UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' REPLY IN SUPPORT OF
PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

INTRODUCTION

The controlling commissioners on remand once again dismissed Plaintiffs Citizens for Responsibility and Ethics in Washington and Melanie Sloan's ("Plaintiffs") complaint against the American Action Network ("AAN"). As Plaintiffs detailed in their opening brief, the controlling commissioners reached this conclusion by interpreting *Buckley v. Valeo*, 424 U.S. 1, 79 (1976), to preclude the Federal Election Commission ("FEC") from finding a violation of the Federal Election Campaign Act ("FECA") even though all parties agree that AAN violated the express terms of the statute by making more than $1,000 in qualifying political expenditures in a year, but not registering and reporting as a political committee. In their response to Plaintiffs' brief, the FEC and AAN attempt to evade the fact that the sole rationale for the controlling commissioners' conclusion is an interpretation of *Buckley*. Rather, they devote much ink to extolling the controlling commissioners' factual analysis, which—this time—contained some discussion of AAN's ads, in an attempt to distract from the relevant issue here: whether the controlling commissioners misinterpreted *Buckley* once again.

The issue on review here is the controlling commissioners' interpretation of *Buckley*, because absent *Buckley*, the plain language of the FECA requires that AAN register and report as a political committee. Thus, the only legal basis for excusing AAN from registering and reporting is if, under *Buckley*, AAN lacks as its "major purpose the nomination or election of a candidate." AR 1779. If *Buckley* does not require AAN to be excused, then the FECA requires AAN to report. Here, the controlling commissioners interpreted *Buckley* as requiring AAN to be excused because the group spent money on electioneering communications, which those commissioners ruled are so non-political that they count in favor of finding that AAN is not a

political committee. In other words, under their interpretation of *Buckley*, the FEC was forbidden from applying the plain language of the FECA to recognize AAN is a political committee solely *because* AAN ran ads that, according to the Supreme Court, by their very nature are "specifically intended to affect [an] election." *McConnell v. FEC*, 540 U.S. 93, 127 (2003). Nothing in the FEC's or AAN's briefs can hide the fact that that is not only an impermissible interpretation of *Buckley*, it is a patently absurd interpretation of the Supreme Court's decision that, as before, "blinks reality." *CREW v. FEC*, 209 F. Supp. 3d 77, 93 (D.D.C. 2016) (Cooper, J.).

Under any level of review, but especially under the *de novo* review warranted here, the controlling commissioners' interpretation of *Buckley* is impermissible. Providing voters information "about the sources of election-related spending," *Citizens United v. FEC*, 558 U.S. 310, 367 (2010) (quoting *McConnell*, 424 U.S. at 66), is vital to the "free functioning of our national institutions," *Buckley*, 424 U.S. at 67. All electioneering communications are election-related spending. *McConnell*, 540 U.S. at 127, 196. Thus, no reasonable interpretation of *Buckley* excuses a group from reporting because the group in question expended millions of dollars on ads that are so substantially related to elections that Congress has subjected them *all* to campaign disclosure laws with the Supreme Court's approval. Nor does a reasonable interpretation of *Buckley* result in an "unworkable" test that carves out so-called "issue advocacy" electioneering communications from others, *Indep. Inst. v. FEC*, 216 F. Supp. 3d 176, 188 (D.D.C. 2016), based on an arbitrary and capricious cherry picking of facts to the exclusion of the overwhelming evidence of electoral purpose. Nor does it require the FEC to adopt that test in the service of an "inapposite" framework from a case that has no relevance to the scope of

federal campaign finance disclosure laws. *CREW*, 209 F. Supp. 3d at 90 (discussing *Wisconsin Right to Life, Inc. v. FEC (WRTL II)*, 551 U.S. 449 (2007)). In short, *Buckley* did not forbid the FEC from applying the plain language of the FECA to an organization that meets the statutory $1,000 expenditure threshold simply because the group engages in *even more* federal electioneering. Because *Buckley* does not command AAN to be excused from reporting, the plain language of the FECA governs, which indisputably requires AAN to register as a political committee and report its contributors.

The controlling commissioners' continued refusal to find reason to believe that AAN violated the FECA based on their "impermissible interpretation" of *Buckley* is contrary to law. *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). Accordingly, the dismissal which "result[s]" from it is contrary to law. *Id.* Plaintiffs therefore respectfully request the Court to once again vacate their dismissal, correct their erroneous interpretations of law, and remand for consideration in light of the correct interpretation of *Buckley*.[1]

ARGUMENT

I. If *Buckley* Does Not Forbid Recognizing AAN is a Political Committee, the FECA Commands the FEC To Do So.

As they did before, the controlling commissioners on remand found no reason to believe AAN violated the FECA because they interpreted the major purpose test from *Buckley*, 424 U.S. at 79, to prohibit recognizing the group is a political committee. As CREW's opening brief established, that interpretation was, and still is, contrary to law. Nonetheless, the FEC and AAN

