UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*,	)	
Plaintiffs,	)	Civ. No. 16-2255 (CRC)
v.	)	
FEDERAL ELECTION COMMISSION,	)	
Defendant,	)	
AMERICAN ACTION NETWORK,	)	SUMMARY JUDGMENT REPLY AND OPPOSITION
Intervenor-Defendant.	)	

FEDERAL ELECTION COMMISSION'S REPLY
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT
AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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In its opening brief, the Federal Election Commission ("FEC" or "Commission") explained why the agency's post-remand actions with respect to plaintiffs' administrative complaints against Americans for Job Security ("AJS") and American Action Network ("AAN") are not contrary to law. (FEC's Mem. in Supp. of its Mot. for Summ. J. at 19-44 (Docket No. 29) (sealed) ("FEC Mem.").) [redacted] Plaintiffs' challenge to the controlling Commissioners' reasons for dismissing the administrative complaint about AAN also fails because the controlling decision is not contrary to the guidance of this Court or any of the other decisions plaintiffs highlight, and is consistent with the FEC's own lengthy 2007 policy statement regarding its case-by-case approach to the major-purpose test.

Plaintiffs' brief provides no basis for the Court to rule in their favor. They seek to reduce their burden by incorrectly arguing in favor of an expedition requirement for FEC delay cases and against deferential review under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in contravention of clear Circuit authority construing FECA's contrary-to-law standard in 52 U.S.C. § 30109(a)(8). [redacted]

[redacted]

Plaintiffs' claims with respect to the merits of the AAN matter are primarily rooted in their dissatisfaction with the Court's rejection of their theory, based on a conflation of FECA's distinct disclosure schemes, that FEC Commissioners act contrary to law when they fail to count all non-express advocacy electioneering communications as indicative of a major purpose of nominating or electing candidates. The Court's remand opinion concluded that the controlling Commissioners erred in making categorical distinctions about such communications that were unsupported by the law. It is plaintiffs who err here in insisting upon their preferred categorical distinctions. The controlling Commissioners' new dismissal decision satisfies the deferential review applicable here because it is free from the errors the Court previously identified and is not otherwise contrary to law. Nor is it arbitrary or capricious, even if the Court could consider plaintiffs' improper extra-record materials. The Court should grant summary judgment to the Commission.

I. STANDARDS OF REVIEW

As the Commission explained in its opening brief, the contrary-to-law standard of section 30109(a)(8) entails distinct judicial considerations with respect to plaintiffs' contentions that the agency has (1) failed to act on the AJS matter and (2) made substantive legal errors in dismissing the AAN matter. (FEC Mem. at 20-25.) Plaintiffs' attempts to water down the deferential nature of these standards are contrary to Circuit law and should be rejected.

A. The Court Analyzes Plaintiffs' Failure-to-Act Claim for Reasonableness, Using the Standards Generally Applicable to Agency Inaction

As the Commission has explained, the Court analyzes plaintiffs' failure-to-act claim regarding the AJS matter using a reasonableness standard, evaluating whether the agency has acted in a manner that is arbitrary or capricious. The Court makes this determination by applying the four factors set forth in *Common Cause v. FEC*, 489 F. Supp. 738, 744 (D.D.C. 1980), and the six factors discussed in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) ("*TRAC*"). (FEC Mem. at 20-21.) As observed in one of the cases plaintiffs rely on, the "standard is 'a highly deferential one . . . which presumes the agency's action to be valid.'" *Citizens for Percy '84 v. FEC*, No. 84-2653, 1984 WL 6601, at *4 (D.D.C. Nov. 19, 1984) (quoting *Evtl. Def. Fund v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981)).

Although plaintiffs do not dispute this standard in the main (Mem. of P. & A. in Supp. of Pls.' Cross-Mot. for Summ. J. and in Opp'n to the FEC's and AAN's Motions for Summ. J. at 21-22 (Docket No. 32) (Sealed) ("Pls.' Mem.")), they incorrectly seek to add a requirement that the FEC is required to act "'expeditiously'" (*e.g.*, *id.* at 21 & n.6 (quoting *Common Cause*, 489 F. Supp. at 744)). They make this argument even though the Commission showed in its opening brief that FECA's previously-existing expedition requirement was deleted decades ago. (FEC Mem. at 21-22 n.3.) Relying on *Common Cause*, plaintiffs nevertheless argue that "'the Court must determine whether the Commission has acted 'expeditiously.'" (Pls.' Mem. at 21 (quoting *Common Cause*, 489 F. Supp. at 744).) But plaintiffs overlook that the *Common Cause* court explicitly explained that it was applying the pre-1980 version of the statute in that case. 489 F. Supp. at 739 n.1 (explaining that the court was applying "the pre-amendment version of the Act"); *see also Nat'l Right to Work Comm. v. FEC*, 2 Fed. Election. Campaign Fin. Guide (CCH) ¶ 9225 at 51773 n.4. (D.D.C. 1984) ("[T]he FECA provision expressly calling for expedition has

been deleted, see [section 30109(a)], and the 'arbitrary, capricious or contrary to law' standard is now employed.") (attached as Exhibit 1). Plaintiffs also contend that "the FECA still provides the FEC *must* 'conduct investigations and hearings expeditiously'" (Pls.' Mem. at 21 n.6 (quoting 52 U.S.C. § 30107(a)(9) (emphasis added)), but FECA does not in fact state that the agency "must" conduct investigations and hearings expeditiously but rather that it "has the power" to do so, 52 U.S.C. § 30107(a)(9). The D.C. Circuit has accordingly determined that FECA requires the Commission "to proceed with due deliberation after it receives a complaint alleging violations of the Act," *Perot v. FEC*, 97 F.3d 553, 558 (D.C. Cir. 1996) (per curiam), and has not included an independent requirement of "expedition" in its analysis of the relevant factors.

