UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, *et al*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant, CROSSROADS GRASSROOTS POLICY STRATEGIES, Intervenor-Defendant.	Civil Action No. 1:14-cv-00148 (RJL) **ORAL ARGUMENT REQUESTED** MOTION FOR SUMMARY JUDGMENT

CROSSROADS GRASSROOTS POLICY STRATEGIES'
MOTION FOR SUMMARY JUDGMENT

Intervenor-Defendant Crossroads Grassroots Policy Strategies ("Crossroads GPS") cross-moves this Court for an order (1) granting its motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure and Local Rule 7(h) and dismissing the plaintiffs' (collectively, "Public Citizen") complaint for lack of jurisdiction with prejudice, and (2) denying plaintiffs' motion for summary judgment (Dkt. No. 23).

In support of this motion, Crossroads GPS files (1) a Memorandum of Points and Authorities in Support of Its Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, and (2) a Proposed Order. Crossroads GPS requests oral argument on this motion.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, *et al*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant, CROSSROADS GRASSROOTS POLICY STRATEGIES, Intervenor-Defendant.	Civil Action No. 1:14-cv-00148 (RJL) MEMORANDUM OF POINTS AND AUTHORITIES

CROSSROADS GRASSROOTS POLICY STRATEGIES' MEMORANDUM OF POINTS AND AUTHORITIES (1) IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND (2) IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

As construed by the Supreme Court in 1976, the comprehensive rules and restrictions that govern "political committees" under the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act"), attach only to organizations that either are under the control of a candidate or have as their "major purpose" the "nomination or election of a candidate." *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (per curiam). The Court imposed the major purpose standard to cure First Amendment overbreadth and vagueness in the Act's definition of "political committee," which literally applies to "any" group that receives contributions or makes expenditures in excess of $1,000 during a calendar year. *See id.*; 52 U.S.C. § 30101(4)(A). But *Buckley* "did not mandate a particular methodology for determining an organization's major purpose." *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 556 (4th Cir. 2012).

On October 13, 2010, Public Citizen complained to the Federal Election Commission ("FEC" or "Commission") that Crossroads Grassroots Policy Strategies ("Crossroads GPS") had become a "political committee" but had failed to make the reports and disclosures required by that status. Public Citizen claimed to have been injured because it desired access to information Crossroads GPS should have been compelled to disclose. Dissatisfied with the FEC's dismissal of that complaint, Public Citizen brought suit under 52 U.S.C. § 30109(a)(8)(A), seeking the statutory remedy of an order declaring the dismissal contrary to law and requiring the FEC to conform to that declaration. It contended that such an order would dispose of the controlling Commissioners' grounds for dismissal and, thus, was likely to lead to enforcement by the FEC that would force Crossroads GPS to make the disclosures Public Citizen seeks. *See FEC v. Akins*, 524 U.S. 11 (1998) (sustaining standing on such a theory).

In pursuit of the limited statutory remedy, Public Citizen asks this Court to untangle all the major-purpose test's competing policy considerations. For reasons discussed below, this

roving warrant would outstrip the Court's limited role and displace the FEC as primary decision-maker. Public Citizen's position rests on two errors, either of which is independently fatal to its case. In other words, Public Citizen can prevail only if the Court accepts both of its arguments.

First, Public Citizen contends that FECA unambiguously bars the Commission from examining an entity's overall spending to determine whether its major purpose is electoral. Instead, Public Citizen argues, the Commission is legally required to assess an organization's spending based solely on a single-calendar-year metric. Where, as here, an organization comes into existence at mid-year, Public Citizen limits the analysis to the group's few start-up months. Only by squinting through that "artificial and myopic lens"—the controlling FEC Commissioners' words—can Public Citizen even suggest that Crossroads GPS's major purpose is electoral spending. This is because the categories of spending Public Citizen attributes to federal elections outweighed Crossroads GPS's other disbursements only in 2010 (more precisely, the last seven months of 2010). Using any other available measuring period, such as Crossroads GPS's disbursements collectively during 2010 and 2011 or during its first fiscal year, the opposite balance is seen. Because neither FECA nor court precedent commands a narrow, rigid calendar-year approach to considering an organization's major purpose, the controlling FEC Commissioners reasonably refused to engineer their analysis in that artificial way. Tellingly, Public Citizen cites no example in the Commission's entire history in which the agency applied the jury-rigged standard Public Citizen advocates. And, because Crossroads GPS's post-2010 spending swamps all of the spending Public Citizen seeks to count, a broader analytical timeframe is fatal to Public Citizen's case.

Second, Public Citizen asserts that the Commission was required to count more types of spending when assessing Crossroads GPS's major purpose. In addition to spending for express

advocacy and its functional equivalent, Public Citizen demands the Commission count spending for communications that merely "promote," "support," "attack," "oppose," "criticize," or are otherwise "negative" about sitting federal officials running for reelection. But the controlling Commissioners reasonably limited the type of speech that is indicative of an electoral purpose to those communications that are necessarily electoral. The Commissioners adequately explained why a broader standard was unworkable and could chill political speech. There is no basis to second-guess this conclusion. Moreover, this approach defeats Public Citizen's case, even if the Commission limited its analysis to only spending during Crossroads GPS's first calendar year. In other words, Public Citizen's theory requires minimizing the time period measured, while maximizing the spending that is treated as electoral.

Public Citizen also says the Commission unreasonably weighed the record evidence in assessing Crossroads GPS's "central organizational purpose," giving too much weight to Crossroads GPS's self-generated documents and not enough to various (inaccurate) media reports. But such a weighing of evidence in the "fact-intensive inquiry" that Public Citizen calls for merits great deference and is hardly the type of arbitrariness the courts may condemn as contrary to law. AR410.

In any event, a jurisdictional defect now requires dismissal. The jurisdictional defect arises because the five-year statute of limitations, 28 U.S.C. § 2462, now has run on the violations asserted by Public Citizen. The FEC consistently dismisses such stale complaints, and such a dismissal would be entirely consistent with the judicial remedy Public Citizen seeks in this lawsuit. Thus, Public Citizen cannot show a substantial likelihood that the judicial relief it seeks would redress its alleged injury, and the complaint must be dismissed.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background.

1. FECA comprehensively governs the financing of elections for federal office. The Act, as relevant here, regulates people and entities that raise and spend funds in connection with federal elections. Broadly speaking, the regulated community falls into two camps: "political committees" and "[e]very person (other than a political committee)." 52 U.S.C. § 30104(a), (c)(1); *see also id*. § 30101(11) (defining "person" to include individuals, corporations, "or any other organization or group of persons").

a. The default rules apply to speakers that are not political committees. All persons are regulated by the Act if they make either "expenditures" or "electioneering communications"—the two types of independent electoral speech FECA regulates. An "expenditure" is a payment made "for the purpose of influencing any election for Federal office." *Id.* § 30101(9)(A)(i). As refined by the Supreme Court, the term covers only speech that contains explicit words of express advocacy, like "vote for," "vote against," "elect," or "defeat." *Buckley*, 424 U.S. at 44 n.52, 79-80.[1] "Electioneering communications" are broadcast, cable or satellite communications disseminated shortly before an election, that refer to a clearly identified federal candidate, and target the candidate's electorate. 52 U.S.C. § 30104(f)(3)(A)(i).

When a speaker spends a threshold sum of money on either independent expenditures or electioneering communications, it must file a one-time disclosure report. Each event-driven report is tailored to the triggering communication. For example, if an entity spends more than $250 on an independent expenditure, it must report the amount spent and the identity of each

[1] The only type of expenditure that Crossroads GPS makes is an "independent expenditure," which is an expenditure for a communication "expressly advocating the election or defeat of a clearly identified candidate . . . that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents." 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16(a).

person who gave the speaker more than $200 "for the purpose of furthering the reported independent expenditure." 11 C.F.R. § 109.10(e)(1)(vi); 52 U.S.C. § 30104(c)(2)(C); *see also* 52 U.S.C. § 30104(f)(2); 11 C.F.R. § 104.20(c) (electioneering communications). The entity does not need to account for and report to the FEC all its other receipts and disbursements. This regime, the Supreme Court has held, fully meets "[t]he state interest in disclosure" and "provide[s] precisely the information necessary to monitor [a speaker's] independent spending activity and its receipt of contributions." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986).

b. "Political committees," by contrast, face a comprehensive disclosure regime. Under FECA, any "committee, club, association, or other group of persons" that receives over $1,000 in contributions or makes over $1,000 in expenditures in a calendar year is a "political committee." 52 U.S.C. § 30101(4)(A). Once so designated, a group must comprehensively report to the FEC all of its contributions and disbursements, itemizing all donors who contribute in excess of $200 in a calendar year. *Id.* § 30104(b).

"And that is just the beginning . . . ." *Citizens United v. FEC*, 558 U.S. 310, 338 (2010). A political committee must also appoint a treasurer, 52 U.S.C. § 30102(a), who can be held personally liable even if the committee is incorporated, 70 Fed. Reg. 3 (Jan. 3, 2005). It must forward all contributions to the treasurer within 10 or 30 days, depending on the amount. 52 U.S.C. § 30102(b)(2). It must preserve records of receipts and disbursements for three years. *Id.* § 30102(d). It must file an organizational statement, and promptly report to the FEC any changes to information on that statement. *Id.* § 30103(a)-(c). It must file recurring disclosure reports—monthly, quarterly or semi-annually, pre-election, and post-election—until it is permitted to terminate political-committee status. *Id.* § 30104(a)(4). Each disclosure report must

account for, among other things: the total amount of receipts, itemized by ten different categories; any persons making loans (along with the identity of "any endorser or guarantor of such loan"); any persons providing rebates, refunds, dividends, or interest, or any other offset to operating expenditures in an aggregate amount over $200; all disbursements, itemized by category (there are twelve); the identity of all persons to whom loan repayments or refunds have been made; the total sum of all operating expenses; etcetera. *Id.* § 30104(b); *see also Citizens United*, 558 U.S. at 338.

Contrary to Public Citizen's representations, *e.g.*, Public Citizen Mot. for Summ. J. 24 (Dkt. No. 23); Public Citizen Reply 7 (Dkt. No. 38), FECA imposes significant fundraising restrictions on entities classified as political committees. Political committees cannot, for example, accept contributions from federal-government contractors, or from congressionally chartered corporations, or from foreign nationals (individuals or entities). 52 U.S.C. §§ 30118(a), 30119, 30121. Nor can they receive funds from national banks, meaning that a political committee seeking a bank loan must follow a set of FEC-mandated lending regulations. 11 C.F.R. § 100.82(a)(1)-(4).[2] "If a loan fails to meet any of these [regulatory] conditions, then a prohibited contribution from the lending institution results." FEC, *Nonconnected Committees* at 20 (May 2008), http://www.fec.gov/pdf/nongui.pdf (citing 11 C.F.R. § 100.82(a)).[3] All told, being labeled a "political committee" has profound consequences for public speakers.

[2] Crossroads GPS has not accepted contributions from these sources.

[3] Notwithstanding the D.C. Circuit's decision in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc)—which struck FECA's base contribution limits as applied to political committees making only independent expenditures—the FEC appears to view some or all of the restrictions listed above as still applying to independent-expenditure-only committees. *See, e.g.*, First General Counsel's Report at 6 n.4, MUR 6726 (Chevron Corp. et al.) ("[F]ederal contractors remain prohibited from making contributions to any political committee, including independent expenditure-only political committees."); *see also Wagner v. FEC*, 793 F.3d 1 (D.C. Cir. 2015) (upholding ban on contributions from federal contractors to candidates and parties), *cert. denied*, No. 15-428, 84 U.S.L.W. 3217 (U.S. Jan. 19, 2016).