[1] On January 5, 2018, the parties submitted a stipulation dismissing without prejudice Plaintiffs' claims with respect to Americans for Job Security. *See* Joint Stip. of Partial Dismissal, ECF No. 44. Accordingly, this brief does not address those claims.

argue that Plaintiffs have failed to show it was contrary to law for the controlling commissioners to excuse AAN from registering and reporting as a political committee. The FEC asserts that "[n]o law—not this Court's remand decision or any other decision—compels the FEC to view an organization's spending on non-express advocacy electioneering communications as categorically indicative of a major purpose of nominating or electing candidates." FEC Mot. 35, ECF No. 28; *see also* FEC Reply 19, ECF No. 40 (arguing Plaintiffs do "not identify any law which the controlling [c]ommissioners contravened"); AAN Br. 9–10, ECF No. 38 ("[T]his case is not about the outer bounds of what the Commission *could* have done."). Thus, they argue, because no law orders the controlling commissioners to subject AAN to disclosure, the controlling commissioners were free to simply excuse AAN from following the law and free to deprive Plaintiffs and the voting public of vital information.

Both the FEC and AAN fundamentally misunderstand the inquiry here: because the FECA commands the FEC to recognize *all* groups that meet the FECA's thresholds are political committees, the *only* basis the FEC could have had to ignore that command is that *Buckley* forbade it from doing so. It is the FECA that "the controlling [c]ommissioners contravened." *Cf.* FEC Reply 19. The only possible basis the controlling commissioners could have to contravene the FECA is that *Buckley* compelled them to. Thus, the inquiry here must start with reviewing the controlling commissioners' interpretation of *Buckley*. To prevail, Plaintiffs need only show that *Buckley* does not *compel* the agency to excuse groups from reporting because they run "non-express advocacy electioneering communications," *cf.* FEC Mot. 35; that is, Plaintiffs need only show the dismissal "result[ed]" from an impermissible interpretation of law, *Orloski*, 795 F.2d at 16. The parties do not dispute that AAN qualifies as a political committee

under the terms of the statute. Accordingly, unless *Buckley* compels the FEC to excuse AAN from the FECA's reporting requirements, the dismissal was contrary to law.

A. The Issue in Dispute is the Controlling Commissioners' Interpretation of *Buckley*, Not the FECA.

The FEC and AAN do their best to attempt to recast the decision below as one that involves no legal interpretation at all, and instead as one based solely on the FEC's expertise and factual analysis. But their attempts fail. Interpretation of the statutory text, a task on which the agency's expertise would come to bear,[2] was not necessary because all parties agree AAN meets the statutory requirements to report under the FECA. Thus, all that remained was to interpret *Buckley*'s command to carve out from the FECA's regime those groups that engaged in activities so unrelated to elections that, while they would meet the statute's thresholds, subjecting those groups to disclosure would not "fulfill the purposes of the act." 424 U.S. at 79. Accordingly, it cannot reasonably be disputed that the controlling commissioners were engaging in legal interpretation.

The FECA requires any organization which "makes expenditures aggregating in excess of $1,000 during a calendar year" to report its contributors. 52 U.S.C. §§ 30101(4); 30104(a), (b). There is no dispute that AAN spent more than $1,000 on qualifying political expenditures (and indeed spent much more) in a calendar year and that, therefore, AAN meets the statutory qualifications of a political committee. AR 1645–66, 1765. There is no dispute that, looking solely at the statute, the FEC must find AAN has violated the law by failing to register and report as a political committee. 52 U.S.C. §§ 30101(4); 30104(b). Nor is there any dispute that, by

[2] *See N.Y. N.Y., LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002); *CREW*, 209 F. Supp. 3d at 87.

failing to do that, the FEC has deprived Plaintiffs and millions of American voters of information to which Congress entitled them—the identities of AAN's contributors—information that Congress recognized was vital to the "free functioning of our national institutions." *Buckley*, 424 U.S. at 67. Finally, there is no dispute that the only basis the FEC could have to ignore the unambiguous commands of Congress is that the carve-out created by the Supreme Court in *Buckley* required it to do so. Neither the FEC nor AAN identify any other possible basis for the controlling commissioners' divergence from the FECA's plain terms, nor could they. Indeed, because the FECA "speaks clearly to the precise question at issue" about what groups are to be subject to political committee disclosure, *Buckley* provides the only grounds on which the controlling commissioners may lawfully refuse to "give effect to the unambiguously expressed intent of Congress." *Barnhart v. Walton*, 535 U.S. 212, 217–218 (2002). The issue in dispute, therefore, is whether the controlling commissioners correctly interpreted *Buckley*'s carve-out.

