UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

AMERICAN ACTION NETWORK'S MOTION FOR SUMMARY JUDGMENT

Intervenor-Defendant American Action Network cross-moves this Court for an order (1) granting its motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure and Local Rule 7(h) and dismissing the Plaintiffs' complaint with prejudice, and (2) denying the Plaintiffs' motion for summary judgment.

In support of this motion, American Action Network files (1) a Memorandum of Points and Authorities in Support of Its Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, and (2) a Proposed Order.

American Action Network requests oral argument on this motion.

Respectfully submitted,

/s/ Claire J. Evans
Jan Witold Baran (D.C. Bar No. 233486)
Caleb P. Burns (D.C. Bar No. 474923)
Claire J. Evans (D.C. Bar No. 992271)
Wiley Rein LLP
1776 K Street NW
Washington, DC 20006
Tel.: 202.719.7000
Fax: 202.719.7049

Counsel for American Action Network

March 1, 2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

AMERICAN ACTION NETWORK'S
MEMORANDUM OF POINTS AND AUTHORITIES
(1) IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND
(2) IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The American Action Network is an "issue advocacy group that occasionally speaks out on federal elections." AR1710. Between 2009 and 2010, only about 15 percent of American Action Network's spending was for advertisements that expressly advocated the election or defeat of federal candidates. Over that same period, American Action Network spent considerably more on classic issue advertisements calling for Congress to repeal healthcare legislation or address other legislative issues. American Action Network disclosed this spending in appropriate filings with the Federal Election Commission ("FEC").

American Action Network's central organizational purpose is not the nomination or election of federal candidates. But, in a complaint filed with the FEC, plaintiffs Citizens for Responsibility and Ethics in Washington and Melanie Sloan (collectively "CREW") asserted that American Action Network's spending nonetheless made the group a political committee, subjecting it to punishment for failure to comply with the intrusive and burdensome regulatory obligations attached to that status. And, when the FEC voted to dismiss CREW's complaint, CREW filed this suit, contending the FEC could not lawfully decline to prosecute CREW's complaint.

First Amendment considerations limit political committee status to groups that either are under the control of a candidate or have as their singular "major purpose" the "nomination or election of a candidate." *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). This case involves only the major purpose prong. With judicial approval, the FEC assesses major purpose "on a case-by-case basis, taking into consideration the unique facts and circumstances involved." AR1705. And its decisions command deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

CREW thus faces an exceptionally heavy burden. It must show the FEC's straightforward and comprehensively explained application of law to the facts was so unreasonable and capricious as to be actually "contrary to law," the controlling legal standard. 52 U.S.C. § 30109(a)(8). Seeking to lighten its burden, CREW claims a dismissal by fewer than four Commissioners does not deserve deference and that this dismissal is based on several bright-line legal rules not supported by the statute. But binding precedent gives full *Chevron* deference to a decision by three controlling Commissioners. And the controlling Commissioners here grounded their decision not to prosecute on the unique facts and circumstances involved in this matter as required by the major purpose doctrine, not on the supposed bright-line rules that CREW erects as straw men.

The Commission's reasoned and fact-based application of law is enough to require dismissal of CREW's complaint under any standard of review. Yet there is an additional reason to dismiss CREW's complaint—a jurisdictional one that stems from the fact that the statute of limitations has run on the violations that CREW seeks to pursue. The expiration of the statute of limitations leaves no significant likelihood that any decision from this Court can redress CREW's claimed injury because the FEC routinely dismisses "stale" complaints—even before the statute of limitations has run. The statute of limitations expired here over nineteen months ago. This case has become merely academic and should be dismissed.

STATEMENT OF THE CASE

A. Legal Background

CREW asserts, without citation or limitation, that the Supreme Court "assum[es] that campaign contributions and spending would be disclosed." CREW Mot. at 4 (Dkt. No. 33). Not so. The Supreme Court has imposed strict limitations on the disclosure required by the Federal Election Campaign Act ("FECA") in order to ensure the constitutionality of the reporting and

other obligations it imposes. These obligations are different for two groups: "political committees" and "[e]very person (other than a political committee)." 52 U.S.C. § 30104(a), (c)(1).

The obligations are far greater for "political committees" than they are for "persons," which include individuals, corporations, and "any other organization or group of persons." *Id.* § 30101(11). When a "person" makes an "independent expenditure" or "electioneering communication" that meets certain statutory cost thresholds, it must file a one-time disclosure report. An "independent expenditure" is an expenditure "expressly advocating the election or defeat of a clearly identified candidate," *id.* § 30101(17), using words like "vote for," "vote against," "elect," or "defeat," *Buckley*, 424 U.S. at 44 n.52, 79-80. An "electioneering communication" refers to a clearly identified federal candidate in a broadcast, cable, or satellite communication made shortly before an election, which targets the candidate's electorate. 52 U.S.C. § 30104(f)(3)(A)(i). "Electioneering communications," by definition, do not include express advocacy even though they refer to a federal candidate. *Id.* § 30104(f)(3)(B)(ii) (excluding from definition of "electioneering communication" a communication that constitutes an independent expenditure under the Act). "Electioneering communications" can also function as "genuine issue ads" that "focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter." *FEC v. Wis. Right To Life, Inc.*, 551 U.S. 449, 470 (2007) ("*Wis. Right To Life II*").

The particulars of the required one-time disclosure report are directly linked to the type of communication made. For example, if a person spends more than $250 on an independent expenditure, the person must disclose the amount spent and those who contributed more than $200 for the purpose of furthering that expenditure. 52 U.S.C. § 30104(c). Similarly, if a person

pays more than $10,000 for electioneering communications, the person must disclose the amount spent and those who contributed at least $1,000 for the purpose of furthering the electioneering communications. 52 U.S.C. § 30104(f); 11 C.F.R. § 104.20. The person need not disclose any other sources of funding. This limited disclosure satisfies the government's informational interests by "provid[ing] precisely the information necessary to monitor [a speaker's] independent spending activity and its receipt of contributions." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986).

The regulation of "political committees" is far more burdensome. FECA defines a "political committee" as "any committee, club, association, or other group of persons" that either receives more than $1,000 in contributions or makes more than $1,000 in expenditures during a calendar year. 52 U.S.C. § 30101(4). Once classified as a "political committee," the entity must file comprehensive reports with the FEC that disclose all contributions and all disbursements and identify every donor that contributed in excess of $200 in a calendar year. *Id.* § 30104(a)(4), (b). The reports are extensive and onerous, requiring "political committees" to itemize receipts and disbursements according to statutory categories, disclose all operating expenses, and identify information about loans, rebates, refunds, dividends, and interest greater than $200. *Id.* § 30104(b); *see also Citizens United v. FEC*, 558 U.S. 310, 338 (2010). And the burden is a recurring one—reports must be filed monthly, quarterly or semi-annually, pre-election, and post-election, until the entity is permitted to terminate political-committee status. 52 U.S.C. § 30104(a)(4).

Beyond reporting burdens, a political committee must appoint a treasurer who can be held personally liable even if the committee is incorporated, *id.* § 30102(a); 70 Fed. Reg. 3 (Jan. 3, 2005); must forward all contributions to the treasurer within 10 or 30 days, depending on the

amount, 52 U.S.C. § 30102(b)(2); must preserve records of receipts and disbursements for three years, *id*. § 30102(d); and must file an organizational statement and promptly report to the FEC any changes to information on that statement, *id.* § 30103(a)-(c).

These significant registration, reporting, and other regulatory obligations pose a threat to the First Amendment freedoms of speech and association. *Buckley*, 424 U.S. at 79. As a result, four decades ago, the Supreme Court held that the Act's definition of "political committee" must be narrowly tailored to reach only those "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* (emphasis added). This means that a political committee cannot be a "group[] engaged purely in issue discussion." *Id.* Nor can it be one that has a "central organizational purpose [of] issue advocacy, although it occasionally engages in activities on behalf of political candidates." *Mass. Citizens for Life*, 479 U.S. at 252 n.6. According to the Supreme Court, the government's interest in disclosure is "too remote" to burden the speech and work of primarily issue advocacy groups whose "major purpose" is not the nomination or election of federal candidates. *Buckley*, 424 U.S. at 79-80. This standard gives non-profit issue advocacy groups, like American Action Network, substantial room to discuss the issues that they deem salient and to engage in limited candidate advocacy without triggering the onerous obligations that attach to political committees.

The Supreme Court "did not mandate a particular methodology for determining an organization's major purpose," *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 556 (4th Cir. 2012), but emphasized that the "major purpose" must be so dominant that the group's activities "can be assumed to fall within the core area sought to be addressed by Congress" and "are, by definition, campaign related," *Buckley*, 424 U.S. at 79.

The FEC has concluded that the decision about an organization's major purpose "requires the flexibility of a case-by-case analysis of an organization's conduct that is incompatible with a one-size-fits-all rule." *Political Committee Status*, 72 Fed. Reg. 5,595, 5,601 (Feb. 7, 2007) (the "Supplemental E&J"). It has nonetheless looked to two factors (1) whether the organization's central organizational purpose, as expressed in its publications and public statements, is the nomination or election of federal candidates, and (2) whether there is "sufficiently extensive spending on Federal campaign activity" by comparing the organization's election-related spending to its overall spending. *Id.*; *see also N.M. Youth Organized v. Herrera*, 611 F.3d 669, 678 (10th Cir. 2010).[1]

The Commission's case-by-case approach is highly fact-specific and does not lend itself to rigid rules. For example, the FEC has looked to an entity's spending based on the specific facts before it without setting a strict time period for that spending (*e.g.*, calendar year, election cycle, life of the organization). The FEC also has not specified the exact types of spending that are sufficiently related to the nomination or election of a candidate to count toward its major purpose. It has instead conducted its case-by-case approach guided by the Supreme Court's admonition that a group's major purpose must be so sufficiently clear and prominent that the group should understand that it is operating "within the core area" of candidate (not issue) advocacy regulated by FECA. *Buckley*, 424 U.S. at 79.

