

NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 18-5136

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

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

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee,

and

AMERICAN ACTION NETWORK,
Intervenor Defendant-Appellant.

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

As the opening motion to dismiss demonstrated, and as American Action Network (“AAN”) concedes, a “court order remanding the case to the Federal Election Commission,” like the decision AAN seeks to appeal here, “is not a final, appealable order.” *CREW v. FEC*, No. 16-5300, 2017 WL 4957233, at *1 (D.C. Cir. Apr. 4, 2017) (per curiam); *see also* AAN Opp. to Mot. to Dismiss at 10, ECF

No. 1739314 [hereinafter, “AAN Opp.”]. Nonetheless, in an attempt to manufacture appellate standing, AAN pretends this appeal addresses another issue entirely: whether the Federal Election Commission’s (“FEC”) failure to conform to such a remand order is a final agency action for which AAN may seek original judicial review. AAN fails, however, to meet its burden to show jurisdiction for the actual relevant issue here—whether the district court order on appeal here is final and subject to appellate review—and entirely fails to distinguish this appeal from the identical appeal previously dismissed by this Court.

To begin with the only relevant point AAN makes, AAN asserts that this case is of such an “unusual circumstance[.]” that the general rule that remand orders are not final orders should be discarded. AAN Opp. 10–11 (quoting *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 751 F.3d 629, 633 (D.C. Cir. 2014)). AAN fails to show, however, that absent appeal here, it will suffer the kind of “substantial irreparable harm” that could warrant interlocutory review. *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 331 (D.C. Cir. 1989) (permitting agencies to seek interlocutory review of remand decision due to irreparable harm they would face in absence of immediate appeal). Unlike the plaintiffs in the only relevant case AAN cites, *In re Long-Distance*, who faced permanent loss of their assets unlawfully held by the agency if the district court remand order was not altered to impose a strict time-line for agency action, 751

F.3d at 633; *id.* at 637 (Brown, J., concurring and dissenting), AAN faces absolutely no prejudice from the district court's order. As with the last order AAN unsuccessfully sought to appeal, the order here merely remanded the case back to the FEC. AAN is not being deprived of its assets and there is no impending statute of limitations that would cut off AAN's ability to seek remedy. As was the case with the prior dismissed appeal, AAN only faces the possibility of an enforcement proceeding or citizen suit. Any injury those proceedings could impose is certainly not irreparable: AAN will have the "opportunity to appeal" all nonfinal decisions in the event of an adverse judgment in either proceeding. *Id.* (quoting *Occidental*, 873 F.2d at 330).

AAN's primary concerns seems to be that it faces litigation brought by CREW rather than by the FEC. *See* AAN Opp. 2, 11, 13, 14. Putting aside the question of why AAN is certain it will never face active enforcement from the FEC despite its violations of law, the need for AAN to defend either a citizen suit or an enforcement action is not an injury, never mind an irreparable one. *McSurley v. McClellan*, 697 F.2d 309, 317 n.13 (D.C. Cir. 1982) ("Litigation costs, standing alone, do not rise to the level of irreparable injury."). There is no material difference between AAN's need to defend a citizen suit and its need to defend an enforcement action on remand. If anything, AAN is benefited because "litigants against the government face greater obstacles than litigants against private" parties.

Copeland v. Marshall, 641 F.2d 880, 895 (D.C. Cir. 1980). Indeed, when this Court found the previous order was non-final and that AAN “has not shown that this court has jurisdiction under the Federal Election Campaign Act in spite of this lack of finality,” *CREW*, 2017 WL 4957233, at *1, AAN likewise faced the possibility of either defending a citizen suit or an enforcement action. Thus, the fact that it now faces those same possibilities does nothing to change the analysis.

Rather than demonstrate that the district court order is final, or that the district court order imposes irreparable injury on it, AAN seeks to portray this appeal as something that it is not: a direct legal challenge to the FEC’s failure to conform with the remand order. *See* AAN Opp. 12. Nearly all of the authority it cites relates to a question that may be relevant in that sort of challenge—when is an agency decision final and thus subject to *original* judicial review?¹—but that is not

¹ *See U.S. Army Corps of Eng’rs v. Hawkes Co.*, 136 S. Ct. 1807, 1811 (2016) (“The question presented is whether that determination is final agency action judicially reviewable under the Administrative Procedure Act.”); *Fed. Trade Comm’n v. Standard Oil Co.*, 449 U.S. 232, 239 (1980) (finding no “final agency action”); *Rhea Lana, Inc. v. Dep’t of Labor*, 824 F.3d 1023, 1026 (D.C. Cir. 2016) (“Agency action is final”); *Scenic Am., Inc. v. U.S. Dep’t of Transp.*, 836 F.3d 42, 55 (D.C. Cir. 2016) (finding “final agency action”); *Nat’l Treasury Emps. Union v. Fed. Labor Relations Authority*, 754 F.3d 1031, 1039 (D.C. Cir. 2014) (reviewing “finality of an agency decision”); *Coal. for Sustainable Res., Inc. v. U.S. Forest Serv.*, 259 F.3d 1244, 1251 (10th Cir. 2001) (“[A]gency inaction can become ‘final.’”); *Cobell v. Norton*, 240 F.3d 1081, 1095 (D.C. Cir. 2001) (reviewing for “final agency action”); *Nat. Res. Def. Council, Inc. v. Env’tl. Prot. Agency*, 22 F.3d 1125, 1133 (D.C. Cir. 1994) (finding “final agency decision”); *Her Majesty the Queen in Right of Ontario v. Env’tl. Prot. Agency*, 912 F.2d 1525,

the relevant question here. AAN's authority misses the mark because the FEC's failure to conform is not the subject of this appeal. Rather, this is an appeal from the *district court order* remanding the case to the agency. AAN fails to point to any authority to show that those two questions are the same or that the finality of agency authority after remand has any bearing on question of interlocutory appeal of a non-final district court order. Thus, AAN's *preferred* question of whether the FEC's failure to conform is a final agency action from which AAN could seek original judicial review has no bearing on the *actual* question before this Court of whether the district court order below remanding the case to the agency is a final appealable order.

