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 REPLY MEMORANDUM IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO CREW'S CROSS-MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Plaintiffs, Citizens for Responsibility and Ethics in Washington and Melanie Sloan (collectively, "CREW"), are simply trying for another bite at the apple with this lawsuit. The dispute began in 2012, when CREW filed an administrative complaint at the Federal Election Commission ("FEC" or "Commission"), alleging 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. AR 1480-88. But AAN is not a political committee because it is not under the control of a candidate and it does not have as its "major purpose" the "nomination or election of a candidate." *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). Instead, AAN "is an issue advocacy group that occasionally speaks out on federal elections." AR 1710.

At every stage, CREW has tried to shoehorn AAN into "political committee" status by counting *every* electioneering communication that AAN funded prior to the 2010 midterm elections as *per se* indicative of a "major purpose" to nominate or elect candidates. The Commission and this Court have already rejected CREW's request—and for good reason. Under Supreme Court precedent, some electioneering communications have "no electioneering purpose" because they are genuine issue advertisements. *McConnell v. FEC*, 540 U.S. 93, 206 (2003). This Court, therefore, required an ad-by-ad review to determine whether any of AAN's electioneering communications were indicative of a major purpose to nominate or elect candidates—or were indicative of some other major purpose, like issue advocacy. *See Citizens for Responsibility & Ethics in Washington v. FEC*, 209 F. Supp. 3d 77, 93 (D.D.C. 2016) ("*CREW I*").

The Commission's review on remand was "free of the legal errors identified in this Court's previous Opinion and Order." Mem. Op. and Order at 5, *CREW I*, No. 14-1419-CRC

(D.D.C. Apr. 6, 2017) (Dkt. No. 74) ("*CREW I* Mem. Op."). CREW nonetheless challenges the remand decision as inconsistent with the Court's prior order and as "contrary to law" and "arbitrary and capricious" because it did not incorporate the *per se* rule that the Court previously rejected.

The Court need not devote much time to CREW's recycled arguments. They fly in the face of the Court's prior order and are contrary to Supreme Court precedent that prevents the Commission from assigning political committee status to a group whose "central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252 n.6 (1986). AAN is—and always has been—an issue-advocacy group that does not have as its major purpose the nomination or election of candidates. The Commission was thus correct to again dismiss CREW's complaint, particularly when its analysis is considered under the highly deferential standard of review that applies to this case. This Court should reject CREW's challenge and grant summary judgment to AAN. It is time for this stale case—challenging lawful conduct that occurred seven to eight years ago—to finally end.

II. THE COMMISSION'S DISMISSAL IS ENTITLED TO *CHEVRON* DEFERENCE.

The FEC's dismissal was proper under any standard of review, but the proper standard of review is the highly deferential standard set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). CREW concedes that "a court *may* provide deference" to an FEC decision to dismiss a complaint, but argues that this decision to dismiss falls within two exceptions to the rule. Pls.' Cross-Mot. for Summ. J. at 16 (Dkt. No. 32 ("Opp.") (emphasis added); *id.* at 15-20. It does not, for reasons already detailed by this Court. As this Court held, (A) the FEC's application of the "major purpose" test involves "implementation choices within the agency's sphere of competence [that] warrant the Court's

deference," and (B) the "same standard of review applies to all FEC decisions, whether they be unanimous or determined by tie vote." *CREW I*, 209 F. Supp. 3d at 85, 88.

A. The FEC's Fact-Specific Application Of The "Major Purpose" Test Is Entitled To Deference.

The Court remanded this case so that the FEC could decide a fact-intensive question that is squarely within the agency's expertise. Specifically, the Court asked the Commission to reconsider its decision without the legal error identified by the Court, which it described as an "erroneous understanding that the First Amendment effectively required the agency to exclude from its consideration all non-express advocacy in the context of disclosure." *Id.* at 93.[1] The Court thus required the Commission to conduct a "fact-intensive" review of the record, *id.*, including a review of the twenty electioneering communications that AAN funded seven years ago to determine whether any were indicative of a "major purpose" to nominate or elect candidates. The Court did not prejudge the Commission's factual analysis; it "never ordered the FEC to reach a particular result, or to consider any particular ad—or any proportion of electioneering communications—election-related." *CREW I* Mem. Op. at 6. Rather, the Court resolved the predicate legal question in this dispute (specifically, whether electioneering communications could be categorically excluded from the major purpose analysis), and remanded for a fact-specific application of the Commission's "judicially approved case-by-case approach to adjudicating political committee status" without the bright-line rule that the Court rejected. *CREW I*, 209 F. Supp. 3d at 93 (citation omitted).

[1] The Court of Appeals has found that the Court's prior decision is not yet final for purposes of appeal. *See* Order, Nos. 16-5300, 16-5343 (D.C. Cir. Apr. 4, 2017) (Dkt. No. 1669311). AAN has accepted the Court's holdings for purposes of these motions, but respectfully reserves the right to challenge the Court's prior decision in any appeal. *See* Section III(C) below.

The Commission's resulting ad-by-ad analysis is precisely the type of analysis that is entitled to this Court's deference under the standard set forth in the Court's prior decision. It is "less about *what Buckley* (and subsequent precedent) means and more about *how Buckley* (and the test it created) should be implemented" on the facts of this case. *Id.* at 87. Addressing the facts presented in each of the advertisements and the context in which they were aired, the Commission's analysis of AAN's electioneering communications is fundamentally different from its analysis the first time around, which the Court found "turn[ed] directly and almost exclusively on judicial precedent." *Id.* at 86. Now, the decision is filled with factual details and conclusions that are squarely within the Commission's expertise.

The distinctions made among the electioneering communications and the decisions reached on remand are the types of "implementation choices" that "warrant the Court's deference." *Id.* at 87-88. Because the factual analysis "call[s] on the FEC's special regulatory expertise," it includes the "types of judgments that Congress committed to the sound decision of the agency." *Id.* at 87. As this Court recognized, the Commission "is vested with 'primary and substantial responsibility for administering and enforcing [FECA],' including the 'sole discretionary power' to initiate enforcement actions." *Id.* (quoting *Buckley*, 424 U.S. at 109, 112 n.153; *FEC v. Democratic Senatorial Campaign Comm.* ("*DSCC*"), 454 U.S. 27, 37 (1981)). The FEC is, therefore, "precisely the type of agency to which deference should presumptively be afforded" in this context. *DSCC*, 454 U.S. at 37. It has been charged with resolving complex issues in an area where every decision "touch[es] upon political speech" and "implicates the First Amendment." *Bush-Quayle '92 Primary Comm., Inc. v. FEC*, 104 F.3d 448, 452 (D.C. Cir. 1997) (citation omitted). The decision below reflects the Commission's expertise in navigating

these issues on the facts of this case and, therefore, is entitled to "extremely deferential" review. *Orloski v. FEC*, 795 F.2d 156, 167 (D.C. Cir. 1986).

