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)

PLAINTIFF CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON'S MOTION FOR LEAVE TO FILE SURREPLY IN OPPOSITION TO MOTION TO STAY

Plaintiff Citizens for Responsibility and Ethics in Washington ("CREW") respectfully seeks leave of the Court to file the attached Surreply to address American Action Network's ("AAN") portrayal of a decision, not raised in its initial motion, that it asserts is dispositive as to the instant motion to stay. "The decision to grant or deny leave to file a sur-reply is committed to the sound discretion of the Court." *Lu v. Lezell*, 45 F. Supp. 3d 86, 91 (D.D.C. 2014). Granting leave to file a surreply is appropriate when a reply leaves "a party . . . 'unable to contest matters presented to the court for the first time.'" *Ben-Kotel v. Howard Univ.*, 319 F.3d 532, 536 (D.C. Cir. 2003) (citation omitted). AAN's reply rests entirely on its discussion of case law cited for the first time in its reply—discussion of which CREW is unable to contest absent a surreply.

Pursuant to Local Civil Rule 7(m), counsel for CREW conferred with counsel for AAN and AAN opposes CREW's request.

Dated: July 12, 2018

Respectfully submitted,

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For the first time in its reply, American Action Network ("AAN") asserts that that a "new D.C. Circuit decision undermines essentially all of CREW's arguments against a stay." AAN Reply in Further Support of its Mot. for a Stay at 1, ECF No. 13 [hereinafter, "AAN Reply"]. AAN asserts that a divided, nonfinal decision of the D.C. Circuit "strikes at the foundation of this lawsuit" because, AAN says, it found "[n]othing in the [Federal Election Campaign Act] overcomes the presumption against judicial review." *Id* at 2. (quoting *CREW v. FEC*, 892 F.3d 435, 439 (D.C. Cir. 2018) ("*CREW/CHGO*")). AAN, however, fails to accurately characterize that decision and its impact here. Rather than being dispositive, it has little import to the issues presently before this Court.

The nonfinal decision on which AAN hangs its entire reply found "unreviewable" the Federal Election Commission's ("FEC") dismissal of CREW's complaint against a different organization, the Commission on Hope, Growth and Opportunity ("CHGO"). *CREW/CHGO*, 892 F.3d at 437 & n.2. According to the panel decision, the FEC there did not reach the legal issues underpinning CREW's complaint against CHGO, but rather dismissed solely on the basis of "the agency's prerogative not to proceed with enforcement." *Id.* at 438. Specifically, the

controlling commissioners issued a statement of reasons that pointed to prudential concerns with enforcement, specifically the possible expiration of the statute of limitations and concerns the respondent was "defunct." *Id.* (internal quotation marks omitted). The divided panel found that a dismissal based on those concerns—and only those concerns—rested "squarely on the grounds of prosecutorial discretion" and that in such a case "[n]othing in the substantive statute overcomes the presumption against judicial review." *Id.* at 439 (finding *Heckler v. Chaney*, 470 U.S. 821 (1984) "controls this case").[1]

AAN entirely fails, however, to show that *CREW/CHGO* will aid its appeal of this Court's judgment that the FEC's dismissal of action against it was contrary to law, never mind show it is likely to succeed. The statements of reasons issued by the controlling commissioners with respect to AAN could not be further from the facts central to the holding in *CREW/CHGO*. The Court is already familiar with those statements and found that they were based on the commissioners' interpretation of *Buckley v. Valeo*, 424 U.S. 1, 79 (1976), and the First Amendment, not on prosecutorial discretion as was the case in CHGO. *See CREW v. FEC*, 299 F. Supp. 3d 83, 90–91 (D.D.C. 2018) ("*CREW II*"); *CREW v. FEC*, 209 F. Supp. 3d 77, 84 (D.D.C. 2016) ("*CREW I*"). Indeed, the second statement of reasons—the one with which the FEC failed to conform and which gave rise to this suit—*never* mentions prosecutorial discretion or agency resources, nor does it cite *Heckler*. *See* Statement of Reasons of Chairman Matthew S. Petersen and Comm'rs Caroline C. Hunter and Lee E. Goodman, MUR 6589R (Oct. 19, 2016) [hereinafter "Second Dismissal SoR"] (attached as Exhibit 1). Thus, it cannot be said, as was the

