UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, *et al.*,	)	
Plaintiffs,	)	Civ. No. 14-148 (RJL)
v.	)	
FEDERAL ELECTION COMMISSION,	)	REPLY MEMORANDUM
Defendant,	)	
CROSSROADS GRASSROOTS POLICY STRATEGIES,	)	
Intervenor-Defendant.	)	

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

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TABLE OF CONTENTS

Page

ARGUMENT 1

I. THE COURT MUST APPLY *CHEVRON*'S EXCEEDINGLY DEFERENTIAL STANDARD OF REVIEW 2

A. Plaintiffs Fail to Distinguish Court of Appeals Precedent Requiring the Court to Apply *Chevron* Deference 4

B. Even If the Court Could Ignore the Court of Appeals's Controlling Authority, Plaintiffs' Arguments Against *Chevron* Deference Are Meritless 6

C. The Governmental Interest in Disclosure Does Not Reduce Plaintiffs' Burden 12

D. Plaintiffs Cannot Rely on Material Beyond the Administrative Record or Waived Arguments 14

II. THE FEC'S DISMISSAL MUST BE AFFIRMED BECAUSE IT WAS NOT CONTRARY TO LAW 15

A. Plaintiffs Fail to Identify Any Prior Interpretation or Law Contrary to the Controlling Commissioners' Approach 16

B. The Controlling Commissioners' Analysis of Crossroads's Public Statements Was Reasonable 18

C. The Controlling Commissioners' Analysis of Crossroads's Spending Was Also Reasonable 20

1. The Controlling Commissioners' Determination of Crossroads's Relevant Spending Was Reasonable 20

2. The Controlling Commissioners' Determination of the Relevant Time Period Was Reasonable 24

D. The Controlling Statement Does Not Set a Spending Threshold 27

III. THE FEC'S BROAD PROSECUTORIAL DISCRETION INDEPENDENTLY SUPPORTS AFFIRMANCE 28

CONCLUSION 30

TABLE OF AUTHORITIES

Akins v. FEC, 101 F.3d 731 (D.C. Cir. 1996) 8

**Akins v. FEC*, 736 F. Supp. 2d 9 (D.D.C. 2010) 3, 6

**Buckley v. Valeo*, 424 U.S. 1 (1976) 6, 16, 25

Camp v. Pitts, 411 U.S. 138 (1973) 14

Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) 1, 6

Christensen v. Harris County, 529 U.S. 576 (2000) 10

City of Arlington, Tex. v. FCC, 133 S. Ct. 1863 (2013) 9

Coburn v. McHugh, 679 F.3d 924 (D.C. Cir. 2012) 15

Common Cause v. FEC, 842 F.2d 436 (D.C. Cir. 1988) 11

Democratic Congressional Campaign Comm. v. FEC, 831 F.2d 1131 (D.C. Cir. 1987) 5

Earthworks v. Dep't of the Interior, 279 F.R.D. 180 (D.D.C. 2012) 15

EMILY's List v. FEC, 581 F.3d 1 (D.C. Cir. 2009) 8

FEC v. Akins, 524 U.S. 11 (1998) 30

**FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981) 3, 4, 5, 17

FEC v. GOPAC, Inc., 917 F. Supp. 851 (D.D.C. 1996) 18

**FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981) 16

FEC v. Malenick, 310 F. Supp. 2d 230 (D.D.C. 2004) 18, 26

**FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) 16

**FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471 (D.C. Cir. 1992) 5, 21

FEC v. Nat'l Rifle Ass'n of Am., 254 F.3d 173 (D.C. Cir. 2001) 4, 11

FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007) 22

Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec., 769 F.3d 1127 (D.C. Cir. 2014) 9, 10, 12

Free Speech v. FEC, 720 F.3d 788 (10th Cir. 2013) 7-8, 8, 9, 25

**Heckler v. Chaney*, 470 U.S. 821 (1985) 30

IMS, P.C. v. Alvarez, 129 F.3d 618 (D.C. Cir. 1997) 14

**In re Sealed Case*, 223 F.3d 775 (D.C. Cir. 2000).....4, 5, 10, 11, 12

La Botz v. FEC, 61 F. Supp. 3d 21 (D.D.C. 2014) 29

McConnell v. FEC, 540 U.S. 93 (2003).....8, 22

Negusie v. Holder, 555 U.S. 511 (2009).....7

**N.M. Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010) 23

Real Truth About Abortion, Inc. v. FEC, 681 F.3d. 544 (4th Cir. 2012).....8, 9, 25

Shays v. FEC, 511 F. Supp. 2d 19 (D.D.C. 2007) 8, 25

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 4

Stark v. FEC, 683 F. Supp. 836 (D.D.C. 1988) 6, 29

Tindal v. McHugh, 945 F. Supp. 2d 111 (D.D.C. 2013).....15

United States v. Mead Corp., 533 U.S. 218 (2001) 9, 10

Unity08 v FEC, 596 F.3d 861 (D.C. Cir. 2010).....8

Van Hollen v. FEC, 811 F.3d 486 (D.C. Cir. 2016) 7, 14

Wisconsin Right to Life, Inc. v. Barland, 751 F.3d 804 (7th Cir. 2014).....23

Statutes

52 U.S.C. § 30101(4)(A).....6, 25

52 U.S.C. § 30104(c)(1), (2)(A), (C) 13

52 U.S.C. § 30104(f).....22

*52 U.S.C. § 30109(a)(8).....2

52 U.S.C. § 30120.....13

Miscellaneous

FEC Advisory Op. 2009-23, 2009 WL 3320540 (Oct. 9, 2009) 21

**Rules and Regulations: Political Committee Status*, 72 Fed. Reg. 5595 (Feb. 7, 2007).....21, 25, 26

ARGUMENT

In its opening brief, the Federal Election Commission ("FEC" or "Commission") explained why the three FEC Commissioners' decision dismissing plaintiffs' administrative complaint against Crossroads Grassroots Policy Strategies ("Crossroads"), as set forth in those Commissioners' controlling statement of reasons, was reasonable and not contrary to law. (FEC's Mem. of P. & A. in Supp. of its Cross-Motion for Summ. J. and in Opp'n to Pls.' Mot. for Summ. J. at 18-50 (Docket No. 32) ("FEC Mem.").) The Commission explained that the standard of review in this case is limited and extremely deferential and that, with respect to the substantive "major purpose" analysis at issue, the controlling Commissioners' approach was consistent with prior guidance from courts and the FEC itself in its lengthy 2007 policy statement regarding the agency's case-by-case approach to the major-purpose test.

