UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant, AMERICAN ACTION NETWORK, Intervenor-Defendant.	Civil Action No. 1:16-cv-02255-CRC

AMERICAN ACTION NETWORK'S MOTION FOR SUMMARY JUDGMENT

Intervenor-Defendant American Action Network moves for an Order granting its Motion for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure and Local Rule 7(h) and dismissing the Plaintiffs' Amended Complaint with prejudice.

In support of this Motion, American Action Network files a Memorandum of Points and Authorities and a Proposed Order.

Respectfully submitted,

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AMERICAN ACTION NETWORK'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

This is the second time that this Federal Election Commission ("FEC") enforcement proceeding has been before the Court. Last year, the Court reviewed the FEC's first decision to dismiss the administrative complaint filed by plaintiffs, Citizens for Responsibility and Ethics in Washington and Melanie Sloan (collectively, "CREW"), which alleged that the American Action Network ("AAN") was a "political committee" from mid-2009 to mid-2011, and thus violated the Federal Election Campaign Act ("FECA") by failing to register as one. *Citizens for Responsibility and Ethics in Washington v. FEC*, 209 F. Supp. 3d 77 (D.D.C. 2016) ("*CREW I*").

AAN cannot be a political committee unless it is under the control of a candidate or has as its "major purpose" the "nomination or election of a candidate." *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). It is undisputed that AAN is not candidate-controlled. The FEC found in its first review of the administrative complaint that AAN does not have as its major purpose the nomination or election of candidates. AR 1710. Rather, "it is an issue advocacy group that occasionally speaks out on federal elections." *Id.* Indeed, AAN devotes the vast majority of its spending to its mission to "create, encourage and promote center-right policies based on the principles of freedom, limited government, American exceptionalism, and strong national security." AR 1562. It is also registered as a tax-exempt section 501(c)(4) social welfare organization—a status that is incompatible with a major purpose to nominate or elect candidates. *See* 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii). Because "AAN's major purpose is not the nomination or election of a federal candidate," the FEC dismissed the complaint. AR 1710.

The Court reviewed this first dismissal decision and remanded with instructions for the FEC to do a more granular review of twenty electioneering communications that AAN sponsored seven years ago before the 2010 midterm elections. *CREW I*, 209 F. Supp. 3d at 93, 95. Electioneering communications, by definition, do not include express advocacy for or against the

nomination or election of candidates. But they do identify a candidate in the days preceding an election, and some are the functional equivalent of express advocacy. The Court was concerned that the FEC may have applied a "bright-line" rule that electioneering communications could never indicate a major purpose to nominate or elect candidates, and so directed the FEC to review AAN's advertisements again before deciding what AAN's major purpose was back in the 2009 to 2011 time period. *Id.* at 93. But the Court was clear: it was *not* requiring the FEC to count *every* electioneering communication as indicative of a major purpose to nominate or elect candidates. *Id.* That would be inconsistent with the varied nature of electioneering communications and "the FEC's judicially approved case-by-case approach to adjudicating political committee status." *Id.* (citation omitted).

The FEC reconsidered the entire record on remand, and detailed its careful and fact-specific review of AAN's electioneering communications. AR 1763-81. The FEC changed its characterization of some of AAN's electioneering communications based on the Court's ruling and counted them as indicative of a major purpose to nominate or elect candidates. AR 1779. But, even after recharacterizing some ads—and taking an especially conservative approach with another by counting the more than $1 million spent on it even though the advertisement is "better categorized as a grassroots lobbying communication"—AAN was still not a political committee. *Id.* At most, AAN devoted about 26 percent of its spending during the 2009 to 2011 time period to activities that were indicative of a major purpose to nominate or elect candidates. AR 1779-80. This is not sufficient to show that AAN had a major purpose to nominate or elect candidates, *see CREW I*, 290 F. Supp. 3d at 95, so the FEC again dismissed the administrative complaint, AR 1780.

CREW has now returned to this Court to challenge the FEC's dismissal on remand. But the vast majority of CREW's arguments boil down to its disagreement with the Court's decision that there should *not* be a bright-line rule that all electioneering communications categorically indicate a major purpose to nominate or elect candidates. *See CREW I*, 209 F. Supp. 3d at 93. CREW has, for example, challenged the Commission's "continued refusal to consider electioneering communications as indicative of a group's purpose to nominate or elect federal candidates." Am. Compl. ¶ 79. And it has labeled the FEC's factual analysis "arbitrary and capricious" because the Commission did not simply ask "whether the ads meet the definition of an electioneering communication." *See* Reply Br. at 16, *CREW I*, No. 14-1419-CRC (D.D.C. Jan. 20, 2017) (Dkt. No. 68) ("*CREW I* Reply").

The Court should again reject CREW's request for a bright-line rule and affirm the Commission's careful, detailed, and comprehensive review of this case. The fact-intensive and case-specific conclusions that the Commission reached are due deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), but they should be affirmed under any standard. AAN is an issue-advocacy group that does not have as its major purpose the nomination or election of candidates. It is time for this stale case—challenging lawful conduct that occurred seven to eight years ago—to finally end. Summary judgment should be granted to AAN.

II. STATEMENT OF FACTS

A. American Action Network

AAN was founded in 2009 with the mission to "create, encourage and promote center-right policies based on the principles of freedom, limited government, American exceptionalism, and strong national security." *CREW I*, 209 F. Supp. 3d at 83 (quoting AR 1490). AAN's organizational documents and website describe it as an issue-centric "action tank" that has as its

"primary goal" putting "center-right ideas into action by engaging the hearts and minds of the American people and spurring them into active participation in our democracy." *See* About AAN, https://americanactionnetwork.org/about-aan/. It is not under the control of any candidate, party, or officeholder. *Id.* Instead, it "welcomes supporters of its center-right values and policy proposals regardless of party affiliation, and looks forward to working with legislators, government officials, and advocates of either party who are willing to advance policies consistent with the Network's principles." *Id.*

AAN has been recognized by the Internal Revenue Service as a Section 501(c)(4) social welfare organization—meaning that it is "primarily engaged" in activities that do "not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office." *See* 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i)-(ii).[1] It has worked to advance its policy goals by hosting educational activities, grassroots policy events, and interactive policy briefings. *CREW I*, 209 F. Supp. 3d at 83 (citing AR 1563).