B. CREW's Administrative Complaint

On June 7, 2012, CREW filed an administrative complaint with the FEC, alleging that American Action Network violated FECA by failing to register as a political committee and

[1] It is undisputed that American Action Network's central organizational purpose is not the nomination or election of federal candidates. Neither CREW, the Commission's Office of General Counsel, nor the dissenting Commissioners has argued otherwise. This litigation, as a result, focuses on the spending prong of the FEC's analysis.

comply with the related disclosure and other regulatory requirements. *See* AR1480-1552. But American Action Network is a not-for-profit social welfare organization, exempt from taxation under Section 501(c)(4) of the Internal Revenue Code, which focuses its efforts primarily on issue advocacy and grassroots lobbying and organizing. AR1562-63. It spends little of its budget on express candidate advocacy, instead working to promote "principles of freedom, limited government, American exceptionalism, and strong national security" through policy briefings, educational materials, and advertising campaigns designed to educate and motivate like-minded Americans to take a greater role in the democratic process with respect to issues like energy, education, tax policy, immigration, national security, spending, and health care. *Id.* American Action Network focuses primarily on issues—not candidates—with the goal of putting "center-right ideas into action by engaging the hearts and minds of the American people and spurring them into active participation in our democracy." American Action Network, *About*, *available at* https://americanactionnetwork.org/about (last visited Mar. 1, 2016).[2]

CREW nonetheless alleged that American Action Network's spending on independent expenditures and electioneering communications between July 23, 2009 and June 30, 2011—all of which was reported to the FEC and made publicly available on the one-time disclosure reports required by law—showed that American Action Network's "major purpose" was the nomination or election of a candidate. AR1486. According to CREW, during that time period, American Action Network spent over $18 million to "produc[e] and broadcast[] television and Internet advertisements in 29 primary and general elections." AR1482. CREW admitted that the amount American Action Network spent on independent expenditures that expressly advocated the

[2] American Action Network, a not-for-profit social welfare organization devoted to issue advocacy, is separate and distinct from its affiliate, the "Congressional Leadership Fund," which *does* have the "major purpose" of nominating and electing candidates and *is* registered with the FEC as a political committee.

election or defeat of a candidate was far smaller—about $4.1 million. *Id.* The remaining amount (about $14 million) was spent on electioneering communications. *Id.*

CREW took issue with just six of American Action Network's electioneering communications, which accounted for about 25 percent (or about $3.6 million) of the alleged spending on electioneering communications. AR1483-84. CREW then compared the entire amount (approximately $18 million) spent on express advocacy and electioneering communications to the overall spending that American Action Network reported to the IRS in Form 990 filings (approximately $27 million). AR1484-85. CREW argued that this analysis showed that American Action Network has a "major purpose" of influencing elections because it devoted 66.8 percent of its spending to independent expenditures and electioneering communications. AR1485-86.

CREW tried to downplay the context of American Action Network's electioneering communications, which confirmed their focus on issues of central concern to American Action Network. CREW admitted that some of the advertisements were "ostensibly related to the [health care] legislation." AR1484. In fact, they were part of an ongoing effort to encourage the repeal or amendment of the health care law and addressed other "salient policy issues including federal spending, the stimulus, tax relief, . . . and cap and trade." AR1709.

For example, repeal of the health care law had gained momentum during the summer and fall of 2010 and came to a head during the lame duck session of Congress in November later that year. AR1567-70. All aspects of the law—its $500 billion in Medicare cuts, $400 billion in higher taxes, and the individual mandate to purchase private health insurance—were up for debate. AR1567. By mid-September 2010, fifteen bills to repeal or revise the law had been introduced, including the bill (H.R. 4903) referenced in American Action Network's

electioneering communications. AR1568. At the same time, two discharge petitions were circulating in the House of Representatives, and significant pressure was mounting on Members of Congress to defy congressional leadership and sign the discharge petitions to repeal the entire law or a portion of it. AR1568-69. Efforts were also underway in the Senate to fully or partially repeal the law. AR1568. When Members of Congress returned from recess and convened their lame duck session in November, Congress considered several specific proposals for repealing or amending the law. AR1570. American Action Network's advertisements were designed to enlist the American people in these repeal efforts at precisely the time Congress was addressing them.

The FEC's Office of General Counsel analyzed fourteen additional advertisements that American Action Network reported as electioneering communications. AR1649-55. These additional advertisements related to the looming expiration of the Bush tax cuts, proposed spending packages, and other issues that occupied the congressional agenda before the 2010 elections and that Congress left to debate during its November lame duck session. *See, e.g.*, David M. Herszenhorn, *House G.O.P. Leader Signals He's Open to Obama Tax Cut*, N.Y. Times, Sept. 12, 2010;[3] Carrie Budoff Brown, *Obama, GOP reach tax cut deal*, Politico, Dec. 6, 2010;[4] *Obama pushes $50 billion in infrastructure spending*, CNN, Sept. 7, 2010.[5]

C. The FEC's Dismissal

The Commission voted to dismiss the complaint against American Action Network on June 24, 2014. AR1686. Three Commissioners found that the record did not support the charge

[3] http://www.nytimes.com/2010/09/13/us/politics/13cong.html (last visited Mar. 1, 2016).

[4] http://www.politico.com/story/2010/12/obama-gop-reach-tax-cut-deal-046042 (last visited Mar. 1, 2016).

[5] http://www.cnn.com/2010/POLITICS/09/06/obama.economy/ (last visited Mar. 1, 2016).

that American Action Network's "major purpose" is electing candidates and three would have pursued the matter further. AR1686.[6]

As is customary, the three Commissioners who voted to dismiss (the so-called "controlling" Commissioners) supplied the Commission's statement of reasons. They detailed Supreme Court precedent, which construes the "major purpose limitation [to] ensure[] that issue advocacy organizations are not swept into the Act's burdensome regulatory scheme," AR1699, and requires the FEC to "distinguish electoral advocacy from issue speech," AR1702. They then applied the Commission's case-by-case approach to CREW's complaint against American Action Network and found that American Action Network "does not have the requisite major purpose for political committee status." AR1706.

First, they found that American Action Network's "stated purpose is . . . issue-centric: to create, encourage, and promote a set of policy preferences." *Id*. *Second*, they concluded that American Action Network's section 501(c)(4) status under the Internal Revenue Code reinforces that its primary purpose is not "participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office," which would have been inconsistent with that status. AR1707. *Third*, they found that, aside from the "roughly $4.1 million" that American Action Network spent on independent expenditures for express candidate advocacy, "[t]he vast majority—if not all—of [American Action Network's] remaining spending went to further purposes other than the nomination or election of a candidate." AR1708. Significant sums were spent on forming the organization, developing its internal procedures, establishing

[6] The FEC must dismiss a complaint if four Commissioners do not find "reason to believe" that a violation of FECA occurred. 52 U.S.C. § 30109(a)(2). If four Commissioners find "reason to believe" a violation occurred, the Commission conducts an investigation, and then determines whether there is probable cause that a violation occurred. *Id.* § 30109(a)(2), (4). If four Commissioners find probable cause, the Commission must attempt conciliation before it can seek civil penalties in federal court. *Id*. § 30109(a)(4), (6).

policy priorities, and hosting policy briefings. AR1708-09. Additional amounts—roughly $13 million—were devoted to "genuine issue advertisements" that "focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter." AR1709. Concluding that these amounts did not evidence a purpose to nominate or elect a candidate, the controlling Commissioners held that "the roughly $4.1 million that [American Action Network] 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." *Id.* This amount "represented approximately 15% of its total expenses during the same period" and was "hardly 'so extensive that the organization's major purpose may be regarded as campaign activity.'" *Id.*

The decision of the controlling Commissioners was at odds with the recommendation of the FEC's Office of General Counsel, as set forth in its First General Counsel's Report. *See* AR1635-61. The controlling Commissioners rebutted what they called "the two flawed premises" of the First General Counsel's Report: (1) that all electioneering communications are indicative of a major purpose to elect candidates, even if they do not expressly advocate a candidate's election or defeat, and (2) that an organization's "major purpose" can be "evaluated through the limited lens of a single calendar year." *Id.* The first premise, they explained, is contrary to Supreme Court precedent that protects issue advocacy groups from extensive political committee regulation. AR1710-13. The second premise is at odds with the Commission's case-by-case approach as it could create an artificial and distorted picture of an organization's "major purpose" based on whether or not the calendar year at issue is an election year. AR1713-15.