In arguing that a vestige of the deleted expedition requirement remains, plaintiffs also rely on the district court decisions in *Democratic Senatorial Campaign Committee v.* FEC, No. 95-0349, 1996 WL 34301203 (D.D.C. Apr. 17, 1996) ("*DSCC*") and *FEC v. Rose*, 608 F. Supp. 1 (D.D.C. 1984), *reversed sub nom. In re National Congressional Club*, Nos. 84-5701, 84-5719, 1984 WL 148396 (D.C. Cir. Oct. 24, 1984) (per curiam). (Pls.' Mem. at 21 n.6.) But the court in *DSCC* explained that it did "not reach the questions whether the Act imposes an obligation upon the FEC to investigate expeditiously and, if so, whether the FEC has done so in this case" because it found that the agency had failed to act reasonably. *DSCC*, 1996 WL 34301203, at *7 n.5; *id.* at *7 ("[T]he law is clear in this Circuit that the FEC must at least act reasonably.") And the cited decision in *Rose* was summarily reversed by the very D.C. Circuit opinion explicating the reasonableness standard on which the parties otherwise agree. In the *Rose* district court opinion plaintiffs cite, "the district court . . . incorrectly applied a 'presumption' that the Commission has acted 'contrary to law' whenever it fails to resolve a complaint within the two-

year period between elections." *In re Nat'l Cong. Club*, 1984 WL 148396, at *1. The Court of Appeals reversed because "[t]he Act makes absolutely no reference to such a presumption. Rather, in using the language 'contrary to law,' Congress appears to have intended that the unreasonableness of the Commission's delay in completing its task be tested under standards generally applicable to review of agency inaction." *Id.*; *accord Judicial Watch, Inc. v. FEC*, 293 F. Supp. 2d 41, 48 (D.D.C. 2003) (explaining that FECA gives the FEC the power to conduct investigations expeditiously but "does not create a deadline in which the FEC must act" (internal quotation marks omitted)). Plaintiffs' claim that FECA includes an expedition requirement in this context is incorrect.

B. The Court Should Accord *Chevron* Deference to the Controlling Commissioners' Dismissal of Plaintiffs' Complaint Concerning AAN

Turning to the standard for reviewing the controlling Commissioners' dismissal of plaintiffs' administrative complaint concerning AAN, plaintiffs agree that, in this context, section 30109(a)(8)'s contrary to law standard requires that the dismissal must be sustained unless it was based on (1) an "impermissible interpretation" of FECA or (2) even "under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion.'" *Citizens for Responsibility & Ethics in Wash. v. FEC*, 209 F. Supp. 3d 77, 85 (D.D.C. 2016) ("*CREW I*"), *appeal dismissed*, Nos. 16-5300, 16-5343 (D.C. Cir. Apr. 4, 2017) (per curiam) (Doc. #1669311) (quoting *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986)); Pls.' Mem. at 15. Additionally, consistent with the Commission's opening brief, governing D.C. Circuit law, and the Court's own observations (*see* FEC Mem. at 22-25), plaintiffs acknowledge that courts

undertaking such review "may provide deference where appropriate under the doctrine in *Chevron*." (Pls.' Mem. at 16.)[1]

In addition, plaintiffs do not dispute that section 30109(a)(8)'s arbitrary or capricious review is similar to the second step of *Chevron* review. (FEC Mem. at 23-25 & n.5.) They agree that this standard requires them to show that the Commissioners "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *CREW I*, 209 F. Supp. 3d at 88; Pls.' Mem. at 20-21. Nor do they dispute that when the Court determines whether the AAN dismissal "'was arbitrary or capricious or otherwise an abuse of discretion,'" it uses an "'extremely deferential'" standard "'requir[ing] affirmance if a rational basis for the agency's decision is shown.'" (FEC Mem. at 23 (quoting *Orloski*, 795 F.2d at 167); *id.* at 23-24 (relying on *Van Hollen v. FEC*, 811 F.3d 486, 495 (D.C. Cir. 2016); *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981); *Combat Veterans for Cong. Political Action Comm. v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015); *Public Citizen, Inc. v. Fed. Energy Regulatory Comm'n*, 839 F.3d 1165, 1171 (D.C. Cir. 2016)).)

Notwithstanding these settled principles, plaintiffs argue that de novo is appropriate here (Pls.' Mem. at 15-20), relying on arguments that are inconsistent with the Court's analysis in *CREW I* and their improper, extra-record concerns about the ebb and flow of spending without

[1] Plaintiffs' suggestion that the contrary to law standard allows the Court to act in order to correct the agency "permit[ting] activity" that itself is "'contrary to law'" (Pls.' Mem. at 5), if correct, would effectively eliminate the agency's prosecutorial discretion and require the Court to substitute its judgment in place of the Commissioners. This interpretation is contrary not only to plaintiffs' other arguments, but decades of D.C. Circuit law interpreting section 30109(a)(8). *See, e.g., Citizens for Responsibility & Ethics in Wash. v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007).

disclosed contributors over several recent election cycles (*id.* at 13-14). The Court should reject these arguments.

According to plaintiffs, the controlling Commissioners' analysis of whether there was reason to believe AAN was a political committee because of its spending is an "interpretation concern[ing] matters over which [those Commissioners] do not have special authority or expertise," because those Commissioners allegedly "interpret[ed] . . . *Buckley*'s 'major purpose' test" and not FECA's statutory text. (*Id.* at 16-18.) But contrary to this claim that the controlling Commissioners' did not draw upon their experience or expertise (*id.* at 17 n.3), the application of these Commissioners' experience and expertise is evident in the ten single-spaced pages they devoted to analyzing whether AAN's electioneering communications indicated that there was reason to believe that it was a political committee (AR 1767-79). The Court itself has described how the Commissioners "outlined a new framework for evaluating whether AAN's electioneering communications (i.e., non-express advocacy) indicated a major purpose to nominate or elect a federal candidate; and then applied that framework in a fact-intensive manner to *each* of AAN's electioneering communications." Mem. Op. & Order at 3, *CREW v. FEC*, No. 14-1419 (CRC) (D.D.C. Apr. 6, 2017) (internal quotation marks omitted) (Docket No. 75) (sealed) ("Show-Cause Decision"). Plaintiffs' notion that this analysis concerned matters outside of the Commissioners' expertise is unconvincing.

Indeed, the Court has already rejected the premise of plaintiffs' argument, explaining that the Supreme Court's narrowing construction of FECA's political committee definition in 52 U.S.C. § 30101(4)(A) announced in *Buckley* "did not convert every judicial challenge to an FEC action linked in any way to the major purpose test into an issue for the courts' de novo review." *CREW I*, 209 F. Supp. 3d at 88. "If it had, this Court would not have deferred to the FEC when

the agency decided to adjudicate political committee status — and the major purpose test — rather than promulgate a rule defining it." *Id.* "But the Court did defer, and rightly so, reasoning that this implementation choice was 'exactly the type of question generally left to the expertise of an agency.'" *Id.* (quoting *Shays v. FEC*, 511 F. Supp. 2d 19, 31 (D.D.C. 2007)). Accordingly, the controlling Commissioners' "choices regarding the timeframe and spending amounts relevant in applying the 'major purpose' test are implementation choices within the agency's sphere of competence, and therefore warrant the Court's deference." *Id.* Far from being the "type of judgment that the Court previously found did not warrant *Chevron* deference" (Pls.' Mem. at 18 n.4), the controlling Commissioners' implementation choices regarding "spending amounts relevant in applying the 'major purpose' test" principally at issue with respect to AAN do "warrant the Court's deference." *CREW I*, 209 F. Supp. 3d at 88.

