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,

Defendant-Appellant,

v.

Citizens for Responsibility and Ethics in Washington and Nicholas Mezlak,[1]

Plaintiffs-Appellees,

Federal Election Commission,

Defendant-Appellee.

DEFENDANT-APPELLANT CROSSROADS GRASSROOTS POLICY STRATEGIES' OPPOSITION TO PLAINTIFFS-APPELLEES' MOTION TO DISMISS FOR LACK OF JURISDICTION

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[1] *Hereinafter*, "CREW."

Crossroads Grassroots Policy Strategies ("Crossroads") respectfully opposes CREW's motion to dismiss this appeal. CREW alleges Crossroads' standing – which Crossroads indisputably had at the outset of this litigation, and which CREW did not challenge at the time – has evaporated. Although mootness, not standing, is the relevant issue, Crossroads' standing is clear.

From its founding in 2010 as an issue advocacy and grassroots lobbying organization, Crossroads has raised and spent millions of dollars on its program activities, and continues to do so to this day. Although primarily focused on its issue advocacy and grassroots lobbying mission, some of Crossroads' spending has been in the form of independent expenditures. During the 2010, 2012, and 2014 election cycles, Crossroads made substantial independent expenditures, relying on a long-standing Federal Election Commission ("Commission") regulation that protected the privacy of Crossroads and its donors, and which the district court recently invalidated.

Early in the 2016 election cycle, CREW attacked the validity of the Commission regulation, filing a complaint in the district court which gave rise to the decision on appeal. Crossroads continued its operations but shifted its spending away from independent expenditures because of the legal cloud the CREW litigation created. If this appeal removes that cloud, Crossroads intends to

resume its independent expenditure activity. Because Crossroads thus has suffered injury that success on appeal will alleviate, it has standing.

But at this point in the dispute, standing is not the relevant question. Standing is judged at the outset and is essential to start the adjudication. Once litigation begins, Article III is satisfied unless changing circumstances render the matter moot. The distinction matters because CREW has the heavy burden of establishing mootness, and CREW has not met and cannot meet that burden. In fact, this Court has held that under the particular circumstances presented here, appeals are not moot.

CREW cites no authority that a party that has a demonstrated track record of relying on an invalidated agency regulation and a desire and ability to continue doing so if the regulation is revived does not satisfy Article III. To the contrary, such litigation is common. And Crossroads is a particularly appropriate litigant here because, due to peculiarities in the Commission's structure and procedures, two of the four sitting commissioners have managed to prevent the agency from defending a regulation that was unanimously adopted by all six commissioners serving at the time.[2]

[2] *See* Chair Caroline C. Hunter and Commissioner Matthew S. Petersen, Statement on *CREW v. FEC*, No. 16-cv-259, *available at* https://bit.ly/2Ey1yil; *see also* Joint App'x Pt. 2 (district court Dkt. No. 38-1), AR1494 (noting the Commission adopted the invalidated regulation by a 6-0 vote).

ARGUMENT

As a preliminary matter, the district court's ruling addressed two intertwined issues. The first was the Commission's dismissal of an administrative complaint CREW filed against Crossroads with the Commission, which alleged that Crossroads had failed to properly identify its donors on its independent expenditure reports. CREW claimed that the Commission's dismissal was contrary to law and used its complaint in the district court to bootstrap a belated challenge to the validity of the Commission's regulation, which Crossroads had relied on for many years in conducting its activities. The district court struck down both the regulation and the Commission's dismissal of the administrative complaint as contrary to law and remanded the dismissal to the Commission. CREW now argues that, because the Commission again dismissed CREW's remanded administrative complaint (albeit on grounds of prosecutorial discretion), Crossroads no longer has a justiciable interest in validating the legality of the regulation.

CREW's argument implies – though CREW never expressly states – that CREW will not further challenge the latest Commission dismissal of the administrative complaint against Crossroads. Assuming that to be so, CREW's instant motion largely turns on whether Crossroads has given up its operational interest in future reliance on the invalidated regulation. It has not.

