UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, *et al.*,	)	
Plaintiffs,	)	Civ. No. 14-148 (RJL)
v.	)	
FEDERAL ELECTION COMMISSION,	)	MEMORANDUM OF POINTS AND AUTHORITIES
Defendant.	)	

FEDERAL ELECTION COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Lisa J. Stevenson (D.C. Bar No. 457628)
Deputy General Counsel — Law

Kevin Deeley
Acting Associate General Counsel

Erin Chlopak (D.C. Bar No. 496370)
Acting Assistant General Counsel

Greg J. Mueller (D.C. Bar No. 462840)
Charles Kitcher (D.C. Bar No. 986226)
Attorneys

FEDERAL ELECTION COMMISSION
999 E Street N.W.
Washington, DC 20463
(202) 694-1650

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INTRODUCTION

Plaintiffs Public Citizen, Inc., ProtectOurElections.org, Craig Holman, and Kevin Zeese challenge the Federal Election Commission's ("FEC" or "Commission") dismissal of their administrative complaint alleging certain campaign-finance violations by Crossroads Grassroots Policy Strategies ("Crossroads"). Plaintiffs alleged that Crossroads violated the Federal Election Campaign Act ("FECA" or "Act") by spending substantial sums of money on advertising referencing federal candidates and legislative issues without registering with the Commission as a "political committee" and complying with the disclosure requirements that apply to such groups. In December 2013, the Commission voted on whether to find "reason to believe" that Crossroads had violated FECA and pursue an investigation. The Commission did not approve pursuing the matter further, and so voted to close its file, thereby dismissing plaintiffs' administrative complaint.

Plaintiffs disagree with the Commission's dismissal of their administrative complaint but they cannot meet their heavy burden of demonstrating that the dismissal was arbitrary, capricious, an abuse of the agency's broad discretion, or otherwise contrary to law. Instead, plaintiffs seek to escape the well-established standard of review by urging the Court to disregard binding precedent in favor of a results-oriented analysis that plaintiffs claim is necessary to protect the government's interest in disclosure. But the undisputed importance of the government's disclosure interest is irrelevant here. The value of the information Crossroads would have to disclose were it found to be a political committee does not bear on *whether* Crossroads is a political committee in the first place. Plaintiffs' disclosure argument wholly begs the question.

The sole issue in this case is whether the Commission's analysis of Crossroads's political-committee status and concomitant dismissal of plaintiffs' administrative complaint was contrary to law. It clearly was not. The decision of the three Commissioners who voted not to proceed, which they thoroughly explained in a statement of their reasons, was grounded in the administrative record, reflects a reasonable application of the FEC's repeatedly upheld case-by-case method for determining political-committee status using the Supreme Court's "major purpose" test, and accords with other courts' applications of that test. It is also consistent with courts' repeated admonitions to interpret the Act with sensitivity to the First Amendment area in which the Commission regulates. The decision easily satisfies the low threshold that requires this Court to affirm the Commission's dismissal. The Court accordingly should deny plaintiffs' motion for summary judgment and grant the Commission's cross-motion.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

A. The FEC and FECA's Administrative Enforcement Process

1. The Commission

The FEC is a six-member, independent agency vested with statutory authority over the administration, interpretation, and civil enforcement of FECA and other federal campaign-finance statutes. Congress authorized the Commission to "formulate policy" with respect to FECA, 52 U.S.C. § 30106(b)(1) (formerly 2 U.S.C. § 437c(b)(1)),[1] "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA]," *id.* §§ 30107(a)(8), 30111(a)(8) (§§ 437d(a)(8), 438(a)(8)), and to investigate possible violations of the Act, *id.*

[1] Effective September 1, 2014, the provisions of FECA that were codified in Title 2 of the United States Code were recodified in a new title, Title 52. *See* Editorial Reclassification Table, http://uscode.house.gov/editorialreclassification/t52/Reclassifications_Title_52.html. To avoid confusion, this submission will indicate in parentheses the former Title 2 citations.

§§ 30109(a)(1)-(2) (§§ 437g(a)(1)-(2)). The Commission has exclusive jurisdiction to initiate civil enforcement actions for violations of FECA in the United States district courts. *Id.* §§ 30106(b)(1), 30109(a)(6) (§§ 437c(b)(1), 437g(a)(6)).

2. FECA's Administrative Enforcement Process and Judicial-Review Standard

FECA permits any person to file an administrative complaint with the Commission alleging a violation of the Act. *Id.* § 30109(a)(1) (§ 437g(a)(1)); *see also* 11 C.F.R. § 111.4. After reviewing the complaint and any response filed by the respondent, the Commission considers the complaint to determine whether it provides "reason to believe" that FECA has been violated. 52 U.S.C. § 30109(a)(2) (2 U.S.C. § 437g(a)(2)). Any administrative investigation under this provision is confidential until the administrative process is complete. *Id.* § 30109(a)(12) (§ 437g(a)(12)). If at least four of the FEC's six Commissioners vote to find such reason to believe, the FEC may investigate the alleged violation; otherwise, the agency dismisses the administrative complaint. *Id.* §§ 30106(c), 30109(a)(2) (§§ 437c(c), 437g(a)(2)).

If the Commission votes to proceed with an investigation, it then must determine whether there is "probable cause" to believe that FECA has been violated. *Id.* § 30109(a)(4)(A)(i) (§ 437g(a)(4)(A)(i)). Like a reason-to-believe determination, a determination to find probable cause that a violation of FECA has occurred requires an affirmative vote of at least four Commissioners. *Id.* §§ 30106(c), 30109(a)(4)(A)(i) (§§ 437c(c), 437g(a)(4)(A)(i)). If the Commission so votes, it is statutorily required to attempt to remedy the violation informally by attempting to reach a conciliation agreement with the respondent. *Id.* The Commission's assent to a conciliation agreement requires an affirmative vote of at least four Commissioners and such an agreement, unless violated, operates as a bar to any further action by the Commission related to the violation underlying that agreement. *Id.* If the Commission is unable to reach a

conciliation agreement, FECA authorizes the agency to institute a *de novo* civil enforcement action in federal district court. *Id.* § 30109(a)(6)(A) (§ 437g(a)(6)(A)). The institution of a civil action under section 30109(a)(6)(A) (437g(a)(6)(A)) requires an affirmative vote of at least four Commissioners. *Id.* § 30106(c) (§ 437c(c)).

If, at any point in the administrative process, the Commission determines that no violation has occurred or decides to dismiss the administrative complaint for some other reason, the complainant may file suit in this District against the Commission to obtain judicial review of the Commission's dismissal decision. *Id.* § 30109(a)(8)(A) (§ 437g(a)(8)(A)). Reviewable dismissal decisions include instances in which "the Commission deadlocks 3-3 and so dismisses a complaint." *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("*NRSC*") ("[A split vote] dismissal, like any other, is judicially reviewable under [§ 30109(a)(8) (§ 437g(a)(8))]."); *Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987) ("*DCCC*") (same). In such split-vote cases, in order "to make judicial review a meaningful exercise, the three Commissioners who voted to dismiss must provide a statement of their reasons for so voting. Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did." *NRSC*, 966 F.2d at 1476.

As the D.C. Circuit has explained, judicial review in an action brought pursuant to section 30109(a)(8)(A) (437g(a)(8)) is "limited": "[T]he Commission's dismissal of a complaint should be reversed only if contrary to law. Thus, in resolving questions involving the FEC's construction of the Act, our task is . . . [only to determine] whether the Commission's construction [is] sufficiently reasonable to be accepted." *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988) (quoting *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37,

39 (1981) ("*DSCC*")) (citations and internal quotation marks omitted); *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986) (explaining that FEC dismissal of an administrative complaint cannot be disturbed unless it was based on an "impermissible interpretation of the Act . . . [or] was arbitrary or capricious, or an abuse of discretion"). That limited judicial review of FEC dismissals applies equally to those dismissals that result from a split vote. *NRSC*, 966 F.2d at 1475-76; *see also infra* pp. 21-26.

B. FECA's Registration and Reporting Requirements

One of the ways FECA advances its important purpose of reducing corruption of the political process is by requiring that the financing of certain kinds of election-related communications be disclosed to the public. *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam) ("[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity."). Disclosure also serves the "governmental interest in provid[ing] the electorate with information about the sources of election-related spending." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1459 (2014) (internal quotation marks omitted) (alteration in original). FECA imposes several different kinds of disclosure obligations that apply depending upon the nature of the organization making the communications and the timing, form, and content of the communications.

1. Event-Driven Reporting Requirements

The Act's event-driven reporting requirements apply whenever speakers' communications meet certain regulatory criteria. As relevant here, FECA requires that spending above certain thresholds on communications that are "independent expenditures" and "electioneering communications" must be disclosed.

An "independent expenditure" is a communication "expressly advocating the election or defeat of a clearly identified candidate" and that is made without coordinating with the candidate or a political party. 52 U.S.C. § 30101(17) (2 U.S.C. § 431(17)); 11 C.F.R. § 100.16. The term "independent expenditure" was not part of FECA or the 1974 amendments to the Act. In *Buckley v. Valeo*, the Supreme Court reviewed a provision in the original version of FECA prohibiting expenditures of more than $1,000 "relative to" a federal candidate. 424 U.S. at 39-44. To avoid vagueness concerns, the Court construed that prohibition "to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office" and held that these communications could not constitutionally be limited as the Act required. *Id.* at 44-45.

After *Buckley* was decided, Congress embraced the Court's "express advocacy" holding in its definition of a new statutory term, "independent expenditure." Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 102(g)(3), 90 Stat. 475, 479. In the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Congress revised the definition of "independent expenditure" into its current form. Pub. L. No. 107-155, § 211, 116 Stat. 81, 92-93.

BCRA also added to FECA a new statutory term, "electioneering communications." An electioneering communication is (1) a "broadcast, cable, or satellite communication" (2) referring to a "clearly identified" federal candidate (3) that is made within a 30- or 60-day run up to an election, convention, or caucus (depending upon what kind of election or other event it is) and (4) is "targeted to the relevant electorate." 52 U.S.C. § 30104(f)(3) (2 U.S.C. § 434(f)(3)); 11 C.F.R. § 100.29. Communications falling within the 30- or 60-day statutory windows may be electioneering communications without being express advocacy. *McConnell v. FEC*, 540 U.S. 93, 189 (2003) (explaining that, in comparison to *Buckley*'s holding concerning

express advocacy, electioneering communications are "not so limited"). That is, such communications may mention candidates without expressly advocating for their election or defeat. In upholding the provisions of BCRA associated with electioneering communications, the Supreme Court concluded that the four "components are both easily understood and objectively determinable." *Id.* at 194.

