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

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| CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,<br><br>Plaintiff,<br><br>v.<br><br>FEDERAL ELECTION COMMISSION,<br><br>Defendant. | Civ. No. 22-3281 (CRC)<br><br>MEMORANDUM IN SUPPORT OF MOTION TO DISMISS |

**FEDERAL ELECTION COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS**

The administrative actions under review here have a long and involved history, well known to this Court. This case represents the third time plaintiff Citizens for Responsibility and Ethics in Washington ("CREW") has challenged the Federal Election Commission's ("Commission" or "FEC") actions on an underlying administrative complaint alleging that American Action Network ("AAN"), an organization operating as a tax-exempt non-profit under section 501(c)(4) of the Internal Revenue Code, violated the Federal Election Campaign Act ("FECA" or "Act") by failing to register with the Commission as a "political committee" and comply with the reporting requirements applicable to such groups. Plaintiff's single-count complaint again seeks judicial review pursuant to FECA's special judicial review provision, 52 U.S.C. § 30109(a)(8). After a recent round of consideration at the administrative level that was spurred by an interest in resolving stale matters, three Commissioners have indicated that the matter is not worthy of revisiting substantive votes that took place more than four years ago even

if the merits of CREW's campaign finance allegations were again before the Commission, so a remand serves no possible purpose. As detailed below, plaintiff's complaint should be dismissed, because relief available under 52 U.S.C. § 30109(a)(8)(C), a remand to the agency, here would not serve a discernible interest and the futility doctrine supports avoiding a third round of administrative proceedings.

## BACKGROUND

### I. THE FEC AND FECA'S ADMINISTRATIVE ENFORCEMENT PROCESS

The FEC is a six-member, independent agency of the United States government with "exclusive jurisdiction" to administer, interpret, and civilly enforce FECA. *See generally* 52 U.S.C. §§ 30106, 30107. Congress authorized the Commission to "formulate policy" with respect to FECA, *id.* § 30106(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA]," *id.* §§ 30107(a)(8), 30111(a)(8); and to investigate possible violations of the Act, *id.* § 30109(a)(1)-(2). The Commission has exclusive jurisdiction to initiate civil enforcement actions for violations of the Act in the United States district courts. *Id.* §§ 30106(b)(1), 30109(a)(6).

FECA provides that decisions of the Commission "with respect to the exercise of its duties and power under the provisions of th[e] Act shall be made by a majority vote of the members of the Commission," and that certain specified actions require "the affirmative vote of 4 members of the Commission." 52 U.S.C. § 30106(c). As explained in greater detail below, the decision to open an investigation or take other statutory steps in the process of enforcing against an alleged violation of FECA thus requires the assent of at least four Commissioners. 52 U.S.C. §§ 30106(c), 30107(a)(6), (9).

FECA permits any person to file an administrative complaint with the Commission alleging a violation of the Act. *Id.* § 30109(a)(1); *see also* 11 C.F.R. § 111.4. After reviewing the complaint and any response filed by the respondent, the Commission considers whether there is "reason to believe" that FECA has been violated. 52 U.S.C. § 30109(a)(2). If at least four of the FEC's six Commissioners vote to find such reason to believe, the Commission may investigate the alleged violation. *Id.* §§ 30106(c), 30109(a)(2).

If the Commission votes to proceed with an investigation, it then must determine whether there is "probable cause" to believe that FECA has been violated. *Id.* § 30109(a)(4)(A)(i). Like a reason-to-believe determination, a determination to find probable cause to believe that a violation of FECA has occurred requires an affirmative vote of at least four Commissioners. *Id.* §§ 30106(c), 30109(a)(4)(A)(i). If the Commission so votes, it is statutorily required to attempt to remedy the violation informally and attempt to reach a conciliation agreement with the respondent. *Id.* § 30109(a)(4)(A)(i). Entering into a conciliation agreement requires an affirmative vote of at least four Commissioners and such an agreement, unless violated, operates as a bar to any further action by the Commission related to the violation underlying that agreement. *Id.* If the Commission is unable to reach a conciliation agreement, FECA authorizes the agency to institute a *de novo* civil enforcement action in federal district court. *Id.* § 30109(a)(6)(A). The institution of a civil action under section 30109(a)(6)(A) requires an affirmative vote of at least four Commissioners. *Id.* § 30106(c).

