UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

AMERICAN ACTION NETWORK'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

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INTRODUCTION

Citizens for Responsibility and Ethics in Washington ("CREW") complains that the American Action Network ("AAN") challenged its Complaint with a "litany" of arguments. Opp'n 1 (Dkt. No. 26). But AAN has only done so because there are a "litany" of fundamental problems with CREW's Complaint that each require its dismissal with prejudice. For example:

- CREW is not the right plaintiff. It lacks standing to claim that voters were harmed by the lack of disclosures during the 2010 election cycle when CREW cannot vote.
- This is not the right case. CREW's allegations cannot be reviewed because the Federal Election Commission ("FEC") dismissed them in an exercise of prosecutorial discretion.
- These are not the right claims. CREW seeks to investigate new claims and time periods that it never gave the FEC an opportunity to consider and to pursue stale claims long after the statute of limitations has run.
- This is not a constitutional exercise. CREW cannot exercise authority vested solely in the Executive Branch, nor can it seek to punish conduct based on a standard articulated years after that conduct occurred.
- There is no violation of law. The FEC was correct as a matter of law when it twice dismissed CREW's allegations because AAN has not violated the Federal Election Campaign Act ("FECA").

CREW tries to downplay and sidestep these issues, arguing that it has unfettered authority to investigate and pursue potential violations of the FECA unbounded by the restrictions that would apply had the FEC pursued CREW's initial claims. But that is not the law. As detailed below, CREW is restricted by the Constitution, principles of unreviewable prosecutorial discretion, the FECA citizen-suit provision, and the statute of limitations. Its Complaint must be dismissed.

ARGUMENT

CREW's opposition confirms that its Complaint must be dismissed for lack of standing, for lack of subject matter jurisdiction, as time-barred, and for failure to state a claim.[1]

I. CREW FAILS TO CARRY ITS BURDEN TO DEMONSTRATE STANDING.

Multiple decisions in this Circuit have held that CREW lacks standing to bring FECA claims. *See* Mem. 14–20 (Dkt. No. 24-1). CREW has not shown that this case warrants a different result. CREW does not deny that it bears the burden to establish standing. And CREW concedes, as it must, that (a) no individual voter affected by AAN's failure to register as a political committee is a party to this lawsuit, and (b) CREW's standing is not "backed up by specific factual representations in an affidavit or declaration," *Sierra Club v. FERC*, 827 F.3d 36, 44 (D.C. Cir. 2016). With a Complaint and Opposition devoid of specifics, supporting documentation, and a voter plaintiff, CREW cannot establish standing. This case should be dismissed in its entirety due to this foundational flaw.

A. CREW's Attempts To Assert Informational Standing Fail.

Facing controlling precedent from this Circuit holding that it lacks standing to bring FECA cases, CREW attempts to convert *FEC v. Akins*, 524 U.S. 11 (1998)—which was decided long before the cases relied upon by AAN[2]—into a blanket endorsement of Article III standing for all who have filed an administrative complaint with the FEC. Opp'n 7–9. "But *Akins* does not open the door so wide." *Becker v. FEC*, 230 F.3d 381, 389 (1st Cir. 2000). *Akins* merely

[1] On several occasions, AAN has briefed its argument that AAN is not a "political committee" even accepting CREW's factual allegations as true. AAN incorporates by reference its pleadings in case Nos. 14-cv-1419 and 16-cv-2255.

[2] While *Common Cause v. FEC*, 108 F.3d 413 (D.C. Cir. 1997) (per curiam), technically precedes the Supreme Court's decision in *Akins*, the D.C. Circuit subsequently told CREW that it has "never overruled *Common Cause* and [has] applied its holding and rationale after *Akins*." *CREW v. FEC*, 475 F.3d 337, 341 n.2 (D.C. Cir. 2007) ("*Americans for Tax Reform II*").

"holds that a voter suffers cognizable injury under FECA when it is deprived of information that the Act requires be disclosed." *Wertheimer v. FEC*, 268 F.3d 1070, 1074 (D.C. Cir. 2001) (emphasis added); *see also Akins*, 524 U.S. at 26 (explaining that, "[i]n sum, respondents, as voters, have satisfied both prudential and constitutional standing requirements") (emphasis added).[3] CREW is not a "voter," *CREW v. FEC*, 401 F. Supp. 2d 115, 118 (D.D.C. 2005) ("*Americans for Tax Reform I*"), so CREW does not have informational standing.[4]

The D.C. Circuit rejected CREW's interpretation of *Akins* over ten years ago. Then, as now, CREW argued that it is enough under *Akins* to claim that "information would be helpful to [CREW] 'and others to whom they would communicate it.'" Br. for Appellant, *CREW v. FEC*, No. 06-cv-5014, 2006 WL 1908672, at *22–23 (D.C. Cir. June 29, 2006) (emphasis added). In CREW's view, *Akins* reduces "the injury-in-fact inquiry [so it] is not a particularly searching or demanding one where . . . a plaintiff is complaining about its 'inability to obtain information,' including 'campaign-related contributions and expenditures.'" *Id.* at *22 (citation omitted). Arguing that such information "would be useful information for the public in evaluating the role and influence" of a conservative non-profit organization, CREW claimed it had standing to seek it. *Id.* at 23 n.10.

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[3] *See also Akins*, 524 U.S. at 13-14 (explaining that the case asked whether "a group of voters[] have standing to challenge the Commission's determination in court") (emphasis added); *Nader v. FEC*, 725 F.3d 226, 229–30 (D.C. Cir. 2013) ("[I]n *Akins*, the Supreme Court held that a group of voters had standing to argue that the FECA entitled them to information[.]") (emphasis added); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549–50 (2016) (*Akins* "confirm[ed] that a group of voters' 'inability to obtain information' that Congress had decided to make public is a sufficient injury in fact to satisfy Article III") (emphasis added); *Vroom v. FEC*, 951 F. Supp. 2d 175, 178 (D.D.C. 2013) (citing *Akins* for the proposition that "voters may have standing to complain") (emphasis added). *Cf. Becker,* 230 F.3d at 390 (finding that third party asserting interests of voters "sweeps too broadly" to support standing).

