

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON**)
1331 F Street, N.W. Suite 900)
Washington, D.C. 20004,)

Plaintiff,)

v.)

FEDERAL ELECTION COMMISSION)
1050 First Street, N.E.)
Washington, D.C. 20463,)

Defendant.)

Civil Action No. _____

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

1. This is an action for injunctive and declaratory relief under the Federal Election Campaign Act of 1971 (“FECA”), 52 U.S.C. § 30109(a)(8)(C), challenging as arbitrary, capricious, an abuse of discretion, and contrary to law the dismissal by the Federal Election Commission (“FEC” or “Commission”) of an administrative complaint by Citizens for Responsibility and Ethics in Washington (“CREW”) against the American Action Network (“AAN”) after repeated remands to the agency to correct legal errors identified by Judge Christopher Cooper, *see CREW v. FEC*, 299 F. Supp. 3d 83 (D.D.C. 2018) (“*CREW IP*”); *CREW v. FEC*, 209 F. Supp. 3d 77 (D.D.C. 2016) (“*CREW P*”).

2. This is the third time that CREW has had to sue the FEC over its unlawful treatment of CREW’s complaint against AAN, a group that spent and continues to spend millions of dollars to influence federal elections without any disclosure about the sources of its funds. The first two times, a United States District Court reversed the dismissal because the commissioners who blocked the investigation by voting against a reason-to-believe vote—the

first step in the FEC’s enforcement procedures—did so based on an analysis that “blink[ed] reality,” *CREW I*, 209 F. Supp. 3d at 93, and caused the court to question the commissioners’ sincerity, *CREW II*, 299 F. Supp. 3d at 98, respectively. Specifically, the commissioners treated the millions AAN spent on electioneering communications as cause to *excuse* AAN from political committee reporting, notwithstanding the fact its ads aired shortly before an election, targeted electorates, attacked candidates, and urged voters to express their displeasure “in November.”

3. This third time, however, the FEC dismissed the complaint for very different reasons, after a single commissioner blocked a reason-to-believe vote by the then four-member Commission. That Commissioner has issued a new analysis disclaiming the previous analyses, and instead stating that electioneering communications count towards concluding a group is a political committee, that the proper analysis focuses on the group’s calendar year’s activities, and that, consequently, AAN unequivocally was and is a political committee. In addition, that controlling opinion disclaimed any lawful basis for dismissal, including prosecutorial discretion and the statute of limitations. Rather, the now-controlling opinion of the FEC is that the dismissal was “absolutely contrary to law.”

4. This perhaps perplexing explanation for dismissal is the direct result of D.C. Circuit precedent providing that the commissioners who blocked the last reason-to-believe vote before the dismissal are the “controlling commissioners” who speak on behalf of “the Commission” with respect to the following dismissal. *CREW v. FEC*, 993 F.3d 880, 883 (D.C. Cir. 2021) (“*New Models*”). In this case, Commissioner Ellen L. Weintraub is now the controlling commissioner as she is the commissioner who single-handedly blocked the last reason-to-believe vote.

5. Here, there is no dispute. A dismissal without any lawful or rational basis is, without doubt, arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. There is no dispute that under existing law, organizations like AAN that devote more than half of their annual spending on express advocacy or electioneering communications or a combination of the two (or, for that matter, other federal campaign activity) are not excused from the reporting obligations imposed by the FECA on political committees. There is no dispute that the statute of limitations does not preclude enforcement against AAN. And there is no dispute that this case does not warrant prosecutorial discretion. Indisputably, the FEC's dismissal of CREW's complaint against AAN is, once again, contrary to law.

JURISDICTION AND VENUE

6. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 52 U.S.C. § 30109(a)(8)(A). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331, and 28 U.S.C. §§ 2201(a) and 2202. Venue lies in this district under 52 U.S.C. § 30109(a)(8)(A) and 28 U.S.C. § 1391(e).

PARTIES

7. Plaintiff CREW is a non-profit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code.

8. CREW is committed to protecting the right of citizens to be informed about the activities of government officials, to ensuring the integrity of government officials, protecting our political system from corruption, and reducing the influence of money in politics. CREW is dedicated to empowering voters to have an influential voice in government decisions and in the governmental decision-making process. CREW uses a combination of research, litigation, and advocacy to advance its mission.

