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 REPLY
IN FURTHER SUPPORT OF ITS MOTION FOR A STAY

A stay of this litigation is now more justified than ever. Since American Action Network ("AAN") asked for a stay, there have been two critical developments:

1) The D.C. Circuit held that judicial review is not available—and a citizen suit like this is not permitted—where the Federal Election Commission ("FEC") relied on its prosecutorial discretion when dismissing an enforcement matter, as it did here;[1] and

2) AAN asked the D.C. Circuit to quickly and summarily reverse this Court's prior opinions and orders because of this new Circuit precedent.[2]

Citizens for Responsibility & Ethics in Washington ("CREW") opposes a stay, but does not mention this new precedent that was issued in another of its enforcement disputes with the FEC. CREW's silence is deafening. The new D.C. Circuit decision undermines essentially all of CREW's arguments against a stay. For example, CREW argues that a stay will be "lengthy" and "potentially [last] for years," Opp. at 6 (Dkt. 12), but the D.C. Circuit could quickly and summarily decide that there is no statutory basis for this lawsuit. CREW also argues that AAN cannot show "any likelihood of success on appeal" to justify an order that maintains the status

[1] *Citizens for Responsibility & Ethics in Washington, et al. v. FEC*, 892 F.3d 435, 441 (D.C. Cir. 2018).

[2] Motion for Summary Reversal and Vacatur, *Citizens for Responsibility & Ethics in Washington v. FEC*, No. 18-5136 (D.C. Cir. June 25, 2018) (Dkt. 1737659).

quo, *id.* at 23, but the D.C. Circuit just parted company with this Court on a threshold issue. And the difference is not abstract: the D.C. Circuit held that "[n]othing in the substantive statute [the Federal Election Campaign Act ("FECA")] overcomes the presumption against judicial review" expressed in *Heckler v. Chaney*, 470 U.S. 821 (1985). *See CREW*, 892 F.3d at 439. This Court found that "FECA's express provision for the judicial review of the FEC's dismissal decisions . . . is just such a rebuttal." *CREW v. FEC*, 209 F. Supp. 3d 77, 88 n.7 (D.D.C. 2016).

As a result, if ever a stay were appropriate to preserve the status quo, it is appropriate here. The statutory basis for this lawsuit sits on shaky ground, and the D.C. Circuit should be given the time required to decide whether it can proceed. Doing so will save the Court and the parties time, will be the most efficient way forward should this case ultimately proceed, and will be consistent with the stay issued in the only known prior citizen suit. *See* Opp. at 13 (conceding that the "only precedent citizen suit" was stayed). The stay should not be prolonged, will protect the FEC's enforcement authority and AAN's rights in the meantime, and will not harm CREW's ability to ultimately proceed should the D.C. Circuit conclude it has the right to do so.

The Court should also deny CREW's alternative request to jump ahead of the normal process by issuing so-called "document preservation subpoenas" to third parties. CREW has no right to such subpoenas in this context, relying instead on cases governed by a statute that expressly contemplates their issuance. And CREW cannot meet the standard that applies even under those inapplicable cases, as CREW has provided nothing more than speculation to support its fear of document destruction. This Court should reject CREW's request to burden third parties with preservation subpoenas related to allegations that may not (and AAN believes will not) ever proceed in this case.

I. ARGUMENT

As next detailed, the Court should (A) stay all further proceedings pending final appellate resolution of CREW's precursor case against the FEC, and (B) deny CREW's alternative request to serve some undisclosed set of document preservation subpoenas on third-parties.

A. The Court Should Stay This Case Pending Resolution of *CREW v. FEC*.

A stay is particularly appropriate here because (1) AAN has asked the D.C. Circuit to quickly and summarily decide an issue that could eliminate the statutory basis for this lawsuit, (2) the standard for a stay pending related litigation is more than satisfied here, and (3) the traditional four-factor standard for a stay pending appeal strongly favors a stay as well.

1. AAN Has Asked The D.C. Circuit To Quickly And Summarily Decide An Issue That Would Eliminate The Basis For This Litigation.