CREW's argument against deference is that *any* application of the "major purpose" test should be given de novo review because "major purpose is not a statutory or regulatory test, but a judicial one" created in the *Buckley* decision. Opp. at 17. This Court found otherwise, holding that "the Supreme Court's revised construction of the statute [in *Buckley*] did *not* convert every judicial challenge to an FEC action linked in any way to the major purpose test into an issue for the courts' de novo review." *CREW I*, 209 F. Supp. 3d at 88 (emphasis added). The Court instead distinguished pure interpretations of precedent, which it would review de novo, from other decisions, such as those "regarding the timeframe and spending amounts relevant in applying the 'major purpose' test." *Id.* The Court emphasized that the Commission has the right to deference over the latter category of decisions, as they are "exactly the type of question[s] generally left to the expertise of an agency." *Id.* (quoting *Shays v. FEC*, 511 F. Supp. 2d 19, 31 (2007)). The Court should recognize that right to deference again here, and review the Commission's remand analysis of which amounts spent on electioneering communications are "relevant in applying the 'major purpose' test" with great deference. *Id.*

B. Settled Precedent Requires That Split-Vote Dismissals Be Given Deference.

The Court rightly rejected CREW's request to deny split-vote dismissals deference, as D.C. Circuit precedent requires that the "same standard of review appl[y] to all FEC decisions, whether they be unanimous or determined by tie vote." *Id.* at 85 (citing cases). CREW renews its argument here, Opp. at 18-20, but the Court remains "obligated to follow controlling circuit precedent," *United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997).

There is no ambiguity in D.C. Circuit precedent on the requirement that deference be given to split-vote FEC decisions. In *In re Sealed Case*, the D.C. Circuit held that "we owe

deference to a legal interpretation . . . that prevails on a 3-3 deadlock." 223 F.3d 775, 779 (D.C. Cir. 2000). Therefore, "'a reviewing court should accord deference to the Commission's rationale . . . [even in] situations in which the Commission deadlocks and dismisses.'" *CREW I*, 209 F. Supp. 3d at 85 (quoting *FEC v. Nat'l Republican Senatorial Comm.* ("*NRSC*"), 966 F.2d 1471, 1476 (D.C. Cir. 1992)).

Deference is appropriate given Congress's intentional design of the statutory scheme to ensure that "every important action [the FEC] takes is bipartisan." *Combat Veterans for Congress PAC v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015). By statute, "no more than three of its six voting members may be of the same political party," *DSCC*, 454 U.S. at 37, with four votes required to commence an investigation, 52 U.S.C. § 30109(a)(2). "Congress's purpose of requiring four affirmative votes was to 'assure that enforcement actions . . . will be the product of a mature and considered judgment,'" and not the result of politics or partisanship. *Combat Veterans*, 795 F.3d at 153 (citation omitted).

Indeed, at every stage of the enforcement process, the statute respects the delicate First Amendment issues at stake and tilts the scale against the regulation of First Amendment activity. By law, the FEC must dismiss a complaint if four Commissioners do not find "reason to believe" that a violation of FECA occurred. 52 U.S.C. § 30109(a)(2). But even if four Commissioners find "reason to believe" a violation occurred, penalties are not automatically available. Instead, the Commission must conduct an investigation and determine whether there is probable cause that a violation occurred. *Id*. § 30109(a)(2), (4). And even if four Commissioners find probable cause, the case is still not over. Instead, the Commission must attempt conciliation and then, if that fails, reach bipartisan agreement to proceed to federal court where it will have to prove the alleged violation. *Id*. § 30109(a)(4), (6).

The requirement of four affirmative votes at each stage is thus part of a careful design that is intended to protect First Amendment activity and those engaged in it. It also means that a split three-to-three vote by the Commission has meaning under the statute—it means that the Commission did not find sufficient cause to proceed. The three Commissioners who voted to dismiss are the "controlling group for purposes of the decision" and their "rationale necessarily states the agency's reasons for acting as it did." *NRSC*, 966 F.2d at 1476. And, as with any other decision issued by the agency, it is "particularly appropriate" to defer to the Commission's reason for its three-to-three decision to dismiss. *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988) ("Deference is particularly appropriate in the context of the FECA, which explicitly relies on the bipartisan Commission as its primary enforcer.").

CREW acknowledges that the D.C. Circuit requires that deference be given split-vote FEC decisions, but argues that "none of the above precedent is good law after *United States v. Mead Corp*., 533 U.S. 218 (2001)." *CREW I*, 209 F. Supp. 3d at 85 n.5; *see also* Opp. at 18-20. The Court was right to reject this argument last time, and it should reject it again here.

CREW's argument depends on a misreading of *Mead* as having restricted *Chevron* deference to only those agency actions that are binding precedent in future cases. *See* Opp. at 18-20. According to CREW, a split-vote dismissal does not meet this standard because the statement of three Commissioners is "not . . . binding legal precedent or authority for future cases." *Id.* at 18 (citing *Common Cause*, 842 F.2d at 449 n.32).

But *Mead* did *not* restrict *Chevron* deference in this way, as this Court recognized that, under *Mead*, "the prospective, binding nature of an agency's interpretation is *not* the sole consideration regarding the applicability of *Chevron*." *CREW I*, 209 F. Supp. 3d at 85 n.5 (emphasis added). Rather, "the type of delegated authority warranting *Chevron* deference 'may

be shown in a variety of ways, as by an agency's power to engage in adjudication . . . or by some other indication of comparable congressional intent.'" *Id.* (quoting *Mead*, 533 U.S. at 227). *Mead*, as a result, could not have silently overruled *In re Sealed Case*, because the D.C. Circuit there "engaged in a thorough consideration of just such 'indication[s]'" of congressional intent. *Id.* (quoting *Mead*, 533 U.S. at 227).

For example, the D.C. Circuit "observ[ed] that an FEC enforcement decision, even one produced by deadlock, is 'part of a detailed statutory framework for civil enforcement . . . analogous to a formal adjudication,' that it 'assumes a form expressly provided for by Congress,' and that ultimately it can result in the imposition of criminal penalties." *Id.* (quoting *Sealed Case*, 223 F.3d at 780). "All of those considerations led the court to conclude that an FEC enforcement decision 'falls on the *Chevron* side of the line.'" *Id.* (quoting *Sealed Case*, 223 F.3d at 780). And that conclusion was fully consistent with *Mead*, which found that "a very good indicator of delegation meriting *Chevron* treatment" are "express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." *Mead*, 533 U.S. at 229. Indeed, there has not been "a single case in which a general conferral of . . . adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority." *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 306 (2013).

