UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The Plaintiffs, Citizens for Responsibility and Ethics in Washington ("CREW") and Melanie Sloan, by their undersigned counsel, respectfully move this Court, pursuant to Federal Rule of Civil Procedure 56, for summary judgment declaring that the failure of the Federal Election Commission ("FEC") to find "reason to believe" that the American Action Network ("AAN") and Americans for Job Security ("AJS") violated the Federal Election Campaign Act ("FECA"), 52 U.S.C. § 30101 *et seq.*, was contrary to law, and directing the FEC to conform with such declaration within 30 days consistent with the Court's judgment.

Support for this motion is set forth in the accompanying Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment, the Declaration of Stuart C. McPhail, and the joint appendix containing copies of those portions of the administrative record that are cited or otherwise relied upon, to be filed no later than April 28, 2016. Plaintiffs'

requested relief is set forth in the accompanying Proposed Order. Plaintiffs respectfully request oral argument on this motion.

Dated: December 22, 2015.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
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INTRODUCTION

This challenge arises from the Federal Election Commission's ("FEC") dismissals of Plaintiffs' complaints against the American Action Network ("AAN") and Americans for Job Security ("AJS") for their failure to register as political committees with the FEC. All of the FEC commissioners agreed that AAN's and AJS's "express advocacy" (*i.e.*, ads explicitly asking voters to "vote for" a candidate or employing similar "magic words") should count toward finding that they were political committees: groups that must disclose their contributors to ensure public transparency of campaign funding. Three commissioners (the "controlling commissioners") did not agree, however, that their electioneering communications—ads run shortly before an election, aired to tens of thousands of voters in that election, and specifically naming a candidate in that election—should also count. These ads included, for example, one praising a candidate and condemning her opponent, and another ad touting the actions a candidate would take if elected. Nonetheless, the three commissioners concluded that the First Amendment barred the FEC from counting such communications toward finding that the groups' "major purpose[s]" were to nominate or elect federal candidates. As they concluded that at least 50% of a group's spending over its entire existence must go to express advocacy for it to have such a major purpose, they found that AAN and AJS did not qualify as political committees. Their votes deadlocked the commission in a three-to-three tie, preventing an FEC investigation; consequently, their votes, despite not reflecting a majority of the commission, were controlling.

Their conclusion, however, is contrary to law, and warrants reversal by this Court. The First Amendment provides ample room for disclosure from politically active groups, including those groups heavily involved in electioneering communications. Further, any sensible reading of *Buckley*'s "major purpose" test must count electioneering communications as evidence of the

group's political purposes. The public has a vital interest in disclosure of the contributors to a group that spends extensively on electioneering communications just as it does with a group that spends extensively on "magic words" ads. In addition, a group's calendar year activities are the most relevant to determining the group's current major purpose, and the group may also use less than 50% of its total spending to pursue that purpose. Finally, the FECA requires only a "reason to believe," not conclusive evidence, to begin an investigation. Accordingly, Plaintiffs respectfully request this Court grant summary judgment and find that the controlling commissioners' conclusions were contrary to law, in violation of 52 U.S.C. § 30109(a)(8)(C).

STATEMENT OF FACTS

A. The Growth of Dark Money Campaign Spending

As the Supreme Court recognizes, disclosure of campaign spending "permits citizens and shareholders to react to the speech of corporate entities in a proper way." *Citizens United v. FEC*, 558 U.S. 310, 371 (2010). "This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* Unfortunately, however, campaign spending has only grown more opaque in recent election cycles.

Before 2006, groups that do not disclose their contributors spent very little money on federal elections. Ex. 1.[1] After the Supreme Court decided *FEC v. Wisconsin Right to Life* in 2007, lifting the limit on funds for certain kinds of campaign activity, these "dark money" groups began to spend heavily. *Id. Citizens United* further loosened the reins on campaign spending by outside groups, and dark money grew to represent more than $135 million in election spending in

[1] Exhibits refer to exhibits attached to the accompanying Declaration of Stuart C. McPhail in Support of Plaintiffs' Motion for Summary Judgment, filed herewith. The court may take notice of these exhibits as they constitute "legislative" facts that can aid the Court in its analysis of the First Amendment, federal campaign finance statutes, and *Buckley*'s "major purpose" test. *See Rufer v. FEC*, 64 F. Supp. 3d 195, 205 (D.D.C. 2014) (noting facts underlying efficacy of campaign finance laws were "legislative" facts that a court may consider on appellate review); *see also Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) ("[W]hen a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal.").

2010. *Id.* Most of that spending, $79.9 million, went to electioneering communications, and by the FEC's own admission, the sources of funds were reported for less than 10% of those ads. *See* Def. FEC's Answer ¶ 30, *Van Hollen v. FEC*, No. 1:11-cv-00766(ABJ) (D.D.C. June 21, 2011) (Ex. 2). By 2012, dark money spending ballooned to more than $300 million. Ex. 1. This represented nearly one third of money spent by outside groups in the 2012 election. *Id.* In Senate races alone, dark money spending doubled from 2010 to 2014, from $105 million to $226 million. Ex. 3 at 2. In the 11 most competitive Senate races in 2014, dark money groups comprised approximately 59% of outside spending. *Id.*

This spending is only growing. As of September 2015, dark money groups had already spent more than $4.6 million in the current presidential election cycle, five-times what such groups had spent by this time in the 2012 election. Ex. 4. This spending made up nearly 20% of all reported outside spending at that time, up considerably from the 7% of such spending at the same time in 2012. *Id.*

It is no coincidence that dark money spending has increased so significantly: contributors are consciously choosing ways to spend money on elections that will not require disclosure. The president of Crossroads GPS, one of the largest dark money groups in operation, admitted that the "value of confidentiality to some donors" was a major reason for the group's formation. Ex. 5. Further, when a court threatened that anonymity by finding that groups funding electioneering communications would need to disclose their contributors, spending on electioneering communications plummeted and the funds were diverted to express advocacy as contributors for such communications could remain hidden under current FEC rules. Ex. 6; *see also Van Hollen v. FEC*, 851 F. Supp. 2d 69, 89 (D.D.C. 2012), *rev'd*, 694 F.3d 108 (D.C. Cir. 2012); 11 C.F.R.

§ 109.10(e)(vi). That decision was subsequently reversed, allowing money to flow back to electioneering communications without risk of disclosure. Ex. 6.

B. The Dark Money Loophole

Given the Supreme Court's assumption that campaign contributions and spending would be disclosed, and that disclosure would suffice to address much of the government's interest behind campaign finance laws, it is critical to understand how so much undisclosed money has nonetheless flooded our elections. Unfortunately, the FEC's failure to reasonably interpret and enforce the laws has opened a loophole through which massive sums of money have flowed.

The Federal Election Campaign Act ("FECA") provides two regimes for disclosure of campaign-related communications. First, certain groups classified as political committees must regularly file reports disclosing their spending and contributors. Second, everyone, regardless of whether they qualify as a political committee, must file a report disclosing some information when they engage in either of two types of election-related communications: "independent expenditures" and "electoral communications."

An "independent expenditure" is an expenditure for a communication "expressly advocating the election or defeat of a clearly identified candidate" that is not coordinated with the campaign. 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16. The scope of ads that qualify as "independent expenditures" is quite narrow. It is limited to "express advocacy": ads that use phrases such as "vote for," "re-elect," "Smith for Congress," "vote against," etc., or ads that, "in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)." 11 C.F.R. § 100.22.

Under FEC rules, any person spending more than $250 on independent expenditures in a calendar year must file a report with the FEC every time that person makes an independent expenditure, and the report must disclose "[t]he identification of each person who made a

contribution in excess of $200 to the person filing such report," but only if the "contribution was made for the purpose of furthering the reported independent expenditure." 11 C.F.R. § 109.10; *but see* 52 U.S.C. § 30104(b)(3)(A), (c)(1), (c)(2)(C). Under the rule, contributions not earmarked for a specific independent expenditure need not be reported, regardless of whether the donor intended the contribution to help nominate or elect a candidate. 11 C.F.R. § 109.10.

Aware of the severe limitations of this category, Congress required reporting for a second narrow category of election-related communication: "electioneering communications." *McConnell v. FEC*, 540 U.S. 93, 128–29, 196–97 (2003). Electioneering communications are (1) "broadcast, cable, or satellite communication[s]" that (2) "refer[] to a clearly identified candidate for Federal office," (3) are "publicly distributed within 60 days before a general election for the office sought by the candidate, or within 30 days before a primary" or similar election "for the office sought by the candidate," and (4) are "targeted to the relevant electorate." 11 C.F.R. § 100.29(a); *see also* 52 U.S.C. § 30109(f)(3). The statue and FEC regulations further limit the types of communications treated as electioneering communications. Only ads that reach 50,000 or more persons are considered "publicly distributed." 11 C.F.R. § 100.29(b)(3), (5), (7). Internet communications, print media, and mailings do not qualify as electioneering communications. *Id.* § 100.29(b)(1), (c)(1). Finally, explicitly excluded are "news stor[ies], commentar[ies], and editorial[s] distributed" by anyone other than the political party, political committee, or candidate. *Id.* § 100.29(c)(2).

Anyone spending more than $10,000 on electioneering communications during a calendar year must file a report with the FEC every time they make an electioneering communication disclosing various types of contributions, depending on the nature of the entity paying for the ad. 11 C.F.R. § 104.20(b), (c)(7)–(9). Most relevant here, under the FEC's rules,

if the electioneering communication is "made by a corporation or a labor organization," then the "name and address of each person who made a donation aggregating $1,000 or more to the corporation or labor organization" over the prior calendar year must be disclosed, but again only if the donation "was made for the purpose of furthering electioneering communications." *Id.* § 104.20(c)(9).[2]

Consequently, while everyone, including dark money groups, must file disclosures with the FEC if they engage in one of two very limited forms of election-related communication, under current FEC rules, they need not disclose the actual source of the funds for the ads unless the contributions were earmarked for the purpose of airing those particular ads. Contributions made for the more general purpose of aiding in the nomination or election of a candidate need not be, and are not, reported.

The rules are different for political committees. Political committees must periodically file reports with the FEC that, among other things, identify each person who contributed more than $200 to the group in a calendar year. 52 U.S.C. § 30104(b)(3)(A), 11 C.F.R. § 104.3(a). There is no requirement that the contribution be earmarked to be disclosed.

