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' REPLY BRIEF CONCERNING ITS EMERGENCY MOTION FOR A STAY PENDING APPEAL

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[1] *Hereinafter*, "CREW."

Crossroads Grassroots Policy Strategies ("Crossroads") respectfully replies to CREW's Opposition ("Opp.") to its Emergency Motion for a Stay Pending Appeal. CREW's rhetoric notwithstanding, it is clear that the district court's existing 45-day stay is inadequate, that it should be extended pending this appeal, and that this Court should confirm that speakers may rely upon the regulation during the pendency of the appeal.

Vacating a foundational reporting regulation just weeks before the upcoming November election obviously threatens serious and irreparable injury. This is true for Crossroads as well as the public, which is denied the speech of groups that will be compelled to restrain constitutionally protected and statutorily permitted speech because of sudden uncertainty over the standards ensuring the privacy of donors to statutorily defined nonpolitical organizations. The district court acknowledged this confusion and injury when it stayed its vacatur for 45 days, and two commissioners on the Federal Election Commission ("Commission") similarly have warned "the court's decision is already causing confusion. Even though the vacatur has not yet gone into effect, members of the public are in doubt as to whether they can rely on the challenged regulation because the court declared it legally invalid." Commission Chair Caroline C. Hunter and Commissioner Matthew S. Petersen, *Statement on CREW v. FEC*, No. 16-cv-259 (Sept. 6, 2018).[2]

[2] https://www.fec.gov/resources/cms-content/documents/Statement_of_Chair_

As the commissioners further explained, the district court's hope that a short stay would lead the Commission to adopt a pre-election interim regulation will not materialize because (i) systemic constraints, including a mandatory 30-day congressional review period, preclude such rapid Commission action, and (ii) several commissioners believe the existing regulation remains lawful and expect it will be vindicated by this appeal.

This appeal has great merit. Far from demonstrating the regulation is invalid under *Chevron* step one, the district court issued 113 pages of complex construction that relied heavily on the same policy arguments this Court recently rejected when it upheld a similar Commission disclosure regulation. *See Van Hollen v. FEC*, 811 F.3d 486 (D.C. Cir. 2016). Moreover, after studying the district court's analysis, two of four commissioners remain convinced "the court should have upheld the Commission's regulation as a reasonable interpretation of the [statute]." Hunter and Petersen, *supra*. Finally, CREW acknowledged in its district court opposition that it first articulated the statutory reading it now claims to be clear only in 2012. Dkt. No. 52 at 14. Clear statutory subsections do not require 113 pages to parse, do not divide their administrative agency's commissioners, and do not reveal newly-discovered clarity decades later.

Hunter_and_Commissioner_Petersen_in_CREW_v._FEC.pdf.

After 38 years and 19 elections without the donor information vacatur supposedly will produce, CREW cannot plausibly claim that allowing a few more months for orderly appellate review will seriously injure it. This Court therefore should grant a stay pending appeal and also confirm that speakers may rely upon the regulation throughout the appellate process.[3]

I. Crossroads and CREW Agree That, at a Minimum, This Case "Raises a Serious Legal Question."

A movant may obtain a stay either by demonstrating "a combination of probable success and the possibility of irreparable injury" or that the court has "ruled on an admittedly difficult legal question and . . . the equities of the case suggest that the status quo should be maintained." *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844-45 (D.C. Cir. 1977). Under the second formulation, it "will ordinarily be enough that the [movant] has raised serious legal questions going to the merits, so serious, substantial, [and] difficult as to make them a fair ground of litigation and thus for more deliberative investigation." *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986) (quoting *Holiday Tours*, 559 F.2d at 844). Indeed, "potentially persuasive

[3] CREW's Opposition (23 n.13) complains that Fed. R. App. P. 8(a)(2)(A) bars relief because a stay motion remains pending before the district court. Not so. Crossroads' motion before this Court (at 2) explained that it waited as long as it could for the district court to act.

authority for its legal position" may suffice. *John Doe Co. v. Consumer Fin. Protection Bureau*, 849 F.3d 1129, 1132 (D.C. Cir. 2017).

As explained below and earlier, *see* Mot. at 11-15, Crossroads has a strong likelihood of success on appeal. Moreover, CREW conceded in its district court opposition that this case "admittedly raises a serious legal question." Dkt. No. 52 at 3-4.