AAN has also sponsored television advertisements. *Id.* Some of AAN's advertisements during the 2009 to 2011 time period at issue here were independent expenditures that expressly advocated the election or defeat of a candidate. *Id.* at 83-84 (citing AR 1638, 1709). But the vast majority were not. The amount spent on independent expenditures amounted to just about 15 percent of AAN's overall spending (about $4.1 million of about $27.1 million in spending). *Id.* AAN's independent expenditures, as a result, do not make AAN's major purpose the

[1] AAN, the not-for-profit social welfare organization devoted to issue advocacy, is separate and distinct from its affiliate, the "Congressional Leadership Fund," which *does* have the "major purpose" of nominating and electing candidates and *is* registered with the FEC as a political committee.

nomination or election of candidates. *Id.* at 95 ("A reasonable application of a 50%-plus rule would not appear to be arbitrary and capricious.").

CREW's allegations, as a result, have focused on twenty other advertisements that AAN funded prior to the 2010 midterm elections, and which CREW seeks to count as indicative of a major purpose to nominate or elect candidates. AAN spent about $13.7 million (or about half of its spending) on these "electioneering communications." *Id.* at 83.

But not all electioneering communications indicate a major purpose to nominate or elect candidates. By definition, electioneering communications do not include express advocacy for or against a candidate. 52 U.S.C. § 30104(f)(3)(B)(ii). Instead, an advertisement qualifies as an electioneering communication so long as it includes a reference to a federal candidate shortly before an election and is disseminated to the candidate's electorate. *Id.* § 30104(f)(3)(A)(i). Some advertisements that meet this standard are the functional equivalent of express advocacy. *See McConnell v. FEC*, 540 U.S. 93, 206 (2003). But others contain issue advocacy, run at a time when they can make use of the heightened public interest in politics—and heightened pressure on candidates—to educate the public and urge candidates to make commitments about issues of interest to the organization. *See CREW I*, 209 F. Supp. 3d at 93; *see also FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 470 (2007) ("*WRTL II*"). An organization's sponsorship of an electioneering communication, therefore, does not automatically indicate that it spent money on an advertisement that is indicative of a major purpose to nominate or elect candidates. *CREW I*, 209 F. Supp. 3d at 93. Instead, this Court held, each electioneering communication must be carefully reviewed through "the FEC's judicially approved case-by-case approach to adjudicating political committee status." *Id.* (citation omitted).

AAN's electioneering communications focused on four issues central to AAN's purpose: tax reform, federal spending, health care, and energy. AR 1770-78; *see also* Issues, https://www.americanactionnetwork.org/issues/. They were run prior to the 2010 midterm elections at a time when it was "widely anticipated that Congress would meet in a post-election 'lame duck' session in November 2010 to consider several pieces of major legislation," including "the expiring Bush-era tax cuts, federal spending, health care, and energy (including potential cap-and-trade bills)." AR 1768-69 (citations omitted). With "the possibility that party control of Congress could change as a result of the 2010 midterm elections, it was generally believed that there would be attempts to pass controversial legislation before the swearing-in of a new Congress in January 2011." AR 1769 (citations omitted). It was, therefore, an ideal time for advertisements that focused the public on the issues that AAN cares about—and to call the public to put pressure on incumbents (at a time they were feeling particularly vulnerable) to promise action consistent with AAN's center-right ideals.

B. CREW's Administrative Complaint

In June 2012, CREW filed an administrative complaint with the FEC, alleging that AAN was a "political committee" during its first two years (mid-2009 through mid-2011) and violated FECA because it did not register with the FEC as one. AR 1480-88. "Political committee" status requires that an entity be under the control of a candidate or have as its "major purpose" "the nomination or election of a candidate." *See CREW I*, 209 F. Supp. 3d at 80 (quoting *Buckley*, 424 U.S. at 79). CREW asked the FEC to find that AAN was a political committee by treating electioneering communications as *per se* indicative of a major purpose to nominate or elect candidates. AR 1486. As a result, CREW added all of AAN's spending on independent expenditures to all of its spending on electioneering communications, and argued that the total

amount—about 66.8 percent of AAN's total spending during the period—showed that AAN's major purpose was the nomination or election of candidates. AR 1485-86.

By a vote of 3-3, the Commission found that there is no "reason to believe" that AAN violated FECA by failing to register as a political committee. AR 1686. The three Commissioners who voted to dismiss (the so-called "controlling" Commissioners) supplied the Commission's Statement of Reasons. *CREW I*, 209 F. Supp. 3d at 83-84. They concluded that AAN's "public statements, organizational documents, and overall spending history objectively indicate that the organization's major purpose has been issue advocacy and grassroots lobbying and organizing"—and not the nomination or election of candidates. AR 1690. In reaching this conclusion, the FEC found that AAN's electioneering communications were issue advocacy, such that the money spent on them "indicate[s] that [AAN']s purpose was something other than the nomination or election of a federal candidate." AR 1709. As a result, the FEC concluded that "the roughly $4.1 million that AAN spent on independent expenditures between 2009 and 2011 was the totality of its spending that was for the purpose of nominating or influencing the election of a federal candidate." *Id.* Because this "represented approximately 15% of its total spending during the same period," the Commission held that "AAN's major purpose is not the nomination or election of a federal candidate." AR 1709-10.

