IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON 1331 F Street, N.W. Suite 900 Washington, D.C. 20004, Plaintiff, v. **FEDERAL ELECTION COMMISSION** 1050 First Street, N.E. Washington, D.C. 20463, Defendant.	)	Civil Action No. _____

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

1. This is an action for injunctive and declaratory relief under the Federal Election Campaign Act of 1971 ("FECA"), 52 U.S.C. § 30109(a)(8)(C), challenging as arbitrary, capricious, an abuse of discretion, and contrary to law the dismissal by the Federal Election Commission ("FEC" or "Commission") of an administrative complaint by Citizens for Responsibility and Ethics in Washington ("CREW") against the American Action Network ("AAN") after repeated remands to the agency to correct legal errors identified by Judge Christopher Cooper, *see CREW v. FEC*, 299 F. Supp. 3d 83 (D.D.C. 2018) ("*CREW II*"); *CREW v. FEC*, 209 F. Supp. 3d 77 (D.D.C. 2016) ("*CREW I*").

2. This is the third time that CREW has had to sue the FEC over its unlawful treatment of CREW's complaint against AAN, a group that spent and continues to spend millions of dollars to influence federal elections without any disclosure about the sources of its funds. The first two times, a United States District Court reversed the dismissal because the commissioners who blocked the investigation by voting against a reason-to-believe vote—the

first step in the FEC's enforcement procedures—did so based on an analysis that "blink[ed] reality," *CREW I*, 209 F. Supp. 3d at 93, and caused the court to question the commissioners' sincerity, *CREW II*, 299 F. Supp. 3d at 98, respectively. Specifically, the commissioners treated the millions AAN spent on electioneering communications as cause to *excuse* AAN from political committee reporting, notwithstanding the fact its ads aired shortly before an election, targeted electorates, attacked candidates, and urged voters to express their displeasure "in November."

3. This third time, however, the FEC dismissed the complaint for very different reasons, after a single commissioner blocked a reason-to-believe vote by the then four-member Commission. That Commissioner has issued a new analysis disclaiming the previous analyses, and instead stating that electioneering communications count towards concluding a group is a political committee, that the proper analysis focuses on the group's calendar year's activities, and that, consequently, AAN unequivocally was and is a political committee. In addition, that controlling opinion disclaimed any lawful basis for dismissal, including prosecutorial discretion and the statute of limitations. Rather, the now-controlling opinion of the FEC is that the dismissal was "absolutely contrary to law."

4. This perhaps perplexing explanation for dismissal is the direct result of D.C. Circuit precedent providing that the commissioners who blocked the last reason-to-believe vote before the dismissal are the "controlling commissioners" who speak on behalf of "the Commission" with respect to the following dismissal. *CREW v. FEC*, 993 F.3d 880, 883 (D.C. Cir. 2021) ("*New Models*"). In this case, Commissioner Ellen L. Weintraub is now the controlling commissioner as she is the commissioner who single-handedly blocked the last reason-to-believe vote.

5. Here, there is no dispute. A dismissal without any lawful or rational basis is, without doubt, arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. There is no dispute that under existing law, organizations like AAN that devote more than half of their annual spending on express advocacy or electioneering communications or a combination of the two (or, for that matter, other federal campaign activity) are not excused from the reporting obligations imposed by the FECA on political committees. There is no dispute that the statute of limitations does not preclude enforcement against AAN. And there is no dispute that this case does not warrant prosecutorial discretion. Indisputably, the FEC's dismissal of CREW's complaint against AAN is, once again, contrary to law.

JURISDICTION AND VENUE

6. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 52 U.S.C. § 30109(a)(8)(A). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331, and 28 U.S.C. §§ 2201(a) and 2202. Venue lies in this district under 52 U.S.C. § 30109(a)(8)(A) and 28 U.S.C. § 1391(e).

PARTIES

7. Plaintiff CREW is a non-profit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code.

8. CREW is committed to protecting the right of citizens to be informed about the activities of government officials, to ensuring the integrity of government officials, protecting our political system from corruption, and reducing the influence of money in politics. CREW is dedicated to empowering voters to have an influential voice in government decisions and in the governmental decision-making process. CREW uses a combination of research, litigation, and advocacy to advance its mission.

9. In furtherance of its mission, CREW seeks to expose unethical and illegal conduct of those involved in government. One way that CREW does this is by educating citizens regarding the integrity of the electoral process and our system of government. Toward this end, CREW monitors the campaign finance activities of those who run for federal and state office and those who support or oppose such candidates and publicizes those who violate federal campaign finance laws through its website, press releases, and other methods of distribution. CREW also files complaints with the FEC when it discovers violations of the FECA. Publicizing campaign finance violators and filing complaints with the FEC serve CREW's mission of keeping the public informed about individuals and entities that violate campaign finance laws and deterring future violations of campaign finance law.

10. In order to assess whether an individual, candidate, political committee, or other regulated entity is complying with federal campaign finance law, CREW needs the information contained in receipts and disbursements reports that political committees and others must file pursuant to the FECA, 52 U.S.C. § 30104; 11 C.F.R. §§ 104.1–22, 109.10. CREW is hindered in its programmatic activity when an individual, candidate, political committee, or other regulated entity fails to disclose or provides false information in reports required by the FECA.

11. CREW relies on the FEC's proper administration of the FECA's reporting requirements because the FECA-mandated disclosure reports are the only source of information CREW can use to determine if an individual, candidate, political committee, or other regulated entity is complying with the FECA. The proper administration of the FECA's reporting requirements includes mandating that all disclosure reports required by the FECA are properly and timely filed with the FEC. CREW is hindered in its programmatic activity when the FEC fails to properly administer the FECA's reporting requirements.

12. CREW has standing here because CREW alleges "violations of the FECA that require accurate disclosure of contribution information and the filing of public reports by political committees." *Campaign Legal Center v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020) (citations omitted). CREW's injury is not mooted by its prior citizen suit against AAN, as the court recently dismissed that case for lack of jurisdiction without awarding CREW a disclosure of information that would have remedied CREW's injuries.

13. Defendant FEC is the federal agency established by Congress to oversee the administration and civil enforcement of the FECA. *See* 52 U.S.C. §§ 30106, 30106(b)(1).

STATUTORY AND REGULATORY FRAMEWORK

Political Committees

14. The FECA and the implementing FEC regulations impose on "political committees" registration, organization, and disclosure requirements.

15. The FECA and implementing FEC regulations define a "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 52 U.S.C. § 30101(4)(A); 11 C.F.R. § 100.5(a).

16. An "expenditure" is "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(9)(A); 11 C.F.R. § 100.16. A "contribution" includes "any gift, … or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i); 11 C.F.R. § 100.52(a).

17. Notwithstanding the statutory test, the Supreme Court has carved out from the reach of the FECA's political committee provisions groups that, while they met the statutory definition, were neither under the control of a candidate nor had the requisite "major purpose" to nominate or elect of federal candidates. *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

18. Determination of a group's "major purpose" requires a fact-intensive, case-by-case analysis of an organization. FEC, Political Committee Status, Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5601 (Feb. 7, 2007) ("Supplemental E&J"). An organization's major purpose may be demonstrated by its activities, and a group that devotes a sufficiently extensive amount of its spending to campaign activity is not excused from the FECA's political committee provisions. *See FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986).

19. Neither the Court, nor the FECA or FEC regulations define the scope of qualifying campaign activity. The FECA and FEC regulations nonetheless regulate two forms of communications as election-related: express advocacy communications and electioneering communications. 52 U.S.C. §§ 30101(17), 30104(f); 11 C.F.R §§ 100.16, 100.29(a). An express advocacy communication is any communication that expressly asks the audience to "vote for" or "vote against" a candidate, or uses similar terms such that "[r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action." 11 C.F.R. § 100.22. An electioneering communication is any broadcast communication that "refers to a clearly identified candidate for Federal office," is publicly distributed within "60 days before a general, special, or runoff election for the office sought by the candidate, or … 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate," "is targeted to the relevant electorate," and does not fall within one of the

statutory exceptions. 52 U.S.C. § 30104(f)(3)(A), (B); 11 C.F.R. § 100.29(a). The FECA imposes various disclosure burdens on anyone who spends a sufficient amount of money on either form of communication. 52 U.S.C. §§ 30104(c)(1), (f)(1); 11 C.F.R. §§ 104.20(b), 109.10.

20. The FECA and FEC regulations require all political committees to register with the FEC within 10 days of becoming a political committee. 52 U.S.C. § 30103(a); 11 C.F.R. § 102.1. Nonetheless, "the law does not require a committee to register as a [political committee] in order to be one." Statement of Reasons of Chairman Allen Dickerson, MUR 7920 (Oklahomans for T.R.U.M.P.),https://perma.cc/6Q2C-PDY8 .

21. The FECA and implementing FEC regulations require political committees to file periodic reports with the FEC that, among other things: (1) identify all individuals contributing an aggregate of more than $200 in a year to the organization, and the amount each individual contributed; (2) identify all political committees making a contribution to the organization, and the amount each committee contributed; (3) detail all of the organization's outstanding debts and obligations; and (4) list all of the organization's expenditures, including its independent expenditures and electioneering communications. 52 U.S.C. § 30104(a)(4), (b), (f)(2); 11 C.F.R. §§ 104.3, 104.4, 104.20(b). A political committee's obligations continue until either it or the FEC terminates its status as permitted by the FECA. 52 U.S.C. § 30103(d).

Enforcement

22. The FECA divides civil enforcement between the FEC and private complainants. 52 U.S.C. § 30107(e). Before seeking relief, a private complainant must exhaust their remedies before the FEC. *CREW v. AAN*, 410 F. Supp. 3d 1, 25 (D.D.C. 2019). To exhaust their claim, any person who believes there has been a violation of the FECA may file a sworn complaint with the FEC. 52 U.S.C. § 30109(a)(1). Based on the complaint, the response from the person alleged to

have violated the Act, and any recommendation of the FEC's Office of General Counsel ("OGC"), the FEC then votes on whether there is "reason to believe" a violation of the FECA may have occurred. 52 U.S.C. § 30109(a)(2). If four commissioners vote to find there is "reason to believe" a violation of the FECA may have occurred, the FEC must notify the respondents of that finding and must "make an investigation of such alleged violation." *Id.*

23. After the investigation, the OGC recommends whether the Commission should vote to find there is "probable cause" to believe the FECA has been violated. 52 U.S.C. § 30109(a)(3). If four commissioners vote to find probable cause to believe a violation of the FECA has occurred, the FEC must attempt for at least 30 days, but not more than 90 days, to resolve the matter "by informal methods of conference, conciliation and persuasion." 52 U.S.C. § 30109(a)(4)(A)(i).

24. If the FEC is unable to settle the matter through informal methods, it may institute a civil action for legal and equitable relief in the appropriate United States district court. 52 U.S.C. § 30109(a)(6)(A). In any action instituted by the FEC, a district court may grant injunctive relief as well as impose monetary penalties. 52 U.S.C. § 30109(a)(6)(B)–(C).

25. If at any stage of the proceedings the FEC dismisses a complaint, any "party aggrieved" may seek judicial review of that dismissal in the United States District Court for the District of Columbia. 52 U.S.C. § 30109(a)(8)(A). All petitions from the dismissal of a complaint by the FEC must be filed "within 60 days after the date of the dismissal." 52 U.S.C. § 30109(a)(8)(B).

26. The district court reviewing the FEC's dismissal of a complaint may declare the FEC's actions "contrary to law." 52 U.S.C. § 30109(a)(8)(C). Where a dismissal occurs after a failure of the Commission to secure four votes to find reason to believe a respondent violated the

law, the court looks to the reasoning provided by the "controlling commissioners" who most recently defeated the reason-to-believe vote and who speak for "the Commission" as to its reasons for dismissal. *CREW v. FEC*, 993 F.3d 880, 883 (D.C. Cir. 2021), *pet. for review en banc filed*, *CREW v. FEC*, No. 19-5161 (D.C. Cir. June 23, 2021).

27. The court also may order the FEC "to conform with such declaration within 30 days." 52 U.S.C. § 30109(a)(8)(C). If the FEC fails to abide by the court's order, the FECA provides the complainant with a private right of action, brought in the complainants' own name, "to remedy the violation involved in the original complaint." *Id.*

FACTUAL BACKGROUND

American Action Network

28. The Washington, D.C.-based American Action Network ("AAN"), formed in July 2009, is a tax-exempt organization under section 501(c)(4) of the Internal Revenue Code.

29. AAN describes its mission as creating, encouraging, and promoting center-right policies based on the principles of freedom, limited government, American exceptionalism, and strong national security, and states as its "primary goal" "to put our center-right ideas into action by engaging the hearts and minds of the American people and spurring them into active participation in our democracy."

30. Between July 23, 2009, and June 30, 2011, according to reports AAN filed with the FEC, AAN spent $4,096,910 on independent expenditures and $14,038,625 on electioneering communications, a total of $18,135,535. Broken down by AAN's fiscal year, AAN reported spending $4,036,987 on independent expenditures and $14,038,625 on electioneering communications between July 1, 2010 and June 30, 2011, a total of $18,075,612. AAN further reported spending $59,922 on independent expenditures between July 23, 2009 and June 30,

2010. That money was spent largely producing and broadcasting television and Internet advertisements in 29 primary and general elections.

31. AAN's earliest independent expenditure was $29,000 the group spent on an ad supporting Tim Burns, a Republican candidate for a special election for a House seat in Pennsylvania, on May 6, 2010. Accordingly, AAN met the statutory qualification for political committee status—making over $1,000 in expenditures in one calendar year, 52 U.S.C. § 30101(4)—no later than May 6, 2010.

32. AAN also spent significant funds on at least twenty versions of electioneering communications in at least twenty different 2010 federal races. For example, starting on October 22, 2010, just weeks before the election, AAN spent $725,000 broadcasting an advertisement against Rep. Ed Perlmutter (D-CO) that expressed disbelief that "convicted rapists can get Viagra paid for by the new health care bill." Noting Rep. Perlmutter had voted for the Affordable Care Act, the advertisement encouraged viewers to "tell Congressman Perlmutter to vote for repeal in November" and to "[v]ote Yes on H.R. 4903." The House went into recess at the end of September 2010, with no votes scheduled on H.R. 4903 or any other bill repealing the health care law during November 2010 or, indeed, the remainder of the 111th Congress. Accordingly, AAN's reference to a vote "in November" could have referred only to the upcoming congressional election in which viewers of the advertisement could vote.

33. All of the electioneering communications AAN broadcast in 2010 similarly were related to the election. The ads not only met the statutory definition of electioneering communications, but criticized or praised the identified candidate, discussed the identified candidate's voting record, did not discuss a pending legislative matter, referred to the upcoming election, ran in the weeks before an election rather than at the beginning of the electioneering

communication window, and/or referred to non-incumbent candidates. Accordingly, all AAN's electioneering communications exhibit the purpose of nominating or electing federal candidates.

34. The proper time period for comparing AAN's political activity to its overall spending is the 2010 calendar year. However, because AAN's fiscal year runs from July 1 through June 30, and it reported its overall spending to the Internal Revenue Service ("IRS") on its tax returns using those time periods, CREW does not have sufficient information to precisely determine AAN's overall spending for 2010.

35. The closest time period for which there is reported information about AAN's spending is its 2010 fiscal year, covering July 1, 2010 through June 30, 2011. On its 2010 tax return, AAN reported spending a total of $25,692,334 on all activities during that period. As discussed above, AAN reported to the FEC spending $18,075,612 on independent expenditures and electioneering communications during the 2010 fiscal year. As a result, AAN's political spending comprised approximately 70.4 percent of its total spending in that fiscal year.

36. AAN may have spent even more money on politics. On its 2010 tax return, AAN reported spending a total of $5,035,953 on political expenditures. That is approximately $998,966 more than the amount it reported to the FEC spending on independent expenditures that year. AAN maintained in previous proceedings that none of the money it spent on electioneering communications qualified as political activity. Accordingly, AAN may have spent an additional $998,966 on political activities which it has not explained. If this sum is added to the $18,075,612 AAN reported spending on independent expenditures and electioneering communications, AAN's total political spending for fiscal year 2010 would be $19,074,577, or 74.2 percent of its total spending.

37. Looking instead at AAN's first two years of existence, AAN still spent most of its money on election-related activities. On its 2009 tax return, AAN reported spending a total of $1,446,675 on all activities for the period July 23, 2009 through June 30, 2010, its 2009 fiscal year, making AAN's total reported spending for its 2009 and 2010 fiscal years combined $27,139,009. The $18,135,535 in independent expenditures and electioneering communications AAN reported to the FEC, therefore, comprises approximately 66.8 percent of its total spending between July 23, 2009 and June 30, 2011.

38. As with its 2010 tax return, AAN's 2009 tax return reported more political expenditures than AAN reported to the FEC. AAN's 2009 tax return identified $185,108 in political expenses, about $125,186 more than AAN reported in independent expenditures during the same period. Including all of AAN's unexplained spending for fiscal years 2009 and 2010 brings its total spending on political activity to $19,199,763. Based on this figure, AAN's political spending comprised 70.7 percent of its overall spending between July 23, 2009 and June 30, 2011.

