UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant, AMERICAN ACTION NETWORK, Intervenor-Defendant.	Civil Action No. 1:14-cv-01419-CRC REPLY MEMORANDUM

AMERICAN ACTION NETWORK'S REPLY MEMORANDUM
IN FURTHER SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The question before the Federal Election Commission ("FEC" or "Commission") was a fact-specific and limited one—between July 2009 and June 2011, was American Action Network ("AAN") a "political committee" under the Federal Election Campaign Act ("FECA" or "Act")? The FEC correctly determined that it was not. Political committee status requires that the organization either be under the control of a candidate or have as its singular "major purpose" the "nomination or election of a candidate." *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). AAN is instead "an issue advocacy group that occasionally speaks out on federal elections." AR1710.

With its reply brief, CREW does not challenge the Commission's decision on its own terms. Rather, it asks this Court to start afresh, without any regard or deference to what the FEC concluded, and issue an original ruling to broaden the scope of disclosure permitted by the First Amendment. But that is not the role of this Court. Precedent requires this Court to defer to the justification articulated in the Statement of Reasons provided by the controlling bloc of Commissioners. And that Statement of Reasons followed directly from precedent that distinguishes express advocacy and its functional equivalent from issue advocacy. Only the former can justify the onerous and intrusive regulatory burdens that FECA imposes on political committees. That is precisely what the controlling bloc of Commissioners concluded when they declined to impose those burdens on AAN, an "issue advocacy group." AR1710.

This Court should reject CREW's invitation to make new law in this case. Regardless of what CREW thinks the law should or could be, this Court need only decide whether CREW has shown that the FEC's dismissal, on the facts of this case, was based on an impermissible interpretation of FECA under the law as it is now, or was otherwise "arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). CREW has not, and cannot, meet that standard. Only about fifteen percent of AAN's spending between 2009

and 2010 was for advertisements that expressly advocated the election or defeat of federal candidates. AAN's "major purpose" is not the nomination or election of federal candidates.

The Court should reject CREW's request for a pathmarking decision for a second reason as well: it would be an improper advisory opinion. The statute of limitations has run on the violations that CREW seeks to pursue. Given the FEC's longstanding practice of dismissing stale complaints, there is not a significant likelihood (as there must be) that a decision from this Court can redress the injury that CREW claims.

This case is not one that CREW can use to chart new ground. The FEC's case-specific decision about conduct that occurred over five years ago was reasonable and consistent with precedent. The Court should grant summary judgment to AAN.

ARGUMENT

I. The Commission's Dismissal Is Entitled To *Chevron* Deference.

This Court "owe[s] deference to a legal interpretation . . . that prevails on a 3-3 deadlock." *In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000). CREW nonetheless argues that the legal interpretation that prevailed here on a 3-3 vote should not be given any deference. *See* Plaintiffs' Reply at 2-13 (Apr. 22, 2016) (Doc. 40) ("Reply"). CREW's argument is based on several faulty premises. For example, CREW argues that AAN requires *Chevron* deference to prevail—but AAN prevails under any standard of review because the FEC's decision was—as AAN *has* argued—reasonable *and* correct. *See id.* at 1, 3; AAN's Br. at 16-38 (Mar. 1, 2016) (Doc. 38) ("AAN Br."). CREW is also wrong about the result of an affirmance here, claiming that it will let AAN "keep all of [its] contributors secret." Reply at 2. But AAN will remain subject to the FEC's event-driven disclosure requirements that force AAN to disclose contributions made for the purpose of furthering AAN's candidate advocacy. *See* AAN Br. at 3-4; FEC's Br. at 6 (Mar. 1, 2016) (Doc. 36). And, contrary to CREW's claim, AAN has not

asked for "extreme deference." Reply at 2. It has asked for the deference that is "particularly appropriate in the context of the FECA." *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988). CREW's substantive arguments against deference are just as meritless.

A. Deference To The FEC, A Bipartisan Agency, Is Particularly Appropriate.

CREW seeks to render the FEC essentially irrelevant to the determination of "political committee" status under FECA, arguing that *de novo* review is required and prevents any deference to the FEC's decision. *See* Reply at 1, 2-13, 15, 20-22, 28-29, 35, 38, 43, 44-46. This extraordinary claim is based on two facts—(1) the Commission considered judicial precedent and First Amendment principles in reaching its decision, and (2) the Commission voted 3-3 to dismiss. But the FEC *must* consider precedent. It has a "unique prerogative to safeguard the First Amendment when implementing its congressional directives." *Van Hollen v. FEC*, 811 F.3d 486, 501 (D.C. Cir. 2016), *pet'n for reh'g filed* (Mar. 4, 2016). And Congress intended that 3-3 votes by the Commission would have substantive meaning. There is nothing unique about this case that renders deference improper.

The FEC is a unique bipartisan agency that has as its "sole purpose the regulation of core constitutionally protected activity." *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003). Congress, as result, designed the agency so that "every important action it takes is bipartisan." *Combat Veterans for Congress PAC v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015). "[N]o more than three of its six voting members may be of the same political party," *FEC v. Dem. Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981), and four votes are required for an investigation to proceed, 52 U.S.C. § 30109(a)(2). In this way, Congress created a process that ensures that "enforcement actions . . . will be the product of a mature and considered judgment"—and not the result of politics or partisanship. *Combat Veterans*, 795 F.3d at 153. No one may be subjected to an intrusive investigation or prosecution absent agreement across party lines.

