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 MOTION FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL AND A STAY PENDING APPEAL

American Action Network hereby moves for certification of the Orders issued on September 30, 2019 (Dkt. No. 28), March 20, 2018 (Dkt. No. 47 in Case No. 16-cv-2255), and September 19, 2016 (Dkt. No. 53 in Case No. 14-cv-1419) for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). American Action Network also moves for a stay pending such interlocutory appeal. A Memorandum of Points and Authorities and Proposed Order accompany this Motion. Undersigned counsel discussed this Motion with counsel for Citizens for Responsibility and Ethics in Washington. Citizens for Responsibility and Ethics in Washington opposes this Motion.

Respectfully submitted,

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Dated: October 18, 2019

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2019, a true and correct copy of the foregoing Motion, the supporting Memorandum of Points and Authorities, and the accompanying Proposed Order, were served electronically on all registered counsel of record via ECF and are available for viewing and downloading from the ECF system.

s/ Stephen Obermeier
Stephen Obermeier

UNITED STATES DISTRICT COURT
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AMERICAN ACTION NETWORK'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL AND A STAY PENDING APPEAL

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INTRODUCTION

The Court should certify an interlocutory appeal and stay further proceedings pending that appeal so that the D.C. Circuit has an opportunity to resolve novel and case-determinative issues before a private party investigates and prosecutes sensitive First Amendment conduct that the Federal Election Commission ("FEC") has repeatedly declined to pursue. The Court recognized that "this is the first suit to be filed under FECA's citizen-suit provision," *CREW v. FEC*, No. 18-cv-945, slip op. at 2 (D.D.C. Sept. 30, 2019) ("*CREW III*"), Dkt. No. 29, and as such, raises several important "issues of first impression," *id.* at 42 n.11. Indeed, the Court entered admittedly "uncharted territory" with its recent decision, resolving threshold issues about the Court's jurisdiction and the appropriate standard of review that no other court has had an opportunity to consider. *See* Tr. Mot. Hr'g at 22, Dkt. No. 31; *id.* at 24.

This case raises issues of first impression and of extraordinary importance, including (1) whether, under a recent D.C. Circuit opinion, the Court may review allegations that the FEC stated it was dismissing as an exercise of prosecutorial discretion based on the Court's conclusion that the FEC's considerations regarding the legal merits of the claim, rather than prudential factors, predominated, (2) whether the Court has jurisdiction when the D.C. Circuit has found that organizational plaintiffs, including CREW, lack standing to pursue similar allegations, (3) whether the Court can proceed if the legal reasoning the FEC provided when it dismissed the same allegations was not, in fact, "contrary to law," and (4) if the Court has jurisdiction, whether it can impose disclosure obligations outside the time periods covered by the original administrative complaint even though the statute limits the Court's jurisdiction to the "original complaint."

The case is thus ideally suited for interlocutory appeal at this juncture, something the Court itself has suggested. *See, e.g.*, Tr. Mot. Hr'g at 34–35, 50–51. An appeal could eliminate the need for any further proceedings. And more importantly, it will ensure that the D.C. Circuit decides *in*

advance whether a private party can prosecute allegations about speech and conduct that the First Amendment protects even though the FEC—the federal agency with "sole discretionary power" to initiate enforcement actions, *Buckley v. Valeo*, 424 U.S. 1, 111 n.153 (1976)—chose to dismiss the same allegations in an exercise of prosecutorial discretion and based on legal reasoning and factual determinations squarely within its expertise. That issue has repercussions far beyond this case; the threat that third parties may prosecute political speech they oppose undoubtedly will chill the associational and free speech rights of individuals and organizations who understandably would like to avoid the risk of trial for expressing their political opinions. The Court should certify an interlocutory appeal and stay this action pending that needed review.

BACKGROUND

The Court is well acquainted with the history of this case. In 2012, CREW—along with Washington, D.C. resident Melanie Sloan, CREW's then-Executive Director—filed an administrative complaint with the FEC alleging that AAN was an unregistered political committee from mid-2009 to mid-2011. CREW sought an FEC "investigation into these allegations," a declaration that AAN "violated the FECA and applicable FEC regulations," and "sanctions appropriate to these violations." Original Compl. at 8, *In re Am. Action Network*, MUR No. 6589 (filed June 7, 2012), Dkt. No. 24-2.