CREW's primary complaint about the requested stay is that it may be "lengthy." *See, e.g.*, Opp. at 1, 2, 6-10, 14, 18-22, 25-28. But the stay will not be any longer or more "indefinite" than the stay in any other case that has been stayed pending an appeal. *See, e.g.*, Order, *DSCC v. NRSC*, Civ. No. 97-1493 (D.D.C. Aug. 27, 1997) (Dkt. 11) (staying citizen suit pending related appeal); *see also Fairview Hosp. v. Leavitt*, No. 05-1065, 2007 WL 1521233, at *3 n.7 (D.D.C. May 22, 2007) (rejecting argument that a stay pending a related appeal would be "indefinite"). And, in fact, the stay requested here should be far shorter than usual because AAN has asked the D.C. Circuit to quickly and summarily determine whether this litigation may proceed—or whether it is precluded by the D.C. Circuit's June 15 decision regarding prosecutorial discretion. *See* Motion for Summ. Reversal and Vacatur, No. 18-5136 (D.C. Cir. June 25, 2018) (Dkt. 1737659).

In its recent decision, the D.C. Circuit held in another of CREW's enforcement disputes with the FEC that judicial review is <u>not</u> permitted when the FEC dismisses an enforcement

complaint in reliance on its prosecutorial discretion. *CREW*, 892 F.3d at 441-42. In so doing, the D.C. Circuit parted ways with this Court on a question that was before it in 2016. At that time, the FEC argued that its exercise of prosecutorial discretion when dismissing the allegations against AAN was lawful and precluded review. *See* Mot. for Summ. J. at 49-50, No. 14-1419 (D.D.C. Mar. 1, 2016) (Dkt. 36); Reply at 24-25, No. 14-1419 (D.D.C. May 23, 2016) (Dkt. 42). This Court disagreed, stating:

> "[A]n agency's decision not to take enforcement action . . . is only presumptively unreviewable," and that "presumption may be rebutted [by the relevant] substantive statute." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). Here, FECA's express provision for the judicial review of the FEC's dismissal decisions, as well as a particular standard governing that review, 52 U.S.C. § 30109(a)(8)(C), is just such a rebuttal. The Court will therefore apply the contrary-to-law standard, as Congress has instructed it to.

CREW, 209 F. Supp. 3d at 88 n.7.

In its other case before the D.C. Circuit, CREW urged the Circuit to adopt the reasoning of this Court, arguing that this Court correctly held that "the controlling commissioners' simple citation of prosecutorial discretion" did not "render[] any legal error in their analysis irrelevant." *See* Reply Br. at 7, No. 17-5049 (D.C. Cir. Aug. 10, 2017) (Dkt. 1688161) (citing *CREW*, 209 F. Supp. at 93). But the D.C. Circuit disagreed. It held that "[n]othing in the substantive statute overcomes the presumption against judicial review." *CREW*, 892 F.3d at 439. And it found that to be true even if the FEC separately articulated a substantive reason for dismissing the matter, citing the "firmly-established principle" against "carving reviewable legal rulings out from the middle of non-reviewable actions." *Id.* at 442 (collecting authority).

As a result, D.C. Circuit precedent now establishes that unless "the agency's action was based entirely on its interpretation of the statute," there "can be no judicial review for abuse of discretion, or otherwise." *Id.* at 441 & n.11 (citations omitted). The D.C. Circuit's decision thus strikes at the foundation for this lawsuit. For if the Court did not have authority to review the

FEC's first dismissal decision, then it also did not have authority to find the dismissal "contrary to law," to require additional agency proceedings, to review the FEC's second dismissal decision, to find it "contrary to law," or to authorize the filing of this citizen suit. *See id.* at 439-40. Because the FEC relied on its prosecutorial discretion when dismissing the allegations against AAN, "CREW [was never] entitled to have the court evaluate . . . the individual considerations the controlling Commissioners gave in support of their vote not to initiate enforcement proceedings." *Id.* at 441.