The Court has rejected plaintiffs' next argument as well. Urging the Court to "reconsider its prior decision with respect to *Chevron* deference to three-commissioner statement[s] of reasons" (Pls.' Mem. at 20), plaintiffs once again rehash their claim that the controlling dismissal decision lacks sufficient force of law to require deference under *United States v. Mead Corp.*, 533 U.S. 218 (2001) (*id.* at 18-20). This argument remains contrary to controlling D.C. Circuit law and Congress's intent "to preclude coercive Commission action . . . where the Commission . . . is evenly split." *In re Sealed Case*, 223 F.3d 775, 780 (D.C. Cir. 2000). In *Mead*, the Supreme Court explained that the type of delegated authority that warrants deference "may be shown in a variety of ways, as by an agency's power to engage in adjudication . . . or by some other indication of comparable congressional intent." 533 U.S. at 227. As this Court explained, the Court of Appeals in "*Sealed Case* engaged in a thorough consideration" of the indications warranting *Chevron* deference approved of in *Mead* and concluded that such considerations

meant "that an FEC enforcement decision 'falls on the *Chevron* side of the line.'" *CREW I*, 209 F. Supp. 3d at 85 n.5 (quoting *In re Sealed Case*, 223 F.3d at 780). Instead of accepting plaintiffs' argument that *Mead* undercut the Court of Appeals's conclusions in *In re Sealed Case* (or the precedents upon which it was based), this Court "'follow[ed] controlling circuit precedent.'" *Id.* (quoting *United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997)).

Lest there could be any doubt, in *FEC v. National Rifle Association of America*, which was decided post-*Mead*, the D.C. Circuit itself viewed the analysis in *In re Sealed Case* as consistent with *Christensen v. Harris County*, 529 U.S. 576 (2000) and *Mead*. 254 F.3d 173, 184-86 (D.C. Cir. 2001). And in *Fogo De Chao (Holdings) Inc. v. U.S. Department of Homeland Security*, upon which plaintiffs rely (Pls.' Mem. at 18-19), the Court of Appeals found that the subject agency's decision was "the product of *informal* adjudication within the [agency], rather than a *formal adjudication.*" 769 F.3d 1127, 1136 (D.C. Cir. 2014) (emphasis added). The Supreme Court held in *Mead* that "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." 533 U.S. at 230. In contrast to the agency action in *Fogo De Chao*, the dismissal decision here falls on the *Chevron* side of the line because it is "'analogous to a formal adjudication.'" *CREW I*, 209 F. Supp. 3d at 85 n.5 (quoting *Sealed Case*, 223 F.3d at 780). In any event, the dismissal here has legal force, despite the 3-3 split vote, because it resolved the underlying AAN matter and precludes further enforcement proceedings. Plaintiffs' force-of-law argument thus remains unsound. "Th[e] same standard of review applies to all FEC decisions, whether they be unanimous or determined by tie vote." *Id.* at 85.

II. PLAINTIFFS' EFFORT TO INTRODUCE EXTRA-RECORD EVIDENCE OF GENERAL POLITICAL SPENDING TRENDS SHOULD BE REJECTED

Plaintiffs' concerns about the "[g]rowth" of "dark money nonprofits" (Pls.' Mem. at 13-14) continues not to provide a basis to accept plaintiffs' challenges. Section 30109(a)(8) does not permit what would appear to be an "'across-the-board challenge to how the FEC approaches the "major purpose" issue.'" *Citizens for Responsibility & Ethics in Wash. v. FEC*, 164 F. Supp. 3d 113, 120 (D.D.C. 2015). Disclosure of election-related spending is an undoubted and undisputed important government interest (FEC Mem. at 6), but the only question here regarding the AAN matter is whether the controlling Commissioners acted contrary to law by concluding that AAN should not be required to make the disclosures required of political committees. Whether AAN should make the disclosures required of political committees depends on whether it is in fact a political committee. Plaintiffs assume that it is, but the question for the Court is whether the Controlling Commissioners acted contrary to law in voting not to find reason to believe that it was. And even if the Court required evidence of the type plaintiffs have presented, the Court's recourse is not to use a one-sided presentation of facts, submitted for the first time in litigation reviewing an administrative decision (Pls.' Mem. at 13-14), but to remand the matters to the agency for legislative fact finding. *E.g.*, *Beach Commc'ns, Inc. v. FCC*, 959 F.2d 975, 987 (D.C. Cir. 1992) (remanding to agency because the court "require[s] additional 'legislative facts'"). Here, no such remand is necessary because this case is not about whether spending without disclosed contributors by organizations that are not political committees is generally problematic. *See Citizens for Responsibility & Ethics in Wash.*, 164 F. Supp. 3d at 120 ("CREW's exclusive remedy for its disagreement with the FEC's rationale is to challenge those particular decisions under the judicial review provision of FECA [in section 30109(a)(8)].").

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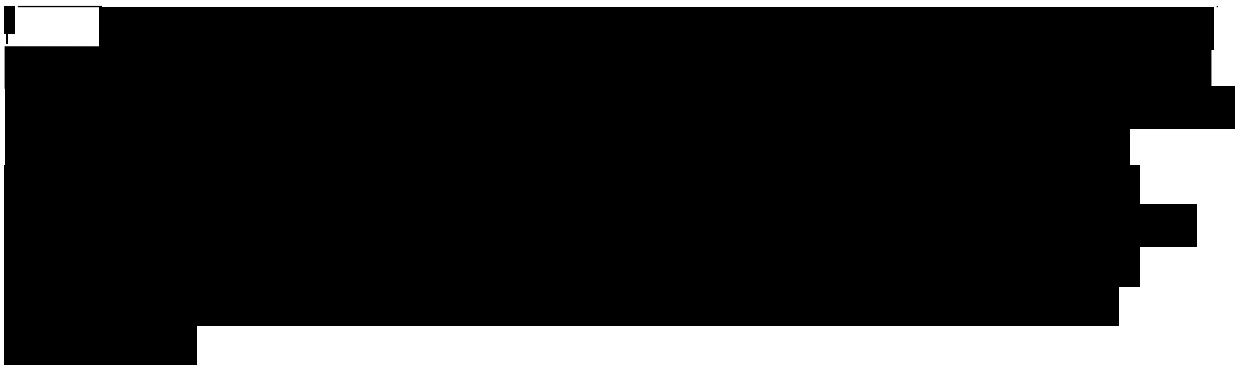

