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

AMERICAN ACTION NETWORK'S REPLY IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY REVERSAL AND VACATUR

In September 2016, the district court made a discrete threshold error that stands in direct odds with this Court's precedent, and that, if corrected, will eliminate years of additional unwarranted litigation. The district court's error is not abstract: this Court held that "[n]othing in the substantive statute [the Federal Election Campaign Act ("FECA")] overcomes the presumption against judicial review" expressed in *Heckler v. Chaney*, 470 U.S. 821 (1985). *Citizens for Responsibility and Ethics in Washington, et al. ("CREW") v. Fed. Election Comm'n*, 892 F.3d 434, 439 (D.C. Cir. 2018). The district court instead found that "FECA's express provision for the judicial review of the FEC's dismissal decisions

. . . is just such a rebuttal." *CREW v. Fed. Election Comm'n*, 209 F. Supp. 3d 77, 88 n.7 (D.D.C. 2016). It is difficult to imagine a more direct word-for-word conflict between two decisions.

CREW does not deny that the conflict exists, but argues that this case is factually different and that it is too soon to apply this Court's precedent because the mandate has not yet issued. But there is no reason to delay the result required by the recent *CREW* decision. The factual differences that CREW has identified are immaterial; indeed, CREW relied on the decision below when briefing the *CREW* case because it resolved the same question. And this Court's opinions are binding when issued; they cannot be ignored simply because jurisdiction has not yet returned to the district court. This Court should, therefore, apply its recent decision and summarily reverse the decisions below. Doing so will resolve this long-running dispute and result in "a major savings of time, effort, and resources for the parties, counsel, and the Court." D.C. Cir. Handbook at VII(A).

I. ARGUMENT

A. This Court's *CREW* Decision Resolves This Appeal.

CREW argues that it is "unclear" whether the Court's decision in *CREW* applies. Opp. at 10-17 (Dkt. 1739328). But there is no ambiguity. When *CREW* was before this Court, CREW argued that the decision below "rejected" the argument that the Court has since adopted. Reply Br. at 7, No. 17-5049 (D.C. Cir.

Aug. 10, 2017) (Dkt. 1688161) ("Reply Br.") (citing *CREW*, 209 F. Supp. at 93). And CREW was correct that the two cases are squarely on point, as the court below found that FECA overcomes the presumption against judicial review, and this Court held that it does not. *CREW*, 892 F.3d at 439; *CREW*, 209 F. Supp. 3d at 88 n.7.

CREW points to three factual differences between this case and *CREW* to try to postpone its application. But they do not provide a basis for delay, as they do not change the critical fact that the cases have in common: the Federal Election Commission dismissed both cases in reliance on its prosecutorial discretion. Its decisions, as a result, are not subject to judicial review. *CREW*, 892 F.3d at 441.

First, CREW notes that this case includes two dismissal decisions—one that was issued initially and one that was issued on remand. Opp. at 11-14. CREW argues that this Court can only consider the basis for the *second* dismissal decision, which was issued after the district court found the Commission's reliance on prosecutorial discretion irrelevant. *Id.* That second decision, CREW argues, supersedes the first and "rests solely on the FEC's interpretation of the law," rather than on prosecutorial discretion. *Id.*

The second dismissal decision says otherwise. There, the Commission "incorporate[d] by reference" the "analysis and discussion on all points" from its first dismissal decision "except for aspects deemed contrary to law by the court."

Mot., Ex. 4 at 2 (Dkt. 17376959). And while the district court found that the Commission's reliance on prosecutorial discretion was irrelevant, it never found it contrary to law. *CREW*, 209 F. Supp. 3d at 88 n.7. As a result, the "reasoning for [the Commission's] original votes"—which included prosecutorial discretion—is just as much a part of the second dismissal decision as the first. *See* Mot., Ex. 4 at 2; *see also Elec. Frontier Found. v. U.S. Dep't of Justice*, 739 F.3d 1, 10 (D.C. Cir. 2014) ("[I]f an agency chooses expressly to adopt or incorporate by reference" another document, "the reasoning [in that document] becomes that of the agency.") (citations omitted).

In any event, the district court's analysis of the first dismissal decision is properly before this Court. This appeal was deferred so that the Court could hear one appeal that covered the district court's review of *both* dismissal decisions—instead of "entertaining two appeals, one from the order of remand and one from entry of a district court order reviewing the remanded proceedings." *Pueblo of Sandia v. Babbitt*, 231 F.3d 878, 880 (D.C. Cir. 2000) (cited in Order, Case Nos. 16-5300, 16-5343 (D.C. Cir. Apr. 4, 2017) (Dkt. 1669311)). The fact that the district court's first decision contains this threshold error thus means that American Action Network has already been improperly subjected to years of unwarranted legal proceedings. It does not mean that the error is immune from review.

