**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

PUBLIC CITIZEN, *et al.*,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,
Defendant.

Civil Action No: 14-148 (RJL)

# PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

J. Gerald Hebert (DC Bar No. 447676)
Paul S. Ryan (DC Bar No. 502514)
CAMPAIGN LEGAL CENTER
215 E Street NE
Washington, DC 20002
(202) 736-2200

Scott L. Nelson (DC Bar No. 413548)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

*Attorneys for Plaintiffs*

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## ARGUMENT

### I. THE CONTROLLING COMMISSIONERS' CONSTRUCTION OF THE FEDERAL ELECTION CAMPAIGN ACT IS NOT ENTITLED TO *CHEVRON* DEFERENCE.

The FEC insists that although as many Commissioners *disagree* with the legal propositions that underlie the controlling Commissioners' votes not to investigate Crossroads GPS as *agree* with them, the controlling Commissioners' legal views are entitled to the same deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as if they were an exercise of the agency's "authority . . . to elucidate a specific provision of the statute by regulation." *Id.* at 843–44. But absent reason to believe Congress implicitly delegated authority to non-majority groupings of Commissioners to "speak with the force of law," *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001), the controlling Commissioners' claimed construction of the Federal Election Campaign Act of 1971, 52 U.S.C. § 30101 *et seq.* (FECA) is "beyond the *Chevron* pale." *Id.* at 234.

The FEC argues that because dismissal of a complaint is reviewable agency action, and because the controlling Commissioners' reasons for their votes determine whether that action is "contrary to law," *see FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("*NRSC*") and *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986), it follows that their legal interpretations of FECA should receive *Chevron* deference. Not so. Many agency actions are reviewable final actions and are reviewed on the basis of the reasons given for them, but not all such actions—or all such reasons—receive *Chevron* deference. As the Supreme Court stated in *Mead*, "agencies charged with applying a statute necessarily make all sorts of interpretive choices," but "not all of those choices bind judges to follow them." 533 U.S. at 227. Whether an agency whose actions are subject to judicial review to determine whether they are "contrary to law" gets the added boost of *Chevron* deference, under which courts defer to the agency's

reasonable construction of statutory ambiguities that evidence gaps left by Congress for the agency to fill, depends on whether "Congress would expect the agency to be able to speak with the force of law" in taking the particular type of action at issue. *Id*. at 229. In other words, "for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue *in the particular manner adopted*." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013) (emphasis added).

While Congress delegated authority to the FEC to speak with the force of law under FECA in a variety of ways, it is not reasonable to suppose that it delegated the power to issue binding constructions of FECA through three-to-three deadlocks. Such a view would have extraordinary and paradoxical consequences. Here, for example, the votes of three Commissioners, premised on their views of the statute, resulted in reviewable agency action: dismissal of a complaint. But if the Commission were faced with a proposal to embody those views in a regulation, the three Commissioners who disagree with them would block that action. The refusal to issue a regulation would likewise be final, reviewable agency action, and in an action seeking judicial review the views of the Commissioners who declined to enact the regulation would be subject to review under the "contrary to law" standard. In those circumstances, the arguments the FEC makes in this case would suggest that the views of those Commissioners would also be entitled to *Chevron* deference. Obviously, an agency cannot simultaneously have two contradictory views of a legal issue that are both subject to deference. Yet that would be the implication of the agency's argument here.

The example demonstrates that the agency's claim to deference is analytically untenable. Congress could not have contemplated that an evenly divided agency could, by deadlock, adopt a statutory construction with the force of law. Nor would Congress 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. *Chevron* provides for 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." *Mead*, 533 U.S. at 226–27. Congress does not grant agencies authority to adopt rules with the force of law through non-majority decisions, which can only block action, not take it affirmatively. 52 U.S.C. § 30109(a)(4)(A)(i). "A 3-3 split vote is a disagreement, not a decision." Statement of Vice Chair Ann M. Ravel and Commissioner Ellen L. Weintraub on Judicial Review of Deadlocked Votes, at 4 (June 17, 2014), http://eqs.fec.gov/eqsdocsMUR/14044354045.pdf.

The FEC contends, however, that binding precedent compels this Court to grant *Chevron* deference to the three Commissioners who blocked action here. The FEC concedes that most of D.C. Circuit decisions concerning review of FEC deadlocks did not actually address *Chevron* deference, but it contends that *In re Sealed Case*, 223 F.3d 775 (D.C. Cir. 2000), held definitively that *Chevron* deference applies. *Sealed Case* predated the Supreme Court's decision in *Mead*, which emphasized that *Chevron* deference depends on Congress's intent to allow an agency to make rules with the force of law through the means used by the agency in the particular case, and it failed to analyze whether Congress would have intended to allow non-majority blocs of Commissioners to make binding legal rules. More importantly, however, *Sealed Case* was not a proceeding reviewing a Commission decision and hence did not decide the standards that would apply in a case involving such review.

Rather, in *Sealed Case*, the Department of Justice sought to enforce a grand jury subpoena for attorney-client communications and argued that the crime-fraud exception applied

because the communications involved a criminal FECA violation. The FEC had already declined, by a three-three vote, to find probable cause to believe that the exact conduct alleged by DOJ violated FECA. The D.C. Circuit held that in these circumstances, DOJ could not contend that the conduct fell within the crime-fraud exception. *See id*. at 780–83.

The court's decision emphasized that the proceedings before it were criminal and that allowing criminal proceedings where the Commission had declined to pursue even civil charges would potentially subject parties "to criminal penalties where Congress could not have intended that result." *Id*. at 780. The court further made clear that the issue before it was the effect to be given the Commission's vote "*in the context presented here*—where the Department of Justice in a criminal case relies on an interpretation of the relevant statutes that has been rejected by the Commission in a 3-3 decision that, under the statutory voting mechanism, . . . controls Commission enforcement." *Id*. at 779 (emphasis added). And the court pointed out that the Commission's dismissal of the complaint had itself been a judicially reviewable action, *id*. at 780, a consideration that argued for according the decision respect in what amounted to a collateral challenge but implied the possibility that a different standard might apply in direct review proceedings.

In any event, it does not appear that *Sealed Case*'s observations about deference played any role in the court's actual holding. The court stated that whether the conduct alleged by DOJ was criminal within the meaning of the crime-fraud exception was "a pure question of law, which we resolve de novo." *Id*. at 778–79. The court then proceeded to reject each of DOJ's arguments that the alleged conduct constituted a violation not because the law was ambiguous, but because DOJ's "improbable" arguments had "no visible statutory support" and were "without exception faulty." *Id*. at 781, 782. Because DOJ's weak arguments quite evidently would not

have prevailed under any standard, the court's discussion of *Chevron* deference appears to be merely dicta.

