

NOT YET SCHEDULED FOR ORAL ARGUMENT

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No. 18-5136

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

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CITIZENS FOR RESPONSIBILITY AND  
ETHICS IN WASHINGTON, *et al.*,  
Plaintiffs-Appellees,

v.

FEDERAL ELECTION COMMISSION,  
Defendant-Appellee,

and

AMERICAN ACTION NETWORK,  
Intervenor Defendant-Appellant.

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**APPELLEES CITIZENS FOR RESPONSIBILITY AND ETHICS IN  
WASHINGTON’S AND MELANIE SLOAN’S MOTION DISMISS FOR  
LACK OF JURISDICTION**

Appellees Citizens for Responsibility and Ethics in Washington and Melanie Sloan (together, “CREW”) respectfully move to dismiss the appeal filed by Intervenor Defendant-Appellant American Action Network, Inc. (“AAN”) because this Court lacks jurisdiction over the appeal.

This Court previously dismissed for lack of jurisdiction an identical appeal brought by AAN seeking to review a lower court judgment that the Federal Election Commission's ("FEC" or "Commission") dismissal of CREW's administrative complaint was "contrary to law" under 52 U.S.C. § 30109(a)(8)(C). *CREW v. FEC*, No. 16-5300, 2017 WL 4957233 (D.C. Cir. Apr. 4, 2017) (per curiam). In its decision, this Court held that "[t]he district court order remanding the case to the Federal Election Commission is not a final, appealable order." *Id.* at \*1. In this appeal, AAN once again seeks to challenge an order of the district court remanding the case back to the FEC for further action.<sup>1</sup> Accordingly, this appeal, just like the last appeal, seeks improper review of a non-final remand order and should be dismissed.

For these reasons and those detailed below, this Court should grant CREW's motion and dismiss AAN's appeal.

## **BACKGROUND**

### **I. Statutory and Regulatory Background**

The Federal Election Campaign Act ("FECA") sets out a number of obligations for organizations and individuals who engage in federal campaign activity. Relevant here, the FECA regulates two types of electoral communications

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<sup>1</sup> In accordance with Federal Rule of Appellate Procedure 27(a)(2)(B)(iii) and Circuit Rule 27(g)(2), CREW has included a copy of the district court's opinion on review as Exhibit 1 to this motion.

as campaign activity, and regulates organizations that engage in extensive campaign activity.

First, the FECA regulates communications that “expressly advocat[e]” for the election or defeat of federal candidates. 52 U.S.C. § 30101(17). These are communications that use words like “vote for,” “defeat,” or “re-elect,” or which could only be reasonably interpreted as advocating the election or defeat of a candidate. 11 C.F.R. § 100.22. Second, the FECA regulates broadcast communications that clearly identify a candidate if the communications air within a short time period before an election, target the candidate’s electorate, and are broadcast to a large audience. 52 U.S.C. § 30104(f) (defining an “electioneering communication”). Persons who spend significant funds on these two types of communications must file reports with the FEC disclosing certain limited information. 52 U.S.C. § 30104(c), (f).

Separately, the FEC regulates organizations that engage in extensive federal campaign activities. Called “political committees” in the nomenclature of the FECA, these are groups that make at least \$1,000 in expenditures to influence elections, or which accept at least \$1,000 in contributions to influence elections, within a calendar year. 52 U.S.C. § 30101(4). Additionally, the Supreme Court carved out from the reach of the FECA’s political committee provisions those organizations that are not under the control of a candidate, or which do not have a

“major purpose” of nominating or electing federal candidates. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). One way of discerning a group’s major purpose is to determine whether it spends “extensively” on activities to influence elections compared to its other activities. *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 262 (1986). For those organizations that meet the statutory threshold and which are not excluded under *Buckley*, the FECA imposes more comprehensive disclosure. *See* 52 U.S.C. § 30104(b).

In addition to these provisions, the FECA also creates a government agency that has initial authority over administering and enforcing the FECA: the FEC. 52 U.S.C. §§ 30106–30109.

