UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON'S MEMORANDUM IN OPPOSITION TO AMERICAN ACTION NETWORK'S MOTION FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL AND A STAY PENDING APPEAL

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American Action Network's ("AAN") longstanding refusal to comply with federal-election law harms Plaintiff Citizens for Responsibility and Ethics in Washington ("CREW") and the country. AAN deprived CREW and voters in 2010 and 2012 of their right to be "fully informed" about "[t]he sources of a candidate's financial support," *Buckley v. Valeo*, 424 U.S. 1, 67, 76 (1976), and "who is speaking about a candidate," *Citizens United v. FEC*, 558 U.S. 310, 369 (2010), and AAN has continued to deprive CREW and voters of that right in every year and every election since. *See* Mem. Op. 27, Dkt. 29 ("MTD Op.") (recognizing "[m]aking CREW 'whole' might well require ordering AAN to disclose everything it would have had to disclose had it complied with the law in the first instance"). Worse yet, AAN has used the delay in resolving CREW's complaint to dump millions of new dollars from undisclosed sources into elections while depriving CREW of its legal rights to information that must be disclosed and upending dozens of federal elections by denying millions of voters their right to an informed exercise of their franchise. Until this case is resolved, only AAN—and the benefited candidates—can know the sources of this influence on elections nationwide.

Consistent with its strategy since this dispute began, AAN's motion for interlocutory appeal is merely the latest step to delay this case—and in doing so continue to undermine transparent elections. AAN cannot meet its "heavy burden" to show this is a truly "exceptional" case justifying interlocutory appeal, however. *Selden v. Airbnb, Inc.*, No. 16-cv-933 (CRC), 2016 WL 7373776, at *1 (D.D.C. Dec. 19, 2016) (Cooper, J.) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978)). Rather, AAN points only to its continued disagreement with this Court's rulings, mustering the same wobbly support it cited in its unsuccessful motion to dismiss. But AAN's dissatisfaction with the Court's ruling does not warrant interlocutory appeal.

Nor is it necessary to stay proceedings at this juncture. As AAN acknowledges, at oral argument the Court asked the parties for their thoughts on whether an interlocutory appeal was needed here. After hearing from both sides on the issue, the Court declined to immediately certify questions for interlocutory review when it denied, in large part, AAN's motion to dismiss and instead set a schedule to begin discovery in the case in earnest. There was no reason to delay proceedings when the Court issued its ruling at the end of September, as the Court's decision made clear. And there have been no further developments that might alter the Court's current course.

Finally, the Court should scrutinize AAN's hyperbole about this action's chilling effect on free speech, which is plainly an attempt to circumvent the exacting criteria for interlocutory appeal. Congress intended the Federal Election Campaign Act ("FECA") to provide for precisely this type of private litigation in the face of FEC inaction, and the Court has at its disposal various methods to keep sensitive AAN information confidential in discovery and at trial. (To that end, the parties have already begun discussing a draft protective order.)

At bottom, AAN is now proposing its *third* appeal related to its duty to report. This Court should not permit AAN endless—and inefficient—appeals as it evades its duty to provide CREW and the public with relevant information. CREW respectfully requests that the Court reject AAN's latest attempt at delay and deny AAN's request for interlocutory appeal (and a stay) so this case can finally proceed to the merits after nearly a decade. The parties' soon-to-be filed Rule 26(f) report will show that the parties intend to work expeditiously to ready this case for trial. And, lest it get lost amid AAN's arguments, Rule 1 safeguards "the just, speedy, and inexpensive determination of every action and proceeding"; AAN's proposal of serial appeals is at odds with these protections.

BACKGROUND

CREW filed an administrative complaint with the Federal Election Commission (FEC) on June 7, 2012 alleging AAN violated the FECA. Compl. ¶¶ 37, 66. CREW alleged AAN's activities between 2009 and 2011 caused it to become a political committee, a designation that required AAN to, among other things, disclose its donors from the point at which it became a political committee and to continue to do so thereafter. *See CREW v. FEC*, 299 F. Supp. 3d 83, 85 (D.D.C. 2018) ("*CREW II*"). Those activities included devoting more than $18 million—more than two-thirds of its spending—on election-related ads. *Id.* Among those ads were some attacking Rep. Ed Perlmutter and Rep. Dina Titus for purportedly voting to provide "convicted rapists" with "Viagra." *Id.* at 98.

Despite CREW's complaints, AAN did not stop devoting itself to influencing elections. It spent millions more on independent expenditures and electioneering communications in the subsequent years, and also made multi-million-dollar contributions to super PACs to fund their electoral activities. FEC, Independent Expenditures, AAN, https://bit.ly/2Pf6f4k (last visited Nov. 1, 2019); FEC, Receipts, CLF, https://bit.ly/2qDpkml (last visited Nov. 1, 2019) ("CLF Receipts") (filtered for contributions from AAN). Indeed, on the day this Court issued its decision on AAN's motion to dismiss last month, AAN sought to sway yet another federal election by making a $53,407 contribution to the Congressional Leadership Fund ("CLF"), a registered super PAC, bringing AAN's total 2019 untraceable contributions to CLF to nearly $3.7 million. *See* CLF Receipts.

