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' REPLY IN SUPPORT OF ITS MOTION TO DISMISS FOR LACK OF JURISDICTION

Citizens for Responsibility and Ethics in Washington and Nicholas Mezlak (together, "CREW") submit this reply in support of their motion to dismiss the appeal of Crossroads Grassroots Policy Strategies ("Crossroads").

Crossroads's opposition does not dispute the central facts supporting CREW's motion—namely, that Crossroads has not made an independent expenditure ("IE") since 2014; that it transferred its IE spending to a different nonprofit, One Nation, in 2015; and that it has no concrete plans to make future IEs. Rather than disputing these points, Crossroads claims that it is deterred from making IEs by the "legal cloud" created by this litigation. Opp. 1. But Crossroads's newly-raised claim of subjective chill is thoroughly debunked by the historical record, which shows that legal action against Crossroads under the Federal Election Commission Act ("FECA") has *not* deterred either Crossroads or One Nation from spending millions on IEs. The record further shows that Crossroads's lack of IEs since 2014 is attributable not to fear of litigation, but to its transfer of political spending to One Nation in 2015.

Even if Crossroads's fears were genuine, its mere "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013), which Crossroads has not demonstrated.

Crossroads also conflates the concepts of standing *to appeal* with standing to *bring suit* and the doctrine of mootness, and cites inapposite case law, all of which confirms its inability to demonstrate a cognizable injury caused by the district court's order.

ARGUMENT

I. Standing To Appeal, Not Mootness, Is The Applicable Doctrine Here

Crossroads asserts that mootness, not standing, is the applicable doctrine here, because "[o]nce litigation begins, Article III is satisfied unless changing circumstances render the matter moot." Opp. 2, 8-10. That is wrong. Standing to appeal is a separate Article III requirement distinct from both standing to bring suit and mootness. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 66-67 (1997) (recognizing that "standing under Article III to pursue appellate review" is distinct from mootness); *NRDC v. Pena*, 147 F.3d 1012, 1018 (D.C. Cir. 1998) (recognizing that "standing to appeal" and "standing to bring suit" are distinct requirements). As this Court has explained, "[t]he most obvious difference between standing to appeal and standing to bring suit is that the focus shifts to injury caused by the judgment rather than injury caused by the underlying facts." *NRDC*, 147 F.3d at 1018. Given this focus, whether Crossroads had standing to intervene below, *see* Opp. 8, 14, is immaterial; what matters is whether, at the time it appealed the district court order, Crossroads suffered an "adverse effect" from that order. *See Transamerica Ins. Co. v. South*, 125 F.3d 392, 396 (7th Cir. 1997) ("[E]ven a party who has properly intervened in a case may not appeal a judgment from which he or she suffers no adverse effects."); *see also Diamond v. Charles*, 476 U.S. 54, 68 (1986). In conducting this inquiry, courts apply traditional Article

III standing concepts, including the requirement of an "injury in fact" that is concrete, particularized, and actual or imminent. *See Hollingsworth v. Perry*, 570 U.S. 693, 705-07 (2013); *Diamond*, 476 U.S. at 68-69.[1]

Thus, despite its efforts to recast the issue as one of mootness on which CREW carries a "heavy burden," Opp. 8-13, CREW's motion to dismiss squarely raises the question of whether Crossroads has standing to appeal—an issue on which *Crossroads* carries the burden, *see Hollingsworth*, 570 U.S. at 715.

II. Crossroads Fails To Show Any Cognizable Injury Caused By The District Court's Order

As explained in CREW's motion, Crossroads has not established any injury caused by the district court's order because, given its lack of recent IEs or concrete plans to make IEs, it has not shown (1) "an intention to engage in a course of conduct . . . proscribed by" the FECA (as interpreted by the district court), for which (2) "there exists a credible threat of enforcement." Mot. 8. Crossroads responds that it ceased making IEs in 2014, and continues to refrain from making

[1] Crossroads argues that CREW's standing cases are inapposite because they concerned whether parties "had standing at the outset of the litigation in district court." Opp. 14. Crossroads is wrong. Although standing to appeal and standing to bring suit focus on different injury-causing events (*i.e.*, the appealed order vs. the defendant's actions), the same standards apply in determining whether the injury alleged is cognizable. *See Hollingsworth*, 570 U.S. at 705-07; *Diamond*, 476 U.S. at 68-69. Crossroads also asserts that CREW's standing cases are inapposite because they involved efforts to have laws enforced. Opp. 14-15. That distinction is immaterial—the standing principles CREW relied upon from these cases are ones of general applicability.