Under the FECA, a group that receives more than $1,000 in "contributions" or makes more than $1,000 in "expenditures" in a calendar year for the purpose of influencing a federal election is a political committee. 52 U.S.C. § 30101(4); 11 C.F.R. § 100.5(a). The FEC interprets "expenditure" in this context to include only money spent on express advocacy. FEC, Political Committee Status, Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5604 (Feb .7, 2007) ("Supplemental E&J").[3] In *Buckley v. Valeo*, however, the Supreme Court added

[2] This rule is currently the subject of a legal challenge in *Van Hollen v. FEC*, Nos. 15-5016 & 15-5017 (D.C. Cir. Jan. 12, 2015).

[3] The FECA defines a "contribution" as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A).

a second requirement for a group to be a classified as a political committee under the law: that it must have as its "major purpose" the "nomination or election of a candidate." 424 U.S. 1, 79 (1976). The Court reasoned such a requirement would prevent groups "engaged purely in issue advocacy" from being swept up in the definition of political committee. *Id.*

Three commissioners have interpreted the "major purpose" test to protect far more than "pure[]" issue advocacy groups, however, instead interpreting the test to ensure that only the narrowest subset of groups could qualify as political committees. They have substituted the Court's test with one of their own: (1) does a group admit in its "official public statements" or "official documents," or by its "chosen tax status," that it is a political committee and, (2) if not, does it spend a "majority" of its budget over its "lifetime of existence and activities" on "express advocacy," to the exclusion of any and all other campaign-related activities that aid in the nomination or election of a candidate? AR 1449, 1456, 1458, 1462, 1701, 1707, 1710, 1714. Indeed, according to the controlling commissioners, any sums spent on non-express advocacy communications count *against* finding that the group is a political committee. They treat that spending as non-political, adding it to the group's total spending (the denominator in the test) but not the group's expenditures for the nomination or election of candidates (the numerator). The controlling commissioners have steadfastly blocked even an investigation into any group (including AAN and AJS) not meeting this overly narrow and unreasonable test, ensuring that groups that do not meet their test evade the rigorous disclosure required by the FECA.

In this way, the three commissioners—in contravention of the law—have opened a massive loophole through which millions of dollars in campaign-related spending have flowed. So long as a group (1) avoids spending more than 50% of its budget over its existence on express advocacy and does not state in its official documents that it is a political committee, and (2) does

not accept contributions earmarked for independent expenditures or electioneering communications, that group can keep secret the identities of all of its contributors. This allows the sources of campaign funds to remain hidden and prevents the public from "mak[ing] informed decisions and giv[ing] proper weight to different speakers and messages." *Cf. Citizens United*, 558 U.S. at 371.

C. Dark Money is Now Prevalent

The loophole created by the FEC's failure to reasonably enforce the FECA has allowed dark money groups, including the subjects of this action, to become a formidable force in elections. AAN was formed in July 2009 as a tax-exempt social welfare organization under § 501(c)(4) of the Internal Revenue Code ("tax code"). AR 1490. According to reports AAN filed with the FEC, between July 23, 2009 and June 30, 2011, it spent at least $18.1 million to produce and broadcast ads focused on 29 primary and general elections. AR 1482, 1638, 1649–55. This figure includes $13,792,875 AAN spent on electioneering communications in 2010 focusing on approximately 21 races: ads that, according to the controlling commissioners, did not demonstrate that AAN's purpose was to nominate or elect federal candidates. AR 1482, 1638. Among these ads were some attacking Rep. Ed Perlmutter and Rep. Dina Titus, asserting that they voted to provide "convicted rapists" with "Viagra." AR 1652. The ads urged voters to tell the members of Congress "in November"—when they were up for reelection—to vote to repeal the law. *Id.* Similar ads pressed voters to register their displeasure with other candidates "in November": one against Rep. Gerry Connolly for ostensibly "stripp[ing] [taxpayers] bare," one against Rep. Stephanie Herseth Sandlin for providing "health care for illegal immigrants," and another against Rep. Mark Critz for "quit[ting] work and leav[ing] town," to list only a few. AR 1649–54. AAN spent an additional $484,999 on an ad to tout Kelly Ayotte, then a candidate for the U.S. Senate, and the fact that she would stop a deal to "[r]aise electric rates" if elected,

while her opponent would support it. AR 1679.[4] Combined, AAN's political ads comprised roughly 66.8% of the group's total spending for the first two years of its existence. AR 1485. AAN did not register as a political committee, however, and has not disclosed who paid for any of its ads. AR 1482, 1487, 1560.

AJS formed in 1997 as a tax-exempt business league under § 501(c)(6) of the tax code. AR 48, 49–50. In 2010, according to reports filed with the FEC, AJS spent approximately $9.5 million on campaign advertisements, including $4.6 million spent on electioneering communications in eight races and that the controlling commissioners refused to attribute toward AJS's major purpose. AR 1393–94. Those electioneering communications included an ad promoting Scott Brown, a candidate in the January 19, 2010 special election for a U.S. Senate seat in Massachusetts. AR 1404. The ad, aired just four days before the election, praised Mr. Brown, stating he would "protect Medicare," not "raise taxes," and would "listen to the people, not the lobbyists"—things he could do only if elected to federal office. AR 5, 1404. AJS produced and aired an electioneering communication attacking William Halter, the lieutenant governor of Arkansas and candidate for the U.S. Senate seat in Arkansas for "export[ing] jobs to Bangalore" while he was in the private sector, and asked viewers to "tell Bill Halter thanks for nothing." AR 1405. Another ad AJS ran praised Ken Buck, then a candidate for a U.S. Senate seat in Colorado, touting his plan to "get Colorado back to work" if viewers elected him. AR 1428. Another ad boasted of U.S. Senate candidate Pat Toomey's record as a small businessman. AR 1429.[5] Combined, AJS's political ads comprised approximately 76.5% of

[4] AAN's other ads similarly opposed or criticized federal candidates close to their elections. AR 1649–55.
[5] AJS's other ads similarly opposed or criticized (or in two cases, praised) federal candidates close to their elections. AR 1404–07.

AJS's total spending in 2010. AR 1433. Nonetheless, AJS did not register as a political committee and has not disclosed any of its contributors. AR 48.

AAN and AJS are far from alone. For example, also active in 2010, Crossroads GPS spent approximately $20.8 million on ads to support the election of Republican candidates and provided an additional $15.8 million in grants that may have been spent on similar political activities. Ex. 7 at 8 n.16, 26. Crossroads GPS assured contributors that they could provide unlimited contributions to the group while also allowing the contributors to evade any legally mandated disclosure. Ex. 8 ¶ 27.[6] Similarly, a group called the Commission on Hope, Growth & Opportunity ("CHGO") spent approximately $4.05 million, 85% of its budget, in 2010 on ads "credited by many for the GOP gaining control of the US House of Representatives." Ex. 10 at 17; Ex. 11. Despite these overtly political activities, neither Crossroads GPS nor CHGO registered as a political committee, nor have they reported any contributors for their ads. Ex. 9 (reporting "0" in contributions to the FEC); Ex. 10 at 20.

Due to the FEC's inaction, AAN and AJS have become a template for political groups to hide political spending. For example, the Kentucky Opportunity Coalition spent more than $13 million, 67% of its total expenditures in the 2014 election cycle, on ads to reelect Senator Mitch McConnell without registering as a political committee or disclosing the source for any of its funds. Exs. 12–14. Another organization, Carolina Rising, Inc., despite claiming to be a nonpolitical social-welfare organization, was admittedly started "to sort of help the conservatives and the Republicans in North Carolina." Exs. 15, 16. Indeed, in a moment of candor, the group's president admitted that Carolina Rising spent $4.7 million on ads "to get [Thom Tillis]

[6] Crossroads GPS has remained active, spending more than $70 million in 2012 on express advocacy, Ex. 9 at 2, and $26 million in the 2014 elections, *id.* at 3.

elected" to the U.S. Senate. Exs. 16, 17. Nevertheless, like AAN and AJS, Carolina Rising never registered as a political committee nor disclosed its contributors. Ex. 18.

Lastly, the activities of these purported non-political committees have not gone unnoticed by candidates. For example, an investigation into Wisconsin Governor Scott Walker's activities uncovered evidence that the governor sought contributions for an ostensibly nonpolitical organization to be used in his fight against a recall campaign. Ex. 19.[7] The governor apparently stressed to donors that contributions to the organization "are not disclosed" and that it could "accept corporate donations without limits." *Id.* (quoting June 2011 email to Governor Walker). Clearly, Governor Walker viewed contributions to dark money groups as valuable as contributions to his campaign, a view likely shared by those candidates aided by AAN and AJS, with the additional benefit that they were shielded from any disclosure or contribution limits.

D. Procedural History

On March 8, 2012, plaintiffs CREW and Melanie Sloan filed a complaint with the FEC against AJS for violations of the FECA ("MUR 6548"). AR 1–13. The complaint alleged that AJS's extensive political spending demonstrated that its major purpose was the nomination or election of a candidate, and thus that AJS violated 2 U.S.C. § 433 (now 52 U.S.C. § 30103) by failing to register as a political committee. *Id.* Thereafter, Plaintiffs filed a complaint against AAN on June 7, 2012 ("MUR 6589"), similarly alleging AAN's extensive political spending demonstrated that it should have registered as a political committee. AR 1480–87.

The FEC's Office of the General Counsel ("OGC") issued reports on both AAN and AJS and recommended finding reason to believe that each organization violated the FECA. AR 1390–1433, 1635–84. The reports found that AAN and AJS each met the statutory requirement

[7] Although the group in question was focused on a state election and therefore would not fall under the FEC's jurisdiction, it is reasonable to assume that such activities are rampant in the federal arena.

for registration as a political committee by meeting the $1,000 expenditure threshold. AR 1401, 1645–66. Turning to their major purposes, the OGC found that the "overall conduct" of each organization was "alone sufficient to establish that [their] major purpose in 2010 was the nomination or election of federal candidates." AR 1402, 1646. Applying a test focused on the group's spending on federal campaign activity in a calendar year, the OGC found AJS spent at least $9.5 million in 2010 on federal campaign activity, about 76.5% of its total spending for the year. AR 1411. Applying the same test to AAN, the OGC found AAN spent at least $17 million on federal campaign activity, about 62.6% of its total spending in 2010. AR 1659.