FECA requires that spending above certain thresholds on independent expenditures and electioneering communications be disclosed. Any entity that spends more than $250 to finance independent expenditures must file with the Commission a disclosure report that includes, *inter alia*, the date and amount of each expenditure and the identification of anyone who contributed more than $200 to further it. *See* 52 U.S.C. §§ 30104(c)(1), (2)(A), (C) (2 U.S.C. §§ 434(c)(1), (2)(A), (C)); 11 C.F.R. § 109.10(e). Similarly, any entity making electioneering communications aggregating more than $10,000 must file a report that includes, *inter alia*, the date and amount of each disbursement, the identity of all clearly-identified candidates mentioned and the elections in which they are running, and the name and address of each donor who gave an aggregate of $1,000 or more to a segregated bank account if that account was used to make the disbursements. 52 U.S.C. §§ 30104(f)(1)-(2) (2 U.S.C. §§ 434(f)(1)-(2)); 11 C.F.R. § 104.20. If the disbursements were made by a corporation or labor union, the organization must identify the name and address of each person who contributed an aggregate of $1,000 or more over the course of the previous 12 to 24 months "for the purpose of furthering electioneering communications." 11 C.F.R. § 104.20(c)(9).

2. Political-Committee Status

In addition to the foregoing reporting requirements for independent expenditures and electioneering communications, which apply to every person or entity upon reaching the relevant

spending thresholds, FECA provides that certain organizations, which qualify as "political committees," are subject to additional disclosure requirements. Political committees must, *inter alia*, register with the Commission, appoint a treasurer, maintain names and addresses of contributors, and file periodic reports disclosing to the public most receipts of $200 or more. 52 U.S.C. §§ 30103, 30104(a)-(b) (2 U.S.C. §§ 433, 434(a)-(b)).

Under FECA, any "committee, club, association, or other group of persons" that receives more than $1,000 in "contributions" or makes more than $1,000 in "expenditures" in a calendar year is a "political committee." 52 U.S.C. § 30101(4)(A) (2 U.S.C. § 431(4)(A)); 11 C.F.R. § 100.5(a). The Act defines "contribution" and "expenditure" to include any payment of money to or by any person "for the purpose of influencing any election for Federal office." 52 U.S.C. §§ 30101(8)(A)(i), (9)(A)(i) (2 U.S.C. §§ 431(8)(A)(i), (9)(A)(i)). In *Buckley*, however, the Supreme Court explained that the way FECA defined political-committee status "only in terms of amount of annual 'contributions' and 'expenditures'" might result in an overbroad application by reaching "groups engaged purely in issue discussion." 424 U.S. at 79. The Court therefore concluded that, in order to "fulfill the purposes of the Act," FECA's political-committee provisions "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.* *Buckley* thus established that an entity that is not controlled by a candidate must register as a political committee only if the group (1) crosses the $1,000 threshold of contributions or expenditures and (2) has as its "major purpose" the nomination or election of federal candidates.

In March 2004, the Commission issued a notice of proposed rulemaking seeking comment on whether the FEC should, *inter alia*, promulgate a regulatory definition of "political committee" that would encompass all "527" groups — *i.e.*, political organizations holding tax-

exempt status under Section 527 of the Internal Revenue Code. *Proposed Rules: Political Committee Status*, 69 Fed. Reg. 11,736, 11,748-11,749 (Mar. 11, 2004); *see* 26 U.S.C. §§ 527(a), (e)(1). In 2004, after receiving comments — including from Public Citizen, the lead plaintiff in this case — and hearing testimony, the Commission issued an Explanation and Justification "explaining why it took no action to re-define 'political committee.'" *Shays v. FEC*, 511 F. Supp. 2d 19, 23 (D.D.C. 2007). A court of this District rejected a challenge to the agency's decision to "pursue adjudication over rulemaking" but found that the Commission should "better explain its decision." *Id.* Accordingly, in February 2007 the Commission published in the Federal Register a Supplemental Explanation and Justification further explaining its decision not to promulgate such a regulation. *Rules and Regulations: Political Committee Status*, 72 Fed. Reg. 5595 (Feb. 7, 2007) ("Supplemental E&J").

The Supplemental E&J stated that, rather than adopting a new regulation, the Commission would instead continue its longstanding practice of determining an organization's major purpose through case-by-case adjudication. *See id.* at 5596-97. It also explained that although the major-purpose requirement can be satisfied "through sufficiently extensive spending on Federal campaign activity," *id.* at 5601 (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) ("*MCFL*")), a fact-specific analysis of an organization's conduct — by reference to its public statements and spending on other activity — can be necessary to evaluate whether the organization's major purpose is the nomination or election of federal candidates, *id.* Finally, the Supplemental E&J discussed several prior matters in which the Commission had examined a group's major purpose, explaining that those decisions, taken together, "provid[ed] considerable guidance to all organizations" regarding the Commission's application of the major-purpose test. *Id.* at 5595, 5605-06.

The Commission's case-by-case approach to determining political-committee status has been upheld each of the three times it has been challenged. It was upheld by the district court in *Shays*, 511 F. Supp. 2d at 29-31. More recently, it was upheld by the United States Court of Appeals for the Fourth Circuit in *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d. 544, 556 (4th Cir. 2012) ("*RTAA*"), *cert. denied*, 133 S. Ct. 841 (2013), and by the Tenth Circuit Court of Appeals in *Free Speech v. FEC*, 720 F.3d 788, 797-98 (10th Cir. 2013), *cert. denied*, 134 S. Ct. 2288 (2014).

II. FACTUAL BACKGROUND

A. Plaintiffs' Administrative Complaint

In an administrative complaint dated October 12, 2010, plaintiffs (and two other entities, ProsperityAgenda.us and AmericanCrossroadsWatch.org) alleged that Crossroads had violated FECA by "raising and spending significant amounts of money to influence the 2010 congressional elections without (1) registering as a political committee, . . . (2) filing political committee disclosure reports, . . . and (3) complying with the political committee organizational requirements." (AR 1-2.) Plaintiffs' administrative complaint requested that the Commission find reason to believe that Crossroads had violated certain of FECA's provisions, "conduct an immediate investigation under [52 U.S.C. § 30109(a)(8)(A) (2 U.S.C. § 437g(a)(2))]," and "determine and impose appropriate sanctions for any and all violations," including enjoining Crossroads "from any and all violations in the future" and imposing "such additional remedies . . . necessary and proper to ensure compliance with FECA." (AR 19-20.)

Crossroads responded to plaintiffs' administrative complaint in a submission to the Commission dated December 22, 2010. (AR 32-90.) Crossroads thereafter submitted two supplemental responses dated September 9, 2011 and October 10, 2011. (AR 92-176; AR 228-

37.) On April 23, 2012, Crossroads further submitted two Form 990 annual returns it had filed with the IRS detailing its financial activities between June 1, 2010, and December 31, 2011. (AR 239-339.) On November 21, 2012, the FEC's Office of General Counsel submitted to the Commission its First General Counsel's Report and Proposed Factual and Legal Analysis concerning the Crossroads matter. (AR 340-93.) This staff report recommended that the Commission find reason to believe that Crossroads violated FECA "by failing to organize, register, and report as a political committee, and that the Commission authorize an investigation." (AR 366.)

B. The Commission's Dismissal of the Administrative Complaint

On December 3, 2013, the Commission, by a vote of 3-3, did not find reason to believe that Crossroads had violated FECA's registration and reporting requirements for political committees. (AR 395.) Vice Chair Ravel and Commissioners Walther and Weintraub voted to find reason to believe and to authorize an investigation. (*Id.*) Chairman Goodman and Commissioners Hunter and Petersen voted against finding reason to believe. (*Id.*) The Commission then voted 6-0 to close the file. (*Id.*)

On January 8, 2014, Chairman Goodman and Commissioners Hunter and Petersen issued a Statement of Reasons ("statement") explaining their vote against finding reason to believe Crossroads had violated the Act. (AR 400-504.) On January 10, Vice Chair Ravel and Commissioners Walther and Weintraub issued a separate statement explaining their votes to proceed. (AR 505-09.) Because Chairman Goodman and Commissioners Hunter and Petersen were the Commissioners voting against a reason-to-believe finding, their "rationale necessarily states the agency's reasons for acting as it did" and they accordingly constitute the "controlling group" of Commissioners in this case. *NRSC*, 966 F. 2d at 1476.

Chairman Goodman and Commissioners Hunter and Petersen found that Crossroads's "public statements, organizational documents, and overall spending history objectively indicate that the organization's major purpose has been, and continues to be, issue advocacy and grassroots lobbying and organizing." (AR 400.) Their statement relied upon certain key facts about Crossroads that are not materially disputed. Based on those facts, which are set forth below, *see infra* pp. 12-14, the controlling group analyzed Crossroads's central organizational purpose and its federal campaign spending as compared to its other spending, and concluded that Crossroads "was not required to register with the Commission and file reports with the Commission as a political committee." (AR 427.)

1. Crossroads

Crossroads established itself in June 2010 as a nonprofit corporation (AR 401) and has applied for section 501(c)(4) status as a social welfare organization (Pls.' Mem. of Points and Authorities in Supp. of Pls.' Mot. for Summ. J. at 4 (Docket No. 23) ("Pls.' Mem.")). Crossroads's Articles of Incorporation and Mission Statement declare its purpose to be "'to further the common good . . . by engaging in research, education, and communication efforts regarding policy issues of national importance'" and to provide "'a road map for action'" by concerned Americans. (AR 401.) In 2010 and 2011, Crossroads articulated a "'7 in '11' National Action Plan" promoting seven policy objectives for "legislative action," addressing issues like tax rates, Congressional spending, national debt, health care reform, and American energy. (AR 402.) Crossroads is distinct from another entity, American Crossroads, which is organized under section 527 of the Internal Revenue Code and files reports with the Commission as an independent expenditure-only political committee. (AR 403-04.) The two organizations

share some employees, including Steven Law, who serves as president of both. (AR 403-04; Pls.' Mem. at 4.)

Between its formation in June 2010 and December 15, 2010, Crossroads raised approximately $43.6 million and spent approximately $39.1 million. (AR 402; Pls.' Mem. at 6.) Of that $39.1 million, Crossroads spent $15,445,049.50 on independent expenditures that expressly advocated the election or defeat of candidates. (AR 402; Pls.' Mem. at 6.) During that period, Crossroads also spent an additional $5.4 million on ten advertisements that criticized certain federal candidates while advocating some of Crossroads's stated policy goals, but that did not contain express advocacy (AR 415), including $1,104,783.48 that Crossroads reported to the Commission as electioneering communications (AR 402). (*See also* Pls.' Mem. at 6, 8-10.)

Crossroads did not disband or wind down its operations at the end of 2010. (AR 402.) During the first five months of 2011, Crossroads raised (approximately) an additional $5 million and spent $3 million — none of which it spent on independent expenditures. (AR 402; AR 240.) Therefore, for its first fiscal year running from its formation in June 2010 to May 31, 2011, Crossroads raised a total of $48,404,791 and spent $42,344,884. (AR 240.) During the remainder of 2011, Crossroads raised an additional $28,402,008 and spent $22,375,630 more — again, none of which it spent on independent expenditures. (AR 402-03 & n.10; AR 293; *see also* AR 414 & n.66 (noting that Crossroads's reports filed with the Commission showed that its cumulative independent expenditures during the entire 2010-2011 election cycle totaled $15,445,049).) Thus, in its first two years of existence, Crossroads raised a total of $76,806,799 and spent a total of $64,720,514. (AR 403;[2] AR 240, 293.)

