UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

FEDERAL ELECTION COMMISSION'S REPLY MEMORANDUM
IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

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In its opening brief, the Federal Election Commission ("FEC" or "Commission") detailed why the agency's dismissals of plaintiffs' administrative complaints against Americans for Job Security ("AJS") and American Action Network ("AAN"), as explained in the controlling statements of reasons of three Commissioners, were reasonable and not contrary to law. (FEC's Mem. in Supp. of its Cross-Mot. for Summ. J. and in Opp'n to Pls.' Mot. for Summ. J. at 19-50 (Docket No. 36) ("Mem.").) The standard of review here is limited and extremely deferential. And, with respect to the substantive "major purpose" analyses at issue, the controlling Commissioners' approach in each matter was consistent with court guidance and the FEC's own lengthy 2007 policy statement regarding its case-by-case approach to the major-purpose test.

Plaintiffs' response to the briefs filed by the FEC and AAN provides no basis for the Court to rule in their favor. Their argument for an unprecedented de novo standard of review and against deferential review under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), contravenes controlling Circuit authority compelling the Court to apply *Chevron* deference. And their argument that AJS and AAN could be regulated as political committees because FECA's disclosure programs are constitutional purports to address a question that is not presented in this case. This Court is not asked to decide the constitutional permissibility of requiring disclosure for any groups distributing electioneering communications. The narrow issue in this case is whether it was contrary to law for the FEC not to find reason to believe that AJS and AAN violated FECA by not registering as political committees. In these matters, the controlling Commissioners applied the major-purpose test in a First Amendment-sensitive manner, as higher courts have reiterated the FEC must do when interpreting FECA, and they concluded that there was no reason to believe AJS and AAN were political committees.

Critically, plaintiffs have failed to carry their burden of establishing that the controlling Commissioners' major-purpose analyses were contrary to law. The extremely deferential standard of review that applies under 52 U.S.C. § 30109(a)(8), combined with plaintiffs' evident failure to identify any law contrary to the controlling Commissioners' decisions, is dispositive and requires the Court to sustain the challenged dismissal decisions. Plaintiffs' attempted showing that their preferred approach is constitutionally permissible does not nearly satisfy their burden of showing that the controlling Commissioners' approach was contrary to law. Because plaintiffs have failed to meet their burden, and because the controlling Commissioners' analyses were reasonable, consistent with applicable law, and independently supported by the FEC's broad prosecutorial discretion, the Court must grant summary judgment to the Commission.

I. THE COURT'S REVIEW IS REQUIRED TO BE EXTREMELY DEFERENTIAL, CONFINED TO THE ISSUES PRESENTED, AND BASED ON THE ADMINISTRATIVE RECORD

In this section 30109(a)(8) case, the Court must apply *Chevron* deference in evaluating the dismissal decisions and decline plaintiffs' new request for de novo review. It should also reject plaintiffs' efforts to reframe the case as a dispute about whether disclosure requirements are constitutional, as well as their improper reliance on extra-record material.

A. The Court Must Accord the FEC's Dismissal Decisions *Chevron* Deference

The Court must apply *Chevron* deference here because Congress's design of the agency's relatively formal adjudication process fits in the heartland of agency action that the Supreme Court has defined to be accorded that level of deference, and because the Court of Appeals has so held as a matter of Circuit law. Circuit precedent requires that the dismissals of plaintiffs' administrative complaints must be sustained under the Act's contrary-to-law standard, 52 U.S.C. § 30109(a)(8), unless they were based on (1) an "impermissible interpretation" of FECA or

(2) even "under a permissible interpretation of the statute, w[ere] arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986)); *see also, e.g.*, *Common Cause v. FEC*, 108 F.3d 413, 415 (D.C. Cir. 1997) (per curiam) (same); *Akins v. FEC*, 736 F. Supp. 2d 9, 16-17 (D.D.C. 2010) (same). The contrary-to-law standard is "*extremely deferential*" and "*requires affirmance* if a rational basis for the agency's decision is shown." *Orloski*, 795 F.2d at 167 (emphases added) (internal quotation marks omitted). Accordingly, the Court's task in this case is "not to interpret the statute as it [thinks] best but rather the narrower inquiry into whether the Commission's construction was sufficiently reasonable to be accepted." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981) ("*DSCC*") (internal quotation marks omitted); *see also* Mem. at 20-28.

As explained in the FEC's opening brief, in *In re Sealed Case*, the Court of Appeals accorded "*Chevron* deference" to an FEC split-vote enforcement dismissal decision materially identical to the ones at issue here, 223 F.3d 775, 780 (D.C. Cir. 2000). (Mem. at 24-26.) Plaintiffs attempt to distinguish *In re Sealed Case*'s lengthy discussion of *Chevron* deference as "dicta" and argue that the decision "implied" the possibility that *Chevron* deference might not apply in this direct review context. (Pls.' Reply in Supp. of Pls.' Mot. for Summ. J. and in Opp'n to Defs.' Cross-Mots. for Summ. J. at 10 & n.4 (Docket No. 40) ("Pls.' Reply").) But plaintiffs' suggestion that the opinion's discussion of deference was dicta is contradicted by the D.C. Circuit's plainly deferential approach as well as its explicit acknowledgement that "[p]rinciples governing the relationships of courts and agencies . . . compel us to address — *and, indeed, ultimately defer to* — a civil enforcement [statement] issued by the [FEC]." 223 F.3d at 776 (emphasis added). Furthermore, plaintiffs' attempt to distinguish the case based on its criminal context (Pls.' Reply at 10) is unavailing because the D.C. Circuit made clear that the criminal

nature of the case was immaterial, 223 F.3d at 779-80, and that its analysis was grounded in its prior holding "that we owe deference to a legal interpretation supporting a negative probable cause determination that prevails on a 3-3 deadlock," *id.* at 779 (citing *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("*NRSC*")).

