UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. AMERICAN ACTION NETWORK, Defendant.	Civil Action No. 1:18-cv-945 (CRC)

AMERICAN ACTION NETWORK'S MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR CERTIFICATION AND STAY

Pursuant to Federal Rule of Civil Procedure 54(b), and in light of the D.C. Circuit's recent decision in *CREW v. FEC*, 993 F.3d 880 (D.C. Cir. 2021), American Action Network hereby moves for reconsideration of the Order issued on September 30, 2019 (Dkt. No. 28). In the alternative, American Action Network requests that the Court certify its order for interlocutory appeal and stay proceedings pending appeal. A Memorandum of Points and Authorities and Proposed Order accompany this Motion. Undersigned counsel discussed this Motion with counsel for Citizens for Responsibility and Ethics in Washington, which opposes this Motion.

Respectfully submitted,

By: s/ *Stephen J. Obermeier*
Stephen J. Obermeier (D.C. Bar No. 979667)
Caleb P. Burns (D.C. Bar No. 474923)
Jeremy J. Broggi (D.C. Bar No. 1191522)
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000
sobermeier@wiley.law

Counsel for Defendant

Dated: May 26, 2021

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2021, a true and correct copy of the foregoing Motion, the supporting Memorandum of Points and Authorities, and the accompanying Proposed Order, were served electronically on all registered counsel of record via ECF and are available for viewing and downloading from the ECF system.

s/ *Stephen J. Obermeier*
Stephen J. Obermeier

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,

Plaintiff,

v.

AMERICAN ACTION NETWORK,

Defendant.

Civil Action No. 1:18-cv-945 (CRC)

AMERICAN ACTION NETWORK'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR CERTIFICATION AND STAY

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INTRODUCTION

In its motion to dismiss, American Action Network ("AAN") argued that the administrative dismissal on which Citizens for Responsibility and Ethics in Washington ("CREW") sought to base this litigation was unreviewable because the Federal Election Commission had justified that dismissal in part on its prosecutorial discretion. This Court rejected that argument. Observing that the FEC had also supported its decision with legal reasons, this Court held that discretionary dismissals "premised on . . . legal interpretations are judicially reviewable." *CREW v. AAN*, 410 F. Supp. 3d 1, 18 (D.D.C. 2019) ("*AAN I*").

The D.C. Circuit has now squarely rejected that proposition. In *CREW v. FEC*, 993 F.3d 880, 882 (D.C. Cir. 2021) ("*New Models*"), the D.C. Circuit confirmed that a district court cannot review an FEC decision to dismiss that is based even in part on enforcement discretion. The D.C. Circuit expressly held that it "matters[ ] not whether legal interpretation underlay the decision" to dismiss because any "Commission decision that rests even in part on prosecutorial discretion cannot be subject to judicial review." *Id.* at 884, 886 n.4. And the D.C. Circuit made crystal clear that a court "cannot . . . review the legal analysis that accompanied the Commission's exercise of prosecutorial discretion" no matter how brief the invocation of discretion and "irrespective of the length of [the] legal analysis." *Id.* at 887.

That decision is impossible to reconcile with this Court's refusal to dismiss this case. Indeed, the language the FEC used to invoke its prosecutorial discretion in *New Models* is virtually identical to the language that that the FEC used here. Because the continued prosecution of this case would squarely conflict with *New Models*—not to mention be manifestly unjust to AAN—this Court should reconsider its prior order under Federal Rule of Civil Procedure 54(b) and dismiss this case because it is unreviewable. *See, e.g.*, *Attias v. CareFirst, Inc.*, No. 15-cv-00882

(CRC), 2021 WL 311000, at *6–9 (D.D.C. Jan. 29, 2021) (Cooper, J.) (granting Rule 54(b) reconsideration based on intervening D.C. Circuit precedent).

In the alternative, the Court should certify its prior order for immediate appeal pursuant to 28 U.S.C. § 1292(b) and stay this action pending that appeal. *See, e.g.*, *Kennedy v. District of Columbia*, 145 F. Supp. 3d 46, 52 (D.D.C. 2015) (Cooper, J.) (denying Rule 54(b) reconsideration and certifying 28 U.S.C. § 1292(b) interlocutory appeal).

