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April 5, 2018

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**BY HAND DELIVERY AND EMAIL:
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Mr. Peter Reynolds
Office of the General Counsel
Federal Election Commission
1050 First Street, NE
Washington, D.C. 20463

Re: Third Supplemental Response in MUR 6589 (American Action Network, Inc.)

Dear Mr. Reynolds:

Enclose herewith is the American Action Network's Third Supplemental Response in the above-captioned matter.

Sincerely,

Caleb P. Burns

cc: Chair Caroline C. Hunter (by hand delivery and email: CommissionerHunter@fec.gov)
Vice-Chair Ellen L. Weintraub (by hand delivery and email: CommissionerWeintraub@fec.gov)
Commissioner Steven T. Walther (by hand delivery and email: swalther@fec.gov)
Commissioner Matthew S. Petersen (by hand delivery and email: mpetersen@fec.gov)

Enclosure

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 6589R
American Action Network, Inc.	)	

THIRD SUPPLEMENTAL RESPONSE OF THE AMERICAN ACTION NETWORK, INC.

The American Action Network, Inc. ("AAN") respectfully submits this third supplemental response to request that the Commission again dismiss this matter. The Commission has twice voted to dismiss this case—in June 2014 and again in October 2016—finding by a vote of 3-3 that there was no reason to believe that AAN violated the Federal Election Campaign Act of 1971, as amended (the "FECA"), because AAN was not a political committee during the challenged 2009 to 2011 time period. The U.S. District Court has asked the Commission to take a third look at the record, this time using a new standard articulated for the first time in the court's March 20, 2018 opinion. *Citizens for Responsibility & Ethics in Washington v. FEC*, No. 16-cv-2255 (CRC), 2018 WL 1401262, at *14 (D.D.C. Mar. 20, 2018) ("*CREW II*").[1]

The Commission should again dismiss the case. AAN was not a political committee even under the court's new analysis, much of which AAN disagrees with. The court continues to require a flexible analysis based on the totality of the record when determining whether an entity is a political committee. *Id.* at *13 n.14. And here, the whole record shows that AAN's "major purpose" has never been the "nomination or election of a candidate" as required for political

[1] As a threshold matter, AAN believes that the district court's decision was in error and the Commission should immediately appeal it, particularly since AAN cannot appeal this decision in its own right at this time. *See CREW v. FEC*, No. 16-5300, 2017 WL 4957233 (D.C. Cir. Apr. 4, 2017). Nevertheless, given that the Commission did not appeal the district court's first decision, this submission proceeds on the basis that the Commission also will not appeal the district court's March 20, 2018 ruling, and argues (without waiving any right to appeal) why dismissal still remains proper under the new district court decision.

committee status. *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976). Dismissal on the merits, therefore, remains the correct result. But the Commission should also conclude that it would be unwise to devote further resources to this case as the statute of limitations expired several years ago, AAN has not funded electioneering communications since 2010, there are significant litigation risks and due process concerns should the Commission proceed based on a standard adopted almost eight years after the challenged speech, and the Commission's priorities have shifted to more recent elections and pressing concerns. Each of these facts makes this an ideal candidate for the Commission to exercise its prosecutorial discretion to dismiss. Indeed, the Commission already dismissed a matter involving political committee allegations and advertisements run in the same 2010 election cycle—the Commission on Hope, Growth and Opportunity ("CHGO") matter—because it had become stale. When challenged, the district court found that the dismissal was a "rational exercise of prosecutorial discretion under FECA." *See CREW v. FEC*, 236 F. Supp. 3d 378, 397 (D.D.C. 2017). This case is an even more compelling one to dismiss based on prosecutorial discretion.

AAN respectfully requests that the Commission act promptly in dismissing this case, whether on the merits, through prosecutorial discretion, or for both reasons. The district court directed the Commission to "conform with [its] declaration within 30 days," *CREW II*, 2018 WL 1401262, at *14, a directive that requires that the Commission, at a minimum, commence the required procedures under 52 U.S.C. § 30109 within those thirty days, *see* Order, *CREW II*, No. 16-cv-2255 (CRC) (D.D.C. Mar. 20, 2018); *see also Hagelin v. FEC*, 332 F. Supp. 2d 71, 81-82 (D.D.C. 2004) (holding that FEC must begin compliance within 30 days), *rev'd on other grounds*, 411 F.3d 237 (D.C. Cir. 2005). AAN would, of course, welcome a dismissal and Supplemental Statement of Reasons within those thirty days (by April 19), as such action would

provide clear evidence that the Commission acted timely and in accordance with the court's declaration. But if that is not possible, AAN requests that the Commission issue a preliminary statement to clarify that, in conformance with the district court's decision, a Supplemental Statement of Reasons is being prepared and will be issued promptly. In either case, AAN also requests that the Commission make clear that it is not abandoning its earlier Statements of Reasons but that it is instead disposing of the case in this manner because of a legal construction imposed upon it by a federal court.