The D.C. Circuit's express and controlling recognition in *In re Sealed Case* (and reiterated in *FEC v. National Rifle Association of America*, 254 F.3d 173, 185 (D.C. Cir. 2001)) that *Chevron* deference is accorded to split-vote dismissals by the FEC follows from earlier — and also controlling — decisions in *NRSC*, 966 F.2d at 1475-76 (applying "ordinar[y]" principles of agency deference), *Democratic Congressional Campaign Committee v. FEC*, 831 F.2d 1131, 1135 n.5 (D.C. Cir. 1987) ("In the absence of prior Commission precedent . . . judicial deference to the agency's initial decision *or indecision* would be at its zenith." (emphasis added)), and *DSCC*, 454 U.S. at 37 (explaining that the FEC "is precisely the type of agency to which deference should presumptively be afforded"). (Mem. at 22-28.) Lest there could be any doubt, *Chevron itself* relied on *DSCC* in articulating the standard which now bears *Chevron*'s name. 467 U.S. at 843 n.11; *Stark v. FEC*, 683 F. Supp. 836, 840-41 (D.D.C. 1988).

B. Plaintiffs' Arguments in Favor of De Novo Review Are Meritless and Contravene Binding Precedent Requiring *Chevron* Deference Here

In their opening brief, plaintiffs agreed that section 30109(a)(8)'s contrary-to-law standard requires the Court to determine if either of the agency's dismissal decisions resulted from an impermissible interpretation of the Act or, even, under a permissible interpretation, was arbitrary or capricious, or an abuse of discretion. (Pls.' Mem. of P.&A. in Supp. of Pls.' Mot. for Summ. J. at 14 (Docket No. 33) (citing *Orloski*, 795 F.2d at 161).) Now, plaintiffs have reversed course and urge the Court to disregard controlling authority in order to review the dismissal decisions de novo. (Pls.' Reply at 2-13.) In support of this dramatic new standard, plaintiffs

argue: (1) the controlling Commissioners purportedly did not interpret FECA; (2) the dismissal decisions lack the requisite force of law and the FEC is estopped from arguing otherwise; and (3) section 30109(a)(8) is not a deferential standard. (*Id.*) All of these arguments are meritless.

1. The Controlling Commissioners Interpreted FECA

As explained in the FEC's opening brief, in light of the Supreme Court's imposition of the major purpose requirement in *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (per curiam), it plainly was not contrary to law for the FEC to interpret FECA's statutory provision defining "political committee" with the major purpose limitation when exercising its enforcement authority. (Mem. at 22.) The Court is required to defer to the agency's interpretation of the applicable provision of the Act, 52 U.S.C. § 30101(4)(A), through the process of case-by-case adjudication. When interpreting that provision, as here, the FEC exercises its congressionally delegated gap-filling authority in enforcing FECA's core political-committee provisions. (*See* Mem. at 2-3 (explaining that Congress vested the FEC "with statutory authority over the administration, interpretation, and civil enforcement of FECA").)

Plaintiffs nevertheless contend that the controlling Commissioners were not interpreting section 30101(4)(A) at all, but solely the major-purpose test, as if that test were unmoored from any of the Act's provisions. (Pls.' Reply at 5-7.) In addition, they also repeatedly claim that the controlling Commissioners "interpreted" the First Amendment and the major-purpose test to conclude that "the [FEC] is *barred* from treating" AJS and AAN as "political committees." (*Id.* at 1 (emphasis added); *see also id.* at 2-3.) These claims are incorrect. What the Commissioners concluded in *applying* the major-purpose test to AJS and AAN was that neither group's relevant spending was "'so extensive that [its] major purpose may be regarded as campaign activity.'" (AR 1458 (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262

(1986) ("*MCFL*")); AR 1709.) The Court should also reject plaintiffs' baseless and conflicting suggestion that the agency may have been improperly attempting to "disregard the [Supreme] Court's" major-purpose test (Pls.' Reply at 6-7).

Importantly, plaintiffs themselves concede that the controlling Commissioners were interpreting section 30101(4)(A) in arguing that their "challenge raises" the question of whether "the FEC dismissed the complaint as a result of an impermissible interpretation *of the Act*." (*Id.* at 13 (internal quotation marks omitted) (emphasis added).) In accordance with that concession, and consistent with the principle that the Supreme Court's interpretation of section 30101(4)(A) in *Buckley* "is the law and must be given effect," *Chevron*, 467 U.S. at 843 n.9, all parties agree that the test has become part of the Act's political-committee definition. The Commission's interpretation of that narrowed definition is therefore entitled to *Chevron* deference. *Cf. Orloski*, 795 F.2d at 161-68 (according *Chevron* deference to FEC's manner of distinguishing permissible donations to non-political events from prohibited corporate donations to campaign events and upholding the agency's dismissal of the administrative complaint); *id.* at 167 (explaining that although it could "be argued that [the FEC's] interpretation is at the outer bounds of permissible choice" it was still a "'reasonable choice within a gap left open by Congress'" and thus that the challenge must fail (quoting *Chevron*, 467 U.S. at 866)). In *Van Hollen v. FEC*, the Court of Appeals recently and analogously applied *Chevron* deference in evaluating an FEC regulation implementing *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"). 811 F.3d 486, 496 (D.C. Cir. 2016), *pet. for rehearing en banc filed*, No. 15-5016 (D.C. Cir.).[1]

[1] Plaintiffs' attempt to distinguish *Van Hollen* on the basis that the regulation at issue there did not "'implement[]'" *WRTL* (Pls.' Reply at 5) is unavailing. *See Van Hollen*, 811 F.3d at 491 ("The FEC published a Notice of Proposed Rulemaking . . . and requested comments on proposed rules that 'would *implement* the Supreme Court's decision in [*WRTL*].'" (quoting 72 Fed. Reg. 50261, 50262 (Aug. 31, 2007) (emphasis added))).

