UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

AMERICAN ACTION NETWORK'S REPLY
IN SUPPORT OF ITS MOTION FOR CERTIFICATION OF AN
INTERLOCUTORY APPEAL AND A STAY PENDING APPEAL

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INTRODUCTION

American Action Network ("AAN") showed in its opening brief that the Court should certify an immediate interlocutory appeal and stay further proceedings until the D.C. Circuit resolves four novel and case-determinative issues. AAN Mem., Dkt. No. 33-1. The fact that these issues touch on sensitive First Amendment conduct and involve claims that the Federal Election Commission ("FEC")—the agency with expertise in this area—has repeatedly declined to pursue compounds the need for appellate review before further litigation in this Court.

Citizens for Responsibility and Ethics in Washington ("CREW") responds by accusing AAN of "delay" and by mischaracterizing the basis for AAN's request as mere "disagreement with this Court's rulings." Opp'n 1, Dkt. No. 35. In doing so, CREW ignores that the Court expressly stated that this case might "be a good candidate for certification for interlocutory appeal," Tr. Mot. Hr'g 34, Dkt. No. 31, and recognized that this first-of-its-kind case filed under the citizen-suit provision of the Federal Election Campaign Act ("FECA") has entered "uncharted territory," *id.* at 22, 24. *See also CREW v. FEC*, No. 18-cv-945, slip op. at 2 (D.D.C. Sept. 30, 2019) ("*CREW III*"), Dkt. No. 29 ("this is the first suit to be filed under FECA's citizen-suit provision"); *id.* at 42 n.11 (recognizing "issues of first impression").

Moreover, in an effort to show urgency, CREW repeatedly accuses AAN, without evidence, of *continuing* to violate the FECA. *See, e.g.*, Opp'n 16, 17. But this Court has already dismissed CREW's claims for liability after June 2011. The allegations at issue here are nearly ten years old, and there are thus no exigencies that would justify rushing this case to trial without allowing the threshold jurisdictional issues raised by AAN to be reviewed by the D.C. Circuit.

The case is ideally suited for interlocutory appeal at this juncture because it raises issues of first impression and of extraordinary importance that go to the Court's subject-matter jurisdiction to entertain this action, or that could at least substantially narrow its scope. Because

AAN has shown that the statutory elements for certification are met, and in view of the serious risk that sensitive First Amendment activity will be damaged if the issues presented by AAN are not quickly and definitively resolved by the D.C. Circuit, the Court should certify an immediate interlocutory appeal and stay further proceedings in this Court.

ARGUMENT

I. THE COURT SHOULD CERTIFY ITS ORDERS FOR IMMEDIATE APPEAL.

The Court "should not hesitate to certify an interlocutory appeal" in this case, *see Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009), because its orders involve "controlling question[s] of law as to which there is substantial ground for difference of opinion" and an immediate appeal "may materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(b). AAN showed in its opening motion how each of the statutory elements is met, AAN Mem. 7–18, and CREW fails to rebut that showing.[1]

A. CREW Fails To Rebut AAN's Showing Of Substantial Grounds For Difference Of Opinion On Four Controlling Issues Of Law.

As AAN demonstrated in its opening brief, this case presents four controlling issues of law on which there are substantial grounds for difference of opinion: (1) whether the FEC's dismissal

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[1] CREW attempts to elevate the statutory standard for certification by invoking outdated caselaw purportedly reserving interlocutory appeal only for "exceptional" cases. Opp'n 1, 5, 10, 15, 17. CREW's efforts must fail because the statute does not specify that requirement and the Supreme Court has confirmed that the necessary preconditions for certification are found within the four corners of the statute. *See Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1708 (2017); *accord* 16 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 3929 (3d ed. supp. 2019) ("[t]he statute is not limited by its language to 'exceptional' cases" and "hundreds of appeals decided under § 1292(b) . . . do not meet the 'exceptional' test"). Not surprisingly, the D.C. Circuit has used mandamus to police refusals to grant certification where the statutory elements are met but the district court refuses certification without good reason. *See In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 756 (D.C. Cir. 2014) (granting mandamus where district court "denied . . . requests" for certification and stay); *In re Trump*, No. 19-5196, 2019 WL 3285234, at *1 (D.C. Cir. July 19, 2019) (per curiam) (holding district court "abused its discretion" by denying certification).

