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. 18-cv-945 (CRC)

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON'S MEMORANDUM IN OPPOSITION TO AMERICAN ACTION NETWORK'S MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR CERTIFICATION AND STAY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

In seeking reconsideration or interlocutory appeal of this Court's prior denial of its motion to dismiss, defendant American Action Network ("AAN") yet again asks the Court to permit it to evade its legal obligations for flooding federal elections with millions of dollars while hiding the sources of those funds from plaintiff Citizens for Responsibility and Ethics in Washington ("CREW") and the public. This Court has repeatedly rejected AAN's contention that a passing reference to "prosecutorial discretion" in a legally defunct statement by a non-majority of the Federal Election Commission ("FEC" or "Commission") can work the wonders AAN proposes. AAN now claims, however, to have new authority which upends previous case law and this Court's decisions. It does not.

First, AAN's "new" matter is nothing of the sort: this Court already considered the statement in the New Models dismissal and found it dissimilar to even the Commission's first statement here—a statement this Court recognized ceased having legal effect once the commissioners replaced it with a new statement. The authority AAN now raises, a recent divided panel decision considering the New Models dismissal, *CREW v. FEC*, 993 F.3d 880 (D.C. Cir. 2021) ("*New Models II*"), *pet. for reh'g en banc filed*, interpreted the statement there exactly as this Court did. Both this Court and the divided panel recognized the New Models' statement examined legal and prudential considerations, and found the prudential considerations provided an unreviewable additional basis for dismissal. That is nothing like the Commission's dismissal here, which rested solely on legal interpretations.

AAN's tortured reading of *New Models II* does not warrant alteration of this Court's repeated judgments. Even charitably reading the commissioners' first Statement of Reasons to invoke discretion, both this Court and *New Models II* recognized that an invocation of discretion that "turn[s] on legal grounds" is "judicially reviewable under FECA's 'contrary to law'

standard." *See New Models II*, 993 F.3d at 895; *accord* Mem. Op. 24, Dkt. No. 29 ("MTD Op."). Further, this first Statement of Reasons, that was then superseded, lacked the "prudential and discretionary considerations" that were determinative in *New Models II*, 993 F.3d. at 885-86, and AAN's misleading omission, in their brief, of that operative language from the New Models statement cannot make up for that fact.

Second, AAN provides no basis to revive the superseded Statement of Reasons on which its entire argument hangs. AAN effectively concedes that it has no argument when considering the second, and only operative, Statement of Reasons, which lacks even the passing reference to "prosecutorial discretion" that AAN claims is determinative. Yet the superseded Statement of Reasons is a "dead letter," and "cannot be revived in favor of" AAN, even if the commissioners abandoned it in light of this Court's judgment in prior litigation. *See Ctr. for Sci. in the Pub. Int. v. Regan*, 727 F.2d 1161, 1165 (D.C. Cir. 1984).

Third, the *New Models II* decision hardly presents settled authority warranting dismissal or interlocutory review at this juncture. Judge Millett strongly dissented from the opinion, echoing the sentiment of a majority of judges of the D.C. Circuit who have considered the impact of its precursor, *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) ("*CHGO*"). CREW today filed a petition for en banc review of the *New Models II* decision, and prudence favors waiting for the full Circuit's consideration of the issue before affording AAN the drastic relief it seeks here.

Nevertheless, even putting aside the infirmities in *New Models II* identified in CREW's petition, that decision did not bar review of dismissals based entirely on legal analysis, as AAN contends. Because *New Models II* does not provide reason for this Court to reconsider its judgment, it also does not provide a basis for interlocutory appeal and stay.

BACKGROUND

CREW filed a complaint with the FEC on June 7, 2012 alleging AAN violated the FECA. Compl. ¶¶ 37, 66, MUR No. 6589. CREW alleged AAN's activities between 2009 and 2011 caused it to become a political committee, a designation that required AAN to, among other things, disclose its donors from the point at which it became a political committee and to continue to do so thereafter. *See CREW v. FEC*, 299 F. Supp. 3d 83, 85 (D.D.C. 2018) ("*CREW II*"). CREW alleged those activities included devoting more than $18 million on reported election-related ads. *Id.* That spending included $13.7 million in electioneering communications that targeted the constituencies of federal candidates, including non-current officeholders, aired shortly before the election, asked viewers to register their disagreement "in November," and attacked the candidate by, for example, accusing them of giving "Viagra to Rapists." *Id.* at 88, 98–99.

Despite CREW's complaints, AAN spent millions more on independent expenditures and electioneering communications in the subsequent years, without disclosure, and also made multi-million-dollar contributions to super PACs to fund their electoral activities. *See* FEC, Independent Expenditures, AAN, https://bit.ly/2Pf6f4k (last visited June 23, 2021); FEC, Receipts, CLF, https://bit.ly/2qDpkml (last visited June 23, 2021) ("CLF Receipts") (filtered for contributions from AAN). Indeed, in 2020 alone, AAN spent almost $21 million to influence federal elections through contributions to its affiliated super PAC. *See* CLF Receipts.

In 2013, the FEC's Office of General Counsel recognized the merits of CREW's complaint and recommended pursuing enforcement. Compl. ¶ 67. Nonetheless, the Commission split three-to-three, blocking further action because they found AAN's electioneering communications were so unrelated to elections that disclosure would not serve the purposes of

the FECA. Compl. ¶ 69. Echoing their legal analysis, the three commissioners stated in their Statement of Reasons that these same "constitutional doubts . . . militate[d] in favor of cautious exercise of [their] prosecutorial discretion." MTD Op. 21–22. This Court held that analysis "blinks reality" and is contrary to law. *CREW v. FEC*, 209 F. Supp. 3d 77, 93 (D.D.C. 2016) ("*CREW I*"). The FEC did not appeal.

