NOT YET SCHEDULED FOR ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON and MELANIE T. SLOAN, Appellees, v. FEDERAL ELECTION COMMISSION, Appellee, AMERICAN ACTION NETWORK, Appellant.	)	No. 18-5136

APPELLANT AMERICAN ACTION NETWORK'S OPPOSITION TO THE MOTION TO DISMISS FOR LACK OF JURISDICTION

American Action Network respectfully opposes the motion of Citizens for Responsibility and Ethics in Washington and Melanie Sloan (collectively, "CREW") to dismiss this appeal as premature. American Action Network has twice persuaded the Federal Election Commission to dismiss an administrative complaint filed by CREW, but twice the district court has set the dismissals aside as "contrary to law." In April, the Federal Election Commission attempted again to conform to the district court's judgment, but one controlling Commissioner announced that the Federal Election Commission will take no further action in

response to the district court, much less act within the thirty days set by the Federal Election Campaign Act, as amended ("FECA"), and specified by the district court.

Invoking the two district court judgments and the Federal Election Commission's refusal to take further action, CREW has now filed a so-called "citizen suit" directly against American Action Network, attacking its core First Amendment activities. With this appeal, American Action Network contends that the two district court judgments are themselves contrary to law and provide no legal basis for CREW's private action against American Action Network. The issues presented by this appeal thus turn entirely on the validity of the two judgments below, and there is no prospect that the Federal Election Commission will take further action to alter those issues.

This appeal is thus critically different than the case when it was last before the Court. Then, while cross-appeals were pending, the Federal Election Commission took action within the allotted time to conform to the district court's first judgment, and CREW filed additional district court proceedings that could have affected the issues then on appeal. Now, even CREW agrees that "all available evidence indicates" that there is no longer any "ongoing and active FEC investigation" that could result in post-judgment filings. Opp. to Mot. to Stay at 14, No. 18-945 (D.D.C. June 22, 2018) (Dkt. 12). The issues decided by the district court have crystalized and are ready for decision.

CREW's motion to dismiss should, therefore, be denied. This Court has authority over the district court's "final decisions," 28 U.S.C. § 1291, which are "judgment[s] of a district court" subject to FECA's appeal provision, 52 U.S.C. § 30109(a)(9). The judgments should be reviewed before American Action Network is subjected to a citizen suit that depends on their validity.

I. BACKGROUND

This dispute began in 2012 when CREW filed an administrative complaint at the Federal Election Commission alleging that American Action Network violated FECA during the 2010 election cycle. *See CREW v. Fed. Election Comm'n*, 209 F. Supp. 3d 77, 83 (D.D.C. 2016). CREW's allegations have been back and forth between the Federal Election Commission and the district court, but there is now no prospect of any further action before the Federal Election Commission or review of such action by the district court.

1. *The Federal Election Commission's First Review.* CREW's 2012 administrative complaint alleged that American Action Network was an unregistered political committee between July 2009 and June 2011. But American Action Network is a not-for-profit social welfare organization with an issue-centric purpose, and precedent has long protected issue advocacy groups from political committee regulation. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252 n.6 (1986).

In June 2014, the Commission did not have sufficient votes to open an investigation into CREW's allegations, and so dismissed the complaint. *CREW*, 209 F. Supp. 3d at 83; *see also CREW v. Fed. Election Comm'n*, 892 F.3d 434, 437 (D.C. Cir. 2018) ("[U]nder FECA, the Commission may pursue enforcement only upon 'an affirmative vote of 4 of its members'") (citations omitted). In accordance with Circuit precedent, the three Commissioners who voted against proceeding supplied the reasons for the Commission's dismissal. *CREW*, 209 F. Supp. 3d at 83. They explained that they did not think the charges were supported by fact or precedent and believed the case was appropriate for a dismissal based on prosecutorial discretion. *See id.* at 84, 88 n.7; *see also* Mot. for Summ. Reversal, Ex. 3, No. 18-5136 (D.C. Cir. June 25, 2018) (Dkt. 1737659).