of CREW's complaint in an exercise of prosecutorial discretion is reviewable; (2) whether CREW has standing; (3) whether the FEC's dismissals were "contrary to law"; and (4) whether the Court may consider imposing disclosure obligations outside the jurisdictional period covered in CREW's original FEC Complaint. *See* AAN Mem. 7–17. CREW fails entirely to show otherwise, spending most of its brief attacking straw men or simply failing to respond to AAN's arguments. At bottom, 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., Inc. v. Sprint Commc'ns Co.,* 297 F. Supp. 2d 90, 98 (D.D.C. 2003) (citation omitted). AAN has plainly met that low standard.

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

CREW asserts there is no substantial ground for disagreement as to whether the FEC's dismissal is reviewable after *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), *see* Opp'n 8–9, but that contention is baseless. *CHGO* is "a very recent D.C. Circuit opinion," so there is little precedent applying it. Tr. Mot. Hr'g at 34. And *CHGO* provoked from Judge Pillard both a "panel dissent" and "dissent from rehearing en banc," as well as "a thoughtful concurrence from Judge Griffith" raising "important issues." *Id.* at 34. As the Court recognized, these factors suggest that it would be helpful for the Circuit to "define the contours [of *CHGO*] a little better before we proceed to a trial." *Id.* at 34.

The Court's opinion in *CREW III* confirms that there are substantial grounds for disagreement regarding reviewability. As AAN explained, the Court's attempts to distinguish *CHGO* raise a substantial ground for disagreement because the Court's view tracks the position espoused by the *CHGO* dissent, which was expressly rejected by the panel majority. AAN Mem. 9–10 (*comparing* 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* 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)).

Rather than contend with AAN's argument, CREW mischaracterizes it, claiming that "AAN . . . suggest[s] . . . that the FEC's dismissal was devoid of legal reasoning." Opp'n 9. That is not what AAN said. AAN contends that a dismissal which relies at least *in part* on prosecutorial discretion is not reviewable. AAN Mem. 10. This Court held otherwise because it believed that the controlling Commissioners' express "invocation of prosecutorial discretion" was not sufficient to overcome their legal reasoning, *CREW III*, slip op. 24, but there are certainly grounds for disagreement on that point because both the Supreme Court and the D.C. Circuit have found that legal reasoning is a traditional factor informing the exercise of enforcement discretion, *see, e.g.*, *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 282–83 (1987) ("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"); *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)).

CREW's effort to distinguish Judge Contreras' decision also fails. CREW relies on speculation contained in a footnote rather than on the holding of the case, which squarely supports AAN. *Compare CREW v. FEC*, 380 F. Supp. 3d 30, 42 (D.D.C. 2019) ("That invocation [of prosecutorial discretion], brief as it was, thus insulated the Controlling Commissioners' decision from reviewability under [*CHGO*]."), *appeal docketed*, No. 19-5161 (D.C. Cir.), *with id.* at n.12 ("Had the Controlling Commissioners invoked prosecutorial discretion based on their legal analysis . . . the Court, perhaps, could undertake a more piercing review."). Indeed, that Judge

Contreras questioned what might happen on facts that were not before him actually confirms that there are at least substantial grounds for difference of opinion.

CREW also fails even to address the flawed foundation for this proceeding. *CHGO* held that "[n]othing in [FECA] overcomes the presumption against judicial review" of FEC enforcement decisions. 892 F.3d at 439. But this Court allowed this action to proceed precisely because it believed that "FECA's express provision for the judicial review of the FEC's dismissal decisions . . . is just such a rebuttal." *CREW v. FCC*, 209 F. Supp. 3d 77, 88 n.7 (D.D.C. 2016) ("*CREW I*"); *accord CREW III*, slip op. at 16–24. That determination should be reviewed by the D.C. Circuit because it established the foundation for this lawsuit and, in the wake of *CHGO*, there are substantial grounds for questioning whether it was correct.