IEs, because it has been deterred by the "legal cloud" of "uncertainty" created by this lawsuit and the district court's order, which risk requiring it to disclose its contributors. Opp. 5-8; Opp. Add. A (Law Aff.) ¶¶ 5-9. Crossroads further asserts that if it prevails and the FEC regulation is reinstated, it intends to make IEs again. Opp. Add. A (Law Aff.) ¶ 10. Crossroads's claims fail for several reasons.

A. The Historical Record Refutes Crossroads's Claim Of Subjective Chill

The historical record thoroughly debunks Crossroads's claim that this lawsuit and the district court's order have "chilled" it from making IEs, as well as its claim that it will make IEs again if the FEC regulation is reinstated. From October 2010 through January 2014, several FEC complaints and lawsuits were brought against Crossroads that equally risked exposing its contributors. These actions, however, did not deter either Crossroads or its successor organization, One Nation, from spending millions on IEs. Meanwhile, Crossroads's lack of IEs since 2014 coincides with its transfer of political spending to One Nation in 2015, strongly indicating that this is the true reason for Crossroads's cessation of IEs.

A timeline of key events, sourced from public records, illustrates the point:

- **Oct. 13, 2010:** Public Citizen files an administrative complaint alleging that Crossroads violated FECA by operating as a "political committee" without complying with governing requirements. If successful, this complaint would require Crossroads to disclose its contributors. *Public Citizen v. Crossroads*, MUR No. 6396, https://bit.ly/2P23N2k.

- **Oct. 13-Oct. 30, 2010:** Undeterred by the threat of having to disclose its contributors, Crossroads spends ***over $8.4 million*** on IEs. FEC, Independent Expenditures, https://bit.ly/2qoefCh.

- **July 27, 2012-Nov. 4, 2012**: Still undeterred, Crossroads spends ***over $70.9 million*** on IEs. FEC, Independent Expenditures, https://bit.ly/2JxGKWS.

- **Nov. 14, 2012:** A week after the November 2012 election, CREW files its administrative complaint in this case. *In re Crossroads*, MUR No. 6696, https://bit.ly/2zhfozG.

- **Jan. 31, 2014:** Public Citizen files suit following the FEC's dismissal of its above-referenced administrative complaint. *Public Citizen v. FEC*, No. 14-cv-148 (D.D.C.), https://bit.ly/2zgetiT.

- **Feb. 1, 2014-Oct. 31, 2014:** Again, undeterred by the pending CREW and Public Citizen complaints, Crossroads spends ***over $26 million*** on IEs. FEC, Independent Expenditures, https://bit.ly/2P2Mkqy.

- **2015:** One Nation announces its formation, noting that Steven Law, president of Crossroads, will also serve as One Nation's president. Press Release, One Nation, https://bit.ly/2zldluo. Crossroads transfers its political spending to One Nation to take advantage of One Nation's tax-exempt status, according to public reporting. Mot. 6-7 (citing articles).[2]

- **Feb. 16, 2016:** CREW files this suit following the FEC's dismissal of its administrative complaint.

- **Feb. 17, 2016-Nov. 1, 2016:** Similarly undeterred, One Nation spends ***over $3.4 million*** on IEs. FEC, Independent Expenditures, https://bit.ly/2EXf6UQ.

The above timeline demonstrates that, as a matter of historical fact, complaints raising legal "cloud[s] of uncertainty" over whether contributors would

[2] CREW cited these articles in it motion, and Crossroads does not dispute them.

need to be disclosed have not deterred Crossroads or One Nation from spending millions on IEs. Rather, Crossroads appears to have stopped making IEs because it transferred its political operations to One Nation.