Despite these recommendations, the Commission deadlocked on both complaints on June 24, 2014. AR 1434, 1686. The same three commissioners voted against the OGC's recommendation in both cases, and their statements of reasons are nearly identical for each. *Compare* AR 1438–69 *with* AR 1690–1723. To explain their vote, the controlling commissioners, purporting to interpret the First Amendment, first criticized the FECA's political committee provisions as "weighty" and "extensive" constitutional burdens. AR 1444, 1696 (calling political committee status a "First Amendment impingement[]"). They then interpreted *Buckley*'s "major purpose" test to allow for only an exceedingly narrow application of the FECA's political committee provisions: only those groups that devote more than half of their spending over the course of their existence to express advocacy need register as political committees and disclose their contributors. AR 1444–54, 1461–63, 1696–1705, 1713–15. The controlling commissioners gave no consideration to the public's interest in the transparency of groups spending heavily on electioneering communications in combination with express advocacy. Rather, the controlling commissioners concluded that the only relevant communications that counted toward qualifying a group as a political committee were those with

"magic words" like "vote for" or "vote against" a particular candidate. AR 1450–54, 1701–05. Excluded were electioneering communications; indeed, under the controlling commissioners' test, such ads count *against* finding that the group qualified as a political committee. *Id.*; AR 1457, 1709 (comparing total expenditures, including sums spent on electioneering communications, to sums spent on express advocacy). The controlling commissioners then compared that overly narrow sum to an overly broad category of spending: AAN and AJS's total spending over their entire existence (which, in AJS's case, included more than a decade of activity), rather than the far more relevant spending in the past calendar year. AR 1457, 1708.

Finding that AAN and AJS did not devote more than half of their spending over their existence to express advocacy, the controlling commissioners concluded that the First Amendment barred applying the FECA's political committee disclosure requirements to them. AR 1456–58, 1708–09.[8] Because the FEC was deadlocked and could not proceed with an investigation, it voted to dismiss the complaints. AR 1434, 1686.

Thereafter, plaintiffs brought this suit pursuant to 2 U.S.C. § 437g(a)(8) (now codified as 52 U.S.C. § 30109(a)(8)) in federal court on August 20, 2014.

ARGUMENT

A. Jurisdiction

This action arises under the Federal Election Campaign Act of 1971 ("FECA"), 52 U.S.C. § 30101 *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.* This Court has jurisdiction pursuant to 52 U.S.C. § 30109(a)(8)(A) and 28 U.S.C. § 1331.

[8] The controlling commissioners further found AAN and AJS were not organized for the purpose of nominating or electing federal candidates simply because the groups did not admit to such a purpose in certain public documents or in their response to the FEC. AR 1455–56, 1706–07.

B. Standard of Review

1. General Standard of Review

A court reviews an FEC decision to dismiss a complaint to determine whether it is "contrary to law." 52 U.S.C. § 30109(a)(8)(C); *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987) (finding dismissals resulting from deadlocked FEC votes are subject to judicial review). "The FEC's decision is 'contrary to law' if (1) the FEC dismissed the complaint as a result of an impermissible interpretation of the Act, or (2) the FEC's dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986) (internal citations omitted). In deciding whether an action is "arbitrary or capricious, [or] an abuse of discretion," courts employ the same standard as under the APA. *In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538, 550–51, 551 n.6 (D.C. Cir. 1980) (Wald, J., concurring). If an agency has changed its position, it must provide a satisfactory explanation why. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983). A court evaluating a dismissal analyzes the reasons provided by the commissioners who refused to find reason to believe a violation occurred as they represent the group that prohibited the FEC from going forward. *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992).

2. De Novo *Review of Controlling Commissioners' Interpretations of Law*

When interpreting statutes and regulations over which they have congressionally conferred authority, agencies normally receive deference for their decisions under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Agencies, however, have no particular expertise in analyzing the Constitution or judicial precedent. Accordingly, courts afford such interpretations no deference. *See N.Y. N.Y., LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002) ("We are not obligated to defer to an agency's interpretation of Supreme Court

precedent under *Chevron* or any other principle." (internal quotation marks omitted)); *Public Citizen v. Burke*, 843 F.2d 1473, 1478 (D.C. Cir. 1988) ("The federal Judiciary does not, however, owe deference to the Executive Branch's interpretation of the Constitution."); *see also Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc) (refusing *Chevron* deference to FEC's interpretation of "major purpose" because it derived from Supreme Court precedent and constitutional law), *vacated on other grounds*, 524 U.S. 11 (1998). A review of the controlling commissioners' statements of reasons shows that, in refusing to allow an investigation to proceed, they sought to interpret the requirements of the First Amendment and the "major purpose" test outlined in *Buckley*. *See, e.g.*, AR 1443–44, 1694–96. Consequently, the question before the court is whether the controlling commissioners' interpretation of the "major purpose" test is contrary to the "major purpose" test required by law, as determined *de novo* by this court.

Further, even if the controlling commissioners were interpreting the FECA or the FEC's own regulations—issues to which *Chevron* deference might typically apply—the Court need not defer to the controlling commissioners' interpretation. *Chevron* deference is limited to actions by the agency within the scope of its authority. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013); *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (*Chevron* deference limited to agency actions having "force of law"); *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (same). Here, the vote of three commissioners is insufficient to exercise the authority of the FEC.

By congressional design, the FEC has authority to act only when four members of the commission agree. *See* 52 U.S.C. § 30106(c). While three members of the commission may stymie FEC action, requiring a court to review their statement of reasons to determine whether

the commission's failure to act is "contrary to law," such statement would not express the legally authorized interpretation of the FEC:

> [A] statement of reasons [of the three controlling commissioners] would not be binding legal precedent or authority for future cases. The statute clearly requires that for any *official* Commission decision there must be at least a 4-2 majority vote. To ignore this requirement would be to undermine the carefully balanced bipartisan structure which Congress has erected.

Common Cause v. FEC, 842 F.2d 436, 449 n.32 (D.C. Cir. 1988).[9]

Finally, the FEC cannot claim *Chevron* deference in this action because it is judicially estopped from doing so. The FEC represented to the Court earlier in this litigation that the controlling commissioners could not exercise the legal authority of the FEC—a prerequisite for *Chevron* deference—and were awarded the relief they sought. They may not take a different position now. *See New Hampshire v. Maine*, 532 U.S. 742, 749–50 (2001).[10]

C. The Dismissals of Plaintiffs' Complaints Were Contrary to Law

The FEC dismissed Plaintiffs' complaints against AAN and AJS because the three controlling commissioners refused to find reason to believe the groups were political

[9] While *In re Sealed Case*, 223 F.3d 775 (D.C. Cir. 2000), found deference is owed to a three-vote panel of the FEC, *see id.* at 779–80, that case involved a peculiar situation in which the DOJ sought to enforce a subpoena based on an interpretation of the FECA, *see id.* at 777, not one in which a court has been called to review the controlling commissioners' statement of reasons. Further, its conclusion is unsupported and runs contrary to the precedent on which it purports to rely. In particular, *In re Sealed Case* rests its conclusion on *FEC v. National Republican Senatorial Committee*, 966 F.2d 1471 (D.C. Cir. 1992), but that case explicitly stated that it was not considering whether a particular interpretation was permissible, *see id.* at 1478, and therefore did not purport to apply *Chevron*. Nor does *In re Sealed Case* discuss the prior decision in *Common Cause v. FEC*, quoted above.

[10] In moving to dismiss part of Plaintiffs' complaint, the FEC represented that "[a] statement of *three* Commissioners explaining their rationale for voting not to pursue an investigation or other enforcement action in a particular administrative enforcement matter does not—and by statute cannot—establish any policy or regulation on behalf of the Commission." Def.'s Mot. to Dismiss at 16, ECF No. 5. Consequently, the FEC argued, Plaintiffs could not challenge the decision of the three commissioners under the APA. *Id.* The Court agreed with Plaintiffs and dismissed Plaintiffs' APA claims. *See* Order (Aug. 13, 2015), ECF No. 19. To receive *Chevron* deference, however, the agency action in question must carry the force of law, *i.e.*, it must be a "policy or regulation" promulgated "on behalf of the Commission." *See Christensen*, 529 U.S. at 587. As the FEC has already admitted that the statement of the three commissioners lack force of law—and thus warrants no *Chevron* deference—and the FEC was afforded the relief it sought on the basis of that argument, the FEC is now judicially estopped from adopting a different position. *See New Hampshire*, 532 U.S. at 749–50.

committees, deadlocking the commission. But the controlling commissioners' reasons for refusing to find reason to believe are based on impermissible interpretations of the law. First, they impermissibly interpreted the First Amendment to bar disclosure from any group that did not meet the narrowest definition of political committee: one that is primarily engaged in the creation and dissemination of express advocacy communications. Courts routinely find, however, that the First Amendment permits disclosure of political spending. Second, they impermissibly interpreted *Buckley*'s "major purpose" test to treat electioneering communications as irrelevant to determining a group's major purpose. Electioneering communications, however, unquestionably serve the purpose of nominating or electing federal candidates, and courts and Congress understand a group's electioneering communications to be equally political as express advocacy. Third, the controlling commissioners impermissibly interpreted the "major purpose" test to require an evaluation of a group's activities over its entire existence, despite the reality that groups' purposes often evolve. Fourth, the controlling commissioners impermissibly interpreted the "major purpose" test to require that relevant spending equate to 50% of a group's total spending, despite such a standard fostering evasion and frustrating the purposes of the FECA. These interpretations were impermissible and, thus, the dismissals were contrary to law.

