UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. AMERICAN ACTION NETWORK, Defendant.	Civil Action No. 18-cv-945 (CRC)

AMERICAN ACTION NETWORK'S MOTION FOR A STAY AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

AAN respectfully moves this Court for a stay of the proceedings in this case pending final appellate resolution of related case *Citizens for Responsibility and Ethics in Washington, et al. v. Federal Election Commission*, D.C. Circuit No. 18-5136 ("*CREW v. FEC*"). Pursuant to Local Civil Rule 7(m), Defendant's counsel conferred with Plaintiff's counsel concerning this motion and was informed that CREW would oppose this Motion, but would agree to stay all deadlines pending its resolution.

I. INTRODUCTION

CREW filed this lawsuit—*CREW v. American Action Network* ("*CREW v. AAN*")—in reliance on a unique statutory provision in the Federal Election Campaign Act ("FECA") that allows this suit *only* if the Federal Election Commission ("FEC" or "Commission") has acted in a manner that was "contrary to law" and refused to conform to a proper declaration stating so. *See* 52 U.S.C. § 30109(a)(8)(C). Those very issues—whether the Commission acted "contrary to law" when it twice dismissed CREW's enforcement complaint against AAN and whether it was required to conform to this Court's different view of the law—are issues that are now before the D.C. Circuit in *CREW v. FEC*. If AAN succeeds in that appeal, and the D.C. Circuit finds that the Commission's prior dismissals were not "contrary to law," there will be no statutory basis for

this lawsuit. All the time and resources spent on briefing and judicial analysis of novel issues in this First Amendment case will have been wasted. That alone is reason to stay.

But there are many more reasons to stay this case. In forty-four years, this is only the second known contested case that has been filed in reliance on this unique statutory provision, and the first case was stayed pending "final appellate resolution" of the case against the FEC on which it depended. *See* Order, *DSCC v. NRSC*, Civ. No. 97-1493 (D.D.C. Aug. 27, 1997). A stay in this context protects invaluable interests—including the FEC's enforcement authority and AAN's right to have these allegations resolved through the confidential and sequential administrative process designed by statute—until the D.C. Circuit can determine whether there is a basis for this lawsuit. It will protect against duplicative litigation, *Reiffin v. Microsoft Corp.*, 104 F. Supp. 2d 48, 58 (D.D.C. 2000), and the "serious risk of chilling protected speech" through additional burdensome litigation, *see Citizens United v. FEC*, 558 U.S. 310, 326-27 (2010). It will not harm CREW, whose allegations focus on advertisements that aired eight years ago. And, because this case and *CREW v. FEC* share the "same parties," the "same subject matter," "grow[] out of the same event," and "involve[] common issues of fact," *see* Notice of Related Cases, *CREW v. AAN*, Dkt. No. 3, the D.C. Circuit's decision will necessarily impact the parties' arguments and the Court's analysis even if this case is ultimately able to proceed.

This is, as a result, a textbook case for a stay. It will either be resolved by the D.C. Circuit, or will be governed by the standard the D.C. Circuit provides. A stay will not harm any party, but proceeding could cause irreparable harm to AAN and the FEC. The Court should enter a stay pending final appellate resolution of *CREW v. FEC*.

II. BACKGROUND

A. FECA Establishes A Multi-Step Process For Enforcement Matters.

This case and *CREW v. FEC* stem from the same FEC enforcement proceeding initiated by CREW in 2012. The FEC has "'primary and substantial responsibility for administering and enforcing [FECA],' including the 'sole discretionary power' to initiate enforcement actions," *CREW I*, 209 F. Supp. 3d 77, 87 (D.D.C. 2016) (citation omitted), and to "determine in the first instance whether or not a civil violation of the Act has occurred," *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981).

Congress requires that enforcement matters follow a confidential and sequential process in order to "safeguard" those charged with FECA violations. *See Combat Veterans for Cong. Political Action Comm. v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015) (citation omitted). Initially, an entity must present its allegations to the FEC in an administrative complaint. 52 U.S.C. § 30109(a)(1). The Commission must then keep its efforts confidential—even as to the party that filed the administrative complaint—until the matter is closed. *See, e.g.*, 52 U.S.C. § 30109(a)(12)(A); *see also, e.g., In re Sealed Case*, 237 F.3d 657, 666-67 (D.C. Cir. 2001) ("We hold that both [52 U.S.C. § 30109](a)(12)(A) and 11 C.F.R. § 111.21(a) plainly prohibit the FEC from disclosing information concerning ongoing investigations under any circumstances without the written consent of the subject of the investigation.").