AAN appealed, but the D.C. Circuit granted the FEC's motion to dismiss AAN's appeal. *CREW v. FEC*, No. 16-5300, 2017 WL 4957233 (D.C. Cir. Apr. 4, 2017) (per curiam).

On remand, the Commission again split, with the same set of commissioners voting against enforcement. Compl. ¶ 71 (citing *CREW II*, 299 F. Supp. 3d at 101). Rather than adhere to their prior explanation, however, the commissioners issued a new Statement of Reasons. *Id.* That statement still treated most of AAN's electioneering communications as so unrelated to elections that they excused AAN from disclosure, but also dropped any reference to "prosecutorial discretion." *See* MTD Op. 7–9. This Court found the commissioners' new rationale was also contrary to law because it failed to incorporate the presumption that electioneering communications have an election-related purpose. *Id.* The FEC again did not appeal.

AAN attempted to again appeal and moved for summary reversal and vacatur based on AAN's contention that the intervening decision in *CHGO* prohibited the decisions in *CREW I* and *CREW II*. Appellant AAN's Mot. for Summ. Reversal and Vacatur 10, *CREW v. FEC*, 18-5136 (D.C. Cir. June 25, 2018) ("Mot. for Summ. Reversal"). Nonetheless, the D.C. Circuit dismissed AAN's appeal, finding AAN could not appeal before a final judgment was issued and that AAN had "not demonstrated that a departure from that general rule is warranted." *CREW v. FEC*, No. 18-5136, 2018 WL 5115542, at *1 (D.C. Cir. Sept. 19, 2018) (per curiam).

On remand from *CREW II*, the FEC failed to conform to this Court's order within 30 days, triggering CREW's right to bring a civil action directly against AAN. 52 U.S.C. § 30109(a)(8)(C); Compl. ¶¶ 72–73. Accordingly, CREW filed the instant suit on April 23, 2018.

On November 2, 2018, AAN moved to dismiss this action, relying in part on *CHGO*, *see* AAN's Mot. to Dismiss, Dkt. No. 24, and on a decision raised at oral argument that found *CHGO* barred review of the FEC's dismissal of CREW's complaint against a different dark money group, called New Models, *see* Tr. 12:15–23 (discussing *CREW v. FEC*, 380 F. Supp. 3d 30 (D.D.C. 2019) ("*New Models I*")). The Court denied AAN's motion on September 30, 2019. MTD Op., Dkt. No. 29. Rejecting AAN's various challenges, the Court found, in relevant part, that *CHGO* did not preclude this suit. *Id.* at 17. In particular, the Court understood *CHGO* to block review when the FEC relied "on factors particularly within its expertise." *Id.* at 19. The Court concluded *CHGO* did not apply here, where the "dismissal [was] premised on . . . legal interpretations." *Id.* at 21. The Court also contrasted the dismissal here with the one at issue in *New Models I*, where the "controlling Commissioners based their decision on 'three reasons,'" with two being legal, but a distinct third reason "reflected prosecutorial discretion rooted in prudential concerns." *Id.* at 19–20.

On October 18, 2019, AAN sought to certify an interlocutory appeal, in part to review this Court's judgment of the application of *CHGO* and treatment of *New Models I*. *See* AAN's Mot. Cert. of an Interlocutory Appeal and a Stay Pending Appeal, Dkt. No. 33. This Court denied AAN's motion, stating that the question of reviewability after *CHGO* and *New Models I* was "not a particularly close call." *See* Op. and Order 5, Dkt. No. 37 ("IA Op."). The Court stated its prior decision "faithfully applied" *CHGO*, "as well as prior Supreme Court and Circuit

precedent" that remained binding, and found that, notwithstanding *CHGO* and *New Models I*, review was proper here because the dismissal was rooted "entirely in legal conclusions." *See id.*

Since that decision, the parties have been constructively involved in productive discovery procedures, and the parties expect to complete discovery in two weeks. Under the discovery schedule entered by the Court on May 27, 2021, dispositive motions are due on November 1, 2021.

ARGUMENT

AAN's motion once again tries to evade its obligation to comply with the FECA on the thinnest of reeds: a passing remark in a superseded statement by less than a majority of commissioners. The Court has now rejected that argument multiple times, including after comparing the FEC's language here to that in New Models, and AAN's purported new authority adds nothing to that analysis. The Court already considered and distinguished the dismissal AAN raises, and AAN's attempts to revisit it based on a recent decision by the D.C. Circuit cannot succeed. The decision provides no basis for this Court to reconsider its repeated judgments, never mind reason to certify this case for interlocutory review and interim stay.

I. AAN Provides No Basis for This Court to Reconsider its Decisions

AAN's motion relies entirely on purported "new . . . authority" that AAN claims "squarely rejected" the Court's holding in denying AAN's motion to dismiss. *See* AAN Mot. 1, 8, Dkt. No. 59 ("AAN Mot.") (citing *Jones v. District of Columbia*, No. 16-cv-2405 (DLF), 2019 WL 5690341, at *6-7 (D.D.C. June 13, 2019) (granting Rule 54(b) reconsideration based on new "similar" authority)); *cf. Attias v. CareFirst Inc.*, No. 15-cv-00882 (CRC), 2021 WL 311000, at *6 (D.D.C. Jan. 29, 2021) (quoting *Lewis v. Dist. of Columbia*, 736 F. Supp. 2d 98, 102 (D.D.C. 2010) (cleaned up)) (reconsideration under Rule 54(b) is "not boundless, but rather is 'limited by

the law of the case doctrine and subject to the caveat that where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again'"). But the matter on which AAN relies is not new at all, and in fact this Court considered it and has already distinguished even the superseded Statement of Reasons. Nothing in AAN's motion, or the recent panel decision on which AAN relies, alters the Court's analysis.