In sum, the Commissioners found that the record shows that American Action Network "is an issue advocacy group that occasionally speaks out on federal elections." AR1710. It is,

therefore, "precisely the type of group the major purpose test was adopted" for—an issue advocacy group that must be spared "the 'burdensome alternative' of political committee status." *Id.*

ARGUMENT

I. The Commission's Dismissal Easily Survives Judicial Review.

CREW's challenge to the Commission's dismissal order must be rejected. As explained below, the Commission's decision (A) is entitled to *Chevron* deference, (B) reflects a reasonable and straightforward interpretation of FECA, judicial precedent, and Commission authorities, and (C) is not undermined by CREW's various attacks, which accuse the Commission of adopting rules that it did *not* adopt in its fact-specific analysis of this case.

A. The Controlling Commissioners' Decision Is Entitled To *Chevron* Deference.

FECA requires the vote of four Commissioners for the Commission to find that there is reason to believe a violation of the Act has occurred. 52 U.S.C. § 30109(a)(2). If three Commissioners vote against that finding, the matter must be dismissed, and the rationale of the three controlling Commissioners "necessarily states the agency's reasons for acting as it did." *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992). A court, therefore, "owe[s] deference to a legal interpretation . . . that prevails on a 3-3 deadlock." *In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000).[7] This means that the Court can only reverse the FEC's dismissal if it was the "result of an impermissible interpretation of" FECA, was "arbitrary or capricious," or was an "abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986); *see also* 52 U.S.C. § 30109(a)(8)(C); *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C.

[7] The D.C. Circuit's decision in *In re Sealed Case* involved a vote after investigation about whether there was probable cause that a violation occurred. Because four votes are needed at both the reason-to-believe stage (at issue here) and the probable cause stage (at issue in *In re Sealed Case*), the same standard of review applies.

Cir. 2005). This standard is "extremely deferential" and "requires affirmance if a rational basis for the agency's decision is shown." *Orloski*, 795 F.2d at 167.

CREW argues that *de novo* review should instead apply. It should not. *First*, CREW argues that agencies are not entitled to deference on the interpretation of the Constitution or judicial precedent. CREW Mot. at 14. But the issue before the Commission is a *statutory* question—the "major purpose" requirement is a "narrowing construction" of FECA adopted by the Supreme Court. *McConnell v. FEC*, 540 U.S. 93, 191-93 (2003); *see also Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 487 (7th Cir. 2012); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 59 (1st Cir. 2011). As a result, the FEC's interpretation of FECA and its major purpose test is entitled to deference, just like any other case involving a statute previously construed by a federal court. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).[8]

Second, CREW argues that the decision of three Commissioners should not be given *Chevron* deference because they do not represent a majority of the Commission. CREW Mot. at 15-16. This argument is foreclosed by circuit precedent, which holds that the statement of reasons provided by the controlling Commissioners is entitled to *Chevron* deference. *See In re Sealed Case*, 223 F.3d at 779; *Nat'l Republican Senatorial Comm.*, 966 F.2d at 1476. This Court

[8] CREW relies on *Akins v. FEC*, 101 F.3d 731 (D.C. Cir. 1996), arguing that the court did not there defer to the FEC's interpretation of the "major purpose" test. But *Akins*, later vacated by the Supreme Court, pre-dates both *McConnell* and *Brand X*, which clarify that the FEC is entitled to deference because the "major purpose" test is a statutory interpretation of FECA. Moreover, vacatur of a judgment of the Court of Appeals "deprives that court's opinion of precedential effect." *O'Connor v. Donaldson*, 422 U.S. 563, 577 n.12 (1975); *see also Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 n.2 (9th Cir. 1991) ("A decision may be *reversed* on other grounds, but a decision that has been *vacated* has no precedential authority whatsoever.").

"is not at liberty to disregard clearly established, controlling precedent." *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 114 (D.D.C. 2010).

CREW tries to distinguish this circuit precedent in a footnote to no avail. CREW Mot. at 16 n.9. It argues that *In re Sealed Case* "involved a peculiar situation in which the DOJ sought to enforce a subpoena based on an interpretation of the FECA," rather than a case on direct review. *Id.* But the court rejected the argument that it would be *less* appropriate to defer under the case's "peculiar" circumstances than on direct review, holding that deference applies in *both* situations: it is "irrelevant that the prevailing interpretation was established in the context of agency enforcement, whereas this is a criminal prosecution." *In re Sealed Case*, 223 F.3d at 779.

CREW also fails to weaken *In re Sealed Case* by looking to cases that pre-date it. *See* CREW Mot. at 16 & n.9 (citing *Nat'l Republican Senatorial Comm.*, 966 F.2d 1471; *Common Cause v. FEC*, 842 F.2d 436 (D.C. Cir. 1988)). These cases are entirely consistent with *In re Sealed Case* as they afford the same high degree of deference to the FEC. The D.C. Circuit's decision in *National Republican Senatorial Committee* states that the controlling Commissioners' "rationale . . . necessarily states the agency's reasons for acting as it did," such that "a reviewing court should accord deference" to it. 966 F.2d at 1476. And that conclusion was based on the *Common Cause* decision cited by CREW, which emphasized that "[d]eference is particularly appropriate in the context of the FECA." *Common Cause*, 842 F.2d at 448.

CREW's citation to Supreme Court precedent also does not alter the D.C. Circuit's conclusions about the deference due to the FEC. *See* CREW Mot. at 15 (citing *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013); *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Christensen v. Harris Cty.*, 529 U.S. 576 (2000)). *In re Sealed Case* and circuit precedent is binding unless "'effectively overrule[d],' *i.e.*, 'eviscerate[d]'" by later Supreme Court decisions. *Nat'l Inst. of*

Military Justice v. U.S. Dep't of Defense, 512 F.3d 677, 683 n.7 (D.C. Cir. 2008) (citation omitted). That clearly has not occurred here. *In re Sealed Case* relies on the Court's decision in *Christensen* and, if anything, anticipates its decision in *Mead*. The *Mead* Court found that deference is appropriate where "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226-27. The court in *In re Sealed Case* applied this same analysis, finding that each step of the FEC's enforcement process is "part of a detailed statutory framework for civil enforcement and is analogous to a formal adjudication, which itself falls on the *Chevron* side of the line." 223 F.3d at 780. This process "tend[s] to foster the fairness and deliberation that should underlie a pronouncement" with the force and effect of law. *Mead*, 533 U.S. at 230; *see also FEC v. Nat'l Rifle Ass'n*, 254 F.3d 173, 185 (D.C. Cir. 2001) ("[I]n making probable cause determinations, the Commission fulfills its statutorily granted responsibilities, giving ambiguous statutory language concrete meaning through case-by-case adjudication."). The FEC's dismissal thus resulted from expressly delegated adjudicatory powers and carries the force and effect of law; it is, therefore, entitled to *Chevron* deference. As the Supreme Court recently confirmed, there has not been "a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field." *City of Arlington*, 133 S. Ct. at 1874.

Moreover, a split-vote dismissal of a complaint is not a "failure to act," CREW Mot. at 16, on the part of the Commission. Congress consciously required four votes to proceed on a complaint "to assure that enforcement actions . . . will be the product of a mature and considered judgment." *Combat Veterans for Cong. Political Action Comm. v. FEC*, 795 F.3d 151, 153

(D.C. Cir. 2015); *see also id.* ("The four-affirmative-vote, non-delegation, and bipartisanship requirements reduce the risk that the Commission will abuse its powers."). By congressional design, "[i]f the FEC votes 3-3 not to find a violation, that means the FEC has determined that the conduct does not violate the law." Brad Smith, *What does it mean when the Federal Election Commission "Deadlocks,"* Center for Competitive Politics (Apr. 14, 2009).[9] In other words, when the Commission votes 3-3 "that given actions do not constitute a violation of the law, it has decided that those actions do not violate the law," *id.*, and it has done so through "a form expressly provided for by Congress," *In re Sealed Case*, 223 F.3d at 780 (quoting *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991)).

Finally, CREW argues that the Commission has somehow waived the deference it is due by stating in its motion to dismiss that three Commissioners "cannot establish any policy or regulation on behalf of the Commission." CREW Mot. at 16 n.10 (citing FEC Mot. to Dismiss at 16). But CREW confuses two separate issues: (1) whether three Commissioners can establish a binding policy or regulation on behalf of the Commission and (2) whether three Commissioners can issue a decision that has the force and effect of law in a particular case. Only the latter is at issue here, and circuit precedent requires that the decision be given *Chevron* deference.

B. The Commission's Dismissal Reflects A Reasonable Application Of Law.

Regardless of the standard of review that applies, but especially under the deferential standard required by law, the Commission's dismissal easily survives judicial review. The record shows that American Action Network is, at its core, an issue advocacy group. With only about fifteen percent of its funding spent to expressly support or oppose candidates for federal

[9] http://www.campaignfreedom.org/2009/04/14/what-does-it-mean-when-the-federal-election-commission-deadlocks/ (last visited Mar. 1, 2016). Mr. Smith is a former FEC Chairman. His biography can be found here: http://www.campaignfreedom.org/about/staff/bradley-a-smith/.

office, it cannot be said that "the major purpose" of American Action Network is the election of candidates. As explained below, the Commission (1) reasonably focused on American Action Network's express advocacy, amounting to about $4.1 million of the approximately $27 million spent by American Action Network, and (2) reasonably concluded that the vast majority, if not all, of the money that American Action Network spent on electioneering communications was devoted to issue—not candidate—advocacy.

1. The Commission Reasonably Focused On Express Advocacy When Deciding Whether American Action Network's "Major Purpose" Is The Election Of Candidates.