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IV. THE COMMISSION'S DISMISSAL OF THE AAN MATTER IS NOT CONTRARY TO LAW OR ARBITRARY OR CAPRICIOUS

The Commission's opening brief explained why the dismissal of plaintiffs' administrative complaint concerning AAN is not contrary to law. (FEC Mem. at 31-44.) The decision of the controlling Commissioners is supported by courts' sensitive approach to the First Amendment issues arising under the FEC's regulation, consistent with the agency's explanation of its approach to evaluating political committee status, FEC, *Rules and Regulations: Political Committee Status*, 72 Fed. Reg. 5595 (Feb. 7, 2007) ("Suppl. E&J")), and consistent with the Court's opinion in *CREW I*. (FEC Mem. at 31-35.) The controlling Commissioners analyzed AAN's non-express advocacy communications in detail. (*Id.* at 33-35.) Their analysis accords with the Court's own analysis of the issues and the Supreme Court's analyses of independent expenditures in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), and electioneering communications in *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled in part by Citizens United v. FEC*, 558 U.S. 310 (2010) and *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"). (FEC Mem. at 35-42.) It is not arbitrary or capricious. (*Id.* at 42-44.)

In response, plaintiffs' brief does not identify any law which the controlling Commissioners contravened in analyzing AAN's major purpose. Rather, plaintiffs argue that the controlling Commissioners impermissibly interpreted *Buckley* by relying upon *WRTL* in contravention of the Court's holding in *CREW I* and by acting contrary to the Supreme Court's decision in *McConnell* and a recent three-judge court decision in this District. Improperly relying on extra-record materials that were not before the Commission, plaintiffs also argue that the controlling rationale is arbitrary or capricious. These arguments are all without merit. At the core of each of them is plaintiffs' rejected theory that all electioneering communications must categorically be counted towards a major purpose finding.

A. The Dismissal Decision Is Not Contrary to Law

The Court should sustain the dismissal decision because it is not contrary to law. The decision is supported by, and not contrary to, each of the principal decisions on which plaintiffs rely, including this Court's decision in *CREW I*, the Supreme Court's decisions in *WRTL* and *McConnell*, and the three-judge Court decision in *Independence Institute v. FEC*, 216 F. Supp. 3d 176 (D.D.C. 2016), *aff'd*, 137 S. Ct. 1204 (2017).

1. The Dismissal Decision Does Not Improperly Rely on *WRTL*

Plaintiffs continue to insist that "it was legal error for the controlling commissioners to apply [*WRTL*] to interpret *Buckley*'s application to political committee reporting." (Pls.' Mem. at 24.) They argue that because the controlling Commissioners' analysis of AAN's electioneering communications is in line with the way the Supreme Court in *WRTL* analyzed certain issue communications referencing federal candidates by name (*id.* at 25), the Commissioners again contravened the Court's conclusion in *CREW I* that *WRTL*'s "constitutional division between express advocacy and issue speech [wa]s simply inapposite," *CREW I*, 209 F. Supp. 3d at 90. (*See* Pls.' Mem. at 24-28.)

The problem with this argument is that the constitutional division the Court found inapposite in *CREW I* is not present in the controlling Commissioners' new dismissal decision. As the Court has explained, the new analysis under review "no longer exclude[s] as irrelevant to the major-purpose inquiry, on a categorical basis, all spending on electioneering communications (i.e., non-express advocacy)." (Show-Cause Decision at 5; FEC Mem. at 40 (explaining that the Court's show-cause decision rejected the same argument that applying *WRTL* was in direct contravention of the Court's opinion in *CREW I*).) That the Commissioners' interpretation of *WRTL* was found to be legally erroneous in *CREW I* does not preclude an analysis consistent

with *WRTL* that is *not* erroneous — *i.e.*, "free of the legal errors identified in [*CREW I*]." (Show-Cause Decision at 5.) Indeed, rather than arguing that the controlling Commissioners have contravened *WRTL* or any other decision, as in *CREW I*, plaintiffs now tellingly complain that the new analysis "parrots the distinctions" in *WRTL*. (Pls.' Mem. at 25.) But arguing that the controlling Commissioners' reasoning is *consistent* with a similar analysis by the Supreme Court hardly furthers plaintiffs' effort to show that the decision was contrary to law. Rather, it confirms that the new dismissal should be sustained.[4]

Indeed, the FEC has been called to distinguish electoral spending from issue spending in a number of contexts, including in the context of *disclosure* of express advocacy as a result of portions of *Buckley v. Valeo*. The Court held there that the express advocacy distinction was a required narrowing construction in *both* the context of spending limits and disclosure requirements, including not just political-committee reporting but also event-driven reporting. *See Buckley*, 424 U.S. at 39-51 (narrowing limitation on expenditures "'relative to a clearly identified candidate'" because "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application") (quoting FECA); *id.* at (narrowing disclosure provision for persons making "'expenditures . . . for the purpose of influencing' the nomination or election of federal candidates" due to the "potential for [that language to] encompass[] both issue discussion and advocacy of a political result") (quoting FECA).

[4] Plaintiffs' inaccurate suggestion (Pls.' Mem. at 33) that the controlling Commissioners found that only "ads that are the 'equivalent of express advocacy'" can evidence "the purpose to nominate or elect candidates" distorts a point made in the FEC's opening brief. The quote taken from the Commission's brief referenced the functional equivalent of express advocacy because that was the context of *WRTL*, not because that concept played a role in the controlling Commissioners' analysis of the major purpose test here.

The Commission subsequently promulgated a regulatory definition of express advocacy, which was applicable to *both* the disclosure provisions and the prohibition on corporate and union expenditures. *See* 11 C.F.R. § 100.22; Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35292, 35294 (July 6, 1995) ("Express Advocacy E&J"). The Commission explained that identification of express advocacy could occur in part through whether a communication discusses "a candidate's character, qualifications, or accomplishments," whether it "encourage[s] any type of action on any specific issue," and whether "made in close proximity to an election," with timing "considered on a case-by-case basis." Express Advocacy E&J, 60 Fed. Reg. at 35295. This regulation has governed FECA's disclosure requirements for more than 20 years.

