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.	Civ. No. 14-1419 (CRC) **ORAL ARGUMENT REQUESTED** MOTION FOR SUMMARY JUDGMENT

FEDERAL ELECTION COMMISSION'S MOTION FOR SUMMARY JUDGMENT

Defendant Federal Election Commission ("Commission") respectfully cross-moves this Court for an order (1) granting summary judgment to the Commission pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Civil Rule 7(h), and (2) denying plaintiffs' summary judgment motion (Docket No. 33). In support of this motion, the Commission is filing a Memorandum in Support of Its Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment and a Proposed Order. The Commission requests oral argument on this motion.

Respectfully submitted,

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March 1, 2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*,	)	
Plaintiffs,	)	Civ. No. 14-1419 (CRC)
v.	)	
FEDERAL ELECTION COMMISSION,	)	MEMORANDUM
Defendant,	)	
AMERICAN ACTION NETWORK,	)	
Intervenor-Defendant.	)	

FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs Citizens for Responsibility and Ethics in Washington and Melanie Sloan challenge the Federal Election Commission's ("FEC" or "Commission") dismissal of their administrative complaints alleging certain campaign-finance violations by Americans for Job Security ("AJS") and American Action Network ("AAN"). Plaintiffs alleged that AJS and AAN each violated the Federal Election Campaign Act ("FECA" or "Act") by spending substantial sums of money on advertising referencing federal candidates and legislative issues without registering with the Commission as "political committees" and complying with the disclosure requirements that apply to such groups. In June 2014, the Commission voted on whether to find "reason to believe" that either AJS or AAN had violated FECA. The Commission did not approve pursuing either matter further, and so voted to close its files, thereby dismissing plaintiffs' administrative complaints.

Plaintiffs disagree with the dismissals of the administrative complaints but they cannot meet their heavy burden of demonstrating that either dismissal was arbitrary, capricious, an abuse of the agency's broad discretion, or otherwise contrary to law. Instead, plaintiffs seek to escape the well-established standard of review by urging the Court to disregard binding precedent in favor of a results-oriented analysis that plaintiffs believe would vindicate the government's interest in disclosure. But the undisputed importance of the government's disclosure interest is irrelevant here. The value of the information AJS or AAN would have to disclose if one or both of them were found to be a political committee does not bear on *whether* they are political committees in the first place. Plaintiffs' disclosure argument and their improper, extra-record "dark money" discussion wholly begs the question.

The only issues in this case are whether the Commission's analyses of AJS's or AAN's political-committee status, and concomitant dismissals of plaintiffs' administrative complaints, were contrary to law. They were not. The decisions of the three Commissioners who voted not to proceed in each matter are thoroughly explained in a separate statement of reasons for each matter. Each was grounded in the administrative record, reflects a reasonable application of the FEC's repeatedly upheld case-by-case method for determining political-committee status using the Supreme Court's "major purpose" test, and accords with other courts' applications of that test. The statements are also consistent with courts' repeated admonitions that FECA must be interpreted in accordance with the First-Amendment-sensitive area in which the Commission regulates. The Commissioners' explanations more than satisfy the low threshold that requires this Court to affirm the dismissals in both matters. The Court accordingly should deny plaintiffs' motion for summary judgment and grant the Commission's cross-motion.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

A. The FEC and FECA's Administrative Enforcement Process

1. The Commission

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

FECA to make decisions through majority votes and, for certain actions, including enforcement decisions, with the affirmative vote of at least four Commissioners. *Id.* § 30106(c).

2. FECA's Administrative Enforcement and Judicial-Review Provisions

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

If the FEC proceeds with an investigation, it then must determine whether there is "probable cause" to believe that FECA has been violated. *Id.* § 30109(a)(4)(A)(i). A probable cause determination also requires an affirmative vote of at least four Commissioners. *Id.* §§ 30106(c), 30109(a)(4)(A)(i). If the Commission so votes, it is statutorily required to attempt to reach a conciliation agreement with the respondent. *Id.* The FEC's assent to a conciliation agreement requires an affirmative vote of at least four Commissioners and such an agreement, unless violated, bars any further action by the FEC related to the violation underlying that agreement. *Id.* If the FEC is unable to reach a conciliation agreement, FECA authorizes the FEC to institute a de novo civil enforcement action in federal district court, upon an affirmative vote of at least four Commissioners. *Id.* §§ 30106(c), 30109(a)(6)(A).

If, at any point in the administrative process, the Commission determines that no violation has occurred or decides to dismiss the administrative complaint for some other reason, the complainant may file suit in this District against the Commission to obtain judicial review of the Commission's dismissal decision. *Id.* § 30109(a)(8)(A). Reviewable dismissal decisions

include instances in which "the Commission deadlocks 3-3 and so dismisses a complaint." *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("*NRSC*") ("[A split vote] dismissal, like any other, is judicially reviewable under [§ 30109(a)(8)]."); *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987) ("*DCCC*") (same). In such split-vote cases, in order "to make judicial review a meaningful exercise, the three Commissioners who voted to dismiss must provide a statement of their reasons for so voting. Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did." *NRSC*, 966 F.2d at 1476; *see also* Mem. Op. at 6-7 (Docket No. 20).

B. FECA's Registration and Reporting Requirements

One way FECA reduces corruption in politics is by requiring public disclosures concerning the financing of certain kinds of election-related communications. *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam) ("[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity."). Disclosure also "provid[es] the electorate with information about the sources of election-related spending." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1459 (2014) (internal quotation marks omitted). FECA imposes different kinds of disclosure obligations depending upon the nature of the organization making the communications and the timing, form, and content of the communications.

1. Event-Driven Reporting Requirements

FECA's event-driven reporting requirements apply to particular communications that meet certain criteria. As relevant here, FECA requires that spending above certain thresholds on "independent expenditures" or "electioneering communications" must be disclosed.

An "independent expenditure" is a communication "expressly advocating the election or defeat of a clearly identified candidate" and that is made without coordinating with the candidate or a political party. 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16. The term "independent expenditure" was not part of FECA or its 1974 amendments. In *Buckley*, the Supreme Court reviewed a provision of FECA prohibiting expenditures of more than $1,000 "relative to" a federal candidate. 424 U.S. at 39-44. To avoid vagueness concerns, the Court construed that provision "to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office" and held that these communications could not constitutionally be limited as the Act required. *Id.* at 44-45.

After *Buckley* was decided, Congress embraced the Court's "express advocacy" holding in its definition of a new statutory term, "independent expenditure." Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 102(g)(3), 90 Stat. 475, 479.

The Bipartisan Campaign Reform Act of 2002 ("BCRA") added to FECA a new statutory term, "electioneering communications." An electioneering communication is (1) a "broadcast, cable, or satellite communication" (2) referring to a "clearly identified" federal candidate (3) that is made within a 30- or 60-day run up to an election, convention, or caucus (depending upon what kind of election or other event it is) and (4) is "targeted to the relevant electorate." 52 U.S.C. § 30104(f)(3); 11 C.F.R. § 100.29. Communications falling within the 30- or 60-day statutory windows may be electioneering communications even if they do not expressly advocate for the identified candidate's election or defeat. *McConnell v. FEC*, 540 U.S. 93, 189 (2003), *overruled in part by Citizens United v. FEC*, 558 U.S. 310 (2010).[1]

[1] BCRA also revised the definition of "independent expenditure" into its current form. Pub. L. No. 107-155, § 211, 116 Stat. 81, 92-93.

Any entity that spends more than $250 to finance independent expenditures must file with the Commission a disclosure report that identifies, *inter alia*, the date and amount of each expenditure and anyone who contributed more than $200 to further it. *See* 52 U.S.C. § 30104(c)(1), (2)(A), (C); 11 C.F.R. § 109.10(e). Similarly, any entity making electioneering communications aggregating more than $10,000 must report, *inter alia*, the date and amount of each disbursement, the identity of all clearly identified candidates mentioned and the elections in which they are running, and the name and address of each donor who gave an aggregate of $1,000 or more to a segregated bank account if that account was used to make the disbursements. 52 U.S.C. § 30104(f)(1)-(2); 11 C.F.R. § 104.20. If the disbursements were made by a corporation or labor union, the organization must identify the name and address of each person who contributed an aggregate of $1,000 or more over the course of the previous 12 to 24 months "for the purpose of furthering electioneering communications." 11 C.F.R. § 104.20(c)(9).

2. Regulation of "Political Committees"

FECA also provides that certain organizations, which qualify as "political committees," are subject to distinct disclosure requirements. Political committees must, *inter alia*, register with the FEC, appoint a treasurer, maintain names and addresses of contributors, and file periodic reports disclosing most receipts of $200 or more. 52 U.S.C. §§ 30103, 30104(a)-(b).

Under FECA, any "committee, club, association, or other group of persons" that receives more than $1,000 in "contributions" or makes more than $1,000 in "expenditures" in a calendar year is a "political committee." 52 U.S.C. § 30101(4)(A); 11 C.F.R. § 100.5(a). The Act defines "contribution" and "expenditure" to include any payment of money to or by any person "for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i), (9)(A)(i). In *Buckley*, however, the Supreme Court explained that FECA's definition of political-committee

status "only in terms of amount of annual 'contributions' and 'expenditures'" might result in an overbroad application by reaching "groups engaged purely in issue discussion." 424 U.S. at 79. The Court therefore concluded that, in order to "fulfill the purposes of the Act," FECA's political-committee provisions "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.*; Mem. Op. at 4. *Buckley* thus established that an entity that is not controlled by a candidate must register as a political committee only if the group crosses the $1,000 threshold of contributions or expenditures *and* has as its "major purpose" nominating or electing federal candidates.

In March 2004, the Commission issued a notice of proposed rulemaking seeking comment on whether the FEC should, *inter alia*, promulgate a regulatory definition of "political committee" that would encompass all "527" groups — *i.e.*, political organizations holding tax-exempt status under Section 527 of the Internal Revenue Code. *Proposed Rules: Political Committee Status*, 69 Fed. Reg. 11,736, 11,748-11,749 (Mar. 11, 2004); *see* 26 U.S.C. § 527(a), (e)(1). In 2004, after receiving and hearing testimony, the Commission issued an Explanation and Justification "explaining why it took no action to re-define 'political committee.'" *Shays v. FEC*, 511 F. Supp. 2d 19, 23 (D.D.C. 2007). A court of this District rejected a challenge to the agency's decision to "pursue adjudication over rulemaking" but found that the Commission should "better explain its decision." *Id.* Accordingly, in February 2007 the Commission published in the Federal Register a Supplemental Explanation and Justification further explaining its decision not to promulgate such a regulation. *Rules and Regulations: Political Committee Status*, 72 Fed. Reg. 5595 (Feb. 7, 2007) ("Supplemental E&J").