1. The First Amendment Allows Ample Room for Disclosure of Campaign Spending

In refusing to find reason to believe that either AAN or AJS failed to register and file disclosure reports as a political committee, the three controlling FEC commissioners largely relied on the First Amendment and judicial opinions applying it to conclude that disclosure was constitutionally suspect. For example, the controlling commissioners interpreted "political committee" to cover an exceedingly narrow category of groups "to ensure that issue advocacy groups are not chilled from engaging in First Amended-protected speech and association" by the

"weighty" and "extensive" registration, organization, and disclosure burdens. AR 1444, 1696 (calling political committee status a "First Amendment impingement[]"). They asserted that requiring disclosure from "issue groups"—groups not meeting that exceedingly narrow definition—is not "constitutionally acceptable." AR 1447, 1699. They also expressed "grave constitutional doubt" about the OGC's method for determining whether a group's major purpose qualified it as political committee. AR 1460, 1712. The controlling commissioners' understanding of the First Amendment, however, has no basis in the Constitution and is foreclosed by precedent. Laws mandating disclosure of campaign spending, including those mandating disclosure of the contributors behind electioneering communications and disclosure premised on a group's political committee status, routinely have been upheld as constitutional.

The controlling commissioners' view that disclosure conflicts with the First Amendment is simply false. "The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way." *Citizens United*, 558 U.S. at 371. Disclosure serves a vital public interest, yet "impose[s] no ceiling on campaign-related activities," *Buckley*, 424 U.S. at 64, and does "not prevent anyone from speaking," *McConnell*, 540 U.S. at 201. It "helps voters to define more of the candidates' constituencies" and is "a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election to public view." *Buckley*, 424 U.S. at 81–82.

> [D]isclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

Id. at 66–67 (internal quotation marks omitted); *see also McCutcheon v. FEC*, 134 S. Ct. 1434,

1459 (2014) ("[D]isclosure of contributions minimizes the potential for abuse of the campaign finance system."); *Doe v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring) (concurring in eight to one judgment upholding disclosure identities of individuals signing ballot initiative, stating "[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed"); *Citizens United*, 558 U.S. at 366–371 (stating "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages"; finding disclosure triggers a lesser form of scrutiny than the strict scrutiny that applies to bans on campaign speech).

Those interests are not limited to disclosure of contributors who support activities and communications that expressly advocate the election or defeat of candidates. They are equally served by disclosure of electioneering communications, a category of communications first defined by the Bipartisan Campaign Reform Act ("BCRA"):

> [T]he important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements—providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions—apply in full to BCRA. Accordingly, *Buckley* amply supports application of FECA § 304's disclosure requirements to the entire range of "electioneering communications."

McConnell, 540 U.S. at 196 (discussing FECA § 304, codified as amended as 52 U.S.C. § 30104, the provision of the FECA that includes political committee reporting; upholding disclosure of electioneering communications by a vote of eight to one); *see also id.* at 126–29, 196–97, 231 (discussing constitutionality of electioneering communications regulation).

Disclosure by political committees is an essential means to fulfill the public's interest in campaign transparency, an interest that amply supports the modest registration and organizational burdens imposed on such groups. *See Burroughs v. United States*, 290 U.S. 534,

541–42, 548 (1934) (finding "public disclosure" of political committee contributors "tend[s] to prevent the corrupt use of money to affect elections"); *see also Buckley*, 424 U.S. at 67 (citing *Burroughs* with approval); *McConnell*, 540 U.S. at 223–24 (same). A majority of the courts of appeals, including the D.C. Circuit, have upheld contributor disclosure provisions under both FECA and comparable state laws, including laws that have broadly defined "political committee."[11] Indeed, in May, the Ninth Circuit upheld Hawaii's political committee disclosure law against a First Amendment challenge. *See Yamada v. Snipes*, 786 F.3d 1182, 1185 (9th Cir. 2015). The law defined political committee to include any group making more than $1,000 in expenditures over two years, regardless of whether the group has a major purpose of influencing an election, *see id.* at 1195, 1200–01, a far broader category than covered by the FECA, regardless of how electioneering communications are treated. The plaintiff appealed the Ninth Circuit's holding to the Supreme Court, arguing that Hawaii's political committee

[11] *See, e.g.*, *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 134–39 (2d Cir. 2014) ("*VRTLC*"), *cert. denied*, 135 S. Ct. 949 (2015) (upholding disclosure law defining political committee as any group spending more than $1,000 in two years to support or oppose a candidate; rejecting argument that political committee status must be limited to groups with a "major purpose" to influence elections); *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 414–15 (5th Cir. 2014) (upholding disclosure law that defined political committee to include any group which engages in "some" activities that "support[] or oppos[e]" a candidate); *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1240, 1253 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 529 (2013) (upholding law applying political committee status to, and requiring attendant disclosures by, groups that raise contributions or spend "more than $500 in a year to expressly advocate the election or defeat of a candidate"); *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 555–57 (4th Cir. 2012) ("*RTAA*"), *cert. denied*, 133 S. Ct. 841 (2013) (rejecting argument that FECA's political committee status must be determined by looking to whether "campaign-related speech amounts to 50% of all expenditures"); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 470–71, 491 (7th Cir. 2012) (upholding disclosure law that defined political committee to include any groups that spent more than $3,000 on ads that met definition "almost verbatim" of electioneering communications under federal law); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 42, 54–57, 59 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (2012) (upholding disclosure law for political committees even though law did not require a political committee have a "major purpose" of influencing an election); *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1008–12 (9th Cir. 2010), *cert. denied*, 562 U.S. 1217 (2011) (upholding disclosure statute that defined political committee as a group with a "primary or one of the primary purposes" to "affect, directly or indirectly, governmental decision making by supporting or opposing candidates"); *SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010), *cert. denied*, *Keating v. FEC*, 562 U.S. 1003 (2010) (upholding FECA's political committee organization and reporting requirements for group engaged in express advocacy); *see also Del. Strong Families v. Att'y Gen. of Del.*, 793 F.3d 304, 307, 313 (3d Cir. 2015) (upholding disclosure law that required any group spending more than $500 on an electioneering communication to disclose all contributors to it within the past year).

requirements—which encompassed registration, appointment of a treasurer, record keeping, and filing of disclosure reports, including reports disclosing contributors—were overly burdensome and unsupported by precedent upholding one-time, event-driven disclosure: precisely the arguments made by the controlling commissioners here. *See* Pet. for Cert. 13, *Yamada v. Snipes*, No. 15-215 (Aug. 14, 2015) (Ex. 20). The Supreme Court nevertheless refused to hear the plaintiff's challenge. *Yamada v. Shoda*, No. 15-215, 2015 U.S. LEXIS 7545 (Nov. 30, 2015).[12]

Similarly, the Second Circuit upheld a state campaign finance law that defined political committee to include any group that spent more than $1,000 over two years on ads that "support[] or oppose[]" a candidate, even if the ads did not constitute express advocacy, and even though the law applied no major purpose test at all. *See VRTLC*, 758 F.3d at 123–25, 128–29, 136. The appellate court found that, "[b]y requiring that entity to meet reporting and organizational requirements, Vermont can ensure that the underlying speaker is revealed." *Id.* at 138. The Fifth Circuit reached the same conclusion when it upheld against a constitutional challenge a Mississippi campaign finance law that required groups to, among other things, appoint treasurers and file disclosure reports if they spent $200 to influence an election. *Justice v. Hosemann*, 771 F.3d 285, 288–89 (5th Cir. 2014). The court found that "Mississippi is not asking groups to adopt a complex structure; instead, it is asking them to do little more than

[12] The controlling commissioners rely on *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), to conclude that disclosure may be sought only from groups primarily engaged in express advocacy, AR 1448, 1699, but that case does not undermine the Supreme Court's support for political committee disclosure. At issue in *MCFL* was a ban on corporate speech and the question whether that ban placed an unjustified burden on a corporation not faced by other speakers simply due to its corporate status. *See* 479 U.S. at 251–52. The Court noted that it did, and one such burden included the need to create a separate political committee if it chose to engage in any political advocacy, a burden not faced by unincorporated speakers. *See id.* at 254 (noting MCFL would be subject to "more extensive requirements" than if it was unincorporated). But AAN and AJS need not create a separate political committee to speak so long as they register as political committees themselves, a burden faced by any group meeting the FECA's political committee definition.

anything a prudent person or group would do in these circumstances anyway." *Id.* at 300 (internal quotation marks omitted).

As these cases demonstrate, the First Amendment permits political committee registration, organization, and disclosure obligations to apply to a group simply because it spends $1,000 on express advocacy over two years, without regard to its major purpose. Accordingly, the First Amendment also permits these obligations to apply to a group that, in a year, spends more than $4.9 million on express advocacy and more than $4.5 million on electioneering communications (AJS), AR 1393–94, or that spends more than $4 million on express advocacy and more than $13 million on electioneering communications (AAN), AR 1638.

Further, as these cases demonstrate, the organizational "burdens" that come with political committee status do not, as the controlling commissioners contend, impinge on the First Amendment. Those requirements are reasonable and substantially related to important government interests: accurate disclosure of political committee expenditures and contributions to voters would necessarily be frustrated if groups provided inaccurate information. *See Yamada*, 786 F.3d at 1195–97; *VRTLC*, 758 F.3d at 138; *Hosemann*, 771 F.3d at 300. Indeed, the D.C. Circuit has expressly upheld the FECA's organizational requirements against First Amendment challenge, noting that "[t]he Supreme Court has consistently upheld [the FECA's] organizational and reporting requirements against facial challenges." *SpeechNow*, 599 F.3d at 696. The D.C. Circuit found that "the organizational requirements that SpeechNow protests, such as designating a treasurer and retaining records, [do not] impose much of an additional burden upon SpeechNow." *Id.* at 697.