[2] The controlling group's statement contains some immaterial typographical errors regarding these totals. The correct figures are those reflected on Crossroads's tax returns. (*Compare* AR 403 (statement) (identifying $78,806,799 in total receipts and $62,740,514 in total

Crossroads's financials can thus be summarized as follows:

	By 12/15/2010	By 5/31/2011	By 12/31/2011
Cumulative Receipts	$43.6 million	$48.4 million	$76.8 million
Cumulative Expenses	$39.1 million	$42.3 million	$64.7 million
Cumulative Independent Expenditures (Express Advocacy)	$15.4 million (39% of expenses)	$15.4 million (36% of expenses)	$15.4 million (24% of expenses)

2. Crossroads's "Major Purpose"

There is no dispute that Crossroads "crossed the statutory threshold for political committee status by making over $1,000 in independent expenditures." (AR 404-05; Pls.' Mem. at 7.) For that reason, the controlling group of Commissioners' analysis of whether Crossroads was a political committee focused on assessing the organization's "major purpose."

To determine Crossroads's major purpose, the controlling group relied on judicial decisions creating, evaluating, and applying the major-purpose test, as well as the Commission's own 2007 Supplemental E&J explaining the Commission's approach to the test. Their statement first discussed the major-purpose test's origins in *Buckley*, noting that the test was then "reaffirmed" in *MCFL* and "reiterate[d]" in the Commission's Supplemental E&J. (AR 405-06.) Additionally, the statement explained that *MCFL* established both (1) that an issue advocacy organization could engage in activities on behalf of federal candidates without becoming a political committee, and (2) that an organization could be classified as a political committee if its political spending became "'so extensive'" that its "'major purpose may be regarded as campaign activity.'" (AR 406 (quoting *MCFL*, 479 U.S. at 262).)

Turning to lower courts' applications of the major-purpose test, the controlling statement explained that the Fourth and Tenth Circuit Courts of Appeals have interpreted *Buckley* to hold

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spending), *with* AR 240, 293 (tax returns) (identifying $76,806,799 in total receipts and $64,720,514 in total spending).)

that an organization may be classified as a political committee only if it has "the" major purpose of electing or nominating federal candidates, as opposed to "a" major purpose, *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 288-89 (4th Cir. 2008); *RTAA*, 681 F.3d at 556; *Free Speech*, 720 F.3d at 797. (AR 407-08.) The statement further described the Tenth Circuit's fact-based approach to the major-purpose test, which analyzes organizations' public statements or comparative spending: "There are two methods to determine an organization's 'major purpose': (1) examination of the organization's central organizational purpose; or (2) comparison of the organization's electioneering spending with overall spending to determine whether the preponderance of expenditures is for express advocacy or contributions to candidates," *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 678 (10th Cir. 2010) (citing *Colorado Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1127, 1152 (10th Cir. 2007)). (AR 406-07.)

The statement also discussed the decisions of courts in this District in *FEC v. Malenick*, 310 F. Supp. 2d 230 (D.D.C. 2004), and *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996), explaining that these decisions shed additional light on how courts have applied the major-purpose test at the federal regulatory level. (AR 408-09.)

Based upon these judicial decisions and the Commission's Supplemental E&J, the statement summarized the major-purpose inquiry as follows:

> While these are not the *only* factors that may be considered, assessing a group's central organization purpose by examining an organization's public and non-public statements, like those reviewed by district courts in *Malenick* and *GOPAC*, and comparing a group's spending on campaign activities with its spending on activities unrelated to the election or defeat of a specific candidate to assess whether a group's "independent spending [has] become so extensive that the organization's major purpose may be regarded as campaign activity," are "important considerations when determining whether an organization qualifies as a PAC."

(AR 408-09 (footnotes and citations omitted).) Explaining that "it would be an unusual case for a group whose central organization purpose is *not* the nomination or election of a candidate and whose spending is *not* predominantly campaign-related to otherwise meet the major purpose test on the basis of other factors" (AR 409), the controlling group then analyzed Crossroads's major purpose in view of its (1) central organizational purpose and (2) comparative spending.

With respect to Crossroads's central organizational purpose, the controlling group found that Crossroads's "primary political activities since its inception have been focused on advancing public policy objectives." (AR 410.) Relying on *GOPAC* and the Supplemental E&J, the controlling group found that it was required to give Crossroads's official documents "significant weight" and that press reports about Crossroads did not alter this conclusion. (AR 410-12.) Accordingly, the controlling group concluded that "nothing in Crossroads['s] official documents — including its articles of incorporation, mission statement, and website — indicates that its central organizational purpose was the nomination or election of a federal candidate." (AR 412.)

Next, the Commissioners found that they must test that conclusion by "determin[ing] whether [the] group's *ex ante* subjective determination of its major purpose is established *ex post* by its objectively verifiable statements and spending." (AR 412.) The controlling group thus analyzed Crossroads's spending in mathematical terms, dividing the organization's relevant spending (the "numerator") by the organization's total spending during the relevant time period (the "denominator") in order to determine its comparative spending percentage. (AR 412-24.) Because "[c]ourts . . . in political committee cases have focused on express advocacy spending" (AR 413 (citing *Herrera*, *Coffman*, *GOPAC*, and *Malenick*)), the controlling group found that the relevant portion of Crossroads's 2010 spending was the $15.4 million it spent on independent expenditures (AR 413-14). The controlling group then considered the full administrative record

and calculated that this level of spending was 36 percent of Crossroads's total spending during its first fiscal year of June 2010 through May 2011 (in which Crossroads's total spending was $42.3 million) and only 25 percent of its total spending in all of 2010 and 2011 ($64.7 million). (AR 414-15.)[3]

The controlling group further explained that even if Crossroads's relevant spending were calculated by including Crossroads's 2010 non-express advocacy electioneering communications (adding $1.1 million to the numerator), Crossroads's relevant spending would be "only 42 percent of total spending." (AR 424.) And it further explained that even if the rest of the $4.3 million in non-express-advocacy issue ads that criticized federal candidates were included, increasing Crossroads's relevant spending to $20.8 million, Crossroads's relevant spending would still amount to less than half of its total spending during its first fiscal year ($42.3 million), or 49 percent. (*Id.*) Their statement pointed out that only by using that full $20.8 million spending amount as the numerator and by limiting the denominator to the calendar, not fiscal, year ($39.1 million) would Crossroads's comparative spending appear to make up the majority of its expenses. (*Id.*) Given the controlling group's disagreement that "such mathematics or methods are appropriate, let alone permitted," it found that Crossroads "cannot be considered a political committee based on its spending." (*Id.*)

Finally, the controlling group noted that the Commission's "broad discretion to dismiss matters" pursuant to *Heckler v. Chaney*, 470 U.S. 821, 831 (1985), independently warranted dismissal. The Commissioners explained that the broader spending analysis it declined to embrace had not been "properly noticed." (AR 427 n.117.)

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[3] The controlling group's calculation of 25 percent of total spending in 2010-11 was reached using total expenses of $62.7 million. *See supra* n.2. Substitution of the correct denominator, $64.7 million, results in a slightly lower 24 percent spending ratio.

ARGUMENT

The Commission's dismissal of plaintiffs' administrative complaint must be sustained because it was clearly not contrary to law. The rationale of the three Commissioners who voted not to find reason to believe that Crossroads had violated FECA reflects a thorough review of the record before the Commission, including a careful analysis of Crossroads's statements and a detailed review of its financial activities. It also accords with the courts' instruction that FECA be interpreted in a manner that is sensitive to the First Amendment activity being regulated by the statute. Because that analysis was plainly reasonable and concerns an area in which the Commission's inquiry is necessarily both flexible and required to be accorded extreme deference, the Court must affirm the agency's action.

I. STANDARD OF REVIEW

In reviewing the agency's decision, the Court is bound to follow the well-established decisions of the Supreme Court and D.C. Circuit explicitly requiring that the Commission's adjudicatory dismissal decision be accorded full deference. Although plaintiffs attempt to reduce their heavy burden by urging the Court to apply a lesser degree of deference in this case because the dismissal was not the result of a majority vote of Commissioners, as well as on the ground that disclosure is an important interest, the Court must reject these arguments.[4] Longstanding,

[4] Plaintiffs also attempt to reduce their heavy burden by arguing that the reason-to-believe standard is "low" or "undemanding." (Pls.' Mem. at 3, 24-25.) But the FEC Policy Statement plaintiffs rely on for that proposition does not establish that this is so. Rather, the statement generically explains that while the Commission will find reason to believe "in cases where the available evidence in the matter is at least sufficient to warrant conducting an investigation, and where the seriousness of the alleged violation warrants either further investigation or immediate conciliation," it finds no reason to believe when the submitted materials "fail to give rise to a reasonable inference that a violation has occurred." *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12,545, 12,546 (Mar. 16, 2007). Here, three of the Commissioners reached the former conclusion and three reached the latter one.

settled precedent requires that the Court limit its review and accord full deference to the Commission's duly articulated decision not to proceed on the administrative enforcement matter plaintiffs initiated against Crossroads, irrespective of how the decision was reached. Additionally, this is an administrative review case in which the Court acts as an appellate tribunal and limits its review to the administrative record.

A. Judicial Review Under Section 30109(a)(8) (437g(a)(8)) Is "Limited" and "Extremely Deferential"

Congress provided in FECA that the judicial task in section 30109(a)(8) (437g(a)(8)) cases like this is to determine whether the Commission's dismissal of plaintiffs' administrative complaint is "contrary to law." 52 U.S.C. § 30109(a)(8)(C) (2 U.S.C. § 437g(a)(8)(C)). Under well-settled, controlling decisions construing section 30109(a)(8) (437g(a)(8)), that standard of review is "limited." *Common Cause*, 842 F.2d at 448; *Citizens for Responsibility & Ethics in Washington v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007) ("At this stage, judicial review of the Commission's refusal to act on complaints is limited to correcting errors of law." (citing 52 U.S.C. § 30109(a)(8) (2 U.S.C. § 437g(a)(8)))). As this Court has explained, and as plaintiffs acknowledge (Pls.' Mem. at 15), the Commission's dismissal of an administrative complaint cannot be disturbed unless it was based on (1) an "'impermissible interpretation of'" FECA or (2) "'if the FEC's dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion.'" *Akins v. FEC*, 736 F. Supp. 2d 9, 16-17 (D.D.C. 2010) (quoting *Orloski*, 795 F.2d at 161); *see also, e.g.*, *Common Cause v. FEC*, 108 F.3d 413, 415 (D.C. Cir. 1997) (per curiam).