The FECA, however, does not leave sole enforcement authority to the FEC. Its sets forth a path through which private parties may seek compliance with the law, subject to administrative gatekeeping. First, private parties may file a complaint with the FEC against any person believed to have violated the statute. 52 U.S.C. § 30109(a)(1). The FEC then seeks a response to the complaint from the alleged violator (the “respondent”), and the agency’s staff makes a recommendation to the Commission about whether the complaint gives rise to a “reason to believe” a violation may have occurred. *Id.* at § 30109(a)(2). The “reason to believe” standard is a low bar that is satisfied as long as there are “credibl[e] alleg[at]ions” a violation “may” have occurred. FEC, Statement of

Policy Regarding Commission Action in Matters at Initial Stage in the

Enforcement Process, 72 Fed. Reg. 12,545, 12,545 (Mar. 16, 2007). The

Commission then votes on whether it finds reason to believe and, if at least four commissioners do so, an investigation must proceed “expeditiously.” 52 U.S.C.

§§ 30107(a)(9), 30109(a)(2). Based on the results of that investigation, the FEC

staff then recommends whether to find “probable cause” a violation occurred. *Id.*

at § 30109(a)(3). If at least four commissioners agree there is probable cause, the

FEC requires the agency to attempt to conciliate with the violator. *Id.* at

§ 30109(a)(4)(A). If conciliation fails, the FEC may then bring a civil case against

the violator. *Id.* at § 30109(a)(6).

If the FEC fails to find reason to believe or probable cause, or otherwise dismisses the complaint, the complainant may seek judicial review of the FEC’s dismissal. 52 U.S.C. § 30109(a)(8). In that action, a court may declare the FEC’s dismissal was “contrary to law,” and order the FEC to “conform with” that judgment within thirty days. *Id.* at § 30109(a)(8)(C). The effect of the judgment therefore is to remand the case back to the agency for further proceedings. *See CREW*, 2017 WL 4957233, at \*1. A court cannot mandate a particular outcome on remand. *FEC v. Akins*, 524 U.S. 11, 25 (1998); *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 315 (D.C. Cir. 2015).

If the FEC fails to conform with the court’s judgment, however, the FECA provides the complainant with a cause of action “in the name of such complainant” to bring a separate civil case “to remedy the violation involved in the original complaint.” 52 U.S.C. § 30109(a)(8)(C).

## **II. Procedural Background**

### **A. CREW’s Administrative Complaint and Agency Proceedings**

In June 2012, CREW filed an administrative complaint with the FEC alleging AAN violated the FECA by failing to register and report as a political committee. *CREW v. FEC*, 209 F. Supp. 3d 77, 83 (D.D.C. 2016) (“*CREW I*”). The complaint alleged that AAN qualified as a political committee between 2009 and 2011 under the statute, 52 U.S.C. § 30101(4), and was not excluded under *Buckley*, 424 U.S. at 79, when AAN devoted roughly \$27.1 million to election related advertising, a “majority of its spending throughout the period.” *CREW I*, 209 F. Supp. 3d at 82–83. For example, one of AAN’s ads airing in the leadup to an election accused an incumbent candidate in that election of supporting “[f]ree healthcare for illegal immigrants” and “Viagra for convicted sex offenders,” and it encouraged viewers to take action “[i]n November” when the candidate was up for reelection. *Id.* at 80.

The FEC’s staff recommended finding reason to believe AAN violated the FECA by failing to register and report as a political committee. *Id.* at 83.