II. Crossroads Is Likely to Succeed on Appeal.

Crossroads has a strong likelihood of success on appeal. Crossroads' motion (at 4-7) reviewed the legislative history of 52 U.S.C. § 30104(c)(1) and (c)(2)(C) showing that the 1979 Amendments merely consolidated the previously separate requirements for contributors to and the makers of a particular independent expenditure to report their respective contributions and spending. Crossroads also illustrated how Congress's alternating use of the articles "an" and "the" justify the FEC's longstanding statutory construction.

Crossroads' motion (at 7-8) further detailed how the Commission transmitted the challenged regulation to Congress under a special congressional review provision, how Congress did not disapprove the rule, how the Commission consistently interpreted and enforced the statute and implementing regulation for more than 38 years, and how Congress amended the independent expenditure

reporting statute six times without disturbing the Commission's interpretation embodied in the regulation.

Rather than directly respond to these abundant authorities, CREW makes two other merits rebuttals that are easily dispatched.

A. CREW and the District Court Misconstrue the Statute by Misreading *Buckley*.

CREW and the district court mistakenly rely on the Supreme Court's definition of a "contribution" in *Buckley v. Valeo*, 424 U.S. 1, 78 (1976) to construe subsection 30104(c)(1) to require the reporting of funds "that are earmarked for political purposes." Opp. at 9; Memo Op. at 28-30. At the same time, the district court articulated at least three not entirely consistent definitional standards for the term "contribution," *see* Memo Op. at 55, 56, 61, none of which recognized that *Buckley* construed "contributions" in this context as funds given to be converted to independent expenditures.

As *Buckley* explained, 2 U.S.C. § 434(e) – the predecessor of the statutory provision at issue here – imposed "disclosure requirements . . . on spending that is unambiguously campaign related . . . [that] takes the form of independent expenditures or of contributions to an individual or group" that makes independent

expenditures. 424 U.S. at 81 (emphasis added).[4] On the prior page, *Buckley* uses the phrase "spending that is unambiguously campaign related" to refer to "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate" (i.e., an independent expenditure). *Id.* at 80. Therefore, when *Buckley* used shorthand to describe section 434(e)'s contributor reports as applying to "contributions earmarked for political purposes," *id.*, "[t]he only contributions . . . with which the *Buckley* Court appears to have been concerned are those that will be converted to expenditures subject to regulation under [the statute]" (i.e., independent expenditures), *FEC v. Survival Educ. Fund*, 65 F.3d 285, 295 (2d Cir. 1995).

B. The District Court Lacked Jurisdiction to Hear CREW's Untimely Challenge to the Regulation.

CREW claims standing to challenge the regulation because the Commission relied on its validity to dismiss the original administrative complaint. But on remand the Commission dismissed without any such reliance, *see* Hunter and Petersen, *supra* (referencing 52 U.S.C. § 30111(e)'s "good faith" reliance provision), and CREW concedes its claim on the underlying administrative complaint "is now moot," Opp. at 3 n.2, 11 n.9.

[4] As CREW acknowledges, the current statute merely "shifted [the] burden [of the contributors who formerly reported their contributions separately] on to those making the independent expenditure." Opp. at 4 (emphasis added).

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 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 this Court has already concluded, "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).

Relatedly, CREW admits it failed to raise concerns about the regulation until after it had been in existence for over three decades. *See, e.g.*, Opp. at 6 n.5; Dkt. No. 52 (district court) at 14. But 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). In general, untimely regulatory challenges should be entertained only "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).[5] CREW should not be allowed to end-run the statute of limitations by bringing a complaint that now has been dismissed on grounds unrelated to the long-standing regulation.

III. Crossroads Has Demonstrated Irreparable Harm.

Notwithstanding CREW's assertions, Crossroads has demonstrated irreparable injury. Steven Law, Crossroads' 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 the ambiguities and deficiencies in the district court's decision. Law Aff. (Doc. No. 1748550) ¶ 10. 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 regarding its 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. "[W]here, as here, prosecutions are actually threatened, this challenge, if not clearly frivolous, will establish the threat of irreparable injury." *Dombrowski v. Pfister*, 380 U.S. 479, 490 (1965).

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[5] *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).