Finally, *Sealed Case*, unlike this case, did not present a claim that a three-Commissioner bloc should receive *Chevron* deference for legal theories that contradict prior Commission interpretations of the laws governing political committee status, such as those in the various Commission actions relied on by the Commission's Office of General Counsel ("OGC") in its First General Counsel's Report (AR 340–68) and in the 2007 Supplemental Explanation and Justification regarding political committee status,[1] which commanded majority votes of the Commission. *Sealed Case* emphasized that the views of the three Commissioners who voted not to find probable cause were consistent with Commission precedents and regulations. *See* 223 F.3d at 781–83. Nothing in *Sealed Case* commands that a bloc of three Commissioners receive *Chevron* deference when, in disagreement with three other sitting Commissioners, they depart from statutory constructions previously adopted by Commission majorities.[2]

## II. THE DETERMINATION OF "POLITICAL COMMITTEE" STATUS IS VITAL TO ADVANCING THE GOVERNMENTAL INTERESTS IN DISCLOSURE.

The significance of political committee status in this case is that it triggers comprehensive disclosure requirements under FECA, including an obligation to report donors who give more than $200. 52 U.S.C. § 30104(b)(3)(a); *see generally* 52 U.S.C. § 30103 (registration of political committees), *id.* § 30104(a) (regular reporting of receipts and disbursements); *id.* § 30120 (disclaimers). The FEC counters that the nature of the underlying law is irrelevant because it does not affect the "level of judicial scrutiny of an agency dismissal."

[1] Political Committee Status, 72 Fed. Reg. 5595 (Feb. 7, 2007) (Supplemental Explanation and Justification) ("2007 SE&J").

[2] The FEC also relies on *FEC v. NRA*, 254 F.3d 173 (D.C. Cir. 2001), but *NRA* held only that advisory opinions adopted by Commission majorities receive *Chevron* deference.

FEC Mem. Supp. Summ. J. and Opp. Pls.' Mot. for Summ. J. ("FEC Br.") at 26 (Doc. 32). The FEC's argument misses the point. That political committee status entails only disclosure is crucial because it contradicts the controlling Commissioners principal justification for their failure to investigate: namely, their assertion that "First Amendment concerns" require limiting the "major purpose" inquiry to a review of Crossroads GPS's express advocacy communications. FEC Br. at 29.

Contrary to the view of the three controlling Commissioners, the FEC has long taken the position that one method of determining a group's "major purpose" is to compare the amount spent on "federal campaign activity" to the amount spent on "activities that [a]re not campaign related." 2007 SE&J, 72 Fed. Reg. at 5605. In 2010, Crossroads GPS spent approximately $39.1 million. About $15.4 million of that amount was reportedly spent for independent expenditures (i.e., express candidate advocacy), and an additional $5.4 million for communications that did not contain express advocacy but criticized or opposed clearly identified federal candidates before the 2010 federal elections, including approximately $1.1 million on "electioneering communications." AR 345–46, 356. The controlling Commissioners chose to limit the "relevant universe" of Crossroads GPS's spending to express advocacy; because this category of spending amounted to less than 50 percent of the group's total spending in 2010, they concluded that Crossroads GPS did not meet the "major purpose" test for political committee status. AR 411–19.

The Commissioners explained their decision to deviate from the FEC's established approach and consider only express advocacy instead of a broader category of "federal campaign activity" by claiming that the First Amendment compelled this result. *See, e.g.*, FEC Br. at 18, 29. But Supreme Court precedent suggests the opposite. The Court has never limited the "major

purpose" inquiry to a review of express advocacy spending. And given that political committee status entails only disclosure, such a constricted inquiry would be inconsistent with the Court's repeated holding that the government's interest in disclosure extends beyond express advocacy and its functional equivalent.

**A. Determinations of Political Committee Status Entail Only Disclosure and Thus Are Not Limited by the Express Advocacy Standard.**

For an entity that, like Crossroads GPS, makes no contributions to candidates or parties and limits its campaign activity to independent spending, the obligations that attend political committee status are entirely disclosure-related. When the Supreme Court devised the "major purpose" test in *Buckley v. Valeo*, 424 U.S. 1 (1976), a federal political committee was required to comply not only with disclosure requirements, but also contribution limits, 52 U.S.C. § 30116(a)(1), (a)(2), and restrictions on corporate and union contributions, 52 U.S.C. § 30118(a). Following the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), the D.C. Circuit Court of Appeals invalidated these contribution limits as applied to political committees that make only independent expenditures. *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010). In response, the FEC ruled that political committees that make only independent expenditures are not bound by the federal contribution limits, nor the corporate and union contribution ban. FEC Advisory Op. ("AO") 2010-09; FEC AO 2010-11. Today, an "independent expenditure-only committee"—the designation Crossroads GPS is trying to avoid—must comply only with registration, reporting and recordkeeping requirements.

Because federal political committee status implicates only disclosure, the statute and regulations governing political committee status are supported by the governmental interests justifying political disclosure laws. The Supreme Court has reiterated that disclosure "provid[es] the electorate with information, deter[s] actual corruption and avoid[s] any appearance thereof,

and gather[s] the data necessary to enforce more substantive electioneering restrictions." *McConnell v. FEC*, 540 U.S. 93, 196 (2003). The first of these, the public's informational interest, is "alone . . . sufficient to justify" disclosure laws. *Citizens United*, 558 U.S. at 369. "'Uninhibited, robust, and wide-open' speech" is unlikely to "occur when organizations hide themselves from the scrutiny of the voting public." *McConnell*, 540 U.S. at 197 (citation omitted). The FECA political committee disclosure requirements directly advance the "First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." *Id*.