The Commission must also reach bipartisan agreement about an enforcement matter several times during the administrative process, or must dismiss. *See Combat Veterans*, 795 F.3d at 153 ("Congress designed the Commission to ensure that every important action it takes is bipartisan."). Before conducting an investigation, four Commissioners must find "reason to believe" that FECA was violated. *Id.* § 30109(a)(2). A "reason to believe" finding permits an investigation, after which the Commission may only proceed if four Commissioners find

"probable cause to believe" that a violation occurred. *Id.* § 30109(a)(2), (4). The Commission must then attempt to informally conciliate the matter. *Id.* § 30109(a)(4)(A)(i). Failing such informal resolution, the statute requires the agreement of four Commissioners to file an enforcement action in court. *Id.* § 30109(a)(6).

Congress also created an exclusive judicial review mechanism for use if the Commission dismisses an administrative complaint or unreasonably delays in resolving it. By statute, "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia." 52 U.S.C. § 30109(a)(8)(A). The court must conduct an "extremely deferential" review, *Orloski v.* FEC, 795 F.2d 156, 167 (D.C. Cir. 1986), under which it "may declare that the dismissal of the complaint or the failure to act is contrary to law" and "direct the Commission to conform with such declaration within 30 days," 52 U.S.C. § 30109(a)(8)(C). The district court's order is then subject to appeal, where the D.C. Circuit may "set[ ] aside, in whole or in part, any such order of the district court." *Id.* § 30109(a)(9).

Absent an appeal, or if the D.C. Circuit does not "set aside" the district court's order on appeal, the statute contemplates a second lawsuit—but *only if* the Commission refuses to accept the "contrary to law" finding in the case brought against it. *Id.* § 30109(a)(8)(C). In such an extraordinary circumstance, the statute states that "the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint." *Id.* Only one known contested case has previously been filed; it was stayed, and then dismissed, without the need for substantive action. *See DSCC v. NRSC*, Civ. No. 97-1493 (D.D.C.); *see also* Ex. A (Weintraub statement) ("In the 44-year history of the FEC, this provision has never been fully utilized.").

B. This Litigation Depends On *CREW v. FEC*, Which Is On Appeal.

This case and *CREW v. FEC* stem from CREW's June 7, 2012 administrative complaint, which alleged that AAN violated FECA because it "was a political committee between July 23, 2009 through June 30, 2011, but failed to register as one with the FEC." *See* Joint Appendix at AR 1485 ¶ 19, *CREW v. FEC*, No. 16-2255 (D.D.C. 2018). But a political committee must either be under the control of a candidate or have as its "major purpose" the nomination or election of candidates, *see Buckley v. Valeo*, 424 U.S. 1, 79 (1976), and the Commission has twice decided that AAN did not have the requisite "major purpose" because its official statements, mode of organization, and spending instead show that its major purpose is issue advocacy and grassroots lobbying.

The Commission's votes were split votes, with three Commissioners finding no "reason to believe" there was a violation and three stating that they would investigate further. And the Commission is not alone in having different opinions on the issues in *CREW v. FEC*. This Court reviewed both dismissal decisions and, both times, acknowledged that there are various views on the question of how to determine an entity's "major purpose." For example, in its first decision, this Court noted that the Commission's first dismissal decision was consistent with decisions from the Seventh and Tenth Circuit, but believed that the Commission should have taken a different approach. *See CREW v. FEC*, 209 F. Supp. 3d 77, 91 (D.D.C. Sept. 19, 2016) (citing *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014); *N.M. Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010)). This Court also found error in the Commission's second dismissal decision, but acknowledged that the Commission had balanced "directives that . . . push[ed] the agency in opposite directions." *CREW v. FEC*, No. 16-cv-2255, 2018 WL 1401262, at *14 (D.D.C. Mar. 20, 2018).

The disagreements on the issues in *CREW v. FEC* make it an ideal candidate for an appeal. And at least two of the four current Commissioners agree. They issued a statement that details their concerns with the Court's prior decisions, and expresses their support for an appeal to provide better clarity and certainty in this "important areas of law." Ex. B (Hunter and Petersen statement). AAN filed its notice of appeal on May 4, 2018. *See CREW v. FEC*, No. 18-5136 (D.C. Cir.).

CREW, meanwhile, filed its complaint in this matter on April 23, 2018. CREW bases this Court's jurisdiction on the "contrary to law" finding that is now before the D.C. Circuit in *CREW v. FEC*. *See* Compl. ¶¶ 7-8, 71, *CREW v. AAN*, Dkt. No. 1.