9. In furtherance of its mission, CREW seeks to expose unethical and illegal conduct of those involved in government. One way that CREW does this is by educating citizens regarding the integrity of the electoral process and our system of government. Toward this end, CREW monitors the campaign finance activities of those who run for federal and state office and those who support or oppose such candidates and publicizes those who violate federal campaign finance laws through its website, press releases, and other methods of distribution. CREW also files complaints with the FEC when it discovers violations of the FECA. Publicizing campaign finance violators and filing complaints with the FEC serve CREW's mission of keeping the public informed about individuals and entities that violate campaign finance laws and deterring future violations of campaign finance law.

10. In order to assess whether an individual, candidate, political committee, or other regulated entity is complying with federal campaign finance law, CREW needs the information contained in receipts and disbursements reports that political committees and others must file pursuant to the FECA, 52 U.S.C. § 30104; 11 C.F.R. §§ 104.1–22, 109.10. CREW is hindered in its programmatic activity when an individual, candidate, political committee, or other regulated entity fails to disclose or provides false information in reports required by the FECA.

11. CREW relies on the FEC's proper administration of the FECA's reporting requirements because the FECA-mandated disclosure reports are the only source of information CREW can use to determine if an individual, candidate, political committee, or other regulated entity is complying with the FECA. The proper administration of the FECA's reporting requirements includes mandating that all disclosure reports required by the FECA are properly and timely filed with the FEC. CREW is hindered in its programmatic activity when the FEC fails to properly administer the FECA's reporting requirements.

12. CREW has standing here because CREW alleges “violations of the FECA that require accurate disclosure of contribution information and the filing of public reports by political committees.” *Campaign Legal Center v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020) (citations omitted). CREW’s injury is not mooted by its prior citizen suit against AAN, as the court recently dismissed that case for lack of jurisdiction without awarding CREW a disclosure of information that would have remedied CREW’s injuries.

13. Defendant FEC is the federal agency established by Congress to oversee the administration and civil enforcement of the FECA. *See* 52 U.S.C. §§ 30106, 30106(b)(1).

STATUTORY AND REGULATORY FRAMEWORK

Political Committees

14. The FECA and the implementing FEC regulations impose on “political committees” registration, organization, and disclosure requirements.

15. The FECA and implementing FEC regulations define a “political committee” as “any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year.” 52 U.S.C. § 30101(4)(A); 11 C.F.R. § 100.5(a).

16. An “expenditure” is “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.” 52 U.S.C. § 30101(9)(A); 11 C.F.R. § 100.16. A “contribution” includes “any gift, ... or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.” 52 U.S.C. § 30101(8)(A)(i); 11 C.F.R. § 100.52(a).

17. Notwithstanding the statutory test, the Supreme Court has carved out from the reach of the FECA's political committee provisions groups that, while they met the statutory definition, were neither under the control of a candidate nor had the requisite "major purpose" to nominate or elect of federal candidates. *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

18. Determination of a group's "major purpose" requires a fact-intensive, case-by-case analysis of an organization. FEC, Political Committee Status, Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5601 (Feb. 7, 2007) ("Supplemental E&J"). An organization's major purpose may be demonstrated by its activities, and a group that devotes a sufficiently extensive amount of its spending to campaign activity is not excused from the FECA's political committee provisions. *See FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986).

19. Neither the Court, nor the FECA or FEC regulations define the scope of qualifying campaign activity. The FECA and FEC regulations nonetheless regulate two forms of communications as election-related: express advocacy communications and electioneering communications. 52 U.S.C. §§ 30101(17), 30104(f); 11 C.F.R §§ 100.16, 100.29(a). An express advocacy communication is any communication that expressly asks the audience to "vote for" or "vote against" a candidate, or uses similar terms such that "[r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action." 11 C.F.R. § 100.22. An electioneering communication is any broadcast communication that "refers to a clearly identified candidate for Federal office," is publicly distributed within "60 days before a general, special, or runoff election for the office sought by the candidate, or ... 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate," "is targeted to the relevant electorate," and does not fall within one of the

statutory exceptions. 52 U.S.C. § 30104(f)(3)(A), (B); 11 C.F.R. § 100.29(a). The FECA imposes various disclosure burdens on anyone who spends a sufficient amount of money on either form of communication. 52 U.S.C. §§ 30104(c)(1), (f)(1); 11 C.F.R. §§ 104.20(b), 109.10.