CREW cites some other cases, but they do not eliminate the requirement of deference here. *See* Opp. at 18. One states that "*Chevron* deference is appropriate" where, as here, Congress has expressly delegated authority to an agency and the agency has acted in a formal manner in accordance with that authority. *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 56-57 (2011). Another looked to factors—such as the decision's binding

effect on third parties—only because the agency's interpretation was adopted "in the absence of a formal adjudication or notice-and-comment rulemaking." *Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec*., 769 F.3d 1127, 1136-37 (D.C. Cir. 2014). The decision here instead resulted from a formal process that is "analogous to a formal adjudication," *Sealed Case*, 223 F.3d at 780, and in which Congress gave the Commission "sole discretionary power" to decide whether to initiate an enforcement action, *CREW I*, 209 F. Supp. 3d at 87 (quoting *Buckley*, 424 U.S. at 112 n.153). The Commission's decision is due deference. *See Mt. Royal Joint Venture v. Kempthorne*, 477 F.3d 745, 754 (D.C. Cir. 2007) ("If the agency enunciates its interpretation through . . . formal adjudication, we give the agency's interpretation *Chevron* deference.").

III. THE COMMISSION'S DISMISSAL 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 even under the standard set forth in the Court's prior decision. The Commission's dismissal on remand was neither (A) contrary to law nor (B) arbitrary and capricious, so summary judgment must be entered in AAN's favor.

A. The Commission's Decision Is Not "Contrary To Law."

CREW argues that the Commission *could* have done more in response to the Court's prior Opinion and *could* have relied on *McConnell*, 540 U.S. 93, to justify a test that characterizes all electioneering communications as indicative of a major purpose to nominate or elect candidates. *See* Opp. at 22-36. But this case is not about the outer bounds of what the

Commission *could* have done. It is governed by the highly deferential "contrary to law" standard, which asks only whether the Commission's decision is itself contrary to law. It is not. The Commission's ad-specific and nuanced approach to AAN's electioneering communications followed directly from this Court's prior decision and was consistent with precedent, including *McConnell*. The Court should enter summary judgment in AAN's favor.

1. The Commission's Legal Analysis Is Not "Contrary To" This Court's Prior Opinion.

The Court previously found CREW's argument "that the FEC has failed to comply with this Court's Order" to be "off the mark." *CREW I* Mem. Op. at 5. CREW presents the argument again, *see* Opp. at 22-28, and it still misses the mark.

First, CREW argues that the Commission did not fully comply with the Court's decision because it could have done more. CREW characterizes the Commission's approach as the "bare minimum" required and suggests that the Commission intentionally tried to deny the Court's opinion of effect. *See, e.g.*, *id*. at 10, 23-24 (alleging that the Commissioners "concocted" a new test designed to reach the same "predetermined decision"). But not only is an "administrative agency . . . presumed to act in accordance with the court's interpretation" on remand, it is clear that the Commission *did* act in accordance with that interpretation here. *See Taing v. Chertoff*, 526 F. Supp. 2d 177, 187 (D. Mass. 2007), *aff'd sub nom. Taing v. Napolitano*, 567 F.3d 19 (1st Cir. 2009).

Within thirty days of the Court's opinion, the Commission "reconsidered the matter in full," scrutinized each advertisement, and came to a materially different decision because of this Court's opinion. *See* AR 1767. The Commission respected the Court's conclusion that its prior analysis rested on an "erroneous understanding that the First Amendment effectively required the agency to exclude from its consideration all non-express advocacy in the context of disclosure."

Id. (quoting *CREW I*, 209 F. Supp. 3d at 93). As a result, and "in conformance with the court's declaration," the Commission considered "AAN's electioneering communications—which by definition do not contain express advocacy—in [its] analysis." *Id.*

The Commission's implementation of the Court's decision is apparent. [redacted] In this matter, the Commission changed its characterization of four out of twenty disputed electioneering communications, finding that they *were* indicative of a "major purpose" to nominate or elect candidates. AR 1779; *see also CREW I* Mem. Op. at 5-6 (The Commission "left open the possibility that at least some of the spending on those ads might indicate a campaign-related major purpose. And it identified four such ads that *did* indicate such a purpose.") (emphasis in original).

The Commission's decision to change course on four advertisements was no small matter, as the advertisements amounted to nearly $1.9 million in relevant spending. AR 1779. And the Commission went further, completing an alternate analysis that considered approximately $1.07 million spent on a fifth advertisement for a total of nearly $3 million in spending on non-express advocacy. AR 1776, 1779. The Commission thought that the fifth advertisement was "best understood as a call to action to motivate viewers to contact the named officeholders and tell them to 'fix the healthcare mess' during the lame-duck session," but thought it a close enough call to warrant the additional analysis. *Id.*

The Commission's analysis did not change the end result, as even with the fifth 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. But that does not mean the Commission tried to minimize or evade the Court's prior Order, as CREW suggests. It simply means that AAN is—as it has always represented—an issue advocacy group that does *not* have a "major purpose" to nominate or elect candidates.

Second, CREW argues that the Commission "doubl[ed] down on [its] prior legal errors" on remand because it continued to "assume, following *WRTL II*, [that non-express advocacy] may not be regulated" consistent with the First Amendment. Opp. at 22, 25. CREW admits that the Commission did not include this interpretation of *WRTL II* in its Statement of Reasons. Instead, CREW asks the Court to read between the lines to find the error which, according to CREW, the Commission "attempted to hide." *See, e.g.*, *id*. at 25, 28.

The Court cannot find an agency decision "contrary to law" based on an alleged legal error that does not appear in the decision. Nor can the Court ascribe some nefarious meaning to the Commission's silence. Doing so is entirely at odds with "the strong presumption of honesty and integrity to which the FEC is entitled." *FEC v. Automated Bus. Servs.*, 888 F. Supp. 539, 542 (S.D.N.Y. 1995). This Court must assume that the FEC has "act[ed] properly and according to law," *FCC v. Schreiber*, 381 U.S. 279, 296 (1965), and can only find that presumption overcome if there is a showing that "the agency has made a *clear* error of judgment," *Nader v. FEC*, 823 F. Supp. 2d 53, 58 (D.D.C. 2011) (emphasis added). There can be no "clear" error when, as here, the supposed error is a matter of CREW's speculation.