The contrary-to-law standard is "'extremely deferential'" to the agency's decision and "'requires affirmance if a rational basis for the agency's decision is shown.'" *Akins*, 736 F. Supp. at 17 (quoting *Orloski*, 795 F.2d at 167); *see also* Pls.' Mem. at 15 (acknowledging that

"the standard of review is deferential"). As the Supreme Court explained more than three decades ago, in another section 30109(a)(8) (437g(a)(8)) case in which the FEC dismissed an administrative complaint, "the Commission is *precisely* the type of agency to which deference should presumptively be afforded." *DSCC*, 454 U.S. at 37 (emphasis added). This is due to its "'primary and substantial responsibility for administering and enforcing [FECA],'" its authority to "'formulate general policy with respect to the administration of [the] Act,'" its "'sole discretionary power' to determine in the first instance whether or not a civil violation of the Act has occurred," and its "inherently bipartisan" nature resulting from the fact that "no more than three of its six voting members may be of the same political party." *Id*. "For these reasons" and others, the Court said, Congress "wisely provided" that the "dismissal of a[n administrative] complaint should be reversed only if 'contrary to law.'" *Id.*

In assessing whether the Commission's decision resulted either from an impermissible interpretation of the Act or, even under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion, *Akins*, 736 F. Supp. 2d at 16, the Court's task in this case is "not to interpret the statute as it [thinks] best but rather the narrower inquiry into whether the Commission's construction was sufficiently reasonable to be accepted," *DSCC*, 454 U.S. at 39 (internal quotation marks omitted). Indeed, "[t]o satisfy this standard it is not necessary for [the Court] to find that the agency's construction was the only reasonable one or even the reading the [C]ourt would have reached" on its own "if the question initially had arisen in a judicial proceeding." *Id.* In applying this "*Chevron*" deference, which is "principal[ly] justifi[ed]" by the agency's "practical . . . expertise," *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990), the Court must affirm the dismissal so long as the agency's construction was permissible and its application of that construction not arbitrary and capricious, *see Chevron*

U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.11 (1984) (citing *DSCC* for the proposition that the "court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding"); *Akins*, 736 F. Supp. 2d at 18 (likening *Chevron* deference to that described in *DSCC*).

B. The Court Must Accord the FEC's Dismissal Decision *Chevron* Deference

The extremely deferential standard of review that applies in this case is not altered, as plaintiffs' contend (*see* Pls.' Mem. at 15-18), by the nature of the dismissal, which resulted from a 3-3 split vote instead of a majority vote such as 6-0, 5-1, or 4-2. The D.C. Circuit has squarely held that it owes deference to an FEC legal interpretation supporting a decision not to proceed on an enforcement matter, even if it only "prevails on a 3-3 deadlock." *In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000); *FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 185 (D.C. Cir. 2001).

In *NRSC*, another matter in which the Commission split 3-3, the Court of Appeals applied "ordinar[y]" principles of agency deference to the rationale of dissenting Commissioners because "those Commissioners constitute[d] a controlling group for purposes of the decision, [and] their rationale necessarily state[d] the agency's reasons for acting as it did." 966 F.2d at 1475-76. Under that deferential standard of review, the Court of Appeals found that the construction of a disputed regulation articulated by the three "declining-to-go-ahead Commissioners," *Common Cause*, 842 F.2d at 449, could be sustained in light of the "Commission's precedents and statements," which did not "clearly establish" what the disputed regulation meant. *NRSC*, 966 F.2d at 1476-77. The Court of Appeals held that it was "enough to say" that the Commission had provided, through the statement of the declining Commissioners, "a reasoned justification

for not doing so" and found that "[i]t was error for the district court to force a different construction upon the Commission and the entities subject to its regulation." *Id.* at 1478.

The deference that the D.C. Circuit accorded the dissenting Commissioners in *NRSC* had its roots in two earlier FEC cases that also arose from split-vote dismissals: *DCCC*, 831 F.2d 1131, and *Common Cause*, 842 F.2d 436.[5] In *DCCC*, in an opinion authored by then-Judge Ruth Bader Ginsburg, the D.C. Circuit had "held that, to make judicial review a meaningful exercise, the three Commissioners who voted to dismiss must provide a statement of their reasons for so voting." *NRSC*, 966 F.2d at 1476 (discussing *DCCC*). A footnote in the *DCCC* opinion "strongly suggest[ed] that, if the meaning of the statute is not clear, a reviewing court should accord deference to the Commission's rationale," even in a situation in which the Commission was divided. *Id.* The *DCCC* footnote stated that "[i]n the absence of prior Commission precedent . . . *judicial deference to the agency's initial decision or indecision would be at its zenith.*" *DCCC*, 831 F.2d at 1135 n.5 (emphasis added).

Shortly after *DCCC* was decided, the D.C. Circuit "expanded it to control generally situations in which the Commission deadlocks and dismisses." *NRSC*, 966 F.2d at 1476. In *Common Cause*, another case presenting that situation, the Court of Appeals reasoned that "[a]lthough the panel in *DCCC* limited its holding to the facts of that case, we cannot find a principled distinction between the situation in *DCCC* and the case at bar." 842 F.2d at 449 (internal citation omitted). With that extension of *DCCC*, the D.C. Circuit in *NRSC* accordingly

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[5] These two cases, like *DSCC*, were dismissed at the "reason to believe" stage of the Commission's enforcement process. In *NRSC*, the court considered the Commission's actions at the subsequent "probable cause" stage. Like a reason to believe finding, a probable cause finding requires four affirmative votes of Commissioners to proceed to the next step. *See supra* p. 3. Because of the highly analogous nature of the inquiries, the D.C. Circuit and courts in this District have made no distinctions in reviewing FEC dismissals based upon whether they occurred at the reason to believe or probable cause stages.

determined that the "import of *DCCC* today is that we see no material distinction between" a case reviewing a deadlock dismissal "and the Supreme Court's decision in *DSCC*" reviewing a unanimous dismissal. *NRSC*, 966 F.2d at 1476. "[B]oth *DCCC* and *DSCC* were on review of Commission decisions, with supporting rationales, to dismiss complaints." *Id.*; *see also Stark v. FEC*, 683 F. Supp. 836, 840-41 (D.D.C. 1988) ("[T]his Court reads *DCCC* to require that the same deference [accorded by the Supreme Court in *DSCC*] be accorded the reasoning of 'dissenting' Commissioners who prevent Commission action by voting to deadlock as is given the reasoning of the Commission when it acts affirmatively as a body to dismiss a complaint."). Accordingly, the same level of deference is owed when considering dismissals resulting from split votes as is owed to majority or unanimous dismissals.

More recently, the Court of Appeals has reaffirmed the deference afforded to declining-to-go-ahead Commissioners and elaborated on its bases. In *In re Sealed Case*, 223 F.3d 775 (D.C. Cir. 2000), which plaintiffs do not mention, the D.C. Circuit deferred to the interpretation of such a controlling group with respect to whether a financial transaction involving a foreign national was illegal under FECA. *Id.* at 780 ("[W]e find the Commission's probable cause determination here entitled to deference."). That decision foreclosed the Department of Justice's argument that the crime-fraud exception to privilege required the production of documents that could have been associated with the transaction. *Id.* at 779 ("This case does not fall within the crime-fraud exception because what [the Republican National Committee] and its officials are accused of is not criminal."). Although the context of the case was different from *NRSC* — *NRSC* concerned an interpretation of an FEC regulation (not FECA itself) and concerned a civil (not criminal) matter — the Court of Appeals found these differences immaterial in deferring to the dissenting Commissioners' adjudicative decision. *Id.* at 779-80.

In re Sealed Case further explains why *Chevron* deference is appropriate in instances in which the Commission deadlocks in enforcement proceedings. Based upon the structure of section 30109 (437g), FECA's enforcement provision, the court explained that "the probable cause determination is part of a detailed statutory framework for civil enforcement and is analogous to a formal adjudication," thus falling on the "*Chevron* side of the line." *Id.* at 780; *Nat'l Rifle Ass'n of Am.*, 254 F.3d at 185 (explaining that "in making probable cause determinations, the Commission . . . giv[es] ambiguous statutory language concrete meaning through case-by-case adjudication"; these were among the reasons why the court in *In re Sealed Case* determined that the FEC's "probable cause determination and its underlying statutory interpretation had sufficient legal effect to warrant *Chevron* deference"); *see also United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."); *id.* at 230 n.12 (collecting instances of *Chevron* deference in adjudication cases).[6]

Indeed, unlike other agencies, which may issue no-action letters prepared by staff, the FEC's "no-action decision here was made by the Commission itself." *In re Sealed Case*, 223 F.3d at 780; *see also Nat'l Rifle Ass'n of Am.*, 254 F.3d at 185. By providing in FECA that it

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[6] *Hispanic Leadership Fund, Inc. v. FEC*, 897 F. Supp. 2d 407 (E.D. Va. 2012), upon which plaintiffs rely (Pls.' Mem. at 16-17), actually supports the Commission here. Contrary to plaintiffs' notion that a dismissal of an enforcement matter establishes "no cognizable agency action for *Chevron* purposes" (Pls.' Mem. at 16), the court explained in that case that in the enforcement context in which *NRSC* was decided, "the deadlock amounted to final agency action that was reviewable in federal district court." *Hispanic Leadership Fund, Inc.*, 897 F. Supp. 2d at 428. The court distinguished *NRSC* on this basis, explaining that the Commission's deadlock in the very different context of responding to an advisory opinion request, by contrast, "did not result in[] reviewable agency action." *Id.* That was why the Virginia district court did not defer to the views of the Commissioners on either side of the divide.

takes four Commissioner votes to proceed on an enforcement matter, but only three to dismiss, Congress sought to ensure that the agency would not "provide room for partisan misuse." H.R. 12406, H. Rep. No. 94-917, 94th Cong., 2d Sess. at 3 (1976). The legislative history concerning the FEC's structure confirms that Congress designed the Commission to "initiate investigations, . . . and take other steps of comparable importance only upon the affirmative vote of four . . . members. The four-vote requirement serves to assure that enforcement actions as to which the Congress has no continuing voice, will be the product of a mature and considered judgment." *Id*. The D.C. Circuit has echoed these concerns, explaining that *Chevron* deference to a Commission's split-vote enforcement dismissal is warranted both because it is consistent with Congress's design of the agency to be "statutorily balanced between the major parties" and with the Supreme Court's instructions in *DSCC*, which were "more consonant with *Chevron*" deference (even though *Chevron* had not been decided yet) than with "*Skidmore*" deference. *In re Sealed Case*, 223 F.3d at 780-81.[7] "If courts do not accord *Chevron* deference to a prevailing decision that specific conduct is *not* a violation, parties may be subject to criminal penalties where Congress could not have intended that result." *Id.* at 780 (emphasis added). Plaintiffs contend that deference to three Commissions here would "frustrate the purposes of the Act" (Pls.' Mem. at 16), but deference to a dismissal resulting from an absence of a bipartisan majority furthers the Congressional intent of enforcement that is expert and bipartisan.