It is undisputed that American Action Network devoted about $4.1 million between July 2009 and June 2011 to independent expenditures that expressly advocated the election or defeat of a candidate for federal office. AR1709. This amount, which represents only about fifteen percent of American Action Network's spending during that same period, does not establish that "the major purpose" of American Action Network is the election of candidates. And it is only organizations that have "the major purpose" of electing candidates that may be regulated as political committees. *Buckley*, 424 U.S. at 79 (emphasis added). This dispute thus focuses on American Action Network's electioneering communications. If the Commission reasonably found that they do not show that American Action Network's major purpose is the election of candidates, CREW's challenge must be rejected.

The Commission's focus on American Action Network's express advocacy (including whether its electioneering communications were the functional equivalent of express advocacy) was reasonable and guided by precedent. When determining an organization's "major purpose," courts have repeatedly cautioned that issue advocacy must be excluded from the calculation. The D.C. Circuit found that the political committee definition must be narrowly construed "since it potentially reaches . . . the activities of nonpartisan issue groups which [seek to] influenc[e] the

public to demand of candidates that they take certain stands on the issues." *Buckley v. Valeo*, 519 F.2d 821, 863 (D.C. Cir. 1975) (en banc), *aff'd in part and rev'd in part*, 424 U.S. l (1976). The Supreme Court cited this language approvingly and confirmed that the political committee definition should not be stretched to apply to issue-oriented groups. *Buckley*, 424 U.S. at 79. Instead, *Buckley* defined a "political committee as including only those entities that have as [the] major purpose engaging in express advocacy in support of a candidate . . . by using words such as 'vote for,' 'elect,' 'support,' 'vote against,' 'defeat,' or 'reject.'" *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712 (4th Cir. l999).[10] The major purpose test thus ensures that the Commission "avoid[s] the regulation of activity 'encompassing both issue discussion and advocacy of a political result.'" Supplemental E&J, 72 Fed. Reg. at 5,597 (quoting *Buckley*, 424 U.S. at 79).

An organization need not *only* engage in issue advocacy to receive protection from the strictures of political committee status. Rather, an organization is protected where its "central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates." *Mass. Citizens for Life*, 479 U.S. at 252 n.6. So long as the organization is "*primarily* engaged in speech on political issues unrelated to a particular candidate," it is not a political committee. *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 288 (4th Cir. 2008) (emphasis added); *see also Real Truth About Abortion*, 681 F.3d at 556 (defining the question as "whether the election or defeat of federal candidates for office is the major purpose of an organization, and not simply a major purpose"); *FEC v. GOPAC*, 917 F. Supp. 851, 863-64

[10] The excerpt from this opinion originally used the phrase "a major purpose," but the Fourth Circuit later explained that it was a "miscommunication" made in error. *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 288 n.5 (4th Cir. 2008); *see also id.* at 287-90.

(D.D.C. 1996) (declining to consider a letter that did "not advocate [the candidate's] election or defeat" as evidence that a group's major purpose was the election of candidates).

Because express advocacy has a purpose of electing candidates, courts have limited the analysis of an entity's "major purpose" to independent expenditures that use words such as "vote for," "elect," "support," "vote against," "defeat," or "reject." *See N.M. Youth Organized*, 611 F.3d at 678 (evaluating whether a "group spends a preponderance of its expenditures on express advocacy" and including only "expenditures on express advocacy or contributions to candidates" in the major purpose inquiry) (emphasis added); *Fla. Right to Life, Inc. v. Mortham*, No. 98-770CIVORL19A, 1999 WL 33204523, at *4 (M.D. Fla. Dec. 15, 1999) (restricting political committee status "to organizations whose major purpose is engaging in 'express advocacy'" as defined in *Buckley*) (emphasis added), *aff'd in relevant part on appeal sub. nom., Fla. Right to Life, Inc. v. Lamar*, 238 F.3d 1288 (11th Cir. 2001).

But the Commission did not even draw the line at independent expenditures in this case. It instead left open the possibility that electioneering communications that are the "functional equivalent" of express advocacy may be relevant to an organization's "major purpose." AR1705. It then reasonably concluded (*see* Section I.B.2, below) that American Action Network's electioneering communications are *not* the functional equivalent of express advocacy because they are genuine issue advertisements.

The line that the Commission drew—between electioneering communications that are the functional equivalent of express advocacy and those that are issue advocacy—is one that follows directly from Supreme Court precedent. The Supreme Court "made clear in [*Wisconsin Right To Life II*] that the distinction between issue advocacy and express advocacy can be paramount in the context of electioneering communications." *Colo. Right to Life Comm. v. Coffman*, 498 F.3d

1137, 1153 n.11 (10th Cir. 2007). The Court in *Wisconsin Right to Life II* rejected the FEC's then view that *any* electioneering communication "is the 'functional equivalent' of an ad saying defeat or elect that candidate." 551 U.S. at 470. It held that *only* those ads that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate" may be treated as the functional equivalent of express advocacy. *Id.* at 469-70. Any other result "would effectively eliminate First Amendment protection for genuine issue ads." *Id.* at 471.

Moreover, *Buckley* made clear that disclosure requirements cannot be imposed where they are "too remote" from the "core area" of candidate advocacy that Congress sought to regulate. 424 U.S. at 79. The Commission's decision in this case to consider only speech within this core area—*i.e.*, express advocacy and its functional equivalent—as triggering political committee status was thus an entirely reasonable application of *Buckley* and its First Amendment principles. "The FEC is 'unique among federal administrative agencies,' having 'as its sole purpose the regulation of core constitutionally protected activity—the behavior of individuals and groups only insofar as they act, speak and associate for political purposes.'" *Van Hollen v. FEC*, No. 15-5016, 2016 WL 278200, at *12 (D.C. Cir. Jan. 21, 2016) (quoting *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003) (alterations omitted)). "[M]ore than other agencies whose primary task may be limited to administering a particular statute, every action the FEC takes implicates fundamental rights." *Id.* By drawing the line at the functional equivalent of express advocacy, the FEC reasonably limited the application of the major purpose test in this case to those communications within the "core area" of candidate advocacy, *Buckley*, 424 U.S. at 79, and "fulfilled its unique mandate," *Van Hollen*, 2016 WL 278200, at *12.

Indeed, the First Amendment requires that speakers receive clear advance notice where core constitutionally protected speech, such as that at issue here, may result in punishment. *See*

Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982) (requiring a more stringent vagueness test where First Amendment rights are implicated). This does not mean that standards must be mathematically precise. But, where a standard has a sufficiently clear core application and a penumbra that shades off into uncertainty, the First Amendment counsels against aggressively enforcing that standard to its outermost bound. *See Wis. Right To Life II*, 551 U.S. at 475 ("Where the First Amendment is implicated, the tie goes to the speaker, not the censor."). As the agency charged with regulating the most sensitive core free speech, it was thus entirely reasonable for the FEC to focus on the speech that falls clearly within the heartland of its jurisdiction and to decline regulation of speech that was "too remote" from express candidate advocacy. *Buckley*, 424 U.S. at 79.

The Commission, therefore, reasonably and necessarily decided that American Action Network's issue advocacy electioneering communications are not demonstrative of a major purpose to elect candidates—they are not the "'functional equivalent' of an ad saying defeat or elect that candidate." *Wis. Right To Life II*, 551 U.S. at 470. That left approximately fifteen percent of American Action Network's spending devoted to express advocacy related to candidates—far from the amount that would establish that its "major purpose" is the election of candidates. To the contrary, American Action Network's major purpose is the "discussion of issues, including political issues," and it "may not be regulated as a political committee under the Act." AR1705; *see also Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 839 (7th Cir. 2014) ("[I]ndependent groups *not* engaged in express election advocacy as their major purpose cannot be subjected to the complex and extensive regulatory requirements that accompany the PAC designation." (emphasis added)). The Commission's reasoning had a "rational basis" and must be affirmed. *See Orloski*, 795 F.2d at 167.

2. The Commission Reasonably Decided That American Action Network's Issue Advertisements Do Not Show A "Major Purpose" To Elect Candidates.

The Commission's decision, on the facts of this case, that American Action Network's electioneering communications were issue advocacy was neither "arbitrary and capricious" nor an "abuse of discretion." *See id.* at 161. CREW challenged only six of American Action Network's advertisements—none of which includes explicit words of candidate advocacy and each of which references the ongoing health care repeal effort. *See supra* at 7-10; AR1483-84; *Buckley*, 424 U.S. at 44 n.52; 11 C.F.R. § 100.22(a). The Commission also considered several other advertisements encouraging the public to contact their representatives to oppose various spending proposals and support efforts to re-authorize the Bush administration's tax cuts, as well as take action on other prominent issues. AR1649-55. The Commission reasonably concluded that these were genuine issue ads and not "the 'functional equivalent' of an ad saying defeat or elect that candidate." *Wis. Right To Life II*, 551 U.S. at 470.

The Supreme Court has emphasized that issue advocacy does not have an electoral purpose "simply because the issues may also be pertinent in an election." *Id.* at 474. An issue advertisement, therefore, does not become the "functional equivalent" of express advocacy merely because it mentions, criticizes, promotes, or asks citizens to contact a particular candidate. *Id.* at 470-73. The ad must instead be "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 469-70 (emphasis added).