And—importantly—the D.C. Circuit clarified that CREW is not permitted to pursue a citizen suit where the FEC has relied on its prosecutorial discretion. At the D.C. Circuit, CREW argued that the FEC's reliance on prosecutorial discretion should "trigger[] FECA's 'citizen suit' provision, which entitles a private entity to bring an enforcement action when the Commission has declined to do so." *Id.* at 440 (citing 52 U.S.C. § 30109(a)(8)(C)). The D.C. Circuit rejected CREW's argument, finding it incompatible with the FEC's absolute prosecutorial discretion. *Id.* The law simply does not allow CREW to take on the role of enforcer when the agency with actual enforcement authority exercised its prerogative to drop the allegations. *Id.*

CREW has unsurprisingly tried to distinguish the D.C. Circuit's decision in an effort to save this lawsuit. *See* Opp. to Motion for Summ. Reversal and Vacatur, No. 18-5136 (D.C. Cir. July 5, 2018) (Dkt. 1737659). But CREW previously acknowledged that the D.C. Circuit's decision about prosecutorial discretion would apply equally to this litigation. When briefing the D.C. Circuit case that now precludes this one, CREW relied on this Court's decision, which "rejected" the argument that was "adopted" and on appeal in that case. *See* Reply Br. at 7, No. 17-5049 (D.C. Cir. Aug. 10, 2017) (Dkt. 1688161) (citing *CREW*, 209 F. Supp. at 93). And, in any event, the D.C. Circuit will soon sort through this issue. A stay is appropriate to preserve the status quo in the meantime.

CREW argues that the appeal will be short-lived for a different reason: because it thinks that the appeal is not yet ripe. *See* Opp. at 23. CREW must not believe its own argument, though, because it fills its opposition brief with arguments about how "lengthy" the stay could be, dragging on for "years." *See, e.g.*, *id.* at 1, 2, 6-10, 14, 18-22, 25-28. And, in fact, CREW is wrong when it argues that AAN's appeal is premature. CREW claims that it has exhausted all administrative remedies and concedes that "all available evidence indicates that" the FEC enforcement proceeding is complete. *Id.* at 14. In other words, the Court's decisions are now final, and subject to appeal. CREW would prefer that the FEC proceeding be final enough to justify this citizen suit, but somehow not final enough to warrant an appeal—but that is not the law. *See* AAN Opp. to Mot. to Dismiss, No. 18-5136 (D.C. Cir. July 5, 2018) (Dkt. 1739314).

Indeed, the posture of the pending appeal is fundamentally different from the last time this dispute was before the D.C. Circuit. At that time, and while the appeal was pending, the Commission again dismissed the enforcement matter and CREW filed a second lawsuit challenging the second dismissal. The FEC thus asked the D.C. Circuit to postpone its review until it could also review (if necessary) a decision from this Court regarding the second dismissal decision. *See, e.g.*, Mot. to Dismiss at 2, 12, Nos. 16-5300, 16-5343 (D.C. Cir. Dec. 8, 2016) (Dkt. 1650065). That consolidated appeal is now ripe and appropriate. The FEC has not moved to dismiss the appeal as premature—in contrast to its decision last time.[3] An appeal was taken in the case that CREW describes as the "only precedent citizen suit." Opp. at 13. And AAN certainly has the right to appeal a judgment that is adverse to it under FECA, which states that "[a]ny judgment of a district court under this subsection may be appealed to the court of

[3] Last time, like this time, the FEC did not have sufficient votes to file an appeal of this Court's Order, and so did not file. *See* Opp. Ex. 4; *see also* Mot. to Dismiss at 7, Nos. 16-5300, 16-5343 (D.C. Cir. Dec. 8, 2016) (Dkt. 1650065). But last time, unlike this time, the FEC filed a motion to dismiss the appeal as premature. *Id.*

appeals." 52 U.S.C. § 30109(a)(9). CREW would prefer to limit this section so that it applies only to decisions that CREW disagrees with and wants to appeal, but the statute gives appeal rights to "any judgment."