Despite the FEC's and AAN's attempts to reframe the decision below, the controlling commissioners squarely understood the only lawful basis to excuse AAN from reporting was because *Buckley* commanded it: that is why they, in fact, based their dismissal on their interpretation of the case. They recognized that, but for *Buckley*, AAN would qualify as a political committee under the plain terms of the FECA. AR 1645–66, 1765; *see also* AR 1779 (recognizing that, while AAN qualifies as a political committee under the FECA, they would find a violation "only if" *Buckley* permitted it). Thus, they understood their task was to interpret *Buckley*, not to interpret the FECA, and set about doing so. *See* AR 1765 n.12 (recognizing *Buckley* is the source of the "major purpose" carve out from the FECA); AR 1767 (recognizing question was whether "AAN's 'major purpose' is Federal campaign activity"); *id.* (creating test

to "evaluat[e] major purpose"); AR 1772 (concluding ads "are not indicative of a major purpose to nominate or elect federal candidates" and therefore justified excusing AAN from reporting); AR 1774 (same); AR 1776 (same); AR 1780 (concluding AAN lacked the requisite major purpose required by *Buckley*, and therefore must be excused from reporting). Whatever factual analysis the controlling commissioners conducted was grounded in their understanding of the test *Buckley* provided—only by first understanding the scope of the carve-out *Buckley* and subsequent caselaw created could they understand what facts were relevant or determinative on the question of whether any particular activity would excuse a group like AAN from reporting. The test against which AAN's ads are judged is derived solely from their understanding of *Buckley* and subsequent case law. AR 1767–78 (providing only caselaw as source for proposed test). That is why their decision, notwithstanding their "ten singled-spaced pages" repeating AAN's ads, FEC Reply 7, ultimately results from an interpretation of *Buckley*.

Buckley is the only basis the controlling commissioners cited or could cite as a lawful basis for excusing AAN from political committee reporting. Accordingly, the issue on review here is the controlling commissioners' interpretation of *Buckley*.[3]

[3] While the FEC and AAN make feints at arguing that the dismissal was purely discretionary, FEC Reply 6 n.1, AAN Reply 9–10, the statement of the controlling commissioners does not cite discretion as its basis for dismissal but, rather, cites their legal interpretation of *Buckley*. Moreover, discretion would not be a lawful basis for dismissal. The commissioners may not constitutionally pick and choose what groups must report as political committees and what information the public has access to based solely on their discretion. *See Lamont v. Postmaster General*, 381 U.S. 301, 306 (1965) (agency's discretionary power over what information plaintiff received was unconstitutional). Thus, the only factors the FEC may constitutionally consider when deciding whether to require an organization to report as a political committee are the statutes plain terms and the commands of the judiciary.

B. The Challenged Interpretation is that *Buckley* Excuses AAN from Disclosure Because AAN Made Electioneering Communications.

The controlling commissioners' analysis below necessarily started with an interpretation of *Buckley*, and the review of that analysis here necessarily starts with determining whether the controlling commissioners correctly interpreted *Buckley*. The three controlling commissioners refused to apply the plain terms of the FECA to AAN because they believed *Buckley* forbade them from doing so. AR 1779. In particular, they interpreted *Buckley* to forbid the FEC from recognizing an organization is a political committee if the organization makes a sufficient amount of electioneering communications that the controlling commissioners deem "issue" advocacy. AR 1768. Under their analysis, AAN spent a sufficient sum on these ads, such that AAN's spending on other ads the commissioners deemed political amounted to only 22% of the group's total spending. AR 1779.

Buckley, however, only forbids applying the FECA's political committee obligations to groups that, while possessing the requisite statutory characteristics, (a) are not under the "control of a candidate," or (b) do not have a "major purpose" of nominating or electing candidates. *Buckley*, 424 U.S. at 79. *Buckley* found applying the political committee burdens to these groups, notwithstanding the clear terms of the statute, would not "fulfill the purposes of the Act" and therefore ordered the FEC to excuse them from political committee reporting. *Id.* The controlling commissioners therefore must have found that, because AAN ran certain electioneering communications, requiring it to register as a political committee and disclose its contributors would not "fulfill the purposes of the Act."

The question before the Court then is whether the controlling commissioners were correct to interpret *Buckley* to forbid the FEC from applying the FECA to AAN because of the millions

of dollars AAN spent on electioneering communications. If *Buckley* does not forbid recognizing AAN is a political committee, then the FECA requires the FEC to do so.

As Plaintiffs demonstrated in their opening brief and further show below, the answer to that question is no. No permissible interpretation of *Buckley* would excuse an organization from disclosing information to voters *because* that group runs an electioneering communication—a communication bearing qualities that the Supreme Court squarely held entitle voters to information about its funding sources. *McConnell*, 540 U.S. at 196–97. Congress and the Supreme Court recognize that electioneering communications—without exception—"constitute campaigning every bit as much as . . . any ad currently considered to be express advocacy." 147 Cong. Rec. S2455 (daily ed. Mar. 19, 2001) (Sen. Snowe); *accord McConnell*, 540 U.S. at 196 (holding government's interest in mandating disclosure of campaign advocacy "appl[ies] in full" to the "entire range" of ads that meet the electioneering communication definition).[4] Accordingly, no reasonable or permissible interpretation of *Buckley* would deny Plaintiffs and the public information *solely because* the reporting group engaged in conduct that Congress and the Supreme Court has deemed electoral. Because the controlling commissioners' absurd conclusion to the contrary therefore resulted from an "impermissible" interpretation of *Buckley*, their decision is "contrary to law." *Orloski*, 795 F.2d at 161.