2. As the Supreme Court recognized in *Buckley*, these restrictions and requirements would be unconstitutional if the term "political committee" were read broadly. Funding restrictions and reporting laws must be drawn "in proportion to the interest served, . . . [and] employ[] . . . a means narrowly tailored to achieve the desired objective." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1456-57 (2014) (citation and internal quotation marks omitted; ellipses in original); *see also Davis v. FEC*, 554 U.S. 724, 744 (2008). But imposing "political committee" burdens on every group that exceeds FECA's $1,000 contribution or expenditure threshold would yield a means-end mismatch that would be a serious First Amendment flaw. As the FEC has acknowledged, to require full disclosure and political committee status from every entity that makes more than $1,000 in expenditures "is unnecessary to effectuate the purposes of the Act." FEC Br. at 21, *FEC v. Akins*, No. 96-1590, 1997 WL 523890 (U.S. Aug. 21, 1997).

To address this constitutional infirmity, the Supreme Court "construed the words 'political committee' more narrowly." *Buckley*, 424 U.S. at 79. "To fulfill the purposes of the Act," the Court held, the term "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.*

3. The Court in *Buckley* "did not mandate a particular methodology for determining an organization's major purpose." *Real Truth About Abortion, Inc.*, 681 F.3d at 556. *Buckley* emphasized, however, that the required major purpose had to be so dominant that the group's activities "can be assumed to fall within the core area sought to be addressed by Congress" and "are, by definition, campaign related." *Buckley*, 424 U.S. at 79.

In the nearly four decades since *Buckley*, the Commission has applied the so-called major-purpose test on a case-by-case basis, developing two freestanding benchmarks for measuring an entity's major purpose. First, the FEC evaluates the entity's "central

organizational purpose," by reference to available statements made by the entity. Second, the Commission also looks to the proportion of the entity's federal election-related spending as compared to its overall spending. This spending analysis is comprehensive and highly fact-dependent. For example, the Commission has never settled on a rigid time period for the analysis, instead measuring each group's spending in a broad-based, inclusive fashion based on the facts of each case. Nor has the agency settled definitively on what types of spending are sufficiently related to the nomination or election of a candidate to count toward an entity's major purpose. The lodestar remains *Buckley's* requirements that a group's major purpose be sufficiently clear to avoid vagueness concerns and sufficiently dominant that the group's activities can be assumed to lie at the core of FECA's domain.

B. Public Citizen's Administrative Complaint.

1. For the past five years, Crossroads GPS has worked primarily to advance social welfare, including by engaging in public-policy advocacy. The organization was founded in June 2010, and its "7 in '11" National Action Plan detailed seven policy goals for the first year of its existence: guaranteeing low tax rates; stopping Congress's perceived waste of taxpayer money; attacking the national debt; reforming health care responsibly; ending the "bailout culture"; advocating border protection and law enforcement; and prioritizing American energy development. AR402.

As the administrative record reflects, Crossroads GPS's spending during 2010 and 2011 furthered these objectives. Between its founding in June 2010 and December 2011—the only data contained in the record—Crossroads GPS collected more than $78,800,000 in donations and spent more than $62,700,000. Of the total spent, more than 75%—nearly $50,000,000—went to a combination of research on policy matters; grants to organizations that share Crossroads GPS's mission; grassroots communications addressing policymaking issues, including legislation,

budget priorities, regulations, public hearings, and investigations; fundraising expenses; and management and general expenses. AR402-403.

During that time, less than one quarter of Crossroads GPS's disbursements paid for independent expenditures. AR403. All were duly disclosed to the FEC on independent-expenditure reports. Crossroads GPS continues to engage in national policy debates. AR404.

2. In October 2010, Public Citizen filed an administrative complaint with the FEC against Crossroads GPS. AR1-22. Public Citizen alleged that Crossroads GPS was a political committee because it had "a 'major purpose' to influence federal candidate elections" and had made more than $1,000 in expenditures in 2010. AR12.

To support its major-purpose theory, Public Citizen claimed that Crossroads GPS's "express advocacy expenditures" established "Crossroads GPS's 'major purpose' as influencing the 2010 federal election." AR15. At the same time, though, many of the exemplar public communications cited in the administrative complaint addressed legislative and policy issues—not federal elections. AR16-19. Many did not even refer to elections, either directly or indirectly. The administrative complaint nonetheless claimed that all these public communications must have been made "for the purpose of influencing" federal campaigns and should count toward Crossroads GPS's major purpose. AR15.

Public Citizen also pointed to media accounts about Crossroads GPS. According to the administrative complaint, these materials gave reason to believe that Crossroads GPS's "central organizational purpose" was to campaign for or against federal candidates. AR13-14.

3. In June 2011, the FEC's Office of General Counsel submitted its "First General Counsel's Report" to the full Commission, along with a Factual and Legal Analysis. AR91.1-91.63. This report concluded that Crossroads GPS was likely a political committee, but it did not

explain the relevant timeframe in which the Commission should conduct a major-purpose analysis. After Crossroads GPS submitted a supplemental response detailing its 2011 activities, the Office of General Counsel stated that the supplemental response did not alter its analysis contained in the First General Counsel's Report. AR425. Several months later, however, after discussion during the Commission's executive session, the Office of General Counsel requested permission to withdraw the First General Counsel's report. *Id.*

More than a year later, in November 2012, the FEC Office of General Counsel substituted a second "First General Counsel's Report." That report recommended finding reason to believe that Crossroads GPS's major purpose was the nomination or election of federal candidates. To reach that result, the report analyzed the organization's spending in an extraordinary way. The report first adopted a narrow, rigid calendar-year metric for the major-purpose test. Because Crossroads GPS was incorporated in June 2010, the report concentrated exclusively on the organization's spending during its first six months of existence in the second half of 2010. In purporting to evaluate Crossroads GPS's "overall conduct," the report intentionally omitted Crossroads GPS's spending for the rest of its fiscal year and for the remainder of 2011. Thus, the report ignores more than $25,000,000 of non-electoral spending in the months after the 2010 general election, but which was detailed in the administrative record. AR92-176.

Having circumscribed the relevant timeframe, the report then artificially inflated the spending that would count toward Crossroads GPS's electoral major purpose. Even squinting through a calendar-year lens, independent expenditures amounted to less than 40% of Crossroads GPS's spending in 2010. AR414-15. So the report added an assortment of public communications that did not expressly advocate for or against federal candidates but, in the

Commission staff's view, "criticized" or "opposed" officeholders who were up for reelection. AR358. All of these public communications discussed the positions of sitting legislators on issues of national importance and satisfied the standard for genuine issue advocacy articulated in *FEC v. Wisconsin Right to Life, Inc*., 551 U.S. 449 (2007). Most predated the 2010 general election by months and did not even identify the named officeholders as candidates. AR39-40. Nor did they mention elections at all, instead addressing legislative and policy questions of the sort identified in Crossroads GPS's national action plan—Medicare, the national debt, and the Affordable Care Act. AR358-61.

Nevertheless, the FEC Office of General Counsel decided these ads must have been created "for the purpose of influencing . . . election[s] for Federal office." 52 U.S.C. § 30101(9)(A)(i). Factoring in their costs, the report added another $5,400,000 in spending to the federal-election side of the analysis. So framed, Crossroads GPS's "federal campaign activity" (an undefined term), in the seven months of its existence in 2010, was said to amount to 53% of its total spending during that limited period. AR365-66. According to the report, that percentage satisfied the major-purpose test. By using the shortest time period possible, and the broadest possible standard for measuring "electoral" spending, the FEC Office of General Counsel concluded there was thus "reason to believe" Crossroads GPS was a political committee, with all the fundraising restrictions, reporting obligations, and liabilities that attend that status.

C. The Commission's Decision.

A year after receiving the second First General Counsel's report, the Commission voted to dismiss the matter. AR395. Three FEC Commissioners determined that the record provided inadequate grounds for proceeding; the other three Commissioners would have pursued the matter. In keeping with Circuit precedent, the three Commissioners who voted to dismiss—the

"controlling" Commissioners—supplied a statement of reasons on behalf of the Commission. Rejecting the Office of General Counsel's analysis, they found that the administrative complaint failed both the spending-based standard and the central-organizational-purpose standard of the major-purpose test.[4]

1. In evaluating Crossroads GPS's major purpose, the controlling Commissioners refused to artificially limit their review to seven months of a single calendar year. Finding no support in FECA for that "myopic and artificial window," AR419, the Commissioners expressed concern that considering only a "very brief snapshot of time"—seven months in this case—would "provide[] an incomplete and distorted picture of [a] group's major purpose," AR419-20. "[I]f a group continues to be active past [an] election date," that activity is, of course, "also evidence of its true purpose." AR420-21. Moreover, because the Commission has "routinely looked at activity beyond a single calendar year" in other enforcement matters, suddenly adopting a "new legal norm" for penalizing past First Amendment activity would raise grave due-process concerns. AR421-22.

The calendar-year metric was the lynchpin of the Office of General Counsel's major purpose spending analysis, the controlling Commissioners concluded. Even if the Commission accepted the Office of General Counsel's broadest view of "federal campaign activity," this spending would amount to only one third of Crossroads GPS's spending when measured against all the spending in the administrative record (June 2010 through December 2011). Even viewed through a fiscal-year lens, the total still would be less than half. AR424. Only by isolating the seven months' activity in 2010—and including speech outside the express advocacy standard as

[4] While the Office of General Counsel report referenced Crossroads GPS's public and non-public statements, AR343-45, it did not determine that Crossroads GPS's central organizational purpose was electoral or recommend that the Commission find reason to believe Crossroads GPS was a political committee on this ground. AR366.

discussed, *infra*—could the Office of General Counsel create any "scenario where Crossroads GPS's campaign spending exceeds 50 percent of its total spending." AR423.

For good measure, the controlling Commissioners also made clear that the Office of General Counsel's (and Public Citizen's) sweeping concept of "federal campaign activity" was suspect as well. Along with unambiguously campaign-related speech (*i.e.*, express advocacy), the Office of General Counsel included any speech that merely "praised" or "criticized" an officeholder running for reelection. Drawing on *Buckley's* limiting principles, the controlling Commissioners rejected that vague and open-ended approach, reasoning that only express advocacy and its functional equivalent should be treated as evidence of federal electoral activity in an entity's major purpose determination. That would ensure political-committee status was reserved for those groups operating in "the core area sought to be addressed by Congress." *Buckley*, 424 U.S. at 79; AR413, 418.

By the same token, the Office of General Counsel's more ambitious stance was visibly untailored to the government interests at stake. The Office of General Counsel's approach would impose comprehensive political-committee restrictions and requirements based on an entity's speech that does not advocate for or against federal candidates—and often does not mention elections at all. That, the controlling Commissioners said, was a bridge too far. Such an approach "would count spending wholly outside of the Commission's regulatory jurisdiction for the explicit purpose of asserting that very regulatory jurisdiction over the organization." AR415. That would defeat the very point of the major-purpose test, which is to "to ensure that groups whose major purpose is advocating issues related to public policy are *not* regulated as political committees." AR415 (emphasis added).