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[7] Under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), agency "interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law" "do not warrant *Chevron*-style deference" and are only "'entitled to respect.'" *Nat'l Rifle Ass'n of Am.*, 254 F.3d at 184-85 (quoting C*hristensen v. Harris County*, 529 U.S. 576, 587 (2000)). "[T]he court grants an agency's interpretation only as much deference as its persuasiveness warrants," examining "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Brown v. United States*, 327 F.3d 1198, 1205 (D.C. Cir. 2003) (internal quotation marks omitted); *Skidmore*, 323 U.S. at 139-40.

For these reasons, the Court must refuse plaintiffs' request to lessen their burden by disregarding binding precedent and refusing to apply *Chevron* deference to a "prevailing decision" that specific conduct does not provide reason to believe that a violation of FECA has occurred. Plaintiffs' request (Pls.' Mem. at 17) that the Court apply "*Skidmore*" deference must be rejected because this Court is bound to follow the Court of Appeals's controlling decisions in *NRSC*, *In re Sealed Case*, *National Rifle Association*, *DCCC*, and *Common Cause*, as well as the Supreme Court's decision in *DSCC*. This Court must therefore accord *Chevron* deference to the controlling group of Commissioners in this case, just as other courts in this District have done when reviewing Commission dismissals resulting from split votes. *See, e.g.*, *Common Cause*, 108 F.3d at 415 (reciting the district court's application of "*Chevron* deference" to the "'declining-to-go-ahead' Commissioners"); *GOPAC, Inc.*, 917 F. Supp. at 860 (noting that the statutory provision entitling the FEC to *DSCC* deference is section 30109(a)(8) (437g(a)(8))).

C. The Government's Disclosure Interest Does Not Alter the Standard of Review

Although plaintiffs devote substantial space to their arguments that FECA's "political committee disclosure requirements . . . directly advance the compelling governmental interests in 'providing the electorate with information'" (Pls.' Mem. at 21), the government's interest in disclosure is neither disputed nor relevant to the level of judicial scrutiny of an agency dismissal. This is not a challenge to FECA's disclosure provisions and the importance of the government's disclosure interest does not change the standard of review that governs this section 30109(a)(8) (437g(a)(8)) case. The Court must therefore decline plaintiffs' insistence that it "assess[] . . . the adequacy of the FEC's reasons for its decision" based on "*the effect*" of that decision on the disclosure of the information plaintiffs wish to obtain. (Pls.' Mem. 21 (emphasis added).) Whether the FEC's decision was contrary to law is the only question before the Court and the

answer to *that* question is what determines whether plaintiffs or the public were potentially deprived of information to which they were entitled, not the other way around. Plaintiffs' backwards, results-oriented approach places the cart before the horse, and must be rejected.[8]

D. The Court Reviews the Commission's Dismissal Based Solely on the Administrative Record and As If It Were an Appellate Tribunal

Finally, because this is an administrative review proceeding, the Court's review is limited to the administrative record. *See, e.g.*, *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010) ("The [Administrative Procedure Act] limits judicial review to the administrative record except when there has been a strong showing of bad faith or improper behavior or when the record is so bare that it prevents effective judicial review." (internal quotation marks omitted)). In reviewing the Commission's dismissal, the "district court . . . does not perform its normal role but instead sits as an appellate tribunal." *Palisades Gen. Hosp. Inc. v. Leavitt*, 426 F.3d 400, 403 (D.C. Cir. 2005) (explaining further that if the court "determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the correct legal standards" (citations and internal quotation marks omitted)).

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[8] Plaintiffs' disclosure argument is also exaggerated. Plaintiffs complain (Pls.' Mem. at 18) that, absent classification as a political committee, "none of [the Act's full] disclosure obligations" will apply to Crossroads. Not so. As the Seventh Circuit Court of Appeals recently recognized, it is clear that even groups "whose major purpose is not express advocacy — are not completely immune from disclosure and disclaimer rules for their occasional spending on express election advocacy." *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 839 (7th Cir. 2014). Plaintiffs themselves acknowledge that is the case here, asserting in their brief that even though Crossroads is not a political committee, it "self-reported more than $15 million in independent expenditures" in 2010 (Pls.' Mem. at 27). Crossroads has also reported its electioneering communications. *See supra* p. 13. It has thus submitted reports pursuant to event-driven disclosure requirements established by Congress.

II. THE FEC'S DISMISSAL WAS CLEARLY NOT CONTRARY TO LAW

There is no dispute that Crossroads met the $1,000 statutory threshold for political-committee status. Thus, the only question here is whether the controlling group of Commissioners reasonably concluded that Crossroads did not clear the "'additional hurdle to establishing political committee status'" of having as its major purpose the nomination or election of federal candidates. *Free Speech*, 720 F.3d at 797 (quoting Supplemental E&J, 72 Fed. Reg. at 5601).

The controlling group reasonably concluded that Crossroads did not have that purpose. Their reasoning accords with the narrow construction of FECA's political-committee definition that the Supreme Court and the federal courts of appeals, including the D.C. Circuit, have followed for nearly four decades, as well as the Commission's own Supplemental E&J and historical practices. The controlling group's approach to analyzing Crossroads's major purpose — by examining its central organizational purpose and comparative spending — was squarely justified and reasonable.

To determine Crossroads's central organizational purpose, the controlling statement analyzed Crossroads's public statements, evaluating these statements and other information that was in the record before the agency. In assessing Crossroads's comparative spending, the controlling group identified what it determined to be Crossroads's relevant federal campaign activity and compared it to Crossroads's total spending. Based on this analysis, the controlling Commissioners reasonably determined that Crossroads's major purpose was "issue advocacy and grassroots lobbying and organizing" (AR 400), and that Crossroads's allocation of one third or one quarter of its total spending on federal campaign spending further showed that its major purpose was *not* the nomination or election of federal candidates. Indeed, the controlling

Commissioners' nuanced analysis even reasonably justified dismissal under several more sweeping approaches with which they disagreed. In any event, they also concluded that these more sweeping approaches had not been made clear to potentially regulated individuals and entities and therefore warranted the exercise of the agency's broad discretion not to prosecute, an independently valid reason for affirmance here.

Because this application of the major-purpose test was consistent with FECA, multiple court decisions, and the Commission's own statements and practice, it was reasonable and certainly not contrary to law.

A. The Controlling Commissioners' Approach to Determining Crossroads's "Major Purpose" Was Reasonable

1. *Buckley* and Its Progeny Narrowly Construed the Meaning of "Political Committee"

The controlling group's approach to the major-purpose test was based upon First Amendment concerns that have been expressed by various courts and commentators, including even lead plaintiff Public Citizen. The test itself arose out of the Supreme Court's concern that FECA's political-committee definition, if mechanically applied, might sweep too broadly. In *Buckley*, the Court feared that defining political-committee status "only in terms of amount of annual 'contributions' and 'expenditures' . . . could be interpreted to reach groups engaged purely in issue discussion." 424 U.S. at 79 (footnote omitted). Noting that lower courts had construed "'political committee' more narrowly" in order to "avoid questions of unconstitutionality," *id.* at 79 & n.106, the Court limited the reach of FECA's definition of "political committee" to "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate," *id.* This construction was sufficient, the Court said, "[t]o fulfill the purposes of the Act"; the expenditures of such "major

purpose" groups could be "assumed to fall within the core area sought to be addressed by Congress," which are, "by definition, campaign related." *Id.*

MCFL reaffirmed *Buckley*'s major-purpose holding. 479 U.S. at 252 n.6 (quoting *Buckley*, 424 U.S. at 79). Even though the organization at issue in the case, MCFL, occasionally "engage[d] in activities on behalf of political candidates," it could not be regulated as a political committee because "[i]ts central organizational purpose [was] issue advocacy." *Id.* Only if a group's spending "become[s] so extensive that [its] major purpose may be regarded as campaign activity, [can it properly] . . . be classified as a political committee." *Id.* at 262. Organizations that do have that major purpose are political committees and are subject to "extensive requirements," including recordkeeping and reporting requirements. *Id.* at 254; *Citizens United v. FEC*, 558 U.S. 310, 337 (2010) (noting that political-committee obligations are "extensive").

The Supreme Court has not directly addressed the major-purpose test since its decisions in *Buckley* and *MCFL*.[9] The Court of Appeals for the D.C. Circuit has likewise not refined the particulars of the major-purpose test, though it has followed the Supreme Court's cautious approach. In *FEC v. Machinists Non-Partisan Political League*, the Court of Appeals explained that because evaluating political-committee status arises in the "delicate" First Amendment area, "there is no imperative" to stretch the statute or to "read into it oblique inferences of Congressional intent." 655 F.2d 380, 394 (D.C. Cir. 1981). "Achieving a reasonable, constitutionally sound conclusion in this case requires just the opposite," the court observed, *id.*, before holding that the FEC lacked jurisdiction to regulate contributions of a group seeking to

[9] Although a question about the test was raised in *FEC v. Akins*, 524 U.S. 11 (1998), the Court declined to answer it, instead permitting the Commission to address a threshold question about new rules defining the term "members" for purposes of a "membership organization." *Id.* at 26-29. In *McConnell v. FEC*, 540 U.S. 93 (2003), in the course of upholding a definition of "federal election activity" added to FECA by BCRA, the Court cited *Buckley*'s major-purpose discussion with approval but did not otherwise elaborate on its focus. *Id.* at 170 n.64.

"draft" Edward Kennedy as a candidate for president, *id.* at 390-97. The Court of Appeals's approach in *Machinists* reflects the Supreme Court's conclusion that political-committee status should be narrowly construed to avoid the constitutional problems about which "*Buckley* and its lower court predecessors" were concerned. *Id.* at 394; *see also Unity08 v FEC*, 596 F.3d 861, 867-69 (D.C. Cir. 2010) (following *Machinists*).

Consistent with the foregoing authorities, Public Citizen itself has similarly observed in formal comments submitted to the Commission in response to the Commission's 2004 notice of proposed rulemaking, *see supra* pp. 8-9, that it is "essential" that the definition of political committee not be overextended. It explained that "a legitimate 501(c) organization should not have to fear that it will become a political committee simply by engaging in political issue-related criticisms of public officials." Public Citizen, *Comments on the Notice of Proposed Rulemaking on Political Committee Status* (NPRM 2004-06) at 10 ("Public Citizen Comments"), *available at* http://www.fec.gov/pdf/nprm/political_comm_status/public_citizen_holman.pdf (last visited Sept. 10, 2014).

2. The Controlling Commissioners' Approach to Determining Political-Committee Status Was Based on Judicial Decisions and the Commission's Precedents

The controlling group's approach not only hewed to the "reasons that the Court in *Buckley* and *MFCL* narrowed the statutory definition of political committee" (AR 410), but also followed the judicial opinions considering the test and the Commission's case-by-case method.