C. CREW's First District Court Challenge

In August 2014, CREW filed suit in this Court pursuant to FECA's judicial review provision, 52 U.S.C. § 30109(a)(8). CREW's complaint challenged two FEC dismissal decisions as arbitrary, capricious, and contrary to law—the dismissal of CREW's complaint against AAN and the dismissal of CREW's complaint in a separate proceeding against an unrelated entity, Americans for Job Security ("AJS"). *See CREW I*, 209 F. Supp. 3d at 80. In both cases, the FEC had voted 3-3 that there is no reason to believe that either organization violated FECA by failing

to register as a political committee. *Id.* Under the statutory scheme, the votes of four Commissioners are needed to proceed in order "to assure that enforcement actions . . . will be the product of a mature and considered judgment," *Combat Veterans for Cong. Political Action Comm. v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015), and so the cases were dismissed.

On cross-motions for summary judgment, this Court found that the Commission's dismissals were "contrary to law" for two reasons.[2] *First,* the Court concluded that the Commission had applied a "bright-line rule" that excluded all electioneering communications from consideration in the "major purpose" analysis. *CREW I*, 209 F. Supp. 3d at 93. The Court found that this bright-line rule—and specifically, "the erroneous understanding that the First Amendment effectively required the agency to exclude from its consideration all non-express advocacy in the context of disclosure"—was a "legal error" that required a remand. *Id. Second*, "at least as applied to AJS," the Court concluded that the Commission erred by "[l]ooking *only* at relative spending over an organization's lifetime," without considering whether the organization's purpose changed over the years. *Id.* at 94 (emphasis in original).

The Court remanded each case to the Commission and ordered it to conform with the Court's declaration within thirty days. *Id.* at 95. "[T]he Court did *not* compel the Commission to arrive at a different result—i.e., to reverse course and commence an investigation into whether AAN or AJS had unlawfully failed to register as political committees." Mem. Op. and Order at 2, *CREW I*, No. 14-1419-CRC (D.D.C. Apr. 6, 2017) (Dkt. No. 74) ("*CREW I* Mem. Op.") (emphasis in original). The Court also "never ordered the FEC to reach a particular result, or to

[2] The Court of Appeals has found that the Court's prior decision is not yet final for purposes of appeal. *See* Order, Case Nos. 16-5300, 16-5343 (D.C. Cir. Apr. 4, 2017) (Dkt. 1669311). AAN has accepted the Court's holdings for purposes of this motion, but respectfully reserves the right to challenge the Court's prior decision in any appeal. *See* Section III below.

consider a particular ad—or any proportion of electioneering communications—election-related" on remand. *Id.* at 6. Instead, it "directed the FEC to reconsider its decision without 'exclud[ing] from its [major purpose] consideration all non-express advocacy.'" *Id.* (quoting *CREW I*, 209 F. Supp. 3d at 93).

D. The FEC's Dismissal On Remand

"The FEC did just that" on remand in the AAN proceeding—*i.e.*, it reconsidered its decision without excluding all non-express advocacy from its major purpose analysis. *Id.* Within thirty days of the Court's decision, the FEC reopened the administrative matter, "developed a new framework for evaluating which expenditures suggested an election-related purpose, and applied that new framework to AAN's ads." *Id.* at 5. The "new framework the FEC developed was free of the legal errors identified in the Court's previous Opinion and Order." *Id.* The Commission "no longer excluded as irrelevant to the major-purpose inquiry, on a categorical basis, all spending on electioneering communications." *Id.* "Instead, it left open the possibility that at least some of the spending on those ads might indicate a campaign-related major purpose" and "identified four such ads that *did* indicate such a purpose." *Id.* at 5-6 (emphasis in original). The Commission also ensured that its "determination did not turn on the application of the 'lifetime-only' rule" by considering "AAN's spending solely in a single year" as well as over the two years at issue in this case. *Id.* at 5 n.4.

Based on its second review of the record, the Commission again voted 3-3 that there is no "reason to believe" that AAN violated FECA by failing to register as a political committee. AR 1762. The controlling Commissioners supplied the Commission's Statement of Reasons, which details the Commission's "holistic," nuanced, and comprehensive review based on its "judicially approved case-by-case, fact-intensive approach" to adjudicating political committee status." *See* AR 1767, 1780.

The FEC thoroughly examined "AAN's electioneering communications to determine which ones are indicative of a major purpose to nominate or elect a candidate." AR 1764. The Commission emphasized that it weighed and balanced various features of each advertisement, and "relied heavily on [its] expertise and experience regulating political activities and non-political committees." AR 1764, 1767-68, 1780.

Governed by this Court's decision, the FEC changed its characterization of four of AAN's electioneering communications, which amounted to about $1.88 million in spending. AR 1779; *see also* AR 1773-74 ("Bucket"), 1777-78 ("New Hampshire"), 1778-79 ("Order" and "Extreme"). The Commission concluded that a fifth advertisement ("Read This") was "a close call," and so counted the approximately $1.07 million spent on it as indicative of a purpose to nominate or elect candidates to see whether it changed the end result. AR 1776, 1779. It did not. Even counting the "Read This" advertisement, AAN's "total outlay on ads indicating a purpose to nominate or elect federal candidates would still constitute only 26%—well under half—of its overall spending." AR 1779. This spending percentage, combined with AAN's issue-focused mode of organization and official statements, led the Commission to "conclude that AAN was not a political committee under the Act and Commission regulations because it did not have as its major purpose the nomination or election of candidates." AR 1764, 1779.

CREW challenged the Commission's decision to dismiss on remand with this litigation and with a motion for an order to show cause in the first lawsuit. *See* Mot. for an Order to Show Cause, *CREW I*, No. 14-1419 (CRC) (D.D.C. Nov. 14, 2016) (Dkt. No. 57) ("*CREW I* Motion"). The Court denied CREW's motion for an order to show cause, finding that the Commission had complied with the Court's prior order, and that CREW's new arguments about the remand decision should be decided in this lawsuit. *See CREW I* Mem. Op. at 4-6.