The statute also rebuts CREW's claim that it may proceed here even if the D.C. Circuit reverses this Court's prior decisions. *See* Opp. at 15-16. The statute expressly gives the D.C. Circuit authority to "set[] aside, in whole or in part, any such order of the district court." 52 U.S.C. § 30109(a)(9). And if the D.C. Circuit sets aside this Court's prior orders, there will be no order requiring the Commission to conform, and no statutory authority for a citizen suit. For where "a district court judgment is reversed on appeal, the effect of the appellate court ruling is that the judgment was never correct to begin with." *Balark v. City of Chicago*, 81 F.3d 658, 663 (7th Cir. 1996). This means that "[i]f a judgment has been paid immediately, it must be refunded." *Id.* It also means that if a citizen suit was filed, it must be dismissed.

Of course, this Court need not be able to predict exactly what the D.C. Circuit will do on appeal in order to grant a stay. A stay is warranted 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) (emphases added). That standard is certainly satisfied here. The D.C. Circuit has been asked to resolve a threshold issue about prosecutorial discretion that could eliminate the statutory basis for this lawsuit. CREW concedes that, if the D.C. Circuit proceeds to the merits of the case, its views about "the treatment of electioneering communications under *Buckley*'s 'major purpose' test" are at least "likely to be relevant here." Opp. at 17. In fact, CREW's complaint is filled with allegations about electioneering communications and citations to this Court's prior opinions. *See* Compl. ¶¶ 3, 4, 23, 25-26, 40, 44-52, 54-55, 59, 69, 71, 81. The Court should

pause this litigation to provide the D.C. Circuit time to decide whether this case may proceed and, if it may, what standard applies. Any time waiting for that decision will be time well spent.

2. A Stay Is Justified Even Under CREW's Heightened Standard Of Review.

CREW also tries to avoid a stay by attempting to create an essentially insurmountable stay standard for this context. *See* Opp. at 5-6. CREW's argument is incompatible with the Court's "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)). It is also inconsistent with the numerous stays that have been granted so related proceedings could shed light on the issues before the Court. *See, e.g.*, *id.*; *Burwell*, 233 F. Supp. 3d at 87-88; *Fonville v. D.C.*, 766 F. Supp. 2d 171, 174 (D.D.C. 2011); *Fairview Hosp.*, 2007 WL 1521233, at *3; *IBT/HERE Emp. Representatives' Council v. Gate Gourmet Div. Am.*, 402 F. Supp. 2d 289, 293 (D.D.C. 2005).

In the end, though, CREW's arguments about the proper standard are irrelevant because a stay is warranted under even CREW's heightened standard. CREW admits that a stay was justified in the "only precedent citizen suit." Opp. at 13. And CREW concedes that a stay would be appropriate where "a plaintiff's claim would be precluded by a prior adverse judgment," *id.* at 9 (citation omitted), or where a "threshold—and di[s]positive—issue in th[e] litigation" is pending before the appellate court, *id.* at 10 (citation omitted). CREW thus provides several solid bases for a stay this case: it would be consistent with the only prior comparable case; CREW's lawsuit will be precluded if it loses on appeal; and a threshold and dispositive issue is currently pending before the D.C. Circuit. The Court should enter the stay.

CREW's standard of review argument ignores a critical fact about this case: CREW is a party to the pending appeal. As a result, this is not a stay that would force "a litigant in one cause . . . to stand aside while a litigant in another settles the rule of law that will define the rights of both." *See Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936) (cited at Opp. at 7); *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 732 (D.C. Cir. 2012) (cited at Opp. at 6). Stays may still be appropriate in such cases, but the Court needs to consider whether the stay will harm the party "wait[ing] upon the outcome of a controversy to which he is a stranger." *Landis*, 299 U.S. at 255; *see also Dellinger v. Mitchell*, 442 F.2d 782, 785-86 (D.C. Cir. 1971) (cited at Opp. at 6, 8, 9) (criticizing stay of civil case pending related criminal action because stay applied "to civil plaintiffs who are not criminal defendants").