Nonetheless, the Commission split three-to-three on the recommendation, leading to a dismissal of CREW's complaint. *Id.*

The three commissioners who voted against finding reason to believe, and thus whose votes were controlling, issued a statement explaining their conclusions. *Id.* Those commissioners found that AAN met the FECA's statutory qualification for political committee status, having spent more than \$1,000 in a calendar year on ads intended to influence federal elections. *Id.* Nonetheless, the three commissioners concluded AAN's major purpose was not to nominate or elect candidates. *Id.* at 84. Their conclusion was based, in most relevant part, on their decision that the First Amendment mandated treating AAN's spending on electioneering communications—communications regulated because they are designed to influence elections—as activity *not* designed to influence elections. *Id.* Accordingly, they found AAN's electioneering communications could not be used to show AAN engaged in extensive spending to influence elections, and thus could not show AAN's major purpose was to nominate or elect candidates. *Id.* They therefore concluded AAN's ads, including the “Viagra for convicted sex offenders” ad described above, justified excusing AAN from political committee reporting obligations. *Id.*

## **B. *CREW I* and Dismissal of AAN's Appeal**

CREW sought judicial review of the FEC's dismissal. *CREW I*, 209 F. Supp. 3d at 84. On September 19, 2016, Judge Christopher Cooper granted summary judgment to CREW and found that the FEC's dismissal of CREW's complaint against AAN was "contrary to law." *Id.* at 95. In relevant part, Judge Cooper held the controlling commissioners' conclusion that spending on electioneering communications must always count against finding an organization's major purpose is electioneering, and must never count towards that result, "blinks reality." *Id.* at 93. Judge Cooper remanded the action to the FEC with an order to conform with the declaration within thirty days, stating that failure to appeal or conform would authorize CREW to bring a civil suit. *Id.* at 95.

On October 19, 2016, AAN appealed Judge Cooper's judgment in *CREW I*. *See* Notice of Appeal by Intervenor-Defendant Am. Action Network, *CREW v. FEC*, No. 16-5300, Doc. #1642533, at ECF p. 10. The FEC moved to dismiss the appeal, citing the non-finality of the district court order and AAN's lack of standing. *See* Appellee Fed. Election Comm'n's Mot. to Dismiss for Lack of Jurisdiction, Nos. 16-5300, 16-5343 (D.C. Cir. Dec. 8, 2016) ("FEC Mot. to Dismiss"). On April 4, 2017, this Court dismissed AAN's appeal, holding that "[t]he district court order remanding the case to the [FEC] is not a final, appealable

order.” *CREW*, 2017 WL 4957233, at \*1 (citing *Pueblo of Sandia v. Babbitt*, 231 F.3d 878, 880 (D.C. Cir. 2000)).

### **C. Administrative Procedure On Remand**

After Judge Cooper’s judgment in *CREW I*, the case was remanded back to the FEC for further action. *CREW v. FEC*, 299 F. Supp. 3d 83, 90 (D.D.C. 2018) (“*CREW II*”). Nevertheless, without waiting for any additional analysis from the FEC staff, the same three commissioners voted to again block enforcement of *CREW*’s complaint against AAN by refusing to vote to find reason to believe AAN violated the Act, leading to a new three-to-three split. *Id.* Those commissioners issued a new statement justifying their vote notwithstanding Judge Cooper’s judgment in *CREW I*, purportedly engaging in an ad-by-ad analysis of each of AAN’s electioneering communications to determine whether they exhibited a purpose to influence elections. *Id.* In particular, they applied a test that treated any electioneering communication as lacking a purpose of influencing elections if (1) it avoided explicit references to “elections, voting, political parties’ and the like,” (2) the ad mentioned a legislative issue, (3) the limited “context” of the ad showed the legislative issue might be addressed by the government, and (4) it contained a “call to action” that was not a call to elect or defeat the named candidate. *Id.* Applying this test, the commissioners found nearly all of AAN’s ads, including the “Viagra for convicted sex offenders” ad, lacked any purpose to

influence elections. *Id.* at 91, 98. Accordingly, the FEC again dismissed CREW's administrative complaint. *Id.* at 91–92.