In 2013, the FEC's Office of General Counsel recognized the merits of CREW's complaint and recommended pursuing enforcement. Compl. ¶ 67. Nonetheless, the Commission split three-to-three, blocking further action based on reasoning that, according to this Court,

"blinks reality" and is contrary to law. Compl. ¶ 69 (quoting *CREW v. FEC*, 209 F. Supp. 3d 77, 93 (D.D.C. 2016) ("*CREW I*")). AAN appealed that judgment, but the D.C. Circuit dismissed the appeal because "[t]he district court order remanding the case to the [FEC was] not a final, appealable order." *CREW v. FEC*, No. 16-5300, 2017 WL 4957233, at *1 (D.C. Cir. Apr. 4, 2017) (per curiam).

On remand, the Commission again split and blocked enforcement based on reasoning that this Court determined was contrary to law for its failure to incorporate the presumption that electioneering communications have an election-related purpose. Compl. ¶ 71 (citing *CREW II*, 299 F. Supp. 3d at 101). AAN appealed again. In opposing CREW's motion to dismiss the appeal, AAN cited the pending citizen suit in this matter, the need for deference to agency proceedings, and the potential impact on AAN's First Amendment rights as reasons to proceed with an immediate appeal. Appellant AAN's Opp. to the Mot. to Dismiss for Lack of Jurisdiction 2, 11–17, *CREW v. FEC*, No. 18-5136 (D.C. Cir. July 5, 2018). AAN also moved for summary reversal and vacatur based on AAN's contention that the intervening decision in *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) ("*CREW/CHGO*") prohibited the decisions in *CREW I* and *CREW II*. Appellant AAN's Motion for Summary Reversal and Vacatur 10, *CREW v. FEC*, 18-5136 (D.C. Cir. June 25, 2018). Nonetheless, the D.C. Circuit dismissed AAN's new appeal, finding AAN could not appeal before a final judgment issued and that AAN had "not demonstrated that a departure from that general rule is warranted." *CREW v. FEC*, No. 18-5136, 2018 WL 5115542, at *1 (D.C. Cir. Sept. 19, 2018).

On remand from *CREW II*, the FEC failed to conform its decision within 30 days, triggering CREW's right to bring private suit against AAN. Compl. ¶¶ 72–73; 52 U.S.C. § 30109(a)(8)(C). Accordingly, CREW filed the instant suit on April 23, 2018. *See* Compl.

Thereafter, the Court entered a limited stay "pending the D.C. Circuit's resolution of [AAN's] pending Motion for Summary Reversal and Vacatur." Order, Dkt. 16. After the D.C. Circuit dismissed the appeal and denied AAN's Motion for Summary Reversal and Vacatur as moot, *CREW*, 2018 WL 5115542, at *1, this Court lifted the stay and set a briefing schedule, Minute Order (D.D.C. Oct. 1, 2018).

On November 2, 2018, AAN moved to dismiss this action. Dkt. 24. The Court denied that motion on September 30, 2019. MTD Op. Rejecting AAN's various challenges, this Court found, among other things, that CREW suffered informational injury sufficient to confer standing, *id.* at 13, that *CREW/CHGO* did not preclude this suit, *id.* at 17, and that AAN's perfunctory challenges to *CREW I* & *CREW II* did not warrant revisitation of those decisions, *id.* at 41. Further, the Court left open any appropriate remedy for CREW's injury, which the Court recognized could hypothetically "require ordering AAN to disclose everything it would have had to disclose had it complied with the law in the first instance." *Id.* at 27.

On October 18, 2019, AAN filed the instant motion to certify the Court's decision on AAN's motion to dismiss for interlocutory appeal and to stay further proceedings pending that appeal.

ARGUMENT

AAN cannot meet its "heavy burden" to show that "exceptional circumstances" exist here that might warrant interlocutory appeal. *See Coopers*, 437 U.S. at 475; *Selden*, 2016 WL 7373776, at *1. "A party seeking certification pursuant to § 1292(b) must meet a high standard to overcome the 'strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing proceeding by interlocutory appeals.'" *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, 233 F. Supp. 2d 16, 20 (D.D.C. 2002) (quoting *United States v. Nixon*, 418

U.S. 683, 690 (1974)). "The Court may certify an order for interlocutory appeal [only] if it finds there are 'controlling question[s] of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.'" *Selden*, 2016 WL 7373776, at *1 (quoting 28 U.S.C. § 1292(b)). Even then, "appeal of a non-final order is left to the discretion of the district court." *APCC Serv., Inc. v. Spring Comm'ns. Co., L.P.*, 297 F. Supp. 2d 90, 95 (D.D.C. 2003).