But CREW is not a "stranger" to the appeal at the D.C. Circuit. It will be fully involved in litigating the issues that must be resolved in its favor for this lawsuit to proceed. And, in any event, this case does present the "extraordinary" and "rare circumstances" that CREW seeks for a stay even under these cases: as CREW explains, in the 44-year history of the FECA, there has been just one prior citizen suit, and it was stayed pending appeal of the initial FEC action. *See* Opp. at 13, 25. In these circumstances, the balance of competing interests weighs entirely in favor of a stay. Even if this dispute "has been pending for several years," the far more "pressing need" is to ensure that the First Amendment issues are correctly resolved, as "the question has now been adjudicated and interpreted differently by [an] administrative agency, . . . federal district courts," and federal Courts of Appeals. *See Fonville*, 766 F. Supp. 2d at 174.

Finally, CREW goes to great lengths to try to besmirch AAN's description of the applicable standard, claiming that it is "based on misquotations and misrepresentations." Opp. at

2, 5-10.[4] But CREW's complaint boils down to AAN's inclusion of one "*see*" citation at the end of one factually accurate statement: specifically, the statement that the pending appeal "will either eliminate the basis for this case or '*assist in the determination of the questions of law involved*.'" Mot. at 6 (quoting *Landis*, 299 U.S. at 253) (emphasis added). CREW faults AAN for quoting this language, arguing that it appears in the Court's description of the district court ruling, rather than in the Court's own holding. *See* Opp. at 5-10. CREW's complaint is much ado about nothing. The same concept—and indeed the same language—has recently and repeatedly been relied upon to justify stays in this Circuit. *See, e.g.*, *Hulley Enters. Ltd. v. Russian Fed'n*, 211 F. Supp. 3d 269, 276 (D.D.C. 2016) ("[A] stay may be warranted where the resolution of other litigation will likely 'narrow the issues in the pending cases and assist in the determination of the questions of law involved.'") (quoting *Landis*, 299 U.S. at 253); *Fonville*, 766 F. Supp. 2d at 174 ("[T]he Court is persuaded that a stay is warranted because resolution of pending litigation in the D.C. Court of Appeals will likely 'narrow the issues in the pending cases and assist in the determination of the questions of law involved.'") (quoting *Landis*, 299 U.S. at 253).

The Court, therefore, is well within its authority to stay this case in order to "serve the interests of judicial efficiency." *Burwell*, 233 F. Supp. 3d at 88. Indeed, because the pending appeal "raises nearly identical issues," a stay "pending the final resolution of those matters will

[4] Indeed, CREW casts aspersions on AAN throughout its brief, dialing up the rhetoric and acting as though CREW has already proven the allegations in its Complaint. *See, e.g.*, Opp. at 1 (accusing AAN of "having flouted its disclosure obligations under the federal campaign finance laws for nearly a decade"), 2 (accusing AAN of "misquoting" and "misleadingly quoting" caselaw), 12 (threatening that "the Department of Justice may prosecute a group like AAN"). AAN, of course, takes issue with each and every one of CREW's accusations, which are so flawed that they give the impression that CREW is grasping at straws. But, because CREW's comments are irrelevant to the merits of this motion, AAN has focused this brief on the arguments that are properly before the Court.

foster efficiency and conservation of resources." *Fonville*, 766 F. Supp. 2d at 174. The Court should enter the requested stay.

3. CREW's Other Arguments Against a Stay Fall Flat.

Even if the Court were to consider this motion under the typical four-factor stay pending appeal standard, a stay would be warranted. *See* Mot. at 10-13. CREW disagrees, but each of its arguments can be readily dismissed.

For the first factor, CREW argues that AAN cannot show a likelihood of success on appeal because this Court resolved all issues correctly. *See* Opp. at 23-25. But CREW acknowledges that the Court may grant a stay based on the existence of "serious legal questions." *Id.* at 24. And though CREW argues that the Court needs to have "serious legal questions" about its own holding, CREW obtained a stay in a different case because that is *not* the standard. In *CREW v. Office of Administration*, the Court did not think that reversal was likely, but granted a stay nonetheless because the substantive legal question was a serious one. 593 F. Supp. 2d 156, 161 (D.D.C. 2009).