Equally troubling, determining what non-electoral speech is covered by the Office of General Counsel's standard would raise precisely the vagueness concerns that drove the Supreme Court in *Buckley* to impose a limiting construction on the term "expenditure" to begin with. AR416. "Candidates," the Court stressed in *Buckley*, "especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." 424 U.S. at 42. "Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest." *Id.* For this reason, *Buckley* construed "expenditure" to reach "precisely . . . that spending that is unambiguously related to the campaign of a particular federal candidate." AR404 (quoting 424 U.S. at 80). In light of the similar constitutional concerns underpinning the Court's major-purpose test, the controlling Commissioners reasoned, it would be indefensible to "bootstrap" political-committee status using a group's discourse on public issues. AR415-16.

2. The controlling Commissioners also considered the second part of the major-purpose analysis—how Crossroads GPS defined its "central organizational purpose." The Commissioners took account of all materials in the administrative record, including Crossroads GPS's organizing documents, mission statement, and website, along with media accounts compiled by the Office of General Counsel. AR410-12. As part of this "fact-intensive inquiry," the Commissioners "g[ave] due weight to the form and nature of the statements." AR410 (quoting 72 Fed. Reg. 5,595, 5,601 (Feb. 7, 2007)). They determined that Crossroads GPS's "official documents" were the most relevant. AR410. The collected media accounts were less credible—indeed, many contained errors and mistakenly confused Crossroads GPS with another organization, a registered political committee named American Crossroads. AR411-412. Thus, "Crossroads GPS clearly did not trip the central organizational purpose prong." AR412.

ARGUMENT

I. The FEC Dismissal Easily Survives Review

A. Courts in this Circuit Review the Interpretations of Controlling FEC Commissioners Under *Chevron*.[5]

FECA requires the vote of four Commissioners to find reason to believe a violation of the Act has occurred. 52 U.S.C. § 30109(a)(2); *see generally* FEC Cross-Mot. for Summ. J. 3-4 (Dkt. No. 32). If three Commissioners vote against finding reason to believe, the matter is dismissed, and the rationale of the three controlling Commissioners "necessarily states the agency's reasons for acting as it did." *FEC v. Nat'l Republican Senatorial Comm*., 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("*NRSC*"). Thus, as the D.C. Circuit has squarely held, "if the meaning of the statute is not clear, a reviewing court should accord deference" to the controlling Commissioners' interpretation. *Id.*; *see also In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000) ("We have already held that we owe deference to a legal interpretation supporting a negative probable cause determination that prevails on a 3-3 deadlock."); *Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131, 1135 n.5 (D.C. Cir. 1987) ("*DCCC*").

Public Citizen asks this Court to break with circuit precedent and review the FEC's reasoning in this matter under the less deferential *Skidmore* standard. Public Citizen Mot. for Summ. J. 17; *Skidmore v. Swift & Co*., 323 U.S. 134 (1944). It argues the D.C. Circuit has simply been wrong to accord *Chevron* deference to FEC enforcement actions dismissed by 3-3 votes. Public Citizen Mot. for Summ. J. 16-17; Public Citizen Reply 1-3. This is incorrect but beside the point. Whatever Public Citizen may think the law *should* be, this Court "is not at liberty to disregard clearly established, controlling precedent." *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 114 (D.D.C. 2010), *aff'd*, 669 F.3d 315 (D.C. Cir. 2012).

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[5] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Public Citizen thus tries to distinguish away the entire body of Circuit law. *NRSC*, for example, involved an interpretation "of one of the Commission's own regulations" rather than of FECA. Public Citizen Mot. for Summ. J. 16. But in *In re Sealed Case*, the court acknowledged that *NRSC* "involved interpretation of an FEC regulation rather than of FECA," yet it still applied *Chevron* deference to statutory interpretations arising out of a Commission dismissal based on a 3-3 vote of FEC Commissioners. *In re Sealed Case*, 223 F.3d at 779-80. Likewise, Public Citizen claims that "most" of the controlling decisions "did not actually address Chevron deference." Public Citizen Reply 3. Again, *In re Sealed Case* answered that precise objection. Applying *Chevron* deference to FEC dismissals of enforcement actions by 3-3 votes was "consistent" with precedent, the court said, even if earlier decisions had not spoken "explicitly in *Chevron* terms." 223 F.3d at 781.

Public Citizen fails to distinguish *In re Sealed Case*. Public Citizen asserts that, because *In re Sealed Case* involved an appeal from a collateral criminal proceeding, its holding was limited to such circumstances and that a different standard might apply on direct review. Public Citizen Reply 3-4. Public Citizen latches onto the court's statement that it had to determine whether deference was appropriate "in the context presented here." *In re Sealed Case*, 223 F.3d at 779. But this misses the point: the court was determining whether to extend to collateral criminal proceedings the *Chevron* deference applicable on direct review under 52 U.S.C. § 30109(a)(8). Satisfied that *Chevron* deference governed in both circumstances, the court found it "irrelevant that the prevailing interpretation was established in the context of agency enforcement, whereas this is a criminal prosecution." *Id.*

Public Citizen also contends that the competing interpretation in *In re Sealed Case* "would not have prevailed under any standard," so "the court's discussion of *Chevron* deference

appears to be merely dicta." Public Citizen Reply 4-5. But that does not declaw the court's holding that *Chevron* applies. Taking this theory to its logical endpoint, *any* standard-of-review reasoning would qualify as dicta where a litigant makes a "weak" showing. Public Citizen Reply 5. That, to state the obvious, is not the rule.

Public Citizen's fallback argument is that *In re Sealed Case* and its predecessors were overruled by the Supreme Court's decision in *United States v. Mead Corp*., 533 U.S. 218 (2001). Not so. Circuit precedent is binding unless "'effectively overrule[d],' i.e., 'eviscerate[d]'" by later Supreme Court decisions. *Nat'l Inst. of Military Justice v. U.S. Dep't of Defense*, 512 F.3d 677, 682 n.7 (D.C. Cir. 2008); *see also Grocery Mfrs. Ass'n v. E.P.A.*, 693 F.3d 169, 180 (D.C. Cir. 2012) (Tatel, J., concurring). Public Citizen comes nowhere close to making that showing here. In *Mead*, the Court held that not every interpretive action is entitled to *Chevron's* deferential standard; rather, deference is appropriate where "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226-27. Determining whether *Chevron* deference is warranted under *Mead* is not a boundless inquiry into congressional intent; rather, it is available if agencies can claim "express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." *Id.* at 229. The "interpretation's legal effect" is thus the "touchstone" of the inquiry. *In re Sealed Case*, 223 F.3d at 780 (citing *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000)).

If anything, the D.C. Circuit's reasoning in *In re Sealed Case* anticipated *Mead*. (*Christensen*—on which *In re Sealed Case* relied—is viewed as *Mead's* "foreshadowing predecessor." Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial*

Deference, 90 Minn. L. Rev. 1537, 1551 (2006).) As *In re Sealed Case* explained, each step of the FEC's enforcement process is "part of a detailed statutory framework for civil enforcement and is analogous to a formal adjudication, which itself falls on the *Chevron* side of the line." *In re Sealed Case*, 223 F.3d at 780. This process "tend[s] to foster the fairness and deliberation that should underlie a pronouncement" with the force and effect of law. *Mead*, 533 U.S. at 230; *see also FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 185 (D.C. Cir. 2001) ("[I]n making probable cause determinations, the Commission fulfills its statutorily granted responsibilities, giving ambiguous statutory language concrete meaning through case-by-case adjudication."). Because the FEC's dismissal was issued through expressly delegated adjudicatory powers carrying the force and effect of law, the controlling Commissioners' interpretation is entitled to *Chevron* deference. As the Supreme Court recently remarked, there has not been "a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field." *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1874 (2013).

B. The Commission's Dismissal of Public Citizen's Complaint Was Reasonably Explained and Followed from a Permissible Interpretation of the Law.

The courts may overturn a Commission dismissal decision only if it is "contrary to law," 52 U.S.C. § 30109(a)(8)(C)—a term that incorporates *Chevron* and the arbitrary-and-capricious standard alike. *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). Here, the controlling Commissioners reasonably interpreted FECA and faithfully applied the major-purpose test both in evaluating Crossroads GPS's spending and in assessing its "central organizational purpose." Their decision was also the product of reasoned decisionmaking, satisfying arbitrary-and-capricious review. For these reasons, Public Citizen's complaint should be dismissed.

1. The Commission acted reasonably in identifying Crossroads GPS's electoral and non-electoral spending.

In analyzing Crossroads GPS's spending, the controlling Commissioners rejected Public Citizen's complaint for two independent reasons. Accordingly, to invalidate the dismissal Public Citizen must negate both of those reasons. First, it must show the Commission was legally bound to artificially and rigidly segment its major-purpose analysis into discrete calendar-year-by-calendar-year boxes. Second, it must show the Commission was legally bound to add certain non-express advocacy discourse—disseminated many months before Election Day—to the federal-election side of the scale. Only by showing that the Commission was legally required to limit its review to a calendar-year metric and classify speech falling outside the express advocacy standard as evidence of federal electoral activity in the major-purpose determination can Public Citizen prevail. "Without one of these approaches," the controlling Commissioners explained, "the other standing alone would be inadequate to show that Crossroads GPS's spending was sufficiently extensive." AR423. Public Citizen cannot make either of these showings, much less both.

a. The Commission reasonably measured Crossroads GPS's "major purpose" based on the organization's broader pattern of spending rather than based solely on a calendar-year metric.

In calculating what fraction of a group's spending is undeniably federal and electoral in nature—and therefore counts towards the major-purpose test—the Commission must bookend its analysis with a start date and an end date. That much everyone agrees on. *See* Public Citizen Mot. for Summ. J. 28; FEC Cross-Mot. for Summ. J. 42-43; AR505-09 (dissenting Commissioners' statement of reasons). The issue is what that time frame should look like. In keeping with the agency's case-by-case approach to major purpose determinations, the controlling Commissioners decided that "the facts in [each] case . . . will determine the

appropriate time frame for analysis." AR423 n.101. Here, the administrative record contained data on Crossroads GPS's spending from June 1, 2010 (its founding date), through December 31, 2011. AR414-15. The controlling Commissioners took all that information into account. Based on that comprehensive analysis, they found that federal electoral spending was not sufficient to satisfy the major-purpose test—even if Public Citizen's extreme view of the spending that should count as federal election-related is used. AR424.

Public Citizen says it was contrary to law for the Commissioners to use anything other than a rigid, myopic calendar-year-by-calendar-year metric even when that method requires the Commissioners to ignore available information in the administrative record. In other words, the Commissioners were required to zoom in on Crossroads GPS's activity solely between June 1, 2010, and December 31, 2010. No 2011 spending could be considered.

That is not the law. Congress did not unambiguously dictate Public Citizen's wooden calendar-year formula (or any other rigid timeframe for that matter). Nor was it arbitrary or capricious for the controlling Commissioners to decline to employ that one-size-fits-all standard.

i. As a statutory matter, Public Citizen's calendar-year metric does not follow from congressional command. Public Citizen Mot. for Summ. J. 29. If Congress "has directly spoken to the precise question at issue," the court and the agency "must give effect to the unambiguously expressed intent." *Agape Church, Inc. v. FCC*, 738 F.3d 397, 406 (D.C. Cir. 2013) (quoting *Chevron*, 467 U.S. at 842-43). But contrary to Public Citizen's view, nothing in FECA "makes clear" that the Commission must balance an entity's electoral and non-electoral spending on a fixed calendar-year basis. Public Citizen Mot. for Summ. J. 29. In fact, text, structure, and history display no legislative intent—unambiguous or otherwise—on the question.