This makes the FEC "'precisely the type of agency to which deference should presumptively be afforded' because [its] bipartisan composition makes it especially fit to 'decide issues charged with the dynamics of party politics'" that implicate constitutional rights. *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005) (quoting *Dem. Senatorial Campaign Comm.*, 454 U.S. at 37). Congress not only gave the FEC "'sole discretionary power' to determine in the first instance whether or not a civil violation of the Act has occurred," *Dem. Senatorial Campaign Comm.*, 454 U.S. at 37, but designed the process so that deference to the FEC's decision—even if the result of a split vote—is "particularly appropriate." *Common Cause*, 842 F.2d at 448. By statute, a 3-3 vote means that the Commission has found no "reason to believe" a violation occurred, and the rationale of the Commissioners "who voted to dismiss . . . necessarily states the agency's reasons for acting as it did." *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992). The court thus "owe[s] deference to a legal interpretation . . . that prevails on a 3-3 deadlock." *Sealed Case*, 223 F.3d at 779.

CREW would instead deny the FEC deference because it did the job it was created to do. "[T]he very nature of the FEC dictates that all Commission determinations will touch upon political speech" and "implicate[] the First Amendment." *Bush-Quayle '92 Primary Comm., Inc. v. FEC*, 104 F.3d 448, 452 (D.C. Cir. 1997) (citation omitted). The FEC nonetheless remains "precisely the type of agency to which deference should presumptively be afforded." *Id.* (citation omitted). That deference extends to this case, where the inability to reach bipartisan agreement, by statute, means that there is no "reason to believe" an investigation is warranted.

B. Determination of "Political Committee" Status Under FECA Is A Statutory Question Entitled To Deference.

CREW argues that deference should not apply based on cases where *de novo* review was applied to agency interpretations of judicial precedent. *See* Reply at 2-7. But this case is about

the FEC's interpretation of its statute. CREW alleged that AAN committed "direct . . . violations of [FECA]." AR1480. The FEC similarly defined the question, stating "[i]n this matter, we must determine if [AAN] . . . is a 'political committee' under [FECA]." AR1690.

To decide this statutory question, the FEC applied the "major purpose" doctrine, which was first articulated in *Buckley*. But the mere fact that the doctrine first appeared in a Supreme Court case does not deny deference to all subsequent applications of FECA's political committee requirements. *See Bush-Quayle '92*, 104 F.3d at 452. Rather, proper application of the "major purpose" doctrine remains a statutory question. It is a *statutory* construction of FECA that was adopted to avoid questions of constitutionality. *Buckley*, 424 U.S. at 79 ("'political committees' so construed" avoids vagueness and overbreadth concerns); *see also McConnell v. FEC*, 540 U.S. 93, 191-91 (2003) (describing *Buckley*'s related "express advocacy limitation" as "the product of statutory interpretation"); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 487 (7th Cir. 2012) ("the 'major purpose' limitation . . . was a creature of statutory interpretation"). By definition, then, the "major purpose" doctrine is one of "competing plausible interpretations of a statutory text." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). The FEC thus retains its authority to interpret the statute and receive *Chevron* deference for that interpretation. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 982 (2005).

CREW argues that the FEC should not receive this deference because it was the Supreme Court that interpreted the statute, rather than a lower court. Reply at 6. But the authorities that CREW cites do not support this distinction. Justice Stevens's concurring opinion in *Brand X* stated only that deference may "not necessarily be applicable" if a Supreme Court decision "remove[s] any pre-existing ambiguity." *Brand X*, 545 U.S. at 1003 (Stevens, J., concurring). That has not occurred here. The *Cuomo* decision instructed agencies to consider relevant

precedent regardless of whether it is "authoritative on the question." *Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519, 528 n.2 (2009). And the *Home Concrete* case simply recognized that a pre-*Chevron* reference to a possible ambiguity may not reflect a post-*Chevron* conclusion that the statute includes a gap that the agency should be given deference to fill. *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1844 (2012).

Here, there can be no question that *Buckley*'s construction of the statute left ambiguities that the FEC is uniquely positioned to fill. CREW concedes that judicial precedent can leave "a hole" in the statutory scheme—and that the Commission is entitled to *Chevron* deference when it regulates to fill it. Reply at 5 (citing *Van Hollen*, 811 F.3d at 490-92). CREW's brief provides evidence of some of the "holes" that *Buckley* left in the statutory scheme, as CREW concedes that *Buckley* does not *require* the position it advocates here. *See* Reply at 21. This is because the Court "did not mandate a particular methodology for determining an organization's major purpose." *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 556 (4th Cir. 2012). Application of the "major purpose" doctrine instead "involves difficult policy choices that agencies are better equipped to make than courts." *Brand X*, 545 U.S. at 980. Those policy choices should be made by the agency charged with "primary and substantial responsibility for administering and enforcing the Act." *See Buckley*, 424 U.S. at 109; *see also Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 290 n.10 (4th Cir. 2011) (noting that *Chevron* deference would apply to an agency's formal interpretation of the "significant nexus" test that the Court grafted onto the Clean Water Act).

The cases that CREW cites confirm that deference is required here. For example, CREW places great weight on *Akins v. FEC*, 101 F.3d 731 (D.C. Cir. 1996), which has no "precedential effect" because it was vacated by the Supreme Court. *FEC v. Akins*, 524 U.S. 11, 29 (1998);

O'Connor v. Donaldson, 422 U.S. 563, 577 n.12 (1975). But the case also fails to undermine the use of deference here. *Akins* made clear that its decision reached only the question of "*whether* the Court established a major purpose test," and not "*how* such a test is to be implemented." *See Akins*, 101 F.3d at 740-41 (emphases in original). This case involves only the latter question.

CREW cites other cases that also turn on the threshold question of *whether* precedent applies and not (as here) on *how* to implement the statute in light of indisputably applicable precedent. *See Negusie v. Holder*, 555 U.S. 511, 520 (2009) (whether decision applying the Displaced Persons Act of 1948 applies to case applying the Refugee Act of 1980); *Ne. Beverage Corp. v. NLRB*, 554 F.3d 133, 138 (D.C. Cir. 2009) (whether decision about an "ongoing 'labor dispute'" applies where there is no ongoing labor dispute); *McDonald Partners, Inc. v. NLRB*, 331 F.3d 1002, 1006 (D.C. Cir. 2003) (whether decision about post-contract presumption applies to pre-contract evidence). Here, all agree that the "major purpose" doctrine applies. *See, e.g.*, Reply at 2-3. The question is *how* it applies, and on that question, the FEC receives deference.