An issue advertisement focuses "on a legislative . . . issue [and urges] the public to adopt" a particular position and to contact the candidate with respect to the matter at issue. *Id.* at 470. That is exactly what each of the advertisements that CREW challenged does. They reference the health care law and ongoing repeal efforts that occupied Congress's attention at the

time. AR1709. They "contain no references to elections, candidacies, or political parties." *Id.*; *see also Wis. Right To Life II,* 551 U.S. at 470. They do not take a position on anyone's "character, qualifications, or fitness for office." *Id.*; *see also* AR1709. They instead focus on the substantive issues that were of central interest to American Action Network and were pending before Congress.

Even CREW acknowledged that many of the advertisements were "ostensibly related to [the health care] legislation." AR1484. It argued that they nonetheless became express advocacy because they referenced a "vote" in "November." *Id.*; *see also* CREW Mot. at 36.[11] But the advertisements called upon citizens to contact their representatives to tell *them* to "vote for repeal [of the health care law] in November." AR1483 (emphasis added). In other words, these were genuine issue advertisements placed at a time when there was building momentum for the health care repeal effort that Congress would be specifically addressing in its November 2010 lame duck session.

As explained, *supra* at 8-10, there was substantial activity on Capitol Hill in the autumn of 2010 related to proposals to repeal or modify the health care law. There were at least fifteen bills introduced and two discharge petitions circulated by mid-September 2010 that would have repealed or modified the health care law. AR1567-69. And, when Congress returned from its recess in November, Members considered several specific proposals to repeal or amend provisions of the law during its November lame duck session. AR1570. Amidst the significant

[11] CREW's brief does not distinguish between advertisements made by American Action Network and by Americans for Job Security. *See* CREW Mot. at 36. CREW also relies on extra-record material about the actions of other entities, such as Crossroads GPS, the Commission on Hope Growth & Opportunity, and the Kentucky Opportunity Coalition. *See* Decl. of Stuart C. McPhail (Dkt No. 33-1) (Dec. 22, 2015). The Court need not consider CREW's irrelevant allegations about the actions of other entities; the Court's review is limited to the question of whether the Commission abused its discretion in concluding that *American Action Network* was not required by FECA to register as a political committee.

amount of public and congressional attention the health care law was attracting at the time, American Action Network sought to generate further support among the American public to pressure Congress for repeal.

In addition, American Action Network's issue advocacy addressed other issues and legislation pending in the fall of 2010 that would be voted on during Congress's lame duck session. One issue was the scheduled expiration of the Bush-era tax cuts on December 31, 2010. *See* Jackie Calmes, *Obama Is Against a Compromise on Bush Tax Cuts*, N.Y. Times, Sept. 7, 2010.[12] Another was whether to approve a number of major spending packages. *See* Meredith Shiner, *Bennet bucks Obama's $50B plan*, Politico, Sept. 8, 2010 (referring to President's spending proposal as a "second stimulus package").[13] There was deep disagreement in Congress as to whether some or all of the tax cuts should be re-authorized and whether to approve these spending proposals. When Congress went into recess at the end of September, these issues had not yet been resolved and were the subjects of vigorous public debate during the recess. *See* Gail Russell Chaddock, *Congress adjourns, but spending bills and Bush tax cuts still loom*, Christian Science Monitor, Sept. 30, 2010 ("But what stands out as Congress breaks for the next six weeks is what's left undone. That includes all spending bills for the fiscal year beginning Oct. 1 and decisions on extending the so-called Bush tax cuts, now set to expire on Dec. 31.");[14] Bruce Alpert, *Congress faces long to-do list after campaign recess*, Times-Picayune, Oct. 1, 2010 ("Congress left a lot of things undone when it recessed this week so members could return home

[12] http://www.nytimes.com/2010/09/08/us/politics/08obama.html (last visited Mar. 1, 2016).

[13] http://www.politico.com/story/2010/09/bennet-bucks-obamas-50b-plan-041887 (last visited Mar. 1, 2016).

[14] http://www.csmonitor.com/USA/Politics/2010/0930/Congress-adjourns-but-spending-bills-and-Bush-tax-cuts-still-loom (last visited Mar. 1, 2016).

to campaign. It failed, for example, to pass any of the 13 major spending bills . . . .").[15] Ultimately, Congress re-authorized the tax cuts and rejected an "omnibus" spending package during Congress's lame duck session in November and December 2010. *See* Brian Montopoli, *Obama Signs Bill to Extend Bush Tax Cuts*, CBS News, Dec. 17, 2010;[16] David Rogers, *Dems concede budget fight to GOP*, Politico, Dec. 16, 2010.[17]

American Action Network's issue advertisements took positions on these and other high-profile issues and urged constituents to contact their representatives and encourage them to vote for legislation consistent with American Action Network's positions. *See, e.g.*, AR1720 ("Call Chris Murphy. Tell him to repeal his government health care mess."); AR1721 ("And instead of extending tax cuts for Pennsylvania families and businesses, he voted with Nancy Pelosi to quit working and leave town. . . . Tell Congressman Critz that Pennsylvania families need tax relief this November, not more government."); AR1723 ("Tell Congresswoman Herseth Sandlin to vote 'no' on a second, wasteful stimulus in November."). Thus, the Commission concluded that these were properly characterized as "genuine issue advertisements" regarding "salient policy issues" that were the subject of current public and congressional debate, not candidate advocacy.

On these facts, it was not arbitrary and capricious or an abuse of discretion to conclude that electioneering communications like these were issue advocacy that did not indicate a "major purpose" of electing candidates. Their exclusion from the FEC's spending analysis was reasonable, explained, and consistent with precedent. With just about fifteen percent of spending

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[15] http://www.nola.com/politics/index.ssf/2010/10/congress_faces_long_to-do_list.html (last visited Mar. 1, 2016).

[16] http://www.cbsnews.com/news/obama-signs-bill-to-extend-bush-tax-cuts/ (last visited Mar. 1, 2016).

[17] http://www.politico.com/story/2010/12/dems-concede-budget-fight-to-gop-046520 (last visited Mar. 1, 2016).

devoted to the election of candidates, it is clear that American Action Network's "major purpose" is not the election of candidates, and the Commission's dismissal of CREW's complaint alleging otherwise must be affirmed.[18]

C. CREW's Attacks On The Commission's Dismissal Decision Are Meritless.

CREW challenges the Commission's straightforward and fact-specific decision by presenting an incomplete analysis of the First Amendment and arguing that the Commission somehow adopted improper bright-line rules that the Commission denied making. *See, e.g.*, AR1705 (emphasizing that the Commission was considering American Action Network's "major purpose" on a "case-by-case" basis and in light of the "unique facts and circumstances" presented). CREW's arguments do not undermine the case-specific decision that the Commission in fact made, which follows directly from on-point First Amendment precedent that CREW largely ignores.

1. CREW's First Amendment Arguments Miss The Mark.

CREW begins its brief with a lengthy discourse about the limitless disclosure that it thinks the First Amendment allows. CREW Mot. at 17-25. But the question before this Court is far more limited—whether the Commission reasonably concluded that American Action Network is *not* a "political committee" under FECA. While the strict limitations on political committee status are necessitated by First Amendment considerations, *see Buckley*, 424 U.S. at

[18] Technically, the dismissal was the result of the Commission's failure to affirmatively find "reason to believe" that a violation occurred. A "reason to believe" finding requires "a minimum evidentiary threshold [providing] at least some legally significant facts to distinguish the circumstances from every other" situation where an entity engages in unregulated speech. *Democratic Senatorial Campaign Comm. v. FEC*, 745 F. Supp. 742, 744-46 (D.D.C. 1990) (internal quotation marks and citation omitted). The conclusion reached in the Commission's statement of reasons was one of law and was based on the absence of "legally significant facts" that would have indicated a violation of the Act occurred. There was, therefore, no basis for finding "reason to believe" that a violation occurred.

79, there is no reason to resolve broad questions of First Amendment law in this case. The Court need only decide whether the Commission's decision reasonably interpreted FECA when it found that American Action Network—having devoted the vast majority (about 85 percent) of its spending to issue advocacy, educational events, and internal administrative issues—does not have the "major purpose" of electing candidates. *See, e.g.*, *Orloski*, 795 F.2d at 162 (A "court need not find that agency's construction of the statute is the only permissible one, but rather that it is a 'sufficiently rational' one." (citing *Chem. Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985)).

CREW's advocacy for limitless disclosure under the First Amendment is thus beside the point—for even CREW admits that disclosure is *not* boundless under FECA. CREW concedes that disclosure is far more constrained for those that do not have political committee status—and that political committee burdens apply only to organizations that have as their "major purpose" the "nomination or election of a candidate." CREW Mot. at 7 (quoting *Buckley*, 424 U.S. at 79). CREW would prefer that the FEC construe the "major purpose" limitation to capture more organizations. But it is not this Court's role to determine precisely *where* the line *could* be drawn, so long as the Commission identified a reasonable standard and explained the basis for it. *See Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 214 (D.C. Cir. 2013); *see also ExxonMobil Gas Mktg. Co. v. F.E.R.C.*, 297 F.3d 1071, 1085 (D.C. Cir. 2002) (Courts should not review an agency's line-drawing decision "unless a petitioner can demonstrate that lines drawn . . . are patently unreasonable, having no relationship to the underlying regulatory problem." (citations omitted)).