And CREW's speculation finds no support in the decision, which says the exact opposite of what CREW claims. As this Court recognized, "[t]he FEC no longer excluded as irrelevant to the major-purpose inquiry, on a categorical basis, all spending on electioneering communications (i.e., non-express advocacy)." *CREW I* Mem. Op. at 5. In so doing, the Commission [redacted]

[redacted] classified nearly $1.9 million spent by AAN on non-express advocacy as indicative of a major purpose to nominate or elect candidates, AR 1779. The Commission's remand analysis is thus "free of the legal errors identified in the Court's previous Opinion and Order," *CREW I* Mem. Op. at 5, including "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," *CREW I*, 209 F. Supp. 3d at 93.

To the extent CREW argues that the Court's prior decision precluded the Commission from considering whether *any* advertisements were indicative of a major purpose to engage in issue advocacy, its argument also fails. *See, e.g.*, Opp. at 25 (faulting Commission brief for arguing that "[s]ome electioneering communications may constitute genuine issue advocacy") (quoting FEC Mem. in Supp. Mot. for Summ. J. at 38 (Aug. 4, 2017) (Dkt. No. 28) ("FEC Br.")). CREW suggests that, because the Supreme Court in *WRTL II* distinguished between the "functional equivalent of express advocacy" and "issue ads," and because this Court found that *WRTL II* is "inapposite," the Commission could no longer consider whether AAN's advertisements were issue advertisements. *Id.* (quoting *CREW I*, 209 F. Supp. 3d at 89-90). CREW's argument fails as a matter of fact and law.

Factually, CREW is incorrect that the Commission drew a bright line at the "functional equivalent of express advocacy." *See id.* The Commission instead made the distinction that this Court required between electioneering communications that are indicative of a major purpose to nominate or elect candidates—and those that reflect some other major purpose, such as issue advocacy. The result was a Commission decision that counted advertisements that are *not* the functional equivalent of express advocacy, *see* AR 1709, as indicative of a major purpose to nominate or elect candidates, *see* AR 1779.

Legally, CREW also errs if its argument is that this Court precluded the Commission from considering whether AAN's major purpose is to engage in issue advocacy. The Court's discussion of *WRTL II* did not—and could not—eliminate the FEC's responsibility to ensure that issue advocacy groups are not classified as political committees. That requirement is part and parcel of the "major purpose" test, which was created to ensure that a "group[] engaged purely in issue discussion" would *not* qualify as a political committee. *Buckley*, 424 U.S. at 79. Thus, the Commission *cannot* characterize a group as a political committee if its "central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates." *Mass. Citizens for Life*, 479 U.S. at 252 n.6. Irrespective of *WRTL II*, then, the rule remains that the Commission's political committee analysis must "avoid the regulation of activity 'encompassing both issue discussion and advocacy of a political result.'" Supplemental Explanation and Justification, Political Committee Status, 72 Fed. Reg. 5595, 5597 (2007) ("Supplemental E & J") (quoting *Buckley*, 424 U.S. at 79). The Court did not upend this fundamental restriction on political committee status, or eliminate the fact that some electioneering communications are more indicative of an issue-centric purpose. Instead, consistent with the Supreme Court's recognition that some electioneering communications have "no electioneering purpose," *McConnell*, 540 U.S. at 206, the Court rightly declined to order the FEC "to consider any particular ad—or any proportion of electioneering communications—election-related," *CREW I* Mem. Op. at 6.

The Commission's analysis was thus fully consistent with this Court's prior decision. It "no longer excluded as irrelevant to the major-purpose inquiry, on a categorical basis, all spending on electioneering communications (i.e., non-express advocacy)." *Id*. at 5. The Court

should again reject CREW's argument that "the FEC has failed to comply with this Court's Order." *Id.*

2. The Commission's Legal Analysis Is Not "Contrary To" The Supreme Court's *McConnell* Decision.

The Court should also reject CREW's claim that the Commission's analysis is contrary to the Supreme Court's decision in *McConnell*. *See* Opp. at 28-33. CREW's arguments fail because they depend on a misrepresentation of the Commission's flexible analysis and an abandonment of the "contrary to law" standard that governs this case.

First, CREW argues that the Commission's remand framework is contrary to *McConnell* by speculating that the remand framework would classify advertisements as "non-political" even though they were described as "political" in *McConnell*. *See id*. at 28-31. CREW points to the "Yellowtail" advertisement described in *McConnell*, and other advertisements from the *McConnell* record, that "referenced an 'issue' consistent with the speaker's purported agenda and included a call to action to contact the representative and express support." *See id*. at 31; *see also id.* at 29 (quoting Yellowtail and Jane Doe advertisements), 30 (describing Republicans for Clean Air and Citizens for Better Medicare advertisements). CREW believes that each of these advertisements would be treated as "non-political" under the Commission's framework because each included a "legislative critique" and a "call to action." *Id.* at 29.

CREW's concern about the Commission's framework is misplaced. The Commission said the exact opposite about the "Yellowtail" advertisement—it described the "Yellowtail" advertisement as a "paradigmatic example" of an electioneering communication that *does* "indicate a purpose of nominating or electing a candidate" under the standard of this Court's prior decision. AR 1768. The Commission also clarified that no one factor, or combination of factors, in its analysis was case-determinative. It was providing "meaningful guidance" and *not*

hard-and-fast rules that would automatically classify an advertisement as indicative or not indicative of a major purpose to nominate or elect candidates. *See, e.g.*, *id*.

The Commission's application of its new framework confirmed that it does *not* include any "one-size-fits-all rule[s]" that would necessarily capture the advertisements that CREW describes. *See* AR 1779. For example, contrary to CREW's claim that any advertisement with a "legislative critique and [a] call to action" would be automatically deemed "non-electoral," Opp. at 29, the Commission engaged in a detailed analysis of an advertisement that included a legislative critique and a call to action, AR 1775 ("Read This"), and ultimately found the advertisement to be such a "close call" that it treated it as indicative of a major purpose to nominate or elect candidates to see whether it would change the end result, *see* AR 1776, 1779. Had the Commission adopted the bright-line rule that CREW imagines, this exercise would have been entirely unnecessary.

