UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

As Plaintiffs demonstrated in their opening brief, in dismissing Plaintiffs' complaints against the American Action Network ("AAN") and Americans for Job Security ("AJS"), the controlling commissioners erroneously interpreted the First Amendment and the "major purpose" test created by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), to conclude that the Federal Election Commission ("FEC") is barred from treating those groups as political committees. Those misinterpretations, contrary to the purposes of the Federal Election Campaign Act ("FECA") and the expectations of the Supreme Court, opened a massive loophole in the campaign finance disclosure system through which millions of dollars already have flowed and contributed to the explosion of dark money in recent elections. Pls.' Mot. for Summ. J. 2–11 ("Mot."). Plaintiffs seek to reverse the controlling commissioners' decision in order to correct those errors and obtain the transparency guaranteed by the FECA and the Supreme Court.

In opposition, the FEC and AAN raise a number of meritless arguments. Notably, they do not claim that the controlling commissioners' interpretations were right, arguing only that this Court must defer to them. That is incorrect. This Court reviews the controlling commissioners' interpretations *de novo*. The FEC and AAN further fail to present any compelling support for the controlling commissioners' misinterpretations. Contrary to the commissioners' conclusions, the First Amendment does not bar disclosure from groups like AAN and AJS, a group's spending on electioneering communications count toward demonstrating that its major purpose is to nominate or elect candidates, a calendar year is the proper time period for measuring a group's activities, and *Buckley* did not impose a 50%+1 test for a group's activities to qualify it as a political committee. In blocking the FEC from even starting an investigation of AAN or AJS, the controlling commissioners also improperly imposed a higher standard than the FECA's "reason

to believe" test. Finally, the novel arguments raised by the FEC and AAN do not support the controlling commissioners' dismissal of Plaintiffs' complaints: the controlling commissioners did not invoke prosecutorial discretion as a reason for dismissal and, even if they had, that fact would not alter this Court's analysis; and Plaintiffs have standing to bring this challenge.

The controlling commissioners' erroneous interpretations underlying their dismissals were contrary to law. Accordingly, Plaintiffs respectfully request this Court grant Plaintiffs' motion for summary judgment and deny the FEC's and AAN's cross-motions.

ARGUMENT

I. The Statements of Reasons Do Not Warrant Deference

Both the FEC and AAN claim this Court has almost no role in resolving whether the three controlling commissioners' interpretation of *Buckley*'s "major purpose" test—one that would allow political organizations like AAN and AJS to keep all of their contributors secret—is correct. According to the Defendants, the Court must defer to the controlling commissioners' decision, accepting it if it has any "rational basis." The extreme deference the FEC and AAN prefer, however, is not the standard for a court to review an agency's interpretation of constitutional law and judicial precedent, especially one that, as here, does not represent a decision of a majority of the commissioners.

A. Courts Review an Agency's Judicial and Constitutional Interpretations *De Novo*

In dismissing Plaintiffs' complaints, the controlling commissioners' statements of reasons asserted they did so to "ensure that issue advocacy groups are not chilled from engaging in First Amendment protected-speech and association." AR 1444, 1696. They concluded that requiring disclosure from "issue groups" like AAN and AJS was not "constitutionally acceptable." AR 1447, 1699. Accordingly, they interpreted the "major purpose" test, which the controlling

commissioners acknowledged was "fashioned" by the Court in *Buckley* and "clarified" by lower courts, to exclude AAN and AJS. AR 1447–49, 1456–58, 1699–1703, 1708–10.

The FEC and AAN do not argue that these interpretations were correct. Rather, they argue that the Court must defer to these interpretations under *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984), and find them sufficiently reasonable. Agency interpretations of court decisions, however, receive no deference. Courts are "the supposed experts in analyzing judicial decisions" and thus there is "no reason" for them "to defer to agency interpretations of the Court's opinions." *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002); *accord Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 959 n.17 (D.C. Cir. 2013) ("[W]e owe no deference to an agency's interpretation of judicial precedent."), *overruled on other grounds, Am. Meat Inst. v. Dep't. of Agric.*, 760 F.3d 18 (D.C. Cir. 2014); *Ne. Bev. Corp. v. NLRB*, 554 F.3d 133, 138 n.* (D.C. Cir. 2009); *McDonald Partners, Inc. v. NLRB*, 331 F.3d 1002, 1005 (D.C. Cir. 2003); *N.Y. N.Y., LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002) (rejecting any deference "under *Chevron* or any other principle" to agency opinion that "purport[s] to rest on the [agency's] interpretation of Supreme Court opinions"), *see also Negusie v. Holder*, 555 U.S. 511, 521–23 (2009) (rejecting *Chevron* deference to agency's interpretation of judicial precedent). Nor does the judiciary "owe deference to the Executive Branch's interpretation of the Constitution." *Public Citizen v. Burke*, 843 F.2d 1473, 1478 (D.C. Cir. 1988); *see also Robertson v. FEC*, 45 F.3d 486, 489 (D.C. Cir. 1995) ("It was hardly open to the Commission, an administrative agency, to entertain a claim that the statute which created it was in some respect unconstitutional"); *Mudd v. Caldera*, 134 F. Supp. 2d 138, 145 (D.D.C. 2001). The controlling commissioners' statements of reasons, based entirely on their interpretations of *Buckley*, other judicial precedent, and the First Amendment, warrant no deference from this Court.

Akins v. FEC, 101 F.3d 731 (D.C. Cir. 1996) (*en banc*), *vacated*, 524 U.S. 11 (1998), is squarely on point. There, the *en banc* D.C. Circuit held the FEC's interpretation of *Buckley*'s "major purpose" test—the same test at issue here—warranted no deference. *See id.* at 740.

> It is undisputed that the statutory *language* is not in issue, but only the limitation—or really the extent of the limitation—put on this language by Supreme Court decisions. We are not obliged to defer to an agency's interpretation of Supreme Court precedent under *Chevron* or any other principle. The Commission's assertion that Congress and the Court are equivalent in this respect is inconsistent with *Chevron*'s basic premise. *Chevron* recognized that Congress delegates policymaking functions to agencies, so deference by the courts to agencies' statutory interpretations of ambiguous language is appropriate. But the Supreme Court does not, of course, have a similar relationship to agencies, and agencies have no special qualifications of legitimacy in interpreting Court opinions. There is therefore no reason for courts—the supposed experts in analyzing judicial decisions—to defer to agency interpretations of the Court's opinions. This is especially true where, as here, the Supreme Court precedent is based on constitutional concerns, which is an area of presumed judicial competence.

Id. *Akins* went on to interpret *Buckley*'s "major purpose" test *de novo*. *Id.* at 740–44.

While *Akins* was vacated, the Supreme Court did not question the *en banc* conclusion regarding deference. *See* 524 U.S. at 27. Rather, the Supreme Court held that the petitioners had standing and remanded the case for consideration of an issue that would moot the dispute. *See id.* at 19, 29. Had the Supreme Court thought the FEC's interpretation of *Buckley* warranted *Chevron* deference, however, it simply could have agreed that the FEC's interpretation was reasonable and closed the matter. There would have been no reason to remand for the further consideration that the Court ordered.

Moreover, the precedent on which *Akins* relied, *Public Citizen v. Burke*, remains good law and is binding in this circuit. *See Akins*, 101 F.3d at 740 (citing *Public Citizen*, 843 F.2d at 1478). Further, other D.C. Circuit decisions, relying on *Akins* even after it was vacated, have

denied *Chevron* deference and remain binding law. *See N.Y.N.Y.*, 313 F.3d at 590; *Univ. of Great Falls*, 278 F.3d at 1341. There is nothing "dubious" about *Akins*. *Cf.* FEC Mem. 22 n.4.[1]

The recent decision in *Van Hollen v. FEC*, 811 F.3d 486 (D.C. Cir. 2016), *petition for reh'g en banc filed* (Mar. 11, 2016) (Nos. 15-5016, 15-5017), is not to the contrary. There, the court held the FEC's interpretation of the FECA, 52 U.S.C. § 30104(f), embodied in a recent regulation, was entitled to *Chevron* deference. *See Van Hollen*, 811 F.3d at 492. In contrast to the FEC's characterization, the regulation in question neither "implement[ed]" nor interpreted judicial authority. FEC Mem. 22. Rather, the regulation sought to fill a hole left by *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL II*"). Prior to *WRTL II*, corporations could not engage in electioneering communications, so the FECA did not specify how corporations should report them. *See Van Hollen*, 811 F.3d at 490. When *WRTL II* struck down the ban on corporate funded electioneering communications, the FEC was left to decide how to apply the still remaining statutory disclosure provisions to corporations. *Id.* at 490–91. Here, in contrast, *Buckley* did not leave a hole in the FECA's political committee requirements that the FEC has been called upon to fill. Rather, *Buckley* "fashioned" the very test that the controlling commissioners interpreted. AR 1447, 1699.

Faced with the insurmountable fact that courts do not give *Chevron* deference to agency interpretations of judicial opinions, the FEC and AAN weakly assert that the controlling commissioners were not interpreting *Buckley* after all, but rather were interpreting the FECA, 52 U.S.C. § 30101(4)(A). FEC Mem. 22; AAN Mem. 13 (stating the controlling commissioners

[1] Although its argument is not clear, the FEC also implies that *Unity08 v. FEC*, 596 F.3d 861 (D.C. Cir. 2010) and *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009) cast doubt on *Akins*. They do not. Neither *Unity08* nor *EMILY's List* mention *Akins* or discuss the deference owed to agency interpretations of judicial opinions and the Constitution. Regardless of whether the decisions "reaffirm[ed] the major-purpose test," FEC Mem. 22 n.4, they are irrelevant to the question of what deference is owed to the FEC's interpretation of that test.

interpreted a "*statutory* question"). At issue in this case, however, is the FEC's interpretation of the "major purpose" test, words that do not appear in the FECA. Rather, as the FEC and AAN admit throughout their briefs, the "major purpose" test is not the work of the FECA, but was "adopted by the Supreme Court." AAN Mem. 13; *id.* at 10 (arguing controlling commissioners' analysis was grounded in "Supreme Court precedent"); FEC Mem. 22 ("Given the Supreme Court's imposition of the major purpose requirement . . . ."); *id.* at 43–44 ("T]he major-purpose test is an 'additional hurdle to establishing political committee status' that the Supreme Court established in *Buckley*. Thus, Congress has not expressed *any* intent, ambiguous or otherwise," regarding the test). Indeed, the FEC concedes there "is no dispute that AJS and AAN 'crossed the *statutory* threshold for political committee status,'" further undermining its claim that the agency was interpreting the FECA and not *Buckley*. FEC Mem. 14 (emphasis added) (quoting AR 1454, 1706).

Moreover, as the "major purpose" test is a construction of the Supreme Court, the FEC may not now disregard the Court's test and apply its own novel interpretation of the FECA. While an agency may disregard the interpretation of an ambiguous statute rendered by a lower court and substitute that interpretation with its own, *see Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005), an agency may not ignore an interpretation of a statute rendered by the Supreme Court, *see id.* at 1003 (Stevens J., concurring) (noting *Brand X* is "not necessarily . . . applicable to a decision by this Court"); *see also United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1840, 1843 (2012) (finding Court's prior interpretation of "not 'unambiguous'" statute binding on agency; finding *Brand X* does not control in such situations); *Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 528 n.2 (2009) (refusing to defer to agency rule in *Brand X* where earlier decision was "one in a long and

unbroken line of cases" interpreting statute). The controlling commissioners thus could not, and in fact did not, discard *Buckley* and interpret FECA anew.[2] Instead, they sought to implement *Buckley* as they interpreted it.

The controlling commissioners gave as their reasons for dismissing Plaintiffs' complaints their conclusions that the First Amendment and *Buckley* prohibited the FEC from finding that AAN and AJS were political committees. Accordingly, their interpretations of the First Amendment and *Buckley* are the issues subject to review here, and the Court reviews those interpretations *de novo*.