20. The FECA and FEC regulations require all political committees to register with the FEC within 10 days of becoming a political committee. 52 U.S.C. § 30103(a); 11 C.F.R. § 102.1. Nonetheless, “the law does not require a committee to register as a [political committee] in order to be one.” Statement of Reasons of Chairman Allen Dickerson, MUR 7920 (Oklahomans for T.R.U.M.P.), <https://perma.cc/6Q2C-PDY8> .

21. The FECA and implementing FEC regulations require political committees to file periodic reports with the FEC that, among other things: (1) identify all individuals contributing an aggregate of more than \$200 in a year to the organization, and the amount each individual contributed; (2) identify all political committees making a contribution to the organization, and the amount each committee contributed; (3) detail all of the organization’s outstanding debts and obligations; and (4) list all of the organization’s expenditures, including its independent expenditures and electioneering communications. 52 U.S.C. § 30104(a)(4), (b), (f)(2); 11 C.F.R. §§ 104.3, 104.4, 104.20(b). A political committee’s obligations continue until either it or the FEC terminates its status as permitted by the FECA. 52 U.S.C. § 30103(d).

Enforcement

22. The FECA divides civil enforcement between the FEC and private complainants. 52 U.S.C. § 30107(e). Before seeking relief, a private complainant must exhaust their remedies before the FEC. *CREW v. AAN*, 410 F. Supp. 3d 1, 25 (D.D.C. 2019). To exhaust their claim, any person who believes there has been a violation of the FECA may file a sworn complaint with the FEC. 52 U.S.C. § 30109(a)(1). Based on the complaint, the response from the person alleged to

have violated the Act, and any recommendation of the FEC's Office of General Counsel ("OGC"), the FEC then votes on whether there is "reason to believe" a violation of the FECA may have occurred. 52 U.S.C. § 30109(a)(2). If four commissioners vote to find there is "reason to believe" a violation of the FECA may have occurred, the FEC must notify the respondents of that finding and must "make an investigation of such alleged violation." *Id.*

23. After the investigation, the OGC recommends whether the Commission should vote to find there is "probable cause" to believe the FECA has been violated. 52 U.S.C. § 30109(a)(3). If four commissioners vote to find probable cause to believe a violation of the FECA has occurred, the FEC must attempt for at least 30 days, but not more than 90 days, to resolve the matter "by informal methods of conference, conciliation and persuasion." 52 U.S.C. § 30109(a)(4)(A)(i).

24. If the FEC is unable to settle the matter through informal methods, it may institute a civil action for legal and equitable relief in the appropriate United States district court. 52 U.S.C. § 30109(a)(6)(A). In any action instituted by the FEC, a district court may grant injunctive relief as well as impose monetary penalties. 52 U.S.C. § 30109(a)(6)(B)–(C).

25. If at any stage of the proceedings the FEC dismisses a complaint, any "party aggrieved" may seek judicial review of that dismissal in the United States District Court for the District of Columbia. 52 U.S.C. § 30109(a)(8)(A). All petitions from the dismissal of a complaint by the FEC must be filed "within 60 days after the date of the dismissal." 52 U.S.C. § 30109(a)(8)(B).

26. The district court reviewing the FEC's dismissal of a complaint may declare the FEC's actions "contrary to law." 52 U.S.C. § 30109(a)(8)(C). Where a dismissal occurs after a failure of the Commission to secure four votes to find reason to believe a respondent violated the

law, the court looks to the reasoning provided by the “controlling commissioners” who most recently defeated the reason-to-believe vote and who speak for “the Commission” as to its reasons for dismissal. *CREW v. FEC*, 993 F.3d 880, 883 (D.C. Cir. 2021), *pet. for review en banc filed*, *CREW v. FEC*, No. 19-5161 (D.C. Cir. June 23, 2021).

27. The court also may order the FEC “to conform with such declaration within 30 days.” 52 U.S.C. § 30109(a)(8)(C). If the FEC fails to abide by the court’s order, the FECA provides the complainant with a private right of action, brought in the complainants’ own name, “to remedy the violation involved in the original complaint.” *Id.*

FACTUAL BACKGROUND

American Action Network

28. The Washington, D.C.-based American Action Network (“AAN”), formed in July 2009, is a tax-exempt organization under section 501(c)(4) of the Internal Revenue Code.

29. AAN describes its mission as creating, encouraging, and promoting center-right policies based on the principles of freedom, limited government, American exceptionalism, and strong national security, and states as its “primary goal” “to put our center-right ideas into action by engaging the hearts and minds of the American people and spurring them into active participation in our democracy.”