Importantly, the Supreme Court has not limited the governmental interest in disclosure to express advocacy communications; to the contrary, the Court has explicitly stated that the informational interest extends even beyond communications that are the functional equivalent of express advocacy. In *McConnell*, it upheld the federal electioneering communications disclosure law although it regulated "'communications' that do not meet *Buckley*'s definition of express advocacy." *Id.* at 190. The Court made clear that "the express advocacy limitation . . . was the product of statutory interpretation rather than a constitutional command," *id*. at 191–92, and went so far as to find that the express advocacy test was "functionally meaningless" in distinguishing election-related speech from pure issue advocacy. *Id*. at 193. In *Citizens United*, the Court again explicitly rejected the "contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." 558 U.S. at 369. It noted that ads promoting a documentary about then-candidate Hillary Clinton—even though they concerned a commercial transaction—nevertheless could be subject to disclosure because the public had "an interest in knowing who is speaking about a candidate shortly before an election." *Id.*

The FEC itself recently endorsed this principle in defending federal disclosure requirements against constitutional challenge in *Independence Institute v. FEC*, -- F. Supp. 3d --, 2014 WL 4959403 (D.D.C. Oct. 6, 2014). As the FEC argued there:

> *McConnell* and *Citizens United* highlight the fundamental flaw in plaintiff's central argument . . . that disclosure requirements cannot constitutionally be applied to speech that lacks express candidate advocacy. The *McConnell* Court explicitly "rejected the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy." The Court in *Citizens United* similarly rejected a request to "import" into the context of [electioneering communications] disclosure requirements the distinction between express advocacy . . . and issue advocacy . . . .. [A] number of the federal Courts of Appeals have embraced *Citizens United* in concluding that *Buckley*'s distinction between express candidate advocacy and issue advocacy does not apply in the context of campaign-finance disclosure requirements.

FEC Mem. Opp. Summ. J. at 17, *Independence Institute*, 2014 WL 4959403 (No. 14-1500), http://fec.gov/law/litigation/indinst_fec_opp_mpi.pdf (citations omitted).

The FEC may attempt to distinguish these statements from its position here on grounds that *Independence Institute* concerned "event-driven" electioneering communications disclosure provisions whereas this case concerns the more comprehensive political committee disclosure requirements. FEC Br. at 5–10. But the "major purpose" test itself guards against the possibility that a group that makes only incidental payments for election-related communications will be required to register as a political committee. *Buckley*, 424 U.S. at 79. There is no logic in further limiting the "major purpose" inquiry to express advocacy spending given that the Supreme Court has repeatedly held that the express advocacy test does not accurately distinguish between speech that can and cannot be subject to disclosure. If the government's interest in disclosure extends beyond express advocacy and its functional equivalent, then the government has the same interest in obtaining comprehensive disclosure from a group whose major purpose is to support or oppose candidates for election as it has from a group whose major purpose is express

advocacy; indeed, the Supreme Court has held that for the purposes of disclosure there is no meaningful difference between these types of speech.

Furthermore, the "event driven" disclosure provisions highlighted by the FEC are insufficient to ensure meaningful disclosure from groups such as Crossroads GPS. *See* 52 U.S.C. § 30104(c), (f). As interpreted by the FEC, the reporting requirements for both independent expenditures and electioneering communications require a non-profit corporation to disclose only donors who earmarked contributions "for the purpose of furthering" a communication. *See* 11 C.F.R. §§ 104.20(c)(9), 109.10(e). In practice, this interpretation has resulted in minimal donor disclosure from groups engaged in election-related advertising, depriving the public of disclosures necessary for informed voting. For instance, the FEC has acknowledged that in 2010, persons making electioneering communications disclosed the sources of less than 10 percent of their $79.9 million in electioneering communications. Answer ¶ 30, *Van Hollen v. FEC*, 851 F. Supp. 2d 69 (D.D.C. 2012) (No. 11-766). By contrast, a federal political committee must disclose all of its donors of $200 or more. 52 U.S.C. § 30104(b)(3)(a). Furthermore, the event-driven reporting requirements do not require groups to disclose how they financed the overhead, salaries and other indirect expenses related to covered communications. *Compare id.* § 30104(f)(1) *and id.* § 30104(b)(3). This omission is problematic for a group like Crossroads GPS because the FEC does not dispute that at least 39 percent of its spending in 2010 was election-related, and the associated overhead expenses were presumably significant as well.

In accordance with *Buckley*, *McConnell* and *Citizens United*, the FEC's established procedure for determining an organization's major purpose is not limited to a review of express advocacy spending. Instead the FEC conducts a broader analysis of an organization's "federal campaign activity"—a term not construed by the Commission to mean "express advocacy." *See*

2007 SE&J at 5597, 5601, 5604, 5605; *see also* Section III.A.2 *infra*. And neither the controlling Commissioners nor the FEC in its papers here suggest that this broader inquiry has been ruled in any way impermissible. To the contrary, as the FEC acknowledges, the broader inquiry has been upheld by multiple courts of appeals against constitutional challenge. *See* FEC Br. at 10 (citing *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d. 544, 556 (4th Cir. 2012) ("*RTAA*"), *cert. denied*, 133 S. Ct. 841 (2013); *Free Speech v. FEC*, 720 F.3d 788, 797–98 (10th Cir. 2013), *cert. denied*, 134 S. Ct. 2288 (2014)). By wrongly invoking constitutional concerns and discounting the powerful interests served by disclosure, the controlling Commissioners acted arbitrarily and capriciously and contrary to law.

**B. The Controlling Commissioners Present No Judicial Authority to Support Their Adoption of an Express Advocacy Standard.**

The FEC does not dispute that the Supreme Court has repeatedly held that disclosure requirements may extend beyond express advocacy communications—and that the FEC has adopted this position. The FEC instead argues that limiting the "major purpose" analysis to express advocacy is justified because "*Buckley* and its progeny narrowly construed the meaning of 'political committee.'" FEC Br. at 29. But this statement is only half correct. While *Buckley* did narrowly construe the definition of "political committee," it did so by creating the "major purpose" test in the first instance, not by limiting the analysis of a group's major purpose to a review of its spending on express advocacy. 424 U.S. at 79–80. *Buckley* only formulated the "express advocacy" test to define the kinds of communications subject to disclosure for entities that were *not* "major purpose" groups. *Id.* (applying express advocacy limiting construction to expenditures by "an individual other than a candidate or a group other than a 'political committee'"). If anything, *Buckley* suggests that the "express advocacy" standard is not appropriate in the analysis of an organization's major purpose.

Further, the reason *Buckley* "narrowly construed the meaning of "political committee" to encompass only "major purpose" groups was its concern that in the absence of such a construction the term "political committee" could be "interpreted to reach groups engaged *purely* in issue discussion." *Id.* at 79 (emphasis added). That concern is plainly not relevant as to Crossroads GPS, which concedes that it spent 39 percent of its 2010 budget on express advocacy advertising (FEC Br. at 14), and is thus in no way comparable to the "pure" issue group hypothesized in *Buckley*. A "narrow construction" of the "major purpose" test is therefore particularly unsuited to this case.

