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 REPLY
IN SUPPORT OF ITS MOTION FOR RECONSIDERATION OR,
IN THE ALTERNATIVE, FOR CERTIFICATION AND STAY

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INTRODUCTION

Citizens for Responsibility and Ethics in Washington ("CREW") offers two arguments why the D.C. Circuit's recent decision in *CREW v. FEC*, 993 F.3d 880 (D.C. Cir. 2021) ("*New Models*"), does not mandate reconsideration. Neither can overcome the straightforward fact that the D.C. Circuit has squarely rejected this Court's holding that discretionary dismissals are judicially reviewable if they are premised on legal interpretations. Justice requires that this Court reconsider its decision now rather than force American Action Network ("AAN") to expend substantial time and resources briefing summary judgment and waiting for an appeal.

First, CREW tries to distinguish *New Models* on the ground that the FEC did not properly invoke its prosecutorial discretion here. That argument is based on a misreading of *New Models*, where the D.C. Circuit held that any "Commission decision that rests *even in part on prosecutorial discretion* cannot be subject to judicial review." 993 F.3d at 884 (emphasis added). As AAN has explained, that standard is readily satisfied here because, just as in *New Models*, the FEC dismissed for legal reasons "and . . . prosecutorial discretion." 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) ("First SOR"), https://www.fec.gov/files/legal/murs/6589/14044362004.pdf.

CREW attempts to distinguish the FEC's express invocation of enforcement discretion on the theory that "an invocation of prosecutorial discretion [must be] untethered to any legal analysis" and supported by more than the FEC's "constitutional doubts" about the merits of a prosecution. CREW Mem. 10, 12. But under *New Models*, courts must "take the Commission at its word when it invokes prosecutorial discretion, irrespective of how many words it uses or the structure of its sentences." *New Models*, 993 F.3d at 889 n.8. The FEC was not required to explain its nonenforcement decision further in order to take it out of the realm of judicial review. "FECA

does not govern how the Commission may exercise its enforcement discretion, and therefore such discretion cannot be subject to judicial review." *Id.* at 889.

In any event, the FEC's stated reasons do, in fact, reflect prudential and discretionary considerations. It is settled law that a common reason for declining enforcement "is the prosecutor's belief (sometimes publicly stated) *that the law will not sustain a conviction*." *New Models*, 993 F.3d at 886 n.4 (emphasis added) (quoting *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 282–83 (1987)); *see also id.* ("It is the nature of the decision not to prosecute that matters, not whether legal interpretation underlay the decision . . . ."). And even though that judgment undoubtedly involves legal interpretation—as it did in *New Models* itself—the nonenforcement decision is still discretionary and thus simply "is not subject to judicial review." *Id.* at 889.

Second, CREW wrongly contends that *New Models* does not control because the FEC supposedly "abandoned the first Statement of Reasons" on remand from this Court's decision in *CREW v. FEC*, 209 F. Supp. 3d 77, 88 n.7 (D.D.C. 2016) ("*CREW I*"). CREW Mem. 15. That argument rests on a false premise. On remand, the FEC expressly reaffirmed and "incorporate[d] by reference" its prior analysis presented in the first statement of reasons "on all points" except those where this Court directed it to reach a different result. Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioner Lee E. Goodman at 2 MUR No. 6589R (Oct. 19, 2016) ("Second SOR"), https://www.fec.gov/files/legal/murs/6589/16044401031.pdf. Its invocation of enforcement discretion was thus just as much a part of the second statement as the first. Contrary to CREW's contention, the FEC did not "rescind" its prior analysis, but rather stood fully behind it. And even if it had not reaffirmed and incorporated by reference that invocation, the FEC's

second statement would not affect reviewability in this case because that statement would not exist but for the Court's erroneous remand.

Forcing AAN to continue to expend considerable time and resources defending itself in a case that is unreviewable is egregiously unfair. The Court should grant reconsideration now and stem the continued waste of judicial and party resources on claims that do not belong before this Court. 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).

ARGUMENT

I. *NEW MODELS* MANDATES REVERSAL OF THIS COURT'S ORDER ON THE MOTION TO DISMISS.

The Court should exercise its "inherent power" to reconsider its order on the motion to dismiss, *Cobell v. Jewell*, 802 F.3d 12, 25 (D.C. Cir. 2015) (quoting *Greene v. Union Mutual Life Ins. Co. of Am.*, 764 F.2d 19, 22 (1st Cir. 1985) (Breyer, J.)), because, as AAN has explained, the D.C. Circuit's *New Models* decision makes plain that this Court's reasons for reviewing the FEC's dismissal decision were incorrect. AAN Mot. 7–12. CREW does not offer any persuasive basis on which to distinguish *New Models*.