30. Between July 23, 2009, and June 30, 2011, according to reports AAN filed with the FEC, AAN spent \$4,096,910 on independent expenditures and \$14,038,625 on electioneering communications, a total of \$18,135,535. Broken down by AAN’s fiscal year, AAN reported spending \$4,036,987 on independent expenditures and \$14,038,625 on electioneering communications between July 1, 2010 and June 30, 2011, a total of \$18,075,612. AAN further reported spending \$59,922 on independent expenditures between July 23, 2009 and June 30,

2010. That money was spent largely producing and broadcasting television and Internet advertisements in 29 primary and general elections.

31. AAN's earliest independent expenditure was \$29,000 the group spent on an ad supporting Tim Burns, a Republican candidate for a special election for a House seat in Pennsylvania, on May 6, 2010. Accordingly, AAN met the statutory qualification for political committee status—making over \$1,000 in expenditures in one calendar year, 52 U.S.C. § 30101(4)—no later than May 6, 2010.

32. AAN also spent significant funds on at least twenty versions of electioneering communications in at least twenty different 2010 federal races. For example, starting on October 22, 2010, just weeks before the election, AAN spent \$725,000 broadcasting an advertisement against Rep. Ed Perlmutter (D-CO) that expressed disbelief that “convicted rapists can get Viagra paid for by the new health care bill.” Noting Rep. Perlmutter had voted for the Affordable Care Act, the advertisement encouraged viewers to “tell Congressman Perlmutter to vote for repeal in November” and to “[v]ote Yes on H.R. 4903.” The House went into recess at the end of September 2010, with no votes scheduled on H.R. 4903 or any other bill repealing the health care law during November 2010 or, indeed, the remainder of the 111th Congress. Accordingly, AAN's reference to a vote “in November” could have referred only to the upcoming congressional election in which viewers of the advertisement could vote.

33. All of the electioneering communications AAN broadcast in 2010 similarly were related to the election. The ads not only met the statutory definition of electioneering communications, but criticized or praised the identified candidate, discussed the identified candidate's voting record, did not discuss a pending legislative matter, referred to the upcoming election, ran in the weeks before an election rather than at the beginning of the electioneering

communication window, and/or referred to non-incumbent candidates. Accordingly, all AAN's electioneering communications exhibit the purpose of nominating or electing federal candidates.

34. The proper time period for comparing AAN's political activity to its overall spending is the 2010 calendar year. However, because AAN's fiscal year runs from July 1 through June 30, and it reported its overall spending to the Internal Revenue Service ("IRS") on its tax returns using those time periods, CREW does not have sufficient information to precisely determine AAN's overall spending for 2010.

35. The closest time period for which there is reported information about AAN's spending is its 2010 fiscal year, covering July 1, 2010 through June 30, 2011. On its 2010 tax return, AAN reported spending a total of \$25,692,334 on all activities during that period. As discussed above, AAN reported to the FEC spending \$18,075,612 on independent expenditures and electioneering communications during the 2010 fiscal year. As a result, AAN's political spending comprised approximately 70.4 percent of its total spending in that fiscal year.

36. AAN may have spent even more money on politics. On its 2010 tax return, AAN reported spending a total of \$5,035,953 on political expenditures. That is approximately \$998,966 more than the amount it reported to the FEC spending on independent expenditures that year. AAN maintained in previous proceedings that none of the money it spent on electioneering communications qualified as political activity. Accordingly, AAN may have spent an additional \$998,966 on political activities which it has not explained. If this sum is added to the \$18,075,612 AAN reported spending on independent expenditures and electioneering communications, AAN's total political spending for fiscal year 2010 would be \$19,074,577, or 74.2 percent of its total spending.

37. Looking instead at AAN's first two years of existence, AAN still spent most of its money on election-related activities. On its 2009 tax return, AAN reported spending a total of \$1,446,675 on all activities for the period July 23, 2009 through June 30, 2010, its 2009 fiscal year, making AAN's total reported spending for its 2009 and 2010 fiscal years combined \$27,139,009. The \$18,135,535 in independent expenditures and electioneering communications AAN reported to the FEC, therefore, comprises approximately 66.8 percent of its total spending between July 23, 2009 and June 30, 2011.

