UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

AMERICAN ACTION NETWORK'S MOTION FOR A STAY AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

AAN respectfully moves this Court for a stay of the proceedings in this case pending final appellate resolution of related case *Citizens for Responsibility and Ethics in Washington, et al. v. Federal Election Commission*, D.C. Circuit No. 18-5136 ("*CREW v. FEC*"). Pursuant to Local Civil Rule 7(m), Defendant's counsel conferred with Plaintiff's counsel concerning this motion and was informed that CREW would oppose this Motion, but would agree to stay all deadlines pending its resolution.

I. INTRODUCTION

CREW filed this lawsuit—*CREW v. American Action Network* ("*CREW v. AAN*")—in reliance on a unique statutory provision in the Federal Election Campaign Act ("FECA") that allows this suit *only* if the Federal Election Commission ("FEC" or "Commission") has acted in a manner that was "contrary to law" and refused to conform to a proper declaration stating so. *See* 52 U.S.C. § 30109(a)(8)(C). Those very issues—whether the Commission acted "contrary to law" when it twice dismissed CREW's enforcement complaint against AAN and whether it was required to conform to this Court's different view of the law—are issues that are now before the D.C. Circuit in *CREW v. FEC*. If AAN succeeds in that appeal, and the D.C. Circuit finds that the Commission's prior dismissals were not "contrary to law," there will be no statutory basis for

this lawsuit. All the time and resources spent on briefing and judicial analysis of novel issues in this First Amendment case will have been wasted. That alone is reason to stay.

But there are many more reasons to stay this case. In forty-four years, this is only the second known contested case that has been filed in reliance on this unique statutory provision, and the first case was stayed pending "final appellate resolution" of the case against the FEC on which it depended. *See* Order, *DSCC v. NRSC*, Civ. No. 97-1493 (D.D.C. Aug. 27, 1997). A stay in this context protects invaluable interests—including the FEC's enforcement authority and AAN's right to have these allegations resolved through the confidential and sequential administrative process designed by statute—until the D.C. Circuit can determine whether there is a basis for this lawsuit. It will protect against duplicative litigation, *Reiffin v. Microsoft Corp.*, 104 F. Supp. 2d 48, 58 (D.D.C. 2000), and the "serious risk of chilling protected speech" through additional burdensome litigation, *see Citizens United v. FEC*, 558 U.S. 310, 326-27 (2010). It will not harm CREW, whose allegations focus on advertisements that aired eight years ago. And, because this case and *CREW v. FEC* share the "same parties," the "same subject matter," "grow[] out of the same event," and "involve[] common issues of fact," *see* Notice of Related Cases, *CREW v. AAN*, Dkt. No. 3, the D.C. Circuit's decision will necessarily impact the parties' arguments and the Court's analysis even if this case is ultimately able to proceed.

This is, as a result, a textbook case for a stay. It will either be resolved by the D.C. Circuit, or will be governed by the standard the D.C. Circuit provides. A stay will not harm any party, but proceeding could cause irreparable harm to AAN and the FEC. The Court should enter a stay pending final appellate resolution of *CREW v. FEC*.

II. BACKGROUND

A. FECA Establishes A Multi-Step Process For Enforcement Matters.

This case and *CREW v. FEC* stem from the same FEC enforcement proceeding initiated by CREW in 2012. The FEC has "'primary and substantial responsibility for administering and enforcing [FECA],' including the 'sole discretionary power' to initiate enforcement actions," *CREW I*, 209 F. Supp. 3d 77, 87 (D.D.C. 2016) (citation omitted), and to "determine in the first instance whether or not a civil violation of the Act has occurred," *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981).

Congress requires that enforcement matters follow a confidential and sequential process in order to "safeguard" those charged with FECA violations. *See Combat Veterans for Cong. Political Action Comm. v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015) (citation omitted). Initially, an entity must present its allegations to the FEC in an administrative complaint. 52 U.S.C. § 30109(a)(1). The Commission must then keep its efforts confidential—even as to the party that filed the administrative complaint—until the matter is closed. *See, e.g.*, 52 U.S.C. § 30109(a)(12)(A); *see also, e.g., In re Sealed Case*, 237 F.3d 657, 666-67 (D.C. Cir. 2001) ("We hold that both [52 U.S.C. § 30109](a)(12)(A) and 11 C.F.R. § 111.21(a) plainly prohibit the FEC from disclosing information concerning ongoing investigations under any circumstances without the written consent of the subject of the investigation.").

The Commission must also reach bipartisan agreement about an enforcement matter several times during the administrative process, or must dismiss. *See Combat Veterans*, 795 F.3d at 153 ("Congress designed the Commission to ensure that every important action it takes is bipartisan."). Before conducting an investigation, four Commissioners must find "reason to believe" that FECA was violated. *Id.* § 30109(a)(2). A "reason to believe" finding permits an investigation, after which the Commission may only proceed if four Commissioners find

"probable cause to believe" that a violation occurred. *Id.* § 30109(a)(2), (4). The Commission must then attempt to informally conciliate the matter. *Id.* § 30109(a)(4)(A)(i). Failing such informal resolution, the statute requires the agreement of four Commissioners to file an enforcement action in court. *Id.* § 30109(a)(6).

Congress also created an exclusive judicial review mechanism for use if the Commission dismisses an administrative complaint or unreasonably delays in resolving it. By statute, "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia." 52 U.S.C. § 30109(a)(8)(A). The court must conduct an "extremely deferential" review, *Orloski v.* FEC, 795 F.2d 156, 167 (D.C. Cir. 1986), under which it "may declare that the dismissal of the complaint or the failure to act is contrary to law" and "direct the Commission to conform with such declaration within 30 days," 52 U.S.C. § 30109(a)(8)(C). The district court's order is then subject to appeal, where the D.C. Circuit may "set[ ] aside, in whole or in part, any such order of the district court." *Id.* § 30109(a)(9).

Absent an appeal, or if the D.C. Circuit does not "set aside" the district court's order on appeal, the statute contemplates a second lawsuit—but *only if* the Commission refuses to accept the "contrary to law" finding in the case brought against it. *Id.* § 30109(a)(8)(C). In such an extraordinary circumstance, the statute states that "the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint." *Id.* Only one known contested case has previously been filed; it was stayed, and then dismissed, without the need for substantive action. *See DSCC v. NRSC*, Civ. No. 97-1493 (D.D.C.); *see also* Ex. A (Weintraub statement) ("In the 44-year history of the FEC, this provision has never been fully utilized.").

B. This Litigation Depends On *CREW v. FEC*, Which Is On Appeal.

This case and *CREW v. FEC* stem from CREW's June 7, 2012 administrative complaint, which alleged that AAN violated FECA because it "was a political committee between July 23, 2009 through June 30, 2011, but failed to register as one with the FEC." *See* Joint Appendix at AR 1485 ¶ 19, *CREW v. FEC*, No. 16-2255 (D.D.C. 2018). But a political committee must either be under the control of a candidate or have as its "major purpose" the nomination or election of candidates, *see Buckley v. Valeo*, 424 U.S. 1, 79 (1976), and the Commission has twice decided that AAN did not have the requisite "major purpose" because its official statements, mode of organization, and spending instead show that its major purpose is issue advocacy and grassroots lobbying.

The Commission's votes were split votes, with three Commissioners finding no "reason to believe" there was a violation and three stating that they would investigate further. And the Commission is not alone in having different opinions on the issues in *CREW v. FEC*. This Court reviewed both dismissal decisions and, both times, acknowledged that there are various views on the question of how to determine an entity's "major purpose." For example, in its first decision, this Court noted that the Commission's first dismissal decision was consistent with decisions from the Seventh and Tenth Circuit, but believed that the Commission should have taken a different approach. *See CREW v. FEC*, 209 F. Supp. 3d 77, 91 (D.D.C. Sept. 19, 2016) (citing *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014); *N.M. Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010)). This Court also found error in the Commission's second dismissal decision, but acknowledged that the Commission had balanced "directives that . . . push[ed] the agency in opposite directions." *CREW v. FEC*, No. 16-cv-2255, 2018 WL 1401262, at *14 (D.D.C. Mar. 20, 2018).