AAN's motion fails to make this required showing. AAN identifies four questions for which it asserts immediate appeal is justified: (1) CREW's informational injury, (2) the application of *CREW/CHGO*, (3) the *potential* for a post-2011 disclosure remedy, and (4) this Court's decision to review the FEC commissioners' analysis of *Buckley*, 424 U.S. 1, *de novo* (and the effect of this Court's acknowledgement, in the second decision, that agencies often balance "directives that … push the agency in opposite directions"). AAN Mot. 1, 15, Dkt. 33. None of these questions yield a substantial ground for difference of opinion, however, and three of the proposed questions for certification do not control this case in any meaningful sense. Interlocutory appeal on any of the questions—which would again be AAN's third federal appeal attempt before any trial—is only likely to incur further delay in AAN's required disclosure.

AAN's motion for a stay should also be denied. First, as AAN fails to justify interlocutory appeal, there is no cause to stay pending such appeal. Second, even if an appeal were warranted, AAN fails to show a stay is justified given the absence of a strong likelihood of success on appeal, the lack of irreparable harm to it from proceeding, and the considerable harm further delay would cause CREW and the public.[1]

[1] AAN's motion also oddly requests certification of two orders not issued in this case. *See* AAN Mot. at 1. It cites no authority allowing it to appeal orders from another case, which would appear to violate the express terms of § 1292(b). 28 U.S.C. § 1292(b) (a court may certify an

I. AAN Fails to Identify A Substantial Ground for Difference of Opinion on Any of Its Questions

On each question AAN proposes to certify, AAN does little more than "claim the district court's ruling was incorrect." *FEC v. Club for Growth*, No. 05-1851 (RMU), 2006 WL 2919004, at *2 (D.D.C. Oct. 10, 2006). "Mere disagreement," however, "even if vehement, with a court's ruling does not establish a substantial ground for difference of opinion sufficient to satisfy the statutory requirements for an interlocutory appeal." *Judicial Watch*, 233 F. Supp. 2d at 20 (internal quotation marks omitted).

To establish a substantial ground of difference of opinion, the movant must point to a difference existing in "controlling authority." *See id.* at 22; *Club for Growth*, 2006 WL 2919004, at *3 (finding no substantial difference of opinion where movant "does not cite a single case supporting any of its arguments"). Even where there is a "dearth of precedent within the controlling jurisdiction," the movant must at least point to "conflicting decisions in other circuits." *Selden*, 2016 WL 73737776, at *1 (quoting *APCC*, 297 F. Supp. 2d at 107); *see also Judicial Watch*, 233 F. Supp. 2d at 19–20 (reviewing cases and noting extreme rarity of interlocutory appeal). Here, AAN fails to identify differences grounded in case law.

A. CREW's Standing to Pursue this Action

With respect to CREW's standing, AAN continues to misconstrue CREW's alleged informational injury, as CREW previously noted. MTD Op. 12. CREW's injury is not "derivative," *compare* AAN's Mot. 12 *with* MTD Op. 12—CREW itself has been denied

"order" that it issues "in a civil action"). To the extent AAN faces any cognizable injury that may afford it standing to pursue an interlocutory appeal here, such injury must stem solely from the decisions of this Court in this proceeding. To the extent that this Court incorporated any relevant legal conclusions from *CREW I* and *CREW II* into its decision on the motion to dismiss here, CREW focuses this brief on AAN's failure to show those legal conclusions warrant interlocutory appeal as well.

information to which it is entitled and which would be helpful to its activities—and therefore AAN's purported authority is not in conflict with this Court's holding. Nor is it conflict with the "host of cases" AAN cited before and cites again here confirming that other plaintiffs lacked standing to obtain "information in the form of legal conclusions." MTD Op. 13, *see also* AAN Mot. 12 (citing cases considered and found not applicable). "[T]he nature of the information allegedly withheld is critical to the standing analysis." MTD Op. 13–14 (quoting *Common Cause v. FEC*, 108 F.3d 413, 417 (D.C. Cir. 1997)). Little surprise then that other plaintiffs in situations far afield of this one, seeking categorically different types of information, might have lacked standing. "[D]ifferent outcome[s] based on different facts" do not establish any difference of opinion "on any question of law," and the latter is necessary to warrant interlocutory appeal. *Selden*, 2016 WL 7373776, at *1. On this particular standing question, courts—this Court and the Court in *CLC v. FEC*, 245 F. Supp. 3d 119, 127 (D.D.C. 2017)—have rejected AAN's approach. AAN argues *CLC* was wrongly decided, AAN Mot. 13, but as with its other arguments, it cites nothing to support its position, hobbling its effort at interlocutory review.[2]

B. Judicial Review of FEC Action

Similarly, there is no substantial ground for difference of opinion as to this Court's decision that *CREW/CHGO* does not prevent this case. AAN protests the "policy" of permitting judicial review, AAN Mot. 11—as Congress legislated, notwithstanding *CREW/CHGO*—but it cites no "controlling authority" for its preferred policy of no review of agency decisions