[4] *See also* Decl. of Stuart McPhail in Support of Pls. Reply ("McPhail Decl."), Ex. 1. (Comments of Sen. McCain et al. at 3, Notice 2002-13 (FEC Aug. 23, 2002) ("[I]n general, reporting for electioneering communications should be analogous to reporting for independent expenditures.")); *id.* Ex. 2 (Br. of Intervenor-Defs. 60 n.48, *McConnell v. FEC*, 540 U.S. 93 (2003) (regulating electioneering communications "serve[d] the very purposes that underlie the preexisting independent expenditure provisions: bringing campaign spending of the 'issue' ad variety within the scope of [the] longstanding source and disclosure rules" that govern express advocacy)).

II. The Controlling Commissioners Interpreted *Buckley* To Compel the FEC to Excuse AAN from Political Committee Reporting. That is Contrary to Law.

The controlling commissioners interpreted *Buckley* to excuse groups from reporting when they expend a sufficient sum on certain types of electioneering communications. AR 1779–80. As Plaintiffs demonstrated in the previous litigation and in their opening brief here, *Buckley* does not excuse groups from reporting merely because they run electioneering communications. Nonetheless, the FEC and AAN argue that the controlling commissioners were right to excuse AAN because it ran certain types of electioneering communications—communications which Congress and the Supreme Court recognize are election-related and warrant disclosure to voters. Controlling precedent, including from the Supreme Court, however, reject the controlling commissioners' conclusion that an electioneering communication can ever justify denying voters' access to information, and nothing cited by the FEC nor by AAN salvage that absurd conclusion.[5]

[5] While AAN is still required to file one-time event reports, those reports do not provide nearly the amount of information to voters as political committee reporting does. A political committee must report all contributions they receive above $200. 52 U.S.C. § 30104(b)(3)(A). A one-time report about an electioneering communication, however, only requires the disclosure of contributors who gave over $1,000 in the past year, *id.* § 30104(f)(2), and, if the maker is a corporation like AAN, only those contributors who gave to "for the purpose of furthering electioneering communications," 11 C.F.R. § 104.20(c)(9). That type of reporting is easily evaded by simply not accepting (or claiming not to accept) contributions earmarked for electioneering communications, but still accepting funds intended to influence elections. Effectively, that means groups like AAN do not report *any* contributions, and AAN has never disclosed a single contributor even on its one-time reports. *See* McPhail Decl. Exs. 3–6 (example AAN Form 9s reporting electioneering communications but disclosing no contributions). Thus, relieving AAN of political committee reporting here effectively excuses AAN from *all* contributor disclosure. Moreover, by creating a dual reporting mechanism of one-time reports and more fulsome political committee reporting, Congress understood the one-time event reporting was not an adequate substitute where political committee reporting was warranted.

A. *Buckley* Does Not Forbid Treating Groups as Political Committees Solely Because They Run Electioneering Communications.

The controlling commissioners found that AAN devoted only 22% of its spending to qualifying political expenditures. AR 1779. They did so despite the fact that AAN spent over $13 million on electioneering communications: a sum that, when considered along with their independent expenditures, exceeded 50% of AAN's spending in a two-year period (never mind in the single relevant calendar year). The only reason the controlling commissioners refused to recognize AAN as a political committee—the only reason the controlling commissioners deprived Plaintiffs and voters of knowledge of the sources of election-related spending—is because they treated most of the money AAN spent on electioneering communications as entirely unrelated to the election or defeat of candidates.

For example, among the $13 million worth of electioneering communications AAN ran in 2010 was one called "Read This," which told voters:

> Congress doesn't want you to read this. Just like [candidate]. [Candidate] & Nancy Pelosi rammed through government healthcare. Without Congress reading all the details. $500 billion in Medicare cuts. Free healthcare for illegal immigrants. Even Viagra for convicted sex offenders. So tell [candidate] to read this: In November, Fix the healthcare mess Congress made.