B. A Statement of Reasons Joined by Only Three Commissioners is "Not Law" and Does Not Warrant *Chevron* Deference

In addition, *Chevron* deference is inappropriate for agency declarations that have no binding effect. As the FEC and AAN concede, a statement of three commissioners is not binding and is not law. *Chevron* deference to such a statement is therefore unwarranted.

Only agency actions with "force of law" warrant *Chevron* deference. *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001). Whether an act has "force of law" depends on whether the act is binding on third parties in future cases. The Supreme Court established this principle in *Mead*, refusing to provide *Chevron* deference to agency interpretations located in "ruling letters" that stated only the agency's position "with respect to a particular transaction or issue" and on which "no other person should rely." *Id.* at 222–23. The Court found the letters did not "bespeak the legislative type of activity that would naturally bind more than the parties to the ruling." *Id.* at 232. As the "letter's binding character as a ruling stops short of third parties," it

[2] It would be improper at this stage to supplant the controlling commissioners' stated reasons for dismissal, one based on their interpretation of the First Amendment and *Buckley*, with one that purportedly discards *Buckley*. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.").

did not have the "force of law," a prerequisite for *Chevron* deference. *Id.* at 233–34; *see also Mayo Found. For Med. Educ. & Research v. United States*, 562 U.S. 44, 57 (2011) (*Chevron* deference only justified where agency issue's decision has "force of law" with "binding" effect); *Gonzales v. Oregon*, 546 U.S. 243, 255–56 (2006) (*Chevron* deference appropriate only where agency interpretation "promulgated in the exercise of" agency's authority to "make rules carrying the force of law"); *Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1137 (D.C. Cir. 2014) ("[T]he expressly non-precedential nature of the Appeals Office's decision conclusively confirms that the Department was not exercising through the Appeals Office any authority it had to make rules carrying the force of law. That is because the decision's 'binding character as a ruling stops short of third parties' and is 'conclusive only as between [the agency] itself and the [petitioner] to whom it was issued.'" (citation omitted)); *Martinez v. Holder*, 740 F.3d 902, 909–10 (4th Cir. 2014) (holding opinion by less-than-majority of agency board not entitled to *Chevron* deference).

In moving to dismiss a portion of Plaintiffs' claims here, the FEC admitted that the "required statements from declining-to-go-ahead Commissioners in three-three dismissals are '*not law.*'" FEC Mot. to Dismiss Reply 4, ECF No. 12 ("FEC Reply") (quoting *Common Cause v. FEC*, 842 F.2d 436, 449 & n.32 (D.C. Cir. 1988)). Reiterating that point, the FEC admits in its brief that the statement of reasons of three commissioners "would not be binding legal precedent or authority in *future* cases." FEC Mem. 27; *see also* AAN Mem. 16 (asserting that a statement of reasons in a three-vote panel would have "force and effect of law *in a particular case*," but not outside that case (emphasis added)); *id.* at 15 (conceding *Chevron* deference appropriate only as to "rules carrying the force of law"). As a result, under *Mead*, as the decision of the three controlling commissioners is not binding legal precedent or authority in future cases

and is not law, it does not warrant *Chevron* deference. *See Mead*, 533 U.S. at 233–34.

While majority-vote decisions of the FEC receive deference in appropriate cases, none of the reasons supporting those opinions apply to three-vote decisions like the ones under review here. In contrast to the "inherently bipartisan" nature of a four-vote panel, the three-vote panels here do not reflect a bipartisan consensus about the proper application of the law. *Cf. FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) ("*DSCC*") (noting "inherently bipartisan" nature of commission); *see also Combat Veterans for Congress Political Action Comm. v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015) (noting "[t]he four-affirmative-vote, non-delegation, and bipartisanship requirements reduce the risk that the Commission will abuse its powers.").[3] Nor do three commissioners have the authority to "formulate general policy with respect to the administration" of FECA. *DSCC*, 454 U.S. at 37 (quoting 52 U.S.C. § 30107(a)(9)); FEC Reply at 3, 4. There is no reason to afford such statements deference.

In response, the FEC and AAN rely on cases predating *Mead*: *In re Sealed Case*, 223 F.3d 775 (D.C. Cir. 2000), *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471 (D.C. Cir. 1992) ("*NRSC*"), *Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131 (D.C. Cir. 1987) ("*DCCC*"), and *Stark v. FEC*, 683 F. Supp. 836 (D.D.C. 1988). Unguided by *Mead*, however, these cases wrongly afforded deference without analyzing whether the agency action in question bound third parties. *NRSC* misread *Common Cause* to mandate deference to a non-majority statement of reasons. 966 F.2d at 1476 (citing *Common Cause*, 842 F. 2d at 439, 451). *DCCC* noted in passing that *DSCC* granted deference to a six-zero vote of the FEC, but the case considered only whether a three-vote panel need issue a statement of reasons to enable judicial review, an issue that the court recognized was distinct from the deference owed. *See* 831 F.2d at

[3] Indeed, the three other commissioners here issued their own statements of reasons, and those statements represent a view that garnered an equal amount of Commission support to the controlling commissioners' statement.

1134 (noting two issues are "analytically discrete"). *Stark* found deference only in reviewing the exercise of prosecutorial discretion. 683 F. Supp. at 840. *Mead* altered the analysis for *Chevron* deference, so these cases offer no guidance. *Mayo Found.*, 562 U.S. at 56 (noting *Mead* revised framework for determining *Chevron* deference); *Am. Fed'n. of Gov't Emps. v. Veneman*, 284 F.3d 125, 129 (D.C. Cir. 2002) (stating "plain error" to rely on pre-*Mead* jurisprudence to determine which agency action warrants *Chevron* deference).

The same is true for *In re Sealed Case*, which, unguided by *Mead*, focused on the procedural aspects of an agency adjudication to determine whether the decision had the "force of law" and did not look to whether such guidance had any binding effect. 223 F.3d at 780 (emphasis omitted). Moreover, the case arose in the highly particular situation in which the Department of Justice sought to criminally prosecute individuals for activity that the FEC had previously determined did not even give rise to a civil penalty. *Id.* Recognizing the Department lacked the "bipartisan" protection of the FEC and thus could pursue politically motivated prosecutions, the court worried that, "[i]f 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." *Id.* Here, however, there is no risk of any such double jeopardy. Rather, Plaintiffs ask this Court to review the FEC's deadlock to determine whether it is contrary to law, which is the remedy the court in *In re Sealed Case* implied was the appropriate path to correct the FEC's error, instead of a collateral criminal prosecution. *Id.*[4]

Finally, the FEC and AAN rely on *FEC v. NRA of Am.*, 254 F.3d 173 (D.C. Cir. 2001), but that case held the court owed deference to an FEC advisory opinion which "ha[s] binding

[4] Further, the case's discussion of deference is dicta as the court found that the Department's theory "had no visible statutory support" and was "without exception, faulty." *Id.* at 782, 783.

legal effect on the Commission," noting "[a]ny person involved in either the specific transaction or another materially indistinguishable transaction may rely on the opinion." *Id.* at 185. Unlike the decisions here, that advisory opinion was supported by a majority of the commissioners. *Id.* at 184 (citing Advisory Opinion 1984-24, passed on a four-to-two vote).

There is no dispute that the statements of reasons offered to justify the dismissal of Plaintiffs' complaints against AAN and AJS have no binding effect on the FEC or third parties. An agency statement which has no binding effect on future cases does not have the force of law and, thus, warrants no *Chevron* deference.

C. The FEC is Estopped from Asserting *Chevron* Deference

Even if the controlling commissioners' statements of reasons could warrant any *Chevron* deference, which they do not, the FEC further is judicially estopped from claiming any *Chevron* deference. In moving to dismiss Plaintiffs' Administrative Procedures Act ("APA") claim, the FEC declared that the statement of reasons of three commissioners is "not law," and "does not—and by statute cannot—establish any policy or regulation" that is binding authority "on behalf of the Commission." FEC Mot. to Dismiss at 16, ECF No. 5; FEC Reply at 3–4 (admitting such statement "would not be binding legal precedent or authority for future cases). The Court granted the FEC the relief it sought on the basis of these arguments. *See* Order (Aug. 13, 2015), ECF No. 19. Consequently, the FEC is estopped from changing its position now. *New Hampshire v. Maine*, 532 U.S. 742, 749–50 (2001).

In opposing Plaintiffs' motion for summary judgment, the FEC did not dispute that it is estopped from seeking *Chevron* deference, and, accordingly, has conceded that point. *Hopkins v. Women's Div.*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003) ("It is well understood in this Circuit that when a [party] files an opposition to a dispositive motion and addresses only certain arguments raised by the [other party], a court may treat those argument that the [first party] failed to address

as conceded.") *aff'd*, 98 F. App'x 8 (D.C. Cir. 2004).

While AAN attempts a perfunctory opposition, its arguments only serve to further prove that the FEC is estopped. AAN attempts to distinguish the FEC's argument in its motion to dismiss from those needed to establish *Chevron* deference here. According to AAN, the FEC argued at the motion to dismiss stage that the controlling commissioners could not "establish a binding policy or regulation on behalf of the Commission," but that here the issue is whether the controlling commissioners could "issue a decision that has the force and effect of law in a particular case." AAN Mem. 16. As recognized by *Mead*, however, an act only has the force and effect of law when it is binding on parties beyond a particular case. 533 U.S. at 233–34. Consequently, AAN's contentions do not alter that the FEC represented to the Court that the controlling commissioners' issued no binding statement of reasons, and that the Court granted the FEC the relief it sought. The FEC is therefore estopped from asserting the statements are binding now, and estopped from seeking *Chevron* deference.

D. Section 30109 Imposes No Additional Deference

Finally, the FEC appears to argue that section 30109(a)(8) imposes its own deferential review. FEC Mem. 20–21 (arguing section 30109(a)(8) review is "limited" and "extremely deferential"). But section 30109(a)(8) imposes no such deference: it asks only whether the FEC's dismissal is "contrary to law" and, if so, then authorizes judicial relief.

The cases on which the FEC relies support this point. Those decisions either grant deference under the *Chevron* doctrine, deference not warranted here for the reasons stated above, *see DSCC*, 454 U.S. at 37 (discussing deference owed to FEC under *Chevron* review); *Common Cause*, 842 F.2d at 448 (noting review is "limited" when analyzing action under "*Chevron*'s second prong"), or recognize deference afforded when a court reviews whether the FEC's decision was "arbitrary and capricious," *see Orloski v. FEC*, 795 F.2d 156, 167 (D.C. Cir. 1986)

(stating "arbitrary and capricious" review is "extremely deferential"). *Orloski*, however, recognized that the FECA's "contrary to law" standard asks two distinct questions: if "(1) the FEC dismissed the complaint as a result of an impermissible interpretation of the Act," and "(2) if the FEC's dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary and capricious, or an abuse of discretion." *Id.* at 161. This challenge raises the first question, a question over which the FEC enjoys no deference where *Chevron* is inapplicable. *Akins*, 101 F.3d at 740.

As the question presented here is whether the controlling commissioners' interpretations of the First Amendment and *Buckley*, issued in non-binding statements representing only three of the six commissioners, are "impermissible," the Court's role is to undertake a *de novo* review in determining whether those interpretations conflict with the Court's interpretation of the First Amendment and *Buckley*. If the Court concludes that the controlling commissioners erred in their interpretations, then the dismissals were "contrary to law" and warrant reversal.

II. The Court May Take Notice of Legislative Facts

In reviewing the controlling commissioners' statements of reasons *de novo*, this Court sits as an "appellate tribunal" over the FEC. FEC Mem. 20. As an appellate tribunal, the Court may take judicial notice of facts outside the administrative record "to it enable to understand the issues clearly." *Beach Commc'n, Inc. v. FCC*, 959 F.2d 975, 987 (D.C. Cir. 1992) ("'[I]t may sometimes be appropriate to resort to extra-record information to enable judicial review of agency action to become effective.' . . . In the instant case, we require additional 'legislative facts' . . . ." (citations omitted)); *see also Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 305 F.R.D. 256, 298 (D.N.M. 2015) ("To the extent that materials go towards elucidating the standard by which the Court should judge the facts of this case, rather than elucidating the facts themselves, the Court may look to, and the parties may cite to, evidence outside the

record."); *cf.* FED. R. EVID. 201 advisory committee's note ("'In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion.' . . . This is the view which should govern judicial access to legislative facts." (citation omitted)).

