

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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 CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, CA No: 1:18-cv-00945-CRC  
 Plaintiff, Washington, D.C.  
 vs. Tuesday, August 6, 2019  
 11:06 a.m.  
 AMERICAN ACTION NETWORK,  
 Defendant.  
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TRANSCRIPT OF MOTION HEARING  
 HELD BEFORE THE HONORABLE CHRISTOPHER R. COOPER  
 UNITED STATES DISTRICT JUDGE

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APPEARANCES:

For the Plaintiff: **STUART C. MCPHAIL, ESQ.**  
**ADAM RAPPAPORT, ESQ.**  
 CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON  
 1101 K Street, NW, Suite 201  
 Washington, DC 20005  
 (202) 408-5565  
 smcphail@citizensforethics.org  
  
**SATHYA S. GOSSELIN, ESQ.**  
**SETH R. GASSMAN, ESQ.**  
 HAUSFELD LLP  
 1700 K Street, NW, Suite 650  
 Washington, DC 20006  
 (202) 540-7200  
 SGosselin@hausfeld.com

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Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription

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APPEARANCES (CONTINUED):

For the Defendant:

**STEPHEN J. OBERMEIER, ESQ.**  
**CLAIRE J. EVANS, ESQ.**  
**JEREMY J. BROGGI, ESQ.**  
WILEY REIN LLP  
1776 K Street, NW  
Washington, DC 20006  
(202) 719-7000  
sobermeier@wileyrein.com

Court Reporter:

Lisa A. Moreira, RDR, CRR  
Official Court Reporter  
U.S. Courthouse, Room 6718  
333 Constitution Avenue, NW  
Washington, DC 20001  
202-354-3187

## P R O C E E D I N G S

1  
2 THE COURTROOM DEPUTY: Your Honor, we're on the  
3 record for Civil Case 18-945, *Citizens for Responsibility*  
4 *and Ethics in Washington vs. American Action Network.*

5 Counsel, if you can please approach the lectern  
6 and identify yourselves for the record.

7 MR. OBERMEIER: Good morning, Your Honor; Steve  
8 Obermeier on behalf of the American Action Network. Here at  
9 the table with me are my colleagues, Claire Evans and Jeremy  
10 Broggi.

11 THE COURT: Mr. Obermeier, how are you?

12 MR. OBERMEIER: Good. How are you?

13 THE COURT: Good.

14 MR. McPHAIL: Good morning, Your Honor; Stuart  
15 McPhail for plaintiff CREW, and I'm joined at counsel's  
16 table by Sathya Gosselin, Seth Gassman, and Adam Rappaport.

17 THE COURT: Okay. Good morning, everybody.

18 MR. McPHAIL: Good morning.

19 THE COURT: All right. We're here on the  
20 defendant's motion to dismiss.

21 So I would like to, if possible, keep this to  
22 about an hour or so. I don't have strict time limits, but  
23 I'd like to keep it to an hour or so, if possible. Feel  
24 free to discuss whatever issues you'd like, but I am most  
25 interested in the question of reviewability in light of the

1 CHGO ruling by the Circuit, as well as how to handle any  
2 post June 2011 activities in the event the case goes  
3 forward.

4 MR. OBERMEIER: Understood, Your Honor. Thank  
5 you, and that's actually what I was going to propose as  
6 well.

7 THE COURT: Okay.

8 MR. OBERMEIER: I was also going to address  
9 standing, if it pleases the Court. Obviously you're  
10 familiar with a lot of these issues, but I do think there  
11 have been some, you know, big changes since the last time we  
12 were here that affect both standing and the prosecutorial  
13 discretion point.

14 THE COURT: Okay.

15 MR. OBERMEIER: And, of course, with respect to  
16 the substantive constitutional and other merits issues, I  
17 have no intention of raising those today; and merits issues  
18 are in there really mostly to preserve them since it hasn't  
19 gone to appeal yet.

20 THE COURT: I take no offense.

21 MR. OBERMEIER: Thanks, Your Honor.

22 Your Honor, I am going to start with standing.  
23 And as an initial matter, I think the whole case should be  
24 dismissed with prejudice on the standing issue, and the  
25 important development here with respect to standing is that

1 the last time Your Honor heard this case there was a voter  
2 plaintiff in the case, Marie Sloan or, excuse me, Melanie  
3 Sloan, who is no longer a plaintiff. Now there's no voter  
4 plaintiff in the case, and there can't be. The statute  
5 limits the potential plaintiffs here to the complainants.  
6 The only complainant voter was Ms. Sloan, and she's not  
7 here. So without Ms. Sloan, there's no standing here.

8 And it really boils down, I think, to two issues.  
9 There are a lot of cases in the briefs, but I think it kind  
10 of comes down to two issues. CREW alleges two types of  
11 injury. They allege an informational injury, that it didn't  
12 receive information it was entitled to receive under the  
13 statute, and a programmatic injury, that it's been hindered  
14 in carrying out its core activity. And I think three D.C.  
15 Circuit cases are dispositive of the standing issue, and  
16 that's the *Nader* decision, the *Spann* decision, and the  
17 *National Treasury Employees Union* decision.

18 So I'll start with *Nader*.

19 Under *Nader*, there's no informational injury to  
20 CREW, which does not participate in the political process.  
21 That case involved Ralph Nader's efforts to compel  
22 disclosure of contributions and expenditure information from  
23 groups that helped to allegedly undermine him in the  
24 previous election. And *Nader*, importantly, interprets  
25 *Akins*, which CREW relies on, and was decided after two of

1 the other key cases on which CREW relies, which were *Shays*  
2 and *Zivotofsky*.

3 THE COURT: When was *Nader* decided?

4 MR. OBERMEIER: *Nader* is 2013, Your Honor.

5 THE COURT: Okay.

6 MR. OBERMEIER: And I'm going to try not to do too  
7 much quoting from cases, but some of this stuff kind of  
8 requires it. And in *Nader*, the D.C. Circuit stated: The  
9 Supreme Court's ruling in *Akins* and our ruling in *Shays*  
10 establish that litigants who claim a right to information  
11 allege the type of concrete injury needed for standing to  
12 bring a FECA claim if the disclosure they seek is related to  
13 their informed participation in the political process. So  
14 *Nader* asked the FEC to compel information to show that  
15 certain organizations have violated the statute.

16 THE COURT: Okay. How does that standard square  
17 with the D.C. Circuit's articulation of informational  
18 standing in *Friends of Animals v. Jewell* three years later  
19 in 2006 where it said there are two prongs: the statute  
20 requires that the information be disclosed and that there's  
21 no reason to doubt plaintiff's claim that the information  
22 would help them? Is your position that this information  
23 would not help CREW?

24 MR. OBERMEIER: Well, two things, Your Honor.  
25 First of all, I think in *Jewell* the Court found there was no

1 standing in that case. Second of all, *Nader* --

2 THE COURT: You don't argue that that's the  
3 standard that the Circuit set forth.

4 MR. OBERMEIER: Well, I'm saying that -- I was  
5 about to say, Your Honor, that *Nader* established a standard  
6 for the FECA and specifically says that it requires that it  
7 has to be related to the informed participation in the  
8 political process. So I think that's a key distinction.  
9 And what the Court found was that what *Nader* was looking for  
10 amounts to seeking disclosure to promote law enforcement.

11 And, Your Honor, I think CREW is exactly like  
12 *Nader*. CREW does not seek information to facilitate its  
13 informed participation in the political process because it  
14 does not and cannot vote, and as a 501(c)(3) it's foreclosed  
15 from contributing or participating in the political process.  
16 And that's what Judge Randolph found at the *American*  
17 *Crossroads II* decision, another D.C. Circuit decision.