Second, CREW argues that the Commission *must* have adopted a bright-line rule because any other approach would be inconsistent with the Commission's desire for "objectivity, clarity, and consistency." Opp. at 32-33 (quoting AR 1768). But the Commission noted that it was achieving its goal of objectivity, clarity, and consistency by providing "meaningful guidance"—and not strict rules. *See* AR 1768. This "case-by-case approach to adjudicating political committee status" has been "judicially approved." *CREW I*, 209 F. Supp. 3d at 93 (citing *Shays*, 511 F. Supp. 2d at 30). CREW, therefore, has no reason to complain that the Commission adhered to its case-specific approach on remand. *See* Supplemental E & J, 72 Fed. Reg. at 5602.

Third, CREW argues that the *McConnell* Court found that anyone "who wished to communicate 'an issue ad[] during [the] timeframes' of an electioneering communication, but who lacked an electoral purpose, would simply 'avoid[] any specific reference to federal

candidates.'" Opp. at 32 n.9 (quoting *McConnell*, 540 U.S. at 206). CREW reasons that the Court must have concluded from this that every electioneering communication is "intended to influence the election." *Id.*[2]

The Supreme Court made no such finding. Instead, the Court considered a then-ban on corporate- and union-funded electioneering communications, and reasoned that it left open two avenues for "future corporations and unions" to fund issue advertisements. *McConnell*, 540 U.S. at 206. They could "pay[] for the ad from a segregated fund," meaning that they could continue to fund electioneering communications that have "no electioneering purpose." *Id*. Or they could pay for the ad without a segregated fund, so long as they "avoid[ed] any specific reference to federal candidates" (as that would take the advertisement out of the definition of an electioneering communication). *Id.* The Court's analysis clearly recognized that *some* electioneering communications would continue to be genuine issue advocacy.

Fourth, CREW argues that the Commission *could* have adopted a test under *McConnell* that counts all electioneering communications as indicative of a major purpose to nominate or elect candidates. Opp. at 31-33. According to CREW, the Supreme Court in *McConnell* "found that *all* electioneering communications were sufficiently electoral as to warrant disclosure." *Id.* at 31 (citing *McConnell*, 540 U.S. at 206). CREW reasons that the Commission should have extended that finding to conclude that all electioneering communications are also sufficiently indicative of a major purpose to nominate or elect candidates. *Id*. at 31-33.

[2] The Court need not reach this argument because it was relegated to a footnote. *See*, *e.g.*, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, 146 F. Supp. 3d 112, 126 (D.D.C. 2015) ("Arguments made in a perfunctory manner, such as in a footnote, are waived.") (internal quotation marks and citation omitted).

But what the Commission *could* do consistent with *McConnell* is a very different question from what the Commission *must* do to comply with *McConnell*. The latter question is the only one that matters in this case, which is governed by the "contrary to law" standard. And, irrespective of CREW's policy arguments about what it thinks the Commission could and should do, the fact is that *McConnell* is fully consistent with the Commission's remand decision. For, as CREW concedes, *McConnell* states that some electioneering communications have "no electioneering purpose." *Id*. at 31 (quoting *McConnell*, 540 U.S. at 206).

CREW tries to distinguish this "no electioneering purpose" language to no avail. CREW first claims that the language describes a "matter of dispute between the parties and among the judges on the District Court" about whether an electioneering communication could ever lack an electioneering purpose. *Id.* (quoting *McConnell*, 540 U.S. at 206). But the described dispute was instead over the "precise percentage" of electioneering communications that do not have an electioneering purpose—meaning that the disagreement accepted that some do not have that purpose. *McConnell*, 540 U.S. at 206. CREW also argues that this "no electioneering purpose" language is limited by its context, as it related to a then-ban on speech, rather than to a disclosure requirement. Opp. at 31-32. But the other aspects of *McConnell* on which CREW relies *also* related to the then-restriction on corporate- and union-funded electioneering communications that was later overruled in *Citizens United v. FEC*, 558 U.S. 310 (2010). *See id*. at 28-31 (relying on *McConnell*, 540 U.S. at 193). And, in any event, the Commission did not consider itself *bound* by this language in *McConnell*. Instead, it provides additional support for the Commission's fact-specific conclusion that not every electioneering communication in this case was indicative of a major purpose to nominate or elect candidates. With the Supreme Court on record that some electioneering communications have "no electioneering purpose," 540 U.S. at

at 206, it was not "contrary to law" for the Commission to conclude that some electioneering communications in this case did not have that purpose either. CREW's challenge must be rejected.

3. The Court Should Again Reject CREW's Request For A Categorical Rule That All Electioneering Communications Must Be Considered Indicative Of A Major Purpose To Nominate Or Elect Candidates.

CREW concludes its "contrary to law" arguments with a renewed request to "declare contrary to law *any* approach taken by the FEC that does not assess political committee status by considering *all* electioneering communications as indicative of a 'purpose' to 'nominat[e] or elect[ ] . . . a candidate.'" *CREW I*, 209 F. Supp. 3d at 93 (quoting *Buckley*, 424 U.S. at 79); *see* Opp. at 33-36. The Court rejected this request last time, and it should reject it again.

CREW's argument is incompatible with the "contrary to law" standard that governs the Court's review of this enforcement proceeding. CREW does not argue that the Commission *must* treat all electioneering communications as indicative of a major purpose to nominate or elect candidates. Instead it argues that it would be a "*permissible* interpretation of *Buckley*'s 'major purpose' test" to treat all electioneering communications as indicative of a major purpose to nominate or elect candidates. Opp. at 36 (emphasis added). This approach would *not* be "permissible," as it would impose political committee status on issue advocacy groups contrary to the Supreme Court's holding that such regulation would violate the First Amendment. *See, e.g.*, *Mass. Citizens for Life*, 479 U.S. at 252 n.6; *Buckley*, 424 U.S. at 79. But the Court need not even decide that issue in this case, because it is governed by the "contrary to law" standard. CREW must show that "'the FEC dismissed the complaint as a result of an *impermissible* interpretation of [FECA].'" *CREW I*, 209 F. Supp. 3d at 85 (quoting *Orloski*, 795 F.2d at 161) (emphasis added). It is not enough for CREW to argue that another interpretation may also be permissible. CREW must show that the approach taken by the Commission was not allowed.

CREW cannot meet this standard. It argues only that the Commission could have gone further and still complied with the First Amendment. This argument accepts that the Commission already complied with the law. And there is no requirement that the Commission go further if possible and test the outer limits of the First Amendment. Instead, the rule is the opposite: the Commission is required "to safeguard the First Amendment." *Van Hollen, Jr. v. FEC*, 811 F.3d 486, 501 (D.C. Cir. 2016); *cf. Blount v. SEC*, 6l F.3d 938, 946 (D.C. Cir. 1995) ("The First Amendment does not require the government to curtail as much speech as may conceivably serve its goals."). The Commission was thus right to proceed cautiously, hew closely to existing precedent, and ensure compliance with the First Amendment—particularly in this enforcement context.