A. *New Models* Mandates Reversal Because The FEC Invoked Prosecutorial Discretion And Thus Did Not Rely "Solely On Legal Interpretations."

In *New Models*, the D.C. Circuit held that any "Commission decision that rests *even in part on prosecutorial discretion* cannot be subject to judicial review." 993 F.3d at 884 (emphasis added). That is exactly what happened in this case: the FEC dismissed for legal reasons "and . . . prosecutorial discretion." First SOR at 27; *see also id.* at 23–24 n.137 ("[T]he

constitutional doubts raised here militate in favor of cautious exercise of our prosecutorial discretion."); Second SOR at 2 (incorporating First SOR by reference).

This Court originally reached a different conclusion, reasoning that the FEC's decision should be reviewable because its "two references to prosecutorial discretion [were] tethered to [the FEC's] legal reasoning." *CREW v. AAN*, 410 F. Supp. 3d 1, 17–22 (D.D.C. 2019) ("*AAN I*") (citing *CREW v. FEC*, 892 F.3d 434, 441 n.11 (D.C. Cir. 2018) ("*CHGO*")); *see also CREW v. AAN*, 415 F. Supp. 3d 143, 146 (D.D.C. 2019) ("*AAN II*") ("When the FEC's invocation of prosecutorial discretion is based on legal analysis, it does not preclude judicial review under *CHGO*."). According to this Court, discretionary dismissals "premised on . . . legal interpretations are judicially reviewable." *AAN I*, 410 F. Supp. 3d at 18.

New Models squarely rejected that proposition. Under *New Models*, courts must "take the Commission at its word when it invokes prosecutorial discretion, irrespective of how many words it uses or the structure of its sentences." 993 F.3d at 889 n.8. Where "the Commission provide[s] legal analysis and also invoke[s] its enforcement discretion," the decision "is not subject to judicial review." *Id.* at 889; *see also id.* at 886 n.4 ("It is the nature of the decision not to prosecute that matters, not whether legal interpretation underlay the decision . . . .").

The FEC's invocation of enforcement discretion in this case is indistinguishable from the nonenforcement decision the D.C. Circuit deemed unreviewable in *New Models*. In that case, just like this one, the FEC dismissed for "legal reasons 'and . . . prosecutorial discretion.'" *New Models*, 993 F.3d at 889 n.8 (quoting Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioner Lee E. Goodman at 31, MUR No. 6872 (Dec. 20, 2017), https://www.fec.gov/files/legal/murs/6872/17044435569.pdf); *see also id.* (explaining that "there is no doubt" the FEC relied on discretion "because the Commission has told us that it" did so

(citation omitted)). Although the vast majority of the FEC's analysis explained its reasons for concluding that New Models was not a "political committee" under FECA, the D.C. Circuit held that "[b]ecause enforcement discretion is [also] a basis for the Commission's action, we have no grounds to review its statutory analysis." *Id.* at 889. *New Models* requires the same result here.

According to CREW, the FEC's express invocation of prosecutorial discretion is "misleading" because the rest of the FEC's statement allegedly "rested solely on legal interpretations." CREW Mem. 1–2, 12. CREW argues *New Models* is different because there the FEC also said, in a footnote, that prosecution "would not be an appropriate use of Commission resources" and this, in CREW's estimation, reflects "actual prudential analysis." CREW Mem. 10, 12.

The D.C. Circuit has rejected CREW's argument twice over, in *CHGO* and *New Models*. *See New Models*, 993 F.3d at 886 ("CREW is not entitled to have the court evaluate for abuse of discretion the individual considerations the controlling Commissioners gave in support of their vote not to initiate enforcement proceedings." (quoting *CHGO*, 892 F.3d at 441)). Courts are not positioned to distinguish "actual prudential analysis" from some other version of prudential analysis. The reason is simple: "FECA provides no legal criteria a court could use to review an exercise of prosecutorial discretion under the 'contrary to law' standard." *Id.* at 885. Thus, when the FEC invokes enforcement discretion, there is simply "no room" for a court "to selectively exercise judicial review based on whether the Commission places more or less emphasis on discretionary factors when declining to pursue enforcement." *Id.*

That includes discretionary factors linked to the FEC's legal analysis, like those the FEC relied upon in this case and in *New Models*. Indeed, *New Models* clarified this point when it held that "it is the nature of the decision not to prosecute that matters, not whether legal interpretation

underlay the decision." *Id.* at 886 n.4. This also underscores why CREW is wrong to suggest that "constitutional doubts" cannot reflect "actual prudential analysis." CREW Mem. 10. As *New Models* 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*.