2. *The First District Court Case: CREW v. Federal Election Commission, No. 14-1419 (D.D.C.), now on appeal.* CREW challenged the dismissal decision pursuant to FECA's judicial review provision, and in September 2016, the district court entered summary judgment for CREW. *See CREW*, 209 F. Supp. 3d at 95. The district court acknowledged that the Commission had relied on its prosecutorial discretion, but found that reliance irrelevant, stating:

> "[A]n agency's decision not to take enforcement action . . . is only presumptively unreviewable," and that "presumption may be rebutted [by the relevant] substantive statute." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). Here, FECA's express provision for the judicial review of the FEC's dismissal decisions, as well as a particular

> standard governing that review, 52 U.S.C. § 30109(a)(8)(C), is just such a rebuttal.

Id. at 88 n.7. As explained in American Action Network's pending Motion for Summary Reversal, this reasoning was just rejected by this Court, which found that "[n]othing in the substantive statute overcomes the presumption against judicial review" in this context. *CREW*, 892 F.3d at 439, 440-41.

As a result, even though the Commission's decision was not subject to "judicial review for abuse of discretion, or otherwise," *id.*, the district court reviewed the decision and found it "contrary to law," *CREW*, 209 F. Supp. 3d at 92. In so doing, the district court acknowledged that the Commission's decision was consistent with Seventh Circuit precedent, but reasoned that the Seventh Circuit was "out of step with the legal consensus." *Id.* at 90-92. The district court ordered the Commission to conform with its decision within thirty days. *Id.* at 95.

3. *The Federal Election Commission's Second Review.* The Commission quickly and comprehensively reconsidered the record using a new standard devised by the district court, and again dismissed in a deadlocked vote. *See CREW*, 299 F. Supp. 3d at 90-92; *see also* Mot. for Summ. Reversal, Ex. 4, No. 18-5136 (D.C. Cir. June 25, 2018) (Dkt. 1737659). The Commissioners who voted to dismiss explained that, even under the district court's new standard, they could not find that American Action Network was a political committee during the 2010 election cycle. *Id.*

4. *The Cross-Appeals: CREW v. Federal Election Commission, Nos. 16-5300 and 16-5343.* Before learning of the Federal Election Commission's decision to again dismiss the enforcement matter, American Action Network filed an appeal of the district court's decision. CREW responded by cross-appealing and challenging the second dismissal in district court.

All parties acknowledged that the dismissal of the underlying enforcement proceeding affected the timing of the cross-appeals. For purposes of efficiency, CREW and American Action Network asked this Court to place the cross-appeals in abeyance until the district court could consider the propriety of the second dismissal in CREW's new district court filings. *See* Mot. to Hold in Abeyance, No. 16-5300 (D.C. Cir. Nov. 15, 2016) (Dkt. 1646225). The Federal Election Commission also asked the Court to wait for the district court to consider the second dismissal, but argued that a dismissal of the appeal (rather than a stay) was appropriate. *See, e.g.*, Mot. to Dismiss at 2, 12, Nos. 16-5300, 16-5343 (D.C. Cir. Dec. 8, 2016) (Dkt. 1650065). This Court granted the Federal Election Commission's motion to dismiss. *See* Order, Nos. 16-5300, 16-5343 (D.C. Cir. Apr. 4, 2017) (Dkt. 1669311).

5. *The Second District Court Case: CREW v. Federal Election Commission, No. 16-2255 (D.D.C.), now on appeal.* CREW's challenge to the second dismissal proceeded in district court, where the court again entered

summary judgment for CREW in March 2018. *See CREW*, 299 F. Supp. 3d at 101. The district court found that the Commission's second dismissal decision was consistent with its prior decision, but decided it was "contrary to law" for a new reason. *Id.* at 92. The district court again directed the Commission to conform with its decision within thirty days, and quoting FECA's citizen suit provision, stated that "[i]f the FEC does not timely conform with the Court's declaration, 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)).