2. Whether CREW Has Standing To Pursue This Action.

CREW also fails to rebut AAN's showing of substantial grounds for difference of opinion as to CREW's standing. As AAN explained in its opening brief, "[t]he 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." AAN Mem. 11. The same is true here.

CREW contends that the cases cited by AAN involved "other plaintiffs in situations far afield of this one." Opp'n 8. In fact, the exact opposite is true. The D.C. Circuit has held that *CREW* lacks standing to sue in hopes of obtaining *FECA disclosures* 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). Similarly, "courts in this District have repeatedly dismissed CREW complaints when standing was premised on claims nearly identical to those raised in this Complaint," AAN Mem. 12 (citing AAN Mem. Supp. Mot. Dismiss 17 (collecting examples)), at least where, as here,

CREW fails to join an individual voter to the complaint. Yet CREW cannot explain why these cases—which reach a different result on standing based on *nearly the same allegations in this Complaint*—do not show a substantial ground for difference of opinion as to CREW's ability to pursue its asserted informational injury.

Nor does CREW respond to AAN's arguments showing why the Court's reliance on *Campaign Legal Center v. FEC*, 245 F. Supp. 3d 119 (D.D.C. 2017), *appeal docketed*, No. 18-5239 (D.C. Cir.), was misplaced. CREW acknowledges this Court's holding that "the nature of the information allegedly withheld is critical to the standing analysis." Opp'n 8 (quoting *CREW III*, slip op. 13–14) (alteration omitted). If that is so, then it would certainly seem relevant that *Campaign Legal Center* "relies primarily on two environmental cases involving the Clean Air Act and the Endangered Species Act" rather than on cases involving FECA disclosures. AAN Mem. 13. Yet CREW glosses over that error in *Campaign Legal Center* without even acknowledging it, let alone addressing the D.C. Circuit's contrary holding that a party (like CREW) which cannot "participat[e] in the political process" lacks standing to seek FECA "disclosure." *Nader v. FEC*, 725 F.3d 226, 230 (D.C. Cir. 2013). CREW's failure to address these points confirms these substantial grounds for disagreement about CREW's standing.

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

CREW also fails to rebut AAN's showing of substantial grounds for difference of opinion as to whether the legal reasoning included in the FEC's dismissals was "contrary to law"—which is a necessary predicate for any citizen suit. *See* 52 U.S.C. § 30109(a)(8)(C); AAN Mem. 13–15.

CREW principally contends the Court's decision to engage in *de novo* review of the FEC's decision is unquestionable because the FEC interpreted FECA through a First Amendment gloss supplied by the courts. Opp'n 10–12. But that argument proves too much. "[U]nique among federal administrative agencies," "every action the FEC takes implicates fundamental rights." *Van*

Hollen, Jr. v. FEC, 811 F.3d 486, 499 (D.C. Cir. 2016) (brackets and citation omitted). Nevertheless, the FEC "is precisely the type of agency to which deference should presumptively be afforded." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). Moreover, as AAN explained, courts routinely defer to agency interpretations of statutes that reject judicial constructions, *see, e.g.*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005), so it should not be at all surprising that "where an agency has adopted a judicial test as its own" courts will likewise review 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). The Court's choice to engage in *de novo* review is thus subject to significant disagreement notwithstanding CREW's protests to the contrary.

CREW likewise has no answer to AAN's showing that the Court's balancing of "directives that . . . push[ed] the agency in opposite directions" is subject to significant disagreement. AAN Mem. 15 (quoting *CREW II*, 299 F. Supp. 3d at 101). Half of the Commissioners then on the FEC issued a statement that detailed their concerns with the Court's decision and expressed support for an appeal to better provide clarity in this "important area of law." *Id.* (citation omitted); *cf.* *Kennedy v. Bowser*, 843 F.3d 529, 533 (D.C. Cir. 2016) ("In acknowledging substantial ground for difference of opinion, the court pointed especially to guidance from the United States Equal Employment Opportunity Commission"). CREW's failure to contest this point confirms that there is a substantial basis for difference of opinion.

This Court should certify its order to protect the FEC's enforcement authority and to avoid the "serious risk of chilling protected speech" that would occur from additional burdensome litigation over the 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.