39. AAN has never terminated its political committee status as permitted by 52 U.S.C. § 30103.

Procedural History

40. On June 7, 2012, CREW filed a complaint with the FEC against AAN for violating the FECA ("MUR 6589"). The complaint alleged, as demonstrated by its extensive spending on federal campaign activities, that AAN's major purpose was the nomination or election of federal candidates.

41. On January 17, 2013, the OGC issued the First General Counsel's Report recommending the Commission find reason to believe AAN had as its major purpose the

nomination or election of federal candidates during 2010, and therefore violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to organize, register, and report as a political committee. In particular, the OGC found AAN spent at least $4,096,910 on independent expenditures between July 2009 and June 2011, of which approximately $4,044,572 was spent in 2010. The OGC further found AAN spent at least $12,968,445 on electioneering communications during 2010. The OGC could not determine the total amount AAN spent in 2010 alone, so it assumed all of AAN's reported spending occurred in 2010—the assumption most beneficial to AAN. The OGC then concluded AAN spent at least $17,013,017 on federal campaign activity during 2010, or at least 62.6 percent of its total spending for that calendar year on federal campaign activity. As a result, the OGC concluded, AAN's spending showed the group's major purpose during 2010 was federal campaign activity.

42. Despite the OGC's detailed analysis, on June 24, 2014, the Commission deadlocked three-to-three, and thus failed to find reason to believe AAN had violated 52 U.S.C. §§ 30102, 30103, or 30104. The Commission then voted to close the file by a vote of six-to-zero, dismissing CREW's complaint.

43. On July 30, 2014, the FEC released the statement of reasons of the three commissioners who voted against finding reason to believe—then Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen. These commissioners concluded AAN's major purpose, based on its public statements, organizational documents, and overall spending history, "has been issue advocacy and grassroots lobbying and organizing."

44. To reach that conclusion, the commissioners interpreted the First Amendment and judicial precedent to require the FEC to treat all expenses for AAN's non-express advocacy communications, including AAN's electioneering communications, as cause to *excuse* AAN

from political committee reporting. Further, they interpreted the *Buckley*'s "major purpose" limitation as considering the group's activities over its entire life and treating all such activity as equally important to determine whether the group's current major purpose in a given election year was to nominate or elect candidates. Finally, in a footnote, the commissioners stated that "constitutional doubts raised here militate in favor of cautious exercise of our prosecutorial discretion."

45. On August 20, 2014, CREW brought suit against the FEC challenging the dismissal of CREW's administrative complaint against AAN as "contrary to law" in violation of 52 U.S.C. § 30109(a)(8).

46. On September 19, 2016, Judge Christopher Cooper granted CREW's motion for summary judgment, finding that the FEC's dismissal of CREW's complaint against AAN was "contrary to law." *CREW I*, 209 F. Supp. 3d at 95. In relevant part, Judge Cooper ruled that the commissioners committed legal error by applying an inapposite "express advocacy/issue speech distinction in the realm of disclosure," *id.* at 92, and by concluding that "First Amendment effectively required the agency to exclude from its consideration all non-express advocacy in the context of disclosure," including the FECA's political committee provisions, *id.* at 93. The Court found that it "blinks reality to conclude that many of the ads considered by the Commissioners in this case were not designed to influence the election or defeat of a particular candidate in an ongoing race." *Id.* Rather, the Court noted that the record supported the conclusion that, at a minimum, "*many* or even *most* electioneering communications indicate a campaign related purpose." *Id.* Additionally, though the Court deferred to the three commissioners' consideration of "a particular organization's full spending history" in their major purpose analysis, it found the application in this case was arbitrary because it "ignore[d] crucial facts indicating whether an

organization's major purpose has changed." *Id.* at 94 (deferring pursuant to *Chevron U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837 (1984)). Accordingly, the Court reversed the dismissal and remanded for reconsideration within thirty days, to be done in conformity with the Court's declaration. *Id.* at 95.

47. On October 18, 2016, the Commission again deadlocked three-to-three on whether there was reason to believe AAN violated 52 U.S.C. §§ 30102, 30103, 30104 in the remanded matter (now designated MUR 6589R), and then voted five-to-one to close the file, again dismissing CREW's complaint. Then-Chairman Matthew S. Petersen and then-Commissioners Caroline C. Hunter and Lee E. Goodman—the commissioners who voted against finding reason to believe on remand and the same commissioners who had voted against finding reason to believe AAN violated the FECA in the first instance—issued a new statement of reasons explaining their continued refusal to find reason to believe AAN had violated the FECA by failing to register as a political committee. In relevant part, the commissioners claimed to apply a flexible ad-by-ad analysis but continued to treat nearly all electioneering communications as cause to excuse AAN from political committee reporting and continued to equally weigh such activities against AAN's lifetime of spending to determine AAN's major purpose in a particular election-year.

48. CREW moved for an order to the FEC to show cause why its dismissal of CREW's complaint was not a failure to conform with the Court's prior dismissal. On April 6, 2017, the Court denied CREW's request, finding the new framework employed by the commissioners "was free of the legal errors identified in this Court's previous Opinion and Order," but reserved the question of whether the new analysis was contrary to law due to other errors. *CREW v. FEC*, No. 14-1419-CRC (D.D.C. Apr. 6, 2017) (ECF No. 74).

49. At the same time CREW sought the order to show cause, CREW also once again sought judicial review of this dismissal pursuant to 52 U.S.C. § 30109(a)(8)(C). On March 20, 2018, Judge Cooper found that the analysis in the new statement of reasons demonstrated the dismissal was indeed "contrary to law." *CREW II*, 299 F. Supp. 3d at 101. Judge Cooper found that electioneering communications "presumptively have an election-related purpose." *Id.* at 93 (emphasis omitted). Only an "extraordinary" and "rare" electioneering communication would lack this purpose and thus cause the sums spent on it to count against finding the organization had the major purpose of nominating or electing candidates. *Id.* at 97. Judge Cooper found that the commissioners' analysis did not adequately reflect this presumption and thus their analysis of AAN's electioneering communications was contrary to law. Judge Cooper remanded the matter to the Commission, ordered the FEC to conform with the March 20, 2018 judgment within 30 days, and noted the FEC's failure to "timely conform with the Court's declaration" would mean "CREW may bring 'a civil action to remedy the violation involved in the original complaint.'" *Id.* at 101 (quoting 52 U.S.C. § 30109(a)(8)(C)).

50. On April 11, 2018, CREW filed an amended complaint with the FEC substituting complainant Melanie Sloan with complainant Noah Bookbinder and substituting new allegations specific to Mr. Bookbinder, but otherwise repeating the allegations in CREW's original 2012 complaint. Complaint, MUR 6589 (AAN) (Apr. 11, 2018), Ex. 1.

51. On April 19, 2018, Commissioner Weintraub published a statement about CREW's court victory, noting the relief provided in the statute was the authorization of a lawsuit by CREW against AAN. Statement of Vice Chair Ellen L. Weintraub Regarding *CREW v. FEC & American Action Network*, (Apr. 19, 2018), Ex. 2, https://perma.cc/LW5C-LN6P ("Weintraub

Third AAN Statement"). She stated that it was time to "let this matter move forward unimpeded by commissioners who have fought every step of the way to keep dark money dark." *Id.*

52. The FEC thereafter failed to conform with the Court's declaration, and CREW filed suit against AAN on April 23, 2018. Judge Cooper denied AAN's motion to dismiss CREW's suit, finding CREW had standing, CREW exhausted its claims, and a reference to prosecutorial discretion in the commissioners' first statement of reasons did not deprive the court of jurisdiction. *See generally CREW v. AAN*, 410 F. Supp. 3d 1 (D.D.C. 2019). Approximately three years later, after discovery had completed, the Court reconsidered its decision with respect to the effect of the reference to prosecutorial discretion in the first statement of reasons in light of an intervening D.C. Circuit decision, *New Models*, 993 F.3d 880, and found that it precluded the Court's decision in *CREW I. CREW v. AAN*, No. 18-cv-945 (CRC), 2022 WL 612655, at *8 (D.D.C. March 2, 2022). The Court then found that either *CREW I*'s impropriety rendered all subsequent events a nullity or, alternatively, the reference to prosecutorial discretion in the first statement was incorporated by reference into the second statement, which rendered *CREW II* a nullity and thus deprived the Court of jurisdiction over CREW's citizen suit against AAN. *AAN*, 2022 WL 612655, at *8 n.7. CREW appealed that decision, and the case is currently being held in abeyance pending the D.C. Circuit's *en banc* review of *New Models*.

53. On August 29, 2022, the FEC once again voted to dismiss the remanded complaint against AAN. *See* Certification, MUR 6589R (AAN) (Aug. 29, 2022), Ex. 3, https://perma.cc/B8ET-SUNH. Commissioner Weintraub voted against dismissal. *Id.*

54. The FEC published the record of its AAN proceedings approximately thirty days after dismissal, revealing for the first time that the FEC reconsidered its reason-to-believe findings on May 10, 2018, shortly after CREW filed its suit against AAN. *See* Certification,

MUR 6589R (AAN) (May 10, 2018), Ex. 4, https://perma.cc/US95-WQDP . The Commission at that time had only four members, as Commissioners Goodman and Ravel had resigned. The record revealed that Commissioners Hunter and Petersen changed their votes and now voted to find reason-to-believe that AAN failed to register and report as a political committee. *Id.* Commissioner Walther joined them in that vote. *Id.* Nonetheless, the vote did not garner the required four votes because Commissioner Weintraub defeated the reason-to-believe vote. *Id.* That was the last reason-to-believe vote the Commission took before it dismissed the case in August 2022.

55. Under the current precedent of the D.C. Circuit, because Commissioner Weintraub singularly blocked the most recent reason-to-believe vote, she is the "controlling commissioner" who now speaks for "the Commission" in this case. *New Models*, 993 F.3d at 883.

56. Commissioner Weintraub issued a Statement of Reasons on September 30, 2022 to provide the analysis required for review of the dismissal here. Statement of Reasons of Commissioner Weintraub, MUR 6589R (AAN) (Sept. 30, 2022), Ex.5 https:/perma.cc/C9FD-EESZ ("Weintraub Fourth AAN Statement"). In it, she stated the Commission "explicitly *disclaim[s]* in its entirety the reasoning contained" in the prior controlling statements of reasons, that it "did *not* dismiss this matter pursuant to its prosecutorial discretion" and, in fact, "unequivocally disclaims prosecutorial discretion as a rationale for the Commission's dismissal of this matter." *Id.* at 8–9. She further explained that "[t]he Commission did *not* dismiss this matter because the statute of limitations had elapsed" and that in fact "[t]he Commission has considerable equitable remedies available to it that are not subject to 28 U.S.C. § 2462." *Id.* at 9.

57. Further, Commissioner Weintraub, speaking on behalf of the Commission, concluded that "the evidence before the Commission showed that AAN met the definition of a

political committee, which *does* have to disclose the identity of its donors." *Id.* at 9–10. She reached that conclusion through her prior analyses, incorporated by reference, interpreting the FECA and the major purpose test. *Id.* at 2, 11.

58. In particular, the FEC's controlling analysis is that "activity that extends well beyond express advocacy" is relevant "for the purpose of determining political committee status." Statement of Vice Chair Ravel and Commissioners Walther and Weintraub at 3, MUR 6538 (AAN) (July 30, 2014), Ex. 6, https://perma.cc/6PCT-DN6Z ("Weintraub First AAN Statement"); *accord* Statement of Reasons of Commissioners Ann M. Ravel and Ellen L. Weintraub at 3, MUR 6538R (AAN) (Dec. 5, 2016), Ex. 7, https://perma.cc/75JU-K4EV ("Weintraub Second AAN Statement") ("[T]he major purpose inquiry is not limited to express advocacy and its functional equivalent."). Incorporating Judge Cooper's rationale from *CREW I* and *CREW II*, the controlling analysis recognized that the amounts a group spends on electioneering communications, except in rare and extraordinary occasions, constitute federal campaign activities that count towards concluding the group's major purpose is to influence federal elections. Weintraub First AAN Statement at 3–4; *accord* Weintraub Second AAN Statement at 3, 6, Weintraub Third AAN Statement. Additionally, the major purpose analysis compares the group's calendar year campaign activity against only the group's spending that same calendar year, and consequently any group devoting more than half of its spending in a calendar year to campaign activity may not be excused from registering and reporting as a political committee. Weintraub First AAN Statement at 3–4; *accord* Weintraub Second AAN Statement at 6 n.28 (status can be determined by examining "calendar year spending").

59. Employing those metrics, Commissioner Weintraub, speaking on behalf of the Commission, concluded that the evidence established "AAN spent a minimum of $17 million on

federal campaign activity in 2010," meaning "at least 62.6 percent … of AAN's total spending in that year supported federal campaign activity." Weintraub First AAN Statement at 4; *accord* Weintraub Second AAN Statement at 6.

60. Accordingly, Commissioner Weintraub concluded, speaking on behalf of the Commission, that "dismissal of this matter was unreasonable, given the facts before the Commission, the law governing this activity, and the reasoning referenced above." Weintraub Fourth AAN Statement at 11. Accordingly, it is the FEC's position that "[t]he Commission's dismissal of this matter was contrary to law." *Id.*

PLAINTIFF'S CLAIMS FOR RELIEF

CLAIM ONE
The FEC's Dismissal of the AAN Matter Is Arbitrary, Capricious, an Abuse of Discretion, and Contrary to Law

61. CREW re-alleges and incorporate by reference all preceding paragraphs as fully set forth herein.

62. The FEC's dismissal on remand of the CREW's administrative complaint against AAN was arbitrary, capricious, an abuse of discretion, and contrary to law in violation of 52 U.S.C. § 30109(a)(8)(C).

63. The FEC dismissed CREW's complaint alleging AAN failed to register and report as a political committee as early as 2009 and no later than 2010 in violation of 52 U.S.C. §§ 30102, 30103, 30104 and the FEC's implementing regulations. It did so notwithstanding the fact that the controlling opinion of the Commission is that AAN in fact violated those provisions and that AAN is a political committee and "does have to disclose the identity of its donors," Weintraub Fourth AAN Statement at 9–10, based on its analysis concluding that AAN devoted more than 62 percent of its spending in 2010 to influence elections, demonstrating AAN's major

purpose was to elect federal candidates, Weintraub First AAN Statement at 4; Weintraub Second AAN Statement at 6.

64. Having considered the merits and found more than reason to believe AAN failed to register and report as a political committee since 2010, the controlling opinion disclaimed all other possible lawful bases to dismiss. In particular, the FEC's controlling opinion disclaimed any reliance on prosecutorial discretion and concluded the statute of limitation did not provide a basis to dismiss the complaint. Weintraub Fourth AAN Statement at 8.

65. Accordingly, there is no lawful basis for the dismissal of CREW's complaint against AAN. Indeed, the controlling opinion of the FEC is that "dismissing the complaint in this matter was *absolutely* contrary to law." *Id.* at 8.

REQUESTED RELIEF

WHEREFORE, CREW respectfully requests that this Court:

(1) Declare that a group's electioneering communications constitute federal election activity that alone, or when combined with other qualifying activities, may demonstrate that a group's major purpose is to influence federal elections if they are sufficiently extensive.

(2) Declare that the major purpose test compares a group's calendar year federal campaign activity to its other spending that same calendar year to determine whether the group's federal campaign activities are sufficiently extensive to demonstrate the group's major purpose is to nominate or elect federal candidates, that the group's activity in other calendar years may not negate a finding that the group's major purpose is to influence federal elections in that calendar year, and that a group may not be excused from political committee reporting because it lacks a requisite major purpose in other calendar years.

(3) Declare that a group that devotes half or more of its annual spending to qualifying federal campaign activity, including electioneering communications, has spent extensively on federal campaign activity and thus has a major purpose to nominate or elect federal candidates, and thus may not be excused from reporting as a political committee under the FECA, while recognizing a group may demonstrate its major purpose is to nominate or elect federal candidates when it meets a lower spending threshold, either in combination with or separate from other evidence in a fact-intensive, case-by-case analysis.

(4) Declare that a group's political committee status, and its duty to continually report, may only terminate as provided by law under 52 U.S.C. § 30103.

(5) Declare the FEC's dismissal of MUR 6589R (AAN) on remand was arbitrary, capricious, an abuse of discretion, and contrary to law;

(6) Order the FEC to conform to such declaration within 30 days pursuant to 52 U.S.C. § 30109(a)(8)(C);

(7) Award CREW its costs, expenses, and reasonable attorneys' fees; and

(8) Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

STUART McPHAIL
(D.C. Bar No. 1032529)
Citizens for Responsibility and Ethics
in Washington
1331 F Street N.W., Suite 900
Washington, D.C. 20004
Phone: (202) 408-5565
Facsimile: (202) 588-5020
smcphail@citizensforethics.org

October 27, 2022

Attorney for Plaintiff

Exhibit 1

CREW | citizens for responsibility and ethics in washington

April 11, 2018

Federal Election Commission
Office of Complaints Examination
and Legal Administration
1050 First Street, N.E.
Washington, D.C. 20002

Re: MUR 6589/Amended Complaint

Dear Sir or Madam:

Please find under cover of this letter an amended complaint in MUR 6589. We file this amended complaint to supplement the complainants provided in CREW's original complaint, filed on March 8, 2012. In the time during which CREW's complaint has been pending, CREW has experienced staff changes necessitating an update to the parties to the complaint. CREW submits this amended complaint to substitute me, CREW's current executive director, as a complainant for CREW's previous executive director, Melanie Sloan. Accordingly, the amended complaint includes new allegations specific to me (*see* Am. Compl. ¶¶ 1, 6, and conclusion), and removes allegations specific to Ms. Sloan. The exhibits to the amended complaint are identical to the exhibits to the original complaint and are incorporated therein, but, in the interest of not duplicating copies in the administrative record, CREW does not resubmit the exhibits.