Finally, even if *Buckley* had applied an "express advocacy" test to cabin determinations of political committee status, it would have done so when such status entailed not only disclosure, but also contribution limits and source restrictions. *McConnell* and *Citizens United* have since clarified that express advocacy is not the constitutional boundary of disclosure. The FEC has recognized as much, arguing that any attempt to limit disclosure to express advocacy "ignores the Court's clarification that *Buckley* did not establish a 'constitutionally mandated line' between express candidate advocacy and issue advocacy." FEC Mem. at 18, *Independence Institute*, 2014 WL 4959403 (No. 14-1500) (citing *McConnell*, 540 U.S. at 190). The controlling Commissioners' insistence on limiting the "major purpose" test—and thus, federal political committee disclosure—to groups whose major purpose is express advocacy cannot be squared with the FEC's own description of controlling Supreme Court precedent.

Indeed, the FEC acknowledges that the Supreme Court did not "mandate a particular methodology for determining an organization's major purpose," *see* FEC Br. at 31, so it is difficult to discern how *Buckley* justifies the controlling Commissioners' decision to depart from the Commission's established approach to "major purpose" determinations. Similarly, while the

FEC cites *FEC v. GOPAC, Inc.*, 917 F. Supp. 851 (D.D.C. 1996), and *FEC v. Malenick*, 310 F. Supp. 2d 230 (D.D.C. 2004), as supportive precedents in this Circuit, *see* FEC Br. at 40, it stops short of asserting that either case restricted the "major purpose" inquiry to express advocacy spending.

The only judicial authority that the FEC claims as specific support for the controlling Commissioners' position is two lower court decisions that it cherry-picks from *different* Circuits. FEC Br. at 39–41.[3] The first is a Seventh Circuit decision that *postdated* the dismissal of plaintiffs' complaint and could not have been the grounds for the controlling Commissioners' decision. *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014). The second is *New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010), but there the Tenth Circuit ruled on a different issue, namely the constitutionality of a state statutory definition of "political committee" that relied upon a $500 monetary spending threshold as a proxy for the "major purpose" test. In reviewing state law, the Tenth Circuit noted that one method of determining an organization's "major purpose" was a "comparison of the organization's electioneering spending with overall spending to determine whether the preponderance of expenditures is for express advocacy or contributions to candidates." *Id*. at 678. Putting aside whether the Tenth Circuit properly interpreted Supreme Court authority on this point,[4] it did not purport to rule on the

[3] The controlling Commissioners also asserted that *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008), supports an express advocacy standard, AR 407, but the FEC seems to have retreated from this claim, which is not surprising because the Fourth Circuit noted that the "major purpose" inquiry turns on a group's spending on communications "*supporting or opposing* a candidate," not on express advocacy. *See* 525 F.3d at 288 (emphasis added).

[4] *Herrera* relies on a different Tenth Circuit case, *Colorado Right to Life Committee, Inc. v. Coffman*, 498 F.3d 1137 (10th Cir. 2007) ("*CRLC*"), which claimed reliance on *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"). But the *MCFL* passage highlighted in *CRLC*, *see* 498 F.3d at 1152, does not state that the "major purpose" inquiry should focus only a group's *express advocacy* spending, and indeed, the FEC here does not even argue for this interpretation of *MCFL*. *See* 479 U.S. at 262 ("[S]hould MCFL's independent

constitutionality of the FEC's more comprehensive approach to assessing a group's "major purpose." *Id*. Indeed, *Herrera*'s discussion of the "major purpose" test *could not have* implied any criticism of FEC because just three years later, the Tenth Circuit upheld the FEC's approach in *Free Speech*. 720 F.3d at 797–98; *see also id.* at 795–96, 798 ("[*Citizens United*] not only rejected the 'magic words' standard urged by plaintiff but also found that disclosure requirements could extend beyond speech that is the 'functional equivalent of express advocacy' to address even ads that 'only pertain to a commercial transaction.'") (citation omitted).

In short, the controlling Commissioners' decision to deviate from the FEC's standard approach to "major purpose" and review only spending on express advocacy runs counter to Supreme Court precedent. "First Amendment concerns" do not justify the dismissal of plaintiffs' administrative complaint and that action was therefore arbitrary, capricious, an abuse of discretion and contrary to law under *Orloski* and 52 U.S.C. § 30109(a)(8)(C).

## III. THE CONTROLLING COMMISSIONERS' RATIONALE FOR DISMISSING PLAINTIFFS' ADMINISTRATIVE COMPLAINT WAS CONTRARY TO LAW AND UNREASONABLE.

The Commission's failure to investigate whether Crossroads GPS violated the law by failing to register as a political committee cannot be squared with the legal and constitutional standards governing the "major purpose" determination, nor was it appropriate given the undemanding "reason to believe" standard applicable at the investigatory stage of FEC enforcement proceedings.[5] The Statement of Reasons of the three controlling Commissioners is

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spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee.").

[5] The FEC disputes plaintiffs' characterization of the reason-to-believe standard, *see* FEC Br. at 18 n.4, but even the controlling Commissioners acknowledged "the lower standard of proof likely necessary to find reason to believe." AR 410. Elsewhere, the FEC has described the statutory phrase as "misleading" because it "implies that the Commission has evaluated the evidence and concluded that the respondent has violated the Act," when in fact "a 'reason to believe' finding simply means that, after evaluating the complaint, the respondents' responses to

contrary to FECA and is arbitrary, capricious and an abuse of discretion. *See* 52 U.S.C. § 30109(a)(8)(C); *Orloski*, 795 F.2d at 161.

**A. The Controlling Commissioners' Near-Total Exclusion of Anything Beyond Self-Generated Documents in Analyzing the "Central Organizational Purpose" Was Arbitrary and Capricious and Contrary to Law.**

The controlling Commissioners asserted that to "determine a group's purpose, courts have relied primarily on the materials created and utilized by that group." AR 409. However, the "major purpose" test as described in numerous prior cases and in the Commission's own guidance materials is decidedly not limited to a group's "official statements of purpose." AR 411. The inquiry explicitly demands consideration of a broad range of the group's public statements and conduct beyond "official statements."

In this case, the statements relied on by the controlling Commissioners are self-serving and are undermined by many other statements and activities indicating that the Crossroads GPS's fundamental purpose was to engage in campaign activity. Thus, in accordance with well-established agency policy and relevant case law, OGC recommended finding "reason to believe" that Crossroads GPS was in violation of FECA by looking beyond unreliable "official" statements of its intent to consider the group's "overall conduct." AR 355–56; *see also* AR 352 n.21 ("The [*RTAA*] court rejected an argument—similar to the one made by Crossroads GPS here—that the "major purpose" test must be confined to (1) examining an organization's expenditures to see if campaign-related speech amounts to 50% of all expenditures; or (2) reviewing the organization's central purpose revealed by its organic documents.'") (citations and internal quotation marks omitted). Ultimately, OGC concluded that Crossroads GPS's "formal"

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the complaint . . . , and information available on the public record, the Commission believes a violation *may have* occurred." *See* FEC Legislative Recommendations – 2005, http://www.fec.gov/law/legislative_recommendations_2005.shtml (emphasis added).

claims about its "central organizational purpose" were eclipsed by the more than $20 million of spending on public advertising and public statements corroborating an electoral intent. The controlling Commissioners rejected this analysis in favor of an unprecedented and unreasonable new test.