[2] *In re Trump*, No. 19-5196, 2019 WL 3285234 (D.C. Cir. July 19, 2019), a case involving "separation of power issues . . . in a lawsuit bought by members of the Legislative Branch against the President of the United States," *id.* at *1, has no application here, not least because it did not rely on informational injury at all. It did not purport to alter § 1292(b)'s requirement to show a substantial difference in controlling authority, even on questions of standing, but rested on the unique nature of the "inter-branch dispute." *Id.*

governed by legal reasoning. Nor did this Court reach a "different" conclusion from Judge Contreras with respect to *CREW/CHGO*. AAN Mot. 9. There, Judge Contreras determined that *CREW/CHGO* prevented review in a different case with different facts *premised on the nature of the commissioners' invocation of prosecutorial discretion in that instance*. *CREW v. FEC*, 380 F. Supp. 3d 30, 37–38 (D.D.C. 2019). In doing so, Judge Contreras expressly recognized *CREW/CHGO* might not apply where "the Controlling Commissioners invoked prosecutorial discretion based on their legal analysis." *Id.* at 42 n.12. Again, this case presents the situation Judge Contreras hypothesized. MTD Op. 20.

AAN renews its suggestion that the FEC's dismissal was devoid of legal reasoning, *cf.* AAN Mot. 10, yet the FEC's dismissal was premised *entirely* on the controlling Commissioners' legal reasoning, as CREW previously argued. MTD Op. 24. Taking the commissioners "at their word," their invocation of prosecutorial discretion in the first Statement of Reasons was based entirely on "their interpretation of the FECA in light of First Amendment doctrine." *Id.*[3]

[3] Nor is there any dissonance between the Court's decision and *Heckler v. Chaney*, 470 U.S. 821 (1985), *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), or *United States v. Fokker Services B.V.*, 818 F.3d 733 (D.C. Cir. 2016). AAN Mot. 10. As even AAN's quotations show, those decisions apply where agency *action* is unreviewable because it is exclusively a matter of agency discretion, *Chaney*, 470 U.S. at 837 (agency's nonenforcement decision); *ICC*, 482 U.S. at 282–83 (denial of rehearing); *Fokker*, 818 F.3d at 471 (prosecutor's charging decision), but even *CREW/CHGO* recognized the FEC's dismissal actions remain reviewable when based on the agency's legal interpretation(s), *CREW/CHGO*, 892 F.3d at 441 n.11 (recognizing FEC dismissals would still be reviewed if based "entirely" on legal analysis); *see also CREW v. FEC*, 923 F.3d 1141, 1148 (D.C. Cir. 2019) (en banc) (Pillard, J., dissenting). Rather, *CREW/CHGO* placed a new limit on judicial review of particular FEC reasons for dismissal. *See* 892 F.3d at 439 (conditioning review on where commissioners "plac[e] their judgment"). Here, because the FEC's dismissal of CREW's complaints against AAN remained reviewable, and because the commissioners rested their judgment entirely on legal analysis, judicial review was appropriate notwithstanding *CREW/CHGO*. That is very much consistent with *Heckler*, *ICC*, and *Fokker*.

C. **FEC Action Contrary to Law**

AAN also fails to show a substantial difference of opinion with respect to this Court's decision in *CREW I* about the deference afforded agency interpretations of judicial opinions. AAN Mot. 14. This Court properly recognized in *CREW I* that "[i]n case after case, courts have affirmed this fairly intuitive principle, that courts need not, and should not, defer to agency interpretations of opinions written by courts." *CREW I*, 209 F. Supp. 3d at 87 (citing *Nat'l Ass'n of Mfrs. v. N.L.R.B.*, 717 F.3d 947, 959 n.17 (D.C. Cir. 2013), *overruled on other grounds*, *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014); *Univ. of Great Falls v. N.L.R.B.*, 278 F.3d 1335, 1340–41 (D.C. Cir. 2002); *N Y. N.Y., LLC v. N.L.R.B.*, 313 F.3d 585, 590 (D.C. Cir. 2002); *Piersall v. Winter*, 507 F. Supp. 2d 23, 38 (D.D.C. 2007); *Mudd v. Caldera*, 134 F. Supp. 2d 138, 144 (D.D.C. 2001)). AAN cites no authority contravening that well-settled standard; its authorities reinforce this Court's conclusion that *CREW/CHGO* does not dictate dismissal of CREW's complaint here.