18 THE COURT: You can participate in the political  
19 process without voting, correct?

20 MR. OBERMEIER: That's true, Your Honor, but as a  
21 501(c)(3) CREW cannot. And also they're not -- and as Judge  
22 Bates said -- it was a 2005 decision; I believe it was  
23 *American Crossroads I*. What CREW is saying is, "Well, we  
24 want information to share it with others." That's a  
25 derivative injury. And what CREW is really relying on, Your

1 Honor, is a parenthetical in *Akins* that talks about giving  
2 injuries -- or, excuse me, giving information to others.  
3 And as Judge Bates said, that's a derivative injury. That's  
4 not enough to show a concrete injury to CREW. And so,  
5 again, they're more like -- they're more like *Nader*.

6 THE COURT: Doesn't *Akins* say -- *Akins* dealt with  
7 voters.

8 MR. OBERMEIER: Uh-huh.

9 THE COURT: But the injury was both to the voters'  
10 ability to receive the information for their own purposes,  
11 but also to communicate it to others.

12 MR. OBERMEIER: Well, again, I think that the  
13 "communicate it to others" was literally in a parenthetical  
14 in the decision, and I would say that *Nader*, years after  
15 *Akins*, said what it said about having to be using it in the  
16 political process; so I think *Nader* governs the decision.

17 And now, Your Honor, I'll move on to --

18 THE COURT: Didn't Judge Bates recently uphold the  
19 Campaign Legal Center's standing to challenge the FEC's  
20 dismissal of administrative complaints that it filed in the  
21 *CLC v. FEC* case?

22 MR. OBERMEIER: Your Honor, to be honest, I'm not  
23 familiar with that case off the top of my head.

24 THE COURT: Okay.

25 MR. OBERMEIER: Your Honor, I'll move on to the



1 programmatic injury as well, and then move on to the other  
2 issues Your Honor wanted to get to.

3 Under *Spann* and *National Treasury Employees*  
4 *Union* -- and these are two D.C. Circuit cases that CREW  
5 cites -- CREW has failed to allege a programmatic injury.  
6 CREW has alleged only a setback to the organization's  
7 abstract social interests, and it's made no allegation and  
8 representation that it has expended resources dealing with  
9 the alleged unlawful behavior.

10 So in *Spann*, the D.C. Circuit -- this is from I  
11 think 1990. It's now Justice Ginsburg --

12 THE COURT: It wouldn't have to make a  
13 representation. It would just have to include something to  
14 that effect in its complaint, correct?

15 MR. OBERMEIER: It would have to allege a  
16 depletion of resources, Your Honor, and that's not in the  
17 complaint. And, in fact, what's in the complaint -- and  
18 I've got it right here. CREW alleges that it has been,  
19 quote, hindered in carrying out its core programmatic  
20 activities when individuals and entities that attempt to  
21 influence elections and elected officials are able to keep  
22 their identities hidden. I think that's kind of  
23 fundamentally abstract.

24 They go on to say, "When groups that are legally  
25 obligated to report their activities, and contributors do

1 not do so, CREW is deprived of information critical to  
2 advancing its ongoing mission of educating the public."

3 So what CREW there is saying expressly is that  
4 their programmatic injury is the undermining of their  
5 mission, and *National Treasury* says that's not enough.  
6 *National Treasury* says, quote, Conflict between a  
7 defendant's conduct and an organization's mission is alone  
8 insufficient to establish Article III standing.

9 That's precisely the case here, Your Honor. Not  
10 only is it not in the complaint about a depletion of  
11 resources, there's been no affidavits or anything suggesting  
12 as much. That's actually what happened in *Spann*. There  
13 were actually affidavits.

14 And Judge Leon recently held, with respect to a  
15 CREW complaint making these exact same allegations, that  
16 they lacked a programmatic injury for the same reason. And  
17 Judge Bates made a similar finding in the *Americans For*  
18 *Prosperity* case that I referenced before.

19 THE COURT: Okay. Is the Judge Leon case cited in  
20 your briefs?

21 MR. OBERMEIER: It is. It is the *Murray Energy*  
22 case. Sorry. I bounce around with the name usage because  
23 of all the CREW cases but...

24 THE COURT: Yes.

25 MR. OBERMEIER: So, Your Honor, with that I'll

1 move on to the reviewability issue. And the entire case  
2 also should be dismissed for lack of subject matter  
3 jurisdiction because the FEC expressly exercised its  
4 prosecutorial discretion in dismissing the original  
5 complaint.

6 In another key development, again, since this  
7 Court last heard this case, the D.C. Circuit in what I call  
8 *CHGO II* has interpreted --

9 THE COURT: I was wondering how you were going to  
10 pronounce it. I thought "Chicago," you know?

11 MR. OBERMEIER: Yes, someone told me to say it  
12 that way. I go with "Cha-go." It sounds kind of funny,  
13 too.

14 -- has interpreted *Heckler* to hold that even if  
15 the FEC relies on prosecutorial discretion, even in part to  
16 dismiss an agency complaint, the entire FEC decision is  
17 unreviewable, and this is true even if some statutory  
18 interpretation can be teased out of the statement of  
19 reasons, and --

20 THE COURT: You don't have to tease out the  
21 statutory interpretation in this statement of reasons,  
22 right?

23 MR. OBERMEIER: Well, it's there, Your Honor.

24 THE COURT: It's the whole thing, isn't it?

25 MR. OBERMEIER: Well, much of it is, yes, Your

1 Honor, and I guess I have two responses to that.

2 One is, you know, that argument is the first  
3 argument that CREW makes in their brief, and respectfully I  
4 think that was Judge Pillard's argument that lost. It lost  
5 at the panel decision. And also one of the big things  
6 that's happened, I think, Your Honor, since even briefing,  
7 was that en banc has now been denied. So certainly when  
8 CREW raised that argument in its briefing it made sense. En  
9 banc was pending. Now that that's no longer pending. That  
10 ship has sailed.

11 And to be also clear, I mean, Judge Pillard also  
12 wrote a dissent to the en banc, but no one signed on to  
13 that, and only one other judge wanted en banc review. So  
14 this is the law of the Circuit right now.

15 THE COURT: Right. So I guess here's my question.  
16 Whenever an agency declines to investigate, it is an  
17 exercise of discretion in some sense, right? In *CHGO* and  
18 the *New Models* case before Judge Contreras, that  
19 prosecutorial discretion was explicitly grounded in, you  
20 know, resource allocation concerns and the fact that the  
21 subjects of those complaints were no longer in existence or  
22 no longer had bank accounts. Sort of traditional bread and  
23 butter unreviewable prosecutorial discretion factors, right?

24 If you look at the references to prosecutorial  
25 discretion here, there's a bald reference in the conclusion,

1 and there's a reference in Footnote 137 in the first  
2 statement of reasons that roots the exercise of  
3 prosecutorial discretion in the constitutional doubts that  
4 the agency had that obviously, to me at least, stem from  
5 their interpretation of the Constitution, which the Court  
6 held to be erroneous and which is subject to review under  
7 the statute and arguably under *CHGO*.

8 Why isn't that the proper reading of the FEC's  
9 invocation of prosecutorial discretion in this case? What,  
10 other than the constitutional doubts in Footnote 137, did  
11 the FEC base its prosecutorial discretion on, and where is  
12 that in either statement of reasons?

13 MR. OBERMEIER: Well, Your Honor, that is  
14 what they base it on, but I would take -- I guess what I  
15 dispute --

16 THE COURT: So how, then, is that any different  
17 than review based on legal interpretations?

18 MR. OBERMEIER: Well, I think there's a couple of  
19 big differences.

20 Okay. So the first is if you look at Footnote  
21 137, the beginning of the footnote is talking about  
22 constitutional interpretation that the agency's doing. Then  
23 it says -- in the final sentence it says -- let me just find  
24 the language here, Your Honor, because I have it. It says,  
25 "The constitutional doubts" --

1 THE COURT: Let me get there, too --

2 MR. OBERMEIER: Oh, I'm sorry, Your Honor.

3 THE COURT: -- so we're on literally the same  
4 page. All right. Go ahead.

5 MR. OBERMEIER: So the actual sentence about  
6 prosecutorial discretion says, "The constitutional doubts  
7 raised here militate in favor of cautious exercise of our  
8 prosecutorial discretion."