The Commission deadlocked. Three Commissioners found no reason to believe that AAN violated FECA and voted to dismiss CREW's administrative complaint; three Commissioners voted to commence an investigation. Because a "reason to believe" finding requires the affirmative vote of four Commissioners, the Commissioners voting to dismiss controlled the outcome and their statement of reasons served as the basis for the agency's dismissal of CREW's administrative complaint. The controlling Commissioners held that AAN was not a "political committee" as that term is used in FECA because AAN did not have as its "major purpose" the

nomination or election of federal candidates. *See* Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 27, MUR No. 6589 (July 30, 2014). The controlling Commissioners also determined that they would dismiss the complaint "in exercise of [their] prosecutorial discretion." *Id.* CREW sought review of the dismissal in this Court. The FEC argued, among other things, that the dismissal was "justified by the Commission's broad prosecutorial discretion." FEC Mem. Supp. Summ. J. at 49, *CREW v. FEC*, 209 F. Supp. 3d 77 (D.D.C. 2016) (No. 14-cv-01419), Dkt. No. 36; *see id.* at 50 (citing *Heckler v. Chaney*, 470 U.S. 821 (1985)).

The Court held the FEC's dismissal "contrary to law." *CREW v. FEC*, 209 F. Supp. 3d 77, 95 (D.D.C. 2016) ("*CREW I*"), *appeal dismissed*, Nos. 16-5300, 16-5343, 2017 WL 4957233 (D.C. Cir. Apr. 4, 2017). At the threshold, the Court held that "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)," was sufficient to rebut the ordinary presumption that prosecutorial discretion is unreviewable. *Id.* at 88 n.7. On the merits, the Court's conclusion hinged on its decision not to apply the deferential standard of review announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

Although the Court recognized that "[u]sually, when a court's review turns on an interpretation of FECA's terms, the 'contrary to law' standard involves a straightforward application of the familiar two-step framework outlined in *Chevron*," it determined "this [was] not a usual case" because the "major purpose" test was a First Amendment gloss arising from *Buckley*. *CREW I*, 209 F. Supp. 3d at 86. The Court found that the controlling Commissioners had erred when they found persuasive a Seventh Circuit decision holding that electioneering communications were categorically excluded from the "major-purpose" calculation. *See id.* at 90

(stating that "the controlling Commissioners grounded their decision … on an outlier"). The Court remanded with instructions for the FEC to conduct, within 30 days, a more particularized review of AAN's spending on advertisements. AAN appealed, but the D.C. Circuit dismissed that appeal because "[t]he district court order remanding the case to the Federal Election Commission [was] not a final, appealable order." 2017 WL 4957233, at *1.

On remand, the Commission deadlocked and dismissed for a second time. Consistent with the Court's decision, the three controlling Commissioners did not "categorically exclude AAN's electioneering communications from its major-purpose calculation." *CREW v. FEC*, 299 F. Supp. 3d 83, 90 (D.D.C. 2018) ("*CREW II*"), *appeal dismissed*, No. 18-5136, 2018 WL 5115542 (D.C. Cir. Sept. 19, 2018). Instead, they conducted a fact-specific review of the twenty disputed AAN electioneering communications in a more than nineteen-page, single-spaced analysis that used the Court's standard, weighed various factors, and recharacterized four electioneering communications as indicative of a major purpose to nominate or elect candidates. Nevertheless, the Court again found that the FEC's dismissal was "contrary to law." *Id.* at 101. This time, the Court held that the FEC had failed to apply a presumption "that spending on electioneering communications contributes to a 'major purpose' of nominating or electing a candidate for federal office." *Id.*; *see also id.* at 97. Once again, the Court remanded with instructions for the FEC to conform within 30 days to the Court's new standard. AAN noticed its appeal.

Soon after AAN noticed its appeal, the D.C. Circuit issued its decision in *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) ("*CHGO*"), *reh'g en banc denied*, 923 F.3d 1141 (D.C. Cir. 2019), another case arising after an FEC deadlock on an administrative complaint filed by CREW alleging that a third party should have registered as a political committee. The D.C. Circuit held the FEC's dismissal of CREW's administrative complaint was an unreviewable exercise of prosecutorial

discretion and further that "[n]othing in [FECA] overcomes the presumption against judicial review" articulated in *Heckler v. Chaney*, 470 U.S. 821 (1985). *CHGO*, 892 F.3d at 439. The court explained that it made no difference whether the controlling Commissioners had paired their exercise of enforcement discretion with substantive legal reasoning because "[t]he law of this circuit 'rejects the notion of carving reviewable legal rulings out from the middle of non-reviewable actions.'" *See id.* at 441–42 (citations omitted). The D.C. Circuit also held that a "court may not authorize a citizen suit" when "the Commission exercises its prosecutorial discretion to decline an enforcement action" because such authorization "necessarily" would require the court to "subject the Commission's exercise of discretion to judicial review, which it cannot do." *Id.* at 439–40.

