Found. v. F.C.C.*, 46 F.3d 1173, 1178 n.2 (D.C. Cir. 1995) (emphasis added), by "a party against whom a rule is applied," *Indep. Cmty. Bankers of Am. v. Bd. of Governors of Fed. Reserve Sys.*, 195 F.3d 28, 34 (D.C. Cir. 1999) (emphasis added).[9] The district court should not have permitted CREW to misuse a narrow, defensive-minded exception to end-run the statute of limitations and challenge a long-standing regulation based on a theory CREW admits only raising in 2012. *See* Opp. (Dkt. No. 52) at 14.

Furthermore, when "a plaintiff has sued to challenge the lawfulness of certain [agency] action . . . but that portion of the action is rendered moot, the plaintiff does not retain standing to challenge the regulation that was the basis for that action apart from any concrete application that threatens imminent harm to his

[9] *See also Grid Radio v. F.C.C.*, 278 F.3d 1314, 1320–21 (D.C. Cir. 2002); *N.L.R.B. Union v. Fed. Labor Relations Auth.*, 834 F.2d 191, 195 (D.C. Cir. 1987).

interests." *Cierco v. Mnuchin*, 857 F.3d 407, 417 (D.C. Cir. 2017) (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009)). Indeed, as the D.C. Circuit has already concluded in the FECA context specifically, "given that reliance on that regulation would afford a defense to 'any sanction,' . . . the court might well uphold FEC non-enforcement without ever reaching the regulation's validity." *Shays v. FEC*, 414 F.3d 76, 95–96 (D.C. Cir. 2005) (emphasis added).

Here, by CREW's own admission, its challenge to the dismissal is "moot," Opp. (Dkt. No. 52) at 7 n.6., for reasons independent of the regulation's validity, *see Hunter-Petersen Statement*. *First*, as the FEC commissioners noted, 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, 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.

Third, in *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018), the D.C. Circuit 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. Here again, the regulation's validity had no effect on CREW because the Commission grounded its recent dismissal of the enforcement case on reasons other than the regulation's validity (e.g., concerns about fair notice, etc.).[11]

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[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).

[11] 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 this 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.

So for all of the above reasons, Crossroads has demonstrated a clear likelihood of success on the merits.

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

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

Having recognized that a stay was warranted, the district court relied on unfounded hopes to cut its stay so short that its judgment 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) (citing potential for "voter confusion") – 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

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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 separate and apart from the agency's statutory interpretation. *See* Op. at 105. Moreover, the recent dismissal on remand does not at all rest on a construction of the statute.

[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;[12] *see also* Minn. Stat. § 203B.081 (providing that absentee voting for the 2018 mid-term election begins 46 days before the election (i.e., on September 21)).

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);[13] *Wise v. Lipscomb*, 434 U.S. 1329 (1977) (Powell, J., Circuit

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12 https://www.eac.gov/assets/1/6/2016_EAVS_Comprehensive_Report.pdf.

13 *See also* Memorandum Regarding Remedies from the Common Cause and League of Women Voters Plaintiffs at 4, *Common Cause v. Rucho*, Civ. A. No. 1:16-cv-1026 (M.D.N.C. Aug. 31, 2018), at https://www.commoncause.org/wp-content/uploads/2018/08/PLDG-Common-Cause-v.-Rucho-August-31-2018-Brief-re-Remedies.pdf (expressing concern that adopting new electoral rules on September 17, 2018 and ratifying them shortly thereafter would

Justice) (granting stay where lower court action upended decades-long elections procedures). Indeed, this 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), and appeared to delay issuing the *Citizens United* decision until 36 hours after the nationally significant Massachusetts special Senate election in January 2010, *see* Paul Kane and Karl Vick, *Republican Brown Beats Coakley in Special Senate Election in Massachusetts*, Washington Post (Jan. 20, 2010).

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

inhibit "voters [from being] able to be educated about the different candidates and their positions").

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 court 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 L). 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[14] *with* FEC Form 9 filings, Jan. 1, 2012, through Mar. 30, 2012,[15] and Sep. 18, 2012, through Nov. 6, 2012.[16]

The district court here 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 district court's order otherwise "declared [the regulation] to be invalid," Order at 2 (Dkt. No. 42), 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).[17] Moreover, after the 45-day stay ends, a quarterly FEC disclosure report will be due on October 15 that covers independent expenditures

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

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

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

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

made 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),[18] CREW's Executive Director has threatened legal action against those who rely upon the existing FEC 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).[19] 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. And where "as here, prosecutions are actually threatened, this challenge . . . will

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

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

establish the threat of irreparable injury." *Dombrowski v. Pfister*, 380 U.S. 479, 490 (1965).

As to Crossroads specifically, the organization's president attests that Crossroads "is at present deterred and constrained from sponsoring any independent expenditures for the remainder of this election cycle" as a result of this Court's decision. Law Aff. ¶ 10 (Addendum L). Mr. Law cites CREW's threats to use the decision to file complaints against groups making independent expenditures that do not report their donors pursuant to the decision as an additional deterrent on Crossroads' speech. *Id.* ¶ 11. The practical constraint imposed on Crossroads' ability to make independent expenditures as a result of the district court's decision is informed by its experience in *Van Hollen I*, when a similar decision also inhibited Crossroads' and others' speech. *Id.* ¶ 12. So Crossroads too, like the public at large, is being irreparably harmed by the district court's decision.