ARGUMENT

The district court's recent decision did not hold that AAN was a political committee, or require the Commission to find reason to believe that AAN was one. Instead, the court left open the possibility that the Commission "would reach the same outcome on remand." *See CREW II*, 2018 WL 1401262, at *14. In this case, the Commission should reach the same outcome—*i.e.*, dismissal—based on the merits, through an exercise of prosecutorial discretion, or both.[2]

I. AAN Was Not A Political Committee, Even Under The Court's New Standard.

The court's ruling on the merits was limited and novel. The court agreed with much of the Commission's prior analysis, which it found complied with the court's prior decision. *Id.* at *6. There, the court precluded the Commission from applying a categorical approach to electioneering communications on remand, under which all spending on electioneering communications would be treated as either indicative, or not indicative, of a major purpose to nominate or elect candidates. *Id.* at *6, 13. The court reviewed the Commission's flexible ad-by-ad analysis and found it "free of the legal errors identified in the Court's previous Opinion

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[2] AAN focuses this third supplemental response on the district court's March 20, 2018 decision, but incorporates by reference AAN's July 20, 2012 response, October 1, 2012 supplemental response, and October 6, 2016 second supplemental response, which provide further confirmation that dismissal is the appropriate result here.

and Order." Mem. Op. and Order at 5-6, *CREW I*, No. 1:14-cv-01419 (CRC) (D.D.C. Apr. 6, 2017).

But the court decided that the required non-categorical approach should categorically attach a "presumption" to all electioneering communications. *CREW II*, 2018 WL 1401262, at *13. According to the court, the Commission "must presumptively treat spending on electioneering ads as indicating a purpose of nominating or electing a candidate." *Id.* at *7.

AAN disagrees with the court's new presumption, which is based on a statute (the Bipartisan Campaign Reform Act of 2002 ("BCRA")) that the district court admits "did not touch the text of FECA's definition of 'political committee,'" *id.* at *10, and a Supreme Court decision released *after* the challenged conduct commenced that does not deal with the question of political committee status, *see Citizens United v. FEC*, 558 U.S. 310 (2010). The presumption also stands in stark contrast to the Supreme Court's conclusion that some advertisements fall within the definition of an "electioneering communication" but have "no electioneering purpose." *McConnell v. FEC*, 540 U.S. 93, 206 (2003). An electioneering communication may, instead, evidence a purpose to engage in issue advocacy during the pre-election period when such advocacy "is most vital in a democracy" and most able to obtain the public's attention. *See* 145 Cong. Rec. S12575, S12583 (daily ed. Oct. 14, 1999) (letter from L. Murphy, Director, ACLU Washington Office). But the Commission need not challenge the court's decision to again dismiss this case. For at least two reasons, AAN was still not a political committee under the new standard.

First, the Court held that the Commission "may, on remand, yet again exclude from its analysis some of the ads that it previously excluded" because spending on electioneering communications may overcome the presumption under "special circumstances." *CREW II*, 2018

WL 1401262, at *13, *14. And there are special circumstances here that justify finding that a significant portion of AAN's spending on electioneering communications was not made with the purpose to nominate or elect candidates. CREW's own administrative complaint described the electioneering communications as "related to . . . legislation." Compl. ¶ 13. Nine advertisements, on their face, expressly reference pending legislation by number, *see, e.g.*, "Quit Critz," "Ridiculous," "Wallpaper," "Naked," "Leadership," "Mess," "Repeal," "Secret," "Skype." Most of the advertisements ask constituents to convey a very specific message about pending or expected legislation, *see, e.g.*, "Back Pack" ("vote to cut spending"), "Taxes" ("vote to extend the tax cuts"), "Leadership" ("vote for repeal"). The specific issues discussed in the advertisements were the subject of the legislative concern during what has been described as "the most productive of the lame duck Congressional sessions ever." Garance Franke-Ruta, *The Most Productive Lame Duck Since WWII-and Maybe Ever*, The Atlantic, Dec. 22, 2010.[3] In other words, these were advertisements that "discuss[ed] the substance of a proposed bill" and "urge[d] the viewer to call a named incumbent representative and request that she vote for the bill"—facts that the district court found indicative of an issue-related purpose. *See CREW II*, 2018 WL 1401262, at *11.[4]

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[3] Available at http://www.theatlantic.com/politics/archive/2010/12/the-most-productive-lame-duck-since-wwii-andmaybe-ever/68442/.