Second, CREW notes that the Commission included a lengthy legal analysis in the dismissal decisions at issue here, in contrast with the decisions considered in *CREW*, which focused on prosecutorial discretion. Opp. at 14-17. This is also beside the point because there "can be no judicial review for abuse of discretion, or otherwise" unless "the agency's action was based *entirely* on its interpretation of the statute." *CREW*, 892 F.3d at 441 & n.11 (citations omitted and emphasis added).

It does not matter, then, that the Commission considered "whether a violation has occurred" and whether the Commission would be "likely to succeed" if it pursued enforcement. *See id.* at 439 n.7 (quoting *Chaney*, 470 U.S. at 831-32). Such questions are highly relevant to an agency's decision to exercise prosecutorial discretion. *Id.* Nor does it matter that the Commission used this case to put the regulated community on notice of how it views the law, and how it may apply the law in some future enforcement proceeding. Instead, what matters is that the Commission decided *not* to rest its decision solely on its legal analysis in this case, and elected to dismiss based on an exercise of prosecutorial discretion. That decision eliminates any basis for judicial review. This Court cannot "carv[e] reviewable legal rulings out from the middle of non-reviewable actions." *Id.* at 441-42 (internal quotation mark and citations omitted).

CREW seeks to relitigate this issue by arguing that the Court needs to reconcile *CREW* with *Federal Election Commission v. Akins*, 524 U.S. 11, 26 (1998). *See* Opp. at 14-15. But this Court *already* reconciled *CREW* with *Akins*, explaining that *Akins* involved a Federal Election Commission decision to dismiss a charge based solely on an interpretation of FECA. *CREW*, 892 F.3d at 438 n.6. The Court explained that, consistent with *CREW*, "there may be [judicial] review under FECA if—as in *Akins*—the agency's action was based entirely on its interpretation of the statute." *Id.* at 441 n.11 (citations omitted). In all other cases—including cases like this that pair an exercise of prosecutorial discretion with "some statutory interpretation"—judicial review is not available. *Id.* at 442.

Finally, CREW claims that the court below found "as a matter of fact" that the Federal Election Commission dismissed the charges based on its view of the First Amendment, rather than on discretion. *See* Opp. at 17 n.3. But the district court made no such finding, instead acknowledging that the Federal Election Commission thought that its dismissal decision was "justified by the Commission's broad prosecutorial discretion." *CREW*, 209 F. Supp. 3d at 88 n.7. Nor could the district court make such a finding, as the Commission's decision expressly states that it was based on an "exercise of our prosecutorial discretion." Mot., Ex. 3 at 27. To be sure, the district court identified what it saw as a "legal error in the Commissioners' statements." *CREW*, 209 F. Supp. 3d at 93. But it did so only

because it subjected those statements to judicial review, contrary to this Court's *CREW* decision. CREW's argument thus shows why a summary reversal is so appropriate here. By correcting the court's foundational error now, the Court will save time and resources—and prevent their continued waste on issues that should never have been subjected to judicial review in the first place.

B. This Motion Is Not Premature.

CREW also seeks to postpone application of *CREW*, but there is no reason for delay because (1) *CREW* is binding precedent, and (2) this appeal is ripe.

1. The Court's Decision In *CREW* Is Binding Precedent.

CREW argues that the Court's *CREW* decision is not "final" because the mandate has not yet issued. Opp. at 2, 17-18. But CREW "should not confuse the mandate with the judgment itself." D.C. Cir. Handbook at XIII(A)(2). "[T]he judgment is entered on the day of the Court's decision and not when the mandate is issued." *Id.* at XIII(C). And the judgment, once entered, "is binding until reversed or set aside." *Gunn v. Plant*, 94 U.S. 664, 669 (1876). As a result, *CREW* is "the law of this Circuit and 'binds [this Court], unless and until overturned by the court en banc or by Higher Authority.'" *Gen. Comm. of Adjustment, GO-368 v. Burlington N. & Santa Fe Ry. Co.*, 295 F.3d 1337, 1340 (D.C. Cir. 2002) (citation omitted).

CREW's contrary argument is based on an advisory committee note to Federal Rule of Appellate Procedure 41, which recognizes that the "parties' obligations" do not become fixed "until issuance of the mandate." Opp. at 17. That may be true, but it does not mean that the Court's judgment has no effect in the meantime. "A mandate is the official means of communicating [the Court's] judgment to the district court and of returning jurisdiction in a case to the district court." *Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992). A stay of the mandate, therefore, "merely delays the return of jurisdiction to the district court to carry out [the Court's] judgment in that case." *Id.* It "in no way affects the duty of this [Court] and the courts in this circuit to apply *now* the precedent established" by the decision "as binding authority" in other cases. *Id.* (emphasis added).