38. As with its 2010 tax return, AAN's 2009 tax return reported more political expenditures than AAN reported to the FEC. AAN's 2009 tax return identified \$185,108 in political expenses, about \$125,186 more than AAN reported in independent expenditures during the same period. Including all of AAN's unexplained spending for fiscal years 2009 and 2010 brings its total spending on political activity to \$19,199,763. Based on this figure, AAN's political spending comprised 70.7 percent of its overall spending between July 23, 2009 and June 30, 2011.

39. AAN has never terminated its political committee status as permitted by 52 U.S.C. § 30103.

Procedural History

40. On June 7, 2012, CREW filed a complaint with the FEC against AAN for violating the FECA ("MUR 6589"). The complaint alleged, as demonstrated by its extensive spending on federal campaign activities, that AAN's major purpose was the nomination or election of federal candidates.

41. On January 17, 2013, the OGC issued the First General Counsel's Report recommending the Commission find reason to believe AAN had as its major purpose the

nomination or election of federal candidates during 2010, and therefore violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to organize, register, and report as a political committee. In particular, the OGC found AAN spent at least \$4,096,910 on independent expenditures between July 2009 and June 2011, of which approximately \$4,044,572 was spent in 2010. The OGC further found AAN spent at least \$12,968,445 on electioneering communications during 2010. The OGC could not determine the total amount AAN spent in 2010 alone, so it assumed all of AAN's reported spending occurred in 2010—the assumption most beneficial to AAN. The OGC then concluded AAN spent at least \$17,013,017 on federal campaign activity during 2010, or at least 62.6 percent of its total spending for that calendar year on federal campaign activity. As a result, the OGC concluded, AAN's spending showed the group's major purpose during 2010 was federal campaign activity.

42. Despite the OGC's detailed analysis, on June 24, 2014, the Commission deadlocked three-to-three, and thus failed to find reason to believe AAN had violated 52 U.S.C. §§ 30102, 30103, or 30104. The Commission then voted to close the file by a vote of six-to-zero, dismissing CREW's complaint.

43. On July 30, 2014, the FEC released the statement of reasons of the three commissioners who voted against finding reason to believe—then Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen. These commissioners concluded AAN's major purpose, based on its public statements, organizational documents, and overall spending history, “has been issue advocacy and grassroots lobbying and organizing.”

44. To reach that conclusion, the commissioners interpreted the First Amendment and judicial precedent to require the FEC to treat all expenses for AAN's non-express advocacy communications, including AAN's electioneering communications, as cause to *excuse* AAN

from political committee reporting. Further, they interpreted the *Buckley*'s "major purpose" limitation as considering the group's activities over its entire life and treating all such activity as equally important to determine whether the group's current major purpose in a given election year was to nominate or elect candidates. Finally, in a footnote, the commissioners stated that "constitutional doubts raised here militate in favor of cautious exercise of our prosecutorial discretion."

45. On August 20, 2014, CREW brought suit against the FEC challenging the dismissal of CREW's administrative complaint against AAN as "contrary to law" in violation of 52 U.S.C. § 30109(a)(8).

46. On September 19, 2016, Judge Christopher Cooper granted CREW's motion for summary judgment, finding that the FEC's dismissal of CREW's complaint against AAN was "contrary to law." *CREW I*, 209 F. Supp. 3d at 95. In relevant part, Judge Cooper ruled that the commissioners committed legal error by applying an inapposite "express advocacy/issue speech distinction in the realm of disclosure," *id.* at 92, and by concluding that "First Amendment effectively required the agency to exclude from its consideration all non-express advocacy in the context of disclosure," including the FECA's political committee provisions, *id.* at 93. The Court found that it "blinks reality to conclude that many of the ads considered by the Commissioners in this case were not designed to influence the election or defeat of a particular candidate in an ongoing race." *Id.* Rather, the Court noted that the record supported the conclusion that, at a minimum, "*many or even most* electioneering communications indicate a campaign related purpose." *Id.* Additionally, though the Court deferred to the three commissioners' consideration of "a particular organization's full spending history" in their major purpose analysis, it found the application in this case was arbitrary because it "ignore[d] crucial facts indicating whether an

organization’s major purpose has changed.” *Id.* at 94 (deferring pursuant to *Chevron U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837 (1984)). Accordingly, the Court reversed the dismissal and remanded for reconsideration within thirty days, to be done in conformity with the Court’s declaration. *Id.* at 95.