In support of their motion and this reply, Plaintiffs submit a number of materials to show that the FEC's unreasonably narrow readings of *Buckley*'s "major purpose" test and the First Amendment have led to an explosion of dark money directly at odds to the purposes of the FECA. The materials do not purport to explain the controlling commissioners' statements of reasons or to show material before the agency that the agency arbitrarily or capriciously excluded. The Court may therefore take notice of these materials, to the extent it finds them useful, to determine the proper reading of the First Amendment and *Buckley*. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 324 (2010) (looking to effect of law to interpret it).[5]

III. Contrary to the Controlling Commissioners' Interpretation, the First Amendment Permits Disclosure

As shown in Plaintiffs' opening motion, the controlling commissioners dismissed Plaintiffs' complaints because, in large part, they believed enforcing disclosure against AAN and AJS would not be "constitutionally acceptable." AR 1447, 1699. They interpreted the First Amendment to protect AAN and AJS from disclosure "to ensure that issue advocacy groups are not chilled from engaging in First Amendment-protected speech and association." AR 1444,

[5] In contrast, however, AAN cites in its brief a number of news articles for which it provides no basis for judicial notice. *See* AAN Mem. 9, 24–25. Unlike Plaintiffs' materials that explain the proper scope of the First Amendment and *Buckley*, AAN's materials do no more than attempt to show that the controlling commissioners were reasonable in concluding that AAN's electioneering communications were not the functional equivalent of express advocacy. The materials AAN cites therefore are not legislative facts, but adjudicative facts. *See* FED. R. EVID. 201 advisory committee's note ("Adjudicative facts are simply the facts of the particular case.") The Court, however, is limited to the adjudicative facts in the administrative record unless there is a reason to expand that record. *See Earthworks v. Dep't of the Interior*, 279 F.R.D. 180, 184 (D.D.C. 2012). The extra-record materials AAN cites are improper, and Plaintiffs respectfully ask this Court to strike them.

1696. As the weight of authority demonstrates, however, the First Amendment does not bar disclosure from organizations like AAN and AJS. [6]

In opposition, the FEC and AAN do not argue that the First Amendment, properly construed, supports the controlling commissioners' interpretation. Rather, they argue only that the controlling commissioners' interpretation was "reasonable." FEC Mem. 31, 35; AAN Mem. 12, 16. Nevertheless, as the controlling commissioners' interpreted the Constitution, their interpretation is afforded no deference. *See supra* Part I.A. Consequently, as the controlling commissioners' interpretation was contrary to the proper application of the First Amendment—which the FEC and AAN do not dispute—it was contrary to law.

A. The Controlling Commissioners' Interpretation is Contrary to the Weight of Authority

The majority of circuits, including the D.C. Circuit, have found that the First Amendment poses no barrier to requiring disclosure from groups engaged in electoral advocacy, even where the groups do not devote a majority of their spending to express advocacy.[7] The FEC and AAN make no serious attempt to dispute this weight of authority, however. They do not even mention the majority of the cases Plaintiffs cite. Others are cited in passing or in support of other points

[6] The FEC and AAN do not seriously dispute that the controlling commissioners' idiosyncratic views of the First Amendment led them to dismiss Plaintiffs' complaints. In fact, their briefs admit that "[t]he controlling [c]ommissioners' approach to the major-purpose test was based upon First Amendment concerns." FEC Mem. 31; *id.* at 19 (arguing that the FEC interprets FECA "in a manner that is sensitive to the First Amendment activity regulated by the statute"); AAN Mem. 1 ("First Amendment considerations limit political committee status to groups that either are under the control of a candidate or have as their singular 'major purpose' the 'nomination or election of a candidate.'"); *id.* at 20 (arguing "every action the FEC takes implicates First Amendments rights").

[7] *See Yamada v. Snipes*, 786 F.3d 1182, 1185 (9th Cir.2015); *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 134–39 (2d Cir. 2014) ("*VRTLC*"); *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 414–15 (5th Cir. 2014); *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1240, 1253 (11th Cir. 2013); *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 555–57 (4th Cir. 2012) ("*RTAA*"); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 470–71, 491 (7th Cir. 2012); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 42, 54–57, 59 (1st Cir. 2011); *SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010); *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 776, 786 (9th Cir. 2006); *see also McConnell v. FEC*, 540 U.S. 93, 193 (2003) (the First Amendment does not "erect[] a rigid barrier between express advocacy and so-called issue advocacy"); *accord Citizens United*, 558 U.S. at 368–69 (same); *Del. Strong Families v. Att'y Gen. of Del.*, 793 F.3d 304, 307, 313 (3d Cir. 2015).

of law. In the end, neither the FEC nor AAN make any attempt to argue that they are consistent with the controlling commissioners' interpretation of the First Amendment.

At most, AAN takes issue with *VRTLC* and *Alaska Right to Life*. AAN argues that *VRTLC* is inapposite because the Vermont law at issue did "not trigger perpetual reporting obligations." AAN Mem. 30. That law, however, required extensive reporting by political committees, similar to that imposed by FECA. The Vermont law required political committees to file reports "in the first year of the two-year general election cycle" and eight times in the second year, as well as three more reports every four years if the political committee supported or opposed local candidates. VT. STAT. ANN. TIT. 17 § 2964(a)(1), (b)(1). The need to file these reports was triggered by accepting $1,000 in contributions and making $1,000 in expenditures in any two-year period on any advertisements promoting or opposing a candidate, influencing an election, or advocating a position on a public question. *VRTLC*, 758 F.3d at 123. Thus, even though the reporting requirement was not "perpetual," it was easily triggered in any given two-year period and led to reporting comparable to the FECA's requirements for political committees.

With regard to *Alaska Right to Life*, AAN seeks to distinguish that decision by arguing that the Alaska law distinguished between "electioneering communications" and "issues communications" and only considered the former in determining political committee status. AAN Mem. 30, n.19. But that fact is immaterial. The Alaska law defined "issues communications" as those that did "not support or oppose a candidate for election to public office." *Alaska Right to Life*, 441 F.3d at 781. The law therefore did not exclude all communications beyond express advocacy, as the three controlling commissioners would in this case, but only excluded ads that did not "support" or "oppose" a candidate. Further, the Alaska

law expressly counted toward a group's political committee status its "electioneering communications," defined "comparabl[y]" to federal law. *Id.* Finally, the case recognized that the exclusion of "issues communications" is "not constitutionally compelled." *Id.* at 785.

For its part, AAN argues that these cases largely considered state level laws, and thus are not instructive as to federal law. AAN Mem. 29–30. This contention, however, mistakes the relevancy of these cases. The First Amendment binds both federal and state governments. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925). Accordingly, if the First Amendment permits state law to require disclosure by a group based on its electoral activities beyond mere express advocacy, then, *ipso facto*, it permits federal law to do the same thing.[8]

Despite the overwhelming case law permitting disclosure from groups due to electoral activity beyond their express advocacy, AAN argues that such broader disclosure would involve the regulation of speech beyond the FECA's "sufficiently clear core application" to "a penumbra that shades off into uncertainty," a result AAN argues the "First Amendment counsels against." AAN Mem. 21. AAN's argument is nonsensical. Disclosure of electioneering communications is a core component of the FECA. *See McConnell v. FEC*, 540 U.S. 93, 196 (2003); *Citizens United*, 558 U.S. at 369. Further, such disclosure involves no uncertainty: the definition of electioneering communication is clear. *McConnell*, 540 U.S. at 194.

In response to this authority, the FEC and AAN cite, with little exception, the same cases on which the controlling commissioners relied, and which, as explained in Plaintiffs' opening memorandum, provide no support for the controlling commissioners' interpretation of the First

[8] AAN also attempts to portray Plaintiffs' citation to such cases as hypocritical because Plaintiffs criticized the controlling commissioners' reliance on cases interpreting state law to decide federal law. *See* AAN Mem. 29. Plaintiffs' positions are entirely consistent. A judicial decision that a state law does not run afoul of the First Amendment is instructive as to the First Amendment's application to federal law. A judicial decision interpreting the meaning of a state law, however, has no bearing on the meaning of federal law. *Cf. Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 842 (7th Cir. 2014) (interpreting state law that did not employ a "major purpose" test); *N.C. Right to Life, Inc. v. NCRTL*, 525 F.3d 274, 286 (4th Cir. 2008) (interpreting state law's "major purpose" test).

Amendment. *See* Mot. 21 n.12, 32–35. One of those cases, *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), predated the Bipartisan Campaign Reform Act's ("BCRA") regulation of electioneering communications, and held only that a corporation could not be subject to additional burdens to which non-corporate speakers were not subject. *Id.* at 254. *MCFL* did not consider the relevancy of a group's electioneering communications to its major purpose: the issue was not even before the Court. *See id.* at 252 n.6. Indeed, in the case's sole discussion of the "major purpose" test, given as a justification for not subjecting MCFL to greater burdens than other groups, the Court stated MCFL, like any group, would be regulated as a political committee if its "*spending*," not just its express advocacy, "become so extensive that the organization's major purpose may be regarded as *campaign activity*," not merely express advocacy. *Id.* at 262 (emphasis added). Thus, to the extent *MCFL* says anything about political committee status under the FECA, it contradicts the controlling commissioners' rationale.

Wisconsin Right to Life, Inc. v. Barland, 751 F.3d 804 (7th Cir. 2014), is similarly inapposite. *Barland* considered a state law that (a) imposed no "major purpose" test at all, and (b) regulated speech that both went "well beyond" the FECA's electioneering communications and was "fatally vague and overbroad." *See id.* at 834–35. Further, *Barland*'s discussion of what activities may qualify a group as political committee was dicta and based on a misreading of *Citizens United* that wrongly excluded the Supreme Court's holding on electioneering communications. *Compare Barland*, 751 F.3d at 836, *with Citizens United*, 558 U.S. at 368–69; *see also VRTLC*, 758 F.3d at 132 n.12, 138 (criticizing *Barland*); *Indep. Inst. v. FEC*, 70 F. Supp. 3d 502, 507–08 (D.D.C. 2014) (same), *rev'd on other grounds*, No. 14-5249, 2016 U.S. App. LEXIS 3731 (D.C. Cir. Mar. 1, 2016). In contrast, when the question of which communications constitutionally could qualify a group as a political committee was squarely presented to the

Seventh Circuit, it held that communications beyond express advocacy were relevant. *See Madigan*, 697 F.3d at 471–72, 486–91.

North Carolina Right to Life v. Leake, 525 F.3d 274 (4th Cir. 2008) ("*NCRTL*"), is also unhelpful to the FEC and AAN. That case considered the proper application of a state law's political committee test and found that it was unconstitutional because the law applied political committee status to groups that were not "primar[ily], or only" engaged in influencing elections. *Id.* at 288. To the extent *NCRTL* said anything about the limit of constitutionally permissible considerations with regard to that test, the Fourth Circuit has explicitly disavowed it. *See RTAA*, 681 F.3d at 552–53, 557 (rejecting *NCRTL*'s "dicta" and stating the major purpose test "does not . . . make consideration of any other factors [than a group's express advocacy] improper").