Because the Supreme Court did not "mandate a particular methodology for determining an organization's major purpose," the courts that have considered challenges to the Commission's methodology have agreed with the Commission that it is "free to administer FECA political committee regulations either through categorical rules or through individualized

adjudications." *RTAA*, 681 F.3d at 556; *Free Speech*, 720 F.3d at 797; *see also Shays*, 511 F. Supp. 2d at 30-31. "The determination of whether the election or defeat of federal candidates for office is *the* major purpose of an organization, and not simply *a* major purpose, is inherently a comparative task." *RTAA*, 681 F.3d at 556; *Free Speech*, 720 F.3d at 797. The Fourth and Tenth Circuits, as well as Judge Sullivan in this District, therefore agreed that the major-purpose determination requires a "fact-intensive analysis," and is "incompatible with a one-size-fits-all rule." *RTAA*, 681 F.3d at 556-57; *Free Speech*, 720 F.3d at 797-98; *see also Shays*, 511 F. Supp. 2d at 29-31. "The necessity of a contextual inquiry is supported by judicial decisions applying the major purpose test, which have used the same fact-intensive analysis that the Commission has adopted." *RTAA*, 681 F.3d at 557 (citing *Malenick*, 310 F. Supp. 2d at 234-37, *GOPAC, Inc.*, 917 F. Supp. at 859, 864-66, and *Shays*, 511 F. Supp. 2d at 29-31); *Free Speech*, 720 F.3d at 798. Accordingly, as plaintiffs acknowledge, courts have "consistently . . . upheld" (Pls.' Mem. at 23) the Commission's "sensible" and "flexibl[e] . . . case-by-case" method of determining an organization's major purpose. *RTAA*, 681 F.3d at 556, 558; *Free Speech*, 720 F.3d at 797-98; *see also Shays*, 511 F. Supp. 2d at 29-31.

The Commission's Supplemental E&J explains that the FEC performs the major-purpose analysis by consulting sources such as the group's public statements, government filings, charters, and bylaws. *See* 72 Fed. Reg. at 5601, 5605 (describing sources). For example, "[a]n analysis of [an organization's] public statements can . . . be instructive in determining an organization's purpose." 72 Fed. Reg. at 5601 (citing *Malenick*, 310 F. Supp. 2d at 234-36; *GOPAC, Inc.*, 917 F. Supp. at 859; Advisory Opinion 2006-20 (Unity 08)); *see also id.* ("The Commission may need to examine statements by the organization that characterize its activities and purposes."); *id.* at 5605 (noting use of "organizational planning documents"). In addition,

the Commission has also explained that it "may . . . need to evaluate the organization's spending on Federal campaign activity, as well as any other spending by the organization." *Id.* at 5601.

Here, the controlling group's approach was based upon these factors articulated in the Supplemental E&J. Their statement analyzed Crossroads's major purpose by reviewing its "public and non-public statements" and by comparing its "spending on campaign activities with its spending on activities unrelated to the election or defeat of a specific candidate to assess whether" its "'independent spending [had] become so extensive that [Crossroads's] major purpose [could] be regarded as campaign activity.'" (AR 406 (quoting *MCFL*, 479 U.S. at 262).).[10] Thus, to the extent plaintiffs acknowledge (Pls.' Mem. at 16 n.2) that the Commission's Supplemental E&J should be accorded *Chevron* deference, they cannot dispute that the reasonable construction of that Supplemental E&J reflected in the controlling Commissioners' statement should also be accorded *Chevron* deference, *NRSC*, 966 F.2d at 1476-77.

The controlling group's approach was also consistent with lower courts' approaches to the major-purpose test, including the methods employed by the Courts of Appeals for the Tenth and Fourth Circuits. In the course of analyzing a state law, the Tenth Circuit held that there are "two methods" to determine major purpose: (1) examination of the organization's central organizational purpose or (2) comparing election-related "spending with overall spending to determine whether the preponderance of expenditures is for express advocacy or contributions to candidates." *Herrera*, 611 F.3d at 678. The approach taken here uses the same areas of inquiry, while employing an analysis that is *more* thorough than the alternative methods of analysis described in *Herrera*. The controlling group treated *both* the central organizational purpose *and*

[10] The controlling group in no way purported to change the agency's position. (Pls.' Mem. at 18, 30-31 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).) Nor could three members of the Commission do so without a fourth vote. *Common Cause*, 842 F.2d at 449 n.32.

spending inquiries as necessary to the major-purpose analysis (rather than the Tenth Circuit's disjunctive test) and noted that the test is met "if either prong is satisfied." (AR 407.)

The approach used here also conforms with the Fourth Circuit's explanation that "the Commission first considers a group's political activities, such as spending on a particular electoral or issue-advocacy campaign, . . . and then it evaluates an organization's 'major purpose,' as revealed by that group's public statements, fundraising appeals, government filings, and organizational documents." *RTAA*, 681 F.3d at 555 (citation omitted). And it is consistent with the way the district court in *GOPAC* explained that an "organization's purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates." 917 F. Supp. at 859.

Accordingly, the controlling group's method of determining Crossroads's political-committee status by considering its organizational documents and spending was consistent with the FEC's Supplemental E&J and various judicial decisions applying the major-purpose test.

B. The Controlling Group of Commissioners' Determination of Crossroads's "Major Purpose" Was Reasonable

In applying the major-purpose test, the controlling group of Commissioners correctly sought to determine Crossroads's *sole* major purpose. As their statement explained (AR 407-08), *Buckley* and its progeny have made clear that the question is whether Crossroads had "*the* major purpose" of "the nomination or election of a candidate." *Buckley*, 424 U.S. at 79 (emphasis added). "If organizations were regulable merely for having the support or opposition of a candidate as 'a major purpose,'" political-committee status could reach "organizations primarily engaged in speech on political issues unrelated to a particular candidate." *Leake*, 525 F.3d at 287-88; *see also RTAA*, 681 F.3d at 556; *Free Speech*, 720 F.3d at 797. The controlling group thus analyzed whether Crossroads's sole major purpose was nominating or electing

candidates by evaluating Crossroads's central organizational purpose as described in its public statements and its relevant electoral spending in comparison to its other spending.

1. The Controlling Commissioners' Determination That Crossroads's Central Organizational Purpose Was Not the Nomination or Election of Candidates Was Reasonable

The controlling group analyzed Crossroads's central organizational purpose by analyzing its public statements and records. Just as the relevant portion of the Commission's Supplemental E&J relied on decisions of courts in this District, *Malenick* and *GOPAC*, *see* 72 Fed. Reg. at 5601, the controlling Commissioners reviewed these decisions for guidance. The controlling group's statement explained that in *Malenick*, for example, "the court reviewed the organization's announced goals, brochures, fundraising letters, and express advocacy communications sent to its members, all of which indicated that the major purpose of the group in question was the election of federal candidates." AR 409; *Malenick*, 310 F. Supp. 2d at 235. It similarly explained that *GOPAC* indicated that "official statements from a group, such as a group's organizing documents or statement of purpose, or other materials put forth under the group's name, including fundraising documents or press releases, are the primary documents by which an entity's central organizational purpose is to be determined." AR 410; *compare GOPAC, Inc.*, 917 F. Supp. at 859 ("The organization's purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates."), *with id.* at 862-67 (rejecting reliance on less formal evidentiary submissions such as magazine articles and "an audiotape and transcript of a conversation or meeting among unidentified persons").

As the controlling group correctly determined, Crossroads's organizational documents do not indicate that its primary purpose is the election or nomination of candidates. Crossroads's

Articles of Incorporation and Mission Statement declare its purpose to be "'to further the common good . . . by engaging in research, education, and communication efforts regarding policy issues of national importance'" and to provide "'a road map for action.'" (AR 401.) Crossroads's "'7 in '11' National Action Plan" promotes seven policy objectives for "legislative action" and likewise does not call for the election or defeat of particular candidates but focuses more broadly on issues (such as those reflected in Crossroads's ads) like guaranteeing low tax rates that encourage American economic growth, aggressively attacking the national debt, reforming health care, protecting our borders, and prioritizing American energy development. (AR 402.) The Commissioners' finding that Crossroads's "organizational documents," "mission statement," and "primary political activities since its inception" were "focused on advancing public policy objectives" appropriately gave "due weight to the form and nature of the statements" in the record, Supplemental E&J, 72 Fed. Reg. at 5601, and thus was plainly reasonable. (AR 410.)[11]

Plaintiffs appear to agree that Crossroads's official statements support its claim that it is not a political committee, and contend only that the controlling group's reliance upon these "self-serving, self-generated" statements was "arbitrary and capricious and contrary to law" based upon an inapposite analogy to the Federal Rules of Evidence. (Pls.' Mem. at 38, 40.) But the agency has often looked to self-generated statements in the past, as evidenced by *Malenick* and *GOPAC*. *See also, e.g.*, Advisory Opinion 2006-20 at *4 (Unity 08) ("Unity 08's self-proclaimed major purpose is the nomination and the election of a presidential candidate and a

[11] While the Commissioners' statement also mentioned Crossroads's "IRS tax status," it did not place "great reliance" on it, as plaintiffs claim. (Pls.' Mem. at 39.) Rather, the statement pointed out that tax status was "certainly relevant" although "not dispositive." AR 411; Supplemental E&J, 72 Fed. Reg. at 5597 ("Neither FECA, its subsequent amendments, nor any judicial decision interpreting either, has substituted tax status as an acceptable proxy for this conduct-based determination.").

vice-presidential candidate."). These statements provide a sound basis for determining an organization's objectives.

Plaintiffs' suggestion that the controlling group should have relied upon "*spending* on public advertising" (Pls.' Mem. at 39 (emphasis added)) conflates the central organizational purpose and spending analyses and certainly does not demonstrate any error in the controlling group's approach. Plaintiffs also suggest that greater weight should have been placed on "public statements" about that spending, but the controlling group examined such statements and found them insufficiently specific regarding the actual identity of the organization responsible for such statements as well as the specific advertising to which they referred. (AR 403-04, 411-12.)

With respect to the analysis of Crossroads's public statements, the controlling Commissioners' statement reflects careful consideration of the record before the Commission and reasonably found that the evidence before the agency did not undermine those public statements. Based on the facts before the Commission, the statement's conclusion that Crossroads was what it declared itself to be was neither unreasonable nor arbitrary, and it certainly was not unlawful.

2. The Controlling Commissioners' Assessment of Crossroads's Comparative Spending Was Reasonable

The controlling group also reviewed Crossroads's federal campaign spending in order to determine whether Crossroads's "*ex post*" financial activity was consistent with its "*ex ante*" stated goals. (AR 412.) The controlling group determined that the most relevant universe of spending for determining Crossroads's federal campaign spending was the group's $15.4 million worth of independent expenditures — *i.e.*, express advocacy urging the election or defeat of clearly identified federal candidates — and compared that spending with Crossroads's $42.3 million total spending in its first fiscal year, running from inception in June 2010 to May 2011.