47. On October 18, 2016, the Commission again deadlocked three-to-three on whether there was reason to believe AAN violated 52 U.S.C. §§ 30102, 30103, 30104 in the remanded matter (now designated MUR 6589R), and then voted five-to-one to close the file, again dismissing CREW’s complaint. Then-Chairman Matthew S. Petersen and then-Commissioners Caroline C. Hunter and Lee E. Goodman—the commissioners who voted against finding reason to believe on remand and the same commissioners who had voted against finding reason to believe AAN violated the FECA in the first instance—issued a new statement of reasons explaining their continued refusal to find reason to believe AAN had violated the FECA by failing to register as a political committee. In relevant part, the commissioners claimed to apply a flexible ad-by-ad analysis but continued to treat nearly all electioneering communications as cause to excuse AAN from political committee reporting and continued to equally weigh such activities against AAN’s lifetime of spending to determine AAN’s major purpose in a particular election-year.

48. CREW moved for an order to the FEC to show cause why its dismissal of CREW’s complaint was not a failure to conform with the Court’s prior dismissal. On April 6, 2017, the Court denied CREW’s request, finding the new framework employed by the commissioners “was free of the legal errors identified in this Court’s previous Opinion and Order,” but reserved the question of whether the new analysis was contrary to law due to other errors. *CREW v. FEC*, No. 14-1419-CRC (D.D.C. Apr. 6, 2017) (ECF No. 74).

49. At the same time CREW sought the order to show cause, CREW also once again sought judicial review of this dismissal pursuant to 52 U.S.C. § 30109(a)(8)(C). On March 20, 2018, Judge Cooper found that the analysis in the new statement of reasons demonstrated the dismissal was indeed “contrary to law.” *CREW II*, 299 F. Supp. 3d at 101. Judge Cooper found that electioneering communications “presumptively have an election-related purpose.” *Id.* at 93 (emphasis omitted). Only an “extraordinary” and “rare” electioneering communication would lack this purpose and thus cause the sums spent on it to count against finding the organization had the major purpose of nominating or electing candidates. *Id.* at 97. Judge Cooper found that the commissioners’ analysis did not adequately reflect this presumption and thus their analysis of AAN’s electioneering communications was contrary to law. Judge Cooper remanded the matter to the Commission, ordered the FEC to conform with the March 20, 2018 judgment within 30 days, and noted the FEC’s failure to “timely conform with the Court’s declaration” would mean “CREW may bring ‘a civil action to remedy the violation involved in the original complaint.’” *Id.* at 101 (quoting 52 U.S.C. § 30109(a)(8)(C)).

50. On April 11, 2018, CREW filed an amended complaint with the FEC substituting complainant Melanie Sloan with complainant Noah Bookbinder and substituting new allegations specific to Mr. Bookbinder, but otherwise repeating the allegations in CREW’s original 2012 complaint. Complaint, MUR 6589 (AAN) (Apr. 11, 2018), Ex. 1.

51. On April 19, 2018, Commissioner Weintraub published a statement about CREW’s court victory, noting the relief provided in the statute was the authorization of a lawsuit by CREW against AAN. Statement of Vice Chair Ellen L. Weintraub Regarding *CREW v. FEC & American Action Network*, (Apr. 19, 2018), Ex. 2, <https://perma.cc/LW5C-LN6P> (“Weintraub

Third AAN Statement”). She stated that it was time to “let this matter move forward unimpeded by commissioners who have fought every step of the way to keep dark money dark.” *Id.*

52. The FEC thereafter failed to conform with the Court’s declaration, and CREW filed suit against AAN on April 23, 2018. Judge Cooper denied AAN’s motion to dismiss CREW’s suit, finding CREW had standing, CREW exhausted its claims, and a reference to prosecutorial discretion in the commissioners’ first statement of reasons did not deprive the court of jurisdiction. *See generally CREW v. AAN*, 410 F. Supp. 3d 1 (D.D.C. 2019). Approximately three years later, after discovery had completed, the Court reconsidered its decision with respect to the effect of the reference to prosecutorial discretion in the first statement of reasons in light of an intervening D.C. Circuit decision, *New Models*, 993 F.3d 880, and found that it precluded the Court’s decision in *CREW I*. *CREW v. AAN*, No. 18-cv-945 (CRC), 2022 WL 612655, at *8 (D.D.C. March 2, 2022). The Court then found that either *CREW I*’s impropriety rendered all subsequent events a nullity or, alternatively, the reference to prosecutorial discretion in the first statement was incorporated by reference into the second statement, which rendered *CREW II* a nullity and thus deprived the Court of jurisdiction over CREW’s citizen suit against AAN. *AAN*, 2022 WL 612655, at *8 n.7. CREW appealed that decision, and the case is currently being held in abeyance pending the D.C. Circuit’s *en banc* review of *New Models*.