The disagreements on the issues in *CREW v. FEC* make it an ideal candidate for an appeal. And at least two of the four current Commissioners agree. They issued a statement that details their concerns with the Court's prior decisions, and expresses their support for an appeal to provide better clarity and certainty in this "important areas of law." Ex. B (Hunter and Petersen statement). AAN filed its notice of appeal on May 4, 2018. *See CREW v. FEC*, No. 18-5136 (D.C. Cir.).

CREW, meanwhile, filed its complaint in this matter on April 23, 2018. CREW bases this Court's jurisdiction on the "contrary to law" finding that is now before the D.C. Circuit in *CREW v. FEC*. *See* Compl. ¶¶ 7-8, 71, *CREW v. AAN*, Dkt. No. 1.

III. ARGUMENT

A stay of this case falls well within the Court's broad discretion to stay all proceedings pending resolution of related litigation. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). *CREW v. FEC* is a distinct case that will either eliminate the basis for this case or "assist in the determination of the questions of law involved." *See id.* at 253. For that reason alone, the Court should grant a stay of these proceedings. But, as detailed below, a stay is justified under any standard, including the traditional four-factor test that governs stays pending appeal.

A. The Court Should Stay This Case Pending Related Litigation.

Whether this litigation proceeds, and what standard applies if it does, depends on *CREW v. FEC*, which is now before the D.C. Circuit. The Court should exercise its authority over its docket to stay this case pending related litigation for purposes of efficiency and fairness.

This Court has "broad discretion to stay all proceedings in an action pending the resolution of independent legal proceedings." *Seneca Nation of Indians v. U.S. Dep't of Health & Human Servs.*, 144 F. Supp. 3d 115, 119 (D.D.C. 2015) (quoting *Hussain v. Lewis*, 848 F. Supp. 2d 1, 2 (D.D.C. 2012)). The Court should exercise that discretion here, where "many of

the applicable issues may be resolved by the D.C. Circuit" and "the D.C. Circuit may otherwise provide instruction on the issues here." *Univ. of Colo. Health at Mem'l Hosp. v. Burwell*, 233 F. Supp. 3d 69, 88 (D.D.C. 2017).

The Court's authority to stay this case flows from "the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 879 n.6 (1998) (citation omitted). The Court's exercise of that authority is "warranted when, as here, a prior case which may have preclusive effect over the instant proceedings is pending on appeal." *Burwell*, 223 F. Supp. 3d at 87. It is never "in the interest of judicial economy or in the parties' best interests" to "litigat[e] essentially the same issues in two separate forums." *IBT/HERE Emp. Reps.' Council v. Gate Gourmet Div. Am.*, 402 F. Supp. 2d 289, 293 (D.D.C. 2005) (citations omitted). That is even more so when the decision on appeal will control the action before this Court. It is then unquestionably appropriate to "defer consideration . . . until the appellate proceedings addressed to the prior judgment are concluded." *Burwell*, 223 F. Supp. 3d at 87 (quoting *Martin v. Malhoyt*, 830 F.2d 237, 264 (D.C. Cir. 1987)). Even if the appellate case does not eliminate the need for further litigation, a stay will "serve the interests of efficiency by allowing the D.C. Circuit to provide guidance on issues affecting the disposition of this case." *Id.* (citation omitted).

The factors favoring a stay are especially strong here, given the sequential judicial review process established by FECA. Congress expressly gave the D.C. Circuit authority to "set[] aside, in whole or in part," an order from this Court that declares a Commission dismissal "contrary to law" and directs conformance with the Court's declaration. 52 U.S.C. § 30109(a)(9). Congress also gave the Commission "'primary and substantial responsibility for administering and enforcing [FECA],' including the 'sole discretionary power'" to decide whether or not to initiate

an enforcement action. *CREW v. FEC*, 209 F. Supp. 3d at 87 (citation omitted). The Commission should not be denied that enforcement authority so long as it remains possible that the D.C. Circuit could find that its dismissals were consistent with the law—and that there is no statutory basis for such an extraordinary delegation of its executive authority.

This is particularly so because this case falls squarely within the Commission's authority to decide whether or not to regulate First Amendment activity. *See, e.g.*, *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981) ("The subject matter which the FEC oversees, in contrast, relates to the behavior of individuals and groups only insofar as they act, speak and associate for political purposes."). The Supreme Court has repeatedly cautioned that the burden of litigation "create[s] an inevitable, pervasive, and serious risk of chilling protected speech." *Citizens United*, 558 U.S. at 327; *see also FEC v. Wisc. Right to Life*, 551 U.S. 449, 469 (2007) (stating that the burdens of litigation "will unquestionably chill a substantial amount of political speech"); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 794 (1988) (finding that "the costs of litigation . . . must necessarily chill speech in direct contravention of the First Amendment's dictates"). A stay will protect against further burdening AAN's First Amendment conduct with additional litigation, when the D.C. Circuit may find that the Commission was correct to dismiss the allegations.

A decision *not* to stay this case would break from precedent. The only other known contested private suit filed pursuant to the FECA was stayed while the case against the FEC was on appeal. *See* Order, *DSCC v. NRSC*, Civ. No. 97-1493 (D.D.C. Aug. 27, 1997). That case involved a failure to act allegation (rather than an improper dismissal allegation), but the same statutory review provisions applied. Citing concerns about confidentiality and simultaneous duplicative proceedings, the district court stayed the private action pending "final appellate

resolution" of the precursor case against the FEC. *See* Order, *DSCC v. NRSC*, Civ. No. 97-1493 (D.D.C. Aug. 27, 1997).

The same stay should be entered here. As then, it will protect confidential information from unwarranted disclosure should the D.C. Circuit find that an investigation is not permitted under the statute because the Commission appropriately voted to dismiss. It will also serve "the compelling public interest in avoiding duplicative proceedings." *Fed. Hous. Fin. Agency v. First Tennessee Bank Nat. Ass'n*, 856 F. Supp. 2d 186, 193 (D.D.C. 2012). Indeed, when the Court "weigh[s] competing interests" for and against a stay, as it must, all valid considerations weigh in favor of one. *See Burwell*, 233 F. Supp. 3d at 88 (citation omitted). The "considerations that may cut against a stay are if 'the second action presents claims or issues that must be tried regardless of the outcome of the first action' or 'there are cogent reasons to fear the effects of delay.'" *Id.* (quoting Wright and Miller § 4433 p. 94 (2003)). But here, the D.C. Circuit's decision could resolve this case. And the time required to obtain an appellate decision does not present cause for concern, as the case looks backward and focuses on CREW's allegation that "AAN was a political committee between July 23, 2009 through June 30, 2011, but failed to register as one with the FEC." *See* Compl. ¶ 8, *CREW v. AAN*, No. 18-945 (D.D.C. 2018) (citing 52 U.S.C. § 30109(a)(8)(C)); Joint Appendix at AR 1485 ¶ 19, *CREW v. FEC*, No. 16-2255 (D.D.C. 2018).

This case should, therefore, be stayed pending related litigation for purposes of efficiency and fairness. The D.C. Circuit's decision may "narrow the issues in the pending case[] and assist in the determination of the questions of law involved." *Fonville v. D.C.*, 766 F. Supp. 2d 171, 174 (D.D.C. 2011). It may also entirely eliminate the need for this litigation. "Given the indistinguishable nature of the legal issues" here and in *CREW v. FEC*, "efficiency requires that

this case be stayed." *Fairview Hosp. v. Leavitt*, Civ. No. 05-1065, 2007 WL 1521233, at *3 (D.D.C. May 22, 2007).

B. This Case Also Satisfies The Four Traditional Factors For A Stay Pending Appeal.

The traditional standard for a stay pending appeal does not govern this motion, as *CREW v. FEC* is on appeal from independent litigation against the FEC. But even if the more stringent four-factor test for a stay pending appeal applied, a stay should be granted pending final appellate resolution of *CREW v. FEC*.