Notably, none of the cases AAN now cites concern agency interpretation of a judicial opinion. For example, in *National Cable & Telecommunications Association v. Brand X Internet Services*, the Court considered deference to agency interpretation of a statute *rejecting* prior conflicting judicial interpretations. 545 U.S. 967, 979–80 (2005); *see also U.S. Telecomm. Ass'n v. FCC*, 295 F.3d 1326, 1332 (D.C. Cir. 2002) ("At bottom, the FCC's order rests not on judicial precedent but on its interpretation of the term 'telecommunications carrier' in the Telecommunications Act of 1996."). Even more inapposite is *Precon Development Corporation v. U.S. Army Corps of Engineers*, where the court *denied* any deference, and observed in a footnote that deference might be available if the agency independently interpreted the statute through notice-and-comment rulemaking consistent with the judicial decision. *See* 633 F.3d 278,

290 n.10 (4th Cir. 2011). Here, by contrast, the controlling commissioners were solely interpreting the "major purpose" test as set out by the Supreme Court in *Buckley*. *See CREW I*, 209 F. Supp. 3d at 87–88 ("The statute the FEC was charged to implement has since been 'construed' by the Supreme Court to incorporate the 'major purpose' limitation on political committee status."). The commissioners themselves could not have been clearer—they considered the "major purpose" test to be exclusively a judicial construction, without grounding in the statute. *See Statement of Reasons of Chairman Lee E. Goodman and Comm'rs Caroline C. Hunter and Matthew S. Petersen* 10, 17, 25 MUR 6589 (AAN) (July 30, 2014), https://www.fec.gov/files/legal/murs/6589/14044362004.pdf. This is not a case where the commissioners independently interpreted the FECA's political committee rules and came to the same conclusion as a court—this is a case where the commissioners were interpreting and applying judicial authority to limit the clear application of the statutory text. There is no disagreement about the deference afforded when agencies interpret judicial authority: they receive none. *See, e.g.*, *Univ. of Great Falls*, 278 F.3d at 1340–41.

What is more, because the FECA defines political committees as any group that makes more than a $1,000 in expenditures or accepts more than a $1,000 in contributions in a year, 52 U.S.C. § 30101(4)(A), the Commissioners could not have *independently* applied a major purpose limitation as it would conflict with the plain text. *Chevron, USA, Inc. v. NRDC*, 467 U.S. 837 (1984) ("If the intent of Congress is clear, that is the end of the matter."); *see also Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc) (stating it "cannot be[] contended" that 52 U.S.C. § 30101(4) is "ambiguous"), *vacated on other grounds*, *FEC v. Akins*, 524 U.S. 11 (1998). Rather, the Supreme Court in *Buckley* did so in its power to construe statutes "in the interest of partially saving the statute's constitutionality," *Unity08 v. FEC*, 596 F.3d 861, 863 (D.C. Cir.

2010), a power not dependent on ambiguity in the statutory text after exhausting all tools of statutory construction, *see Edward DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (avoiding unconstitutional interpretation unless "plainly contrary to the intent of Congress"). The FEC has no such power absent ambiguity in the statute, further undermining AAN's quest for interlocutory appeal here.

D. Hypothetical Remedies as Discovery Begins

AAN lastly fails to show any ground for substantial difference of opinion as to the Court's discussion of the scope of the remedy here. Indeed, as a preliminary matter, that discussion cannot give rise to interlocutory appeal *because the Court expressly did not decide it.* "The basic requirement of an interlocutory appeal under [section] 1292(b) is that the district court have made an order." *Ray v. Am. Nat'l Red Cross*, 921 F.2d 324, 325 (D.C. Cir. 1990). "The statute does not contemplate that a district judge may simply certify a question without first deciding it." *Id.* Here, the Court did not resolve the scope of any potential remedy for AAN's violation, but rather "reserve[d] 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." MTD Op. 28. As there is no order on that question to appeal, AAN cannot justify an interlocutory appeal in search of an advisory opinion. Even if the Court *had* resolved this question, AAN nevertheless cannot point to any controlling authority that would require a different outcome. AAN cites nothing in support of its conclusion that the Court could not order AAN to disclose post-2011 information to remedy the violation, if proven.

Instead, AAN resorts to a hybrid argument concerning jurisdiction and exhaustion. As to jurisdiction, AAN notes only that the Court may only "remedy the violation involved in the original complaint." 52 U.S.C. § 30109(a)(8)(C). Yet the Court acknowledged as much in

explaining that "Congress has [nevertheless] conferred upon the courts broad equitable powers to remedy FECA violations." MTD Op. at 27–28. Failing that argument, AAN notes next that a party must exhaust administrative remedies before obtaining judicial relief. *See* AAN Mot. 16–17.[4] But that too tells us nothing about the scope of appropriate remedies *after* exhaustion (and a judgment on the merits). As the Court found, CREW has already exhausted all of the administrative remedies required by the FECA and a "remedy [to] the violation involved in [CREW's] original complaint," 52 U.S.C. § 30109(a)(8)(C), even if construed as limited to AAN's failure to register as a political committee and begin reporting by June 2011, could include disclosure from that point until now. MTD Op. 27. There is no difference of opinion of law on that point.