53. On August 29, 2022, the FEC once again voted to dismiss the remanded complaint against AAN. *See Certification*, MUR 6589R (AAN) (Aug. 29, 2022), Ex. 3, <https://perma.cc/B8ET-SUNH>. Commissioner Weintraub voted against dismissal. *Id.*

54. The FEC published the record of its AAN proceedings approximately thirty days after dismissal, revealing for the first time that the FEC reconsidered its reason-to-believe findings on May 10, 2018, shortly after CREW filed its suit against AAN. *See Certification*,

MUR 6589R (AAN) (May 10, 2018), Ex. 4, <https://perma.cc/US95-WQDP> . The Commission at that time had only four members, as Commissioners Goodman and Ravel had resigned. The record revealed that Commissioners Hunter and Petersen changed their votes and now voted to find reason-to-believe that AAN failed to register and report as a political committee. *Id.* Commissioner Walther joined them in that vote. *Id.* Nonetheless, the vote did not garner the required four votes because Commissioner Weintraub defeated the reason-to-believe vote. *Id.* That was the last reason-to-believe vote the Commission took before it dismissed the case in August 2022.

55. Under the current precedent of the D.C. Circuit, because Commissioner Weintraub singularly blocked the most recent reason-to-believe vote, she is the “controlling commissioner” who now speaks for “the Commission” in this case. *New Models*, 993 F.3d at 883.

56. Commissioner Weintraub issued a Statement of Reasons on September 30, 2022 to provide the analysis required for review of the dismissal here. Statement of Reasons of Commissioner Weintraub, MUR 6589R (AAN) (Sept. 30, 2022), Ex.5 <https://perma.cc/C9FD-EESZ> (“Weintraub Fourth AAN Statement”). In it, she stated the Commission “explicitly *disclaim[s]* in its entirety the reasoning contained” in the prior controlling statements of reasons, that it “did *not* dismiss this matter pursuant to its prosecutorial discretion” and, in fact, “unequivocally disclaims prosecutorial discretion as a rationale for the Commission’s dismissal of this matter.” *Id.* at 8–9. She further explained that “[t]he Commission did *not* dismiss this matter because the statute of limitations had elapsed” and that in fact “[t]he Commission has considerable equitable remedies available to it that are not subject to 28 U.S.C. § 2462.” *Id.* at 9.

57. Further, Commissioner Weintraub, speaking on behalf of the Commission, concluded that “the evidence before the Commission showed that AAN met the definition of a

political committee, which *does* have to disclose the identity of its donors.” *Id.* at 9–10. She reached that conclusion through her prior analyses, incorporated by reference, interpreting the FECA and the major purpose test. *Id.* at 2, 11.

58. In particular, the FEC’s controlling analysis is that “activity that extends well beyond express advocacy” is relevant “for the purpose of determining political committee status.” Statement of Vice Chair Ravel and Commissioners Walther and Weintraub at 3, MUR 6538 (AAN) (July 30, 2014), Ex. 6, <https://perma.cc/6PCT-DN6Z> (“Weintraub First AAN Statement”); *accord* Statement of Reasons of Commissioners Ann M. Ravel and Ellen L. Weintraub at 3, MUR 6538R (AAN) (Dec. 5, 2016), Ex. 7, <https://perma.cc/75JU-K4EV> (“Weintraub Second AAN Statement”) (“[T]he major purpose inquiry is not limited to express advocacy and its functional equivalent.”). Incorporating Judge Cooper’s rationale from *CREW I* and *CREW II*, the controlling analysis recognized that the amounts a group spends on electioneering communications, except in rare and extraordinary occasions, constitute federal campaign activities that count towards concluding the group’s major purpose is to influence federal elections. Weintraub First AAN Statement at 3–4; *accord* Weintraub Second AAN Statement at 3, 6, Weintraub Third AAN Statement. Additionally, the major purpose analysis compares the group’s calendar year campaign activity against only the group’s spending that same calendar year, and consequently any group devoting more than half of its spending in a calendar year to campaign activity may not be excused from registering and reporting as a political committee. Weintraub First AAN Statement at 3–4; *accord* Weintraub Second AAN Statement at 6 n.28 (status can be determined by examining “calendar year spending”).