9 THE COURT: Right. So we think that we should  
10 tread carefully because we don't believe that an enforcement  
11 action would be consistent with the Constitution. And  
12 that's what the entire first ruling that I issued was about,  
13 right?

14 MR. OBERMEIER: Well, so this is the difference,  
15 Your Honor. So what the FEC is saying is that here, in  
16 these circumstances -- so this is a one-shot enforcement  
17 situation -- it does not want to overstep in light of the  
18 constitutional concerns and litigation risk. And *Chaney*,  
19 when it's describing the aspects of what goes into  
20 prosecutorial discretion, they say -- *Chaney* says:  
21 Discretion in a one-shot enforcement action includes, quote,  
22 whether the agency is likely to succeed if it acts and  
23 whether the action, quote, best fits the agency's overall  
24 policies.

25 And if you look at the D.C. Circuit --

1           THE COURT: But this doesn't say anything about  
2 policies, and any assessment of likelihood of success is  
3 based on the constitutional concerns, not any, you know,  
4 inability to gather facts or any other prudential concerns.

5           MR. OBERMEIER: But that's what goes into  
6 prosecutorial discretion all the time. That's what's said  
7 in the *ICC*, or they call it the *BLE* case, where -- I  
8 actually forget who authored that, but to demonstrate that  
9 the falsity of that proposition -- it's enough to show that  
10 a common reason for failure to prosecute an alleged criminal  
11 violation is the prosecutor's belief, sometimes publicly  
12 stated, that a law will not sustain a conviction. And  
13 that's what's going on here.

14           And one of the key things, too -- and I think  
15 Judge Bates goes through this in the *NAACP* decision, goes  
16 through the types of prosecutorial discretion; some that  
17 would get shoehorned into getting review and some that  
18 doesn't. And the two key cases are *OSG* and *Crowley* that he  
19 cites.

20           And the *OSG* decision -- well, *Crowley* makes clear,  
21 I think --

22           THE COURT: Sorry. Just let me -- this is Judge  
23 Bates in *NAACP*?

24           MR. OBERMEIER: Yes, Your Honor. And he goes  
25 through --

1 THE COURT: And that's cited in your briefs?

2 MR. OBERMEIER: I think in our brief. Definitely  
3 in CREW's brief as well.

4 THE COURT: Okay.

5 MR. OBERMEIER: And that's a DACA decision, but  
6 what he's doing there is he's going through the law on  
7 prosecutorial discretion, and I think it's just really  
8 helpful to see how the D.C. Circuit goes through this.

9 And so you've got the *OSG* decision, and you've got  
10 the *Crowley* decision. And *Crowley*, I believe, was Judge  
11 Williams, and he says -- and he basically says: In the one-  
12 shot enforcement context it is almost always the case that  
13 the discretion is unreviewable.

14 What *OSG is* -- *OSG* is actually where -- it has to  
15 do with interpretation of a maritime statute, but the idea  
16 is that the agency there was consistently not applying the  
17 statute, and so there was a general policy derived from how  
18 the agency was handling that particular situation. And it  
19 was that general policy that was reviewable. And so I think  
20 that's actually very different here because there's no  
21 indication of a general policy --

22 THE COURT: And I've already rejected CREW's  
23 argument to that effect earlier in the case.

24 MR. OBERMEIER: Well, right, and I think it's the  
25 absence of that general policy which is what makes this



1 nonreviewable under the D.C. Circuit precedent, under *OSG*  
2 and *Crowley*. And so that's where -- that's why this ends up  
3 being like Judge Contreras's decision.

4 THE COURT: Right. So is it your view that all  
5 the agency has to do is invoke prosecutorial discretion as a  
6 talisman without any explanation of the factors that went  
7 into that decision not to pursue an investigation?

8 MR. OBERMEIER: Well, I guess -- I guess I'll  
9 answer that two ways here, Your Honor. First of all, here  
10 that was the reasoning that I think fits into the *Chaney*  
11 listing of types of things that go into prosecutorial  
12 discretion, but overall I think what --

13 THE COURT: And that is simply constitutional  
14 doubts. That's the only --

15 MR. OBERMEIER: Sure. It's litigation risk.

16 THE COURT: It's litigation risk based on  
17 constitutional doubt.

18 MR. OBERMEIER: And general policy that *Chaney* is  
19 talking about.

20 THE COURT: Well, I don't see anything about  
21 general policies.

22 MR. OBERMEIER: Well, I'm sorry, maybe "general  
23 policy" isn't the right language, Your Honor. Your  
24 indulgence, please, Your Honor, while I...

25 Whether the action, quote, best fits with the

1 agency's overall policies; that's the language from *Chaney*,  
2 and I think that's exactly what the FEC was doing here.

3 And sorry, to finish answering your question,  
4 I mean, just saying "prosecutorial discretion," then I  
5 don't -- I'm not sure where you fall, then, in the framework  
6 that Judge Bates analyzes where you would fall in terms of  
7 *OSG* versus *Crowley* versus, you know, failure to enforce a  
8 statute entirely, which is an exception in *Chaney*.

9 What you have here, though, is more than that, and  
10 that's how you know, in this single-shot enforcement, it  
11 falls in the unreviewability category and not in the  
12 reviewability category, if that makes sense, Your Honor.

13 And so I think I addressed -- I will just quickly  
14 address one of the arguments that CREW raised about this,  
15 which was that this was an abdication of statutory -- excuse  
16 me, an abdication of enforcement under *CHGO II*. I think  
17 *CHGO II* also decided that. Footnote 9 talks about these  
18 precise types of -- these issues raised here, the reporting  
19 issues raised here and said, "There's no indication that the  
20 agency's not doing this as a matter of policy."

21 THE COURT: Does it matter at all that CREW's suit  
22 is based on the agency's failure to conform with the Court's  
23 second order, which obviously covered the second statement  
24 of reasons? And the second statement of reasons makes no  
25 mention whatsoever, unless I missed it, of prosecutorial

1 discretion. Why would it be appropriate to bootstrap the  
2 first mention of prosecutorial discretion into the second  
3 statement of reasons?

4 MR. OBERMEIER: Respectfully, Your Honor, I don't  
5 think it's bootstrapping at all. I think it's removing the  
6 foundation, the jurisdictional foundation, of the rest of  
7 the case.

8 CHGO II actually talks about this. Not this  
9 specific circumstance, but Judge Randolph says: A Court may  
10 not authorize a citizens suit unless it first determines  
11 that the commission acted contrary to law under FECA or  
12 under the APA's equivalent. Yet, to make this  
13 determination, a Court necessarily must subject the  
14 commission's exercise of discretion to judicial review,  
15 which it cannot do.

16 THE COURT: Okay. So your position is that in  
17 light of CHGO, I did not have jurisdiction to issue the  
18 first order.

19 MR. OBERMEIER: Precisely, Your Honor. Precisely.

20 And, Your Honor, unless you have any additional  
21 questions about the prosecutorial discretion issue, I'll  
22 move on to talk about the post June 30, 2011, claims and why  
23 the Court lacks subject matter jurisdiction over those  
24 claims.

25 THE COURT: Please do.

1           MR. OBERMEIER: So, Your Honor, 8(a)(C) provides  
2 that CREW may bring this case to remedy the violation  
3 involved in the original complaint.

4           So CREW doesn't dispute that that's a jurisdiction  
5 requirement. I think that's important. CREW refers to it  
6 as an exhaustion requirement, which, of course, means that  
7 the agency would have to have the opportunity to review the  
8 issues raised here before they came to this court. So the  
9 issue really becomes and the dispute, at this point, is over  
10 what is the violation involved in the original complaint;  
11 and under the express language of the original complaint, it  
12 only encompasses AAN's political committee status between  
13 2009 and 2011.