E. Novelty in Lieu of a Substantial Ground for Difference of Opinion

Conceding that there might not be substantial grounds for differences of opinion in controlling authority, AAN argues that the novelty of these questions is alone sufficient to justify interlocutory appeal. AAN Mot. 8. That a case raises an issue of "first impression in this Circuit," however, "does not require, or in this instance, justify, certification of an interlocutory appeal." *Washington Tennis & Educ. Found., Inv. v. Clark Nexsen, Inc.*, 324 F. Supp. 3d 128, 145 (D.D.C. 2018). AAN cannot overcome the "demanding" standard for interlocutory appeal to establish a difference of opinion based on existing authority. *Selden*, 2016 WL 7373776, at *1. And in contrast to AAN's assertion, *Kennedy v. District of Columbia*, 145 F. Supp. 3d 46

[4] *See Beck Chevrolet Co. v. GM LLC*, 787 F.3d 663, 680 (2d Cir. 2015) (noting party could not obtain relief where statute conditioned relief on prior exhaustion and plaintiff failed to exhaust); *Walther v. Baucus*, 467 F. Supp. 93, 94 (D. Mont. 1979) (finding plaintiff could not file § 30109(a)(8)(C) suit prior to district court judgment finding FECA dismissal was contrary to law); *see also United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001) (finding court may, but need not, exercise its discretion to issue injunction).

(D.D.C. 2015), "did not certify the issue for interlocutory appeal on [the novelty of the issue] alone." *Washington Tennis*, 324 F. Supp. 3d at 145. Rather, *Kennedy* certified appeal "based on the existence of a District of Connecticut opinion and an EEOC Guidance Document." *Id.*; *cf.* MTD Op. 41 (statements of the OGC and minority of FEC commissioners are not authority).[5] *Kennedy* did not therefore depart from the general rule that a movant for interlocutory appeal must show a difference of opinion already in existence and based on legal authority. Moreover, even if novelty could alone be sufficient, the D.C. Circuit has already considered all of the issues AAN raises here and found AAN had "not demonstrated that a departure from [the] general rule [of appeal only after final judgment] is warranted." *CREW*, 2018 WL 5115542, at *1.

AAN's failure "to demonstrate the second of the three conditions required for an interlocutory appeal" is alone enough to deny the motion. *Club for Growth*, 2019 WL 2919004, at *3.

II. AAN's Motion Cannot Satisfy the Other Two Requirements for Interlocutory Appeal

While the failure to identify a substantial difference of opinion grounded in controlling authority is reason enough to deny AAN's motion, AAN's motion also falters on the other two criteria. First, at least three of the questions AAN identifies are not *controlling* questions. Second, appeal here on any of the points will not "likely and materially advance the ultimate determination." *Educ. Assistance Found. For Descendants of Hungarian Immigrants in the*

[5] *Mwani v. Bin Laden*, 947 F. Supp. 2d 1 (D.D.C. 2013)—a case involving 500 foreign victims suing a foreign terrorist organization and where the court did not certify a question for interlocutory appeal but rather ordered the parties to apply for interlocutory appeal, without any consideration of the three factors required by § 1292(b), *id.* at 5—also does not modify AAN's need to show a substantial difference based on controlling authority.

Performing Arts, Inc. v. United States, No. 11-1573 (RBW), 2014 WL 12780253, at *3 (D.D.C. Nov. 21, 2014).

First, AAN concedes that appeal of at least one of its questions—the scope of the available remedy—would not "terminate" the litigation. AAN Mot. 8. AAN incorrectly asserts, however, that two other questions—the effect of *CREW/CHGO* and this Court's *Chevron* analysis in *CREW I*—would terminate this case altogether. *Id.* Both questions relate only to the propriety of this Court's judgments in *CREW I* and *CREW II*. Notably, the FEC declined to appeal any error in either *CREW I* or *CREW II*, though it could have. *See CREW*, 2018 WL 5115542, at *1 (noting agencies are permitted to appeal non-final remand orders). That failure to appeal and related remand subjected the FEC to a choice: to conform or to step aside. 52 U.S.C. § 30109(a)(8)(C). By neither appealing the judgments nor conforming with *CREW II*, the statutory requirements to give rise to CREW's cause of action here were all satisfied. *Willy v. Coastal Corp.*, 503 U.S. 131, 138–39 (1992) (consequences for ignoring court order do not turn on propriety of initial order).[6]

Nor would resolution of those three questions involve a "procedural determination that may significantly impact the action." *APCC*, 297 F. Supp. 2d at 96. AAN argues that the three non-dispositive questions it raises could impact the scope of discovery, yet it cites nothing to support its contention that these potential discovery alterations transform this case into one of the "truly exceptional cases" for which "§ 1292(b) is reserved." *Judicial Watch*, 233 F. Supp. 2d at

[6] Additionally, as this Court recognized, *CREW/CHGO* only has any relevance at all to *CREW I*, where the Court reviewed a statement of reasons that at least contained the words "prosecutorial discretion." The statement was superseded by the second statement of reasons, which is the statement that gave rise to *CREW II* and this suit. Thus, even if the Court erred in its treatment of prosecutorial discretion in *CREW I*, the controlling commissioners' decision to abandon that statement renders AAN's dispute on that point moot. MTD Op. 20 n.5; *see also Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1353 (D.C. Cir. 2014).