III. ARGUMENT

The Court should enter summary judgment in AAN's favor because CREW's challenge merely repackages an argument that this Court already rejected—that the FEC needed to apply a "bright-line rule" that *every* electioneering communication indicates a major purpose to nominate or elect candidates. *See CREW I*, 209 F. Supp. 3d at 93. Just as before, CREW challenges the FEC's legal analysis because "the First Amendment does not bar treating even a single electioneering communication as election-related," *CREW I* Motion at 11, and challenges the FEC's factual analysis because it does not simply ask "whether the ads meet the definition of an electioneering communication," *CREW I* Reply at 16.

The Court was right to deny CREW's request for a bright-line rule last time, and it should deny that request again here. On remand from this Court's decision, the Commission performed a careful and fact-intensive analysis of the totality of AAN's activities, including its electioneering communications. The FEC's review was consistent with precedent and "free of the legal errors identified in this Court's previous Opinion and Order." *CREW I* Mem. Op. at 5. For reasons detailed below, the Court should (A) provide the FEC's remand decision *Chevron* deference and (B) find that it easily survives judicial review under any standard of review. Alternatively, the Court should (C) sustain the FEC's dismissal based on the reasoning from the first Statement of Reasons, which was not itself "contrary to law."

A. The Commission's Dismissal Decision Is Due *Chevron* Deference.

CREW bears a particularly heavy burden in this case, which is governed by an "extremely deferential" "contrary to law" standard. *Orloski v. FEC*, 795 F.2d 156, 167 (D.C. Cir. 1986). Under this standard, the Court may only remand to the agency if "'the FEC dismissed the complaint as a result of an impermissible interpretation of [FECA],' or . . . 'the FEC's dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary

or capricious, or an abuse of discretion.'" *CREW I*, 209 F. Supp. 3d at 85 (quoting *Orloski*, 795 F.2d at 161). This means that "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." *FEC v. Democratic Senatorial Campaign Comm.* ("*DSCC*"), 454 U.S. 27, 39 (1981). Rather, this standard "requires affirmance if a rational basis for the agency's decision is shown." *Orloski*, 795 F.2d at 167 (citation omitted).

The Court's review is especially deferential because the Commission's decision is grounded in "implementation choices" about the "spending amounts relevant in applying the 'major purpose' test," so should be given *Chevron* deference. *See CREW I*, 209 F. Supp. 3d at 88. Unlike the FEC's previous dismissal decision, which the Court found turned on an interpretation of precedent, the FEC's decision on remand reflects the Commission's fact-bound examination of the record, including AAN's electioneering communications, to determine whether AAN's spending "support[s] a conclusion that AAN's 'major purpose' is Federal campaign activity (*i.e.*, the nomination or election of a Federal candidate)." AR 1767 (citation omitted); *see also* AR 1768-79. In other words, the Commission's decision on remand is "less about *what Buckley* (and subsequent precedent) means and more about *how Buckley* (and the test it created) should be implemented." *CREW I*, 209 F. Supp. 3d at 87 (emphases in original). The FEC's decision, therefore, "warrant[s] the Court's deference." *Id.* at 88.

Indeed, the Commission's "implementation choices, which call on the FEC's special regulatory expertise, were the types of judgments that Congress committed to the sound discretion of the agency." *Id.* at 87; *see also* AR 1780 ("We relied heavily on our expertise and experience regulating political activities and non-political committees."). The Court need not

second guess them. The FEC is "'precisely the type of agency to which deference should presumptively be afforded,' since it is vested with 'primary and substantial responsibility for administering and enforcing [FECA],' including the 'sole discretionary power' to initiate enforcement actions." *CREW I*, 209 F. Supp. 3d at 87 (quoting *DSCC*, 454 U.S. at 37; *Buckley*, 424 U.S. at 109, 112 n. 153).

The fact that this case was resolved by a vote of three Commissioners does not change the deference that is due because the "same standard of review applies to all FEC decisions, whether they be unanimous or determined by tie vote." *Id.* at 85 (citing *In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000); *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("*NRSC*")). "This follows because the Commissioners voting for dismissal 'constitute a controlling group for purposes of the decision,' and so 'their rationale necessarily states the agency's reasons for acting as it did.'" *Id.* (quoting *NRSC*, 966 F.2d at 1476). This Court, as a result, "owe[s] deference" to the Commission's decision that AAN—an issue advocacy group—is not a political committee because it devoted, at most, 26 percent of its relevant spending to activities that are indicative of a major purpose to nominate or elect candidates. *See In re Sealed Case*, 223 F.3d at 779.

B. The Commission's Decision Easily Survives Judicial Review.

Regardless of the standard of review that applies, but especially under the deferential standard required by law, the Commission's dismissal easily survives judicial review. The record shows that AAN is, at its core, an issue advocacy group that does not have as its major purpose the nomination or election of candidates. The Commission was, therefore, right to dismiss CREW's complaint because there is no reason to believe that AAN is an unregistered political committee. The Commission's decision was neither (1) contrary to law nor (2) arbitrary and capricious, so summary judgment must be entered in AAN's favor.

1. The Commission's Case-Specific Decision Is Not Contrary To Law.

(a) The Commission's Flexible And Nuanced Approach Was Consistent With Precedent.