CREW relies on cases that confirm this point. Having resolved a threshold question, the D.C. Circuit called upon the agency to implement the statute "not only by applying whatever principles it can derive from the Supreme Court's decisions, but also by considering the policy implications" involved. *N.Y. N.Y., LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002). The Supreme Court did as well. *See Negusie*, 555 U.S. at 520 ("Whatever weight or relevance these various authorities may have in interpreting the statute should be considered by the agency in the first instance . . . ."). That is exactly what the FEC did here—it considered First Amendment principles and policy considerations to reach a conclusion that AAN is not a political committee. Its "legal interpretation" is entitled to deference. *Sealed Case*, 223 F.3d at 779; *FEC v. Nat'l Rifle Ass'n*, 254 F.3d 173, 182, 187 (D.C. Cir. 2001) (deferring to FEC interpretation based, in

part, on Supreme Court precedent); *see also Dep't of Air Force, 436th Airlift Wing, Dover Air Force Base v. Fed. Labor Relations Auth.*, 316 F.3d 280, 285-86 (D.C. Cir. 2003) (finding agency construction reasonable in part because it was supported by precedent).[1]

C. Split-Vote Dismissals Are Entitled To *Chevron* Deference Under Settled Precedent.

CREW also cannot escape Circuit precedent, which requires this Court to defer to the FEC's split-vote dismissal, by pointing to the Supreme Court's decision in *United States v. Mead*, 533 U.S. 218 (2001). *See* Reply at 7-11. "[D]istrict judges, like panels of this court, are obligated to follow controlling circuit precedent until either we, sitting en banc, or the Supreme Court, overrule it." *United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997). And the *Mead* decision did not expressly or implicitly overrule the D.C. Circuit's decision in *Sealed Case* or its holding that "we owe deference to a legal interpretation . . . that prevails on a 3-3 deadlock." 223 F.3d at 779. Instead, *Sealed Case* is entirely consistent with *Mead*.

CREW claims that *Mead* held that *Chevron* deference applies only to agency actions that are binding on third parties in future cases. Reply at 7-11. *Mead* did not. Instead, *Mead* considered two types of agency actions: (1) those that result from "a relatively formal administrative procedure tending to foster . . . fairness and deliberation," and (2) those for which "no such administrative formality was required and none was afforded." *Mead*, 533 U.S. at 230-31. For the first formal group, *Mead* found it "fair to assume generally that Congress contemplates administrative action with the effect of law," such that *Chevron* applies. *Id.* at 230. Indeed, "a very good indicator of delegation meriting *Chevron* treatment" are "express

[1] The other cases that CREW cites are inapplicable. In one, the agency ignored the constitutional issues that precedent sought to avoid. *Univ. of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). Here, the FEC did the exact opposite—it considered the constitutional issues in order to avoid them. In another, the court found that the agency decision did not include a statutory interpretation. *Pub. Citizen v. Burke*, 843 F.2d 1473, 1478 (D.C. Cir. 1988). Here, the FEC recognized that the issue before it was one of statutory interpretation. *See* AR1690. And in another the question of deference was not presented because the agency did not decide the contested issue. *Robertson v. FEC*, 45 F.3d 486, 489 (D.C. Cir. 1995). Here, the FEC did.

congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." *Id.* at 229. For the second informal group, *Mead* left open the possibility that *Chevron* deference could apply if, for example, the agency action was binding on third parties. *Id.* at 231-33.

Mead did not eliminate *Chevron* deference where, as here, the interpretation was "arrived at after . . . formal adjudication," *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000), and in "a form expressly provided for by Congress," *Sealed Case*, 223 F.3d at 780 (citation omitted). Indeed, there has not been "a single case in which a general conferral of . . . adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority." *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1874 (2013).

Mead could not have overruled *Sealed Case* because *Sealed Case* considered the two categories of agency action identified in *Mead* and recognized that those arrived at informally may "*lack the force of law* [and] not warrant *Chevron*-style deference." *Sealed Case*, 223 F.3d at 780 (quoting *Christensen*, 529 U.S. at 587) (emphasis in original). *Sealed Case* then found that a 3-3 FEC decision is *not* that type of informal action, but instead "falls on the *Chevron* side of the line." *Id.* For good reason. It results from a formal process that is "part of a detailed statutory framework for civil enforcement and is analogous to a formal adjudication." *Id.* It "assumes a form expressly provided for by Congress." *Id.* (citation omitted). And it is a "decision . . . by the Commission itself, not the staff, [which] precludes further enforcement." *Id.*

The other cases that CREW cites confirm that *Chevron* deference applies here. They provide that "*Chevron* deference is appropriate" where, as here, Congress has expressly delegated authority to an agency and the agency has acted in a formal manner in accordance with that authority. *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 56-57

(2011). And they show that the D.C. Circuit has only looked to other factors—such as the binding effect on third parties—after finding that an agency interpretation was *informally* developed. *See Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec*., 769 F.3d 1127, 1136-37 (D.C. Cir. 2014) (interpretations were not "marked by the qualities that might justify *Chevron* deference in the absence of a formal adjudication or notice-and-comment rulemaking"); *Am. Fed'n of Gov't Emps., AFL-CIO v. Veneman*, 284 F.3d 125, 129 (D.C. Cir. 2002) (interpretation "was not the product of a statutorily-created decision-making process, such as formal adjudication or notice-and-comment rulemaking"); *see also Mt. Royal Joint Venture v. Kempthorne*, 477 F.3d 745, 754 (D.C. Cir. 2007) ("If the agency enunciates its interpretation through . . . formal adjudication, we give the agency's interpretation *Chevron* deference.").