BACKGROUND

The Court is well acquainted with the history of this case. In 2012, CREW filed an administrative complaint with the FEC alleging that AAN should have registered as a political committee from mid-2009 to mid-2011 pursuant to the Federal Election Campaign Act ("FECA"). CREW sought an FEC "investigation into these allegations," a declaration that AAN "violated the FECA and applicable FEC regulations," and "sanctions appropriate to these violations." Original Compl. at 8, *In re Am. Action Network*, MUR No. 6589 (filed June 7, 2012), Dkt. No. 24-2.

The FEC deadlocked. Three Commissioners found no reason to believe that AAN violated the FECA and voted to dismiss CREW's administrative complaint; three Commissioners voted to commence an investigation. Without the requisite affirmative vote of four Commissioners to proceed, the Commissioners voting to dismiss controlled the outcome and their statement of reasons served as the basis for the agency's dismissal of CREW's administrative complaint.

The controlling Commissioners concluded that AAN was not a "political committee" as that term is used in the FECA because AAN did not have as its "major purpose" the nomination or election of federal candidates. *See* Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 27, MUR No. 6589 (July 30, 2014), https://www.fec.gov/files/legal/murs/6589/14044362004.pdf. The controlling Commissioners also determined that they would dismiss the complaint "in exercise of [their] prosecutorial

discretion." *Id.* CREW sought review of the dismissal in this Court. The FEC argued, among other things, that the dismissal was "justified by the Commission's broad prosecutorial discretion." FEC Mem. Supp. Summ. J. at 49, *CREW v. FEC*, 209 F. Supp. 3d 77 (D.D.C. 2016) (No. 14-cv-01419), Dkt. No. 36; *see id.* at 50 (citing *Heckler v. Chaney*, 470 U.S. 821 (1985)).

This Court held the FEC's dismissal "contrary to law." *CREW v. FEC*, 209 F. Supp. 3d 77, 95 (D.D.C. 2016) ("*CREW I*"), *appeal dismissed*, Nos. 16-5300, 16-5343, 2017 WL 4957233 (D.C. Cir. Apr. 4, 2017). At the threshold, the Court held that the "FECA's express provision for the judicial review of the FEC's dismissal decisions, as well as a particular standard governing that review, 52 U.S.C. § 30109(a)(8)(C)," rebuts the ordinary presumption that prosecutorial discretion is unreviewable. *Id.* at 88 n.7. On the merits, the Court's conclusion hinged on its decision not to apply the deferential standard of review announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See id.* at 86. The Court remanded with instructions for the FEC to conduct, within 30 days, a more particularized review of AAN's advertisements, namely, those that qualified as electioneering communications as defined by the FECA. *See id.* at 95. AAN appealed, but the D.C. Circuit dismissed that appeal because "[t]he district court order remanding the case to the Federal Election Commission [was] not a final, appealable order." 2017 WL 4957233, at *1.

On remand, the FEC deadlocked and dismissed for a second time. Consistent with the Court's decision, the three controlling Commissioners did not "categorically exclude AAN's electioneering communications from its major-purpose calculation." *CREW v. FEC*, 299 F. Supp. 3d 83, 90 (D.D.C. 2018) ("*CREW II*"), *appeal dismissed*, No. 18-5136, 2018 WL 5115542 (D.C. Cir. Sept. 19, 2018). Instead, they followed the Court's command and conducted a fact-specific review of the twenty disputed AAN electioneering communications in an analysis that used the

Court's standard, weighed various factors, and recharacterized four electioneering communications as indicative of a major purpose to nominate or elect candidates. Nevertheless, the Court again found that the FEC's dismissal was "contrary to law," and remanded with instructions for the FEC to conform within 30 days to the Court's new standard. *Id.* at 101. AAN noticed its appeal.

Soon after AAN noticed its appeal, the D.C. Circuit issued its decision in *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) ("*CHGO*"), *reh'g en banc denied*, 923 F.3d 1141 (D.C. Cir. 2019) ("*CHGO*"), another case arising from an FEC deadlock on an administrative complaint filed by CREW alleging that a nonprofit organization should have registered as a political committee. There, the D.C. Circuit held that the FEC's dismissal of CREW's administrative complaint was an unreviewable exercise of prosecutorial discretion and further that "[n]othing in [FECA] overcomes the presumption against judicial review" articulated in *Heckler v. Chaney*, 470 U.S. 821 (1985). *Id.* at 439. The court explained that it made no difference whether the controlling Commissioners had paired their exercise of enforcement discretion with substantive legal reasoning because "[t]he law of this circuit 'rejects the notion of carving reviewable legal rulings out from the middle of non-reviewable actions.'" *Id.* at 441–42 (citations omitted). The D.C. Circuit also held that a "court may not authorize a citizen suit" when "the Commission exercises its prosecutorial discretion to decline an enforcement action" because such authorization "necessarily" would require the court to "subject the Commission's exercise of discretion to judicial review, which it cannot do." *Id.* at 439–40.