Nor do *Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013), *N.M. Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010) ("*NMYO*"), *FEC v. Malenick*, 310 F. Supp. 2d 230 (D.D.C. 2004), or *FEC v. GOPAC*, 917 F. Supp. 851 (D.D.C. 1996), support the controlling commissioners. None considered whether electioneering communications evidence a group's major purpose under *Buckley*. *See Free Speech*, 720 F.3d at 797–98 (rejecting challenge asserting "major purpose" was vague because it looked at more than a group's express advocacy); *NMYO*, 611 F.3d at 678–79 (evaluating group that engaged in neither express advocacy nor electioneering communications and, at most, devoted 7% and .5% of its yearly budgets to campaign activity); *Malenick*, 310 F. Supp. at 235–37 (finding defendant satisfied major purpose test on basis of its stipulated goals and activities); *GOPAC*, 917 F. Supp. at 858 (finding group focused on state and local level elections not covered by the FECA).

To supplement the inapposite authority on which the controlling commissioners rely, the FEC cites *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981), a

case which predates the BCRA's regulation of electioneering communications by more than twenty years. The FEC argues that the case supports the claim that the FECA's political committee status regulates a "delicate" First Amendment area, and thus a court should not "read into it oblique inferences of Congressional intent." FEC Mem. 32 (quoting 655 F.2d at 394). It is not in dispute, however, that the controlling commissioners looked to the First Amendment, not congressional intent, in misapplying the major purpose test, a that fact demonstrates the lack of *Chevron* deference owed to the controlling commissioners. Further, it would be impossible to read "oblique inferences of Congressional intent" into the major purpose test because that test is not a creation of Congress at all. Moreover, *Machinists* recognition that political committee status should be construed in light of "constitutional problems about which '*Buckley* and its lower court predecessors' were concerned," FEC Mem. 32–33 (quoting 655 F.2d at 394), is exactly the point: nearly every court to consider the matter, including the Supreme Court, has found disclosure triggered by electioneering communications raises no constitutional problem. In light of that chorus of authority finding no constitutional concern, *Buckley* must be reasonably interpreted to allow disclosure.[9]

The conclusion that the First Amendment does not bar requiring disclosure from groups like AAN and AJS also follows from the narrow construction the major purpose test should

[9] For its part, AAN also cites out-of-circuit and unreported authority that predates BCRA's regulation of electioneering communications and *McConnell*. *See Fla. Right to Life, Inc. v. Mortham*, No. 98-770CIVORL19A, 1999 WL 33204523 (M.D. Fla. Dec. 15, 1999), *aff'd in part Fla. Life, Inc. v. Lamar*, 238 F.3d 1288 (11th Cir. 2001) (per curiam). This case does not support the controlling commissioners. First, on interlocutory appeal, the defendant conceded that the Florida political committee statute at issue was "overbroad" and thus unconstitutional. *Lamar*, 238 F.3d at 1289. As the issue was not in dispute before the Eleventh Circuit, the court's decision could not authoritatively decide it. Further, more than a decade after *Lamar*, the Eleventh Circuit upheld Florida's revised political committee law, *Worley*, 717 F.3d at 1253, even though the law was not limited to "organizations whose major purpose is engaging in 'express advocacy,'" *Mortham*, 1999 WL 33204523 at *4 (emphasis omitted). Rather, *Worley* upheld a law which required any group that was not "formed for purposes other than to support or oppose issues or candidates" and that spent more than $500 in a year on express advocacy to register as a political committee, appoint a treasurer, and file regular disclosure reports. *See Worley*, 717 F.3d at 1240–41, 1252 n.7, 1253. To the extent *Mortham* carried any weight, it ceased to do so after *Worley*.

receive. In establishing the test, *Buckley* created an exception to the statutory scheme crafted by Congress in the FECA. No party disputes that the sole statutory test—the expenditure or acceptance of contributions of more than $1,000 in a calendar year—was easily met here by both AAN and AJS. FEC Mem. 14. Consequently, pursuant to Congress's command, AAN and AJS would have to register as political committees, identify a treasurer, and file reports disclosing their contributors. *Buckley* carved out from the plain statutory test those groups lacking the "major purpose" to elect or nominate candidates, believing the regulation of such groups would not "fulfill the purposes of the Act." *Buckley*, 424 U.S. at 79. *Buckley*, therefore, created an exception to FECA's statutory text, and exceptions are read narrowly. *C.I.R. v. Clark*, 489 U.S. 726, 739 (1989) ("[W]e usually read the exception narrowly in order to preserve the primary operation of the [statute]."). As the Constitution does not bar FECA's political committee disclosure rules, and disclosure of groups heavily involved in electioneering communications would "fulfill the purposes of the Act," *Buckley*'s exception should be read narrowly to preserve the primary operation of the FECA and to not exclude those groups.

In the end, even the FEC and AAN concede that the First Amendment "permi[ts]" treating AAN and AJS as political committees, but argue that no case has directly commanded the FEC to do so. FEC Mem. 40; AAN Mem. 28. Of course, if the First Amendment permits disclosure from AAN and AJS, then the controlling commissioners' interpretation that the amendment does not permit disclosure from them was contrary to law, and the dismissals based on that interpretation must be reversed. The absence of a decision directly commanding the FEC to treat AAN and AJS as political committees is beside the point: Plaintiffs seek that relief here.[10]

[10] The FEC's and AAN's argument is little more than a repackaging of their *Chevron* deference claim: that unless there is some inescapable judicial precedent, then the FEC has free reign to decide to whom it will, and will not,

In sum, the great weight of authority contradicts the controlling commissioners' assertion that the First Amendment bars treating AAN and AJS as political committees on the basis of their electioneering communications. It is indisputable that the weight of authority holds that the First Amendment permits the FEC to take account of a group's communications beyond mere express advocacy when applying political committee rules.

B. The FECA's Political Committee Disclosure Obligations Are Substantially Related to Plaintiffs' Undisputed Interest in AAN and AJS

In moving for summary judgment, Plaintiffs noted the public's interest in disclosure from groups heavily involved in electioneering, like AAN and AJS, is substantially related to the FECA's regulation of those groups as political committees, and that such substantial relation satisfied the First Amendment. Mot. 22, 24. The FEC and AAN criticize this analysis, claiming it is "results-oriented" and arguing that the voting public's interest in disclosure based on spending on electioneering communications does not justify classifying groups like AAN and AJS as political committees. Both critiques miss the mark.

The FEC first faults Plaintiffs' substantial relation analysis as "results-oriented." FEC Mem. 48. The First Amendment, however, commands a "results-oriented" approach. A law survives the "exacting scrutiny" applied to disclosure laws like the FECA's political committee rules when the result of the law is "substantial[ly] relat[ed]" to a "sufficiently important" government interest. *Citizens United*, 558 U.S. at 366–67. Accordingly, because the result of treating AAN and AJS as political committees under the FECA would be substantially related to the concededly "important" interest in "knowing who is speaking about a candidate shortly

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apply the FECA's political committee rules. For the multitude of reasons stated above, *see supra* Part I., *Chevron* deference is inappropriate.

before an election," *id.* at 369, that result satisfies constitutional scrutiny.[11]

It is undisputed that Plaintiffs' and the public's interest in the financial sources behind AAN's and AJS's communications is sufficiently important to justify disclosure. At a minimum, all parties agree that the FECA's event-driven electioneering communications rules constitutionally apply to AAN's and AJS's advertisements. FEC Mem. 49, AAN Mem. 28; *see also Citizens United*, 558 U.S. at 369. Accordingly, the sole question is whether treating AAN and AJS as political committees because of their extensive spending on both electioneering and express advocacy is "substantial[ly] relat[ed]" to that same interest. *See Citizens United*, at 366–67. To ask the question is to answer it: registering and requiring AAN and AJS to report as political committees would provide Plaintiffs and the public with information about who is speaking about a candidate shortly before an election by funding communications through the groups. *See id.* That result therefore justifies the application of the FECA to the groups.

Nevertheless, AAN argues that, despite this undisputed interest, its ads were "genuine issue ads" and that voters have no important interest in their financial support. Voters, however, have an important interest in knowing "who is speaking about a candidate shortly before an election." *Citizens United*, 558 U.S. at 369. That interest it not lessened when, in addition to speaking about a candidate, the communication also speaks about a "legislative issue."[12] Because voters have an interest in the transparency that "appl[ies] in full" to "the entire range of 'electioneering communications,'" then voters have an interest in the transparency of even

[11] *See also McConnell*, 540 U.S. at 196 (providing other important interests served by disclosure); *Buckley*, 424 U.S. at 66–67 (same).

[12] Because both express advocacy and electioneering communications relate to "core" areas of the First Amendment, *see Buckley*, 424 U.S. at 47–48, they receive the highest constitutional protections for any speech. Thus, "genuine issue ads" can receive no greater protection than express advocacy or electioneering communications. The focus then is on the governments' interest in regulating the speech and whether there is a substantial relation between that regulation and the interests served. *See Citizens United*, 558 U.S. at 366–67. So long as the "genuine issue ad" meets the qualifications of either an electioneering communication or express advocacy, a substantial relation exists between the public's interest in transparency and the FECA's disclosure rules. *See id.* at 369.

AAN's and AJS's "issue ads." *McConnell*, 540 U.S. at 196.

Further, AAN's and AJS's ads were at least as related to the nomination or election of candidates as Citizens United's electioneering communications—ads for which the Court found the public had a sufficiently important interest in disclosure. *Citizens United*, 558 U.S. at 369. Citizens United's electioneering communications consisted of advertisements asking viewers to purchase the group's movie. *Id.* Nonetheless, despite the fact that the ads "only pertain[ed] to a commercial transaction" and not to any election, the Court recognized the "public has an interest in knowing who is speaking about a candidate shortly before an election." *Id.* In contrast, AANs ads were far more election-related, leveling accusations that candidates voted to give "Viagra" to "convicted rapists," for instance, and praising candidates who did not yet hold any office and thus had no constituents for actions they would take if elected. *See* AR 1649–54.[13] If the public had an interest in the disclosure of Citizens United's movie ads, they have even more of an interest in AAN's and AJS's ads.[14]

Nonetheless, the FEC argues that, even if the public has an interest in disclosure, the FECA represents an important balance between that interest and "conflicting privacy interests." FEC Mem. 48. That is not in dispute. Nevertheless, the privacy concerns at issue are reflected in the First Amendment scrutiny applied to—and found outweighed by—FECA's disclosure laws. *See Buckley*, 424 U.S. at 64 ("[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment."). By finding that a group's electioneering communications may justify disclosure,

[13] AAN also attempts to argue that only six of its electioneering communications are at issue, accounting for approximately $3.6 million of its spending. AAN Mem. 8. This simply misstates the record. Plaintiffs' complaint described, *as examples*, six ads from AAN, AR 1483–84, but Plaintiffs alleged that AAN spent more than $14 million on electioneering communications, AR 1482; *see also* AR 1649 n.17 ("Although six of these advertisements are specifically identified in the Complaint, all of the advertisements identified in this report are included in the Complaint's allegations.")

[14] AJS's ads were as similarly election related as AAN's ads. AR 1404–07, 1428–29.

the Court squarely found that the public's interest in disclosure outweighs the privacy interests involved. *See Citizens United*, 558 U.S. at 369; *McConnell*, 540 U.S. at 197–98.

AAN also argues that, regardless of the public's interest in its financial backers, the disclosure of those backers' identities could "mislead" voters about who really supports its political activities. AAN Mem. 28. The risk that a voter could potentially misunderstand AAN's and AJS's disclosures, however, does not undermine the substantial relation between voters' interest and FECA's political committee disclosure rules. Indeed, the FEC is constitutionally barred from considering the risk that voters will not interpret the information in the way that AAN and AJS prefer. The government may not regulate speech with an eye to "the advantages of [citizens] being kept in ignorance." *Va. St. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 769 (1976); *accord Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 228 (1989) (rejecting government's "claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them"). While AAN might prefer that voters be kept in ignorance as to its contributors, the FEC may not look to that interest in refusing to enforce the FECA. The public has an interest in knowing who is speaking about a candidate shortly before an election and must be allowed to interpret the meaning of that information for themselves. *See McConnell*, 540 U.S. at 197 ("Plaintiffs never satisfactorily answer the question of how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public."). To the extent any candidate or contributor worries that voters may incorrectly conclude that one supports the other, "the best means to [avoid misunderstanding] is to open the channels of communication rather than to close them down." *Va. St. Bd. of Pharmacy*, 425 U.S. at 770.