In response to the briefs filed by the FEC and Crossroads, plaintiffs have provided no basis upon which the Court could rule in their favor. Although plaintiffs do not really dispute the limited nature of the standard of review that the Court must apply, they argue that the Court should not apply the deferential standard of *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) despite controlling Circuit authority compelling the Court to do so. Plaintiffs' arguments against *Chevron* deference are meritless. Furthermore, their argument that disclosure from Crossroads is warranted because FECA's various disclosure programs are constitutional does not help answer the question confronting the Court in this case. The question at issue is whether it was contrary to law for the Commission not to investigate Crossroads's political-committee status based on the record that was before the agency when it made its decision (not the improper extra-record materials plaintiffs now seek to introduce). In reviewing that record, the controlling Commissioners found that Crossroads lacked the major purpose of

nominating or electing candidates. Plaintiffs' arguments about the undisputed virtues of tailored disclosure requirements assume that Crossroads had the purpose of nominating or electing candidates. But whether disclosure from Crossroads is required by law here turns on the group's political-committee status, and not on whether disclosure is beneficial or constitutional as an abstract matter. The controlling Commissioners appropriately took into account constitutional concerns regarding specific questions actually at issue here, applying the major-purpose test in a First Amendment-sensitive manner, as the D.C. Circuit and Supreme Court have repeatedly reiterated the Commission must do when interpreting FECA.

Most critically, plaintiffs have failed to carry their burden of establishing that the controlling Commissioners' analysis of Crossroads's major purpose was contrary to law. The combination of the extremely deferential standard of review that applies in this case under 52 U.S.C. § 30109(a)(8), and plaintiffs' evident failure to identify any law contrary to the controlling Commissioners' decision, is dispositive and requires the Court to sustain the FEC's dismissal. Plaintiffs' attempted showing that their preferred approach could have been affirmed falls short of the necessary showing that the actual approach used by the controlling Commissioners should not be affirmed. Because plaintiffs have failed to meet their burden, and because the controlling Commissioners' analysis was 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 MUST APPLY *CHEVRON*'S EXCEEDINGLY DEFERENTIAL STANDARD OF REVIEW

The Court must apply *Chevron* deference in evaluating the agency's reasons for dismissing plaintiffs' administrative complaint. Such deference is due 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 *Chevron* deference, and because, not unrelatedly, the Court of Appeals has so held as a matter of Circuit law. (FEC Mem. at 21-26.)

Although plaintiffs continue to resist the characterization of the level of deference to be applied in this case as "*Chevron* deference," they do not dispute the standard of review. Under controlling Circuit precedent as stated by this Court, the Commissioners' dismissal of plaintiffs' administrative complaint must be sustained unless it was based on (1) an "'impermissible interpretation'" of FECA or, (2) even "'under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion.'" *Akins v. FEC*, 736 F. Supp. 2d 9, 16-17 (D.D.C. 2010) (quoting *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986)). They also do not dispute that the contrary-to-law standard is "'*extremely deferential*'" and "'*requires affirmance* if a rational basis for the agency's decision is shown.'" *Id.* at 17 (quoting *Orloski*, 795 F.2d at 167) (emphases added). And they do not dispute that 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). Plaintiffs accordingly acknowledge that they must at least clear the high bar of showing that the agency's actions were contrary to law because they were "arbitrary and capricious." (*E.g.*, Pls.' Reply Mem. in Supp. of Their Mot. for Summ. J. and Mem. in Opp'n to Def.'s Cross-Mot. for Summ. J. at 15, 18, 24, 30 (Docket No. 39) ("Pls.' Reply to FEC"); Pls.' Reply Mem. in Supp. of Their Mot. for Summ. J. and Mem. in Opp'n to Crossroads Grassroots Policy Strategies's Mot. for Summ. J. at 10, 19, 44 (Docket No. 62) ("Pls.' Reply to Crossroads").) Tellingly, and properly, they also address whether the approach of the controlling Commissioners satisfies "'extremely deferential' review." (*E.g.*, Pls.' Reply to Crossroads at 25; *see also id.* at 20-28

(arguing about the Commissioners' spending analysis "under any level of review"); Pls.' Reply to FEC at 24 (making contentions about the dismissal "under . . . *Chevron*").) Plaintiffs also conceded in their opening brief that the Court should at least accord the Commission the lesser deference of *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944). (*See* Pls.' Mem. of P. & A. in Support of Pls.' Mot. for Summ. J. at 17 (Docket No. 23).)

A. Plaintiffs Fail to Distinguish Court of Appeals Precedent Requiring the Court to Apply *Chevron* Deference

Given the clear permissibility of the controlling Commissioners' interpretation of FECA, plaintiffs would not gain much by convincing the Court that the extremely deferential standard of review that the Court must use here is not "*Chevron* deference." The size of that gain is irrelevant, in any event, because controlling precedent compels this Court to apply the "added boost of *Chevron* deference" (Pls.' Reply to FEC at 1). In *In re Sealed Case*, the Court of Appeals explained that it was according "*Chevron* deference" to an FEC split-vote enforcement dismissal decision materially identical to the situation here. 223 F.3d 775, 780 (D.C. Cir. 2000). *Chevron* deference was and is warranted because it is consistent both with Congress's design of the agency to be "statutorily balanced between the major parties" and with the Supreme Court's instructions in *DSCC*, 454 U.S. at 37, 39, which were "more consonant with *Chevron*" (than *Skidmore*). *Id.* at 780-81. In *FEC v. National Rifle Association of America*, the Court of Appeals expressly reiterated that in *In re Sealed Case*, the FEC's negative "probable cause determination and its underlying statutory interpretation [by controlling Commissioners in a split-vote case] had sufficient legal effect to warrant *Chevron* deference." 254 F.3d 173, 185 (D.C. Cir. 2001).

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 to FEC at 3-5.) But their 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' reliance on the criminal context of the case as a distinguishing feature (Pls.' Reply to Crossroads at 7) 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 started from its previous 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 *National Rifle Association* that *Chevron* deference is the type of deference accorded to split-vote dismissals by the FEC follows from its earlier (and also controlling) decisions, and the Supreme Court's decision in *DSCC*. (FEC Mem. at 21-26.) Even before *In re Sealed Case*, the D.C. Circuit applied "ordinar[y]" principles of agency deference in *NRSC*, which similarly involved a split-vote dismissal decision. 966 F.2d at 1475-76. And before *NRSC*, in *Democratic Congressional Campaign Committee v. FEC*, then-Judge Ruth Bader Ginsburg's opinion for the Court of Appeals stated, again, that when the FEC is divided on an enforcement decision, "[i]n the absence of prior Commission precedent . . . judicial deference to the agency's initial decision or indecision would be at its zenith." 831 F.2d 1131, 1135 n.5 (D.C. Cir. 1987). Finally, in *DSCC*, upon which all these decisions rely, the Supreme Court explained that "the Commission is precisely the type of agency to which deference should presumptively be afforded." 454 U.S. at 37. 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; *accord Akins*, 736 F. Supp. 2d at 18 (citing *Chevron* and *DSCC* together); *Stark v. FEC*, 683 F. Supp. 836, 840-41 (D.D.C. 1988) (concluding that the "same deference" accorded in *DSCC* also "be accorded the reasoning of 'dissenting' Commissioners who prevent Commission action by voting to deadlock").