Please further note that our address has changed. Please direct all future correspondence to the address below.

Sincerely,

Noah Bookbinder
Executive Director
Citizens for Responsibility and Ethics
in Washington
455 Massachusetts Ave., N.W.
Washington, D.C. 20001
(202) 408-5565 (phone)
(202) 588-5020 (fax)
nbookbinder@citizensforethics.org

Encl.

FEDERAL ELECTION COMMISSION

In the matter of:

American Action Network MUR No. 6589

AMENDED COMPLAINT

1. Citizens for Responsibility and Ethics in Washington ("CREW") and Noah Bookbinder bring this complaint before the Federal Election Commission ("FEC" or "Commission") seeking an immediate investigation and enforcement action against the American Action Network for direct and serious violations of the Federal Election Campaign Act ("FECA").

Complainants

2. Complainant CREW is a non-profit corporation, organized under section 501(c)(3) of the Internal Revenue Code. CREW is committed to protecting the right of citizens to be informed about the activities of government officials and to ensuring the integrity of government officials. CREW is dedicated to empowering citizens to have an influential voice in government decisions and in the governmental decision-making process. CREW uses a combination of research, litigation, and advocacy to advance its mission.

3. In furtherance of its mission, CREW seeks to expose unethical and illegal conduct of those involved in government. One way CREW does this is by educating citizens regarding the integrity of the electoral process and our system of government. Toward this end, CREW monitors the campaign finance activities of those who run for federal office and publicizes those who violate federal campaign finance laws through its website, press releases and other methods of distribution. CREW also files complaints with the FEC when it discovers violations of the FECA. Publicizing campaign finance violators and filing complaints with the FEC serves

CREW's mission of keeping the public informed about individuals and entities that violate campaign finance laws and deterring future violations of campaign finance law.

4. In order to assess whether an individual, candidate, political committee or other regulated entity is complying with federal campaign finance law, CREW needs the information contained in receipts and disbursements reports political committees must file pursuant to the FECA, 2 U.S.C. § 434(a)(2); 11 C.F.R. § 104.1. CREW is hindered in its programmatic activity when an individual, candidate, political committee or other regulated entity fails to disclose campaign finance information in reports of receipts and disbursements required by the FECA.

5. CREW relies on the FEC's proper administration of the FECA's reporting requirements because the FECA-mandated disclosure reports are the only source of information CREW can use to determine if an individual, candidate, political committee or other regulated entity is complying with the FECA. The proper administration of the FECA's reporting requirements includes mandating that all disclosure reports required by the FECA are properly and timely filed with the FEC. CREW is hindered in its programmatic activity when the FEC fails to properly administer the FECA's reporting requirements.

6. Complainant Noah Bookbinder is the executive director of Citizens for Responsibility and Ethics in Washington, a citizen of the United States, and a registered voter and resident of Maryland. As a registered voter, Mr. Bookbinder is entitled to receive information contained in disclosure reports required by the FECA, 2 U.S.C. § 434(a)(2); 11 C.F.R. § 104.1. Mr. Bookbinder is harmed when an individual, candidate, political committee or other regulated entity fails to report campaign finance activity as required by the FECA. *See FEC v. Akins*, 524 U.S. 11, 19 (1998), *quoting Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976) (political committees must disclose contributors and disbursements to help voters understand who

provides which candidates with financial support). Mr. Bookbinder is further harmed when the FEC fails to properly administer the FECA's reporting requirements, limiting his ability to review campaign finance information.

Respondent

7. The American Action Network ("AAN") is a tax-exempt organization established in July 2009, organized under section 501(c)(4) of the Internal Revenue Code, and based in Washington, D.C.

8. As of June 6, 2012, AAN was not a registered political committee.

Factual allegations

9. Between July 23, 2009 and June 30, 2011, AAN spent at least $18,135,535 on independent expenditures and electioneering communications, largely on and producing and broadcasting television and Internet advertisements in 29 primary and general elections. *See* American Action Network Independent Expenditure Reports, available at: http://query.nictusa.com/cgi-bin/fecimg/?C90011230; American Action Network Electioneering Communications Reports, available at: http://query.nictusa.com/cgi-bin/fecimg/?C30001648.[1]

10. AAN reported to the FEC it spent $4,096,910 on independent expenditures and $14,038,625 million on electioneering communications between July 23, 2009 and June 30, 2011.

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[1] Other organizations calculated AAN spent even more. Open Secrets concluded AAN spent $26,088,031 on independent expenditures and electioneering communications in 2010, and Public Citizen found the group spent $20,935,958. *Compare* Open Secrets, 2010 Outside Spending, by Groups (available at: http://www.opensecrets.org/outsidespending/detail.php?cmte=American+Action+Network&cycle=2010) *with* Public Citizen, 12 Months After: The Effects of Citizens United on Elections and the Integrity of the Legislative Process, January 2011. CREW independently analyzed AAN's FEC reports, conservatively excluding from the total spending potentially duplicative entries for independent expenditures and electioneering communications.

11. AAN's independent expenditures included: $849,909 to produce and broadcast advertisements against Bill Keating, a Democrat running for a House seat in Massachusetts; $703,404 to produce and broadcast advertisements against Bryan Lentz, a Democrat running for a House seat in Pennsylvania; $659,909 to produce and broadcast advertisements against Dan Seals, a Democrat running for a House seat in Illinois; $455,000 to produce and broadcast advertisements against Sen. Russ Feingold (D-WI); and $134,909 to produce and broadcast advertisements against Chad Causey, a Democrat running for a House seat in Arkansas.[2]

12. AAN's independent expenditures further included sponsoring a website related to the New Hampshire Senate race between Democrat Paul Hodes and Republican Kelly Ayotte that asked for signatures on a petition to "help send Hodes packing," and spending $514,894 on television, radio, and internet advertisements calling Hodes "unaffordable."

13. AAN also spent significant funds on electioneering communications. For example, starting on October 22, 2010, AAN spent $725,000 broadcasting an advertisement against Rep. Ed Perlmutter (D-CO) expressing disbelief that "convicted rapists can get Viagra paid for by the new health care bill." *See* http://politicalcorrection.org/adcheck/201010230004. Noting Rep. Perlmutter had voted for the legislation, the advertisement encouraged viewers to "tell Congressman Perlmutter vote for repeal in November" and to "vote yes on H.R. 4903." The House went into recess at the end of September 2010, and no votes were scheduled on H.R.

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[2] As of March 2011, when CREW filed an Internal Revenue Service complaint against AAN, all of the organization's political advertisements were available on its YouTube channel. Nearly all of the advertisements have now been made private (and thus not publicly accessible), or taken down from YouTube. *See* http://www.youtube.com/user/AmericanActNet. Copies of some of the advertisements or transcripts of them remain available elsewhere. *See, e.g.*, http://politicalcorrection.org/search/tag/american_action_network.

4903 or any other bill repealing the health care law during November 2010 or in the remainder of the 111th Congress. AAN's reference to a vote "in November," while ostensibly related to the legislation, appears to be a furtive reference to the upcoming election in which viewers could vote.

14. AAN spent another $705,000 broadcasting an identical advertisement against Rep. Dina Titus (D-NV). *See* http://politicalcorrection.org/adcheck/201010180015.

15. AAN also spent $725,000 on a different advertisement also encouraging viewers to call Rep. Perlmutter "in November" and tell him to vote to repeal the health care law. *See* http://politicalcorrection.org/adcheck/201010160005. AAN spent another $370,000 broadcasting an identical advertisement against Rep. Mark Schauer (D-MI). *Id.*

16. AAN further reported as electioneering communications millions of dollars it spent on advertisements that did little more than call candidates "extreme" and tie them to former House Speaker Nancy Pelosi. For example, AAN spent $875,000 on an advertisement claiming that Ann Kuster, the Democratic candidate for a New Hampshire House seat, supported massive tax hikes, and asserting that "Nancy Pelosi is not extreme. Compared to Annie Kuster." *See* http://politicalcorrection.org/adcheck/201010150019. Similarly, AAN spent $225,000 on an advertisement noting that Mike Oliverio, the Democratic candidate for a West Virginia House seat, supported Mrs. Pelosi and would do whatever she told him to. *See* http://politicalcorrection.org/adcheck/201010190009.

17. On its 2009 tax return, covering July 23, 2009 through June 30, 2010, AAN reported spending a total of $1,446,675 on all activities. *See* AAN 2009 Form 990, Part I, Line 18 (attached as Exhibit A). On its 2010 tax return, covering July 1, 2010 through June 30, 2011, AAN reported spending a total of $25,692,334 (attached as Exhibit B).

18. Combined, AAN reported spending a total of $27,139,009 from July 23, 2009 through June 30, 2011. As a result, 66.8 percent of AAN's total spending for this period - the first two years of its existence - was for independent expenditures and electioneering communications.

Count I

19. AAN was a political committee between July 23, 2009 through June 30, 2011, but failed to register as one with the FEC.

20. The FECA and FEC regulations define a "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A); 11 C.F.R. § 100.5(a). "Expenditures" for the purpose of this definition only includes "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley v. Valeo*, 424 U.S. at 80.

21. An "independent expenditure" is, by definition, an expenditure by a person for a communication "expressly advocating the election or defeat of a clearly identified candidate," 2 U.S.C. § 431(17).

22. AAN made expenditures aggregating in excess of $1,000 during 2010. AAN reported to the FEC it spent $4,096,910 on independent expenditures for 2010.

23. In addition, only organizations whose "major purpose" is the nomination or election of federal candidates can be "political committees." *Id.* at 79. The FEC conducts a fact-intensive case-by-case analysis of an organization to determine if its major purpose is the nomination or election of federal candidates. Federal Election Commission, Political Committee

Status, Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5601 (Feb. 7, 2007) ("Supplemental E&J"); *The Real Truth About Obama, Inc. v. FEC*, 796 F. Supp. 2d 736, 751 (E.D. Va. 2011). An organization can satisfy the major purpose doctrine through sufficiently extensive spending on federal campaign activity. *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986); Supplemental E&J, 72 Fed. Reg. at 5601.

24. All of AAN's spending on independent expenditures and electioneering communications were for the purpose of the nomination or election of federal candidate. An independent expenditure expressly advocates the election or defeat of a candidate, 2 U.S.C. § 431(17), and an advertisement that qualifies as an electioneering communication is the functional equivalent of express advocacy, *Citizens United v. FEC*, 130 S. Ct. 876, 889-890 (2010).

25. As demonstrated by its extensive spending on federal campaign activity, AAN's major purpose between July 23, 2009 and June 30, 2011 was the nomination or election of federal candidates. During that period, AAN's first two years of existence, the group spent 66.8 percent of its expenditures on independent expenditures and electioneering communications.

26. FECA and FEC regulations require all political committees to register with the FEC within 10 days of becoming a political committee. 2 U.S.C. § 433(a); 11 C.F.R. § 102.1(d).

27. AAN is not, and has never been, a registered political committee with the FEC.

28. By failing to register as a political committee, AAN violated 2 U.S.C. § 433(a) and 11 C.F.R. § 102.1(d).

Count II

29. As a political committee, AAN was required to file periodic reports with the FEC that, among other things: (1) identified all individuals who contributed an aggregate of more than $200 in a year to AAN and the amount individual each contributed; (2) identified all political committees that made a contribution to AAN and the amount each committee contributed; (3) detailed AAN's outstanding debts and obligations; and (4) listed all of AAN's expenditures. 2 U.S.C. § 434(a)(4); 11 C.F.R. § 104.1(a).

30. AAN failed to file any of these reports with the FEC.

31. By failing to file these reports, AAN violated 2 U.S.C. § 434(a)(4) and 11 C.F.R. § 104.1(a).

Conclusion

WHEREFORE, Citizens for Responsibility and Ethics in Washington and Noah Bookbinder request that the FEC conduct an investigation into these allegations, declare the respondent to have violated the FECA and applicable FEC regulations, impose sanctions appropriate to these violations and take such further action as may be appropriate.

ON BEHALF OF COMPLAINANTS

Noah Bookbinder
Executive Director
Citizens for Responsibility and Ethics in Washington
455 Massachusetts Ave., N.W.
Washington, D.C. 20001
(202) 408-5565 (phone)
(202) 588-5020 (fax)

Verification

Citizens for Responsibility and Ethics in Washington and Noah Bookbinder hereby verify that the statements made in the attached Complaint are, upon information and belief, true. Sworn pursuant to 18 U.S.C. § 1001.

Noah Bookbinder

Sworn to and subscribed before me this 11 day of April, 2018.

Notary Public

DISTRICT OF COLUMBIA: SS
SUBSCRIBED AND SWORN TO BEFORE ME
THIS 11th DAY OF April, 2018.
NOTARY PUBLIC
My Commission Expires Nov 14, 2021

Exhibit 2

VICE CHAIR ELLEN L. WEINTRAUB
FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

STATEMENT OF VICE CHAIR ELLEN L. WEINTRAUB REGARDING *CREW v. FEC & American Action Network*

April 19, 2018

Fire alarms are sometimes housed in boxes labeled "Break glass in case of emergency." The Federal Election Campaign Act has such a box; it's the provision that allows complainants to sue respondents directly when the Federal Election Commission fails to enforce the law itself (52 USC § 30109(a)(8)(C)). In the 44-year history of the FEC, this provision has never been fully utilized. Today, I'm breaking the glass.

Citizens for Responsibility and Ethics in Washington (CREW) filed a complaint in June 2012 – nearly six years ago – alleging that the American Action Network spent millions of dollars on advertising designed to influence elections, was therefore a political committee, and should be thus required to disclose its donors. In the years that have followed, several of my colleagues, over my objections, have repeatedly acted to shield the sources of American Action Network's millions of dollars in dark money from public view. The Commission has been hauled into U.S. District Court twice and has twice been told in no uncertain terms that these colleagues' approach is "contrary to law."

Most recently, in a sharply worded March 20, 2018 opinion, U.S. District Court Judge Christopher R. Cooper found the arguments of the controlling bloc of commissioners to be unserious, granted CREW's motions for summary judgment against the Commission, laid out the correct path for analyzing American Action Network's political advertising, and ordered the Commission to conform within 30 days. By the terms of the Court's order: "If the FEC does not timely conform with the Court's declaration, CREW may bring 'a civil action to remedy the violation involved in the original complaint'" (citing 52 USC § 30109(a)(8)(C)).

Over a difficult and frustrating decade at the Commission, I have seen colleagues with a deep ideological commitment to impeding this country's campaign-finance laws erode the public's right to free, fair, and transparent elections. These commissioners have rejected the Supreme Court's conclusion that transparency in campaign finance "enables the electorate to make informed decisions" and to hold elected officials accountable (*Citizens United v. FEC,* 558 U.S. 310, 371 (2010)). Their actions in this matter – and over the past decade – have convinced me that despite two clear defeats before the District Court, they will eventually find a way to block meaningful enforcement of the law in this and any other dark-money matter that comes before us.

This matter holds real promise of shining a bright light on a significant source of dark money. It's time to break the glass and let this matter move forward unimpeded by commissioners who have fought every step of the way to keep dark money dark. I fully support the sound reasoning of the Court's March 20 opinion. That is why I believe CREW can and should pursue its complaint directly against American Action Network, as Congress provided for under the Federal Election Campaign Act. My goal here, as always, is to enforce America's campaign-finance laws fairly and effectively. Placing this matter in CREW's hands is the best way to achieve that goal.

Exhibit 3

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 6589R
American Action Network	)	

CERTIFICATION

I, Vicktoria J. Allen, Acting Deputy Secretary of the Federal Election Commission, do hereby certify that on August 29, 2022, the Commission decided by a vote of 5-1 to take the following actions in MUR 6589R:

1. Close the file.
2. Send the appropriate letter.

Commissioners Broussard, Cooksey, Dickerson, Lindenbaum, and Trainor voted affirmatively for the decision. Commissioner Weintraub dissented.