[4] The district court discounted the Commission's prior decision because the court saw no evidence that the "House actually considered a [healthcare] repeal bill during the December lame-duck session." *CREW II*, 2018 WL 1401262, at *12. But evidence of a formal debate on a bill cannot be required to establish that a communication was made with an issue-advocacy purpose, as organizations cannot wait for certainty that a bill will be debated to begin their issue advertising efforts—many of which are designed to incentivize legislative efforts. In any event, here there is evidence that "GOP leaders—and some rank-and-file Members—had vowed to launch the repeal effort immediately after the Nov. 2 elections" (*i.e.*, during the lame duck session). David M. Drucker, *GOP Waits on Health Care Repeal*, Roll Call (Nov. 16, 2010). There is also evidence that Congress debated efforts to partially repeal Obamacare during that

The district court acknowledged that some electioneering communications—including at least one of AAN's—are made with a "dual purpose." *CREW II*, 2018 WL 1401262, at *12. As a result, not all spending on such advertisements can be considered indicative of a major purpose to nominate or elect candidates because it was not all spent for that purpose. As a result, even accepting the court's conclusion that the presumptive "primary purpose" of most electioneering communications is the nomination or election of candidates, *id.*, the Commission should still conclude that a significant portion of the spending on AAN's electioneering communications was made for a different issue-centric purpose. Such an analysis confirms that AAN's spending did not evidence a major purpose to nominate or elect candidates.

For example, the Commission previously counted all of AAN's spending on independent expenditures ($4,096,910) and up to five electioneering communications (totaling $2,940,394) as indicative of a major purpose to nominate or elect candidates. *See* Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman ("SSOR"), MUR 6589 (Oct. 19, 2016) at 17. AAN's remaining spending on electioneering communications totals $9,663,801, and relates to the advertisements that the Commission has already concluded are *most* indicative of purpose to engage in issue advocacy. *See id.* As a result, even in the extreme situation where the Commission counted the majority of spending on those remaining electioneering communications as indicative of a major purpose to nominate or elect candidates, AAN still would have devoted less than 50 percent of its 2009 through 2011

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lame duck session. *See* Jennifer Haberkorn and Sarah Kliff, *GOP Says Nix to Dem Health Law Fix*, Politico (Dec. 13, 2010).

spending, and 2010 spending, to activities indicative of a purpose to nominate or elect candidates.[5]

Second, AAN also is not a political committee under the district court's new approach because the court was clear that spending on advertisements cannot be the "sole relevant factor in determining [AAN]'s major purpose." *CREW II*, 2018 WL 1401262, at *13 n.14. And here, the record as a whole confirms that AAN was not a political committee. It is not under the control of a candidate. *See About AAN*, www.americanactionnetwork.org/about-aan. It did not make contributions to candidates. Its organizational documents and website described it as an issue-centric "action tank" that works to "create, encourage and promote center-right policies." *Id.* It devoted itself to educational and grassroots policy and organized educational events and issue briefings. The public record shows that it continues to spend significant amounts on issue advertisements—many that are aired far outside the context of any election.[6] It has been

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[5] AAN's total spending from 2009 to 2011 was $27,139,009, and its total spending in 2010 was $25,692,334. *See* SSOR, MUR 6589 at 17. The Commission previously counted up to $7,037,304 of the spending from that period—calculated by adding $4,096,910 spent on independent expenditures to $2,940,394 spent on five electioneering communications (including one that the Commission previously considered only arguably "indicative of a major purpose to nominate or elect federal candidates"). *See id.* & n.52. If that $7,037,304 is added to 51% of the remaining funds AAN spent on electioneering communications (51% * $9,663,801 = $4,928,539), AAN still spent just $11,965,843 from 2009 to 2011 with the purpose of nominating or electing candidates. That amount is 44% of AAN's 2009 to 2011 spending, and 47% of AAN's 2010 spending. Neither percentage is consistent with regulating AAN as a political committee. *See CREW I*, 209 F. Supp.3d at 95 (finding that a 50%-plus rule for determining an organization's major purpose is "reasonable").

[6] *See, e.g.*, AAN Continues Promoting Tax Reform with $1 Million Campaign (Mar. 26, 2018), https://www.americanactionnetwork.org/press/american-action-network-continues-promoting-tax-reform-with-1-million-campaign/; AAN Launches $3 Million Television Ad Campaign Promoting The Tax Cuts And Jobs Act (Nov. 7, 2017), http://americanactionnetwork.org/press/american-action-network-launches-3-million-television-ad-campaign-promoting-tax-cuts-jobs-act/; AAN Launches $2 Million Ad Blitz Ahead Of Budget Vote (Oct. 24, 2017), http://www.americanactionnetwork.org/press/american-action-network-launches-2-million-adblitz-ahead-budget-vote/; AAN Releases $250,000 Digital Ad Campaign to Advance Tax Reform (May 31, 2017), http://www.americanactionnetwork.org/press/american-action-network-

recognized by the Internal Revenue Service as a Section 501(c)(4) social welfare organization—meaning that it is "primarily engaged" in activities that do "not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office." *See* 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i)-(ii). In other words, AAN's "central organizational purpose is issue advocacy, although it [has] occasionally engage[d] in activities on behalf of political candidates." *See FEC v. Mass. Citizens for Life*, 479 U.S. 238, 254 n.6 (1986). As a result, AAN is not, and never was, a "political committee." *Id.* This case should again be dismissed on the merits.