[4] Elsewhere, CREW has brought litigation in partnership with a voter affected by the alleged FECA violation, underscoring that securing an appropriate plaintiff is not difficult. *See, e.g.*, *CREW v. FEC*, 316 F. Supp. 3d 349, 356 (D.D.C. 2018) (noting that case was brought by CREW and "a registered voter in Ohio").

The D.C. Circuit rejected CREW's argument then, and this Court should reject it now. According to the D.C. Circuit, CREW lacks standing to enforce the FECA because, "[u]nlike the plaintiffs in [*Akins*], who wanted certain information so that they could make an informed choice among candidates in future elections, CREW cannot vote; it has no members who vote; and because it is a § 501(c)(3) corporation under the Internal Revenue Code, it cannot engage in partisan political activity." *Americans for Tax Reform II*, 475 F.3d at 339.

CREW also tries to create Article III standing by generically claiming that it has prudential standing because it is operating within the "zone of interest" that FECA sought to regulate. Opp'n 10; *see also id.* at 6–7 n.3. But CREW cannot satisfy its burden by asserting "disclosure is required by law," *Nader*, 725 F.3d at 229–30, or by pointing to its "participati[on] in the antecedent administrative proceedings whence the litigation arises," *City of Orrville v. FERC*, 147 F.3d 979, 985 (D.C. Cir. 1998); *see also CREW v. FEC*, 799 F. Supp. 2d 78, 85 (D.D.C. 2011) ("*Peace Through Strength*") (similar). Instead, CREW must demonstrate that it is among the "certain kinds of plaintiffs [that Congress allowed] to sue under a particular statute." *Howard R.L. Cook & Tommy Shaw Found. ex rel. Black Emps. of Library of Cong., Inc. v. Billington*, 737 F.3d 767, 771 n.3 (D.C. Cir. 2013). This CREW cannot do.

The FECA "creates a . . . private cause of action only under limited circumstances," *Stockman v. FEC*, 138 F.3d 144, 153–54 (5th Cir. 1998), and only "at the behest of particular persons," *CREW v. FEC*, 164 F. Supp. 3d 113, 120 (D.D.C. 2015) (emphasis added), which does not include CREW. Specifically, "candidates, political parties, and voters are within the 'zone of interests'" protected by the FECA, *Buchanan v. FEC*, 112 F. Supp. 2d 58, 65 (D.D.C. 2000), as "all of these parties are participants in the political election and campaign process. CREW is not." *Americans for Tax Reform I*, 401 F. Supp. 2d at 120–21 (emphasis added). CREW's

reliance on cases with candidate plaintiffs, like *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008), and *Center for Individual Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012), is thus misplaced. Candidates may be within the zone of interests, but CREW is not.

B. CREW's Allegations Of Programmatic Injury Lack Specificity And Merit.

CREW's separate assertion that it has standing "because its 'discrete programmatic concerns are being directly and adversely affected by the challenged action,'" Opp'n 11 (quoting *Common Cause*, 108 F.3d at 417), also fails. As an initial matter, programmatic injury—at least as CREW defines it, *i.e.*, a disruption in its ability to obtain and disseminate information about candidates—is not an independent basis for standing separate from informational standing. *See CEI v. NHTSA*, 901 F.2d 107, 123 (D.C. Cir. 1990) (placing harm to programmatic activities under the umbrella of informational standing). But even assuming CREW could rest standing on some independent programmatic harm, it has not sufficiently demonstrated one here.

CREW contends that it can establish a programmatic injury sufficient to support standing through a bare and general allegation that its "activities [are] more difficult." Opp'n 12. But as one of CREW's cited cases makes clear, much more is required. CREW must "allege concrete drains on [an organization's] time and resources." *Spann v. Colonial Vill.*, 899 F.2d 24, 29 (D.C. Cir. 1990). "[S]imple inconvenience to 'abstract social interests'" is not enough. *American for Tax Reform I*, 401 F. Supp. 2d at 122. CREW must also show that it has expended "operational costs beyond those normally expended to carry out its advocacy mission" in light of the alleged injury, *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 12 (D.C. Cir. 2011) (internal quotation marks omitted); *see also Nat'l Fair Hous. All. v. Carson*, 330 F. Supp. 3d 14, 42 (D.D.C. 2018)

(noting same).[5] There are no such allegations in CREW's complaint, and thus CREW has failed to establish standing even under the artificially-low bar that it tries to set.[6]

Notably, CREW does not try to remedy the deficiency in its pleading. To "defeat a motion to dismiss, an organization must substantiate its injury 'by affidavit or other specific evidence that a challenged statute or policy frustrates the organization's goals and requires the organization to expend resources . . . [it] otherwise would spend in other ways.'" *Ctr. for Responsible Sci. v. Gottlieb*, 311 F. Supp. 3d 5, 9 (D.D.C. 2018) (citation omitted). CREW has offered no such evidentiary support here despite (unsuccessfully) attempting to do so previously. *See, e.g.*, Decl. Melanie Sloan, *CREW v. FEC*, No. 04-cv-2145 (D.D.C. filed May 11, 2005).

Even had CREW attempted to submit evidentiary support, CREW's reliance on an alleged programmatic injury would have been insufficient. As AAN explained, CREW made the same allegations previously and was denied standing. *See* Mem. 17 (citing *Americans for Tax Reform I*, 401 F. Supp. 2d at 122). This is particularly significant given that the "Supreme Court has noted that 'in many cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases.'" *Spann*, 899 F.2d

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[5] CREW also acknowledges that, to establish programmatic standing, it must separately demonstrate that AAN's failure to register and make the requisite disclosures as a political committee is "at loggerheads with [CREW's] stated mission." *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1429 (D.C. Cir. 1996) ("*NTEU*"). But CREW utterly fails to explain how publishing information about independent speech—which the Supreme Court has deemed non-corruptive, *see Citizens United v. FEC*, 558 U.S. 310, 356–61 (2010)—furthers CREW's mission of protecting the American "political system from corruption," Opp'n 12.