Despite the Commission's repeated characterization of its political committee status inquiry as "flexible" and "fact-intensive," *see, e.g.*, FEC Br. at 18, 32, 43, that characterization does not square with the circumscribed analysis undertaken by the controlling group. The controlling Commissioners limited their review at every opportunity, refusing to consider evidence that the Commission has specifically singled out as relevant to a group's major purpose. They derided OGC's "extra-curricular research" into Crossroads GPS's activities and statements, discrediting anything but the group's "official statements of purpose" because "stray quotes in newspaper articles cannot undermine the stated purpose of a group." AR 411.

In contrast, the full Commission has expressly adopted an approach to political committee status determinations that is not only flexible but *comprehensive*: According to the Commission's articulation of its "major purpose" test, "an analysis of public statements may be instructive in determining a group's purpose," but the "courts' interpretation of the constitutionally mandated "major purpose" doctrine requires the Commission to conduct investigations into the conduct of specific organizations that may reach well beyond publicly available advertisements." SE&J at 5601; *see also id.* at 5605 (noting "comprehensive analysis required to determine an organization's major purpose"). In prior cases, the Commission has determined that a group's major purpose was federal campaign activity on the basis of, *inter alia*, "(1) Statements made to prospective donors detailing the organization's goals; (2) public statements on the organization's Web site; (3) statements in a letter from the organization's

Chairman thanking a large contributor; (4) statements by a member of the organization's Steering Committee on a news program; and (5) statements in various fundraising solicitations." SE&J at 5605 (discussing MUR 5511); *see also id.* at 5601–02, 5605 (describing prior cases).

The Commission's comprehensive approach to political committee status was upheld by this Court in *Shays v. FEC*, 511 F. Supp. 2d 19 (D.D.C. 2007). There, the FEC defended its decision not to adopt a regulation but, instead, to make political committee status determinations through enforcement actions, arguing that the "major purpose" doctrine "requires the flexibility of a case-by-case analysis of an organization's conduct," including not only the "the content of [a group's] *public* statements," but also the "*internal* statements of the organization," and "the organization's fundraising appeals." *Id.* at 29 (emphasis added). The district court approved the FEC's approach, noting that "*Buckley* established the major purpose test, but did not describe its application in any fashion." *Id.*; *see also Malenick*, 310 F. Supp. 2d. at 234 ("An organization's purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates.") (quoting *GOPAC*, 917 F. Supp. at 859). Furthermore, considering a wide array of publicly available material minimizes the intrusiveness of the inquiry and is particularly appropriate at the reason-to-believe stage (*see supra* note 5).

The controlling Commissioners' near-exclusive reliance on Crossroads GPS' self-serving, self-generated articles of incorporation, mission statement, website and other documents as determinative of the group's central organizational purpose cannot be squared with the Commission's longstanding approach.

**B. The Controlling Commissioners' Imposition of an Express Advocacy Limitation in Reviewing Crossroads GPS's Spending Was Arbitrary and Capricious and Contrary to Law.**

In evaluating whether the dismissal of plaintiff's administrative complaint was arbitrary and capricious under *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), this Court should consider whether the "FEC has consistently adhered to" the controlling Commissioners' interpretation of political committee status. *Orloski*, 795 F.2d at 166. As the dissenting Commissioners noted, the 2007 SE&J is the "most comprehensive and most recent document explaining how the Commission determines an organization's major purpose." AR 507. If the agency has changed its position, it must acknowledge that it has done so and provide reasons for the new policy. *See State Farm*, 463 U.S. at 41–42; *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The controlling Commissioners have failed to do so here.

Under the Commission's well-established "major purpose" test, funds spent on communications that support or oppose a clearly identified federal candidate—even those that do not contain express advocacy—may be considered federal campaign activity. AR 356; *see also* 2007 SE&J, 72 Fed. Reg. at 5605 (considering the proportion of spending related to federal campaign activity compared to the proportion spent on "activities that [a]re not campaign related"). The controlling Commissioners, however, limited the "relevant universe" of Crossroads GPS's spending to express advocacy. Because the Commission has neither "consistently adhered to this interpretation" of FECA, *Orloski*, 795 F.2d at 165–66, nor "articulate[d] a satisfactory explanation" for its "depart[ure] from a prior policy *sub silentio*," *State Farm*, 463 U.S. at 43 (internal quotation marks and citation omitted), the dismissal of plaintiffs' complaint was arbitrary, capricious, an abuse of discretion and contrary to law.

After opining that a group's "relevant spending may not encompass non-electoral communications," the controlling group went on to characterize millions of dollars of Crossroads GPS's spending on ads criticizing federal candidates in the weeks and months preceding the 2010 federal election as "spending on activities unrelated to campaigns." AR 413. The FEC justifies this unprecedentedly constrained version of the "major purpose" analysis as "reasonable," and denies that the controlling group's formulation is at all in conflict with past agency applications of the "major purpose" test. *See* FEC Br. at 38–42. The FEC is wrong on both counts. First, the controlling Commissioners' approach is not "reasonable" because it has no basis in law and finds no support in relevant Supreme Court precedent, *see* Section II *supra*. Second, their approach directly contradicts well-established agency policy. To say that plaintiffs simply "prefer" a broader test, as the FEC glibly suggests (FEC Br. at 40), does nothing to justify the Commission's departure from its own policy.

In its 2007 description of the factors it uses to determine whether an organization is a political committee, the Commission noted that it employs an "express advocacy" construction of the statutory definition of "expenditure" to determine whether an organization has met the $1,000 expenditure threshold for political committee status, but also made clear that the "express advocacy" standard is *not* determinative of the "major purpose" analysis. 2007 SE&J, 72 Fed. Reg. at 5604. Instead, the "major purpose" analysis requires a determination of whether the organization's major purpose is "federal campaign activity," which is not construed by the Commission to mean "express advocacy." AR 356. Similarly, FECA's definition of "federal election activity," which applies to the requirement that state political party committees use only funds raised under federal limits to pay for "federal election activity," is not limited to express advocacy. *See* 52 U.S.C. §§ 30101(20) (definition), 30125(b) (state party requirements). "Federal

election activity" includes, *inter alia*, a public communication that promotes, supports, attacks or opposes a federal candidate "regardless of whether the communication expressly advocates a vote for or against a candidate." *Id*. § 30101(20)(A)(iii); *see also* Pls.' SJ Mem. at 26 n.5.