CREW, 209 F. Supp. 3d at 80; AR 1722. The ad was (1) broadcast (2) to 50,000 or more voters (3) in the clearly identified candidate's electorate (4) shortly before the candidate's election "[i]n November." AR 1722; 52 U.S.C. § 30104(f); McPhail Decl. Ex. 3 (AAN Form 9 (Oct. 15, 2010) (filing for one version of "Read This" ad)). Congress has found these characteristics cause the ad to "constitute campaigning every bit as much as . . . any ad" that expressly tells the voter to "vote against" the named candidate, 147 Cong. Rec. S2455; 11 C.F.R. § 100.22, and thus regulate them as an "electioneering communication," 52 U.S.C. § 30104(f). The Supreme Court

has said that those characteristics alone are sufficient to justify imposing campaign disclosure on their maker, irrespective of anything else about the ad. *McConnell*, 540 U.S. at 196 (holding voters have justified interest in disclosure of the "entire range" of ads meeting electioneering communication definition). That is because those characteristics make the ad so "substantial[y] relat[ed]" to elections that disclosure "'provid[es] the electorate with information' about the sources of election-related spending." *Citizens United*, 558 U.S. at 367 (quoting *McConnell*, 424 U.S. at 66).[6]

Nevertheless, it was *because* AAN ran that and other similar electioneering communications that the controlling commissioners excused AAN from political committee reporting. In other words, the controlling commissioners interpreted *Buckley* to hold that AAN's reporting would not fulfill the purposes of the FECA to provide voters with information about election-related spending *because* AAN engaged in election-related spending. That interpretation of *Buckley* blinks reality.[7]

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[6] That is why the FECA treats both types of ads in very similar ways. *Compare* 52 U.S.C. § 30104(c) (making express advocacy ad triggers disclosure) *with id.* § 30104(f) (making electioneering communication triggers disclosure); *and id.* § 30116(a)(7)(B) (coordinated express advocacy ads count as contributions) *with id.* § 30116 (a)(7)(C) (coordinated electioneering communications count as contributions); *see also id.* § 30120(a) (both types of ads must carry disclaimers); *id.* § 30121 (neither ad may be funded by foreign money).

[7] AAN misrepresents the record and states that the controlling commissioners found the "Read This" ad quoted above was sufficiently election related that it would not excuse AAN from political committee reporting. AAN Reply 16. The record shows, however, that the controlling commissioners found that this ad lacked any relation to elections and therefore weighed the ad on the side of excusing AAN from its political committee obligations. AR 1779. It was only in an alternative analysis, meant to show that switching their view of that ad would not alter the outcome, that they entertained the idea that the ad might have an electoral purpose. *Id.* Thus, AAN is incorrect to represent that the controlling commissioners treated at least one of AAN's ads with a legislative critique and a call to action as political. *Cf.* AAN Reply 16.

1. All Electioneering Communications Substantially Relate to Elections, Thus Subjecting Groups that Air Them to Disclosure Fulfills the Purposes of the FECA.

No reasonably interpretation of *Buckley* would forbid the application of congressionally commanded reporting to an organization *because* the organization makes electioneering communications. In crafting the electioneering communication category, Congress carefully and narrowly tailored the category to capture communications that "constitute campaigning every bit as much as . . . any ad currently considered to be express advocacy." 147 Cong. Rec. S2455. The Supreme Court, rejecting the decision of a lower court finding that voters' interest in disclosure could only apply to a subset of electioneering communications based on their content and that voters did not have an interest in knowing information about the sources of *every* electioneering communication, *see McConnell v. FEC*, 251 F. Supp. 2d 176, 794 (D.D.C. 2003) (Leon J., concurring in part and dissenting in part), held that the voters' interest in election-spending disclosure applied "to the *entire range* of electioneering communications," *McConnell*, 540 U.S. at 196 (emphasis added). In other words, the very characteristics that make an ad an "electioneering communication" demonstrate its purpose to influence elections, *id.*, and therefore, disclosure of the ads' financial backing "fulfill[s] the purpose[] of the [FECA]," *Buckley*, 424 U.S. at 79. *Buckley*, however, only excused organizations from reporting when they engaged in a sufficient amount of activities for which disclosure does not "fulfill the purposes of the Act" because they are unrelated to the "nomination or election of a candidate." *Id.* Because *every* electioneering communication is substantially related to elections—because every electioneering communication, by reason of its being an electioneering communication, is "specifically intended to affect election results," *McConnell*, 540 U.S. at 127—*Buckley* cannot be

permissibly interpreted to excuse an organization from disclosure because it makes one.

The controlling commissioners nevertheless unlawfully and impermissibly interpreted *Buckley* to exclude groups from political committee reporting if they spend a sufficient sum on electioneering communications, so long as the particular electioneering communication at issue does not fall into an exceedingly narrow and ill-defined category that the controlling commissioners deem political. At first blush, this is at least an improvement on their first interpretation of *Buckley* which excluded organizations from political committee reporting if they spent a sufficient sum on *any* electioneering communication. AR 1690–17.[8] The Court rightfully found that that interpretation of *Buckley* was impermissible and thus the controlling commissioners' previous decision to excuse AAN from reporting was contrary to law. *CREW*, 209 F. Supp. 3d at 92. Nevertheless, the controlling commissioners' new interpretation is not meaningfully different and once again impermissibly interprets *Buckley* to exclude groups from reporting *because* they run ads that are election-related.