B. Even If the Court Could Ignore the Court of Appeals's Controlling Authority, Plaintiffs' Arguments Against *Chevron* Deference Are Meritless

Despite this overwhelming and settled authority, plaintiffs argue that *Chevron* deference does not apply because (1) the controlling Commissioners did not interpret FECA and (2) their dismissal decision lacks the requisite force of law. (Pls.' Reply to Crossroads at 2-9; Pls. Reply to FEC at 1-5.) Both claims are incorrect. In light of the Supreme Court's imposition of the major purpose requirement, *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. Moreover, the controlling Commissioners' dismissal decision carries the force of law despite the 3-3 split vote of the agency's Commissioners because that is how Congress designed FECA's relatively formal adjudication procedure to operate.

Contrary to plaintiffs' argument (Pls.' Reply to Crossroads at 2-6), the FEC is not seeking *Chevron* deference with respect to some general interpretation of *Buckley*. Rather, 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, the FEC was exercising the "gap-filling authority" (Pls.' Reply to Crossroads at 2) that Congress delegated to it in enforcing FECA's core political-committee provisions. (*See* FEC Mem. at 2-3 (explaining that Congress vested the FEC "with statutory authority over the administration, interpretation, and civil enforcement of FECA").) In so doing, the

Commissioners were permitted to take into account the "changed circumstances" resulting from major "[c]onstitutional decisions" of the Supreme Court. *See Van Hollen v. FEC*, 811 F.3d 486, 496 (D.C. Cir. 2016) (applying deferential review to an FEC regulation implementing the Supreme Court's decision in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*") even though that decision "said absolutely nothing" about the disclosure provision the FEC subsequently revised), *pet. for rehearing en banc filed*, No. 15-5016 (D.C. Cir.).

Plaintiffs' cited authorities do not support their claim that *Chevron* deference is not owed to the manner in which the FEC applied section 30101(4)(A) with *Buckley*'s major-purpose limitation. In *Negusie v. Holder*, 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). The Court's holding that the agency had not yet exercised that authority, necessitating a remand for it to do so, resulted from its conclusion that the agency had mistakenly imported an earlier Supreme Court holding interpreting a provision in one statute into the different statutory context at issue. *Id.* at 516-25. But because *Buckley* interpreted the same provision of FECA at issue here, and because the major-purpose test unquestionably applies, *Negusie* does not support plaintiffs. As in that case, the Court explained that "[w]hatever weight or relevance . . . various authorities may have in interpreting the statute should be considered by the agency in the first instance." *Id.* at 520.

Similar to *Negusie*, the interpretive errors by the National Labor Relations Board in the cases plaintiffs cite (Pls.' Reply to Crossroads at 5-6) have no bearing here because all parties agree that the major purpose test is an "'additional hurdle to establishing political committee status'" that Crossroads must clear in order to be regulated as a political committee. *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")). Plaintiffs' reliance on the D.C. Circuit's contrary and 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) (Pls.' Reply to Crossroads at 5-6) is likewise misplaced because that opinion is nonprecedential and is inconsistent with the D.C. Circuit's subsequent reaffirmations of the major-purpose test during the last twenty years. *See, e.g.*, *Unity08 v. FEC*, 596 F.3d 861, 867-69 (D.C. Cir. 2010); *EMILY's List v. FEC*, 581 F.3d 1, 16 n.15 (D.C. Cir. 2009); *see also McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003) (citing *Buckley*'s major-purpose discussion with approval), *overruled in part by Citizens United v. FEC*, 558 U.S. 310 (2010).

Most fundamentally, plaintiffs' argument misconceives the relative domains of expertise of the FEC and the courts upon which *Chevron* deference is partially based, and upon which the contrary-to-law standard of section 30109(a)(8) is wholly based. Though the courts may be expert in matters of constitutional law, they do not possess special expertise regarding whether the nomination or election of a candidate is the major purpose of an organization. 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 either through categorical rules or through individualized adjudications." *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d. 544, 556 (4th Cir. 2012) ("*RTAA*"), *cert. denied*, 133 S. Ct. 841 (2013); *Free Speech*, 720 F.3d at 797; *see also Shays v. FEC*, 511 F. Supp. 2d 19, 30-31 (D.D.C. 2007). As here, that "inherently . . . comparative task" is one to be 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 Commission's resulting determination.

Plaintiffs are also mistaken in arguing that deference is not owed because the FEC's dismissal decision supposedly lacks the force of law. (Pls.' Reply to Crossroads at 6-9; Pls.' Reply to FEC at 1-3.) Their reliance on *United States v. Mead Corp.*, 533 U.S. 218 (2001) is misplaced because the basis of deference here is adjudication, not rulemaking. In *Mead*, the Supreme Court held that generally unexplained tariff classifications made by some 46 port-of-entry Customs offices 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. *Mead* 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 (collecting instances of *Chevron* deference in "adjudication cases"). As the Supreme Court later said in another case which plaintiffs also cite (Pls.' Reply to FEC at 2), "[w]hat the dissent needs, and fails 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). Plaintiffs have likewise failed to produce such a case.

Also meritless is plaintiffs' specific notion that *Mead* and the D.C. Circuit's decision in *Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127 (D.C. Cir. 2014) ("*Fogo De Chao*") undercut *In re Sealed Case*'s conclusions regarding *Chevron* deference.

(Pls.' Reply to Crossroads at 7-9.) Following *Christensen v. Harris County*, 529 U.S. 576 (2000), *Mead* held that the 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 *Fogo De Chao*, the D.C. Circuit held that the challenged "decision, and any legal interpretations contained within it," were not entitled to *Chevron* deference because they "were the product of *informal* adjudication within the [agency], rather than a *formal adjudication* or notice-and-comment rulemaking." 769 F.3d at 1136 (emphases added).

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 statements were not like such interpretations; rather than being beyond the *Chevron* pale, they fell on the "*Chevron* side of the line." 223 F.3d at 780; *compare Fogo De Chao*, 769 F.3d at 1136-37 (explaining that it was "[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" that "weighs against the application of *Chevron* deference" (internal quotation marks and citation omitted)). A decision of an agency's commissioners pursuant to a congressionally specified, relatively formal adjudication procedure is accorded deference under *In re Sealed Case*. That accords squarely with *Mead* and *Fogo De Chao*, as the lack of agency deference in those cases related to informal determinations by individual agency branches throughout the country. In *National Rifle Association*, which was decided post-*Mead*, the D.C. Circuit itself viewed *In re Sealed Case* as consistent with

Christensen and *Mead* in the course of extending *Chevron* deference from the split-vote enforcement context to the agency's advisory opinion context. 254 F.3d at 184-86.