The Supplemental E&J stated that, rather than adopting a new regulation, the Commission would continue its longstanding practice of determining an organization's major

purpose through case-by-case adjudication. *See id.* at 5596-97. The Commission makes that fact-specific determination by reviewing the group's activity, including by examining its "Federal campaign activity," spending on other activity, and public statements. *Id.* at 5601 (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) ("*MCFL*")). Finally, the Supplemental E&J discussed several prior matters in which the Commission had examined a group's major purpose, explaining that those decisions "provid[ed] considerable guidance to all organizations" regarding the FEC's application of the test. *Id.* at 5595, 5605-06.

II. FACTUAL BACKGROUND

A. Plaintiffs' Administrative Complaints

In an administrative complaint dated March 8, 2012, plaintiffs alleged that "AJS's major purpose in 2010 was the nomination or election of federal candidates," and that, consequently, AJS and its president, Stephen DeMaura, had violated FECA by "failing to register as a political committee" and by "failing to file [the] periodic reports required of political committees." (AR 11-12.) In a separate administrative complaint dated June 7, 2012, plaintiffs alleged that "AAN's major purpose between July 23, 2009 and June 30, 2011 was the nomination or election of federal candidates" and that it likewise had violated FECA by "failing to register as a political committee" and by failing "to file [the] periodic reports" required of political committees. (AR 1486-87.) Both complaints requested that the FEC "conduct an investigation into these allegations, declare the respondent[s] to have violated [FECA] and applicable FEC regulations," and impose sanctions and take "such further action as may be appropriate." (AR 13; AR 1487.)

AJS and Mr. DeMaura responded to plaintiffs' administrative complaint on May 4, 2012. (AR 48-1389.) AAN submitted an initial response on July 20, 2012 (AR 1560-96), and on October 1, 2012, it submitted a supplemental response providing an amended IRS Form 990 it

had filed for the period July 1, 2010 through June 30, 2011 (AR 1597-1634). The FEC's Office of General Counsel submitted to the Commission its First General Counsel's Reports and Proposed Factual and Legal Analyses concerning the AAN matter on January 17, 2013 (AR 1635-84) and concerning the AJS matter on May 2, 2013 (AR 1390-1433). The in-house staff reports respectively recommended that the Commission find reason to believe that AJS and AAN had violated FECA "by failing to organize, register, and report as a political committee, and that the Commission authorize an investigation." (AR 1411; AR 1659.)

B. The FEC's Dismissals of Plaintiffs' Administrative Complaints

On June 24, 2014, the Commission, by a vote of 3-3, did not find reason to believe that AJS had violated FECA's registration and reporting requirements for political committees. (AR 1434-35.) Commissioners Ravel, Walther, and Weintraub voted to find reason to believe and to authorize an investigation. (*Id.*) Commissioners Goodman, Hunter, and Peterson voted against finding reason to believe. (*Id.*) On the same date, the Commission also voted 3-3 on the AAN matter, and likewise did not find reason to believe that AAN had violated FECA's political committee registration and reporting requirements. (AR 1686-87.) Commissioners Ravel, Walther, and Weintraub voted to find reason to believe and to authorize an investigation, and Commissioners Goodman, Hunter, and Peterson voted against finding reason to believe. (*Id.*) The Commission then voted 6-0 to close the files in both matters. (AR 1434-35; AR 1686-87.)

On July 30, 2014, the Commissioners issued several Statements of Reasons concerning the AJS and AAN matters. Commissioners Goodman, Hunter, and Peterson issued a statement explaining their vote against finding reason to believe that AJS had violated the Act. (AR 1438-69.) They also issued a separate statement explaining their vote concerning AAN. (AR 1690-1723.) Commissioners Ravel, Walther, and Weintraub issued a combined statement in both

matters explaining their votes to proceed with investigations of AJS and AAN. (AR 1470-76; AR 1724-30.) Because Commissioners Goodman, Hunter, and Petersen were the Commissioners voting against making reason-to-believe findings, their "rationale[s] necessarily state[] the agency's reasons for acting as it did" and they accordingly constitute the "controlling group" of Commissioners in both matters. *NRSC*, 966 F. 2d at 1476.

In their statement concerning AJS, Commissioners Goodman, Hunter, and Petersen noted that the FEC had previously considered whether AJS is a political committee. (AR 1438.) "As before," they wrote, "we believe AJS — an organization that has spent less than ten percent of its funds on express advocacy during its entire existence — is an issue-advocacy organization that cannot be regulated as a political committee." (*Id.* (footnote omitted).) In their statement concerning AAN, Commissioners Goodman, Hunter, and Petersen found that AAN's "public statements, organizational documents, and overall spending history objectively indicate that the organization's major purpose has been issue advocacy and grassroots lobbying and organizing." (AR 1690.) Both statements relied upon certain key facts about AJS and AAN that are not materially disputed. Based on those facts, which are set forth below, *see infra* pp. 10-13, the controlling Commissioners analyzed the groups' central organizational purposes and their federal campaign spending as compared to their other spending, and concluded that neither AJS nor AAN had "violated the Act by failing to register and report as a political committee." (AR 1463; AR 1716.)

1. AJS

Established in 1997, AJS is an incorporated non-profit tax-exempt organization that has registered with the IRS as a section 501(c)(6) entity. AR 1441; 26 U.S.C. § 501(c)(6) (providing tax-exemption to, *inter alia*, "[b]usiness leagues, chambers of commerce"). AJS's Articles of

Incorporation state that it has the purpose of uniting "in a common organization businesses, business leaders, entrepreneurs, and associations of businesses" and promoting "the common business interests of its members . . . by helping the American public to better understand public policy issues of interest to businesses." (AR 1441 (internal quotation marks omitted).) Its 2009 Form 990 tax return declared that AJS "educat[es] the public through television, radio, newspaper and direct mail advertising . . . on economic issues with a pro-market, pro-paycheck message." (AR 19.) AJS's website identifies issues it is "actively working to affect," including: "Reducing Taxes," "Tort Reform," "Free Markets & Free Trade," "Transportation," "Education Reform," "Health Care Reform & Modernization," and "Energy." (AR 1441 n.22 (internal quotation marks omitted); AR 100.)

AJS's past activities have focused on these kinds of issues. In 2004 and 2005, AJS "ran a series of print and radio advertisements in various jurisdictions to promote public support of a repeal of the estate . . . tax." (AR 1441.) In 2006, "AJS aired television communications in several states advocating against legislation to establish the asbestos trust fund." (*Id.*) "[T]hese ads sought to raise public support for AJS's economic-policy positions." (AR 1442.) "[N]one featured any language expressly advocating the election or defeat of a federal candidate, nor were they run within thirty days of a primary election or [within] sixty days of a general election." (*Id.*) AJS's administrative response states that it did not make any electioneering communications until 2008, nor did it make any independent expenditures until 2010. (AR 52.)

Between its founding in 1997 and May 2012, AJS "received a total of approximately [$54 million] in membership dues and assessments and has spent a total of approximately [$51 million] on its activities and communications." (AR 95 ¶ 3.) AJS's 2009 Form 990 tax return reflects that it received $12,411,684 and spent $12,417,809 between November 1, 2009 and

October 31, 2010. (AR 18.) In the 2010 calendar year, AJS reported spending a total of $4,908,847.27 on independent expenditures and a total of $4,598,519.60 more on ten electioneering communications. The appendix to the controlling statement reproduces the scripts for the ten electioneering communications and breaks down AJS's costs for creating and disseminating them. (AR 1466-69.)

Therefore, of the total $51 million AJS spent during the fifteen-year period between 1997 and May 2012, AJS's spending of "just under $5 million" (AR 1442), or $4,908,847.27, on independent expenditures represents 9.6 percent of its total spending. (*See* AR 1458 & n.128.) AJS's total 2010 spending on independent expenditures ($4,908,847) represents 39.5 percent of its spending that year ($12,417,809). (AR 1463 n.151.)[2] AJS's financials as captured in the record can thus be summarized as follows:

	1997 to May 2012	**2010**[3]
Receipts	$54 million	$12.4 million
Expenses	$51 million	$12.4 million
Independent Expenditures	$4.9 million (9.6% of expenses)	$4.9 million (39.5% of expenses)

2. AAN

AAN is a non-profit 501(c)(4) corporation. AR 1692; 26 U.S.C. § 501(c)(4) (providing tax-exemption to, *inter alia*, non-profit "[c]ivic leagues or organizations . . . operated exclusively for the promotion of social welfare"). Its Form 990 tax returns and website describe it as an "'action tank' that will create, encourage and promote center-right policies based on the principles of freedom, limited government, American exceptionalism, and strong national

[2] Because the record does not contain AJS's exact receipts and expenses in the 2010 calendar year, all of the Commissioners used AJS's fiscal year information as a proxy in their analyses. (*See, e.g.*, AR 1463 n.151; AR 1473 n.22.)

[3] *See* supra n.2.

policy." (AR 1491; AR 1519.) AAN's tax returns declare that it has "built a premier grassroots advocacy organization," "created a cutting edge technological platform," and "[c]onducted over 20 policy interactive briefs called 'Learn and Lead' with over 1000 activities involved from around the country." (AR 1491.) It has hosted public officials as guest speakers to educate "grassroots leaders about critical issues facing our country with regards to energy, education, tax policy, immigration, national security, spending and health care." (*Id.*)

AAN's 2009 Form 990 tax return reflects that it received $2,750,372 and spent $1,446,675 between July 23, 2009 and June 30, 2010. (AR 1490.) Its 2010 Form 990 tax return states that it received $27,479,384 and spent $25,692,334 in its second fiscal year, ending June 30, 2011. (AR 1518; AR 1600.) Thus, AAN received $30,229,756 and spent "over $27 million" (AR 1692), or $27,139,009, during its first two fiscal years. In 2010, AAN's FEC filings reflect that it spent a total of approximately $4,096,910 on independent expenditures (AR 1708) and roughly $13 million more on 20 electioneering communications (AR 1709, 1719-23). The controlling statement's appendix reproduces the scripts for the 20 electioneering communications and breaks down AAN's costs for creating and disseminating them. (AR 1719-23.)