And here, the line that the Commission drew—between organizations devoting significant funds to express advocacy and those devoting significant funds to issue advocacy—

was reasonable and thoroughly explained, with reference to Supreme Court precedent that draws the line in the same place. AR1710-13; *see also supra* at 17-19. CREW largely ignores this precedent. Its entire First Amendment section does not once mention *Buckley*'s holding that political committee status (and the attendant disclosures and other burdens) may apply only to those groups with the major purpose of electing candidates or *Wisconsin Right To Life II*'s holding that not all electioneering communications advocate for the election or defeat of a candidate. *See* CREW Mot. at 17-25.

CREW instead cherry picks sentences from various judicial decisions in an effort to paint a picture of unlimited disclosure under the First Amendment. But "[n]ot every intrusion into the First Amendment can be justified by hoisting the standard of disclosure." *Stop This Insanity, Inc. Emp. Leadership Fund v. FEC*, 761 F.3d 10, 16 (D.C. Cir. 2014). Indeed, earlier this year, the D.C. Circuit found that "a robust disclosure rule" could do far more harm than good: it could "mislead voters as to who really supports" a group's political activities and threaten donor privacy. *Van Hollen*, 2016 WL 278200, at *9, *12.

It is, therefore, not enough to simply point to cases that acknowledge that there is a public interest in disclosure. *See, e.g.*, CREW Mot. at 18-19 (citing cases). Cases that *permit* disclosure in different circumstances do not *require* disclosure here, where the Court has placed strict limitations on political committee status. For example, CREW relies on decisions permitting one-time, event-driven disclosure reports. *See, e.g.*, *Citizens United*, 558 U.S. at 371; *McConnell*, 540 U.S. at 201 (cited at CREW Mot. at 18-19). But these reports, which are not at issue here, are far removed from "the comprehensive registration and reporting system imposed on political committees." *Barland*, 751 F.3d at 824; *see also Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 597-98 (8th Cir. 2013) (distinguishing "perpetual, ongoing reports" from

"a one-time report"), *cert. denied*, 134 S. Ct. 1787 (2014); *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 876-77 (8th Cir. 2012) (similar).

CREW points to nothing that *requires* the FEC to impose political committee status on an issue advocacy group like American Action Network (and, in fact, Supreme Court precedent prevents it). Indeed, CREW relies on cases that *undermine* its argument, emphasizing that there are limits on the public interest in disclosure. *See, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434, 1456-57 (2014) (requiring that reporting laws be drawn "in proportion to the interest served, . . . [and] employ[] . . . a means narrowly tailored to achieve the desired objective"); *Doe v. Reed*, 561 U.S. 186, 228 (2010) (confirming a "governmental interest in disclosure must survive exacting scrutiny" (citation omitted)); *Buckley*, 424 U.S. at 64 (holding that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment") (cited at CREW Mot. at 18-19). It is those limits that restrict the analysis here and confirm that the Commission's decision was rational and fully in accordance with law.

Without federal law on its side, CREW tries to find refuge in state law, arguing that courts have authorized broader "political committee" definitions under their state regimes. This effort to find a one-size-fits-all approach to "political committee" status ignores the variations among state laws—as CREW itself concedes. *See* CREW Mot. at 32 (arguing that certain state cases do not "shed light on the proper application of *Buckley*'s 'major purpose' test").

Indeed, political committee status under FECA carries significant and continuing burdens that are not imposed under the laws of each state. It is those burdens that require the "major purpose" limitation. *See Buckley*, 424 U.S. at 79. In states with similarly burdensome political committee regulations, courts have also imposed a major purpose requirement. *See, e.g.*, *Barland*, 751 F.3d at 841-42 (invalidating a Wisconsin disclosure regime). In states with less

burdensome obligations, the result may be different. *See, e.g.*, *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118 (2d Cir. 2014) (approving Vermont law where—unlike under FECA—political committee status requires the making of both expenditures and contributions for the purpose of influencing Vermont elections, does not trigger perpetual reporting obligations, and requires solely the reporting of expenditures, contributions, and debts).[19]

In the end, comparisons to state laws cannot change the result under FECA, which must adhere to *Buckley*'s "major purpose" limitation. *Buckley*, 424 U.S. at 79. For groups with the major purpose of electing candidates, FECA's burdensome political committee regulations are constitutional. *See SpeechNow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010). For all other persons, disclosure is limited to one-time, event-driven reports that are linked to their particular independent expenditures and electioneering communications and that American Action Network dutifully filed.

2. The Commission Did Not *Per Se* Exclude Electioneering Communications From The "Major Purpose" Analysis.

CREW's next criticism of the Commission's decision is unwarranted because the Commission did not do what CREW claims it did. CREW Mot. at 25-37. According to CREW, the Commission "interpreted the 'major purpose' test to capture *only* those groups who spend a majority of their budget on express advocacy, *to the exclusion of all other campaign activity, including electioneering communications*." *Id.* at 25 (emphases added). The decision on review, however, did not find that electioneering communications could *never* be indicative of a major

[19] CREW also relies on *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773 (9th Cir. 2006), arguing that it shows that electioneering communications may trigger political committee status. *See* CREW Mot. at 29. CREW fails to mention that the Alaska statute at issue in that case distinguishes between "electioneering communications" and "issues communications" and allows only the former to trigger political committee status. *Alaska Right to Life Comm.*, 441 F.3d at 785 ("The disclosure requirement is not triggered by an expenditure that supports an 'issues communication.'" (citation omitted)).

purpose to elect candidates. It instead concluded, on the facts of this case, that American Action Network's electioneering communications are not. *See, e.g.*, AR1705 n.98 ("None of [American Action Network's] advertisements are the 'functional equivalent' of express advocacy."), AR1709 (American Action Network's advertisements "are genuine issue advertisements."). The Commission's decision was reasonable and followed directly from precedent that precludes the FEC from imposing political committee burdens on issue advocacy groups like American Action Network. *See supra* at 17-19.

There is, therefore, no reason to decide in this case whether the Commission erred by adopting "a bright line rule that looks only at the sum of a group's reported independent expenditures compared to the organization's reported expenditures in its tax filings." CREW Mot. at 35. The Commission's decision is devoid of any such rule. It instead reflects an "appl[ication] [of] the major purpose doctrine on a case-by-case basis, taking into consideration the unique facts and circumstances involved." AR1705.

It would also be inappropriate to accept CREW's invitation to adopt a different "bright line rule" that counts *all* electioneering communications as indicative of a major purpose. *See, e.g.*, CREW Mot. at 26 ("Electioneering communications are as relevant as express advocacy to the analysis of a group's major purpose.").[20] *First*, CREW itself argues that the Commission should follow a "flexib[le] . . . case by case analysis" and not adopt a "one-size-fits-all rule." *Id.* at 35 (citation omitted). *Second*, the rule CREW seeks is foreclosed by precedent.

[20] While CREW suggests that Congress envisioned that electioneering communications would trigger political committee status, CREW Mot. at 26-27, the opposite is true. The principal sponsor of the electioneering communication disclosure regulations, Senator Jim Jeffords, stated that these new provisions (the "Snowe-Jeffords provisions" of the Bipartisan Campaign Finance Reform Act) would "not require . . . groups [like the National Right to Life Committee or the Sierra Club] to create a PAC or another separate entity" and would "not require the invasive disclosure of all donors." 147 Cong. Rec. S2812-13 (Mar. 23, 2001).

As detailed above, *see supra* at 17-18, the Supreme Court held in *Buckley* that political committee burdens cannot be imposed absent a "major purpose" to elect candidates. *See Buckley*, 424 U.S. at 79. In *Wisconsin Right To Life II*, the Supreme Court clarified that not all electioneering communications are the equivalent of candidate advocacy. 551 U.S. at 469-70. CREW would nonetheless find that all electioneering communications *per se* reflect a purpose to elect candidates. Such a rule flatly contradicts *Wisconsin Right To Life II*, and the Commission reasonably declined to adopt it.[21]

CREW attempts to cast doubt on the Commission's decision by trying to distinguish the appellate court cases cited in the Commissioners' statement of reasons. CREW Mot. at 30-35. But the Commission did not state that it was *bound* by those decisions; all parties agree that the courts have not "mandate[d] a particular methodology for determining an organization's major purpose." *Real Truth About Abortion, Inc.*, 681 F.3d at 556. The Commission instead pointed to them as examples of courts' adopting a similar "major purpose" approach. For example, the Seventh Circuit in *Barland* held that "political committee" status must be "limited to express advocacy and its functional equivalent as those terms were explained in *Buckley* and *Wisconsin Right to Life II*," *see* 751 F.3d at 834, and the Fourth Circuit in *North Carolina Right to Life*

[21] CREW's alternative bright-line rule fares no better. In a footnote, CREW argues that any communication that "promotes, attacks, supports, or opposes" a federal candidate should be considered reflective of a major purpose to elect candidates. CREW Mot. at 37 n.21. This standard has remarkable breadth and presents insurmountable vagueness issues, as it would cover nearly any statement about any elected official at any time and in any place. And, contrary to CREW's suggestion, it has not been accepted as "sufficiently clear to withstand constitutional scrutiny" in this context. *See id.* (citing *McConnell*, 540 U.S. at 170 n.64). This standard was considered in the context of political "*party speakers*," where advertisements can be "presumed to be in connection with election campaigns." *McConnell*, 540 U.S. at 170 n.64 (emphasis added). "The context . . . is very different" here. *Barland*, 751 F.3d at 837. In any event, the Court need not consider this alternative argument because CREW raised it "in a perfunctory manner, such as in a footnote." *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, No. CV 14-2014, 2015 WL 7428532, at *9 (D.D.C. Nov. 20, 2015) (citation omitted).

confirmed "that the burdens of political committee designation [may] only fall on entities whose primary, or only, activities are within the 'core' of Congress's power to regulate elections," 525 F.3d at 288. CREW tries to shrug off these examples as relevant only to different "state regime[s]." *See* CREW Mot. at 32. But the question before this Court is whether the Commissioners' reasoning had a "rational basis," not whether they were bound by the decisions they cited. *Orloski*, 795 F.2d at 167. The fact that federal courts in similar contexts have approached the "major purpose" analysis in a nearly identical way merely confirms that the Commissioners had a "rational basis" for their similar case-specific approach here.