AAN moved the D.C. Circuit for summary reversal based on *CHGO*. AAN argued that the D.C. Circuit's determination that "[n]othing in [FECA] overcomes the presumption against judicial review," *id.* at 439, required reversal of this Court's contrary conclusion that "FECA's

express provision for the judicial review of the FEC's dismissal decisions . . . is just such a rebuttal," *CREW I*, 209 F. Supp. 3d at 88 n.7. *See* AAN Mot. Summ. Rev. at 1–2, *CREW v. FEC*, No. 18-5136 (D.C. Cir. June 25, 2018), Doc. No. 1737659. In addition, AAN argued that this Court's authorization of a citizen suit was contrary to *CHGO*'s holding that a district court "may not authorize a citizen suit" when the FEC declines enforcement based on prosecutorial discretion. *CHGO*, 892 F.3d at 440; *see also* AAN Mot. Summ. Rev. at 9, 13. The D.C. Circuit dismissed the appeal without reaching the merits because "[t]he district court orders remanding the action to the Federal Election Commission [were] not final, appealable orders." *CREW,* 2018 WL 5115542, at *1.

Meanwhile, the FEC did not act within 30 days following the Court's remand. In a public statement, then-FEC Vice Chair Ellen L. Weintraub—one of the non-controlling Commissioners who opposed dismissal in the FEC's prior deadlocked votes—announced that she had declined to vote in order to intentionally deprive the FEC of the quorum necessary to conform with this Court's order. *See* Statement of Vice Chair Ellen L. Weintraub Regarding *CREW v. FEC & American Action Network* (Apr. 19, 2018), https://www.fec.gov/resources/cms-content/documents/2018-04-19-ELW-statement.pdf. The intentional effect was to enable CREW to bring a citizen suit pursuant to 52 U.S.C. § 30109(a)(8)(C). *Id.* Ordinarily, a single Commissioner's non-participation would not defeat a quorum, but in this case, that was possible because the FEC had only four seated Commissioners, the bare statutory minimum needed for the FEC to act.

CREW accepted Vice Chair Weintraub's invitation and filed this lawsuit against AAN a few days later. CREW expanded its allegations against AAN, requesting a declaration that AAN became a political committee in 2009 or 2010 and remains one today. *See* Compl. ¶¶ 21–22. Following a brief stay to determine the appealability of *CREW II*, AAN filed a motion to dismiss.

AAN argued, among other things, that the FEC's dismissal decision was not reviewable in light of the D.C. Circuit's *CHGO* decision because it included an exercise of prosecutorial discretion, and that the Court lacked jurisdiction to consider conduct beyond that alleged in CREW's original administrative complaint under the plain language of 52 U.S.C. § 30109(a)(8)(C).

The Court denied the motion in large part, finding that CREW's case-in-chief can proceed on all time periods alleged in CREW's original administrative complaint, *i.e.*, from mid-2009 to mid-2011. With respect to reviewability, the Court did "not read *CHGO* to preclude judicial review here" because, in the Court's view, the controlling Commissioners' "two references to prosecutorial discretion [were] tethered to their legal reasoning." *AAN I*, 410 F. Supp. 3d at 15. In denying AAN's subsequent motion for certification of an interlocutory appeal, the Court reiterated its position that "[w]hen the FEC's invocation of prosecutorial discretion is based on legal analysis, [that invocation] does not preclude judicial review under *CHGO*." *CREW v. AAN*, 415 F. Supp. 3d 143, 146–47 (D.D.C. 2019) ("*AAN II*"). Following these decisions, the parties entered fact discovery. AAN has now produced, subject to the Court's protective order, thousands of confidential and highly confidential documents, and the parties are actively preparing for the next phases of this litigation.