993 F.3d at 886 n.4 (quoting *ICC*, 482 U.S. at 282–83) (emphases added); *see also, e.g.*, *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 741 (D.C. Cir. 2016) ("The decision whether to prosecute turns on factors such as 'the strength of the case . . . .'").

This is precisely the sort of practical consideration the record in this case reflects. The FEC expressly stated that "the constitutional doubts raised here militate in favor of cautious exercise of our prosecutorial discretion" under "*Heckler v. Chaney*, 470 U.S. 821, 831 (1985)," First SOR at 24 n.137, thus tying its legal analysis to a policy judgment about the desirability of enforcement under the circumstances. Although that express linkage is not required under *New Models*, here it confirms that the FEC's nonenforcement decision reflects "prudential and discretionary considerations" within the agency's expertise, *New Models*, 993 F.3d at 886; *see also Public Citizen v. FEC*, No. 14-cv-148, 2021 WL 1025813, at *3–5 (D.D.C. Mar. 17, 2021) (explaining that the FEC's legal reasoning can reflect "prudential concerns" including "concern[s] about the likelihood of success of prosecuti[on]" and reluctance to assert "new legal theories" without adequate notice). This plainly refutes CREW's claim that the FEC's decision rested solely on legal interpretations.

To underscore this point, consider the example *New Models* gave of an FEC dismissal "based solely on judicially reviewable legal determinations." 993 F.3d at 891 & n.11 (citing MUR Nos. 7309, 7399 (June 7, 2019) (Crowdpac, Inc.),

https://www.fec.gov/files/legal/murs/7309/19044417414.pdf). In that example, the FEC explained its legal reasons for dismissing a complaint against Crowdpac, Inc. and, unlike this case or *New Models*, *never mentioned its prosecutorial discretion*. That example is further proof that *New Models* does not allow a court to look behind the FEC's invocation of discretion.[1] The D.C. Circuit's decision in *New Models*, including its citation to Crowdpac, Inc., 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.

B. The FEC Did Not "Abandon" Its Prosecutorial Discretion.

Having failed to show that the FEC's first statement of reasons did not effectively invoke prosecutorial discretion, CREW asserts the FEC "abandoned the first Statement of Reasons" on remand from this Court's decision in *CREW I*. CREW Mem. 15. CREW is again wrong.

Far from abandoning its first statement, the FEC's second statement reaffirms the first statement, expressly "incorporat[ing] by reference that analysis and discussion on all points except for aspects deemed contrary to law by the court," including "our reasoning for our original votes." Second SOR, at 2. "It is well established that an agency may explain itself by incorporating by reference parts of the record." *Christian Broad. Network v. Copyright Royalty Tribunal*, 720 F.2d 1295, 1306 (D.C. Cir. 1983); *accord Conn. Dep't of Pub. Util. Control v. FERC*, 484 F.3d 558,

[1] CREW is also wrong in its claim that the D.C. Circuit "already rejected AAN's argument" that the FEC's invocation of discretion renders its nonenforcement decision unreviewable. CREW Mem. 14. The decision CREW relies upon expressly avoided "the Commission's reviewability argument," *Campaign Legal Ctr. v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020), affirming the FEC dismissal in that case on the merits. It is axiomatic that "cases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994); *cf. Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) ("[T]he existence of unaddressed jurisdictional defects has no precedential effect."). In any event, CREW's attempts to take both *CHGO* and *New Models* en banc belies its contention here that the reviewability question has already been settled in its preferred direction.

561 (2007) ("FERC may incorporate by reference discussions in other decisions . . . ."). By incorporating its first statement of reasons into the second, the FEC reaffirmed its exercise of prosecutorial discretion. There is no sense in which the FEC "abandoned" its reliance on discretion.

But even if the FEC had failed to incorporate its first statement, that failure would be immaterial because the second statement merely complies with the Court's directive to provide "additional . . . explanation" conforming with the Court's interpretation of FECA. *CREW I*, 209 F. Supp. 3d at 95 (citation omitted). And, as AAN has explained, the second statement exists only because this Court mistakenly reviewed the first decision. If this Court did not have authority to review the FEC's first dismissal decision, then it also did not have authority to find the dismissal "contrary to law," to require additional agency proceedings, to review the FEC's second dismissal decision, to find it "contrary to law," or to authorize the filing of this citizen suit. Once the foundational error resulting in review of the first dismissal 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."