6. *The Federal Election Commission Concludes Its Review.* Exactly thirty days after the district court's judgment, Federal Election Commission Vice Chair Ellen Weintraub issued a statement that she had decided to prevent further agency action so that CREW could sue American Action Network directly. *See* Mot. to Dismiss, Ex. 2 ("Weintraub Statement"). Commissioner Weintraub had voted on each of the two prior occasions to proceed with the enforcement matter, and she still believed an investigation was appropriate. *Id.* But she saw an opportunity in the two vacancies now at the Commission: as one of four sitting Commissioners, she could prevent the Commission from taking further enforcement action by abstaining, thereby depriving the Commission of the legally necessary fourth vote to proceed.

Commissioner Weintraub issued her statement via Twitter, explaining that she was precluding further Commission action because she wanted CREW to "pursue its complaint directly against American Action Network" "unimpeded by [the] commissioners" who previously voted to dismiss. *Id.*; *see also* @EllenLWeintraub, *available at* https://twitter.com/EllenLWeintraub/status/987101164775919622. The two current Commissioners that had previously voted to dismiss responded with a statement that they had conformed to the district court's judgment in spite of their disagreement with the district court's legal conclusions. *See* Statement of Chair Hunter and Commissioner Petersen at 1, 14 (Apr. 26, 2018), *available at* https://www.fec.gov/resources/cms-content/documents/3117_001_v2.pdf ("Hunter and Petersen Statement").

7. *CREW's Citizen Suit Against American Action Network, No. 18-945.* Commissioner Weintraub's statement marked the effective end of enforcement proceedings at the Federal Election Commission. Four days later, CREW filed a complaint directly against American Action Network in district court, relying on the two prior district court judgments (now on appeal) and the Federal Election Commission's inability to "conform" to them within thirty days. *See, e.g.*, Compl. ¶¶ 3-7, No. 18-945 (D.D.C. Apr. 23, 2018) (Dkt. 1). According to CREW, the judgments, combined with the Federal Election Commission's inaction, triggered the citizen suit provision of FECA, which states that certain private parties may

seek to "remedy the violation involved in the original [administrative] complaint" in limited circumstances. 52 U.S.C. § 30109(a)(8)(C).

8. *This Appeal*. After learning of Commissioner Weintraub's decision to preclude further agency action, American Action Network filed its Notice of Appeal. *See* Notice of Appeal, No. 16-2255 (D.D.C. May 4, 2018). The appeal challenges the district court's two prior judgments, and argues that each should be vacated as contrary to law.

The Federal Election Commission has not appealed, apparently also due to Commissioner Weintraub's recalcitrance. *See* Hunter and Petersen Statement at 1, 14; *see also* Mot. to Dismiss, Ex. 3. But unlike last time (when the Federal Election Commission also did not have sufficient votes to appeal), the Federal Election Commission has not argued that this appeal is premature. CREW has instead adopted that argument, asking this Court to deny review of the district court judgments on which its citizen suit depends.

II. ARGUMENT

CREW argues that this appeal should be dismissed because an "identical" prior appeal was dismissed. But the facts could not be more different now. When that appeal was pending, the Federal Election Commission conformed with the district court's judgment, new district court proceedings ensued, and all parties agreed that such litigation could affect the issues on appeal. *See* Mot. to Dismiss at

2, 9, 11, 12, Nos. 16-5300, 16-5343 (D.C. Cir. Dec. 8, 2016) (Dkt. 1650065). It was thus apparent that a dismissal could "'promote[] judicial economy and efficiency by avoiding the inconvenience and cost of two appeals: one from the remand order and one from a later district court decision reviewing the proceedings on remand.'" *Id.* at 10-11 (quoting *Sierra Club v. U.S. Dep't of Agric.*, 716 F.3d 653, 656 (D.C. Cir. 2013)).