"In the D.C. Circuit, a court assesses four factors when considering a motion to stay and injunction pending appeal: (1) the moving party's likelihood of success on the merits of its appeal, (2) whether the moving party will suffer irreparable injury, (3) whether issuance of the stay would substantially harm other parties in the proceeding, and (4) the public interest." *Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 7, 12 (D.D.C. 2014). Each factor supports a stay here.

First, a stay should issue because *CREW v. FEC* involves "serious legal questions going to the merits" that are "a fair ground of litigation and thus for more deliberative investigation." *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986). In *CREW v. FEC*, this Court resolved important questions about agency authority, the First Amendment, political committee status, and the proper application of the "major purpose" doctrine following the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010). These "serious legal question[s]" justify a stay even if the Court believes that AAN's success on appeal is unlikely. *See Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela*, 185 F. Supp. 3d 233, 250 (D.D.C. 2016) (citation omitted); *see also CREW v. Office of Admin.*, 593 F. Supp. 2d 156, 161 (D.D.C. 2009) (granting stay to "maintain[] the status quo" because "a serious legal

question is presented" even though "the Court cannot agree with CREW that there is a substantial likelihood that it will prevail on the merits of its appeal.").

Of course, AAN believes that it will succeed on appeal. But the Court need not abandon its prior opinions to conclude that success on appeal may be "likely" for purposes of satisfying the first factor of the analysis. *See, e.g.*, *FTC v. Heinz, H.J. Co.*, No. 00-5362, 2000 WL 1741320, at *2 (D.C. Cir. Nov. 8, 2000) ("'50% plus" likelihood of success" is not needed "to justify relief") (citation omitted). The issues in this case have divided courts and Commissioners. The Commission has issued two split-vote dismissals. The Court's first decision expressly parts ways with the Seventh and Tenth Circuits, *see CREW v. FEC*, 209 F. Supp. 3d at 91, and its second decision resolved "directives that . . . push the agency in opposite directions," *CREW v. FEC*, 2018 WL 1401262, at *14. In light of these disagreements, it is at least "likely"—as that term is understood by case law—that the D.C. Circuit could resolve the competing positions differently on appeal. Indeed, existing D.C. Circuit precedent criticizes efforts to regulate as political committees those organizations whose activities consist of asking "the public to demand of candidates that they take certain stands on the issues." *Buckley v. Valeo*, 519 F.2d 821, 863 n.112 (D.C. Cir. 1975) (en banc), *aff'd in part and reversed in part*, 424 U.S. 1 (1976).

Second, there is a "significant possibility" that AAN will suffer irreparable harm absent a stay. *See CREW*, 593 F. Supp. 2d at 161. Congress has carefully crafted a confidential and sequential administrative process for enforcement matters in order to "safeguard" those that, like AAN, are challenged because they have engaged in protected First Amendment conduct. *See Combat Veterans*, 795 F.3d at 153. That process requires dismissal of the charges—before any investigation occurs and before any information is disclosed, even to the complaining party—where there is no "reason to believe" that a FECA violation has occurred. *See* 52 U.S.C.

§ 30109(a)(2); *In re Sealed Case*, 237 F.3d 657, 666 (D.C. Cir. 2001) ("[B]oth FECA and the FEC's regulations interpreting the statute create an extraordinarily strong privacy interest in keeping the records sealed.").

CREW v. FEC places directly before the D.C. Circuit the Commission's prior conclusions that there is no "reason to believe" that AAN violated FECA. If AAN succeeds on appeal, then, the decision will vindicate its statutory right to be free of the type of investigation and disclosure that this case could require. But that could be an empty victory without a stay of this case, which seeks to proceed with precisely the type of investigation and disclosure that Congress foreclosed in the absence of a "reason to believe" finding. For good reason, then, the court relied on similar confidentiality concerns when it previously stayed a contested case pending resolution of the precursor action against the Commission. *See* Order, *DSCC v. NRSC*, Civ. No. 97-1493 (D.D.C. Aug. 27, 1997). Maintaining the status quo will guard against the irreparable harm that AAN would face (through no fault of its own) should there be a different resolution of the important First Amendment issues in *CREW v. FEC* on appeal.

Third, CREW will not suffer harm—let alone "substantial harm"—from a stay, but the FEC could be irreparably harmed absent one. CREW's case depends on the decision in *CREW v. FEC*; it must succeed on appeal there in order to proceed here. As a result, if AAN prevails on appeal, CREW will have suffered no harm as it will have never had a right to pursue this case in the first place. And if AAN does not succeed on appeal, CREW will still not be harmed because its case focuses on AAN's past conduct between July 2009 and June 2011. *See* 52 U.S.C. § 30109(a)(8)(C); *see also* Joint Appendix (AR 1485 ¶ 19), *CREW v. FEC*, No. 16-2255 (D.D.C. 2018). There is thus no imminent deadline or reason to rush ahead, particularly when CREW will share in the efficiencies that waiting for the D.C. Circuit's decision will provide.

In contrast, the FEC could suffer irreparable harm to its enforcement authority should this case proceed without a stay. It has been delegated "'primary and substantial responsibility for administering and enforcing [FECA],'" including the "sole discretionary power" to decide whether or not to initiate an enforcement action. *CREW v. FEC*, 209 F. Supp. 3d at 87 (citation omitted). This case seeks to deny the Commission its enforcement authority by transferring it to a private party. Such extraordinary delegation of executive authority should not occur so long as the D.C. Circuit could conclude that the Commission has done nothing to warrant it.

Finally, the public interest supports a stay. The public has a strong interest in clarity and consistency when First Amendment rights are concerned. *Cf., Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 499 (1982) (stating that additional "clarity" is required where First Amendment rights are implicated). That interest will be furthered by a stay, which will allow the D.C. Circuit to resolve the First Amendment issues in *CREW v. FEC*, and prevent any potentially inconsistent rulings from this Court in the meantime. The public interest also favors a stay in order to preserve the intended sequenced and confidential statutory review process. Proceeding now, without regard to the fact that the D.C. Circuit could still conclude that AAN is entitled to the protections of the administrative process, would send a message that could chill First Amendment activity—something fundamentally at odds with the public interest. *See, e.g., Virginia v. Hicks*, 539 U.S. 113, 119 (2003) ("Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas."). As a result, even under the more stringent stay pending appeal standard, this Court should maintain the status quo and permit further analysis of the important First Amendment issues on appeal in *CREW v. FEC* before proceeding with additional and duplicative litigation here.

IV. CONCLUSION

This case depends on the result of *CREW v. FEC*, which is presently on appeal. The Court should stay all further proceedings pending its final appellate resolution.

Respectfully submitted,

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June 1, 2018

Counsel for American Action Network

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

[PROPOSED] ORDER

Upon consideration of Defendant American Action Network's Motion for a Stay, and all memoranda and materials submitted in support of and in opposition to the motion,

IT IS HEREBY ORDERED that Defendant American Action Network's motion to stay all proceedings in this case pending final appellate resolution of *Citizens for Responsibility and Ethics in Washington, et al. v. Federal Election Commission*, D.C. Circuit No. 18-5136, is **GRANTED**; and

IT IS FURTHER ORDERED that this case is **STAYED** pending further order of the Court.

DATED: _____

_____
Hon. Christopher R. Cooper
United States District Judge

NAMES OF PERSONS TO BE SERVED WITH PROPOSED ORDER UPON ENTRY

In accordance with LCvR 7(k), listed below are the names and addresses of the attorneys and parties entitled to be notified of the proposed order's entry:

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EXHIBIT A

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 B

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

STATEMENT ON *CREW v. FEC*, NO. 16-CV-02255

CHAIR CAROLINE C. HUNTER AND
COMMISSIONER MATTHEW S. PETERSEN

Numerous court decisions over nearly a half-century have sought to protect issue advocacy groups from the burdensome registration and reporting requirements for political committees under the Federal Election Campaign Act of 1971, as amended (the "Act"). Most recently, these issues were relitigated in *CREW v. FEC*, where the district court disagreed with our analysis that the non-profit American Action Network ("AAN") is not a political committee and remanded the matter to the Commission to conform with the court's opinion within 30 days — April 19, 2018.