FEC administrative enforcement matters, including remanded matters, are required by FECA to be kept confidential until the administrative process is complete. 52 U.S.C. § 30109(a)(12)(A) ("Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving

such notification or the person with respect to whom such investigation is made."); 11 C.F.R. § 111.21. FECA further provides for the imposition of a fine on "[a]ny member or employee of the Commission, or any other person, who violates" section 30109(a)(12)(A). 52 U.S.C. § 30109(a)(12)(B).

If, at any point in this process, the Commission dismisses an administrative enforcement matter, FECA provides the complainant with a narrow cause of action for judicial review of the Commission's dismissal decision. *See id.* § 30109(a)(8)(A) (detailing the procedure for seeking judicial review of an administrative dismissal and the scope of such review). That statutory provision also allows a party who has filed an administrative complaint with the Commission to bring a civil action in this District alleging that the Commission has "fail[ed] to act" on its complaint within 120 days. *Id*. § 30109(a)(8)(A).

FECA expressly limits the scope of relief available to a plaintiff challenging an FEC dismissal decision or alleging that the Commission has failed to act on an administrative complaint. The reviewing court may only (a) declare that the Commission's failure to act or dismissal was "contrary to law" and (b) order the Commission to "conform with" the court's declaration within 30 days. 52 U.S.C. § 30109(a)(8)(C). If the Commission does not conform with such an order, the original administrative complainant may bring "a civil action to remedy the violation involved." *Id.*

## II. FACTUAL AND PROCEDURAL BACKGROUND

The saga that preceded CREW's complaint seeking judicial review of the Commission's handling of its complaint against AAN spans more than a decade and no fewer than six published opinions of this Court. *See CREW v. FEC* ("*CREW I*"), 209 F. Supp. 3d 77 (D.D.C. 2016) (first remand to FEC); *CREW v. FEC* ("*CREW II*"), 299 F. Supp. 3d 83 (D.D.C. 2018) (second remand

to FEC); *CREW v. AAN*, 410 F. Supp. 3d 1 (D.D.C. 2019) (granting in part and denying in part AAN's motion to dismiss private right of action); *CREW v. AAN*, 415 F. Supp. 3d 143 (D.D.C. 2019) (denying AAN's motion for certification of questions for interlocutory appeal); *CREW v. AAN*, 590 F. Supp. 3d 164 (D.D.C.) (granting AAN's motion for reconsideration and dismissing private right of action), appeal filed, 22-7038 (D.C. Cir. 2022).[1]

**A. CREW's Original Administrative Complaint against AAN**

More than ten years ago, in June of 2012, plaintiff filed an administrative complaint with the Commission alleging that AAN violated FECA's requirement that groups meeting the definition of a "political committee" register as such and file periodic reports about their receipts and disbursements. Compl. ¶ 40; *see* 52 U.S.C. §§ 30103(a), 30104(a)-(b). Under FECA, any "committee, club, association, or other group of persons" that receives more than $1,000 in "contributions" or makes more than $1,000 in "expenditures" in a calendar year is a "political committee." 52 U.S.C. § 30101(4)(A); 11 C.F.R. § 100.5(a). The Act defines "contribution" and "expenditure" to include any payment of money to or by any person "for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i), (9)(A)(i). In *Buckley v. Valeo*, however, the Supreme Court limited that statutory definition to "only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U.S. 1, 79 (1976) (*per curiam*). *Buckley* thus established that an entity that is not controlled by a candidate must register as a political committee only if the group crosses the $1,000 threshold of contributions or expenditures *and* has as its "major purpose" nominating or electing federal candidates. CREW's 2012

[1] This Court also granted the Commission's motion to dismiss CREW's Administrative Procedure Act claim in *CREW I*. *CREW v. FEC*, 164 F. Supp. 3d 113 (D.D.C. 2015).

administrative complaint alleged that AAN met the major-purpose test in 2009 and 2011. (Compl. ¶ 40.)

The FEC's Office of the General Counsel issued a First General Counsel's report in 2013, recommending that the Commission find reason to believe AAN had violated FECA's registration and reporting requirements for political committees. (Compl ¶ 42.) The Commission divided evenly on that question by a 3-3 vote on June 17, 2012, and then voted unanimously to close its file. (*Id.*) The three Commissioners who voted against finding reason to believe issued a statement of reasons explaining their votes. Under D.C. Circuit precedent, those Commissioners "constitute a controlling group for purposes of the decision" and "their rationale necessarily states the agency's reasons for acting as it did" for purposes of judicial review. *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992). The *CREW I* controlling Commissioners concluded that AAN did not meet *Buckley*'s major-purpose requirement and additionally cited "prosecutorial discretion" as a basis for declining enforcement. (*See* Compl. ¶ 44.)