August 29, 2022
Date

Attest:

Vicktoria J Allen
Digitally signed by Vicktoria J Allen
Date: 2022.08.29 17:06:54 -04'00'

Vicktoria J. Allen
Acting Deputy Secretary of the Commission

Exhibit 4

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 6589R
American Action Network	)	

CERTIFICATION

I, Laura E. Sinram, recording secretary of the Federal Election Commission executive session, do hereby certify that on May 10, 2018, the Commission took the following actions in the above-captioned matter:

1. Failed by a vote of 2-1 to:

    a. Find reason to believe respondent American Action Network violated 52 U.S.C. §§30102, 30103, and 30104.

    b. Release the relevant DVS tally vote records, including:

        i. The tally vote on whether to find reason to believe that American Action Network violated 52 U.S.C. §§ 30102, 30103, and 30104 due April 19, 2018, in which Chair Hunter and Commissioner Petersen voted to find reason to believe and Commissioner Walther voted to find reason to believe (subject to approval of the Office of General Counsel's proposed Factual and Legal Analysis), approve compulsory process, and send the appropriate letters; and Vice Chair Weintraub abstained.

        ii. The tally vote on whether to certify the reason to believe vote due April 23, 2018, in which Chair Hunter and Commissioner Petersen voted to certify the vote of April 19, 2018, Vice Chair Weintraub objected defensively, and Commissioner Walther did not vote.

        iii. The tally vote due April 19, 2018, to include discussion of MUR 6589R (American Action Network) among the Commission's agenda items for the Executive Session to be held on April 19, 2018, in which Vice Chair Weintraub objected.

c. Release the certification without redaction.

Commissioners Hunter and Petersen voted affirmatively for the motion. Commissioner Walther dissented. Commissioner Weintraub abstained.

2. Failed by a vote of 3-0 to:

a. Find reason to believe respondent American Action Network violated 52 U.S.C. §§ 30102, 30103, and 30104.

b. Release the relevant DVS tally vote records, including:

i. The tally vote on whether to find reason to believe that American Action Network violated 52 U.S.C. §§ 30102, 30103, and 30104 due April 19, 2018, in which Chair Hunter and Commissioner Petersen voted to find reason to believe and Commissioner Walther voted to find reason to believe (subject to approval of the Office of General Counsel's proposed Factual and Legal Analysis), approve compulsory process, and send the appropriate letters; and Vice Chair Weintraub abstained.

ii. The tally vote on whether to certify the reason to believe vote due April 23, 2018, in which Chair Hunter and Commissioner Petersen voted to certify the vote of April 19, 2018, Vice Chair Weintraub objected defensively, and Commissioner Walther did not vote.

iii. The tally vote due April 19, 2018, to include discussion of MUR 6589R (American Action Network) among the Commission's agenda items for the Executive Session to be held on April 19, 2018, in which Vice Chair Weintraub objected.

Commissioners Hunter, Petersen, and Walther voted affirmatively for the motion. Commissioner Weintraub abstained.

3. Failed by a vote of 3-0 to:

a. Find reason to believe that American Action Network violated 52 U.S.C. §§ 30102, 30103, and 30104.

b. Authorize the use of compulsory process.

c. Approve the Factual and Legal Analysis emailed by the Office of General Counsel on April 17, 2018 at 10:20 a.m., as amended by replacing the phrase "cabining their message's timing" with "cabining the message's timeframe" on page 14.

d. Send the appropriate letter.

Commissioners Hunter, Petersen, and Walther voted affirmatively for the motion.

Commissioner Weintraub abstained.

4. Failed by a vote of 3-1 to:

a. Close the file.

b. Send the appropriate letters.

Commissioners Hunter, Petersen, and Walther voted affirmatively for the motion.

Commissioner Weintraub dissented.

Attest:

5/14/18
Date

Laura E. Sinram
Laura E. Sinram
Deputy Secretary of the Commission

Exhibit 5

COMMISSIONER ELLEN L. WEINTRAUB
FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	MUR 6589R
American Action Network	)	

STATEMENT OF REASONS OF COMMISSIONER ELLEN L. WEINTRAUB

More than a billion dollars of dark money has flooded into our elections since *Citizens United*.[1] This matter is one in a long line of cases where the Commission has failed to ensure the transparency about money in politics that Congress has required, that the Supreme Court has upheld, and that the American people deserve.[2] The Commission's repeated failure to pursue investigations into dark-money groups like American Action Network is sadly well known.

I have written extensively about the merits of this matter over the years. I incorporate by reference the analysis and discussion made in my previous statements on all points:

• Statement of Reasons of Vice Chair Ann M. Ravel and Commissioners Steven T. Walther and Ellen L. Weintraub, MURs 6538 and 6589 (AJS & AAN) (July 30, 2014)[3];

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[1] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). *See* Michael Beckel, Dark money spending since *Citizens United* set to eclipse $1 billion, ISSUE ONE (Sep. 10, 2020), *found at* https://issueone.org/articles/dark-money-spending-since-citizens-united-set-to-eclipse-1-billion/; Anna Massoglia and Karl Evers-Hillstrom, 'Dark money' topped $1 billion in 2020, largely boosting Democrats, OPEN SECRETS (Mar. 17, 2021) *found at* https://www.opensecrets.org/news/2021/03/one-billion-dark-money-2020-electioncycle/.

[2] *See, e.g.*, MURs 7672, 7674, and 7732 (Iowa Values, *et al.*) (OGC recommended finding reason to believe respondent violated the Act by not registering and reporting as a political committee, but an insufficient number of Commissioners voted to support OGC's recommendations; *see* FGCR dated Sept. 25, 2020 and Cert. dated Feb. 11, 2021); MUR 7860 (Jobs and Progress Fund, Inc., *et al.*) (same; *see* FGCR dated Aug. 27, 2021 and Cert. dated Nov. 2, 2021); MUR 7513 (Community Issues Project) (same; *see* FGCR dated Sept. 18, 2019 and Cert. dated Sept. 12, 2021); MUR 7479 (Keeping America in Republican Control PAC, *et al.*) (same; *see* FGCR dated Apr. 26, 2019 and Cert. dated Apr. 5, 2021); MUR 7181 (Independent Women's Voice) (same; *see* FGCR dated Jan. 21, 2020 and Cert. dated Mar. 1, 2021); MUR 6596 (Crossroads Grassroots Policy Strategies) (same; *see* FGCR dated Mar. 7, 2014 and Certs. dated Nov. 2, 2015, Nov. 18, 2015, Dec. 18, 2015, and Mar. 27, 2019); MUR 6872 (New Models) (same; *see* FGCR dated May 21, 2015 and Cert. dated Nov. 15, 2017); MURs 6391 and 6471 (Commission on Hope, Growth and Opportunity) (same; *see* FGCR dated Dec. 26, 2013 and Cert. dated Sept. 18, 2014); MUR 6402 (American Future Fund) (same; *see* FGCR dated Jan. 17, 2013 and Cert. dated Nov. 20, 2014); MUR 6538 (Americans for Job Security) (same; *see* FGCR dated May 2, 2013 and Cert. dated June 26, 2014).

[3] Statement of Reasons of Vice Chair Ann M. Ravel and Commissioners Steven T. Walther and Ellen L. Weintraub, MURs 6538 and 6589 (Americans for Job Security and American Action Network) (July 30, 2014), *found at* http://eqs.fec.gov/eqsdocsMUR/14044362039.pdf.

• Statement of Reasons of Commissioners Ann M. Ravel and Ellen L. Weintraub, MUR 6589R (AAN) (Dec. 5, 2016)[4];

• Statement of Vice Chair Ellen L. Weintraub Regarding *CREW v. FEC & American Action Network* (April 19, 2018).[5]

This case also raises broader issues. The D.C. Circuit's jurisprudence regarding the dismissal of Commission enforcement complaints has seriously damaged this agency's ability to enforce the law. The Circuit's legal fictions conflate important and distinct Commission votes, leading to a marked departure from what Congress intended in the Federal Election Campaign Act, as amended ("FECA" or the "Act").[6] Interestingly, the legal fictions in this particular matter amount to *science* fiction – time travel in particular.

This matter demonstrates clearly why the D.C. Circuit's deference to so-called "controlling commissioners" is woefully misplaced. We have a dismissal in this matter not because I abstained on a reason-to-believe vote in 2018. We have a dismissal in this matter because five of my colleagues voted to dismiss this matter on Aug. 29, 2022.[7] If the D.C. Circuit wants to know why the Commission dismissed this (or *any*) matter – which is the question before a court *every time* a complainant files a dismissal lawsuit against the Commission pursuant to 52 U.S.C. § 30109(a)(8) – it might want to ask the commissioners who, you know, voted to dismiss the matter.[8]

Since the 1980s, the D.C. Circuit has focused on the Commission's split reason-to-believe ("RTB"[9]) votes (which are nothing but failed motions) and de-emphasized the successful vote at a later point in time that actually dismisses an enforcement matter. This matter is, also, then, an object lesson in how dismissal votes and their timing play a consequential and independent role in how the Commission's enforcement matters play out.

Enforcement matters generally follow this sequence of events: 1. Commissioners vote on whether to pursue the matter; 2. If that vote fails, commissioners vote on whether to dismiss the matter; and 3. If that vote succeeds, commissioners who voted No in Step 1 write statements explaining their vote.

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[4] Statement of Reasons of Commissioners Ann M. Ravel and Ellen L. Weintraub, MUR 6589R (AAN) (Dec. 5, 2016), *found at* http://eqs.fec.gov/eqsdocsMUR/16044403699.pdf.

[5] Statement of Vice Chair Ellen L. Weintraub Regarding *CREW v. FEC & American Action Network* (April 19, 2018) ("2018 Weintraub AAN Statement"), *found at* https://www.fec.gov/resources/cms-content/documents/2018-04-19-ELW-statement.pdf.

[6] 5 U.S.C. § 30101, *et seq.*

[7] In FEC parlance, the final action the Commission takes in an enforcement matter is to "close the file." That is the act that dismisses the matter, authorizing public release of the files and triggering the complainant's right to sue "within 60 days after the date of the dismissal." 52 U.S.C. § 30109(a)(8)(B).

[8] None of the five commissioners who voted to dismiss this matter ever voted on the merits of the complaint.

[9] The trigger for Commission action in an enforcement matter is a finding, based on information received in a complaint or in the course of its supervisory responsibilities, that the Commission has "reason to believe that a person has committed, or is about to commit, a violation" of the Act ("reason to believe" or "RTB," in FEC shorthand). 52 U.S.C. § 30109(a)(2).

In the first round of this matter, for example, the Commission split 3-3 on June 24, 2014 on whether to pursue the complaint and then immediately dismissed the matter by unanimously voting to close the file. On July 30, 2014 – just over a month later – the commissioners who voted against pursuing the complaint published a statement explaining their vote.[10]

Here's the time-travel element: When the commissioners published their statement on July 30, D.C. Circuit precedent *retroactively applied their reasoning to the June 24 vote to not pursue the complaint.* The Commission's reasoning on June 24, in other words, was what those commissioners wrote five weeks later, on July 30.

Although the time lag is longer, the same principle applies here. I am writing in September 2022 to explain my May 10, 2018 vote that prevented the Commission from pursuing RTB in this matter. As soon as this statement is published, the rationale it contains will travel back in time more than four years to explain why, in May 2018, the RTB vote failed. And if the complainant wishes to sue the Commission within 60 days after its August 29, 2022 vote to dismiss the matter, the rationale contained in this statement will be evaluated by the court to determine whether the dismissal is contrary to law.[11]

But this matter has far more going on. The gory details of the procedural history of this matter are laid out in Appendix A.[12] Here are the highlights:

CREW filed an FEC enforcement complaint against the American Action Network ("AAN") in June 2012, alleging that AAN should have registered with the Commission as a political committee.[13] In June 2014, the Commission split on whether to move forward with the complaint

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[10] *See* MUR 6589 (American Action Network ("AAN")), *found at* https://www.fec.gov/data/legal/matter-under-review/6589/; Certification, MUR 6589R (June 24, 2014) (Commissioners Ravel, Walther, and Weintraub voting Yes and Commissioners Goodman, Hunter, Petersen voting No), *found at* https://www.fec.gov/files/legal/murs/6589/14044361924.pdf; Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen, MUR 6589 (AAN) (July 30, 2014) ("2014 Republican SOR"), *found at* http://eqs.fec.gov/eqsdocsMUR/14044362004.pdf.

[11] 52 U.S.C. § 30109(a)(8)(B). The D.C. Circuit currently requires courts to defer to the statement of reasons written by the commissioner or commissioners whose votes at the reason-to-believe stage prevent a complaint from moving forward against the advice of the Commission's attorneys. *See, e.g., Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1135 (D.C. Cir. 1987) ("If three or more Commissioners vote against moving forward, this controlling group must provide a statement of reasons for that decision"). I have argued strongly that the Circuit's precedent stems from a fundamental misreading of how the Commission actually handles its enforcement matters, but for the moment, this is the law. The Circuit is currently considering whether to review the panel decision in *Citizens for Responsibility & Ethics in Wash. v. FEC*, 993 F.3d 880 (D.C. Cir. 2021) *("New Models* panel decision"). *See* Ellen L. Weintraub, *Statement On the Opportunities Before the D.C. Circuit in the* New Models *Case To Re-Examine* En Banc *Its Precedents Regarding 'Deadlock Deference'* (March 2, 2022) ("Weintraub *New Models* Statement"), *found at* https://www.fec.gov/documents/3674/2022-03-02-ELW-New-Models-En_Banc.pdf. Petition for Rehearing *En Banc*, *CREW v. FEC ("New Models en banc* petition"), No. 19-5161 (D.C. Cir.), *found at* https://www.fec.gov/resources/cms-content/documents/crew_195161_pet_rhrg.pdf.

[12] Two decisions also play an important role in this timeline: *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) *("CHGO"), found at* https://www.cadc.uscourts.gov/internet/opinions.nsf/A0A7C6C35F1863B3852582AD0054B275/$file/17-5049- 1736010.pdf; *pet. for reh'g en banc denied*, 923 F.3d 1141 (D.C. Cir. 2019); and *New Models* panel decision, *supra* note 11. Key dates from those cases are included in the Appendix.

[13] *See* Appendix A for details and references regarding these dates.

and voted to dismiss it. The naysaying commissioners published a statement explaining their votes.[14] CREW sued the Commission and won in Sept. 2016. The Commission again split on whether to move forward and again dismissed the complaint. The naysaying commissioners published another statement explaining their votes.[15] CREW sued again and won in March 2018.

The Commission did not conform to the court's declaration that the second dismissal was contrary to law, so under the Act, on April 19, 2018, CREW became authorized to sue AAN directly to remedy the violation alleged in its original FEC complaint. It filed that suit four days later. Even though the court's deadline for the Commission had expired and the third-party lawsuit was already in court, the Commission held three RTB votes and one dismissal vote on May 10, 2018. All RTB motions failed, the final one when I withheld my Yes vote and abstained; the dismissal motion failed when I voted against it.[16]

The May 10 votes – disclosed today for the first time by the Commission's publishing of the public file in this matter now that the complaint has been dismissed – transformed the posture of this matter. It is instructive to examine exactly where everything stood on May 10, 2018. On that day, two proceedings had concluded entirely, and two proceedings were ongoing:

- **Entirely Concluded: *CREW v. FEC ("CREW I")*, No. 14-1419 (D.D.C.)**
  The complaint in *CREW I* was filed Aug. 20, 2014. CREW won that case on Sept. 19, 2016 when the district court declared the 2014 Republican SOR to be contrary to law, writing, that its theory of the case "blinks reality."[17] At that moment, the district court's decision that the Commission's dismissal was contrary to law was consistent with applicable circuit precedent.

  Following the Act's provisions, the district court then remanded the matter back to the Commission for it to act in accordance with the court's declaration within 30 days.[18] On Oct. 8, 2016, the Commission held further RTB votes[19] and dismissed the matter again.[20] The Oct. 8 dismissal vote was the last action the Commission took related to this lawsuit.

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[14] 2014 Republican SOR, *supra* note 10.

[15] 2016 Republican SOR, *supra* note 10.

[16] Certification, MUR 6589R (May 10, 2018).

[17] Opinion, *CREW v. FEC*, 209 F. Supp. 3d 77, 93 (D.D.C. 2016) (finding the initial dismissal of CREW's complaint against AAN "contrary to law" and remanding matter to the Commission), *found at* https://www.fec.gov/resources/legal-resources/litigation/crew141419_dc_opinion2.pdf.

[18] 52 U.S.C. § 30109(a)(8)(C).

[19] Certification, MUR 6589R (Oct. 8, 2016) (Commissioners Ravel, Walther, and Weintraub voting Yes and Commissioners Goodman, Hunter, Petersen voting No). The Commission's 30 days ran out on Oct. 19, 2016; any successful votes between Oct. 8 and Oct. 19 could have served as the Commission's final word on the matter.

[20] *Id.* (Commissioners Goodman, Hunter, Petersen, Walther, and Weintraub voting Yes and Commissioner Ravel voting No).

On Oct. 19, 2016, when the 30-day period expired, *CREW I*, No. 14-1419 (D.D.C.) was finished: All the requirements of 52 U.S.C. § 30109(a)(8) governing such lawsuits had been fulfilled.[21]

- **Entirely Concluded: *CREW v. FEC ("CREW II")*, No. 16-2255 (D.D.C.)**
  CREW filed suit again on Nov. 14, 2016. It won that case on March 20, 2018, when the district court declared the 2016 Republican SOR to be contrary to law and remanded the matter to the Commission to conform with this declaration within 30 days. At that moment, the district court's decision that the Commission's dismissal was contrary to law was consistent with applicable circuit precedent. Thirty days passed and the Commission took no action on the matter.