Ultimately, plaintiffs seem to disbelieve that Congress could "have favored a system under which the deference that the views of a three-member bloc of Commissioners receive depends on whether they favored or opposed the agency action that a deadlock forestalled," *i.e.*, that deference could be accorded to a non-majority "block[ing] action." (Pls.' Reply to FEC at 2-3.) But this is precisely what Congress did. Plaintiffs overlook the distinction between the FEC's authority to regulate prospectively through rulemakings or adjudications in which four or more Commissioners agree on a rationale, on the one hand, and the power of three Commissioners to compel dismissal of an administrative enforcement matter, on the other. While it is true that the D.C. Circuit noted in *Common Cause v. FEC* that "a statement of reasons [by declining-to-go-ahead Commissioners] would not be binding legal precedent or authority for *future* cases," 842 F.2d 436, 449 n.32 (D.C. Cir. 1988) (emphasis added) (*see also* Pls.' Reply to Crossroads at 3, 9 (quoting the FEC's recitation of this settled law)), the statement of three such Commissioners in a case like this one is the agency's official decision and is to be accorded *Chevron* deference in the context of judicial review of that *adjudicative* decision, *In re Sealed Case*, 223 F.3d at 780.

Thus, contrary to plaintiffs' contention that a 3-3 dismissal "is not an exercise of authority to make rules carrying the force of law that are entitled to deference" (Pls.' Reply to Crossroads at 9 (internal quotation marks omitted)), such binding dismissals are exactly how the agency was designed to operate in the adjudicative realm. (FEC Mem. at 24-25.) Whether that design is considered a feature, as Congress understood it, or a defect, as plaintiffs do, deference to a dismissal resulting from an absence of a majority furthers the Congressional intent of

requiring that any federal campaign finance enforcement be the product of the Commissioners' bipartisan expertise. *In re Sealed Case*, 223 F.3d at 780 ("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." (citation omitted)). The D.C. Circuit's dicta in *Fogo De Chao* was about the non-precedential nature of the informal decisions of a different agency, 769 F.3d at 1137, and the Court's holding in *In re Sealed Case* is binding here: "If courts do not accord *Chevron* deference to a prevailing decision that specific conduct is not a violation, parties may be subject to criminal penalties where Congress could not have intended that result." 223 F.3d at 780. Accordingly, in conducting its review under section 30109(a)(8), this Court must accord *Chevron* deference to the controlling Commissioners' dismissal decision, just as the D.C. Circuit itself did in *In re Sealed Case* and in the cases that preceded it.

C. The Governmental Interest in Disclosure Does Not Reduce Plaintiffs' Burden

Plaintiffs also continue to seek to reduce their burden by stressing the importance of the government's interest in disclosure. (Pls.' Reply to FEC at 5-14; Pls.' Reply to Crossroads at 25 ("[T]he controlling Commissioners' insistence on importing an express advocacy limitation into the 'major purpose' inquiry stymies the goal of obtaining disclosure of the identities of those who fund advocacy for or against the election of federal candidates.").) This argument continues to rely on the disputed premise that Crossroads is a political committee. (FEC Mem. at 26-27.)

Even if plaintiffs were correct that disclosure is what is "entirely" at stake in this case (Pls.' Reply to FEC at 7), their argument that Crossroads was required to make political-committee disclosures assumes the answer to the antecedent question being litigated in this case, namely whether all FEC determinations other than finding reason to believe that Crossroads was

a political committee were contrary to law. Plaintiffs acknowledge that the Supreme Court's narrowing construction using the major-purpose test was based on its concern in *Buckley* that otherwise the term "political committee" could sweep in groups engaged purely in issue discussion. (*Id.* at 12.) But plaintiffs assert that "[t]hat concern is plainly not relevant as to Crossroads [], which concedes that it spent 39 percent of its 2010 budget on express advocacy advertising, and is thus in no way comparable to the 'pure' issue group hypothesized in *Buckley*." (*Id.* (citation omitted).) Plaintiffs' argument that "[a] 'narrow construction' of the 'major purpose' test is therefore particularly unsuited to this case" (*id.*) places the cart before the horse. Whether political-committee-type disclosure from Crossroads is warranted turns not on whether disclosure from Crossroads advances disclosure interests but rather on whether Crossroads has the major purpose of nominating or electing candidates.

Plaintiffs' disclosure argument also overlooks FECA's different disclosure requirements, some of which already apply to Crossroads and none of which are actually in dispute in this case. Plaintiffs complain as though Crossroads has not disclosed any of its activity. But Crossroads has disclosed $15,445,049.50 it reportedly spent on express advocacy in 2010, as required by the statute. 52 U.S.C. § 30104(c)(1), (2)(A), (C); FEC Mem. at 13. Furthermore, it is irrelevant that the Supreme Court has also upheld the electioneering communications disclosure obligations Congress added in the Bipartisan Campaign Reform Act of 2002 ("BCRA") despite the fact that these disclosure requirements capture speech that is not limited to express advocacy (Pls.' Reply to FEC at 8-9; Pls.' Reply to Crossroads at 24-25). Crossroads has also reported spending $1,104,783.48 on electioneering communications in 2010. (FEC Mem. at 13.) And FECA requires that disclaimers be placed on all of Crossroads's independent expenditures and electioneering communications, 52 U.S.C. § 30120; these communications do not exemplify

Crossroads "'hid[ing itself] from the scrutiny of the voting public,'" as had occurred pre-BCRA. (Pls'. Reply to FEC at 8 (quoting *McConnell*, 540 U.S. at 197).) Neither the constitutionality nor the efficacy (*see id.* at 10) of FECA's "event-driven" disclosure programs can be disputed in this case. Again, the question of whether Crossroads must make disclosures beyond its express advocacy and electioneering communications turns on whether it is a political committee, not whether plaintiffs are dissatisfied with Crossroads's current level of disclosure.

Plaintiffs complain that event-driven reporting is inadequate (Pls.' Reply to FEC at 10), but the Court of Appeals has rejected those concerns. *Van Hollen*, 811 F.3d 486. As that Court held in the context of BCRA, seeking more disclosure "does not mean Congress wasn't also concerned with, say, the conflicting privacy interests that hang in the balance"; "[j]ust because *one* of [the statute's] purposes (even *chief* purposes) was broader disclosure does not mean that anything less than maximal disclosure is subversive." *Id.* at 494.

D. Plaintiffs Cannot Rely on Material Beyond the Administrative Record or Waived Arguments

As the parties have recognized, this is an "action for review on an administrative record." (Joint Meet and Confer Statement at 1 (Docket No. 18) (citing LCvR 16.3(b)(1)).) Consequently, judicial review must be limited to the administrative record "already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142, 143 (1973) (per curiam). Indeed, a "widely accepted principle of administrative law [is] that the courts base their review . . . on the materials that were before the agency at the time its decision was made." *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997); *see also* FEC Mem. at 27.