### B. Judicial Proceedings in *CREW I*, No. 14-1419 (D.D.C.), and Proceedings on Remand

CREW sought judicial review of the dismissal, challenging the *CREW I* controlling group's analysis as contrary to law. Compl. ¶ 45; *see CREW I*, 209 F. Supp. 3d at 83-84. This Court discerned legal errors in the controlling statement of reasons and remanded the matter to the FEC with instructions to conform with the Court's opinion. *CREW I*, 209 F. Supp. 3d at 93-95.

On remand, the Commission again divided evenly on the question whether to find reason to believe that AAN had violated FECA's registration and reporting requirements for political committees, with three Commissioners voting in favor of reason to believe and three voting

against. (Compl. ¶ 47.) The Commission then voted 5-1 to close the file. (*Id.*) The three Commissioners that voted against making the reason-to-believe finding issued a statement explaining their votes, and this Court concluded that the statement conformed with the remand order. *See* also Mem. Op. & Order at 2, *CREW v. FEC*, No. 14-1419 (CRC) (D.D.C. Apr. 6, 2017) (Docket No. 74) (denying motion for order to show cause as to why Commission had not complied with remand order); Compl. ¶ 47.

### C. Judicial Proceedings in *CREW II*, No. 16-2255 (D.D.C.), and Proceedings on the Second Remand

CREW filed a second action for judicial review under 52 U.S.C. § 30109(a)(8) on November 14, 2016, challenging the *CREW II* controlling commissioners' post-remand statement of reasons. Compl. ¶ 49; *see CREW II*, 299 F. Supp. 3d at 90-92. This Court again concluded that the controlling statement of reasons contained legal errors and remanded the matter to the Commission a second time. *CREW II*, 299 F. Supp. 3d at 101.

That time, however, the Commission took no public action within thirty days of the Court's remand order and the agency's file on AAN remained open. (*See* Compl. ¶ 52.) As a result, on April 23, 2018, CREW availed itself of the private right of action against AAN to remedy the FECA violations it had alleged to the Commission pursuant to 52 U.S.C. § 30109(a)(8)(C). (*See* Compl. ¶ 52.)

### D. CREW's Private Suit Against AAN and Subsequent Commission Action

AAN moved to dismiss CREW's private suit, arguing among other things that CREW lacked standing under Article III and that the predicate for the lawsuit was erroneous because the initial controlling group's legal reasoning was immune from judicial review because it relied in part on prosecutorial discretion. This Court initially rejected those arguments. *See CREW v. AAN*, 410 F. Supp. 3d at 15-20. After that decision, however, the D.C. Circuit provided

clarification that a controlling statement of reasons that relies in part on prosecutorial discretion is not judicially reviewable, even if the controlling group also relies on interpretations of FECA that would be otherwise judicially reviewable. *See CREW v. FEC*, 993 F.3d 880 (D.C. Cir. 2021) ("*New Models*"), pet. for reh'g en banc denied, 2022 WL 17578942 (D.C. Cir. Dec. 12, 2022) (per curiam). Following that decision, this Court granted AAN's motion for reconsideration and dismissed CREW's private suit, concluding that the reference in the original controlling statement to prosecutorial discretion made that dismissal judicially unreviewable and therefore deprived CREW of the predicate contrary-to-law finding on which the right of action was based. *CREW v. AAN*, 590 F. Supp. 3d 164 (D.D.C. 2022). CREW's appeal of that decision is pending at the D.C. Circuit. *See CREW v. AAN*, No. 22-7038 (D.C. Cir.).[2]

On August 29, 2022, the Commission voted to close its file on the AAN matter that had followed *CREW II* and the second remand. (Compl. ¶ 53.) That action resulted in the first public disclosure, pursuant to FEC policy, of the Commission's handling of the AAN matter after this Court's second remand order. (*See id.* ¶¶ 53-54.) That record revealed that on May 10, 2018, shortly after CREW filed its private suit against AAN, the Commission held a series of votes on the underlying administrative complaint. (*See* Compl. ¶¶ 52, 54; *id.* Exh. 4.) Several votes to find reason to believe that AAN had violated FECA's political committee provisions failed by a vote of 3-0, with Commissioner Weintraub abstaining from the vote. (*See* Compl. ¶ 54; *Id.* Exh. 4.)[3] A subsequent vote to close the file also failed by a vote of 3-1.

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[2] American Action Network has conferred with counsel for the Commission about its planned motion for intervention and will be bringing to the Court's attention the application of the holding in *CREW v. AAN* to this case.