A. This Court Already Found the Matter on Which AAN Relies is Dissimilar, Even If Considering the Superseded Statement

AAN's motion rests on a recently divided decision by Judges Rao and Katsas that addressed the FEC's dismissal of CREW's complaint against New Models. *See* AAN Mot. 1 (citing *New Models II*, 993 F.3d 880). That is the same dismissal this Court considered at length and found distinguishable in both its decision denying AAN's motion to dismiss and denying AAN's request for an interlocutory appeal. *See* MTD Op. 19–20; IA Op. 5. There, unlike here, the controlling commissioners "based their decision on 'three reasons'" of which two were legal, but a "third, however, reflected prosecutorial discretion rooted in prudential concerns." *See* MTD Op. 19–20. The split D.C. Circuit decision agreed with that description, recognizing that New Models involved a dismissal that "rested on two *distinct* grounds:" two commissioners' "interpretation of FECA and [their] 'exercise of … prosecutorial discretion.'" *New Models II*, 993 F.3d at 884 (emphasis added). Critically, "prosecutorial discretion [was] exercised *in addition to the legal grounds*." *Id.* at 887 (emphasis in original).

There was "no doubt" that the invocation of prosecutorial discretion in New Models was independent because, while brief, it "rested squarely on prudential and discretionary considerations relating to resource allocation and the likelihood of successful enforcement." *Id.* at 886, 889 n.8. These are "discretionary considerations at the heart of *Chaney*'s holding." *Id.* at 885 (citing *Heckler v. Chaney*, 470 U.S. 821 (1985)). The split panel recounted the

commissioners' "concerns about resource allocation, the fact that New Models is now defunct and likely judgment proof, and the fact that the events at issue occurred many years prior, leading to potential evidentiary and statute of limitations hurdles." *New Models II*, 993 F.3d at 885, 889 n.8. If the commissioners' "analysis of statutory requirements" were the sole factors discussed, the split panel said it would have reviewed them, but it concluded that courts had "no 'law' to apply" in reviewing the commissioners' accompanying "weighing of practical enforcement considerations." *Id.* at 885. Determining that *CHGO* "foreclose[d]" review where there was an "explicit," and "addition[al]" basis grounded in discretionary factors that courts could not review, the split panel affirmed Judge Contreras's dismissal below. *See id.* at 885, 886 (*CHGO* "leaves no room for us to selectively exercise judicial review based on whether the Commission places more or less emphasis *on discretionary factors* when declining to pursue enforcement" (emphasis added)). That accords with this Court's understanding that "[w]hat precludes judicial review" is "reliance by the FEC on factors particularly within its expertise in exercising that discretion." MTD Op. 19.[1]

As this Court recognized when previously considering the New Models dismissal, this case presents a very different scenario. Here, the controlling commissioners gave only a single

[1] To be sure, the split panel erred in insulating the independent legal interpretations from review simply because a statement relying on prudential factors accompanied them, as explained by Judge Millett in dissent. *See New Models II*, 993 F.3d at 895–906. Further, a majority of the judges on the D.C. Circuit to consider the issue has already expressed disagreement with the *CHGO* decision on which the split New Models decision exclusively relies, *see CHGO*, 892 F.3d at 442–53 (Pillard, J., dissenting); *CREW v. FEC*, 923 F.3d 1141 (D.C. Cir. 2019) (en banc) (Judges Pillard and Wilkins voting for en banc review); *CREW*, 923 F.3d at 1141 (Griffith, J., concurring) (stating *CHGO* is "contrary to Congress's intent"); *CLC v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020) (unanimously refusing to apply *CHGO*); *CLC*, 952 F.3d at 358–63 (Edwards, J., concurring) (stating *CHGO* is "flatly at odds with the Supreme Court decision in *FEC v. Akins*," 524 U.S. 11 (1998), and "ignores this court's decisions"). The strong disagreement with *CHGO*, and by extension this recent split panel decision, should at least caution against the application of the divided decision that AAN urges here.

reason for dismissal: their "examina[tion] [of] whether AAN's challenged electioneering advertisements evince an electoral purpose." *See* MTD Op. 20. "All roads" in the statements concerning AAN, including the superseded first statement, "lead to legal interpretations." *Id.* at 22. *New Models II* recognized that dismissals like the one here, "rest[ing] solely on legal interpretation," remain reviewable. *New Models II*, 993 F.3d at 884 (emphasis omitted); *id.* at 891 (holding review remains available "when the agency has declined to act based on legal reasons that a court *can* review under the 'contrary to law' standard" (emphasis added)). That is the same decision this Court reached, "faithfully appl[ying]" *CHGO*, IA Op. 5, of which *New Models II* declares itself to be a "straightforward application," *New Models II*, 993 F.3d at 886.

Notwithstanding this Court's previous consideration of the New Models dismissal, AAN asserts the split panel radically altered the landscape. But its attempts to recast *New Models II* fail. The split panel did not bar review of dismissals when only legal analysis "underlay" them, even if when recast as "prosecutorial discretion." *Cf.* AAN Mot. 9. Further, absent here is the discussion of prudential factors that were determinative in New Models, and AAN's attempt to manufacture similarity by altering the record betrays the error in its argument.