This is hardly surprising, since the major-purpose test is a product of later Supreme Court interpretation, not congressional drafting. *See Buckley*, 424 U.S. at 79. Thus, "it is doubtful that, in enacting [FECA], Congress even anticipated" that the Commission would need to assess an entity's overall purpose as a precondition to labeling it a political committee. *Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108, 111 (D.C. Cir. 2012) (per curiam) (rejecting *Chevron*-step-one challenge in similar circumstances); *cf. Am. Tunaboat Ass'n v. Brown*, 67 F.3d 1404, 1408 (9th Cir. 1995) ("Congress, in all likelihood, did not anticipate this situation. Nor, quite evidently, did Congress speak to this issue."). "[E]mploying traditional tools of statutory construction," there is thus no basis to find that "Congress had an intention on the precise question at issue." *Chevron*, 467 U.S. at 843 n.9. Nor, in the 40 years since the Supreme Court announced the major-purpose test, has Congress once amended the definition of "political committee" to limit the Commission's discretion in this area. *Compare* Pub. L. No. 92-225, title III, § 301(d), 86 Stat. 11 (1972), *with* 52 U.S.C. § 30101(4)(A).

Public Citizen's only response is that a different, statutory prerequisite to political-committee status references calendar years. (As noted above, the FECA defines "political committee" to mean any group that receives contributions or makes expenditures totaling more than $1,000 "during a calendar year." 52 U.S.C. § 30101(4)(A).) From this, Public Citizen infers that Congress "unambiguously" intended a calendar-year metric for the major-purpose test as well. Public Citizen Mot. for Summ. J. 30. But that does not follow. Congress's enactment of calendar-year language for a bright-line statutory threshold does not unambiguously limit what evidence is relevant under a standard later made controlling by the courts. This is not a close question. Congress did not "directly resolv[e]" the contours of the major-purpose test five years before that test was established. *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 697

(D.C. Cir. 2014) (citation omitted). Because neither Congress nor the courts "mandate[d] a particular methodology for determining an organization's major purpose," *Real Truth About Abortion, Inc.*, 681 F.3d at 556, the controlling Commissioners were not required to use Public Citizen's rigid calendar-year formula.[6]

ii. Nor was it otherwise unreasonable for the controlling Commissioners to refuse Public Citizen's metric. Contrary to Public Citizen's view, looking beyond a single calendar year's spending was not "a change in FEC policy." Public Citizen Reply 27. Rather, as the Commissioners made clear, "the Commission routinely look[s] at activity beyond a single calendar year." AR421. In MUR 5751, for example, the Office of General Counsel examined "receipts and disbursements from 2002-2006." *Id.* So too in MUR 5753, where Commission staff based their major-purpose analysis on the respondents' activity "during the entire 2004 cycle." AR422; Factual and Legal Analysis, at 11, 18, MUR 5753 (Aug. 9, 2006) (League of Conservation Voters, et al.); *see also* Statement of Reasons of Commissioners Petersen and Hunter, at 24-25, MUR 5842 (June 10, 2009) (Economic Freedom Fund, et al.) (looking at 2006 election cycle for major-purpose inquiry); *FEC v. Malenick*, 310 F. Supp. 2d 230, 235 n.6 (D.D.C. 2004) (looking to contributions "in 1995 and 1996"), *rev'd in part on reconsideration*, No. 02-cv-1237, 2005 WL 588222 (D.D.C. Mar. 7, 2005); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 865 (D.D.C. 1996) (examining 1989 and 1990 activities).

The examples go on. In 1996, for instance, the Commission issued an advisory opinion analyzing a foundation's "pattern of . . . contributions" over a "six-year period (1990 to 1995)." FEC Adv. Op. 1996-3, at 3 (Apr. 19, 1996). Strikingly, the Commission in that matter remarked that "in 1990 political contributions formed 48% of all [foundation] outlays." *Id.* at 3 n.5. But

[6] Public Citizen does not claim that the Commissioners' interpretation is statutorily impermissible under *Chevron* step two. Public Citizen Mot for Summ. J. 31-33 (arguing, in the alternative, only that there were flaws in the Commission's decision-making).

the Commission gave that spending little weight because "it occurred in the *initial year* of the Foundation's establishment when outlays were, in absolute terms, small compared with subsequent years and the Foundation's disbursement programs were not yet fully developed." *Id.* (emphasis added). The parallels between that analysis and the Commissioners' reasoning in this case are hard to miss.

Even the cases referenced (obliquely) by Public Citizen disprove its calendar-year thesis. *See* Public Citizen Mot. for Summ. J. 29 (citing AR364). In MUR 5487, for example, the Commission looked at the spending "[d]uring the entire 2004 election cycle," and also made note of the respondents' spending through April 2006. Conciliation Agreement ¶¶ 18, 36, MUR 5487 (Feb. 28, 2007) (Progress for America Voter Fund). The same is true of MUR 5754. There, the Commission again looked to spending during the "entire 2004 election cycle," without distinguishing activities attributable to 2003 versus 2004. Conciliation Agreement ¶ 13, MUR 5754 (Dec. 13, 2006) (MoveOn.org Voter Fund) (the respondent was formed in 2003 and continued activity in 2004). As the controlling Commissioners did here, the Commission also evaluated that respondent's post-election spending; the agency noted that the organization "effectively ceased active operations" after the election and "has limited its disbursements primarily to legal and administrative costs." *Id.* ¶ 16; *see also* Conciliation Agreement ¶ 36, MURs 5511 & 5525 (Swift Boat Veterans and POWs for Truth) ("Since the 2004 election, SwiftVets has effectively ceased active operations . . . and has limited its disbursements primarily to legal and administrative costs, as well as charitable contributions to veteran-related charities."). In short, there has never been a Commission "policy" of cabining the major-purpose analysis to a single calendar year. Instead, Public Citizen is trying to impose a novel new policy that the FEC never adopted and the controlling Commissioners reasonably rejected.

Rejecting Public Citizen's strict calendar-year metric also does not frustrate FECA's purposes. Public Citizen Reply Mem. 27. Indeed, Public Citizen does not contend otherwise, tilting instead at a standard the controlling Commissioners deliberately chose not to adopt.

Public Citizen insists that using a strict "fiscal year analysis" to evaluate major purpose would "unduly compromise[] the Act's purposes." Public Citizen Mot. for Summ. J. 32; Public Citizen Reply 27. For reasons discussed by the FEC, however, a 12-month fiscal-year metric is no more susceptible to abuse than a 12-month calendar-year metric. *E.g.*, FEC Cross-Mot. for Summ. J. 44-45; AR420. Ultimately, the merits of a fiscal-year versus calendar-year approach are mostly academic here, since the controlling Commissioners disclaimed *both* standards: "We do not believe that fiscal year is the required time frame in all analyses any more than we believe calendar year is." AR423 n.101. Rather, the facts of each specific case "will determine the appropriate time frame for analysis." *Id.*

Based on the full administrative record, the controlling Commissioners analyzed Crossroads GPS's activity through a range of lenses, including a comprehensive view of all the organization's spending contained in the administrative record. There is nothing about that inclusive, fact-specific analysis that frustrates FECA's purpose, and Public Citizen does not dispute the point. In fact, avoiding formalistic fiscal- and calendar-year metrics ensures that parties cannot easily escape regulation through sharp accounting practices.

iii. There is a due-process dimension as well. As the controlling Commissioners explained, the calendar-year metric first surfaced in 2013, mid-way through this enforcement proceeding. Using it to penalize Crossroads GPS's 2010 activity would thus "raise serious due process concerns." AR425; *see also* AR422 ("[D]ue process would preclude the Commission

from seeking to enact a new legal norm now, without prior notice, behind closed doors in a confidential enforcement action and apply it retroactively.").

The controlling FEC Commissioners were right to perceive this problem. "The constitutional requirement that defendants be given fair notice of conduct that can subject them to punishment is deeply rooted in our legal system and applies to any defendant—criminal or civil—faced with punishment at the hands of the state, an agency, or a jury." Theodore J. Boutrous, Jr. & Blaine H. Evanson, *The Enduring and Universal Principal of "Fair Notice"*, 86 S. Cal. L. Rev. 193, 204 (2013). In simplest terms, "regulated parties should know what is required of them so they may act accordingly." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). "It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012).

These principles apply with full force here. If adopted, the volte-face urged by the Office of General Counsel would have violated principles of "fair notice" at a foundational level. *United States v. Williams*, 553 U.S. 285, 304 (2008). In 2010, no speaker could guess that the Commission would begin evaluating political-committee status strictly on a rigid calendar-year basis. Quite the opposite; the "regulatory history" discussed above "makes it apparent that the Commission policy in place at th[at] time" involved just the sort of comprehensive analysis the controlling Commissioners applied here. *Fox Television Stations, Inc.*, 132 S. Ct. at 2318; see *supra* 22-23. In fact—and as the controlling FEC Commissioners protested—the calendar-year metric was not even conceived of until 2012. The standard "sprung into existence in the Second

First General Counsel's Report issued . . . in this matter," which staff circulated to the Commission more than two years after Public Citizen filed its administrative complaint. AR422.

The due-process implications are obvious: "Because OGC's legal test was evolving behind closed doors while this enforcement matter was under review, the Respondent and other similarly situated organizations did not have clear prior notice that their respective major purposes would be analyzed by OGC under a single calendar-year rule." AR515. The added fact that the FEC's enforcement action, if it had proceeded, would have invaded "'sensitive areas of basic First Amendment freedoms'" only compounds the gravity. *Fox Television Stations, Inc*., 132 S. Ct. at 2318 (citation omitted). For this reason also, the controlling Commissioners reasonably declined to apply such a constitutionally suspect interpretation in this case. *Cf. Agape Church, Inc*., 738 F.3d at 413 (Kavanaugh, J. concurring) (approving agency's "invok[ing] the principle of constitutional avoidance" in light of "serious" constitutional problems).

b. In determining whether Crossroads GPS's major purpose is electoral, the Commission reasonably declined to factor in speech that Congress has not regulated as electoral advocacy.

i. Public Citizen also argues that the Commission should have included more of Crossroads GPS's spending on the federal-election side of the major-purpose scale. In Public Citizen's view, it was not enough that the Commission factored in Crossroads GPS's undisputedly campaign-related speech, its express advocacy. Public Citizen argues the agency also should have included any communications that "promote," "support," "attack," "oppose," "criticize," or are otherwise "negative" about federal officeholders who are up for reelection.