[3] At the time of the May 2018 votes, the Commission had only four sitting members. (*See* Compl. ¶ 54.)

As the Commissioner that through her abstention deprived the agency of the fourth vote required to find reason to believe, Commissioner Weintraub issued a statement of reasons on September 30, 2022, which provides a controlling rationale for the agency's actions. *See* Compl. ¶¶ 55-60; *id.* Exh. 5; *see also New Models*, 993 F.3d at 883 n.3.[4] While the effect of Commissioner Weintraub's vote was to prevent the Commission from proceeding with further enforcement, her statement incorporated prior statements that analyzed CREW's administrative complaint, supported enforcement, and noted record evidence that AAN had used "at least 62.5%" of its total spending to support "federal campaign activity" in 2010 (Compl. Exh. 6 at 5). The statement also referenced this Court's decision in *CREW I* that called for reassessment of AAN's electioneering communications because "'*many* or even *most*'" of those communications "'indicate a campaign-related purpose,'" (*id.* Exh. 7 at 3-4 (quoting *CREW I*, 209 F. Supp. 3d at 93)). The controlling statement concluded that based on "the facts before the Commission [and] the law governing this activity . . . the Commission's dismissal of this matter was contrary to law." (*See* Compl. ¶¶ 55-60; *id.* Exh. 5; *see also id.* Exh. 2 (Statement of Vice Chair Ellen L. Weintraub Regarding *CREW v. FEC & American Action Network* (Apr. 19, 2018); *id.* Exh. 6 (Statement of Reasons of Vice Chair Ann M. Ravel, Commissioner Steven T. Walther, and Commissioner Ellen L. Weintraub, MURs 6538 & 6589 (July 30, 2014); *id.* Exh. 7 (Statement of Reasons of Commissioners Ann M. Ravel and Ellen L. Weintraub, MUR 6589R (Dec. 5, 2016).)

The closure of the Commission's file on the AAN matter also revealed that the Commission had taken a vote on closing the file on January 11, 2022, after additional departures

[4] The Commission is unaware of any previous case in which a single abstaining Commissioner caused the FEC to lack the required four votes to find reason to believe and pursue further enforcement proceedings. As that abstention caused the Commission to "fail[] to muster four votes in favor of initiating an enforcement proceeding," *CREW v. FEC*, 892 F.3d 434, 437 (D.C. Cir. 2018), the explanation for that abstention has controlling weight.

and appointments increased the Commission membership to a full slate of six. *See* Certification, MUR 6589R (American Action Network) (Jan. 11, 2022), https://www.fec.gov/files/legal/murs/6589R/6589R_26.pdf. That vote was evenly divided, 3-3. *Id.* Commissioners Dickerson, Cooksey, and Trainor placed into the file a statement explaining that the matter had been placed on the agenda "with an eye toward resolving stale matters and ensuring responsible use of agency resources" and that they voted in favor of closing the file in the matter but took "no position on the merits of" the prior Commission votes that had failed to find reason to believe against AAN. *See* Statement of Reasons of Chairman Allen J. Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III, MUR 6589R (American Action Network) (May 13, 2022) ("Dickerson, et al. Statement") at 3, 6, https://www.fec.gov/files/legal/murs/6589R/6589R_30.pdf.[5]

CREW filed this lawsuit seeking judicial review of the Commission's latest dismissal after the second remand.

## ARGUMENT

### I. STANDARD OF REVIEW

Dismissal of a complaint is appropriate pursuant to Rule 12(b)(6) where, accepting the factual allegations in the complaint as true and drawing all reasonable inferences in a plaintiff's favor, the complaint fails as a matter of law to state a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Rollins v. Wackenhut Servs., Inc.*, 703 F.3d 122, 129 (D.C. Cir. 2012) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *Ashcroft v. Iqbal,* 556 U.S. 662, 678

[5] Commissioner Dickerson also separately issued a statement responding to some of the points made in Commissioner Weintraub's September 2022 statement of reasons. Supplemental Statement of Reasons of Chairman Allen J. Dickerson, MUR 6589R (American Action Network) (Oct. 12, 2022), https://www.fec.gov/files/legal/murs/6589R/6589R_32.pdf.

(2009). A claim must be dismissed "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief." *Bell Atl. Corp.*, 550 U.S. at 558.