#### **D. *CREW II* and the Remand Decision Below**

CREW again sought judicial review of the FEC's dismissal on remand. *CREW II*, 299 F. Supp. 3d at 92. On March 20, 2018, Judge Cooper again issued summary judgment to CREW, finding that the FEC's dismissal on remand was also contrary to law. *Id.* at 101. Judge Cooper found the controlling commissioners' test did not properly interpret the "major purpose" doctrine from Supreme Court's decision in *Buckley*. *Id.* In particular, Judge Cooper found that electioneering communications are "presumptively" intended to influence elections, *id.* at 93, and therefore that they presumptively count towards finding that a group's major purpose is to nominate or elect candidates, *id.* at 101. As in *CREW I*, after declaring the dismissal contrary to law, Judge Cooper remanded the action to the FEC for conformity within thirty days. *Id.* As in *CREW I*, Judge Cooper notified the FEC that failure to conform would result in authorizing of a civil suit by CREW against AAN. *Id.*

On May 4, 2018, AAN filed the instant notice of appeal. *See* Notice of Appeal by Intervenor-Defendant Am. Action Network, Doc. #1730129, at ECF p. 8.

### **E. CREW's Citizen Suit**

The thirty days provided by FECA for the FEC to conform to Judge Cooper's March 20 declaration in *CREW II* expired on April 19, 2018. Though in possession of the case remanded to it, the FEC apparently has failed to conform with Judge Cooper's judgment by either finding reason to believe AAN violated the statute and opening an investigation or by dismissing the complaint for a lawfully permissible reason. *See* Statement of Vice Chair Ellen L. Weintraub Re. *CREW v. FEC & Am. Action Network* (Apr. 19, 2018), <https://www.fec.gov/resources/cms-content/documents/2018-04-19-ELW-statement.pdf> (attached as Exhibit 2) (stating that Commissioner Weintraub—now one of four FEC commissioners—believes “CREW can and should pursue its complaint directly against [AAN]”); *see also* Letter from Kathleen M. Guith, Assoc. Gen. Counsel for Enf't to Noah Bookbinder and Melanie Sloan Re. MUR 6589R, American Action Network (May 17, 2018) (attached as Exhibit 3) (stating case was remanded to FEC after Judge Cooper's March 20 judgment and that matter was “currently open before the Commission,” but not disclosing any vote to proceed with an investigation or to close the investigation). Accordingly, having exhausted its administrative remedies, CREW brought a civil action directly against AAN on April 23, 2018. *See* Compl., *CREW v. AAN*, No. 18-cv-945

(CRC) (D.D.C. Apr. 23, 2018). That action is now proceeding before the district court.

### **STANDARD OF REVIEW**

The party invoking this Court's jurisdiction bears the burden of establishing that the Court has jurisdiction over the appeal. *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002).

When determining its own jurisdiction, the Court may consider documents outside of the administrative record. *Id.* at 900; *Manguriu v. Lynch*, 794 F.3d 119, 121 (1st Cir. 2015) (collecting cases). The Court further may take judicial notice of facts on the public record, including in other proceedings. *Covad Commc'ns Co. v. Bell Atl. Corp.*, 407 F.3d 1220, 1222 (D.C. Cir. 2005); *Conecuh-Monroe Cmty. Action Agency v. Bowen*, 852 F.2d 581, 583 (D.C. Cir. 1988) (taking judicial notice of administrative ruling issued after district court's decision); *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) ("Courts may take judicial notice of official court records . . .").

### **ARGUMENT**

#### **I. The Appeal is Premature Because the District Court's Remand Order is Not Final**

As this Court repeatedly has held, "[a] district court order remanding the case to the [FEC] is not a final, appealable order." *CREW*, 2017 WL 4957233, at \*1; *see also Democratic Nat'l Comm. v. FEC*, No. 99-5123, 1999 WL 728351, at

\*1 (D.C. Cir. Aug. 4, 1999) (per curiam) (dismissing appeal of district court order remanding to the Commission because the order was not final). Consequently, AAN may not seek appellate review of the order at this time, but must await to appeal an actual final decision in an enforcement proceeding with the FEC.

“It is well settled that, as a general rule, a district court remanding a case to an agency for significant further proceedings is not final.” *Pueblo of Sandia*, 231 F.3d at 880 (internal quotation marks omitted). This rule “promotes 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.” *Sierra Club v. U.S. Dep’t of Agric.*, 716 F.3d 653, 656 (D.C. Cir. 2013).

