UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*,	)	
Plaintiffs-Cross Appellants,	)	Nos. 16-5300, 16-5343
v.	)	
FEDERAL ELECTION COMMISSION,	)	
Defendant-Appellee,	)	
AMERICAN ACTION NETWORK, INC.,	)	**REPLY**
Intervenor Defendant-Appellant.	)	

APPELLEE FEDERAL ELECTION COMMISSION'S
REPLY IN SUPPORT OF ITS MOTION TO DISMISS APPEAL
FOR LACK OF JURISDICTION

In their responses to the Federal Election Commission's ("Commission" or "FEC") motion to dismiss, appellant American Action Network, Inc. ("American Action Network") and cross-appellants Citizens for Responsibility and Ethics in Washington and Melanie Sloan (collectively, "CREW") confirm the prematurity of these appeals.

American Action Network acknowledges, as it must, the pendency of directly relevant proceedings in the court below, and does not dispute that the outcome of such proceedings could obviate its anticipatory appeal. And while it

has apparently abandoned its claim of jurisdiction under 28 U.S.C. § 1291, it insists, without a single supporting decision, that the Federal Election Campaign Act, 52 U.S.C. § 30109(a)(9) ("FECA"), should be construed to authorize its immediate appeal over a non-final remand order. More than a hundred years of jurisprudence makes clear, however, that appellants must wait until final resolution of the underlying matter before invoking this Court's jurisdiction, if at all. Indeed, if the district court upholds the post-remand dismissal of CREW's claims regarding American Action Network, the organization, as a prevailing party, may lack any interest in appellate review of the lower court's initial decision.

American Action Network's appeal must be dismissed for the additional reason that it lacks standing. Its *anticipated* injury traces directly to the ongoing litigation regarding the post-remand dismissal decision, review of which is still pending in the court below. American Action Network lacks standing at this time to obtain premature appellate review of the district court's initial remand order, which did not directly injure the organization because on remand, the administrative complaint against it was again dismissed.

For its part, CREW does not even attempt to establish this Court's jurisdiction over the appeals, and effectively concedes that if American Action Network's appeal is dismissed, CREW's conditional cross-appeal must also be dismissed.

I. THE FINAL-JUDGMENT REQUIREMENT APPLIES HERE

Contrary to American Action Network's assertion (Opp'n at 2 (Doc. # 1656950)), the FEC's jurisdictional challenge does not "rest[] solely on 28 U.S.C. § 1291." Instead, the Commission invoked the general and well-established principle that, except in certain circumstances not relevant here, finality is a necessary predicate to appellate jurisdiction. (FEC Mot. at 10-13 (Doc. # 1650065).) This foundational principle applies equally to this Court's jurisdiction under 28 U.S.C. § 1291 and 52 U.S.C. § 30109(a)(9), both of which American Action Network invoked in its notice of appeal, (Doc. # 1642533, at ECF p. 10). The FEC's motion to dismiss thus correspondingly encompassed both provisions. American Action Network now appears to have abandoned its reliance on section 1291. (*Compare id.* (invoking jurisdiction under section 1291), *with* Opp'n at 2, 11 (asserting that the applicability of section 1291 is "irrelevant" and "beside the point").)

The finality requirement for appellate jurisdiction is such a bedrock principle of federal law that it has long been engrafted onto statutes that, like section 30109(a)(9), do not expressly require finality. *McLish v. Roff*, 141 U.S. 661, 664-66 (1891); *see also, e.g.*, *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 755 (1986) (interpreting judicial-review provision to require finality even though it was not expressly limited to review of final orders),

overruled on other grounds by Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); *Fed. Power Comm'n v. Metro. Edison Co.*, 304 U.S. 375, 384-85 (1938) (same); *Meredith v. Fed. Mine Safety & Health Review Comm'n*, 177 F.3d 1042, 1047-48 (D.C. Cir. 1999) (same); *Papago Tribal Util. Auth. v. Fed. Energy Regulatory Comm'n*, 628 F.2d 235, 238 (D.C. Cir. 1980) (same); 16 Charles A. Wright, *et al.*, *Fed. Prac. & Proc. Juris.* § 3942 (3d ed. updated Apr. 2016) ("A finality requirement is commonly attributed . . . to statutes that simply provide for review of administrative orders.").

Over 100 years ago, the Supreme Court considered a statute that authorized direct "appeals or writs of error" to the Court in certain enumerated cases. *McLish*, 141 U.S. at 664. The appellant argued that the Court had jurisdiction over an interlocutory order because the provision did not expressly require finality, whereas other provisions of the same statute did. *Id.* at 664-65.

The Supreme Court disagreed, holding that the provision's omission of the word "final" did not abrogate the long-standing finality requirement for appellate jurisdiction. *Id.* at 664-66. It held that the provision must be interpreted in the context of prior legislation regarding appellate jurisdiction and the "long-standing rules of practice and procedure in the federal courts." *Id.* at 665. Finality, the Court explained, was "a well-settled and ancient [common law] rule of English practice," which the United States adopted:

> From the very foundation of our judicial system the object and policy of the acts of congress in relation to appeals and writs of error . . . have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal.