A few weeks ago, the D.C. Circuit issued its decision in *New Models*, yet another case arising from an FEC deadlock on an administrative complaint filed by CREW alleging that a nonprofit organization should have registered as a political committee. In *New Models*, CREW made the exact same argument to the D.C. Circuit that it made to this Court: *CHGO* was not controlling "because the Commission's statement of reasons in this case featured only a brief mention of prosecutorial discretion alongside a robust statutory analysis, whereas the statement of reasons in [*CHGO*] rested exclusively on prosecutorial discretion." *New Models*, 993 F.3d at 883;

see also CREW Opp'n Mot. Dismiss 16–19 (arguing "a single sentence referencing prosecutorial discretion" cannot be "the *real* reason for dismissal"), Dkt. No. 26.

The D.C. Circuit rejected CREW's argument. The court confirmed that a district court cannot review an FEC decision to dismiss so long as it is based even in part on prosecutorial discretion. *New Models*, 993 F.3d at 882 (citing *CHGO*, 892 F.3d at 434). And the D.C. Circuit expressly held that it "matters[ ] not whether legal interpretation underlay the decision" to dismiss because any "Commission decision that rests even in part on prosecutorial discretion cannot be subject to judicial review." *Id.* at 884, 886 n.4. Where that discretion is invoked, a court "cannot . . . review the legal analysis that accompanied the Commission's exercise of prosecutorial discretion" no matter how brief the invocation and "irrespective of the length of [the] legal analysis." *Id.* at 887. The D.C. Circuit also rejected the idea that the FECA's provision authorizing review of whether agency action is "contrary to law" is somehow different from the Administrative Procedure Act's provision authorizing review of whether agency action is "not in accordance with law." *Id.* at 892.

ARGUMENT

I. THE COURT SHOULD RECONSIDER ITS ORDER ON THE MOTION TO DISMISS.

A. Under Rule 54(b), The Court Should Reconsider Or Modify An Interlocutory Order "As Justice Requires."

Rule 54 authorizes this Court to modify or reconsider an "interlocutory order disposing of 'fewer than all the claims or the rights and liabilities of fewer than all the parties' 'at any time' before the [C]ourt's entry of final judgment." *Cobell v. Jewell*, 802 F.3d 12, 19 (D.C. Cir. 2015) (quoting Fed. R. Civ. P. 54(b)). This "flexible" standard reflects "the 'inherent power of the rendering district court to afford such relief from interlocutory judgments as justice requires.'" *Id.* (quoting *Greene v. Union Mut. Life Ins. Co. of Am.*, 764 F.2d 19, 22 (1st Cir. 1985) (Breyer, J.));

see also Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc., 630 F.3d 217, 227 (D.C. Cir. 2011) ("Rule 54(b) . . . recognizes [the district court's] inherent power to reconsider an interlocutory order 'as justice requires.'").

In this Circuit, "justice requires" reconsideration "where a controlling or significant change in the law or facts [has occurred] since the submission of the issue to the court." *Jud. Watch v. Dep't of Army*, 466 F. Supp. 2d 112, 123 (D.D.C. 2006) (citation omitted). Reconsideration thus is frequently granted where, as here, intervening precedent would require the district court to reach a different decision on a previously decided motion to dismiss. *See, e.g.*, *Attias*, 2021 WL 311000, at *10 (Cooper, J.) (granting, in part, a motion for reconsideration because intervening D.C. Circuit precedent would have required the Court to retain two claims it previously dismissed); *Pinson v. U.S. Dep't of Justice*, No. 12-1872 (RC), 2021 WL 790380, at *5 (D.D.C. Jan. 8, 2021) (granting a motion for reconsideration because intervening Supreme Court precedent required dismissal of claims that the court previously allowed under then-controlling precedent); *Jones v. District of Columbia*, No. 16-cv-2405 (DLF), 2019 WL 5690341, at *6–7 (D.D.C. June 13, 2019) (granting a motion for reconsideration because "the existence of new and persuasive authority" from another district court opinion required reinstatement of previously dismissed claim).

B. The D.C. Circuit's *New Models* Decision Mandates Reversal Of This Court's Order On The Motion To Dismiss.

New Models makes plain that this Court's reasons for finding the FEC's dismissal decision reviewable were incorrect. This Court held that *CHGO* did not "preclude judicial review here" because the controlling Commissioners' "two references to prosecutorial discretion [were] tethered to their legal reasoning" and "*CHGO* explained [that] dismissals premised on those sorts of legal interpretations are judicially reviewable." *AAN I*, 410 F. Supp. 3d at 17–22 (citing *CHGO*, 892 F.3d at 441 n.11); *see also AAN II*, 415 F. Supp. 3d at 146 ("When the FEC's invocation of

prosecutorial discretion is based on legal analysis, it does not preclude judicial review under *CHGO*.").