In the application of the major purpose analysis to communications here, the controlling Commissioners did not include the features of the express advocacy or functional equivalent tests that provide much of the narrowing construction, such as requiring an unmistakable electoral portion, 11 C.F.R. § 100.22(b)(1), but did use certain indicia that are consistent with the Commission's Express Advocacy E&J that have sensibly been used by the Commission to distinguish between candidate advocacy and issue advocacy in different contexts. It was reasonable for the controlling group to consider the extent of references to candidates versus issues and whether the communications contain issue- or candidate-related calls to action (AR 1767-78), and plaintiffs have not directly disagreed that such considerations can in at least some circumstances provide helpful indicia of purpose. Plaintiffs complain that the controlling analysis improperly parrots language in *WRTL*, an application of strict scrutiny in the context of a speech prohibition, but their analysis could also be alleged to parrot portions of the

Commission's explanation for its express advocacy regulation, which has governed disclosure without a successful challenge as underinclusive for decades.

2. The Dismissal Decision Is Not Contrary to *McConnell*

Nor is there any merit to plaintiffs' argument that the controlling Commissioners' analysis "conflicts with . . . *McConnell*." (Pls.' Mem. at 28; *id.* at 28-33.) The controlling Commissioners agree with plaintiffs that the "'Yellowtail'" ad discussed in *McConnell* "may evidence an electoral purpose." (AR 1768 n.23 (citing *McConnell*, 540 U.S. at 193 n.78).) Their assessment of the ad as "a critique of the candidate's personal behavior" (*id.*) is not undermined by the text of the ad's juxtaposition of Yellowtail's alleged personal conduct ("'fail[ing] to make his own child support payments'") with his legislative conduct ("'vot[ing] against child support enforcement'"), because the mention of his vote and vague exhortation to "'[c]all Bill Yellowtail'" to "'[t]ell him to support family values,'" *McConnell*, 540 U.S. at 193 n.78, primarily reinforces the alleged personal failings instead of speaking to a particular legislative issue. (*Contra* Pls.' Mem. at 29 (contending that the Yellowtail ad contains a "legislative critique").) Thus, like AAN's "Bucket" ad that could be deemed indicative of a major purpose to nominate or elect a federal candidate, the Yellowtail ad "appear[ed] to be more about creating a negative impression of [the candidate] in the mind of the viewer than on changing [his] legislative behavior." (AR 1774.) It was not contrary to *McConnell* for the controlling Commissioners to distinguish such ads from others such as "Repeal," in which AAN claimed that "'Obamacare'" was a "trillion-dollar health care debacle," with "job-killing taxes," and urged viewers to tell Congressman Mark Shauer "'to vote for repeal H.R. 4903 (202)225-6276 in November.'" (AR 1775).

Furthermore, that *McConnell* upheld the constitutionality of electioneering communication disclosure provisions of the Bipartisan Campaign Reform Act ("BCRA") does not mean, as plaintiffs argue, that communications the Court found could permissibly be "regulat[ed] under the FECA" (Pls.' Mem. at 30) necessarily count towards a major-purpose finding. Plaintiffs' argument that "the [Supreme] Court [in *McConnell*] found that *all* electioneering communications were sufficiently electoral as to warrant disclosure" (Pls.' Mem. at 31) and that "the Court should clarify to the agency that *the* permissible interpretation of *Buckley*'s 'major purpose' test treats a group's electioneering communications in the same way it treats express advocacy" (*id*. at 36 (emphasis added)), again seeks to collapse the distinct disclosure regimes respecting organizations making electioneering communications and applying to political committees. This Court has already rejected plaintiffs' argument that "*all* electioneering communications" should be counted as election-related for the purpose of determining political committee status. *CREW I*, 209 F. Supp. 3d at 93. In *McConnell*, the Court held that Congress could respond to the problem of groups running sham issue ads and/or attempting to hide behind anodyne-sounding names such as "Republicans for Clean Air" and "Citizens for Better Medicare" (Pls.' Mem. at 29) by requiring the event-driven disclosures BCRA established. *McConnell*, 540 U.S. at 189-202. Here, AAN has disclosed its electioneering communications as contemplated by BCRA and the FEC is not aware of any other such communications that were not disclosed. (FEC Mem. at 38.)

Plaintiffs also argue that an ad run in the 2000 Republican presidential primary by Republicans for Clean Air, contrasting the environmental records of John McCain and George W. Bush, demonstrates inconsistencies in the controlling Commissioners' approach. (Pls.' Mem.

at 29-30.) Not so. First, the text of the ad is less focused on criticizing the record of the named officeholder (McCain) than it is on supporting his opponent (Bush):

> Last year, John McCain voted against solar and renewable energy. That means more use of coal-burning plants that pollute our air. New York Republicans care about clean air. So does Governor Bush. He led one of the first states in America to clamp down on old, coal-burning electric power plants. Bush clean air laws will reduce air pollution more than a quarter million tons a year. That's like taking five million cars off the road. Governor Bush. Leading . . . so each day dawns brighter.

MUR 4982 (Bush for President, Inc.), *Statement of Reasons of Commissioner Scott E. Thomas and Commissioner Danny Lee McDonald* at 2 (footnotes omitted), http://eqs.fec.gov/eqsdocsMUR/00000127.pdf. In this regard, this ad resembles AAN's "New Hampshire" communication, which specifically mentioned an officeholder ("Congressman Hodes") but focused more on making a favorable contrast with former Senator Kelly Ayotte, his then-opponent, a situation which the controlling Commissioners found could "indicate an electoral purpose" and count towards a major-purpose finding. (AR 1777-78.)

Further, in relying on this matter that was largely about coordination, not political committee status, plaintiffs appear to have overlooked that the FEC's staff did not recommend finding reason to believe on allegations that Republicans for Clean Air was a political committee because "the advertisement does not contain express advocacy, and therefore there is no federal contribution or expenditure in excess of $1,000 with respect to the broadcasts." FEC, MUR 4982 (Bush for President, Inc.), First General Counsel's Report at 25-26, http://eqs.fec.gov/eqsdocsMUR/00000124.pdf.[5] Finally, contrary to plaintiffs' suggestion (Pls.'

[5] The FEC notes that the quotation of the organization's "purported agenda" that plaintiffs identify (Pls.' Mem. at 30) comes from the respondents' submission, not the FEC staff's analysis of the political committee question.

Mem. at 30), the Court in *McConnell* never discussed the Republicans for Clean Air ad's application to political committee status. Rather, the Court highlighted the organization's name, Republicans for Clean Air, using it as one of its examples of groups "hiding behind dubious and misleading names," *McConnell*, 540 U.S. at 197, in order to uphold BCRA's undisputed electioneering communications requirements not previously applying to such groups but now applying to AAN.