CREW's challenge fails, then, because it was by definition *not* contrary to law to ensure compliance with the First Amendment by excluding spending on electioneering communications that were indicative of a major purpose to engage in issue advocacy from the amounts it considered indicative of a major purpose to nominate or elect candidates. The Supreme Court has held that political committee status *cannot* reach a "group[] engaged purely in issue discussion," *Buckley*, 424 U.S. at 79, or a group whose "central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates," *Mass. Citizens for Life*, 479 U.S. at 252 n.6. The Supreme Court has also recognized that some electioneering communications have "no electioneering purpose" because they are genuine issue ads. *McConnell*, 540 U.S. at 206. The Commission's careful approach on remand thus sought to avoid attaching political committee status to an issue advocacy group, as attaching that status to an issue advocacy group *would* violate the First Amendment.

The Commission's cautious approach was thus consistent with Supreme Court precedent. It also finds support in congressional intent, as Congress has rejected efforts to regulate issue advocacy groups. In 2007, the Senate rejected an effort that would have regulated grassroots lobbying by requiring disclosures of "major media campaigns . . . designed for the purpose of influencing Members of Congress or the executive branch on specific issues." 153 Cong. Rec. S647-01, S660, 2007 WL 108633 (daily ed. Jan. 17, 2007). Senator McCain, the architect of modern campaign finance reform, explained that the provision "simply goes too far, and I fear that the unintended consequences would negatively impact the legitimate, constitutionally protected activities of small citizen groups and their members." 153 Cong. Rec. S737-02, S740, 2007 WL 120450 (daily ed. Jan. 18, 2007).

The House of Representatives rejected a companion measure, citing similar concerns that "[c]itizens have a constitutional right to contact their elected representatives on any issue. Regulation, particularly when accompanied by penalties for failure to completely comply with all the regulations, can chill free speech no less than an outright censorship ban can." Transcript, House Judiciary Committee Meeting, 2007 WL 1464454 (May 17, 2007). The House thus opted for a hands-off approach that "strengthen[s] robust communications between average citizens and Members of Congress, through such things as phone calls and constituent letters." H. Rep. No. 110-161, at 33 (2007).

The bright-line rule that CREW advocates is thus contrary to congressional intent and precedent that protects issue advocacy groups from intrusive political committee regulation. Not every electioneering communication is indicative of a major purpose to nominate or elect candidates, and the Commission was not required to treat them as if they were. CREW's challenge must be rejected and summary judgment entered in AAN's favor.

B. The Commission's Decision Was Not "Arbitrary And Capricious."

The Commission provided far more than a "rational basis" for its decision, and so it is not arbitrary and capricious. *See Orloski*, 795 F.2d at 167 (citation omitted). The Commission conducted a careful ad-by-ad review of AAN's electioneering communications that showed that, at most, AAN devoted 26 percent of its spending between 2009 and 2011 to activities that indicated a major purpose to nominate or elect candidates. AR 1780. It considered AAN's "mode of organization" as a Section 501(c)(4) organization, *id.*, a status that is incompatible with its major purpose being the nomination or election of candidates, *see* 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii). It looked again at AAN's "official statements," which evidence its issue-centric mission to "create, encourage, and promote center-right policies based on the principles of freedom, limited government, American exceptionalism, and strong national policy." AR 1764. The Commission's careful analysis, which "relied heavily" on its specialized expertise and experience, AR 1780, easily survives the deferential arbitrary and capricious standard.

As next detailed, CREW's challenges to the Commission's thoughtful work are either repackaged requests to treat all electioneering communications as indicative of a major purpose to nominate or elect candidates, amount to a mere disagreement with the Commission, or are grounded in a mischaracterization of the Commission's analysis. Because these arguments do not provide a basis for disturbing the Commission's careful resolution of this matter, CREW's challenge must be rejected.

First, CREW repeatedly and inaccurately claims that the Commission did not apply its specialized expertise to decide the issues presented, but simply accepted arguments made by AAN in a supplemental filing, *see, e.g.*, Opp. at 9, 10, 17 n.3, 36. Not so. The Commission "rel[ied] heavily on [its] expertise and experience regulating political activities and non-political

committees," AR 1780, and parted ways with AAN in several material ways.[3] For example, AAN argued that all twenty "electioneering communications are issue advertisements that are not campaign related" and so should not be considered indicative of a major purpose to nominate or elect candidates. *See* AR 1737, 1742-54. The Commission disagreed and found that four were indicative of that purpose and that another was "a close call." AR 1770-79. The Commission also did not limit itself to the "context identified by AAN," as CREW contends. Opp. at 36. It instead conducted independent research to better understand "the context in which the electioneering communications were run" seven years ago. AR 1768. Its remand decision, as a result, relies on several press reports in addition to those identified by AAN.[4] CREW has no basis for questioning the Commission's application of its expertise to the facts in this matter.

Second, CREW argues that the Commission ignored where and when the advertisements were run. Opp. at 36-39. According to CREW, the Commission should have considered whether the ads were run in "tightly contested" races, whether AAN ran similar ads in races where incumbents were not up for re-election, and whether AAN ran issue advertisements after the election concluded. *Id.* But these are not "important aspect[s] of the problem" that the Commission "entirely failed to consider." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm*

[3] Of course, there would have been nothing "arbitrary and capricious" had the Commission decided to accept the lawful and reasonable analysis submitted by AAN, particularly because the statute calls for such submissions. *See* 52 U.S.C. § 30109(a)(1); *see also* AR 1554 (notifying AAN that, "[u]nder the Act you have the opportunity to demonstrate in writing that no action should be taken against [AAN] in this matter.").

[4] For example, page 7 of the Statement of Reasons cites five articles that are not referenced in AAN's supplemental submission. *Compare* AR 1734-59 *with* AR 1769 (citing Alexander Bolton, Democrats to Stuff 20 Bills into Post-Election Lame-Duck Session, The Hill (Sept. 28, 2010); Robin Bravender, Cap-and-Trade Prospects Shaky in Lame Duck, N.Y. Times (Jul. 29, 2010); John Fund, The Obama-Pelosi Lame Duck Strategy, Wall St. J. (Jul. 9, 2010); Charles Krauthammer, Beware the Lame Duck, Wash. Post (Jul. 23, 2010); Liz Halloran, Congress Braces for Hectic Lame-Duck Session, NPR (Nov. 14, 2010)).

Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). CREW's allegations were not included in its administrative complaint. CREW alleged there only that the electioneering communications were *per se* "for the purpose of the nomination or election of [a] federal candidate." AR 1486. The Commission cannot be found to have "entirely failed to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, where the "aspect" relied upon was not "important" enough to raise before the agency, *see, e.g. Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015) (faulting agency for failure to "engage[] the arguments *raised* before it") (emphasis added); *Am. Ass'n of Cosmetology Schs. v. Devos*, No. 17-0263, 2017 WL 2804886, at *15 (D.D.C. June 28, 2017) (faulting agency for failure to explain "how it resolved any significant problems *raised* during [the administrative process]") (emphasis added).

And, in any event, the Commission did consider where and when the advertisements were run. It noted that "electioneering communications, by definition, must refer to a clearly identified federal candidate" in the days prior to an election. AR 1768. It identified each incumbent that was named in an advertisement. AR 1770-79. It considered the broader context of the races at issue, like, for example, whether the advertisement also identified the incumbent's opponent in the particular race. AR 1778. And, had CREW questioned whether AAN has funded issue advertisements outside of the election context, a review of AAN's website would have confirmed that AAN's issue advocacy has continued.[5]

[5] AAN's issue advertisements in 2017 include the following: *American Action Network Launches $3 Million Television Ad Campaign Promoting The Tax Cuts And Jobs Act* (Nov. 7, 2017), *available at* http://americanactionnetwork.org/press/american-action-network-launches-3-million-television-ad-campaign-promoting-tax-cuts-jobs-act/; *American Action Network Launches $2 Million Ad Blitz Ahead Of Budget Vote* (Oct. 24, 2017), *available at* http://www.americanactionnetwork.org/press/american-action-network-launches-2-million-ad-blitz-ahead-budget-vote/.

The Commission was right not to focus more on these issues. CREW's definition of a "tightly contested" race captures any race that at any time was labeled by any poll as a "toss up" race or one that "leans" Republican or Democrat. Opp. at 36-37. Essentially any race could be called "tightly contested" under this standard. The question thus remains the same as the one that the Commission considered—does the advertisement reflect a major purpose to nominate or elect candidates? That classification does not (and should not) change with the latest polls. The Commission's review of the "New Hampshire" advertisement proves this point. CREW relies on a poll that labeled the 2010 New Hampshire Senate race as "leans GOP." *Election 2010: Senate Balance of Power*, Rasmussen Reports (Nov. 1, 2010), *available at* http://www.rasmussenreports.com/public_content/politics/elections/election_2010/election_2010_senate_elections/election_2010_senate_balance_of_power (cited at Opp. at 36). The same report notes that the same New Hampshire Senate race was at another time considered "Solid Republican." *Id.* The "New Hampshire" advertisement did not change simply because the race was no longer "tightly contested" under CREW's definition. Instead, the Commission found that, under the standard adopted in the Court's prior decision, the advertisement was always indicative of a major purpose to nominate or elect candidates. AR 1778.

The Commission was also right to decide that advertisements do not *per se* become indicative of a major purpose to nominate or elect candidates simply because they refer to a candidate in the days before an election. As the Commission noted, these facts mean only that the advertisement meets the definition of an electioneering communication; therefore, "by themselves, [they] do not make the communications electoral." AR 1768. It has long been accepted that an advertisement may fall within this definition and yet have "no electioneering purpose." *McConnell*, 540 U.S. at 206.

There are many reasons to broadcast an issue advertisement that mentions a candidate prior to an election that have nothing to do with the election itself. Candidates—particularly incumbents—are "intimately tied to public issues involving legislative proposals and governmental actions." *Buckley*, 424 U.S. at 42. "Not only do candidates campaign on the basis of their positions on various [public] issues, but campaigns themselves generate issues of public interest." *Id.* And issue advocacy groups have learned that "members of the public are generally more receptive to and engaged in considering government policy ideas and issues as elections near. If that is the time when people will listen, that is the time to speak." *McConnell v. FEC*, 251 F. Supp. 2d 176, 794 (D.D.C. 2003) (Leon, J.) (citation omitted). This is particularly true because "once an election occurs, there seems to be a period of fatigue during which political matters are of less interest, making issue ads then less effective." *Id.* (citation omitted).

Identifying a candidate in an issue advertisement before an election is a valuable way to "focus the public's attention" on an issue. *Id.* (citation omitted). While "citizens in general may not pay close attention to the activities of their representative" as a general matter, election season can "bring to the constituents' attention [similarities and] differences between their views and their representative's activities." Michael J. Waggoner, *Log-Rolling & Judicial Review*, 52 U. Colo. L. Rev. 33, 39-40 (1980). As a result, an incumbent's "support or opposition to a bill or policy may have important persuasive effect" that can convince the public to take action and contact their representative about the issue. *McConnell*, 251 F. Supp. 2d at 794 (citation omitted).

Because "elected officials are most attuned to the views of their constituents in the pre-election period," issue advertisements can be particularly useful way to affect policy. *Id.* (citation omitted). Members of Congress are likely to be back home in their districts during this

period, seeking "to determine the views of their constituents." *FEC v. WRTL*, 551 U.S. 449, 472 (2007) (opinion of Roberts, C.J.) ("*WRTL II*"). An "ad run at that time may succeed in getting more constituents to contact the Representative while he or she is back home." *Id.* The pre-election period is also an ideal time to convince viewers to contact their representatives and communicate a policy position because doing so can lead to real change—either through a commitment from a candidate or by turning the election into a referendum about a policy preference. *Id.* (citation omitted). This was ever more true in 2010 because Congress planned a lame-duck session to begin immediately after the election.

"[T]he right to speak out at election time is [thus] one of the most zealously protected under the Constitution." *FEC v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2d Cir. 1980). Indeed, "the time that [issue advocacy] is most vital in a democracy [is] during an election season." *See* 145 Cong. Rec. S12575, S12583 (daily ed. Oct. 14, 1999) (letter from Laura W. Murphy, Director, ACLU Washington Office). That is the time "when everyone is paying attention!" *Id.* And when a lame-duck session is anticipated (as it was here), the pre-election period can become a "period[] of intense legislative activity." *See* Br. for Appellant, *Wis. Right to Life, Inc. v. FEC*, No. 04-1581, 2005 WL 3076093, at *19 n.16 (U.S. Nov. 14, 2015) (quotations omitted).