For reasons discussed below, the controlling Commissioners reasonably disagreed. As an initial matter, however, it bears emphasis that the issue need not be resolved in this case. Even accepting Public Citizen's broad vision of "federal campaign activity," the Commissioners made clear dismissal would still be proper when that activity was compared to Crossroads GPS's

overall spending (i.e., its 2010 and 2011 activity combined). AR423-24. For that period, "the $20.8 million that [Public Citizen] proposes to be generalized federal campaign activity" would amount to less than one third of Crossroads GPS's total spending. AR424. Even through a fiscal-year lens, the percentage would comprise less than half of the organization's spending. Only by circumscribing the time period to a calendar year *and* requiring consideration of speech beyond express advocacy can Public Citizen "conjure a scenario where Crossroads GPS's campaign spending exceeds 50 percent of its total spending." AR423. Because the controlling Commissioners reasonably declined to bind themselves to the calendar-year metric, *see supra* 19-26, the parties' competing views about electoral spending have no bearing on the outcome of the enforcement proceeding. *See, e.g.*, *Nader v. FEC*, 823 F. Supp. 2d 53, 67, 68 (D.D.C. 2011) (dismissing case when FEC's alleged error would not have led to "a different decision").

ii. Even assuming the Commissioners were required to limit their timeframe to a calendar year, the controlling Commissioners' analysis of Crossroads GPS's federal election spending was entirely reasonable. Unlike its calendar-year complaint, Public Citizen does not claim that the Commissioners' application of the major purpose test was statutorily impermissible under *Chevron*. Nor does Public Citizen dispute the basic premise of the Commissioners' decision: that a line must be drawn—somewhere—between election-related spending and non-election-related spending. *See* Public Citizen Mot. for Summ. J. 26. Public Citizen's complaint is simply that the controlling Commissioners chose the wrong place to draw that line. *Id.*

A straightforward application of administrative-law doctrine should yield judgment for the Commission. FECA's arbitrary-and-capricious standard "is an extremely deferential standard which requires affirmance if a rational basis for the agency's decision is shown."

Orloski, 795 F.2d at 167. And this is doubly true when it comes to the sort of line-drawing at issue here. "An agency has 'wide discretion' in making line-drawing decisions." *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 214 (D.C. Cir. 2013). "It is only required to identify the standard and explain its relationship to the underlying regulatory concerns." *Id.* (quoting *WorldCom, Inc. v. FCC*, 238 F.3d 449, 462 (D.C. Cir. 2001)); *see also Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998) (Declining "to review line-drawing . . . unless a petitioner can demonstrate that lines drawn . . . are patently unreasonable, having no relationship to the underlying regulatory problem." (internal quotation marks and citations omitted)).

Here, the controlling Commissioners provided a reasoned explanation for keying the major-purpose test to express advocacy and the functional equivalent of express advocacy, and they likewise demonstrated that line's relationship to the underlying regulatory problem. In the Commissioners' judgment, their interpretation provided for a close fit between the comprehensive laws that govern political committees and the governmental interests to be served. AR415-19. As the Supreme Court has made clear, the major-purpose test serves to ensure that political-committee status attaches only to groups that engage overwhelmingly in activities "within the core area sought to be addressed by Congress." *Buckley*, 424 U.S. at 79; *see also* AR418. By homing in on express advocacy—the only class of speech that is *necessarily* electoral—and its functional equivalent, the Commissioners thus reasonably accommodated the FECA's "purpose in disclosure while also minding carefully the constitutional interests in privacy also at stake." *Van Hollen v. FEC*, No. 15-5016, 2016 WL 278200, at *12 (D.C. Cir. Jan. 21, 2016). "By tailoring the disclosure requirements to satisfy constitutional interests in privacy, the FEC fulfilled its unique mandate [in regulating core constitutionally protected activity]." *Id.*; *cf. Akins v. FEC*, 736 F. Supp. 2d 9, 19 (D.D.C. 2010)

("While the dividing line between lobbying and electioneering may be, at times, hard to draw, . . . nothing in the Act indicates that the Commission acted contrary to law by refusing to equate lobbying in general . . . with efforts to influence federal elections.").

Moreover, Public Citizen's open-ended "promote-attack-support-oppose" standard raises obvious vagueness problems, which the controlling Commissioners were right to recognize.[7] As the Supreme Court remarked in creating the express-advocacy test in the first place, terms like "relative to" and "'advocating the election or defeat of' a candidate" fail to provide "fair warning" to speakers. *Buckley*, 424 U.S. at 41-42 & n.48. Public Citizen's standard is even less clear. In fact, Public Citizen itself cannot explain what speech would be covered. It defines "federal campaign activity" variously as speech that "support[s]," "oppose[s]," "criticize[s]," "attacks," "promotes," is "highly negative" about, and even "contained views"—*contained views*—about officeholders up for reelection. Public Citizen Mot. for Summ. J. 7, 8, 26 & n.5.

This standardless standard poses precisely the vagueness problems *Buckley* sought to avoid. "Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Buckley*, 424 U.S. at 42. Yet in Public Citizen's approach, any communication, at any time, that "contain[s] views" about incumbents may expose the communication's sponsor to comprehensive reporting laws, funding restrictions,

[7] Although the Supreme Court rejected a vagueness challenge to the "promote-attack-support-oppose" standard in *McConnell v. FEC*, 540 U.S. 93 (2003), the Court considered this challenge in the context of requiring political parties to pay for certain public communications with federal funds. "[S]ince actions taken by political parties are *presumed* to be in connection with election campaigns," "[t]he words 'promote,' 'oppose,' 'attack,' and 'support' clearly set forth the confines within which potential *party speakers* must act in order to avoid triggering the provision." *Id.* at 170 n.64 (emphasis added). "The context . . . is very different" when this standard is applied to other speakers, the Seventh Circuit has explained, because "[t]he First Amendment vagueness and overbreadth calculus must be calibrated to the kind and degree of the burdens imposed on those who must comply with the regulatory scheme." *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 837 (7th Cir. 2014). "[T]he greater the burden on the regulated class, the more acute the need for clarity and precision." *Id.* The "promote-attack-support-oppose" standard may not be vague in the context of requiring political parties—whose activities are "presumed" to be campaign-related—to pay for certain public communications with federal funds, but it raises serious vagueness concerns when used to determine whether the spending of other types of speakers can subject these speakers to regulation as "political committees." "Nothing in *McConnell* authorizes this." *Id.* at 838.

government subpoenas, and civil and criminal liability. The controlling Commissioners were right to question this boundless know-it-when-you-see-it standard.

In fact, the Crossroads GPS enforcement matter illustrates just how elastic Public Citizen's standard can be. Compare two public communications, one from Crossroads GPS's case and one from an enforcement matter involving "Campaign for America." Crossroads GPS ran the following advertisement, "Hurting," in August 2010:

> We're hurting. But what are they doing in Washington? Congressman Joe Sestak voted for Obama's big government health care scheme, billions in job-killing taxes, and higher insurance premiums for hard-hit families. Even worse, Sestak voted to gut Medicare—a $500 billion cut. Reduced benefits for 850,000 Pennsylvania seniors. Higher taxes and premiums. Fewer jobs. Medicare cuts. The Sestak/Obama plan costs us too much. Tell Congressman Sestak: stop the Medicare cuts.

AR360. According to the Office of General Counsel (and Public Citizen), this advertisement "provide[s] evidence that Crossroads GPS had as its major purpose the nomination or election of federal candidates." AR358. It "features a clearly identified federal candidate," it "criticizes or opposes [that] candidate," and it was disseminated "shortly before the 2010 elections." AR361. That means the advertisement counts toward Crossroads GPS's electoral major purpose.

By comparison, consider the advertisement that "Campaign for America" ran in *The New York Times* in the end of July 1998. As described by the Office of General Counsel:

> It contains a caricature of then-Speaker Newt Gingrich sweeping a piece of paper entitled "Shays-Meehan Bill" under a rug. At the top of the ad is the question: "Can't This Guy Ever Keep His Word?" Under the cartoon is the following text:
>
> > On June 11, 1995 at a New Hampshire town hall meeting, House Speaker Newt Gingrich shook President Clinton's hand and agreed to create a bipartisan blue-ribbon commission on campaign reform.
> >
> > On November 13, 1997, Speaker Gingrich said, "We are committed to having a vote by sometime in March [1998]."
> >
> > It is now July 1998 and all Speaker Gingrich has done on campaign finance reform is manipulate House rules to obstruct a real vote.

America deserves a clean vote on Shays-Meehan before the August recess.

Speaker Gingrich, stop sweeping campaign finance reform under the rug.

First General Counsel's Report of Lois G. Lerner, Associate General Counsel, at 25, MUR 4940 (Dec. 19, 2000) (Campaign for America et al.).

Like Congressman Sestak in 2010, Speaker Gingrich was up for reelection in 1998. Yet the Office of General Counsel determined that Campaign for America's advertisement "d[id] *not* constitute campaign activity." *Id.* (emphasis added). Using reasoning that would apply with equal force to Crossroads GPS, the Office of General Counsel concluded that the Gingrich advertisement did not "call[] on the public to support or oppose the election of any federal candidate." *Id.* Rather, its "thrust [wa]s to urge federal officeholders to support campaign finance reform." *Id.* And, whereas the Office of General Counsel in Crossroads GPS's matter dubbed August 2010 "shortly before the 2010 elections," in Campaign for America's enforcement action, it found late July 1998 to be "well before the general election." *Id.*; *see also* AR365 (suggesting that 2011 spending—more than *one year* before the next general election—could be "federal campaign activity").[8]

That the standard Public Citizen advocates can both inculpate and exonerate similarly situated speakers is, to say the least, a problem. One of the main purposes of the vagueness doctrine is to ensure "precision and guidance . . . so that those enforcing the law do not act in an arbitrary or discriminatory way." *Fox Television Stations, Inc*., 132 S. Ct. at 2317. Particularly "[r]igorous adherence" to these principles is required "[w]hen speech is involved." *Id.*; *see also*

[8] The lack of clarity as to *when* an advertisement is close enough to an election to constitute campaign activity underscores another vagueness problem with Public Citizen's preferred standard. Under current law, advertisements that "support" or "oppose" candidates may be presumed to constitute electoral activity at any time when distributed by groups that are undoubtedly electoral—*i.e.*, political parties and PACs whose stated purpose is electoral activity. The same presumption does not apply to issue advocacy groups. Such groups will be in the position of having to predict when a communication is near enough in time to an election to constitute electoral activity. Public Citizen's open-ended and vague standard will have the effect of chilling issue-oriented speech disseminated months before an election.

Plunkett v. Castro, 67 F. Supp. 3d 1, 22 (D.D.C. 2014) ("Government is at its most arbitrary when it treats similarly situated people differently." (citation omitted)). Given their mandate to "avoid unnecessarily burdening . . . First Amendment rights," *AFL-CIO v. FEC*, 333 F.3d 168, 178 (D.C. Cir. 2003), the controlling Commissioners reasonably declined to follow Public Citizen's preferred approach here.

iii. Public Citizen's contrary arguments lack merit. *First*, Public Citizen exhaustively attempts to distinguish the precedent cited in the Commissioners' statement of reasons. Public Citizen Mot. for Summ. J. 33-36. The controlling Commissioners, however, did not state that the cited decisions "compel[led]" their reasoning, Public Citizen Mot. for Summ. J. 34 n.8; all parties agree that the courts have not "mandate[d] a particular methodology for determining an organization's major purpose." *Real Truth About Abortion, Inc.*, 681 F.3d at 556. Rather, the Commissioners pointed to those decisions as examples of courts' adopting a First Amendment-sensitive approach similar to their own. In *New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010), for instance, the court analyzed an organization's "overall spending" to determine whether it "spends a preponderance of its expenditures on *express advocacy* or contributions to candidates," *id*. at 678 (emphasis added). Public Citizen dismisses this particular example as hailing from a "different Circuit[]" and involving "state law." Public Citizen Mot. for Summ. J . 35; Public Citizen Reply 13. Again, though, the question is not whether the controlling Commissioners' reasoning is dictated by judicial *stare decisis*, but whether their decision had a "rational basis." *Orloski*, 795 F.2d at 122. The fact that federal courts in similar contexts have taken a nearly identical view only confirms the reasonableness of the Commissioners' judgment.