The district court has thus recognized that it is "bound by the ruling [of this Court] despite the fact that no mandate has issued." *In re Vitamins Antitrust Litig.*, MDL No. 1285, 2003 WL 21802133, at *1 n.1 (D.D.C. Aug. 4, 2003) (citing cases). The Tenth Circuit found it "inconsequential" that "no mandate had yet issued from this court." *Bastien v. Office of Senator Ben Nighthorse Campbell*, 409 F.3d 1234, 1235 (10th Cir. 2005). The Eleventh Circuit explained that, even if "the mandate in [a prior case] has not yet issued, it is nonetheless the law in this circuit." *Martin*, 965 F.2d at 945 n.1. And the Ninth Circuit held that "a stay of the mandate does not 'destroy the finality of an appellate court's judgment'"

because "a published decision is 'final for such purposes as stare decisis, and full faith and credit, unless it is withdrawn by the court.'" *In re Zermeno-Gomez*, 868 F.3d 1048, 1052-53 (9th Cir. 2017) (citation omitted).

CREW relies on two decisions, but neither supports its request to temporarily shelve this Court's decision. Opp. at 17-18. CREW first cites *Carver v. Lehman*, 558 F.3d 869 (9th Cir. 2009), but the Ninth Circuit rejected reading this case to mean that "a decision is not binding . . . until the mandate has issued." *Zermeno-Gomez*, 868 F.3d at 1052 (citing *Carver*, 558 F.3d at 878-79). To drive the point home, the Ninth Circuit "unequivocally stated that a published decision constitutes binding authority and must be followed unless and until it is overruled by a body competent to do so." *Id.* at 1053. The other case CREW relies on states only that "an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Indep. Petroleum Ass'n of Am. v. Babbitt*, 235 F.3d 588, 596 (D.C. Cir. 2001). That is true. But it is also true that the courts in this Circuit must "abide by a recent decision of one panel of this court unless the panel has withdrawn the opinion or the court En banc has overruled it." *Brewster v. C.I.R.*, 607 F.2d 1369, 1373 (D.C. Cir. 1979). This Court's general practice of "withhold[ing] issuance of the mandate until the expiration of the time for filing a petition for rehearing," Cir. R. 41(a)(1), does not place the decision on ice.

This Court, as a result, has routinely relied on panel decisions as soon as they are issued. *See, e.g.*, *Dep't of Justice v. Fed. Labor Relations Auth.*, 144 F.3d 90, 91 (D.C. Cir. 1998) (relying on decision "also issued today"); *Anne Arundel Cty., Md. v. U.S. Envtl. Prot. Agency*, 963 F.2d 412, 416 (D.C. Cir. 1992) (holding that "resolution of this issue is governed by the analysis of the identical question in an opinion issued today by a separate panel of this court"); *Saint Mary of Nazareth Hosp. Ctr. v. Schweiker*, 741 F.2d 1447, 1449 (D.C. Cir. 1984) (relying on "the rationale of the opinion issued today" in a difference case). Indeed, even where rehearing en banc is granted, it is "the panel's judgment, but ordinarily not its opinion, [that] will be vacated." Cir. R. 35(d).

As a result, parties rightly file notices of supplemental "authority" as soon as this Court issues a relevant decision. That is exactly what the Federal Election Commission has done with respect to this Court's *CREW* decision, which it has filed in two of the pending district court cases challenging Commission action. *See Pub. Citizen v. Fed. Election Comm'n*, No. 14-148 (D.D.C. July 6, 2018) (Dkt. 83); *CREW v. Fed. Election Comm'n*, No. 16-259 (D.D.C. July 6, 2018) (Dkt. 40). The *CREW* decision is authority here as well, and it is not too soon to apply it.

2. The Judgments Below Are Final For Purposes Of Appeal.

Finally, CREW incorporates its argument that this appeal is premature. Opp. at 9. It is not. *See* Opp. to Mot. to Dismiss (D.C. Cir. July 5, 2018) (Dkt.

1739314). The district court issued its final decisions on the issues now on appeal and closed the cases. The Federal Election Commission did not act within thirty days as required by the district court's order, which means that there is no prospect for post-judgment filings or agency action that could interfere with this Court's review. The statute expressly authorizes an appeal of "any judgment of a district court." 52 U.S.C. § 30109(a)(9). And CREW has filed a separate lawsuit in district court, relying on the finality and correctness of the two district court decisions and the Federal Election Commission's inaction to authorize CREW's suit directly against American Action Network. This is, therefore, the precise moment when an appeal is proper—and when an order summarily vacating the district court's decisions can best result in "a major savings of time, effort, and resources for the parties, counsel, and the Court." D.C. Cir. Handbook at VII(A).

II. CONCLUSION

This Court should quickly and completely resolve this appeal by summarily reversing and vacating the decisions below, which improperly subjected the Federal Election Commission's unreviewable discretionary dismissal decision to judicial review.

Respectfully submitted,

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I hereby certify that on July 12, 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
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