Indeed, AAN's ability to challenge the FEC's failure to conform is dubious, at best. AAN faces no "direct and immediate effect" from the FEC's failure to

1531 (D.C. Cir. 1990) (same); *Capitol Tech. Servs., Inc. v. F.A.A.*, 791 F.2d 964, 969 (D.C. Cir. 1986) ("[A]gency action has taken final form."); *Ciba-Geigy Corp. v. U.S. Envtl. Proc. Agency*, 801 F.2d 430, 438 (D.C. Cir. 1986) (finding "final agency action"); *Pub. Citizen Health Research Grp. v. Comm'r, Food & Drug Admin.*, 740 F.2d 21, 28 (D.C. Cir. 1984) (reviewing "'unreasonably delayed' agency action"); *Carter/Mondale Pres. Comm., Inc. v. Fed. Election Comm'n*, 711 F.2d 279, 285–86 (D.C. Cir. 1983) (discussing judicial review of "final agency action"); *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) (reviewing finality of order of Benefits Review Board); *Citizens for a Better Env't v. Costle*, 617 F.2d 851, 853 n.5 (D.C. Cir. 1980) ("[A]n agency's failure to act becomes . . . a final decision."); *Envtl. Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1098 (D.C. Cir. 1970) (determining whether "Secretary has issued no final order reviewable in this court").

conform, *cf. Ciba-Geigy Corp.*, 801 F.2d at 436, or indeed any “undu[e] prejudice” at all, *cf. Cobell*, 240 F.3d at 1095, that might give rise to the need for judicial review of the FEC’s inaction. Indeed, AAN now enjoys what it asked for: inaction from the FEC. If there is “no prospect of any further agency action,” AAN Opp. 11, then there is no need to appeal and AAN has no standing to appeal. While AAN frets that it must now defend itself from private enforcement, it faces no greater “legal consequences” than it faced from the previous district court order. *Cf. Nat’l Treasury Emps. Union*, 754 F.3d at 1039.²

This Court has also already rejected AAN’s contention that its “return to the position of a respondent subject to enforcement proceedings” creates an irreparable legal consequence giving rise to judicial review. AAN Opp. to FEC’s Mot. to Dismiss for Lack of Jurisdiction at 15, *CREW v. FEC*, Nos. 16-5300, 16-5343 (D.C. Cir. filed Jan. 23, 2017) [hereinafter “AAN Opp. to FEC MTD”] (quoting *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 317 (D.C. Cir. 2015))). Despite AAN’s contention that the loss of the agency judgment in its

² AAN also argues that the FEC’s failure to conform *after* remand somehow makes the district court order final. See AAN Opp. 15. AAN cites nothing for this point and it makes no attempt to show why the FEC’s failure to conform would make the district court order final now. See AAN Opp. 5. Indeed, when the FEC dismissed CREW’s complaint prior to the appeal but after the previous remand order— indisputably final agency action—even that did not render that previous district court decision final and subject to appellate review. *CREW*, 2017 WL 4957233, at *1.

favor rendered the district court's decision appealable, AAN Opp. 15, this Court already found AAN "has not shown that this court has jurisdiction" based on that fact, *CREW*, 2017 WL 4957233, at *1.

This Court also has previously rejected AAN's remaining argument that the Federal Election Campaign Act provides respondents an absolute right to interlocutory appellate review. *See* AAN Opp. to FEC MTD at 9–10 (arguing 52 U.S.C. § 30109(a)(9) grants it right to interlocutory appeal). In an attempt to say *something* new on the point, AAN only adds a mischaracterization of CREW's arguments. Contrary to AAN's suggestion, CREW did not suggest that a remand order "can never be appealed" by *anyone*. AAN Opp. 16. It is clear, for example, that the FEC could have appealed the order below. *See Occidental*, 873 F.2d at 331–32 (holding agency may appeal remand orders). It is equally clear AAN, however, may not seek interlocutory appeal, at least absent some irreparable injury.

The existence of a citizen suit is not such an irreparable injury. AAN is free to defend that suit, just as it was free to defend against an FEC enforcement proceeding. AAN may seek appellate review of any adverse judgment in the citizen suit, just as it could from an enforcement action, and then raise its various challenges at that time, just as before. In sum, AAN fails to identify anything in its

papers to show that this appeal is not, for all material purposes, identical to its previously dismissed appeal.

CONCLUSION

For the foregoing reasons, this CREW respectfully requests this Court grant the pending motion to dismiss for lack of jurisdiction.

Dated: July 12, 2018.

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

I hereby certify that, on July 12, 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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