Finally, voters' recognized interest in disclosure of the contributors behind electioneering

communications is substantially related to the organization, registration, and continual reporting requirements the FECA places on political committees. In crafting the framework for political committee disclosure, Congress understood that event-driven disclosure was insufficient to satisfy voters' legitimate and important interests.[15] Courts have recognized that the requirement that groups heavily involved in communications regulated by the FECA register, organize, and report as political committees serves the public's "interest in knowing who is speaking about a candidate and who is funding that speech," *SpeechNow*, 599 F.3d at 698, "deters and helps expose violations of other campaign finance violations," *id.*, and ensures the public receives "reliable information," *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1007 (9th Cir. 2010), without "impos[ing] much of an additional burden" on the group, *SpeechNow*, 599 F.3d at 697; *accord Yamada*, 786 F.2d at 1195; *Justice v. Hosemann*, 771 F.3d 285, 300 (5th Cir. 2014), *cert. denied* 2016 U.S. LEXIS 2404 (Apr. 4, 2016); *Worley*, 717 F.3d at 1250. The FEC and AAN concede as much: they admit that independent expenditures may qualify a group as a political committee even though independent expenditures are also the subject of event-driven disclosure rules. *See* 52 U.S.C. § 30104(c). There is no basis to treat electioneering communications differently. Disclosure from groups heavily involved in electioneering communications equally serves the same goals as disclosure by groups heavily involved in independent expenditures. The FEC and AAN simply provide no explanation why the voters'

[15] Indeed, AAN's event-driven electioneering communication disclosures prove that this disclosure does not—as AAN's contends—"satisf[y] the government's informational interest by provid[ing] precisely the information necessary to monitor [a speaker's] independent spending activity and its receipt of contributions." AAN Mem. 4 (quotation marks omitted). AAN has filed numerous one-off electioneering communication reports, but disclosed none of the contributors behind its ads. *See, e.g.*, AAN Form 9 (Oct. 15, 2010), Ex. 1 (reporting ".00" in contributions, but $875,0000 in electioneering communications); AAN Form 9 (Oct. 15, 2010), Ex. 2 (reporting ".00" in contributions, but $850,000 in electioneering communications); AAN Form 9 (Oct. 14, 2010), Ex. 3 (reporting ".00" in contributions, but $1,450,000 in electioneering communications). Exhibits refer to the exhibits in the attached Declaration of Stuart McPhail in Support of Plaintiffs' Reply in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment, filed herewith.

interest in accurate and complete reporting justifies imposing registration and organizational burdens on groups heavily involved in independent expenditures, but would not justify imposing the same burdens on groups heavily involved in electioneering communications.

In sum, Plaintiffs and voters have an indisputably legitimate interest in learning the source of AAN and AJS's funds, funds which were used to create independent expenditures and electioneering communications. Ordering AAN and AJS to register, organize, and report as political committee is substantially related to Plaintiffs' and the public's interest. Accordingly, the First Amendment allows the FECA's political committee rules to apply to AAN and AJS, and the controlling commissioners' conclusion otherwise was contrary to law.

IV. Contrary to the Controlling Commissioners' Conclusion, Communications Beyond Express Advocacy Demonstrate a Group's Major Purpose

Besides wrongfully interpreting the First Amendment to bar disclosure, the controlling commissioners misinterpreted *Buckley*'s "major purpose" test to exclude a group's electioneering communications. A group's electioneering communications, however, are highly relevant to determining if the group's major purpose is the nomination or election of a candidate, and the controlling commissioners' interpretation otherwise was contrary to law.

A. Contrary to the Controlling Commissioners' Interpretation of *Buckley*, Electioneering Communications Evidence a Group's "Major Purpose"

In upholding the FECA's regulation of electioneering communications, the Supreme Court found that such communications are "identical in important respects" to independent expenditures. *McConnell*, 540 U.S. at 126–29. Both are "used to advocate the election or defeat of clearly identified candidates" and "are intended to affect election results." *Id.* Recognizing the similarity of electioneering communications and independent expenditures, the Supreme Court held that "the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements" for independent expenditures "apply in full" to "the entire range of

'electioneering communications.'" *Id.* at 196. That decision concurred with Congress's understanding that electioneering communications "constitute[d] campaigning every bit as much as . . . any ad currently considered to be express advocacy," 147 Cong. Rec. S2433, 2455 (daily ed. Mar. 19, 2001) (Sen. Snowe), as well as the parallel regulations that the FECA imposes on independent expenditures and electioneering communications, *see* 52 U.S.C. §§ 30104(b), (c), (f); 30116(a)(7)(B), (C), 30120(a), 30121(a)(1)(C).

Importantly, in upholding BCRA's disclosure regime for electioneering communications, the Court expressed no concern with the fact that electioneering communications could be used to qualify a group as a political committee, despite the fact that the parties and Justice Kennedy in dissent raised with the Court the concern that BCRA's regulation of electioneering communications could "force[] issue advocacy groups whose major purpose is not partisan politics to be treated as political committees." ACLU Juris. Statement at 19, *McConnell v. FEC*, No. 02-1734 (May 29, 2003), Ex. 4; *accord McConnell*, 540 U.S. at 332–33 (Kennedy, J., concurring in part and dissenting in part) (citing ACLU's briefing and arguing BCRA might cause groups whose "primary purpose is [not] to influence elections . . . to operate as if they were"). Despite this concern having been put to the Court, it nonetheless found that *Buckley*'s holdings as to the FECA's disclosure requirements—the political committee disclosure requirements not excluded—"apply in full" to electioneering communications. *McConnell*, 540 U.S. at 196.

Nevertheless, the FEC and AAN argue that the controlling commissioners had a "rational basis" to exclude electioneering communications from the analysis of AAN's and AJS's major purpose. AAN Mem. 21; FEC Mem. 35.[16] The authority on which the FEC and AAN rely,

[16] As a preliminary matter, on the *de novo* review warranted here, Defendants must show more than that the controlling commissioners had a "rational basis" for their decision. *See supra* Part I. AAN's attempt to recast the

however, fails to demonstrate the correctness of the controlling commissioners' interpretation of *Buckley*. They cite no cases holding that electioneering communications may not count toward satisfying *Buckley*'s "major purpose" test. They do not distinguish or otherwise argue against the reasoning outlined in the majority of circuits which have found that a group's activities beyond its express advocacy are relevant to demonstrating its major purpose. *See supra* Part III.A.[17] Nor do the FEC or AAN distinguish the prior FEC decisions which looked beyond a group's express advocacy to determine the group's major purpose. *See* Mot. 29–30 & 37 n.21 (discussing FEC, Political Committee Status, 72 Fed. Reg. 5595 (Feb. 7, 2007) ("Supp. E&J"); MURs 5511, 5525 (Swiftboat); MUR 5754 (MoveOn.org); MUR 5753 (League of Conservation Voters)).

Instead, they attempt to rely on other authority which does not actually support the controlling commissioners' exclusion of all non-express advocacy from their analysis. The FEC and AAN make much of *WRTL II*'s statement that "not all electioneering communications are the functional equivalent of express advocacy." *See* FEC Mem. 39 (citing *WRTL II*, 551 U.S. at 469–70); *accord* AAN Mem. 20 (same). Yet *WRTL II* only drew the distinction between electioneering communications and express advocacy in an attempt to show why its holding did not conflict with previous authority upholding bans on corporate express advocacy. *See* 551 U.S. at 461. *Citizens United*, however, struck down the ban on corporate express advocacy, vacating the distinction drawn by *WRTL II*. *See Citizens United*, 558 U.S. at 395 (Stevens J.,

issue as "line drawing" does not change that burden. The cited authority either relate to *Chevron*, *see, e.g.*, *ViroPharma, Inc. v. Hamburg*, 898 F. Supp. 2d 1, 21 (D.D.C. 2012) ("[I]nterpretive line drawing is at the heart of *Chevron* deference."); *Exxonmobile Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1083 (D.C. Cir. 2002) (invoking *Chevron* deference), or to arbitrary and capricious review, *see, e.g.*, *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2013) (discussing deference to agency line drawing under arbitrary and capricious review). As *Chevron* and arbitrary and capricious standards are inapplicable here, AAN's authority is inapposite.

[17] The FEC argues that none of these decisions "requir[ed] that the FEC include non-express-advocacy spending in performing its major-purpose analysis." FEC Mem. 37. Of course, the issue here is not whether the FEC is in contempt of a previous court order, only whether the dismissals were contrary to law.

dissenting) (noting majority opinion "overrul[es] or disavow[s]" *WRTL II*). By contrast, with regard to disclosure, *Citizens United* squarely held "disclosure requirements [need not be] limited to speech that is the functional equivalent of express advocacy." *Id.* at 369.

The remaining authorities on which they rely are similarly inapposite. Some, like *WRTL II*, considered the propriety of *bans* on speech and not *disclosure* requirements. *See, e.g.*, *MCFL*, 479 U.S. at 241. Several cases do not discuss electioneering communications at all, *NMYO*, 611 F.3d at 678; *Machinists*, 655 F.2d at 394; *Malenick*, 310 F. Supp. 2d at 236 n.7; *GOPAC*, 917 F. Supp. at 858; *Mortham*, 1999 WL 33204523 at *2, or actually support finding a group's electioneering communications are relevant, *Free Speech*, 720 F.3d at 797–98 (rejecting argument that "major purpose" test is limited to express advocacy); *RTAA* 681 F.3d at 555–57 (same); *see also MCFL*, 479 U.S. at 262 (noting group may be treated as a political committee based on its "spending" and "campaign activity," not simply its express advocacy). Others discussed relevant material in dicta that is contradicted by other circuit authority and is heavily criticized, *Barland*, 751 F.3d at 842; *see also VRTLC*, 758 F.3d at 132 n.12, 138; *Madigan*, 697 F.3d at 471–72, 486–91, or have been disavowed, *NCRTL*, 525 F.3d 274; *see also RTAA*, 681 F.3d at 552–53, 557.

Without authority on which to rely, the FEC and AAN argue that Congress did not intend for a group's electioneering communications to go toward qualifying the group as a political committee. The FEC argues that BCRA did not make electioneering communications "subject to FECA's then-existing disclosure regime, such as the existing reporting requirements for political committees." FEC Mem. 38. That is true, but also entirely irrelevant because, as the FEC recognizes, *Buckley*'s major purpose test *is not in the statute at all*. *See* FEC Mem. 43–44 (arguing "Congress has not expressed *any* intent" regarding the scope of the major purpose test

because the test was established by the Court, not Congress). It is not surprising that Congress did not attempt to amend what was not in the statute. Rather, the relevant point is that, with regard to those disclosure regimes actually in the statute, Congress imposed nearly identical disclosure requirements for electioneering communications as existed for express advocacy. Given the parallel interest in disclosure under the statutory regimes, it would be exceedingly odd to find a separation of interest with regard to political committee status.

The FEC further relies on the difference in verbiage used by the FECA in describing express advocacy and electioneering communications. Under the FECA, express advocacy communications are described as "expenditures." 52 U.S.C. § 30101(17). Electioneering communications are described as "disbursements." 52 U.S.C. § 30104(f). The FEC places far too much weight on the statute's use of synonyms. First, it is more than reasonable that Congress chose not to describe electioneering communications as expenditures. To do so would introduce confusion where the Supreme Court construed "expenditure" to mean express advocacy. *Buckley*, 424 U.S. at 80. Describing electioneering communications as a type of expenditure could imply that electioneering communications must contain express advocacy—the exact opposite of the result sought by Congress. *See McConnell*, 540 U.S. at 126–27. Second, even the FEC recognizes that the terms "expenditure" and "disbursement" are interchangeable in evaluating which activities could evidence a group's major purpose. *See* Supp. E&J, 72 Fed. Reg. at 5597 ("FECA further defines the terms 'contribution' and 'expenditure'" as "receipts and *disbursements* made 'for the purpose of influencing any election for Federal office'" (emphasis added)); *see also id.* at 5605 (noting FEC found group satisfied major purpose requirement where "91% of its reported *disbursements* were spent on advertisements directed to Presidential battleground states" (emphasis added)).