3. The Commission Reasonably Considered American Action Network's Broader Spending Without Limiting Itself To Calendar-Year Statistics.

CREW next argues that the Commissioners acted contrary to law when they did not adopt a rigid calendar-year timeframe in which to assess American Action Network's major purpose. CREW Mot. 37-40. CREW did not ask for a calendar-year timeframe in its administrative complaint; there, it relied on American Action Network's approximately $27 million in overall spending between July 23, 2009 and June 30, 2011. AR1485-86. It now changes its approach, arguing that the Office of General Counsel was correct when it recommended in the First General Counsel's Report that the question of "whether [American Action Network] had the requisite major purpose" be limited to a review of only "its activities during the 2010 calendar year." AR1659. Using this approach—and ignoring information from 2009 and 2011 in the record—the Office of General Counsel estimated that, in 2010, American Action Network spent about $17 million on independent expenditures and electioneering communications and about $27.1 million in total. *Id.*

This argument is a sideshow because it depends entirely on CREW's ability to pull in electioneering communications, which were properly excluded from the analysis. *See supra* at

17-23. The Office of General Counsel estimated that American Action Network spent about $4 million on express advocacy during 2010—totaling just about fifteen percent of its $27.1 million in total spending. AR1638. A calendar-year metric, therefore, does not turn American Action Network into a political committee. Its "major purpose" remained issue advocacy in 2010.

The argument is also meritless. The Commissioners' decision to reject a calendar-year approach that CREW did not request was not arbitrary and capricious or contrary to law. CREW does not argue that federal law mandates a calendar-year metric; it instead argues that such an approach would "*harmonize*" a different and earlier-enacted pre-requisite to political committee status, which requires the "political committee" to have received contributions or made expenditures totaling more than $1,000 in a calendar year. CREW Mot. at 37-38 (citing 52 U.S.C. § 30101(4)(A)). If Congress "has directly spoken to the precise question at issue," the court and the agency "must give effect to the unambiguously expressed intent." *Agape Church, Inc. v. FCC*, 738 F.3d 397, 406 (D.C. Cir. 2013) (quoting *Chevron*, 467 U.S. at 842-43). But even CREW concedes that FECA does not expressly require that the Commission assess an entity's electoral and non-electoral spending on a fixed calendar-year basis to determine an entity's "major purpose." CREW's sole support for the fixed formula is in a section of FECA that was drafted five years before the "major purpose" test existed.

It was not unreasonable for the Commissioners to reject a calendar-year approach in this case. As the controlling Commissioners explained, "determining an organization's major purpose via a narrow snapshot of time" undermines the point of the major purpose test, which is to limit the application of political committee requirements "to groups with the clearest electoral focus." AR1713. CREW agrees, admitting that an organization's activities may differ in an election year, such that its spending "over the following year" may be relevant to determining its

"major purpose." *See* CREW Mot. at 39. The Commissioners reasonably concluded that the time frame of its analysis—like every other part of its analysis—should proceed on a case-by-case basis. *See* AR1713 n.141 (incorporating Matter Under Review ("MUR") 6396, Statement of Reasons of Commissioners Goodman, Hunter, and Petersen at 24 n.101 (Jan. 8, 2014) ("[T]he facts in [each] case . . . will determine the appropriate time frame for analysis.").[22]

And contrary to CREW's argument, this case-by-case approach to the pertinent time frame was also supported by prior Commission decisions—including those attached to CREW's Motion. In MUR 5751, the Office of General Counsel examined receipts and disbursements from 2002-2006. *See* Decl. of Stuart McPhail, Ex. 28 at 3. In MUR 5753, Commission staff based their analysis on activity "during the entire 2004 cycle." *Id.*, Ex. 29 at 11, 18. MUR 5754 similarly involved an analysis of "the entire 2004 election cycle." *Id.*, Ex. 30 at 13.

There are many more similar examples. In MUR 5487, the Commission looked at the spending "[d]uring the entire 2004 election cycle." MUR 5487, Conciliation Agreement ¶¶ 18, 36 (Feb, 28, 2007). In an advisory opinion, the Commission analyzed a "pattern of . . . contributions" over a "six-year period (1990 to 1995)." FEC Adv. Op. 1996-3, at 3 (Apr. 19, 1996). Even judicial cases look to a broader time period. *See FEC v. Malenick*, 310 F. Supp. 2d 230, 234 n.5 (D.D.C. 2004), *rev'd in part on reconsideration*, No. 02-cv-1237, 2005 WL 588222 (D.D.C. Mar. 7, 2005) (considering contributions over a two-year period (1995 and 1996)); *GOPAC*, 917 F. Supp. at 865 (considering activities from 1989 and 1990).

Indeed, the Commission's flexible approach is so long-standing that application of a calendar-year approach in this case would have due process implications. The Commission's

[22] All documents associated with a MUR or Alternative Dispute Resolution ("ADR") file can be found by using the FEC's Enforcement Query System (http://eqs.fec.gov/eqs/searcheqs). Users can locate the relevant file by entering the appropriate MUR or ADR number in the "Case #" field.

Office of General Counsel did not begin advocating a calendar-year approach until 2012—well after the 2010 calendar year to which CREW seeks to apply it. *See* MUR 6396, Statement of Reasons of Commissioners Goodman, Hunter, and Petersen at 23 (Jan. 8, 2014). It is axiomatic in administrative law that "regulated parties should know what is required of them so they may act accordingly." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). In 2010, there was no reason to conclude that a strict calendar-year approach would apply to the political committee analysis. For this reason also, it was reasonably rejected here. "It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding . . . ." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012).

4. The Commission Did Not Adopt A Rule Requiring That The "Major Purpose" Be Supported By At Least Fifty Percent Of Spending.

Finally, CREW faults the Commission for adopting a "bright-line 50% test" that determines an organization's status by "asking, not whether the group's major purpose is the nomination or election of a candidate, but whether more than 50% of the group's expenditures go to express advocacy." CREW Mot. at 40-43. This argument also finds no support in the Commission's actual statement of reasons. The Commission applied "the major purpose doctrine on a case-by-case basis, taking into consideration the unique facts and circumstances involved with [American Action Network]." AR1705. Those facts showed that the money spent by American Action Network for the purpose of electing a candidate "represented approximately 15% of its total expenses during the same period"—an amount "hardly 'so extensive that the organization's major purpose may be regarded as campaign activity.'" AR1709 (quoting *Mass.*

Citizens for Life, 479 U.S. at 262). The Commission did not—and had no reason to—determine the exact percentage of spending that could constitute a "major purpose" in this case or any other case.[23]

The Commission's conclusion that about fifteen percent of spending falls far short of a "major purpose" follows directly from the fact that an organization can only have one "major purpose." The Supreme Court limited political committee status 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 (emphasis added). The Court reiterated the necessity of a singular purpose ten years later, confirming that "an entity subject to regulation as a 'political committee' under the Act is one that is either 'under the control of a candidate or the major purpose of which is the nomination or election of a candidate.'" *Mass. Citizens for Life*, 479 U.S. at 252 n.6. An organization "fits neither of these descriptions" where—as with American Action Network—"[i]ts central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates." *Id.*

The Court's requirement of one "major purpose" in this analysis is evident from the different words it has used where multiple "major purposes" are appropriate. *See, e.g.*, *CBS, Inc. v. FCC*, 453 U.S. 367, 405 n.2 (1981) ("One of the major purposes of the Federal Election Campaign Act . . ."); *Bowsher v. Merck & Co*., 460 U.S. 824, 833 (1983) ("the two major purposes of the bill . . ."); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 592 (1980) ("a major purpose of the First Amendment . . ."). The question, therefore, is not "whether influencing campaigns is [only] 'a major purpose' of the group," *see Koerber v. FEC*, 583

[23] In the Americans for Job Security MUR, the controlling Commissioners concluded that spending only 9.8% on express advocacy is not enough to demonstrate that an organization's major purpose is the election or defeat of federal candidates. AR1458.

F. Supp. 2d 740, 748 (E.D.N.C. 2008) (emphasis added), but "whether the election or defeat of federal candidates for office is the major purpose of an organization, and not simply a major purpose," *Real Truth About Abortion*, 681 F.3d at 556. The Commission agrees: an organization "must . . . have the major purpose of engaging in Federal campaign activity" before it may be regulated as a political committee. Supplemental E&J, 72 Fed. Reg. at 5601 (emphasis added).