Finally, CREW cannot avoid *Sealed Case* by claiming estoppel. *See* Reply at 8-9, 11-12. AAN has simply stated that four Commissioners must agree in order to establish a Commission policy or regulation. But, under FECA, three Commissioners can dismiss a Complaint and it has the "force of law." That is what the D.C. Circuit held, *Sealed Case*, 223 F.3d at 779-80, and what Congress intended, *Combat Veterans*, 795 F.3d at 153. Neither the FEC nor AAN has stated otherwise. *Chevron* deference applies here. The Court can only reverse if the FEC's dismissal was the "result of an impermissible interpretation of" FECA, was "arbitrary or capricious," or was an "abuse of discretion." *Orloski*, 795 F.2d at 161. It was not.

II. The Commission's Dismissal Was Not "Contrary To Law."

CREW's challenge fails on the merits, particularly under the deferential review that applies. The FEC looks to two factors when determining "political committee" status: (1) the organization's central purpose, as expressed in its publications and public statements, and (2) the organization's spending on Federal campaign activity as compared to its overall spending. *Political Committee Status*, 72 Fed. Reg. 5,595, 5,601 (Feb. 7, 2007). This case turns on the

second factor. With respect to the first factor, the record shows that AAN is a not-for-profit social welfare organization, which focuses its efforts primarily on issue advocacy and grassroots lobbying and organizing. AR1562-63. CREW did not previously challenge this issue-centric focus—and while it now challenges it in a footnote, its argument is based solely on the spending that is the subject of the second factor of the FEC's analysis. *See* Reply at 47 n.24; *see also Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, No. 14-2014, 2015 WL 7428532, at *9 (D.D.C. Nov. 20, 2015) ("Arguments made in a perfunctory manner, such as in a footnote, are waived.") (citation omitted); *In re Yelverton*, 527 B.R. 557, 563 (D.D.C. 2014) (declining to reach arguments "raise[d] for the first time in . . . reply briefs").

With respect to the second factor, the record shows that, during the two-year period from July 23, 2009 to June 30, 2011, AAN only devoted about fifteen percent of its spending to advertisements that expressly support or oppose candidates for federal office. AR1709. The FEC reasonably concluded that this small amount does not establish that "the major purpose" of AAN is the nomination or election of candidates. AR1709-10, 1716.

During those same two years, AAN spent additional amounts on electioneering communications about the issues that are germane to its organizational purpose. CREW's case depends on treating these issue advertisements as indicative of a "major purpose" to nominate or elect candidates. CREW does not dispute that AAN's electioneering communications *were* genuine issue advertisements about legislative and policy issues. Reply at 23-24; *see also* AAN Br. at 22-26.[2] Instead, CREW argues that they should be treated like express advocacy in the

[2] CREW does make two arguments about the issue advertisements, neither of which merits much discussion. First, CREW argues that the Court should strike citations in AAN's brief to news articles that confirm that AAN's advertisements related to live legislative issues. *See* Reply at 14 n.5. CREW's request is ironic given CREW's reliance on news articles. It is also meritless, as the articles merely provide background information that confirms the issue-centric nature of AAN's advertisements, something that CREW has not disputed in its Reply. Second, CREW argues that AAN misstated the record by arguing that just six electioneering communications are at issue. *Id.* at 24 n.13. In fact, AAN stated consistently with the record that CREW's administrative complaint described six

"major purpose" analysis. *Id*. CREW's argument fails to identify anything "contrary to law" in the FEC's decision. Indeed, in this case, it is CREW's position that is contrary to precedent.

A. The Commission's First Amendment Analysis Was Properly Grounded In Precedent Governing Political Committee Status.

CREW argues it was "contrary to law" to require anything less than the full disclosure that is permitted by the First Amendment. *See* Reply at 14-27. According to CREW, "the First Amendment poses no barrier to requiring disclosure from groups engaged in electoral advocacy, even where the groups do not devote a majority of their spending to express advocacy." *Id.* at 15. Therefore, CREW argues, it was "contrary to law" to find that "enforcing disclosure against AAN . . . would not be 'constitutionally acceptable.'" *Id.* at 14 (quoting AR1699).

There are four principal problems with this argument. *First*, the FEC did not decide whether it was constitutional to "enforce disclosure." It decided whether AAN could be subjected to the burdensome registration, reporting, and regulatory obligations that attach to political committee status under FECA. *See, e.g.*, AR1690. That those obligations include increased disclosure does not mean that disclosure is the only burden on First Amendment rights at issue in this case. Political committees "are burdensome alternatives; they are expensive to administer and subject to extensive regulations." *Citizens United v. FEC*, 558 U.S. 310, 337 (2010); *see also* AAN Br. at 4-5. Thus, the mere fact that some disclosure may be permitted under the First Amendment for groups engaged in issue advocacy does not answer the question presented here about political committee status. *See, e.g.*, *Wisc. Right to Life v. Barland*, 751 F.3d 804, 824 (7th Cir. 2014) (A "one-time, event-driven disclosure rule is far less burdensome than the comprehensive registration and reporting system imposed on political committees.").

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electioneering communications and that the Commission "also considered several other advertisements encouraging the public to contact their representatives to oppose various spending proposals and support efforts to re-authorize the Bush administration's tax cuts, as well as take action on other prominent issues." AAN Br. at 22.

AAN already makes event-driven disclosures about its issue advertisements, as CREW concedes. Reply at 23. The question here is whether AAN must also register as a political committee because of them. On these facts, it need not. AR1716.