AAN moved the D.C. Circuit for summary reversal based on *CHGO*. It argued that the D.C. Circuit's determination that "[n]othing in [FECA] overcomes the presumption against judicial review," *id.* at 439, required reversal of this Court's contrary conclusion that "FECA's express provision for the judicial review of the FEC's dismissal decisions … is just such a rebuttal," *CREW I*, 209 F. Supp. 3d at 88 n.7. *See* AAN Mot. Summ. Reversal at 1–2, *CREW v. FEC*, No. 18-5136 (D.C. Cir. June 25, 2018), Dkt. No. 1737659. In addition, this Court's authorization of a citizen suit was contrary to *CHGO*'s holding that a district court "may not authorize a citizen suit" when the FEC declines enforcement based on prosecutorial discretion. *CHGO*, 892 F.3d at 440; *see* AAN Mot. Summ. Reversal at 9, 13. The D.C. Circuit dismissed the appeal without reaching the merits because "[t]he district court orders remanding the action to the Federal Election Commission [were] not final, appealable orders." 2018 WL 5115542, at *1.

Meanwhile, back at the FEC, the Commission did not act within 30 days following the Court's remand. In a public statement, FEC Vice Chair Ellen L. Weintraub—one of the non-

controlling Commissioners who opposed dismissal in the FEC's prior deadlocked votes—announced that she had declined to vote in order to intentionally deprive the FEC of the quorum necessary to conform with this Court's order and thereby to enable CREW to bring a citizen suit pursuant to 52 U.S.C. § 30109(a)(8)(C). *See* Statement of Vice Chair Ellen L. Weintraub Regarding *CREW v. FEC & American Action Network* (Apr. 19, 2018), https://www.fec.gov/resources/cms-content/documents/2018-04-19-ELW-statement.pdf. Although ordinarily a single Commissioner's non-participation would not defeat a quorum, in this case, that was possible because the FEC had only four seated Commissioners, the bare statutory minimum needed for the FEC to act.

CREW accepted Vice Chair Weintraub's invitation and filed this lawsuit against AAN a few days later. Without Ms. Sloan as a co-plaintiff, CREW expanded its allegations against AAN, requesting a declaration that AAN became a political committee in 2009 or 2010 and remains one today. Compl. ¶¶ 21–22. Following a brief stay to determine the appealability of *CREW II*, AAN filed a motion to dismiss. As relevant here, AAN argued: (1) the FEC's dismissal decision was not reviewable in light of the D.C. Circuit's *CHGO* decision because it included an exercise of prosecutorial discretion; (2) CREW lacked standing because, among other things, Ms. Sloan is no longer party to the case and CREW, as a 501(c)(3) corporation, cannot vote or "participat[e] in the political process," *Nader v. FEC*, 725 F.3d 226, 230 (D.C. Cir. 2013); (3) the statute precludes this action because the legal reasoning in the FEC's dismissals was not "contrary to law," and (4) the Court lacked jurisdiction to consider conduct beyond that alleged in CREW's original administrative complaint under the plain language of 52 U.S.C. § 30109(a)(8)(C).

The Court denied the motion in large part, finding that CREW's case-in-chief can proceed on all time periods alleged in CREW's original administrative complaint, *i.e.*, from mid-2009 to

mid-2011. The Court left the door open to considering the later, and not previously pleaded, time periods when fashioning a remedy. The Court's decision also incorporated and affirmed its reasoning in *CREW I* and *CREW II*. *See CREW III*, slip op. at 21–22.

ARGUMENT

I. THE COURT SHOULD CERTIFY ITS ORDER FOR APPEAL UNDER § 1292(B).

A district court may certify an order for immediate appeal where the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and … an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see Z St. v. Koskinen*, 791 F.3d 24, 28 (D.C. Cir. 2015). "[D]istrict courts should not hesitate to certify an interlocutory appeal" where, as here, these statutory prerequisites are met. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009). The Court suggested at the hearing on AAN's motion to dismiss that certification on reviewability might be appropriate in light of the D.C. Circuit's *CHGO* decision. *See* Tr. Mot. Hr'g at 34–35 ("[W]hy wouldn't this case be a good candidate for certification for interlocutory appeal on this issue given that there's a very recent D.C. Circuit opinion, there's a panel dissent, there's a dissent from rehearing en banc, there's a thoughtful concurrence from Judge Griffith saying that these are important issues?"); *see id.* at 50–51. The Court should certify its orders to allow resolution of that question and three others. Doing so could avoid needless trial proceedings and allow the D.C. Circuit to resolve critical threshold issues that it will almost certainly confront in all events.