III. ARGUMENT

A stay of this case falls well within the Court's broad discretion to stay all proceedings pending resolution of related litigation. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). *CREW v. FEC* is a distinct case that will either eliminate the basis for this case or "assist in the determination of the questions of law involved." *See id.* at 253. For that reason alone, the Court should grant a stay of these proceedings. But, as detailed below, a stay is justified under any standard, including the traditional four-factor test that governs stays pending appeal.

A. The Court Should Stay This Case Pending Related Litigation.

Whether this litigation proceeds, and what standard applies if it does, depends on *CREW v. FEC*, which is now before the D.C. Circuit. The Court should exercise its authority over its docket to stay this case pending related litigation for purposes of efficiency and fairness.

This Court has "broad discretion to stay all proceedings in an action pending the resolution of independent legal proceedings." *Seneca Nation of Indians v. U.S. Dep't of Health & Human Servs.*, 144 F. Supp. 3d 115, 119 (D.D.C. 2015) (quoting *Hussain v. Lewis*, 848 F. Supp. 2d 1, 2 (D.D.C. 2012)). The Court should exercise that discretion here, where "many of

the applicable issues may be resolved by the D.C. Circuit" and "the D.C. Circuit may otherwise provide instruction on the issues here." *Univ. of Colo. Health at Mem'l Hosp. v. Burwell*, 233 F. Supp. 3d 69, 88 (D.D.C. 2017).

The Court's authority to stay this case flows from "the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 879 n.6 (1998) (citation omitted). The Court's exercise of that authority is "warranted when, as here, a prior case which may have preclusive effect over the instant proceedings is pending on appeal." *Burwell*, 223 F. Supp. 3d at 87. It is never "in the interest of judicial economy or in the parties' best interests" to "litigat[e] essentially the same issues in two separate forums." *IBT/HERE Emp. Reps.' Council v. Gate Gourmet Div. Am.*, 402 F. Supp. 2d 289, 293 (D.D.C. 2005) (citations omitted). That is even more so when the decision on appeal will control the action before this Court. It is then unquestionably appropriate to "defer consideration . . . until the appellate proceedings addressed to the prior judgment are concluded." *Burwell*, 223 F. Supp. 3d at 87 (quoting *Martin v. Malhoyt*, 830 F.2d 237, 264 (D.C. Cir. 1987)). Even if the appellate case does not eliminate the need for further litigation, a stay will "serve the interests of efficiency by allowing the D.C. Circuit to provide guidance on issues affecting the disposition of this case." *Id.* (citation omitted).

The factors favoring a stay are especially strong here, given the sequential judicial review process established by FECA. Congress expressly gave the D.C. Circuit authority to "set[] aside, in whole or in part," an order from this Court that declares a Commission dismissal "contrary to law" and directs conformance with the Court's declaration. 52 U.S.C. § 30109(a)(9). Congress also gave the Commission "'primary and substantial responsibility for administering and enforcing [FECA],' including the 'sole discretionary power'" to decide whether or not to initiate

an enforcement action. *CREW v. FEC*, 209 F. Supp. 3d at 87 (citation omitted). The Commission should not be denied that enforcement authority so long as it remains possible that the D.C. Circuit could find that its dismissals were consistent with the law—and that there is no statutory basis for such an extraordinary delegation of its executive authority.

This is particularly so because this case falls squarely within the Commission's authority to decide whether or not to regulate First Amendment activity. *See, e.g.*, *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981) ("The subject matter which the FEC oversees, in contrast, relates to the behavior of individuals and groups only insofar as they act, speak and associate for political purposes."). The Supreme Court has repeatedly cautioned that the burden of litigation "create[s] an inevitable, pervasive, and serious risk of chilling protected speech." *Citizens United*, 558 U.S. at 327; *see also FEC v. Wisc. Right to Life*, 551 U.S. 449, 469 (2007) (stating that the burdens of litigation "will unquestionably chill a substantial amount of political speech"); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 794 (1988) (finding that "the costs of litigation . . . must necessarily chill speech in direct contravention of the First Amendment's dictates"). A stay will protect against further burdening AAN's First Amendment conduct with additional litigation, when the D.C. Circuit may find that the Commission was correct to dismiss the allegations.

A decision *not* to stay this case would break from precedent. The only other known contested private suit filed pursuant to the FECA was stayed while the case against the FEC was on appeal. *See* Order, *DSCC v. NRSC*, Civ. No. 97-1493 (D.D.C. Aug. 27, 1997). That case involved a failure to act allegation (rather than an improper dismissal allegation), but the same statutory review provisions applied. Citing concerns about confidentiality and simultaneous duplicative proceedings, the district court stayed the private action pending "final appellate

resolution" of the precursor case against the FEC. *See* Order, *DSCC v. NRSC*, Civ. No. 97-1493 (D.D.C. Aug. 27, 1997).