The Court remanded this case so the FEC could apply its "judicially approved case-by-case approach to adjudicating political committee status." *CREW I*, 209 F. Supp. 3d at 93 (citing Political Committee Status, 72 Fed. Reg. 5,595, 5,597 (Feb. 7, 2007) (Supplemental Explanation and Justification ("Supplemental E & J")). That is precisely what the Commission did. It conducted a "case-by-case, fact-intensive" review based on the "totality of the circumstances" in which it "relied heavily on [its own] expertise and experience." AR 1764, 1767, 1780. Its approach was "free of the legal errors identified in this Court's previous Opinion and Order." *CREW I* Mem. Op. at 5.

Although the Commission's case-by-case approach does not lend itself to rigid rules, it must be guided by one fundamental principle—that a political committee *must* be either "under the control of a candidate" or have as its "major purpose . . . the nomination or election of a candidate." *Buckley*, 424 U.S. at 79; *see also CREW I*, 209 F. Supp. 3d at 82. A political committee *cannot* be an organization that "occasionally engages in activities on behalf of political candidates" if its "central organizational purpose is issue advocacy." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252 n.6 (1986).

There is no mandated "methodology for determining an organization's major purpose," *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 556 (4th Cir. 2012), but the Supreme Court has emphasized that a "major purpose" of nominating or electing candidates must be so dominant that the group's activities "are, by definition, campaign related" rather than issue focused, *Buckley*, 424 U.S. at 79. The Commission, as a result, conducts its "major purpose" analysis so that it "avoid[s] the regulation of activity 'encompassing both issue discussion and

advocacy of a political result.'" Supplemental E & J, 72 Fed. Reg. at 5,597 (quoting *Buckley*, 424 U.S. at 79).

Not every electioneering communication evidences a major purpose of nominating or electing candidates. "Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions," *Buckley*, 424 U.S. at 42, and so advertisements may meet the statutory standard for an electioneering communication, but involve "speech about public issues more generally, or 'issue advocacy,' that mentions a candidate for federal office," *WRTL II*, 551 U.S. at 456 (citing *McConnell*, 540 U.S. 93). This Court, as a result, rightly rejected CREW's request for a "bright-line rule" that *every* electioneering communication is indicative of a major purpose to nominate or elect candidates. *CREW I*, 209 F. Supp. 3d at 93. Some electioneering communications indicate a different purpose entirely.

On remand, the Commission conducted a careful and nuanced review, drawing on its own experience and expertise, in order to determine what spending should be considered indicative of a major purpose to nominate or elect candidates. It did not apply a bright-line rule about electioneering communications, its approach was "free of the legal errors identified in this Court's previous Opinion and Order," *CREW I* Mem. Op. at 5, and its decision respected the First Amendment implications of regulating speech that does not fall within the "core area" of candidate advocacy, *Buckley*, 424 U.S. at 79. Indeed, CREW concedes that there is no decision that requires that the Commission classify AAN as a political committee. *See* Reply at 21, *CREW I*, No. 14-1419-CRC (D.D.C. Apr. 22, 2016) (Dkt. No. 40). And this Court has held that the Commission was not compelled on remand "to consider any particular ad—or any proportion of electioneering communications—election related." *CREW I* Mem. Op. at 6. That should be

the end of the matter. The Commission's decision contains no "impermissible interpretation of [FECA]" and so is not "contrary to law." *See CREW I*, 209 F. Supp. 3d at 85 (quoting *Orloski*, 795 F.2d at 161).

(b) CREW's Challenges To The Commission's Legal Analysis Are Meritless.

CREW nonetheless argues that the Commission's decision is "contrary to law" for four reasons, each of which is either based on a misinterpretation of what the Commission did or recycles an argument that was already rejected. They do not call into question the lawfulness of the Commission's decision that AAN's major purpose from 2009 to 2011 was not the nomination or election of candidates.

First, CREW claims that the Commission adopted a hard-and-fast rule that any "ad which 'relates to the speaker's issue agenda' and includes a 'call to action' asking viewers to lobby their representative is not election-related." Am. Compl. ¶ 78. This rule, CREW argues, is contrary to *McConnell*, 540 U.S. at 193 n.23, which found that advertisements could reference issues and include a call to action and nevertheless be "political." Am. Compl. ¶ 78.

CREW's challenge fails because the Commission did not adopt the rule that CREW describes. Instead, the Commission's statements and analysis demonstrated that it was applying a flexible approach that did not rely on bright-line rules and did not make any particular feature of an advertisement, or combination of features, case-determinative. *See, e.g.*, AR 1763, 1767-68, 1780. The Commission weighed and balanced the "totality of the circumstances" in light of its expertise, including any "references to candidacies, elections, voting, [or] political parties," the "extent to which the ad focuses on issues important to the group," whether the advertisement's context shed light on its meaning, and whether the communication included a

"call to action and, if so, whether the call relates to the speaker's issue agenda." AR 1764, 1767-1768.

There was nothing unbending about the Commission's review of these features. For example, some advertisements that did not contain express references to candidacies or the election were nonetheless found indicative of a major purpose to nominate or elect candidates. The "New Hampshire" advertisement was one—it did not mention candidacies or the election, but it did name the two candidates running for a Senate seat and contrasted their positions. AR 1777-78 ("New Hampshire"). This, along with other features of the ad, led the Commission to count the advertisement as indicative of a major purpose to nominate or elect candidates. AR 1778.

The FEC applied the same flexible approach when considering whether an advertisement had a "call to action" on an issue relevant to AAN. Rather than apply some automatic rule as CREW contends, the FEC considered these features as relevant, but not determinative, data points in its analysis. For example, the "Read This" advertisement includes a call to action about one of AAN's core issues: it urges the public to "tell [Charlie Wilson/Jim Himes/Chris Murphy] to read this: In November, fix the healthcare mess Congress made." AR 1775. But the Commission did not mechanically find that the advertisement did not indicate a major purpose to nominate or elect candidates. Instead, it considered the advertisement to be a "close call"—and such a "close call" that it counted the nearly $1.07 million spent on it as indicative of a major purpose to nominate or elect candidates to strengthen its conclusion that—even including this ad—AAN's major purpose is not candidate advocacy. *See* AR 1776, 1779. Had the Commission adopted the bright-line rule that CREW imagines, this exercise would have been entirely unnecessary. The Commission's approach was the flexible approach called for by

precedent. CREW cannot make it "contrary to law" by creating a "rule" that the Commission did not adopt or apply.