II. This Is An Ideal Matter For A Dismissal Based On Prosecutorial Discretion.

The Commission should also conclude that it is unwise to devote further resources to a third review of the record in this stale dispute. The statute of limitations ran several years ago on the facts underlying the complaint's central allegations. There still is no evidence of a FECA violation (let alone a clear violation) for the reasons detailed above. *See* Section I. Proceeding would unlawfully subject AAN to an investigation based on a new theory adopted nearly eight years after AAN aired the challenged advertisements. *See, e.g.*, *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) ("*WRTL*") (explaining that litigation over electioneering communications is "burdensome" and "will unquestionably chill a substantial amount of political speech"). And the Commission's priorities have necessarily changed over time. Spending on electioneering communications now represents just about 0.1% of non-party spending in elections, while newspaper headlines highlight the many other pressing concerns before the

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releases-250000-digital-ad-campaign-advance-tax-reform/; AAN Kicks Off $2 Million Nationwide TV Ad Campaign on AHCA (May 23, 2017), http://www.americanactionnetwork.org/press/american-action-networkkicks-off-2-million-nationwide-tv-ad-campaign-ahca/; AAN Launches $900k Campaign Supporting Trade Promotion Authority (June 4, 2015), https://www.americanactionnetwork.org/press/aan-launches-900k-campaign-supporting-tradepromotion-authority/.

Commission. It is entirely appropriate to dismiss this case so the Commission can focus its resources on more current priorities.

A. The Commission Has Broad Discretion In Determining Which Cases To Pursue.

The FEC "has broad discretionary power in determining whether to investigate a claim, and whether to pursue civil enforcement under [the FECA]," *Combat Veterans for Cong. Political Action Comm. v. FEC*, 983 F. Supp. 2d 1, 15 (D.D.C. 2013) ("*Combat Veterans*"), aff'd, 795 F.3d 151 (D.C. Cir. 2015) (quoting *Akins v. FEC*, 736 F.Supp.2d 9, 21 (D.D.C.2010)). An "agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The FEC, like other agencies, "must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Id.*; *see also Nader v. FEC*, 823 F. Supp. 2d 53, 65–66 (D.D.C. 2011) (applying *Heckler*'s principles to the FEC). Courts, in particular, do not "sit as a board of superintendance directing where limited agency resources will be devoted," *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986), and recognize that an "agency generally cannot act against each technical violation of the statute it is charged with enforcing," *Heckler*, 470 U.S. at 831; *see also CREW v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007) (explaining how "[n]o one contends that the Commission must bring actions in court on every administrative complaint").[7]

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[7] In fact, "an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch." *Heckler*, 470 U.S. at 832. *Cf. In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1153 (D.C. Cir. 2006) (observing how it "is well established that the exercise of prosecutorial discretion is at the very core of the

A Commission decision to dismiss based on prosecutorial discretion is afforded great deference if challenged. Provided it is "sufficiently detailed so as to allow a reviewing court to determine why the controlling commissioners decided to forego prosecution," *CREW*, 236 F. Supp. 3d at 390, complainants bear a "substantial burden" when they seek to overturn such a dismissal and must make a "clear showing" that it was invalid, *La Botz v. FEC*, 61 F. Supp. 3d 21, 33, 34 (D.D.C. 2014). This is because deference to the Commission's prosecutorial discretion dismissals is "great," *Combat Veterans*, 983 F. Supp. 2d at 15, "extremely deferential," *Orloski v. FEC*, 795 F.2d 156, 167 (D.C. Cir. 1986), and "generally . . . absolute," *La Botz*, 61 F. Supp. 3d at 34, and requires affirmance by a reviewing court provided "a rational basis for the agency's decision is shown," *Orloski*, 795 F.2d at 167. Courts recognize that FECA's judicial review provisions are "not intended to work a transfer of prosecutorial discretion from the Commission to the courts," *Common Cause v. FEC*, 489 F. Supp. 738 (D.D.C. 1980) (quoting 125 Cong. Rec. S19099 (daily ed., Dec. 18, 1979) (Statement of Sen. Pell)), and that courts are "not here to run the [Commission]," *Rose*, 806 F.2d at 1091. CREW is no stranger to this high bar, having litigated and lost a case against the Commission on this very issue just last year. *See CREW*, 236 F. Supp. 3d at 378.

The Commission routinely considers whether to proceed based on an application of its Enforcement Priority System ("EPS"), which it uses to rate cases "against objective criteria to determine whether they warrant use of the Commission's limited resources." Press Release, FEC, FEC Completes Action on Six Enforcement Cases (Feb. 13, 2007).[8] Several criteria in the EPS system apply with full force here: the case has become stale, such that an investigation

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executive function," and that courts "consistently hesitate to attempt a review of the executive's exercise of that function.").

[8] Available at https://www.fec.gov/updates/fec-completes-action-on-six-enforcement-cases-2/.

would not be an efficient use of the Commission's resources, and the statute of limitations is long expired. *See id.*; General Counsel's Report, Agenda Document No. X02-27 (April 10, 2002).