2. The Controlling Commissioners' Interpretation of Buckley *is Contrary to* McConnell.

As Plaintiffs argued in their opening brief, *McConnell* squarely forecloses the controlling commissioners' interpretation of *Buckley*. In reply, the FEC and AAN take a portion of *McConnell* out of context and try to portray it in an absurd light at odds with the rest of the decision, focus on inapposite authority and distinctions, and grasp at entirely irrelevant aspects of ads *McConnell* found were political in a vain attempt to distinguish the materially identical ads

[8] Further, as shown below, this first blush gives a false impression. The FEC briefing here and a subsequent administrative decision reveal that the controlling commissioners continue to apply an "express advocacy or its functional equivalent only" test. *See infra* Part II.B.1.

AAN ran. Those attempts fail because, as *McConnell* squarely recognized, all electioneering communications are sufficiently election-related to subject their makers to disclosure, including political committee disclosure.

The FEC first attempts to argue that *McConnell* supports the controlling commissioners' interpretation of *Buckley* to require them to distinguish between some electioneering communications and others, and to excuse organizations from reporting if the electioneering communications they make are deemed to lack an electioneering purpose. They argue that *McConnell*, despite finding that voters' interest in disclosure applied to the "entire range" of electioneering communications, recognized that some electioneering communications "had no electioneering purpose." FEC Reply 27. The FEC contends that the commissioners must therefore review the electioneering communications to see which ones lack an electioneering purpose. *Id.* This is incorrect. As Plaintiffs explained in their opening brief, the FEC unmoors that language in *McConnell* from its context. In the quoted language, *McConnell* was merely recounting a matter of "dispute between the parties and among the judges on the District Court." 540 U.S. at 206; *compare McConnell*, 251 F. Supp. 2d at 588 (Kollar-Kotelly, J.) (holding "the record demonstrates that as an objective matter advertisements sharing [electioneering communication] characteristics influence the outcome of federal elections") *with id.* at 794 (Leon J., concurring in part and dissenting in part) (arguing characteristics that make ad an electioneering communication are insufficient to subject it to disclosure laws, and that the content of the ads must be reviewed to confirm that they indicate the purpose of nominating or

electing a candidate).[9] Far from adopting the position that some ads lacked an electoral purpose, *cf.* FEC Reply 27, the Supreme Court found that federal disclosure laws could apply to each and every electioneering communication because the qualities that made the ad an electioneering communication were sufficient to conclude the ads was substantially related to elections. *McConnell*, 540 U.S. at 196.[10]

Indeed, the Supreme Court held that, at least for corporate and union funded electioneering communications, *every* electioneering communication must issue from a "segregated fund," which is a type of political committee. 540 U.S. at 206. Under the FEC's interpretation, however, the very fact these segregated funds paid for all types of electioneering communications would mean that, under *Buckley*, these segregated funds might not be recognized as political committees at all because their airing those ads would eventually require the FEC to excuse them from reporting. That is ludicrous. *McConnell* recognized there was nothing improper or unlawful about requiring an organization spending significant sums on electioneering communications to report as a political committee.[11]

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[9] AAN cites extensively to Judge Leon's position in the lower court as if it is authority showing some electioneering communications lack an electoral purpose, *see* AAN Reply 26, but neglects to inform the Court that this opinion and, in particular, the very cited passages, were rejected and overruled by the Supreme Court, *see id.*

[10] Furthermore, the subjective intent of the maker of an electioneering communication is irrelevant and may not be constitutionally considered in deciding whether an ad has an electioneering purpose or merely intends to advance some policy goal. *See Buckley*, 424 U.S. at 43 (citing *Thomas v. Collins*, 323 U.S. 516 (1945)). The question is thus not whether a particular individual might make an electioneering communication yet lack an intent to influence elections; rather, the question is whether an electioneering communication bears sufficient objective markers such that voters have a legitimate interest in their disclosure, and that subjecting the maker to disclosure would "fulfill the purposes of the act." *Id.* at 79. *McConnell* held they all do.

[11] As also noted in Plaintiff's opening brief, this section of the *McConnell* opinion related to the

The FEC next attempts to distinguish the various ads *McConnell* found were election related communications, but its attempts fail. As Plaintiffs demonstrated in their opening brief, the Supreme Court recognized the "Yellowtail", Republicans for Clean Air, and Citizens for Better Medicare ads were intended to influence elections, CREW Br. 28–31, ECF No. 32, but the test put forth by the controlling commissioners would have found these ads lacked that purpose. The FEC responds to this argument by identifying small and non-substantive distinctions between the ads AAN ran and the ads discussed in *McConnell*. These are distinctions without a difference, and the FEC's attempts to reconcile the conflict with *McConnell* fails. FEC Reply 23–26. For example, the FEC notes that the "Yellowtail" ad accused the candidate of the negative "personal conduct" of "hitting his wife" while AAN's ads merely accused candidates of aiding rapists. *See* FEC Reply 23; AR 1768. As another example, the FEC says that because Citizens for Better Medicare *praised* the named candidate, its ad was electoral, while AAN's ads