The D.C. Circuit reached exactly the opposite conclusion in *New Models*. There, just like here, the controlling Commissioners' statement of reasons included a "robust analysis" of the legal reasons for their decision and "made only passing reference to prosecutorial discretion." 993 F.3d at 886. There, just like here, CREW argued that the legal analysis sufficed to distinguish the case from *CHGO*, reasoning that "the Commission's statement of reasons in this case featured only a brief mention of prosecutorial discretion alongside a robust statutory analysis, whereas the statement of reasons in [*CHGO*] rested exclusively on prosecutorial discretion." *Id.* at 883. And the D.C. Circuit squarely rejected that argument, concluding that it "matters[ ] not whether legal interpretation underlay the decision" to dismiss because any "Commission decision that rests even in part on prosecutorial discretion cannot be subject to judicial review." *Id.* at 884, 886 n.4.

In so holding, the D.C. Circuit made clear that district courts cannot review FEC decisions that rest even in part on prosecutorial discretion no matter how brief the invocation of discretion and "irrespective of the length of its legal analysis." *Id.* at 887. As the D.C. Circuit explained:

> [A] common reason for failure to prosecute an alleged criminal violation is the prosecutor's belief (sometimes publicly stated) that the law will not sustain a conviction. That is surely an eminently "reviewable" proposition, in the sense that courts are well qualified to consider the point; yet it is entirely clear that the refusal to prosecute cannot be the subject of judicial review.

Id. at 886 n.4 (quoting *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 282–83 (1987)). Accordingly, what matters in every case is not *the reason* the FEC gives for invoking its prosecutorial discretion, but *only whether* the FEC invokes its discretion. Where it does, a district court must dismiss an action that seeks review of any aspect of that FEC dismissal.

This case is indistinguishable from *New Models*. Here too, while the FEC engaged in a lengthy legal discussion, it also invoked its prosecutorial discretion. Indeed, the FEC *used the*

exact same language that precluded review in *New Models*. In *New Models*, the controlling Commissioners' statement invoked the FEC's discretion this way:

> New Models's organizational purpose, tax exempt status, public statements, and overall spending evidence an issue discussion organization, not a political committee having the major purpose of nominating or electing candidates. As a result, it cannot (nor should it) be subject to the "pervasive" and "burdensome" requirements of registering and reporting as a political committee. For these reasons, *and in exercise of our prosecutorial discretion*, we voted against finding reason to believe that New Models violated the Act by failing to register and report as a political committee and to dismiss the matter.

Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioner Lee E. Goodman at 31, MUR No. 6872 (Dec. 20, 2017) (footnote omitted) (emphasis added).[1] Here, the controlling Commissioners' statement invoked the FEC's discretion like this:

> AAN is an "issue-advocacy groups that only occasionally engage[d] in express advocacy." As such, it cannot and should not be subject to the "pervasive" and "burdensome" requirements of registering and reporting as a political committee. For that reason, *and in exercise of our prosecutorial discretion*, we voted against finding reason to believe AAN violated the Act by failing to register and report as a political committee.

Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 27, MUR No. 6589 (July 30, 2014) (footnotes omitted) (emphasis added).[2] Those invocations of the FEC's prosecutorial discretion are virtually identical. The D.C. Circuit's intervening decision in *New Models* thus compels the conclusion that the FEC's dismissal in this case "cannot be subject to judicial review." *New Models*, 993 F.3d at 884.

It makes no difference that "the second Statement of Reasons—issued on remand from *CREW I* and challenged in *CREW II*—does not mention prosecutorial discretion at all." *AAN I*, 410 F. Supp. 3d at 19. As an initial matter, the second statement exists only because this Court

[1] This statement is available at https://www.fec.gov/files/legal/murs/6872/17044435569.pdf.