CREW also fails to rebut AAN's showing that the Court should, at the very least, certify a question about the permissible scope of this litigation because 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. *See* AAN Mem. 15–17.

CREW contends that there is nothing to certify because the Court has "not [yet] order[ed] AAN to disclose post-2011 information to remedy the violation, if proven." Opp'n 12. That misses the point. By "reserv[ing] the flexibility to consider whether, if a registration violation is found, the proper remedy would be to require AAN to disclose reporting information from post-June 2011," *CREW III*, slip op. 28, the Court affirmed its jurisdiction to examine whether AAN was a political committee "after June 2011," *id.* at 29; *see also id.* at 30 ("The parties will be given an opportunity to weigh in on these [post June 2011] issues"). Indeed, CREW gives away the game when it reveals that it may seek "to gather facts" about AAN's "post-2011" activities even during the liability phase. Opp'n 16. Because it is well settled that "[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), there is at least 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, and the Court should certify that question.[2]

[2] CREW also mischaracterizes AAN's request for certification as an effort to replace the "substantial grounds for difference[ ] of opinion" standard with "novelty . . . alone." Opp'n 13–14. To the contrary, AAN relies on extensive discussion of precedent to demonstrate substantial grounds for disagreement on four important issues of first impression. *See supra* section I.A.1–I.A.4; AAN Mem. 8–17. Moreover, the Supreme Court has recognized that "[t]he preconditions for § 1292(b) review" are "most likely to be satisfied" when a district court ruling "involves . . . new legal question[s]," *Mohawk Indus.*, 558 U.S. at 110–11; *accord Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011) ("[W]hen novel legal issues are presented, on which fair-minded jurists might reach contradictory conclusions, a novel issue may be certified for

B. CREW Fails To Rebut AAN's Showing That The Four Issues Of Law Involved In The Order Are Controlling.

AAN has also shown that the four issues of law involved in the order are "controlling." 28 U.S.C. § 1292(b); *see* AAN Mem. 7–8. Indeed, CREW concedes that standing controls. And its attempts to characterize the remaining three questions as non-controlling fail.

Foremost, CREW cannot deny that if the Court lacks jurisdiction to review the FEC's exercise of prosecutorial discretion, or that if there is no "contrary to law" determination justifying a citizen suit, this litigation must be dismissed for lack of subject-matter jurisdiction. *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)). So, CREW obfuscates by pointing out that these issues were decided in *CREW I* and *CREW II*. Opp'n 14–15. That is a red herring. AAN presented the same issues again in this case, and the Court decided them. *CREW III*, slip op. 16–24 (reviewability), 41–42 (contrary to law); *see Fort Bend Cty. v. Davis*, 139 S. Ct. 1843, 1849 (2019) ("[C]hallenges to subject-matter jurisdiction may be raised by the defendant at any point in the litigation, and courts must consider them *sua sponte*." (quotation marks omitted)). They are thus ripe for interlocutory appeal. And, in any event, the questions are at minimum "logically interwoven" with this case, *see Kahl v. Bureau of Nat'l Affairs, Inc.*, 856 F.3d 106, 114 (D.C. Cir. 2017), so they should be reviewed together.

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interlocutory appeal"), as has this Court, *see Kennedy v. Dist. of Columbia*, 145 F. Supp. 3d 46, 52 (D.D.C. 2015) (Cooper, J.) (certifying issue of "first impression"); *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, No. 18-cv-594, 2018 WL 8997442, at *2 (D.D.C. Nov. 1, 2018) (Cooper, J.) (recognizing "interlocutory appeal" may be appropriate where "the Circuit has never had occasion to determine the question presented here"), so the novelty of the issues raised here plainly supports interlocutory review. CREW also attempts to distinguish *Kennedy* on the grounds that it involved both "novelty" and "a difference of opinion," Opp'n 13–14, but that is exactly the case here.