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ban on corporate and union funded electioneering communications, a rule which required a tighter fit between the purpose of the ads and voters' interests than does a rule merely requiring disclosure. *Compare Citizens United*, 558 U.S. at 340 (bans are subject to strict scrutiny requiring "narrow[] tailor[ing]") *with id.*, at 367 (disclosure rules subject to "exacting scrutiny" requiring only a "substantial relation"). Accordingly, even if *McConnell* thought some electioneering communications lacked a sufficient electioneering purpose to justify banning them, it could (and did) find that those same communications had enough of an electioneering purpose to justify subjecting their maker to disclosure. The fact that the ban was later struck down, on which the FEC and AAN mysteriously rely, FEC Reply 27 n.7; AAN Reply 18, is entirely irrelevant. The disclosure laws, including political committee disclosure, continue. Indeed, far from showing electioneering communications lack an electoral purpose, the fact that the same ban on express advocacy ads—ads that indisputably have an electioneering purpose—was also struck, *Citizens United*, 558 U.S. at 365, shows the striking of the ban has no bearing on the communications having or lacking an electoral purpose. *McConnell* understood *Buckley* did not prohibit the application of political committee status to a group that runs a sufficient amount of electioneering communications, and nothing in overturning the ban affects that.

attacked the named candidate and therefore were not election-related. FEC Reply 26.[12] These distinctions are clearly nonsensical and have no bearing on the relevant question: whether the ads are "substantial[y] relat[ed]" to elections such that disclosure "'provid[es] the electorate with information' about the sources of election-related spending." *Citizens United*, 558 U.S. at 367. Nor are the distinctions grounded in the controlling commissioners' proffered test. Rather, FEC counsel attempts, post-hoc, to distinguish problematic authority. Moreover, neither the FEC nor AAN even discuss *McConnell*'s hypothetical ad that the Court gave as the paradigmatic example of an election-related electioneering communication: one that "condemned [Jane] Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *McConnell*, 540 U.S. at 127 (noting there "[l]ittle difference" between that ad and one that "urged viewers to 'vote against Jane Doe'"). The FEC does not discuss it because that ad clearly describes every single one of AAN's electioneering communications.[13]

Most importantly, the reason *McConnell* found each and every one of these ads had an electoral purpose was not because the ad mentioned two current officeholders rather than one, *cf.* FEC Reply 25,[14] or because the ad praised a candidate versus urging him to change his voting

[12] This distinction also fails to take into account the full scope of Citizens for Better Medicare's ads considered by the Court which, while praising Rep. Fletcher, also attacked other candidates. *See McConnell*, 251 F. Supp. 2d at 546 (Kollar-Kotelly, J.) (noting the group ran ads "supporting [Republicans] *and attacking* Democratic candidates" (emphasis added)); *see also* McPhail Decl. Ex. 7 (The Campaign Finance Institute, Issue Ad Disclosure, Recommendations for a New Approach App. A8 (Feb. 2001), http://bit.ly/2gIkVWK (noting group's ads "criticiz[ed] Reps. Bill Luther (D-MN), Mark Udall (D-CO), Leonard Boswell (D-IA) and Darlene Hooley (D-OR)").

[13] *See also* McPhail Decl. Ex. 1 at 8–9 (statement of BCRA sponsors describing as political ad referring to Rep. Greg Ganske's record on legislative votes and asking viewers to call him; rejecting any distinction between ads that mention an incumbent vs. others).

[14] For an indiscernible reason, the FEC notes that it did not find this particular ad by Republicans

position, *cf.* FEC Reply 25, or because the ad used domestic violence versus rape as its hook, *cf.* FEC Reply 23. The reason *McConnell* said these ads clearly had an electoral purpose is because *they were electioneering communications*. *See McConnell*, 540 U.S. at 127 ("[T]he conclusion that such ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election.)*; see also McConnell*, 251 F. Supp. 2d at 546 (Kollar-Kotelly, J.) (noting fact ads identifying candidates ran "in the 60 days prior to the 2000 federal election demonstrates that these advertisements were designed to influence the federal election"). That alone was enough to find the ads were aimed at influencing elections and subject their makers to disclosure.

The FEC nonetheless argues that *McConnell* was solely concerned with preventing groups from airing these ads while hiding behind "anodyne-sounding names," a problem that it contends was solved by requiring groups like AAN to file one-time reports and to claim authorship of the ads. FEC Reply 24. But even if this was the thrust of *McConnell*, it would mean *McConnell*'s concern remains unresolved. Here, millionaires and billionaires are assuredly hiding behind the anodyne-sounding name "American Action Network," and voters have no idea who AAN's "sponsors" and "donors" are. This is all because the controlling commissioners refuse to recognize AAN is a political committee. *See McConnell*, 540 U.S. at 128–29. Indeed, rather than concerning itself with the mere identification of authorship—particularly the mere identification of an author with no identity other than as creator of these and similar ads—

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for Clean Air contained express advocacy. FEC Reply 25. That of course is the point—it is not express advocacy but it was still intended to influence elections, and therefore cannot justify excusing its author from disclosure.