1. *Rather Than "Underlay" an Otherwise Unreviewable Weighing of Prudential Factors, Legal Interpretation Was the Sole Basis for Dismissal Here*

New Models II considered a dismissal with "distinct" justifications, with one squarely grounded in prudential considerations. *New Models II*, 993 F.3d at 884. Nonetheless, AAN argues that *New Models II* also "rejected" this Court's "conclusion" that "discretionary dismissals 'premised on … legal interpretations are judicially reviewable.'" AAN Mot. 1 (quoting MTD Op. 22). To reach this conclusion, AAN focuses on a footnote in *New Models II* to argue discretionary dismissals are unreviewable regardless of "whether legal interpretation underlay the decision." *New Models II*, 993 F.3d at 886 n.4.

New Models II recognizes the contrary. It expressly stated that an invocation of "discretion" that "turn[s] on legal grounds" is "judicially reviewable under FECA's 'contrary to law' standard." *Id.* at 895.

Of course, legal interpretations could "underlay" an exercise of prosecutorial discretion in ways that a court would still be "ill-equipped to review," *id.* at 885, 886 n.4: "[a]n agency might conclude that the costs of litigating a potential action outweigh the likely benefits of enforcing a statue on the margins," MTD Op. 23. But, here, there was no actual prudential analysis from which legal interpretations need be "teased." *New Models II*, 993 F.3d at 883. Rather, as this Court recognized, the only concern supporting the reference to prosecutorial discretion was the commissioners' "constitutional doubts." *See* MTD Op. 22. That was not a stand-in for prudential considerations like "litigation risk" (words that never appeared in any statement). *See id.* Rather, it was a restatement of the commissioners' decision to dismiss based solely on "their interpretation of FECA in light of First Amendment doctrine." *See id.* at 23–24.[2]

In contrast, the discussion in *New Models II* on which AAN relies, and from which AAN partially quotes, was not addressing a case in which "prosecutorial discretion was rooted entirely in [reviewable] legal misgivings." *Id.* Rather, as the remainder of the quoted sentence makes clear, *New Models II* was making a different point: that a statement "rest[ing] squarely on prudential and discretionary considerations relating to resource allocation and the likelihood of successful enforcement" was, by its "nature" unreviewable, and courts could not review any

[2] Moreover, the FEC and its commissioners have given cause to believe they mean nothing by "prosecutorial discretion" other than a dismissal based on legal interpretation. For example, in *Lieu v. FEC*, the FEC referred to a dismissal as an act of unreviewable prosecutorial discretion notwithstanding the fact that the statement on review never used the term "prosecutorial discretion" and the dismissal "was based exclusively on [the commissioners'] interpretation of" precedent. 370 F. Supp. 3d 175, 183-84 (D.D.C. 2019), *summarily aff'd*, No. 19-5072, 2019 WL 5394632 (D.C. Cir. Oct. 3, 2019).

legal analysis that might "underlay" it. *New Models II*, 993 F.3d at 886 & n.4. "[T]he nature of the decision not to prosecute" was unreviewable because it was based on the "weighing of practical enforcement considerations" for which there was "no 'law' to apply." *Id.* at 885, 886 n.4. In contrast, a statement that rested solely on legal interpretation, even if it purported to invoke prosecutorial discretion that was "rooted entirely in [such] legal misgivings," MTD Op. 24, would be, by its nature, "judicially reviewable under FECA's 'contrary to law' standard," *New Models II*, 993 F.3d at 895.[3]

Here, legal interpretation did not "underlay" an unreviewable rationale for dismissal. *Cf. id.* at 886 n.4. It was not merely "baked in" an "unreviewable discretionary decision." *See* MTD Op. 24 n.6 (distinguishing *ICC*, 482 U.S. at 282-83). Rather, the explanation was "entirely based on legal conclusions." *Id.* Accordingly, it was reviewable, as even *New Models II* concedes.

[3] *New Models II* is wrong on the reviewability of a statement invoking both legal and discretionary factors. Rather than turning on the presence or absence of any words in an explanation—particularly one which represents only a non-majority of the agency—it is the "formal action, rather than its discussion, that is dispositive." *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 281 (1987). Here, the formal action was a vote to close the file occurring after a merits vote on whether there was reason to believe AAN violated the FECA, without reference to any exercise of prosecutorial discretion. *See* Certification, MUR No. 6589 (AAN) (June 24, 2014), https://bit.ly/3zsKNNO (last visited June 23, 2021). That is the same formal action that occurred in *Akins* and which the Supreme Court found reviewable. *Compare Akins*, 524 U.S. at 26, *and* Certification, MUR 2804 (AIPAC) (June 17, 1992) ("Akins Record"), https://bit.ly/3iCuDM1 (last visited June 23, 2021) (page 3409–10) (6-0 vote to "close the file" after merits vote), *with Akins*, 524 U.S. at 25 (citing, as example of exercise of prosecutorial discretion, vote to "take no further action") *and* Akins Record 3409 (4-2 vote to "take no further action"), *and* Certification, MUR No. 7181 (Mar. 1, 2021), https://bit.ly/2RnH6I0 (last visited June 23, 2021) (voting 4-2 to "[d]ismiss based on prosecutorial discretion under [*Chaney*]"). *New Models II* wrongly focused on "discussion" rather than "formal action," *ICC*, 482 U.S. at 281, but at the very least it still requires discussion of factors courts are ill-equipped to review.