14           The original complaint -- the timeline is really  
15 important. I mean, the original complaint was filed in June  
16 of 2012. So that's over a year after this time period, and  
17 yet in the original complaint it uses all past tense  
18 language. So it says, Count 1, AAN was a political  
19 committee, but failed to register as one. Count 2 says AAN  
20 failed to file the required reports. The original complaint  
21 doesn't allege any continuing violations.

22           THE COURT: Okay. Tell me this. Had the FEC  
23 chosen to investigate, could they have investigated post  
24 June 2011 conduct?

25           MR. OBERMEIER: I suppose yes, Your Honor, though

1 I guess the issue is it's very different when it's the FEC  
2 in this context because you have a statute here of limiting  
3 jurisdiction --

4 THE COURT: Well, you've argued in your  
5 constitutional claims that CREW is simply standing in the  
6 shoes of the government, improperly so. But if that's the  
7 case, if this is a form of qui tam action, if the FEC can  
8 investigate post 2011 claims but chose not to do so, why  
9 can't CREW?

10 MR. OBERMEIER: Because this is statutory subject  
11 matter jurisdiction.

12 THE COURT: Okay.

13 MR. OBERMEIER: Based on who the complainant is  
14 and what is in their original complaint, the four corners of  
15 that dictates this action as it's here now by the plain  
16 language. So that's the distinction.

17 THE COURT: Okay.

18 MR. OBERMEIER: And that's what I don't think CREW  
19 can get around, Your Honor, is that the complaint itself  
20 doesn't allege anything continuing going forward. And so  
21 what their -- so the complaint, as it stands, that is the  
22 complaint here in this court, basically alleges eight years  
23 of alleged violations without any supporting facts based on  
24 a two-year time period in the original complaint.

25 And, Your Honor, as you know this, the Court

1 already ruled that, A, an organization's major purpose can  
2 change over time. That was in response to CREW arguing that  
3 earlier. I think there's likely judicial estoppel on this  
4 point. They've raised it. They were successful. They're  
5 now using the opposite argument against us.

6           Going back to the beginning exhaustion  
7 requirement, anything that happened post 2011 hasn't gone  
8 before the agency.

9           THE COURT: Isn't there another way to sort of  
10 frame this that I don't think either side does here? I take  
11 your argument that there's jurisdiction for allegations  
12 involved in the original complaint, okay, and that the  
13 original complaint focused on conduct between 2009 and 2011.  
14 So, you know, if that's correct, that's an issue of  
15 liability. Should CREW have register -- should AAN have  
16 registered as a political committee based on the conduct  
17 that it engaged in during that period of time?

18           And we're obviously in sort of uncharted territory  
19 here. I understand there's never been one of these citizens  
20 suits actually litigated, but, you know, assuming this is a  
21 bench -- it would be a bench trial after some period of  
22 discovery, why wouldn't it make sense to essentially  
23 bifurcate liability, right?

24           You know, was AAN operating as a political  
25 committee during that alleged time period covered by the

1 original complaint? If the answer is no, then judgment in  
2 AAN's favor. If the answer is yes, at the end of whatever  
3 proceeding then there could be a remedies phase, the focus  
4 of which is, okay, what do we do about that? Is there a  
5 disclosure obligation for those two years, or should that  
6 disclosure obligation go forward? And it strikes me as a  
7 potentially prudent way to proceed, if the case does  
8 proceed, to bifurcate the proceedings in that fashion.

9 Any reaction to that? It's part of the remedy,  
10 right? How far should disclosure go? And perhaps the  
11 burden should then shift to AAN to show that at some point  
12 its major purpose did change. It now operates as a pure,  
13 you know, issues advocacy group.

14 MR. OBERMEIER: So I think the first problem I  
15 have with it, Your Honor, is it's still bumped into a  
16 subject matter jurisdiction issue. If subject matter  
17 jurisdiction is limited by the original complaint, then the  
18 Court lacks jurisdiction to keep any phase of it going  
19 forward, I think. I mean, that's our fundamental point. It  
20 has to end in 2011 under the plain language of the statute  
21 in the original complaint. So I guess that's the first  
22 problem.

23 The second problem is there aren't even facts  
24 alleged in this complaint before you right now that suggests  
25 any violation after 2011. I mean, that's a 12(b)(6)

1 fundamental problem with the complaint. And it's not like  
2 that information isn't -- you know, if CREW knew how to get  
3 public information from the key time period, they would have  
4 known how to do it afterwards, and yet those facts don't end  
5 up in this complaint.

6 So I think I would say before even getting to  
7 bifurcation --

8 THE COURT: But that's my point, that it wouldn't  
9 be an issue in the liability phase; and if there's a  
10 violation, then we say, "Okay, how does one remedy that?"  
11 And the district court obviously has fairly broad discretion  
12 to order remedies in response to a violation of law.

13 MR. OBERMEIER: But not remedies that would  
14 involve behavior after the time period with which the Court  
15 has subject matter jurisdiction.

16 THE COURT: There are all sorts of ongoing  
17 injunctions governing conduct going forward based on prior  
18 violations of law, right?

19 MR. OBERMEIER: Okay. Maybe -- now I'm seeing a  
20 little bit differently what you're --

21 THE COURT: So as of 2011 -- and, you know, this  
22 is all sort of uncharted territory.

23 MR. OBERMEIER: No, I appreciate it, Your Honor.

24 THE COURT: And now is not the time to make these  
25 decisions, if at all, but, you know, I can envision a world



1 where a violation is found, you know, so CREW -- excuse me,  
2 AAN should have registered as a political committee, but  
3 then determining what that means going forward and whether  
4 the injunction should cover reporting from 2011 to the  
5 present.

6 MR. OBERMEIER: And I guess what I would say, Your  
7 Honor, is to cover the reporting after 2011 it would have to  
8 cover behavior after 2011, which is not -- which the Court  
9 doesn't have jurisdiction over, if that makes sense.

10 THE COURT: Okay. Maybe that's a fight for  
11 another day.

12 MR. OBERMEIER: It sounds like it may be, Your  
13 Honor.

14 THE COURT: Maybe not.

15 MR. OBERMEIER: Your Honor, I'm checking the time.  
16 I've been going a half an hour, Your Honor, so unless you  
17 have any further questions --

18 THE COURT: Why don't we hear from the plaintiffs.

19 MR. OBERMEIER: Thank you, Your Honor.

20 MR. McPHAIL: Good morning, Your Honor.

21 THE COURT: Good morning.

22 MR. McPHAIL: The problem with AAN's motion and  
23 its arguments today are that it refuses to recognize that my  
24 client is here to recover for an injury that AAN has caused  
25 to it. The arguments this morning have focused on standing,

1 prosecutorial discretion, and CREW's exhaustion. So I'll  
2 direct my comments towards those points, but I would be  
3 happy to answer any questions that the Court, of course,  
4 has.

5 On the question of standing, as the Court said in  
6 *Akins*, a plaintiff suffers an injury in fact when the  
7 plaintiff fails to obtain information which must be publicly  
8 disclosed pursuant to a statute, period. And based on that,  
9 the Court found that plaintiffs there suffered injury in  
10 fact when they were denied information about an alleged  
11 political committee, their AIPAC, where its money was coming  
12 from, where its money was going. That's the exact  
13 information CREW seeks from AAN.

14 THE COURT: And how does obtaining that  
15 information help CREW specifically further its mission, to  
16 the extent that furthering a mission is a basis of standing,  
17 or how does it promote some function that CREW is currently  
18 engaging in?

19 I mean, one could read the complaint as, you know,  
20 they were required to disclose this information. It didn't.  
21 That's generally a violation of law that sounds more like a  
22 general injury as opposed to an injury particular to CREW's  
23 operational activities. Explain why that's not so.

24 MR. McPHAIL: Well, Your Honor, there are actually  
25 two injuries. And as the D.C. Circuit said in the *Jewell*

1 case, the *Havens* injury, the impairment of activities, is a  
2 separate and distinct injury an organization like CREW can  
3 suffer apart from a mere informational injury which CREW  
4 suffers as soon as CREW is denied information it is legally  
5 entitled to.