Id. at 665-66. Absent evidence that Congress intended "so radical a change" as to eliminate the finality requirement, the Court held that the provision granted appellate jurisdiction only over final judgments. *Id.* at 666.

More recently, the Supreme Court and this Court confirmed that a judicial-review provision silent as to finality is *presumed* to contain an implicit finality requirement unless there is an express indication otherwise. *See Bell v. New Jersey*, 461 U.S. 773, 777-79 (1983) ("The strong presumption is that judicial review will be available only when agency action becomes final."); *Meredith*, 177 F.3d at 1048 (construing appeal provision to include finality requirement "[i]n the absence of any clear evidence that Congress intended a more generous review than the norm").[1]

Nothing in section 30109(a)(9) overcomes this "strong presumption." American Action Network emphasizes section 30109(a)(9)'s reference to "any judgment" (Opp'n at 10), but in similar contexts, courts have declined to interpret

[1] *Cf. Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1232 (2014) (holding that, when interpreting a statute, common-law adjudicatory principles presumptively apply); *United States v. Texas*, 507 U.S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law.").

the word "any" as abrogating the presumption of a finality requirement. *Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 106, 112-13 (1948) (holding that jurisdiction under statute authorizing judicial review of "any order" was limited to final orders); *Carter/Mondale Presidential Comm. v. FEC*, 711 F.2d 279, 284 n.9 (D.C. Cir. 1983) (similar); *Rosenthal & Co. v. Commodity Futures Trading Comm'n*, 614 F.2d 1121, 1125-27 (7th Cir. 1980) (similar); *Puget Sound Traffic Ass'n v. Civil Aeronautics Bd.*, 536 F.2d 437, 438-39 & n.2 (D.C. Cir. 1976) (similar).

Further, section 30109(a)(9) authorizes appeals only of a "judgment" — a word that itself connotes finality. *Black's Law Dictionary* 918 (10th ed. 2014) (defining "judgment" as "[a] court's final determination of the rights and obligations of the parties in a case").

American Action Network hypothesizes (Opp'n at 10) that Congress intended section 30109(a)(9) to authorize appeals of non-final remand orders, but it fails to identify any legislative history demonstrating that Congress viewed remand orders to the FEC so differently that it intended to depart from over 100 years of common-law practice in the context of FECA.

Accordingly, under *McLish* and its progeny, section 30109(a)(9) should be construed to include the same finality requirement that applies to other non-final remand orders.

II. THE DECLARATORY JUDGMENT ACT IS NOT AN END-RUN AROUND WELL-ESTABLISHED FINALITY REQUIREMENTS

American Action Network's attempt (Opp'n at 2, 10) to establish appellate jurisdiction pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201(a), is similarly misguided. That statute may "enlarge[] the range of remedies available in the federal courts but [it] d[oes] not extend their jurisdiction." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). The statute thus does not "make declaratory judgments somehow more final, or final at an earlier stage, than other sorts of judgments." *Peterson v. Lindner*, 765 F.2d 698, 703 (7th Cir. 1985). Rather, the Declaratory Judgment Act "mean[s] no more than that with regard to finality and review, declaratory judgments are like other judgments." *S. Parkway Corp. v. Lakewood Park Corp.*, 273 F.2d 107, 108 (D.C. Cir. 1959); *see also Peterson*, 765 F.2d at 703 (holding that the Declaratory Judgment Act stands for the "unremarkable proposition that when a declaratory judgment otherwise meets the requirements for finality, it will be considered final even though the relief granted is 'merely' declaratory rather than coercive").

Indeed, litigants seeking judicial review of agency actions often seek a declaration as to the legality of the challenged agency action. *See* 33 Charles A. Wright, *et al.*, *Fed. Prac. & Proc. Judicial Review* § 8312 (1st ed. updated Apr. 2016) (noting declaratory judgment is one remedy available under the Administrative Procedure Act). Under American Action Network's theory, all

remand orders so declaring would be transformed into final judgments under the Declaratory Judgment Act. Yet the organization fails to identify a single case where such a remand order was found to be a "final" appealable judgment pursuant to that statute. To the contrary, this Court has found that a remand order granting declaratory relief was *not* a final appealable judgment. *Sierra Club v. U.S. Dep't of Agric.*, 716 F.3d 653, 656 (D.C. Cir. 2013); *see also Alsea Valley All. v. Dep't of Commerce*, 358 F.3d 1181, 1184-86 (9th Cir. 2004) (internal quotation marks omitted) (finding district court remand order "declar[ing the agency's action] unlawful and set[ting it] aside as arbitrary and capricious" not to be a final appealable order).

The remand order at issue here, like other remand orders, is not a "final" appealable judgment.