Plaintiffs nevertheless attempt to rely on certain material — mostly concerning Crossroads's grants to other organizations — that is cited in its latest briefs. (*E.g.*, Pls.' Reply to Crossroads at 19 n.6, 26-28 & nn.9-14.) It is undisputed that this extra-record material was not

before the agency when it made its decision (*e.g.*, AR 365 n.47 (explaining that the Commission "does not have sufficient information to determine whether some of the other categories of 2010 spending, such as the grants Crossroads [] issues, would also qualify as federal campaign activity")); indeed, some of it did not become available until after the dismissal in December 2013 (Pls.' Reply to Crossroads at 27 & n.14 (citing report from February 2016 concerning the IRS's recent grant of Crossroads's application for tax-exempt status as a social welfare organization)). Such extra-record material is improper in this section 30109(a)(8) case and cannot inform this Court's review of the controlling rationale for the challenged dismissal. *See Earthworks v. Dep't of the Interior*, 279 F.R.D. 180, 184 (D.D.C. 2012) ("[T]o ensure fair review of an agency decision, a reviewing court 'should have before it neither more nor less information than did the agency when it made its decision.'" (citations omitted) (collecting cases)).

Additionally, by not making an argument based on Crossroads's grants when the matter was before the agency (AR 1-22), or even in plaintiffs' opening brief (Pls.' Mem. in Support of Pls.' Mot. for Summ. J. at 27 n.6 (Docket No. 23)), that argument has been waived. *Tindal v. McHugh*, 945 F. Supp. 2d 111, 129-31 (D.D.C. 2013) (complaining party waived issue it failed to raise with agency); *Coburn v. McHugh*, 679 F.3d 924, 929 (D.C. Cir. 2012) (explaining that courts are "bound to adhere to the hard and fast rule of administrative law, rooted in simple fairness, that issues not raised before an agency are waived and will not be considered by a court on review" (internal quotation marks omitted)). Accordingly, such extra-record materials and new arguments must be refused.

II. THE FEC'S DISMISSAL MUST BE AFFIRMED BECAUSE IT WAS NOT CONTRARY TO LAW

In their statement explaining the dismissal of plaintiffs' administrative complaint, the controlling Commissioners' analysis of whether Crossroads had the major purpose of nominating

or electing a federal candidate was reasonable. Their analysis is consistent with case law and Commission policy and precedents. Critically, plaintiffs' complaints about the manner in which these Commissioners' evaluated Crossroads's public statements and spending fail to establish that any element of their analysis was contrary to law under the prevailing standard. The simple answer to plaintiffs' case is that the controlling Commissioners' dismissal decision must be sustained because there is no law to which their decision is contrary. In addition to clearing that low bar, the controlling Commissioners' dismissal should be sustained because they reasonably analyzed Crossroads's central organizational purpose and comparative spending in light of the law, Commission precedents, and the undisputed factual record that was before the agency.

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

As demonstrated in the FEC's opening brief, the leading cases from the Supreme Court and D.C. Circuit, *Buckley*, *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), and *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981) ("*Machinists*"), and even plaintiff Public Citizen's own comments, are consistent with the controlling Commissioners' approach in dismissing plaintiffs' administrative complaint. (FEC Mem. at 29-31.) That approach was also consistent with the more recent lower court decisions concerning the major-purpose test and the Commission's Supplemental E&J. (*Id.* at 31-34.)

Plaintiffs cite no cases holding that the major-purpose test must be conducted in some way that the controlling Commissioners ignored or contradicted. Instead, they 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. (Pls.' Reply to FEC at 11 (arguing that "neither the controlling Commissioners nor the FEC in its papers here suggest that [plaintiffs' preferred] broader inquiry has been ruled in any way impermissible");

Pls.' Reply to Crossroads at 23-25 (contending that "the great weight of current case law holding that political committee status is not restricted by the express advocacy standard").) Whatever the merits of these arguments, plaintiffs fail to make arguments consistent with their burden. It is one thing to show that an approach is *permissible*; it is quite another to show that it is *required*. Thus, regardless of whether it would be constitutional for the FEC to include non-express advocacy communications in a group's relevant spending when performing the comparative spending analysis portion of the major-purpose inquiry, as plaintiffs contend, such a showing falls short of demonstrating that it would be unreasonable for Commissioners to use other, alternative approaches. It is insufficient to argue that plaintiffs' proposed analysis would be better than the analysis they are challenging. The Court's obligation is "not to interpret the statute as it [thinks] best but rather the narrower inquiry into whether the Commission's construction was sufficiently reasonable to be accepted," and "it is not necessary for [the Court] to find that the agency's construction was the only reasonable one or even the reading the [C]ourt would have reached" on its own "if the question initially had arisen in a judicial proceeding." *DSCC*, 454 U.S. at 39 (internal quotation marks omitted).

Plaintiffs are also incorrect in arguing that the controlling group's approach "contradict[ed] prior Commission interpretations of the laws governing political committee status" (Pls.' Reply to FEC at 5), or "deviate[d]" (*id.* at 6, 14) or "depart[ed]" (*id.* at 12, 18) from "the Commission's expressed standards" (*id.* at 20; Pls.' Reply to Crossroads at 10, 13, 20, 21, 35 (similarly contending that the controlling Commissioners departed or deviated from the agency's "longstanding approach to major-purpose determinations")). Plaintiffs' vague charges that the controlling statement departed from precedent are supported only by unspecific citations to, *e.g.*, "various Commission actions relied on by the Commission's Office of General Counsel

. . . in its First General Counsel's Report and . . . the 2007 Supplemental [E&J]" (Pls.' Reply to FEC at 5 (citation omitted)) or unidentified "prior Commission actions" (Pls.' Reply to Crossroads at 18; *id.* at 20-21 (citing a "break" from "the Commission's past policy")). But statements in the First General Counsel's Report are neither law nor binding on the agency's Commissioners. (FEC Mem. at 42 n.12.) And the "various Commission actions" cited in the First General Counsel's Report (Pls.' Reply to FEC at 5) predated the intervening federal appellate court decisions upon which the controlling group relied (FEC Mem. at 42) and do not themselves compel the conclusion that Crossroads was a political committee (*see* AR 416 n.75).

B. The Controlling Commissioners' Analysis of Crossroads's Public Statements Was Reasonable

Not only did the controlling Commissioners not depart from any identified law, but those Commissioners' analysis of Crossroads's central organizational purpose was also reasonable. As the Commission has already explained, the controlling group's analysis of Crossroads's statements was consistent with the Supplemental E&J and with *FEC v. Malenick*, 310 F. Supp. 2d 230, 235 (D.D.C. 2004) and *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996), and the controlling group's assessment of Crossroads's organizational documents reasonably found that those documents do not indicate that Crossroads's primary purpose is the election or nomination of candidates. (FEC Mem. at 35-37.) Plaintiffs do not dispute these points, but instead complain about the controlling group's supposedly "near-exclusive" reliance on Crossroads's "self-serving" and "self-generated" public statements. (Pls.' Reply to FEC at 15-17.) But all statements by a group are "self-generated" and intended to serve the group's interests. That is why the agency reviews them — to see what the group is saying about itself.