Therefore, of the total $27,139,009 AAN spent between June 2009 and July 2011, AAN spent 15.1 percent ($4,096,910) on independent expenditures. (AR 1709.) AAN's spending of $4,096,910 on independent expenditures during 2010 (assuming they were all made after June 2010) comprised 15.9 percent of its total spending of $25,692,334 in its 2010 fiscal year. AAN's financials as captured in the record can thus be summarized as follows:

	June 2009 to July 2011	**2010 Fiscal Year**
Receipts	$30.2 million	$27.5 million
Expenses	$27.1 million	$25.7 million
Independent Expenditures	$4.1 million (15.1% of expenses)	$4.1 million (15.9% of expenses)

3. The Controlling Commissioners' Approach to the Major Purpose Test

There is no dispute that AJS and AAN "crossed the statutory threshold for political-committee status by making over $1,000 in independent expenditures in 2010." (AR 1454; AR 1706.) For that reason, the controlling group of Commissioners' analyses focused on assessing each organization's "major purpose." Those Commissioners relied on judicial decisions creating, evaluating, and applying the major-purpose test, issue speech as it relates to political-committee status, as well as the Commission's own 2007 Supplemental E&J explaining the Commission's approach to the major-purpose test. (AR 1444-54; AR 1696-1705.)

The controlling Commissioners first discussed the major-purpose test's origins and establishment in *Buckley*, noting that the test was then "reaffirmed" in *MCFL*. (AR1447-48; AR 1699-1700.) Those Commissioners' statements explained that *MCFL* established both (1) that an issue advocacy organization could engage in activities advocating for federal candidates without becoming a political committee, and (2) that an organization could be classified as a political committee if its political spending became "'so extensive'" that its "'major purpose may be regarded as campaign activity.'" (AR 1448 (quoting *MCFL*, 479 U.S. at 262); AR 1699 (same).)

Turning to lower courts' applications of the major-purpose test, the controlling statements discussed *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 838 (7th Cir. 2014), in which the Seventh Circuit Court of Appeals invalidated part of a Wisconsin provision that imposed political-committee reporting requirements on "ordinary citizens, grass-roots issue-advocacy groups, and § 501(c)(4) social-welfare organizations." *Id.* at 838. The requirement applied when such groups exceeded a $300 threshold in "communicat[ing] their views about any political issue close to an election and include[d] the name or likeness of a candidate in a way that could be

construed by state regulators as a reference to the candidate's qualifications or as 'support' or 'condemnation' of the candidate's record or positions." *Id.* The Seventh Circuit had reasoned that imposing political-committee registration and reporting requirements on "groups that engage in express election advocacy as their major purpose . . . is a relevantly correlated and reasonably tailored means of achieving the public's informational interest," but it rejected the imposition of such requirements "on issue-advocacy groups that only occasionally engage in express advocacy." *Id.* at 841; *see also* AR 1448 (discussing *Barland*); AR 1700 (same).

The controlling statements also explained that the Fourth and Tenth Circuits have interpreted *Buckley* to hold that an organization may be classified as a political committee only if it has "the" major purpose of electing or nominating federal candidates, as opposed to "a" major purpose, *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 288-89 (4th Cir. 2008); *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d. 544, 556 (4th Cir. 2012) ("*RTAA*"), *cert. denied*, 133 S. Ct. 841 (2013); *Free Speech v. FEC*, 720 F.3d 788, 797 (10th Cir. 2013), *cert. denied*, 134 S. Ct. 2288 (2014). (AR 1449 n.69; AR 1700 n.65.) Those statements further described the Tenth Circuit's approach to the major-purpose test, which analyzes organizations' public statements or comparative spending: "[T]he Tenth Circuit identified two methods for determining an organization's major purpose: [1] 'an examination of the organization's central organizational purpose'; or [2] a 'comparison of the organization's electioneering spending with overall spending to determine whether the preponderance of expenditures is for express advocacy or contributions to candidates,'" *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 678 (10th Cir. 2010) (citing *Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1127, 1152 (10th Cir. 2007)). (AR 1448-49; AR 1700.)

The statements additionally discussed the decisions of courts in this District in *FEC v. Malenick*, 310 F. Supp. 2d 230 (D.D.C. 2004), and *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996), explaining that these decisions shed additional light on how courts have applied the major-purpose test. (AR 1449; AR 1701.)

After discussing the Supreme Court's consideration of issue speech in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"), the controlling statements summarized the Commission's decision not to promulgate a regulatory major-purpose-test rule following the 2004 notice of proposed rulemaking and the FEC's choice, instead, to continue using its case-by-case approach. (AR 1451-54; AR 1703-05.) The Commissioners explained that although the "basic approach to political committee status outlined in the 2007 Supplemental E&J remains valid," "some portions of the guidance contained therein [had] been superseded by subsequent case law and Commission interpretations." (AR 1452; AR 1704.) The controlling statements noted that *WRTL* and *Barland* were both issued after the Supplemental E&J. (*Id.*)

Based upon the above-referenced judicial decisions and the Commission's Supplemental E&J, the controlling group of Commissioners explained their view that two factors, while not exclusive, are "most relevant" here: "(1) assessing [AJS's and AAN's] central organizational purpose by examining its public and non-public statements; and (2) analyzing [AJS's and AAN's] spending on campaign activities with its spending on activities unrelated to the election or defeat of a federal candidate, including the group's genuine issue speech." (AR 1706 (footnote omitted); *see also* AR 1455.)

4. The Controlling Statements' Application of the Major Purpose Test to AJS and AAN

The controlling Commissioners applied the two factors and concluded that neither AJS nor AAN had the central organizational purpose of nominating or electing federal candidates,

and that neither group's spending reflected that its major purpose was nominating or electing federal candidates.

The controlling group concluded that "[t]he official documents of AJS, including its articles of incorporation, its purpose statement, and its website, all indicate that AJS's central organizational purpose is to promote economic issues, not the nomination or election of a federal candidate." (AR 1456.) They explained that AJS's "organizational documents, including its website, mission statement, and status as a 501(c) organization, counsel against it being a political committee." (AR 1455.) And the Commissioners noted that although an organization's tax status "is not dispositive," AJS has been "organized as a 501(c)(6) for seventeen years — it was even audited by the IRS in 2004 only to have no further action taken." (AR 1455-56.)

To determine if AJS's spending had "become so extensive as to subject" AJS "to regulation as a political committee," the controlling Commissioners compared "the group's overall spending on express advocacy against its overall spending on activities unrelated to campaigns, including issue advocacy." (AR 1456 (internal quotation marks omitted).) The Commissioners analyzed AJS's "entire history" of spending dating back to 1997, and found that "all of [AJS's] electioneering communications identified in the [administrative] Complaint are genuine issue advertisements." (AR 1456-57.) They explained that during the course of its history, "AJS spent over $50 million to promot[e] its public policy agenda through issue advocacy activities and communications, but only $4.9 million — or a mere 9.8 percent — of that spending was on express advocacy." (AR 1458 (internal quotation marks and footnotes omitted).) And they concluded that AJS's spending was not "'so extensive that [its] major purpose may be regarded as campaign activity.'" (*Id.* (quoting *MCFL*, 479 U.S. at 262).)

The controlling Commissioners similarly relied on AAN's official statements in concluding that "AAN's organizational documents and official public statements indicate that AAN was organized to promote public policy and engage in issue advocacy." (AR 1706.) They also cited as relevant AAN's 501(c)(4) status, "given that [AAN was] well aware of [its] limitations under a 501(c) exemption." (AR 1707 & n.109 (noting that AAN's administrative response stated its calculation that, between 2009-2011, "'at most, only 19% of AAN's spending was for political activities' as the IRS defines them'").) "Based upon AAN's official public statements and chosen tax status," the Commissioners found that "AAN's central organizational purpose is not the nomination or election of a candidate to federal office." (AR 1707.)

The Commissioners further concluded that AAN's spending "indicates that while nominating or electing candidates may have been *a* purpose of the organization in the time period in question, it was not *the* major purpose of the organization." (AR 1708.) After explaining that AAN had spent funds on various organization-building activities (AR 1708-09), in addition to approximately $4.1 million it spent on independent expenditures in 2010, the Commissioners discussed AAN's spending on issue advertising. Concluding that AAN's advertisements "[we]re genuine issue advertisements," the Commissioners determined that, "[a]ccordingly, the roughly $13 million that AAN spent on these . . . advertisements indicate that its purpose was something other than the nomination or election of a federal candidate." (AR 1709.) "Indeed, the roughly $4.1 million that AAN spent on independent expenditures between 2009 and 2011 was the totality of its spending that was for the purpose of nominating or influencing the election of a federal candidate and represented approximately 15% of its total expenses during the same period." (*Id.*) Consequently, the Commissioners concluded that

AAN's spending was not "so extensive" such that its major purpose could be "regarded as campaign activity." (*Id.* (internal quotation marks omitted).)

Finally, both statements of reasons expressed the controlling Commissioners' disagreement with the Commission's in-house counsel's comparative spending analyses. (AR 1458-63; AR 1710-15.) In particular, the statements' explained the Commissioners' conclusions that (1) the relevant spending should not encompass genuine issue advertisements when calculating the numerator of the spending ratio, and (2) it is inappropriate to confine the relevant time period to a single calendar year when determining the denominator. (*Id.*) Both statements also noted that the controlling Commissioners relied upon the agency's prosecutorial discretion in choosing to vote to dismiss the administrative complaints. (AR 1460-61 n.142, 1463 n.153; AR 1712-13 n.137, 1716 n.153 (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).)

ARGUMENT

The Commission's dismissals of plaintiffs' administrative complaints must be sustained because they were not contrary to law. The rationales of the three Commissioners who voted not to find reason to believe that either AJS or AAN violated FECA reflect their thorough review of the records before the Commission, including careful analyses of both organizations' statements and detailed reviews of their financial activities and communications. They also accord with courts' instructions that FECA be interpreted in a manner that is sensitive to the First Amendment activity regulated by the statute. Those Commissioners' analyses were reasonable and concern an area in which the Commission's inquiry is necessarily both flexible and accorded extreme deference. The agency's dismissals of both matters therefore should be affirmed.

I. STANDARD OF REVIEW

In reviewing the challenged dismissal decisions under section 30109(a)(8), the Court is bound by controlling decisions of the Supreme Court and D.C. Circuit requiring that the Commission's dismissal decisions be accorded full deference, irrespective of the Commission's divided votes on the matters. Plaintiffs' attempts to reduce their heavy burden by urging de novo review and a lesser degree of deference lack support and must be rejected. Additionally, in performing contrary-to-law review under section 30109(a)(8), the Court acts as an appellate tribunal and limits its review to the administrative record. Plaintiffs' extensive extra-record attachments do not bear on this case.

A. Review Under Section 30109(a)(8) Is "Limited" and "Extremely Deferential"

In section 30109(a)(8), Congress mandated that the judicial task in cases like this is to determine whether the Commission's dismissals of plaintiffs' administrative complaints are "contrary to law." 52 U.S.C. § 30109(a)(8)(C). Well-settled decisions construing section 30109(a)(8) make clear that such review is "limited." *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988); *Citizens for Responsibility & Ethics in Washington v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007) (explaining that judicial review under section 30109(a)(8) "is limited to correcting errors of law"). As plaintiffs acknowledge (Pls.' Mem. at 14), the FEC's dismissal of an administrative complaint cannot be disturbed unless it was based on an "impermissible interpretation of" FECA or was otherwise "arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986); *see also, e.g.*, *Common Cause v. FEC*, 108 F.3d 413, 415 (D.C. Cir. 1997) (per curiam); *Akins v. FEC*, 736 F. Supp. 2d 9, 16-17 (D.D.C. 2010).