These facts also undermine Crossroads's claim that it intends to resume making IEs if the FEC regulation is reinstated. If the reason Crossroads stopped making IEs was not CREW's filing of this suit or the district court's order, then it follows that reversal of that order will not lead to Crossroads making IEs again. Nor would there be any need for Crossroads to make IEs again, since One Nation can do that (as it did in 2016). Moreover, even if the regulation is reinstated, Crossroads's purported concerns about contributor disclosure will not be alleviated, since the Public Citizen suit remains pending in district court. *See Public Citizen v. FEC*, No. 14-cv-148 (D.D.C.).

In short, the historical record shows that Crossroads's current claim of self-censorship is nothing more than an after-the-fact rationalization manufactured for purposes of trying to defeat CREW's motion. Crossroads thus fails to show the "'substantial probability' of injury" necessary to demonstrate standing. *See Chamber of Commerce of U.S. v. EPA*, 642 F.3d 192, 201 (D.C. Cir. 2011).

B. Crossroads's Claim Of Subjective Chill Is Insufficient To Demonstrate Standing

Even if it were genuine, Crossroads's claim of subjective "chill" is insufficient to demonstrate standing. To begin, Crossroads cannot claim any injury

based on potential enforcement relating to its *past* conduct. The FEC dismissed CREW's complaint in this case on remand, Mot. 5, and the FEC Office of General Counsel recommended dismissal under the "safe harbor" provision of 52 U.S.C. § 30111(e), based on Crossroads's prior reliance on the now-invalidated regulation. *See* First General Counsel's Report at 15, MUR 6696R, Aug. 24, 2018, https://bit.ly/2OoygTC. CREW has not appealed that dismissal, and the 60-day period for filing such an appeal has elapsed. 52 U.S.C. § 30109(a)(8)(B).

Moreover, Crossroads's claim that it "continues to face liability risk from the other" IEs it made in 2014, Opp. 7, is incorrect. The FEC has issued guidance in response to the district court's decision in this case, stating that "[i]n the interests of fairness" it was exercising its "prosecutorial discretion" *not* to enforce any "change in reporting requirements for those entities that made independent expenditures only before September 18, 2018." FEC Press Release, Oct. 4, 2018, https://bit.ly/2yKmqxt. Given the FEC's actions and the availability of § 30111(e)'s safe harbor, it is exceedingly *unlikely* that Crossroads will face any enforcement action for IEs made before September 2018.

Consequently, Crossroads can only claim that it might be injured by enforcement based on future IEs. But Crossroads's mere subjective fears of future enforcement will not suffice, for "'present deterrence from First Amendment conduct because of the difficulty of determining the application of a regulatory

provision to that conduct' will not 'by itself support standing.'" *Am. Library Ass'n v. Barr*, 956 F.2d 1178, 1193 (D.C. Cir. 1992). Indeed, "[s]ubjective 'chill,' . . . is not enough to constitute injury in fact. Rather, . . . whether plaintiffs have standing . . . depends on how likely it is that the government will attempt to use these provisions against them—that is, on the threat of enforcement—and not on how much the prospect of enforcement worries them." *Id.* The "threat of enforcement" must be "material," "sufficiently imminent," *Matthew A. Goldstein, PLLC v. U.S. Dep't of State*, 851 F.3d 1, 4-5 (D.C. Cir. 2017), and based "on concrete evidence," *Clapper*, 568 U.S. at 420.