Even if plaintiffs were right that the FEC's approach "explicitly demands consideration of a broad range of [a] group's public statements and conduct" (*id.* at 15),[1] their factual claim that the controlling Commissioners "did not comprehensively analyze the record" (Pls.' Reply to Crossroads at 33) is incorrect. The controlling Commissioners *did* consider the record. What they found when they did so was that neither the research done by the agency's staff of publicly available information "nor the few articles included in the [Administrative] Complaint provide sufficient evidence to undermine Crossroads['s] official statements of purpose." (AR 411.) Specifically, they found that "many of the articles" conflated Crossroads with "American Crossroads." (*Id.*) And they agreed with Crossroads that there were "numerous instances where a newspaper article misrepresents the position of or a statement by a representative of Crossroads," using an example from a *Wall Street Journal* article to illustrate the point. (AR 412.) Although plaintiffs cast the error the controlling group supposedly made in considering Crossroads's public statements as one of process, plaintiffs' real disagreement is with the conclusions the Commissioners drew from the record. To the extent plaintiffs' arguments are anything other than simple, legally insufficient disagreement about whether the materials are credible, they are exclusively based on information that is not part of the administrative record (*see* Pls.' Reply to Crossroads at 34-35 (relying on Crossroads's "use" of an article regarding coordination)). This extra-record evidence cannot be the basis for a finding that the Commissioners' evaluation of Crossroads's statements was contrary to law. *Supra* pp. 14-15.

Plaintiffs also incorrectly suggest that the FEC's Office of General Counsel recommended finding reason to believe that a violation had occurred because of Crossroads's

[1] The portion of the Supplemental E&J plaintiffs' rely on for this contention actually explains that such analysis "'may'" be instructive and that the FEC's investigation "'may'" reach beyond publicly available ads. (*See* Pls.' Reply to FEC at 16 (quoting Supplemental E&J).)

public statements, positing that the staff analysis "look[ed] beyond unreliable 'official' statements of its intent to consider the group's 'overall conduct.'" (Pls.' Reply to FEC at 15.) The Office of General Counsel did no such thing. On the contrary, it explicitly expressed its recommendation solely on its analysis of Crossroads's spending. (AR 355-56 ("In this case, Crossroads['s] proportion of spending related to federal campaign activity is *alone* sufficient to establish that its major purpose in 2010 was the nomination or election of federal candidates." (emphasis added)).) As the controlling group explained, their conclusion based on the whole record was that the "various articles discussing American Crossroads and Crossroads [] do not undermine" Crossroads's organizational documents, "especially in light of Crossroads['s] explanations" — and the Office of General Counsel "d[id] not contend otherwise." (AR 412.)

C. The Controlling Commissioners' Analysis of Crossroads's Spending Was Also Reasonable

Plaintiffs' claims that the controlling group of Commissioners' analysis of Crossroads's spending was (1) improperly constrained as to the relevant universe of spending and (2) improperly expansive as to the relevant time period similarly fail to show that the Commissioners' approach was contrary to law. Their approach was reasonable in both respects.

1. The Controlling Commissioners' Determination of Crossroads's Relevant Spending Was Reasonable

As explained in the FEC's opening brief, the controlling group's identification of the relevant universe of spending as Crossroads's independent expenditures was reasonable and not contrary to law. (FEC Mem. at 37-42.) Plaintiffs nevertheless contend that the evaluation of Crossroads's spending in the controlling statement "depart[ed] from [the agency's] own policy" and "has no basis in law and finds no support in relevant Supreme Court precedent." (Pls.' Reply to FEC at 18-19; Pls.' Reply to Crossroads at 24-25.) These charges are meritless.

Initially, the controlling statement does not purport to change the FEC's way of evaluating political-committee status. (FEC Mem. at 33 & n.10.) Nor does it show a departing application of the agency's policy. Plaintiffs cite nothing in the Supplemental E&J requiring Commissioners to include an organization's non-express advocacy communications when comparing a group's "campaign activities" to its "activities unrelated to campaigns." 72 Fed. Reg. at 5601-02. That is because the Supplemental E&J contains no such requirement. Instead, plaintiffs focus on the Supplemental E&J's use of the phrase "Federal campaign activity," which they argue has not been defined to mean "express advocacy" and then suggest should be equated with a similar phrase, "federal election activity," added to FECA by BCRA to include certain communications that promote, support, attack, or oppose a federal candidate. (Pls.' Reply to FEC at 19-21 (citing 52 U.S.C. § 30101(20)(A)(iii)), 23; Pls.' Reply to Crossroads at 29-31.) But the FEC already defined "Federal campaign activity" in the Supplemental E&J. The phrase simply means "the nomination or election of a Federal candidate." 72 Fed. Reg. at 5597 (using "i.e." to define "Federal campaign activity" this way); FEC Advisory Op. 2009-23, 2009 WL 3320540, at *2 (Oct. 9, 2009) (same) (citing *Buckley*, 424 U.S. at 79; *MCFL*, 479 U.S. at 262; Supplemental E&J, 72 Fed. Reg. at 5595, 5597, 5601). Because "the nomination or election of a Federal candidate" is the "major purpose" element a group must have in order to be a political committee, the phrase "Federal campaign activity" in no way requires that certain non-express advocacy spending be included in the major purpose analysis. There is no "clearly establish[ed]" determination regarding precisely what spending constitutes "Federal campaign activity" and the controlling group's expertise is accordingly entitled to deference. *NRSC*, 966 F.2d at 1476-77.

Plaintiffs also take the Supreme Court's decision in *McConnell* out of context when they state here that the Court "made clear that the express advocacy test was 'functionally

meaningless' in distinguishing election-related speech from issue advocacy." (Pls.' Reply to Crossroads at 24-25; Pls.' Reply to FEC at 8-10.) The Supreme Court in *McConnell* did uphold BCRA's electioneering communications definition, but that holding included the determination that the components of the "electioneering communication" definition were "both easily understood and objectively determinable," and thus raised "none of the vagueness concerns that drove our analysis in *Buckley*." 540 U.S. at 189-94. Plaintiffs' oblique references to their view of the proper definition of "Federal campaign activity" contradict their suggestion that *no* vagueness concerns are at issue here. (*See, e.g.*, Pls'. Reply to FEC at 21 n.6 (contending that there was "good reason" to view a campaign "targeted to battleground states" and defining an officeholder's record as "electorally motivated").) *McConnell* also did not hold that the equivalency of certain electioneering communications and express advocacy means that all electioneering communications and all express advocacy communications are the same for political-committee status purposes. On the contrary, the Court recognized that some electioneering communications may be genuine issue ads. *McConnell*, 540 U.S. at 206; *see also WRTL*, 551 U.S. at 470 (discussing genuine issue ads). Thus, the Supreme Court's upholding of disclosure for electioneering communications does not support plaintiffs' contention that Congress and the Supreme Court somehow made the additional determination that electioneering communications are the equivalent of express advocacy for purposes of evaluating political-committee status. Congress's creation of an entirely separate disclosure regime for electioneering communications in BCRA belies that contention. 52 U.S.C. § 30104(f).