The contrary-to-law standard is "extremely deferential" to the agency's decision and "requires affirmance if a rational basis . . . is shown." *Orloski*, 795 F.2d at 167. As the Supreme

Court explained more than three decades ago, in another section 30109(a)(8) case challenging the FEC's dismissal of an administrative complaint, "the Commission is *precisely* the type of agency to which deference should presumptively be afforded." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) ("*DSCC*") (emphasis added). This is due to the FEC's "'primary and substantial responsibility for administering and enforcing [FECA],'" its authority to "'formulate general policy with respect to the administration of [the] Act,'" its "'sole discretionary power' to determine in the first instance whether or not a civil violation of the Act has occurred," and its "inherently bipartisan" nature resulting from the fact that "no more than three of its six voting members may be of the same political party." *Id*. "For these reasons" and others, the Court said, Congress "wisely provided" that the "dismissal of a[n administrative] complaint should be reversed only if 'contrary to law.'" *Id.*

In assessing whether the challenged dismissals were contrary to law, the Court's task here is "not to interpret the statute as it [thinks] best but rather the narrower inquiry into whether the Commission's construction was sufficiently reasonable to be accepted." *DSCC*, 454 U.S. at 39 (internal quotation marks omitted). Indeed, "[t]o satisfy this standard it is not necessary for [the Court] to find that the agency's construction was the only reasonable one or even the reading the [C]ourt would have reached" on its own "if the question initially had arisen in a judicial proceeding." *Id.* In applying this *Chevron* deference, which is "principal[ly] justifi[ed]" by the agency's "practical . . . expertise," *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990), the Court must affirm the dismissal so long as the agency's construction was permissible and its application of that construction not arbitrary and capricious, *see Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.11 (1984) (citing *DSCC*); *Akins*, 736 F. Supp. 2d at 18 (likening *Chevron* deference to that described in *DSCC*).

B. The Court Must Accord *Chevron* Deference to the FEC's Split Vote Which Implemented, in Part, a Constitutional Holding

The extremely deferential standard of review applicable to FEC dismissals extends to those, as here, that are animated in part by constitutional concerns. Given the Supreme Court's imposition of the major purpose requirement, *Buckley*, 424 U.S. at 79, it plainly was not contrary to law for the FEC to interpret 52 U.S.C. § 30101(4)(A) with that limitation. Contrary to plaintiffs' argument (Pls.' Mem. at 14-15), however, the FEC is not seeking deference with respect to some generalized interpretation of *Buckley*; rather, the Court is required to defer to the agency's interpretation of the applicable provision of the Act, section 30101(4)(A). In interpreting that provision, the Commission is permitted to take into account the "changed circumstances" resulting from major "[c]onstitutional decisions" of the Supreme Court. *See Van Hollen v. FEC*, ___ F.3d ___, 2016 WL 278200, at *9 (D.C. Cir. Jan. 21, 2016) (applying deferential review to an FEC regulation implementing *WRTL* even though that decision "said absolutely nothing" about the disclosure provision the Commission subsequently revised). Plaintiffs' request that the Court deviate from the norm of deference and apply a de novo standard of review (*see* Pls.' Mem. at 14-15) is thus unfounded.[4]

Nor is the deferential standard of review altered by the nature of the dismissal, which resulted from a 3-3 split vote instead of a majority vote such as 6-0, 5-1, or 4-2. The D.C. Circuit has squarely held that it owes deference to an FEC legal interpretation supporting a decision not to proceed on an enforcement matter, even if it only "prevails on a 3-3 deadlock."

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[4] Plaintiffs rely on the Court of Appeals's vacated opinion in *Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc), *vacated on other grounds*, 524 U.S. 11 (1998), to argue against deference (Pls.' Mem. at 15). That opinion, however, is nonprecedential and of even more dubious value given that Court's repeated reaffirmation of the major-purpose test during the last twenty years. *See, e.g.*, *Unity08 v. FEC*, 596 F.3d 861, 867-69 (D.C. Cir. 2010); *EMILY's List v. FEC*, 581 F.3d 1, 16 n.15 (D.C. Cir. 2009).

In re Sealed Case, 223 F.3d 775, 779 (D.C. Cir. 2000); *FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 185 (D.C. Cir. 2001).

In *NRSC*, another case in which Commissioners split 3-3, the Court of Appeals applied "ordinar[y]" principles of agency deference to the rationale of dissenting Commissioners. The Court found that the construction of a disputed regulation articulated by the three "declining-to-go-ahead Commissioners," *Common Cause*, 842 F.2d at 449, could be sustained in light of the "Commission's precedents and statements," which did not "clearly establish" what the disputed regulation meant. *NRSC*, 966 F.2d at 1476-77. The Court held that it was "enough to say" that the FEC had provided, through the declining Commissioners' statement, "a reasoned justification for" its actions and found that "[i]t was error for the district court to force a different construction upon the Commission and the entities subject to its regulation." *Id.* at 1478.

The deference that the D.C. Circuit accorded the dissenting Commissioners in *NRSC* had its roots in *DCCC*, 831 F.2d 1131, an earlier FEC case that also arose from a split-vote dismissal.[5] In *DCCC*, in an opinion authored by then-Judge Ruth Bader Ginsburg, the D.C. Circuit "held that, to make judicial review a meaningful exercise, the three Commissioners who voted to dismiss must provide a statement of their reasons for so voting." *NRSC*, 966 F.2d at 1476 (discussing *DCCC*). A footnote in the *DCCC* opinion "strongly suggest[ed] that, if the meaning of the statute is not clear, a reviewing court should accord deference to the Commission's rationale," even in a situation in which the Commission was divided. *Id.* The

[5] *DCCC* and *DSCC* were dismissed at the "reason to believe" stage of the Commission's enforcement process. In *NRSC*, the court considered the Commission's actions at the subsequent "probable cause" stage. Like a reason to believe finding, a probable cause finding requires four affirmative votes of Commissioners to proceed to the next step. *See supra* p. 3. Because of the highly analogous nature of the inquiries, the D.C. Circuit and courts in this District have made no distinctions in reviewing FEC dismissals based upon whether they occurred at the reason to believe or probable cause stages.

DCCC footnote stated that "[i]n the absence of prior Commission precedent . . . ***judicial deference to the agency's initial decision or indecision would be at its zenith.***" *DCCC*, 831 F.2d at 1135 n.5 (emphasis added).

Shortly after deciding *DCCC*, the D.C. Circuit "expanded it to control generally situations in which the Commission deadlocks and dismisses." *NRSC*, 966 F.2d at 1476. The D.C. Circuit in *NRSC* determined that the "import of *DCCC* today is that we see no material distinction between" a case reviewing a deadlock dismissal "and the Supreme Court's decision in *DSCC*" reviewing a unanimous dismissal. ***Id.*** "[B]oth *DCCC* and *DSCC* were on review of Commission decisions, with supporting rationales, to dismiss complaints." ***Id.***; ***see also Stark v. FEC***, 683 F. Supp. 836, 840-41 (D.D.C. 1988) ("[T]his Court reads *DCCC* to require that the same deference [accorded by the Supreme Court in *DSCC*] be accorded the reasoning of 'dissenting' Commissioners who prevent Commission action by voting to deadlock as is given the reasoning of the Commission when it acts affirmatively as a body to dismiss a complaint."). Accordingly, split-vote dismissals are owed the same level of deference as is owed to majority or unanimous dismissals.

More recently, and subsequent to its vacated decision in *Akins*, the Court of Appeals reaffirmed the deference afforded to declining-to-go-ahead Commissioners and elaborated on its bases. In *In re Sealed Case*, 223 F.3d 775 (D.C. Cir. 2000), as plaintiffs acknowledge (Pls.' Mem. at 16 n.9), the D.C. Circuit deferred to such a "controlling group's" interpretation of whether a financial transaction involving a foreign national was illegal under FECA. ***Id.*** at 780 (finding FEC's determination regarding whether there was probable cause to believe a violation had occurred "entitled to deference"). That decision foreclosed the Department of Justice's argument that the crime-fraud exception to privilege required the production of documents

possibly associated with the transaction. *Id.* at 779 ("This case does not fall within the crime-fraud exception because what [the Republican National Committee] and its officials are accused of is not criminal."). Although the context was different from *NRSC* — *NRSC* concerned an interpretation of an FEC regulation (not FECA itself) and concerned a civil (not criminal) matter — the Court of Appeals found these differences immaterial in deferring to the dissenting Commissioners' adjudicative decision. *Id.* at 779-80; *contra* Pls.' Mem. at 16 n.9 (attempting to distinguish *In re Sealed Case* due to its "peculiar situation").

In re Sealed Case further explains why *Chevron* deference is appropriate in instances in which the Commission deadlocks in enforcement proceedings. Based upon the structure of section 30109, FECA's enforcement provision, the *In re Sealed Case* court explained that "the probable cause determination is part of a detailed statutory framework for civil enforcement and is analogous to a formal adjudication," thus falling on the "*Chevron* side of the line." 223 F.3d at 780; *Nat'l Rifle Ass'n of Am.*, 254 F.3d at 185 (explaining that "in making probable cause determinations, the Commission . . . giv[es] ambiguous statutory language concrete meaning through case-by-case adjudication"; these were among the reasons why the court in *In re Sealed Case* determined that the FEC's "probable cause determination and its underlying statutory interpretation had sufficient legal effect to warrant *Chevron* deference"); *see also United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."); *id.* at 230 n.12 (collecting instances of *Chevron* deference in adjudication cases); Mem. Op. at 8 (explaining that agencies may announce new principles through adjudication).