Applying this familiar rule, this Court previously dismissed an identical appeal brought by AAN challenging the remand order of Judge Cooper. *CREW*, 2017 WL 4957233, at \*1. The Court dismissed that appeal due to its holding that judgments finding FEC dismissals contrary to law within the meaning of the FECA are not “final, appealable order[s],” and that there is no basis for the Court’s jurisdiction to review such remand order “in spite of this lack of finality.” *Id.*

Of course, AAN is not permanently barred from seeking appellate review of Judge Cooper’s decision in *CREW II* or, for that matter, in *CREW I*, assuming a final order eventually issues against AAN. If, for example, the FEC decides to

reopen its investigation of AAN and proceed with an enforcement action, AAN could seek appellate review of any adverse judgment in that action, as well as all of the previous district court decisions. *Lakes Pilots Ass'n v. U.S. Coast Guard*, 359 F.3d 624, 625 (D.C. Cir. 2004) (holding that a party aggrieved by the outcome on remand may “seek judicial review, including review in the court of appeals, raising not only new issues but all those on which it got no satisfaction in its original challenge”); *Occidental Petrol. Corp. v. SEC*, 873 F.2d 325, 330 (D.C. Cir. 1989) (holding that, while a party cannot appeal from a non-final remand order, “a party claiming to be aggrieved by final agency action can appeal, if still aggrieved, at the conclusion of the administrative proceedings on remand”). On the other hand, in the event the FEC once again dismisses the action below or otherwise chooses not to proceed, there would be no need for AAN to seek judicial review. Dismissing this premature appeal accounts for the possibility that no appeal will be taken and that the ultimate resolution of the proceedings below satisfy all parties.

## **II. The Non-Finality of the District Court’s Order Does Not Depend on the Existence of Proceedings on Remand**

Notably, the Court’s decisions dismissing appeals from judgments finding an FEC dismissal is contrary to law have not rested on the progress of any FEC investigation or other proceedings on remand. For example, in moving to dismiss AAN’s previous appeal, the FEC argued for dismissal due to both the non-finality of the district court’s decision, and the fact that the FEC had dismissed the claims

against AAN on remand. *See* FEC Mot. to Dismiss at 13–15, *CREW*, Nos. 16-5300, 16-5343 (D.C. Cir. Dec. 8, 2016) (“Because the American Action Network matter was again dismissed on remand, American Action Network has, in fact, suffered no legally cognizable injury from the district court’s Remand Order.”). Nonetheless, this Court did not reach, and its decision did not depend on, that alternative ground for dismissal. Indeed, by finding the district court’s remand decision was not a final order, the Court’s decision bars review of such orders regardless of the circumstances that occur on remand. Accordingly, this Court’s jurisdiction to determine this appeal does not turn on whether the administrative proceedings below have terminated in AAN’s favor.

For the same reason, the fact that AAN has been named as a defendant in a private civil suit under 52 U.S.C. § 30109(a)(8)(C) does not alter this Court’s jurisdiction to hear this appeal. Just as AAN must wait to seek appellate review of a final judgment if the FEC successfully pursues a civil enforcement proceeding, AAN must wait to seek appellate review of any judgment against it, and any rulings that adopt the reasoning of *CREW I* or *CREW II*, in the civil action.

Because this Court lacks jurisdiction over AAN’s premature appeal of an interlocutory remand order, the appeal should be dismissed. *CREW*, 2017 WL 4957233, at \*1; *Democratic Nat’l Comm.*, 1999 WL 728351, at \*1.

## CONCLUSION

For the foregoing reasons, this Court should dismiss AAN's appeal.

Dated: June 25, 2018.

Respectfully submitted,

*/s/ Stuart McPhail* \_\_\_\_\_

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

I hereby certify, on this 25th day of June, 2018, that:

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted under Fed. R. App. P. 32(f), this document contains 3,266 words.
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**CERTIFICATE OF SERVICE**

I hereby certify that, on June 25, 2018, a true and correct copy of Plaintiffs' notice of cross appeal was filed and served electronically through the Court's CM/ECF system upon the following counsel of record:

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