Indeed, both AAN and AJS have tax-exempt status under § 501(c) of the tax code, and the IRS already imposes strict requirements on such groups. They must, for example, "keep . . .

permanent books of account or records . . . sufficient to show specifically the items of gross income, receipts and disbursements," and records "required to substantiate the information" on its annual return. 26 C.F.R. § 1.6001-1(c). Failing to keep these records or filing false information with the IRS can result in criminal penalties. 26 U.S.C. § 7203.[13]

Moreover, courts have not only upheld campaign finance disclosure in the face of challenge, they have continually relied on the availability of disclosure to find that other, more restrictive, forms of campaign finance regulation were not the least restrictive means to achieve the government's interest. For example, in *Buckley*, the Court noted that "[t]he interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by § 608(c)'s campaign expenditure ceilings." 424 U.S. at 55; *see also id.* at 68 (noting "disclosure requirements . . . appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist"). In *Citizens United*, after striking down the ban on corporate-funded independent expenditures, the Court opined that modern disclosure capabilities would be sufficient to satisfy the government's interests. *See* 558 U.S. at 370 ("With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their position and supporters."); *id.* at 369 ("[D]isclosure is a less restrictive alternative to more comprehensive regulations of speech."). And in *McCutcheon v. FEC*, Chief Justice Roberts, writing for the Court, extolled the virtues of disclosure, finding that it "often represents a less restrictive alternative to flat bans on certain types or quantities of speech." *See* 134 S. Ct. at 1459–60. Indeed, the Court relied on the risk created by the aggregate contribution limits that disclosure may be evaded, as the limits might

[13] Further, state laws often require nonprofits to appoint a treasurer. *See, e.g.*, D.C. Code § 29-406.40(a).

encourage donations to dark money organizations not subject to them, as a reason to strike down those limits. *See id.*

Finally, any suggestion that disclosure driven by political committee status is constitutionally different than the one-time disclosure driven by the incident of communication is mistaken. The Supreme Court, D.C. Circuit, and the majority of other circuit courts have not limited voters' interest in disclosure to one-time events, but, rather, have routinely upheld political committee disclosure requirements on the grounds that they provide a vital public service. *See, e.g.*, *Burroughs*, 290 U.S. at 548; *Yamada*, 786 F.3d at 1194–1201; *Reisman*, 764 F.3d at 440; *VRTLC*, 758 F.3d at 134–39; *SpeechNow*, 599 F.3d at 697–98. Further, reporting contributions specifically earmarked for particular campaign communications—the only contributions that need be disclosed under the FEC's interpretation of event-driven disclosure law—simply fails to capture the full scope of contributions made for the purpose of nominating or electing federal candidates, about which the public has a substantial interest in learning. Contributors to groups like AAN and AJS—and other dark money groups that spend heavily on federal campaign activity, regardless of whether the majority of the money goes to express advocacy—can expect their money will be used to elect (or defeat) one or more candidates; they did not need to earmark it for that purpose.

Simply put, the voting public's substantial interest in disclosure extends not only to disclosure in light of particular instances of campaign spending, but also to disclosure as to those groups through which campaign money flows. The burdens imposed by the law on political committees are reasonable and tailored to the important interests served. The First Amendment affords ample room for disclosure by groups like AAN and AJS that are engaged in campaign

activity beyond mere express advocacy, and the controlling commissioners' conclusions otherwise were contrary to law.

2. Groups' Electioneering Communications Are Relevant in Determining their "Major Purpose"

Citing their mistaken First Amendment concerns, the controlling commissioners 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. AR 1450–54, 1701–05 (treating all non-express advocacy as constitutionally protected "issue speech" that cannot trigger political committee status). But the public's interest in disclosure is not limited to express advocacy and groups that spend more than 50% of their expenditures on express advocacy. Congressional intent, Supreme Court precedent, and common practice demonstrate that electioneering communications are similarly instructive as to whether a group's major purpose is the nomination or election of a candidate. There is no basis to exclude electioneering communications from the "major purpose" analysis as the controlling commissioners have done. Had the controlling commissioners counted AAN's and AJS's electioneering communications, they would have been forced to conclude that the groups satisfied *Buckley*'s "major purpose" test as their activity to nominate or elect federal candidates would have consisted of at least 60% (AAN) and more than 75% (AJS) of their expenditures for the year.[14]

[14] Indeed, it is questionable whether the "major purpose" test is still necessary. *Buckley* created the test as a way to limit the impact of political committee status when that status resulted in strict contribution and expenditure limits. *See* 52 U.S.C. § 30116(a)(1), (a)(2). These limits, however, no longer apply at least to non-coordinated political committees, *see SpeechNow*, 599 F.3d at 696, undermining the need for a major purpose test. *See Yamada*, 786 F.3d at 1200–01 (finding "major purpose" test not required by Constitution); *VRTLC*, 758 F.3d at 136 (same); *Madigan*, 697 F.3d at 490 (same); *Nat'l Org. for Marriage*, 649 F.3d at 59 (same).

a) Electioneering Communications Are as Relevant as Express Advocacy to the Analysis of a Group's Major Purpose

Congress first ordered the reporting of electioneering communications in 2002 as a way to capture campaign activity that was evading disclosure. *See* BCRA, 107 Pub. L. No. 155, § 201, 116 Stat. 81, 88 (2002). This narrow category of communications—encompassing only widely distributed broadcast ads airing shortly before an election that clearly identify a candidate but eschew the "magic words" that would trigger express advocacy regulations—became a favorite of organizations trying to skirt campaign finance law, having just as much (if not more) impact as traditional express advocacy on the electorate. *See McConnell*, 540 U.S. at 126–27. As the congressional record reflects, these communications "constitute[d] campaigning every bit as much as . . . any ad currently considered to be express advocacy and therefore subject to Federal election laws." 147 Cong. Rec. S2455 (daily ed. Mar. 19, 2001) (Sen. Snowe).[15] Accordingly, regulating electioneering communications "serve[d] the very purposes that underlie the preexisting independent expenditure provisions: bringing campaign spending of the 'issue' ad variety within the scope of [the] longstanding source and disclosure rules" that already governed express advocacy. Br. of Intervenor-Defs. 60 n.48, *McConnell*, 540 U.S. 93 (2003) (Ex. 23).

In enacting the FECA, Congress clearly recognized the comparable political impact of electioneering communications and express advocacy. Both trigger disclosure provisions and both can be deemed contributions if they are conducted in a coordinated fashion. *Compare* 52

[15] *See also* 148 Cong. Rec. S2141 (daily ed. Mar. 20, 2002) (Sen. McCain) ("This bill would simply subject soft money-funded campaign ads that masquerade as issue discussion to the same laws that have long governed campaign ads."); Comments of Sen. McCain *et al.* at 3, Notice 2002-13 (FEC Aug. 23, 2002) (Ex. 21) ("[I]n general, reporting for electioneering communications should be analogous to reporting for independent expenditures."); Def.-Intervenors' Excerpts of Br. of Defs. I-96, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003 (Ex. 22) (arguing that electioneering communication disclosure rules "are just the types of rules that FECA has long imposed on 'independent expenditures' that 'expressly advocat[e]' the election or defeat of a federal candidate").

U.S.C. § 30116(a)(7)(B) (coordinated expenditures, including express advocacy, to be treated as contributions) *with* 52 U.S.C. § 30116(a)(7)(C) (coordinated electioneering communications to be treated as contributions). Both sets of communications also must carry disclaimers identifying the entity responsible for paying for the ads. 52 U.S.C. § 30120(a). Foreign nationals are barred from funding either type of communication. 52 U.S.C. § 30121(a)(1)(C).

The Supreme Court similarly recognized the interest in identifying the sponsors behind electioneering communications—often labeled "issue advocacy" by their authors—and express advocacy, rejecting the argument that the "First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy." *McConnell*, 540 U.S. at 193; s*ee also Citizens United*, 558 U.S. at 368–69 ("[W]e reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy."). The Court wrote:

> While the distinction between "issue" and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects. Both were used to advocate the election or defeat of clearly identified candidates, even though the so-called issue ads eschewed the use of magic words. Little difference existed, for example, between an ad that urged viewers to "vote against Jane Doe" and one that condemned Jane Doe's record on a particular issue before exhorting viewers to "call Jane Doe and tell her what you think." Indeed, campaign professionals testified that the most effective campaign ads, like the most effective commercials for products such as Coca-Cola, should, and did, avoid the use of the magic words. Moreover, the conclusion that such ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election. Corporations and unions spent hundreds of millions of dollars of their general funds to pay for these ads, and those expenditures, like soft-money donations to the political parties, were unregulated under FECA. Indeed, the ads were attractive to organizations and candidates precisely because they were beyond FECA's reach, enabling candidates and their parties to work closely with friendly interest groups to sponsor so-called issue ads when the candidates themselves were running out

> of money. . . . While the public may not have been fully informed about the sponsorship of so-called issue ads, the record indicates that candidates and officeholders often were. A former Senator confirmed that candidates and officials knew who their friends were and "sometimes suggest[ed] that corporations or individuals make donations to interest groups that run 'issue ads.'" As with soft-money contributions, political parties and candidates used the availability of so-called issue ads to circumvent FECA's limitations, asking donors who contributed their permitted quota of hard money to give money to nonprofit corporations to spend on "issue" advocacy.

McConnell, 540 U.S. at 126–29. Given the Court's concern about electioneering communications and its understanding that such communications serve the same purposes as express advocacy, a group whose major purpose is the creation and dissemination of electioneering communications should be subject to the same disclosure obligations as one whose major purpose is the creation and dissemination of express advocacy.

The Court's "major purpose" test reflects this understanding and is broadly worded to capture both express advocacy and electioneering communications, as well as other non-express advocacy campaign activities. In *Buckley*, the Court established the "major purpose" test in the context of discussing a separate expenditure provision, which it construed to apply only to express advocacy. *See* 424 U.S. at 79–80. In the same discussion, however, the Court eschewed the language of express advocacy with regard to the major purpose test. *Id.*. Rather than state that the group's major purpose must be to create and distribute communications that ask viewers to "vote for" or "vote against" a candidate, the Court stated the purpose need only be the "nomination or election of a candidate," alluding to a broader category of activity than express advocacy. *Id.* at 79. This cannot be accidental. *See also MCFL*, 479 U.S. at 262 (noting that if a group's "independent *spending*," not just its expenditures on express advocacy, "become so extensive that the organization's major purpose may be regarded as *campaign activity*," not

merely express advocacy, then it "would be classified as a political committee" (emphasis added)); *RTAA*, 681 F.3d at 555–57 (rejecting argument that relevant activity for the "major purpose" test is limited to express advocacy).

Moreover, courts have upheld against constitutional challenge state law campaign finance disclosure regimes that have counted groups' non-express advocacy communications, including their electioneering communications, toward their political committee status. *See Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 776, 786 (9th Cir. 2006), *cert. denied*, 549 U.S. 886 (2006) (upholding law allowing group's electioneering communications to qualify it as a political committee); *see also VRTLC*, 758 F.3d at 138 (upholding law defining political committee to include any group spending $1,000 in two years on ads that promote, attack, support, or oppose candidates, regardless of whether ads include express advocacy); *RTAA*, 681 F.3d at 555–57 (finding FEC may consider activity beyond express advocacy spending); *Nat'l Org. for Marriage*, 649 F.3d at 42, 62–63 (upholding law triggering political committee status through expenditures on communications that "promot[e]," "support," or "oppos[e]").