A. The Order Involves Four Controlling Issues Of Law.

AAN seeks immediate appeal regarding four questions decided or affirmed in the September 30 Order: (1) whether the FEC's dismissal based on an exercise of its prosecutorial discretion is reviewable; (2) whether CREW has standing to pursue this action; (3) whether the FEC's dismissal decisions were "contrary to law," and (4) if the Court has jurisdiction, whether it

may consider imposing disclosure obligations outside the time period covered by the original administrative complaint, even in a remedial context.

These issues are controlling. The first three would eliminate the suit entirely: If the Court lacks jurisdiction to review the FEC's exercise of prosecutorial discretion, if CREW lacks standing to sue, or if there is no "contrary to law" determination justifying a citizen suit, this litigation must be dismissed. *See, e.g.*, *Philipp v. Fed. Republic of Germany*, 253 F. Supp. 3d 84, 87 (D.D.C. 2017) ("Controlling questions of law include issues that would terminate an action if the district court's order were reversed." (citation omitted)).

The fourth issue—whether the Court may impose disclosure obligations outside the time period subject to the administrative complaint, even if in a remedial context—is also controlling because it could expand the "scope" of this litigation from the two years alleged in the administrative complaint to a decade-long period. *See Molock v. Whole Foods Mkt. Grp., Inc.*, 317 F. Supp. 3d 1, 4 (D.D.C. 2018) (certifying order where resolution of "jurisdictional limits" affected "scope"); *APCC Servs., Inc. v. Sprint Commc'ns Co., L.P.*, 297 F. Supp. 2d 90, 96 (D.D.C. 2003) ("The resolution of an issue need not necessarily terminate an action in order to be controlling, but instead may involve a procedural determination that may significantly impact the action." (quotations and citation omitted)). Clarity on the scope of this litigation, should it proceed despite the other threshold issues that require dismissal, will preserve judicial and party resources.

B. There Are Substantial Grounds For Difference Of Opinion On Four Controlling Issues Of Law Involved In The Order.

An appeal is also warranted because of the "substantial ground for difference of opinion" on each of the threshold issues. *See* 28 U.S.C. § 1292(b). Courts in this Circuit have found a substantial ground for difference of opinion where, as here, the reviewing court must resolve an issue "of first impression," *Kennedy v. District of Columbia*, 145 F. Supp. 3d 46, 52 (D.D.C. 2015)

(Cooper, J.) (quoting *Mwani v. Bin Laden*, 947 F.Supp.2d 1, 5 (D.D.C. 2013)); *cf. CREW III*, slip op. at 42 n.11 (acknowledging "issues of first impression" in this case), and where there "may be a substantial difference of opinion among judges" as to whether the resolution of the novel issues was "correct," *Kennedy*, 145 F. Supp. 3d at 52 (citation omitted). Courts have recognized that the standard for disagreement is low where, as here, "proceedings … threaten to endure for several years [and] depend on an initial question of jurisdiction . . . or the like." *APCC Servs.*, 297 F. Supp. 2d at 98 (quoting 16 Wright & Miller, Federal Practice & Procedure, § 3930 at 422 (1996)).

1. Whether The FEC's Dismissal Decision Is Reviewable.

The Court recognized that there is a difference of opinion about the proper application of the D.C. Circuit's recent *CHGO* decision to FEC dismissal decisions. *See* Tr. Mot. Hr'g at 34–35, 50–51. In *CHGO*, the D.C. Circuit held that "there can be no judicial review for abuse of discretion, or otherwise" if such a dismissal includes an exercise of prosecutorial discretion, even if the FEC paired or explained that exercise of discretion with an interpretation of the law. *See* 892 F.3d at 441–42. Judge Contreras has since dismissed a challenge to just such an FEC decision. *See CREW v. FEC*, 380 F. Supp. 3d 30, 41 (D.D.C. 2019), *appeal docketed*, No. 19-5161 (D.C. Cir.); *see also id.* at 42 ("That invocation [of prosecutorial discretion], brief as it was, thus insulated the Controlling Commissioners' decision from reviewability under [*CHGO*].").