[1] AAN reliance on *CREW/CHGO* is also premature as the decision is not yet even final. *CREW/CHGO* was issued on June 15, 2018. The time to seek rehearing has not yet expired, *see* Fed. R. App. P. 40, and the mandate has not yet issued. "A court of appeals' judgment or order," however, "is not final until issuance of the mandate." Fed. R. App. P. 41(c) advisory committee's note to 1998 amendment.

case in CHGO, that the dismissal rests "squarely" on such grounds, *cf. CREW/CHGO*, 892 F.3d at 439. AAN concedes, as the panel was required to concede in *CREW/CHGO*, that binding Supreme Court authority *at least* requires judicial review where "the Commission declines to bring an enforcement action on the basis of its interpretation of" the law, *id.* at 441 n.11 (citing *FEC v. Akins*, 524 U.S. 11, 26 (1998) (reviewing agency dismissal based on its interpretation of *Buckley*'s major purpose test); *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27 (1981); AAN Reply 10. That is precisely what happened here. Thus, *CREW/CHGO* bears no relation to this Court's decision in *CREW II*, and the decision does nothing to bolster AAN's failed attempt to show a likelihood of success on appeal.

Trying to avoid this conclusion, AAN pretends both here and in the appellate court that it is not appealing *CREW II* at all, but rather *CREW I*'s decision with respect to the first statement of reasons. AAN contends that the first statement of reasons' terse citation to *Heckler* in two short footnotes renders all subsequent proceedings null and void under *CREW/CHGO*. AAN Reply 4–5. AAN fails to show any likelihood of success on appeal on the basis of that argument, however—particularly in its motion for summary reversal before the court of appeals—or that it would have any impact on these proceedings if successful.

First, AAN entirely fails to show that its appeal of *CREW II* turns on an issue from a separate judgment in *CREW I* on a statement of reasons subsequently abandoned by the commissioners. It failed to show either here or in the appellate court that it can revive the superseded first statement of reasons and have it reviewed under *CREW/CHGO*, or that a decision related to that superseded state of reasons would have any application here. *See Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1353 (D.C. Cir. 2014) (parties cannot seek judicial review of superseded agency statements of reasons). Even if AAN could put that statement of

reasons before the court, it fails to show *CREW/CHGO* applies to it. While the first statement of reasons tersely cited *Heckler* in two footnotes, *see* Statement of Reasons of Chairman Lee E. Goodman and Comm'rs Caroline C. Hunter and Matthew Petersen, 24 n.137, 27 n.153, MUR 6589 (July 30, 2014) [hereinafter "First Dismissal SoR"] (attached as Exhibit 2), the dismissal was "squarely" premised on the commissioners' interpretation of the law, not on prosecutorial discretion; *see generally id.*; *cf. CREW/CHGO*, 892 F.3d at 439. After discussing about a dozen judicial decisions, First Dismissal SoR at 5–16, reaching the legal conclusion that the Constitution permits imposing disclosure only on organizations based on their express advocacy communications, *id.* at 16, and devoting further pages to rejecting the legal interpretation of their own Office of General Counsel, *id.* at 21–24, the commissioners came to a firm legal conclusion: AAN was not a political committee under the law, *id.* at 1; *see also CREW I*, 209 F. Supp. 3d at 84 ("[T]he Commissioners concluded that [AAN's] major purpose was [not] the nomination or election of a federal candidate."). That conclusion leaves no room for prosecutorial discretion. Indeed, in later recounting the basis for dismissal contained in their first statement, the three commissioners said simply that "we concluded that AAN did not have as its major purpose the nomination or election of a candidate and, thus, voted against finding reason to believe AAN violated the act." Second Dismissal SoR at 1.

Yet, as it did in *CREW I*, AAN would treat those thirty-four pages of legal analysis as irrelevant dicta and instead find the entire basis for the FEC's first dismissal in language in two footnotes. The first reads, "[m]oreover, the constitutional doubts raised here militates in favor of cautious exercise of our prosecutorial discretion" and cites *Heckler*, 470 U.S. at 831, First Dismissal SoR at 24 n.137, and the second reads, in its entirety, "*[s]ee Heckler* at 831; *see also supra* note 137," *id.* at 27 n.163. As this Court has already recognized, the decision of the

controlling commissioners was based on legal analysis, not prosecutorial discretion, and the footnotes do not show otherwise.