We strongly disagree with the court's decision, as we explain in detail below, and believe the decision should be appealed. It incorrectly substituted the court's judgment for the Commission's on a question falling squarely within the Commission's jurisdiction and expertise. The court also erred in concluding that the Bipartisan Campaign Reform Act ("BCRA") expressed a clear intent to sweep issue advocacy into the Commission's analysis for determining whether a 501(c) organization should be regulated as a political committee. Congress expressed no such intent.

We regret that there does not appear to be four votes to appeal the district court's opinion. Moreover, because a single district court decision has limited precedential value, the state of this important area of law is now less certain.[1] Nevertheless, *we* have acted in conformance with the court's decision, and believe that all Commissioners should do so as well.[2]

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[1] A single district court decision is not binding on the Commission outside the context of that particular case and would not be binding on any other court, including a court in the same district. *See Am. Elec. Power Co., Inc.*, 564 U.S. at 428 ("[F]ederal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court."); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1176 (D.C. Cir. 1987) ("The federal courts spread across the country owe respect to each other's efforts and should strive to avoid conflicts, but each has an obligation to engage independently in reasoned analysis. Binding precedent for all is set only by the Supreme Court, and for the district courts within a circuit, only by the court of appeals for that circuit."), *aff'd sub nom. Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989).

[2] Unfortunately, it appears as though one of our colleagues seeks to remove the Commission from its enforcement role and turn the matter over to a private party. *See* Vice Chair Ellen L. Weintraub, Twitter, https://twitter.com/EllenLWeintraub/status/987101164775919622; Complaint, *CREW v. AAN*, No.1:18-cv-00945 (April 23, 2018). Ill-advised public statements on social media and attempts to obstruct routine Commission operations raise questions of bias and/or prejudgment, which, in turn, implicate serious questions of due process.

I. FACTUAL AND LEGAL BACKGROUND

The Act defines a "political committee" to include any group of persons that within a calendar year receives more than $1,000 in contributions or makes more than $1,000 in expenditures.[3] In *Buckley v. Valeo*, the Supreme Court held that the Act's definition of "political committee" impermissibly swept within its ambit groups engaged primarily in issue discussion.[4] For this reason, the Court narrowly construed the definition of political committee to reach only groups that (1) meet the statutory definition and (2) have as their *major purpose* the nomination or election of a federal candidate.[5] A decade after *Buckley*, the Supreme Court reaffirmed the distinction between PACs and issue groups.[6] Accordingly, the Commission may regulate entities as "political committees" under the Act only if they have as their major purpose the nomination or election of a candidate.[7]

Political committees are subject to regulatory requirements that make them "burdensome alternatives" and "expensive to administer."[8] For instance, political committees must register with the Commission and disclose publicly all of their financial activity in regular, periodic filings, in contrast to other persons who need only file certain limited, event-triggered reports.[9]

A. CREW'S ADMINISTRATIVE COMPLAINT AGAINST AAN

In 2012, Citizens for Responsibility and Ethics in Washington ("CREW") filed with the Commission a complaint against AAN, an organization recognized by the IRS as tax-exempt under section 501(c)(4) of the Internal Revenue Code.[10] AAN aired independent expenditures

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3 52 U.S.C. § 30101(4)(A).

4 *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *see also id.* at 42-43 (discussing identical concern and interpreting "relative to a federal candidate" as requiring words of express advocacy).

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions.

5 *Id.* at 79.

6 *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986).

7 *Buckley*, 424 U.S. at 79.

8 *Citizens United v. FEC*, 558 U.S. 310, 337-38 (2010) (listing regulatory requirements).

9 *See generally* 52 U.S.C. §§ 30102-04 (establishing political committees' registration, organization, and ongoing reporting requirement). *Compare* 52 U.S.C. § 30104(a) (establishing a regular, periodic filing schedule for disclosure reports) and (b) (detailing the information to be disclosed on committees' reports), *with* 52 U.S.C. § 30104(c) (providing that persons other than political committees need file independent expenditure reports only upon making certain independent expenditures) and (f) (same as to electioneering communications).

10 Treasury regulations provide that a 501(c)(4) organization "may carry on lawful political activities and remain exempt under section 501(c)(4) as long as it is *primarily* engaged in activities that promote social welfare." *See* Rev. Rul. 1981-95, 1981-1 C.B. 332 (emphasis added). *See* IRS Exempt Organizations Master File, https://www.irs.gov/charities-non-profits/exempt-organizations-business-master-file-extract-eo-bmf (search in

and electioneering communications in the two fiscal years after its establishment in 2009.[11] CREW alleged that AAN failed to register as a political committee and file attendant disclosure reports.[12] We voted to dismiss the complaint upon concluding that AAN's major purpose was not the nomination or election of a federal candidate.[13] Critical to our analysis — and the ensuing litigation — was our conclusion that "the roughly $13 million that AAN spent on" electioneering communications did not count towards a finding that AAN's major purpose was the nomination or election of federal candidates.[14]

In reaching this conclusion, we used the approach articulated in the Commission's 2004 Explanation and Justification and 2007 Supplemental Explanation and Justification,[15] modified, as necessary, in light of subsequent Supreme Court decisions distinguishing "campaign-related" speech from "genuine issue advocacy"[16] and generally recognizing greater First Amendment rights for associations, such as corporations and labor unions. This tailored application of the "major purpose" test reflected the Commission's unique role in regulating "core constitutionally protected activity — 'the behavior of individuals and groups only insofar as they act, speak and

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District of Columbia for "American Action Network") (continuing to recognize AAN as tax-exempt under section 501(c)(4)).

11 *See* Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen, MUR 6589 (American Action Network); Complaint, MUR 6589 (American Action Network) (June 7, 2012).

An independent expenditure is an expenditure that "expressly advocat[es] the election or defeat of a clearly identified candidate" and is not coordinated with that candidate. 52 U.S.C. § 30101(17). An "electioneering communication" is "any broadcast, cable, or satellite communication which (I) refers to a clearly identified candidate for Federal office (II) . . . within 60 days before a general . . . or 30 days before a primary [election] and (III) . . . is targeted to the relevant electorate" except for, among other things, "a communication which constitutes an expenditure or independent expenditure under this Act." 52 U.S.C. § 30104(f)(3)(A), (B).

12 Complaint, MUR 6589 (American Action Network).

13 *See* Statement of Reasons, MUR 6589.

14 *Id.* at 19-20.

15 *Id.* at 17-21; *see also* Political Committee Status, 72 Fed. Reg. 5596 (Feb. 7, 2007) (supplementing original explanation and justification); Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68056 (Nov. 23, 2004).

16 *Citizens United*, 558 U.S. at 336 ("*WRTL* said that First Amendment standards must eschew the open-ended rough-and-tumble of factors, which invit[es] complex argument in a trial court and a virtually inevitable appeal.") (internal quotes omitted); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469-70 (2007) ("*WRTL II*") ("[A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.").

associate for political purposes,'"[17] and balanced the sometimes competing values of associational privacy and the public's interest in disclosure.[18]

B. First Legal Challenge To Commission Action

CREW challenged the dismissal in federal court and persuaded the court that the Commission erred in excluding all non-express advocacy communications in its major purpose analysis.[19] But recognizing the Commission's "judicially approved case-by-case approach" to determine an entity's major purpose, the court refused to "replac[e] the Commissioners' bright-line rule with one of its own" that considers "*all* electioneering communications as indicative of a 'purpose' to 'nominat[e] or elect[] . . . a candidate.'"[20] Instead, the court remanded the matter

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[17] *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003) (quoting *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981)).