The Court reached a different conclusion. It attempted to distinguish *CHGO* by pointing out that although the FEC had clearly invoked its prosecutorial discretion, it had discussed extensively its "interpretation of the statute" but only minimally its prudential concerns. *CREW III*, slip op. at 18 (citation omitted); *see id.* at 21–22. But there are certainly grounds for disagreement on this point, as the Court's view tracks the position espoused by the *CHGO* dissent, which was expressly rejected by the panel majority. *Compare CHGO*, 892 F.3d at 444 (Pillard, J., dissenting) (arguing an FEC dismissal should be reviewable if it "was based on legal error")

and 923 F.3d at 1145 (Pillard, J., dissenting from denial of rehearing en banc) (similar), *with CHGO*, 892 F.3d at 442 (majority) (finding that review of any legal reason furnished by the FEC would "be mistaken" if the FEC also exercised prosecutorial discretion); *and id.* at 441 n.11 (elaborating). Under *CHGO*, an "agency enforcement decision[ ]" is not reviewable "for abuse of discretion, or otherwise" unless it is "based *entirely* on [the agency's] interpretation of the statute." *Id.* at 441 & n.11 (emphasis added). It is undisputed that the FEC's dismissal here was not based "entirely" on legal reasoning, so the Court should proceed cautiously and provide the D.C. Circuit with an opportunity to apply its recent decision before any further review.

Indeed, proceeding with this litigation also conflicts with the Supreme Court precedent on which *CHGO* relied. 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. 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" (internal quotation marks omitted)). These decisions provide a further basis for finding a substantial ground for difference of opinion as to whether the FEC's dismissal decision is reviewable.

The Court supported its departure from *CHGO* with policy considerations, but there is also ground for disagreement over the best policy in this situation. The Court was concerned that strict adherence to *CHGO* would permit the FEC to "circumvent judicial review" by "simply sprinkl[ing] the term [prosecutorial discretion] throughout a Statement of Reasons." *CREW III*, slip op. at 19 (citing *CHGO*, 923 F.3d at 1149 (Pillard, J., dissenting from denial of rehearing en banc)). But the Court's approach disincentivizes the FEC from providing any legal analysis—even to inform the regulated community about "how the agency will enforce a statute or regulation—in other words, how it will exercise its broad enforcement discretion"—because doing so could subject a private party, like AAN, to prolonged and unnecessary litigation. *Cf. Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014) (Kavanaugh, J.) (explaining purpose of agency policy statements). Indeed, under the distinction drawn by the Court, a party like AAN can be investigated even though the First Amendment cautions against proceeding—while another party would avoid further investigation even if its actions were plainly contrary to law simply because the FEC explained its exercise of prosecutorial discretion in terms of resource and timing concerns. The D.C. Circuit should have an opportunity to weigh in on this policy disagreement before the Court takes any further action here.

2. Whether CREW Has Standing To Pursue This Action.

There is also a substantial ground for difference of opinion as to CREW's standing in this case because "the standing question arises at the intersection of precedent." *See In re Trump*, No. 19-5196, 2019 WL 3285234, at *1 (D.C. Cir. July 19, 2019) (per curiam) (holding the district court abused its discretion in denying certification on standing). The D.C. Circuit, and the majority of courts in this District, have held that CREW lacks standing to assert informational injury premised on a supposed failure to make disclosures required by FECA.

The reason is straightforward. Plaintiffs "allege the type of concrete injury needed for standing to bring a FECA claim if the disclosure they seek is related to their informed participation in the political process." *Nader*, 725 F.3d at 230 (citing *FEC v. Akins*, 524 U.S. 11 (1998)). CREW is unable to meet this criterion because 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." *CREW v. FEC*, 475 F.3d 337, 339 (D.C. Cir. 2007) (affirming dismissal); *see also, e.g.*, *CREW v. FEC*, 401 F. Supp. 2d 115, 120 (D.D.C. 2005) ("*ATR I*") ("standing … is often difficult for organizational plaintiffs like CREW to satisfy"); *All. for Democracy v. FEC*, 335 F. Supp. 2d 39, 48 (D.D.C. 2004) (finding no injury that could support standing where plaintiffs "failed to show how [the] information … could have a concrete effect on plaintiffs' voting in future elections").

CREW answers that it will help others participate in the political process by publicizing potential FECA violations. But that alleged injury amounts to either nonjusticiable "derivative harm," *ATR I*, 401 F. Supp. 2d at 121, or disclosure in aid of law enforcement, an interest courts consistently reject as establishing standing, *see, e.g.*, *Nader*, 725 F.3d at 230 (no standing where plaintiff hoped to "get the bad guys"); *Common Cause v. FEC*, 108 F.3d 413, 418 (D.C. Cir. 1997) (no "justiciable interest in the enforcement of the law"). Indeed, courts in this District have repeatedly dismissed CREW complaints when standing was premised on claims nearly identical to those raised in this Complaint, *see* AAN Mem. Supp. Mot. Dismiss, at 17 (collecting examples), Dkt. No. 24-1, and CREW often sues in partnership with a voter to avoid that result, *see, e.g.*, *CREW v. FEC*, 316 F. Supp. 3d 349, 356 (D.D.C 2018) (case brought by CREW and "a registered voter in Ohio"). At bottom, the relief CREW seeks is no different than what the FEC twice declined to pursue.