  On April 19, 2018, when the 30-day period expired, *CREW II*, No. 16-2255 (D.D.C.) was finished: All the requirements of 52 U.S.C. § 30109(a)(8) governing such lawsuits had been fulfilled.

- **Quite Open: *CREW v. AAN* (*"CREW III"* or the "third-party suit"), No. 18-945 (D.D.C.)**
  On April 23, 2018, pursuant to 52 U.S.C. § 30109(a)(8)(C), CREW filed its third-party suit against AAN,[22] noting that it had gained jurisdiction to do so on April 19, 2018,[23] when *CREW II* was finished. On May 10, 2018, the third-party suit was proceeding, just as the Act contemplated, having been authorized by a district court with jurisdiction over the matter.

- **Quite Open: MUR 6589R, the underlying enforcement matter**
  The Court's March 20, 2018 remand to the Commission re-opened this matter. The Commission's May 10, 2018 RTB votes became the working disposition of this complaint. The May 10 votes are disclosed for the first time by the Commission's release, today, of the enforcement file in this matter, pursuant to the August 29, 2022 dismissal.[24]

On April 9, 2021, a D.C. Circuit panel decided the *New Models* appeal.[25] This ill-advised opinion rendered any Commission dismissal invulnerable to judicial review if the commissioners

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[21] On April 26, 2017, the district court denied CREW's motion asking it to (a) order the FEC to show cause why it should not be held to have violated the court's order and (b) authorize a third-party suit under the Act. The court denied the motion, holding that the Commission's Oct. 8 dismissal vote had served as conformance to the court's declaration. *See* Opinion and Order Denying Motion for Order to Show Cause, *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, No. 14-1419 (D.D.C.) *(CREW I)* at 6, *found at* https://ecf.dcd.uscourts.gov/doc1/04516007951 [fee site] (holding that Commission had complied with the court's order because "the Court directed the FEC to reconsider its decision without excluding from its major purpose consideration all non-express advocacy. The FEC did just that." (internal references and quotes removed)). *See also* 52 U.S.C. § 30109(a)(8)(C).

[22] *CREW v. AAN*, No. 18-945 (D.D.C.) *(CREW III)*.

[23] 52 U.S.C. § 30109(a)(8)(C).

[24] Certification, MUR 6589R (Aug. 29, 2022).

[25] *New Models* panel decision, *supra* note 11.

explaining themselves cited "prosecutorial discretion" as the reason they had voted to not pursue the complaint.

AAN, the defendant in the third-party suit, took note of this development. The district court denied AAN's motion to dismiss the third-party suit on *New Models* grounds on Sept. 23, 2019.[26] It did so taking the 2016 Republican SOR as the Commission's then-current reasoning.[27] But on March 2, 2022, the district court reversed itself and held that the intervening 2021 *New Models* panel decision precluded the district court's earlier review of the Commission's reasoning. Because of *that,* the district court held, it should not have held the 2014 Republican SOR to be contrary to law. It held that the 2016 Republican SOR presently before the court either:

> (a) should not have existed at all because the *New Models* panel decision precluded review of the 2014 Republican SOR's invocation of prosecutorial discretion and "the Court lacked the power to issue the remand order that resulted in the second statement," or
>
> (b) could not be reviewed because the 2016 Republican SOR incorporated by reference the 2014 Republican SOR's invocation of prosecutorial discretion, thus rendering itself unreviewable.[28]

And so the district court dismissed CREW's third-party suit against AAN.[29]

But the court did not know that on the day the *New Models* panel decision hit the streets on April 9, 2021, the 2014 and 2016 Republican SORs had been dead letters for almost two years,[30] as the Commission had superseded its 2014 and 2016 RTB votes on May 10, 2018, when it held three further RTB votes and a dismissal vote on the matter. And the commissioners who had held the pen for the first two statements of reasons no longer held that pen: Whatever status my colleagues' previous votes may have earned them as "declining-to-go-ahead commissioners" was entirely undone that day because all three of them voted in *favor* of that day's RTB motions.[31]

The D.C. Circuit's rule for civil litigation is that "a retroactive decision can affect only suits pending in the courts or not yet brought, but cannot be raised by previously unsuccessful litigants."[32] Neither *CREW I* nor *CREW II* were pending when the *New Models* panel decision was

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[26] *CREW v. AAN*, 410 F. Supp. 3d 1 (D.D.C. 2019) *(CREW III)*.

[27] *Id.* at 10.

[28] Memorandum Opinion and Order, *CREW v. AAN* (No. 18-945) (March 2, 2022) *(CREW III)*, at 16 note 7. ("But as AAN points out, if the passing reference to prosecutorial discretion in the initial statement made the first dismissal unreviewable under *New Models*, then the Court lacked the power to issue the remand order that resulted in the second statement. The result would have been a dismissal of CREW's case, and the Commissioners never would have issued a second statement. In any event, the second Statement of Reasons 'incorporate[d] by reference' the first one 'on all points except for aspects deemed contrary to law' by this Court," citing 2016 Republican Statement at 2).

[29] *Id.* at 17.

[30] The district court's dismissal of the third-party suit in March 2022 took only the *New Models* decision into account, but it is worth noting that the 2014 and 2016 Republican statements of reasons had been dead letters for more than a month even when the panel decision in *CHGO* was released on June 15, 2018.

[31] Certification, MUR 6589R (May 10, 2018).

[32] *Zweibon v. Mitchell*, 606 F.2d 1172, 1177 (D.C. Cir. 1979). The Supreme Court has held that when it "applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full

published. The Commission had lost both cases, and the remainder of 52 U.S.C. § 30109(a)(8)'s terms governing such lawsuits had been fulfilled. The Commission – and AAN as intervenor – were the "previously unsuccessful litigants" barred by the Circuit rule from raising a decision retroactively.

Under the D.C. Circuit's rule on retroactivity, then, the *New Models* decision can only be applied to the two matters that were open at the time the decision landed: MUR 6589R, the underlying enforcement matter, and *CREW v. AAN*, No. 18-0945 (D.D.C.), the third-party suit.

MUR 6589R was dismissed by the Commission in August 2022. The *New Models* decision *could* apply to a dismissal lawsuit filed by the complainant pursuant to 52 U.S.C. § 30109(a)(8) if the controlling statement of reasons cites prosecutorial discretion as the reason the matter had not been pursued. (Spoiler alert: That's *this* statement. It will *not* cite prosecutorial discretion.)[33]

Now, remember the time travel mentioned at the outset of this statement? It comes into play here. When the motions to find RTB in this matter failed on May 10, 2018, and then the motions to dismiss this matter succeeded August 29, 2022, D.C. Circuit jurisprudence required that May 10, 2018, outcome to have an explanation. Pursuant to binding D.C. Circuit precedent, this September 2022 statement today retroactively becomes the rationale for the Commission's May 10, 2018, RTB votes.

With all that in mind, the *New Models* decision is irrelevant to the third-party suit. The third-party suit is not litigating whether the Commission's dismissal of the complaint in this matter was contrary to law. That ship has sailed. The third-party suit is litigating the merits of the original administrative complaint.[34] CREW gained jurisdiction to file the third-party suit because the Commission did not conform to the court's declaration that the second dismissal was contrary to law within 30 days.

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retroactive effect *in all cases still open on direct review* and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper v. Virginia Dep't of Tax'n*, 509 U.S. 86, 97, (1993) *(emphasis added).*

[33] Note that the Commission has considered this file to be open ever since March 20, 2018, when the district court declared the Commission's dismissal of the matter to be contrary to law and remanded it back to us. Opinion, *CREW v. FEC*, 299 F. Supp. 3d 83 (D.D.C. 2018) *(CREW II)* (finding the second dismissal of CREW's complaint contrary to law, and again remanding to the Commission), *found at* https://www.fec.gov/resources/legal-resources/litigation/crew_162255_dc_opinion.pdf.

A court reviewing the Commission's August 2022 dismissal of this matter should note that when the Commission conducted its vote, it was well aware of the district court's March 2022 decision reconsidering that March 2018 declaration, the decision that dismissed the *CREW v. AAN* third-party lawsuit. None of the six commissioners who voted on the matter raised any objection that the Commission was somehow acting unnecessarily or improperly. Though I voted against dismissing the matter on that day, I accepted the view of our Office of General Counsel that the file was open and that a close the file dismissal vote was in order.

[34] Complaint, *CREW v. AAN*, 18-945 (D.D.C.) *(CREW III)*, at ¶1 ("This is an action to remedy American Action Network's ('AAN') violations of the Federal Election Campaign Act of 1971 ('FECA'), brought pursuant to 52 U.S.C. § 30109(a)(8)(C)."); 52 U.S.C. § 30109(a)(8)(C) (the "complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint").

The district court applied the correct legal standard to the then-active Commission positions in *CREW I* in 2016 and *CREW II* in 2018, but by March 2022, the Commission's position had changed. When the *New Models* decision was published April 9, 2021, unbeknownst to the court, the underlying complaint was not being pursued because of the May 10, 2018, RTB votes, not any previous Commission votes. The 2014 and 2016 Republican SORs were no longer active; within the Commission, they had been superseded by subsequent votes, and beyond the Commission, all the litigation that had challenged them had concluded. On April 9, 2021, the rationale for the Commission's failure to pursue this complaint was not any sort of prosecutorial discretion.

SO, WHAT *IS* THE CONTROLLING-COMMISSIONER EXPLANATION OF THE MAY 10, 2018 RTB VOTES?

My vote on May 10, 2018 prevented the Commission from finding reason to believe that a violation had occurred in this matter – as I intended it to do. Because this was the last time such a motion was made in this matter, my reasoning, and my reasoning alone, controls as the Commission's position.

Oddly, in this case, D.C. Circuit caselaw demands an explanation from the commissioner who voted against RTB but also against dismissing this matter – a commissioner who believes that this dismissal is firmly contrary to law.[35] And this is hardly the most serious distortion the D.C. Circuit's conflations have inflicted upon the Commission's ability to enforce the law. The D.C. Circuit should take the opportunity presented by the *New Models en banc* petition to reverse its *New Models*, *CHGO*, and *NRSC*[36] precedents.

Now, ordinarily, those explaining a dismissal's rationale agree with the outcome and explain all the ways the dismissal was not contrary to law. Not this time. This controlling statement of reasons will explain why dismissing the complaint in this matter was *absolutely* contrary to law.

As an initial matter, here's what the reasoning is *not:*

- I explicitly *disclaim* in its entirety the reasoning contained in the Statements of Reasons of Commissioners Goodman, Hunter, and Petersen in MURs 6589 and 6589R.[37]

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[35] And this is not the only matter where this is the case. I am also the controlling commissioner in MURs 6915 and 6927 (Bush). This kind of outcome from the D.C. Circuit's conflations was predictable and predicted. *See, e.g.*, Weintraub *New Models* Statement, *supra* note 11, at 12, note 50 ("This is made even more clear when there are significant temporal or voting-lineup differences between the RTB vote and the dismissal vote. If three commissioners voted against RTB in a matter where the Commission's General Counsel counseled otherwise, the President replaced the entire lineup of commissioners, and the newly constituted Commission then simply voted to close the file, from whom is an explanation required? Former commissioners cannot speak for the Commission, nor did their votes cause the matter to be dismissed. Only the sitting commissioners who just dismissed the matter by voting to closing the file can provide the Commission's rationale.").

[36] *FEC v. NRSC*, 966 F.2d 1471 (D.C. Cir. 1992). I discuss this case's flaws in depth here: Weintraub *New Models* Statement, *supra* note 11, at 4-8.

[37] *See* 2014 Republican SOR, *supra* note 10, and Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman, MUR 6589R (AAN) (Oct. 19, 2016) ("2016 Republican SOR"), *found at* http://eqs.fec.gov/eqsdocsMUR/16044401031.pdf.

- The Commission did *not* dismiss this matter pursuant to its prosecutorial discretion.[38] To be clear: this statement, this matter's Controlling Statement of Reasons unequivocally disclaims prosecutorial discretion as a rationale for the Commission's dismissal of this matter.

- The Commission did *not* dismiss this matter because the statute of limitations had elapsed.[39] The Commission has considerable equitable remedies available to it that are not subject to 28 U.S.C. § 2462. The general statute limits itself quite specifically to any action, suit, or proceeding for the enforcement of *"any civil fine, penalty, or forfeiture, pecuniary or otherwise."* This describes some of the tools Congress has given the Commission to enforce the law, but not all of them.

  One power of the Commission is to levy "a civil penalty."[40] This falls directly under the "civil fine, penalty, or forfeiture" terms of 28 U.S.C. § 2462. The law is clear that past the five-year statute of limitations, the Commission may not impose a civil penalty on a respondent. But the Act separately gives the Commission the power to "institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order[.]"[41] These are the Commission's "equitable remedies." Equitable remedies are had when the Commission compels a respondent to, say, file missing reports, amend its filings, register as a political committee, halt a current practice, or attend compliance training. Equitable remedies are also had when the Commission signs agreements with respondents where respondents agree to desist from violating the law going forward, or not to work for a federal political committee for a specified period of time, or to secure their own independent compliance audits and provide the Commission with the results.[42] None of these equitable remedies involve paying a fine or suffering some other monetary penalty. 28 U.S.C. § 2462 cannot reasonably be read to extend to the Commission's equitable remedies.

  In this matter, the Commission has substantial equitable remedies available to it. This is a classic political-committee status matter. AAN styled itself as a 501(c)(4) social-welfare organization that does not have to disclose its donors. But the evidence before

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[38] *See Heckler v. Chaney*, 470 U.S. 821 (1985).

[39] It is worth noting that whether the statute of limitations has elapsed is a legal judgment not properly subject to prosecutorial discretion. If the statute has indeed run on a matter, the Commission lacks the discretion to choose to pursue financial penalties in that matter. Every assertion that the statute of limitations has elapsed draws on an evaluation of the facts of the matter and an evaluation of a statutory provision outside the Act (28 U.S.C. § 2462) and the judicial glosses on that statute – all of which are matters subject to judicial review under the Act. *See* 52 U.S.C. § 30109(a)(8).

[40] 52 U.S.C. §30109(a)(5)(A).

[41] 52 U.S.C. §30109(a)(6); *see also Christian Coalition*, 965 F.Supp. at 72 ("Under the FECA, the Commission has the authority to seek injunctive relief wholly separate and apart from its authority to seek a legal remedy") (*citing* 52 U.S.C. § 30109(a)(6)'s antecedent).

[42] Courts also have equitable remedies available in FECA-related matters, such as issuing a declaratory judgment that the conduct at issue violated the Act.

> the Commission showed that AAN met the definition of a political committee, which *does* have to disclose the identity of its donors. Had the Commission successfully pursued this matter, it would have been well within its authority to require AAN to update its filings with the Commission to include all the information about its contributors that the Act requires.[43]

Now, the practice of courts has been to accept Statements of Reasons published by controlling commissioners after the Commission has voted to dismiss the matter and even after the 60-day deadline has passed for complainants to challenge the dismissals.[44] This approach raises questions under basic administrative law principles.[45]

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[43] The Commission's ability to secure such an outcome was demonstrated in MUR 6538R (Americans for Job Security), *found at* https://www.fec.gov/data/legal/matter-under-review/6538R/.

[44] *See* 52 U.S.C. §30109(a)(8)(B).

[45] The lurking question here is: what constitutes the FEC's administrative record in this or any other enforcement matter? This statement, for instance, was not before this agency when it decided to dismiss this matter. Can it be considered by a court to be part of the administrative record of this matter? The question has not been put directly before the D.C. Circuit in the context of FEC decisions.

The D.C. Circuit defines an agency's administrative record as all materials compiled by the agency that were before the agency at the time a decision was made, and it confines a court's review to the administrative record. *See, e.g., James Madison Ltd. by Hecht v. Ludwig,* 82 F.3d 1085, 1095 (D.C. Cir. 1996) ("The APA requires courts to "review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. "Ordinarily, courts confine their review to the "administrative record." *Edison Elec. Inst. v. OSHA,* 849 F.2d 611, 617–18 (D.C.Cir.1988). The administrative record includes all materials "compiled" by the agency, *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 419, 91 S.Ct. 814, 825, 28 L.Ed.2d 136 (1971), that were "before the agency at the time the decision was made," *Environmental Defense Fund, Inc. v. Costle,* 657 F.2d 275, 284 (D.C.Cir.1981).").

My April 2018 statement, (2018 Weintraub AAN Statement, *supra* note 5), which explained in advance my eventual controlling non-RTB vote in the matter, *was* in the record when the Commission voted to close the administrative record in this matter and dismiss the complaint in August 2022 (and even when the Commission took its May 2018 RTB votes).

(Note that this analysis would render the 2014 and 2016 dismissals of this matter as textbook arbitrary and capricious contrary-to-law actions, because when the Commission voted to close the administrative file and dismiss the matter on June 24, 2014 and Oct. 8, 2016, respectively, the reasoning of the Commission (released July 30, 2014 and Oct. 16, 2016, respectively) was not before the Commission.)