[6] CREW also cites *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010), in support of its standing arguments. Opp'n 12. But that case involved competitor standing, which is a legal theory that is irrelevant and inapplicable here. *See Common Cause*, 108 F.3d at 419 (noting that non-partisan organizations are not competitors with political actors). And in other cases that CREW cites, including *NTEU*, the court actually found that the organization lacked standing. CREW's reliance on *CREW v. FEC*, 243 F. Supp. 3d 91 (D.D.C. 2017) is also misplaced because CREW's standing was not specifically challenged in that case, *see id.* at 102 n.5, which included a voter as a co-plaintiff. The case thus highlights a significant flaw with this case, where there is no plaintiff voter affected by the allegations.

at 29. It is thus dispositive that CREW was previously denied standing in an opinion affirmed by the D.C. Circuit where CREW did not specify "any programmatic concerns that have been concretely and directly impacted adversely by the FEC's actions." *Americans for Tax Reform I*, 401 F. Supp. 2d at 122–23. The Court there explained that "[n]o particular plan is ever identified for the use of the information—for example, CREW never articulates a report that it intends to produce or a press conference that it wishes to hold. [CREW has only articulated a] setback to [its] . . . abstract social interests [involving public education and outreach]." *Id.* The same problem appears here. CREW continues to lack standing.

C. CREW's Injuries Are Not Redressable By This Court.

CREW also lacks standing because it cannot obtain relief from this Court. CREW's claim of redressability is essentially twofold: (1) that it is not "standing in the shoes" of the FEC and so is not restricted by any obstacles the FEC would face in pursuing AAN, and (2) even if CREW stands in the FEC's shoes, CREW is not limited to seeking untimely monetary relief due to the agency's administrative fines program. CREW is wrong on both counts.

First, this case is necessarily premised on CREW "standing in the shoes" of the FEC. When Congress enacted the FECA, it determined that the "FEC is the exclusive civil enforcement authority for violations of [that law]." *Peace Through Strength*, 799 F. Supp. 2d 78, 80 (D.D.C. 2011). This exclusive jurisdiction is "scrupulously respect[ed]," *In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538, 543 (D.C. Cir. 1980), because Congress needed to "delicately balance[the] scheme of procedures and remedies,"' *CREW*, 164 F. Supp. 3d at 120 (citation omitted), where core First Amendment freedoms are at stake, *see FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981).

CREW seeks to upset this carefully arranged system by claiming that, because the FEC did not pursue CREW's complaint after twice dismissing it, CREW is now an ordinary civil

plaintiff free from the FECA's safeguards and limits on the FEC's prosecutorial authority. But CREW's argument does "not measure up to the first-amendment-prompted arrangements Congress devised for FECA enforcement actions." *Galliano v. U.S. Postal Serv.*, 836 F.2d 1362, 1370 (D.C. Cir. 1988). Indeed, it would be truly alarming if CREW were allowed to deny AAN—through no fault of AAN's—the protections of a regime where "courts have 'meticulously scrutinized and substantially restricted' the Commission's actions,'" *AFL-CIO v. FEC*, 177 F. Supp. 2d 48, 63–64 (D.D.C. 2001), *aff'd*, 333 F.3d 168 (D.C. Cir. 2003), and place AAN in a new lawsuit entirely lacking these limits.

On a broader level, CREW has not tried to meet its burden to show that FECA "citizen suits . . . may pursue a wider variety of enforcement actions than governmental enforcement agencies may pursue." *United States v. Pac. Gas & Elec.*, No. C 09-4503 SI, 2011 WL 227662, at *7 (N.D. Cal. Jan. 24, 2011). And CREW could not meet that burden were it to try. The FECA's "bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60–61 (1987); *see also Sierra Club v. Whitman*, 268 F.3d 898, 904–05 (9th Cir. 2001) (same). CREW cannot supplant the restrictions applicable to an FEC enforcement action and substitute in their place some broader unbounded authority to pursue alleged FECA violations.

Indeed, it is noteworthy that, several times in this litigation, CREW has characterized the citizen-suit provision that ostensibly authorizes this suit, 52 U.S.C. § 30109(a)(8)(C), as "the FECA's private attorney general provision." *See, e.g.*, CREW's Reply Br. 45 n.23, *CREW v. FEC*, No. 14-cv-1419 (D.D.C. filed Apr. 22, 2016); *see also* Opp'n 38. That terminology "suggest[s] that Congress intended citizens to step into the shoes of government agencies that

failed to act," *Student Pub. Interest Research Grp. of N.J., Inc. v. AT & T Bell Labs.*, 617 F. Supp. 1190, 1199 (D.N.J. 1985), rather than to permit a private party to file a new lawsuit unbound by the rules applicable to the government in the first instance.

Second, CREW's claims are not redressable because it is foreclosed from seeking the non-monetary relief it desires. CREW tries to avoid application of the mandatory administrative fines program that precludes the Commission (and thus, CREW) from seeking non-monetary relief for political committee reporting violations by stating that a political committee's obligation to file a registration statement—found in 52 U.S.C. § 30103—is not subject to the administrative fines program. What CREW fails to note is that the registration statement is a document that, *inter alia*, requires AAN to list ministerial items such as its mailing address. It does not require the reporting of contributions and expenditures that CREW seeks. Those requirements—found in 52 U.S.C. § 30104—are squarely within the program's scope.

CREW also attempts to avoid application of the administrative fines program by trying to distinguish between violations of 52 U.S.C. § 30104(a) and (b), claiming that one subsection is covered by the administrative fines program and the other is not. The reality, however, is that they are both parts of the same reporting statute, with subsection (a) stating who must file the report and subsection (b) specifying what the report must contain. *See* 52 U.S.C. § 30104(b) (explaining what "[e]ach report under this section shall disclose"). In other words, CREW attempts to make a distinction where there is none. CREW's claims are not redressable, and this case should be dismissed in its entirety for this additional reason.

II. CREW FAILS TO DEMONSTRATE THAT THIS CASE SURVIVES *CHGO II*.

As AAN has explained, *see* Mem. 20–22, the D.C. Circuit eliminated the foundation for this lawsuit earlier this year when it held that a citizen suit under 52 U.S.C. § 30109(a)(8)(C) may not be maintained where the FEC dismisses a complaint in an exercise of prosecutorial

discretion, even where, as here, the FEC paired its exercise of discretion with substantive legal reasoning. *CREW v. FEC*, 892 F.3d 434, 441–42 (D.C. Cir. 2018) ("*CHGO II*"). CREW resists application of that binding precedent, but its arguments are unpersuasive.