2. New Models II *Rested on an Unreviewable Prudential Evaluation*

Faced with these insurmountable differences between the FEC's treatment of New Models and AAN, AAN resorts to misleading omissions to manufacture similarity where there is none. AAN strips the relevant portion of the New Models statement to a few words that also appeared in the superseded statement here to claim that any mention of "prosecutorial discretion," whatever the basis, eliminates review. *See* AAN Mot. 10. But AAN's obfuscation fails for two reasons: first, it ignores the operative language on which the split panel relies, and second, the D.C. Circuit has already rejected AAN's argument.

First, AAN completely ignores the operative language in the New Models statement, which is where the commissioners actually invoked prosecutorial discretion:

> Given the age of the activity and the fact that the organization appears no longer active, proceeding further would not be an appropriate use of Commission resources. *See* 28 U.S.C. § 2462. *See also Nader v. FEC*, 823 F. Supp. 2d 53, 65–66 (D.D.C. 2011) (finding Commission decision to dismiss allegations that several groups were political committee was not contrary to law, and "represents a reasonable exercise of the agency's considerable prosecutorial discretion" given the "staleness of evidence and the defunctness of several of the groups").

Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioner Lee E. Goodman at 31 n.139, MUR No. 6872 (Dec. 20, 2017), https://bit.ly/3iFrYB7 (last visited June 23, 2021); *see also id.* at 7 ("In 2015 New Models ceased operations."); *id.* at 7 n.32 ("*See* New Models, 2015 Form 990 Part IV, Question 31 (representing that the organization liquidated, terminated, dissolved, or otherwise ceased operations)."). It was *that* discussion of "practical enforcement considerations" on which the split decision in *New Models II* rested its conclusion that there were two "distinct" and "explicit[]" grounds for dismissal that left "no doubt" about an invocation of prosecutorial discretion untethered to any legal analysis and thus for which there was "no 'law' to apply." *New Models II*, 993 F.3d at 883–84 (quoting footnote 139), 885, 889 n.8. It was

because of the commissioners' expressed "expertise in weighing *these* factors" that the split panel found itself "ill-equipped to review." *Id.* at 885 (emphasis added); *cf. id.* at 889 ("Because the Commission relied on its unreviewable enforcement discretion as [an additional] basis for dismissal, a judicial determination that the Commission's statutory interpretation was 'contrary to law' would not affect the Commission's ultimate decision to dismiss."). AAN simply ignores the determinative discussion of discretionary factors to create a parallel where there is none. *See* AAN Mot. 10 ("footnote omitted").[4]

This Court rightly focused on that language in distinguishing the New Models dismissal. This Court recognized the New Models dismissal was based, in part, on the commissioners' concern that "proceeding further would not be an appropriate use of Commission resources because 'New Models appeared[ed] no longer active,' had 'liquidated, terminated, dissolved, or otherwise ceased operations,' and had engaged in the activity in question years earlier." MTD Op. 20 (quoting *New Models I*, 380 F. Supp. 3d at 37–38). In contrast, here, the commissioners never "mention[ed] resource-based or other prudential considerations of the sort cited by the controlling Commissioners in *CHGO* and identified by the Supreme Court in [*Chaney*] as grounds to shield discretionary nonenforcement decisions from judicial review." *Id.* at 21. The passing reference to prosecutorial discretion only in the superseded Statement of Reasons was

[4] While the split panel said that the length of the discussion of discretion was not "dispositive or even particularly relevant," *New Models II*, 993 F.3d at 887 n.5, it still relied on the fact that the "invocation of prosecutorial discretion in this case rested squarely on prudential and discretionary considerations relating to resource allocation and the likelihood of successful enforcement," and that the "FECA provides 'no "law" to apply' in reviewing the [commissioners'] *weighing of practical enforcement considerations*," to conclude "a court has no basis on which to assess whether it is 'contrary to law.'" *Id.* at 885, 886 (emphasis added) (quoting *CHGO*, 892 F.3d at 440). Thus, there must be an actual weighing of such non-legal considerations for *New Models II* to apply. Here, there was none.

not, as a factual matter, "distinct from the legal interpretations" that provided the singular basis for the commissioners' vote. *Id.* at 22. The language in New Models is simply dissimilar.

Second, the D.C. Circuit has already rejected AAN's argument that a bare recitation of "prosecutorial discretion" strips a court of the ability to review the Statement of Reasons. In *CLC v. FEC*, the D.C. Circuit *twice* rejected attempts to insulate dismissals from review because the statements reference prosecutorial discretion; first by a motion panel, s*ee* No. 18-5239 (D.C. Cir. June 4, 2019), https://bit.ly/3vqoOnz (last visited June 23, 2021); FEC Mot. for Summ. Aff. 14–19, *CLC v. FEC*, No. 18-5239 (D.C. Cir. Sept. 24, 2018), https://bit.ly/3iFslM1 (last visited June 23, 2021), and then again on full briefing, *CLC*, 952 F.3d at 356; *see also* Br. of the FEC 26–39, *CLC v. FEC*, No. 18-5239 (D.C. Cir. Aug. 14, 2019), https://bit.ly/3xkqhgv (last visited June 23, 2021). Notably, the language in the relevant Statement of Reasons was the identical language AAN points to here as stripping the courts of jurisdiction. *See* Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman, MUR Nos. 6485, 6487, 6488, 6711, and 6930 (Apr. 1, 2016), https://bit.ly/3pUbpTF (last visited June 23, 2021) (claiming dismissal justified as "an exercise of the Commission's prosecutorial discretion"). Nonetheless, two panels of the D.C. Circuit determined review remained proper.[5]

B. The Operative Statement of Reasons Here Never Mentions Discretion

Even if the mere recitation of "prosecutorial discretion" could have the effect AAN supposes (and it does not), the operative Statement of Reasons here never uses that term, nor does it discuss the prudential factors that would actually invoke such discretion under *New Models II*.