In this case, where spending on advertisements to elect candidates amounted to only fifteen percent of American Action Network's total spending, it was neither arbitrary, capricious, nor contrary to law to conclude that "the major purpose" of American Action Network is not the election of candidates.[24]

II. An Independent Jurisdictional Defect Requires The Dismissal Of This Case.

As detailed above, CREW's challenge to the Commission's dismissal decision must be rejected on the merits, as the decision reflects a reasonable and straightforward interpretation of FECA, judicial precedent, and Commission authorities. It also must be rejected because it depends on an alleged injury that can no longer be redressed. Over 19 months ago, in July 2014, the statute of limitations expired, precluding further proceedings before the Commission. CREW, as a result, cannot show—as it must—that there is a "substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Duke Power Co. v. Carolina*

[24] If, notwithstanding the foregoing, the Court were to conclude that American Action Network's issue advocacy electioneering communications should have been considered in determining its "major purpose," the Court should remand the question of whether American Action Network's "major purpose" is the election of candidates to the FEC for consideration in the first instance. *Cf. Noble Energy, Inc. v. Salazar*, 671 F.3d 1241, 1246 (D.C. Cir. 2012) ("[A]n agency is entitled to construe its own regulations in the first instance." (quoting *Am. Petroleum Inst. v. EPA*, 906 F.2d 729, 742 (D.C. Cir. 1990)).

Envtl. Study Grp., Inc., 438 U.S. 59, 79 (1978). Absent that showing, CREW lacks standing to maintain this action and it must be dismissed.

A. The Statute Of Limitations On CREW's FEC Complaint Has Expired.

Stamped across the front of the First General Counsel's Report are the words "EXPIRATION OF SOL: 7/23/14." AR1635. This reflects the five-year statute of limitations that applies to FEC enforcement actions. 28 U.S.C. § 2462 (a "proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued"). CREW has challenged conduct that began in July 2009. The time the FEC required to consider CREW's challenge did not toll the statute of limitations. *FEC v. Nat'l Republican Senatorial Comm.*, 877 F. Supp. 15, 19-21 (D.D.C. 1995). As a result, the FEC can no longer pursue a timely judicial enforcement action even if it were warranted. *See id.*; *FEC v. Nat'l Right To Work Comm., Inc.*, 916 F. Supp. 10, 13-14 (D.D.C. 1996). It would be dismissed as untimely. *See FEC v. Williams*, 104 F.3d 237, 237-41 (9th Cir. 1996) (dismissing FEC enforcement action filed in 1993 as untimely where administrative complaint was filed in 1988 based on conduct between "1987 and the end of January 1988").[25]

The FEC, as a result, regularly dismisses administrative complaints when five years elapse before a judicial enforcement action is commenced. "[C]itizens ought not have the threat of an investigation hanging over them for a lengthy time if it is unlikely that the investigation

[25] If a complainant believes the FEC is arbitrarily and unreasonably delaying a matter, FECA provides a remedy. Beginning 120 days after an administrative complaint is filed, a complainant may bring suit to challenge the delay. *See* 52 U.S.C. § 30109(a)(8)(A); *Democratic Senatorial Campaign Comm. v. FEC*, Civ.No.A. 95-0349, 1996 WL 34301203, at *8 (D.D.C. Apr. 17, 1996) (600-day delay held unlawful, noting "approaching statute of limitations"); *Citizens for Percy v. FEC*, Civ.No.A. 84-2653, 1984 WL 6601 (D.D.C. Nov. 19, 1984) (124-day delay unlawful). CREW did not take advantage of this opportunity.

will actually take place," and "the Commission should focus resources on important cases of more recent vintage, with fresher evidence and more importance to current campaigns." Pre-MUR 395, Statement of Reasons of Commissioners Mason, Smith, and Wold at 2 (Feb. 27, 2002); *see also* ADR 230, Recommendation to Close File (Feb. 11, 2005) ("Due to the fact that the alleged activities noted in the complaint took place more than five years ago, this matter should be dismissed in accordance with the five year statute of limitations period.").

The FEC even has an established procedure for the systematic dismissal of claims that have become "stale" *before* the statute of limitations has run because "[f]ocusing investigative efforts on more recent and more significant activity . . . has a more positive effect on the electoral process and the regulated community." *See* MUR 5097R, General Counsel's Report (Agenda Document No. X02-27) (Apr. 3, 2002). Dismissal was warranted on this basis where the underlying conduct was four years old because "any investigation would have had to be conducted in a hasty and less than thorough fashion in order to beat the statute of limitations." Pre-MUR 395, Statement of Reasons of Commissioners Mason, Smith, and Wold at 3.

B. CREW Cannot Show That Success In This Action Is Significantly Likely To Redress Its Claimed Injury.

As the "party invoking federal jurisdiction, [CREW] bears the burden" of showing that a "case or controversy" exists during all "successive stages of the litigation." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). This means that CREW must show it is "likely, as opposed to merely speculative, that [its] injury will be redressed by a favorable decision." *Id.* at 560 (internal quotation marks and citation omitted). This standard requires CREW to "demonstrate a *significant likelihood* that a decision of [the] Court would redress its alleged injury." *Spectrum Five LLC v. FCC,* 758 F.3d 254, 256 (D.C. Cir. 2014) (emphasis added). Otherwise, its case must be dismissed. *Spencer v. Kemna,* 523 U.S. 1, 7 (1998) ("[T]hroughout

the litigation, the plaintiff [must show injury] likely to be redressed by a favorable judicial decision.").

CREW cannot meet this standard because—even if it receives the relief it has requested—it cannot show a "significant likelihood" that the Commission will proceed to investigate its complaint and, if warranted, impose the political committee burdens on American Action Network that CREW seeks. Under FECA, this Court's authority is limited to a declaration (where appropriate) that the Commission's dismissal was contrary to law and an order directing the Commission to conform to that judgment. *See* 52 U.S.C. § 30109(a)(8)(C). The Court cannot directly order the FEC to pursue the administrative complaint, which is now stale and past its statute of limitations.

To be sure, the mere fact that "we cannot know" with certainty what the Commission will do if a dismissal order is deemed unlawful does not negate standing in every case. In *Akins v. FEC*, 524 U.S. 11, 25 (1998), for example, the Court found standing even though redress was not certain because the FEC could, in "its lawful discretion, reach the same result for a different reason." *Id.* But the case before this Court is not a standard case. This is a case where the statute of limitations has run *and* where the FEC has a practice of dismissing stale complaints—even complaints less stale than CREW's. *See supra* at 37-38. On these facts, CREW cannot show there is a "substantial likelihood" that its informational injury will be redressed. Article III, accordingly, requires that its case be dismissed for lack of standing. *See Lujan*, 504 U.S. at 560-61.[26]

[26] The Court did not consider the statute of limitations issue in *Akins*, which also involved conduct that was over five years old. This silence does not affect the analysis here, because "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925); *Bismullah v. Gates*, 551 F.3d 1068, 1071 (D.C. Cir.

CREW may seek to prolong this litigation by pointing to the Commission's equitable authority, arguing that the statute of limitations statute speaks only of civil fines and penalties. *See* 28 U.S.C. § 2462 (A "proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . . ."). Some courts have relied on the possibility of equitable relief in cases where the statute of limitations has run. *See, e.g., United States v. Banks*, 115 F.3d 916, 919 (11th Cir. 1997) (finding equitable claims not barred); *FEC v. Christian Coalition*, 965 F. Supp. 66 (D.D.C. 1997) (same).

But others squarely reject the argument: "equity will withhold its relief . . . where the applicable statute of limitations would bar the concurrent legal remedy." *FEC v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996) (quoting *Cope v. Anderson*, 331 U.S. 461, 464 (1947)); *see also United States v. Midwest Generation, LLC*, 720 F.3d 644, 647-48 (7th Cir. 2013) (citing *Gabelli v. SEC*, 133 S. Ct. 1216 (2013)) (barring all government claims, including those for equitable relief, because there must be "effective time constraints" on government action); *Nat'l Right To Work Comm.*, 916 F. Supp. at 14 (quoting *Cope*, 331 U.S. at 464) ("when legal and equitable relief are available concurrently, 'equity will withhold its relief . . . where the applicable statute of limitations would bar the concurrent legal remedy.'").

The Court need not pick sides here because—regardless of whether or not the Commission *could* pursue an enforcement case seeking solely equitable relief—it does not appear that the Commission *does* pursue such actions after the statute of limitations on civil penalties has run. In the ten years since *Williams* was decided, the FEC has not proceeded under

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2009); *Indep. Petroleum Ass'n v. Babbitt*, 235 F.3d 588, 597 (D.C. Cir. 2001). It is worth noting, however, that on remand the Commission dismissed the claims that remained due to "the expiration of the applicable statute of limitations." *Akins v. FEC*, 736 F. Supp. 2d 9, 16 (D.D.C. 2010). Further action "would not be an appropriate use of the FEC's limited resources." *Id.*

these circumstances. Any suggestion that it would deviate from that settled practice here is speculative at best. CREW's complaint must be dismissed.

CONCLUSION

For the foregoing reasons, the Court should grant American Action Network's cross-motion for summary judgment, deny CREW's motion for summary judgment, and dismiss CREW's complaint.

Respectfully submitted,

/s/ Claire J. Evans
Jan Witold Baran (D.C. Bar No. 233486)
Caleb P. Burns (D.C. Bar No. 474923)
Claire J. Evans (D.C. Bar No. 992271)
Wiley Rein LLP
1776 K Street NW
Washington, DC 20006
Tel.: 202.719.7000
Fax: 202.719.7049

Counsel for American Action Network

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