59. Employing those metrics, Commissioner Weintraub, speaking on behalf of the Commission, concluded that the evidence established “AAN spent a minimum of \$17 million on

federal campaign activity in 2010,” meaning “at least 62.6 percent ... of AAN’s total spending in that year supported federal campaign activity.” Weintraub First AAN Statement at 4; *accord* Weintraub Second AAN Statement at 6.

60. Accordingly, Commissioner Weintraub concluded, speaking on behalf of the Commission, that “dismissal of this matter was unreasonable, given the facts before the Commission, the law governing this activity, and the reasoning referenced above.” Weintraub Fourth AAN Statement at 11. Accordingly, it is the FEC’s position that “[t]he Commission’s dismissal of this matter was contrary to law.” *Id.*

PLAINTIFF’S CLAIMS FOR RELIEF

CLAIM ONE

The FEC’s Dismissal of the AAN Matter Is Arbitrary, Capricious, an Abuse of Discretion, and Contrary to Law

61. CREW re-alleges and incorporate by reference all preceding paragraphs as fully set forth herein.

62. The FEC’s dismissal on remand of the CREW’s administrative complaint against AAN was arbitrary, capricious, an abuse of discretion, and contrary to law in violation of 52 U.S.C. § 30109(a)(8)(C).

63. The FEC dismissed CREW’s complaint alleging AAN failed to register and report as a political committee as early as 2009 and no later than 2010 in violation of 52 U.S.C. §§ 30102, 30103, 30104 and the FEC’s implementing regulations. It did so notwithstanding the fact that the controlling opinion of the Commission is that AAN in fact violated those provisions and that AAN is a political committee and “does have to disclose the identity of its donors,” Weintraub Fourth AAN Statement at 9–10, based on its analysis concluding that AAN devoted more than 62 percent of its spending in 2010 to influence elections, demonstrating AAN’s major

purpose was to elect federal candidates, Weintraub First AAN Statement at 4; Weintraub Second AAN Statement at 6.

64. Having considered the merits and found more than reason to believe AAN failed to register and report as a political committee since 2010, the controlling opinion disclaimed all other possible lawful bases to dismiss. In particular, the FEC's controlling opinion disclaimed any reliance on prosecutorial discretion and concluded the statute of limitation did not provide a basis to dismiss the complaint. Weintraub Fourth AAN Statement at 8.

65. Accordingly, there is no lawful basis for the dismissal of CREW's complaint against AAN. Indeed, the controlling opinion of the FEC is that "dismissing the complaint in this matter was *absolutely* contrary to law." *Id.* at 8.

REQUESTED RELIEF

WHEREFORE, CREW respectfully requests that this Court:

(1) Declare that a group's electioneering communications constitute federal election activity that alone, or when combined with other qualifying activities, may demonstrate that a group's major purpose is to influence federal elections if they are sufficiently extensive.

(2) Declare that the major purpose test compares a group's calendar year federal campaign activity to its other spending that same calendar year to determine whether the group's federal campaign activities are sufficiently extensive to demonstrate the group's major purpose is to nominate or elect federal candidates, that the group's activity in other calendar years may not negate a finding that the group's major purpose is to influence federal elections in that calendar year, and that a group may not be excused from political committee reporting because it lacks a requisite major purpose in other calendar years.

(3) Declare that a group that devotes half or more of its annual spending to qualifying federal campaign activity, including electioneering communications, has spent extensively on federal campaign activity and thus has a major purpose to nominate or elect federal candidates, and thus may not be excused from reporting as a political committee under the FECA, while recognizing a group may demonstrate its major purpose is to nominate or elect federal candidates when it meets a lower spending threshold, either in combination with or separate from other evidence in a fact-intensive, case-by-case analysis.

(4) Declare that a group's political committee status, and its duty to continually report, may only terminate as provided by law under 52 U.S.C. § 30103.

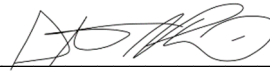
(5) Declare the FEC's dismissal of MUR 6589R (AAN) on remand was arbitrary, capricious, an abuse of discretion, and contrary to law;

(6) Order the FEC to conform to such declaration within 30 days pursuant to 52 U.S.C. § 30109(a)(8)(C);

(7) Award CREW its costs, expenses, and reasonable attorneys' fees; and

(8) Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,



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