Plaintiffs' authorities do not support their claim that *Chevron* deference is not owed to the controlling Commissioners' decisions. The interpretive errors by the National Labor Relations Board plaintiffs cite (Pls.' Reply at 3) are inapposite because, in contrast to those errors, here there is no dispute that the major-purpose test is an "'additional hurdle to establishing political committee status'" that AAN and AJS must clear in order to be regulated as political committees. *Free Speech v. FEC*, 720 F.3d 788, 797 (10th Cir. 2013), *cert. denied*, 134 S. Ct. 2288 (2014) (quoting *Rules and Regulations: Political Committee Status*, 72 Fed. Reg. 5595, 5601 (Feb. 7, 2007) ("Supplemental E&J")). The controlling group's use of the major-purpose test is therefore nothing like, *e.g.*, the NLRB's attempt to interpret a Supreme Court case in order to engage in "the exact kind of questioning into religious matters which [that case] specifically sought to avoid." *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1343 (D.C. Cir. 2002). And in *Negusie v. Holder*, which plaintiffs also cite (Pls.' Reply at 3), the Supreme Court confirmed the subject agency's entitlement to *Chevron* deference "as it gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication." 555 U.S. 511, 517 (2009) (internal quotation marks omitted); *see also* Mem. Op. at 8 (Docket No. 20).

Plaintiffs' reliance (Pls.' Reply at 4-5) on the D.C. Circuit's vacated opinion in *Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc), *vacated on other grounds*, 524 U.S. 11 (1998) remains misplaced. As the FEC explained in its opening memorandum, that opinion is nonprecedential and inconsistent with the D.C. Circuit's subsequent reaffirmations of the major-purpose test during the last twenty years. (Mem. at 22 n.4 (citing cases).) Those reaffirmations are in accord with the Supreme Court's decision in *McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003) (citing the major-purpose discussion with approval), *overruled in part by Citizens United v. FEC*, 558 U.S. 310 (2010), the more recent decisions in *Real Truth About Abortion, Inc. v.*

FEC, 681 F.3d. 544 (4th Cir. 2012) ("*RTAA*") and *Free Speech*, the FEC's issuance of the 2007 Supplemental E&J explaining its approach to the major-purpose test, and the lengthy litigation ultimately resolved in *Shays v. FEC*, 511 F. Supp. 2d 19 (D.D.C. 2007). This post-*Akins* body of law leaves far behind the D.C. Circuit's vacated suggestion that, on the facts of the *Akins* case, whether the test "categorically" applies is unclear, *Akins*, 101 F.3d at 741.[2] The test applies.

Most fundamentally, plaintiffs' argument misconceives the relative domains of expertise of the FEC and the courts upon which *Chevron* deference and the contrary-to-law standard are partially based. The courts, while experts in matters of constitutional law, do not possess special expertise regarding whether the nomination or election of a candidate is the major purpose of an organization. But that determination is centrally within the ambit of the FEC's expertise and regulatory authority, and the Supreme Court accordingly did not "mandate a particular methodology for determining an organization's major purpose," leaving the FEC "free to administer FECA political committee regulations . . . through individualized adjudications." *RTAA*, 681 F.3d. at 556; *Free Speech*, 720 F.3d at 797. As in these matters, that "inherently . . . comparative task" is performed by the agency in accordance with its approved "sensible" and "flexibl[e] . . . case-by-case" method of determining an organization's major purpose. *RTAA*, 681 F.3d at 556, 558; *Free Speech*, 720 F.3d at 797-98. *Chevron* deference is owed to the resulting determinations, including the dismissals at issue here.

2. The Controlling Dismissal Decisions Carry the Force of Law

Plaintiffs are also mistaken in arguing that deference is not owed because the FEC's dismissal decisions supposedly lack the force of law. (Pls.' Reply at 7-11.) The determinations

[2] Plaintiffs' view that the Supreme Court in *Akins* "could have" ignored the issue it remanded for further consideration (Pls.' Reply at 4) misapprehends the purpose of the remand, which was to "take advantage of the [FEC's] expertise" in order to dispose of the case or clarify the issues, *Akins v. FEC*, 524 U.S. 11, 29 (1998).

not to proceed do have legal force, notwithstanding the 3-3 split vote of the agency's Commissioners, because that is how Congress designed FECA's relatively formal adjudication procedure to operate, as the D.C. Circuit has recognized in decisions the Court is bound to follow. (Mem. at 24-28.) These "ordinary adjudications" (Mem. Op. at 2) fully resolved the underlying matters and fall on the *Chevron* side of the line because they preclude further enforcement proceedings in the absence of a remand from this Court. (Mem. at 27.)

Plaintiffs also contend that, under *United States v. Mead Corp.*, 533 U.S. 218 (2001), whether Commission dismissal decisions are "binding on third parties in future cases" is the dispositive part of the analysis in determining the level of deference here. (Pls.' Reply at 7-8.) Contrary to plaintiffs' oversimplified reading, however, the Supreme Court in *Mead* explained that an "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226-27. "Delegation of such authority" the Court instructed, "may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent." *Id.* at 227. In *Mead*, the Court determined that the generally unexplained tariff classifications made by some 46 port-of-entry Customs offices at issue were not entitled to *Chevron* deference because they were too far "removed not only from notice-and-comment [rulemaking] process" but also other indicia that Congress intended deference. *Id.* at 231. By contrast, the Court reiterated that, as here, "a very good indicator of delegation meriting *Chevron* treatment" is "express congressional authorizations to engage in the process of rulemaking *or adjudication*," and recognized that "the overwhelming number of our cases

applying *Chevron* deference have reviewed the fruits of notice-and comment rulemaking *or formal adjudication*." *Id.* at 229-30 (emphases added); *id.* at 230 n.12.