Here, the controlling Commissioners made a fundamental mistake of law by applying an express advocacy standard to *both* prongs of the analysis, contrary to the agency's own guidance. *See, e.g.*, 2007 SE&J, 72 Fed. Reg. at 5597. To evaluate whether an organization's major purpose is federal campaign activity, the Commission has consistently considered (among a range of other indicia) the proportion of spending related to "federal campaign activity" compared to the proportion spent on "activities that [a]re not campaign related." *Id.* at 5601, 5604–05. In accordance with this approach, OGC found that "Crossroads GPS appears to have spent approximately $20.8 million on the type of communications that the Commission considers to be federal campaign activity—approximately $15.4 million on express advocacy communications and $5.4 million on non-express advocacy communications that criticize or oppose a clearly identified federal candidate." AR 365. Because the $20.8 million of federal campaign activity represented approximately 53 percent of the group's total expenditures in 2010, OGC correctly concluded that "Crossroads GPS's spending by itself shows that the group's major purpose during 2010 was federal campaign activity." AR 366. The Commission's rejection of OGC's analysis cannot be sustained because it conflicts with the Commission's expressed standards for determining political committee status.

Even on its own terms, the controlling Commissioners' analysis is incomplete. It failed to consider whether Crossroads GPS's spending on ads that criticized federal candidates and aired more than 30 days before a primary or 60 days before a general election constituted the "functional equivalent" of express advocacy, or was otherwise indicative of Crossroads GPS's

major purpose.[6] Moreover, the controlling Commissioners did not even contemplate whether any of Crossroads GPS's other spending, including grants to other nonprofit organizations, may have reflected a purpose of engaging in federal campaign activity.

As noted by OGC, Crossroads GPS's 2010 Tax Return states that it gave grants totaling approximately $15.9 million to other nonprofit organizations. *See* AR 347 n.16. Some portion of those grant funds may have been used for federal campaign activity, but without an investigation, OGC had insufficient information to make that determination. *See* AR 365 n.47. Even without an investigation, however, there was certainly "reason to believe" that a nontrivial portion of that grant money may have been used to make political expenditures—the records of which would have been filed with and maintained by the FEC itself. One of the grantees, the Center for Individual Freedom ("CIF"), received a $2.75 million grant from Crossroads GPS in 2010 (AR 277)—amounting to almost half of CIF's total revenue for that tax year—and also reported spending more than $2.5 million on electioneering communications.[7] Another grantee, Americans for Tax Reform ("ATR"), received $4 million from Crossroads GPS (AR 277) and reported spending $4.2 million on independent expenditures in 2010.[8] Thus, even if the "major

[6] For example, there was good reason to view even the 2011 "issue advocacy" campaign as electorally motivated insofar as it was targeted to battleground states and districts ("key pressure point congressional districts" (AR 128)), or explicitly sought to frame the debate regarding President Obama's upcoming reelection bid ("First phase of massive advertising blitz to define President Obama's economic and spending record . . . ." (AR 112)).

[7] *See* Ctr. for Responsive Politics ("CRP"), *CIF Outside Spending Summary 2010*, http://www.opensecrets.org/outsidespending/detail.php?cmte=C30001747&cycle=2010. Individual reports of the group's electioneering communications can also be found by searching the FEC website at http://www.fec.gov/finance/disclosure/candcmte_info.shtml.

[8] *See* CRP, *ATR Outside Spending Summary 2010*, http://www.opensecrets.org/outsidespending/detail.php?cmte=C90011289&cycle=2010. The potential relevance of grant activity to the "major purpose" determination is further illustrated by the fact that in 2012, Crossroads GPS gave $26.4 million—its largest grant that year—to ATR. ATR reported spending $15.8 million on independent expenditures in 2012, *see* CRP, *ATR Outside Spending Summary 2012*, http://www.opensecrets.org/outsidespending/detail.php?cmte=C90011289&cycle=2012, of which

purpose" inquiry were properly narrowed to express advocacy or its functional equivalent, the controlling Commissioners' conclusion that Crossroads GPS did not have the requisite major purpose because the group spent "only" 39 percent of its annual budget on "federal campaign activity" does not consider the fact that the group funneled a large portion of its annual expenditures to other politically active groups.

Finally, neither the Commission nor the Supreme Court has ever ruled that a "major purpose" finding requires an organization to spend a majority of its total budget directly on federal campaign activity, let alone that the inquiry is contingent on whether the group meets a 50 percent threshold of express advocacy expenditures. The test set forth in Supreme Court precedent is whether a group's "major purpose" or "primary objective" is "the nomination or election of a candidate" or "campaign activity" or "to influence political campaigns." *Buckley*, 424 U.S. at 78–81; *MCFL*, 479 U.S. at 262. Indeed, the Commission has expressly denied that the "major purpose" test imposes any such 50 percent requirement. In *RTAA*, in response to an argument that the "major purpose" test "can be satisfied only if an entity spends more than half of its funds on magic-words express advocacy, or if its 'organic documents' reveal an 'express intention to operate as a political committee,'" the Commission opposed the petition for certiorari and defended its approach to political committee status determinations by reference to the Supreme Court's opinion in *MCFL*, explaining:

> [T]he major-purpose test was not at issue in [*MCFL*], where it was "undisputed" that the plaintiff's "central organizational purpose" was not candidate-related. In suggesting that the plaintiff's "independent spending" could theoretically "become so extensive that the organization's major purpose may be regarded as campaign activity," the [Supreme] Court neither stated nor implied that express-

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more than $11 million would be necessarily attributable to Crossroads GPS based on the group's overall revenues. *See* Kim Barker, *New Tax Return Shows Karl Rove's Group Spent More On Politics Than It Said*, ProPublica (Nov. 25, 2013), http://www.propublica.org/article/new-tax-return-shows-karl-roves-group-spent-more-on-politics-than-it-said.

> advocacy communications are the only kind of "campaign activity" that can satisfy the major-purpose test. Nor did the Court establish a rigid rule that an organization must devote more than 50% of its funds to campaign-related spending in order for such spending to be deemed "extensive."

Br. for Respondents in Opposition at 20, *RTAA*, 133 S. Ct. 841 (2012) (No. 12-311) (internal citations omitted), http://fec.gov/law/litigation/rtao_sc_sg_brief.pdf; *see also, e.g.*, Br. of FEC at 56–57, *Koerber v. FEC*, No. 08-2257 (4th Cir. Apr. 17, 2009), http://fec.gov/law/litigation/koerber_fec_brief.pdf (appeal dismissed per stipulation).