Second, Public Citizen makes much of the fact that FECA elsewhere defines different categories of regulated speech. For example, Public Citizen notes that the Act defines a broader category of "federal election activity" that has specific application in the context of state political parties, whose federal accounts are appropriately classified as political committees under the Act. Public Citizen Mot. for Summ. J. 26 n.5, 37. For state political parties, "federal election activity" is defined to include speech that "promotes," "supports," "attacks," or "opposes" a federal candidate, "regardless of whether the communication expressly advocates a vote for or against a candidate." 52 U.S.C. § 30101(20)(A)(iii). At base, that is the standard Public Citizen wants to impose on all speakers, even those that are not political committees, by importing this state political party provision into *Buckley's* major purpose test.

The controlling Commissioners were well within their discretion to avoid imputing that political-party-specific standard—that applies to entities that are political committees under FECA—to all private speakers across the board. In fact, the Supreme Court upheld Section 30101(20)(A)(iii) precisely because political parties are different from private groups. As explained by the government in *McConnell v. FEC*, "*[u]nlike some interest groups . . .* parties are primarily and continuously concerned with acquiring power through electoral victory." Gov't Br. at 48, *McConnell v. FEC*, 540 U.S. 93 (2003) (No. 02-1674) (internal quotation marks and citation omitted; emphasis added). "Parties never engage in public communication without regard to its electoral consequences," so "[t]here is consequently no need to distinguish between political party disbursements that are directed at candidate elections and those that are not." *Id.* (citation omitted).[9]

[9] The government's brief in *McConnell* does not appear to be available on public legal databases, though a copy can be found at http://www.democracy21.org/uploads/%7B513D19FA-62B9-4412-9563-C1B1D023E33C%7D.PDF. Relevant pages in the brief are included in an addendum to this memorandum.

The Supreme Court agreed. "[A]ctions taken by political parties are presumed to be in connection with election campaigns," the Court remarked. 540 U.S. at 170 n.64, *overruled in part*, *Citizens United*, 558 U.S. 310. For political parties, the only question is *which* election a particular communication is designed to influence—federal, state, or local. "[T]he relevant distinction," as the government explained in McConnell, "is between disbursements that are directed, in whole or in part, at *federal* elections, and those that are directed at state and/or local elections only." Gov't Br. at 48, *McConnell*, 540 U.S. 93. For political parties, therefore, "[t]he words 'promote,' 'oppose,' 'attack,' and 'support' clearly set forth the confines within which potential *party speakers* must act in order to avoid triggering the provision." *McConnell*, 540 U.S. at 170 n.64 (emphasis added); *see also Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 503 (7th Cir. 2012) (Posner, J., concurring in part and dissenting in part) ("[T]he federal law involved speech referring to particular candidates and made by state political parties the actions of which are presumed to be coordinated with candidates.").

The same cannot be said for every speaker. While political party committees exist solely to nominate and elect candidates, private speakers like Crossroads GPS might direct their speech toward elections or quite literally anything else.[10] Even Public Citizen acknowledged this distinction—for a time. As Public Citizen explained in 2004, "The Congress that enacted BCRA's carefully considered extension to ['federal election activity'] by parties could not have intended to revolutionize the world of non-profits by subjecting them to regulation whenever their issue discussions involve 'attacks' on or 'promotion' of persons who are candidates for

[10] The D.C. Circuit recently discussed the reasonableness of limiting the disclosure requirements for private speakers like Crossroads GPS. In *Van Hollen v. FEC*, the court held that it was reasonable for the FEC to require entities to disclose the source of only those donations "made for the purpose of furthering electioneering communications." 2016 WL 278200, at *3 (quoting 72 Fed. Reg. 72,899, 72,911 (Dec. 26, 2007)). The rule was well-tailored to provide the necessary information to the public but exclude donors who "generally support the entity but not its electioneering communications." *Id.* at *10. Broader disclosure requirements, like those applicable to political committees, would "mislead voters as to who really supports the communications." *Id.* at *9.

office." Comment of Public Citizen at 7, Notice of Proposed Rulemaking 2004-06 (Apr. 5, 2004). "It is one thing," Public Citizen reasoned, "to say that political parties or political committees whose business is electioneering may be subject to regulation aimed at electioneering. It is another thing altogether to sweep in organizations that engage in criticism of elected officials as a necessary part of commenting on public issues . . . ." *Id.* Just so. That Public Citizen has disavowed its earlier position in this litigation does not make it irrational for the controlling Commissioners to hold that line.

Likewise, the fact that Congress defines a reporting regime for "electioneering communications" does not make the controlling Commissioners' tailored approach unreasonable. As an initial matter, Public Citizen does not appear to argue that the controlling Commissioners should have counted all electioneering communications toward Crossroads GPS's major purpose. Public Citizen argues instead that the existence of the electioneering-communication provisions means that the Commissioners needed to count all "promote-support-attack-oppose" speech. *See* Public Citizen Mot. for Summ. J. 37 (only reference to "electioneering communications" in argument).[11]

For reasons already discussed, this is not correct. Granted, Congress has required event-driven reporting for certain narrowly defined activities, such as the dissemination of electioneering communications. *See supra* 4. But that does not mean the only reasonable interpretation of the major-purpose test is one that includes Public Citizen's "promote-attack-support-oppose" speech. Again, express advocacy is the speech closest to "the core area sought

[11] Presumably, Public Citizen would not be satisfied with counting only express advocacy, its functional equivalent, and electioneering communications because even that combined spending in 2010 would not top 50% of Crossroads GPS's activity. The controlling Commissioners made clear that "even if one were to consider all electioneering communication spending as indicative of one's major purpose, while also limiting the scope of review to calendar year spending, Crossroads GPS still would not be considered a political committee. . . . That is still only 42 percent of total spending—hardly 'so extensive.'" AR424 (citation omitted).

to be addressed by Congress" in regulating political committees. *Buckley*, 424 U.S. at 79. And Public Citizen does not explain how the narrowly tailored, event-driven reporting regime for electioneering communications somehow compels its preferred vision of the major-purpose test.

Indeed, there is no reason to think Congress intended even electioneering communications to count toward a group's major purpose. (The statutory definition of "political committee" still references only "expenditures," 52 U.S.C. § 30101(4), and electioneering communications do not constitute expenditures as a matter of law, *id*. § 30104(f)(3)(B)(ii).) Unlike express advocacy, electioneering communications do not, by definition, advocate for or against the identified candidate—meaning that they are further removed from the "core area" that FECA's comprehensive political-committee laws target. *See id*. (excluding from the term "electioneering communication" "a communication which constitutes an expenditure or an independent expenditure under this Act"). To be sure, the Supreme Court has said that Congress can require "one-time, event-driven" disclosure reports for electioneering communications. *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 824 (7th Cir. 2014) (discussing *Citizens United*, 558 U.S. at 336). But, as a number of courts have remarked, that narrowly tailored requirement is far removed from "the comprehensive registration and reporting system imposed on political committees." *Id.*; *see also Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 597-98 (8th Cir. 2013) (distinguishing "perpetual, ongoing reports" from "a one-time report"), *cert. denied*, 134 S. Ct. 1787 (2014); *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 876-77 (8th Cir. 2012) (similar). In hewing to the most clearly electoral spending, the controlling group of FEC Commissioners reasonably explained their standard's "relationship to the underlying regulatory concerns," *Nat'l Shooting Sports Found., Inc*., 716 F.3d at 214, and Public Citizen's competing policy views do not trump that analysis.

Third, Public Citizen charges the controlling Commissioners with violating a "well-established policy" of counting "spending and other activity that does not entail express advocacy" as federal electoral activity for purposes of the major-purpose determination. Public Citizen Mot. for Summ. J. 37. This is wrong. As an initial matter, even if past adjudications had given rise to a "policy"—they did not, *see infra* 43—Public Citizen does not argue that the Commissioners were bound by *stare decisis* to follow those adjudications. Instead, Public Citizen argues simply that the Commissioners failed to "acknowledge" its competing position and "provide reasons" for their preferred approach. Public Citizen Mot. for Summ. J. 33; Public Citizen Reply 18. In truth, however, the Commissioners openly acknowledged that some "Commission MURS from 2004 and 2007" may have "relied on non-express advocacy to find political committee status." AR416. They nonetheless determined that their express-advocacy approach better reflected subsequent judicial precedent and accounted for the First Amendment interests at stake. AR415-16.

That explanation more than sufficed. Under arbitrary-and-capricious review, an agency must simply "display awareness that it is changing position." *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009) (emphasis omitted). Having done so, "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Id.* The Commissioners' explanation met these benchmarks. To claim they needed to "acknowledge" earlier adjudications more fully and "provide reasons" for their competing interpretation is to ignore both the Commissioners' statement of reasons and FECA's deferential standard of review.

This is doubly true because the FEC's history of adjudication decisions displays nothing even approaching a "policy" on the question whether express advocacy or some other category

of spending should count toward an organization's major purpose. As detailed in the General Counsel's Report, the Commission has sometimes considered advertisements that do not contain "magic words" of express advocacy. AR356. But it also has a history of determining major purpose by reference to contributions and expenditures alone. In the *Akins* litigation, for example, the Commission argued that a major-purpose finding was unwarranted because the respondent's "campaign-related *expenditures*, while likely to have exceeded $1,000 in some years, were not its major purpose . . . ." FEC Br. at 3, *Akins v. FEC*, 66 F.3d 348 (D.C. Cir. 1995) (emphasis added), *rehearing en banc granted and opinion vacated by* 74 F.3d 287 (D.C. Cir. 1996), *vacated on other grounds by* 524 U.S. 11 (1998). Likewise, the Commission has advised that "[w]hen determining whether an entity should be treated as a political committee, the standard that has been used is whether a major purpose of the organization is to *make expenditures* or solicit contributions for the nomination or election of candidates." FEC Adv. Op. 1994-25, at 2 (Aug. 19, 1994); *see also* FEC Adv. Op. 1996-13, at 4 (June 10, 1996) ("The [Supreme] Court stated that if MCFL's independent expenditures 'become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee.'"); FEC Adv. Op. 1996-3, at 2 (Apr. 19, 1996) (same); FEC Adv. Op. 1995-11, at 3 (Apr. 28, 1995) (same); Statement of Reasons of Commissioners Petersen, Hunter, and McGahn, at 10-11, MURs 5977 & 6005 (May 1, 2009) (American Leadership Project et al.) (explaining organization's major purpose was not electoral in part because its communications did not contain express advocacy); *accord GOPAC, Inc.*, 917 F. Supp. at 859 ("The organization's purpose may be evidenced by its public statements of its purpose or by . . . its expenditures . . . to or for the benefit of a particular candidate or candidates.").