6 Now, it is correct CREW does use this information.  
7 It's valuable to CREW. CREW says in the complaint it writes  
8 reports to expose paid-to-play corruption, for example; so  
9 it uses information reported under the FECA to compare with  
10 official action and expose potential corruption. It writes  
11 a number of blogs and other forms of media explaining  
12 potential conflicts of interest and other activities  
13 outlined in the complaint. And so CREW is just like the CLC  
14 in *Dem 21* which Judge Bates found both had Article III  
15 injury. Under informational injury, Judge Bates did not  
16 reach the *Havens* question. He found the mere fact that  
17 these organizations were denied information gave rise to an  
18 injury in fact.

19 Now, it's notable that AAN never discusses Judge  
20 Bates's decision, and apparently opposing counsel is not  
21 even familiar with the decision despite it being the most  
22 recent case on the question and being the sole case directly  
23 on point dealing with organizational nonvoter plaintiffs.  
24 And Judge Bates distinguishes all the authority *Akins* cites  
25 in its brief, including discussed at podium, noting that

1 those cases do not say that a plaintiff like CREW -- or  
2 there CLC -- could not suffer injury in fact. Rather those  
3 cases go to the question of whether a plaintiff would have  
4 injury from the failure to receive a legal conclusion that,  
5 for example, a defendant violated the law or that a certain  
6 transaction was in kind contribution.

7 And it's particularly notable AAN cited the  
8 *Americans For Tax Reform* case and relied on both the D.C.  
9 Circuit and the district court decision here. Judge Bates  
10 wrote the district court decision, and he cited those  
11 decisions in his recent decision finding CLC and Dem 21 had  
12 standing, and, as notable, that case is now on appeal. And  
13 the D.C. Circuit recently denied summary adjudication  
14 against CLC with no party and neither the D.C. Circuit  
15 questioning the standing of CLC or Dem 21 there, and that's  
16 because Judge Bates was correct to read *Akins* to apply to  
17 organizations like CREW.

18 In *Akins*, the D.C. Circuit would have limited  
19 standing to those individuals who could show the denial  
20 information impacted their voting, that they were injured as  
21 voters. The Supreme Court rejected that and said that all  
22 the plaintiffs had standing regardless of whether it  
23 impacted their own voting because it was useful to them  
24 either to vote themselves or to share with others and, in  
25 reaching that conclusion, cited *Public Citizen*, a case

1 involving a corporation.

2           So the question of whether CREW is the right kind  
3 of plaintiff, as the Court recognized in *Akins* and Judge  
4 Bates recognized in *CLC*, is actually a zone of interest  
5 question, not an Article III question. And as the Court in  
6 *Akins* recognized, a zone of interest question is a statutory  
7 question. And so it looked at the language of 3109, and it  
8 said the language used there, which allows any person and --  
9 any aggrieved person to bring suit, quote, cast the net  
10 broadly and, therefore, found that the plaintiffs, who,  
11 again, did not show the information was necessary for their  
12 own voting, were within the zone of interest.

13           And that echos what the D.C. Circuit said in the  
14 *Action Alliance* case cited in our briefs, Your Honor, which  
15 recognize where an organization promotes the rights Congress  
16 tends to protect, those organizations are within the zone of  
17 interest of the statute. In *Action Alliance*, there was an  
18 organization that engaged in elderly counseling. Congress  
19 had passed a statute to provide the elderly with  
20 information. The plaintiff sued because they were denied  
21 the information. They needed further counseling, and the  
22 Court said that organization was within the zone of interest  
23 of the statute even though, of course, the organization  
24 itself was not the elderly Congress intended to protect.

25           Also, Your Honor, the FECA protects interests

1 beyond providing voters information. As the Court said in  
2 *Buckley* and other cases, it serves the interest of  
3 combatting corruption by providing facts and not legal  
4 conclusions, providing facts, where money is coming from and  
5 where it's going. And organizations like CREW directly use  
6 that information for their own work.

7 THE COURT: Address prosecutorial discretion.

8 MR. McPHAIL: The question of prosecutorial  
9 discretion. AAN fundamentally overreads the *CHGO* decision.  
10 I use "C-H-G-O." I know there's different ways to say it.  
11 The facts, as this Court recounted, are very different there  
12 than here. There an organization went defunct during the  
13 FEC investigation. It had no money. It had no officers.  
14 It had no counsel. And those reasons the commissioner said  
15 were the reasons why enforcement there would be, quote,  
16 academic. And based on that record, the D.C. Circuit said  
17 the dismissal was squarely, quote, based on prosecutorial  
18 discretion and therefore --

19 THE COURT: Those were the facts, but that's not  
20 what Judge Randolph said that the standard is. In Footnote  
21 11 to that opinion he says, "Unless the decision not to  
22 investigate is based entirely on a legal interpretation,  
23 it's nonreviewable."

24 MR. McPHAIL: And I think that --

25 THE COURT: So what does "entirely" mean?

1 MR. McPHAIL: I think, as Your Honor --

2 THE COURT: And does it mean that if the agency  
3 puts in a footnote that because of constitutional doubts  
4 we're going to -- we think we should be cautious in the  
5 exercise of our prosecutorial discretion, does that take  
6 this case out of the "entirely" category?

7 MR. McPHAIL: It does not, Your Honor.

8 THE COURT: Why not?

9 MR. McPHAIL: Your Honor, because in that case,  
10 again, the Court was talking about discretion and citing  
11 *Heckler* factors and discussing factors that were beyond a  
12 Court's purview to analyze: the proper use of resources,  
13 the policy priorities of the agency.

14 Recognizing that --

15 THE COURT: Isn't litigation risk, as  
16 Mr. Obermeier pointed out, isn't that a traditional basis  
17 for declining to bring a case?

18 MR. McPHAIL: Well, one point, Your Honor, the  
19 words "litigation risk" do not appear in that footnote. The  
20 sole words it uses are "grave constitutional doubts."

21 And as the courts recognize, I believe, in the  
22 *NAACP* --

23 THE COURT: Why isn't it fair to read "litigation  
24 risks" as animating the constitutional doubts? Because of  
25 the doubt that it's constitutional, they may not win, right?

1           MR. McPHAIL: Well, first, Your Honor, of course,  
2 we're bound by the words the commissioners actually used.  
3 We can't go beyond that, and so we can't give reasons.

4           Secondly, AAN's construction of *CHGO* would swallow  
5 the rule. Effectively now, as it recognizes in other cases,  
6 the agency's analysis of the law can be a discretionary  
7 factor courts have looked at. And if a Court were to say,  
8 then, under the FECA, "The FEC's analysis of the law is a  
9 discretionary analysis," then there would be no dismissal  
10 that could be reviewed in the FECA and would render the FECA  
11 a nullity.

12           And that's why even *CHGO* recognized it could not  
13 read its rule that broad because, again, it was ruling on  
14 the background of *Akins*, for example, where there was a  
15 discretionary dismissal below. The FEC said the dismissal  
16 was discretionary to the Supreme Court, and the Supreme  
17 Court said it did not matter, that *Heckler* did not apply to  
18 FECA dismissals, and it had looked at the law -- there I  
19 think it was a membership communication rule -- to issue its  
20 own ruling on what it thought the law was.

21           And it's important to realize, you mentioned the  
22 *New Model's* decision, but there have been other district  
23 court decisions which have also not read the rule as AAN  
24 does here. Again, in the *CLC* decision, the FEC argued --

25           THE COURT: Are those others cited in your --



1           MR. McPHAIL: They are, Your Honor. The *CLC*  
2 decision -- there has been procedures in both these cases  
3 since briefing closed, and the CLC decision is now on  
4 appeal, which happened after briefing closed. There FEC  
5 moved for summary dismissal based on the fact of *CHGO*, and  
6 the D.C. Circuit denied that. And in *CLC*, there was a  
7 dismissal by the FEC that discussed a number of practical  
8 factors. It was about announcing a new rule for LLC pass-  
9 through contributions. And the commissioners went through  
10 lengthy discussions about due process and whether it was  
11 fair to announce a rule and apply it to old plaintiffs or,  
12 sorry, old respondents, and the FEC cited those facts to say  
13 that this was a dismissal based in prosecutorial discretion;  
14 therefore, the Court cannot reach legal questions, and the  
15 D.C. Circuit denied that motion.