CREW acknowledges that it relies solely on cases about disclosure to advocate for political committee status. Reply at 22-27. It reasons that if *Citizens United* held that the public "interest in the financial sources behind AAN's [issue] communications is sufficiently important to justify disclosure" under the Commission's one-time, event-driven disclosure rules, the public interest should also be sufficient to justify disclosure through political committee requirements. *Id.* at 23-24. But *Citizens United* did not consider the second issue, let alone overrule prior cases, including *Buckley,* which held that political committee status cannot extend to issue advocacy groups. *See, e.g.*, *Buckley*, 424 U.S. at 79. The FEC (and this Court on review) must therefore enforce the Supreme Court's limitation on political committee status to electoral advocacy groups. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc*., 490 U.S. 477, 484 (1989) (holding that courts "should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions"). This is particularly so because *Citizens United* emphasized that that political committee status is "burdensome," "expensive," and "onerous," and carries "extensive regulation[]." 558 U.S. at 337-39. Its decision about one-time disclosure requirements does not extend to political committee status. *Barland*, 751 F.3d at 824.

Second, the FEC did not state that "enforcing disclosure against AAN would not be 'constitutionally acceptable.'" Reply at 14 (quoting AR1699). CREW pulls this quote from a description of *Buckley*; the FEC explained that because of the "burdensome regulatory scheme" that attaches to political committees, "[r]egulation of electoral groups, the Court held, was constitutionally acceptable; regulation of issue groups was not." AR1699. That is, in fact, what

Buckely held: a political committee cannot be a "group[] engaged purely in issue discussion." 424 U.S. at 79. The Supreme Court has since clarified that an organization is also not a political committee where its "central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252 n.6 (1986). CREW wants this Court to find the opposite—that it is "constitutionally acceptable" for political committee status to attach to an issue advocacy group like AAN. But that is the finding that would be "contrary to law." The FEC's discussion of *Buckley* and its distinction between express and issue advocacy for purposes of political committee status follows directly from precedent.

Third, by definition, it could not have been "contrary to law" for the FEC to ensure compliance with the First Amendment. CREW never argues that the FEC *violated* AAN's First Amendment speech and association rights. It instead argues that the FEC could have gone further and still been okay. *See, e.g.*, Reply at 14 ("the First Amendment permits disclosure"), 17 ("case law permitting disclosure"), 27 ("the First Amendment allows . . ."). But the FEC was not required to push the First Amendment to its limits. To the contrary, it was required "to safeguard the First Amendment." *Van Hollen*, 811 F.3d at 501. As a result, even if the FEC's approach was cautious, it was still not "contrary to law." It "ensure[d] that the First Amendment-protected freedoms of speech and association are not infringed upon." AR1690.

Fourth, CREW admits that there is no "decision directly commanding the FEC to treat AAN . . . as [a] political committee[]" because of its issue advocacy. Reply at 21. There are, however, cases that *support* the FEC's decision *not* to treat AAN as a political committee because it is "an issue advocacy group that occasionally speaks out on federal elections." AR1710. The D.C. Circuit, for example, held that political committee status cannot reach "the

activities of nonpartisan issue groups." *Buckley v. Valeo*, 519 F.2d 821, 863 (D.C. Cir. 1975) (en banc), *aff'd in part and rev'd in part*, 424 U.S. l (1976). The Supreme Court agreed that issue groups are not political committees. *Buckley*, 424 U.S. at 79. Lower courts have also confirmed that where an organization is "primarily engaged in speech on political issues," it is not a political committee. *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 288 (4th Cir. 2008); *see also* AAN Br. at 17-21, 26-30 (citing cases).

CREW argues that these cases are "inapposite" because they did not "consider[] whether electioneering communications evidence a group's major purpose under *Buckley*." Reply at 19. True or not, this is irrelevant. This case is not about electioneering communications as a whole, but about electioneering communications that are issue advertisements. The FEC would have considered electioneering communications that are the functional equivalent of express advocacy reflective of a "major purpose" to nominate or elect candidates; they just did not exist here. *See* AR1705 n.98; *see also* Reply at 35. The electioneering communications were instead issue advertisements, and the caselaw directly distinguishes issue advocacy from express advocacy and its functional equivalent when determining political committee status. Of course, there need not be a case directly on point to affirm the FEC's decision. The FEC is supposed to fill gaps in the statutory scheme "by applying whatever principles it can derive from the Supreme Court's decisions" and "by considering the policy implications." *N.Y. N.Y.*, 313 F.3d at 590.

Because, as CREW admits, there is no case directly on point that requires the result it seeks, Reply at 21, CREW relies on cases about state regimes that are different from FECA. *See, e.g.*, *Madigan*, 697 F.3d at 488 (cited at Reply at 15, 19) (noting that the state law defines "political committee more narrowly than FECA"). And CREW is wrong that AAN did not "make any attempt to argue that" CREW's preferred cases "are consistent with the controlling

commissioners' interpretation of the First Amendment." Reply at 16. AAN in fact argued that CREW's cases show that, in states with political committee regulations that impose a similar burden to FECA, courts have also imposed a major purpose requirement that looks to express advocacy. *See* AAN Br. at 29-30 (citing cases). By doing so, they support the FEC's decision and confirm that it is not "contrary to law."

CREW also takes issue with AAN's analysis of these state schemes. The distinctions it makes are not convincing. For example, CREW concedes that "issue communications" cannot trigger political committee status under Alaska law, but argues that Alaska law limits "issue communications" to advertisements that do "not support or oppose a candidate for election to public office." Reply at 16 (quoting *Alaska Right To Life Comm. v. Miles,* 441 F.3d 773, 781 (9th Cir. 2006)). The FEC excluded similar issue advertisements from its analysis here; it based its analysis on advertisements that either expressly, or in a functionally equivalent manner, advocated the election or defeat of a candidate. AR1705 n.98,

CREW's criticism of the cases that the FEC relied on is also unfounded. *See* Reply at 17-20. For example, CREW argues that the Supreme Court's *Massachusetts Citizens for Life* decision found all spending relevant to political committee status. *Id.* at 18. Instead, the decision states that an organization *cannot* be subject to "the full panoply of regulations that accompany status as a political committee" absent sufficient "*independent* spending" (*i.e.*, on independent expenditures, which are express advocacy) that shows that its "primary objective is to influence political campaigns." *Mass. Citizens for Life,* 479 U.S. at 262.