[18] *See Van Hollen v. FEC*, 811 F.3d 486, 501 (D.C. Cir. 2016) (citing *AFL-CIO*, 333 F.3d at 170 and holding the Commission's "tailoring was an able attempt to balance the competing values that lie at the heart of campaign finance law.").

[19] *CREW v. FEC*, 209 F. Supp. 3d 77, 89-93 (D.D.C. 2017); *see also* Complaint, *CREW v. FEC*, No. 1:14-cv-021419 (Sept. 19, 2016). To support its holding, the court relies on two separate lines of authority: one addressed whether event-specific disclosure requirements are constitutional for non-express advocacy speech (they are), and the other addressed whether registration, reporting, and other requirements are constitutional for political committees (they also are). *Id.* For several reasons, this misses the mark. For example, it is not correct to conclude that the "division between express advocacy [or its functional equivalent] and issue speech is simply inapposite in the disclosure context." *Id.* at 90. Even opinions the court cites in support demonstrate that the opposite is true. *See e.g., Yamada v. Snipes*, 786 F.3d 1182, 1189 (9th Cir. 2015) (statute is constitutional where "[u]nder the [state] Commission's interpretation, 'influence' refers only to 'communications or activities that constitute express advocacy or its functional equivalent.' This interpretation significantly narrows the statutory language."); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 66-67 (1st Cir. 2011) (disclosure statutes are constitutional because"[a]s narrowed, the terms 'influencing' and 'influence' as used in the statutes at issue here would include only 'communications and activities that expressly advocate for or against a candidate or that clearly identify a candidate by apparent and unambiguous reference and are susceptible of no reasonable interpretation other than to promote or oppose the candidate'"). Further, it is not obvious how these two lines of authority (i.e. that event-driven disclosure laws and political committee requirements both survive judicial review) support a conclusion that the Commission must count electioneering communications toward political committee status. The circuit court decisions that are most clearly on point to this precise issue are the ones we cited originally, and come to the conclusion opposite that of the district court. *See* Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 7-11, MUR 6589 (American Action Network) (citing *Wisconsin Right to Life v. Barland*, 751 F.3d 804 (7th Cir. 2014); *New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010); *N.C. Right to Life Inc. v. Leake*, 525 F.3d 274, 287-88 (4th Cir. 2008); *Colorado Right to Life Committee, Inc. v. Coffman*, 498 F.3d 1137 (10th Cir. 2007); *United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1142 (2d Cir. 1972); *ACLU v. Jennings*, 366 F. Supp. 1041, 1055 (D.D.C. 1973), vacated as moot sub nom., *Staats v. ACLU*, 422 U.S. 1030 (1975)). Of these, the district court dismissed the most recent as an "outlier," and the rest ostensibly because they pre-dated *Citizens United*. *Id.* at 90-91, 90 n.8. That is also incorrect. Both the Seventh Circuit *Barland* and the Tenth Circuit *Herrera* opinions were issued after and referenced *Citizens United*. As a result, at least two circuit courts (in addition to the administering agency) meet the district court's standard for acting "contrary to law."

[20] *CREW v. FEC*, 209 F. Supp. 3d at 93. The court, however, agreed that it was not unreasonable to consider a particular organization's "full spending history." *Id.* at 94. However, the court also concluded that "refusal to give

to the Commission to reconsider its analysis without "exclud[ing] from its [major purpose] consideration all non-express advocacy in the context of disclosure."[21] The court left "how *Buckley* (and the test it created) should be implemented" to the Commission, where "[s]uch implementation choices, which call on the FEC's special regulatory expertise, were the types of judgments that Congress committed to the sound discretion of the agency."[22]

C. COMMISSION ACTION ON REMAND

On remand, we engaged in a text-centric, ad-by-ad analysis of AAN's electioneering communications to determine which ads evidenced a campaign-related focus — that is, which ads included references to candidacies, elections, voting, political parties, or other indicia that the costs of the ad should count towards a determination that the organization's major purpose is to nominate or elect candidates.[23] We also examined the extent to which each of AAN's ads focused on issues important to the group or were merely vehicles to address the candidates referenced in the ad in an effort to influence a federal election.[24] Under this framework, we determined that an additional $1,875,394 of AAN's spending on electioneering communications could evidence the major purpose of nominating or electing federal candidates.[25] However, AAN's election-related spending still amounted to only "26% — well under half — of its overall spending."[26] Accordingly, we again concluded that there was not reason to believe that AAN

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any weight whatsoever to an organizations' [sic] relative spending *in the most recent calendar year*" was arbitrary and capricious. *Id.* (emphasis added). The court also rejected a single calendar year approach as "inflexible." *Id.*

21 *Id.* at 93.

22 *Id.* at 87.

23 *See* Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman, MUR 6589R (American Action Network). We further ascertained whether the communication contained a call to action and, if so, whether the call related to the speaker's issue agenda or, rather, to the election or defeat of federal candidates. We considered information beyond the content of the ad only to the extent necessary to provide context to understand better the message being conveyed. In the absence of more detailed judicial guidance, we felt this analysis best satisfied the essential need for objectivity, clarity, and consistency in administering and enforcing the Act and providing meaningful guidance to the regulated community about which factors would be deemed relevant in a major purpose inquiry. Our analysis also avoided speculating about the subjective motivations of the speaker in determining which ads were sufficiently "campaign related." *See WRTL II*, 551 U.S. at 467 ("After noting the difficulty of distinguishing between discussion of issues on the one hand and advocacy of election or defeat of candidates on the other, the *Buckley* Court explained that analyzing the question in terms of intent and of effect would afford no security for free discussion. . . . *McConnell* did not purport to overrule *Buckley* on this point") (citing *Buckley*, 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945) (quotation omitted))).

24 The "Yellowtail" ad discussed in *McConnell v. FEC* is a paradigmatic example. 540 U.S. 93, 193-94 n.78 (2003). That ad accused a candidate of hitting his wife, skipping child support payments, and being a convicted felon. *Id.* The Court stated that "[t]he notion that this advertisement was designed purely to discuss the issue of family values strains credulity." *Id.*

25 *See* Statement of Reasons at 17, MUR 6589R.

26 *See id.* at 17. In *CREW*, the court stated that "[a] reasonable application of a 50%-plus rule would not appear to be arbitrary and capricious." 209 F. Supp. 3d at 95.

violated the Act by failing to register and report with the Commission as a political committee and dismissed the administrative complaint.[27]

D. SECOND LEGAL CHALLENGE TO COMMISSION ACTION

CREW responded twofold. First, it moved the court to order the Commission to show why its dismissal did not violate the court's prior decision.[28] On the same day, CREW also filed a new complaint under 52 U.S.C. § 30109(a)(8) alleging that the Commission's second dismissal was contrary to law.[29]

The Court denied the show-cause motion. The court explained that the Commission did "just" what the court had instructed it to do — that is, "reconsider its decision without 'exclud[ing] from its [major purpose] consideration all non-express advocacy.'"[30]

The court, however, found on CREW's section 30109(a)(8) claim that the use of "a multifactor test that started from a blank slate" failed to take into account that each ad fell "cleanly" within Congress's definition of an electioneering communication.[31] The court noted that if there had been no congressional action since *Buckley*, the court may have found it unclear whether nonexpress advocacy ads that mention a candidate run near elections should count towards political committee status.[32] However, according to the court, in passing BCRA, Congress expressed an "unambiguous directive" that "electioneering communications *presumptively* have an election-related major purpose,"[33] which "require[d] the agency to presume that spending on electioneering communications contributes to a 'major purpose' of nominating or electing a candidate for federal office, and, in turn, to presume that such spending supports designating an entity as a 'political committee.'"[34] The court did not foreclose that a

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27 Statement of Reasons at 18, MUR 6589R.

28 *See Pls.' Mot. for an Order to Def. FEC to Show Cause*, *CREW v. FEC*, No. 1:14-cv-1419 (D.D.C. Nov. 14, 2016) (Docket No. 57); *CREW v. FEC*, No. 1:14-cv-1419 (D.D.C. Apr. 6, 2017) (Docket No. 74) (redacted version).