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. Order of Aug. 26, 2008) (Dkt. No. 45), but it denies the public (including Crossroads) the standard notice and comment procedures safeguarded under the Administrative Procedure Act 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).[20]

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,

[20] Remarkably, CREW even claims "there is no need or opportunity for either FEC rulemaking or public comment" on the independent expenditure reporting requirement at issue here at all. Opp. at 14. But this directly conflicts with general administrative law principles, specific congressional intent when Congress directed the FEC to conduct a rulemaking in 1980, and the district court's 45-day stay and opinion, the latter of which specifically contemplated the need to resolve some specific reporting scenarios in an interim rulemaking.

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 forces Crossroads and other similarly situated organizations to refrain from core First Amendment political speech that has long been statutorily permitted, or run the risk of having to report donors under either subsection 30104(c)(1) or (c)(2)(C), donors who would otherwise reasonably expect that their giving would remain private – and even though an appellate court 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). *See also San Diegans for Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301, 1303–04 (2006) (Kennedy, J., in chambers) (granting stay pending appeal where subsequent developments may moot case). 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 publicly 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 public 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. There Is a Reasonable Probability the Court Would Grant Certiorari.

This Court has a rich history of adjudicating campaign finance and FEC-related matters.[21] Moreover, individual Justices have taken a particular interest in

[21] *See, e.g.*, *McCutcheon v. FEC*, 572 U.S. 185 (2014); *Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011); *Citizens United v. FEC*, 558 U.S. 310 (2010); *Davis v. FEC*, 554 U.S. 724 (2008); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *Randall v. Sorrell*, 548 U.S. 230 (2006); *McConnell v. FEC*, 540 U.S. 93 (2003); *FEC v. Beaumont*, 539 U.S. 162 (2003); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604

some of the issues generally presented in this case, such as: (a) the interplay between regulated "contributions" and "expenditures," *see, e.g.*, *McCutcheon v. FEC*, 572 U.S. 185, 228 (2014) (Thomas, J., concurring); (b) campaign finance reporting requirements, *see, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 480-85 (2010) (Thomas, J., concurring in part and dissenting in part); (c) the right to privacy while engaging in political speech, *see, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 359-70 (1995) (Thomas, J., concurring); (d) to what extent "courts [should] respect that leeway which Congress intended the agencies to have," *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1364 (2018) (Breyer, J., dissenting); and (e) the making of political contributions as a "basic constitutional freedom" that has "a significant relationship to the right to speak and associate," *Riddle v. Hickenlooper*, 742 F.3d 922, 931 (10th Cir. 2014) (Gorsuch, J., concurring).

Judges on the Court of Appeals for the D.C. Circuit have expressed similar interests in the right of non-profit groups to raise and spend money on independent expenditures. *See, e.g.*, *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009) (Kavanaugh, J.). Judges Brown, Sentelle, and Randolph recently asked this Court

(1996); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182 (1981); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1976).

to provide clarity in drawing lines between free speech and donor reporting, observing:

> The arc of campaign finance law has been ambivalent, bending toward speech and disclosure. Indeed what has made this area of election law so challenging is that these two values exist in unmistakable tension. Disclosure chills speech. Speech without disclosure risks corruption. And the Supreme Court's track record of expanding who may speak while simultaneously blessing robust disclosure rules has set these two values on an ineluctable collision course. . . .
>
> The Supreme Court has vigorously protected the public's right to speak anonymously, even recognizing that anonymous speech has "played an important role in the progress of mankind." *Talley v. California*, 362 U.S. 60, 64 (1960). . . . And yet, the Court has sanctioned startling intrusions on this right to anonymity by upholding mandatory disclosure requirements.
>
> As our discussion of the FEC's rule has shown, the Supreme Court's campaign finance jurisprudence subsists, for now, on a fragile arrangement that treats speech, a constitutional right, and transparency, an extra-constitutional value, as equivalents. But "the centre cannot hold." William Butler Yeats, The Second Coming (1919).

Van Hollen II, 811 F.3d at 488, 499-501. *Cf. McDaniel v. Sanchez*, 448 U.S. 1318, 1322 (1980) (Powell, J., Circuit justice) (granting stay "in view of the ambiguity of our precedents," which led to "a 'reasonable probability' that four Members of the Court will consider the issue sufficiently meritorious – and the need for clarification sufficiently evident – to warrant a grant of certiorari").

D. A Stay Will Not Meaningfully 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. *See, e.g.*, *U.S.P.S. v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 481 U.S. 1301, 1303 (1987) (Rehnquist, Circuit Justice) (granting stay, in part, after finding party could not claim "irreparable harm" where status quo had existed for at least three years); *Lucas v. Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, Circuit Justice) (discounting harm where such "burdens can fairly be ascribed to the [non-movant's] own failure" to timely raise issue with agency). 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.[22]

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

[22] http://classic.fec.gov/pdf/nprm/citizensunited/van_hollen.pdf.

this fall's mid-term 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, appellate courts have 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 of United States v. SEC*, 443 F.3d 890, 909 (D.C. Cir. 2006). *See also Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (observing that "with respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the courts decree"). The district court's decision contravenes these important principles.

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.

Dated: September 14, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 14, 2018, one copy of Crossroads' EMERGENCY APPLICATION TO CHIEF JUSTICE ROBERTS, CIRCUIT JUSTICE FOR THE DISTRICT OF COLUMBIA CIRCUIT, FOR A STAY PENDING APPEAL, along with the supporting documents, was sent electronically and hand-delivered to each of the following:

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