[5] Judge Edwards explained the panel's decision not to apply *CHGO* to bar review: *CHGO* is inconsistent with binding Supreme Court and Circuit precedent. *CLC*, 952 F.3d at 358–63 (Edwards, J., concurring).

AAN focuses only on the September 30, 2014 Statement of Reasons the commissioners provided in determining CREW's complaint did not raise a reason to believe. *See* AAN Mot. 10. But while this Court found that statement contrary to law, *CREW I*, 209 F. Supp. 3d at 95, the FEC did not fail to conform to *CREW I*, *see* Mem. Op. and Order 5, *CREW v. FEC*, No. 14-cv-1419 (D.D.C. Apr. 6, 2017), and consequently CREW did not bring a citizen suit against AAN at that time. Rather, the FEC once again dismissed after a deadlock, and the commissioners abandoned the prior Statement of Reasons and tried again with a *new* Statement of Reasons on October 19, 2016. *See CREW II*, 299 F. Supp. 3d at 90. This Court found that second Statement of Reasons was contrary to law, *id.* at 101, and it was the FEC's failure to conform to this Court's second judgment that gave raise to this suit, *id.* (noting the FEC's failure to conform permitted CREW to bring civil action here); *see also* 52 U.S.C. § 30109(a)(8)(C). AAN effectively concedes that the Statement of Reasons this Court reviewed and which led to this lawsuit never invoked prosecutorial discretion, and that *New Models II* did not block this Court's review of it. Rather, AAN simply asserts that but for this Court's decision in *CREW I*, the commissioners would not have abandoned the first Statement of Reasons. *See* AAN Mot. 10–11.

The problem for AAN is that it does not matter *why* the commissioners changed their analysis. They did so, which moots any arguments arising from the first Statement of Reasons. *See Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1353 (D.C. Cir. 2014) (stating agency's issuance of new explanation for action moots challenge relating to prior explanation); *see also* MTD Op. 20 n.5 ("Generally, the Court would review only the second Statement of Reasons, which as a formal matter superseded the first on remand."); *cf. Harrington v. Chao*, 372 F.3d 52, 58–63 (1st Cir. 2004) (analyzing as sole relevant explanation agency's supplemental Statement of Reasons issued after prior decision remanding for better explanation). For example, in *Center*

for Science in the Public Interest v. Regan, 727 F.2d 1161 (D.C. Cir. 1984), after a district court struck an agency's rule due to a failure to "provide an adequate explanation," the agency revised the rule and explanation rather than appeal the adverse judgment, *id.* at 1162–63. An intervening party wished to defend the prior explanation as "adequate," and thus urged the appellate court to find the district court had erred. *Id.* at 1165. Nevertheless, the D.C. Circuit rejected the attempt because the prior explanation had been superseded by new agency action, rendering it a "dead letter [that] cannot be revived in favor of intervenors." *Id.* at 1165–66. Notably, the D.C. Circuit expressed no concern that the new statement "exists only because [the district court] mistakenly reviewed" the first one. *Cf.* AAN Mot. 10–11. In contrast, AAN cites nothing to support its claim to revive the dead letter Statement of Reasons here.

Nor was it inevitable from *CREW I* that the commissioners would revisit their prior statement. *Cf. id.* The FEC could have appealed any error in *CREW I*, even if AAN could not. *See Occidental Petro. Corp. v. SEC*, 873 F.2d 325, 331 (D.C. Cir. 1989) (noting, absent such opportunity to appeal even a nonfinal order, the agency "would not have an opportunity to appeal the district court's legal ruling after proceedings on remand"). Indeed, rather than appeal, the FEC moved to dismiss AAN's appeal. *See* FEC, Mot. to Dismiss, *CREW v. FEC*, No. 16-5300, 16-5343 (D.C. Cir. Dec. 8, 2016). The fact that the FEC did not avail itself of an opportunity to appeal, and has not issued a final agency action from which AAN could seek relief, means the FEC's interests are "irretrievably lost." *See Occidental*, 873 F.2d at 329.

Similarly, the controlling commissioners could have, on remand, simply reasserted their prior statement or reaffirmed the (purported) invocation of prosecutorial discretion. But they did not. Rather, they abandoned that prior statement and issued a new, superseding statement. As

such, the prior statement is a legal nullity which can afford no harm or benefit. *See Occidental*, 873 F.3d at 331; *see also Ctr. for Science*, 727 F.2d at 1165–66.[6]

Accordingly, as AAN makes no claim that *New Models II* precluded this Court's review of the operative Statement of Reasons here, AAN fails to show reconsideration is warranted.