The cases CREW cites are not to the contrary. In *Center for Science in the Public Interest v. Regan*, 727 F.2d 1161 (D.C. Cir. 1984), and *Amerijet International, Inc. v. Pistole*, 753 F.3d 1343 (D.C. Cir. 2014), the court declined to review challenges to agency actions that had been rendered moot through subsequent agency action or inaction. *See Ctr. for Science*, 727 F.2d at 1166 ("The Treasury's most recent action was the product of a third rulemaking proceeding; it is a different regulation . . . ."); *Amerijet*, 753 F.3d at 1346 ("This alternate procedure

expired . . . during the pendency of Amerijet's request to amend it.").[2] Those cases are completely unlike this one, where AAN is the *defendant* and the FEC has repeatedly reaffirmed its position "that 'the challenged dismissal decisions are independently justified by the Commission's broad prosecutorial discretion,'" *CREW I*, 209 F. Supp. 3d at 88 n.7 (quoting FEC Mot. Summ. J. 49–50), including by expressly incorporating the reasoning of its first statement into the second statement, Second SOR at 2.

For similar reasons, the collateral order doctrine presents no obstacle to this Court's reconsideration. *See* CREW Mem. 16–17. In this litigation, the D.C. Circuit has twice held that this Court's "orders remanding [this] action to the Federal Election Commission [were] not final, appealable orders." *CREW v. FEC*, No. 18-5136, 2018 WL 5115542, at *1 (D.C. Cir. Sept. 19, 2018); *see CREW v. FEC*, Nos. 16-5300, 16-5343, 2017 WL 4957233, at *1 (D.C. Cir. Apr. 4, 2017). Contrary to CREW's contention that any appeal from those orders has been "irretrievably lost," CREW Mem. 16, 21, the D.C. Circuit has expressly preserved for itself review of this Court's orders, including this Court's erroneous decision to review the FEC's dismissal based on prosecutorial discretion.

* * *

The bottom line is that *New Models* meant what it said. Because "the Commissioners who voted against enforcement invoked prosecutorial discretion to dismiss CREW's complaint," this Court "lack[s] the authority to second guess [the] dismissal." *New Models*, 993 F.3d at 882. *New*

[2] CREW cites an out of Circuit case, *Harrington v. Chao*, 372 F.3d 52 (1st Cir. 2004), as authority for the proposition that only a second statement of reasons is relevant in judicial review. *Harrington* establishes no such rule. In *Harrington*, the court affirmed based on the agency's second statement so there was no reason to review the first statement, *id.* at 63; *cf. DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020) (reviewing agency action based on first justification despite the existence of a second justification issued on remand), and *Harrington* does not purport to stand for anything broader.

Models squarely rejects the arguments that this Court embraced in declining to dismiss this case, and the Court should thus grant reconsideration.

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

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), because this case satisfies the statutory prerequisites for interlocutory appeal and for an administrative stay pending appeal. AAN Mem. 12–14.

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

CREW does not dispute that in this case "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)); *see* AAN Mem. 12. CREW denies only that 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).

CREW's position blinks reality. As AAN has explained, 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." 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 . . . ."). CREW believes *New Models* "is wrong," CREW Mem. 11 n.3, and

hopes that a "majority of active judges on the Circuit" will one day vote to overrule it, *id.* at 19.[3] But that wishful thinking does not erase the disparity between this Court's order and *New Models*. Nor does it relieve this Court of its obligation "to follow circuit precedent." *Maxwell v. Snow*, 409 F.3d 354, 358 (D.C. Cir. 2005); *see also Brooks v. Grundmann*, 748 F.3d 1273, 1279 (D.C. Cir. 2014) ("The doctrine of stare decisis compels district courts to adhere to a decision of the Court of Appeals of their Circuit until such time as the Court of Appeals or the Supreme Court of the United States sees fit to overrule the decision." (citation omitted)).

CREW has little to say about *Public Citizen*, 2021 WL 1025813, a recent decision AAN identified as demonstrating an actual difference of opinion among district courts within this Circuit. CREW attempts to sidestep that decision because the FEC dismissal at issue "at least discussed prudential factors, like the lack of fair notice to the defendant." CREW Mem. 18 n.7. But "fair notice" is a legal concept, grounded in due process. *See FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012). So, when CREW argues that the FEC elected not to prosecute based on concerns about "fair notice," CREW necessarily concedes that "legal interpretation underlay the decision." *See New Models*, 993 F.3d at 886 n.4.[4] Thus, as AAN explained, *Public Citizen*

[3] To the extent CREW suggests that "a majority" of active judges have already "found [*New Models* or *CHGO*] inconsistent with prior precedent," CREW Mem. 19; *see id.* at 22, that is incorrect. In fact, just two active judges have expressed disagreement with those decisions. CREW appears to be counting a third judge who has taken senior status, a fourth who has left the D.C. Circuit altogether, and a fifth who voted to rehear *CHGO* without expressing a view on the merits. *See id.* at 8 n.1. In any event, neither two nor five judges is "a majority" of the eleven-member D.C. Circuit. And to the extent there is disagreement about the correctness of *CHGO*, that only serves to underscore AAN's position that there is substantial ground for difference of opinion.