16           And in the *Lew* case, which was decided, again,  
17 after briefing closed -- the cite for that is 370 F. Supp.  
18 3d 175 -- there was a dismissal by the FEC that cited both  
19 law and litigation risk. There the commissioners worried  
20 that enforcement would potentially invite sanctions against  
21 the commission and cited that as a reason, and the FEC  
22 argued to the judge -- I think Judge Sullivan there -- that  
23 *CHGO* meant that decision was unreviewable, and Judge  
24 Sullivan rejected that and found that because dismissal was  
25 rooted in the law and not in discretionary factors that it

1 was still reviewable.

2 THE COURT: Let me ask you this. If I were to  
3 deny the motion to dismiss, why wouldn't this case be a good  
4 candidate for certification for interlocutory appeal on this  
5 issue given that there's a very recent D.C. Circuit opinion,  
6 there's a panel dissent, there's a dissent from rehearing en  
7 banc, there's a thoughtful concurrence from Judge Griffith  
8 saying that these are important issues? While *CHGO* may not  
9 be the right case, rehearing in the right case might be  
10 appropriate.

11 Why wouldn't this be a better vehicle for the  
12 Circuit to take up this issue and sort of define the  
13 contours a little better before we proceed to a trial?

14 MR. McPHAIL: Well, I would say, Your Honor, that  
15 this question's coming up in a number of cases already. In  
16 the *CLC* case, as I've mentioned, it's been raised and will  
17 likely be raised in front of the merits panel.

18 THE COURT: Give me the -- what's that case?

19 MR. McPHAIL: It's 18-5239 in front of the D.C.  
20 Circuit, I believe. The *New Models* case, Your Honor  
21 mentioned, there's an appeal in that case now. And I fully  
22 expect that, whenever this case is complete, AAN will bring  
23 this case up to the D.C. Circuit as well.

24 I would say the question of interlocutory appeal,  
25 there's a number of factors that AAN would have to show or

1 satisfy there, and even if it went up -- I don't think there  
2 would be any reason to stay this case while it went up. As  
3 AAN argues, we've been waiting for --

4 THE COURT: Isn't the reason to certify it to  
5 avoid potentially costly litigation?

6 MR. McPHAIL: Well, Your Honor, we've been  
7 waiting --

8 THE COURT: I know.

9 MR. McPHAIL: There's severe prejudice to the  
10 plaintiff in a number of those factors, and I think we've  
11 been waiting for years for this information.

12 AAN continues to spend money on elections. Just  
13 this past election cycle it spent 30 more million dollars in  
14 elections, and it's likely to keep doing so. And so CREW --  
15 and generally the public, but CREW has a right to this  
16 information, and a right to this information in a timely  
17 fashion. Waiting for an interlocutory appeal so that AAN  
18 can drag its heels further -- it's already asked for a stay  
19 on the appeal despite the fact the D.C. Circuit already said  
20 that was going to be dismissed, and it would seem to cause  
21 more prejudice to the plaintiffs than I don't think is  
22 actually justified.

23 But I would say that the decision has already been  
24 brought up to the D.C. Circuit. Obviously this Court's  
25 proceedings can change in light of any decisions that come

1 out in those other cases as well.

2 But I would also mention one more thing with *CHGO*.  
3 This Court must interpret *CHGO* in light of both *Akins*, the  
4 Supreme Court authority, as well as earlier D.C. Circuit  
5 authority. The earliest panel decision of the D.C. Circuit  
6 governs effectively, and so however the Court reads *CHGO*, it  
7 must also read it in light of the fact that *Akins* said  
8 discretionary dismissals are reviewable under the FECA and  
9 in light of, for example, in *Chamber of Commerce* where the  
10 D.C. Circuit said not only was a discretionary dismissal  
11 reviewable, it was, in fact, an easy case on the contrary  
12 law of dismissal and one that was ripe for reversal. So the  
13 Court has to read those together.

14 I would also say that the authority that the AAN  
15 cited in its argument goes to a very different question.  
16 Traditionally, under the *Heckler* analysis, the question is  
17 is the class of actions reviewable by a Court? So is a  
18 single-shot not-enforceable-action reviewable?

19 Under *Heckler*, the general rule is no, and so the  
20 cases tend to look at whether a nonreviewable decision  
21 becomes reviewable because some reason was given. The  
22 Courts have said no.

23 *CHGO* sort of took a different take on that  
24 precedent and said, "Well, here we have a rule that  
25 dismissals are reviewable because the FECA says so but

1       become not reviewable whenever the FEC uses a particular  
2       reason," which is in conflict with those other decisions  
3       saying a nonreviewable decision does not become reviewable  
4       because a decision's given.

5               And so I think there's a number of problems  
6       relying on what AAN cites to say that a nonreviewable  
7       decision does not become reviewable when the agency uses a  
8       legal interpretation. That just has no application here.

9               THE COURT: Address the post 2011 claims.

10              MR. McPHAIL: Absolutely, Your Honor.

11              We agree that CREW had to exhaust its claims here,  
12       and this Court has been very familiar with that exhaustion.

13              I think, one, AAN simply confuses what CREW  
14       alleged and what CREW exhausted. The language of the FECA  
15       requires that plaintiff exhaust the violation in a  
16       complaint, not the allegations or if we limited the  
17       complaint itself. And here the violation is AAN became  
18       a political committee in its early years, 2009 to 2011,  
19       and, because it was a political committee, had a duty to  
20       report, and it has not reported since that time to any point  
21       until now. And AAN focuses exclusively on the allegations  
22       about -- in the administrative complaint about when it  
23       became a political committee, but that's what triggered its  
24       duty.

25              The second claim for failure to report is not time

1 limited. It says AAN has failed to file its reports as  
2 required by the law. That's the same claim CREW is making  
3 here. And AAN cites nothing for the argument, no exhaust  
4 precedent or anything else, to say that a plaintiff, when  
5 alleging a continuing course of conduct and a continuing  
6 duty, somehow gets cut off from any violations that occur  
7 after administrative complaint is filed with the agency.

8 And I think part of the problem here --

9 THE COURT: CREW could have filed complaints  
10 alleging violations in subsequent election cycles, but it  
11 didn't do that, correct?

12 MR. McPHAIL: CREW could have, but the allegation  
13 was already well-stated. There is no requirement the FEC  
14 has to continually ripen allegations. The violation was  
15 stated in CREW's complaint, and no additional facts were  
16 necessary to show that violation.

17 And as the Court's aware, you have to --

18 THE COURT: Isn't the whole purpose of exhaustion  
19 for the agency to take the first pass at the factual  
20 allegations in the complaint? And here all of the facts  
21 were related to, you know, the ads that we've all gone  
22 through that ran in the run-up to that particular election,  
23 and so, you know, why shouldn't the agency get the first  
24 opportunity to pass on other conduct that you claim  
25 continued AAN's political committee status?

1           MR. McPHAIL: Well, that information was in front  
2 of the agency, Your Honor.

3           THE COURT: Not the post 2011 --

4           MR. McPHAIL: Well, it was.

5           THE COURT: -- activities.

6           MR. McPHAIL: The information CREW relies on --  
7 and there is factual backing for CREW's complaints. CREW  
8 alleged continuing activity. It's a factual allegation, and  
9 the Court can take judicial notice of the FEC filings that  
10 show the activity down to the dollar. That information was  
11 also in front of the FEC. Those are FEC filings. The  
12 agency has that information. It knew, from its own records,  
13 what AAN had done in 2010, which obviously was a focus of  
14 CREW's complaint, and it knew every time since then that,  
15 under the law, AAN should have filed reports and did not  
16 file reports. Again, they could check their own records.