First, CREW contends the FEC is not entitled to the presumption of unreviewability because "a single sentence" invoking prosecutorial discretion "fails to meet the standard of reasoned decision making" and cannot be the agency's "real reason." Opp'n 18–19 (emphasis omitted). The D.C. Circuit, however, did not limit its decision to cases with a lengthy discussion of prosecutorial discretion. Nor did it permit a district court to look behind an agency's articulated reasons to determine whether to subject a decision to review. So long as the FEC's decision includes an exercise of prosecutorial discretion, it is not "based entirely on its interpretation of the statute" and is not reviewable "for abuse of discretion, or otherwise." *CHGO II*, 892 F.3d at 441 & n.11. Here, therefore, the FEC's clear statement that the dismissal was made due to the law "*and* in exercise of our prosecutorial discretion," precludes this Court's review. Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen 24, MUR No. 6589 (July 30, 2014); *see also id.* at 23 n.137.

Second, CREW mischaracterizes *CHGO II* in contending that it does not bar judicial review where an agency articulates "erroneous conclusions of law" as a reason for invoking its prosecutorial discretion. Opp'n 17, 20–21. CREW's view was espoused by the dissent—and expressly rejected by the majority. *Compare CHGO II*, 892 F.3d at 444 (Pillard, J., dissenting) (arguing that an FEC dismissal should be reviewable if it "was based on legal error"), with *id.* at 442 (finding that review of any legal reason furnished by the FEC would "be mistaken" if the FEC also exercised prosecutorial discretion); *accord id.* at 441 n.11. CREW may disagree with

the D.C. Circuit's opinion, *see* Opp'n 17 n.8 (asserting *CHGO II* "conflicts with earlier precedent"), but that does not make the decision any less binding on this Court.

CREW's view also conflicts with Supreme Court precedent. In *Heckler v. Chaney*, 470 U.S. 821 (1985), the Supreme Court dismissed as "unreviewable" an FDA decision that rested on a legal conclusion and an exercise of enforcement discretion. *See id.* at 824–25 (describing decision that rejected a jurisdictional argument and stated that "[w]ere FDA clearly to have jurisdiction . . . we would . . . decline to exercise it"). Two years later, the Supreme Court reaffirmed this principle, describing as "misguided" the argument "that if the agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable":

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

ICC v. Bhd. of Locomotive Eng'rs, 482 U.S. 270, 282–83 (1987); *accord United States v. Fokker Servs B.V.*, 818 F.3d 733, 741 (D.C. Cir. 2016) ("The decision whether to prosecute turns on factors such as the strength of the case" (quotation marks omitted)).

CREW sidesteps or ignores these precedents, instead relying on two non-binding decisions about a different statute and different type of agency decision. Both decisions CREW cites involve the Trump Administration's rescission of the Deferred Action for Childhood Arrivals program. Under D.C. Circuit precedent "an agency's adoption of a general enforcement policy is subject to review" even though a "single-shot nonenforcement decision" (like the one at issue here) is not. *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998) (citation omitted); *accord Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994); *CHGO II*, 892 F.3d at 440 n.9. The cases are thus inapposite here, where D.C. Circuit

precedent squarely rejects CREW's argument that "the single-shot nonenforcement decision [in this case] is expressly made reviewable by . . . 52 U.S.C. § 30109(a)(8)(C)." Opp'n 21 n.11. The D.C. Circuit found otherwise: "Nothing in the substantive statute overcomes the presumption against judicial review." *CHGO II*, 892 F.3d at 439.

Third, CREW argues this Court can review the FEC's exercise of prosecutorial discretion because CREW thinks the FEC has "abdicated" its enforcement authority in recent years by not finding that "a single group . . . should have registered as a political committee." Opp'n 22. According to CREW, this established a "general enforcement policy" and so is reviewable under the cases cited above. But neither the controlling Commissioners in this case, nor the full FEC at any other time, has purported to adopt a policy of nonenforcement of the issues raised by CREW. *See also CHGO II*, 892 F.3d at 440 n.9 ("[CREW's] own submissions show that the FEC routinely enforces the election law violations alleged in CREW's administrative complaint."). That is dispositive. An agency adopts a "general enforcement policy" where it has "expressed the policy as a formal regulation after the full rulemaking process," *Crowley*, 37 F.3d at 676 (citing *Nat'l Wildlife Fed'n v. EPA*, 980 F.2d 765 (D.C. Cir. 1992)), "or has otherwise articulated it in some form of universal policy statement," *id.* (citing *Edison Elec. Inst. v. EPA*, 996 F.2d 326 (D.C. Cir. 1993)). "[A]n agency's decision to decline enforcement in the context of an individual case" remains unreviewable. *Id.* CREW's complaint should be dismissed.

III. CREW FAILS TO DEMONSTRATE THAT ITS POST-JUNE-2011 CLAIMS ARE PROPERLY BEFORE THIS COURT.

Even if CREW could demonstrate that it has standing and that its claims are judicially reviewable, CREW cannot save its post-June-2011 claims because (A) the Court lacks subject matter jurisdiction to hear claims beyond those alleged in the "original complaint" before the FEC, which was limited to AAN's activities between July 23, 2009 and June 30, 2011, and

(B) CREW has failed to state a claim for any violation after June 2011, as it has not alleged facts to support such claims, instead alleging in conclusory fashion that any violation is ongoing.

A. This Court Lacks Subject Matter Jurisdiction Over CREW's Post-June-2011 Claims Because They Were Not Alleged In The "Original Complaint."

It is important to highlight what CREW does not dispute with respect to its post-June-2011 claims. CREW does not dispute that it was required to exhaust its administrative remedies before filing this suit. *See, e.g.*, Opp'n 33. CREW also does not dispute that it has only exhausted the "violation involved in [its] original complaint." *See id.* at 32 (quoting 52 U.S.C. § 30109(a)(8)(C)).[7] And CREW does not dispute that a failure to exhaust—*i.e.*, a failure to include alleged violations in CREW's "original complaint"—would deprive this Court of subject matter jurisdiction over them. *See id.* at 31–36.