Second, CREW argues that the Commission acted "contrary to law" because it "erroneously interpreted" the Court's prior order "to prohibit the conclusion that all of AAN's electioneering communications were political." Am. Compl. ¶ 79. The Court rejected this argument already, finding that CREW's "contention is off the mark." *CREW I* Mem. Op. at 5; *see also, e.g.*, *CREW I* Motion at 21 (making same argument). And the Court was right. In its ad-by-ad review, the Commission never excluded the possibility that, on the facts of this or any other case, every electioneering communication may be indicative of a major purpose to nominate or elect candidates. *See, e.g.*, AR 1768-79. But this was not that case. That does not mean that the Commission was unwilling to change its prior characterization of all the advertisements had that been warranted. In fact, it *did* change its characterization of four advertisements, amounting to nearly $1.9 million in spending. *See* AR 1779. CREW's argument, therefore, remains "off the mark" and should again be rejected. *See CREW I* Mem. Op. at 5.

Third, CREW claims that the Commission acted "contrary to law" because this Court required it to eliminate all consideration of the *WRTL II* decision from its analysis on remand. Am. Compl. ¶ 80. The Court already rejected this argument too. *CREW I* Mem. Op. at 5; *see also, e.g.*, *CREW I* Reply at 6-7 (making same argument). And again, the Court was right. This Court did not declare *WRTL II* irrelevant to the determination of whether an advertisement is, or is not, indicative of issue advocacy. Nor did it attempt to overrule *Buckley*'s requirement that a political committee must have as its major purpose the nomination or election of candidates—and not some other purpose, such as issue advocacy, 424 U.S. at 79. Instead, the Court held that

the Commission should not read *WRTL II* to require it to find that all electioneering communications are *not* indicative of a major purpose to nominate or elect candidates. *See CREW I*, 209 F. Supp. 3d at 89, 93. The Commission fully complied with this directive and "no longer excluded as irrelevant to the major-purpose inquiry, on a categorical basis, all spending on electioneering communications." *CREW I* Mem. Op. at 5. It did not need to go further—as CREW contends—and ignore relevant text in *WRTL II* describing features that are often associated with issue advertisements.

Finally, CREW falls back on its argument that there should be a bright-line rule that all electioneering communications are indicative of a major purpose to nominate or elect candidates. *See* Am. Compl. ¶ 79 (asserting that the "continued refusal to consider electioneering communications as indicative of a group's purpose to nominate or elect federal candidates is based on an impermissible interpretation of *Buckley*"). The Court already rejected this "bright-line rule," *CREW I*, 209 F. Supp. 3d at 93, and it should do so again. CREW never argues that the Commission violated the First Amendment—as it would have to show to meet its burden under the "contrary to law" standard of review. Instead, CREW argues solely that "the First Amendment *does not bar* treating even a single electioneering communications as election-related." *See CREW I* Motion at 11 (emphasis added). In other words, CREW thinks that the Commission could have gone further and been okay.

But that is not a basis for providing relief on review from an enforcement proceeding. CREW admits that there is no case that required the Commission to adopt its preferred approach. *See, e.g.*, Reply at 21, *CREW I*, No. 14-1419-CRC (D.C.C. Apr. 22, 2016) (Dkt. No. 40) (conceding the "absence of a decision directly commanding the FEC to treat AAN . . . as [a] political committee[]"). But there *are* cases that support the Commission's decision to

"safeguard the First Amendment when implementing its congressional directives." *Van Hollen, Jr. v. FEC*, 811 F.3d 486, 501 (D.C. Cir. 2016). Indeed, there are even State statutory schemes that have adopted the approach the Commission initially took—and have excluded all electioneering communications from the determination of political committee status. *See, e.g.*, Ohio Rev. Code § 3517.01(A)(4) and (A)(8)(a). Nothing required the FEC to instead adopt a standard that tests the limits of the First Amendment. By definition, it was *not* contrary to law for the Commission to try to protect First Amendment rights in this enforcement proceeding. The Court should reject CREW's challenge to the Commission's legal analysis, which was entirely consistent with precedent, including this Court's prior decision.

2. The Commission's Fact-Based Decision Is Not Arbitrary Or Capricious.

(a) The Commission Supported Its Decision With An Extensive, Comprehensive, And Reasonable Analysis.

This is a case in which the Commission immediately and conscientiously reconsidered the entire record with a willingness to change its mind based on the Court's order to conform to its decision within thirty days. *See, e.g.*, *CREW I* Mem. Op. at 2-3. The Commission "review[ed] the record anew," "scrutinize[ed] the ads in light of the court's decision," "reconsidered the matter in full," held another vote, and issued a nineteen-page Statement of Reasons—all within thirty days of the Court's order. *See* AR 1767. The Commission made sure that it eschewed bright-line rules and adhered to its judicially approved, "case-by-case, fact-intensive standard for determining political committee status." *See* AR 1765. And it set forth a lengthy explanation for its conclusion that AAN is not a political committee because its "major purpose" is not the nomination or election of candidates.