Nor does Senator Jeffords' statement, partially quoted by AAN, support treating electioneering communications differently than independent expenditures. *See* AAN Mem. 31, n.20. To the contrary, it proves the point that Congress in fact viewed both types of communication as political. In a later portion of the statement omitted by AAN, Senator Jeffords recognizes electioneering communications, which he calls "sham issue ads," "are trying to influence [voters'] vote for or against a particular candidate." 147 Cong. Rec. S2812, S2813 (Mar. 23, 2001) ("[T]he public correctly perceives that electioneering communications are meant to influence their vote."). Even the portion of the Senator's comments quoted by AAN does not support excluding electioneering communications. As BCRA, the legislation being debated, prohibited corporations like the Sierra Club and the National Right to Life Committee from engaging in electioneering communications, such communications could not have required them to "create a PAC" or "disclose[e] all donors." 147 Cong. Rec. at S2812–13.

Without any authority upon which to rely, AAN argues that electioneering communications should not trigger political committee disclosure because not all electioneering communications are motivated by a desire to elect or defeat a candidate. AAN Mem. 2 (arguing "'[e]lectioneering communications' can also function as 'genuine issue ads'"). The Supreme Court, however, has rejected the use of intent-based tests to determine whether or not a particular communication may be subject to the FECA. *Buckley*, 424 U.S. at 42–43. Even if AAN's genuine subjective motive was unrelated to electing or defeating candidates—a highly unlikely possibility considering the content and timing of the ads, *see* Mot. 8–10—that would not render AAN immune from electioneering communications regulation. AAN's argument also would prove too much. After all, the FECA imposes event-driven disclosure on all electioneering communications, regardless of the subjective motive behind them, and AAN does not suggest

such disclosure would be improper. *McConnell*, 540 U.S. at 196 (disclosure justified for "entire range" of electioneering communications); *see also Indep. Inst. v. Williams*, 812 F.3d 787, 792 (10th Cir. 2016) (holding "issue advocacy" not immune from disclosure).

Finally, AAN also makes the peculiar argument that its electioneering communications cannot count toward its political committee status because it must receive "clear advance notice" about which speech is subject to FECA. AAN Mem. 20. *McConnell*, however, explicitly found that the definition of electioneering communications is not vague, 540 U.S. at 194, and so provides AAN with clear notice of which ads will trigger disclosure. Further, clear precedent from the FEC and courts indicate that the relevant activity for assessing a group's major purpose is not limited to its express advocacy, and AAN identities no authority on which it could reasonably rely to the contrary. *See supra* Part III.A. AAN's argument also is contradicted by its own assertion that the FEC may reasonably use a "flexible approach" in applying *Buckley*'s major purpose test. AAN Mem. 35. A flexible approach would give AAN less "clear advance notice" of what activities would qualify it as a political committee than would inclusion of clearly defined electioneering communications.

In sum, there is no authority to support the controlling commissioners' reading of *Buckley* to exclude electioneering communications from the analysis of a group's major purpose. The FEC and AAN provide no authority or argument to support the controlling commissioners' cramped interpretation of *Buckley*. They cannot because the controlling commissioners' interpretation of *Buckley* was contrary to law.

B. The Controlling Commissioners' Categorical Exclusion of Electioneering Communications Is Contrary to Law

Unable to show the controlling commissioners' categorical exclusion of AAN's and AJS's electioneering communications is consistent with *Buckley*, the FEC and AAN attempt to

recast the issue by arguing that the controlling commissioners actually evaluated the electioneering communications individually and determined, on a "case-by-case" basis, that none of AAN's or AJS's electioneering communications indicated a purpose to nominate or elect candidates. That supposition, however, is not supported by the record. Indeed, even in arguing it, the FEC and AAN concede that the controlling commissioners in fact excluded electioneering communications categorically.

The three controlling commissioners' statements of reasons provide no indication that they thought any activity beyond a group's express advocacy could show a group operated with the requisite major purpose. Rather, the controlling commissioners expressly limited the relevant universe of activities to the groups' express advocacy. *See, e.g.*, AR 1448–49, 1700–01 (construing case law to limit relevant spending to "express advocacy"); AR 1458–59, 1710–11 (rejecting OGC's consideration of ads "not contain[ing] express advocacy" as "indicative of major purpose"); AR 1463, 1716 (concluding groups were not political committees because they only "occasionally engage[d] in express advocacy"). Indeed, the FEC admits in its brief that the controlling commissioners "reviewed both AJS's and AAN's 'overall spending *on express advocacy* against [their] overall spending on activities unrelated to campaigns." FEC Mem. 36 (emphasis added) (quoting AR 1456) [18]; *see also id.* (describing controlling commissioners as "[d]efining relevant federal campaign spending" for purposes of finding a group satisfies *Buckley*'s major purpose test "as spending on independent expenditures—express advocacy").

Nevertheless, AAN asserts that the controlling commissioners considered not only the

[18] The FEC also cites AR 1708, although the controlling commissioners' formulation of the test there is slightly different. There, the controlling commissioners state the test as one that "compare[s] a group's spending on *electoral advocacy* against its spending on activities unrelated to campaigns." AR 1708 (emphasis added). The controlling commissioners do not define what activities constitute "electoral advocacy." Nevertheless, from the context, it is clear that by "electoral advocacy," the controlling commissioners meant express advocacy alone. *See, e.g.*, AR 1711 (chastising the OGC for considering any communications beyond AAN's "express advocacy").

groups' express advocacy, but also ads that were the "functional equivalent" of express advocacy. AAN Mem. 17, 19. AAN fails to recognize, however, that per FEC regulation, an ad that is the "functional equivalent" of express advocacy is, by definition, express advocacy. *See WRTL II*, 551 U.S. at 469–70 (defining express advocacy's "functional equivalent" as ads that are "susceptible of no reasonable interpretation other than as appeal to vote for or against a specific candidate"); 11 C.F.R. § 100.22 (defining express advocacy as ads that "can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)"). Thus, AAN only proves Plaintiffs' point: the controlling commissioners categorically refused to look at any activities beyond the groups' express advocacy. *See also* AAN Mem. 11 (stating controlling commissioners' refused to consider "[e]lectioneering communications" that "*do not expressly advocate* a candidates election or defeat" as "indicative of a major purpose" (emphasis added)). Moreover, limiting the relevant material to express advocacy and its functional equivalent, as AAN seeks to do, would be improper. "[D]isclosure requirements," like those imposed by the FECA on political committees, need not be "limited to speech that is the functional equivalent of express advocacy." *Citizens United*, 558 U.S. at 369.

As the statements of reasons make clear, the controlling commissioners categorically excluded from consideration all communications beyond express advocacy in contradiction of the weight of authority and the FEC's previous statement of policy asserting that the FEC would look at a group's "overall conduct" and evaluate that conduct on a "case-by-case" basis. Supp. E&J, 72 Fed. Reg. at 5597.[19] Rather, the controlling commissioners imposed the hard line, rejected by courts, that the political committee status determination must turn solely on the

[19] While the Supplemental E&J's interpretation of *Buckley*'s major purpose test does not warrant *Chevron* deference, the commissioners must nevertheless provide a sufficient explanation for a change in position from that statement of policy. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983).

evaluation of a group's express advocacy. *RTAA*, 681 F.3d at 556–57; *Free Speech*, 720 F.3d at 797.

Counting all of AAN's and AJS's electioneering communications toward their political committee status would not, however, run afoul of the FEC's court-approved policy of case-by-case adjudication, as AAN argues. AAN Mem. 31. The FEC may continue to resolve complaints through adjudication, consistent with judicial approval. *RTAA*, 681 F.3d at 556–57; *Shays v. FEC*, 511 F. Supp. 2d 19, 29 (D.D.C. 2007). Further, counting a group's electioneering communications toward its major purpose would not prevent the FEC from looking at other activity on a case-by-case basis—for example, communications which promote or attack a candidate, or donations to other politically active organizations—to see whether this activity would support finding that the group's major purpose is the nomination or election of candidates. Nonetheless, the mere fact that the FEC may determine a group's major purpose through adjudication rather than defining the matter through regulation does not give the FEC license to misapply *Buckley*.

The controlling commissioners categorically treated electioneering communications as not indicative of AAN's and AJS's major purposes, contrary to a proper interpretation of *Buckley*. Courts, Congress, and experience all demonstrate that electioneering communications are as demonstrative of a group's "major purpose" as the group's express advocacy. The controlling commissioners' conclusion otherwise was contrary to law, and the dismissals premised on that error warrant reversal.

C. Advertisements that Promote, Attack, Support, or Oppose Candidates Also Indicate a Group's Major Purpose

The controlling commissioners also took exception to the OGC's analysis of AAN's and AJS's electioneering communications examining whether they "support or oppose" a candidate.

AR 1459, 1711. But in doing so, the three commissioners disregarded the FEC's prior practice to consider such ads in analyzing a group's major purpose, *see* Mot. Ex. 24 ¶ 35, Ex. 26, and their attempt to argue that intervening authority requires an alteration in that analysis is hollow, *see, e.g.*, *supra* Part IV.A. Accordingly, their refusal to consider such ads was contrary to law.

In response, AAN rather confusedly argues that, despite the Supreme Court's explicit holding that a "'promote,' 'oppose,' 'attack,' and 'support'" ("PASO") standard is not vague, *see McConnell*, 540 U.S. at 170 n.64, the standard is nonetheless vague as to anyone like AAN who is not a "party speaker[]." AAN Mem. 32 n. 21. A law's vagueness, however, is determined on an objective basis. *McConnell*, 540 U.S. at 170 n.64 (concluding that PASO standards "give the person of ordinary intelligence a reasonable opportunity know what is prohibited" (internal quotation marks omitted)).[20] In deciding that a PASO standard is not vague, *McConnell* found that the standard was clear to a "person of ordinary intelligence," *id.*, which, presumably, would at least include sophisticated parties like AAN and AJS, groups with able legal counsel and multi-million dollar budgets.

In short, the controlling commissioners interpreted *Buckley* to exclude groups' ads which promote, attack, support, or oppose a candidate. That interpretation is contrary to law. Accordingly, as the dismissals are premised on that misinterpretation, they should be reversed.

V. The Major Purpose Test Looks to a Group's Calendar Year Spending

In addition to excluding AAN's and AJS's non-express advocacy communications, the controlling commissioners also compared that improperly cramped amount to an improperly broad category of spending: each group's spending over its "lifetime of existence." AR 1462, 1714. Plaintiffs' opening brief argued that such a broad time frame contradicted the FECA and

[20] *See also United States v. Williams*, 553 U.S. 285, 304 (2008) ("[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.").

common sense. In response, the FEC and AAN argue that the controlling commissioners in fact adopted no such test, and that a calendar year test is improper and contradicts FEC precedent. Those arguments are mistaken.

Despite the FEC's and AAN's assertions otherwise, the controlling commissioners did not conduct a flexible analysis that looked to changes in spending to see whether they represented a "deviation or a new norm" for the group in question. FEC Mem. 45. Rather, the controlling commissioners explicitly employed a test that looked to the group's aggregated activities over its "lifetime of existence." AR 1458, 1462, 1708, 1714. The FEC and AAN cannot now change that test that the controlling commissioners applied.