CREW's only argument, therefore, is that its 2012 "original complaint" alleges continuing violations of the FECA from July 23, 2009 through the present. *See* Opp'n 32. CREW's argument is contradicted by the backward-looking language of its "original complaint," which alleged that "AAN was a political committee between July 23, 2009 through June 30, 2011" and "failed" to file reports during that period. *See* Mem. 24–25. Indeed, the "original complaint" is devoid of any express allegations of an ongoing or continuing FECA violation. *See id.* Thus, as this Court recognized, "the period in question" is "mid-2009 through mid-2011." *CREW v. FEC*, 209 F. Supp. 3d 77, 83 (D.D.C. 2016) ("*CREW I*") (emphasis added).

CREW now contends that its "original complaint" "necessarily stated a continuing violation" without using those words. Opp'n 33 (emphasis added). According to CREW, if AAN was a "political committee" between July 23, 2009 through June 30, 2011, it must still be

[7] CREW claims that AAN "strips" the phrase "original complaint" of "context." Opp'n 32. AAN instead described the process for bringing an FEC complaint and quoted Section 30109(a)(8)(C) in full. *See* Mem. 22–23.

one today because AAN never filed papers to terminate that status (which no agency or Court has ever found AAN to hold). *See id.* at 34 (citing 52 U.S.C. § 30103(d)). CREW's attempt to expand the scope of its "original complaint" fails for at least two reasons.

First, CREW is wrong that alleging that an entity was a political committee at a particular time period "necessarily" alleges that it remains one. As this Court has already recognized—at CREW's urging—"an organization's 'major purpose'" with respect to qualifying as a political committee "can change." *CREW I*, 209 F. Supp. 3d at 94; *see also* Mem. 24–25. Thus, even if CREW were correct (it is not) that AAN should have registered as a political committee in 2010, that does not mean that AAN remains one today. Had it registered in 2010, AAN could have filed termination papers based on a change in its "major purpose." Indeed, "the text of FECA does not clearly establish that entities have a continuous obligation to report information." *CREW v. FEC*, 236 F. Supp. 3d 378, 393 (D.D.C. 2017) ("*CHGO I*"); *see also id.* at 392 ("[A]lthough FECA does require periodic filing of information, no section . . . appears to impose a continuous reporting requirement[.]").[8] And CREW can "cite to no precedent suggesting that the [FECA's] reporting requirements are continuous." *Id.* at 393.

Second, although CREW contends it can bring this suit because it has exhausted its claims, the FEC never considered whether AAN was a political committee after June 2011. The purpose of exhaustion is to provide the expert agency an opportunity to review a claim and develop a factual record prior to litigation. *See McCarthy v. Madigan*, 503 U.S. 140, 145 (1992) (holding exhaustion "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency"). Here, the FEC expressly stated that it addressed only AAN's

[8] In particular, the FECA requires "political committees" to file "quarterly," "pre-election," "post-general election," bi-annual, and/or "monthly" reports. *See* 52 U.S.C. § 30104(a)(4). Each of these obligations is tied to a specific point in time; none is "continuing."

activities from July 23, 2009 to June 30, 2011, *see* Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen 2, 4 n.24, 5 n.28, 18 n.109, 19–20 MUR No. 6589 (July 30, 2014); Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman 3, 17, MUR No. 6589 (Oct. 19, 2016), consistent with the time period alleged in CREW's "original complaint." This Court thus lacks subject matter jurisdiction over CREW's new post-June-2011 claims.

B. CREW Also Failed To State A Claim Of Any Post-June-2011 Violations.

CREW does not dispute that it failed to allege a single fact in either its "original complaint" or its Complaint in this Court to support an allegation that AAN's major purpose after June 2011 required it to register as a political committee. *See* Opp'n 34. It instead rests solely on the conclusory allegations that AAN's major purpose "continues to be to nominate or elect federal candidates," and that its organizational purpose "continues to be to nominate or elect federal candidates." *See* Compl. ¶¶ 60–64. This conclusory allegation, unbacked by any factual support, is insufficient to state a claim for relief. For this additional reason, then, CREW's post-June-2011 claims should be dismissed.

C. CREW's Contention That It Is Entitled To Post-June-2011 Discovery Is Irrelevant And Meritless.

CREW spends much of its response arguing that discovery should not be limited to pre-July 2011 conduct even if its case is restricted to pre-July 2011 allegations. *See* Opp'n 34–36. This argument is premature, but also baseless. CREW cannot use discovery in this case to fish for new FECA allegations occurring after the violations it alleged in its "original complaint." Indeed, having spent much of its opposition arguing that it is not "stepping in the shoes" of the FEC and so should not be subject to restrictions on the FEC's enforcement authority, *see, e.g.*, Opp'n 13, 38, CREW changes course when discovery is concerned to argue that it should be

given the FEC's authority to conduct an investigation into an alleged violation even if that investigation "may, and likely will, turn up additional facts not presented to the agency" in the original complaint, *id.* at 35. But CREW confuses two very different proceedings—the FEC's investigation at the agency, which is unbounded by the "original complaint" restriction of the citizen suit statute, and a citizen suit, which is so limited. The scope of any discovery in this case will be governed by Federal Rule of Civil Procedure 26, and so will need to be relevant to the July 23, 2009 through June 30, 2011 time period alleged in the "original complaint."

IV. CREW FAILS TO DEMONSTRATE THAT ITS PRE-JULY-2011 CLAIMS ARE TIMELY.

Because this case is based on allegations regarding AAN's activities during the 2010 election cycle eight years ago, it should also be dismissed as time barred under the five-year statute of limitations of 28 U.S.C. § 2462. CREW argues that the five-year statute of limitations either does not apply or runs until 2023. Its arguments are meritless.