17           THE COURT: But none of that is mentioned in the  
18 first statement of reasons, right?

19           MR. McPHAIL: It is not, Your Honor. Of course  
20 they resolved it on the -- finding there was no duty,  
21 essentially. But the information underlying that violation  
22 was in front of the agency when it reached its judgment.  
23 And I think here there's a -- perhaps AAN's trying to be a  
24 little tricky with the merits in exhaustion because it  
25 argues, one, that exhaustion was limited to showing a

1 violation in 2010 but is arguing on the merits that if at  
2 any point after 2010 it changed its major purpose or stopped  
3 spending so much money on ads that would destroy the  
4 violation. There would never have been a violation of the  
5 law.

6 Of course, again, the exhaustion is the violation.  
7 So if AAN's theory of the law here and if its theory is  
8 going to be, on appeal, that CREW had to prove some facts  
9 about its activity past 2011, then that is part of the  
10 violation CREW alleged. The violation of the statute is  
11 what has been exhausted here, that particular claim.

12 THE COURT: But doesn't AAN have a reliance  
13 interest here? I mean, you know, there was a complaint.  
14 The commission said that they did not violate the statute.  
15 Had the commission investigated and found otherwise, I  
16 suspect AAN may have changed whatever its post 2011 -- it  
17 would have changed course perhaps.

18 MR. McPHAIL: Well, the reliance issue erred in  
19 the due process argument. The Court has been very clear  
20 that when it comes to announcing new rules, especially by a  
21 court, that the test is particularly hard for a defendant to  
22 meet. Even in a criminal context, they'd have to show that  
23 the rule was unexpected and indefensible based on the  
24 current law at the time. Essentially AAN would have to  
25 argue that there was no one in the world -- that Your Honor



1 was being completely irrational when you issued your  
2 decisions in *AAN I* and *AAN II*, and no one could have  
3 predicted that based on the law.

4 But as Your Honor's decision made clear, the law  
5 in 2010 firmly established that its activities at least put  
6 it at risk of being a political committee, if not at least  
7 firmly showing that it was going to be a political committee  
8 based on that activity.

9 If there are --

10 THE COURT: So is CREW's position that AAN was a  
11 political committee as of 2011 and remained a political  
12 committee unless and until it deregistered, or how does  
13 *Buckley* play in on the back end?

14 MR. McPHAIL: Understood.

15 THE COURT: If AAN should have registered as of  
16 2011, in 2015 say that its spending on express advocacy and  
17 electoral, you know, communications dipped to 20 percent,  
18 was it still a political committee at that point, even if it  
19 spent over a thousand dollars?

20 MR. McPHAIL: Yes, Your Honor, and that is the  
21 law.

22 THE COURT: So *Buckley* doesn't apply on the back  
23 end, but it just applies on the front end.

24 MR. McPHAIL: That's correct, Your Honor. That's  
25 what the Court said in *Buckley*. *Buckley* was its test about

1 when a group becomes a political committee because the  
2 contrary rule would be to -- severe gamesmanship  
3 essentially. You have parties that can be controlled by  
4 candidates be a political committee, then stop being  
5 controlled, all of a sudden stop reporting anything they're  
6 doing. You have organizations that would spend significant  
7 amounts in one election cycle become a political committee  
8 then cut off all further reporting based on dipping below  
9 some threshold in the next election cycle. That's why the  
10 law requires a continuing obligation. Once you're a  
11 political committee, you remain a political committee.

12 And it's important to recognize here this is not  
13 an organization that spent significantly in an election  
14 cycle and then went back to charitable work. AAN has spent  
15 tens of millions of dollars since 2010 on elections, on  
16 independent expenditures which all parties agree are clearly  
17 electoral-related activities, on contributions to Super PACs  
18 so that they can spend money on electioneering -- I'm sorry,  
19 independent expenditures. So this is an organization that  
20 we think could even establish a major purpose had continued  
21 and has not changed.

22 But as Your Honor noted, that effectively is a  
23 defense.

24 THE COURT: Well, let's stop there.

25 MR. McPHAIL: Okay.

1           THE COURT: Because even CREW's position was that  
2 all electioneering communications should be treated in the  
3 numerator to determine what percentage of spending should  
4 weigh into major focus, correct?

5           MR. McPHAIL: That was the issue, right.

6           THE COURT: Right. And I rejected that, but I  
7 also said that, you know -- I rejected the FEC's position  
8 that, you know, no electioneering communications should be  
9 treated -- should be included in the numerator. But even if  
10 you include all of those two categories, it still gets AAN  
11 to just 65 percent of its \$27 million of spending from 2009  
12 to 2011.

13           So this isn't a situation where it's 100 percent  
14 electoral activity, and so --

15           MR. McPHAIL: Well, no, Your Honor, although  
16 that's never been the test, and the FEC's never applied --

17           THE COURT: I'm not saying it's a purely  
18 quantitative test.

19           MR. McPHAIL: Understood. And you have to  
20 consider that an organization must also spend money on its  
21 rent, on its payroll, that, you know, can eat up the rest of  
22 that 30 percent.

23           THE COURT: Yes.

24           MR. McPHAIL: But the law is when an organization  
25 becomes a political committee it meets the statutory

1 threshold, it has a major purpose, then it is one until it  
2 terminates, and here we have an organization that could  
3 never have terminated because it does not meet the  
4 requirements of termination. Termination requires that  
5 organizations stop acting like a political committee, and  
6 AAN has never stopped doing that.

7 I would note, to the extent AAN maintains its  
8 purpose has changed or that somehow that the duty got cut  
9 off, that is effectively a defense that they have the burden  
10 to show. We have showed and we've established in our  
11 complaint AAN violated the FECA by becoming a political  
12 committee in 2009 to 2011. It therefore had a duty to  
13 continue reporting. It should have filed a report even in  
14 July and didn't do that. That duty is not only an  
15 obligation that continues into the future but also looks  
16 backwards, and the duty a political committee has in any  
17 reported files is to disclose all wrongfully withheld  
18 information. So if AAN were to file a report today, it must  
19 disclose all information it should have reported going back  
20 to 2010 and did not.

21 THE COURT: And same question as I posed to  
22 Mr. Obermeier. Why wouldn't it be wise to treat that as a  
23 remedy issue after a finding of liability on the conduct  
24 raised in your complaint and that was explicitly analyzed by  
25 the agency?

1           MR. McPHAIL: Well, I think that could make a lot  
2 of sense, Your Honor, though I would note I believe AAN  
3 continues to dispute that 2009 to 2010 activity alone is  
4 insufficient, that we would have to prove activity beyond  
5 that and to establish the political committee status even in  
6 2009. I think AAN wants to treat ex post facto activity as  
7 relevant.

8           I don't quite understand AAN's theory, but I  
9 believe that's AAN's theory of the law, and to the extent  
10 AAN continues that argument, then I think we would have the  
11 right to and the need to establish evidence to reject that  
12 kind of theory of the law.

13          THE COURT: So if it were to put in a declaration  
14 from whoever the CEO of AAN is that its post 2011 spending  
15 was X, then you could test that through discovery. But --  
16 if they opened the door to that, but otherwise, if we're  
17 just confined to the period of the original complaint, what  
18 would be wrong with making a determination of liability  
19 based on that complaint; and then, if there's a finding of  
20 liability, determine, well, what's the remedy for that?  
21 Should there be an order to disclose based on that time  
22 frame, or should that obligation continue subsequently?

23          MR. McPHAIL: Well, I would note, Your Honor, the  
24 violation -- the failure to file the reports is also a  
25 violation so there is a need to show liability on that

1 continuing failure to report as well. That's a separate  
2 section of the statute than the 3103 section.