II. *New Models II* Does Not Warrant Interlocutory Appeal

Because *New Models II* does not provide a basis for this Court to reconsider its motion to dismiss even under Rule 54, it cannot satisfy AAN's "heavy burden" to show "exceptional circumstances" exist to warrant interlocutory appeal. *See Selden v. Airbnb, Inc.*, No. 16-cv-933, 2016 WL 7373776, at *1 (D.D.C. Dec. 19, 2016) (Cooper, J.) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978)). "A party seeking certification pursuant to § 1292(b) must meet a high standard to overcome the 'strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing proceeding by interlocutory appeals.'" *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, 233 F. Supp. 2d 16, 20 (D.D.C. 2002) (quoting *United States v. Nixon*, 418 U.S. 683, 690 (1974)). "The Court may certify an order for interlocutory appeal [only] if it finds there are 'controlling question[s] of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.'" *Selden*, 2016 WL 7373776, at *1 (quoting 28 U.S.C. § 1292(b)). "[D]ifferent outcome[s] based on different facts" do not establish a difference of opinion "on any question of law." *Id.* Even then, "appeal of a non-final order is

[6] At the very least, the commissioners' abandonment of even the mention of "prosecutorial discretion" in the second Statement of Reasons supports the conclusion that the phrase's recitation in the first Statement of Reasons was not intended to invoke a distinct prudential dismissal based on the factors at issue in *Chaney*.

left to the discretion of the district court." *APCC Serv., Inc. v. Spring Comm'ns. Co.*, 297 F. Supp. 2d 90, 95 (D.D.C. 2003).

As explained above, and as incorporated herein, *New Models II* concerned a dismissal "based on different facts," which cannot warrant interlocutory appeal. *See Seldin*, 2016 WL 7373776, at *1. The dismissal there was based on two "distinct" rationales, with one grounded in "discretionary considerations at the heart of *Chaney*'s holding" given as a reason "*in addition to the legal grounds*" for dismissal. *See New Models II*, 993 F.3d at 884, 885, 887. Here, in contrast, there was a singular basis for dismissal (in both superseded and operative statements): the commissioners' "interpretation of FECA in light of First Amendment doctrine is what led them to dismiss the complaint." MTD Op. 24.

The D.C. Circuit has also confirmed that the superseded statement does not warrant immediate review. AAN expressly raised the superseded statement to the D.C. Circuit, arguing that *CHGO* rendered *CREW I* and *CREW II* improper. *See* AAN Mot. for Summ. Reversal. The D.C. Circuit decided that AAN would have to wait for a final order. *See CREW*, 2018 WL 5115542, at *1.

AAN gives no reason that *New Models II* alters the D.C. Circuit's conclusion. Indeed, *New Models II* did not purport to radically depart from prior authority, but rather said its decision was squarely "foreclose[d]" by *CHGO*. *New Models II*, 993 F.3d at 885. Since *New Models II* was "a straightforward application of" *CHGO*, *id.* at 993 F.3d at 886, then *New Models II* cannot provide a basis for immediate appeal where *CHGO* did not.[7]

[7] Nor does *Public Citizen v. FEC*, No. 14-148 (RJL), 2021 WL 1025813 (D.D.C. Mar. 17, 2021) provide a substantial difference of opinion on comparable facts. There, Judge Leon found review was unavailable based on a statement of reasons that at least discussed prudential factors, like the lack of fair notice to the defendant. *See* Statement of Reasons of Chairman Lee E. Goodman and

Finally, as a simple matter of prudence, the Court should decline interlocutory appeal because the D.C. Circuit will soon have a chance to reconsider *New Models II*, and *CHGO*, en banc. A majority of active judges on the Circuit who have considered the decisions have found them inconsistent with prior precedent. *See supra* n.1. A petition for rehearing *New Models II* en banc was filed today. *See* Pet. for Reh'g En Banc, *CREW v. FEC*, No. 19-5161 (D.C. Cir. June 23, 2021). This Court is likely to have the benefit of the results of the en banc petition—or at least to know whether *New Models II* has been vacated—well before any appellate panel could consider interlocutory appeal here, and well before this Court resolves the parties' merits' briefing. Accordingly, even if the Court thought AAN satisfied its burden for an interlocutory appeal, the Court should exercise its discretion to decline certifying such appeal here. *See APCC Serv.*, 297 F. Supp. 2d at 95.

III. A Stay Pending Interlocutory Appeal is Not Warranted

For the same reasons that AAN has not demonstrated it deserves the exceptional relief of an interlocutory appeal, its request to stay the case should also be denied. *See* AAN Mot. 14 (conditioning stay request on interlocutory appeal). Even if an appeal proceeds, however, the case should not be stayed.

"A stay is an 'intrusion into the ordinary process of administration and judicial review.'" *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quoting *Va. Petroleum Jobbers Assn. v. FPC*, 259 F.2d 921, 925 (C.A.D.C 1958) (per curiam)). Accordingly, a movant must establish a stay is justified by demonstrating (1) "a strong showing that he is likely to succeed on the merits," (2) "the applicant will be irreparably injured absent a stay," (3) "issuance of the stay will [not]

Commissioners Caroline C. Hunter and Matthew S. Petersen 28 n.117, MUR No. 6396 (Jan. 8, 2014), https://bit.ly/2TWJuGE (last visited June 23, 2021). The commissioners expressed no similar concern here.

substantially injure the other parties interested in the proceedings," and (4) "the public interest" does not "li[e]" against a stay. *Id.* at 434. "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433–34. Even then, "[a] stay is not a matter of right, even if irreparable injury might otherwise result." *Id.* at 433. The grant of an interlocutory appeal does not entitle a movant to a stay. 28 U.S.C. § 1292(b) (application for interlocutory appeal "shall not stay proceedings in the district court unless the district court judge or the Court of Appeals or a judge thereof shall so order").