Furthermore, the controlling Commissioners' assertion that all non-express advocacy is necessarily unrelated to federal elections and "wholly outside of the Commission's regulatory jurisdiction," AR 415, is contradicted by FECA itself in at least two ways: (1) the Act's regulation of "electioneering communications," which covers ads that mention federal candidates regardless of whether they contain express advocacy; and (2) the Act's definition of non-express advocacy advertising that promotes, supports, attacks or opposes candidates as "federal election activity," *id.* § 30101(20)(A).

Finally, the FEC's attempt to find support for its position in the comments of plaintiff Public Citizen on the FEC's 2004 Notice of Proposed Rulemaking on Political Committee Status is unavailing.[9] Public Citizen's comments argued that if an advocacy organization stays within the proper bounds of its tax status under 26 U.S.C. § 501(c)(4), which requires that the organization exclusively devote itself to social welfare and thus that it not engage in substantial efforts to influence elections,[10] the organization should not be deemed a political committee based solely on issue-related communications that may criticize public officials. Public Citizen

[9] Public Citizen, *Comments on the Notice of Proposed Rulemaking on Political Committee Status* (NPRM 2004-06), http://www.fec.gov/pdf/nprm/political_comm_status/public_citizen_holman.pdf ("2004 Comments").

[10] *See* Public Citizen *et al.*, Comments on REG-134417-13 (relating to degree of permissible campaign intervention by social welfare organizations) (Feb. 27, 2014).

did not suggest that when an organization engages in substantial campaign spending (as Crossroads GPS undoubtedly has), all non-express advocacy communications must be ignored in determining whether it has the major purpose of influencing elections.[11] And more importantly, when the Commission responded to the comments of Public Citizen and others in the 2007 SE&J, it did not adopt any recommendations to change its standards for making "major purpose" determinations, but adhered to its practice of considering the "full range of [an organization's] campaign activities" when making that determination. 72 Fed. Reg. at 5605.

That "major purpose" determinations are made case by case does not permit the Commission to change its approach or disregard its own stated criteria with every new case, nor does it permit three Commissioners to depart from explicit Commission policy without a reasoned explanation. The controlling Commissioners' offered no such explanation. Their analysis limiting the "major purpose" test to spending on express advocacy "unduly compromise[s] the Act's purposes" and "create[s] the potential for gross abuse," *Orloski*, 795 F.2d at 165, and was justified by neither Supreme Court precedent nor First Amendment considerations. The dismissal of plaintiffs' administrative complaint based on this unreasonable interpretation of FECA was arbitrary, capricious, an abuse of discretion and contrary to law under *Orloski*, *Chevron*, *State Farm* and 52 U.S.C. § 30109g(a)(8)(C).

### C. The Controlling Commissioners' Rejection of the Statutory "Calendar Year" Standard Was Arbitrary and Capricious and Contrary to Law.

The controlling Commissioners took the view that their determination of Crossroads GPS's major purpose must be based on its activities in the course of its own fiscal year rather than during a calendar year, rejecting a calendar-year focus as "myopic" and "distorted." AR

[11] On the contrary, Public Citizen suggested using the IRS "exempt function" standard, which is not limited to express advocacy, to determine whether a group organization had engaged in enough election activity to satisfy the "major purpose" test. *See* 2004 Comments, at 11.

419–20. That holding is at odds with the statutory definition of "political committee," which expressly bases political committee status on an organization's actions during a calendar year: FECA defines "political committee" to mean "any committee, club, association or other group of persons which receives contributions aggregating in excess of $1,000 *during a calendar year* or which makes expenditures aggregating in excess of $1,000 *during a calendar year*." 52 U.S.C. § 30101(4)(A) (emphasis added). OGC thus evaluated Crossroads GPS's political committee status under a calendar year standard, both with respect to the $1,000 "expenditure" threshold and with respect to the "major purpose" test, reasoning that a calendar year, "not a self-selected fiscal year, provides the firmest statutory footing for the Commission's "major purpose" determination—and is consistent with FECA's plain language." AR 363–64.

The controlling Commissioners' rejection of OGC's use of a calendar-year standard in analyzing Crossroads GPS's major purpose cannot be squared with the unambiguous statutory language. "[T]he traditional tools of statutory construction, including examination of the statute's text, legislative history, and structure, as well as its purpose," *Shays v. FEC*, 414 F.3d 76, 105 (D.C. Cir. 2005) (internal citations and quotation marks omitted), make clear that the relevant time period for the determination of political committee status under FECA is "a calendar year." 52 U.S.C. § 30101(4)(A). The controlling Commissioners' contrary "fiscal year" standard is "inconsistent with the statutory mandate" and "frustrate[s] the policy that Congress sought to implement." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981).

FECA's overall structure and purpose further evince congressional intent that political committee status be determined on a calendar-year basis: Only two minor FECA provisions use the term "fiscal year"—both involving congressional appropriations to finance the agency's own operations, *see* 52 U.S.C. §§ 30115, 30146—but "calendar year" appears at least 67 times

throughout the Act. *See* 52 U.S.C. § 30101 (definitions); *id.* § 30102 (organization of political committees); *id.* § 30104 (reporting requirements); *id.* § 30109 (enforcement); *id.* § 30116 (contribution limitations); *id.* § 30118 (contributions or expenditures by corporations or unions); *id.* § 30125 (soft money of political parties). In creating the "major purpose" test as a gloss on the statutory definition of "political committee" in *Buckley*, the Supreme Court nowhere expressed an intention to displace the statute's focus on the calendar year as the relevant time period for determining whether an organization is a political committee. The controlling Commissioners failed to give effect to this "unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. Therefore, the dismissal of plaintiffs' complaint was contrary to law because it was based on an impermissible misinterpretation of 52 U.S.C. § 30101(4)(A).

The controlling group defended their action by claiming that OGC's fidelity to the statutory "calendar year" standard amounted to "introduc[ing] a new legal norm": "that a calendar year and only a calendar year is the necessary time frame for determining an organization's political committee status." Supplemental Statement of Reasons of FEC Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 1, http://eqs.fec.gov/eqsdocsMUR/14044352011.pdf. This charge is inaccurate. First, adhering to the express statutory language that the Commission is bound to implement cannot be tantamount to the "introduction of a new legal norm." Second, employing a calendar year standard is fully consistent with the Commission's approach to political committee status in prior enforcement proceedings—and a fiscal year standard is not.