3 I would defer to the Court in how it thinks best  
4 to organize its proceedings here in a way that makes sense  
5 to Your Honor, but I would note, to the extent the Court  
6 would like to focus on the 3103 violation first, I don't  
7 think CREW has any particular objection to that except the  
8 fact that AAN has to at least clarify what its view of what  
9 a 3103 violation is. If it agrees that can be shown through  
10 one year of activity, for example, and that then continues  
11 on and no future activity would change that violation, then  
12 I think that could suffice. If AAN maintains its theory  
13 that later activity is irrelevant to that question, then I  
14 think that requires CREW be able to probe that theory and  
15 find out facts that show AAN's theory doesn't work.

16 THE COURT: Okay.

17 MR. McPHAIL: If there are no further questions?

18 THE COURT: Mr. Obermeier, last word.

19 MR. OBERMEIER: I'll be brief, Your Honor, since  
20 you offered.

21 On this continuing duty point, I just think it's  
22 important to look at what the D.C. Circuit has said about  
23 continuing duties.

24 This is the *Earle* case. It's Judge Henderson, and  
25 there's two types of continuing violations.

1           The first is where multiple violations are needed  
2           to establish the claim, like a hostile work environment.  
3           That's not what I understand CREW to be saying.

4           The second is that where the text of the statute  
5           imposes a continuing obligation, and the text of these  
6           statutes don't impose a continuing obligation at all.  
7           3013(d)(1) is one of the ones they cite. AAN would have had  
8           to register by a date certain, so within ten days after  
9           becoming a political committee. That's not a continuing  
10          violation of any kind. They either had to register or they  
11          didn't at that point.

12          And then --

13          THE COURT: Well, once you register, you have to  
14          stay registered until you cease to be -- until you  
15          deregister, correct?

16          MR. OBERMEIER: Right, but the violation occurred  
17          at the time it wasn't registered. And this goes into once  
18          you get past that point you start bumping into the fact that  
19          the organization can change, so it can't be a continuing  
20          violation.

21          I think Your Honor's question got to this point  
22          when you said what if in 2015 they had, you know, zero  
23          percent on this, and I think that's exactly right. When you  
24          combine the language of the statute with that ruling here, I  
25          don't see how it could be a continuing violation.

1           And then the reporting obligations, those are --  
2 I'm just forgetting the word, Your Honor, but they're  
3 recurring. They're not continuing.

4           And I believe Judge Leon found that in one of his  
5 decisions. Maybe it's Judge Contreras. But the point is,  
6 when you look at the statutes, they're not continuing  
7 violations, and that's what you would need.

8           The other point is something you asked, Your  
9 Honor, about exhaustion, and I just --

10           THE COURT: Before you go there, what about  
11 this -- and how does *Buckley* work, in your view, on the back  
12 end? If AAN was required to register in 2011 but changed  
13 its focus, could it have deregistered on the notion that its  
14 major purpose was no longer electoral communications, or  
15 would it had to have, you know, just stopped spending money  
16 at all?

17           MR. OBERMEIER: This is where you kind of get  
18 down -- there's also a practical issue to this, which is I  
19 don't know how you would deregister if you never registered.  
20 And under *Buckley*, if it's not a major purpose at that  
21 point, I don't know how you could be constitutionally  
22 required to report after that point, if that makes sense,  
23 Your Honor. So --

24           THE COURT: Let's assume there was -- you know,  
25 there was a major purpose finding or there's no suit. Let's



1       assume that there's a political committee that acknowledges  
2       that its major purpose is electoral communications.

3               MR. OBERMEIER:   Okay.

4               THE COURT:   But two years later it's still  
5       spending more than a thousand dollars to influence federal  
6       elections, but it's engaging in much more issue advocacy  
7       than it did at the outset.  Could it deregister at that  
8       point, or would it be consistent with the First Amendment to  
9       still treat that organization as a political committee when  
10      its major purpose is no longer electoral communications?

11              MR. OBERMEIER:   The answer to the second question  
12      is no --

13              THE COURT:   Okay.

14              MR. OBERMEIER:   -- if I follow the question  
15      correctly, and I think it -- could they -- I guess under the  
16      regulations they could deregister, but I don't even know  
17      that that matters from a constitutional standpoint for the  
18      exact reasons I think you're suggesting, Your Honor, which  
19      is when it's not the major purpose anymore, I don't know  
20      constitutionally that the government could make them  
21      register, right?  So that's where you would end up there,  
22      and that wraps into the continuing violation.

23              The only other thing I'll just address real  
24      quickly, Your Honor, is this idea that the FEC had before it  
25      post 2011 facts because they're in the record somewhere at

1 the FEC and can take judicial notice of it. I just --  
2 that's not exhaustion under any definition of exhaustion of  
3 which I'm aware. It wouldn't address major purpose, and  
4 there just -- there's been no exhaustion of anything after  
5 2011, and that is a fundamental point to the post June 30,  
6 2011, claims and there being an absence of subject matter  
7 jurisdiction.

8 THE COURT: Do you have a view -- I know this is  
9 probably out of the blue, but do you have a view on  
10 certification in the event I deny your motion?

11 MR. OBERMEIER: My view would be that it should be  
12 certified, if it's denied, and it should go up for the  
13 reason Your Honor was saying.

14 And I did want to address, since you brought it  
15 up, Your Honor, this idea of prejudice. And CREW may have  
16 some prejudice, and I don't think I need to address that  
17 specifically here, but the prejudice to AAN would be --  
18 it's hard to understate it because if the result here  
19 was disclosure, that is irreparable. There's no putting  
20 that toothpaste back in the tube. So if this isn't  
21 decided, for lack of a better word, Your Honor, right with  
22 respect to what the D.C. Circuit's going to do and AAN were  
23 to have to go forward and start disclosing things and get  
24 into discovery about stuff that it would, you know,  
25 potentially -- there would be no subject matter jurisdiction

1 to do that. The prejudice is substantial.

2 THE COURT: Well, discovery would not necessarily  
3 encompass disclosure of donors. Discovery, as I take it, I  
4 mean, it would be what's the major purpose, which focuses on  
5 expenditures as opposed to donors.

6 MR. OBERMEIER: I suspect there will be some  
7 disagreements over that down the road.

8 THE COURT: And the Court could police those  
9 disagreements.

10 MR. OBERMEIER: Potentially, Your Honor, yes, but  
11 again -- well, it's all the same kind of typical judicial  
12 resources, party resources. All those things are an issue,  
13 too. But I think what Your Honor said about the current  
14 status of this, if that's how you went, an interlocutory  
15 appeal would be appropriate here.

16 THE COURT: And do you agree that there are other  
17 cases up there now that would further sort of define the  
18 notion of reviewability based on prosecutorial discretion?

19 MR. OBERMEIER: Well, clearly I'm not following as  
20 closely as CREW is, so for that I apologize, Your Honor. I  
21 have to look into some of those cases that were cited, but  
22 that may be. It also -- the law on the circuit is *CHGO II*  
23 right now, and that is -- there's no dispute about that.

24 So that's where we are, and that's what this Court  
25 has to deal with in this case, and, you know, what could

1 happen in other cases and different formulations of  
2 prosecutorial discretion, I don't know, Your Honor.

3 Thank you very much, Your Honor.

4 THE COURT: Okay. Thank you very much. We will  
5 take this under advisement. Very interesting issues and  
6 well-briefed on both sides.

7 MR. OBERMEIER: Thank you, Your Honor.

8 THE COURT: Ms. -- sorry, Claire, we didn't hear  
9 from you today, Ms. Evans. It's always a pleasure.

10 All right.

11 (Whereupon the hearing was

12 concluded at 12:11 p.m.)

13 **CERTIFICATE OF OFFICIAL COURT REPORTER**

14  
15 I, LISA A. MOREIRA, RDR, CRR, do hereby  
16 certify that the above and foregoing constitutes a true and  
17 accurate transcript of my stenographic notes and is a full,  
18 true and complete transcript of the proceedings to the best  
19 of my ability.

20 Dated this 4th day of October, 2019.

21  
22  
23 /s/Lisa A. Moreira, RDR, CRR  
24 Official Court Reporter  
25 United States Courthouse  
Room 6718  
333 Constitution Avenue, NW  
Washington, DC 20001