A "lifetime of existence" test, however, directly conflicts with the FECA. The FECA unambiguously states the relevant period for evaluating a group's political committee status is a single calendar year. 52 U.S.C. § 30101(4). Neither *Buckley* nor any subsequent judicial opinion supplanted the statute's calendar year measure, and the FEC and AAN do not argue otherwise.[21]

Moreover, as discussed in Plaintiffs' opening brief, a "lifetime of existence" test would have absurd results, as a group like AJS could spend with abandon on express advocacy knowing that its long history of prior spending would keep it from crossing the FEC's political committee line. The FEC's mischaracterizes this argument, however, by asserting that Plaintiffs are suggesting that AJS cunningly "organized itself" more than a decade ago with full foresight of the eventual rulings in *WRTL II* and *Citizens United*, and "preemptively diluted" its spending in

[21] To the extent *Buckley* is silent on the time period to evaluate a group's major purpose, the FECA's unambiguous calendar-year applies. Assuming, however, that *Buckley*'s major purpose test is interpreted to include its own temporal focus, a proper interpretation of *Buckley* would still focus on a group's major purpose within a calendar year, a conclusion neither the FEC nor AAN disputes. At best, they argue that a lifetime of existence test is "reasonable," FEC Mem. 42; AAN Mem. 34, but because the Court owes no deference to the controlling commissioners' interpretation of *Buckley*, the FEC and AAN fail to carry their burden to show that the controlling commissioners' interpretation was not contrary to law.

anticipation of its activities a decade into the future. FEC Mem. 45. Plaintiffs make no such claim of AJS's prescience. As Plaintiffs argue, and the FEC admits, organizational purposes can "change over time," *id.*, and that is exactly what happened with AJS. Reacting to the change in legal landscape, the group refocused itself on elections. In other words, it "put its money where its mouth is" by spending vast sums on campaign activities. *Id.* AJS's lack of a qualifying major purpose at its time of organization is not determinative. The major purpose test can and does respond to changes in a group's activities, and a calendar year focus allows it to.

Moreover, the FEC does not respond to the central absurdity involved in a "lifetime of existence" test: it would make the time at which a group is brought to the FEC's attention the determinative factor. If a group initially spent significant funds on federal campaign activity and was quickly brought to the FEC's attention, then the FEC would deem it to be a political committee and that status would continue until the group terminated. If, however, that same group was allowed to operate for a few more years, and it reduced its overall share of spending on campaign activity to an insignificant amount and only then was the group brought to the FEC's attention, then the FEC would find that it was not then *and had never been* a political committee. Under a lifetime of existence test, the nature of the group depends entirely on when the FEC decides to look at it. That is an absurd and impermissible result.

The FEC also oddly disputes Plaintiffs' assertion that the controlling commissioners' stated rationale for not looking at a calendar year test—that it would qualify more groups as political committees—improperly puts the cart before the horse. As Plaintiffs noted, it only is possible to know whether more groups should count as political committees *after* applying the test. The FEC argues that the controlling commissioners provided no such rationale, but in the next sentence admits that was exactly the basis for their decision. *See* FEC Mem. 44 (stating a

calendar year test would "inevitably subject many issue-based organizations to burdens of political committee status"). Under *Buckley*, the major purpose test, in combination with the FECA's statutory test, is what differentiates "issue-based organizations" from "political committee[s]." To conclude, therefore, that any group is an "issue-based organization" that should not be subject to FECA's political committee prejudges the question. Which groups are issue groups and which are political committees can only be decided *after* the test is applied.

Without any rational basis for a "lifetime of existence" test, the FEC and AAN turn to FEC precedent in an attempt to find support. Nonetheless, for the reasons discussed in the opening motion, the authority on which the FEC and AAN rely, and on which the controlling commissioners attempted to rely, do not support a "lifetime of existence test." Mot. 38 n.22. They are either the result of deadlocked cases which, as explained, provide no precedent on which to rely, Ex. 5 (MUR 6396 (Crossroads GPS)), or look to a group's spending in each year separately, *Malenick*, 310 F. Supp. 2d at 236 & n.8; *GOPAC*, 917 F. Supp. at 853; Mot. Ex. 28 at 3, Ex. 29 at 3, Ex. 30 at 3–4. AAN also cites additional authority not relied on by the controlling commissioners, but the authority fails to bolster the three commissioners' reasoning. In MUR 5487 (Progress for Am. Fund), the FEC compared a group's spending on ads run "[b]etween May 27, 2004 and November 2, 2004"—less than a calendar year—against is spending over the "entire 2004 election cycle," at most a two year period, and found the group qualified as a political committee. Ex. 6 ¶¶ 13, 36. Of course, if a group's spending over five months can demonstrate its major purpose when compared against two years of spending, then it would obviously do so when compared against a single year of spending. Similarly, the cited advisory opinion further supports a calendar year test as it considered the groups spending as a percentage of each year, separately, and not in aggregate. Ex. 7 at 2.

Finally, AAN makes the nonsensical argument that focusing on its calendar year spending would violate its due process rights, because it would not "know what is required of" it. AAN Mem. 35–36. But AAN argues that it would happily accept a "flexible" "case-by-case" approach, *see id.* at 35, that provided it absolutely no guidance on the time period which the FEC might apply. Moreover, AAN is already on notice that its calendar year activity is relevant to the determination of its political committee status: the FECA's statutory test unambiguously looks to that time period. 52 U.S.C. § 30101(4).[22]

In sum, the FECA uses an unambiguous calendar year test to determine political committee status, and there is no persuasive reason to interpret *Buckley* as either upsetting that test or supplanting it with some other focus. The controlling commissioners' interpretation of *Buckley* to look to a groups' lifetime of existence was contrary to law, and the dismissals of Plaintiffs' complaints on that basis should be reversed.

VI. *Buckley* Does Not Impose 50%+1 Major Purpose Test

The controlling commissioners further dismissed Plaintiffs' complaints because, in part, they determined that the neither AAN's nor AJS's campaign activity constituted a preponderance, *i.e.*, more than 50%, of their activity. AR 1448–49, 1463 n.151, 1700–01. Of course, had they properly counted AAN's and AJS's electioneering communications, this misapplication would be irrelevant, as both AAN's and AJS's qualifying campaign activity within the calendar year far exceeded even a 50% threshold. But as the controlling commissioners wrongly excluded electioneering communications, their improper threshold was determinative at least to AJS. With regard to that group, the controlling commissioners, looking

[22] As Plaintiffs' noted in the opening brief, the time period applied is irrelevant to AAN. If electioneering communications are counted, AAN qualifies as a political committee regardless of whether the FEC looks at its spending in 2010, or its spending over its lifetime in existence which, at the time, was two years.

at only its express advocacy and its activities in the prior calendar year, observed that AJS devoted "approximately 40%" of its spending to qualifying campaign activity. AR 1463 n.151. Nonetheless, they concluded that "[s]uch spending does not clearly signify a *major* purpose . . . ," *id.*, presumably because it did not cross the three commissioners' 50% threshold, *see* Supp. E&J, 72 Fed. Reg. at 5605 (noting group devoting at least "50-75%" of spending to campaign activity qualified as political committee).

As Plaintiffs argued in their opening motion, the controlling commissioners misapplied *Buckley* by extracting a 50%+1 test from it. In their responses, neither the FEC nor AAN defend a 50%+1 test as a proper interpretation of *Buckley*. Indeed, the FEC itself has previously rejected any such threshold test. *See also* FEC, Political Committee Status, 69 Fed. Reg. 68056, 68064–65 (Nov. 23, 2004) (rejecting 50% threshold test). Consequently, there is no dispute that *Buckley* does not command a 50%+1 on a group's activities for it to have a qualifying "major purpose."

Nonetheless, both the FEC and AAN attempt to evade the actual test used by the controlling commissioners, arguing they in fact imposed no numerical test. The FEC focuses on the controlling commissioner's use of the term "preponderance," but admits that the three commissioners' made a numerical analysis based on their interpretation of that term. FEC Mem. 46 (emphasis omitted). AAN argues that *Buckley*'s grammar requires that a qualifying group have only a single major purpose, AAN Mem. 37–38, implying that anything less than a 50% threshold would improperly allow for a group to have multiple purposes. *Buckley*, however, indicates no concern with the number of purposes qualifying groups have. Rather, the case was concerned with the number of purposes that could qualify a group as a political committee, finding only a single purpose would suffice: the nomination or election of candidates. 424 U.S. at 79. Unlike the controlling commissioners, *Buckley* did not ignore the "fundamental

organization reality that most organizations do not have just one major purpose." *Human Life*, 624 F.3d at 1011 (internal quotations marks omitted). Where voters' interest in transparency is substantially related to a group's political committee reporting obligations, there is no reason to believe that "relationship changes so materially as to render the relationship insubstantial once the group[] engage[s] in several [major] purposes including political advocacy." *Id.*

In sum, the controlling commissioners interpretation of *Buckley* to exclude a group like AJS that devotes at least 40% of its budget in a calendar year to qualifying campaign activity—effectively imposing a higher 50%+1 test—is contrary to law. As Plaintiffs' complaints were dismissed partially on those grounds, the Court should resolve the issue *de novo* and reverse.

VII. The Controlling Commissioners Did Not Properly Invoke Prosecutorial Discretion, and Such Discretion Would Not Alter Judicial Review

As an alternative basis to uphold the controlling commissioners' dismissals, the FEC argues that those three commissioners also dismissed Plaintiffs' complaints on the grounds of prosecutorial discretion. The controlling commissioners' terse reference to prosecutorial discretion, however, fails to sufficiently invoke that basis to dismiss. Further, even if the controlling commissioners' offhand reference to prosecutorial discretion could be credited at all, their invocation of the doctrine would not alter this Court's *de novo* review of their decision.

The FEC relies on a passing reference to prosecutorial discretion in the final sentence and two footnotes of the statements of reasons. AR 1461 n.142, 1463 & n.151, 1713 n.137, 1716 & n.153. "[T]he orderly functioning of the process of review," however, "requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). A "terse explanation" does not "meet the standard of reasoned agency decision making." *Robertson*, 45 F.3d at 493; *accord Antosh v. FEC*, 599 F. Supp. 850, 853 (D.D.C. 1984) (court is not required "to accept 'meekly administrative

pronouncements clearly at variance with established facts'" (quoting *Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 463 (D.C. Cir. 1967)). The controlling commissioners' passing statement that the same "constitutional doubts" constituting the substantive basis for their dismissal could "favor" an exercise of prosecutorial discretion, without any further discussion, does not meet that standard. AR 1461 n.142, 1713 n.137. Absent from that cursory reference was any discussion of "whether agency resources are best spent on this violation," or whether "the particular enforcement action best fits the agency's overall polices." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (outlining factors underlying a proper exercise of prosecutorial discussion). The controlling commissioners' fleeting comment hardly constitutes a thoughtful and adequate explanation of prosecutorial discretion that the Court might review. Rather, courts review the grounds "upon which the record discloses [the] action was based," which, here, are the controlling commissioners' misinterpretations of law. *Chenery Corp.*, 318 U.S. at 87; *see also La Botz v. FEC*, 889 F. Supp. 2d 51, 63 n.6 (D.D.C. 2012).

Nor would a proper invocation of prosecutorial discretion alter the Court's *de novo* review of the controlling commissioners' misinterpretations. First, even though the FEC has "discretionary powers to determine whether to investigate a complainant's claim, . . . courts have determined that judicial review is warranted regardless of the discretion afforded to prosecute or investigate." *Common Cause v. FEC*, 655 F. Supp. 619, 622 (D.D.C. 1986), *rev'd on other grounds*, 842 F.2d 436; *accord Akins*, 524 U.S. at 25) ("[T]hose adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground."). While prosecutorial discretion renders an agency's refusal to act "presumptively unreviewable" under the APA, that presumption is rebutted where Congress "circumscribe[es] an agency's power to discriminate among issues or cases it will

pursue," *Heckler*, 470 U.S. at 832–33, as the FECA does here in commanding dismissals not be contrary to law, 52 U.S.C. § 30109(a)(8)(C).