CREW tries to avoid the Seventh Circuit's *Barland* decision by arguing that it ignored *Citizens United*'s approval of disclosure requirements. Reply at 18. But the *Barland* Court considered the issue and found that *Citizens United*'s approval of "the onetime, event-driven

disclosure rule for federal electioneering communications" did not implicitly "[l]ift the express-advocacy limitation" that *Buckley* placed on "the comprehensive, continuous reporting regime imposed on federal [political committees]." *Barland*, 751 F.3d at 836-37 (citations omitted).

CREW claims that the Fourth Circuit disavowed its decision in *Leake* that an organization is not a political committee if it is "primarily engaged in speech on political issues." *See Leake*, 525 F.3d at 288 (cited at Reply at 19). Instead, the Fourth Circuit reaffirmed that political committee status turns on "whether the election or defeat of federal candidates for office is *the* major purpose of an organization, and not simply a major purpose." *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 556 (4th Cir. 2012) (cited at Reply at 19).

CREW finds factual distinctions with other cited cases, Reply at 19-20, but they do not undermine the legal line that these cases drew between express and issue advocacy. *See, e.g.*, *Free Speech v. FEC*, 720 F.3d 788, 797 (10th Cir. 2013) (political committee status cannot "reach groups engaged purely in issue discussion") (citation omitted); *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 678 (10th Cir. 2010) (considering amount spent "on express advocacy or contributions to candidates"); *FEC v. GOPAC*, 917 F. Supp. 851, 863-64 (D.D.C. 1996) (letter that did "not advocate [candidate's] election or defeat" was not evidence of the group's major purpose)). The FEC did not act "contrary to law" or in an "arbitrary and capricious" fashion when it adhered to the line between issue and candidate advocacy in this case.

B. The Commission Reasonably Found That AAN's Issue Advocacy Did Not Show That AAN's "Major Purpose" Is The Election Of Candidates.

CREW next argues that the FEC acted "contrary to law" because it "misinterpreted *Buckley*'s 'major purpose' test to exclude a group's electioneering communications." Reply at 27. The FEC made no such finding. It instead found that the electioneering communications at issue here are not indicative of a major purpose to elect candidates. *See, e.g.*, AR1705 n.98

("None of AAN's advertisements are the 'functional equivalent' of express advocacy."), AR1709 (AAN's advertisements "are genuine issue advertisements"). It never eliminated the possibility that electioneering communications *could* be indicative of a major purpose.

The real burden on CREW, as it ultimately concedes, is to show that it was "contrary to law" to exclude *issue* advertisements from the major purpose analysis. Reply at 35 (arguing that "limiting the relevant material to express advocacy and its functional equivalent [is] improper"). CREW cannot make this showing. For while CREW thinks that political committee status "need not be limited to speech that is the functional equivalent of express advocacy," *id.* (quotation marks omitted), precedent demands otherwise. Political committee status cannot be conferred on an organization whose "central organizational purpose is issue advocacy." *Mass. Citizens for Life*, 479 U.S. at 252 n.6. And electioneering communications must be considered issue advocacy unless they are the "functional equivalent of express advocacy." *FEC v. Wis. Right to Life*, 551 U.S. 449, 469-70 (2007) ("*Wisconsin Right to Life II*"). An organization, as a result, cannot be subjected to political committee status based on its issue advertisements. They are not evidence of a purpose (major or otherwise) to nominate or elect candidates.

CREW's request to find issue advocacy indicative of a major purpose to nominate or elect candidates would inappropriately chart new ground in a case on agency review. Contrary to CREW's argument, the expansive standard does not follow from the observation in *McConnell* that electioneering communications may be "used to advocate the election or defeat of clearly identified candidates." *See* Reply at 27 (quoting *McConnell*, 540 U.S. at 126-29). Some electioneering communications do. But the Court clarified in *Wisconsin Right to Life II* that not every electioneering communication is the functional equivalent of express advocacy. Some are "genuine issue ads." 551 U.S. at 471. CREW's reliance on *McConnell* for a "promote,

oppose, attack, or support" standard is also misplaced. Reply at 37. *McConnell* found only that the standard is sufficiently clear when applied to "actions taken by political parties[, which] are presumed to be in connection with election campaigns." 540 U.S. at 170 n.64. "The context here is very different" as "ordinary citizens, grass-roots issue-advocacy groups, and § 501(c)(4) social-welfare organizations are exposed to civil and criminal penalties for failing to register and report as a [political committee]." *Barland*, 751 F.3d at 837-38. The FEC reasonably declined to incorporate the broader standard into these circumstances. *See also* AAN Br. at 32.

CREW is also wrong when it argues that *Citizens United* vacated *Wisconsin Right to Life II*. Reply at 29-30. CREW's sole support for this statement is in Justice Stevens' *Citizens United* dissent, in which he criticized the majority for "turn[ing] its back on the as-applied review process . . . that was affirmed and expanded" in *Wisconsin Right to Life II*. *Citizens United*, 558 U.S. at 407 (Stevens, J., dissenting). He did not, and could not, vacate the distinction between issue and candidate advocacy electioneering communications set forth in *Wisconsin Right to Life II*, let alone the express advocacy limitation that *Buckley* placed on political committees. The FEC reasonably and properly applied those distinctions and limitations here. *See Rodriguez de Quijas*, 490 U.S. at 484.