The Court relied instead on a non-binding decision finding two corporations had standing because they had "proposed valid uses, related to their organizational missions, for the information that they seek" even though the corporations were "not voters or participants in political elections." *Campaign Legal Ctr. v. FEC*, 245 F. Supp. 3d 119, 128-29 (D.D.C. 2017), *appeal docketed*, No. 18-5239 (D.C. Cir.). But that decision—which itself may be reversed on appeal—appears to conflate programmatic injury with informational injury. Moreover, it relies primarily on two environmental cases involving the Clean Air Act and the Endangered Species Act, *see id.* (citing *Ethyl Corp. v. EPA*, 306 F.3d 1144 (D.C. Cir. 2002) and *Friends of Animals v. Jewell*, 824 F.3d 1033 (D.C. Cir. 2016)), rather than on cases involving FECA.

This Court seems to have recognized the shortcomings of *Campaign Legal Center*, as it attempted to distinguish some of the "host of cases in which courts in this circuit found that plaintiffs lacked standing to challenge FEC dismissals" based on an asserted informational injury. *CREW III*, slip op. at 13. The Court found those cases inapposite because "[t]he case law distinguishes between information in the form of legal conclusions and information in the form of facts." *Id.* at 13–14. But that distinction at best raises a substantial ground for difference of opinion. The Court should ensure CREW has standing before giving it the exceptional investigative and prosecutorial authority it seeks to exercise here.

3. Whether The FEC's Dismissals Were "Contrary To Law."

Even if the Court decides there is no substantial ground for difference of opinion on reviewability after *CHGO*, or on CREW's standing, it should still certify an interlocutory appeal because there is a substantial ground for difference of opinion as to whether the legal reasoning included in the FEC's dismissals was itself "contrary to law"—which is a necessary predicate for any citizen suit. *See* 52 U.S.C. § 30109(a)(8)(C). The FEC exercised its prosecutorial discretion in light of its construction of the statutory term "political committee," *id.* § 30101(4), and its

application of that term to AAN. The controlling Commissioners twice determined that AAN was not a "political committee" because AAN did not have as its "major purpose" the nomination or election of federal candidates. *See CREW I*, 209 F. Supp. 3d at 83–84 (explaining first FEC dismissal); *CREW II*, 299 F. Supp 3d at 90–92 (explaining second FEC dismissal). This Court twice disagreed with the Commission and reaffirmed that disagreement here. *See CREW III*, slip op. at 21–22.

In the first decision, the Court found the FEC's dismissal "contrary to law" based on its *de novo* interpretation of precedent, without deferring to the FEC's interpretation of the "major purpose" requirement. *CREW I*, 209 F. Supp. 3d at 86; *see also Buckley*, 424 U.S. at 79. That approach is at least questionable as agencies are entitled to deference when they interpret ambiguous statutory terms unless a "prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (deferring, under *Chevron*, to FCC declaratory ruling interpreting ambiguous terms despite prior court decisions construing the same language); *see also Van Hollen, Jr. v. FEC*, 811 F.3d 486, 496 (D.C. Cir. 2016) (holding FEC reasonably "promulgat[ed] a new regulation" notwithstanding judicial approval of the original regulation). The Supreme Court has made clear that "the agency," not the court, is "the authoritative interpreter" of a statute Congress has charged it to administer. *Brand X*, 545 U.S. at 983.

The Court believed that the major purpose test could not be deemed a part of the statute. *But see Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 487 (7th Cir. 2012) ("[T]he 'major purpose' limitation . . . was a creature of statutory interpretation"); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 59 (1st Cir. 2011) (explaining "major purpose" test is "an artifact of the

Court's construction of a federal statute"). But the D.C. Circuit has explained that "where an agency has adopted a judicial test as its own" the court reviews the agency's interpretation of that test "with deference." *U.S. Telecom Ass'n v. FCC*, 295 F.3d 1326, 1332 (D.C. Cir. 2002); *accord Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 290 n.10 (4th Cir. 2011) (explaining agency interpretation of court-developed "significant nexus" test would be entitled to *Chevron* deference if adopted with requisite formalities). The Court's choice to engage in *de novo* review is thus itself subject to significant disagreement.