Consequently, it would be well within the Commission's authority and standard practice to dismiss this stale case and "[f]ocus[] investigative efforts on more recent and more significant activity." *Id.* Doing so would have "a more positive effect on the electoral process and the regulated community." *Id.* It would recognize that "[e]ffective enforcement relies upon the timely pursuit of complaints and referrals" and that "[t]he utility of commencing an investigation declines" as a case ages. *Id.* And it would respect the fact that "citizens ought not have the threat of an investigation hanging over them for a lengthy time." Statement of Reasons of Commissioners Mason, Smith, and Wold in Pre-MUR 395, at 2 (Feb. 27, 2002). Indeed, as then-Chairman Walther observed just a few months ago, there is a risk that respondents will be "prejudiced by excessive delay" in the complaint process. Memorandum from Steven T. Walther, Chairman, to the Commission, Assessment of Commission Action on Enforcement Matters Awaiting Reason-to-Believe Consideration at 4 (Nov. 15, 2017).[9]

B. This Case Should Be Dismissed Based On Prosecutorial Discretion.

There are many factors that, together and individually, support a decision to exercise prosecutorial discretion to dismiss this case: (1) the statute of limitations is long expired, (2) the Commission has a full docket with more pressing current issues, (3) AAN has not violated FECA—let alone clearly violated it, (4) there are due process concerns with imposing the district court's evolving standard on AAN years after the challenged conduct, and (5) several other reasons justify a decision to forego the investment of significant additional time and resources into this case.

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[9] Available at https://www.fec.gov/resources/cms-content/documents/mtgdoc_17-53-a.pdf.

1. The Statute Of Limitations Is Long Expired.

CREW's sole allegation is that AAN was a political committee from July 23, 2009 to June 30, 2011. Compl. ¶ 19. Because the statute of limitations for FECA violations is five years, 28 U.S.C. § 2462, this case falls squarely within the Commission's general practice of dismissing stale cases and focusing on more recent activity. As the First General Counsel's Report shows, the statute of limitations expired several years ago. *See* p. 1 ("EXPIRATION OF SOL: 7/23/14").

The Commission has dismissed administrative complaints that were less stale than this one, recognizing that the dismissal of claims may be justified even *before* the statute of limitations has run so that the Commission can "[f]ocus[] investigative efforts on more recent and more significant activity . . . [which] has a more positive effect on the electoral process and the regulated community." MUR 5097R, General Counsel's Report (Agenda Document No. X02-27) (Apr. 3, 2002); *see also* Pre-MUR 395, Statement of Reasons of Commissioners Mason, Smith, and Wold at 2 (Feb. 27, 2002) (dismissing, in part, because "any investigation would have had to be conducted in a hasty and less than thorough fashion in order to beat the statute of limitations."). And recently, the Commission dismissed as stale a complaint involving political committee allegations from the same 2010 election cycle where "the statute of limitations was set to expire, at the latest, in October 2015, shortly before the FEC issued its [decision]." *CREW*, 236 F. Supp. 3d at 392 (rejecting challenge of Commission's dismissal in *CHGO* matter). This complaint should not be treated differently. It is stale and should be dismissed.

The Commission has no authority to seek monetary penalties in this case, and any ability to seek equitable relief is questionable at best. As the district court recognized in its recent review of the dismissal in the *CHGO* matter, there is "major" uncertainty over whether the Commission has authority to seek equitable relief beyond the five-year statute of limitations

period. *Id.* As a result, "it is clear that litigation risk abounds in pursuing" such equitable relief after the statute of limitations has run, making it "reasonable" for the Commission to "conclude[e] that it [is] not worth the litigation risk to pursue charges." *Id.* at 392-93. Courts have concluded that "equity will withhold its relief . . . where the applicable statute of limitations would bar the concurrent legal remedy." *FEC v. Nat'l Right to Work Comm., Inc. ("NRTWC")*, 916 F. Supp. 10, 14-15 (D.D.C. 1996) (quoting *Cope v. Anderson*, 331 U.S. 461, 464 (1947)); *see also FEC v. Williams*, 104 F.3d 237 (9th Cir. 1996). The Commission has respected that principle in the past, and should do so again here.

Indeed, this case is a particularly poor vehicle to adopt a new position and start seeking solely equitable relief after the statute of limitations has run. The merits case against AAN is, at best, weak, *see* Section I, and any claim for forward-looking injunctive relief is weaker still. As evident from the FEC Form 9 disclosures of electioneering communications in the Commission's files, AAN has not made any electioneering communications since 2010. There is, therefore, no "evidentiary support" for a claim that injunctive relief is needed to prevent further harm. *See, e.g., NRTWC*, 916 F. Supp. at 15 (denying an FEC effort to take action beyond the five-year limit, in part because there was no "evidentiary support for [the Commission's] professed apprehension" that similar conduct would occur going forward). The Commission should apply its standard policy to this case and dismiss it as stale.

2. The Commission Is Faced With Many Competing Enforcement Matters And Other Priorities That Outweigh Continued Pursuit Of This Case.