The same weaknesses are evident in plaintiffs' reliance on ads run by Citizens for Better Medicare. (Pls.' Mem. at 30-31.) While the controlling Commissioners have not analyzed this communication or the organization's other activity, the text of the example plaintiffs highlight appears to differ from AAN's communications considerably because it praises the named candidate for his legislative positions and asks the viewer to call him in order to "see what you can do to support his prescription drug plan for seniors."[6] The Commissioners found in their statement that certain of AAN's communications could count towards it being viewed as a political committee because such communications did not "focus on *changing* the voting behavior or policy stances of the named individuals now or in the future" and "[i]n fact, the subtext of both ads is that neither individual is likely to change." (AR 1778 (emphasis added).) The same could be said of the Citizens for Better Medicare ad. Inverting the controlling

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[6] Campaign Finance Institute, *Issue Ad Disclosure*, Appendix at A9 (Feb. 2001), http://www.cfinst.org/disclosure/pdf/issueads_rpt.pdf ("ARDELL DECARLO: My mother came from a family of eight. They have all passed away from cancer. I have had cancer a total of five times. At this point it is my faith and my support from my family and my friends, and then there is the medicine. ANNOUNCER: Congressman Ernie Fletcher has voted to strengthen and improve healthcare for seniors. He is working to add a prescription drug benefit to Medicare and to make sure that medicines are available for every senior who needs them. DECARLO: Without the medicine, I would not be where I am. And with people who have cancer those of us who are waiting, are looking for miracles. ANNOUNCER: Call Congressman Fletcher and see what you can do to support his prescription drug plan for seniors.").

Commissioners' observation that one of AAN's ads appeared "to be more about creating a negative impression of [the candidate, Russ Feingold] in the mind of the viewer than on changing Mr. Feingold's legislative behavior" (AR 1773-74), the Citizens for Better Medicare ad appears mainly to be about creating a positive impression of the candidate in the mind of the viewer, not on changing legislative behavior. And again, the Court in *McConnell* did not discuss the ads' applicability to the organization's political committee status, instead focusing on the fact that Citizens for Better Medicare "was not a grassroots organization of citizens, as its name might suggest, but was instead a platform for an association of drug manufacturers." *McConnell*, 540 U.S. at 128.

Furthermore, plaintiffs are not aided by highlighting (Pls.' Mem. at 31) the *McConnell* Court's observation that "[t]he precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief preelection timespans but had no electioneering purpose is a matter of dispute between the parties and among the judges on the District Court." *McConnell*, 540 U.S. at 206. Consistent with *WRTL*, 551 U.S. at 470, that observation confirms that some electioneering communications may constitute genuine issue advocacy. (FEC Mem. at 38.)[7] Instead of supporting plaintiffs' argument that the Court should find that all electioneering communications evidence an intent to nominate or elect a federal candidate, the Supreme Court's recognition that the line between campaign advocacy and issue advocacy can "'dissolve in

[7] Plaintiffs contend that it is significant that this discussion occurred in the context of the Court's overbreadth discussion of BCRA § 203 and that the Court presumed that "*all* corporate and union funded electioneering communications . . . would originate from a political committee." (Pls.' Mem. at 31-32 & n.9.) But it is far more significant that the analysis plaintiffs rely on was expressly overruled in *Citizens United*, 558 U.S. at 365-66, permitting corporations and unions to finance electioneering communications without resort to a connected political committee. And the Court has maintained its view that legal distinctions may be drawn among different categories of speech such as candidate-related speech and issue speech.

practical application,'" *WRTL*, 551 U.S. at 456-57 (quoting *Buckley*, 424 U.S. at 42), supports the Court's determination to defer to the agency's implementation choices, which are "within the agency's sphere of competence," regarding the "spending amounts relevant in applying the 'major purpose.'" *CREW I*, 209 F. Supp. 3d at 88. Consistent with the Court's instructions to analyze AAN's communications themselves, the controlling Commissioners thus analyzed the communications on their own terms and avoided making categorical determinations of the sort plaintiffs urge. Contrary to plaintiffs' argument that the controlling analysis is inconsistent with *McConnell*'s discussion of "'call'" and "'tell'" advertisements (Pls.' Mem. at 29), the Commissioners found that some of AAN's ads urging contact should not count towards a major purpose finding but that others could. (FEC Mem. at 37 (noting the controlling Commissioners' acknowledgement that the "Read This" ad could be counted towards a major purpose finding despite its inclusion of a "'tell'" exhortation).) The controlling Statement is not contrary to *McConnell*.

3. The Controlling Dismissal Decision Is Not Contrary to *Independence Institute*

Plaintiffs' reliance (Pls.' Mem. at 33-36) on *Independence Institute* is inapposite for similar reasons. In that case, plaintiff Independence Institute argued that it should not be required to make the electioneering-communication disclosures AAN has made because the ad Independence Institute intended to run constituted genuine issue advocacy. 216 F. Supp. 3d at 179, 185-86. As in *McConnell*, Independence Institute was challenging the constitutionality of BCRA's electioneering communication regime. The court's rejection of that challenge correctly reaffirmed the constitutionality of the electioneering communications requirement AAN has already complied with, and does not bear on the separate question of whether there is reason to believe that either AAN or Independence Institute was a political committee. In addition,

plaintiffs here further err in conflating Independence Institute's arguments for avoiding BCRA's event-driven disclosure regime and the controlling Commissioners' political committee analysis at issue in this case. (Pls.' Mem. at 34-35.) In contrast to BCRA's event-driven disclosure requirements, which can constitutionally apply to certain kinds of issue speech, *Independence Institute*, 216 F. Supp. 3d at 187, FECA's political committee disclosure requirements may only apply to a non-candidate controlled organization that has the major purpose of nominating or electing a federal candidate.[8]

Plaintiffs nevertheless argue that it is "unworkable" and "nonsensical" for the controlling Commissioners to distinguish between electioneering communications that are relevant to a major purpose finding and those that are not. (Pls.' Mem. at 34-35 (internal quotation marks omitted).) But the Court's remand decision instructed the Commissioners to "reconsider[]" AAN's electioneering communications "in light of the correction" it identified, and expressly contemplated that the agency could make such distinctions when it "refrain[ed] from replacing the Commissioners' bright-line rule with one of its own." *CREW I*, 209 F. Supp. 3d at 93. In so doing, the Court's decision accords with the differing natures of the Commission's case-by-case evaluation of political committee status and BCRA's electioneering communications disclosure scheme. The former entails an assessment of an organization's essential nature while the latter depends solely upon whether a particular communication has certain ascertainable properties, reflecting distinct regulatory approaches.