29 *See* Complaint, *CREW v. FEC*, No. 1:16-cv-2255 (Nov. 14, 2016).

30 *CREW v. FEC*, No. 1:14-cv-1419, slip op. at 5-6 (Docket No. 74).

31 *CREW*, 2018 WL 1401262 at *7.

32 *Id.* at *9.

33 *Id.* at *7.

34 *Id.* at *14. In reaching this conclusion, the court states that "the Commission continues to overread *WRTL II* for the idea that the primary goal in evaluating AAN's ads should be to determine whether the ads' *content* bears 'indicia of express advocacy.'" *Id.* at *12. We do not think this analysis correctly captures our consideration of *WRTL II*. Nowhere have we argued that, under the First Amendment, disclosure requirements may only apply to communications containing express advocacy (or the functional equivalent thereof). Indeed, we agree with the court that "the Supreme Court has seen no problem with disclosure requirements triggered solely by an electioneering communication's context." *Id.* Instead, the question we have sought to answer in this matter is not whether, but rather which type of, disclosure is required — the event-driven disclosure regime for electioneering communications or the more comprehensive disclosure requirements for political committees. And *WRTL II* is instructive on this

particular electioneering communication might lack an election purpose, but expected that such ads would be "the rare exception, not the rule."[35]

We believe that the decision should be appealed. It appears that at least one of our colleagues disagrees. We write to express our concerns with the opinion.

II. ANALYSIS

An examination of the text of the Act, BCRA's legislative history, and post-enactment comments made during the course of a Commission rulemaking makes clear that Congress has not addressed how the Commission must approach major purpose or political committee determinations.

A. THE TEXT OF THE ACT

The text of the Act — "[t]he starting point in discerning congressional intent"[36] — is silent as to "major purpose." What Congress did in BCRA, as relevant here, was to define certain types of ads as "electioneering communications,"[37] establish an event-driven disclosure regime for the ads,[38] mandate that the ads carry disclaimers,[39] and ban corporations and labor organizations from running the ads.[40] But what Congress never did, as the court itself admitted,[41] is amend the statutory definition of "political committee" or otherwise codify

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point in that it includes an illuminative discussion on the differences between issue discussion and electoral speech, which helps inform the Commission's major-purpose analysis.

35 *CREW*, 2018 WL 1401262 at *13. Indeed, the court indicated that an organization's electioneering communications might not count toward political committee status if they do not "mention [an] election or indirectly reference it," do not "discuss[] the substance [of legislation]," and do not "make any reference to [an] incumbent's prior voting history or otherwise criticize [them]" when calling for viewers to contact their elected representatives. *Id.* at *11.

36 *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004).

37 52 U.S.C. § 30104(f)(3). An "electioneering communication" is "any broadcast, cable, or satellite communication which (I) refers to a clearly identified candidate for Federal office (II) . . . within 60 days before a general . . . or 30 days before a primary [election] and (III) . . . is targeted to the relevant electorate" except for, among other things, "a communication which constitutes an expenditure or independent expenditure under this Act." 52 U.S.C. § 30104(f)(3)(A), (B).

38 52 U.S.C. § 30104(f)(1) ("Every person who makes a disbursement for . . . airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement . . . .").

39 52 U.S.C. § 30120(a) (requiring disclaimers for electioneering communications).

40 52 U.S.C. § 30118. BCRA's ban on corporate electioneering communications was ruled unconstitutional as applied in *WRTL II* and unconstitutional on its face in *Citizens United*.

41 *CREW*, 2018 WL 1401262 at *10 ("It is true that BCRA did not touch the text of FECA's definition of 'political committee.'").

Buckley's "major purpose" test.[42] Congress has never identified a methodology, rule, or factors for the Commission to consider when analyzing whether an entity is a political committee,[43] let alone linked the Act's definition of "political committee" to electioneering communications. There is thus no textual evidence that Congress intended a group's spending on electioneering communications to be considered evidence of a group's major purpose.

Relying on two dictionaries, the court claimed to find a textual "clue" of congressional intent in the use of the term "*electioneering* communications": "Congress chose a label that by its plain meaning deems the ads to 'take part actively and energetically in a campaign to be elected to public office.'"[44] This reliance ignores the D.C. Circuit's objection to the use of dictionaries in the context of interpreting BCRA's electioneering communications provisions. In *Ctr. for Indiv. Freedom v. Van Hollen*, the D.C. Circuit rejected a district court's analysis partially on the grounds that "citing to dictionaries creates a sort of optical illusion, conveying the existence of certainty — or 'plainness' — when appearance may be all there is."[45]

The court, moreover, overlooks a textual clue in the definition of "electioneering communication" at 52 U.S.C. § 30104(f) that cuts against the court's conclusion. Congress could have added the definition of electioneering communication to the general definition of "expenditure," the making of $1,000 or more of which during a calendar year satisfies the Act's definition of political committee. Indeed, the earliest BCRA proposals included such provisions.[46] Congress, however, instead placed the definition of "electioneering communication" among the reporting rules of the Act, codified at section 30104, and clarified

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[42] Generally, when Congress revises a statute, its decision to leave certain sections unamended constitutes at least acceptance, if not explicit endorsement, of the preexisting construction and application of the unamended terms. *See Cottage Save Ass'n v. Comm'r*, 499 U.S. 554, 562 (1991). The court cited *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), in support of its argument that BCRA clarified FECA's definition of "political committee." *CREW*, 2018 WL 1401262 at *10. But in *Williamson* the Court identified numerous pieces of legislation, as well as other rejected legislative proposals, that created a "distinct scheme to regulate the sale of tobacco products," 529 U.S. at 155-56, which "effectively ratified the FDA's previous position that it lacks jurisdiction to regulate tobacco." *Id.* at 156. No such legislative track record on major purpose is present here.

[43] Congress is of course aware of *Buckley*'s major purpose test: Congress responded to *Buckley* in 1976 by amending FECA to include, among other provisions, a definition of independent expenditure, a *Buckley* construction on the definition of "expenditure" that serves to distinguish issue-speech from regulable express advocacy. Further, several legislative proposals have been made to codify or flesh out the major purpose test, particularly with respect to section 527 organizations. *See, e.g.*, 527 Reform Act of 2004, S. 2828, 108th Cong. § 2(a) (proposing to codify without defining "major purpose" into FECA's definition of "political committee") and (b) (proposing to define "major purpose" for section 527 organizations).

[44] *CREW*, 2018 WL 1401262 at *10 (citing Oxford Dictionary of English 565 (3d ed. 2010) and American Heritage Dictionary (5th ed. 2018)).

[45] 694 F. 3d 108, 111 (D.C. Cir. 2012) (quoting A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 71, 72 (1994)).

[46] *See, e.g.*, Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. § 201(a) and (b) (redefining "independent expenditure" and "express advocacy" to include certain broadcast communications that refer to a clearly identified candidate within 60 days of an election); Bipartisan Campaign Reform Act of 1998, H.R. 3526, 105th Cong. § 201(a) and (b) (1998) (same).

that "[t]he term 'electioneering communication' *does not* include . . . a communication which constitutes an expenditure or an independent expenditure under this Act."[47] This carve-out of electioneering communications from the definition of expenditure — which is defined as "any . . . payment . . . made by any person *for the purpose of influencing any election for Federal office*"[48] — contradicts the court's presumption that "electioneering communications have an inherent purpose of influencing a federal election,"[49] such that they must be presumptively equated with independent expenditures in a major purpose analysis. In so doing, the court erases the statutory distinction between expenditures and electioneering communications.

The text also includes clues as to congressional intent with respect to 501(c)(4) organizations. At 52 U.S.C. § 30118(c)(2), Congress created a fallback mechanism for 501(c)(4) and 527 organizations in the event that the ban on *all* corporate electioneering communications, including 501(c)(4) corporations, was found unconstitutional. Congress's fallback would have allowed such organizations to run the ads, using funds from individuals.[50] Therefore, the text of the Act makes clear that Congress's preferred "fix" was to ban 501(c)(4) organizations from running ads. And as for those persons who could air electioneering communications, Congress amended the Act to mandate a specific, event-based disclosure regime, but did not link the running of electioneering communications to the broader, status-driven disclosure regime of political committees.