The court "can take judicial notice [and apply intervening binding precedent] to gauge the futility of allowing the current proceedings to drag on into another round.". *Checkosky v. Albright*, 139 F.3d 221, 227 (D.C. Cir. 1998). "[W]hen a district court is reviewing agency action . . . the legal questions raised by a 12(b)(6) motion and a motion for summary judgment are the same." *Ecological Rts. Found. v. U.S. Env't Prot. Agency*, No. 19-2181, 2022 WL 4130818, at *4 (D.D.C. Sept. 12, 2022) (citing *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993).) "[B]ecause a court can fully resolve any purely legal question on a motion to dismiss, there is no inherent barrier to reaching the merits at the 12(b)(6) stage." *Marshall Cnty. Health Care Auth.*, 988 F.2d at 1226. In evaluating a motion to dismiss for failure to state a claim, "a court may consider 'the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint,' or 'documents upon which the plaintiff's complaint necessarily relies even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss.'" *United States ex rel. Scott v. Pac. Architects & Eng'rs, Inc.*, 270 F. Supp. 3d 146, 152 (D.D.C. 2017) (quoting *Ward v. D.C. Dep't of Youth Rehab. Servs.*, 768 F. Supp. 2d 117, 119 (D.D.C. 2011)).

## II. THIS COURT SHOULD NOT ORDER A FUTILE REMAND

In this case the Court should dismiss this action because three Commissioners have indicated the matter is stale and agency resources should be conserved rather than dedicated to considering afresh whether to pursue the administrative matter after a vote to do so failed more than four years ago. A remand would serve no purpose other than necessitating yet another

round of administrative proceedings, but the outcome of agency consideration of enforcement is preordained.

This was an anomalous administrative matter for many reasons, including that over three and a half years passed between the last substantive vote on whether the matter should be pursued and the Commission's vote to close the file. In the interim, five new Commissioners have been seated. After the matter had been identified as stale and called up for resolution, three of those new Commissioners, who did not participate in that last substantive vote, filed the statement explaining their reasoning for not considering moving forward in the recent period and being in favor of closing the matter. *See* Dickerson, et al. Statement. There are thus considerably more changed circumstances and more information about the status at the agency in the period after a reviewed vote than in the ordinary event when a court considers remanding a potential enforcement matter.

Even assuming an agency has made an error, a remand is not required when the "remand would be futile." *Fogg v. Ashcroft*, 254 F.3d 103, 111 (D.C. Cir. 2001). Here, three Commissioners — a sufficient number to vote down any reason to believe vote on remand — have released a statement explaining that they "took no position on the merits of" the prior Commission votes that had failed to find reason to believe against AAN, but they opposed revisiting that decision and instead voted in favor of closing the file after the matter had been called up "with an eye toward resolving stale matters and ensuring responsible use of agency resources." Dickerson, et al. Statement at 3; *see also id.* at 6 (explaining that the three commissioners have no intention of reevaluating the previous split vote on reason to believe in this matter that "predate[d] our service on the Commission").

In light of those statements, any remand to the agency would only needlessly prolong this stale matter. *See Nat'l Parks Conservation Ass'n v. United States*, 177 F. Supp. 3d 1, 35-36 n.10 (D.D.C. 2016) (applying futility principles after more than six years). There is "not the slightest doubt that the" three current Commissioners issuing those statements "would simply reaffirm" their nonenforcement reasoning. *NLRB v. Am. Geri-Care, Inc.*, 697 F.2d 56, 64 (2d Cir. 1982). Because the "outcome of a new administrative proceeding is preordained," this Court "may forego the futile gesture of remand to the agency." *Keats v. Sebelius*, No. 13-1524, 2019 WL 1778047, at *7 (D.D.C. Apr. 23, 2019) (internal quotation marks omitted) (finding remand likely futile where intervening events made obvious how agency would handle a required review that may have been missed).

In an analogous situation in *FEC v. Legi-Tech*, the D.C. Circuit considered whether to remand administrative matters to the FEC after it was reconstituted without ex-officio members. 75 F.3d 704, 706 (D.C. Cir. 1996). The Court concluded that a later ratification of earlier actions was adequate because it was unlikely that FEC would reach different outcome if it repeated administrative process from beginning. *Id.* at 709. The same is true here. The approach of three current Commissioners to the passage of more than four years since the last substantive vote, and more than a decade since the conduct giving rise to the complaint in this matter, means that the outcome of additional votes by the agency on proceeding with enforcement is preordained. Accordingly, the district court should forego "the futile gesture of remand to the agency." *Keats*, 2019 WL 1778047 at *7 (citations omitted).

## CONCLUSION

For all the foregoing reasons, the Court should dismiss plaintiff's complaint because it fails to state a claim on which relief can be granted.

Respectfully submitted,

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