CREW's reliance on Commission authority fares no better. *See* Reply at 29. The cited decisions only "look[] beyond a group's express advocacy to determine the group's major purpose," *id.*, in that they look to the functional equivalent of express advocacy. They do not look to issue advocacy. Instead, they confirm that the FEC must "avoid the regulation of activity 'encompassing both issue discussion and advocacy of a political result.'" *Political Committee Status*, 72 Fed. Reg. at 5,597; *see also* Decl. of Stuart McPhail (Dec. 22, 2015) (Doc. 33-1), Ex. 24 ¶ 6 (Matters Under Review ("MURs") 5511, 5525). Unlike here, the vast majority of

spending in those cases was devoted to express advocacy and its functional equivalent. *See, e.g.*, *id.* ¶ 28 (advertisements had "no other reasonable meaning than to encourage actions to defeat Senator Kerry"), *id.*, Ex. 30 at 5, 10 (MUR 5754) (advertisements "oppose[d] George W. Bush" and solicitations "clearly indicate[d] the funds received [would] be used to defeat George Bush in the 2004 general election"); *id.*, Ex. 29 at 18 (MUR 5753) ("nearly $5 million of their $6.7 million budget [was spent] expressly advocating the election of John Kerry . . . or promoting federal candidates for the office of President and for Senate and House seats"). Here, express advocacy, and its functional equivalent, amounted to just fifteen percent of AAN's spending. AR1709. AAN does not have a "major purpose" to elect or defeat candidates. AR1710.

Finally, CREW's novel approach is not justified by any argument that AAN made previously. *See* Reply at 32-33, 37. CREW argues that AAN omitted relevant text when it quoted the congressional record. *Id.* at 32. It did not. The full text shows, as AAN argued, that Congress did not intend that its application of one-time, event-driven disclosure requirements to electioneering communications would subject organizations that disseminate electioneering communications to political committee status. *See* 147 Cong. Rec. S2812-13 (Mar. 23, 2001) ("The . . . provisions will not prohibit groups like the National Right to Life Committee or the Sierra Club from disseminating electioneering communications. . . . It will not require such groups to create a [political committee] or another separate entity."). CREW distorts AAN's argument when it claims that that AAN seeks an "intent-based test" that classifies an advertisement based on whether the organization's "subjective motive was unrelated to electing or defeating candidates." Reply at 32. Rather, AAN acknowledged the Supreme Court's test, AAN Br. at 22, which allows an advertisement to be classified as "the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an

appeal to vote for or against a specific candidate." *Wis. Right to Life II*, 551 U.S. at 469-70. And AAN did not argue, as CREW contends, that the FEC could not consider any electioneering communications because "clear advance notice" is required to regulate First Amendment speech. Reply at 33. AAN instead explained that there was no advance notice that issue advertisements could be considered because a long line of precedent establishes that political committee status will not be imposed on issue advocacy groups. AAN Br. at 20-21. The FEC was reasonable and correct to follow that precedent in this case, and find that AAN's issue advocacy showed that its "major purpose" is "issue advocacy and grassroots lobbying and organization"—and not the nomination or election of federal candidates as is required for political committee status.

C. The Commission Reasonably Considered AAN's Spending Over A Two-Year Period.

CREW argues that it was "contrary to law" to adopt a "lifetime of existence" test for determining an organization's "major purpose." Reply at 37-41.[3] But the Commission did not adopt this test. CREW finds it on a page of the decision that explicitly rejects a "rigid, 'one-size-fits-all rule,'" and on another page that describes CREW's allegation that AAN's conduct over a two-year period evidenced its "major purpose. *See* AR 1714, 1708 (cited at Reply at 38); *see also* AR1486 (basing allegations on conduct "between July 23, 2009 and June 30, 2011").

It was not "contrary to law" to review AAN's activities over a two-year period when CREW based its allegations on AAN's "first two years of existence." AR1486. The statute does not unambiguously require any particular metric. CREW instead thinks that a calendar-year metric is a "*reasonable* application of the 'major purpose' test" because it would "*harmonize*"

[3] CREW does not dispute that this argument is irrelevant if issue advertisements do not show a major purpose to elect or defeat candidates (and they do not). *See* AAN Br. at 33-34. Between 2009 and 2010, about 15 percent of AAN's spending was for advertisements that expressly advocated the election or defeat of federal candidates. AR1709. In 2010, the percentage was about the same. AR1638. Under any metric, AAN's "major purpose" is not the election or defeat of candidates.

the major purpose doctrine with a different pre-requisite to political committee status. CREW Br. at 37-40 (Dec. 22, 2015) (Doc. 33) ("CREW Br.") (emphases added). But CREW's approach parts with Commission precedent and creates concerns that CREW acknowledges. *See* AAN Br. at 33-36. For example, CREW has argued that non-election-year spending should be considered alongside election-year spending, which would be impossible if the Commission were limited to a single calendar year. *See* CREW Br. at 39. CREW also states that "organizational purposes can 'change over time,'" Reply at 39, but proposes an approach that would prevent the Commission from considering those changes along with other relevant facts.

The Commission's case-by-case approach solves each of these problems. *See* AR1713-14; AAN Br. at 33-36.[4] It leaves open the possibility that different time periods may be appropriate for different cases, and ensures that activities during an election year do not unreasonably warp the analysis. *Id.* And in addition to being the correct approach, it is reasonable—which is all that is required here. *See Dem. Senatorial Campaign Comm.*, 454 U.S. at 39. CREW alleged that AAN's conduct over a two-year period supported its claims, AR1482, 1485, 1486, and CREW did not argue for the calendar-year approach it now espouses. The FEC reasonably considered all of the evidence that CREW submitted when it found that AAN is not a political committee. And, in any event, "[n]o unfairness exists when the complaining parties (or their predecessors) invited the error" at the agency, as CREW did here. *Petro Star Inc. v. FERC*, 268 Fed. App'x 7, 10 (D.C. Cir. 2008); *see also 3D Glob. Sols., Inc. v. MVM, Inc.*, 754 F.3d

[4] CREW claims that AAN was "nonsensical" in advocating for a case-by-case approach while arguing that a calendar-year approach would violate its due process rights. Reply at 41. CREW's mischaracterization obscures AAN's argument. AAN merely pointed out that it was on notice in 2009 that a flexible case-by-case approach would apply because that has been the FEC's longstanding approach. AAN Br. at 35. AAN had no notice of a possible calendar-year approach, which was not proffered by the FEC's Office of General Counsel until 2012—*after* the conduct at issue occurred. *Id.* at 36.