B. LEGISLATIVE HISTORY

In the absence of clear statutory text to support its conclusion,[51] the court relies heavily on the description of BCRA's legislative history in *McConnell v. FEC*,[52] particularly emphasizing that Congress considered electioneering communications to be "sham" issue ads

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47 2 U.S.C. § 30104(f)(3)(B)(ii) (emphasis added). Further, for purposes of the ban on electioneering communications by corporations, Congress included the term "applicable electioneering communication" under the definition of "expenditure" at section 30118. This further muddies congressional intent, as the definition of "political committee" at section 30101(4) refers to "expenditures" as defined at section 30101(9).

48 *Id.* at § 30101(9) (emphasis added).

49 *CREW*, 2018 WL 1401262 at *10.

50 *Compare* 52 U.S.C. § 30118(c)(1)-(4), *with* (c)(6); *see infra* notes 59-65 and accompanying text.

51 *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, No. 16-1362, __ U.S. __, 2018 WL 1568025 at *7 (Apr. 2, 2018) ("If the text is clear, it needs no repetition in the legislative history; and if the text is ambiguous, silence in the legislative history cannot lend any clarity.") (citing *Avco v. U.S. Dep't of Justice*, 884 F.2d. 621 (D.C. Cir. 1989)); *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 93 (2007) ("[N]ormally neither the legislative history nor the reasonableness of the [agency interpretation] would be determinative if the plain language of the statute unambiguously indicated [Congress's intent]."); *id.* at 108-09 (Scalia, J., dissenting) ("The very structure of the Court's opinion provides an obvious clue as to what is afoot. The opinion purports to place a premium on the plain text of the [statute] but it first takes us instead on a roundabout tour of considerations *other* than language . . . [t]his is a most suspicious order of proceeding.").

52 540 U.S. 93 (2003).

that are intended to influence elections.[53] But in reviewing the BCRA legislative history, we find no "unambiguous directive" that electioneering communications should be factored into the Commission's major purpose analysis, let alone how that analysis should be applied to a 501(c)(4) organization. Instead, we see that Congress intended to ban all corporations — including 501(c)(4) organizations — from making electioneering communications and, where not banned, require discrete, event-driven disclosure.

Significant legislative history suggests that Congress *did not* intend for electioneering communications to count toward political committee status for 501(c) tax-exempt organizations. For example, Senator Jeffords, one of the leading sponsors of the initial electioneering communication proposal, stated that the amendment would "not require such groups [such as National Right to Life Committee or the Sierra Club] to create a PAC or another separate entity."[54] Another sponsor, Senator Snowe, entered into the record her position that the electioneering communications provision was constitutional "[a]s long as the [electioneering disclosure provisions] doesn't produce the chilling effect of requiring an organization to disclose all of its donors, *which Snowe-Jeffords avoids*, it clearly meets court guidelines."[55]

Rather, when first introducing the Snowe-Jeffords Amendment, Senator Snowe explained that the "very simple, very direct, . . . very narrow"[56] proposal would "require . . . the sponsors' disclosure and also the donors on such ads because we think it is important that donors who

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53 *CREW*, 2018 WL 1401262 at *9-10. But at least two members of the Court have questioned interpreting *all* electioneering communications as being presumptively made "in connection with" an election. Justices Kennedy and Scalia pointed out that "the public only tunes in to the political dialogue shortly before the election" and that "[t]he Senator who is, who is at risk is likely to listen. The Senator who has a safe seat is not," Transcript of Oral Argument at 14, 17, *WRTL II*, 551 U.S. 449 (2007) (No. 06-969), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2006/06-969.pdf., a point repeated in *Citizens United*. *See* 558 U.S. at 334 ("It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence.").

54 147 CONG. REC. S2813 (Mar. 27, 2001). In explaining that Congress did not intend to require groups that run electioneering communications to register as PACs or force "invasive disclosure" of donors, Senator Jeffords also stated:

> The Snowe-Jeffords provisions will not prohibit groups like the National Right to Life Committee or the Sierra Club from disseminating electioneering communications; . . . . *It will not require the invasive disclosure of donors*; and . . . *it will not affect the ability of any organization to urge grassroots contacts with lawmakers on upcoming votes.*

Id. at S2812-13 (emphasis added). At least one Commissioner has found these statements "pretty persuasive coming from the guy who wrote the language" as to whether "such groups [must] create a PAC or another separate entity" to run electioneering communications. *See* Hearing Transcript, NPRM on Political Committee Status at 170-71 (April 15, 2004) (statement of then-Vice Chair Ellen Weintraub); *see also* Statement for the Record of Vice Chair Ellen L. Weintraub, NPRM on Political Committee Status at 7 ("[N]othing in BCRA requires that all entities that . . . produce Electioneering Communications (defined term[] under the law) register with the Commission. The Supreme Court [in *McConnell*] understood that.").

55 147 CONG. REC. S3038 (Mar. 28, 2001) (emphasis added).

56 144 CONG. REC. S912 (Feb. 24, 1998) (discussing Senate Amendment No. 1647).

contribute more than $500 to such ads should be disclosed by these organizations."[57] Animating the "limiting" nature of the proposal was the sponsors' concern with passing legislation that would "withstand constitutional scrutiny."[58]

Beyond event-driven disclosure, the BCRA sponsors intended to ban "direct or indirect use of corporation or union money to fund the ads,"[59] including the corporate funds of 501(c)(4) organizations. The first Snowe-Jeffords Amendment, as well as the initial 2001 BCRA bill first proposed in the Senate[60] included a narrower electioneering communications ban that exempted 501(c)(4) and 527 organizations if the communications were paid for by funds provided by individuals.[61] Subsequently, however, the Senate adopted the "Wellstone Amendment,"[62] which effectively eliminated the exception for 501(c)(4) and 527 organizations. Senator Wellstone explained that he intended to put 501(c)(4) and 527 organizations in the same shoes as other corporations and labor organizations.[63] In his floor speech, Senator Wellstone cited *MCFL* for the proposition that "the election communications of nonprofit corporations, such as the one[s] [sic] covered in this amendment, could be regulated once it reached a certain level."[64] But he did not mean treated as political committees; he meant that, under *MCFL*, "they could clearly be banned from running these sham issue ads."[65]

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57 144 CONG. REC. S912 (Feb. 24, 1998); *id.* at S913 ("Congress is permitted to demand the sponsor of an electioneering message to disclose the amount spent on the message and the source of funds."); *id.* ("We are saying in a very narrow period, right before the election, those groups who identify candidates in their ads or use a likeness are required to disclose their donors who donated more than $500.").

58 *Id.* at S913; *id.* at S912-14; *see also Van Hollen*, 811 F.3d at 494 ("That BCRA seeks more robust disclosure does not mean Congress wasn't also concerned with, say, the conflicting privacy interests that hang in the balance. In fact, Congress 'took great care in crafting . . . language to avoid violating the important principles in the First Amendment.'") (quoting 147 CONG. REC. S3033 (Mar. 28, 2001) (statement of Sen. Jeffords)).

59 *Id.* at S912.

60 *See* 144 CONG. REC. S906-07 (Feb. 24, 1998) (reproducing Snowe-Jeffords as Amendment No. 1647); Bipartisan Campaign Reform Act of 2001, S. 27, 107th Cong. § 203.

61 Bipartisan Campaign Reform Act of 2001, S. 27, 107th Cong. § 203.

62 147 CONG. REC. S2907 (March 26, 2001) (reproducing text of Amendment No. 145); United States Senate Roll Call 107th Congress—1st Session, Vote No. 48 (March 26, 2001) (passing Amendment No. 145), *available at* https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=1&vote=00048.

63 147 CONG. REC. S2845, S2487 (March 26, 2001).