[2] This statement is available at https://www.fec.gov/files/legal/murs/6589/14044362004.pdf.

mistakenly reviewed the first decision. And the D.C. Circuit has already held in this very litigation that this Court's "orders remanding [this] action to the Federal Election Commission [were] not final, appealable orders." *CREW*, 2018 WL 5115542, at *1; *see also CREW*, 2017 WL 4957233, at *1. Therefore, this Court's decision to review the FEC's discretionary dismissal remains subject both to revision by this Court on reconsideration after *New Models* and to review by the D.C. Circuit in any eventual appeal. Once that foundational error is corrected, there will no longer be any basis for this lawsuit, as there will no longer be any basis to conclude that the FEC ever acted "contrary to law."

In any event, all the FEC did in its second decision is comply with the Court's directive to provide "additional . . . explanation" conforming with the Court's interpretation of the FECA. *CREW I*, 209 F. Supp. 3d at 95 (citation omitted). The FEC did not alter or withdraw its previously expressed position "that 'the challenged dismissal decisions are independently justified by the Commission's broad prosecutorial discretion.'" *Id.* at 88 n.7 (quoting FEC Mot. Summ. J. 49–50); *see also* AAN Mot. Summ. Rev. 13 ("[T]he district court did not have authority to review the [FEC]'s decision to dismiss CREW's allegations against [AAN] because the Commission did so in reliance on its prosecutorial discretion."). The FEC's orders, issued in the same proceeding, must be evaluated together. And taken together, they make plain that the FEC's decision to dismiss was at least in part based on an exercise of prosecutorial discretion, which is all that *New Models* requires to compel dismissal of this lawsuit.

Justice requires that this Court reconsider its decision now rather than force AAN to wait for an appeal. Reviewability is a foundational issue, and forcing AAN to continue to expend considerable time and resources defending itself in an unreviewable case would be highly inequitable. The Court should therefore correct its decision to account for *New Models* now and

stem the continued waste of judicial and party resources on claims that do not belong before this Court.

II. IF THE COURT DOES NOT RECONSIDER, IT SHOULD CERTIFY ITS ORDER FOR IMMEDIATE APPEAL AND STAY PROCEEDINGS PENDING APPEAL.

A. The D.C. Circuit's *New Models* Decision Provides Grounds For Certification.

In the alternative, the Court should certify its order on the motion to dismiss for immediate appeal. *See, e.g.*, *Kennedy*, 145 F. Supp. 3d at 52 (Cooper, J.) (denying Rule 54(b) reconsideration and certifying 28 U.S.C. § 1292(b) interlocutory appeal).

A district court may certify an order for immediate appeal where the order (1) "involves a controlling question of law" (2) "as to which there is substantial ground for difference of opinion" and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see also Z St. v. Koskinen*, 791 F.3d 24, 28 (D.C. Cir. 2015). "[D]istrict courts should not hesitate to certify an interlocutory appeal" where, as here, these statutory prerequisites are met. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009).

This Court already held in this litigation that "reviewability 'involves a controlling question of law'" and that "reversal on appeal would 'materially advance the ultimate termination of the litigation.'" *AAN II*, 415 F. Supp. 3d at 146 (quoting 28 U.S.C. § 1292(b)). The only remaining question is whether there "is substantial ground for difference of opinion" on whether the FEC's invocation of enforcement discretion precludes judicial review. 28 U.S.C. § 1292(b).

New Models provides the requisite substantial basis for difference of opinion. This Court previously rejected the argument that Judge Contreras' district court decision in the *New Models* case established a substantial ground for difference of opinion about the application of *CHGO* because this Court read that decision as standing for the proposition that "[w]hen the FEC's invocation of prosecutorial discretion is based on legal analysis, it does not preclude judicial

review under *CHGO*." *AAN II*, 415 F. Supp. 3d at 146. But that position is no longer tenable. As explained above, the D.C. Circuit has now expressly clarified that *any* invocation of prosecutorial discretion is unreviewable—even if, as in *New Models* itself, "legal interpretation underlay the decision." *New Models*, 993 F.3d at 886 n.4; *see also id.* at 885–86 ("The fact that the controlling Commissioners' statement of reasons also provided legal reasons—even lengthy ones—for declining enforcement against New Models does not make the decision reviewable[.]"). For that reason, the D.C. Circuit's holding in *New Models* requires reconsideration and dismissal of this case. *See* section I, *supra*. At a minimum, *New Models* now provides a substantial ground for difference of opinion and for certification.