In any event, CREW omits the D.C. Circuit's recent decision about prosecutorial discretion when discussing AAN's likelihood of success. As detailed above, the D.C. Circuit and this Court have now decided the same threshold question differently. *See* Section A(1). When considering whether FECA overcomes the presumption against judicial review in this context, this Court held that FECA contains "just such a rebuttal." *CREW*, 209 F. Supp. 3d at 88 n.7. The D.C. Circuit has now clarified that "[n]othing in [FECA] overcomes the presumption against judicial review." *CREW*, 892 F.3d at 439. In light of this nearly word-for-word disparity, AAN has shown a likelihood of success to justify a stay pending appeal.

For the second factor, CREW argues that AAN cannot show that it would be harmed in the absence of a stay because "litigation costs, standing alone, do not rise to the level of

irreparable injury." Opp. at 10 (citation omitted). But AAN did not rely on litigation costs to justify a stay. AAN argued that, if it succeeds on appeal, it will have a statutory and First Amendment right to be free of the intrusive investigation and disclosure that CREW seeks with this litigation. *See* Mot. for Stay at 11-12. AAN will also have the right to be free of CREW's review of its internal and confidential documents, *see* 52 U.S.C. § 30109(a)(12), something that cannot be addressed "in this litigation by protective orders or other means" as CREW proposes. *See* Opp. at 13.

CREW is also flat wrong under the D.C. Circuit's recent decision when it argues that the FEC does not have "power 'to decide whether or not to regulate First Amendment activity,' thereby granting some sort of First Amendment immunity to those groups over which it abdicates enforcement." *Id.* at 12 n.4 (citation omitted). This argument is a remnant of CREW's prior position, now rejected, that "FECA expressly provides for alternative avenues of enforcement" in this scenario. *Id.* Not so. When the FEC has chosen to exercise its prosecutorial discretion and forego an enforcement matter, "there can be no judicial review for abuse of discretion, or otherwise." *CREW*, 892 F.3d at 441.

For the third and fourth factors, CREW claims that it and the public would suffer harm absent a stay, but CREW hinges its argument on a right that it does not have—that is, the right to pursue different claims than it filed at the FEC. If this case is ever able to proceed, it can only proceed with respect to the violation alleged "in the original complaint." 52 U.S.C. § 30109(a)(8)(C). And CREW put an end date on that alleged violation, pleading that "AAN 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, No. 16-2255 (D.D.C. Jan. 30, 2018) (Dkt. 46). The FEC, therefore, considered only CREW's allegation that "'AAN's major purpose between July 23, 2009 and June 30, 2011 was the nomination or election of federal candidates.'"

Id. at AR1691 and AR1765 (each quoting administrative complaint at AR1486). This Court similarly recognized that "the period in question [was] mid-2009 through mid-2011." *CREW*, 209 F. Supp. 3d at 83. CREW even quoted this time-limiting language when last before the Court. *See* Mot. for Summ. J. at 6, No. 16-2255 (D.D.C. Sept. 26, 2017) (Dkt. 32).

CREW now claims that it can pursue allegations that "AAN is and has been violating the FECA since 2009." Opp. at 4. But CREW did not exhaust this claim, and it cannot pursue it here. To be sure, CREW *could* have alleged in its June 2012 administrative complaint that "AAN *first* became a political committee as early as 2009 and no later than 2010." *Id.* at 19-20. But CREW did not. Instead, in June 2012, CREW alleged *in past tense* that "AAN *was* a political committee between July 23, 2009 through June 30, 2011" full stop. *See* Joint Appendix at AR 1485 ¶ 19, *CREW v. FEC*, No. 16-2255 (D.D.C. Jan. 30, 2018) (emphasis added). Had CREW thought that AAN was an unregistered political committee during a later election cycle, it could have filed another FEC complaint. That CREW did not make such a filing makes perfect sense, though, because AAN was not then, and has never been, a political committee. Accordingly, CREW's citizen suit is limited to the bounds of its complaint, and its attempt to stretch the Court's jurisdiction beyond what the FECA would permit should be rejected.