Here, the Court is reviewing dismissals resulting from the FEC's relatively formal adjudication procedure, exercised in accordance with the Act. "What the [plaintiffs] need[], and [have] fail[ed] to produce, is a single case in which a general conferral of rulemaking *or adjudicative authority* has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field." *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1874 (2013) (emphasis added). There is no dispute that the FEC has the authority to enforce FECA through the Act's detailed enforcement procedure. (Mem. at 3-4.) And the Court has held here that new principles and standards may be announced through adjudicatory procedures like the FEC's. (Mem. Op. at 7-9.) Plaintiffs' citations to cases involving other agencies with dissimilar structures and procedures that generically recite that *Chevron* deference is not owed where, *e.g.*, the interpretation "under consideration" does not fall under the relevant administrative body's designated "authority," *Gonzales v. Oregon*, 546 U.S. 243, 260 (2006), fail to negate the applicability of *Chevron* deference *here*. Likewise misplaced is plaintiffs' reliance (Pls.' Reply at 8) on *Fogo De Chao (Holdings) Inc. v. U.S. Department of Homeland Security*, in which the D.C. Circuit found that the subject agency's decision was "the product of *informal* adjudication within the [agency], rather than a *formal adjudication* or notice-and-comment rulemaking." 769 F.3d 1127, 1136 (D.C. Cir. 2014) (emphases added). The dismissals at issue here were not such informal adjudications.

Plaintiffs' notion that *Mead* undercuts *In re Sealed Case*'s conclusions regarding *Chevron* deference (Pls.' Reply at 9-10) is also meritless. Following *Christensen v. Harris County*, 529 U.S. 576 (2000), *Mead* held that cursory Customs classification rulings were

"beyond the *Chevron* pale" because they were "best treated like 'interpretations contained in policy statements, agency manuals, and enforcement guidelines.'" 533 U.S. at 234 (quoting *Christensen*, 529 U.S. at 587). In *In re Sealed Case*, in contrast, the D.C. Circuit expressly considered whether controlling statements by declining-to-go-ahead FEC Commissioners were like the "interpretations" discussed in *Christensen* and *Mead*. The Court of Appeals concluded that the FEC Commissioners' statements were *not* like such interpretations; instead, the Commissioners' statements fell on the "*Chevron* side of the line." 223 F.3d at 780; *compare Fogo De Chao*, 769 F.3d at 1136-37 (finding that "[t]he absence of those relatively formal administrative procedure[s] that tend[] to foster the fairness and deliberation that should underlie a pronouncement of legal interpretation" in the agency proceeding at issue "weigh[ed] against the application of *Chevron* deference" in that case (internal quotation marks and citation omitted)).[3] Consistent with *NRSC* (which did not "misread[]" *Common Cause* (*contra* Pls.' Reply at 9)), *In re Sealed Case* establishes that a decision of the FEC's Commissioners, pursuant to the Act's relatively formal adjudication procedure is accorded *Chevron* deference under section 30109(a)(8). In *National Rifle Association*, which was decided post-*Mead*, the D.C. Circuit itself viewed the analysis in *In re Sealed Case* as consistent with *Christensen* and *Mead*. 254 F.3d at 184-86.

Ultimately, plaintiffs' attempt to distinguish between the level of deference applied in review of FEC dismissals supported by four or more Commissioners, on the one hand, and those compelled by three Commissioners, on the other, misapprehends that the "'inherently

[3] Even if the Court could ignore the D.C. Circuit's instruction to accord *Chevron* deference here, the standard of review would not be de novo. In the cases cited by plaintiffs, the courts refusing to apply *Chevron* deference still applied the deference of *Skidmore v. Swift & Company*, 323 U.S. 134 (1944). *See Gonzales*, 546 U.S. at 256; *Fogo De Chao*, 769 F.3d at 1137; *Martinez v. Holder*, 740 F.3d 902, 910 (4th Cir. 2014).

bipartisan'" structure of the agency (Pls.' Reply at 9) is employed in both situations. The Court of Appeals made that very point in *Combat Veterans for Congress Political Action Committee v. FEC*, which plaintiffs quote (Pls.' Reply at 9): "[t]he four-vote requirement serves to assure that enforcement actions, as to which Congress has no continuing voice, will be the product of a mature and considered judgment." 795 F.3d 151, 153 (D.C. Cir. 2015) (internal quotation marks omitted). The dismissal decisions reflect exactly how the agency was designed to operate in the adjudicative realm. *See In re Sealed Case*, 223 F.3d at 780 (finding in the context of a criminal investigation that "Congress could not have intended" the prosecutions that could result "[i]f courts do not accord *Chevron* deference to a prevailing decision that specific conduct is not a [FECA] violation"). "Congress vested enforcement power in the FEC, carefully establishing rules that tend to *preclude* coercive Commission action in a partisan situation, where the Commission, itself statutorily balanced between the major parties, is evenly split." *Id.* (citation omitted) (emphasis added); Mem. at 26-27. Accordingly, in conducting its review, this Court must accord *Chevron* deference to the controlling dismissal decisions, just as the D.C. Circuit itself did in *In re Sealed Case* and in the cases that preceded it.[4]

[4] The Commission plainly is not estopped from seeking *Chevron* deference. (*Contra* Pls.' Reply at 11-12.) Setting aside whether the Court could ignore binding Circuit authority on the applicability of *Chevron* deference here, plaintiffs' estoppel argument is misplaced because the FEC has advanced no inconsistent positions. *See, e.g., Contech Const. Products, Inc. v. Heierli*, 764 F. Supp. 2d 96, 106-07 (D.D.C. 2011) (refusing to apply judicial estoppel because party was "not attempting to advance arguments inconsistent with arguments it made during the arbitration proceedings"). The Commission's position in this litigation has remained consistent. Plaintiffs' rejected attempt to challenge a perceived FEC policy supposedly establishing a "massive loophole in the campaign finance disclosure system" (Pls.' Reply. at 1) is precluded, among other things, by the fact that a statement of reasons adopted by three Commissioners does not establish an agency *policy*. The controlling statements of reasons were the result of the agency's relatively formal adjudication process and are entitled to *Chevron* deference in this challenge to the legality of those specific dismissal decisions. Far from conceding plaintiffs' claim of estoppel, the Commission's extensive discussion of these issues in its opening brief (Mem. at 22-28) was responsive to plaintiffs' argument.