As I explained in my 2018 statement, I was withholding my affirmative vote on RTB motions because I believed that dismissing this matter was contrary to law. I knew from long and painful experience that providing a fourth vote for RTB at that moment would only serve to eventually sink the matter, and that voting to instead send the matter to a third-party suit was the best way to get the law enforced. As I wrote of my colleagues in that statement: "Their actions in this matter – and over the past decade – have convinced me that despite two clear defeats before the District Court, they will eventually find a way to block meaningful enforcement of the law in this and any other dark-money matter that comes before us." 2018 Weintraub AAN Statement, *supra* note 5 at 1. So I voted to take the matter out of their hands. My expectations were sadly confirmed by the subsequent dismissals without action on many more dark-money complaints, dispositions exacerbated when the D.C. Circuit utterly destroyed the statutory right of complainants to challenge contrary-to-law dismissals through its *CHGO* and *New Models* precedents.

My April 2018 statement explained why dismissing this matter was contrary to law by incorporating the rationale of the *CREW I* district court: "I fully support the sound reasoning of the [District] Court's March 20[, 2018] opinion." The statement references the opinion in *CREW v. FEC,* 299 F. Supp. 3d 83, 101 (D.D.C. 2018) *(CREW II)* (finding the second dismissal of CREW's complaint contrary to law, and again remanding the matter to the Commission), *found at* https://www.fec.gov/resources/legal-resources/litigation/crew_162255_dc_opinion.pdf.

But unless and until a court outlaws that practice, the reasoning contained in *this* statement will control. Though released after the Commission's Aug. 29, 2022, dismissal vote in this matter, this statement is available to the complainant well before its Oct. 30, 2022, statutory deadline to challenge this dismissal.[46]

As noted above, I incorporate by reference the analysis and discussion made in my previous statements on all points.[47] Because the dismissal of this matter was unreasonable, given the facts before the Commission, the law governing this activity, and the reasoning referenced above, I voted against dismissing it. The Commission's dismissal of this matter was contrary to law.

THE EASE WITH WHICH A COMMISSIONER CAN KILL WORTHY COMPLAINTS

The *New Models* decision has made it absurdly easy for less than a majority of commissioners – or even a single commissioner – to nullify the ability of complainants to challenge the dismissals of their complaints, thus insulating Commission dismissals from any sort of judicial oversight. *New Models* empowers any and every justification for prosecutorial discretion:

- Legal judgments regarding the Act, no matter how inaccurate: *"I voted to dismiss this matter in an exercise of the Commission's prosecutorial discretion because the Act does not cover such activity."*
- Legal interpretations of any *non-FECA* statute or judicial decision, no matter how inaccurate: *"I voted to dismiss this matter in an exercise of the Commission's prosecutorial discretion pursuant to* Marbury v. Madison,[48] *which declared the Federal Election Campaign Act to be unconstitutional."*
- Even an inaccurate factual statement related to or entirely unrelated to the facts of the matter would be upheld under *New Models* as an unreviewable rationale: *"I voted to dismiss this matter in an exercise of the Commission's prosecutorial discretion because the Moon is made of green cheese."*
- No reason need be given at all: *"I voted to dismiss this matter in an exercise of the Commission's prosecutorial discretion, period."*

Were I to include any of the above statements in the reasoning of my statement in this matter, *New Models* would render the Commission's dismissal of this matter invincible to

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Should a court decide that the Commission is indeed subject to basic administrative law principles, my April 2018 statement should be taken as controlling, and this present statement should merely be taken as illuminating.

[46] *See* 52 U.S.C. §30109(a)(8)(B).

[47] Statement of Reasons of Vice Chair Ann M. Ravel and Commissioners Steven T. Walther and Ellen L. Weintraub, MURs 6538 and 6589 (Americans for Job Security and American Action Network) (July 30, 2014), *found at* http://eqs.fec.gov/eqsdocsMUR/14044362039.pdf; Statement of Reasons of Commissioners Ann M. Ravel and Ellen L. Weintraub, MUR 6589R (AAN) (Dec. 5, 2016), *found at* http://eqs.fec.gov/eqsdocsMUR/16044403699.pdf; 2018 Weintraub AAN Statement, *supra* note 5.

[48] 5 U.S. 137 (1803).

challenge. This eviscerates the citizen-suit provisions Congress built into the Act to provide oversight over the Commission's conduct of its enforcement duties.

The point I am raising is not speculative. My colleagues recently cited prosecutorial discretion in explaining their votes that blocked the Commission from pursuing a complaint that alleged a violation *in excess of $780 million.*[49] They based their opinion on their factual and legal assessments of the matter. Commissioner Broussard and I forcefully disputed those assessments,[50] and I wrote separately to note that my colleagues' *entire* statement was based on nothing but factual and legal assessments.[51] But our colleagues' claims were enthusiastically picked up by the Commission's litigators, who, understandably enough, always like a slam-dunk argument. The Commission's litigators filed a motion earlier this month to dismiss a complainant lawsuit filed under § 30109(a)(8) arguing that *New Models* so entirely protected my colleagues' invocation of prosecutorial discretion that it caused the plaintiff's complaint to fail to state a claim, and it should therefore be dismissed under FRCP 12(b)(6).[52]

My colleagues also brazenly asserted controlling-commissioner authority over the *judicial branch* in their June 8, 2022 "policy statement"[53] regarding *CREW v. FEC,* 971 F.3d 340 (D.C. Cir. 2020).[54] In *CREW v. FEC*, the D.C. Circuit had affirmed the district court's characterization of the Act's reporting mandates. But my colleagues dismissed this as "vague and imprecise" and announced that they would be enforcing the law as they – not the D.C. Circuit – saw it. They embraced the Second Circuit's reasoning in *FEC v. Survival Educ. Fund,*[55] and announced their intent to enforce 52 U.S.C. § 30104(c)(1) only as to contributions earmarked to independent expenditures. They would, they announced airily, dismiss other activity pursuant to their powers of prosecutorial discretion.[56]

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[49] Statement of Reasons of Chairman Allen J. Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III, MUR 7784 (Make America Great Again PAC, *et al.)* at 1 (June 9, 2022), *found at* https://www.fec.gov/files/legal/murs/7784/7784_42.pdf.

[50] Statement of Reasons of Commissioners Shana M. Broussard and Ellen L. Weintraub, MUR 7784 (Make America Great Again PAC, *et al.*), (June 15, 2022), *found at* https://www.fec.gov/files/legal/murs/7784/7784_43.pdf.

[51] Supplemental Statement of Reasons of Commissioner Ellen L. Weintraub, MUR 7784 (Make America Great Again PAC, *et al.*) (July 14, 2022), *found at* https://www.fec.gov/files/legal/murs/7784/7784_44.pdf.

[52] Motion to Dismiss, *Campaign Legal Center v. FEC*, No. 22-1796 (Sept. 12, 2022) ("Plaintiff now challenges the FEC's decision not to pursue this matter further, but under binding D.C. Circuit precedent, judicial review is not available where, as here, the votes of the Commissioners who declined to go forward were explicitly based on prosecutorial discretion. *See Citizens for Resp. & Ethics in Wash. v. FEC*, 892 F.3d 434, 438 (D.C. Cir. 2018) ('*Commission on Hope*'). And because this was an exercise of 'unreviewable prosecutorial discretion,' *id*., plaintiff has failed to state a claim for relief that can be granted. Plaintiff's court complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(6).").

[53] *Policy Statement of Chairman Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III Concerning the Application of 52 U.S.C. § 30104(c)* (June 8, 2022) ("Republican Policy Statement"), *found at* https://www.fec.gov/resources/cms-content/documents/CREW_contributions_earmarked_political_purposes_Dickerson_Cooksey_Trainor_06082022.pdf.

[54] 971 F.3d 340 (D.C. Cir. 2020), *aff'g* 316 F. Supp. 3d 349 (D.D.C. 2018).

[55] 65 F.3d 285, 295 (2d Cir. 1995).

[56] Republican Policy Statement, *supra* note 53, at 6.

This amazingly arrogant statement (a) directly contradicted the binding holding in *CREW v. FEC* that the term "earmarked for political purposes" applies more broadly and (b) ignored that the district and circuit courts in *CREW v. FEC* had *expressly rejected* the Second Circuit's reasoning *on exactly that point*.[57] But as outrageous as all that is, what's more outrageous is that they will likely get away with it under the *CHGO* and *New Models* decisions.

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I am deeply disappointed that the Commission has, once again, dismissed a meritorious and important complaint for reasons that are contrary to law. Fortunately, Congress created two more paths to get the law enforced. They are both available to this complainant.

First, within 60 days after the Commission's Aug. 29, 2022 vote to dismiss the matter by closing the file, CREW can sue the Commission on the grounds that the dismissal of its complaint was contrary to law.[58] This lawsuit should succeed, as the position of the Federal Election Commission, as set forth in this controlling Statement of Reasons, is that the dismissal of MUR 6589R was indeed contrary to law.

Next, the complainant has already successfully alleged that the Commission failed to act on its complaint.[59] That suit's conclusion gave rise to the third-party lawsuit the complainant filed against several of the respondents.[60] (The appeal[61] of the dismissal of that lawsuit is on hold until the D.C. Circuit makes a decision regarding the pending *New Models en banc* petition.) The complainant's third-party lawsuit should not be affected by the Commission's dismissal of this matter. The complainant's cause of action against the respondent arose on April 19, 2018, after a thirty-day period during which the Commission did not conform with the district court's March 20, 2018 declaration that the Commission's failure to act on the complainant's complaint was contrary to law.[62] The Commission's dismissal of this matter did nothing to cure the injury that provided the complainant with the Article III standing it needed to maintain its 52 U.S.C. § 30109(a)(8)(A) lawsuit against the Commission and its 52 U.S.C. § 30109(a)(8)(C) lawsuit against respondents.

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In a more functional era for the Commission, commissioners worked hard to find a place where four commissioners could find common ground. Now, however, it has become common practice for half the Commission to simply block enforcement of the law. Such was the case in this matter. Accordingly, it should come as no surprise that many complainants have sought recourse

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[57] *See* 971 F.3d. at 353; 316 F. Supp. 3d at 401 n.43.

[58] 52 U.S.C. § 30109(a)(8)(A) & (B).

[59] *CREW v. FEC*, No. 16-2255 (D.D.C.) *(CREW II)*.

[60] *CREW v. AAN*, 18-945 (D.D.C.) *(CREW III)*.

[61] *CREW v. AAN*, 22-7038 (D.C. Cir.).

[62] *CREW v. AAN*, 18-945 (D.D.C.) *(CREW III)*.

from the courts. Congress anticipated that this bipartisan Commission would sometimes split on enforcement votes and provided a mechanism for the Commission's failure to enforce the law to obtain judicial review. I make no apologies for using the provisions that Congress enacted to try to ensure that those complaints can get a fair hearing in the courts. Those who file complaints before the Commission deserve a meaningful review of their allegations, either by a Commission that will do its job to enforce the law or by a court that will do so.

Sept. 30, 2022

Ellen L. Weintraub
Commissioner

APPENDIX A: TIMELINE

2012 **June 7:** Complaint filed.[63] Commission opens MUR 6589.

2013 **Jan. 17:** Office of General Counsel recommends that the Commission pursue the allegations contained in the complaint.[64]

2014 **June 24:** Commission conducts first reason-to-believe votes. They fail 3-3 along partisan lines.[65]

June 24: Commission votes 6-0 to dismiss complaint.[66]

July 30: Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen publish their first statement of reasons.[67]

Aug. 20: Complainant files its first lawsuit.[68]

2016 **Sept. 19:** District Court declares July 30, 2014 Republican SOR to be contrary to law, writing that it "blinks reality"[69]; remands to Commission to conform with its declaration within 30 days.

Oct. 8: Commission conducts second round of reason-to-believe votes.[70]

Oct. 8: Commission votes 5-1 to dismiss complaint.[71]

Oct. 12: Commission opens MUR 6589R.

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[63] Complaint, MUR 6589 (AAN) (June 7, 2012), *found at* https://www.fec.gov/files/legal/murs/6589/14044361739.pdf.

[64] First General Counsel's Report, MUR 6589 (Jan. 17, 2013) ("FGCR"), *found at* https://www.fec.gov/files/legal/murs/6589/14044361896.pdf.

[65] Certification, MUR 6589 (June 24, 2014), *found at* https://www.fec.gov/files/legal/murs/6589/14044361924.pdf (Commissioners Ravel, Walther, and Weintraub voting Yes and Commissioners Goodman, Hunter, and Petersen voting No).

[66] *Id.*

[67] Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen, MUR 6589 (AAN) (July 30, 2014) ("2014 Republican SOR"), *found at* http://eqs.fec.gov/eqsdocsMUR/14044362004.pdf.

[68] Complaint, *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, No. 14-1419 (D.D.C.) *("CREW I")*, *found at* https://www.fec.gov/resources/legal-resources/litigation/crew141419_complaint.pdf.

[69] Opinion, *CREW v. FEC (CREW I)*, 209 F. Supp. 3d 77, 93 (D.D.C. 2016) (finding the initial dismissal of CREW's complaint against AAN "contrary to law," and remanding to the Commission), *found at* https://www.fec.gov/resources/legal-resources/litigation/crew141419_dc_opinion2.pdf.

[70] Certification, MUR 6589R (Oct. 8, 2016) (Commissioners Ravel, Walther, and Weintraub voting Yes and Commissioners Goodman, Hunter, Petersen voting No).

[71] *Id.* (Commissioners Goodman, Hunter, Petersen, Walther, and Weintraub voting Yes and Commissioner Ravel voting No).

Oct. 16: Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman publish their second statement of reasons, this time regarding MUR 6589R.[72]

Nov. 14: Complainant files its second lawsuit against Commission.[73]

2018 **March 20:** District Court declares 2016 Republican SOR to be contrary to law, remands to Commission to conform with its declaration within 30 days.[74]

April 19: Commission does not conform by court's deadline. Third-party suit is authorized.[75]

April 19: I publish my third statement regarding this matter.[76]

April 23: CREW files third-party suit against AAN.[77]

May 10: Commission conducts third and final round of reason-to-believe votes. One RTB vote fails 2-1, with the Commissioners Matthew S. Petersen and Caroline C. Hunter voting for, Commissioner Steven T. Walther voting against, and me abstaining. Two RTB votes fail 3-0-1 on my abstention.[78]

May 10: Motion to close the file and dismiss complaint fails 3-0-1 on my abstention.[79]

June 15: In the *CHGO* case, the D.C. Circuit affirms district court and establishes circuit precedent of unreviewable deference to invocations of prosecutorial discretion under *Heckler v. Chaney*.[80]

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[72] Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman, MUR 6589R (AAN) (Oct. 19, 2016) ("2016 Republican SOR"), *found at* http://eqs.fec.gov/eqsdocsMUR/16044401031.pdf.

[73] Complaint, *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, No. 16-2255 *(CREW II), found at* https://www.fec.gov/resources/legal-resources/litigation/crew_162255_fec_complaint.pdf.

[74] *CREW II*, *supra* note 45.

[75] 52 U.S.C. § 30109(a)(8)(C).

[76] 2018 Weintraub AAN Statement, *supra* note 5.

[77] *CREW v. AAN*, No. 18-945 (D.D.C.) *(CREW III).*

[78] Certification, MUR 6589R (May 10, 2018) (Commissioners Goodman, Hunter, Petersen voting Yes and Commissioner Weintraub abstaining).

[79] *Id.* (Commissioners Goodman, Hunter, Petersen, Walther, and Weintraub voting Yes and Commissioner Ravel voting No).

[80] *CHGO*, *supra* note 12. *See also Heckler v. Chaney*, 470 U.S. 821 (1985); *see also* Vice Chair Ellen L. Weintraub, Statement on the D.C. Circuit's Decision in *CREW v. FEC*, June 22, 2018, *found at* https://www.fec.gov/resources/cms-content/documents/2018-06-22_ELW_statement_re_CREWvFEC-CHGO.pdf.

2019 **March 29:** In the *New Models* case, the district court dismisses, on *CHGO* grounds, lawsuit challenging Commission's dismissal of CREW's complaint against New Models.[81]

May 14: In the *CHGO* case, the D.C. Circuit denies petition to rehear the matter *en banc.*[82]

Sept. 23: District Court denies AAN's motion to dismiss CREW's citizen suit.[83]

2021 **April 9:** In the *New Models* case, the D.C. Circuit affirms the district court.[84]

June 23: In the *New Models* case, CREW files petition with D.C. Circuit seeking *en banc* review of the April 9 panel decision.[85]

2022 **March 2:** District Court grants motion for reconsideration of its Sept. 23, 2019 decision and dismisses third-party lawsuit.[86]

Aug. 29: Commission dismisses CREW's complaint regarding AAN by voting to close the file.[87]

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[81] District Court Opinion, *CREW v. FEC*, 380 F. Supp. 3d 30 (D.D.C. 2019), *found at* https://www.fec.gov/resources/cms-content/documents/crew_180076_dc_mem_opinion_03-29-19.pdf.