There is likewise a substantial ground for disagreement regarding the Court's second decision as the Court acknowledged that the Commission had balanced "directives that … push[ed] the agency in opposite directions." *CREW II*, 299 F. Supp. 3d at 101. Half of the Commissioners then on the FEC expressed support for further review of these important issues. They issued a statement that detailed their concerns with the Court's prior decisions and expressed support for an appeal to better provide clarity in this "important area of law." Statement of Chair Caroline C. Hunter and Commissioner Matthew S. Petersen on *CREW v. FEC*, No. 16-CV-02255 at 1 (Apr. 26, 2018), https://www.fec.gov/resources/cms-content/documents/3117_001_v2.pdf. The time for that appeal is now. By certifying review of the legal reasoning that underpins this action, the Court will protect invaluable interests, including the FEC's enforcement authority, and will avoid the "serious risk of chilling protected speech" that would occur from additional burdensome litigation over FEC decisions that never were "contrary to law." *See Citizens United v. FEC*, 558 U.S. 310, 326–27 (2010).

4. Whether The Court Has Authority To Craft Remedies Outside The Period Covered By The Original Complaint.

The Court should at the very least certify a question about the permissible scope of this litigation. There is a substantial ground for difference of opinion as to whether the Court has

authority to go beyond the factual allegations of the original administrative complaint, even in a remedial context. This issue, the Court recognized, enters "uncharted territory." Tr. Mot. Hr'g at 22; *see id.* at 24.

It is undisputed that CREW's original administrative complaint alleged only that AAN "was a political committee between July 23, 2009 through June 30, 2011." *See* Original Compl. ¶ 19. And the statute limits the Court's jurisdiction to the "original complaint." 52 U.S.C. § 30109(a)(8)(c). The Court thus correctly held that it lacks jurisdiction over AAN's post-June 2011 conduct. *CREW III*, slip op. at 26. The Court, however, left open the possibility that it *could* review those time periods when crafting a remedy. *See id.* at 24–30 & n.8.

That decision is at least debatable; "[w]ithout jurisdiction the court cannot proceed at all[.]" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (citation omitted). And simply recasting the inquiry as "remedial" does not solve the problem. The Court's remedial authority "may be displaced by 'clear and valid legislative command[ ]'" that "cabin[s] [the] court's discretion to fashion equitable remedies." *Beck Chevrolet Co., Inc. v. Gen. Motors LLC*, 787 F.3d 663, 680 (2d Cir. 2015) (quoting *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001)); *see also Walther v. Baucus*, 467 F. Supp. 93, 94 (D. Mont. 1979) (observing that "a precisely drawn, detailed statute preempts more general remedies" and dismissing a FECA citizen suit for failure to exhaust (internal quotation marks omitted)).

Here, the statute expressly limits jurisdiction such that the Court may only "remedy the violation *involved in the original complaint*." 52 U.S.C. § 30109(a)(8)(C) (emphasis added). Whether AAN was a political committee after that time period, such that it must file additional reports for later time periods, can only be resolved through the statutory process, which requires that an administrative complaint be first presented to the FEC. The doctrine of exhaustion also

compels this result, as "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Mykonos v. United States*, 59 F. Supp. 3d 100, 106 (D.D.C. 2014) (quoting *McKart v. United States*, 395 U.S. 185, 193 (1969)). Thus, before this case proceeds—if this case proceeds—the D.C. Circuit should be given an opportunity to determine the appropriate and lawful scope of this first-of-its-kind case.

C. An Interlocutory Appeal Will Materially Advance The Ultimate Termination Of This Litigation.

An appeal at this time will "materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(b), because it will "hasten or at least simplify the litigation in some material way, such as by significantly narrowing the issues, conserving judicial resources, or saving the parties from needless expense." *Molock*, 317 F. Supp. 3d at 6; *accord APCC Servs.*, 297 F. Supp. 2d at 100. The issues are novel, involve questions that have divided courts, and could eliminate or limit the scope of litigation on remand. And CREW intends to seek discovery that undoubtedly will be expensive and could irreparably injure AAN. *See* Tr. Mot. Hr'g at 50 ("There's no putting that toothpaste back in the tube."). Where, as here, "there are substantial grounds for difference of opinion as to a court's subject matter jurisdiction, courts regularly hold that immediate appeal may 'materially advance the ultimate termination of the litigation.'" *Al Maqaleh v. Gates*, 620 F. Supp. 2d 51, 55 (D.D.C. 2009) (collecting cases).