(AR 412-23.) The amount of Crossroads's express advocacy spending was a little over a third of Crossroads's total spending, or 36 percent. (AR 414-15.) The controlling statement explained that if the entire record of Crossroads's spending during all of 2010 and 2011 were considered, its $15.4 million of express advocacy would constitute a quarter of its $64.7 million total outlay. (*Id.*) These considerations of Crossroads's (1) express advocacy (numerator) and (2) the relevant time period (denominator) were both reasonable, as was the controlling group's conclusion that express advocacy spending representing only a third or a quarter of an organization's total spending was not "so extensive" as to provide reason to believe that Crossroads should have registered as a political committee. (AR 414-15.)

a. Relevant Federal Campaign Spending (Numerator)

The controlling group's decision to limit the relevant universe of spending to Crossroads's independent expenditures was reasonable and not contrary to law. As a general matter and as explained above, narrowly construing which groups may be subject to regulation as political committees under FECA is consistent with the Supreme Court's decisions in *Buckley* and *MCFL*, the Court of Appeals's decision in *Machinists*, and even with plaintiffs' own previous comments on the question. *See supra* pp. 29-31. Indeed, Public Citizen has warned that the major purpose standard must not be "circumvented" by sweeping in organizations whenever they "spend[] a certain amount of money . . . on communications that 'attack' or 'support' a candidate." Public Citizen Comments at 10. Were it otherwise, "precisely what the *Buckley* Court feared will have come to pass: An organization may become subject to regulation as a 'political committee' simply by engaging in political issue-related criticisms of public officials, *and communications that would not otherwise have qualified as covered expenditures will become covered by a process of bootstrapping*." *Id.* (emphasis added).

Likewise, the controlling group's inclusion only of Crossroads's express advocacy spending (and exclusion of activities that were not express advocacy, except perhaps their functional equivalent (AR 414-16)), was a reasonable application of the Supreme Court's mandate that political-committee status be construed narrowly to avoid overbreadth concerns. *Buckley* pointed out in the separate context of expenditures made by "an individual other than a candidate or a group other than a 'political committee'" the necessity of construing "expenditure" narrowly in order to ensure that such "spending . . . is unambiguously related to the campaign of a particular federal candidate." 424 U.S. at 79-80. The controlling Commissioners reasonably determined that "[alt]hough *Buckley* did not construe 'expenditure' to mean 'express advocacy' with respect to groups that are already political committees, it does not follow that the 'express advocacy' construction is not, or should not be, part of the major purpose test . . . in the first instance." (AR 418.)

Indeed, recent court decisions confirm the reasonability of just that approach. For example, just a few months ago, the Seventh Circuit in *Wisconsin Right to Life, Inc. v. Barland* invalidated part of a state provision under which "ordinary citizens, grass-roots issue-advocacy groups, and § 501(c)(4) social-welfare organizations" were required to report as political committees if they exceeded a $300 threshold in "communicat[ing] their views about any political issue close to an election and include[d] the name or likeness of a candidate in a way that could be construed by state regulators as a reference to the candidate's qualifications or as '*support*' or '*condemnation*' of the candidate's record or positions." 751 F.3d 804, 838 (7th Cir. 2014). The Seventh Circuit held that this more expansive portion of the provision was "unconstitutional and must be enjoined," leaving behind in its place a narrower statutory analysis "basically track[ing] the boundaries for express advocacy and its functional equivalent." *Id.* The

court reasoned that imposing political-committee registration and reporting requirements on "groups that engage in express election advocacy as their major purpose . . . is a relevantly correlated and reasonably tailored means of achieving the public's informational interest," but it rejected the imposition of such requirements "on issue-advocacy groups that only occasionally engage in express advocacy." *Id.* at 841.

In *Herrera*, the Tenth Circuit reached a similar conclusion. In analyzing the spending of two groups, the court found no indication" that either spent "a preponderance of its expenditures on *express advocacy* or contributions to candidates." 611 F.3d at 678 (emphasis added).

Likewise, in *GOPAC*, Judge Oberdorfer concluded that the organization was not a political committee, in part by dismissing the relevance of a letter which, though mentioning the name of a federal candidate, "[did] not advocate his election or defeat, nor was . . . directed at [his] constituents." 917 F. Supp. at 863; *accord Malenick*, 310 F. Supp. 2d at 235 (considering communications "advocat[ing] for the election of specific federal candidates" in determining group's major purpose).

Plaintiffs prefer a broader application of the major-purpose test that would include as relevant federal campaign activity spending on non-express-advocacy communications. (Pls.' Mem. at 33-37.) While the controlling group considered a major-purpose analysis that included such spending, such as the $5.4 million Crossroads spent on non-express-advocacy communications relating to its identified policy concerns, it ultimately decided that including such spending would be "problematic." (AR 415.) The inclusion of this spending, their statement explained, would "undermine the function of the major purpose limitation" by potentially regulating issue advocacy organizations as political committees. (*Id.*) Public Citizen has expressed similar concerns. Public Citizen Comments at 10 (stating that an organization

should not "become subject to regulation as 'political committee' simply by engaging in political issue-related criticisms of public officials"). The statement also reflected the Commissioners' concerns that the broader approach plaintiffs urge would "count spending wholly outside of the Commission's regulatory jurisdiction for the explicit purpose of asserting that very regulatory jurisdiction." (AR 415.) On this point, the statement explained that in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), the Supreme Court explained that "merely mentioning a Federal candidate in a critical communication does not necessarily make that communication electoral in nature." (AR 417.) Although the line between campaign advocacy and issue advocacy can "'dissolve in practical application,'" there is a difference between them, and the Court has "recognized that the interests held to justify the regulation of campaign speech and its 'functional equivalent' 'might not apply' to the regulation of issue advocacy." *Wisconsin Right to Life, Inc.*, 551 U.S. at 456-57 (quoting *Buckley*, 424 U.S. at 42 and *McConnell*, 540 U.S. at 206 & n.88).

Plaintiffs fail to identify a single court decision requiring that the Commission include non-express-advocacy spending in performing its major-purpose analysis. Plaintiffs observe (Pls.' Mem. at 36) that the Fourth Circuit in *Leake* described the major-purpose test by reference to an organization's "support[] or opposi[tion]" to a candidate, but the context of this passage makes clear that the Fourth Circuit was not seeking to expand the scope of the major-purpose inquiry. 525 F.3d at 288. In fact, the court's point was just the opposite, explaining that *Buckley*'s phrasing of "the" major purpose (rather than "a" major purpose) indicated that "[t]he Supreme Court has thus *not relaxed* the requirement that an organization have 'the major purpose' of supporting or opposing a candidate to be considered a political committee." *Id.*

(emphasis added); *compare Buckley*, 424 U.S. at 79 (setting forth the major-purpose inquiry in reference to the "nomination or election" of a candidate).[12]

Plaintiffs also contend that the FEC has a "well-established" policy for considering "federal campaign activity" as part of the major purpose analysis. (Pls.' Mem. at 37 (referencing the Supplemental E&J).) Although the Commission used that construction in the Supplemental E&J, plaintiffs fail to establish that the agency has been clear on whether communications beyond those that are express advocacy or its functional equivalent are included under that standard. There was no "clearly establish[ed]" Commission determination on that issue, and the controlling group's expertise is accordingly entitled to deference in its interpretation. *NRSC*, 966 F.2d at 1476-77. Moreover, even if the agency had provided consistent guidance on the question, the controlling group's reliance on intervening appellate court decisions provides an eminently reasonable basis for its decision. (AR 416-17.)

The controlling group's analysis of Crossroads's relevant spending was reasonable and not contrary to law.

b. Time Period (Denominator)

The controlling group's determination of the appropriate time period in which to consider Crossroads's spending was also reasonable. No particular time period analysis is required by

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[12] Plaintiffs also embrace the analysis and recommendations of the Commission's Office of General Counsel. (Pls.' Mem. at 26-27.) But an agency generally has no obligation to accept its staff's views or recommendations, and the D.C. Circuit has specifically minimized the importance of staff views in the course of reviewing agency decisions. *See, e.g.*, *Chelsea Industries, Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002) (rejecting the "rather silly suggestion" that an agency's decision was unreasonable due to conflict with a memorandum containing "General Counsel's understanding of the case law before the present decision"). Thus, courts reviewing Commission action that was contrary to recommendations of its staff have done little more than note that background fact. *See, e.g.*, *In re Sealed Case*, 223 F.3d at 781 (noting General Counsel's position but analyzing Commission's decision); *Akins*, 736 F. Supp. 2d at 24 (granting summary judgment to Commission despite General Counsel's recommendation to find reason to believe that a violation occurred).

FECA or any judicial decision. It therefore fell within the Commission's considerable discretion to determine what appropriate time period to analyze in this case.

As a threshold matter, plaintiffs are incorrect in contending that "the controlling Commissioners took the view that the determination whether Crossroads [] had a major purpose of influencing elections *must* be based on a consideration of its activities in the course of its own fiscal year rather than during a calendar year." (Pls.' Mem. at 28 (emphasis added); *id.* at 12.) What the controlling Commissioners actually found was that "[l]imiting ourselves to short time periods or time periods other than those utilized by the group in question provides an incomplete and distorted picture of the group's major purpose." (AR 419-20.) They expressly noted that they did "not believe that fiscal year is the *required* time frame in all analyses any more than [they] believe calendar year is." (AR 423 n.101 (emphasis added).)

In light of this more nuanced position, the controlling group analyzed Crossroads's spending several different ways, including by reference to (a) its fiscal year, (b) all of its activities in calendar years 2010 and 2011 (constituting the complete record before the Commission), and (c) even limited to Crossroads's spending in calendar year 2010. AR 423-24; *see also infra* pp. 46-47. Their deliberately flexible approach is consistent with the Supplemental E&J. 72 Fed. Reg. at 5602 ("[A]ny list of factors developed by the Commission would not likely be exhaustive . . . , as evidenced by the multitude of fact patterns at issue in the Commission's enforcement matters considering the political committee status of various entities.").

Plaintiffs contend (Pls.' Mem. at 28) that the text of FECA requires that an organization's major purpose be determined based on its "actions during a calendar year," but that argument is misconceived. While it is true that FECA's political committee definition uses a "calendar year" for determining whether an organization has received contributions or made expenditures

exceeding $1,000, 52 U.S.C. § 30101(4)(A) (2 U.S.C. § 431(4)(A)), the major-purpose test is an "'additional hurdle to establishing political committee status'" that the Supreme Court established in *Buckley*. *Free Speech*, 720 F.3d at 797 (quoting Supplemental E&J, 72 Fed. Reg. at 5601). Contrary to plaintiffs' argument (Pls.' Mem. at 29-30), Congress has not expressed *any* intent, ambiguous or otherwise, regarding the relevant scope of time for determining an organization's major purpose.