Indeed, unlike other agencies, which may issue no-action letters prepared by staff, the FEC's "no-action decision here was made by the Commission itself." *In re Sealed Case*, 223 F.3d at 780; *see also Nat'l Rifle Ass'n of Am.*, 254 F.3d at 185. By providing in FECA that it takes four Commissioner votes to proceed on an enforcement matter, but only three to dismiss, Congress sought to ensure that the agency would not "provide room for partisan misuse." H.R. 12406, H. Rep. No. 94-917, 94th Cong., 2d Sess. at 3 (1976). The legislative history concerning the FEC's structure confirms that Congress designed the Commission to "initiate investigations, . . . and take other steps of comparable importance only upon the affirmative vote of four . . . members. The four-vote requirement serves to assure that enforcement actions, as to which the Congress has no continuing voice, will be the product of a mature and considered judgment." *Id*. The D.C. Circuit echoed these concerns, explaining that *Chevron* deference to a Commission's split-vote enforcement dismissal is warranted both because it is consistent with Congress's design of the agency to be statutorily balanced, without a political party possessing a majority, and with the Supreme Court's instructions in *DSCC*, which were "more consonant with *Chevron*" deference (even though *Chevron* had not been decided yet) than with the less deferential standard of review under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *In re Sealed Case*, 223 F.3d at 780-81. "If courts do not accord *Chevron* deference to a prevailing decision that specific conduct is *not* a violation, parties may be subject to criminal penalties where Congress could not have intended that result." *Id.* at 780 (emphasis added).

Plaintiffs acknowledge that *Chevron* deference is appropriate when the agency interprets FECA (as happened here), but they nevertheless contend that "the vote of three [C]ommissioners is insufficient to exercise the authority of the FEC." (Pls.' Mem. at 15.) Binding precedent — including the D.C. Circuit's controlling decisions in *NRSC*, *In re Sealed Case*, *National Rifle*

Association, *DCCC*, and *Common Cause*, and the Supreme Court's decision in *DSCC* — forecloses plaintiffs' request that the Court decline to apply *Chevron* deference to the "prevailing decision[s]" challenged here. Plaintiffs overlook the distinction between the FEC's authority to regulate prospectively through rulemakings or adjudications in which four or more Commissioners agree on a rationale, on the one hand, and the power of three Commissioners to compel dismissal of an administrative enforcement matter, on the other. Thus, while it is true that the D.C. Circuit noted in *Common Cause* that "[a] statement of reasons [by declining-to-go-ahead Commissioners] would not be binding legal precedent or authority for *future* cases," 842 F.2d at 449 n.32 (emphasis added), the statement of three such Commissioners in a case like this one is the agency's official decision and is to be accorded *Chevron* deference in the context of judicial review of that *adjudicative* decision, *In re Sealed Case*, 223 F.3d at 780; *see also* Mem. Op. at 2 (explaining that the AJS and AAN dismissals were "ordinary adjudications"). Contrary to plaintiffs' contention that a 3-3 dismissal does not "exercise the authority of the FEC" (Pls.' Mem. at 15), that is precisely how the agency was designed to operate. Whether that design is considered a feature, as Congress understood it, or a defect, as plaintiffs do, deference to a dismissal resulting from an absence of a majority furthers the Congressional intent of requiring that any federal campaign finance enforcement be the product of the Commissioners' bipartisan expertise.

The Court must therefore accord *Chevron* deference to the controlling group of Commissioners in this case, just as other courts in this District have done when reviewing Commission dismissals resulting from split votes. *See, e.g.*, *Common Cause*, 108 F.3d at 415 (reciting the district court's application of "*Chevron* deference" to the "'declining-to-go-ahead'

Commissioners"); *GOPAC, Inc.*, 917 F. Supp. at 860 (noting that the statutory provision entitling the FEC to *DSCC* deference is section 30109(a)(8)).

C. Section 30109(a)(8) Review is Based Solely on the Administrative Record

As the parties have already recognized, this is an "'action for review on an administrative record'" (Joint Meet and Confer Statement at 1 (Docket No. 30) (quoting LCvR 16.3(b)(1))), in which judicial review must be limited to the administrative record "already in existence, not some new record made initially in the reviewing court," *Camp v. Pitts*, 411 U.S. 138, 142, 143 (1973) (per curiam). Indeed, a "widely accepted principle of administrative law [is] that the courts base their review of an agency's actions on the materials that were before the agency at the time its decision was made." *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997).

Plaintiffs nevertheless attempt to rely on hundreds of pages of material that were not part of the record before the Commission in either underlying matter. (*See* Decl. of Steward C. McPhail, Exhs. 1-20 Dec. 22, 2015 (Docket No. 33-1) ("McPhail Decl.").) Indeed, much of plaintiffs' extra-record material was not even available until *after* the June 24, 2014 dismissals challenged here. (*Id.* Exhs. 1, 3-6, 10-20.) Such extra-record material is improper in this section 30109(a)(8) case and cannot inform this Court's review of the controlling rationales for the challenged dismissal decisions. *See Earthworks v. Dep't of the Interior*, 279 F.R.D. 180, 184 (D.D.C. 2012) ("[T]o ensure fair review of an agency decision, a reviewing court 'should have before it neither more nor less information than did the agency when it made its decision.'" (citations omitted) (collecting cases)).

Plaintiffs' attempt to rely on various court filings and submissions from unrelated judicial and administrative matters as legislative facts is likewise improper. (Pls.' Mem. at 2 n.1; *see* McPhail Decl., Exhs. 2, 7-9, 20-30.) A court's general ability to take judicial notice of such

publicly available records does not supersede the well-settled principle that judicial review of agency actions must be limited to the administrative record before the agency at the time of the decision. *See Dist. Hosp. Partners, L.P. v. Sebelius*, 971 F. Supp. 2d 15, 31-32 (D.D.C. 2013) (refusing to order supplementation of administrative record absent "concrete evidence" that proffered additional material was considered by agency), *aff'd sub nom. Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46 (D.C. Cir. 2015); *Cty. of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 78 (D.D.C. 2008) (refusing to take judicial notice of "[e]xtra-record material constitut[ing] documents, data, and other information which was not part of the administrative record"). Even if the Court chose to take judicial notice of indisputable facts from public sources, plaintiffs' submissions are not limited to such facts. Instead, plaintiffs submit extra-record materials regarding vigorously disputed factual questions, including allegations regarding two other groups alleged to be political committees about which FEC Commissioners disagreed (Pls.' Mem. at 10) and circumstances about Wisconsin Governor Scott Walker's recall campaign that have been the subject of extensive court proceedings (*id.* at 11). Those issues are not appropriate subjects for judicial notice.

Relatedly, plaintiffs' generalized "dark money" arguments (Pls.' Mem. at 2-11), which largely rely on such extra-record material, are a stealth effort to relitigate this Court's August 2015 decision rejecting plaintiffs' earlier attempt to make similar generalized policy arguments. Mem. Op. at 11. In recognizing that this case is a narrow challenge to the Commission's dismissal of two specific administrative complaints, the Court explained that plaintiffs "may of course claim that the basis on which the FEC reached its [dismissal] decisions was arbitrary or unsound," but clarified that "CREW's *exclusive* remedy for its disagreement with the FEC's rationale *is to challenge those particular decisions under the judicial review provision of FECA*."

Id. (emphasis added). Plaintiffs' general facts about topics like "The Growth of Dark Money Campaign Spending" do not relate to the particular decisions at issue here.

The extra-record material in plaintiffs' exhibits was not considered by Commissioners in making the underlying dismissal decisions on review here and such material, and plaintiffs' arguments premised on such material, should thus be disregarded.

II. THE DISMISSAL DECISIONS CLEARLY WERE NOT CONTRARY TO LAW

Because AJS and AAN met the $1,000 statutory threshold for political-committee status, the only question is whether the controlling statements' conclusions that each group did not have as its major purpose the nomination or election of federal candidates were reasonable. *Free Speech*, 720 F.3d at 797. Those conclusions were reasonable and certainly not contrary to law.[6]

The controlling Commissioners' reasoning accords with the narrow construction of FECA's political-committee definition that the Supreme Court and the federal courts of appeals, including the D.C. Circuit, have followed for nearly four decades, as well as the Commission's own Supplemental E&J and historical practices. The controlling group's approach to analyzing the organizations' major purposes — by examining their central organizational purpose and comparative spending — was squarely justified.

To determine AJS's and AAN's central organizational purposes, each statement analyzed the groups' respective public statements and evaluated these statements and other information in the records before the Commission. In assessing the organizations' comparative spending, the controlling group identified what it determined to be their relevant federal campaign activity, each group's express advocacy, and compared such spending to the group's total spending

[6] Following the initiation of this lawsuit, the FEC moved to dismiss certain claims that sought relief under the Administrative Procedure Act. The Court granted that motion, Mem. Op. at 2, meaning that the case is now properly confined to review under 52 U.S.C. § 30109(a)(8).

captured in the administrative records. Based on these analyses, the controlling Commissioners reasonably determined that AJS is an "issue-advocacy organization that cannot be regulated as a political committee" (AR 1438) and that AAN's major purpose is "issue advocacy and grassroots lobbying and organizing" (AR 1690). Because these applications of the major-purpose test were consistent with FECA, multiple court decisions, and the Commission's own statements and practice, they readily pass muster under deferential review.

A. The Controlling Commissioners' Approach to Determining Each of AJS's and AAN's "Major Purpose" Was Reasonable

1. "Political Committee" Has Been Narrowly Construed by Courts

The controlling Commissioners' approach to the major-purpose test was based upon First Amendment concerns that have been expressed by numerous courts and commentators. The test itself arose out of the Supreme Court's concern that FECA's political-committee definition, if mechanically applied, might sweep too broadly. In *Buckley*, the Court feared that defining political-committee status "only in terms of amount of annual 'contributions' and 'expenditures' . . . could be interpreted to reach groups engaged purely in issue discussion." 424 U.S. at 79 (footnote omitted). Noting that lower courts had construed "'political committee' more narrowly" in order to "avoid questions of unconstitutionality," *id.* at 79 & n.106; *see also* AR 1444-47 (discussing pre-*Buckley* analysis); AR 1696-98 (same), the Court limited the reach of FECA's definition of "political committee" to "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate," *Buckley*, 424 U.S. at 79. This construction was sufficient, the Court said, "[t]o fulfill the purposes of the Act"; the expenditures of such "major purpose" groups could be "assumed to fall within the core area sought to be addressed by Congress," which are, "by definition, campaign related." *Id.*

MCFL reaffirmed *Buckley*'s major-purpose holding. 479 U.S. at 252 n.6 (quoting *Buckley*, 424 U.S. at 79). Even though the organization at issue in the case, MCFL, occasionally "engage[d] in activities on behalf of political candidates," it could not be regulated as a political committee because "[i]ts central organizational purpose [was] issue advocacy." *Id.* Only if a group's spending "become[s] so extensive that [its] major purpose may be regarded as campaign activity, [can it properly] . . . be classified as a political committee." *Id.* at 262. Organizations that do have that major purpose are political committees and are subject to "extensive requirements," including recordkeeping and reporting requirements. *Id.* at 254; *Citizens United*, 558 U.S. at 337 (noting that political-committee obligations are "extensive").