Even when the Commission has looked beyond express advocacy, moreover, it comes nowhere close to the blanket "promote-attack-support-oppose" standard that Public Citizen demands. Consider the enforcement matters discussed in the Commission's 2007 Supplemental Explanation & Justification—a document on which Public Citizen puts near-dispositive weight. 72 Fed. Reg. 5,595, 5,605 (Feb. 7, 2007). In none of those enforcement matters did the Commission parse what types of spending should count toward major purpose, and with good reason: None of the respondents raised the issue. The lion's share were self-declared "527 organizations," which, like political parties, "never engage in public communication without regard to its electoral consequences." *See* Gov't Br. at 48, *McConnell v. FEC*, 540 U.S. 93; *see also McConnell*, 540 U.S. at 174 n.67 ("Section 527 'political organizations' are, unlike § 501(c) groups, organized for the express purpose of engaging in partisan political activity."). All of these organizations had documented federal electoral activity as their "central organizational purpose," spending nothing on any state or local elections.[12]

All told, Public Citizen can point to no "settled course of adjudication" giving rise to "a general policy" of the sort it prefers. *Graff v. FBI*, 822 F. Supp. 2d 23, 34 (D.D.C. 2011). As the court of appeals has made clear, the courts of this Circuit "should be loath to intervene" when an FEC "deadlock reflects genuine uncertainty about the law." *DCCC*, 831 F.2d at 1135 n.5. The Court should be particularly hesitant to address what types of communications are included in the federal election spending calculus, as the question need only be reached if the Court determines the Commission was required to adopt a calendar-year metric for purposes of the major-purpose test.

[12] In the single matter involving a 501(c)(4) organization cited in the 2007 Supplemental Explanation & Justification, the respondent "conceded that its major purpose was campaign activity." 72 Fed. Reg. 5,595, 5,605 (Feb. 7, 2007).

2. The Commission reasonably weighed the evidence in finding no reason to believe that Crossroads GPS's "central organizational purpose" was electoral.

Turning to the second major-purpose benchmark, Public Citizen also argues that the FEC should have found reason to believe that Crossroads GPS's "central organizational purpose" was nominating and electing federal candidates. That is not correct. As Public Citizen acknowledges, the Commission's decision is subject to arbitrary-and-capricious review, which is "highly deferential" and "presumes the validity of agency action." *LaRouche's Comm. for a New Bretton Woods v. FEC*, 439 F.3d 733, 737 (D.C. Cir. 2006) (citation omitted). The controlling Commissioners easily met that standard here.

Evaluating a group's central organizational purpose is a "fact-intensive" inquiry that typically involves consideration of the group's public statements as well as non-public materials. AR410; 2007 Supp. E&J, 72 Fed. Reg. at 5601 (citing *FEC v. Malenick*, 310 F. Supp. 2d 230, 234-36 (D.D.C. 2004); *GOPAC*, 917 F. Supp. at 859; FEC Adv. Op. 2006–20 (Unity 08)). Consistent with judicial and agency precedent, the controlling Commissioners explained that "official statements" as well as "other materials put forth under the group's name" are the "primary documents" to consider when making this inquiry. AR410. The Commissioners also had before them media reports collected by Public Citizen and the FEC Office of General Counsel, which allegedly undermined Crossroads GPS's claim that its central organizational purpose was not electoral.

Public Citizen does not dispute that the controlling Commissioners reviewed all the available evidence when assessing Crossroads GPS's central organizational purpose. Its assertions that Commissioners "refus[ed] to consider" documents, Public Citizen Reply 16, boils down to objections about the relative weight given to items of evidence. Public Citizen asserts that the Commissioners gave too much credence to Crossroads GPS's "self-generated"

documents, characterizing them as "self-serving" and "unreliable." Public Citizen Mot. for Summ. J. 38-39; Public Citizen Reply 15. But it "is not the court's function" to reweigh the record evidence before the agency. *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO-CLC v. Pension Ben. Guar. Corp.*, 707 F.3d 319, 325 (D.C. Cir. 2013). Rather, courts must affirm an agency decision if a "'reasonable mind might accept' a particular evidentiary record as 'adequate to support a conclusion.'" *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999) (citation omitted). The court does "not ask whether record evidence could support the petitioner's view of the issue, but whether it supports the [agency's] ultimate decision." *Florida Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010).

The record evidence easily supports the Commissioners' conclusion here. This is not a case where the agency "limited" its review of the record. Public Citizen Reply 16. Rather, consistent with judicial and agency practice, the Commissioners considered all available materials in the record to determine Crossroads GPS's central organizational purpose. AR410-12. The Commissioners explained why giving more weight to Crossroads GPS's self-generated documents was consistent with agency precedent. AR410; *Toy v. United States*, 263 F. Supp. 2d 1, 8 (D.D.C. 2002) ("[T]he [agency] acted within its power when explaining its precedent and concluding that in light of that precedent, the weight of the evidence does not support the plaintiff's allegations."). They also explained why the media reports were inaccurate and thus entitled to less weight. AR411-12. In short, the Commissioners assessed all evidence in the record and reached a reasonable conclusion. That should be the end of the matter.

3. Public Citizen's residual arguments lack merit.

Public Citizen's remaining arguments are both meritless and untimely. (None even appear in Public Citizen's opening motion.) Public Citizen first contends that the inter-organizational grants Crossroads GPS made to other nonprofit groups "may have been used for

federal campaign activity." Public Citizen Reply 21. But this shot in the dark is not "reason to believe." In fact, the only relevant material in the administrative record undercuts Public Citizen's assertions. Crossroads GPS's IRS Form 990s for both 2010 and 2011 make clear that each grant was "accompanied by a letter of transmittal stating that the funds are to be used only for exempt purposes, *and not for political expenditures*, consistent with the organization's tax-exempt mission." AR279, 326, 347 (emphasis added); *see also* AR279, 326 ("Crossroads GPS carefully evaluates the missions and activities of recipient organizations prior to making any grants to ensure that funds are used only for exempt purposes of recognized tax-exempt section 501(c)(4) and 501(c)(6) organizations."). The controlling Commissioners appropriately declined to find reason to believe that these grants were electoral.

Second, Public Citizen summarily faults the controlling Commissioners for concluding that a group whose electoral spending was less than 50% of total spending did not have the major purpose of influencing federal elections. Public Citizen Reply 22. But there was nothing contrary to law in the Commissioners' decision. Having analyzed Crossroads GPS's activity, the Commissioners determined that electoral spending amounted to less than half of the organization's total spending, and thus electoral spending could not be "the major purpose" of the organization. Based on this conclusion, the Commissioners found no reason to believe Crossroads GPS's major purpose was electoral. This outcome was not foreclosed by Congress or by the courts, and the Commissioners rationally explained their line-drawing decision. AR414-15, 423-24. Once again, Public Citizen would apparently have backed this approach to the hilt ten years ago. As Public Citizen argued in 2004, finding major purpose if a group spends "more than 50% of [its] budget" on "activities that promote, support, oppose, or attack federal candidates" would be "far too sweeping and could unjustly capture legitimate advocacy

organizations." Comment of Public Citizen at 12, Notice of Proposed Rulemaking 2004-06 (Apr. 5, 2004). Public Citizen does not explain why it was contrary to law for the Commissioners to base their decision on these same concerns.

II. Because the Statute of Limitations Has Expired on the Charges Against Crossroads GPS, Public Citizen Cannot Show Its Claimed Injury is Substantially Likely to be Redressed by the Relief It Seeks, So this Case Must be Dismissed For Lack of Standing.

A jurisdictional defect now bars Public Citizen's claim. Under Article III of the Constitution, Public Citizen has a continuing obligation to show a substantial likelihood that, if it prevails in this action, its alleged injury will be redressed. Redress need not be certain, or even more likely than not, but a mere possibility is not enough. Here, expiration of the 5-year statute of limitations, 28 U.S.C. § 2462, makes it highly unlikely that the judicial relief Public Citizen seeks will lead to redress of Public Citizen's injury. Thus, Public Citizen lacks standing to maintain this action.

Public Citizen is suing to redress its claimed informational injury—namely, the lack of the disclosures Crossroads GPS supposedly should have made if it were a regulated political committee in 2010. Public Citizen asks this Court to declare that the FEC's reasons for dismissing Public Citizen's administrative complaint were unlawful and order the FEC promptly to conform to the declaration. That is the only remedy provided by "Section (a)(8)," the statute under which Public Citizen has sued. *See* 52 U.S.C. § 30109(a)(8).[13] Public Citizen must show that remedy is likely to redress its claimed informational injury.

In a typical Section (a)(8) case, the controlling commissioners are likely to have stated the important reasons for not pursuing a complaint. If all those reasons are declared contrary to law, there is no basis to predict the FEC will not pursue the case. Thus, Section (a)(8) plaintiffs

[13] Until the recent recodification, that provision appeared at 2 USC § 437g(a)(8). In FEC practice, a suit under that provision continues to be referred to as an "(a)(8)" suit.

often may have a substantial likelihood of redress. *Akins*, 524 U.S. 11. That likelihood of redress evaporates, however, if the statute of limitations runs on the administrative complaint, as has occurred here. The FEC's practice is to dismiss such complaints, and, under these circumstances, Public Citizen no longer can show that success here is likely to redress its claimed injury. Accordingly, this case must be dismissed for lack of Article III jurisdiction.

A. Plaintiff Public Citizen bears the continuing burden of showing that success in this action is significantly likely to redress its claimed injury.

As the "party invoking federal jurisdiction, [Public Citizen] bears the burden" of showing a case or controversy exists during all "successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). This means Public Citizen must show it is "likely, as opposed to merely speculative, that [its] injury will be redressed by a favorable decision." *Id.* at 561 (internal quotation marks deleted.) It must "demonstrate a significant likelihood that a decision of [the] Court would redress its alleged injury." *Spectrum Five LLC v. FCC*, 758 F.3d 254, 256 (D.C. Cir. 2014) (emphasis added). Otherwise, this case must be dismissed. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) ("[T]hroughout the litigation, the plaintiff [must show injury] likely to be redressed by a favorable judicial decision."). Thus, Article III requires Public Citizen to show that the relief the Court can grant—a declaration that the present dismissal was unlawful and an order of remand—will cause the FEC to pursue the complaint.

In *Lujan*, for example, environmental plaintiffs challenged a program established by the Secretary of the Interior. 504 U.S. at 559. The Court noted, however, that, even if the Court struck down the Secretary's program, the plaintiffs' environmental injuries would continue unless other agencies and private parties voluntarily altered their positions. *Id.* at 568. Because plaintiffs could not show a substantial likelihood that an order against the Secretary would cause

other decisions to be made in a way that would relieve plaintiffs' injuries, redressability was speculative, and Article III jurisdiction failed. *Id.*

In contrast to *Lujan*, a sufficient likelihood of redress was established in *Akins*, and Public Citizen's judicial complaint seeks to follow the path *Akins* marked out. In many respects, the facts of this case and *Akins* are parallel. In both cases:

- The FEC dismissed an administrative complaint that alleged a respondent had unlawfully failed to acknowledge it was a "political committee" and file the public disclosures required of political committees. 524 U.S. at 16.
- Complainants brought a Section (a)(8) suit against the FEC, asking the courts to declare that the dismissal was contrary to law and order the FEC to conform to the declaration. *Id.* at 18.
- Complainants asserted they were injured because the FEC dismissal deprived them of information the law intended for them to receive. *Id.* at 21.

The *Akins* majority held the alleged informational injury was sufficiently redressable to give plaintiff the standing required by Article III. *Id.* at 25. Akins recognized the Section (a)(8) judicial remedy [*i.e.*, dismissal] would permit the FEC in "its lawful discretion [to] reach the same result for a different reason." *Id.* So redress was not certain. But no one pointed to evidence that redress was improbable. Explaining that "we cannot know" what the FEC would do if the courts declared the original dismissal unlawful, *Akins* held there was a sufficient likelihood of redress for standing. *Id.*

Under *Akins*, Public Citizen may have adequately pleaded its initial standing. Because the controlling Commissioners' statement of reasons laid out their reasons for dismissal, there was no reason to doubt that, if those reasons were held unlawful, the FEC would pursue the case.