CREW's objection that Crossroads "does not state it intends to run any independent expenditures before the 2018 elections," Opp. at 12 n.10, misses the point: the uncertainty caused by the truncated stay precludes such planning. The two obscenity cases CREW cites to refute Crossroads' irreparable harm also are inapposite, as those authorities do not apply to the core political speech at issue here. *Id*. at 14; *cf. R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 422 (1992) ("[c]ore political speech occupies the highest, most protected position . . . obscenity and fighting words receive the least protection of all").

IV. The Harms to the FEC and the Public – and the Lack Thereof to CREW – Support a Stay.

While Crossroads' motion (at 15-23) details the relevant harms to the parties and the public, it offers three points here in response to CREW's Opposition on this issue. *First*, Crossroads has noted how CREW never claimed to be harmed by the challenged regulation until only recently, notwithstanding its ample opportunity to do so earlier. Such late-breaking "injury" is not the type of substantial, irreparable harm that precludes a stay. *See, e.g.*, *U.S. Postal Serv. 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). CREW's response is that "[t]he continued existence of the regulation will continue to injure CREW." Opp. at 15. However, CREW's claim to injury by being "deprived [] of information to which it is legally entitled," *id.* at 14, begs the very question that must be resolved on appeal: *viz.*, whether the statute in fact "legally entitle[s]" CREW to the donor information it seeks. Therefore, CREW's claim to injury is entirely speculative.

Second, CREW suggests the Commission's failure to appear in this appeal evidences a lack of harm to the agency. Not so. At least two commissioners – and apparently the Commission's professional staff – wanted to appeal but were frustrated from doing so by at least one other commissioner. *See* Hunter and Petersen, *supra*. Notwithstanding the Commission's lack of four votes to authorize an appeal, the agency already advised the district court that "vacatur could result in 'inadequate guidance' for speakers ahead of the 2018 elections." Dkt. No. 30 at 50 (district court); *see also* Dkt. No. 37 at 43.

Third, while CREW attacks application of the *Purcell* principle, the bottom line is that this principle has maximum force in the weeks leading up to a national election. Voting for this year's national midterm election begins in just days. *See, e.g.*, Minn. Stat. § 203B.081.

V. The Centerpiece of CREW's Opposition – the *Van Hollen* Litigation – Does Not Support Its Arguments.

In arguing against a stay, CREW repeatedly links this case back to *Van Hollen v. FEC*, 2012 WL 1758569 (D.C. Cir. May 14, 2012) (per curiam). But *Van Hollen* cuts against CREW.

Over Judge Henderson's objection, the *Van Hollen* motions panel denied a stay largely – and, it turns out, errantly – on the movant's perceived lack of success. *See Ctr. For Individual Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012) (reaching opposite conclusion at merits stage). Had the motions panel more accurately assessed the likelihood of success on the merits, it may well have granted the stay.

CREW's citation to *Van Hollen* for CREW's injury claim is also inapt. In *Van Hollen*, this Court found that the appellee, then-Congressman Van Hollen, would be harmed by a stay because he would not know the donors "to groups sponsoring 'electioneering communications' mentioning him by name." 2012 WL 1758569 at *3. Here, by definition, independent expenditures are not aimed at CREW, and therefore CREW cannot claim the same injury as the *Van Hollen* appellee.

Furthermore, at nearly every step of *Van Hollen*, courts avoided interfering with three general elections. For example, even though denying preliminary relief, the motions panel still prioritized oral argument for "the first appropriate date in

September 2012." *Id.* at *1. The merits panel, in turn, issued its opinion on September 18, 2012 – just four days after oral argument. *See Van Hollen*, 694 F.3d 108. On remand, after an October 29, 2013 hearing, the district court held its opinion until November 25, 2014 – i.e., shortly after the mid-term elections. *See Van Hollen v. FEC*, 74 F. Supp. 3d 407 (D.D.C. 2014). And this Court issued its final opinion in early January 2016, well in advance of the November election. *See Van Hollen*, 811 F.3d 486. This timeline illustrates a judicial desire to avoid upending the campaign finance landscape so close to a national election. This Court could achieve the same result by entering a stay here.

CONCLUSION

The district court correctly stayed its vacatur but cut the stay so short that it does not provide real protection. This Court should extend the stay for the duration of the appeal.

Dated: September 12, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 12, 2018, one copy of the Defendant/Appellant's Reply Brief Concerning Its Emergency Motion for a Stay Pending Appeal was filed and served electronically upon the following counsel of record:

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