The Supreme Court has not directly addressed the major-purpose test since its decisions in *Buckley* and *MCFL*.[7] The D.C. Circuit has likewise not refined the particulars of the major-purpose test, though it has followed the Supreme Court's cautious approach. In *FEC v. Machinists Non-Partisan Political League*, the Court of Appeals explained that because evaluating political-committee status arises in the "delicate" First Amendment area, "there is no imperative" to stretch the statute or to "read into it oblique inferences of Congressional intent." 655 F.2d 380, 394 (D.C. Cir. 1981) ("*Machinists*"). "Achieving a reasonable, constitutionally sound conclusion in this case requires just the opposite," the court observed, *id.*, before holding that the FEC lacked jurisdiction to regulate contributions of a group seeking to "draft" Edward Kennedy as a candidate for president, *id.* at 390-97. *Machinists* follows the Supreme Court's teaching that political-committee status should be narrowly construed to avoid the constitutional

[7] Although a question about the test was raised in *FEC v. Akins*, 524 U.S. 11 (1998), the Court declined to answer it, instead permitting the Commission to address a threshold question about new rules defining the term "members" for purposes of a "membership organization." *Id.* at 26-29. In *McConnell*, in the course of upholding a definition of "federal election activity" added to FECA by BCRA, the Court cited *Buckley*'s major-purpose discussion with approval but did not otherwise elaborate on its focus. 540 U.S. at 170 n.64.

problems about which "*Buckley* and its lower court predecessors" were concerned. *Id.* at 394; *see also Unity08 v FEC*, 596 F.3d 861, 867-69 (D.C. Cir. 2010) (following *Machinists*).

2. Judicial and FEC Precedents Informed the Controlling Approach

The controlling group's approach also followed judicial opinions considering the major-purpose test and the Commission's case-by-case method. Because the Supreme Court did not "mandate a particular methodology for determining an organization's major purpose," the courts that have considered challenges to the Commission's methodology have agreed with the Commission that it is "free to administer FECA political committee regulations either through categorical rules or through individualized adjudications." *RTAA*, 681 F.3d at 556; *Free Speech*, 720 F.3d at 797; *see also Shays*, 511 F. Supp. 2d at 30-31. "The determination of whether the election or defeat of federal candidates for office is *the* major purpose of an organization, and not simply *a* major purpose, is inherently a comparative task." *RTAA*, 681 F.3d at 556; *Free Speech*, 720 F.3d at 797. The Fourth and Tenth Circuits, as well as Judge Sullivan in this District, therefore agreed that the major-purpose determination requires a "fact-intensive analysis," and is "incompatible with a one-size-fits-all rule." *RTAA*, 681 F.3d at 556-57; *Free Speech*, 720 F.3d at 797-98; *see also Shays*, 511 F. Supp. 2d at 29-31. "The necessity of a contextual inquiry is supported by judicial decisions applying the major purpose test, which have used the same fact-intensive analysis that the Commission has adopted." *RTAA*, 681 F.3d at 557 (citing *Malenick*, 310 F. Supp. 2d at 234-37, *GOPAC, Inc.*, 917 F. Supp. at 859, 864-66, and *Shays*, 511 F. Supp. 2d at 29-31); *Free Speech*, 720 F.3d at 798. Accordingly, the courts have upheld the Commission's "sensible" and "flexibl[e] . . . case-by-case" method of determining an organization's major purpose. *RTAA*, 681 F.3d at 556, 558; *Free Speech*, 720 F.3d at 797-98; *see also Shays*, 511 F. Supp. 2d at 29-31.

The Commission's Supplemental E&J explains that the FEC performs the major-purpose analysis by consulting sources such as the group's public statements, government filings, charters, and bylaws. *See* 72 Fed. Reg. at 5601, 5605 (describing sources). For example, "[a]n analysis of [an organization's] public statements can . . . be instructive in determining an organization's purpose." *Id.* at 5601 (citing *Malenick*, 310 F. Supp. 2d at 234-36; *GOPAC, Inc.*, 917 F. Supp. at 859; Advisory Opinion 2006-20 (Unity 08)); *see also id.* ("The Commission may need to examine statements by the organization that characterize its activities and purposes."); *id.* at 5605 (noting use of "organizational planning documents"). In addition, the Commission has also explained that it "may . . . need to evaluate the organization's spending on Federal campaign activity, as well as any other spending by the organization." *Id.* at 5601.

Here, the controlling group's approach was based upon these "fundamental" factors articulated in the Supplemental E&J. (AR 1453; AR 1705.) Their statements analyzed each of AJS's and AAN's major purpose by reviewing their central organizational purposes and by comparing their "spending on campaign activities with [their] spending on activities unrelated to the election or defeat of a federal candidate, including the group[s'] genuine issue speech." (AR 1706 (footnote omitted); *see also* AR 1455.)

The controlling group's approach was also consistent with lower courts' approaches to the major-purpose test, including the methods employed by the Tenth and Fourth Circuits. In the course of analyzing a state law, the Tenth Circuit held that there are "two methods" to determine major purpose: (1) examination of the organization's central organizational purpose or (2) comparing election-related "spending with overall spending to determine whether the preponderance of expenditures is for express advocacy or contributions to candidates." *Herrera*, 611 F.3d at 678. The approach used here also conforms with the Fourth Circuit's explanation

that "the Commission first considers a group's political activities, such as spending on a particular electoral or issue-advocacy campaign, and then it evaluates an organization's 'major purpose,' as revealed by that group's public statements, fundraising appeals, government filings, and organizational documents." *RTAA*, 681 F.3d at 555 (citation omitted). And it is consistent with the way the district court in *GOPAC* explained that an "organization's purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates." 917 F. Supp. at 859; *see also Barland*, 751 F.3d at 841 ("Full political-committee requirements apply only to 'major purpose' groups within the meaning of the *Buckley* limitation.").

B. The Controlling "Major Purpose" Determinations Were Reasonable

In applying the major-purpose test, the controlling group of Commissioners correctly sought to determine each of AJS's and AAN's *sole* major purpose. "If organizations were regulable merely for having the support or opposition of a candidate as 'a major purpose,'" political-committee status could reach "organizations primarily engaged in speech on political issues unrelated to a particular candidate." *Leake*, 525 F.3d at 287-88; *see also RTAA*, 681 F.3d at 556; *Free Speech*, 720 F.3d at 797. The controlling group thus analyzed whether AJS's and AAN's sole major purpose was nominating or electing candidates by evaluating the groups' central organizational purposes as the groups described them in their public statements and by comparing the groups' relevant electoral spending to their other spending.

1. Commissioners Reasonably Concluded That Neither Group's Central Organizational Purpose Was Nominating or Electing Candidates

The controlling group analyzed AJS's and AAN's public statements and records and reasonably determined that neither group's organizational documents indicated that its primary purpose is nominating or electing candidates. *See supra* pp. 17-18. Plaintiffs have never argued

otherwise. (AR 1455 (observing that the administrative complaint does not "even suggest that AJS is a political committee based on its stated organizational purpose"); AR 1708 (similar).)

2. Commissioners' Comparative Spending Findings Were Reasonable

The controlling Commissioners also extensively reviewed both AJS's and AAN's "overall spending on express advocacy against [their] overall spending on activities unrelated to campaigns, including issue advocacy." (AR 1456; AR 1708.) The Commissioners determined that the relevant universe of spending for determining the groups' federal campaign spending was their independent expenditures, and compared that spending with the groups' total spending as documented in each administrative record. (AR 1456-58; AR 1708-09.) This analysis showed that about 10 percent (AJS) or 15 percent (AAN) of the organizations' respective overall spending urged the election or defeat of clearly identified federal candidates. (AR 1458; AR 1709.) These considerations of the groups' (1) express advocacy spending (numerator) and (2) total spending during the relevant time period (denominator) were both reasonable, as were the controlling group's conclusions that each group's express advocacy spending representing only a fraction of the organization's total spending was not "so extensive" as to provide reason to believe that either AJS or AAN was required to register as a political committee. (*Id.*)

a. Relevant Federal Campaign Spending (Numerator)

Defining relevant federal campaign spending as spending on independent expenditures — express advocacy — was reasonable and not contrary to law. As explained *supra* pp. 31-35, the Commissioners' decision to narrowly construe which groups may be regulated as federal political committees is consistent with the Supreme Court's decisions in *Buckley* and *MCFL*, the D.C. Circuit's decision in *Machinists*, and the decisions of other federal courts.

Buckley itself emphasized, in the context of event-driven independent expenditure reporting, that "expenditure" needed to be construed narrowly in order to ensure that such "spending . . . is unambiguously related to the campaign of a particular federal candidate." 424 U.S. at 79-80. Given the Court's vagueness concerns regarding the "contribution" and "expenditure" portions of the political committee definition, it was reasonable for the statements of reasons at issue here to construe the spending that would count towards major purpose as being limited to express advocacy. *Buckley* recognized that political committee expenditures "are, by definition, campaign related," *id.*, which echoes the campaign-relatedness of express advocacy by non-committees and confirms that spending on express advocacy is appropriate when examining groups' spending to determine if they are political committees. (AR 1456-57 n.117.)

Plaintiffs prefer a broader application of the major-purpose test that would include as relevant federal campaign activity spending on non-express-advocacy communications such as electioneering communications. (Pls.' Mem. at 26-37.) But plaintiffs fail to identify a single court decision requiring that the FEC include non-express-advocacy spending in performing its major-purpose analysis. The controlling group of Commissioners, by contrast, drew support for their definition of relevant federal campaign activity from post-*Buckley* case law addressing the question more closely. In *Barland*, the Seventh Circuit reasoned that imposing state political-committee registration and reporting requirements on "groups that engage in express election advocacy as their major purpose . . . is a relevantly correlated and reasonably tailored means of achieving the public's informational interest," but it rejected the imposition of such requirements "on issue-advocacy groups that only occasionally engage in express advocacy." 751 F.3d at 841. The court thus invalidated certain state statutory language that "could be construed by state

regulators as a reference to the candidate's qualifications or as '*support*' or '*condemnation*' of the candidate's record or positions," leaving behind in its place a narrower statutory analysis "basically track[ing] the boundaries for express advocacy and its functional equivalent." *Id.* at 838.