[4] Examination of the FEC dismissal in *Public Citizen* confirms that legal analysis underlay the decision to invoke discretion. When the FEC invoked its enforcement discretion, it explained that its General Counsel's recommendation of prosecution relied on two "new legal theories . . . neither of which were properly noticed." Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 28 n.117, MUR No. 6396 (Jan. 8,

reinforces the conclusion that there is now, at a minimum, a substantial ground for disagreement about how to read *CHGO* and whether invocation of enforcement discretion precludes judicial review.

B. CREW's Arguments Confirm That The Court Should Stay Proceedings In This Court If It Certifies An Appeal.

If the Court certifies an appeal instead of granting reconsideration, the Court should also stay this case. A stay pending interlocutory appeal serves judicial economy and the best interests of the parties, and harm would result to AAN if this case moves forward before or during an appeal. *See* AAN Mem. 14.

CREW's principal objection to a stay rests on its misunderstanding of the legal difference between equitable and administrative stays. *Compare Nken v. Holder*, 556 U.S. 418 (2009) (equitable stay), *with Landis v. N. Am. Co.*, 299 U.S. 248 (1936) (administrative stay). The power to issue an *administrative* stay is "incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Mobley v. CIA*, 806 F.3d 568, 576 (D.C. Cir. 2015) (quoting *Landis*, 299 U.S. at 254). Accordingly, district courts frequently exercise that inherent power without consideration of the factors applicable to equitable stays. *See, e.g.*, *Kennedy*, 145 F. Supp. 3d at 53 (Cooper, J.) (staying proceedings pending interlocutory appeal); *Blumenthal v. Trump*, No. 17-cv-1154, 2019 WL 3948478, at *3 & n.3 (D.D.C. Aug. 21, 2019) (same); *Gov't of Guam v. United States*, No. 1:17-cv-2487, 2019 WL 1003606, at *10 (D.D.C. Feb. 28, 2019) (same); *Philipp v. Fed. Republic*

2014), https://www.fec.gov/files/legal/murs/6396/14044350970.pdf. And in its lengthy legal analysis, the FEC expressly linked that concern to its understanding of due process. *See id.* at 23 ("[D]ue process would preclude the Commission from seeking to enact a new legal norm now . . . ."); *id.* at 26 ("[W]e have routinely objected to creating new legal norms in an enforcement context to be applied retroactively upon respondents because doing so would raise serious due process concerns.").

of Germany, 253 F. Supp. 3d 84, 88–89 (D.D.C. 2017) (same); *Mwani v. Bin Laden*, 947 F. Supp. 2d 1, 5–6 (D.D.C. 2013) (same); *APCC Servs., Inc. v. AT&T Corp.*, 297 F. Supp. 2d 101, 110 (D.D.C. 2003) (same); *United Mine Workers of Am. 1974 Pension Tr. v. Pittston Co.*, 793 F. Supp. 339, 348 (D.D.C. 1992) (same); *Johnson v. Wash. Metro. Area Transit Auth.*, 790 F. Supp. 1174, 1180 (D.D.C. 1991) (same). CREW does not contest AAN's entitlement to an administrative stay, nor could it credibly contend that a stay would not preserve judicial resources here where appellate review of threshold questions could result in dismissal.

Even if the Court were to apply the standard for equitable stays—and to be clear, it should not—the result would be the same. AAN is "likely to succeed on the merits," *Nken*, 556 U.S. at 434 (citation omitted), because its arguments regarding reviewability closely track binding D.C. Circuit precedent. AAN Mem. 8–14. AAN would also be "irreparably injured absent a stay," *Nken*, 556 U.S. at 434 (citation omitted), because it would be forced to continue litigating a case that should have ended long ago, and through which CREW seeks to punish political speech that it opposes. Finally, the balance of equities and the public interest favor a stay, *see id.*, because CREW will not be harmed by a brief pause in a case that looks back ten years, and because significant damage to constitutional rights will result from allowing third parties like CREW to punish political speech that they oppose, and that the executive branch has expressly declined to prosecute.

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

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Dated: June 30, 2021