NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 18-5261

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

CROSSROADS GRASSROOTS POLICY STRATEGIES,

Intervenor Defendant-Appellant,

v.

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON & NICHOLAS MEZLAK,

Plaintiffs-Appellees,

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

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

PLAINTIFFS-APPELLEES' MOTION TO DISMISS FOR LACK OF JURISDICTION

Plaintiffs-Appellees Citizens for Responsibility and Ethics in Washington and Nicholas Mezlak (together, "CREW") respectfully move to dismiss this appeal

for lack of jurisdiction because Intervenor Defendant-Appellant Crossroads Grassroots Policy Strategies ("Crossroads") lacks standing.

To establish standing to appeal, an appellant must demonstrate a cognizable injury caused by the district court's order. Here, the appealed order vacated a Federal Election Commission ("FEC") regulation governing reporting requirements for "independent expenditures." Crossroads, however, has not made an independent expenditure since ***2014***, nor has it offered evidence of any plans to make an independent expenditure. This Court noted as much in holding that Crossroads failed to show any "actual and not theoretical" injury warranting a stay pending appeal. *See* Order at 5-6, *CREW v. FEC*, No. 18-5261 (D.C. Cir. Sept. 15, 2018) [ECF No. 1750838] ("Stay Order") (holding that Crossroads failed to show irreparable injury because, among other things, it did not "identify any actual independent expenditures it has made this quarter or had intended to make in the coming months that are deterred by the order.").

Crossroads's inability to muster such evidence is not surprising, since public reporting indicates that, starting in 2015, it effectively terminated its political operations and shifted activities to a new nonprofit. Crossroads does not deny this reporting, but insists that it "'would like to maintain the ability to continue making independent expenditures[,]' and feels 'deterred and constrained' from doing so." Stay Order at 6. Yet Crossroads's mere desire to keep the regulation in effect,

based on the unsubstantiated possibility that it might make an independent expenditure someday, is not a concrete Article III injury. Moreover, as this Court has explained, "[n]othing in the district court's order prohibits *the making of* independent expenditures"; it "only affects quarterly reporting." *Id.* (emphasis added). Because Crossroads cannot demonstrate a cognizable injury flowing from the district court's order, it lacks standing to appeal. This appeal should therefore be dismissed for lack of jurisdiction.

BACKGROUND

This Court has already set out the pertinent background in its order denying Crossroads's motion for a stay pending appeal. Stay Order at 1-3. Only a brief recitation is necessary here.

In 2012, CREW filed an administrative complaint with the FEC alleging that Crossroads violated the Federal Election Campaign Act ("FECA") by failing to report contributions it received for independent expenditures supporting a candidate in a federal election. *Id.* at 2. CREW's allegations brought to light a "discrepancy" between the scope of disclosure required by FECA, 52 U.S.C. §§ 30104(c)(1), (c)(2)(C), and an FEC regulation, 11 C.F.R. § 109.10(e)(1)(vi)—namely, the statute imposes broader disclosure obligations than the regulation. *Id.* at 1-2. Although the FEC Office of General Counsel acknowledged this discrepancy, the Commission ultimately dismissed CREW's complaint in reliance

on the regulation. *Id.* at 3. CREW then challenged the FEC's decision in district court, asserting both that the dismissal was unlawful under FECA, and that the FEC regulation was facially invalid and thus should be set aside under the Administrative Procedure Act ("APA"). *Id.*

The district court granted Crossroads's unopposed motion to intervene below. At that time, Crossroads asserted it had standing to intervene because if CREW were to succeed on its FECA claim, Crossroads could be subject to "further enforcement proceedings before the FEC," and "much greater disclosure requirements" for its 2012 independent expenditures. Addendum 1 (Crossroads Motion to Intervene) at 6-7.

By order dated August 3, 2018, the district court granted summary judgment for CREW, holding that the FEC regulation was invalid and that the FEC's dismissal of CREW's complaint was contrary to law. *CREW v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018). The district court stayed its order vacating the FEC regulation for 45 days to allow the agency, if it chose, to promulgate interim regulations that comport with 52 U.S.C. § 30104(c). *Id.* at 423. With respect to CREW's FECA claim, the district court remanded the action to the FEC for reconsideration of CREW's administrative complaint. *Id.* Crossroads noticed its appeal of the district court's order on August 24, 2018. The FEC did not appeal.