This is no longer true. There is no prospect of further agency action that could affect the issues raised in this appeal, and there is nothing to be gained from delaying the Court's review. CREW's motion to dismiss should be denied, as (1) this Court has regularly permitted judicial review where there is no prospect of further agency action, and (2) review now follows from FECA, which authorizes appellate review of all judgments—including the judgments below.

A. This Case Is Final Under Circuit Precedent.

CREW relies solely on the "general rule" that "a district court order remanding a case to an agency for significant further proceedings is not" a final, appealable order. *Pueblo of Sandia v. Babbitt*, 231 F.3d 878, 880 (D.C. Cir. 2000). But that rule "is not absolute," *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 751 F.3d 629, 633 (D.C. Cir. 2014), and whatever its application to typical remand orders, this case does not fit the traditional mold. It instead falls squarely within the "unusual circumstances" that have justified a departure from

the general rule and permitted judicial review—*i.e.*, circumstances of agency "recalcitrance" and inaction in response to a district court order. *Id.*; *id.* at 637 (Brown, J. concurring and dissenting). Indeed, were there ever an appeal warranted under the "unusual circumstances" exception, it is this one. The Federal Election Commission cannot take further action because one Commissioner announced that she would not comply with the judgments below in order to trigger a citizen suit. That suit, which was filed under a unique, FECA-specific enforcement provision, depends on the validity of the judgments below and seeks to subject American Action Network to further litigation over core First Amendment conduct that the Federal Election Commission has twice found wholly proper.

This case is thus far afield from the typical remand scenario, in which a delayed appeal can "prevent[] duplicative appeals from both a district court's remand order and an agency's later action." *Id.* at 633. There is no prospect of any further agency action, much less any agency action within the long-expired thirty-day deadline set by the district court. The Court's "pragmatic" and "flexible" approach to finality amply permits review in these circumstances. *Carter/Mondale Pres. Comm., Inc. v. Fed. Election Comm'n*, 711 F.2d 279, 285-86 (D.C. Cir. 1983); *see also U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct.

1807, 1815 (2016) (reaffirming the Court's long-standing "'pragmatic' approach . . . to finality").

This Court has regularly authorized judicial review where "administrative reconsideration of the ruling seems quite unlikely," *Ciba-Geigy Corp. v. U.S. Envtl. Proc. Agency*, 801 F.2d 430, 438 n.9 (D.C. Cir. 1986) (internal citation omitted), or "the agency has not even suggested that any further [developments] could be expected," *Capitol Tech. Servs., Inc. v. F.A.A.*, 791 F.2d 964, 969 (D.C. Cir. 1986); *see also Freeman United Coal Mining Co. v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 721 F.2d 629, 631 (7th Cir. 1983) ("[I]f the proceedings on remand are pretty certain not to generate new appealable issues, the appeal need not be postponed to await the outcome of those proceedings.").

And here, it is more than "quite unlikely" that there will be no further agency proceedings in response to the district court order. *See Ciba-Geigy*, 801 F.2d at 438. Commissioner Weintraub has announced that she will prevent further action, and she is in a position to do so. As a result, judicial review now "certainly could not disrupt the FEC's decisionmaking." *Carter/Mondale Presidential Comm.*, 711 F.2d at 289. Instead, "judicial review now will hasten, not delay, resolution of the ultimate question." *Ciba-Geigy Corp.*, 801 F.2d at 438. It will also help eliminate "uncertainty for the parties." *Pub. Citizen Health Research Grp. v. Comm'r, Food & Drug Admin.*, 740 F.2d 21, 32 (D.C. Cir. 1984).

Judicial review is thus particularly appropriate now. CREW's citizen suit depends on the validity of the judgments below. This Court's review should significantly hasten the resolution of this dispute by eliminating the basis for CREW's citizen suit. And, even if it does not void that suit, review now will eliminate uncertainty about the standards adopted in the judgments below, which CREW seeks to apply to the same allegations now presented in its citizen suit.