In *Herrera*, the Tenth Circuit reached a similar conclusion. In analyzing the spending of two groups under New Mexico's campaign finance act, the court found "no indication" that either spent "a preponderance of its expenditures on *express advocacy* or contributions to candidates." 611 F.3d at 678 (emphasis added). Likewise, in *GOPAC*, the court found an organization was not a political committee under FECA, in part by finding not relevant a letter that mentioned the name of a federal candidate, but "[did] not advocate his election or defeat, nor was it directed at [his] constituents." 917 F. Supp. at 863; *accord Malenick*, 310 F. Supp. 2d at 235 (considering communications "advocat[ing] for the election of specific federal candidates" in determining group's major purpose).[8]

Unable to identify any judicial authority supporting their view that non-express-advocacy spending must be included as relevant federal campaign activity, plaintiffs attempt to rely on first principles. Plaintiffs first argue that Congress's passage of amendments to FECA in 2002 demonstrated its intent to require political-committee-style reporting of electioneering communications. (Pls.' Mem. at 26-29.) This argument practically defeats itself. When Congress enacted electioneering communications disclosure requirements, it did not make those communications subject to FECA's then-existing disclosure regime, such as the existing reporting requirements for political committees. Instead, Congress crafted a new, streamlined

[8] Plaintiffs' miscellaneous attempts to distinguish these decisions (Pls.' Mem. at 32-35) do not change that these decisions support an express advocacy construction of the major-purpose analysis.

disclosure requirement tailored to curbing anonymous sham issue ads. *Compare* 52 U.S.C. § 30104(f) (disclosure of electioneering communications), *with* 52 U.S.C. §§ 30103, 30104(a)-(b) (registration and reporting for political committees). Tellingly, as the Commission observed, "Congress did not amend the definition of expenditure in BCRA, and in fact, specified that 'electioneering communications' are not expenditures under the Act." Supplemental E&J, 72 Fed. Reg. at 5597 (citing 52 U.S.C. § 30104(f)(1)-(2) (treating electioneering communications as "disbursements")). Thus, plaintiffs' argument that by doing one thing Congress actually also meant to do something else, which it easily could have done if it wished, is unconvincing.

Moreover, plaintiffs' unqualified assumption that electioneering communications "serve the same purposes as express advocacy" (Pls.' Mem. at 28) — *i.e.*, advocate for a candidate by avoiding the use of so-called magic words — conflicts with the Supreme Court's recognition that not all electioneering communications are the functional equivalent of express advocacy. "[A] court should find that an ad is 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." *WRTL*, 551 U.S.at 469-70 (emphasis added). Some electioneering communications may be genuine issue ads. *McConnell*, 540 U.S. at 206; *WRTL*, 551 U.S. at 470; *see also* AR 1450-51; AR 1701-03. Under plaintiffs' theory, an organization spending a majority of its funds on genuine issue ads similar to those at issue in *WRTL*, *see* 551 U.S. at 459, would be deemed to have a major purpose of nominating or electing candidates. And even if the line between campaign advocacy and issue advocacy can "'dissolve in practical application,'" the Court has recognized a difference between them. *Id.* at 456-57. Accordingly, Congress's imposition of event-driven reporting requirements for electioneering communications does not compel the

conclusion that such communications must be counted as part of a group's relevant campaign spending in determining its major purpose.

Plaintiffs' contention that courts have upheld "state law campaign finance disclosure regimes that have counted . . . non-express advocacy communications, including their electioneering communications" (Pls.' Mem. at 29) similarly falls far short of their burden in this case. It is one thing to show that an approach is *permissible*; it is quite another to show that it is *required*. Regardless of whether it would be constitutional for the FEC to include non-express advocacy communications in a group's relevant spending when performing the comparative spending analysis portion of the major-purpose inquiry, as plaintiffs contend, such a showing is far short of demonstrating that it would be unreasonable for Commissioners to use other, alternative approaches. As explained above, plaintiffs have failed to identify any authority requiring the FEC to include electioneering communications as relevant spending. There is therefore no law to which the agency's dismissals in these matters could be contrary to.

Plaintiffs also contend that the FEC has "long treated expenditures for all federal campaign activities, not simply for express advocacy, as indicative of a group's major purpose." (Pls.' Mem. at 29 (citing Supplemental E&J).) Although the Commission used the phrase "federal campaign activity" in the Supplemental E&J, plaintiffs fail to identify any FEC statement establishing that communications that lack express advocacy (or, perhaps, its functional equivalent) must be included under that standard. There was no "clearly establish[ed]" Commission determination on that issue, and the controlling group must be accorded deference here. *NRSC*, 966 F.2d at 1476-77. Moreover, even if the agency had provided consistent guidance on the question, the controlling group's reliance on intervening appellate court decisions provides an eminently reasonable basis for its decisions. Indeed, the

controlling group noted its view that "the value of a number of the Commission's past political committee enforcement matters cited in the 2007 Supplemental E&J has been diminished by intervening decisions both by courts and by the Commission." (AR 1453; AR 1704.)

Plaintiffs' other arguments are just as meritless. Plaintiffs' contention that the controlling Commissioners' position "defies reason" by "providing less protection to groups that engage in express advocacy than groups engaged in other speech" (Pls.' Mem. at 35) is backwards. More disclosure is required of groups that have a major purpose of nominating or election federal candidates precisely because such groups have that purpose. Furthermore, plaintiffs' complaint that the controlling Commissioners' approach is inconsistent with the agency's expressed preference for the flexibility of case-by-case adjudication is baseless. (*Id.* at 35.) In both matters, the controlling Commissioners engaged in a fact-specific review of AJS's and AAN's electioneering communications. (AR 1465-69; AR 1718-23.) And plaintiffs' final objection that whatever spending is excluded from the category of relevant election-related expenses wrongly then "counts *against* finding the groups are political committees" (Pls.' Mem. at 36) would exist regardless of where the line is drawn. The comparative spending analysis by its nature requires identification of those expenses that count toward a group's relevant spending and those that do not. Plaintiffs disagree with the controlling determinations but have failed to show that they are contrary to law.

b. Overall Spending During the Relevant Time Period (Denominator)

The controlling determination of the appropriate time period in which to consider AJS's and AAN's spending was also reasonable. Neither FECA nor any judicial decision specifies a particular time period for determining a group's major purpose. It therefore fell within the Commission's considerable discretion to determine what time period was appropriate. In these

matters, the controlling group analyzed the organizations' spending over the entire period in the records before the Commission. In AJS's case, this was the period between its founding in 1997 and May 2012. (AR 1457.) For AAN, the period ran from its founding in July 2009 through June 2011. (AR 1708.) These decisions were reasonable and based upon previous cases and enforcement matters in which courts or the FEC looked beyond a single calendar year in evaluating organizations' major purpose. (AR 1461 n.146 (collecting examples and noting that the same group of Commissioners used this approach in dismissing another matter, MUR 6396 (Crossroads GPS)).)

Plaintiffs contend that the controlling Commissioners "ignored the *most* reasonable application of the 'major purpose' test: consideration of a group's calendar year expenditures." (Pls.' Mem. at 40 (emphasis added).) Whatever the merits of this argument, plaintiffs once again fail to connect their arguments to their burden. It is insufficient to argue that plaintiffs' proposed analysis is better than the analysis they are challenging, or even that their proposed analysis would be best. The Court's obligation is "not to interpret the statute as it [thinks] best but rather the narrower inquiry into whether the Commission's construction was sufficiently reasonable to be accepted," and "it is not necessary for [the Court] to find that the agency's construction was the only reasonable one or even the reading the [C]ourt would have reached" on its own "if the question initially had arisen in a judicial proceeding." *DSCC*, 454 U.S. at 39 (internal quotation marks omitted). Plaintiffs do not argue FECA's text requires an organization's major purpose to be determined based on its actions during a particular calendar year, nor could they. And plaintiffs do not identify any authority mandating a bright-line rule like the calendar-year test they advocate. In fact, courts have rejected the idea that such bright-lines are needed in this context, *RTAA*, 681 F.3d at 557; *Shays*, 511 F. Supp. 2d at 29-31; *Herrera*, 611 F.3d at 679

(rejecting automatic classification of organizations as political committees without reference to organizations' "major purpose").[9]

In any event, the arguments plaintiffs do advance are unpersuasive. They rely on the analysis of the Commission's Office of General Counsel (Pls.' Mem. at 38), which had in turn recommended that the calendar-year test "'provides the firmest statutory footing for the Commission's major purpose determination'" (AR 1461 n.145). But an agency generally has no obligation to accept its staff's views or recommendations, and the D.C. Circuit has specifically minimized the importance of staff views in judicial review of agency decisions. *See, e.g.*, *Chelsea Industries, Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002) (rejecting as "rather silly" argument that agency's decision was unreasonable due to its conflict with "General Counsel's understanding of the case law before the present decision"). Courts reviewing FEC actions contrary to staff recommendations have thus done little more than note that background fact. *See, e.g.*, *In re Sealed Case*, 223 F.3d at 781 (noting General Counsel's position but analyzing Commission's decision); *Akins*, 736 F. Supp. 2d at 24 (granting summary judgment to Commission despite contrary recommendation from General Counsel to find reason to believe).

While it is true that FECA's political committee definition uses a "calendar year" for determining whether an organization has received contributions or made expenditures exceeding $1,000, 52 U.S.C. § 30101(4)(A), the major-purpose test is an "'additional hurdle to establishing

[9] Plaintiffs also attempt to reduce their heavy burden by arguing that the reason-to-believe standard "is a low bar." (Pls.' Mem. at 43-45.) The argument is misplaced. The statement of policy on which plaintiffs rely merely recites in generic terms that the Commission generally will find reason to believe "in cases where the available evidence in the matter is at least sufficient to warrant conducting an investigation, and where the seriousness of the alleged violation warrants either further investigation or immediate conciliation." *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12,545, 12,545-46 (Mar. 16, 2007). Here, three Commissioners concluded that the record was insufficient to warrant further investigative proceedings, and for the many reasons described above, that conclusion was certainly reasonable.

political committee status'" that the Supreme Court established in *Buckley*. *Free Speech*, 720 F.3d at 797 (quoting Supplemental E&J, 72 Fed. Reg. at 5601). Thus, Congress has not expressed *any* intent, ambiguous or otherwise, regarding the relevant scope of time for determining an organization's major purpose, and plaintiffs do not argue otherwise. The Commission nevertheless receives deferential review of how it responded to the changed circumstances following *Buckley*. *Van Hollen*, 2016 WL 278200, at *9. Nor did *Buckley* specify that consideration of an organization's major purpose must parallel the statutory calendar-year test for contributions and expenditures. 424 U.S. at 79. Rather, the Court in *Buckley* referred to an organization's major purpose without further elaboration, and plaintiffs point to no other judicial decisions that have sought to focus or limit the relevant time period for determining a group's major purpose. The controlling Commissioners' decision to use the entire record before it was neither unreasonable nor contrary to law.