The FEC is a fairly small agency by government standards, with limited budgeting and staffing resources spread out across the agency's competing priorities. Nowhere is this more true than in the enforcement division, which a former FEC Chair recently described as "understaffed" and unable to "bring [enforcement matters] up before the commission in a timely fashion."

Nikki Schwab, *Trump Faces Waiting a YEAR for Federal Election Commission to Decide If Payment to Stormy Daniels Breaks Campaign Laws*, Daily Mail.com (Mar. 27, 2018).[10]

As a result, and partly owing to the high volume of complaints from the 2015 to 2016 presidential election cycle, the Commission has a sizable "backlog of enforcement matters" on its docket. Memorandum from Steven T. Walther, Chairman, to the Commission, *Assessment of Commission Action on Enforcement Matters Awaiting Reason-to-Believe Consideration* at 3. Recent press coverage has criticized this accumulation of pending-but-unresolved matters, and this public scrutiny will only increase if the Commission diverts resources from its pressing current matters so that it can again look into a series of advertisements aired in 2010. *See, e.g.*, Nikki Schwab, *Trump Faces Waiting a YEAR for Federal Election Commission to Decide If Payment to Stormy Daniels Breaks Campaign Laws*, Daily Mail.com (Mar. 27, 2018).

The vintage of this case has simply made further proceedings unnecessary. It is far afield from the Commission's current enforcement and related priorities. For example, all commissioners have agreed to prioritize expedited treatment of complaints that involve foreign national contributions over other matters, *see* Press Release, FEC, FEC Approves Two Notices of Availability to Seek Public Comment (Sept. 15, 2016), and Congress recently directed the FEC to report later this year on its role in enforcing the prohibition on foreign national participation in U.S. elections, *see* Allegra Kirkland, *'Incredible': Congress Will Make FEC Report On Foreign Money In Elections*, TPM (Mar. 23, 2018).[11] Moreover, for the first time in over a decade, the Commission has opened a rulemaking on Internet and technology issues, with

[10] Available at http://www.dailymail.co.uk/news/article-5549261/Trump-faces-waiting-YEAR-FEC-decide-payment-Stormy-broke-election-law.html.

[11] Available at https://talkingpointsmemo.com/muckraker/congress-omnibus-request-report-fec-foreign-money-elections.

a major hearing scheduled for June 27, 2018. *See Internet Communication Disclaimers and Definition of "Public Communication,"* 83 Fed. Reg. 12,864 (Mar. 26, 2018).

In contrast, electioneering communications by outside organizations have been falling at a precipitous pace. For example, spending on non-party electioneering communications dropped from a high of $131 million in the 2008 election cycle to approximately $1.5 million in the last election cycle. *See* Ctr. for Responsive Politics, *Total Outside Spending by Election Cycle, Excluding Party Committees*, OpenSecrets.org (Apr. 5, 2018).[12] For its part, FEC records will show that AAN has not made any additional electioneering communications since the 2010 election cycle, instead focusing its time and resources on issue and grassroots advocacy efforts, and occasionally making limited independent expenditures that expressly advocate the election or defeat of federal candidates. In these circumstances—where there have been no electioneering communications by the relevant organization since 2010 and there has been limited recent related activity by the regulated community at-large—it would be out-of-line with Commission practice to continue the pursuit of this stale case that has become irrelevant to contemporary campaigning and politics.

It bears noting that at least some responsibility for the staleness of this case, and the Commission's present resource allocation challenge, lies with CREW. CREW did not file its complaint until well into the five-year statute of limitations period. *See* Compl. (received June 7, 2012); First General Counsel's Report (noting expiration of statute of limitations on July 23, 2014). Had CREW filed its complaint sooner, when electioneering communications were more prominent, the Commission may have had a greater interest and ability in pursuing this matter further. But that is not the case in 2018. According to the FEC's website, the number

[12] Available at https://www.opensecrets.org/outsidespending/cycle_tots.php.

of enforcement matters in court has more than doubled in the last three years. In 2015, the FEC identified 13 then-"ongoing" cases. *See* FEC, *Ongoing Litigation* (archive of Apr. 15, 2015).[13] Today, the Commission's website identifies 29 different cases, including nine lawsuits brought by CREW alone. *See* FEC, *Ongoing Litigation.*[14] The FEC today, therefore, needs to make more resource-driven prosecutorial decisions than ever before. *See Heckler*, 470 U.S. at 831 (agencies should "assess whether . . . agency resources are best spent on this [alleged] violation or another"). This stale case about an increasingly irrelevant issue should be dismissed.

3. The Commission Does Not Have A Strong Case On The Merits, Even Under The District Court's Newly-Created Test.

The Commission is justified in considering the litigation risks associated with proceeding with a case and may dismiss so that it can devote its resources to more apparent violations or egregious cases. *See, e.g.*, *Heckler*, 470 U.S. at 831 (agencies should "assess . . . whether the agency is likely to succeed if it acts"); *CREW*, 236 F. Supp. 3d at 391 (the FEC "rationally concluded that the litigation risk did not justify continued prosecution"). The fact that there have been valid arguments that AAN was not a political committee under any test adopted by the Commission or district court to date—including the court's most recent decision, *see* Section I—strongly supports a prosecutorial discretion dismissal.