On remand, the FEC again dismissed CREW's complaint and voted unanimously to close its file in the matter, effective August 28, 2018. Stay Order at 3; FEC Response to Crossroads's Motion to Stay Pending Appeal at 1-2, *CREW v. FEC*, No. 18-5261 (D.C. Cir. Sept. 7, 2018) [ECF No. 1749558]. The parties agree that this mooted Crossroads's appeal of the district court order insofar as it concerns the propriety of the FEC's initial dismissal of CREW's complaint. Stay Order at 3; *see also Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1353 (D.C. Cir. 2014) (recognizing that agency's issuance of new explanation for action would moot challenge to prior explanation). Thus, the only remaining claim on appeal is CREW's APA challenge to the validity of the FEC regulation.

Crossroads sought to stay the district court's order pending appeal, but that request was rejected by the district court, this Court, and the Supreme Court. *See* Minute Order, *CREW v. FEC*, No. 16-cv-259-BAH (D.D.C. Sept. 15, 2018); Stay Order at 1; Order, *Crossroads v. CREW*, No. 18A274 (U.S. Sept. 18, 2018). In its order denying a stay, this Court held that "Crossroads has not established a likelihood of success on the merits" because "the regulation squeezes the Act's explicit disclosure obligation beyond what the plain statutory text can bear." Stay Order at 3. "In particular," the Court explained, "the regulation shrinks the statutory duty to disclose contributions intended for 'an expenditure' down to only those donations intended to support 'the' specific 'reported

independent expenditure,'" and thus "empties [52 U.S.C. § 30104(c)(1)'s] disclosure obligation of a large portion of its intended operation." *Id.* at 3-4.

Of particular relevance here, this Court also held that Crossroads failed to show that the district court order causes it any injury that is "actual and not theoretical," or that "rise[s] beyond the speculative level." Stay Order at 5, 6. The Court noted that Crossroads offered no "briefing or argument to establish that an [alleged] intrusion on private donors' implicit understanding [of disclosure requirements] constitutes an irreparable injury to Crossroads itself." *Id.* at 6. Nor did "Crossroads identify any actual independent expenditures it has made this quarter or had intended to make in the coming months that are deterred by the order." *Id*. While the Court acknowledged Crossroads's position that it "'would like to maintain the ability to continue making independent expenditures[,]' and feels 'deterred and constrained' from doing so," the Court explained that "[n]othing in the district court's order prohibits the making of independent expenditures." *Id*. Rather, it "only affects quarterly reporting." *Id.*

Crossroads has not reported an independent expenditure since October 31, 2014. *See* FEC, Independent Expenditures (last visited Oct. 5, 2018), https://bit.ly/2N5Xjyc. This may be explained by the fact that Crossroads, starting in 2015, effectively terminated its political operations and shifted activities to a new nonprofit called "One Nation." *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; Josh Israel, *Karl Rove's Outside Spending Groups Migrate To New Dark Money Outfit*, THINKPROGRESS (Aug. 11, 2016), https://bit.ly/2Ccvy0z.

ARGUMENT

An appellant has the "burden to demonstrate standing to appeal the judgment." *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013). This requires the appellant to show "an injury caused by the judgment." *NRDC v. Pena*, 147 F.3d 1012, 1018 (D.C. Cir. 1998); *see Liberty Mut. Ins. Co. v. Travelers Indem. Co.*, 78 F.3d 639, 642 (D.C. Cir. 1996) (appellant must "show an adverse effect of the judgment"). And here, Crossroads's mere "status as an intervenor below . . . does not confer standing . . . [to] appeal." *Diamond v. Charles*, 476 U.S. 54, 68 (1986). Rather, "an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Id.*; *accord Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997). This means that Crossroads must show "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). And because Crossroads here is seeking a form of "pre-enforcement relief" with respect to the FECA, it must

demonstrate "'an intention to engage in a course of conduct . . . proscribed by [the] statute,' under which 'there exists a credible threat of [enforcement].'" *Matthew A. Goldstein, PLLC v. U.S. Dep't of State*, 851 F.3d 1, 4-5 (D.C. Cir. 2017) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (appellant seeking prospective relief must show "threatened injury [is] . . . certainly impending"; mere "'[a]llegations of possible future injury' are not sufficient").