Because the time-limited claim is the only claim properly before this Court, CREW cannot show imminent or irreparable harm from some "present and continuing infringement." *See* Opp. at 20 (citation omitted). Nor can CREW claim an urgent need for the public to immediately review information about advertisements that AAN ran in 2010. *See id.* at 20-22. CREW forgets that it still needs to prove that AAN was an unregistered political committee at that time—something that AAN is confident it will never be able to do even if this case is allowed to proceed. And, in any event, CREW waited until June 2012—nearly two years after the 2010 election—to file its complaint at the FEC. *See* Joint Appendix at AR 1480, *CREW v.*

FEC, No. 16-2255 (D.D.C. Jan. 30, 2018). CREW admits that it could have sought to move the enforcement proceeding along when the FEC did not take action within 120 days, *see* Opp. at 14 (referring to "failure to act" suits), but it did not. CREW instead waited out the two years that the FEC required to resolve the administrative complaint. CREW cannot now manufacture some claim of urgency simply because it wants to avoid a stay.

A stay is thus appropriate in this case, as it was in the only known prior citizen suit, so that the D.C. Circuit can resolve the predicate issues. *See* Order, *DSCC v. NRSC*, Civ. No. 97-1493 (D.D.C. Aug. 27, 1997) (Dkt. 11). CREW tries to distinguish that prior case, arguing that it was a "failure to act" case that turned on the existence of ongoing agency proceedings. *See* Opp. at 13-14. But CREW's argument only shows how much more appropriate a stay would be here, where the FEC *has* exercised its enforcement authority. As there, a stay here will protect confidentiality and avoid simultaneous and duplicative proceedings. *See* Order, *DSCC v. NRSC*, Civ. No. 97-1493 (D.D.C. Aug. 27, 1997). But preserving the status quo here will do even more: it will guard the FEC's enforcement authority over allegations that it has twice dismissed; it will ensure that AAN is not subjected to an investigation that is not authorized by statute; and it will allow the D.C. Circuit to resolve questions critical to this litigation. The Court should enter the stay.

B. The Court Should Deny CREW's Request To Serve Subpoenas On Third-Parties.

Finally, this Court should deny CREW's request to serve subpoenas on non-parties, "such as financial institutions and third-party fundraisers," during the pendency of the stay. *See* Opp. at 25-28. As an initial matter, CREW premises its request on a claim that the stay "may go on for years"—even though both CREW and AAN have filed dispositive motions that would expedite the appeal. *See id.* at 25; *see also* Motion for Summ. Reversal and Vacatur, No. 18-

5136 (D.C. Cir. June 25, 2018) (Dkt. 1737659); Motion to Dismiss, No. 18-5136 (D.C. Cir. June 25, 2018) (Dkt. 1737570). But equally importantly, CREW does not present any valid reason for bypassing the standard discovery rules in this case.

Where, as here, AAN has not answered the complaint and the parties have not conducted a Rule 26(f) conference, CREW may not "seek discovery from *any* source" absent court order. *See* Fed. R. Civ. P. 26(d)(1) (emphasis added). And, generally, discovery at this time "is not permissible, though the Court may grant an exception." *Dunlap v. Pres. Advisory Comm'n on Election Integrity*, No. 17-2361, 2018 WL 3150217, at *22 (D.D.C. June 27, 2018). Third-party discovery should be particularly constrained during this early time period, as the Court must take care to avoid imposing an "undue burden" on third parties. *Id.* at *6; *cf.* Fed. R. Civ. P. 45(d)(1) ("A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.").

Importantly, CREW has no right to "document preservation subpoenas" in this context. Instead, CREW relies solely on cases governed by the Public Securities Litigation Reform Act ("PSLRA"), *see* Opp. at 28, which expressly contemplates early discovery "necessary to preserve evidence or to prevent undue prejudice" when a case is stayed pending decision on a motion to dismiss, 15 U.S.C. § 78u-4(b)(3)(B). No similar statutory text applies here. *Cf. Dunlap*, 2018 WL 3150217, at *22. And, indeed, the Federal Rules do not even expressly authorize the issuance of document preservation subpoenas. *Id.*