Indeed, the FEC itself has long treated expenditures for all federal campaign activities, not simply for express advocacy, as indicative of a group's major purpose. *See* Supplemental E&J at 5601 (noting FEC will evaluate a group's "full range of campaign activities"). For example, in considering a complaint against Swift Boat Veterans for Truth, the FEC found the group constituted a political committee because, in part, 91% of its budget went not only to ads that expressly advocated John Kerry's defeat in the presidential election, but to ads that also attacked his record. Ex. 24 ¶ 35. Similarly, in considering a complaint against MoveOn.org, the FEC found the group constituted a political committee because, in part, it spent 68% of its budget "oppos[ing]" federal candidates," such as ads stating, "George Bush, He's not on our

side," and stating that he "misled" the country. These ads did not contain the "magic words" that the controlling commissioners now deem necessary to constitute express advocacy, yet the FEC found them relevant in determining MoveOn.org's major purpose. Ex. 25 ¶¶ 11–13.

Real world examples bear out the comparability of electioneering communications and express advocacy to the minds of contributors and campaign spenders. As discussed above, when a federal district court struck down an FEC regulation providing anonymity for contributors to electioneering communications, contributions to such communications plummeted and funds were diverted to express advocacy, which allowed donors to remain unnamed. *See Van Hollen*, 851 F. Supp. 2d at 89; Ex. 6. When that district court decision was reversed, funding for electioneering communications could return. Contributors apparently saw no functional difference between these forms of ads save that one allowed them to maintain anonymity while the other did not. Donors plainly understood that both have the same desired effect: to aid in the nomination or election of their preferred candidate.

Simply put, Congress, the courts, and common practice demonstrate that electioneering communications are as relevant to determining a group's major purpose as its express advocacy. After all, both communications serve a political purpose, and just as the public interest in transparency of express advocacy merits disclosure by groups primarily engaged in express advocacy, the public interest in transparency of electioneering communications similarly supports disclosure by groups primarily involved in electioneering communications.

b) <u>The Controlling Commissioners' Explanation Is Inadequate and Does Not Support Excluding Electioneering Communications</u>

In light of this strong support for disclosure and the practical equivalence of electioneering communications and express advocacy, it is surprising the controlling commissioners concluded that applying disclosure requirements to AAN and AJS—groups that

indisputably spent heavily to elect federal candidates—violated their First Amendment rights. To reach this tortured interpretation, the controlling commissioners relied on inapposite and outdated case law and ignored the significant precedent to the contrary.

The controlling commissioners first relied on a set of three cases that predate the Supreme Court's discussion of electioneering communications in *McConnell*, as well as the "major purpose" test set out in *Buckley*: *United States v. National Committee for Impeachment*, 469 F.2d 1135 (2d Cir. 1972); *ACLU v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973), *vacated as moot*, 422 U.S. 1030; and *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975). Each case was premised on vagueness in the FECA: *National Committee* and *Jennings* concerned the vagueness of "expenditure," *see Nat'l Comm.*, 469 F.2d at 1141; *Jennings*, 366 F. Supp. at 1054–55, and *Buckley* focused on overly vague language that would have covered nearly all communications of any kind, s*ee* 519 F.2d at 832. Any vagueness in the FECA's definition of "expenditure," however, was resolved by the Supreme Court in *Buckley*. *See* 424 U.S. at 62, 80. The Court has similarly found electioneering communications—the category of communications the FEC is called upon to evaluate here—are defined in sufficiently concrete terms to survive a vagueness challenge. *See McConnell*, 540 U.S. at 194.[16]

In addition, both *National Committee* and *Jennings* considered situations in which the government sought to classify the respective organizations as political committees on the basis of a single non-express advocacy newspaper advertisement. *See Nat'l Comm.*, 469 F.2d at 1137–38; *Jennings*, 366 F. Supp. at 1042–43. That is not the situation here. The FECA imposes a $1,000 express advocacy threshold before any group is qualified as a political committee, a

[16] In addition, *National Committee*, *Jennings*, and *Buckley* predate the FEC's 2007 Supplemental E&J, which the controlling commissioners admit called for looking at a wider swath of a group's activity than merely express advocacy. AR 1452, 1704. Accordingly, the cases cannot explain why the controlling commissioners concluded that the "major purpose" test has changed from the 2007 guidance.

threshold AAN and AJS easily passed, AR 1401, 1645–46. Further, the "major purpose" test under any formulation would require more than a single advertisement to qualify groups like AAN and AJS, which spent millions of dollars in a single year, as political committees. Irrespective of how AAN's and AJS's additional electioneering communications are counted, the ads at issue in *National Committee* and *Jennings* would not "alone" qualify them as political committees.[17]

The controlling commissioners' post-*Buckley* cases similarly fail to support their exclusion of electioneering communications. The controlling commissioners heavily rely on *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014) and *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008) ("*NCRTL*"), but those cases considered state campaign regimes that went far beyond anything the controlling commissioners were asked to evaluate here. Neither case can shed light on the proper application of *Buckley*'s "major purpose" test because neither state regime employed such a test. *See Barland*, 751 F.3d at 834; *NCRTL*, 525 F.3d at 289.[18] Indeed, the Fourth Circuit has explicitly stated that *NCRTL*'s brief "dicta" on the "major purpose" test, on which the controlling commissioners rely, "does not . . . make consideration of any other factors [than a group's express advocacy] improper" for purposes of determining its major purpose. *RTAA*, 681 F.3d at 557; *see also id.* at 552–53 (distinguishing *NCRTL*). And *Barland*'s conclusion that the state law provision at issue—one that went "well beyond" what was covered by the FECA's electioneering communications

[17] In addition, the statutory provision before the Circuit Court in *Buckley* went far beyond anything in today's FECA, and well beyond the category of communications defined as electioneering communications. *See* 519 F.2d at 870 (considering provision that treated any communication in any form and made at any date as triggering disclosure requirements if they mentioned a federal candidate or his official acts). The FEC is not being called on to enforce any similarly sweeping provision.

[18] The Fourth Circuit found that the absence of the test rendered the state statute unconstitutional, a ruling that puts it in the minority of circuit courts to reach the question. *See VRTLC*, 758 F.3d at 136; *Madigan*, 697 F.3d at 470; *Nat'l Org. for Marriage*, 649 F.3d at 59; *Human Life*, 624 F.3d at 1009; *see also Reisman*, 764 F.3d at 440 (upholding Texas's political committee statute without reference to absent "major purpose" test).

provisions—was "fatally vague and overbroad," 751 F.3d at 834–35, is not instructive as to the treatment of electioneering communications under the FECA, a category of communications that the Supreme Court has found sufficiently definite and narrow to survive constitutional challenge, s*ee McConnell*, 540 U.S. at 194.[19]

In addition, *Barland*'s conclusion that only those groups whose major purposes were "express election advocacy" may qualify as political committees—a conclusion on which the controlling commissioners rely, AR 1448, 1700—was premised on the mischaracterization of the *Citizens United*'s holding regarding electioneering communications as "dicta." *See Barland*, 751 F.3d at 836. Rather than "dicta," the portions of *Citizens United* regarding electioneering communications were necessary to the result in that case. The communications before the Supreme Court in *Citizens United* concerned a movie attacking presidential candidate Hillary Clinton, as well as the advertisements for the movie. *See* 558 U.S. at 319–20. Although the Court found the movie was express advocacy, it ruled that the ads for the movie were electioneering communications and squarely held that the disclosure requirements that applied to them were constitutional. *See* 558 U.S. at 325, 367–71; *see also Indep. Inst. v. FEC*, 70 F. Supp. 3d 502, 507–08 (D.D.C. 2014) (rejecting "dicta" argument). *Citizens United*'s discussion of electioneering communications was anything but "dicta," and thus *Barland*'s conclusion to exclude such communications from a political committee's "major purpose" is misplaced. Indeed, *Barland*'s conclusion is dicta itself as the case did not consider a law concerning a group's electioneering communications.

[19] Further, while *Barland* attempted to distinguish the Circuit's prior decision in *Madigan* and narrow it to express advocacy groups, *see* 751 F.3d at 839, *Madigan* actually upheld a political committee regime that looked beyond a group's mere express advocacy to determine whether it was a political committee. *See Madigan*, 697 F.3d at 471–72, 486–91 (upholding law that allowed a group's advertisements in "opposition to" a candidate to qualify it as a political committee, even though the ads did not constitute express advocacy). Moreover, *Barland*'s conclusion is against the weight of authority, *see supra* n.12, and has been heavily criticized. *See VRTLC*, 758 F.3d at 138 (finding *Madigan* more persuasive than *Barland*); *Indep. Inst.*, 70 F. Supp. 3d at 508 (criticizing *Barland*).

The controlling commissioners' reliance on *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL II*"), is similarly misplaced. At issue in that case was the FECA's then-standing *ban* on electioneering communications by corporate entities. *See id.* at 455; *see also id.* at 464–65 (analyzing electioneering communication ban under strict scrutiny, not lower standard applied to disclosure laws). In striking down that ban, the Supreme Court took great pains to distinguish it from the ban on express advocacy, a ban which *WRTL II* left in place. *See id.* at 456, 478–80 (accepting government interest in banning corporate "independent expenditures"). As *Citizens United* lifted the bar on independent corporate spending, at issue here are the only remaining provisions of the FECA that apply to independent political committees: its disclosure provisions, and the attendant registration and organization requirements that support disclosure. With regard to those provisions, "disclosure requirements [need not be] be limited to speech that is the functional equivalent of express advocacy." *Citizens United*, 558 U.S. at 369; *see also Nat'l Org. for Marriage*, 649 U.S. at 54–57 (finding *WRTL II*'s distinction for issue advocacy does not apply to disclosure laws).