[82] Order (denying pet. for reh'g en banc), *CREW v. FEC (CHGO)*, 923 F.3d 1141 (D.C. Cir. 2019), *found at* https://www.fec.gov/resources/cms-content/documents/crew152038_ac_order2.pdf.

[83] *CREW v. AAN ("CREW III"),* 410 F. Supp. 3d 1 (D.D.C. 2019).

[84] *New Models* panel decision, *supra* note 11.

[85] *New Models en banc* petition, *supra* note 11.

[86] Memorandum Opinion and Order, *CREW v. AAN* (No. 18-945) (March 2, 2022) *(CREW III)*.

[87] Certification, MUR 6589R (AAN) (Aug. 29, 2022).

Exhibit 6

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matters of	)	
Americans for Job Security; and	)	MUR 6538 & MUR 6589
American Action Network	)	

STATEMENT OF REASONS
OF VICE CHAIR ANN M. RAVEL, COMMISSIONER STEVEN T. WALTHER, AND COMMISSIONER ELLEN L. WEINTRAUB

"Dark money" groups[1] are spending vast amounts of money on American elections. Millions of dollars are flowing into our political system – over $310 million in the 2012 federal elections[2] – often to fund aggressively negative ads,[3] without any way for the public to know where the money is coming from. This is not what Congress intended the campaign finance system to do, not what the Supreme Court has insisted should be done, and not how it has long been done at the Federal Election Commission. Disclosure laws provide voters with the information necessary to evaluate the source of political messages. Unfortunately, the Commission has reached an impasse that has prevented us from enforcing the Commission's

[1] The term "dark money" generally refers to federal election spending by 501(c) groups that do not disclose their donors, in part because they claim they are not "political committees." *See, e.g.*, Lee Drutman, *No, Less Disclosure Will Not Reduce Dark Money*, SUNLIGHT FOUND. BLOG (Jul. 17, 2014, 11:49 AM), http://sunlightfoundation.com/blog/2014/07/17/no-less-disclosure-will-not-reduce-dark-money; *see also* Joshua Fechter & David Saleh Rauf, *'Dark Money' Group Riles Up Attorney General Candidates*, HOUS. CHRON., May 24, 2014, at B2; Theodoric Meyer, *IRS Delays New Rules for Dark Money Groups*, PROPUBLICA (May 23, 2014, 12:05 PM), http://www.propublica.org/article/irs-pushes-back-new-rules-for-dark-money-groups; Fredreka Schouten, *'Dark Money' Surges Ahead of Midterms: Certain Groups Spending Tops $23M This Week*, USA TODAY, May 14, 2014, at 3A; Kellan Howell, *Hollywood Increases Political Influence by Funding 'Dark Money' Groups*, WASH. TIMES, Feb. 27, 2014, *available at* http://www.washingtontimes.com/news/2014/feb/27/hollywood-funds-dark-money-groups-to-increase-poli/.

[2] Robert Maguire, *How 2014 is Shaping Up to be the Darkest Money Election to Date*, OPENSECRETS BLOG (Apr. 30, 2014), https://www.opensecrets.org/news/2014/04/how-2014-is-shaping-up-to-be-the-darkest-money-election-to-date/.

[3] Erika Franklin Fowler & Travis N. Ridout, *Negative Angry, and Ubiquitous: Political Advertising in 2012*, THE FORUM, Dec. 2012, at 59, *available at* http://www.degruyter.com/view/j/for.2012.10.issue-4/forum-2013-0004/forum-2013-0004.xml ("Fully 85% of ads sponsored by non-party organizations were purely negative, and another 10% were contrasting, leaving only 5% positive.").

own written policy[4] – a policy that should shine a much-needed light on the sources of dark money.

The Commission recently encountered yet another roadblock when it deadlocked, 3-3, on whether to investigate two organizations that were alleged to have violated the Federal Election Campaign Act by failing to register with the Commission as political committees and report their donors and spending.[5] Both groups, Americans for Job Security ("AJS") and the American Action Network ("AAN"), were heavily involved in political campaigns, spending more than $9.5 million and $17 million, respectively, on advertisements supporting or opposing federal candidates in close proximity to the 2010 elections, without disclosing their donors.[6] At a minimum, the Commission should have investigated these organizations in order to vindicate the public's interest in knowing the source of political spending.[7]

The test for political committee status has two parts. An organization satisfies the first part by receiving contributions or making expenditures in excess of $1,000 during a calendar year.[8] The second part is satisfied if the "major purpose" of the organization is "the nomination or election of a candidate."[9] This "major purpose" requirement was adopted by the Supreme Court, in *Buckley v. Valeo*, in order to address concerns that the test might otherwise reach

[4] *See* Political Committee Status, 72 Fed. Reg. 5595, 5596-97 (Feb. 7, 2007) (Supplemental Explanation and Justification) ("2007 E&J"), *available at* http://sers.fec.gov/fosers/showpdf.htm?docid=34789 (requiring certain organizations to register as political committees and report their activity).

[5] *See* Certification in MUR 6538 (Americans for Job Security), dated June 24, 2014; Certification in MUR 6589 (American Action Network), dated June 24, 2014. In both matters, we voted to find reason to believe that the groups violated the Act. *Id.* Chairman Goodman and Commissioners Hunter and Petersen dissented. *Id.*

[6] First General Counsel's Report in MUR 6538 (Americans for Job Security), dated May 2, 2013, at 21 ("AJS FGCR") ("AJS appears to have spent at least $9,507,365 during 2010 on the type of communications that the Commission has considered to be federal campaign activity."); First General Counsel's Report in MUR 6589 (American Action Network), dated Jan. 17, 2013, at 25 ("AAN FGCR") ("American Action Network appears to have spent at least $17,013,017 during 2010 on the type of communications that the Commission considered to be federal campaign activity.").

[7] OGC recommended that the Commission find reason to believe that AJS and AAN violated 2 U.S.C. §§ 432, 433, and 434 and authorize an investigation to establish the extent, nature, and cost of AJS's and AAN's federal campaign activity. *See* AJS FGCR; AAN FGCR. "Reason to believe" is a threshold determination that by itself does not establish that the law has been violated, "but instead simply means that the Commission believes a violation *may* have occurred." *See* Guidebook for Complainants and Respondents on the FEC Enforcement Process, May 2012, *available at* http://www.fec.gov/em/respondent_guide.pdf (emphasis added). In fact, a "reason to believe" determination indicates only that the Commission has found sufficient legal justification to open an investigation to determine whether there is probable cause to believe that a violation of the Act has occurred. A "reason to believe" finding is appropriate when a complaint "credibly alleges that a significant violation *may* have occurred, but further investigation is required to determine whether a violation in fact occurred and, if so, its exact scope." *See* Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 F.R. 12545 (March 16, 2007), *available at* http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-6.pdf (emphasis added).

[8] 2 U.S.C. § 431(4)(A). The calendar year framework is unambiguous in the statute.

[9] *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

"groups engaged purely in issue discussion."[10] Since *Buckley*, the Commission has made determinations on a case-by-case basis as to whether an organization has the requisite major purpose.[11] In doing so, the Commission has examined an organization's public statements as well as its "full range of campaign activities."[12] In 2007, the Commission published a detailed Supplemental Explanation and Justification providing its reasons for adhering to the existing practice and providing "guidance to all organizations regarding the receipt of contributions, making of expenditures, and political committee status."[13] In doing so, it listed a number of factors that may properly be considered in determining political committee status that were not limited to express advocacy. This "2007 E&J" includes a list of examples of activity from prior matters that the Commission considers to be "campaign activities," and therefore indicative of major purpose, including: "direct mail attacking *or* expressly advocating the defeat of a Presidential candidate," "television advertising opposing a Federal candidate," spending on "candidate research" and "polling," and "other spending . . . for public communications mentioning Federal candidates."[14] Clearly, for the purpose of determining political committee status, this list encompasses activity that extends well beyond express advocacy.

Since 2007, courts in three different circuits have been asked to rule upon the constitutionality of the policy embodied in the 2007 E&J. All three found it to be constitutional.[15] Yet our colleagues have increasingly contended that any communications not containing express advocacy must not be considered in a major purpose analysis, effectively eviscerating the Commission's policy as set forth in the 2007 E&J. This argument "fails to come to terms with the Commission's longstanding view – upheld by the courts – that the required major purpose test is not limited solely to express advocacy (or the functional equivalent of express advocacy)."[16]

In the case of AJS and AAN, spending on advertisements that supported or opposed federal candidates – the types of activity identified in the 2007 E&J – made up a *majority* of each organization's total spending in the 2010 calendar year.[17] For example, AJS, an entity organized under section 501(c)(6) of the tax code, reported spending over $4.9 million on communications

[10] *Id.*

[11] *See* 2007 E&J at 5596-97.

[12] *Id.*

[13] *Id.* at 5596.

[14] *Id.* at 5605 (emphasis added).

[15] *Free Speech v. FEC*, 720 F.3d 788, 798 (10th Cir. 2013), *cert. denied*, 134 S.Ct. 2288 (May 19, 2014); *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d. 544, 556 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 841 (2013); *Shays v. FEC*, 511 F. Supp. 2d 19, 29-31 (D.D.C. 2007); *see also Koerber v. FEC*, 583 F.Supp.2d 740, 746-48 (E.D.N.C. 2008) (denying a motion for a preliminary injunction against the enforcement of the 2007 E&J because the constitutional challenge was unlikely to succeed on the merits).

[16] AJS FGCR at 19; AAN FGCR at 21.

[17] As OGC notes in its reports, major purpose determinations do not require that such spending exceed a 50 percent threshold of the organization's total spending. *See* AJS FGCR at 22, n.30; AAN FGCR at 25, n.42. However, such spending "is alone sufficient to support a finding of major purpose." *Id.*

that expressly advocated for or against a federal candidate ("independent expenditures"[18]) in 2010.[19] In the same year, AJS also reported spending over $4.5 million on communications that mentioned a federal candidate in close proximity to an election ("electioneering communications"[20]). Each of these advertisements supported or opposed a federal candidate.[21] Even if one assumes that every other dollar spent by AJS was unrelated to federal candidates – the assumption most favorable to AJS – at least 76.5 percent (over $9.5 million) of AJS's total spending in calendar year 2010 supported federal campaign activity.[22]

AAN's spending on political advertising was even higher. Formed in 2009 as a 501(c)(4) social welfare organization, AAN's largest spending category was electioneering communications, totaling almost $13.8 million in calendar year 2010.[23] OGC's analysis of these communications concluded that at least $12.9 million was spent on communications close to an election that supported or opposed a candidate.[24] Additionally, AAN spent a little over $4 million on independent expenditures.[25] Combining these figures, AAN spent a minimum of $17 million on federal campaign activity in 2010.[26] Even if one assumes that every other dollar spent by AAN was unrelated to federal candidates and was spent in calendar year 2010 – the assumptions most favorable to AAN – at least 62.6 percent (over $17 million) of AAN's total spending in that year supported federal campaign activity.[27]

As these facts demonstrate, both AJS and AAN are political committees under the plain language of the 2007 E&J. Without question, the undisputed facts concerning these groups' spending were more than sufficient for the Commission to find reason to believe that the law

[18] *See* 2 U.S.C. § 431(17); 11 C.F.R. § 100.16.

[19] AJS FGCR at 4-5.

[20] The term "electioneering communications" is limited to communications made via broadcast, cable, or satellite and targeted to the relevant electorate. *See* 2 U.S.C. § 434(f)(3); 11 C.F.R. § 100.29. Such communications must refer to a clearly identified candidate and be made with 60 days of a general election or 30 days of a primary. *Id.*

[21] AJS FGCR at 5, 15-20.

[22] *Id.* at 21-22. AJS spent a total of slightly over $12.4 million between November 1, 2009 and October 31, 2010. *Id.* at 4, 22. As noted in the FGCR, AJS's tax returns did not allow OGC to pinpoint in which calendar year AJS's unreported spending occurred; accordingly, OGC assumed that all of AJS's additional spending "was both unrelated to federal campaigns and occurred in calendar year 2010 – the assumption most favorable to AJS." *Id.* at 22.

[23] AAN FGCR at 4.

[24] This represents all but two of AAN's communications, which OGC was unable to locate. *Id.* at 1, 5 n.17.

[25] *Id.* at 4.

[26] *Id.*

[27] *Id.* at 25. AAN spent a total of just over $27 million between July 23, 2009 and June 30, 2011. *Id.* at 4. As noted in the FGCR, AAN's tax returns did not allow OGC to pinpoint in which calendar year AAN's unreported spending occurred; accordingly, OGC assumed that all of AAN's additional spending "was both unrelated to federal campaigns and occurred in 2010 – the assumption most favorable to AAN." *Id.* at 25.

may have been violated, and to authorize an investigation. That was the question before the Commission.[28]

Each time the 2007 E&J has been challenged in federal court, it has been held constitutional.[29] Nonetheless, those who have opposed disclosure ignore the only directly relevant precedents and insist that the test in the 2007 E&J must be substantially narrowed to address their own concerns. In making these arguments, they have handpicked only the decisions of courts that have limited or overturned *state* campaign finance laws, decisions which have no direct bearing on *federal* campaign finance law.[30] Most recently, the anti-disclosure camp has pivoted to the decision in *Wisconsin Right to Life v. Barland*, which struck down Wisconsin's registration and disclosure requirements.[31] Yet they make no mention of the numerous cases in which state disclosure laws have been upheld.[32] The Commission is obliged to follow the analytic approach enunciated in the 2007 E&J, adopted by a majority vote, and consistently upheld by the courts.[33] For half of the Commission to do otherwise is unreasonable.

What seems to have been overlooked in the ongoing stalemate over the Commission's policy is that the entire purpose of the political committee status test boils down to a single, compelling policy interest: *disclosure*.[34] Disclosure of donors and political spending is crucial.

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[28] *See* note 7.

[29] *See* note 15.

[30] For example, our colleagues have recently relied heavily on cases interpreting the New Mexico Campaign Reporting Act and North Carolina campaign finance laws. *See* Statement of Chairman Goodman and Commissioners Hunter and Petersen in MUR 6396 (Crossroads GPS), dated Jan. 8, 2014, at 7-8 (*citing New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010); *North Carolina Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2010)). In both of the circuit courts where these cases were decided, subsequent caselaw upheld the Commission's 2007 E&J. *Free Speech v. FEC*, 720 F.3d at 798; *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d. at 556.

[31] 751 F.3d 804 (7th Cir. May 14, 2014).

[32] *See, e.g.*, *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010) (upholding political committee requirements of Washington State's Public Disclosure Law); *Worley v. Florida Secretary of State*, 717 F.3d 1238 (11th Cir. 2013) (upholding political committee requirements of the Florida Campaign Financing Statutes); *Yamada v. Weaver*, 872 F.Supp.2d 1023, 1042-53 (D. Haw. 2012) (upholding political committee requirements of Hawaii's campaign finance laws). In fact, now that disclosure is the only consequence of political committee status, several courts reviewing analogous state political committee statutes have found that it is unnecessary to apply the major purpose test. *See, e.g. Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 59 (1st Cir. 2011), *cert. denied*, 132 S.Ct. 1635 (2012) (upholding political committee requirements of the Maine Clean Election Act); *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 490 (7th Cir. 2012) (upholding political committee requirements of the Illinois Election Code); *Vermont Right to Life Comm.* v. *Sorrell*, No. 12-2904-cv, 2014 WL 2958565, at *13-14 (2nd Cir. July 2, 2014) (upholding political committee requirements of Vermont's campaign finance laws, noting that the lack of explicit reference to an "express advocacy" test in the laws – which included the terms "supporting or opposing one or more candidates" and "influencing an election" in the definition of "political committee" – did not make the laws unconstitutional). For now, however, as stated in the 2007 E&J, the major purpose test continues to be required in interpreting the relevant provisions of the Act.

[33] *See* note 15.

[34] *See* Statement of Reasons of Vice Chair Ravel, Commissioner Walther, and Commissioner Weintraub in MUR 6396 (Crossroads Grassroots Political Strategies), dated Jan. 10, 2014, at 1-2, 5.

This is not just our opinion. According to eight Justices of the Supreme Court, disclosure "enables the electorate to make informed decisions and give proper weight to different speakers and messages."[35] The only consequence of political committee status after *Citizens United* and *SpeechNow* is that political committees must follow organizational and reporting requirements that allow the public to evaluate the source of political messages. The Supreme Court has *repeatedly* upheld such requirements, finding them to be "the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist."[36] The Supreme Court's support for campaign finance disclosure has not wavered:

- "[T]he important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements – providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions – apply in full to [the disclosure requirements of the Bipartisan Campaign Reform Act]."[37]

- "The 1st Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way."[38]

- "With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."[39]

- "With modern technology, disclosure now offers a particularly effective means of arming the voting public with information."[40]

- "[D]isclosure of contributions minimizes the potential for abuse of the campaign finance system."[41]

- "Public disclosure...promotes transparency and accountability in the electoral process to an extent other measures cannot."[42]

In fact, in the 38 years since *Buckley*, the Supreme Court has only *once* struck down a requirement having solely to do with public disclosure of political activity. That 1995 case,

[35] *Citizens United v. FEC*, 558 U.S. 310, 371 (2010).