20. The cases it cites only undermine its argument. In *Molock v. Whole Foods Mark Group, Inc.*, the court certified interlocutory appeal to determine whether the plaintiff could bring a D.C.-only class action, or whether he could bring a nationwide class action involving "thousands" more employees. 317 F. Supp. 3d 1, 4 (D.D.C. 2018). The Court recognized the latter possibility would "place far greater demands on the court" and the "potential time and expenses of obtaining such discovery [for a nationwide class] is staggering." *Id.* at 4, 6. Similarly, in *APCC*, the court certified a question that would dispose of the claims of a number of plaintiffs and "significantly impact the form and conduct of these actions." 297 F. Supp. 2d at 96. Here, AAN's potential questions would not have a similar impact. For the reasons stated above, any contrary resolution of *CREW/CHGO* or *Chevron* deference will have no impact here at all. Nor would the scope of potential remedy—which the Court has not even yet decided—impact the immediate proceedings at all. Regardless of the scope of remedy, CREW will still need to gather discovery about AAN's pre-2011 activities to prove its major purpose at the relevant point (and, insofar as AAN maintains its post-2011 purposes are relevant to its liability, CREW may need to gather facts on that too).

Finally, AAN fails to show that an interlocutory appeal will both "*likely* and *materially* advance the ultimate determination" of this case. *Educ. Assistance Found.*, 2014 WL 12780253, at *3. A movant must do more than "assum[e] that [it] will prevail on appeal." *Judicial Watch*, 233 F. Supp. 2d at 28. Rather, a movant must show success on appeal is the "likely course of events." *Id.* For the reasons stated above, AAN makes no showing of a likelihood of success. Moreover, even if such showing were assumed, appeal here will merely "prolong rather than hasten the termination of litigation." *United States ex rel. Barko v. Halliburton Co.*, 4 F. Supp. 3d 162, 167 (D.D.C. 2014); *accord Arias v. DynCorp*, 856 F. Supp. 2d 46, 54 (D.D.C. 2012).

"[A]llowing immediate appeal . . . would likely only cause further delay" in resolving CREW's claims "that ha[ve] already been pending for over [seven] years." *Chennareddy v. Dodaro*, No. 87–cv-3538 (EGS), 2010 WL 3025164, at *2 (D.D.C. July 22, 2010). Any appeal here is certain to "be very lengthy," as AAN has promised to seek review from the D.C. Circuit en banc and Supreme Court if necessary, "delay[ing] resolution of [this] cas[e] on the merits for years." *Delorenzo v. HP Enter. Serv., LLC*, No. 1:15-cv-0216-RMC, 2016 WL 6459550, at *4 (D.D.C. Oct. 31, 2016). AAN is also certain to appeal any final judgment here and to seek a stay of relief pending that appeal, meaning any interlocutory appeal promises to be wholly "piecemeal." *Club for Growth*, 2006 WL 2919004, at *2.

Delay here is also particularly prejudicial, as AAN is *still* violating the law requiring it to disclose its spending while it dumps millions from unknown sources into elections. *See* CLF Receipts. Every day of further delay in AAN's reporting of its 2009-2011 activity causes irreparable harm to CREW's and the public's right to "prompt disclosure." *Citizens United*, 558 U.S. at 370. AAN should not be permitted procedural delay in the service of keeping its donors secret for as long as possible.

III. A Stay is Not Warranted

For the reasons stated above, AAN has not demonstrated it deserves the exceptional relief of an interlocutory appeal. For that reason alone, its request to stay should be denied. *See* AAN Mot. 18 (requesting a stay only in the event the Court grants interlocutory appeal). Even if an appeal proceeds, however, the case should not be stayed.

"A stay is an intrusion into the ordinary process of administration and judicial review." *Nken v. Holder*, 556 U.S. 418, 427 (2009). Accordingly, a movant must demonstrate a stay is justified by showing (1) "a strong showing that he is likely to succeed on the merits," (2) "the

applicant will be irreparably injured absent a stay," (3) "issuance of the stay will [not] substantially injure the other parties interested in the proceedings," and (4) "the public interest" does not "li[e]" against a stay. *Id.* at 434. "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433–34. Even then, "[a] stay is not a matter of right, even if irreparable injury might otherwise result." *Id.* at 433. Even the grant of an interlocutory appeal does not entitle a movant to a stay. 28 U.S.C. § 1292(b) (application for interlocutory appeal "shall not stay proceedings in the district court unless the district court judge or the Court of Appeals or a judge thereof shall so order").