A) Even If Standing Were the Relevant Analytical Framework, Crossroads Has Standing.

If standing were the correct test – and it is not – Crossroads easily would satisfy it. Invalidation of the Commission regulation inflicts and will inflict injury on Crossroads' First Amendment right of free association that success on this appeal will alleviate.

"[S]tanding consists [of] three elements: First, the plaintiff must have suffered an injury in fact – an invasion of a legally-protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife, et al.*, 504 U.S. 555, 560-61 (1992) (internal citations, quotation marks, ellipses, and brackets omitted).

Seeking to negate any case or controversy, CREW attempts to portray Crossroads as a defunct entity with no probable future activities that will involve the disputed regulation. CREW points to the fact that Crossroads "has not made an independent expenditure since 2014" and alleges that, "starting in 2015,

[Crossroads] effectively terminated its political operations." CREW Mot. at 2 (emphasis added).

The truth is that Crossroads has continued to raise and spend substantial sums in support of its mission, including making grants to other like-minded organizations. Law Aff. (attached hereto as Addendum A) ¶ 3.[3] However, as the supplemental affidavit of Crossroads' President and Chief Executive Officer Steven Law explains, CREW's attack on the legality of the Commission regulation created a cloud of uncertainty leading Crossroads temporarily to modify how it spends its money. *Id.* ¶¶ 5-9.

As Mr. Law explains, since its inception in 2010, electoral advocacy has always been an important (although not primary) part of Crossroads' overall issue advocacy and grassroots lobbying activities. *Id.* ¶ 2. In fact, Crossroads' past independent expenditure activity was the exclusive factual basis for CREW's underlying administrative and district court complaints in this matter. And CREW's district court complaint emphasized the "vast amounts" that "organizations like Crossroads" spend on electoral advocacy. Compl. (district court Dkt. No. 1) ¶ 12. Crossroads altered its practices only because of a cloud of

[3] Grant-making also has been an important part of Crossroads' activities historically. *See*, *e.g.*, Crossroads 2014 IRS Form 990, Sched. I, *available at* http://www.guidestar.org/FinDocuments/2014/272/753/2014-272753378-0c088a17-9O.pdf.

uncertainty that this appeal can alleviate; and if it is alleviated, Crossroads intends to resume its historical practice. Law Aff. ¶¶ 9-10; *see also* Decl. of Steven Law Supporting Crossroads' Mot. to Intervene (district court Dkt. No. 8-4) (attached hereto as Addendum B) ¶ 2.d. ("Crossroads [] has a strong practical interest in the continuing force and validity of . . . the FEC's independent expenditure reporting regulation that Plaintiffs seek to invalidate . . . [which] provide[s] reassurance that Crossroads[']s continuation of similar activities in the future will not be sanctioned").

As Mr. Law explains, Crossroads is unwilling to risk its and its donors' constitutional right to associational privacy by making independent expenditures in light of the vague and overbroad donor identification requirements articulated in the district court's ruling, nor should it be forced to do so. *See* Law Aff. ¶ 7.

Given Crossroads' ample history of making independent expenditures prior to this litigation, which CREW does not dispute, the present and ongoing compelled alteration in Crossroads' preferred means of advocacy, as well as Mr. Law's emphatic sworn testimony that Crossroads intends to resume making independent expenditures upon its successful appeal of the district court's ruling, Law Aff. ¶¶ 2, 9-10, Crossroads has a "concrete," "particularized," "actual," non-"conjectural," and non-"hypothetical" interest in the continued appeal of this case

that gives it standing, *see* CREW Mot. at 7 (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016)).