The need to materially advance the ultimate termination of the litigation is especially acute where, as here, the very act of litigation causes cognizable constitutional harm. The threat that third parties may prosecute political speech they oppose undoubtedly will chill the associational and free speech rights of individuals and organizations who understandably would like to avoid the risk of trial for expressing their political opinions. *See Citizens United*, 558 U.S. at 326–27 (recognizing "litigation over an extended time" creates "an inevitable, pervasive, and serious risk

of chilling protected speech"). "Courts, too, are bound by the First Amendment," *id.* at 326; here, certification would reduce the risk of additional chill to associational and free speech rights.

Importantly, CREW's unsupported claim that an interlocutory appeal to resolve conclusively this Court's jurisdiction would "prejudice … the plaintiff" through delay, Tr. Mot. Hr'g at 35, is not credible. The Court has already ruled that its merits jurisdiction is limited to the 2009 to 2011 timeframe—*a decade ago*—so it is difficult to see how delaying district court adjudication for a few months or even a year would prejudice plaintiffs at all. Moreover, "in the event that it is ultimately found that this Court lacks jurisdiction to litigate these cases, it would be far better for all concerned, including plaintiffs, to have these matters resolved now, as opposed to sometime in the distant future." *APCC Servs.*, 297 F. Supp. 2d at 100.

II. THE COURT SHOULD STAY PROCEEDINGS PENDING § 1292(B) APPEAL.

When certifying an appeal, the Court should also stay this case pending that appeal. A district court possesses inherent authority to "control the disposition of the causes on its docket" and has power to stay an action as an incident of that authority. *See Mobley v. CIA*, 806 F.3d 568, 576 (D.C. Cir. 2015) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). Interlocutory appeal pursuant to § 1292(b) is an appropriate circumstance for exercising this inherent power and often results in entry of a stay. *See, e.g.*, *Blumenthal v. Trump*, No. 17-cv-1154, 2019 WL 3948478, at *3 & n.3 (D.D.C. Aug. 21, 2019) (staying proceedings), *leave to appeal granted sub nom. In re Trump*, No. 19-8005, 2019 WL 4200443 (D.C. Cir. Sept. 4, 2019); *Mwani v. Bin Laden*, 947 F.Supp.2d 1, 5–6 (D.D.C. 2013) (same); *Kennedy*, 145 F. Supp. 3d at 53 (same).

The Court previously stayed this litigation to provide the D.C. Circuit time to consider the appealability of *CREW II* and the same considerations justify a stay now. It will provide "economy of time and effort for [the Court], for counsel, and for litigants," as the appeal could eliminate any further litigation—and will necessarily impact the parties' arguments and Court's analysis even if

it proceeds. *Landis*, 299 U.S. at 254. Indeed, it is never "in the interest of judicial economy or in the parties' best interests" to "litigat[e] essentially the same issues in two separate forums." *IBT/HERE Emp. Reps.' Council v. Gate Gourmet Div. Am.*, 402 F. Supp. 2d 289, 293 (D.D.C. 2005).

A stay will also protect confidential information from unwarranted disclosure, preserve the sequential judicial review process established by FECA, and respect the FEC's enforcement authority. And most important, it will ensure that AAN's First Amendment conduct is not burdened with further litigation until the D.C. Circuit has an opportunity to determine whether the FEC appropriately dismissed the same allegations presented here. Putting AAN through litigation is itself a cognizable harm that threatens its associational and free speech rights. That harm is likely to chill further political speech by AAN and others who are concerned that exercise of their First Amendment rights could subject them to trial at the whim of third parties. And the brief additional time required for the appeal presents no cause for concern in a case that looks backward 10 years. The case should be stayed pending appeal.

CONCLUSION

For the reasons stated above, the Court should certify for appeal its Order granting and denying in part AAN's motion to dismiss and its Orders granting CREW's motions for summary judgment. The Court should also stay its proceedings until such time as that appeal is resolved.

Respectfully submitted,

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Dated: October 18, 2019

Counsel for Defendant

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)

[PROPOSED] ORDER

Upon consideration of American Action Network's Motion for Certification of an Interlocutory Appeal and a Stay Pending Appeal, it is hereby

ORDERED that the Motion is **GRANTED**. It is further

ORDERED that the Orders issued on September 30, 2019 (Dkt. No. 28), March 20, 2018 (Dkt. No. 47 in Case No. 16-cv-2255), and September 19, 2016 (Dkt. No. 53 in Case No. 14-cv-1419) are **CERTIFIED** for interlocutory appeal. It is further

ORDERED that this proceeding is **STAYED**.

SO ORDERED this _____ day of _____, 2019.

_____
CHRISTOPHER R. COOPER
United States District Judge