But the facts are different now. By this motion, Crossroads GPS has shown that the statute of limitations has run, and the FEC has a practice of dismissing stale complaints. Thus, this Court now does have a way to know the FEC is unlikely to pursue the complaint.[14] Because Public Citizen cannot establish the continuing substantial likelihood of redress that Article III requires, this case must be dismissed for lack of standing. *See Lujan*, 504 U.S. at 560-61.

B. The statute of limitations on Public Citizen's FEC complaint has expired.

FEC enforcement actions are subject to the general federal statute of limitations, 28 U.S.C. § 2462, which provides that a "proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued." The FEC's administrative processing of a complaint is preliminary and investigatory and is not a "proceeding for . . . enforcement" that meets the statute of limitations. *FEC v. National Republican Senatorial Committee*, 877 F. Supp. 15, 19-21 (D.D.C. 1995).[15] To satisfy the statute of limitations, a timely judicial enforcement action is required. *Id.*; *FEC v. Nat'l Right To Work Comm., Inc*., 916 F. Supp. 10, 13-14 (D.D.C. 1996).

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[14] Although the alleged violation in *Akins* occurred more than five years before the Supreme Court's decision, the statute of limitations issue was not raised, perhaps because it was not yet clear whether initiating FEC administrative procedures satisfied the statute of limitations or because the FEC's practice of dismissing stale administrative complaints was not yet clearly established. Whatever the reason, "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925); *Bismullah v. Gates*, 551 F.3d 1068, 1071 (D.C. Cir. 2009). In particular, jurisdictional issues are not decided *sub silentio* but must be plainly identified and addressed to establish binding precedent. *Indep. Petroleum Ass'n v. Babbitt*, 235 F.3d 588, 597 (D.C. Cir. 2001) (collecting authority). Interestingly, the FEC ultimately dismissed residual claims in *Akins* because, due to "the expiration of the applicable statute of limitations" further action "would not be an appropriate use of the FEC's limited resources." *Akins v. FEC*, 736 F. Supp. 2d 9, 16 (D.D.C. 2010).

[15] "In contrast to certain other agencies and regulatory regimes, the FEC is given no power to adjudicate liability or to impose civil penalties . . . Instead, the FEC's role is to investigate, to conciliate, and to determine whether or not to bring a civil enforcement action." 877 F. Supp. at 18 (statutory citations omitted).

The leading case is *FEC v. Williams*, 104 F.3d 237 (9th Cir. 1996). There, an administrative complaint was filed with the FEC in 1988 based on events that occurred "between the autumn of 1987 and the end of January 1988." *Id.* at 239. In 1989 the FEC found reason to believe a violation had occurred. *Id.* But the administrative proceeding moved slowly and it was not until late 1993 that the FEC brought suit "seeking the imposition of civil penalties as well as declaratory and injunctive relief." *Id.* Because five years had elapsed before suit was filed, the statute of limitations had expired and the entire action had to be dismissed. *Id.* at 241.[16]

The second First General Counsel's Report in this case notes on its cover page "EXPIRATION OF SOL: 9/1/2014." AR340. Indeed, more than five years have elapsed since Public Citizen filed its October 13, 2010 administrative complaint. At this point, therefore, the statutory limitations period unquestionably has run.[17]

C. There is no substantial likelihood the relief Public Citizen seeks here would cause the FEC to pursue this case.

The FEC regularly dismisses timely filed administrative complaints when five years have elapsed before a judicial enforcement action is commenced.[18] Indeed, the FEC has gone further,

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[16] If a complainant believes the FEC is arbitrarily and unreasonably delaying a matter, Section (a)(8) provides a remedy. Beginning 120 days after an administrative complaint is filed, a complainant may bring suit to challenge such FEC delay. *Democratic Senatorial Campaign Committee v. FEC*, No. 95-0349 1996 WL 34301203, *7-8 (D.D.C. Apr. 17, 1996) (600-day delay held unlawful, noting "approaching statute of limitations"); *Citizens for Percy v. FEC*, No. 84-2653, 1984 WL 6601 (D.D.C. Nov. 19, 1984) (124-day delay unlawful). Here, the Office of the General Counsel spent more than a year revising its First General Counsel's Report and solicited additional responses from Crossroads GPS, AR177, but Public Citizen sat by passively throughout the years-long administrative process and risked that the statute of limitations would expire.

[17] Crossroads GPS signed a tolling agreement on November 9, 2010 that resulted in a tolling of the statute of limitations for twelve days from December 11, 2010 to December 22, 2010. AR31.

[18] The practice is discussed by the controlling Statement of Reasons of Commissioners Mason, Smith, and Wold in Pre-MUR 395 (Feb. 27, 2002) (College Republican National Committee). In that case, the limitations period had not yet expired but seemed likely to do so before the FEC could complete its processing. The controlling Commissioners stated that "any investigation would have had to be conducted in a hasty and less than thorough fashion in order to beat the statute of limitations." *Id.* at 3. Also interesting is the February 11, 2005, Recommendation to Close the File in ADR 230. There, the Director of the FEC's ADR Office declined to accept referral of a matter, explaining, "Due to the fact that the alleged activities noted in the complaint took place more than five years ago, this matter should be dismissed in accordance with the five year statute of limitations period."

establishing a procedure for systematic dismissal of claims that have become "stale," even before the statute of limitations has run.[19]

Because the language of Section 2462 speaks only of actions to enforce penalties of a monetary nature, OGC has argued in other cases that government enforcement actions seeking only equitable relief may remain theoretically possible forever. *Williams* rejected OGC's theory. It held that, although the statute of limitations spoke only of legal remedies, "equity will withhold its relief . . . where the applicable statute of limitations would bar the concurrent legal remedy." 104 F.3d at 240 (quoting *Cope v. Anderson*, 331 U.S. 461, 464 (1947)).

In cases involving other agencies, circuits are split on whether *Williams*' concurrent equitable remedies doctrine applies to government actions for equitable relief. *Compare United States v. Banks*, 115 F.3d 916, 919 n. 60 (11th Cir. 1997) (recognizing an exception for government enforcement efforts) *with United States v. Midwest Generation, LLC*, 720 F.3d 644, 647-48 (7th Cir. 2013) (barring the government's entire claim—including its claim for equitable relief—noting that *Gabelli v. SEC*, 133 S. Ct. 1216 (2013), favors "effective time constraints"). District courts in this circuit are divided with respect to the FEC. *Compare Nat'l Right To Work*

The General Counsel's Report in MUR 6805 (September 2, 2015) is a very current example of the FEC practice of dismissing complaints that become stale after being filed. So far as Crossroads GPS can determine, since *Williams* was decided, the FEC has not authorized a judicial enforcement action where five years have elapsed since the challenged conduct occurred.

[19] One General Counsel's Report, recommending closing several cases under the FEC's Enforcement Priority System, says dismissal of stale cases is warranted because "[f]ocusing investigative efforts on more recent and more significant activity … has a more positive effect on the electoral process and the regulated community." General Counsel's Report, Agenda Document No. X02-27 (April 3, 2002). The controlling Commissioners explained that cases may be dismissed as stale even if they are not "low priority." Statement of Reasons of Commissioners Mason, Smith, and Wold in Pre-MUR 395, at 2. They favored dismissal of four-year-old violations because "the Commission should focus resources on important cases of more recent vintage, with fresher evidence and more important to current campaigns." *Id.*

Comm., 916 F. Supp. at 14 (FEC claims for equitable remedies also are barred) *with FEC v. Christian Coalition*, 965 F. Supp. 66 (D.D.C. 1997) (FEC equitable claims are not barred).[20]

For present purposes, however, that dispute is immaterial. Whether or not the FEC theoretically can seek equitable remedies after the statute of limitations has run, the FEC does not do so. Since *Williams* was decided, the FEC has not sought equitable remedies where actions for civil penalties have become time-barred. Any suggestion that the Commission would deviate from its settled practice in this case is mere speculation at best. That is doubly so since the controlling Commissioners already identified a series of other reasons the FEC's "broad discretion to dismiss matters . . . could properly be applied here." AR427 n.117 (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)). Since the FEC already is inclined to a discretionary dismissal for other reasons, the expiration of the statute of limitations—itself a sufficient basis for dismissal—is the death knell of this case.

Accordingly, Public Citizen no longer can establish a significant likelihood that its informational injury will be redressed.[21] Therefore, any Article III case or controversy has evaporated and, with it, so has this Court's jurisdiction.

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[20] Based on *3M Co. v. Browner*, 17 F.3d 1453, 1461 (D.C. Cir. 1994), the Ninth Circuit rejected the FEC's argument that the statute of limitations does not start running until the offense is discovered. 104 F.3d at 240-41.

[21] If the FEC does not on remand promptly comply with a judicial declaration, the private plaintiff may step in and bring suit. 52 U.S.C. § 30109(a)(8)(C). However, an FEC dismissal on remand because the statute of limitations had run would be consistent with any declaration this case might produce. *See Akins*, 524 U.S. at 25 (the FEC may dismiss on grounds not foreclosed by the order). Thus, Public Citizen could not bring an (a)(8) suit. Moreover, as a private litigant, Public Citizen has no exception to the concurrent remedies rule.

CONCLUSION

For the reasons discussed above, the Court should grant Crossroads GPS's cross-motion for summary judgment, deny Public Citizen's motion for summary judgment, and dismiss Public Citizen's complaint.

Respectfully submitted,

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ADDENDUM

Nos. 02-1674, et al.

In the Supreme Court of the United States

MITCH MCCONNELL, UNITED STATES SENATOR, ET AL., APPELLANTS/CROSS-APPELLEES

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL ELECTION COMMISSION, ET AL.

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should be required to be financed with hard money. Based on its Members' extensive experience under the Commission's former allocation rules, Congress determined that greater constraints on state parties' use of soft money were needed to preserve the integrity of federal elections and federal office-holders. The Constitution does not prevent Congress from acting upon that judgment.

The RNC plaintiffs appear to argue that the FEC's prior allocation rules were invalid, and that a party committee has a First Amendment right to receive unlimited contributions for any political activity that does not expressly advocate the election or defeat of a federal candidate. See RNC Br. 54-55, 88 n.50.[19] The Court in *Buckley* declined, however, to impose an "express advocacy" test for organizations "the major purpose of which is the nomination or election of a candidate," because the expenditures of such organizations "are, by definition, campaign related." 424 U.S. at 79; see *id.* at 79-80. Unlike some interest groups, which may have as their primary function issue advocacy rather than the election of candidates, "parties are primarily and continuously concerned with acquiring power through electoral victory. Parties never engage in public communication without regard to its electoral consequences." D. Green Expert Report 17 n.19. There is consequently no need to distinguish between political party disbursements that are directed at candidate elections and those that are not. Rather, the relevant distinction is between disbursements that are directed, in whole or in part, at *federal* elections, and those that are directed at state and/or local elections only (and even that line addresses only who should regulate; it does

[19] The McConnell plaintiffs state (Br. 13) that the FEC's prior allocation rules "reflected an assiduous regard for our federal system." Like the RNC plaintiffs, however, they contend (*id.* at 26 n.5) that Congress lacks power to "regulate expenditures for speech that does not constitute express advocacy."