3. Section 30109 Review Is "Limited"

Plaintiffs also assert that "section 30109(a)(8) imposes no [deferential review]: it asks only whether the FEC's dismissal is 'contrary to law' and, if so, then authorizes judicial relief." (Pls.' Reply at 12-13.) This argument flies in the face of an unbroken series of higher court opinions holding that section 30109(a)(8) review is "'limited.'" (Mem. at 20 (collecting cases).) It also contravenes the Supreme Court's instructions in *DSCC*, where, after reciting the agency's congressionally authorized powers, responsibilities, and bipartisan structure, the Court explained that Congress "wisely" established the contrary-to-law standard because the FEC is "precisely" the type of agency "to which deference should presumptively be afforded." 454 U.S. at 37. In accordance with these precedents, the Court must reject plaintiffs' request to act beyond its well-established role by substituting its judgment for that of the controlling Commissioners.

C. Plaintiffs' Arguments About Disclosure Fail to Satisfy Their Heavy Burden

Plaintiffs also continue to seek to reduce their burden by stressing their general interests in disclosure, interests they share with the public and the government. (Pls.' Reply at 14-27.) But plaintiffs' argument continues to be improperly results-oriented because it assumes the answer to the central issue here — whether the activities of AJS and AAN required that they be regulated as political committees. (*See* Mem. at 47-49.)

This case is not about whether "the First Amendment [p]ermits [d]isclosure." (Pls.' Reply at 14.) All parties agree that the First Amendment permits certain disclosure requirements, including the particular disclosure requirements of political committees, as courts have overwhelmingly held. For that reason, plaintiffs' attempted showing that "FECA's [p]olitical [c]ommittee [d]isclosure [o]bligations [a]re [s]ubstantially [r]elated to [p]laintiffs' [u]ndisputed [i]nterest in AAN and AJS" (Pls.' Reply at 22-27) seeks to have the Court answer

the wrong question. The question for the Court here is whether AJS and AAN must be regulated as political committees, not whether groups that *are* political committees can be required to make disclosures as a constitutional matter.

The Court should reject plaintiffs' efforts to swap burdens with the FEC. Plaintiffs' argument that "the First Amendment does not bar requiring disclosure from groups like AAN and AJS" (Pls.' Reply at 20) only attempts to establish that AJS and AAN *could* be regulated as political committees if either organization has the major purpose of electing or nominating a candidate (*id.* at 14-22). Plaintiffs attempt to bridge the gap between their showing and their burden by arguing that "if the First Amendment permits disclosure from AAN and AJS, then the controlling [C]ommissioners' interpretation that the [A]mendment does not permit disclosure from them was contrary to law." (Pls.' Reply at 21.) But, once again, this argument assumes the answer to the threshold question of whether AAN and AJS are political committees in the first place. Plaintiffs' wish to know who has contributed to AJS and AAN does not establish that either group must be regulated as a political committee. Nor does the fact that FECA's disclosure programs have been upheld as constitutional answer whether it was contrary to law for the FEC not to require AAN and AJS to register as political committees.

In addition, it is undisputed that AJS and AAN already make disclosures about their express advocacy and electioneering communications, which, contrary to plaintiffs' notion, do permit the public to know "'who is speaking . . . shortly before an election.'" (Pls.' Reply at 22-23 (quoting *Citizens United*, 558 U.S. at 369).) These communications do not exemplify AJS and AAN hiding themselves "behind electioneering communications" (*id.* at 25-26). Rather, they disclose that AJS and AAN are making the communications. Plaintiffs' argument that the propriety of requiring event-driven reporting from AJS and AAN also establishes the propriety

of imposing political-committee reporting obligations on them makes no sense and is belied by Congress's express establishment of different disclosure programs in FECA. (Mem. at 38-39.)

D. Plaintiffs Cannot Rely on Material That Is Not In the Administrative Record

The Commission previously explained that because this case is one in which the Court reviews agency action on an administrative record, such review must be limited to materials that were before the agency when it made its decisions. (Mem. at 28-30.) In response, plaintiffs do not dispute this well-established, broadly applicable rule, but erroneously suggest the Court may consider the extra-record declaration and voluminous attachments it submitted, as legislative facts to "enable [the Court] to understand the issues clearly," even though that material was not before the FEC. (Pls.' Reply at 13-14 (internal quotation marks omitted).) This extra-record evidence remains improper, both because it contravenes this Circuit's record rule and because any necessary legislative facts must be developed at the agency level, not submitted by a party to the litigation after the fact.

In *Jarita Mesa Livestock Grazing Association v. United States Forest Service*, the out-of-district case plaintiffs cite concerning legislative facts (Pls.' Reply at 13), the question turned on "whether the fact goes to illuminating a question of fact or a question of law." 305 F.R.D. 256, 298 (D.N.M. 2015) (explaining that legislative facts are not properly introduced to elucidate the facts of the case). In this case, however, plaintiffs use the extra-record material to show the characteristics of committees and other disputed factual issues (Mem. at 29), not to address a question of law. This use renders the material improper for judicial notice and beyond the proper scope of this proceeding. This case is not about how "the FEC's unreasonably narrow readings of *Buckley*'s 'major purpose' test and the First Amendment have led to an explosion of dark money" (Pls.' Reply at 14) but about whether it was contrary to law not to find that there was

reason to believe AJS and AAN were required to register and report as political committees. (Mem. at 29 (summarizing plaintiffs' use of extra-record evidence).) And even if the Court required evidence of the type plaintiffs have presented, the Court's recourse is not to use a one-sided presentation of facts, submitted for the first time in litigation reviewing administrative decisions, but to remand the matters to the agency for legislative fact finding. *E.g.*, *Beach Commc'ns, Inc. v. FCC*, 959 F.2d 975, 987 (D.C. Cir. 1992) (remanding to agency because the court "require[s] additional 'legislative facts'"). Here, no such remand is necessary because this case is not about the broad disclosure question plaintiffs would prefer to litigate.