Plaintiffs' charge that the controlling Commissioners' approach has no basis in law or in relevant Supreme Court precedent (Pls.' Reply to FEC at 11-14, 19-24) is equally wrong. In its opening brief, the FEC showed that the controlling Commissioners' approach is consistent with

the Supreme Court's decisions in *Buckley* and *MCFL*, the Court of Appeals's decision in *Machinists*, and even with Public Citizen's own previous comments on the question. (*See* FEC Mem. at 29-31, 38.) The Commissioners' analysis is also consistent with the Tenth Circuit's decision in *N.M. Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010) and the decisions of other judges of this Court in *GOPAC, Inc.* and *Malenick*. (*Id.* at 39-40.) It is also consistent with the Seventh Circuit's decision in *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014), although the Commissioners did not rely on that decision as it postdated the issuance of the controlling statement. (*Id.*) By contrast, as explained above, *see supra* pp. 16-17, it is plaintiffs who have failed to show that the Commissioners' comparative spending analysis is in conflict with any judicial decision. The Court should reject plaintiffs' attempt to swap burdens with the FEC. Even if courts have upheld state disclosure regimes counting non-express advocacy (Pls.' Reply to Crossroads at 23-24), and even if the FEC "stops short" of arguing that *GOPAC, Inc.* and *Malenick* "restricted the 'major purpose' inquiry to express advocacy spending" (Pls.' Reply to FEC at 12-13), the question at issue is not whether the controlling Commissioners' approach has been expressly approved but whether it has been disapproved.

In responding to Crossroads's opening brief, plaintiffs make two new arguments regarding Crossroads's spending. For the first time, plaintiffs argue that the controlling Commissioners "failed to assess whether any of Crossroads' advertisements were the 'functional equivalent' of express advocacy." (Pls.' Reply to Crossroads at 25.) This argument is contradicted by the record. The controlling Commissioners expressly recognized in their statement that the FEC's Office of General Counsel did "not argue, nor could it, that these additional communications [the $5.4 million of non-express advocacy plaintiffs believe should have been included] were the functional equivalent of express advocacy." (AR 415 & n.69; *see*

also AR 361 (explaining the Office of General Counsel's view that the ads do not contain the functional equivalent of express advocacy).)

Plaintiffs' other argument resorts to extra-record evidence concerning Crossroads's grants and thus must also be rejected. *See supra* pp. 14-15. Even if recipients of grants from Crossroads used some of the money they received on independent expenditures or electioneering communications (Pls.' Reply to FEC at 21; Pls.' Reply to Crossroads at 25-28), plaintiffs do not explain why the spending of the grantees they identify should be imputed to Crossroads, which, after all, conditioned its provision of grant funds on their use "only for exempt purposes" and "not for political expenditures." (AR 279, 326 ("Crossroads [] carefully evaluates the missions and activities of recipient organizations prior to making any grants to ensure that funds are used only for exempt purposes of recognized tax-exempt section 501(c)(4) and 501(c)(6) organizations. Grants are accompanied by a letter of transmittal stating that the funds are to be used only for exempt purposes, and not for political expenditures, consistent with the organization's tax-exempt mission.").)

2. The Controlling Commissioners' Determination of the Relevant Time Period Was Reasonable

Plaintiffs' arguments that the controlling Commissioners used the wrong time period in evaluating Crossroads's spending are also wide of the mark. Plaintiffs contend that the controlling group of Commissioners based its analysis exclusively on Crossroads's fiscal year (Pls.' Reply to FEC at 24-27; Pls.' Reply to Crossroads at 11-19), but the Commissioners actually considered spending over each of several potential time periods: (a) the 2010 calendar year (as plaintiffs prefer), (b) Crossroads's first fiscal year running from June 2010 to May 2011, and (c) all of the 2010-2011 period that was in the record before the Commission. (AR 423-24; FEC Mem. at 43.) That flexible analysis was squarely in line with precedents and the

Supplemental E&J. "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. The Commissioners' evaluation of Crossroads's spending over multiple alternative time periods was thus consistent with the Commission's earlier guidance. *Id.* at 5602 ("[A]ny list of factors developed by the Commission would not likely be exhaustive . . . , as evidenced by the multitude of fact patterns at issue in the Commission's enforcement matters considering the political committee status of various entities."); *RTAA*, 681 F.3d at 556, 558; *Free Speech*, 720 F.3d at 797-98; *see also Shays*, 511 F. Supp. 2d at 29-31. Plaintiffs' failure to find fault with the analysis the Commissioners actually used demonstrates that their flexible analysis was not contrary to law.

In any event, plaintiffs are also incorrect that the controlling statement's application of a window of time other than the second half of 2010 was "contrary to law because it was based on an impermissible misinterpretation of 52 U.S.C. § 30101(4)(A)." (Pls.' Reply to FEC at 26; Pls.' Reply to Crossroads at 11-13.) FECA's political committee definition does use a "calendar year" for determining whether an organization has received contributions or made expenditures exceeding $1,000, 52 U.S.C. § 30101(4)(A), but 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). Thus, as plaintiffs themselves argue (Pls.' Reply to Crossroads at 12), Congress has not expressed an intent regarding the relevant scope of time for determining an organization's major purpose. Nor did the *Buckley* Court specify that consideration of an organization's major purpose must parallel the statutory calendar-year test. 424 U.S. at 79. Rather, the Court referred to an organization's

major purpose without further elaboration, and plaintiffs point to no judicial decisions that have limited the relevant time period for determining a group's major purpose. Other than their arguments about the text of section 30101(4)(A), plaintiffs rely on "'two matters cited by the [] Supplemental E&J — and in one concluded shortly thereafter'" in which the FEC "'focused on the group's activity during the 2004 calendar year . . . to determine major purpose.'" (Pls.' Reply to FEC at 27.) Yet in cases such as *GOPAC, Inc.*, and *Malenick*, and in other enforcement matters, the relevant analyses looked beyond a single calendar year in evaluating groups' major purpose. (AR 421-23 & nn.96, 97, 101.)[2] Plaintiffs' claim that the calendar year analysis was an established rule from which the controlling Commissioners departed is therefore incorrect.

Importantly, as the FEC summed up in its 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. If the Supplemental E&J provides any guidance regarding a time period for the major purpose analysis, it thus indicates only that the objective $1,000 contribution or expenditure test is based upon a calendar year approach, and the time period for making the more flexible "major-purpose" determination is undefined. This follows from the fact that the crossing of a $1,000 threshold occurs at an objectively ascertainable moment in time, while an organization's primary goal being the nomination or election of candidates does not necessarily do so. The controlling Commissioners' choice not to use a calendar-year

[2] Plaintiffs' observation (Pls.' Reply to Crossroads at 17) that the court in *Malenick* failed to find the organization to be a political committee in 1995, as opposed to 1996, confirms the FEC's view that the statutory threshold requirement is independent of the major-purpose analysis. In *Malenick*, the organization was not a political committee in 1995, not because it failed the major purpose element but because it failed the $1,000 contribution element. *Malenick*, 310 F. Supp. 2d at 236 & n.8.

approach in evaluating Crossroads's political-committee status — to the extent that they actually did fail to do so — was accordingly not in conflict with the statute or arbitrary and capricious. As the FEC explained in its opening brief, the controlling group's use of a fiscal year is practical (an organization's fiscal year establishes when it will file its tax returns, which as this case shows, are a principal source of evidence about the group's spending), not susceptible to manipulation, and no more arbitrary than using a calendar year. (FEC Mem. at 44-46.) The Commissioners' time period analysis was not contrary to law.