Nor is it relevant that the FEC declined to appeal *CREW I* or *CREW II*. AAN intervened in both cases and, as a party to the action, had full appellate rights which it attempted to exercise. *See Ameren Servs. Co. v. FERC*, 893 F.3d 786, 791 (D.C. Cir. 2018) (intervenor "becomes a full participant in the lawsuit and is treated just as if it were an original party" including for "an appeal" (internal quotation marks omitted)). AAN's appeals were dismissed, however, because "[t]he district court orders remanding the action to the Federal Election Commission [were] not final, appealable orders." *CREW v. FEC*, No. 18-5136, 2018 WL 5115542, at *1 (D.C. Cir. Sept. 19, 2018); *see CREW v. FEC*, No. 16-5300, 2017 WL 4957233 (D.C. Cir. Apr. 4, 2017). If anything, the fact that the agency's action is now complete and AAN still has never been afforded appellate review is a reason that counsels *in favor of* interlocutory appeal, not against.

Finally, CREW contends that the remedial question is not controlling because "the scope of potential remedy" under the Court's ruling would not "transform this case." Opp'n 15–16. But, as AAN explained, the difference between the "two years alleged in the administrative complaint" and the "decade-long period" CREW wishes to investigate is plainly relevant. AAN Mem. 8. Because that five-fold increase "may significantly impact the action" the question is "controlling." *APCC Servs.*, 297 F. Supp. 2d at 96; *see Molock v. Whole Foods Mkt. Grp., Inc.*, 317 F. Supp. 3d 1, 3 (D.D.C. 2018) (certifying order where resolution of "jurisdictional limits" affected "scope").

C. CREW Fails To Rebut AAN's Showing That Interlocutory Appeal Will Materially Advance The Ultimate Termination Of This Litigation.

AAN has also shown that definitive resolution now of the four issues of law involved in the order will "materially advance the ultimate termination of this litigation," 28 U.S.C. § 1292(b), because "reversal" on any of the issues presented by AAN 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; *see also* AAN Mem. 17–18.

CREW counters that interlocutory appeal will cause delay. Opp'n 16–17. But CREW overlooks the jurisdictional nature of the questions presented by AAN. 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'" even where there may be some risk of delay. *See Al Maqaleh v. Gates*, 620 F. Supp. 2d 51, 55 (D.D.C. 2009) (collecting cases). Indeed, where jurisdiction is at issue, courts have routinely found that it is "far better for all concerned" to have that issue definitively resolved through an interlocutory appeal before discovery and trial. *APCC Servs.*, 297 F. Supp. 2d at 100. CREW fails to explain why it believes the ordinary practice should not apply to the jurisdictional questions presented by AAN in this case.

Nor is CREW's claim of prejudice credible. That claim is premised on CREW's baseless assertion that "AAN is *still* violating the law requiring it to disclose its spending while it dumps millions from unknown sources into elections." Opp'n 17. But the Court has already dismissed any such claims, so the fact that CREW raises them here only tips CREW's hand to the fact that it intends to press claims and seek remedies outside this Court's jurisdiction.

Moreover, any delay in satisfying CREW's curiosity about AAN's donors surely pales in comparison to the significant First Amendment harm that will result from allowing third parties like CREW to prosecute the political speech that they oppose, *see Citizens United*, 558 U.S. at 326–27, as well as the significant costs of discovery that AAN will face, including the potential disclosure of highly confidential information to a hostile organization. The Court should reject CREW's vague claims about prejudice and certify an immediate appeal.

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

When certifying an appeal, the Court should also stay this case. AAN has shown how a stay pending interlocutory appeal serves judicial economy and the best interests of the parties, and that harm would result to AAN if this case moves forward before or during an appeal. AAN Mem. 18–19.