Plaintiffs' other arguments are easily dispatched. Contrary to plaintiffs' characterization, the controlling Commissioners did not state that their use of AJS's and AAN's whole spending picture was to generally minimize the number of groups "subject . . . to political committee disclosures." (Pls.' Mem. at 38.) What they said was that using a calendar-year test "renders an artificial and indeed distorted picture of the organization." (AR 1714; *see also* AR 1462.) That window "would inevitably subject many issue-based organizations to the burdens of political committee status." (AR 1714; *see also* AR 1462.) Moreover, while plaintiffs disagree with the Commissioners' hypothetical of a group "formed shortly before an election" (Pls.' Mem. at 38-39), it is indisputable that any group that is not formed on January 1 of a particular year will have in its first year a truncated record of activity. That truncation could distort the organization's

record in either direction. By contrast, more fulsome consideration of a group's spending necessarily permits a more comprehensive picture of the organization's activities.

Plaintiffs' "dilut[ion]" complaint that the Commissioners' approach, if accepted, could allow an organization engaging more heavily in campaign activity in one year to "balance[] out the numbers" in later years (Pls.' Mem. at 37, 40) appears to ignore that those balancing-out time periods of relatively low relevant campaign spending requires the organization to spend sums over time to substantiate its bona fides as a genuine issue group, *i.e.*, to put its money where its mouth is. That is the same problem with plaintiffs' argument that AJS's whole spending picture should not be considered — because some of the group's relevant spending in later years was illegal prior to changes in the law. (*Id.* at 39.) Plaintiffs argue that AJS preemptively diluted its spending and presciently predicted the direction of the Supreme Court's jurisprudence, but it is implausible to think that AJS organized itself in a way that made the activity it wanted to do illegal for the first decade of its existence. And even if it is true that an organization's purposes may "change over time" (*id.* at 39), a review of the broadest available view of the organization's activity is the best way to determine whether a change is a deviation or a new norm.

Thus, the controlling determination to analyze AJS's or AAN's activities over the entire periods in the records before the Commission was not contrary to law.

c. The Controlling Statements Do Not Define a Threshold for Campaign Spending

Plaintiffs also wrongly mischaracterize the controlling group's major-purpose analyses as asking simply "whether more than 50% of a group's expenditures go to express advocacy." (Pls.' Mem. at 40-43.) While portions of the controlling statements do discuss comparative spending in terms of *a* percentage, they do not define any threshold spending percentage for triggering political-committee status. (*Compare* AR 1449 (reciting Tenth Circuit's evaluation

"'whether the *preponderance* of expenditures is for express advocacy or contributions to candidates'" (quoting *Herrera*, 611 F.3d at 678) (emphasis added)); AR 1700 (same).)

In these matters, there was no need for the controlling Commissioners to parse whether the relevant spending percentage was "51% or 49%" (Pls.' Mem. at 43) because they concluded that AJS's and AAN's relevant spending constituted about 10 or 15 percent of the groups' overall spending. Such minority spending, they concluded, did not reveal a major purpose of nominating or electing federal candidates. Those conclusions are consistent with the Commission's findings in previous matters in which it found reason to believe, based on spending involving much higher proportions, such as 91 percent, 68 percent, or 50-75 percent. Supplemental E&J, 72 Fed. Reg. at 5605. They are also consistent with the findings of the Tenth Circuit that "groups that devoted only 7% and .5% of their spending to campaign activity" can "be said to only occasionally engage in such activity." (Pls.' Mem. at 42.) It is true that the controlling Commissioners noted that, with respect to AJS, even if they had employed the calendar-year test, the majority of AJS's spending in 2010 funded activities other than independent expenditures. (AR 1463 n.151.) However, this was not a concession that the calendar year should have been used, but an alternative analysis that showed that even under a more sweeping regulatory standard closer to what plaintiffs propose, AJS's "spending [did] not clearly signify a *major* purpose of engaging in express advocacy." (*Id.*)

* * *

The Commission's dismissals of plaintiffs' administrative complaints were plainly reasonable and not contrary to law. The controlling statements of reasons reflect Commissioners' thorough consideration of the administrative records and careful analyses of AJS's and AAN's central organizational purposes and comparative spending. Those analyses

were consistent not only with the Supplemental E&J but also with court decisions describing and applying *Buckley*'s major-purpose test. The controlling analyses reflect the signatories' specialized knowledge and expertise and are owed substantial deference. Although plaintiffs may prefer an alternative method of analyzing groups' major purposes, their *preference* fails to satisfy their heavy burden of demonstrating that the controlling group's analyses were contrary to law. Indeed, even if this Court would have employed a different analysis or reached a different conclusion, that would not render the challenged dismissals impermissible. *DSCC*, 454 U.S. at 39. The controlling rationales thus easily satisfy the Court's reasonableness review.

C. Plaintiffs' General Disclosure Argument Begs the Question and Mischaracterizes the Considerations at Issue

Plaintiffs devote extensive attention to extra-record news reports discussing the rise of so-called "dark money," Pls.' Mem. at 2-11; *see supra* pp. 29-30, and to their policy argument that "[t]he First Amendment [a]llows [a]mple [r]oom for [d]isclosure of [c]ampaign [s]pending" (Pls.' Mem. at 17- 25), but the government's general interest in disclosure is not disputed. Nor is it supportive of plaintiffs' claims.

Disclosure of election-related spending is undoubtedly an important government interest (Pls.' Mem. at 18-22), and plaintiffs' contention that the controlling Commissioners expressed a false "view that disclosure conflicts with the First Amendment" (*id.* at 18) is itself false. While the Commissioners discussed the regulatory obligations associated with political-committee status (AR 1443-44; AR 1694-96), they naturally did not question the constitutionality of such requirements as applied to groups that meet the requirements for political-committee status.

The issue here, however, is not whether FECA's disclosure programs are constitutional, nor is it whether entities such as AJS and AAN *may*, consistent with the First Amendment, be required to disclose the source of their funds. The only question here is whether the controlling

Commissioners acted contrary to law by concluding that AJS and AAN should not be required to make the disclosures required of political committees because they are not political committees. Plaintiffs' results-oriented approach — which argues that the dismissal decisions were contrary to law based on plaintiffs' subjective interest in disclosure by "groups like AAN and AJS" (Pls.' Mem. at 24) — plainly places the cart before the horse, and must be rejected. *Cf. Van Hollen*, 2016 WL 278200, at *7 (rejecting a similar, "particularly results-oriented brand of purposivism" in statutory construction).

Moreover, if this case were a generalized constitutional dispute over disclosure, plaintiffs present a starkly incomplete portrait of the issues that would confront the Court. In passing and amending FECA, Congress was concerned not only with broader disclosure, but also with "conflicting privacy interests" and courts defer to the Commission's efforts to interpret the statute in a way that is "'a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute.'" *Van Hollen*, 2016 WL 278200, at *7 (quoting *Chevron*, 467 U.S. at 845). The Commission is "'unique among federal administrative agencies,'" having "'as its sole purpose the regulation of core constitutionally protected activity.'" *Id.* at *12 (quoting *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003)). Efforts by the Commission at "tailoring" when interpreting FECA are not necessarily contrary to law, and instead may constitute "an able attempt to balance the competing values that lie at the heart of campaign finance law." *Id.* at *14. Far from being an indicator of unreasonableness (Pls.' Mem. at 18), it was entirely appropriate for the controlling statements to recognize countervailing concerns regarding burdens and privacy when applying FECA's disclosure provisions. Plaintiffs appear to be complaining that FECA is underinclusive; but that is a question for Congress. And to the extent plaintiffs complain about a Commission regulation (Pls.' Mem. at 24), that

regulation (which is not before this Court) has just been upheld by the Court of Appeals. *Van Hollen*, 2016 WL 278200.

Plaintiffs' disclosure argument is also overstated. AJS and AAN have filed numerous FEC reports detailing their independent expenditures and electioneering communications. *See supra* pp. 11-13. As the Seventh Circuit recognized, even groups "whose major purpose is not express advocacy — are not completely immune from disclosure and disclaimer rules for their occasional spending on express election advocacy." *Barland*, 751 F.3d at 839.

D. The Dismissals Were Also a Reasonable Exercise of Prosecutorial Discretion

Finally, the challenged dismissal decisions are independently justified by the Commission's broad prosecutorial discretion. AR 1460-61 n.142; AR 1712-13 n.137; *see Akins*, 524 U.S. at 25 (acknowledging that agencies like the FEC "often have discretion about whether or not to take a particular action" and observing that the FEC's "prosecutorial discretion" might have justified dismissal in that case, even if it "agreed with [complainants'] view of the law").

The Commission "clearly has a broad grant of discretionary power in determining whether to investigate a claim." *Common Cause v. FEC*, 655 F. Supp. 619, 623 (D.D.C. 1986), *rev'd on other grounds*, 842 F.2d 436 (D.C. Cir. 1988); *see also DCCC*, 831 F.2d at 1133-34 (discussing FEC's prosecutorial discretion). In *Orloski*, the D.C. Circuit concluded that the FEC is entitled to decide not to begin an investigation based on a "subjective evaluation of claims." 795 F.2d at 168. "It is not for the judiciary to ride roughshod over agency procedures or sit as a board of superintendance [sic] directing where limited agency resources will be devoted. [Courts] are not here to run the agencies." *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986); *see also La Botz v. FEC*, 61 F. Supp. 3d 21, 33 (D.D.C. 2014) (sustaining the Commission's decision not to prosecute based upon its "considerable" discretion); *Stark*, 683 F. Supp. at 840

("[I]t is . . . surely committed to the Commission's discretion to determine where and when to commit its investigative resources").

In *Heckler v. Chaney*, 470 U.S. 821 (1985), the Supreme Court rearticulated the bases for an agency's discretion not to prosecute or enforce. *Id.* at 831 (collecting cases). It observed that such "discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement," and noted that such decisions "often involve[] a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Id.* Agencies may consider not only "whether a violation has occurred," but also, *inter alia*, the best use of agency resources, the agency's likelihood of prevailing if it pursues the violation, whether the requested enforcement action "best fits the agency's overall policies," and, indeed, whether the agency has enough resources to undertake the action at all." *Id.*

Here, both controlling statements noted the FEC's prosecutorial discretion as discrete bases for deciding not to find reason to believe in the AJS and AAN matters. (AR 1463 & n.153; AR 1716 & n.153.) Specifically, the Commissioners expressed concern that in light of the similarities perceived between the approach recommended by the agency's in-house staff and the approach rejected in *Barland*, "constitutional doubts raised . . . militate[d] in favor of cautious exercise of our prosecutorial discretion." (AR 1460-61 n.142; AR 1712-13 n.137.) It was clearly reasonable for Commissioners to decline to pursue enforcement based on the analysis urged by plaintiffs here given the recent rejection of that approach by a federal Court of Appeals. The Commission's dismissal was thus a reasonable exercise of its broad prosecutorial discretion.

CONCLUSION

For the foregoing reasons, the Court should grant the Commission's cross-motion for summary judgment and deny plaintiffs' motion for summary judgment.

Respectfully submitted,

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