II. THE FEC'S DISMISSALS MUST BE AFFIRMED BECAUSE THEY WERE NOT CONTRARY TO LAW

The controlling Commissioners' statements explaining the dismissals of plaintiffs' administrative complaints reasonably analyzed whether AJS and AAN had the major purpose of nominating or electing a federal candidate. These analyses were consistent with case law and Commission policy and precedents. Critically, plaintiffs' complaints about the evaluation of the groups' public statements and spending fail to establish that the controlling Commissioners' analyses were contrary to law under the prevailing standard. The simple answer to plaintiffs' case is that the controlling Commissioners' dismissal decisions must be sustained because there is no law to which either of their decisions is contrary. In addition to clearing that low bar, the controlling Commissioners' dismissals should be sustained because they reasonably analyzed each of AJS's and AAN's central organizational purposes and comparative spending in light of the law, Commission precedents, and the undisputed factual records that were before the agency.

A. Plaintiffs Fail to Identify Any Prior Interpretation or Law Contrary to the Controlling Commissioners' Approaches

As the FEC previously demonstrated, the leading Supreme Court and D.C. Circuit cases are consistent with the controlling Commissioners' approaches here. (Mem. at 31-33 (discussing

Buckley, *MCFL*, and *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981) ("*Machinists*")).) Those approaches were also consistent with more recent lower court decisions concerning the major-purpose test and the FEC's Supplemental E&J. (*Id.* at 33-35.)

Plaintiffs cite no cases holding that the major-purpose test must be applied in some way that the controlling Commissioners ignored or contradicted. *Compare Common Cause v. FEC*, 729 F. Supp. 148, 152 (D.D.C. 1990) (remanding partial dismissal on section 30109(a)(8) review because the controlling Commissioners' analysis "ignored the plain language of the applicable regulation and was not rationally explained"). Instead, plaintiffs continue to attempt to rewrite the standard to shift the analysis from whether what the controlling Commissioners did was reasonable to whether plaintiffs' preferred approach would have been reasonable. (*E.g.*, Pls.' Reply at 29 (arguing that FEC and AAN "cite no cases holding that electioneering communications may not count toward satisfying *Buckley*'s 'major purpose' test"); *see also id.* at 15 & n.7 ("The majority of circuits, including the D.C. Circuit, have found that the First Amendment poses no barrier to requiring disclosure from groups engaged in electoral advocacy, even where the groups do not devote a majority of their spending to express advocacy." (citing cases)); *id.* at 28-29 ("The authority on which the FEC and AAN rely . . . fails to demonstrate the correctness of the controlling [C]ommissioners' interpretation of *Buckley*."); Mem. at 40.)[5] Whatever the merits of these arguments, plaintiffs fail to carry their burden. In determining "whether the Commission's construction was sufficiently reasonable," "it is not necessary for [the Court] to find that the agency's construction was the only reasonable one or even the reading

[5] Plaintiffs continue to assert erroneously that the controlling Commissioners applied a "higher" reason-to-believe standard than appropriate. (Pls.' Reply at 46-47.) As the FEC explained in its opening brief, this assertion does not identify any error but merely evinces disagreement with the application of that standard in the controlling analyses. (Mem. at 43 n.9.)

the [C]ourt would have reached" on its own "if the question initially had arisen in a judicial proceeding." *DSCC*, 454 U.S. at 39 (internal quotation marks omitted).

B. The Controlling Commissioners' Analyses of AJS's and AAN's Public Statements and Spending Were Reasonable

Not only did the controlling Commissioners not depart from any identified law, but those Commissioners' analyses of AJS's and AAN's central organizational purposes and spending were also reasonable. As before, plaintiffs do not seriously dispute the Commissioners' findings with respect to central organizational purposes[6] and focus on the spending analyses. They claim that the controlling Commissioners (1) improperly failed to include as relevant spending amounts spent on electioneering communications and (2) improperly viewed the groups' activities over too broad a time period. Both claims are incorrect.

1. The Controlling Commissioners' Determinations of AJS's and AAN's Relevant Spending Were Reasonable

As explained in the Commission's opening brief (Mem. at 36-41), the controlling group's identification of the relevant universe of spending as AJS's and AAN's independent expenditures was reasonable and not contrary to law. The controlling analyses were also consistent with the Supreme Court's decisions in *Buckley* and *MCFL*, the Court of Appeals's decision in *Machinists*, the Tenth Circuit's decision in *N.M. Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010), the decisions of other judges of this Court in *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996) and *FEC v. Malenick*, 310 F. Supp. 2d 230 (D.D.C. 2004), and with the Seventh Circuit's decision in *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014).

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[6] Although plaintiffs now for the first time speculate that AAN's central organizational purpose is "very much in question" due to the possibility that an FEC investigation might have turned up "relevant internal documents" (Pls.' Reply at 47 n.24), plaintiffs have never argued that either AJS's or AAN's organizational documents indicate that they have the primary purpose of electing or nominating candidates. (Mem. at 35-36.)

(Mem. at 36-38.) Plaintiffs, by contrast, have failed to demonstrate that the Commissioners' comparative spending analyses conflict with any judicial decision or authority.

Plaintiffs continue to argue in favor of the supposed equivalency of electioneering communications and independent expenditures for purposes of determining political committee status. (Pls.' Reply at 27-33.) But plaintiffs plainly misapprehend *McConnell*'s upholding of the electioneering communication disclosure provisions of the Bipartisan Campaign Reform Act ("BCRA") as an unstated holding that electioneering communications categorically count towards finding that a group is a political committee. The *McConnell* Court made no such finding. Plaintiffs' reliance on an ACLU brief and Justice Kennedy's opinion in *McConnell* is wholly misplaced because the discussion plaintiffs cite had nothing to do with whether electioneering communications should be included when evaluating political-committee status but instead concerned BCRA's requirement that corporate electioneering communications be funded through a separate segregated fund, known as the "PAC option." *McConnell*, 540 U.S. at 332-33 (Kennedy, J., concurring in the judgment in part and dissenting in part).