The ACLU has thus explained that it "is not unusual for the ACLU's legislative and issue advocacy to be most intense during an election year, especially in the days leading up to the election." *Id.* For good reason, then, an issue advocacy group may "choose to run an issue ad to coincide with public interest rather than a floor vote." *WRTL II*, 551 U.S. at 473. The mere fact that an election increases public interest does not mean that every electioneering communication is indicative of a major purpose to nominate or elect candidates.

Third, CREW argues that the Commission should have considered what it characterizes as "personal and vitriolic attacks" on a candidate's prior record. Opp. at 39. But the Commission *did* consider criticism in the advertisements. For example, the Commission decided that criticism in the "Bucket" advertisement, paired with other aspects of the advertisement, created an advertisement that indicated a major purpose to nominate or elect candidates. *See* AR 1774. The "Wallpaper" advertisement, in contrast, 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 made the advertisement indicative of an effort "to marshal public sentiment to persuade the officeholders to alter their voting stances." AR 1772. The Commission's careful and nuanced consideration of criticism deserves deference, and shows that the Commission did not "entirely fail[] to consider an important aspect of the problem." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007).

Fourth, CREW thinks that the Commission failed to "adequately explain" why the reference to "November" in certain advertisements did not require that they be counted as indicative of a major purpose to nominate or elect candidates. Opp. at 39-40. But the Commission provided ample explanation for its conclusion, researching the legislation that was expected during the lame-duck session, AR 1768-69, confirming that "Congress did, in fact, meet in lame-duck session in November," AR 1769, and recognizing that several advertisements tied the November reference to a specific bill number, *see, e.g.*, AR 1770 ("Quit Critz"), 1771 ("Ridiculous," "Wallpaper"), 1773 ("Naked"), 1774-75 ("Leadership"), 1775 ("Mess," "Repeal," "Secret"), 1776 ("Skype"). CREW disagrees with the Commission's assessment, arguing that some of the "legislative issues [discussed] were not confined to November." Opp. at 40. But the

advertisements were run at a time when AAN had to predict what was going to occur in November—as the Commission explained, there was then "much *speculation* about[] the legislative proposals that Congress would take up during the lame-duck session." AR 1769 (emphasis added). CREW's argument thus boils down to a mere "difference in view" about how the references to "November" should have been handled, which does not warrant relief. *Defs. of Wildlife*, 551 U.S. at 658 (citation omitted).

Fifth, CREW argues that the Commission failed to consider "the auditory and visual aspects" of the advertisements. Opp. at 40-41. But reviewing an advertisement transcript cannot be arbitrary and capricious because it 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. A transcript review 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, it is not even clear that the Commission failed to consider the actual advertisements, since it "reconsidered the matter in full by reviewing the record anew," AR 1767, and the record included references to advertisement videos, AR 1483-84.

Finally, CREW challenges the analysis as being "rushed" and "rife with basic errors." Opp. at 41. But CREW does not identify any error that would justify the relief it is seeking under the arbitrary and capricious standard. CREW claims that the Commission "again looked to the lifetime expenditures of the group," Opp. at 41, but the Commission also "considered AAN's spending solely in a single year" and reached the same conclusion, *see* AR 1779; *see also CREW I* Mem. Op. at 5 n.4 ("The Commissioners also made clear that their determination did not turn on the application of the 'lifetime-only' rule, which the Court had considered arbitrary

and capricious, at least as applied to AJS."). CREW also claims that the Commission "completely missed" an advertisement that referenced Representative Perlmutter, Opp. at 41, but the Commission considered the advertisement in the form that referenced Representative Shauer, AR 1484 ¶ 15, 1775. And CREW thinks that the Commission "ignored $1.1 million that AAN reported to the IRS as political spending above-and-beyond their spending on express advocacy." Opp. at 41. But the Commission *did* consider the amounts reported to the IRS, *see, e.g.*, AR 1638, and concluded that *more* than $1.1 million above-and-beyond AAN's spending on express advocacy was indicative of a major purpose to nominate or elect candidates, *see* AR 1779. Moreover, even if the Commission added another $1.1 million in spending to the amounts it considered indicative of a major purpose to nominate or elect candidates, AAN's major purpose *still* would not be the nomination or election of candidates, as it would mean that only about 30 percent of AAN's spending was indicative of that purpose. *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.").

The record thus fully supports the Commission's reasonable conclusion that AAN was not a political committee because its major purpose was not and is not the nomination or election of candidates. The Court should reject CREW's challenge and grant summary judgment in AAN's favor.

C. The Commission's First Decision Was Lawful.

Summary judgment could also be granted to AAN because the Commission's initial dismissal decision was not contrary to law. This Court found otherwise for reasons detailed in its September 2016 opinion. *See id*. 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. *Id.* 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.

CREW claims that AAN has not made "any serious attempt to argue that the Court was wrong" in its initial conclusion. Opp. at 25 n.8. Not so. In its Motion for Summary Judgment, AAN "urge[d] 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." AAN's Mot. for Summ. J. at 26-27 (Aug. 4, 2017) (Dkt. No. 30). But, in the interest of efficiency, and because the Commission's dismissal on remand was entirely consistent with the Court's earlier decision, AAN accepted the Court's September 2016 ruling for purposes of its motion and incorporated its prior pleadings by reference instead of repeating arguments that were fully briefed and ruled upon by the Court then.

Summary judgment should therefore be granted to AAN regardless of whether the Court reviews the initial Statement of Reasons or the one issued on remand. At all stages in this case, the Commission properly and reasonably concluded—in full compliance with the law—that AAN is an issue advocacy group and *not* a political committee.

IV. CONCLUSION

AAN was, and remains, an issue advocacy group that does not have the major purpose of nominating or electing candidates. This is evident from AAN's official statements, its mode of organization as a Section 501(c)(4) social welfare organization, its grassroots lobbying and issue advocacy efforts, and its spending. During the mid-2009 to mid-2011 time period at issue, AAN devoted only about 15% of its spending to express advocacy or its functional equivalent. AR 1709. And, under the standard set forth in the Court's prior decision, AAN devoted, at most,

26% of its spending to express advocacy and electioneering communications that indicated a major purpose to nominate or elect candidates. AR 1780.

Given these facts, the Commission reasonably and correctly found that "there is no reason to believe that AAN violated the Act by failing to register with the Commission as a political committee," *id*., because AAN "did not have as its major purpose the nomination or election of candidates, AR 1764. This Court should reject CREW's challenge and grant summary judgment in AAN's favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on November 20, 2017, I served the unredacted version of the American Action Network's Reply Memorandum in Further Support of Its Motion for Summary Judgment and in Opposition to CREW's Cross-Motion for Summary Judgment – which was filed with the Court under seal – via email on the following counsel:

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