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[8] The other case plaintiffs rely on (Pls.' Mem. at 34) considered distinct requirements applying under Montana law, which establishes that an organization making $250 in electioneering communications must register as a "political committee" under Montana law. *Nat'l Ass'n for Gun Rights, Inc. v. Motl*, No. 16-23, 2017 WL 3908078, at *4 (D. Mont. Sept. 6, 2017). The decision did not discuss *Buckley*, the major purpose test, or FECA.

The *Independence Institute* court was right to reject an effort to muddy BCRA's constitutional disclosures required in connection with electioneering communications. Since *Buckley*, courts and legislatures have struggled to avoid vagueness while addressing the dissolution "in practical application" between "discussion of issues and candidates and advocacy of election or defeat of candidates." 424 U.S. at 42. BCRA's electioneering communication definition was a specific attempt at avoiding such vagueness that the Supreme Court had facially upheld, *McConnell*, 540 U.S. at 189-97, and the *Independence Institute* had no cause to disturb the clarity of that provision. But this Court was also right to contemplate the possibility that certain electioneering communications could reasonably not be counted towards finding that AAN was a political committee because some broadcast communications referencing candidates could reasonably be considered not to be aimed at influencing elections. Moreover, analysis of spending for the major purpose test is not limited to communications meeting the electioneering communications definition, and challenging determinations are inevitable. The controlling Commissioners' analysis is not contrary to *Independence Institute*.

[redacted]

Plaintiffs take issue with the controlling Commissioners' view that while "electioneering communications, by definition, must refer to a clearly identified federal candidate," "such

references, by themselves, do not make the communications electoral" (AR 1768), arguing yet again that electioneering communications may be equated with express advocacy because it "would be absurd to say that an ad loses its electoral purpose when it discusses an 'issue' that gives an actual reason for the voters to vote in a particular way" (Pls.' Mem. at 35). This variation of plaintiffs' argument is in considerable tension with courts' recognition that "[i]ssue advocacy conveys information and educates." *WRTL*, 551 U.S. at 470. While an "issue ad" may have an "impact on an election," that impact may "come only after the voters hear the information and choose — uninvited by the ad — to factor it into their voting decisions." *Id.* Plaintiffs contend that certain extra-record transcripts of some of AAN's express advocacy communications also discuss issues (Pls.' Mem. at 35), but it is undisputed that AAN's spending on these ads should — and did — count towards the major purpose finding because the ads expressly advocate for the election or defeat of candidates. And even if they were not express advocacy, the controlling Commissioners might have counted them towards finding that AAN was a political committee because none of the three referenced candidates in the ads plaintiffs feature were officeholders capable of taking legislative action on the issues discussed in the ads. The Commissioners did conclude that some of AAN's involving individuals in office had a legislative purpose, but relied specifically on that fact. (*See, e.g.*, AR 1771 (concluding that each of AAN's "Bush Tax Cut" ads "focuses on government spending and tax cuts and calls on viewers to contact the named officeholders to urge them to take specific legislative actions.").)

B. The Dismissal Decision Is Not Arbitrary or Capricious

In addition to failing to show that the controlling dismissal decision is contrary to law, plaintiffs are nowhere near their burden of showing that the Commissioners "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs

counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. Under this "extremely deferential" standard, *Orloski*, 795 F.2d at 167, the Court should affirm the controlling rationale. Plaintiffs' arguments that the controlling Commissioners acted arbitrarily are improperly based upon extra-record materials not before the Commission when it made its decision and in any event fail on the merits.

1. The Court's Review Under Section 30109(a)(8) Is Based Solely on the Administrative Record

As plaintiffs have conceded, "[t]he parties agree that review of the FEC's dismissal of the AAN's complaint is subject to D.D.C. LCvR 7(n)(1) and *limited to review of the FEC's administrative record*." (Pls.' Meet and Confer Stmt. at 1 (Docket No. 21) (emphasis added); *see also* Minute Order of May 1, 2017 (observing that this is a "case challenging administrative action").) Accordingly, judicial review must be limited to the administrative record "already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142, 143 (1973) (per curiam). Indeed, a "widely accepted principle of administrative law [is] that the courts base their review of an agency's actions on the materials that were before the agency at the time its decision was made." *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997).

Plaintiffs nevertheless attempt to rely on numerous materials — many provided via compressed web links — that were not part of the record before the Commission in either underlying matter. (*See* Pls.' Mem. at 13, 14, 29, 30, 35, 37, 38, 40, 41; Decl. of Stuart C. McPhail, Exhs. 3-4, Sept. 26, 2017 (Docket No. 33-1).) Such extra-record material is improper in this section 30109(a)(8) case and cannot inform this Court's review of the controlling rationales for the challenged dismissal decisions. *See Earthworks v. Dep't of the Interior*, 279

F.R.D. 180, 184 (D.D.C. 2012) ("[T]o ensure fair review of an agency decision, a reviewing court 'should have before it neither more nor less information than did the agency when it made its decision.'" (citations omitted) (collecting cases)). Plaintiffs complain that, following the Court's remand, the controlling Commissioners "look[ed] only to context identified by AAN." (Pls.' Mem. at 36.) But plaintiffs themselves chose not to provide any further context of their own, thus choosing to leave the administrative record devoid of the information they now claim to be essential. The extra-record materials were not considered by Commissioners in making the underlying dismissal decision on review here and such materials, and plaintiffs' arguments premised on them, should thus be disregarded.

In arguing otherwise, plaintiffs contend that the Court can review their extra-record materials because a comment to Rule 201 of the Federal Rules of Evidence notes that judges are unrestricted in determining domestic law. (Pls.' Mem. at 37 n.12.) While it is indisputably a judicial function to determine the law, plaintiffs' assertion that this means that their materials — news stories, broadcast maps, analyses of electoral competition — may be considered in determining the law is incorrect. Plaintiffs' theory would create a loophole swallowing the administrative record rule. Indeed, here plaintiffs seek to use this extra-record material in order to show the characteristics of AAN's electioneering communications, not to address a question of law. Furthermore, as the cases plaintiffs cite explain, judicial consideration of extra-record material is limited to narrow circumstances. *See Oceana, Inc. v. Locke*, 674 F. Supp. 2d 39, 45 (D.D.C. 2009) (discussing four circumstances); *accord, e.g.*, *Beyond Nuclear v. U.S. Dep't of Energy*, 233 F. Supp. 3d 40, 47-49 (D.D.C. 2017) (discussing "three 'unusual circumstances'" (quoting *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008))). And in both cases plaintiffs cite, the courts refused to consider the extra-record materials. In fact, in *National*

Treasury Employees Union v. Hove, the court made an observation that applies here: "[t]he only apparent purpose of plaintiffs' outside evidence is to cast doubt on the wisdom of the [agency's] decisions. However, consideration of outside evidence to determine the correctness or wisdom of the agency's decisions is not permitted." 840 F. Supp. 165, 169 (D.D.C. 1994) (internal quotation marks omitted). And as previously explained, in the event the Court were to determine that it needed additional facts, remand would be the proper course. *See supra* p. 10.