The remaining cases relied on by the controlling commissioners are entirely inapposite. *New Mexico Youth Organized v. Herrera* ("*NMYO*") considered communications that "were not mailed within 30 days of a primary or 60 days of a general election," and thus would not constitute electioneering communications, by a group that never "advocated for the election or defeat of any candidate for office." 611 F.3d 669, 674, 678 (10th Cir. 2010). *FEC v. GOPAC, Inc.* considered whether the FECA could apply to a group whose focus was state and local, but not federal, elections, and found it could not. *See* 917 F. Supp. 851, 858 (D.D.C. 1996). These groups are wholly incomparable to AAN and AJS, which spent millions on ads, including many that expressly advocated the election or defeat of federal candidates. The controlling

commissioners also inexplicably cited *FEC v. Malenick*, a case holding a group met the "major purpose" test but was silent on the relevancy of electioneering communications to that test. *See* 310 F. Supp. 2d 230, 237 (D.D.C. 2004).[20]

The controlling commissioners' position lacks support because it defies reason. They have interpreted the First Amendment as providing less protection to groups that engage in express advocacy than groups engaged in other speech. But express political speech enjoys the greatest protection under the First Amendment. *See Buckley*, 424 U.S. at 47–48 (express advocacy at "core" of First Amendment). Accordingly, the First Amendment cannot grant more protection to a group that spends heavily on electioneering communications than a group that spends heavily on express advocacy: the latter already receives the maximum protection under the Constitution. Rather, the issue is whether voters enjoy a sufficient interest in learning the identities of contributors to groups that engage in both extensive electioneering communications and express advocacy, and whether the FECA's political committee status disclosure requirements bear a substantial relationship to that interest. It is apparent that they do and it does, and the controlling commissioners provide no explanation to justify concluding otherwise.

Not only is the controlling commissioners' interpretation without support, it contravenes the FEC's own description of the "major purpose" test: a "flexib[le] . . .case-by-case analysis" and not a "one-size-fits-all rule." Supplemental E&J at 5601. The controlling commissioners' proposed interpretation is anything but flexible. Rather, it's 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.

[20] The controlling commissioners also cite their previous statements of reasons in cases that deadlocked. AR 1457 n.118, 1458 n.131, 1694 n.28. These statements of reasons, however, do not provide authority upon which the controlling commissioners can justify their decision. They do not represent official determinations of the FEC and they cannot provide any guidance on how to determine the Supreme Court's "major purpose" formulation.

Finally, it is worth recalling the ads that the controlling commissioners concluded did *not* reflect that AAN's and AJS's major purpose supported the election of federal candidates. The controlling commissioners believe these ads count *against* finding the groups are political committees because the commissioners count sums spent on the ads in the groups' total spending but do not count them toward the groups' spending to nominate or elect candidates. Each of the ads ran within a very short window before the election of the referenced federal candidate and was targeted to thousands of voters in that election. AR 1404–07, 1674–80. They included several ads urging voters to tell elected officials "in November"—the time of the election—that they were displeased with them, including an ad attacking Reps. Perlmutter and Titus for allegedly giving "Viagra" to "convicted rapists" and several others attacking members of Congress for allegedly providing "free health care for illegal immigrants." AR 1677. Another advertisement asserted a Republican candidate for the U.S. Senate, if elected, would oppose a deal that her Democratic opponent would support. AR 1679. They also included an advertisement praising a candidate for U.S. Senate, noting the various actions he might take if elected; an ad criticizing a federal candidate for "export[ing] American jobs" while he was a director of a private company; an ad praising a candidate for U.S. Senate and his plans to vote against a bailout if elected; and an ad praising another Senate candidate for his "common sense plan to get Pennsylvania back to work" if elected. AR 1404–07. The purpose of these ads is clear: they sought to elect (or defeat) federal candidates.

In sum, Congress, the courts, and common practice demonstrate that a group's electioneering communications should count toward finding that its major purpose is to nominate or elect a candidate, just as its independent expenditures do. The public has as substantial an interest in knowing about groups that spend significant sums on electioneering communications

as in those that spend on only independent expenditures. Counting electioneering communications toward a group's major purpose would not run the risk of embroiling nonpolitical issue advocacy groups in the FECA's political committee requirements: the category of communications covered is narrow, not vague, and would count only large ad buys. Further, groups would still need to meet the statutory $1,000 expenditure or contribution threshold.[21] Accordingly, the controlling commissioners had no basis to interpret *Buckley*'s "major purpose" test to exclude electioneering communications from an analysis of AAN's and AJS's political committee status. Consequently, their dismissals on that basis were contrary to law.

3. A Group's Activities within the Calendar Year Demonstrate its Current "Major Purpose"

In addition to excluding electioneering communications, the controlling commissioners dismissed the complaints against AAN and AJS because, in part, they evaluated those groups based on their activities over their entire existence. That allowed the controlling commissioners to conclude, erroneously, that the relevant total spending for comparison consisted of the roughly $27 million AAN spent over its two years, AR 1708, and the roughly $50 million AJS spent over a decade, AR 1458. Counting the groups' activities over such a wide swath of time only served to unreasonably dilute their current political spending and was contrary to law.

A calendar year test would harmonize the "major purpose" test with the FECA's statutory test for political committee status, which looks to a group's activities "during a calendar year."

[21] Furthermore, the FEC should treat as counting toward finding that a group's major purpose is to nominate or elect a candidate those ads the group makes that "promote," "attack," "support" or "oppose" a candidate (called "PASO" ads), even if the ad does not reach the level of express advocacy (and regardless of whether they also constitute an electioneering communication). The Supreme Court has found that standard to be sufficiently clear to withstand constitutional scrutiny. *See McConnell*, 540 U.S. at 170 n.64. The Second Circuit found that political committee status may depend on a group's PASO ads. *See VRTLC*, 758 F.3d at 122–23, 128–29. And the FEC has considered a group's PASO ads in determining its major purpose. *See, e.g.*, Ex. 24 ¶ 35 (counting ads that "attack[ed]" presidential candidate John Kerry but were not express advocacy); Ex. 26 (considering solicitation that "promotes, attacks, or opposes federal candidates"). AAN's and AJS's ads are sufficient to meet a PASO standard, but as the controlling commissioners did not apply that standard, this memorandum addresses this issue briefly.

See 52 U.S.C. § 30101(4). The OGC favored evaluating a group's major purpose based on its spending in a calendar year. AR 1410, 1682–84. The OGC recognized that using another time period, such as fiscal year, could lead to absurd results because two groups with identical spending patterns might be evaluated differently if one group's fiscal year ended on May 31 and another group's ended on December 31. AR 1683. The OGC also recognized that prior FEC precedent supported looking to a single year's activities, even if the group had existed for a longer period. AR 1410, 1683.

The controlling commissioners, however, chose to ignore support for a calendar year test, but in crafting their own expansive "lifetime of existence and activities" test, AR 1462, 1714, cited no relevant authority.[22]

Without authority on which to base their conclusion, the controlling commissioners could only appeal to two arguments: (1) looking only to a year's activities might cause the FEC to recognize that more groups have major purposes of nominating or electing federal candidates and, thus, subject more groups to political committee disclosures, and (2) application of the rule to a hypothetical group that formed shortly before an election might be inequitable. The first argument is insupportable—the controlling commissioners provided no rationale for why more groups should *not* be subject to political committee disclosure requirements if their major

[22] The controlling commissioners primarily rely on their own statements of reasons issued in decisions in which they deadlocked the commission in three-to-three votes: statements that, for the reasons discussed above, do not bear the authority of law. AR 1461 n.146, 1694 n.28, 1713 n.139. The controlling commissioners' other authority is inapposite and, rather, supports a more limited window for analysis than the controlling commissioners propose. *GOPAC* considered the group's 2-year budget, from 1989 to 1990, even though the group was formed in 1979. *See* 917 F. Supp. at 853. *Malenick* found that the group was a political committee based in part on its activities in 1995 and 1996, *see* 310 F. Supp. 2d at 232 n.1, 235, but the fact that a group met the political committee definition in both years does not mean that the FEC could not have looked at its activity in one year. Nor do the MURs cited support the controlling commissioners. Ex. 28 at 3 (OGC evaluated group's major purpose by looking at expenditures for each year from 2002-2006, but concluded group never met statutory expenditure requirement); Ex. 29 at 18 (looking at spending in 2004 election cycle, not entire organization life); Ex. 30 at 3–4 (finding MoveOn.org exhibited major purpose to influence elections based on spending over a single year).

purpose for the year was the nomination or election of candidates. The second argument fares little better—a group formed shortly before an election that spends nearly all of its initial funds on electioneering was almost certainly formed for the purpose of that campaign activity. If, however, the timing was merely a coincidence and no such purpose existed, then that defense could be presented to the FEC, and the agency might take notice of its lack of campaign activity over the following year.[23]

In contrast to the controlling commissioners' unpersuasive conjecture, a case actually presented to the Commission provided substantial support for using a calendar year to assess a group's major purpose. According to the controlling commissioners, AJS only began spending on electioneering communications in 2008 and express advocacy in 2010. AR 1442. The decade during which AJS did not engage in political activity, however, can hardly be attributed to its lack of interest in campaign spending. Only in 2007, after *WRTL II*, could AJS legally spend on electioneering communications. *See* 551 U.S. at 481. And only in 2010, in the wake of *Citizens United*, did it become lawful for AJS to spend on express advocacy. *See* 558 U.S. at 365–66. The controlling commissioners completely ignored the fact that it had been illegal for AJS to engage in campaign activity until recently in reviewing AJS's historical activities.

The simple fact is that a group's major purpose can and does change over time, something the controlling commissioners' analysis ignores. Rather, their analysis would allow

[23] Indeed, the controlling commissioners' solution does not resolve the very problem they raise. Take, for example, a group that spends more than 50% of its budget in its first few years of existence to nominate or elect federal candidates, but then spends little to no money on campaign activity in later years. If a complaint is filed early in its lifetime, the FEC will evaluate its spending over its life as it stood then and conclude that it was a political committee. Once the group was qualified as a political committee, it would remain a political committee until it properly terminated with the FEC, 52 U.S.C. § 30103(d), and thus would stay a political committee in later years. If, however, the group was brought to the FEC's attention later in life, it is possible that the group's lifetime spending would have fallen below the 50% mark (or whatever line is imposed), and thus would be found by the controlling commissioners to not only have not been a political committee at the time of their review, *but also to have never been a political committee at all*. The group's political committee status cannot depend on when its existence is brought to the attention of the FEC.

for the absurd result that, if a group existed for long enough, it could spend 100% of its budget on express advocacy for multiple election cycles and still not be deemed a political committee, just so long as its historic spending balanced out the numbers. That result would deny the public the transparency the FECA provides. After all, contributors and candidates do not care about a group's historic purposes if they know that money donated today will go to aid their favored candidate or harm the candidate's opponents.