D. The Controlling Statement Does Not Set a Spending Threshold

Plaintiffs' claims that the controlling Commissioners established "a 50 percent threshold of express advocacy expenditures" (Pls.' Reply to FEC at 22; Pls.' Reply to Crossroads at 36) are also incorrect. While portions of the controlling statement discuss Crossroads's comparative spending in terms of *a* percentage, it does not define any threshold spending percentage for triggering political-committee status. (*Compare* AR 407 (reciting the Tenth Circuit's evaluation "'whether the *preponderance* of expenditures is for express advocacy or contributions to candidates'" (quoting *Herrera*, 611 F.3d at 678) (emphasis added)), *with* AR 423 (explaining that only with a "narrow view of total spending and an expansive view of campaign spending" could Crossroads's spending could be thought to exceed "50 percent of its total spending"), *and* AR 424 (explaining that, under one of the alternative analyses of the controlling Commissioners, "even 49 percent of total spending is significantly lower than the percentages found in" the prior matters summarized in the Supplemental E&J in which "the Commission determined that political committee status existed").)

Instead of defining a particular percentage point at which Crossroads's spending would have signified its major purpose of nominating or electing a federal candidate, the controlling Commissioners analyzed Crossroads's spending using a variety of approaches, including

approaches of which plaintiffs approve. (*E.g.*, AR 424 (analyzing Crossroads's spending including the non-express advocacy that plaintiffs believe should be included against Crossroads's fiscal year).) Plaintiffs wholly fail to grapple with the controlling Commissioners' alternative analyses. What the Commissioners concluded based on the totality of these alternative approaches was that the only way to make Crossroads's spending appear to satisfy major purpose element was by both including spending that they did not believe should be included (non-express advocacy that is not the functional equivalent of express advocacy) *and* by limiting the time period under review to a period the Commissioners believed would be unduly constrained (the first six months of Crossroads's existence). Accordingly, the controlling Commissioners voted not to find reason to believe not only because Crossroads did not appear to have a major purpose under the analysis they thought most appropriate, but also because, even using more sweeping analyses, it still would not appear to have that major purpose. (AR 424-25.) Their actual and nuanced analysis underscores the reasonableness of their decision.

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

Finally, the dismissal of plaintiffs' administrative complaint is separately justified by the Commission's broad prosecutorial discretion. (AR 427 n.117; FEC Mem. at 49-50.) Plaintiffs acknowledge the cases explaining the "FEC's discretion" in general terms and admit that courts have "sustain[ed Commission] decisions not to take enforcement action on the basis of enforcement discretion." (Pls.' Reply to FEC at 29; *see also* FEC Mem. at 49 (collecting cases).) Nevertheless, they contend that enforcement discretion cannot be a basis for affirmance here because the controlling Commissioners' reference to that basis was only "glancing" or "passing" (Pls.' Reply to FEC at 28, 29) and because "the FEC does not possess the almost unreviewable enforcement discretion posited in *Heckler* [*v. Chaney*, 470 U.S. 821 (1985)]" (*id.* at 29).

These arguments are unavailing. The controlling statement expressly noted the Commissioners' views that the political-committee analysis favored by plaintiffs would "expand the universe of an organization's communications while contracting the period of time for evaluating an organization's spending for that analysis." (AR 427 n.117.) In the Commissioners' view, such an approach had not been "properly noticed" to individuals and groups that may be affected by the application of that analysis. (*Id.*) For that reason, the Commissioners observed that the FEC's considerable discretion not to prosecute "could properly be applied here." (*Id.*) While plaintiffs correctly state that the notice point in the controlling statement's final footnote is made succinctly, that does not mean that it is underdeveloped or was not actually relied upon in the Commissioners' decision. On the contrary, that footnote reiterates the several notice, due process, and retroactivity points made more fully earlier in the statement. (*See* AR 421 n.92; AR 422 ("[T]he Commission has made no public statement . . . that would put Crossroads [] on notice that it would be judged based solely upon its activities in calendar year 2010. . . . [E]ven *assuming arguendo* that a single calendar-year approach is the proper one to apply, due process would preclude the Commission from seeking to enact a new legal norm now, without prior notice . . . and apply it retroactively."); *id.* nn.98-99.) Accordingly, the footnote is not the "afterthought" plaintiffs claim (Pls.' Reply to FEC at 28), but a distinct reason the controlling statement provides for the dismissal, that cross-references earlier points that are also "properly . . . applied" (AR 427 n.117) to the prosecutorial discretion context.

Plaintiffs seek to distinguish *La Botz v. FEC*, 61 F. Supp. 3d 21 (D.D.C. 2014) and *Stark*, 683 F. Supp. 836, on the basis that those prosecutorial decisions were more "thoroughly" explained. (Pls.' Reply to FEC at 29.) But they make no effort to explain why notice concerns the Commissioners identified are less appropriate than the limited-resources and evidentiary

issues that they mention with approval. One of the *Heckler* factors is "whether the agency is likely to succeed if it acts." 470 U.S. at 831. After concluding that the FEC had provided insufficient notice regarding potential consideration of communications beyond express advocacy or a calendar-year approach, it was reasonable to determine that a civil enforcement action would face uncertain prospects. (AR 427 n.117.) *La Botz* and *Stark* and the many other decisions the FEC cited in its opening memorandum clearly establish that the agency maintains broad prosecutorial discretion to decide what enforcement matters to pursue.

FEC v. Akins, 524 U.S. 11 (1998) also provides no assistance. There, the Supreme Court confirmed the existence of the FEC's prosecutorial discretion, *id.* at 25, and held that plaintiffs had standing to bring a challenge to an FEC dismissal using section 30109(a)(8), *id.* at 13-14. Here, the FEC is not challenging plaintiffs' standing, and the Supreme Court's comment that it could not know whether the FEC "'would have exercised its prosecutorial discretion'" in the suggested manner (Pls.' Reply to FEC at 28 (quoting *Akins*, 524 U.S. at 25)) is thus inapt. The Supreme Court's point was that a hypothetical exercise of prosecutorial discretion to repeat what the agency had previously done did not destroy Article III causation for standing purposes. *Akins*, 524 U.S. at 25. There is nothing similarly hypothetical about the present situation, where the controlling Commissioners did exercise that discretion. As a result, the FEC's broad prosecutorial discretion is an independent basis for affirmance here.

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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