A. Section 2462 Bars Actions Brought By Private Litigants.

Notwithstanding overwhelming precedent to the contrary, CREW first argues that the five-year statute of limitations set forth in 28 U.S.C. § 2462 does not apply to actions brought by private litigants. Opp'n 25. CREW is mistaken. Private parties are routinely time barred by Section 2462. *See, e.g.*, *Sierra Club v. Okla. Gas & Elec. Co.*, 816 F.3d 666, 675 (10th Cir. 2016) ("§ 2462 bars Sierra Club's suit for civil penalties"); *United States v. Luminant Generation Co.*, 905 F.3d 874, 885 (5th Cir. 2018) ("the concurrent-remedies doctrine may properly be invoked against Sierra Club, a private party acting on its own behalf"); *Trawinski v. United Techs.*, 313 F.3d 1295, 1298 (11th Cir. 2002) ("Section 2462 by its text is generally applicable . . . and the Trawinskis' citizen suit . . . is precisely this sort of action."). And it must, for CREW's interpretation would mean there is no statute of limitations governing its claims.

Neither of the cases CREW cites is to the contrary. In *Erie Basin Metal Products, Inc. v. United States*, 150 F. Supp. 561 (Ct. Cl. 1957), the Court of Claims held that Section 2462 barred the United States from asserting untimely claims. *See id.* at 566. The court then observed that Section 2462 should not bar the United States from asserting a defense based on the same conduct because the statute is expressly written so that its "limitation . . . applies only to actions instituted by the Government." *See id.* (emphasis added). The court thus distinguished between claims and defenses under a straightforward reading of the statute. It did not suggest that claims which, as here, are pursued via a citizen suit somehow avoid application of Section 2462.

The other case CREW cites is no more helpful. In *FEC v. National Right to Work Committee, Inc.*, 916 F. Supp. 10 (D.D.C. 1996), the FEC argued that Section 2462 should not bar actions to enforce the FECA. The district court rejected that argument, holding that the statute applies "to all governmental actions for the assessment of 'civil penalties'" or to obtain "equitable relief," including FECA actions. *Id.* at 13–14. The court did not go further, as CREW would like, and find that the statute applies only to FECA claims filed by the FEC, and not to the same claims pursued in a citizen suit. This case is governed by Section 2462 and is untimely.

B. Section 2462 Applies Here Because CREW Seeks To Impose A "Penalty."

CREW also unsuccessfully tries to avoid the application of Section 2462 by arguing that it does not seek to impose a "penalty." Opp'n 30–31. CREW concedes that this case bears one of two "hallmarks" of a Section 2462 "penalty" because it involves an alleged violation "committed against the United States rather than an aggrieved individual." *See Kokesh v. SEC*, 137 S. Ct. 1635, 1643–45 (2017). But CREW argues that it does not bear the other hallmark—specifically, a remedy that is "punitive" (*i.e.*, designed to deter future conduct) rather than "compensatory" in nature—because, according to CREW, enforcing the FECA's reporting requirements will have only an "incidental effect" on deterring future violations. Opp'n 30.

CREW's argument contradicts the law and its own filings. Courts have upheld the constitutionality of FECA's reporting requirements in part because their enforcement "deters and helps expose violations of other campaign finance restrictions." *SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010) (en banc); *accord McCutcheon v. FEC*, 572 U.S. 185, 223 (2014) (plurality). And CREW has repeatedly lauded the ability of enforcement to deter. In its "original complaint," CREW claimed that it is pursuing this action because of its interest in "deterring future violations of campaign finance law." *See* Dkt. No. 24-2 ¶ 3. CREW has since repeatedly emphasized that goal to this Court. *See, e.g.*, Compl. ¶ 12 ("CREW publicizes the role of these individuals and entities in the electoral process and the extent to which they have violated federal campaign finance laws."); Compl. ¶ 8, No. 14-cv-1419 (filed Aug. 20, 2014) ("Publicizing violations of the FECA . . . serves CREW's mission of . . . deterring future violations"); Compl. ¶ 12, No. 16-cv-2255 (filed Nov. 11, 2016) (same); Am. Compl. ¶ 12, No. 16-cv-2255 (filed Apr. 14, 2017) (same). This Court should hold CREW to its prior representations, consistent with precedent, that actions like this have a deterrent effect. *Cf. New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). And because deterrence is punitive, CREW's claims are governed (and barred) by the five-year statute of limitation period set by Section 2462. *See Kokesh*, 137 S. Ct. at 1643.

C. Section 2462 Also Applies Here Under The Concurrent-Remedies Doctrine.

CREW also tries to avoid application of Section 2462 by claiming that the concurrent-remedies doctrine does not apply. As AAN explained previously, this doctrine holds CREW to the five-year statute of limitations even if this case does not involve a "penalty." *See* Mem. 30–32. CREW's attempt to avoid this doctrine, however, relies entirely on one side of an irrelevant split of authority under which some courts have created an exception to the concurrent-remedies doctrine to allow the Government to seek equitable relief in its own name and in its capacity as a

sovereign. However, as AAN previously explained, this split of authority is beside the point. Every court that has recognized the exception has also held that the exception does not apply to a citizen suit like CREW's. *See, e.g.*, *Nat'l Parks & Conservation Ass'n, Inc. v. Tenn. Valley Auth.*, 502 F.3d 1316, 1327 (11th Cir. 2007) (holding "private attorneys general" barred by § 2462); *Luminant Generation*, 905 F.3d at 885–87 (holding private litigant time barred while allowing government to proceed); *Sierra Club*, 816 F.3d at 676 ("Private plaintiffs . . . are not eligible for the government's exemption."). CREW has not and cannot cite a single case—in this Circuit or elsewhere—that reaches a contrary result. CREW is thus time-barred by Section 2462 regardless of the characterization of its claims.

D. CREW's Pre-July-2011 Claims Accrued Outside The Limitations Period.

Finally, CREW argues that its claims about the 2010 election cycle are not untimely. *See* Opp'n 25–29. It is wrong. Because of the statute of limitations, "an action, suit or proceeding to assess or impose a civil penalty must be commenced within five years of the date of the violation giving rise to the penalty." *3M Co. v. Browner*, 17 F.3d 1453, 1462 (D.C. Cir. 1994). It has now been over eight years since the 2010 election, and over seven years since the July 23, 2009 to June 30, 2011 time period alleged in CREW's "original complaint" lapsed.