The controlling commissioners simply ignored the possibility that a group's purpose might change and ignored the most reasonable application of the "major purpose" test: consideration of a group's calendar year expenditures. Had they reasonably limited their review to AAN's and AJS's activity in the previous calendar year and counted their electioneering communications, it would have been impossible to deny that both AAN's and AJS's major purposes were the nomination or election of candidates.[24] Accordingly, their dismissals of the complaints on those grounds were contrary to law.

4. A Group's "Major Purpose" May Be Supported by Less than 50% of its Expenditures

The controlling commissioners further dismissed Plaintiffs' complaints in part because they interpreted *Buckley*'s "major purpose" test as asking, not whether the group's major purpose is the nomination or election of a candidate, but whether more than 50% of a group's expenditures go to express advocacy. AR 1448–49, 1458, 1463 n.121, 1700–01, 1709. Accordingly, with respect to AJS, they concluded the group did not satisfy the "major purpose" test even though its expenditures on express advocacy—which even the controlling

[24] In fact, with regard to AAN, it qualified as a political committee regardless of whether the FEC evaluated a single calendar year or the entirety of the record of AAN's existence. AAN formed in 2009, so the FEC had before it only 2 years of the group's spending. AR 1708. With two years of activity counted, AAN's express advocacy and electioneering communications consisted of more than 62% of its total spending, demonstrating political activity was not only AAN's major purpose, but also the majority of its activity.

commissioners admit is relevant—amounted to 40% of its spending in the year. AR 1463 n.151.[25] The controlling commissioners' interpretation, however, is contrary to law.

Buckley's "major purpose" test must be interpreted in light of the groups that it sought to exclude. *Buckley* expressly sought to exclude from the reaches of the FECA's political committee status those groups that engage "purely" in issue discussion. *See* 424 U.S. at 79. The Court reiterated that reason in *MCFL*, stating that the FECA excludes groups that "occasionally" engage in political activity. *See* 479 U.S. at 262 (noting a group may be qualified as a political committee if its campaign activity becomes "extensive"). A group that devotes 40% of its spending to campaign activity can hardly be said to do so only "occasionally."

Further, the FEC has recognized that the "major purpose" test does not impose a rigid 50% threshold. As late as 2012, the FEC argued to the Supreme Court that the "major purpose" test did not "establish a rigid rule that an organization must devote more than 50% of its funds to campaign-related spending" to qualify as a political committee. *See* Br. for the Resp't 20, *RTAA*, No. 09-724 (Mar. 2010) (Ex. 27). That position was upheld by the Fourth Circuit. *See RTAA*, 681 F.3d at 555, 557 (rejecting argument that political committee status is limited to groups spending 50% or more of their budgets on campaign-related speech), *on remand from The Real Truth About Obama, Inc. v FEC*, 559 U.S. 1089 (2010). After all, the "fundamental organizational reality [is] that most organizations do not have just one major purpose." *Human Life*, 624 F.3d at 1011 (internal quotation marks omitted).

A bright-line 50% test would easily lead to evasion and would deny the public insight into the groups through which campaign funds flow. For example, a group might dilute its

[25] Of course, if AJS's electioneering communications are also counted, as they should have been, AJS's qualifying expenditures exceed 76.5% of its spending in the year, clearly satisfying even the controlling commissioners' erroneous 50% threshold.

campaign spending to less than 50% by donating significant sums to other groups in the knowledge the other groups would spend the donations on campaign activity. *See, e.g.*, Ex. 7 at 8 n.16, 26 & n.47 (finding group spent about 40% of its budget on express advocacy, and about an additional 40% on grants to other organizations). Or a group might spend 51% of its budget on rent and other overhead that, while not directly tied to express advocacy, serves no other purpose than to allow the group to exist so that it can engage in campaign-related activity. *See, e.g.*, Ex. 11 at 13, 19–20 (noting $1.1 million, about 22% of the group's budget, was spent on consultants to the group).

Once again, however, the controlling commissioners relied on inapposite authority to create a contorted version of the "major purpose" test that is contrary to law. *Colorado Right to Life Committee v. Coffman* did not consider an application of a "major purpose" test because the law at issue had no such test. *See* 498 F.3d 1137, 1154–55 (10th Cir. 2007).[26] *Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013), upheld the FEC's case-by-case analysis of a group's major purpose, but it was not asked to decide any particular threshold for that analysis. *See id.* at 797–98. *NMYO* considered groups that devoted only 7% and .5% of their spending to campaign activity, groups that could be said to only occasionally engage in such activity. *See* 611 F.3d at 679. *GOPAC* considered whether the FECA applied to groups focused solely on state and local, and not federal, elections. *See* 917 F. Supp. at 858. And *Malenick* found that the defendant's major purpose *was* to engage in campaign activity based on its stipulated goals and activities, but did not consider the minimum activity necessary. *See* 310 F. Supp. 2d at 237.

Finally, the controlling commissioners cite *NCRTL*, which found a law defining a political committee to be any group with "a" major purpose of influencing a campaign, was

[26] The Tenth Circuit is in the minority of circuits in finding the "major purpose" test is a constitutional requirement. *See supra* n.16.

unconstitutional. *See* 525 F.3d at 289. But the Fourth Circuit subsequently found that *NCRTL*'s construction of the "major purpose" test—asking whether the "majority" of a group's money is spent supporting or opposing candidates—was *dicta* and refused to follow it. *See RTAA*, 681 F.3d at 557. Further, the Fourth Circuit recognized that *NCRTL*'s constitutional concerns were driven by the "restrictions on campaign speech" imposed by the North Carolina law, including "limits on acceptable contributions and expenditures." *Id.* at 553. Where political committee status imposes only organizational and disclosure burdens, like the FECA now does, the Fourth Circuit has allowed a broader application of political committee status. *Id.*

The controlling commissioners' overly narrow interpretation of the "major purpose" test is unsupported by authority and frustrates the public's substantial interest in transparency of campaign spending. Contributors to groups that devote 51% or 49% of their spending to political activity can readily expect that their contributions will go to influence elections, and candidates recognize contributions to both groups will have that effect. Consequently, the controlling commissioners' dismissals on the grounds that AAN and AJS did not devote more than 50% of their spending to nominate or elect candidates were contrary to law.

D. The Controlling Commissioners' Application of the "Reason to Believe" Standard was Contrary to Law

Finally, it is worth noting that the question before the controlling commissioners was not whether, after a thorough investigation, the preponderance of the evidence indicated that AAN and AJS were political committees. Nor was it whether there was probable cause to believe AAN and AJS were political committees. Rather, the question was simply whether there was a "reason to believe" AAN and AJS were political committees. Nonetheless, the controlling commissioners' statements of reasons demonstrates they applied a far higher standard by considering whether the evidence conclusively demonstrated AAN and AJS were political

committees, *see, e.g.*, AR 1455–56, 1705–07 (finding that because there was at least some evidence either group was not organized for a political purpose, they could not be political committees), a standard that is contrary to law.

The FECA provides that if there is "reason to believe" that a violation has occurred, such as a political committee's failure to organize, register, and disclose, then the commission "shall make an investigation of such alleged violation." 52 U.S.C. § 30109(a)(2); 11 C.F.R. § 111.9. A reason to believe finding precedes a probable cause finding. 52 U.S.C. § 30109(a)(3), (4); 11 C.F.R. §§ 111.16, 111.17. According to the FEC, a reason to believe exists where "the available evidence in the matter is at least sufficient to warrant conducting an investigation." FEC, Statement of Policy Regarding Commission Action in Matters at the Initial State in the Enforcement Process, 72 Fed. Reg. 12545, 12545 (Mar. 16, 2007). "A 'reason to believe' finding followed by an investigation would be appropriate when a complaint credibly *alleges* that a significant violation may have occurred . . . ." *Id.* (emphasis added). "[R]eason to believe" is a low bar.

Had the controlling commissioners applied the correct standard, it is possible an ensuing investigation would have revealed additional evidence as to AAN's and AJS's major purposes. In other matters, the FEC has considered organizations' nonpublic statements to determine that the groups' major purposes were the nomination or election of federal candidates. *See* Supplemental E&J at 5601 (the "major purpose doctrine requires the Commission to conduct investigations into the conduct of specific organizations that may reach well beyond publicly available advertisements"); Ex. 29 at (evaluating group's solicitations). AAN's and AJS's activities at least gave rise to a reason to believe they were political committees, and the ensuing

investigation might have revealed additional evidence that would have conclusively demonstrated that fact even to the controlling commissioners.

Nonetheless, the controlling commissioners never evaluated this possibility because they applied a far higher standard to the complaints than the "reason to believe" standard specified in the FECA. Accordingly, their dismissals were contrary to law.

CONCLUSION

The controlling commissioners' dismissals of Plaintiffs' complaints were contrary to law. Their interpretations of the First Amendment and *Buckley*'s "major purpose" test are unfounded and impermissible. Neither bar the disclosure the FECA mandates from groups like AAN and AJS that are heavily involved in federal campaign activity. Similarly, neither requires the exclusion of a group's electioneering communications from the analysis of its major purpose, requires comparison against spending outside a given calendar year while ignoring changing circumstances and changing purposes, nor requires a group to spend more than 50% of its budget on federal campaign activity. Rather, the "major purpose" test allows for a sensible result: a group's electioneering communications in a year may demonstrate that its major purpose is the nomination or election of a federal candidate, and thus qualify it as a political committee, just as do its independent expenditures. Finally, the controlling commissioners employed a standard to even begin an investigation far higher than that found in the FECA, which requires only "reason to believe" a violation occurred. Consequently, Plaintiffs respectfully request that the Court enter summary judgment, declare the dismissals contrary to law, and order the FEC to conform to that declaration within 30 days.

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