But even if CREW could extend the PSLRA cases and apply them in this context, CREW has not satisfied their standards. Under the PSLRA, "[c]ourts have required something more than mere speculation that documents may be lost or destroyed" before permitting a document preservation subpoena. *In re Massey Energy Co. Sec. Litig.*, No. 10-0689, 2011 WL 4528509, at *5 (S.D.W. Va. Sept. 28, 2011) (cited in Opp. at 28); *see also In re Cree, Inc. Sec. Litig.*, 220

F.R.D. 443, 447 (M.D.N.C. 2004) ("'[W]holly speculative assertions as to the risk of lost evidence and undue prejudice' will not satisfy the standard.") (citation omitted) (cited in Opp. at 28); *In re Heckmann Corp. Sec. Litig.*, No. 10-378-LPS-MPT, 2011 WL 10636718, at *5 (D. Del. Feb. 28, 2011) ("His arguments are grounded on mere speculation of document destruction by the third parties.") (cited in Opp. at 27). Courts have thus required that "[a] party alleging that discovery is 'necessary to preserve evidence' . . . present more than mere 'generalizations of fading memories and allegations of possible loss or destruction.'" *Sarantakis v. Gruttaduaria*, No. 02-1609, 2002 WL 1803750, at *2 (N.D. Ill. Aug. 5, 2002).

But CREW has provided nothing more than mere speculation. It posits that "relevant information *may* also be in the custody of third parties, such as financial institutions and third-party fundraisers." Opp. at 26 (emphasis added). It does not define what that information is or even propose targeted discovery requests. It also only hypothesizes that these third parties *may* destroy information, stating that "financial institutions regularly destroy account records after seven years have elapsed." *Id.* at 27. But CREW has sought to also burden "third-party fundraisers" with its subpoenas, and does not explain why it could not ask AAN for its own financial records should discovery prove appropriate in this case. *See id.* at 26 (conceding that "much of the information relevant to CREW's claims in this case may be in AAN's custody and subject to its preservation obligation"). And, in any event, more than seven years have already passed since AAN aired its advertisements before the 2010 midterm elections. CREW's request thus seems designed to harass AAN's commercial partners and deter its donors, rather than to capture some limited and particularized set of documents that are relevant and at risk of disappearing.

The Court should, therefore, reject CREW's request. CREW's hunch that documents may disappear does not warrant the issuance of third-party subpoenas. That is especially so here,

where the D.C. Circuit may soon eliminate the statutory basis for this lawsuit. *See* Section A(1). And, even if this case were to proceed, CREW would still need to survive a motion to dismiss. *See, e.g.*, *Dunlap*, 2018 WL 3150217, at *25; *see also Guttenberg v. Emery*, 26 F. Supp. 3d 88, 99 (D.D.C. 2014). This Court should refuse CREW's request to put non-parties to the significant burden and "effort of ensuring that every document" responsive to CREW's unbounded discovery wish list "is safeguarded for preservation or production." *See Dunlap*, 2018 WL 3150217, at *25. Permitting such discovery at this time would be particularly "unjust . . . because [CREW's] discovery requests go to the merits of the dispute," and would therefore force third parties "to expend significant resources responding to discovery requests" in a case where it remains possible (and AAN believes quite likely) that CREW will never "have a viable cause of action." *Guttenberg*, 26 F. Supp. 3d at 99. CREW's speculative and unreasonable request for third-party document preservation subpoenas should be denied.

II. CONCLUSION

This case depends on the result of a pending D.C. Circuit case that may soon be resolved by AAN's Motion for Summary Reversal and Vacatur. The Court should stay all further proceedings pending its final appellate resolution, and should deny CREW's extraordinary request for third-party document preservation subpoenas.

Respectfully submitted,

/s/ Claire J. Evans

Jan Witold Baran (D.C. Bar No. 233486)
jbaran@wileyrein.com
Caleb P. Burns (D.C. Bar No. 474923)
cburns@wileyrein.com
Claire J. Evans (D.C. Bar No. 992271)
cevans@wileyrein.com
Wiley Rein LLP
1776 K Street NW
Washington, DC 20006
Tel.: 202.719.7000
Fax: 202.719.7049

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Counsel for American Action Network