AAN's motion fails to meet its burden. For the reasons stated above, it has failed to even lay out a substantial difference of opinion to support its challenge to this Court's rulings, never mind make a "strong showing that [it] is likely to succeed on the merits." *Nken*, 556 U.S. at 434. Nor has AAN identified any "irreparable harm," *id.*, that is both "certain and great," *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 976 (D.C. Cir. 1985). Proceeding in litigation here is not an irreparable harm. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006); *McSurley v. McClellan*, 697 F.2d 309, 317 n.13 (D.C. Cir. 1982). Nor is discovery (subject to a protective order between the parties) of matters AAN would prefer to keep secret. *See Halliburton*, 4 F. Supp. 3d at 167 (noting disclosure of even privileged material not irreparable). AAN's speech is also not chilled: nothing in these proceedings or even a final adverse judgment limits in anyway what AAN may say. *See Citizens United*, 558 U.S. at 366 (disclosure does not "prevent anyone from speaking"); *see also United States v. Philip Morris USA Inc.*, 841 F. Supp. 2d 139, 142 (D.D.C. 2012) ("The mere fact that First Amendment issues are being raised in both cases does not provide sufficient justification to delay" resolution of the case). Nor do these proceedings disrespect the FEC's enforcement authority, *see* 52 U.S.C.

§ 30107(e); *cf.* AAN Mot. 19, and even if that were the case that would not constitute irreparable harm *to AAN* in any event, *see Nken*, 556 U.S. at 434. Finally, AAN's need for interim confidentiality, to the extent appropriate, can be addressed through protective orders and closed-door Court proceedings.

In contrast, a stay does immense and irreparable harm to both CREW and the public to whom CREW communicates. Again, AAN is *still* funneling millions of dollars from undisclosed sources into federal elections, *see* CLF Receipts, and almost certainly will spend millions more to influence the 2020 elections. A stay works immense damage where the case involves "continuing infringement" of a party's rights. *Dellinger v. Mitchell*, 442 F.2d 782, 787 (D.C. Cir. 1972). Moreover, "[t]here is always a public interest in prompt execution [of the law]" and avoiding "permit[ing] and prolong[ing] a continuing violation of United States law." *Nken*, 556 U.S. at 436. AAN's continued failure to report also violates the public's right to be "fully informed" about "[t]he sources of a candidates financial support," *Buckley*, 424 U.S. at 67, 76, and "who is speaking about a candidate," *Citizens United*, 558 U.S. at 369; *see also, e.g.*, Indictment, *United States v. Parnas*, 19-cv-725 (S.D.N.Y. 2019) (alleging source of non-reported campaign funds were Ukrainian nationals). "[T]he public has an interest in knowing who is speaking about a candidate and who is funding that speech." *SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010) (en banc). It allows "citizens [to] see whether elected officials are 'in the pocket' of so-called moneyed interests." *Citizens United*, 558 U.S. at 370. Indeed, disclosure is necessary to preserve the "free functioning of our national institutions." *Buckley*, 424 U.S. at 66–67. AAN's proposed stay puts all that in jeopardy.

Finally, AAN is mistaken that a stay causes no harm because this case "looks backwards 10 years." AAN Mot. 19. CREW and the public are entitled to "prompt disclosure," *Citizens*

United, 558 U.S. at 370, and every day spent in ignorance of AAN's donors is irretrievably lost. Nor is the need for that information academic—beneficiaries of AAN's 2010 spending remain in office and will be running for reelection in 2020. *See* Statement of Candidacy of David B. McKinley (Dec. 14, 2018), https://docquery.fec.gov/cgi-bin/forms/H0WV01072/1301387/.[7] CREW and 2020 voters are entitled to know the "sources of a candidate's financial support," even support from ten years ago which can still be exerting a lingering influence on candidates. *Buckley*, 424 U.S. at 67. And as this Court recognized, even if CREW is limited to proving AAN became a political committee by 2011, making CREW whole could require "AAN to disclose everything it would have had to disclose had it complied with the law in the first instance" from 2011 to now, and even continuing into the future. MTD Op. 27.

CONCLUSION

For the reasons stated above, CREW respectfully requests the Court deny AAN's motion for certification of an interlocutory appeal and its motion to stay these proceedings pending any such appeal.

[7] Rep. McKinley benefited from AAN's ads attacking Mike Oliverio, *CREW II*, 299 F. Supp. 3d at 90 & n.8, who was McKinley's opponent in 2010, *see* FEC, Federal Elections 2010 at 145 (July 2011), https://transition.fec.gov/pubrec/fe2010/federalelections2010.pdf.

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Respectfully submitted,

/s/ Stuart C. McPhail

Stuart C. McPhail (D.C. Bar No. 1032529)
smcphail@citizensforethics.org
Laura C. Beckerman (D.C. Bar No. 1008120)
lbeckerman@citizensforethics.org
Adam J. Rappaport (D.C. Bar No. 479866)
arappaport@citizensforethics.org
CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON
1101 K Street N.W., Suite 201
Washington, DC 20005
Telephone: (202) 408-5565
Fax: (202) 588-5020

Sathya S. Gosselin (D.C. Bar # 989710)
sgosselin@hausfeld.com
Seth R. Gassman (D.C. Bar #1011077)
sgassman@hausfeld.com
HAUSFELD LLP
1700 K Street NW, Suite 650
Washington, DC 20006
Telephone: (202) 540-7200
Facsimile: (202) 540-7201

Counsel for Citizens for Responsibility and Ethics in Washington