As this Court has already found, Crossroads has failed to show that the district court's order causes it any injury that is "actual and not theoretical," or that "rise[s] beyond the speculative level." Stay Order at 5, 6. Because the appealed order affects reporting requirements for independent expenditures, Crossroads needs to show, at minimum, actual or planned independent expenditures that are deterred by the district court's order. It has failed to do that. *See* Stay Order at 6 (finding that Crossroads has not "identif[ied] any actual independent expenditures it has made this quarter or had intended to make in the coming months that are deterred by the order"). Indeed, as noted, Crossroads has not made an independent expenditure since 2014, likely due to its transfer of activities to a different nonprofit. Crossroads can hardly claim to be "adversely affected" by an order concerning disclosure requirements for independent expenditures when it has not made such an expenditure in four years and has no concrete plans to do so. *See*

Goldstein, 851 F.3d at 4-5 (plaintiff lacked standing where it failed to demonstrate an intent to engage in "some desired conduct . . . that might trigger an enforcement action in the first place," and offered "only vague and general descriptions of [intended] . . . activities"); *Russell v. Burris*, 146 F.3d 563, 567 (8th Cir. 1998) (plaintiffs lacked standing to challenge a campaign finance law where they "indicated neither that they would contribute to a specific independent expenditure committee nor that, but for the limitations of [the law], they would form an independent expenditure committee").[1]

Crossroads has provided an affidavit stating that it would "like to maintain the ability to continue making independent expenditures," and that it feels "deterred and constrained" from doing so. Addendum 2 (Law Affidavit) ¶ 10. But Crossroads's mere "desire" to retain the ability to engage in an activity is plainly "insufficient to satisfy the requirement of imminent injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). A party's "'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of 'actual or imminent' injury that [the Supreme Court's] cases require.'" *Id*. And Crossroads offers even less than that

[1] Nor can Crossroads predicate standing on the prospect of FEC enforcement arising from any of its *past* independent expenditures, since the FEC dismissed CREW's complaint on remand and that aspect of Crossroads's appeal is thus moot. *See* Stay Order at 3; *Goldstein*, 851 F.3d at 5 (no standing where there is "no material risk of enforcement" by agency).

here—it fails even to commit to "some day" making an independent expenditure, instead stating only a bare desire to "maintain the ability" to make such expenditures without complying with the FECA's disclosure obligations. This falls far short of a concrete injury.

Moreover, as this Court has explained, the district court's order does not actually impede Crossroads's "ability" to make independent expenditures: "Nothing in the district court's order prohibits *the making of* independent expenditures. The order only affects quarterly reporting." Stay Order at 6 (emphasis added). Such "disclosure requirements" do not cause any injury, since they do not "'prevent [anyone] from speaking.'" *Van Hollen v. FEC*, Nos. 12-5117, 12-5118, WL 1758569, at *3 (D.C. Cir. May 14, 2012) (Rogers, J.) (quoting *Citizens United v. FEC*, 558 U.S. 310, 370, 366 (2010)). And "Crossroads has made no effort" to offer "actual evidence" that its contributors will "'face threats or reprisals'" if their identities are disclosed, nor has it offered "any…argument to establish that an intrusion" on its contributors' interests "constitutes an . . . injury to Crossroads itself." Stay Order at 5-6 (quoting *Citizens United*, 558 at 370); *see also Van Hollen*, 2012 WL 1758569, at *3.

At bottom, Crossroads fails to show that vacatur of the FEC regulation affects it in any meaningful way; all it has shown is that it would prefer for the regulation to remain in place. But "Article III requires more than a desire to

vindicate value interests." *Diamond*, 476 U.S. at 66. Crossroads's mere "'abstract concern'" in the vacated regulation "'does not substitute for the concrete injury required by Art. III.'" *Id.* at 67; *see also* Stay Order at 6 ("[T]he irreparable injuries asserted [by Crossroads] fail to rise beyond the speculative level."). Crossroads thus lacks standing to appeal the district court's order.

CONCLUSION

This appeal should be dismissed for lack of jurisdiction.

Dated: October 15, 2018

Respectfully submitted,

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Dated: October 15, 2018

/s/ Nikhel Sus
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I hereby certify that on October 15, 2018, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

/s/ Nikhel S. Sus
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