[36] *Buckley*, 424 U.S. at 68.

[37] *McConnell v. FEC*, 540 U.S. 93, 195 (2003).

[38] *Citizens United*, 558 U.S. at 370.

[39] *Id.*

[40] *McCutcheon v. FEC*, 134 S. Ct. 1434, 1460 (2014).

[41] *Id.* at 1459.

[42] *Doe v. Reed*, 561 U.S. 186, 199 (2010).

McIntyre v. Ohio Elections Commission, concerned an individual, Margaret McIntyre, who personally prepared and hand-distributed leaflets at a public meeting urging attendees to vote against a local tax levy.[43] She was fined $100 for failing to include her name and address on the leaflets – and the Supreme Court thought that this was a bridge too far, even for a mere disclosure requirement. Nonetheless, Justice Scalia wrote a forceful dissent favoring disclosure. He noted that that anonymous speech "facilitates wrong by eliminating accountability, which ordinarily is the very purpose of the anonymity."[44] Furthermore, Justice Scalia argued that publicity is the "principal impediment" to "mudslinging," "innuendo," "demeaning characterization" of candidates, and "dirty tricks."[45] Disclosing the identity of the speaker, in contrast, "promot[es] a civil and dignified level of debate."[46]

The respondents in these matters are no Margaret McIntyres.[47] AJS and AAN are sophisticated organizations, which spent many millions of dollars on federal campaign activity. The requirements for disclosure are not too onerous for these groups.

Dark money is an increasing problem. The FEC's mission is to ensure that voters receive the information they need – the information that the Supreme Court has said they are entitled to – in order to make informed decisions. The Commission's established approach to evaluating political committee status prevents groups like these from operating under a veil of anonymity. Our democracy is stronger and public debate is enriched when that veil is lifted.

7/30/14
Date

Ann M. Ravel
Ann M. Ravel
Vice Chair

7/30/14
Date

Steven T. Walther
Steven T. Walther
Commissioner

7/30/14
Date

Ellen L. Weintraub
Ellen L. Weintraub
Commissioner

[43] 514 U.S. 334 (1995). McIntyre acted on her own, "[e]xcept for the help provided by her son and a friend, who placed some of the leaflets on car windshields in the school parking lot." *Id.* at 337.

[44] 514 U.S. at 385 (Scalia, J., dissenting).

[45] *Id.* at 382-83.

[46] *Id.* at 382.

[47] It should also be noted that *McIntyre* went out of its way to distinguish the Ohio statute at issue in that case from the Federal Election Campaign Act. *Id.* at 356 ("Not only is the Ohio statute's infringement on speech more intrusive than the *Buckley* disclosure requirement, but it rests on different and less powerful state interests.").

Exhibit 7

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
American Action Network	)	MUR 6589R
	)	

STATEMENT OF REASONS
OF COMMISSIONERS ANN M. RAVEL AND ELLEN L. WEINTRAUB

Remanding this matter to the Commission, Judge Christopher R. Cooper wrote that it "blinks reality" to conclude that advertisements produced by American Action Network ("AAN") were not designed to influence an election.[1] Yet given a chance to revisit this question, our colleagues have blinked reality once again.

AAN is a 501(c)(4) "social welfare" organization that spent roughly $27.1 million between 2009 and 2011, including more than $4 million on independent expenditures and $13.7 million on electioneering communications.[2] On this point, we have made our views clear.[3] Despite its extensive election-related spending, AAN has never registered with the Commission as a political committee, thereby shrouding from public view its donors and the full scope of its spending. A 2012 complaint filed with the Commission alleged that AAN's failure to register and report violated the Federal Election Campaign Act (the "Act"),[4] but in 2014, Chairman Petersen and Commissioners Hunter and Goodman refused to authorize an investigation into the allegations.[5] At the time, they justified this on the basis that only a small portion — $4 million — of AAN's lifetime spending was used for express advocacy, so the organization did not have as a "major purpose" the nomination or election of federal candidates and consequently did not qualify as a federal political committee.[6]

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1 *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, No. 1:14-cv-01419 (CRC), 2016 WL 5107018 at *11 (D.D.C. Sept. 19, 2016) ("*CREW v. FEC*").

2 *See* First General Counsel's Report, MUR 6589 at 25 (Jan. 17, 2013) ("FGCR").

3 Statement of Reasons of Vice Chair Ann M. Ravel and Commissioners Steven T. Walther and Ellen L. Weintraub, MUR 6589 (AAN) (July 30, 2014).

4 As we have previously described at length, *see id.*, the Act requires an entity to register with the Commission as a political committee when it satisfies two criteria: (1) it receives contributions or makes expenditures in excess of $1,000 in a calendar year, 52 U.S.C. § 30101(4)(A); and (2) it has as a major purpose "the nomination or election of a candidate," *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

5 Certification, MUR 6589 (AAN) (June 24, 2014).

6 Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen, MUR 6589 (AAN) (July 30, 2014).

This conclusion was challenged in the U.S. District Court for the District of Columbia, where on September 19, 2016, Judge Cooper sharply rebuked our colleagues' analysis and justifications. Noting courts' repeated vindication of the importance of campaign finance disclosure, the judge declared that the controlling group of Commissioners' exclusion of all non-express advocacy communications from their assessment of AAN's major purpose was "contrary to law" and premised on "an erroneous understanding" of the First Amendment.[7] The court found that "legislative history, past FEC precedent, and court precedent certainly supported the conclusion that *many* or even *most* electioneering communications indicate a campaign-related purpose,"[8] and directed the Commission to reevaluate AAN's major purpose in light of its finding that "well over half of [AAN's] spending during the period was election-related."[9] The court further determined that the Commissioners' refusal to give any weight to an organization's spending in the most recent calendar year ignored "critical facts" regarding its major purpose.[10] The court directed the Commission to conform with its declaration within 30 days.[11]

Despite the court's order, the Commission deadlocked in another 3-3 vote when reevaluating the matter.[12] Flouting the court's opinion, Chairman Petersen and Commissioners Hunter and Goodman again refused to authorize an investigation into the allegations against AAN.[13] In a new Statement of Reasons, our colleagues feigned compliance with the Court's order by evaluating AAN's advertising on a case-by-case basis.[14] From a close review of their analysis, however, it is clear that they have ignored the court's ruling and the plain language of the ads that objectively criticized candidates in the weeks preceding the 2010 elections. This approach is divorced from Supreme Court precedent and from reality.

Our colleagues have concluded that, at most, only five of AAN's twenty electioneering communications showed indications of electoral activity,[15] failing even to re-categorize an advertisement that the court specifically highlighted in its opinion.[16] In so doing, our colleagues have again ignored the plain language of the communications that objectively criticized candidates in the weeks preceding the 2010 elections, not to mention a federal court's clear order to do otherwise.

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7 *CREW v. FEC*, 2016 WL 5107018 at *11.

8 *Id.* at *11 (emphasis in original).

9 *Id.* at *3.

10 *Id.* at *12.

11 *Id.* at *27.

12 Certification, MUR 6589R (AAN) (Oct. 18, 2016).

13 *Id.*

14 Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman, MUR 6589R (AAN) (Oct. 19, 2016).

15 *Id.* at 6-17.

16 *CREW v. FEC*, 2016 WL 5107018 at *1.

The major purpose test was established by the U.S. Supreme Court in *Buckley v. Valeo*. Seeking to provide clear guidance on when groups must register, the Commission codified its interpretation of this standard in the 2007 Supplemental Explanation and Justification on Political Committee Status.[17] The Explanation and Justification specified that the standard requires a comprehensive analysis of an organization's "full range of campaign activities" as well as those activities that are not campaign related.[18] Among the conduct identified as indicative of major purpose was "sufficiently extensive spending on Federal campaign activity."[19]

As Judge Cooper reaffirmed, the major purpose inquiry is not limited to express advocacy and its functional equivalent and likely includes "*many* or even *most* electioneering communications."[20] Indeed, the Commission has previously agreed that any advertisements that support or oppose a clearly identified federal candidate should be considered in determining whether that group has a major purpose of nominating or electing federal candidates.[21]

Despite the court's clear direction, our colleagues concluded here that at least three quarters of AAN's electioneering communications had a "legislative focus" and did not indicate a major purpose to nominate or elect federal candidates.[22] In reaching this conclusion, the Commissioners ignored the plain language of AAN's ads that openly and obviously opposes clearly identified federal candidates. For example, one of AAN's advertisements was explicitly entitled "Quit Critz"[23] and criticized Rep. Mark Critz's record in Congress and support of Democratic leadership:

> He was our district economic development director when we lost jobs and unemployment skyrocketed. Mark Critz. He supports the Obama-Pelosi agenda that's left us fourteen trillion in debt. Mark Critz. And instead of extending tax cuts for Pennsylvania families and businesses, he voted with Nancy Pelosi to quit working and leave town. Mark Critz. Tell Congressman Critz that Pennsylvania families need tax relief this November, not more government. [Ends with superscript over photo: "Tell Congressman Critz vote to cut taxes this November. Yes on H.R. 4746 (202) 224-3121."]

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17 Political Committee Status, 72 Fed. Reg. 5595, 5596-97 (Feb. 7, 2007) (Supplemental Explanation and Justification) ("2007 E&J").

18 *Id.* at 5605.

19 *Id.* at 5601.

20 *CREW v. FEC*, 2016 WL 5107018 at *11.

21 *See* FGCR at n. 10 & accompanying text.

22 *See supra* n. 14, at 10.

23 We note that "Quit Critz" — an apparent directive to either Critz himself to quit his job or the general public to end their support of Critz — might itself have been the functional equivalent of express advocacy had it been included in the ad itself. As it is, the title of the communication was apparently not communicated to its audience. But it should serve as valuable context for any honest attempt to analyze the ad's true purpose.

In "Read This," an advertisement highlighted by Judge Cooper, AAN decried candidates' congressional records in particularly hyperbolic terms:

> [On-screen text:] Congress doesn't want you to read this. Just like [Charlie Wilson/Jim Himes/Chris Murphy]. [Charlie Wilson/Jim Himes/Chris Murphy] & Nancy Pelosi rammed through government healthcare. Without Congress reading all the details. $500 billion in Medicare cuts. Free healthcare for illegal immigrants. Even Viagra for convicted sex offenders. So tell [Charlie Wilson/Jim Himes/Chris Murphy] to read this: In November, fix the healthcare mess Congress made.

These two advertisements, along with the other eighteen run by AAN, clearly criticize and oppose named federal candidates. Their focus is not, as our colleagues suggest, on "issues important to the group,"[24] but on the named candidate's *record* on those issues and asserted failures as a public official. This emphasis on *individual conduct*, rather than issues or policies themselves, belies any suggestion that AAN sought only to engage in legislative advocacy. Instead, the advertisements demonstrate the purpose of the ads: to influence the 2010 election.

Seeking a way around this conclusion, our colleagues cherry-picked language from the ads that was helpful to their desired outcome and manufactured context not previously indicated in the record. Notably, although the Commissioners explicitly stated that they would "avoid speculating about the subjective motivations of the speaker,"[25] they did exactly that, by reading into almost all of the advertisements an intent to influence a hypothetical lame-duck session of Congress following the 2010 elections. For example, "Promise" stated:

> Spending in Washington is out of control . . . Representative Hodes promised he'd fight wasteful spending. Hodes hasn't kept that promise. He voted for Pelosi's stimulus bill. . . . For the auto bailout. . . . For massive government-run health care. Trillions in new spending. As New Hampshire families struggle . . . Hodes continues the wasteful spending spree with our tax dollars.

The ad ends with:

> Tell Congressman Hodes to stop voting for reckless spending.

Despite the fact that the vast majority of the advertisement is dedicated to criticizing a candidate's voting record, our colleagues argue that the last sentence is a "call to action" intended to influence the outcome on possible budget bills in a potential lame-duck session of Congress. Of course, the ad does not even mention the possibility of a post-election Congressional session, nor any legislative initiative. The context our colleagues project upon this ad is created from whole cloth. It is far outweighed by the clear advocacy against Rep. Hodes.

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[24] *See supra* n. 14, at 6.

[25] *Id.*

What's more, while placing AAN's ads in the context of a possible lame-duck session of Congress, our colleagues ignore entirely other contextual details that clearly point to an electoral purpose behind the communications. Notably, all of the twenty electioneering communications (by definition) aired in the sixty days preceding the November 2, 2010 general election. For example, in "Leadership," AAN communicated:

> [Announcer:] Herseth Sandlin on health care: [Herseth Sandlin:] "I stood up to my party leadership and voted no." [Announcer:] The truth is Herseth Sandlin supports keeping Obamacare, a trillion dollar heath care debacle, billions in new job-killing taxes. It cuts five hundred billion from Medicare for seniors then spends our money on health care for illegal immigrants. Tell Congresswoman Herseth Sandlin to vote for repeal in November.

"[T]he use of 'November' in ads such as "Quit Critz," "Read This," and "Leadership," our colleagues explain, "is *best understood* as a reference to the time period in which the lame-duck session would commence."[26]

This is farcical. Not one voter in a thousand would have been aware that Congress might possibly be going into a lame-duck session in November after the election. Not one in a *million* would have thought that the use of "November" in that context would be *best understood* to refer to a lame-duck congressional session instead of Election Day. Any reference to "November" in a politically themed advertisement aired in the weeks before a federal election is most likely to be understood as a reference to those elections and *not* some unmentioned congressional session. But even if it were not, the advertisement, as those above, primarily serves to castigate a candidate in the run-up to an election, with the plain purpose of influencing that election.

In addition to their selective application of context, our colleagues place inordinate weight on the "call to action" contained in some ads in order to obfuscate the fact that the bulk of the communication serves to criticize the candidate's voting record. For example, "Naked," on which AAN spent more than $2 million, stated:

> [Announcer:] How can you tell the taxpayers in Congressman Gerry Connolly's district? We're not so tough to spot. Connolly stripped us with a wasteful stimulus, spent the shirts off our backs. [On-screen text:] $14 Trillion Debt. [Announcer:] Connolly is taking money from our pockets to put in Washington's pockets. [Actor:] Now I don't have any pockets. [Announcer:] Now, Congress wants to strip us bare with more spending. Call Congressman Connolly. Tell him: vote to cut spending this November. [Superimposed text:] Call Congressman Connolly. Vote to cut spending this November. Yes to H.R. 5545 (202) 224-3121.

Our colleagues whistle past the vitriolic criticism of the candidate, and focus only on the call to action (a silent call that appears only in superimposed text), using it to inoculate what is otherwise, by its plain language, an advertisement that opposes a candidate for federal office.

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[26] *Id.* at 9 (emphasis added).

Our colleagues argue that references to candidates do not, by themselves, make communications campaign-related.[27] Here, however, the advertisements — all twenty — do not contain mere references to candidates, but *clear opposition to candidates.* There can therefore be no doubt that these ads constitute federal campaign activity and should be counted toward AAN's campaign-related spending in our major purpose analysis. By this calculus, AAN spent more than $17.7 million on federal campaign activity between 2009 and 2011,[28] approximately 62.2% of its total spending during the same period, even assuming all other spending was unrelated to federal campaigns.[29] By any metric, this number is indicative of "sufficiently extensive spending on Federal campaign activity" and demonstrates that AAN had a major purpose of influencing federal elections.

In 2014, AAN functioned as a political committee. It owed the American people full disclosure of its election-related activities. Our colleagues were given a fair opportunity by the court to recognize this obvious reality. Judge Cooper's decision "identif[ied] the legal error in the Commissioners' statements"—the erroneous understanding of the First Amendment,[30] and required the Commission to reconsider its action in "light of the correction."[31] Given this opportunity, our colleagues again have turned a blind eye to the law and to reality.

Date: December 5, 2016

Ann M. Ravel
Commissioner

Date: December 5, 2016

Ellen L. Weintraub
Commissioner

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27 *See supra* n. 14, at 6. *Cf. CREW v. FEC,* 2016 WL 5107018 at *11 ("citations to legislative history, past FEC precedent, and court precedent certainly support the conclusion that *many* or even *most* electioneering communications indicate a campaign-related purpose").

28 We note as well that our colleagues have disregarded the court's instruction that the Commission give weight to an organization's relative spending in the most recent calendar year. *See CREW v. FEC,* 2016 WL 5107018 at *12. The court emphasized that Congress explicitly chose "calendar year" as its metric for the monetary threshold established in the definition of "political committee" and concluded that an analysis of spending over the lifetime of an organization "tends to ignore crucial facts indicating whether an organization's major purpose has changed and is inconsistent with the FEC's stated fact-intensive approach to the 'major purpose' inquiry." *Id.* Nevertheless, our colleagues continue to analyze AAN's spending over the course of its lifetime. Although AAN formed in 2009, and although we lack a precise breakdown of AAN's spending in 2009, 2010, and 2011, respectively, it is important to recognize the court's opinion that an organization's most recent calendar year spending is most indicative of its major purpose. The available record provides ample reason to believe AAN violated the Act by failing to register and report as a political committee. An investigation will provide us with a more precise understanding of AAN's most recent calendar year spending.

29 FGCR at 25.

30 *CREW v. FEC,* 2016 WL 5107018 at *11.

31 *Id.*