The same stay should be entered here. As then, it will protect confidential information from unwarranted disclosure should the D.C. Circuit find that an investigation is not permitted under the statute because the Commission appropriately voted to dismiss. It will also serve "the compelling public interest in avoiding duplicative proceedings." *Fed. Hous. Fin. Agency v. First Tennessee Bank Nat. Ass'n*, 856 F. Supp. 2d 186, 193 (D.D.C. 2012). Indeed, when the Court "weigh[s] competing interests" for and against a stay, as it must, all valid considerations weigh in favor of one. *See Burwell*, 233 F. Supp. 3d at 88 (citation omitted). The "considerations that may cut against a stay are if 'the second action presents claims or issues that must be tried regardless of the outcome of the first action' or 'there are cogent reasons to fear the effects of delay.'" *Id.* (quoting Wright and Miller § 4433 p. 94 (2003)). But here, the D.C. Circuit's decision could resolve this case. And the time required to obtain an appellate decision does not present cause for concern, as the case looks backward and focuses on CREW's allegation that "AAN was a political committee between July 23, 2009 through June 30, 2011, but failed to register as one with the FEC." *See* Compl. ¶ 8, *CREW v. AAN*, No. 18-945 (D.D.C. 2018) (citing 52 U.S.C. § 30109(a)(8)(C)); Joint Appendix at AR 1485 ¶ 19, *CREW v. FEC*, No. 16-2255 (D.D.C. 2018).

This case should, therefore, be stayed pending related litigation for purposes of efficiency and fairness. The D.C. Circuit's decision may "narrow the issues in the pending case[] and assist in the determination of the questions of law involved." *Fonville v. D.C.*, 766 F. Supp. 2d 171, 174 (D.D.C. 2011). It may also entirely eliminate the need for this litigation. "Given the indistinguishable nature of the legal issues" here and in *CREW v. FEC*, "efficiency requires that

this case be stayed." *Fairview Hosp. v. Leavitt*, Civ. No. 05-1065, 2007 WL 1521233, at *3 (D.D.C. May 22, 2007).

B. This Case Also Satisfies The Four Traditional Factors For A Stay Pending Appeal.

The traditional standard for a stay pending appeal does not govern this motion, as *CREW v. FEC* is on appeal from independent litigation against the FEC. But even if the more stringent four-factor test for a stay pending appeal applied, a stay should be granted pending final appellate resolution of *CREW v. FEC*.

"In the D.C. Circuit, a court assesses four factors when considering a motion to stay and injunction pending appeal: (1) the moving party's likelihood of success on the merits of its appeal, (2) whether the moving party will suffer irreparable injury, (3) whether issuance of the stay would substantially harm other parties in the proceeding, and (4) the public interest." *Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 7, 12 (D.D.C. 2014). Each factor supports a stay here.

First, a stay should issue because *CREW v. FEC* involves "serious legal questions going to the merits" that are "a fair ground of litigation and thus for more deliberative investigation." *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986). In *CREW v. FEC*, this Court resolved important questions about agency authority, the First Amendment, political committee status, and the proper application of the "major purpose" doctrine following the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010). These "serious legal question[s]" justify a stay even if the Court believes that AAN's success on appeal is unlikely. *See Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela*, 185 F. Supp. 3d 233, 250 (D.D.C. 2016) (citation omitted); *see also CREW v. Office of Admin.*, 593 F. Supp. 2d 156, 161 (D.D.C. 2009) (granting stay to "maintain[] the status quo" because "a serious legal

question is presented" even though "the Court cannot agree with CREW that there is a substantial likelihood that it will prevail on the merits of its appeal.").

Of course, AAN believes that it will succeed on appeal. But the Court need not abandon its prior opinions to conclude that success on appeal may be "likely" for purposes of satisfying the first factor of the analysis. *See, e.g.*, *FTC v. Heinz, H.J. Co.*, No. 00-5362, 2000 WL 1741320, at *2 (D.C. Cir. Nov. 8, 2000) ("'50% plus" likelihood of success" is not needed "to justify relief") (citation omitted). The issues in this case have divided courts and Commissioners. The Commission has issued two split-vote dismissals. The Court's first decision expressly parts ways with the Seventh and Tenth Circuits, *see CREW v. FEC*, 209 F. Supp. 3d at 91, and its second decision resolved "directives that . . . push the agency in opposite directions," *CREW v. FEC*, 2018 WL 1401262, at *14. In light of these disagreements, it is at least "likely"—as that term is understood by case law—that the D.C. Circuit could resolve the competing positions differently on appeal. Indeed, existing D.C. Circuit precedent criticizes efforts to regulate as political committees those organizations whose activities consist of asking "the public to demand of candidates that they take certain stands on the issues." *Buckley v. Valeo*, 519 F.2d 821, 863 n.112 (D.C. Cir. 1975) (en banc), *aff'd in part and reversed in part*, 424 U.S. 1 (1976).