The Court has not considered extra record materials when plaintiffs have submitted them before and it should not do so now.

2. Plaintiffs' Evidence Does Not Show That the Controlling Dismissal Decision Is Arbitrary or Capricious

Even if the Court could consider plaintiffs extra-record materials that were not considered by the controlling Commissioners, plaintiffs cannot show that the dismissal decision is arbitrary or capricious. Plaintiffs primarily argue that AAN's "purported policy ads were precisely targeted to the electorate of at-risk Democrats soon to be up for election, while ignoring any officials not up for election or Republicans." (Pls.' Mem. at 36; *id.* at 36-39.) But AAN may have viewed officeholders in tight races as susceptible to constituent demands. Likewise, plaintiffs' complaints about timing (*id.* at 37 ("Nor does the record show any ad by AAN advocating its preferred policy positions after the election and during the lame duck session, even though a voter's call would have been particularly timely then.") are not consistent with the Supreme Court's admonition against similar arguments in *WRTL*, 551 U.S. at 472 (concluding that such observations about the timing of the ads and the failure to run them after the elections were "irrelevant"). Though the Court's holding there arose in the context of application of strict scrutiny to a spending prohibition, it was not unreasonable for the controlling Commissioners to act consistently with that portion of the opinion in the context presented here. Nor are plaintiffs

correct in contending that asserting that AAN's preferred legislative objectives were implausible due to the Democrats' control of Congress in 2010. (Pls.' Mem. at 39-40.) In fact, as the Commission explained in its opening brief, Congress took up and decided to reauthorize the Bush tax cuts during this time. (FEC Mem. at 43.)

Plaintiffs' claim that it was "unnecessary" for AAN to inform their viewers with "attacks on the candidates' records" "if the ads were actually focused on legislative issues" (Pls.' Mem. at 39) is irrelevant. If AAN's goal was to mobilize constituent support for particular legislative action, it would not have been unreasonable for it to make the case to viewers *why* a particular public official should be contacted and urged to vote a certain way. And regardless, there is no basis for plaintiffs' inference that any inclusion of discussion beyond what is necessary to convey the point of the ads necessitates a finding that a candidate-related purpose actually predominates. Plaintiff also argue that the Commission could count as relevant spending non-express advocacy communications that "refer[] to a clearly identified candidate for Federal office" and "promote[]," "support[]," "attack[]," or "oppose[]" a candidate for that office, 52 U.S.C. § 30101(20)(A)(iii). (Pls.' Mem. at 39.) But plaintiffs identify no cases holding that failing to use this standard would be arbitrary in this context.

Plaintiffs also complain that the controlling Commissioners did not "adequately explain [AAN's] ads' constant reference to 'in November.'" (Pls.' Mem. at 39-40.) This is a strange criticism because the controlling Commissioners extensively discussed these references in their statement. As explained in the FEC's opening brief (FEC Mem. at 34), the Commissioners acknowledged that certain of AAN's ads referencing November made them appear arguably more "election-related." (AR 1771.) But the Commissioners determined that "the word 'November' is used only in calls to take specific legislative actions" in "a lame-duck session [of

Congress that] was widely expected to take place in November and, in fact, did begin on November 15, 2010." (*Id.*) In AAN's "Taxes" communication, for example, the script references "November" in just this way: "'Tell Congressman Mark Critz to vote to extend the tax cuts in November.'" (*Id.*) The Commissioners concluded that "the use of 'November' in the ads is best understood as a reference to the time period in which the lame-duck session would commence." (*Id.*; *see* AR 1774, 1776.) Plaintiffs' disagreement with this analysis fails to show that the controlling analysis was inadequate or "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43.

Furthermore, plaintiffs' argument that the Commissioners should have made judgments about AAN's intent based upon the tone and visuals of the communications (Pls.' Mem. at 40-41) is inconsistent with courts' use of transcripts. (*E.g.*, FEC Mem. at 39 (discussing transcript at issue in *WRTL*).) It is also inconsistent with the Supreme Court's related recognition in the context of "an as-applied challenge to" the former prohibition on corporate and union electioneering communications that the "the proper standard . . . must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect." *WRTL*, 551 U.S. at 469; *see also* FEC Mem. at 42-43.

Finally, plaintiffs' charge that the controlling analysis was "rushed" and "rife with basic errors" (Pls.' Mem. at 41) is not borne out by a review of controlling statement itself. Their complaint that the Commissioners wrongly "again looked to the lifetime expenditures of the group" (*id.*) is inconsistent with the Court's observation that "[t]he Commissioners . . . made clear that their determination did not turn on the application of the 'lifetime-only' rule, which the Court had considered arbitrary and capricious, at least as applied to AJS" (Show-Cause Decision at 5 n.4 (citing AR 1779 n.52 (explicitly considering "AAN's spending solely in a single year")).

And the FEC has already explained that inclusion of the Perlmutter ad "would only reinforce the Commissioners' conclusion that AAN was not a political committee because they viewed the ad as not indicating a major purpose of nominating or electing candidates (AR 1775-76)." (FEC Mem. at 43.) Plaintiffs continue to assert that there is a $1.1 million amount that the controlling Commissioners "ignored." (Pls.' Mem. at 41.) But the record does not support that characterization, with the controlling Commissioners having considered roughly $1.75 million more of AAN's spending to be relevant or potentially relevant campaign activity, not less. (FEC Mem. at 44.)

CONCLUSION

For the foregoing reasons, and those set forth in the Commission's opening brief, the Court should grant the Commission's motion for summary judgment and deny plaintiffs' motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November, 2017, I served the unredacted version of the FEC's Reply in Support of Its Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment and the unredacted version of the accompanying Supplemental Declaration of Shanna M. Reulbach that were filed with the Court under seal, by sending these materials by email to the following counsel:

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