Second, an agency seeking to invoke prosecutorial discretion must "suppl[y] reasonable grounds" for its exercise. *Nader v. FEC*, 823 F. Supp. 2d 53, 65 (D.D.C. 2011); *see also Carter/Mondale Presidential Comm., Inc. v. FEC*, 775 F.2d 1182, 1885 (D.C. Cir. 1985) (finding an agency must provide "a coherent and reasonable explanation of its exercise of discretion"). Here, the only possible grounds supplied were the supposed "constitutional concerns" raised in enforcing the FECA against AAN and AJS. But, for the reasons explained above, there are no such constitutional concerns and thus they cannot provide reasonable grounds for dismissal.

Nor would the invocation of prosecutorial discretion grant the controlling commissioners' deferential review. While such deference may be warranted where a court reviews an agency decision that would be subject to arbitrary and capricious review—such as a decision on the best use of agency resources, *cf. Heckler*, 470 U.S. at 831[23]—deference is not warranted where a court reviews whether the FEC invoked an "impermissible" interpretation of law, *Orloski*, 795 F.2d at 161. This Court is as capable as or more capable than the FEC in determining whether the Constitution will impact whether it "is likely to succeed if it acts." *Cf. Heckler*, 470 U.S. at 831; *Public Citizen*, 843 F.2d at 1478. Indeed, to allow the FEC to repackage its misinterpretations of law as exercises of discretion would undermine the FECA's provision for judicial review and risk collapsing all contrary to law review into review for abuse of discretion.

[23] Allowing the FEC to dismiss for lack of resources—which the FEC indisputably did not attempt to do here—would also render an important part of the FECA a nullity: the private attorney general provision. *See* 52 U.S.C. § 30109(a)(8)(C). By allowing a complainant to bring its own suit, Congress created a failsafe to allow for enforcement of the FECA where the FEC fails to do so. *See Sierra Club v. Whitman*, 268 F.3d 898, 905 (9th Cir. 2001) ("If that [agency's] failure to act results from the desire of the Administrator to husband federal resources for more important cases, a citizen suit against the violator can still enforce compliance without federal expense."). If the FEC's dismissal for lack of resources cannot be "contrary to law," then a complainant could never avail itself of the FECA's private attorney general provision.

Cf. Orloski, 795 F.2d at 161 (specifying two distinct forms of review). Moreover, it would create the serious risk of gamesmanship as the FEC could simply immunize itself from judicial review by including curt references to "prosecutorial discretion" in its statement of reasons. *See, e.g.*, AR 1461 n.142, 1713 n.137; *see also* Ex. 8 at 28 n.117.

In sum, the record shows that the Plaintiffs' complaints were dismissed on the basis of impermissible interpretations of law, not prosecutorial discretion, and therefore the propriety of such discretion is not before the Court. Further, even if the controlling commissioners' had invoked prosecutorial discretion, that fact would not alter the *de novo* review of whether the interpretations of law that underlay that decision were permissible or contrary to law.

VIII. The Dismissals Were Contrary to the FECA's "Reason to Believe" Standard

The dismissals also were contrary to law because the controlling commissioners imposed an unreasonably high bar to even allow an investigation into AAN's and AJS's major purposes, contrary to the FECA's command that only a "reason to believe" a violation occurred is necessary. 52 U.S.C. § 30109(a)(2). In response, the FEC admits that the agency's "policy" regarding when to find a reason to believe is outlined in the FEC's Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545 (Mar. 16, 2007), which provides that reason to believe exists where "a complaint credibly alleges that a significant violation may have occurred," *id.* at 12545. Yet the controlling commissioners, contrary to that policy, failed to analyze whether the Plaintiffs' complaints raised "credibl[e] alleg[ations]." Instead, those three commissioners imposed a much higher standard, requiring conclusive evidence demonstrating AAN and AJS were political committees. They found "the record was insufficient" and lacked "legally significant facts" to support a reason to believe a violation occurred, FEC Mem. 43 n.9; AAN Mem. 26 n.18, only by ignoring the extensive evidence in the record of AAN's and AJS's campaign activity, including

millions spent on express advocacy and electioneering communications.[24] In sum, the controlling commissioners imposed a standard far higher than that reflected in the FECA and the FEC's own policy statements, and, accordingly, the dismissals were contrary to law.

IX. Plaintiffs Have Standing

As "aggrieved" parties whose complaints were wrongfully dismissed by the FEC, Plaintiffs have the right to seek judicial review of the dismissals. 52 U.S.C. § 30109(a)(8)(A). AAN argues, however, that Plaintiffs lack standing because, on remand, the FEC might seek to dismiss their complaints on a newly asserted ground: the purported running of the statute of limitations. AAN's argument is meritless.

First, AAN itself admits that the mere fact that the FEC, on remand, "could, in 'its lawful discretion, reach the same result for a different reason'" does not negate Plaintiffs' standing in this case. AAN Mem. 41 (quoting *Akins*, 524 U.S. at 25). Rather, the FEC's dismissal must be judged on the rationale offered by the controlling commissioners, not any new grounds that be advanced on remand. *Chenery Corp.*, 318 U.S. at 87.

Second, the statute of limitations does not bar Plaintiffs from gaining the relief they seek. That relief includes equitable remedies such as requiring AAN and AJS to register as political committees and to fix their reporting violations. Courts have found the FEC's equitable powers are not limited by the statute of limitations. AAN acknowledges this precedent, but contends there is a split in authority. AAN Mem. 42. A close inspection, however, reveals that the better authority is squarely on the side of permitting the FEC to seek equitable relief. *See Riordan v.*

[24] The controlling commissioners also ignored evidence sufficient to raise a reason to believe that AAN was organized for the purpose of electing or defeating federal candidates. Within two years of its establishment, AAN devoted more than $17 million to campaign activity, consisting of at least 62.5% of its spending. AR 1659. Had the controlling commissioners' authorized an investigation, the ensuing investigation could reveal relevant internal documents further demonstrating AAN's true purpose. AAN therefore is wrong to assert that its "organization purpose" is not in dispute. AAN Mem. 6 n.1. That purpose is very much in question.

SEC, 627 F.3d 1230, 1234 (D.C. Cir. 2010) (finding statute of limitations does not bar "purely remedial and preventative" relief); *SEC v. Brown*, 740 F. Supp. 2d 148, 156 (D.D.C. 2010) ("Remedial relief does not constitute a 'penalty' under § 2642, and so is not subject to its statute of limitations."); *FEC v. Christian Coalition*, 965 F. Supp. 66, 71 (D.D.C. 1997) (same); *FEC v. Nat'l Republican Senatorial Comm.*, 877 F. Supp. 15, 20–21 (D.D.C. 1995) (same); *see also Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) ("[A] suit in equity may lie though a comparable cause of action at law would be barred."). In contrast, the cases cited by AAN finding that the FEC's equitable powers are limited by the statute of limitations confused "concurrent jurisdiction" and "exclusive jurisdiction." *Christian Coalition*, 965 F. Supp. at 71–72 (explaining difference in concepts, distinguishing *Cope v. Anderson*, 331 U.S. 461 (1947)); *see also United States v. Telluride Co.*, 146 F.3d 1241, 1248 n.13 (10th Cir. 1998) (criticizing *FEC v. Williams*, 104 F.3d 237 (9th Cir. 1996)); *United States v. Banks*, 115 F.3d 916, 919 n.6 (11th Cir. 1997) (same).[25]

Even if the five-year statute of limitations could limit Plaintiffs' relief, it has not expired. As neither AAN nor AJS have properly registered as a political committee or made the requisite disclosures, their violations of the FECA are continuing and the statute of limitations has not yet begun to run. *United States v. McGoff*, 831 F.2d 1071, 1096 (D.C. Cir. 1987) (statute of limitations for failure to register begins to run only once the quality requiring registration ceases); *United States v. Jacobs*, 781 F.2d 643, 648 (8th Cir. 1986) (a violation "is not exhausted for purposes of the statute of limitations as long as the proscribed course of conduct continues"

[25] AAN also wrongly asserts that the FEC has not, in fact, pursued an equitable remedy after the expiration of the statute of limitations. To the contrary, the FEC did precisely that in *Christian Coalition*. 965 F. Supp. at 68. Nor does AAN cite any authoritative policy or rule of the FEC that would bar equitable enforcement now. *Cf.* AAN Mem. 40 (citing three-vote statement of reasons and staff memorandum, which documents do not create binding authority). Indeed, it appears that at least one commissioner would pursue such a remedy. *See* Ex. 9 at 15–17.

and finding a failure to register is a continuing violation); *CityFed Fin. Corp. v. Office of Thrift Supervision*, 919 F. Supp. 1, 6 (D.D.C. 1994). Nor has the statute of limitations expired, even if it has begun to run. Plaintiffs filed this suit on August 20, 2014, well before a five-year statute of limitations on claims arising from AAN's and AJS's 2010 conduct could have run.[26] Even under AAN's own theory, the statute of limitations had not then expired.

Moreover, styling their argument as one of "standing," AAN mischaracterizes the authority on which it relies, which actually relates to mootness. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). But this case is not moot, and AAN has not carried "[t]he initial 'heavy burden' of establishing mootness." *Honeywell Int'l, Inc. v. NRC*, 628 F.3d 568, 576 (D.C. Cir. 2010). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016). Even the mere fact that an order will have binding legal effect on future actions by the defendant defeats a claim of mootness. *Firefighters v. Stotts*, 467 U.S. 561, 569–70 (1984); *Kifafi v. Hilton Hotels Ret. Plan*, 701 F.3d 718, 724 (D.C. Cir. 2012) (finding mootness does not exist unless "the court's decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future"). An order correcting the FEC's erroneous interpretations of law will greatly affect both Plaintiffs and the FEC in the future, ensuring Plaintiffs receive the important information which the FECA grants to them. Further, as explained above, the FEC can grant the relief Plaintiffs seek against AAN and AJS, and the mere fact that the FEC may again wrongly dismiss Plaintiffs' complaints do not defeat Plaintiffs' legal entitlement to it.

[26] AAN and the FEC appear to have miscalculated when the statute of limitations might have started to run. AAN places near conclusive weight on a line in the OGC memorandum stating "EXPIRATION OF SOL: 7/23/2014." AR 1635. The OGC appears to have wrongly calculated that the statute of limitations began running on the date of AAN's formation. AR 1637 (noting AAN founded in 2009). The conduct giving rise to Plaintiffs' complaint, however, occurred largely in September and October 2010, continuing as late as June 11, 2011. AR 1482. Thus, a five year statute of limitations could expire no earlier than June 11, 2016. *See, e.g.*, AR 1390 (providing statute of limitations for claims against AJS as "9/9/2015"). For the reasons stated above, however, even that date is too early.

Nat'l Wrestling Coaches Ass'n v. Dep't of Ed., 366 F.3d 930, 941 (D.C. Cir. 2004) (finding redressability not defeated where third-parties "could only preclude redress if those third parties took the extraordinary measure of continuing their injurious conduct in violation of the law"); *Univ. Med. Cntr. of S. Nev. v. Shalala*, 173 F.3d 438, 442 (D.C. Cir. 1999) (finding plaintiff's legal entitlement to relief from third parties redresses plaintiff's injury).

AAN's novel statute of limitations argument does not serve to defeat Plaintiffs' claims. Plaintiffs have standing, the statute of limitations does not proscribe the relief they seek, and the case is not moot.

CONCLUSION

The controlling commissioners dismissed Plaintiffs' complaints because they erroneously interpreted the First Amendment and *Buckley* to exclude relevant evidence of AAN's and AJS's major purposes. The controlling commissioners should have considered the millions of dollars AAN and AJS spent on electioneering communications as part of their efforts to nominate or elect candidates in determining each group's major purpose. The controlling commissioners also did not invoke prosecutorial discretion and, even if they had, that would be insufficient to immunize their dismissal from reversal. They further applied a pleading standard far higher than the "reason to believe" standard allowed by the FECA and FEC policy. Finally, Plaintiffs continue to have standing to assert their claims, the FEC may pursue relief after remand, and this case is not moot. Accordingly, Plaintiffs respectfully request the Court grant their motion for summary judgment, deny the FEC's and AAN's cross-motions for summary judgment, and remand this case to the FEC to conform with its judgment.

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