Second, there is a "significant possibility" that AAN will suffer irreparable harm absent a stay. *See CREW*, 593 F. Supp. 2d at 161. Congress has carefully crafted a confidential and sequential administrative process for enforcement matters in order to "safeguard" those that, like AAN, are challenged because they have engaged in protected First Amendment conduct. *See Combat Veterans*, 795 F.3d at 153. That process requires dismissal of the charges—before any investigation occurs and before any information is disclosed, even to the complaining party—where there is no "reason to believe" that a FECA violation has occurred. *See* 52 U.S.C.

§ 30109(a)(2); *In re Sealed Case*, 237 F.3d 657, 666 (D.C. Cir. 2001) ("[B]oth FECA and the FEC's regulations interpreting the statute create an extraordinarily strong privacy interest in keeping the records sealed.").

CREW v. FEC places directly before the D.C. Circuit the Commission's prior conclusions that there is no "reason to believe" that AAN violated FECA. If AAN succeeds on appeal, then, the decision will vindicate its statutory right to be free of the type of investigation and disclosure that this case could require. But that could be an empty victory without a stay of this case, which seeks to proceed with precisely the type of investigation and disclosure that Congress foreclosed in the absence of a "reason to believe" finding. For good reason, then, the court relied on similar confidentiality concerns when it previously stayed a contested case pending resolution of the precursor action against the Commission. *See* Order, *DSCC v. NRSC*, Civ. No. 97-1493 (D.D.C. Aug. 27, 1997). Maintaining the status quo will guard against the irreparable harm that AAN would face (through no fault of its own) should there be a different resolution of the important First Amendment issues in *CREW v. FEC* on appeal.

Third, CREW will not suffer harm—let alone "substantial harm"—from a stay, but the FEC could be irreparably harmed absent one. CREW's case depends on the decision in *CREW v. FEC*; it must succeed on appeal there in order to proceed here. As a result, if AAN prevails on appeal, CREW will have suffered no harm as it will have never had a right to pursue this case in the first place. And if AAN does not succeed on appeal, CREW will still not be harmed because its case focuses on AAN's past conduct between July 2009 and June 2011. *See* 52 U.S.C. § 30109(a)(8)(C); *see also* Joint Appendix (AR 1485 ¶ 19), *CREW v. FEC*, No. 16-2255 (D.D.C. 2018). There is thus no imminent deadline or reason to rush ahead, particularly when CREW will share in the efficiencies that waiting for the D.C. Circuit's decision will provide.

In contrast, the FEC could suffer irreparable harm to its enforcement authority should this case proceed without a stay. It has been delegated "'primary and substantial responsibility for administering and enforcing [FECA],'" including the "sole discretionary power" to decide whether or not to initiate an enforcement action. *CREW v. FEC*, 209 F. Supp. 3d at 87 (citation omitted). This case seeks to deny the Commission its enforcement authority by transferring it to a private party. Such extraordinary delegation of executive authority should not occur so long as the D.C. Circuit could conclude that the Commission has done nothing to warrant it.

Finally, the public interest supports a stay. The public has a strong interest in clarity and consistency when First Amendment rights are concerned. *Cf., Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 499 (1982) (stating that additional "clarity" is required where First Amendment rights are implicated). That interest will be furthered by a stay, which will allow the D.C. Circuit to resolve the First Amendment issues in *CREW v. FEC*, and prevent any potentially inconsistent rulings from this Court in the meantime. The public interest also favors a stay in order to preserve the intended sequenced and confidential statutory review process. Proceeding now, without regard to the fact that the D.C. Circuit could still conclude that AAN is entitled to the protections of the administrative process, would send a message that could chill First Amendment activity—something fundamentally at odds with the public interest. *See, e.g., Virginia v. Hicks*, 539 U.S. 113, 119 (2003) ("Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas."). As a result, even under the more stringent stay pending appeal standard, this Court should maintain the status quo and permit further analysis of the important First Amendment issues on appeal in *CREW v. FEC* before proceeding with additional and duplicative litigation here.

IV. CONCLUSION

This case depends on the result of *CREW v. FEC*, which is presently on appeal. The Court should stay all further proceedings pending its final appellate resolution.

Respectfully submitted,

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