Nor did *Buckley* limit consideration of an organization's major purpose to the statutory calendar-year test for contributions and expenditures. 424 U.S. at 79. Rather, it referred to an organization's major purpose without constraints, and no other judicial decisions have sought to focus or limit the relevant time period for determining an organization's major purpose. Plaintiffs' novel argument (Pls.' Mem. at 29-30) that the lack of any indication by the Supreme Court regarding the relevant time period to be considered in determining an organization's major purpose proves that a calendar year is the only relevant time period makes no sense. Moreover, the Commission itself, in addition to preserving its need for flexibility and applying the major-purpose test on a case-by-case basis, has in numerous previous enforcement matters looked beyond a single calendar year in evaluating organizations' major purpose. (AR 421-23 & n.101 (collecting examples).)

Plaintiffs nevertheless contend (Pls.' Mem. at 32) that allowing a fiscal year analysis could lead to "absurd results," arguing that two organizations with identical spending patterns might be treated differently based solely on how they have organized their affairs. But the inflexible use of a calendar year could lead to precisely the same arbitrary treatment, including causing an entity to be regulated as a political committee due to the Commission ignoring evidence of other, non-independent expenditure activities close to the time period under

examination. Crossroads engaged in just such spending in early 2011. As the controlling statement explained using hypothetical examples (AR 420), an inflexible calendar year analysis has just the same tendency towards arbitrary results as an inflexible fiscal year one, except that at least in the case of a fiscal year analysis, an organization's spending will not be truncated in the first year of its existence (which unless the organization formed on January 1st will be a period of less than 12 months). Indeed, had Crossroads formed six months earlier and engaged in all the same activities — *i.e.*, making expenditures in the first five months of 2010 analogous to those it made in the first five months of 2011 — there would be no difference between a calendar year analysis and a fiscal year one.[13] While that is not to say that the Commission should invariably treat the moment of an organization's formation during an election cycle as mere happenstance (in some cases, an organization's formation and cessation are indicative of its purpose (*see* AR 420-21 & n.89)), here there is nothing suspicious about the timing of Crossroads's formation, in part because it has continued to operate well past the 2010 election cycle upon which plaintiffs exclusively focus.

Because neither FECA, nor Commission regulations, nor any court decision requires the Commission to determine a group's major purpose by reference to *any* particular time period, it cannot have been arbitrary for the controlling group to have considered Crossroads's spending in relation to its fiscal year. Practically speaking, one advantage of using a fiscal year analysis is that it provides a view of the organization that more closely reflects how the organization sees itself. For example, Crossroads's tax returns provide a readily available summary of its financials as they were reported to the IRS. (AR 239-339.) Naturally, these tax returns are based on fiscal year figures. Both for recordkeeping and budgetary reasons, an organization's goals

[13] Indeed, Crossroads's fiscal year now ends on December 31st (AR 293), so there would be no difference between a calendar year or fiscal year analysis for its ongoing activities.

and priorities are more likely to be determinable from the way it organizes its financial affairs over a fiscal year or series of fiscal years — including by reference to things like budgeting, determining priorities, establishing goals — rather than some other arbitrary period. (AR 423.)

Plaintiffs also have no credible explanation why an entity can more readily disguise its spending to avoid political-committee status if the relevant time period is a fiscal year instead of a calendar year. While it is true that an organization can alter its fiscal year, repeated resort to such tactics would be transparent, making such maneuvers of limited use. And the notion that the FEC is *required* to issue a bright-line rule like the one plaintiffs suggest is contrary not only to judicial holdings concerning the major-purpose test, *RTAA*, 681 F.3d at 557; *Shays*, 511 F. Supp. 2d at 29-31; *Herrera*, 611 F.3d at 679 (rejecting automatic classification of organizations as political committees without reference to organizations' "major purpose"), but to plaintiffs' own previous statements as well, *see* Public Citizen Comments at 12 (arguing against using a "$50,000 disbursement threshold" as determinative of an organization's major purpose).

Thus, the controlling group's determination that the record in each case should be used to analyze an organization according to its fiscal year or entire history was reasonable and not contrary to law.

c. Alternative Analyses

The controlling group not only thoroughly explained its analysis and conclusions based on the approach to the major-purpose test it considered to be most correct, but it further considered a number of alternative, broader approaches and explained that even under these alternatives its conclusion would not have changed. (AR 423-24.) For example, their statement observed that even if they were to accept that the relevant time period was the 2010 calendar year, Crossroads's $15.4 million worth of independent expenditures would still only constitute

39 percent of its $39.1 million total spending during its first six months of existence. (AR 423.) The statement also explained that even if it further included Crossroads's $1.1 million worth of electioneering communications, the proportion would rise to "42 percent of total spending." (AR 424.) And it still further calculated that even if all of the express advocacy and non-express advocacy spending were considered, that total spending would still make up less than half (49 percent) of Crossroads's total expenses during its first fiscal year. (AR 424.) As the statement pointed out, however, even that analysis does not require a finding that the dismissal of plaintiffs' administrative complaint was contrary to law. Previous matters in which the Commission found reason to believe based on spending involved much higher proportions, such as 91 percent, 68 percent, or 50-75 percent, Supplemental E&J, 72 Fed. Reg. at 5605. (AR 424, 416 & n.75.)

The controlling group acknowledged that if the broadest numerator and narrowest denominator were considered, over their objections, Crossroads's expenditures would barely exceed half of its total spending (AR 424), or 53 percent. This is the analysis that plaintiffs prefer. (Pls.' Mem. at 27.) Moreover, while there is no requirement that a major purpose finding be premised upon clearance of a 50 percent threshold, Public Citizen itself has previously objected to the Commission's use of a major-purpose analysis categorically designating an entity as a political committee if it spends "more than 50% of an entity's budget . . . on activities that promote, support, oppose or attack federal candidates." Public Citizen Comments at 12. Although Public Citizen previously contended that such automatic classification would be "far too sweeping and could unjustly capture legitimate advocacy organizations," *id.*, plaintiffs now request that the Court override the Commission's exercise of discretion in order make just such a "sweeping" finding.

* * *

The Commission's dismissal of plaintiffs' administrative complaint was plainly reasonable and not arbitrary or capricious, or an abuse of discretion. As their statement of reasons demonstrates, the controlling group of Commissioners thoroughly considered the record before the Commission and carefully analyzed Crossroads's central organizational purpose and comparative spending. Their analysis was consistent not only with the Commission's Supplemental E&J but also with court decisions describing and applying *Buckley*'s major-purpose test. Yet the controlling group went further, explaining that even using more sweeping methods for determining major purpose, Crossroads would still not be a political committee.

Neither FECA nor any court decision requires a specific method for applying *Buckley*'s mandate that political-committee status be imposed only on groups that have the major purpose of nominating or electing a federal candidate. The controlling group's application of that requirement reflected their considerable specialized knowledge and expertise, and was clearly reasonable and certainly not contrary to law. This is especially so in light of the broad deference owed to the Commission's enforcement decisions and the inherent flexibility necessary for proper political-committee-status determinations. Plaintiffs' preference for an alternative method of analyzing Crossroads's major purpose is irrelevant and does not nearly meet plaintiffs' heavy burden of demonstrating that the controlling group's analysis was unreasonable. Indeed, even if this Court would have employed a different analysis or reached a different conclusion, that would not render the Commissioners' decision unreasonable or impermissible. *DSCC*, 454 U.S. at 39. Their rationale thus easily satisfies the Court's reasonableness review.

C. The Dismissal Was Not Contrary to Law For the Separate Reason that It Was a Reasonable Exercise of the Commission's Prosecutorial Discretion

Finally, the dismissal is independently justified by the Commission's broad prosecutorial discretion. AR 427 n.117; *see Akins*, 524 U.S. at 25 (acknowledging that agencies like the FEC "often have discretion about whether or not to take a particular action" and commenting that the FEC's "prosecutorial discretion" might have allowed it not to take the enforcement action requested in that case, even if it "agreed with [complainants'] view of the law").

As courts have explained, the Commission "clearly has a broad grant of discretionary power in determining whether to investigate a claim." *Common Cause v. FEC*, 655 F. Supp. 619, 623 (D.D.C. 1986), *rev'd on other grounds*, 842 F.2d 436 (D.C. Cir. 1988); *see also DCCC*, 831 F.2d at 1133-34 (discussing the Commission's prosecutorial discretion). In *Orloski*, the D.C. Circuit concluded that the Commission is entitled to decide not even to begin an investigation based on a "subjective evaluation of claims." 795 F.2d at 168. "It is not for the judiciary to ride roughshod over agency procedures or sit as a board of superintendance [sic] directing where limited agency resources will be devoted. [Courts] are not here to run the agencies." *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986); *see also La Botz v. FEC*, ___ F. Supp. 2d ___, 2014 WL 3686764, at *7-9 (D.D.C. July 25, 2014) (sustaining the Commission's decision not to prosecute based upon its "considerable" discretion); *Stark*, 683 F. Supp. at 840 ("[I]t is . . . surely committed to the Commission's discretion to determine where and when to commit its investigative resources").

In *Heckler v. Chaney*, 470 U.S. 821 (1985), the Supreme Court rearticulated the bases for an agency's discretion not to prosecute or enforce. *Id.* at 831 (collecting cases). The Court observed that "[t]his recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement," setting

forth the "many" reasons for "this general unsuitability" and noting that "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Id.* The relevant balancing includes consideration not only about "whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Id.*

Here, the controlling group noted the agency's prosecutorial discretion as a discrete basis for its decision not to prosecute. (AR 427 n.117.) It expressed concern that Crossroads could only be deemed a political committee if the Commission evaluated the group's spending by "expand[ing] the universe of [its] communications while contracting the period of time for evaluating [its] spending for that analysis," and that that way of approaching the major-purpose analysis had not been "properly noticed" to potentially regulated actors. (*Id.*) While the Commission's case-by-case method of determining political-committee status necessarily imposes some amount of uncertainty, it was clearly reasonable for the controlling group to decline to pursue enforcement based on the numerator- and denominator-analysis urged by plaintiffs here given the lack of earlier, clear court or Commission endorsement of that approach. The Commission's dismissal was thus a reasonable exercise of its broad prosecutorial discretion.

CONCLUSION

For the foregoing reasons, the Court should grant the Commission's cross-motion for summary judgment and deny plaintiffs' motion for summary judgment.

Respectfully submitted,

Lisa J. Stevenson (D.C. Bar No. 457628)
Deputy General Counsel — Law

lstevenson@fec.gov

Kevin Deeley
Acting Associate General Counsel
kdeeley@fec.gov

Erin Chlopak (D.C. Bar No. 496370)
Acting Assistant General Counsel
echlopak@fec.gov

Greg J. Mueller (D.C. Bar No. 462840)
/s/ Charles Kitcher
Charles Kitcher (D.C. Bar No. 986226)
Attorneys
gmueller@fec.gov
ckitcher@fec.gov

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
(202) 694-1650

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