64 *Id.* at S2848. In *McConnell*, however, the controlling opinion construed the provision as inapplicable to *MCFL* corporations "to avoid constitutional concerns." *McConnell*, 540 U.S. at 210-11. Justice Kennedy wrote that "[w]ere we to indulge the presumption that Congress understood the law when it legislated, the Wellstone Amendment could be understood only as a frontal challenge to *MCFL*." *Id.* at 339 (Kennedy, J., dissenting in part).

65 147 CONG. REC. S2488 (March 26, 2001).

C. POST-ENACTMENT STATEMENTS

Last, we turn to comments and testimony that the Commission received during its post-BCRA rulemaking on political committee status. In that rulemaking, the Commission sought comment on whether and how to count electioneering communications towards a group's major purpose[66] and congressional intent with respect to treating payments for electioneering communications as "expenditures" under its regulations.[67] And in the context of a proposed major purpose test that looked to a group's spending on, among other things, electioneering communications, the Commission acknowledged that some electioneering communications by 501(c) organizations are "confined to advocating action regarding a particular legislative or executive decision."[68] The Commission sought comment on whether a "more focused content analysis for the major purpose test" was needed.[69]

One-hundred and forty BCRA supporters in the House and 19 Senators submitted comments to the Commission indicating that they *did not* intend BCRA to broaden the statutory term "political committee" to encompass 501(c) organizations.[70] They stated that "[t]here has been absolutely no case made to Congress, or record established by the Commission, to support any notion that tax-exempt organizations and other independent groups threaten the legitimacy of our government when criticizing its policies."[71]

Significantly, BCRA's primary sponsors wrote separately:

> It is wholly appropriate for the Commission to undertake in this rulemaking to regulate 527s, whose major purpose *is* to influence elections, but not 501 (c) organizations, whose major purpose, under the tax laws, must be something other than influencing elections. . . . We oppose the proposals for regulation of 501(c) organizations contained in the Commission's Notice. The Commission should instead focus on deciding when a 527 is required to register as a political committee.[72]

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66 Political Committee Status, 69 Fed. Reg. 11736, 11738-39, 11746 (March 11, 2004) (proposing alternative revisions to the definition of "political committee").

67 *Id.* at 11739.

68 *Id.* at 11746.

69 *Id.*

70 *See* Comment of 140 Members of the House of Representatives on Reg. 2003-07 (Political Committee Status) at 2 (Mar. 24, 2004); Comment of 19 Members of the U.S. Senate on Reg. 2003-07 (Political Committee Status) at 2 (Apr. 7, 2004).

71 *See supra* note 70.

72 Comment of Senator Russell D. Feingold, Senator John McCain, Representative Martin T. Meehan, and Representative Christopher Shays on Reg. 2003-07 (Political Committee Status) at 2 (Apr. 9, 2004); *id.* at 1 ("Our conviction that many 527 organizations must register as political committees is based not on BCRA, but on FECA."). Senators McCain and Feingold also submitted testimony that they gave before the Senate Rules Committee in which they explain the material difference between section 527 and 501(c) organizations. Comment

Finally, certain exchanges between Commissioners and witnesses at a rulemaking hearing reveal a common understanding that Congress had not spoken to how a 501(c)(4)'s electioneering communications should factor into a major purpose analysis. For example, then-Chairman Brad Smith asked former Chairman Trevor Potter whether the applicable standard when analyzing a section 501(c)(4)'s major purpose should be express advocacy or something more. Potter replied that "[i]n *McConnell*, the Court said express advocacy is not constitutionally required, so Congress could come up with some other formula, but they have not done so."[73]

* * *

Reviewing the evidence above, we cannot agree with the district court that "FECA and BCRA make clear that Congress *intended* to foreclose the Commission from applying a major-purpose framework that does not, at a minimum, presumptively consider spending on electioneering ads as indicating an election-related major purpose."[74] Instead, we find a clear intent to ban corporate entities from making electioneering communications, while establishing an event-based disclosure regime of reports and disclaimers for those permitted to run such ads.

In BCRA, Congress assumed the continued existence of a hard money system, and sought to reinforce it. Since BCRA, however, the campaign finance landscape has changed dramatically. The courts, culminating in *Citizens United*, have reshaped that system so that corporations, including section 501(c)(4) organizations, may now make independent expenditures and electioneering communications. Given the intervening decisions of *WRTL II* and *Citizens United*, we do not see how Congress *could* have spoken clearly to the precise question here, where the Commission is wrestling with a "class of speakers Congress never expected would have anything to disclose."[75] In that regard, the *CREW* decision is analogous to the *Van Hollen* case litigated before the D.C. Circuit.

There, then-Representative Chris Van Hollen challenged the Commission's electioneering disclosure regime, which the Commission promulgated after *WRTL II*. While the district court (in its first decision) found for Van Hollen at *Chevron*-step one,[76] the D.C. Circuit

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of Senators Russell D. Feingold and John McCain on Reg. 2003-07 (Political Committee Status) at 2-5 (April 2, 2004) ("[U]nder existing tax laws, Section 501(c) groups — unlike section 527 groups — cannot have a major purpose to influence federal elections, and therefore are not required to register as federal political committees, as long as they comply with their tax law requirements."); *id* at 8 ("[C]are must be taken not to chill the legitimate activities of 501(c) advocacy organizations that do not have the primary purpose of influencing elections.").

73 Hearing Transcript, NPRM on Political Committee Status at 162 (April 15, 2004).

74 *CREW*, 2018 WL 1401262 at *13.

75 *Van Hollen*, 811 F. 3d at 490-91.

76 *Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984). Under *Chevron*, a court looks to determine whether Congress "has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. . . . If, however, the court determines Congress has not directly addressed the precise question at issue . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

reversed on appeal, holding that: "The statute is anything but clear, especially when viewed in the light of the Supreme Court's decisions in" *Citizens United* and *WRTL II*.[77]

Here, as in *Van Hollen*, Congress could not have "had an intention on the precise question at issue" because "it is doubtful that, in enacting [52 U.S.C. § 30104(f)], Congress even anticipated the circumstances that the FEC faced."[78] Rather, "[i]t was due to the complicated situation that confronted the agency in 2007 and the absence of plain meaning in the statute that the FEC acted, . . . reflect[ing] an attempt by the agency to provide regulatory guidance . . . following the partial invalidation of the speech prohibition imposed on corporations and labor unions in the context of electioneering communications."[79]

III. CONCLUSION

Contrary to the court's holding in *CREW v. FEC*, Congress has not directly addressed how electioneering communication spending impacts the major-purpose analysis that the Commission must undertake when determining whether an organization is a political committee. Quite the opposite. As the court's analysis acknowledges, BCRA did not amend or otherwise touch FECA's definition of "political committee." But not only is BCRA silent as to how electioneering communications factor into the major-purpose test, there is nary a word in the accompanying legislative record that speaks directly to this issue. And to the extent the legislative record and post-enactment history contain clues about congressional thinking on the subject, they cut against the court's conclusion that electioneering communications must presumptively count towards finding a group's major purpose to be the nomination or election of federal candidates. Thus, the court's conclusion that Congress unambiguously *intended* to foreclose the Commission from applying the major purpose test without first presuming electioneering communication spending to have an election-related purpose is entirely without support and is clearly erroneous. Accordingly, the Commission properly exercises its discretion and expertise in considering which electioneering communications count when determining the political committee status of an organization.

However, because our colleague's statement indicates that there may not be four votes to appeal the district court's opinion, we believe that all Commissioners should act to conform with it.[80]

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77 *Ctr. for Indiv. Freedom*, 694 F. 3d at 110; *see also Van Hollen*, 811 F. 3d at 490-91(upholding the Commission's electioneering communications regulations as consistent with congressional intent).

78 *Ctr. for Indiv. Freedom*, 694 F. 3d at 111.

79 *Id.*

80 We also support the Commission making public the record of our efforts to conform with the court's decision, along with the Office of General Counsel's memorandum setting forth its recommendation whether to appeal.