Indeed, not only is there "substantial ground" for difference of opinion in light of the D.C. Circuit's intervening *New Models* decision, but there is now also actual difference of opinion among district courts within this Circuit. In *Public Citizen v. FEC*, No. 14-cv-148(RJL), 2021 WL 1025813 (D.D.C. Mar. 17, 2021), handed down shortly before the D.C. Circuit's *New Models* decision, another court in this Circuit held that *CHGO* required dismissal where, like here, the FEC's statement of reasons both analyzed the legal merits and invoked prosecutorial discretion. *Id.* at *5. Unlike this Court, *Public Citizen* expressly recognized that the FEC's legal reasoning can reflect "prudential concerns well within its expertise," such as "concern[s] about the likelihood of success of prosecuti[on]" and reluctance to assert "new legal theories" without adequate notice. *Id.* at *3–5; *see also New Models*, 993 F.3d at 886 ("The Commission's invocation of prosecutorial discretion in this case rested squarely on prudential and discretionary considerations relating to resource allocation *and the likelihood of successful enforcement*." (emphasis added)). Because AAN made similar arguments in its motion to dismiss and this Court rejected them, *see AAN I*, 410 F. Supp. 3d at 18–19 (asserting that the FEC's "doubts that a court would sustain enforcement"

are not "prudential" but reviewable "concern[s] based on a legal interpretation"), *Public Citizen* reinforces the conclusion that there is now at least a substantial ground for disagreement about how to read *CHGO* and whether invocation of enforcement discretion precludes judicial review.

B. The Court Should Stay Proceedings In This Court If It Certifies An Appeal.

If the Court certifies its prior order for an interlocutory appeal, then the Court should also stay this case pending appeal. A district court possesses inherent authority to "control the disposition of the causes on its docket" and may stay an action as an incident of that authority. *Mobley v. CIA*, 806 F.3d 568, 576 (D.C. Cir. 2015) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). Interlocutory appeal pursuant to § 1292(b) is an appropriate circumstance for exercising this inherent power and often results in entry of a stay. *See, e.g.*, *Blumenthal v. Trump*, No. 17-cv-1154 (EGS), 2019 WL 3948478, at *3 & n.3 (D.D.C. Aug. 21, 2019) (staying proceedings), *leave to appeal granted sub nom. In re Trump*, No. 19-8005, 2019 WL 4200443 (D.C. Cir. Sept. 4, 2019); *Mwani v. Bin Laden*, 947 F. Supp. 2d 1, 5–6 (D.D.C. 2013) (same).

A stay will provide "economy of time and effort for [the Court], for counsel, and for litigants," as the appeal could eliminate any further litigation—and will necessarily impact the parties' arguments and Court's analysis even if it proceeds into summary judgment motions and trial. *Landis*, 299 U.S. at 254. Indeed, it is never "in the interest of judicial economy or in the parties' best interests" to "litigat[e] essentially the same issues in two separate forums." *IBT/HERE Emps. Representatives' Council v. Gate Gourmet Div. Ams.*, 402 F. Supp. 2d 289, 293 (D.D.C. 2005). The brief additional time required for the appeal presents no cause for concern in a case that looks backward more than 10 years, and in which fact discovery is nearly complete. Thus, the case should be stayed pending any appeal.

CONCLUSION

For the reasons stated above, the Court should reconsider its prior order and dismiss this case. If the Court does not reconsider, then it should certify its order for immediate appeal and stay proceedings pending that appeal.

Respectfully submitted,

By: s/ *Stephen J. Obermeier*
Stephen J. Obermeier (D.C. Bar No. 979667)
Caleb P. Burns (D.C. Bar No. 474923)
Jeremy J. Broggi (D.C. Bar No. 1191522)
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000
sobermeier@wiley.law

Counsel for Defendant

Dated: May 26, 2021

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. AMERICAN ACTION NETWORK, Defendant.	Civil Action No. 1:18-cv-945 (CRC)

[PROPOSED] ORDER GRANTING
AMERICAN ACTION NETWORK'S MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR CERTIFICATION AND STAY

Upon consideration of American Action Network's Motion for Reconsideration or, in the Alternative, for Certification and Stay, it is hereby

ORDERED that the Motion for Reconsideration is **GRANTED**; and it is further

ORDERED that the Complaint is **DISMISSED WITH PREJUDICE** in its entirety.

This constitutes a final appealable order.

SO ORDERED this _____ day of _____, 2021.

_____
CHRISTOPHER R. COOPER
United States District Judge