Even if FECA were ambiguous on the point, the controlling Commissioners' interpretation of FECA as permitting a fiscal-year-based analysis of political committee status was arbitrary, capricious, an abuse of discretion or otherwise contrary to law. As OGC explained,

determining an organization's political committee status with respect to a calendar year, rather than a fiscal year, is "consistent with the Commission's actions in the enforcement matters cited as guidance in the 2007 Supplemental E&J." AR 364. OGC explained:

> In two matters cited by the 2007 Supplemental E&J—and in one concluded shortly thereafter—the Commission focused on the group's activity during the 2004 calendar year for that election to determine major purpose, and only used the groups' later activity to assess their ongoing reporting obligations as political committees.

*Id*. (footnote omitted). The controlling Commissioners' reliance on Crossroads GPS' self-defined fiscal year for the "major purpose" analysis thus constitutes a change in FEC policy. If the agency has changed its position, it must acknowledge that it has done so and provide reasons for the new policy. *See State Farm*, 463 U.S. at 41–42; *Fox Television*, 556 U.S. at 515. The controlling Commissioners have failed to do so here.

Furthermore, employment of a fiscal year analysis for determination of an organization's major purpose "unduly compromise[s] the Act's purposes" and "create[s] the potential for gross abuse." *Orloski*, 795 F.2d at 165. The Commission disputes the possibility that use of a fiscal year standard could lead to absurd results or undermine the Act, and also states that the Commission has looked beyond "a single calendar year" in past enforcement cases. FEC Br. at 44. But given an organization's ability to manipulate and change its own fiscal year—as Crossroads GPS did in 2011, *see* AR 364—a fiscal-year standard would easily enable such groups to evade federal law political committee status and attendant disclosure obligations, and thus would compromise FECA's purposes. A fiscal-year standard would also greatly complicate administration of the Act, as it would never be possible to know whether a group was required to report its activities during an election year without knowing what it might do in the future.

## IV. THE FEC'S ACTION CANNOT BE SUSTAINED ON THE ALTERNATIVE GROUND OF "PROSECUTORIAL DISCRETION."

Lastly, the FEC invokes enforcement discretion and the Supreme Court's decision in *Heckler v. Chaney*, 470 U.S. 821 (1985), as an independent basis for sustaining the Commission's refusal to proceed with an investigation of Crossroads GPS. FEC Br. at 49-50. The FEC relies on a concluding footnote in the controlling Commissioners' opinion "not[ing] that the Commission maintains broad discretion to dismiss matters" and that "[f]or various reasons, including OGC's introduction of new legal theories . . . , we believe that discretion could properly be applied here." AR 427 n.117. The controlling Commissioners' glancing reference to enforcement discretion cannot bear the weight the FEC now seeks to place on it.

Under the familiar principle of *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), an agency action "explicitly based" on particular reasons "must likewise be judged on that basis," *id*. at 87, and "cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained," *id*. at 95. Here, the controlling Commissioners stated explicitly that the "reasons" for their votes not to proceed were those stated in their 29-page opinion, which led them to conclude as a matter of law that "Crossroads GPS was not required to register with the Commission and file reports with the Commission as a political committee." AR 427. Under *Chenery*, their actions must stand or fall based on their stated reasons. A concluding footnote that merely "note[s]" that the Commission has discretion and mentions the possibility that such discretion "could" be exercised does not transform the basis of their action. As in *FEC v. Akins*, 524 U.S. 11 (1998), "we cannot know" based on this afterthought "that the FEC would have exercised its prosecutorial discretion in this way," *id*. at 25, and hence the passing reference to discretion does not obviate the need to review the controlling Commissioners' stated basis for their action.

None of the cases the FEC cites upheld the Commission's failure to take enforcement action based on a reference to the mere possibility of exercising enforcement discretion. *See* FEC Br. at 49. Most of the cited decisions contain only generalizations about the FEC's discretion, and only two sustain decisions not to take enforcement action on the basis of enforcement discretion. *See La Botz v. FEC*, -- F. Supp. 2d ---, 2014 WL 3686764, at *7–*9 (D.D.C. July 25, 2014); *Stark v. FEC*, 683 F. Supp. 836, 840 (D.D.C. 1988). In *La Botz*, the FEC's action was entirely based on the Commission's explicit judgment that further factual investigation would be a waste of limited resources, *see* 2014 WL 3686764, at *2, while in *Stark* the controlling Commissioners thoroughly explained that their votes not to proceed were based largely on assessment of factual and evidentiary matters. *See* 683 F. Supp. at 840. The FEC cites no cases where controlling Commissioners based their action on an elaborate legal analysis that led them to conclude that there was *no violation*, but a court instead sustained the action based on a passing reference to enforcement discretion in the Commissioners' explanation.

In any event, the FEC's reliance on discretion in this case is unavailing. Although the FEC's brief echoes the controlling Commissioners in citing *Heckler*, the FEC fails to note that the FEC does not possess the almost unreviewable enforcement discretion posited in *Heckler* because Congress has chosen to subject the Commission's enforcement decisions to judicial review. Appeals to unreviewable enforcement discretion are unavailing under FECA because "[w]e deal here with a statute that explicitly indicates" that that discretion is reviewable. *Akins*, 524 U.S. at 26. Thus, the Commission's reasons for its purported exercises of enforcement discretion must be overturned if they are arbitrary, capricious, an abuse of discretion, or contrary to law. *Orloski*, 795 F.2d at 161.

Here, the controlling Commissioners' stated reasons for why enforcement discretion "could" be exercised are, like the legal analysis that forms the actual basis of their action, grounded entirely in their disagreement with OGC's supposedly "new legal theories." AR 427, n.117. Because the controlling Commissioners' disagreement with OGC is itself contrary to law, their reasons for believing that discretion "could" be applied fail as well.[12]

## CONCLUSION

This Court should grant plaintiffs' motion for summary judgment; deny the FEC's cross-motion for summary judgment; declare that the FEC's dismissal of plaintiffs' administrative complaint is contrary to law and arbitrary and capricious; and direct the Commission to conform with such declaration within 30 days.

[12] That the controlling Commissioners refused to proceed at the preliminary reason-to-believe stage further undercuts their appeal to "discretion." The reason-to-believe standard is low, *see supra* note 5, and it is implausible to believe that the controlling Commissioners would not have considered it satisfied absent their erroneous legal analysis.

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Respectfully submitted,

/s/ J. Gerald Hebert
J. Gerald Hebert (DC Bar No. 447676)
Paul S. Ryan (DC Bar No. 502514)
CAMPAIGN LEGAL CENTER
215 E Street, NE
Washington, DC 20002
(202) 736-2200

Scott L. Nelson (DC Bar No. 413548)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

*Attorneys for Plaintiffs*