Moreover, Crossroads continues to face liability risk from the other independent expenditures that it made and reported during the 2014 election cycle as a direct result of the district court's ruling. *See* Law Aff. ¶ 2. CREW's underlying administrative complaint did not address any of Crossroads' 2014 independent expenditures, which are still within the statute of limitations. *See* 28 U.S.C. § 2462. Like the independent expenditure reports at issue in this litigation, Crossroads did not identify any donors on its reports for its 2014 independent expenditures because the invalidated Commission regulation did not require it to do so. Crossroads has vigorously maintained in this litigation that its past reliance on the invalidated regulation provides it with an absolute defense against any sanctions under the statute, 52 U.S.C. § 30111(e), and its constitutional right to due process. Nonetheless, the district court held that Crossroads' reliance on the regulation merely "may have a bearing on any accrued penalties," Memo. Op. (Aug. 3, 2018) at 47, and "as the plaintiffs point out," Crossroads could still be forced "to remedy its violation by disclosing its contributors now," *id*. at 48. As Mr. Law has explained, the "remedy" the district court suggests is as serious a punishment as any other sanction for a donor-funded and privacy-oriented organization like Crossroads. *See* Law Aff. ¶ 7.

In short, Crossroads is still subject to the risk of enforcement, penalties, and sanctions for its prior independent expenditures as a direct result of the district court's ruling on appeal, and therefore Crossroads also has continued standing on this basis.

B) CREW's "Standing" Challenge Actually Deals With "Mootness," an Issue on Which CREW Bears a Heavy Burden.

Although Crossroads easily satisfies the test of standing, CREW's motion actually turns on Article III's less demanding mootness standard. Although the two doctrines are cousins, they "differ in critical respects." *Loughlin v. U.S.*, 393 F.3d 155, 169 (D.C. Cir. 2004). Standing is assessed at the outset of litigation. "In contrast, by the time mootness is an issue, the case has been brought and litigated, often (as here) for years. In other words, '[m]ootness doctrine encompasses the circumstances that destroy the justiciability of a suit previously suitable for determination.'" *Loughlin*, 393 F.3d at 169 (quoting 13A Charles Alan Wright et al., Federal Practice & Procedure § 3533 (2d ed. 1984)) (brackets in the original).

CREW does not dispute that Crossroads had an Article III interest when it intervened, and which intervention CREW did not oppose at the time. *See* Crossroads' Mot. to Intervene (district court Dkt. No. 8) (attached as Addendum 1 of CREW Mot.); Decl. of Steven Law Supporting Crossroads' Mot. to Intervene (district court Dkt. No. 8-4) (attached hereto as Addendum B). Instead, CREW's present position is that subsequent "'events have so transpired that the decision

will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.'" *Clarke v. U.S.*, 915 F.2d 699, 701 (D.C. Cir. 1990) (*en banc*) (quoting *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 575 (D.C. Cir. 1990)). This is a question of mootness. *Id.*

The difference is that an "initial 'heavy burden' of establishing mootness lies with the party asserting a case is moot." *Honeywell Int'l., Inc. v. Nuclear Regulatory Comm'n*, 628 F.3d 568, 576 (D.C. Cir. 2010) (quoting *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 459 (D.C. Cir. 1998)); *see also Kifafi v. Hilton Hotels Ret. Plan*, 701 F.3d 718, 724 (D.C. Cir. 2012) (same). A case is not moot if a court's decision merely will "have a more-than-speculative chance of affecting [the non-moving party] in the future." *Clarke*, 915 F.2d at 701 (emphasis added); *see also Kifafi*, 701 F.3d at 724 (same). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot," *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016) (emphasis added) (quoting *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)), and a more-than-"zero" chance that something will happen and "an explicit assertion of intent" to engage in conduct will defeat a claim of mootness, *Clarke*, 915 F.2d at 702. In other words, a case is not moot unless it is "absolutely clear" that the conduct at issue "could not reasonably be expected" to occur. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 193 (2000).