CREW tries to resuscitate its stale claims with two arguments: (1) that the alleged violations should be considered continuing violations, and (2) that the statute of limitations should not be found to commence until April 29, 2018—the date that CREW believes it was authorized to file this citizen suit under the statute. Neither argument saves CREW's claims.

First, and as detailed above, the continuing-violation doctrine, a narrow exception to "the general rule of claim accrual," does not apply here because there is no "'clear directive' from the Congress" that creates a continuing obligation. *See Earle v. D.C.*, 707 F.3d 299, 306 n.9 (D.C. Cir. 2012) (brackets omitted). "[T]he text of FECA does not clearly establish that entities have a

continuous obligation to report information." *CHGO I*, 236 F. Supp. 3d at 393. No case cited by CREW establishes a continuous reporting obligation under FECA.[9] The cases CREW cites about other statutes are irrelevant to the "statutory construction" of the FECA. *See Earle*, 707 F.3d at 307. And CREW itself has conceded that an organization's purpose can change over time, meaning that the mere fact that an entity is a "political committee" at one point in time does not mean that it will continue to be.

CREW's reliance on the continuing-violation doctrine is also misplaced because CREW has not identified any facts supporting any alleged violation within the statute of limitations period. CREW instead pleads facts about AAN's alleged activities from July 23, 2009 to June 30, 2011, and then conclusorily seeks to extend the alleged violation through "the present" because AAN did not file paperwork to terminate its alleged political committee status. *See* Compl. ¶¶ 1, 90. But "the 'mere failure to right a wrong . . . cannot be a continuing wrong . . . for that is the purpose of any lawsuit and the exception would obliterate the rule.'" *See Earle*, 707 F.3d at 306 (citation omitted); *see also id.* at 308 (refusing to find continuing violation where appellant "failed to allege a 'second' violation" in amended complaint); *AKM LLC dba Volks Constructors v. Sec'y of Labor*, 675 F.3d 752, 757 (D.C. Cir. 2012) (similar). In other words, even if AAN were a political committee from July 23, 2009 through June 30, 2011, the continuing-violation doctrine does not let CREW revive that stale claim by simply pleading that AAN did not take action to terminate its alleged political committee status.

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[9] Among the cases CREW erroneously cites is *SpeechNow*. *See* Opp'n 26–27. There, the D.C. Circuit quoted a series of questions certified by a district court, two of which used the adjectival phrase "continuous reporting" to describe certain disclosure obligations under the FECA. 599 F.3d at 691. The district court coined that term apparently to distinguish "periodic reports" from one-time disclosures. *See Speechnow.org v. FEC*, No. 08-cv-0248 (JR), 2009 WL 3101036, at *9 (D.D.C. Sept. 28, 2009). Contrary to CREW's suggestion, the D.C. Circuit did not embrace the term "continuous" anywhere in its own opinion. Nor did the D.C. Circuit consider or address the continuing-violation doctrine for purposes of tolling a statute of limitations.

Second, there is no merit to CREW's contention that the statute of limitations on alleging FECA violations during the 2010 election cycle did not begin until April 29, 2018. Under the law, "the five-year clock begins to tick . . . when a defendant's . . . conduct occurs." *Gabelli v. SEC*, 568 U.S. 442, 448 (2013). CREW concedes that the alleged violations could have been pursued by "the FEC" in 2010. Opp'n 28–29. And CREW must admit that it could have taken action to preserve the timeliness of the 2010 claims by quickly filing an administrative complaint, and then seeking action if the FEC failed to act within 120 days. *See* 52 U.S.C. § 30109(a)(8)(A). Instead, CREW waited until June 2012 to file its administrative complaint, and did not complain during the more than two years that its complaint was pending.

CREW thus asks for a special rule to be created for this context that would begin the statute of limitations period on the date that "CREW could file suit and obtain relief." Opp'n 28 (quotation marks omitted). But statutes of limitations are not designed to protect plaintiffs; they are concerned with doing justice to the defendant. "Statutes of limitations . . . reflect the judgment that there comes a time when <u>the potential defendant</u> 'ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations.'" *3M Co.*, 17 F.3d at 1457 (emphasis added) (citation omitted); *accord Gabelli*, 568 U.S. at 449 ("even wrongdoers are entitled to assume that their sins may be forgotten" (quoting *Wilson v. Garcia*, 471 U.S. 261, 271 (1985)). "In a country where not even treason can be prosecuted, after a lapse of three years, it could scarcely be supposed, that an individual would remain forever liable to a pecuniary forfeiture." *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805) (Marshall, C.J.). CREW's theory that it or the FEC would be allowed to prosecute, <u>until 2023</u>, alleged violations from the 2010 election cycle in spite of a five-year statute of limitations, is "utterly repugnant to the genius of our laws." *See Gabelli*, 568 U.S. at 452 (quoting *Adams*, 2 Cranch at 342).

CREW's request to extend the statute of limitations is also inconsistent with the nature of its cause of action. Section 30109(a)(8)(C) is a "'citizen-suit' provision, which entitles a private entity to bring an enforcement action when the Commission has declined to do so." *See CHGO II*, 892 F.3d at 440. Courts have consistently held that citizen suits "filed by private parties where the government has declined to act" must be brought within five years from "the date that a violation first occurs." *Nat'l Parks*, 502 F.3d at 1322, 1327 (citing *3M Co.*, 17 F.3d at 1462); *accord Sierra Club*, 816 F.3d at 674–76; *Trawinski*, 313 F.3d at 1298. And that must be the standard, or the government would be able to cure an expired statute of limitations by sending the matter to a private party to pursue in a citizen suit. Thus, regardless of whether the suit is brought by a private party or the government, "lengthy delays upset 'settled expectations' to the same extent," and the five-year statute of limitations applies. *3M Co.*, 17 F.3d at 1457. CREW's claims are time-barred.