III. AMERICAN ACTION NETWORK LACKS STANDING TO APPEAL AT THIS TIME

As a result of the challenged remand order, the Commission reconsidered and a controlling group of Commissioners again dismissed CREW's administrative complaint against American Action Network. (FEC Mot. at 7-8.) That post-remand dismissal decision is pending further review by the district court. (*Id.* at 9.) While the Commission agrees that American Action Network *would* have standing to challenge the remand order in connection with a timely appeal of any *future* adverse final decision by the district court regarding the post-remand dismissal,

American Action Network has failed to establish that it has standing to challenge the remand order *now*. Its exclusive reliance (Opp'n at 15) on this Court's inapposite decision in *Crossroads Grassroots Policy Strategies ("Crossroads") v. FEC*, 788 F.3d 312 (D.C. Cir. 2015), is misplaced.

In *Crossroads*, this Court considered the distinct question of whether an administrative respondent had standing to intervene as of right as a defendant in an action for judicial review of the FEC's dismissal of a complaint against that respondent. 788 F.3d at 316-19. The Court found that "[w]hatever the ultimate outcome, Crossroads has a concrete stake in the favorable agency action currently in place," and it thus held that Crossroads had standing to intervene as a defendant in the district court litigation. *Id.* at 319.

Standing to intervene, however, does not automatically confer standing to appeal. *Diamond v. Charles*, 476 U.S. 54, 68 (1986). As this Court has held: "The most obvious difference between standing to appeal and standing to bring suit is that the focus shifts to injury caused by the judgment rather than injury caused by the underlying facts." *Nat. Res. Def. Council v. Pena*, 147 F.3d 1012, 1018 (D.C. Cir. 1998) (quoting 15A Charles Alan Wright, *et al.*, *Fed. Prac. & Proc.* § 3902, at 63 (2d ed. 1991)).

Here, American Action Network is conflating the two. It claims to be at "risk of further enforcement proceedings at the Commission or in district court."

(Opp'n at 1; *see also id.* at 13). The challenged remand order, however, resulted in reexamination and dismissal, not an investigation or enforcement. (FEC Mot. at 7-8.) American Action Network is thus wrong in claiming (Opp'n at 14) that the remand order "reopened an investigation that had been closed."[2] The organization thus did not, in fact, suffer a direct injury from the remand order. Indeed, American Action Network concedes that it is currently a "beneficiary" of the agency's "favorable decision" on remand. (*Id.* at 14.)

American Action Network's speculation about a "risk" of further enforcement proceedings is based on CREW's pending challenge to the post-remand dismissal decision. American Action Network may have standing to defend that dismissal, *i.e.*, "the favorable agency action currently in place," *Crossroads*, 788 F.3d at 316-19, and it is currently doing so in the proceedings below. *See* Am. Action Network's Opp'n to Pls.' Mot. for an Order to Show Cause, *CREW v. FEC*, No. 14-cv-1419-CRC (D.D.C. filed Dec. 12, 2016) (Docket No. 66).[3] But the post-remand dismissal is not currently before this Court and thus

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[2] American Action Network also incorrectly states that it is currently "governed" by the remand order. (Opp'n at 14.) Not so. The order was directed to the FEC, not American Action Network. The operative decision "governing" American Action Network at this time is the post-remand dismissal of the allegations against the organization.

[3] Contrary to American Action Network's suggestion (Opp'n at 16-17), the controlling Commissioners' incorporation in their post-remand dismissal decision of portions of their original decision that the district court did *not* find contrary to

cannot serve as a basis for standing here. Nor can the fact that there is litigation around the dismissal serve as a basis for standing. *See Crossroads*, 788 F.3d at 317 ("[T]he litigation expenses rationale [as a basis for standing] already has been rejected in this Circuit.").

Finally, American Action Network asserts that, to the extent this appeal is moot, the issues are "capable of repetition, yet evading review," (Opp'n at 18), but it does not even attempt to satisfy the elements of that exception to mootness, including showing that this case cannot be fully litigated. *See FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 462-63 (2007). In fact, the issues here *can and will be fully litigated* in the ongoing district court litigation. American Action Network's preference to bypass a final decision by the district court does not establish its standing to appeal at this time.

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law (FEC Mot., Exh. 2, at ECF p. 3), does not revive that otherwise invalidated decision. And even if the district court did not expressly vacate the initial dismissal decision, the court's finding that it was "contrary to law" had the same effect. *See, e.g., Select Specialty Hosp. of Atlanta v. Thompson*, 292 F. Supp. 2d 57, 69 (D.D.C. 2003) (holding that agency action was effectively vacated by a decision invalidating that action based on legal error). American Action Network is thus wrong in suggesting (Opp'n at 16) that the invalidated dismissal decision has not been superseded, and in questioning the propriety of the Commission's citation (FEC Mot. at 15 n.8) to decisions by this Court concluding that appeals concerning superseded agency actions were moot.

Respectfully submitted,

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I hereby certify that on this 6th day of February, 2017, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system.

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