The Commission provided far more than a "rational basis" for its decision, and so its decision must be affirmed. *See Orloski*, 795 F.2d at 167 (citation omitted). For example, it

explained that it considered AAN's "mode of organization" as a Section 501(c)(4) organization, AR 1764, a status that is incompatible with a major purpose to nominate or elect candidates, *see* 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii). It also looked again at AAN's "official statements," which evidence its focus on issue advocacy and grassroots lobbying. AR 1764. AAN's mission, for example, is to "create, encourage, and promote center-right policies based on the principles of freedom, limited government, American exceptionalism, and strong national policy." *Id.* (citation omitted). And the Commission devoted more than ten single-spaced pages to its careful analysis of AAN's electioneering communications. AR 1768-79. The FEC's analysis "relied heavily" on its expertise and identified similarities and differences among the various advertisements to support its fact-specific conclusions about each advertisement. *See, e.g.*, AR 1780. The Commission's decision—particularly because "[r]eview under the arbitrary and capricious standard is deferential"—must be affirmed. *See CREW I*, 209 F. Supp. 3d at 95 (quoting *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007)).

(b) CREW's Challenges To The Commission's Factual Analysis Are Meritless.

CREW criticizes the Commission's careful approach, arguing that it was "arbitrary and capricious" for seven reasons that, in large part, boil down to CREW's continued (and already rejected) assertion that all electioneering communications should be considered indicative of a major purpose to nominate or elect candidates. They should be rejected again and summary judgment entered in favor of AAN.

First, CREW argues that the Commission should have found that advertisements indicate a major purpose to nominate or elect candidates if they qualify as electioneering communications under the statutory standard. According to CREW, the fact that "AAN's ads . . . clearly identified federal candidates, were aired to large audiences shortly before their election, and were

targeted to those candidates' electorates. . . . demonstrate the electoral purpose of all the ads." *CREW I* Reply at 14-15. But that just made them electioneering communications. By statute, "electioneering communications" are defined as any "'broadcast, cable, or satellite' communications" that refer to "'a clearly identified [federal] candidate,'" that are aired "'less than 60 days before a general [election or] 30 days before a primary,'" and "are 'targeted to the relevant electorate.'" *CREW I*, 209 F. Supp. 3d at 81-82 (quoting 52 U.S.C. § 30104(f)(1)-(3)). This Court already rejected a bright-line rule that categorically treats all electioneering communications as *per se* indicative of a major purpose to nominate or elect candidates. The Commission was, therefore, neither "arbitrary" nor "capricious" when it rejected the same rule expressed in different words.

Second, CREW argues that the Commission should not have relied "solely on dry transcripts," but should have considered whether the tone and images of the advertisements conveyed a subjectively "ominous" feeling. *CREW I* Motion at 13. But reviewing transcripts is consistent with this Court's review of the advertisements, *see, e.g.*, *CREW I*, 209 F. Supp. 3d at 80, and with the Supreme Court's review of other advertisements, *see, e.g.*, *McConnell*, 540 U.S. at 193 n.78, and so cannot be "arbitrary and capricious." Looking at transcripts is also justified by the "essential need for objectivity, clarity, and consistency in administering and enforcing the Act," AR 1768, as it protects against inconsistent results based solely on subjective impressions. And, in any event, the Commission "reconsidered the matter in full by reviewing the record anew," AR 1767, so may very well have reviewed the actual advertisements that were cited in CREW's complaint, AR 1483-84.

Third, CREW faults the Commission for ignoring the fact that some advertisements criticized the candidate's prior position on the issue being discussed—something CREW feels

was unnecessary if the goal was simply to "convince viewers to favor AAN's preferred policies and to communicate that view to their representative." *CREW I* Motion at 13-14. But the Commission did *not* ignore criticism in the advertisements. It instead weighed the criticism in its holistic analysis. For example, the Commission decided that the criticism in "Bucket," paired with other aspects of the advertisement, created an advertisement that indicated a major purpose to nominate or elect candidates. *See* AR 1774. In contrast, the "Wallpaper" advertisement included "critici[sm of] past legislative positions taken by the named officeholders," but had other features—such as an identification of "the specific bill (H.R. 4746) that AAN wanted the named officeholders to support"—that led the Commission to conclude that the advertisement was designed "to marshal public sentiment to persuade the officeholders to alter their voting stances." AR 1772. The Commission's careful consideration of criticism deserves deference; the Commission certainly did not "entirely fail[] to consider an important aspect of the problem," *see Defs. of Wildlife*, 551 U.S. at 658.

Fourth, CREW argues that the Commission should have focused on additional context for the advertisements, arguing that the electioneering communications were only run in races that CREW characterizes as "closely-contested" and that the record does not include similar electioneering communications that post-date the election or involve incumbents that were *not* up for re-election. *CREW I* Motion at 14-16. Of course, an advertisement is not an electioneering communication if it is run after an election or does not reference a candidate, *see* 52 U.S.C. § 30104(f)(1)-(3).[3] But, in any event, it was not arbitrary or capricious for the Commission to

[3] And, although the record may not "show any ad by AAN advocating its preferred policy positions *after* the election," *see CREW I* Motion at 16 (emphasis in original), AAN's website confirms that its issue advocacy efforts have continued. *See, e.g.*, AAN Releases $250,000 Digital Ad Campaign to Advance Tax Reform (May 31, 2017), http://www.americanactionnetwork.org/press/american-action-network-releases-250000-digital-

conclude that an advertisement may still be an issue advertisement if only run in "closely-contested" races. As the Commission explained, the Supreme Court has found that "'[c]andidates, especially incumbents, [that] are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various [public] issues, but campaigns themselves generate issues of public interest.'" AR 1701 (quoting *Buckley*, 424 U.S. at 42). An issue advocacy group, therefore, "can certainly choose to run an issue ad to coincide with public interest rather than a floor vote." *WRTL II*, 551 U.S. at 473.