4. Fundamental Fairness and Due Process Concerns Require Dismissal.

The Commission should also dismiss in order to avoid the due process violation that would result from prosecuting AAN based on a standard announced nearly eight years after AAN engaged in the speech that is being challenged. One of the hallmarks of due process is "that laws give the person of ordinary intelligence a reasonable opportunity to know what is

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[13] Available at https://web.archive.org/web/20150403121928/http://www.fec.gov/law/litigationrecent.shtml.

[14] Available at https://www.fec.gov/legal-resources/court-cases/.

prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Nowhere does this principle apply with greater force than where a statute "abut(s) upon sensitive areas of basic First Amendment freedoms." *Id.* at 109.

Here, it was impossible for AAN to have accurately assessed, during the 2009 to 2011 timeframe, what communications might now be counted toward political committee status based on the district court's 2018 decision. CREW's complaint did not seek the court's new standard; CREW instead asked that "*all* electioneering communications [be considered] indicative of a purpose to nominate or elect . . . a candidate"—a position rejected by the district court and the controlling commissioners. *Citizens for Responsibility & Ethics in Washington v. FEC*, 209 F. Supp. 3d 77, 93 (D.D.C. 2016) ("*CREW I*") (internal quotations marks and bracket omitted). The Commission also did not advocate for the court's new standard. Instead, it first found that *no* electioneering communications, other than the functional equivalent of express advocacy, should count toward political committee status. *See* Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen, MUR 6589 (July 30, 2014). And when that standard was rejected by the district court, the Commission applied a non-categorical, flexible approach consistent with the district court's first decision. *See CREW I*, 209 F. Supp. 3d at 93; SSOR, MUR 6589.

Meanwhile, other standards remain on the books. The FEC's Office of General Counsel recognized, for example, that precedent supports a conclusion that only communications that "expressly advocate the election or defeat of a clearly identified candidate" count toward a "major purpose" finding. *See* First General Counsel's Report at 22 n.39 (collecting authority from courts and the Statement of Reasons of Commissioners Petersen and Hunter from MUR

5842). The United States Court of Appeals for the Seventh Circuit reached that same conclusion. *See Wisc. Right to Life v. Barland*, 751 F.3d 804, 824 (7th Cir. 2014).

Making matters worse, the district court found support for its new standard in a Supreme Court decision that was not issued until 2010, partway through the 2009 to 2011 time period that is at issue here. *See Citizens United v. FEC*, 558 U.S. 310 (2010). In the First Amendment context, where the tie goes to the speaker, AAN cannot be prosecuted based on a district court's later adoption of a standard that is at odds with precedent now—and at the time that AAN funded the advertisements being challenged. *See WRTL*, 551 U.S. at 475 ("Where the First Amendment is implicated, the tie goes to the speaker, not the censor."). AAN was not "afforded clear notice as to the legal criteria that the Commission would apply to [it] in order to subject [it] to the significant regulatory burdens applicable to 'political committees.'" Statement of Comm'r Lee E. Goodman, MUR 6391/6471 (CHGO) at 4. Proceeding with an investigation or prosecution would violate due process and fundamental fairness. *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (a "fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is . . . required"); *United States v. Lanier*, 520 U.S. 259, 266 (1997) ("due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope"). The Commission would be wise to dismiss.

5. Many Other Factors Support a Prosecutorial Discretion Dismissal.

A litany of other factors weigh in favor of dismissing this case as a matter of prosecutorial discretion. They include:

1. <u>The District Court's Opinions Appear to Provide CREW the Relief It Wants Most, and Further Proceedings Could Jeopardize This Result.</u> While AAN disagrees with the

district court's rulings and believes them vulnerable on appeal,[15] CREW has applauded them as providing what it wants most—*i.e.*, a ruling of broad applicability that will likely govern the FEC's treatment of similar organizations going forward unless and until challenged in court. *See* Press Release, CREW, CREW Wins Major FEC Lawsuit (Mar. 20, 2018).[16] From the perspective of the complainant, and those commissioners sharing its view, a *Heckler* dismissal could end this case against AAN without risking further district court proceedings about (and possible reconsideration of) the merits of the court's new standard.