1053, 1055 (D.C. Cir. 2014) ("It has long been settled that on appeal a litigant cannot avail himself of an error that he induced.") (citation omitted).

D. The Commission Reasonably Concluded That 15 Percent Of AAN's Spending Did Not Amount To Its "Major Purpose."

CREW argues it was "contrary to law" to adopt "a 50%+1 test" to determine the amount of spending that establishes an organization's "major purpose." Reply at 41-43. But the Commission also did not adopt this test. CREW finds it in a discussion of cases, including one that "held that not only was there no preponderance of spending on express advocacy, there was no indication of any spending on express advocacy at all." AR1700-01 (cited at Reply at 41). This language does not adopt a "preponderance" standard, or any numerical standard at all. Rather, it precedes the Commission's conclusion that it "will apply the major purpose doctrine on a case-by-case basis, taking into consideration the unique facts and circumstances involved with a particular group." AR1705. Here, the money spent by AAN to advocate the election or defeat of candidates "represented approximately 15% of its total expenses during the same period." AR1709. The Commission reasonably concluded that this spending was "hardly 'so extensive that the organization's major purpose may be regarded as campaign activity.'" *Id.* (quoting *Mass. Citizens for Life*, 479 U.S. at 262).

III. The Case Must Be Dismissed Because Article III Redressability is Lacking.

Finally, CREW's complaint must be dismissed because it does not present an Article III controversy. *See* AAN Br. at 40-43. CREW has not shown that the judgment it seeks is likely to redress its asserted injury now that the statute of limitations has run. Reply at 47-50.

First, CREW argues that the Court should ignore this argument because the statute gives CREW the right to seek judicial review and because this rationale was not expressed below. *Id.* at 47. But Article III redressability is a continuing and independent requirement that cannot be

waived or created by Congress. *See, e.g.*, *Wittman v. Personhuballah*, No. 14-1504, 2016 WL 2945226, at *3 (U.S. May 23, 2016) ("The need to satisfy the[] three requirements [of standing] persists throughout the life of the lawsuit."); *Spokeo, Inc. v. Robins*, No. 13-1339, 2016 WL 2842447, at *6 (U.S. May 16, 2016) ("In no event . . . may Congress abrogate the Art. III minima.") (citation omitted); *Fla Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health & Rehab. Servs*., 225 F.3d 1208, 1227 n.14 (11th Cir. 2000) ("[M]ootness—like standing and ripeness—raises [a] basic question of jurisdiction that cannot be waived . . .").

Second, CREW argues that the FEC may still be able to seek equitable relief after the statute of limitations has run. Reply at 47-48. But CREW does not deny that the FEC's practice is to dismiss without pursuing such relief—or that the FEC would be free to follow that practice here should the dismissal be reversed. The FEC's dismissal practice dates back to *FEC v. Williams*, 104 F.3d 237 (9th Cir. 1996), which held that the running of the statute of limitations barred all remedies. The only contrary example CREW offers is *FEC v. Christian Coalition*, 965 F. Supp. 66 (D.D.C. 1997). *See* Reply at 48 n.25. But that case involved an enforcement decision that was made before *Williams* was decided. CREW also argues that *Williams* was wrongly decided. That is beside the point. CREW's inability to identify a post-*Williams* case in which the FEC authorized enforcement action after the statute of limitations ran confirms that it is the FEC's practice to dismiss stale cases. Whether or not the law compels that practice, it eliminates any "substantial likelihood" that the FEC will deviate from it here.

Third, CREW argues that the statute of limitations has not expired under the "continuing violation" doctrine. Reply at 48-49. CREW's "continuing violations theory would transform the failure to right a past wrong" (*i.e.*, the alleged failure to register as a political committee) "into a reason not to start the limitations clock—a result [the Circuit's] precedents plainly proscribe."

AKM LLC v. Sec'y of Labor, 675 F.3d 752, 758 (D.C. Cir. 2012). Instead, the statute of limitations has meaning in this context, and the FEC has appropriately enforced it. *See, e.g.*, Pre-MUR 395, Statement of Reasons of Commissioners Mason, Smith, and Wold (Feb. 27, 2002) (dismissing as stale claims that an organization failed to register and report as a political committee). Moreover, CREW's reliance on the continuing violation doctrine is misplaced because CREW did not allege a continuing violation. Instead, it alleged that "AAN was a political committee between July 23, 2009 through June 20, 2011." AR1485.

Fourth, CREW asserts that the statute of limitations may not expire until June 11, 2016, five years after the last "conduct giving rise to [its] complaint." Reply at 49 n.26. The result is the same if the deadline is imminent or in the past; the FEC's policy of dismissing stale cases is not limited to cases in which the limitations period has already expired. *See* AAN Br. at 40.

Finally, CREW asks the Court to proceed because it would benefit from the order's effect on future cases. Reply at 49-50. But the value of precedent cannot keep a case alive. "[T]hroughout the litigation," there must be an injury that is "likely to be redressed by a favorable judicial decision." *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). Otherwise, the case has "lost its character as a present, live controversy of the kind that must exist [so the Court] avoid[s] advisory opinions on abstract propositions of law." *Hall v. Beals*, 396 U.S. 45, 48 (1969).

Here, CREW cannot achieve redress unless the FEC abandons its long-settled and entirely lawful policy of focusing on current activity and dismissing stale complaints. CREW's mere speculation that the FEC might reverse course and abandon that practice is too slender a reed to establish an Article III controversy.

CONCLUSION

This Court should deny CREW's motion for summary judgment and grant AAN's cross-motion for summary judgment.

Respectfully submitted,

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