V. CREW FAILS TO DEMONSTRATE THAT SECTION 30109(A)(8)(C) AND ITS APPLICATION HERE ARE CONSTITUTIONAL.

A. Section 30109(a)(8)(C) Violates Article II.

CREW gives short shrift to AAN's constitutional arguments, attempting to dismiss as "frivolous" a serious question that the Supreme Court has expressly reserved: whether citizen "suits violate Article II, in particular the Appointments Clause of § 2 and the 'take Care' Clause of § 3." *See Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000).[10]

With respect to the Take Care Clause, CREW's primary contention is that the prosecutorial discretion which stems from the President's constitutional duty to "take Care that the Laws be faithfully executed" applies only to criminal laws. *See* Opp'n 37. But this argument

[10] As AAN explained in its memorandum, the precise question reserved in *Stevens* involved a specific class of citizen suits, namely *qui tam* actions. The constitutional concerns presented by the FECA's citizen suit provision are even more acute. *See* Mem. 36–37.

is directly contrary to binding authority. "Although today 'prosecutorial' usually refers to criminal proceedings, it was not always so." *CHGO II*, 892 F.3d at 438. In the early days of our country, it was understood that the Executive Branch was responsible for "prosecuting" civil laws. *See* The Judiciary Act of 1789, § 35, 1 Stat. 73, 92 (establishing U.S. attorneys, "whose duty it shall be to prosecute . . . all civil actions in which the United States shall be concerned"). The same remains true in our modern administrative state. That is why, "[a]ccording to the Administrative Procedure Act, agency attorneys who bring administrative complaints, including complaints for civil penalties, are performing 'prosecuting functions.'" *3M Co.*, 17 F.3d at 1456 (quoting 5 U.S.C. § 554(d)). Civil actions to enforce the FECA are no different. They are "prosecutorial," *CHGO II*, 892 F.3d at 438, and Section 30109(a)(8)(C) cannot constitutionally transfer that Executive Branch authority to a private party.

With respect to the Appointments Clause, CREW incorrectly claims that the assignment of enforcement authority to individuals who are not "Officers of the United States" is not a violation of the Clause. *See* Opp'n 37. As AAN has explained, *see* Mem 37–39, that assignment was the precise Appointments Clause violation the Supreme Court recognized in *Buckley* and *Printz*. In both cases, the Supreme Court held unlawful Congress's decision to assign Executive Branch enforcement responsibility to individuals who were not in the Executive Branch and appointed pursuant to the strictures of the Appointments Clause. The Appointments Clause was designed, in part, to prevent Congress from having its laws enforced "without the President." *Printz v. United States*, 521 U.S. 898, 923 (1997); *see also Buckley v. Valeo*, 424 U.S. 1, 138–39 (1976). CREW cannot bypass that restriction, nor can it avoid *Printz* by characterizing it as a case about federal commandeering. *See* Opp'n 37 n.22. For while federalism was one basis for the Court's decision; separation of powers was another. *See Printz*, 521 U.S. at 918–25; *see also*

id. at 922 ("federal control of state officers . . . would also have an effect upon . . . the separation and equilibration of powers between the three branches of the Federal Government itself").

CREW is also wrong in contending that AAN's arguments "would doom a wide range of antitrust, securities, and civil rights cases brought by private plaintiffs." Opp'n 38. This case is about Section 30109(A)(8)(C), a unique statute distinguishable from other citizen-suit and private attorney general provisions. Unlike, for example, the *qui tam* provision of the False Claims Act, 31 U.S.C. § 3720(c), the FECA lacks <u>any</u> statutory mechanisms whereby the Executive Branch can assert control over the litigation. *See* Mem. 36–37. Similarly, the Fair Housing Act, at issue in the *Spann* case cited by CREW, *see* 899 F.2d at 24, has a private attorney general provision that contemplates intervention by "the Attorney General." *See* 42 U.S.C. § 3613(e). Other citizen-suit provisions similarly contemplate federal intervention or control. *See, e.g.*, 16 U.S.C. § 1540(g) (Endangered Species Act); 33 U.S.C. § 1365 (Clean Water Act); 42 U.S.C. §§ 2000h-2 (Civil Rights Act), 6972 (Resource Conservation and Recovery Act), 7604 (Clean Air Act). Section 30109(A)(8)(C) affords no similar Executive Branch participation, and so is uniquely flawed under the Constitution.

B. The Application Of Section 30109(a)(8)(C) Violates Due Process.

CREW fares no better in avoiding the due process problems presented by its case. First, CREW argues that there are no due process concerns because the "major purpose" test was articulated in *Buckley*. Not so. The issue here involves the application of the major purpose test in light of fundamental changes in the law since *Buckley*. *See, e.g.*, Bipartisan Campaign Reform Act of 2002 (regulating "electioneering communications" for the first time). And contrary to CREW's argument, <u>the FEC</u>—and not merely a "minority" of commissioners—has found that there was "serious doubt" during the 2010 election cycle about whether electioneering communications were indicative of a major purpose to nominate or elect candidates. Mem. 41

(collecting authority); *see also FEC v. NRSC*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) (recognizing "agency's" views in a case decided by the vote of three controlling commissioners). Another court in this District has recently recognized the due process problem created when "the Commission ha[s] to consider for the first time how and when a corporation might still break the law" due to developments in the law. *Campaign Legal Ctr. v. FEC*, 312 F. Supp. 3d 153, 162 (D.D.C. 2018). Proceeding with enforcement in such a situation "would not only create due process concerns but would risk chilling vitally important political speech that is strictly protected by the First Amendment." *Id.* at 165. That same problem exists here.

Moreover, "[t]here can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964); *see also Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 622 (7th Cir. 2014) (observing that there "are indeed Due Process limits on the retroactive application of a judicial decision"). CREW agrees that judicial decisions can, in fact, "raise fair notice concerns," and the authority upon which it relies confirms that that fair notice principles extend to civil enforcement cases. *See FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 250 (3d Cir. 2015). Application of a new standard adopted years after the challenged conduct in this enforcement context would thus violate the due process clause.

CONCLUSION

For the reasons stated herein, in AAN's Memorandum of Points and Authorities, and articulated by AAN before the Commission and this Court in CREW's related actions, the Court should GRANT the Motion and DISMISS CREW's Complaint with prejudice.

Respectfully submitted,

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Dated: December 21, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2018, a true and correct copy of the foregoing Reply was served electronically on all registered counsel of record via ECF and are available for viewing and downloading from the ECF system.

s/ Claire J. Evans
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