This distinction makes sense. Where the question is whether to initiate a proceeding, a substantial interest should be shown. But to "abandon the case at an advanced stage may prove more wasteful than frugal," and courts should find a case moot only where "one or both of the parties plainly lack a continuing interest, as when the parties have settled or a plaintiff pursuing a nonsurviving claim has died." *Id.* at 191-92 (emphasis added).

C) CREW Did Not and Cannot Carry Its Heavy Burden of Establishing Mootness.

As discussed above, Crossroads has stated unequivocally its intention to resume its independent expenditure activities if it succeeds in this appeal. Crossroads' "uncontroverted intention to operate in the future in ways that would violate [the law as the district court has articulated it] keeps the controversy alive." *Unity08 v. FEC*, 596 F.3d 861, 864 (D.C. Cir. 2010). In *Unity08*, after the Commission determined that the appellant would be subject to unwanted regulation if it continued to engage in its activities, the appellant ceased its activities while it litigated the Commission's determination and appealed an adverse district court ruling. *Id.* On the basis of a sworn declaration by the appellant's chairman "unambiguously stating a conditional intent to resume activities in a future election cycle if the group wins its lawsuit against the Commission," as well as the appellant's statement "blam[in]g the Commission's ruling at issue here for 'forcing [appellant] to scale back – not cease – its

operations' and reiterat[ing] that the group is 'not closing its doors . . . if (when) it wins its case' in court," this Court held that the case was not moot. *Id.* (brackets in the original omitted); *see also Gordon v. Holder*, 721 F.3d 638, 643 (D.C. Cir. 2013) ("[t]he closure of [appellant's] business has not mooted his appeal. [Appellant's] wife submitted a sworn declaration that she and [appellant] intend to reopen their business if they prevail [in their appeal], and that they remain capable of doing so . . . [Appellant's] 'uncontroverted intention to operate in the future in ways that would violate' the [law at issue] 'keeps the controversy alive.'") (quoting *Unity08*, 596 F.3d at 864). Just as the pause in appellants' activities in *Unity08* and *Gordon* did not moot those cases, Crossroads' pause in its independent expenditure activities while it defends against CREW's challenge to the Commission's regulation does not moot Crossroads' appeal of the district court decision in this litigation.

CREW also claims this Court denied Crossroads' interest when it refused to grant a stay to preserve the Commission's regulation pending appeal. But to obtain a stay, Crossroads was required to show that it faced substantial and irreparable injury "of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (internal brackets, quotation marks, and citation omitted); *see also* D.C. Cir. R. 8(a)(1). That is a much greater interest than is necessary to avoid mootness.

This Court's conclusion that Crossroads had not shown it would suffer such dramatic injury in the immediate future does not deny Crossroads' broader interests in this dispute.

And even if standing were the proper analytical framework here (which it is not), a court's denial of an appellant's motion to stay also is not dispositive of standing, as CREW attempts to suggest. Were this so, most appellants whose motions for a stay pending appeal are denied also would necessarily have their appeal dismissed for lack of standing. Surely this cannot be the case. *See*, *e.g.*, *Van Hollen v. FEC*, No. 12-5117, 2012 WL 1758569, at *3 (D.C. Cir. May 14, 2012) (denying appellants' motion to stay pending appeal and rejecting their irreparable harm claim); *compare id. with Van Hollen v. FEC*, 811 F.3d 486 (D.C. Cir. 2016) (deciding case in appellants' favor on the merits).