Review at this time is also consistent with this Court's recognition that, where "administrative inaction" impacts the rights of a party, "an [entity] cannot preclude judicial review" by hiding behind that agency inaction. *Envtl. Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970). Disputes are sufficiently final for purposes of review when an "agency either refuses to take particular requested actions or fails to act entirely before a deadline." *Coal. for Sustainable Res., Inc. v. U.S. Forest Serv.*, 259 F.3d 1244, 1251 (10th Cir. 2001); *see also Citizens for a Better Env't v. Costle*, 617 F.2d 851, 853 n.5 (D.C. Cir. 1980) (per curiam) (observing that "an agency's [timely] failure to act becomes, in effect, a final decision to reject a proposed course of action, which is reviewable"). In such cases, failure "to act constitutes, in effect, an affirmative act" that warrants judicial review. *Cobell v. Norton*, 240 F.3d 1081, 1095 (D.C. Cir. 2001).

It is undisputed that the Commission did not meet the thirty-day deadline set by the district court. CREW, 299 F. Supp. 3d at 101. Nor did it again dismiss the

complaint, even though FECA "compels [the] FEC to dismiss complaints in deadlock situations." *Pub. Citizen, Inc. v. Fed. Energy Regulatory Comm'n*, 839 F.3d 1165, 1170 (D.C. Cir. 2016). It simply did not act. And by not acting within the time period required, the Commission ensured that the judgments below reflect the final judicial analysis of the issues now on appeal.

CREW claims that so long as the enforcement matter remains open at the Federal Election Commission, the district court's judgments cannot be final. *See* Mot. to Dismiss at 11, Ex. 3. But finality does not require the formal closure of an agency proceeding. *See Nat. Res. Def. Council, Inc. v. Envtl. Proc. Agency*, 22 F.3d 1125, 1133 (D.C. Cir. 1994); *Her Majesty the Queen in Right of Ontario v. Envtl. Proc. Agency*, 912 F.2d 1525, 1531 (D.C. Cir. 1990). "Were it otherwise, agencies could effectively prevent judicial review of their policy determinations by simply refusing to take final action." *Cobell*, 240 F.3d at 1095.

Moreover, even if CREW were correct and the open enforcement proceeding precluded this appeal, then it would preclude CREW's citizen suit as well. Under FECA's linear enforcement structure, the Federal Election Commission must stand down before a private party can stand up to pursue enforcement allegations. Otherwise, entities like American Action Network could be forced to defend themselves—and risk being penalized—in two separate proceedings about the same protected First Amendment activity. *See, e.g.*, *Fed. Election Comm'n v. Wis.*

Right to Life, Inc., 551 U.S. 449, 469 (2007) (Robert, C.J.) (explaining how FECA can result in "chilling speech through the threat of burdensome litigation"). CREW's filing of its citizen suit thus confirms that agency proceedings have concluded, and that judicial review is appropriate here and now.

Indeed, CREW's citizen suit also establishes that this appeal is timely under cases that recognize that orders are sufficiently "final" where they have "legal consequences," *Nat'l Treasury Emps. Union v. Fed. Labor Relations Authority*, 754 F.3d 1031, 1039 (D.C. Cir. 2014), or a "direct and immediate effect" on a party, *Ciba-Geigy Corp.*, 801 F.2d at 436 (quoting *Fed. Trade Comm'n v. Standard Oil Co.*, 449 U.S. 232, 239 (1980)). CREW relied on the judgments below, and agency inaction in response, to file a citizen suit that is designed to deny American Action Network the protection of each of the Federal Election Commission's two prior dismissals. American Action Network has thus been denied the protection of a favorable legal ruling shielding it from adverse legal consequences, *see Scenic Am., Inc. v. U.S. Dep't of Transp.*, 836 F.3d 42, 56 (D.C. Cir. 2016), and is currently exposed to the possibility of civil penalties in a separate proceeding, *Rhea Lana, Inc. v. Dep't of Labor*, 824 F.3d 1023, 1027, 1032 (D.C. Cir. 2016). This is the time for an appeal.