Here, Crossroads's fails to provide concrete evidence of likely, imminent enforcement if it makes IEs in the future. Crossroads's affidavit does not claim any risk of enforcement by the FEC. It instead makes only a vague reference to "publicly-expressed threats" by CREW "to file additional lawsuits against nonpolitical organizations" making IEs. Opp. Add. A (Law Aff.) ¶ 7; *see also id* ¶ 9 (referencing unidentified "threat[s] of continued litigation stemming from the district court's decision"). But Crossroads does not identify the specific "threats" by CREW it is referencing, nor does it claim that CREW has directly stated it will sue Crossroads, in particular, if it fails to comply with FECA's disclosure requirements. Rather, Crossroads's affidavit offers only "conclusory assertions" that it is "chilled" due to "uncertainty about" the law and vague, non-specific

threats of litigation, all of which fails to demonstrate standing. *American Library Assoc.*, 956 F.2d at 1192-93; *see also Clapper*, 568 U.S. at 420; *Goldstein*, 851 F.3d at 4-5.

Crossroads also vaguely asserts that if it is "successful in this appeal," it intends "to resume making IEs in furtherance of [its] promotion of center-right policies and legislation." Opp. Add. A (Law Aff.) ¶ 10. But Crossroads's general intent to "resume making IEs" is not the same as an intent to engage in a "'course of conduct . . . *proscribed by*" FECA. *Goldstein*, 851 F.3d at 4-5 (emphasis added). Indeed, the FECA provision at issue does not "proscribe" making IEs; it merely requires entities making IEs to disclose contributors who intended to fund an IE. 52 U.S.C. § 30104(c)(2)(C). Crossroads does not state that it intends to make IEs *without disclosing the information required by FECA*; it states only a generic intent to resume making IEs. That is insufficient. *See Goldstein*, 851 F.3d at 5 (no pre-enforcement injury where appellant offered "only vague and general descriptions of legal activities that [it] intends to undertake," but no indication of conduct violative of the challenged regulations); *Am. Library Ass'n*, 956 F.2d at 1196 (no pre-enforcement injury where plaintiffs denied that their desired actions violated challenged statutes).

Moreover, as explained above, Crossroads's newly-stated desire to make future IEs appears to have been manufactured solely in response to CREW's

motion to dismiss; there is no indication that Crossroads had such an intent at the time it noticed its appeal in this case. Because standing must exist at the commencement of a proceeding, *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 569 nn.4-5 (1992), this too undermines its claim of injury.[3]

III. Crossroads's Case Law Is Inapposite

Crossroads's case law also does not show that it has standing to appeal. *Unity08 v. FEC*, 596 F.3d 861, 864 (D.C. Cir. 2010), and *Gordon v. Holder*, 721 F.3d 638, 643 (D.C. Cir. 2013), both concerned mootness, not standing. This is a significant distinction because, as Crossroads itself points out, standing is more "demanding" than mootness. Opp. 8-10. Moreover, in *Unity08* there was contemporaneous and "uncontroverted" evidence that the plaintiff ceased fundraising operations *because of* the challenged FEC action. 596 F.3d at 864. Here, by contrast, the historical record described above shows that Crossroads stopped making IEs four years *before* the district court's order, that this had nothing to do with CREW's litigation, and that its newfound intent to make future IEs was merely manufactured for purposes of litigation.

[3] Crossroads also argues that it continues to "raise and spend substantial sums in support of its mission, including making grants to other like-minded organizations." Opp. 5. But these activities are not IEs subject to the FECA's reporting requirements, and thus do not qualify as "conduct . . . proscribed by [the] statute," for which "there exists a credible threat of [enforcement]." *Goldstein*, 851 F.3d at 4-5.

Crossroads also challenges CREW's reliance on this Court's order denying a stay pending appeal, claiming that the "irreparable injury" required for a stay is different than the "injury in fact" required by Article III. Opp. 11-12. While the two inquiries are not fully coextensive, they do "overlap." *Taylor v. Resolution Tr. Corp.*, 56 F.3d 1497, 1508 (D.C. Cir. 1995). And this Court's finding that Crossroads has failed to allege any injury that is "actual and not theoretical" or that "rise[s] beyond the speculative level" is directly relevant to the Article III analysis. Mot. 6, 8.

CONCLUSION

This appeal should be dismissed for lack of jurisdiction.

Dated: November 1, 2018

Respectfully submitted,

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Dated: November 1, 2018

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I hereby certify that on November 1, 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.

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