Moreover, Congress's decision not to regulate electioneering communications through FECA's political-committee disclosure regime cannot be waived away on the basis that the major-purpose test "*is not in the statute at all*." (Pls.' Reply at 30.) At the time Congress passed BCRA, the major-purpose test for political committee status had been in place for more than a quarter century. Yet it chose neither to refine nor redefine the statutory meaning of "political committee," nor did it incorporate the disclosure of electioneering communications into that existing system of disclosure. Instead, Congress created a new and distinct manner of disclosure that plaintiffs are seeking to blend into the political committee analysis. Plaintiffs' argument that

the permissibility of disclosure of electioneering communications means that they must be included in evaluating political committee status remains unsound. (Mem. at 38-39.)

Plaintiffs' attempts to distinguish the FEC's authorities (Pls.' Reply at 29-30) are similarly unavailing. Their view that *Citizens United* tacitly overruled "the distinction between electioneering communications and express advocacy" by striking "the ban on corporate express advocacy" (*id.* at 29) is squarely contrary to the Court's application of *WRTL*'s functional-equivalency test. *Citizens United*, 558 U.S. at 324-25 (applying the test to conclude that the film at issue was "equivalent to express advocacy"). The Court also reiterated the burdens associated with the registration and reporting required of political committees. *Id.* at 337-38. In addition, it is to be expected that certain cases that the FEC identified as supportive of an express advocacy construction of the major-purpose test (Mem. at 38) did not also explicitly explain, years before BCRA defined the term, that communications meeting the definition of "electioneering communications" should not count when analyzing an organization's spending. Plaintiffs' characterizations of *Free Speech* and *RTAA* (Pls.' Reply at 30) are incorrect. Rather than stating that spending on electioneering communications must count towards a major-purpose finding, the courts in those cases generally upheld the FEC's flexible, case-by-case method of evaluating political committee status. And plaintiffs do not dispute that the controlling analyses accorded with the Seventh Circuit's *Barland* decision. Rather, they weakly argue that the controlling approach is contrary to law because *Barland* has been "heavily criticized." (*Id.*)[7]

[7] Plaintiff also argue that the Commission must count advertisements meeting "a PASO standard," *i.e.*, spending on non-express advocacy communications that "refer[] to a clearly identified candidate for Federal office" and "promote[]," "support[]," "attack[]," or "oppose[]" a candidate for that office, 52 U.S.C. § 30101(20)(A)(iii), as relevant spending. (Pls.' Reply at 36-37.) But plaintiffs identify no cases holding that failing to use the PASO standard would be contrary to law in this context. (*Contra* Pls.' Reply at 37 (claiming that the "controlling [C]ommissioners interpreted *Buckley* to exclude groups' ads which promote, attack, support, or

Plaintiffs further err in arguing that the controlling Commissioners failed to review AJS's and AAN's advertisements because they "in fact excluded electioneering communications categorically." (Pls.' Reply at 34; *id.* at 33-36.) Plaintiffs' notion that this aspect of the Commissioners' review is "not supported by the record" (*id.* at 34) is itself unsupported. The record reflects the controlling Commissioners' assessments that, as to AJS, "all of the electioneering communications identified in the [Administrative] Complaint are genuine issue advertisements" because "they contain no references to elections, candidacies, or political parties, while 'focus[ing] on a legislative issue, tak[ing] a position on the issue, exhort[ing] the public to adopt that position, and urg[ing] the public to contact public officials with respect to the matter." (AR 1457 (footnotes omitted).) They similarly found that AAN's $13 million worth of electioneering communications were "genuine issue advertisements" even though they "may have been relevant to an election." (AR 1709.) These advertisements, they found, "'focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter,'" and addressed "a number of salient policy issues including federal spending, the stimulus, tax relief, health care, and cap and trade." (*Id.* (footnote omitted).)

2. The Controlling Commissioners' Determinations of the Relevant Time Periods Were Reasonable

Plaintiffs' arguments that the controlling Commissioners used overly broad time periods for comparing AJS's and AAN's spending patterns are unavailing. Plaintiffs assert that the Act imposes a calendar-year time period for evaluating an organization's major purpose and that the Commissioners' decision to review AJS's and AAN's entire periods of activity in the record

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oppose a candidate" and that this "interpretation is contrary to law"); *compare* AR 1459-61 (asserting that the Seventh Circuit's decision in *Barland* rejected a standard similar to the PASO standard plaintiffs urge); AR 1710-13 (same).)

before the agency was unsound for policy reasons and inconsistent with FEC precedents. (Pls.' Reply at 37-41.) Plaintiffs are incorrect. The controlling Commissioners' uses of the entire records before them (AR 1457; AR 1708) were reasonable. (Mem. at 41-45.)

Contrary to their opening brief, in which plaintiffs argued only that a calendar-year test would be superior to the controlling analyses (*see* Mem. at 42), plaintiffs now contend that "FECA unambiguously states the relevant period for evaluating a group's political committee status is a single calendar year," citing section 30101(4). (Pls.' Reply at 38.) As explained in our opening memorandum, however, the statute contains no such unambiguous statement because section 30101(4)(A)'s calendar-year test applies to the determination of whether an organization has received contributions or made expenditures exceeding $1,000, whereas the major-purpose test is an "'additional hurdle to establishing political committee status'" that the Supreme Court established in *Buckley*, *Free Speech*, 720 F.3d at 797 (quoting Supplemental E&J, 72 Fed. Reg. at 5601). (Mem. at 43-44.) Thus, as summed up in the Supplemental E&J, "[p]ursuant to FECA and Supreme Court precedent, the Commission will continue to determine political committee status based on whether an organization (1) [r]eceived contributions or made expenditures in excess of $1,000 during a calendar year, and (2) whether that organization's major purpose was campaign activity." 72 Fed. Reg. at 5606. The courts that have considered the FEC's application of the major-purpose test have rejected the idea that the test requires bright lines such as the calendar-year measurement plaintiffs advocate: "Because *Buckley* and *MCFL* make clear that the major purpose doctrine requires a fact-intensive analysis of a group's campaign activities compared to its activities unrelated to campaigns, any rule must permit the Commission the flexibility to apply the doctrine to a particular organization's conduct." 72 Fed. Reg. at 5601-02; *RTAA*, 681 F.3d at 556-57; *Shays*, 511 F. Supp. 2d at 29-31.