AAN's motion fails to meet its burden. For the reasons stated above, it has failed to even lay out a substantial difference of opinion to support its challenge to this Court's rulings, never mind make a "strong showing that [it] is likely to succeed on the merits." *Nken*, 556 U.S. at 434. Nor has AAN identified any "irreparable harm," *id.*, that is both "certain and great," *Cuomo v. U.S. Nuclear Regul. Comm'n*, 772 F.2d 972, 976 (D.C. Cir. 1985) (per curiam). Proceeding in litigation here is not an irreparable harm. *See Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006); *McSurley v. McClellan*, 697 F.2d 309, 317 n.13 (D.C. Cir. 1982) (per curiam). AAN's speech is also not chilled: nothing in these proceedings or even a final adverse judgment limits in any way what AAN may say. *See Citizens United v. FEC*, 558 U.S. 366, 366 (2010) (disclosure does not "prevent anyone from speaking"); *see also United States v. Philip Morris USA Inc.*, 841 F. Supp. 2d 139, 142 (D.D.C. 2012) ("The mere fact that First Amendment issues are being raised in both cases does not provide sufficient justification to delay" resolution of the case).

In contrast, a stay does immense and irreparable harm to both CREW and the public to whom CREW communicates. Again, AAN is still funneling millions of dollars from undisclosed sources into federal elections, *see* CLF Receipts, and almost certainly will spend millions more

to influence the 2022 elections. A stay works immense damage where the case involves "continuing infringement" of a party's rights. *Dellinger v. Mitchell*, 442 F.2d 782, 787 (D.C. Cir. 1972). Moreover, "[t]here is always a public interest in prompt execution [of the law]" and avoiding "permit[ing] and prolong[ing] a continuing violation of United States law." *Nken*, 556 U.S. at 436. AAN's continued failure to report also violates the public's right to be "fully informed" about "[t]he sources of a candidates financial support," *Buckley v. Valeo*, 424 U.S. 1, 67, 76 (1976), and "who is speaking about a candidate," *Citizens United*, 558 U.S. at 369; *see also, e.g.*, Indictment, *United States v. Parnas*, 19-cv-725 (S.D.N.Y. 2019) (alleging source of non-reported campaign funds were Ukrainian nationals). "[T]he public has an interest in knowing who is speaking about a candidate and who is funding that speech." *SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010) (en banc). It allows "citizens [to] see whether elected officials are 'in the pocket' of so-called moneyed interests." *Citizens United*, 558 U.S. at 370. Indeed, disclosure is necessary to preserve the "free functioning of our national institutions." *Buckley*, 424 U.S. at 66–67. AAN's proposed stay puts all that in jeopardy.

AAN is mistaken in claiming that a stay causes no harm because this case "looks backward more than 10 years." AAN Mot. 14. CREW and the public are entitled to "prompt disclosure," *Citizens United*, 558 U.S. at 370, and every day spent in ignorance of AAN's donors is irretrievably lost. Nor is the need for that information academic: beneficiaries of AAN's 2010 spending remain in office and will be running for reelection in 2022. *See, e.g.*, Statement of Candidacy of David B. McKinley (Nov. 17, 2020), https://bit.ly/3pU0F7y (last visited June 23, 2021).[8] CREW and 2022 voters are entitled to know the "sources of a candidate's financial

[8] Rep. McKinley benefited from AAN's ads attacking Mike Oliverio, *CREW II*, 299 F. Supp. 3d at 90 & n.8, who was McKinley's opponent in 2010, *see* FEC, Federal Elections 2010 at 145 (July 2011), https://bit.ly/3zQP6Ty (last visited June 23, 2021).

support," even support from ten years ago which can still be exerting a lingering influence on candidates. *See Buckley*, 424 U.S. at 67. And as this Court recognized, even if CREW is limited to proving AAN became a political committee by 2011, making CREW whole could require "AAN to disclose everything it would have had to disclose had it complied with the law in the first instance" from 2011 to now, and even continuing into the future. *See* MTD Op. 27.

Finally, to the extent *New Models II* raises any concerns for the Court, the Court should hold AAN's motion in abeyance pending the opportunity for the full en banc court to reconsider the decision. As Judge Millett wrote in her dissent in *New Models II*, that decision "should not be the law of this circuit," *New Models II*, 993 F.3d at 895 (Millett, J., dissenting), echoing the sentiment of a majority of the Judges on the D.C. Circuit to consider this question and who have strongly disagreed with *CHGO*. A petition for rehearing en banc has been filed, and this Court will know in short order whether the petition is denied or whether the full Court intends to reconsider the question and *New Models II* is vacated. In the meantime, the parties have virtually concluded discovery and can follow the current schedule to prepare briefs to allow this Court to timely resolve this matter before it.

CONCLUSION

For the reasons stated above, CREW respectfully requests the Court deny AAN's motion for reconsideration, and AAN's motion for certification of an interlocutory appeal and to stay these proceedings pending any such appeal.

Dated: June 23, 2021

Respectfully submitted,

/s/ Sathya S. Gosselin
Sathya S. Gosselin (No. 989710)
sgosselin@hausfeld.com
Seth R. Gassman (No. 1011077)
sgassman@hausfeld.com
Hilary K. Scherrer (No. 481465)
hscherrer@hausfeld.com
Claire A. Rosset (No. 1719756)
crosset@hausfeld.com
HAUSFELD LLP
888 16th Street, N.W., Suite 300
Washington, DC 20006
Telephone: (202) 540-7200
Facsimile: (202) 540-7201

Stuart C. McPhail (D.C. Bar No. 1032529)
smcphail@citizensforethics.org
Adam J. Rappaport (D.C. Bar No. 479866)
arappaport@citizensforethics.org
CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON
1331 F Street, N.W., Suite 900
Washington, DC 20004
Telephone: (202) 408-5565
Fax: (202) 588-5020

Counsel for Citizens for Responsibility and Ethics in Washington