CREW's principal objection to a stay rests on its misunderstanding of the legal difference between equitable and administrative stays. *Compare Nken v. Holder*, 556 U.S. 418 (2009) (equitable stay), *with Landis v. N. Am. Co.*, 299 U.S. 248 (1936) (administrative stay). The power to issue an administrative stay, of course, is "incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Mobley v. CIA*, 806 F.3d 568, 576 (D.C. Cir. 2015) (quoting *Landis*, 299 U.S. at 254). Accordingly, district courts frequently exercise that inherent power without consideration of the traditional factors applicable to equitable stays. *See, e.g.*, *Kennedy v. Dist. of Columbia*, 145 F. Supp. 3d 46, 53 (D.D.C. 2015) (Cooper, J.) (staying proceedings pending interlocutory appeal); *Blumenthal v. Trump*, No. 17-cv-1154, 2019 WL 3948478, at *3 & n.3 (D.D.C. Aug. 21, 2019) (same); *Gov't of Guam v. United States*, No. 1:17-cv-2487, 2019 WL 1003606, at *10 (D.D.C. Feb. 28, 2019) (same); *Philipp*, 253 F. Supp. 3d at 88–89 (same); *Mwani v. Bin Laden*, 947 F. Supp. 2d 1, 5–6 (D.D.C. 2013) (same); *APCC Servs.*, 297 F. Supp. 2d at 101 (same); *United Mine Workers of Am. 1974 Pension Tr. v. Pittston Co.*, 793 F. Supp. 339, 348 (D.D.C. 1992) (same); *Johnson v. Wash. Metro. Area Transit Auth.*, 790 F. Supp. 1174, 1180 (D.D.C. 1991) (same). CREW does not contest AAN's entitlement to an administrative stay, nor could it credibly contend that a stay would not preserve judicial resources here where appellate review of threshold jurisdictional questions could result in dismissal.

Even if the Court were to apply the standard for equitable stays—and to be clear, it should not—the result would be the same. AAN is "likely to succeed on the merits," *Nken*, 556 U.S. at 434, because its arguments regarding the threshold jurisdictional issues in this case closely track binding Supreme Court and D.C. Circuit caselaw. AAN Mem. 8–17. AAN would also be "irreparably injured absent a stay." *Nken*, 556 U.S. at 434. While CREW contends that AAN will suffer no harm if there is a protective order, the draft protective order offered by CREW[3] would allow CREW itself to review AAN's confidential information, which CREW has suggested could include donor information. Plainly, that result—disclosure of highly sensitive information to a hostile organization *in a case about the protection of such information*—would irreparably harm AAN, as once the information is disclosed, no amount of compensation can remedy AAN's injury (particularly if that information leaked). AAN Mem. 19. Finally, the balance of equities and the public interest favor a stay, *see Nken*, 556 U.S. at 434, because CREW will not be harmed by a stay (this looks back nearly a decade) and because significant damage to First Amendment rights will result from allowing third parties like CREW to prosecute political speech that they oppose. AAN Mem. 15, 17, 18, 19.

It is worth dwelling on that last point for a moment. CREW denigrates AAN's serious concerns about fundamental rights involving speech and association as mere "hyperbole" because, according to CREW, nothing limits "what AAN may say." Opp'n 2, 18. CREW's cramped view of the First Amendment ignores both the settled principle that "[t]he First Amendment protects political association as well as political expression," *Buckley v. Valeo*, 424 U.S. 1, 15 (1976), and

[3] To be clear, the parties have only "discuss[ed]" that a protective order would be necessary, Opp'n 2, and CREW provided a draft order. There have been no negotiations regarding the terms of the order, and AAN has never conceded that a protective order can alleviate the harm of producing confidential information. That is especially so if CREW inappropriately seeks discovery of donor information as that would be akin to the relief requested in this case.

that freedom of expression "includes both the right to speak freely and the right to refrain from speaking at all," *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018) (citation omitted). These rights are especially acute in the context of campaign-finance regulation because campaign-finance "[d]isclosure chills speech," *Van Hollen*, 811 F.3d at 488, and burdens the "group association" necessary for "effective advocacy," *Buckley*, 424 U.S. at 65 (brackets omitted). To be sure, some campaign-finance disclosures are narrowly tailored to serve important governmental interests, but even those disclosure requirements must be carefully monitored in application to protect fundamental rights. The public interest requires that AAN's First Amendment concerns be taken seriously.

CONCLUSION

The Court should certify its orders for interlocutory appeal and stay the proceedings pending the resolution of that interlocutory appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2019, a true and correct copy of the foregoing was served electronically on all registered counsel of record via ECF and is available for viewing and downloading from the ECF system.

s/ Stephen Obermeier
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