2. The (Likely) Refusal of Some Commissioners to Appeal the District Court's Ruling Threatens to Inhibit First Amendment Rights Without Meaningful Judicial Review. There are now two district court decisions on the books that should be reversed on appeal. The Commission, however, did not permit an appeal of the district court's first opinion and—if past practice is any guide—will likely not permit an appeal of the district court's second opinion. Proceeding in this context means that the Commission will likely waste resources, and jeopardize AAN's First Amendment rights, *before* an appellate court can conclusively decide whether this

[15] For example, the district court expressly acknowledged in its first decision that it was finding the Commission's analysis "contrary to law" even though that analysis was fully consistent with Seventh Circuit precedent. *See CREW I*, 209 F. Supp. 3d at 91-2 (citing *Barland*, 751 F.3d 804). Similarly, the district court admitted that its second decision was grounded in BCRA, even though BCRA "did not touch the text of FECA's definition of 'political committee.'" *CREW II*, 2018 WL 1401262, at *10. The court reasoned that a "specific policy embodied in a later federal statute [*i.e.*, BCRA] should control our construction of the priority statute [*i.e.*, FECA], even though [FECA] had not been expressly amended." *Id.* But that is not the case here: "[w]here First Amendment interests are affected, a precise statute 'evincing a legislative judgment that certain specific conduct be . . . proscribed'" is required to "assure[] us that the legislature has focused on the First Amendment interests and determined that other governmental policies compel regulation." *Grayned*, 408 U.S. at 110 (internal citations omitted). Moreover, particularly given the Supreme Court's admonishment that "the tie goes to the speaker, not the censor," *WRTL*, 551 U.S. at 475, the district court's imposition of a presumption to regulate electioneering communications beyond what is proscribed by statute runs directly counter to established principles of statutory interpretation in the First Amendment context.

[16] Available at https://www.citizensforethics.org/press-release/crew-wins-major-fec-lawsuit/.

case should have proceeded in the first place. The Commission could reasonably decide to avoid the unnecessary expense and risk of subjecting AAN to an investigative process that is ultimately found unlawful.

3. The Commission May Pursue Issues Surrounding Political Committee Status in Other Cases. To the extent that the Commission believes it important to further examine the issues in political committee cases, it should do so in fresher cases with more egregious facts. Although the pending matters under review at the Commission are confidential, there likely are newer political committee cases relating to the three complete election cycles that have occurred since AAN ran its advertisements. It is also likely that the matter involving Americans for Job Security is still pending, as there has not been a press release about its resolution. It was remanded by the district court in 2016, *see CREW II*, 2018 WL 1401262, at *4, based on a record in which then-Commissioners Weintraub, Ravel, and Walther claimed it involved a higher percentage of spending on federal campaign activity than at issue here, *see* Statement of Vice Chair Ravel and Commissioners Walther and Weintraub, MURs 6538 and 6589, at 4.[17] With other options on the table, the Commission does not need to pursue this enforcement matter, should it want to put the regulated community on notice that the Commission remains vigilant in this area.

4. One of the Two Complainants Departed Her Position Years Ago. The complaint in this case was filed by Melanie Sloan, both in her individual capacity and also in her capacity as CREW's Executive Director. But Ms. Sloan stepped down from her role at CREW more than three years ago to start a new public affairs firms, focusing on "crisis and disruption strategies." *See* Megan R. Wilson, *CREW Founder Sloan Starts New Venture*, The Hill (Jan. 7, 2015); *see*

[17] Available at http://eqs.fec.gov/eqsdocsMUR/14044362039.pdf.

also CREW, *Our Team.*[18] Given that Ms. Sloan has not only left her organization, but also apparently this entire field of law, the importance of resolving the case on her behalf has greatly diminished. At the very least, her departure underscores the lengthy period of time that this case has been pending.

5. If This Case Is Not Dismissed Now, It Will Likely Remain on the Commission's Docket Well into the Next Decade. As noted above, AAN respectfully believes that the district court's analysis was in error and is vulnerable on appeal. Should the Commission disregard the above considerations and nonetheless proceed with a "reason to believe" finding, AAN intends to vigorously contest such efforts through the federal courts. Given the pace at which the court proceedings have progressed to this point, it is likely that this case would not be resolved until sometime in the 2020s. It is hard to imagine how litigating a case through at least three presidential election cycles would serve the public interest, particularly given the alternative uses to which the Commission's resources could be dedicated instead.

CONCLUSION

The FEC has more than adequate reasons to dismiss this matter on the merits, pursuant to its prosecutorial discretion, or on both bases. This complaint was filed nearly six years ago and pertains to activities that primarily took place in 2010—eight years and over three election cycles ago. There has been no allegation in the years since that AAN is a political committee or is operating in any way other than as the issue advocacy organization it has been since its inception.

Dismissing this stale complaint would allow the Commission to "focus resources on important cases of more recent vintage, with fresher evidence and more importance to current

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[18] Available at https://www.citizensforethics.org/who-we-are/our-team/.

campaigns," Statement of Reasons of Commissioners Mason, Smith, and Wold in Pre-MUR 395, at 2, which would "ha[ve] a more positive effect on the electoral process and the regulated community," General Counsel's Report, Agenda Document No. X02-27 (Apr. 10, 2002). This is especially true where, as here, the five-year statute of limitations has expired and the Commission could not institute an enforcement action. The time has come to end this outdated case and devote the Commission's limited resources to more timely and relevant cases. The Commission should again dismiss this matter.

Respectfully submitted,

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