B. FECA Confirms That This Appeal Is Ripe.

Under FECA, an appeal is statutorily authorized for "[a]ny judgment of a district court under this subsection." 52 U.S.C. § 30109(a)(9). The judgments below are necessarily included in this broad appellate authorization. *See Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 31 (2004) ("[T]he word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (citation omitted).

CREW points out that the district court had just two options below: it could have affirmed the Federal Election Commission's dismissal, or it could have found the decision "contrary to law" and remanded for further proceedings. *See* Mot. to Dismiss at 5. CREW's argument that remand orders can never be appealed thus has broad ramifications that directly contradict FECA's right to appeal "any judgment."

Indeed, if ever an appeal were warranted under FECA, it is to ensure the validity of district court judgments used to justify a citizen suit. There is no freestanding "private right of action to enforce the FECA against an alleged violator." *Perot v. Fed. Election Comm'n*, 97 F.3d 553, 558 n.2 (D.C. Cir. 1996). Instead, the Federal Election Commission has the "sole discretionary power 'to determine' whether or not a civil violation has occurred or is about to occur, and consequently whether or not informal or judicial remedies will be pursued."

Buckley v. Valeo, 424 U.S. 1, 113 n.153 (1976). That means the Federal Election Commission has the right to "determine *in the first instance* whether or not a civil violation of the Act has occurred." *Fed. Election Comm'n v. Dem. Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (emphasis added). Before a private party pursues allegations that the Federal Election Commission already dismissed, an appeal should be available to confirm whether the Federal Election Commission's dismissals were lawful and appropriate.

On appeal, the statute expressly gives this Court authority to eliminate the basis for the citizen suit, as it may "affirm[] or set[] aside, in whole or in part, any such order of the district court." 52 U.S.C. § 30109(a)(9). And if it sets aside the district court's judgment, there is no basis for a citizen suit. For where "a district court judgment is reversed on appeal, the effect of the appellate court ruling is that the judgment was never correct to begin with." *Balark v. City of Chicago*, 81 F.3d 658, 663 (7th Cir. 1996). This means that "[i]f a judgment has been paid immediately, it must be refunded." *Id.* It also means that if a citizen suit was filed, it must be dismissed.

CREW, as a result, cannot insulate from appellate review the district court judgments that could eliminate the statutory basis for its citizen suit.[1] FECA

[1] There is just one prior known citizen suit in the forty-four year history of the Federal Election Commission, and it was stayed pending an appeal to this Court. *See* Order, *Dem. Sen. Campaign Comm. v. Nat'l Republican Sen. Comm.*, Civ. No.

extends appeal rights to "any judgment," recognizes this Court's authority to vacate district court orders that could trigger citizen suits, and requires action by the Federal Election Commission within thirty days of a remand so parties will know within the sixty-day appeal window whether the Commission has acted—or has finalized the judgment for purposes of appeal. *See* Fed. R. App. P. 4(a)(1)(B); 52 U.S.C. § 30109(a)(8)(C). In these circumstances—where a sitting Commissioner on the Federal Election Commission has announced that the agency will not conform to the district court's order—American Action Network has the right to appeal.

CONCLUSION

This Court should deny CREW's motion to dismiss. The enforcement proceedings at the Federal Election Commission have come to an end. The judgments on appeal thus include the district court's final decision on the issues now before this Court. This appeal should proceed.

97-1493 (D.D.C. Aug. 27, 1997) (Dkt. 11). This Court did not reach the merits of the appeal, however, because of questions about the administrative claimant's standing to pursue the charges that were not resolved before the matter settled. *See Dem. Sen. Campaign Comm. v. Fed. Election Comm'n*, 139 F.3d 951, 952 (D.C. Cir. 1998). This Court did not question the finality of the judgment for purposes of that appeal. *See id.*

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

I hereby certify, on this 5th day of July, 2018, that:

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/s/ Claire J. Evans
Claire J. Evans

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2018, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

/s/ Claire J. Evans
Claire J. Evans