Plaintiffs' policy-based argument that using the whole record of AJS's and AAN's spending "would have absurd results" (Pls.' Reply at 38) misses the mark. There is nothing absurd about looking at an organization's relevant electoral spending in the context of its greater operations, including in other years. Reviewing the broadest available view of the organization's activity is an eminently reasonable way to review an organization with purposes that have changed over time, enabling a determination of whether such changes are temporary or more permanent. (Mem. at 45.)[8] Plaintiffs' contention that AJS might opportunistically exploit its prior non-campaign-related spending in order to dilute its later spending (*id.* at 38-39) continues to presume a nefarious intent, and, in so doing, requests that the Court focus on a relatively small and recent subset of activity as AJS's supposed true purpose by discounting its historical and proportionately more substantial activity. In addition, there is no "absurdity" (Pls.' Reply at 39) in the Commission evaluating political committee status on the bases of the available records that exist at the time of review. That is the nature of enforcement. At most, plaintiffs' argument about the timing of FEC determinations establishes the unsurprising proposition that fluctuations in an organization's spending pattern will sometimes make it look more like a political committee and sometimes less. But plaintiffs are wrong in suggesting that it is the FEC that "decides" when "to look." (*Id.* at 39.) The timing of the agency's review flows primarily from the filing of an administrative complaint and any submissions to the agency that follow.

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[8] Plaintiffs' notion that *Buckley* held that an organization need only have *a* purpose of nominating or electing candidates (Pls.' Reply at 42-43) contravenes *Buckley*'s clear statement that "*the*" major purpose of the organization must be the nomination or election of a candidate, 424 U.S. at 79 (emphasis added). *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 287-89 (4th Cir. 2008); *RTAA*, 681 F.3d. at 556; *Free Speech*, 720 F.3d at 797; AR 1449 n.69; AR 1700 n.65. In any event, plaintiffs' argument that the controlling Commissioners employed a "50%+1" test (Pls.' Reply at 41-43) is incorrect. (Mem. at 45-46.)

In sum, plaintiffs have failed to show that the controlling Commissioners' use of the entire records was contrary to law or unreasonable. Their decision to review the entire records was consistent with cases such as *GOPAC, Inc.* and *Malenick*, and in other enforcement matters in which the relevant analyses looked beyond a single calendar year in evaluating groups' major purpose. (AR 1461 n.146.)[9] Accordingly, the Court should sustain the Commissioners' analyses of AJS's and AAN's spending by reference to the entire records that were available.[10]

III. THE FEC'S BROAD PROSECUTORIAL DISCRETION INDEPENDENTLY SUPPORTS AFFIRMANCE

Lastly, the dismissals of plaintiffs' administrative complaints are separately justified by the Commission's broad prosecutorial discretion. (AR 1460-61 n.142; AR 1712-13 n.137; Mem. at 49-50.) Plaintiffs do not contest the FEC's right to dismiss enforcement matters on the basis of prosecutorial discretion. (Pls.' Reply at 43-46.) Rather, they contend that the controlling Commissioners' statements about exercising the agency's prosecutorial discretion were too "passing" to be effective (*id.* at 43) and repeat their meritless arguments in favor of de novo review (*id.* at 45-46). These arguments are unavailing.

The controlling Commissioners expressly stated that the political-committee analysis favored by plaintiffs would face "grave constitutional doubt" in light of the Seventh Circuit's decision in *Barland* and thus favored their "cautious exercise of . . . prosecutorial discretion." AR 1460-61 n.142; AR 1712-13 n.137; *cf. Machinists*, 655 F.2d at 394 (evaluating political-committee status arises in the "delicate" First Amendment area); *Van Hollen*, 811 F.3d at 501

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[9] Plaintiffs' suggestion that the courts in *Malenick* and *GOPAC, Inc.* "look[ed] to [the] group[s'] spending in each year separately" (Pls.' Reply at 40) fails to recognize that the cited portions of the courts' analyses were considering the $1,000 contribution element, not the major purpose element. *Malenick*, 310 F. Supp. 2d at 236 & n.8; *GOPAC, Inc.*, 917 F. Supp. at 853.

[10] For all the reasons that the FEC's "major purpose" determinations are reasonable under *Chevron* review, they would similarly be upheld under *Skidmore* review, *see supra* p. 11 n.3, even if the D.C. Circuit were to revisit the applicable level of deference in any appeal.

(noting FEC's "unique prerogative to safeguard the First Amendment"). Referencing the controlling statements' extended critique of the approach preferred by plaintiffs (AR 1458-63; AR 1710-15), the Commissioners reiterated their concerns about "the problems [the approach] presents" as explained in their statements of reasons in other matters. (AR 1713 n.141.) In their cited statement concerning Crossroads Grassroots Policy Strategies ("Crossroads"), the same controlling Commissioners explained their concern that expanding "the universe of an organization's communications while contracting the period of time for evaluating an organization's spending for that analysis" was problematic because that approach had not been "properly noticed" to individuals and groups that may be affected by the application of that analysis. MUR 6396 (Crossroads), *Statement of Reasons of Chairman Goodman and Commissioners Hunter and Petersen* at 28 n.117 (Jan. 8. 2014), http://eqs.fec.gov/eqsdocsMUR/14044350970.pdf; *see also id.* at 23. Accordingly, the controlling Commissioners' invocation of prosecutorial discretion is not an improper attempt to immunize the agency from judicial review (Pls.' Reply at 45-46), but is of a piece with due process concerns those Commissioners had recently articulated.

Finally, plaintiffs' notion that the Court may review an agency's exercise of prosecutorial discretion using a de novo standard contravenes settled law. (Mem. at 49-50 (citing cases).) "[Courts] are not here to run the agencies." *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986).

CONCLUSION

For the foregoing reasons, and for the reasons set out in the FEC' opening memorandum, the Court should grant summary judgment to the Commission.

Respectfully submitted,

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