CREW also seeks to diminish the privacy interests of Crossroads and its donors, asserting that the compelled donor disclosure at issue does not actually amount to a First Amendment injury. *See* CREW Mot. at 10. Of course Article III is not limited to disputes involving a deprivation of constitutional rights, but in any event, CREW considerably overstates its authorities. This Court has not held that "'disclosure requirements' do not cause any injury," as CREW erroneously asserts. *Id.* (citing *Van Hollen*, 2012 WL 1758569 at *3). To the contrary, as this Court and the Supreme Court have consistently held, "[d]isclosure chills speech." *Van*

Hollen, 811 F.3d 486 at 488; *see also Citizens United v. FEC*, 558 U.S. 310, 366 (2010) ("disclosure requirements may burden the ability to speak") (citing *Buckley v. Valeo*, 424 U.S. 1, 64 (1976)).[4] Relatedly, CREW's assertion that "[n]othing in the district court's order prohibits" independent expenditures is a strawman argument. CREW Mot. at 10 (emphasis added). The question is not whether the decision on appeal "prohibits" speech, but rather whether it inhibits speech, which the decision most certainly does.

But regardless of whether Crossroads' and its donors' privacy interests are of constitutional dimension, they clearly are of substantial importance to Crossroads. Law Aff. ¶ 7. And the statute's complex provisions that require only certain identification of donors under certain conditions demonstrate that such privacy is well within the zone of interests the statute seeks to protect. *See Van Hollen*, 811 F.3d at 494-95 ("[t]hat [the statute] seeks more robust disclosure does not mean Congress wasn't also concerned with, say, the conflicting privacy interests that hang in the balance . . . [the statute] does not require disclosure at all costs; it limits disclosure in a number of ways.").

[4] In fact, Crossroads' First Amendment right of free association and its interest in maintaining its and its donors' privacy is arguably more compelling and important than CREW's stated interest in obtaining information about Crossroads' donors. *Van Hollen*, 811 F.3d at 501 (the "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.'") (quoting William Butler Yeats, THE SECOND COMING (1919)).

D) CREW's Standing Authorities Do Not Apply Here.

CREW cites a number of cases on standing, but none of these supports its underlying premise that standing is the proper framework for considering Crossroads' interests on appeal. In fact, they suggest the opposite.

To begin with, several of the authorities CREW cites addressed whether the parties had standing at the outset of the litigation in district court. *See Spokeo*, 136 S. Ct. at 1544; *Matthew A. Goldstein, PLLC v. U.S. Dept. of State*, 851 F.3d 1, 2 (D.C. Cir. 2017); *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013); *Russell v. Burris*, 146 F.3d 563, 566-67 (8th Cir. 1998); *Summers v. Earth Island Inst.*, 555 U.S. 488, 491-92 (2009). However, as discussed above, there was never any dispute that Crossroads had standing to intervene at the outset of this litigation, and therefore these authorities are inapposite.

CREW also cites various authorities that addressed the standing of private parties defending state laws where the parties' purported interests derived not from the potential enforcement of those laws against them, but rather from their interest in having the government enforce those laws generally. *See Hollingsworth v. Perry*, 570 U.S. 693, 702 (2013); *Diamond v. Charles*, 476 U.S. 54, 57-58, 64-68 (1986); *Arizonans for Official English v. Ariz.*, 117 S. Ct. 1055, 1067-68 (1997). Here, by contrast, Crossroads itself would be subject to enforcement of the

underlying statute as the district court has construed it if Crossroads were to continue making independent expenditures, as it clearly wishes to do.[5]

CONCLUSION

For all of the reasons discussed above, CREW's motion to dismiss should be denied.

Dated: October 25, 2018

Respectfully submitted,

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[5] The other authorities that CREW cites both involved fact-specific standing issues that also are irrelevant here. *See Natural Resources Defense Council v. Pena*, 147 F.3d 1012 (D.C. Cir. 1998); *Liberty Mut. Ins. Co. v. Travelers Indem. Co.*, 78 F.3d 639 (D.C. Cir. 1996).

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/s/ Thomas W. Kirby
Thomas W. Kirby

CERTIFICATE OF SERVICE

I certify that on October 25, 2018, one copy of the Defendant/Appellant's Opposition to Plaintiffs-Appellees' Motion to Dismiss for Lack of Jurisdiction was filed via the Court's CM/ECF system, thereby causing it to be served electronically upon the following counsel of record:

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