Fifth, CREW faults the Commission for not sharing CREW's pessimism about the likelihood of legislative success on issues of concern to AAN during the 2010 lame duck session. *CREW I* Motion at 17-20. According to CREW, voters would have known that "there was no chance of repeal of Obamacare in the lame duck session," so would have understood the advertisements as requests "to vote out the referenced representative." *Id.* at 19. But the Commission was not required to share CREW's unjustified beliefs about the lame duck session. The FEC researched the types of legislation expected during the lame duck session, AR 1768-69, noted that nine advertisements identified specific bills by number, *see, e.g.*, AR 1770 ("Quit Critz"), 1771 ("Ridiculous," "Wallpaper"), 1773 ("Naked"), 1774-75 ("Leadership"), 1775 ("Mess," "Repeal," "Secret"), 1776 ("Skype"), and found that "Congress did, in fact, meet in lame-duck session in November and December of 2010," with "[a]t least one publication

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ad-campaign-advance-tax-reform/; AAN Kicks Off $2 Million Nationwide TV Ad Campaign on AHCA (May 23, 2017), http://www.americanactionnetwork.org/press/american-action-network-kicks-off-2-million-nationwide-tv-ad-campaign-ahca/; AAN Launches $900k Campaign Supporting Trade Promotion Authority (June 4, 2015), https://www.americanactionnetwork.org/press/aan-launches-900k-campaign-supporting-trade-promotion-authority/.

deem[ing] the session 'the most productive of the lame duck Congressional sessions ever," AR 1769-70 (citation omitted). At most, CREW has identified "a difference in view," which does not warrant relief. *See Defs. of Wildlife*, 551 U.S. at 658 (citation omitted).

Sixth, CREW claims that the Commission "*may* have erroneously excluded another $1.1 million in unidentified political spending" from its analysis of AAN's major purpose from 2009 to 2011. *CREW I* Motion at 12 n.6 (emphasis added). CREW is concerned with the difference between the approximately $5.2 million that AAN reported to the IRS as spent on "political campaign activities" and the approximately $4.1 million that AAN disclosed as spent on express advocacy independent expenditures. *Id.* But there is no cause for concern. AAN twice pointed to IRS publications explaining that the IRS standard for "political campaign activities" is "much broader" than the FEC's express advocacy standard. *See* AR 1566, 1597-98. The General Counsel's Office also recognized the difference in its First General Counsel's Office Report. AR 1638. The Commission has now applied an even broader standard to find that nearly $6 million of AAN's spending (or about $7 million if the "Read This" advertisement is included) was indicative of a major purpose to nominate or elect candidates. AR 1779. And, in any event, even if another $1.1 million were added to the higher of these amounts, it would still not change AAN's major purpose, as it would mean that only about 30 percent of AAN's spending was indicative of a major purpose to nominate or elect candidates. *See CREW I*, 209 F. Supp. 3d at 95 ("A reasonable application of a 50%-plus rule would not appear to be arbitrary and capricious.").

Finally, CREW argues that the Commission "arbitrarily and capriciously failed to consider one of AAN's electioneering communications run against Rep. Perlmutter." Am. Compl. ¶ 81. But the Commission *did* consider the advertisement—it just did so in the form that

referenced Representative Shauer. *Compare* AR 1484 at ¶ 15 *with* AR 1775. The Commission's decision to do so was consistent with the First General Counsel's Report, AR 1654, and the prior Statement of Reasons, AR 1722. And, because the Commission found that the advertisement does *not* indicate a major purpose to nominate or elect candidates, AR 1776, the additional consideration that CREW seeks would only further undermine its claim. The Commission reasonably found, based on the totality of the evidence, that AAN is not a political committee. Its conclusion demands deference—and summary judgment in AAN's favor.

C. The Commission's Initial Conclusion That AAN Is Not A Political Committee Was Proper And Provides An Independent Reason To Reject CREW's Challenge.

Summary judgment could also be granted to AAN because the Commission's initial dismissal decision was not contrary to law. This Court has found otherwise for reasons detailed in its September 2016 opinion. *See CREW I*, 209 F. Supp. 3d 77. But, the Court acknowledged that the FEC's first decision followed directly from a decision of the U.S. Court of Appeals for the Seventh Circuit. *CREW I*, 209 F. Supp. 3d at 90-91 (discussing *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014)). For this reason, and others detailed in AAN's pleadings in the prior litigation, it remains AAN's position that the Commission's first dismissal was not "contrary to law." It was, instead, fully consistent with precedent, including the Seventh Circuit decision.

The U.S. Court of Appeals for the D.C. Circuit has held that the Court's September 2016 decision is not yet final for purposes of appeal. *See* Order, Case Nos. 16-5300, 16-5343 (D.C. Cir. Apr. 4, 2017) (Dkt. 1669311). AAN, therefore, urges the Court to reconsider its prior decision—and hold that the Commission's first dismissal was not "contrary to law" because the Commission reasonably found that AAN's spending on express advocacy was the only spending

indicative of a major purpose to nominate or elect candidates. There was, therefore, no need for the decision currently under review because there was no need for a remand.

In the interest of efficiency, and because the Commission's dismissal on remand is entirely consistent with the Court's earlier decision, AAN has accepted the Court's September 2016 ruling for purposes of this motion and has not repeated arguments that were fully briefed and ruled upon by the Court then. AAN, however, respectfully reserves the right to challenge the Court's September 2016 decision should there be an appeal from a decision in this case, *see* Answer ¶ 1 (Dkt. No. 9), and so incorporates its prior pleadings by reference, *see* AAN's Mot. for Summ. J., *CREW I*, No. 14-1419-CRC (D.D.C. Mar. 1, 2016) (Dkt. No. 38); AAN's Reply, *CREW I*, No. 14-1419-CRC (D.D.C. May 23, 2016) (Dkt. No. 43). At all stages in this case, the Commission has properly and reasonably concluded—in full compliance with the law—that AAN is not a political committee. Summary judgment should be granted to AAN.

IV. CONCLUSION

For the foregoing reasons, this Court should grant summary judgment in AAN's favor.

Respectfully submitted,

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