In a last-ditch effort to make *CREW/CHGO* relevant to its appeal, AAN makes much of CREW's recognition in *CREW/CHGO* that this Court rejected in *CREW I* the FEC's contention that merely citing *Heckler* rendered the dismissal consistent with law, even if the dismissal was otherwise based on erroneous legal analysis. AAN Reply 5. Of course, *CREW/CHGO* also rejected the FEC's contention, instead finding the agency's dismissal of the enforcement action in CHGO was not premised on a legal analysis at all, but rather was "squarely" based on the agency's prosecutorial discretion. *CREW/CHGO*, 892 F.3d at 439. Despite AAN's characterization, CREW's argument did not concede that this case rises or falls with the CHGO matter. Neither its attempts to miscast CREW's arguments nor its attempts to recast the statement of reasons here show AAN is likely to succeed on the merits of its appeal.

Second, even if AAN were to somehow succeed, it fails to show a ruling about the first statement of reasons has any application here. After all, 52 U.S.C. §30109(a)(8)(C) conditions a citizen suit solely on the FEC's failure to conform with a court order, not on the propriety of the underlying FEC dismissal. Indeed, even if *CREW I* was erroneous, it does not follow that *CREW II* was erroneous, and it was the FEC's failure to conform to *CREW II* that triggered this suit. Moreover, the FEC chose not to appeal either decision, and AAN points to nothing to support its remarkable contention that the FEC was free to ignore this Court's judgment and still evade the statutorily mandated result for that action. *Cf. Willy v. Coastal Corp.*, 503 U.S. 131, 138–39 (1992) (holding party must bear consequences of its violation of court orders, even if "subsequent determination [found] that the court was without subject-matter jurisdiction," including where there is no "immediate appeal").

Beyond the fact that AAN does not show the decision alters AAN's likelihood of success on appeal, AAN also fails to show that *CREW/CHGO* renders its requested stay anything other than indefinite. AAN did not request a stay solely pending its motion for summary reversal, but requested a stay until "final appellate resolution." AAN Mot. for a Stay 1, ECF No. 11. Further, AAN fails to show that appellate resolution is likely to be resolved speedily in its favor: since it fails to show even a likelihood of success on appeal, AAN completely fails to satisfy its "heavy burden" on its motion for summary reversal. *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987). Moreover, even if AAN succeeded in its motion for summary reversal, that would counsel *against* a stay. The short time to elapse before any such summary appellate adjudication means AAN would face little-to-no additional burden in proceeding here in the meantime, even assuming that judgment would have any bearing here. If, however, AAN's motion fails, then AAN's requested stay would "prevent[] [CREW] from proceeding with [its] claims in federal court for an indefinite period of time, potentially for years." *Belize Social Dev. Ltd. v. Gov't of Belize*, 688 F.3d 724, 732 (D.C. Cir. 2012).[2]

Finally, the decision and AAN's reply don't even come close to meeting AAN's "heavy burden" for the "extraordinary relief" it requests. *Landis v. N. Am. Co.*, 299 U.S. 248, 255–56 (1936). Neither say anything about AAN's "pressing need" for a stay or make out a "clear case of hardship or inequity in being required to go forward." *Id.* at 255. Even if *CREW/CHGO* were applicable to AAN's appeal—which it is not—that alone is not enough to show this is the sort of "rare circumstance[]" deserving the stay AAN seeks. *Id.*

[2] AAN also oddly cites CREW's own motion to dismiss the appeal as reason for a stay. AAN Reply at 14–15. Yet if CREW succeeds in its motion, then a stay would merely have delayed proceedings here without serving any purpose at all.

By premising its reply solely on authority that was not part of its opening motion, AAN effectively concedes that its opening motion was baseless. The recent nonfinal decision does nothing to change this fact. *CREW/CHGO* was decided on very different facts and, even if it stands, provides no reason to delay proceeding with this action.

Dated: July 12, 2018

Respectfully submitted,

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