McConnell's primary focus was the fact that, "[w]hile the public may not have been fully informed about the sponsorship of so-called issue ads" by groups like AAN, "that candidates and officeholders often were." *Id.* History gives us no reason to doubt the candidates benefited by AAN's ads are similarly aware. It is the identity of those sponsors and donors—not just the name of the dark money author—that voters are entitled to know so that they can ensure their elected representatives are not "'in the pocket' of so-called moneyed interests." *Id.* at 259. Yet AAN does not report them, either as a political committee or on its one-time event reports, and it will never report them if the controlling commissioners' proposed reading of *Buckley* prevails. *See* McPhail Decl. Exs. 3–6.

As shown in Plaintiffs' opening brief, and in contrast to the FEC's and AAN's attempts to argue otherwise, *McConnell* squarely held that all electioneering communications are sufficiently election related to justify disclosure simply because they meet the definition of an electioneering communication. It is therefore impermissible to interpret *Buckley* to exclude a group from political committee reporting—a regime designed to ensure voters are fully informed about election related spending—*because* the group runs an electioneering communication. Disclosure from such group would unquestionably "fulfill the purposes of the Act," *see Buckley*, 424 U.S. at 79, so *Buckley* does not forbid the application of the FECA's political committee rules to an organization like AAN.

B. The Controlling Commissioners Again Relied on *WRTL II*'s Issue Advocacy/Express Advocacy Framework, But *WRTL II* is "Inapposite" to Interpreting *Buckley*.

The controlling commissioners previously dismissed Plaintiffs' complaint against AAN because they applied the framework in *FEC v. Wisconsin Right to Life, Inc. (WRTL II)*, 551 U.S.

449 (2007), to their interpretation of what activities would show a group lacked the requisite major purpose required by *Buckley*. Despite an express order not to rely on that framework, it is clear the controlling commissioners relied on the same dichotomy of activities provided under the *WRTL II* framework to again dismiss below, as Plaintiffs' opening brief demonstrated. In response, the FEC essentially concedes that point but argues that the Court's previous decision only prevented the controlling commissioners from citing *WRTL II*, but did not stop them from applying the same framework in an attempt to segregate electioneering communications into election-related ads and so-called issue advocacy. FEC Reply 21. The FEC would reduce the Court's previous holding to a citation rule—rubber stamping their dismissal so long as the controlling commissioners did not cite *WRTL II*. The Court's decision is not so easily diminished, however—it was based on the overwhelming weight of authority, only since bolstered, showing that *WRTL II*'s dichotomy has no place when evaluating the FECA's disclosure provisions or the scope of *Buckley*'s exclusion of groups from those disclosure rules.[15]

[15] The FEC cites the Court's decision on Plaintiffs' Motion for an Order to Show Cause in the previous litigation, *see* Mem. Op. & Order 5, *CREW v. FEC*, 14-cv-1419 (D.D.C. Apr. 6, 2017), as if that decision addressed the propriety of its reliance on *WRTL II* on remand, *see* FEC Reply 20–21. Befitting the procedural posture of that decision, however, the Court did not opine on the permissibility of the controlling commissioners' interpretation of *Buckley* on remand. Rather, the Court found that the commission's analysis on remand did not commit the *exact same* error the Court identified in its previous judgment: the use of *WRTL II* to categorically treat all electioneering communications as lacking any electoral purpose and the exclusion from political committee reporting of groups that ran any type of electioneering communication. Mem. Op. & Order at 5. Rather, it is the Court's September judgment that is the relevant authority, and that judgment found that the FEC's reliance on *WRTL II* "in the disclosure context" was always inappropriate. *CREW*, 209 F. Supp. 3d at 89. The FEC's erroneous portrayal of the Court's show cause order puts it in serious tension with the Court's September judgment, raising the possibility the subsequent order runs afoul of the law of the case doctrine by placing it in conflict with an earlier decision in the case. *Taylor v. FDIC*, 132 F.3d 753, 761 (D.C. Cir. 1997). Nevertheless, there is no reason to read the show cause order as the FEC portrays it.

1. Despite This Court's Admonition, the Controlling Commissioners Again Rely on the WRTL II *Framework.*

The primary reason the Court reversed the controlling commissioners' previous unlawful interpretation of *Buckley* is because the controlling commissioners' interpretation relied on *WRTL II*, 551 U.S. 449. Relying on that case, the controlling commissioners erroneously concluded that "the *WRTL II* framework" that "drew a bold line between express advocacy (and its functional equivalent), which it deemed more regulable, and issue advocacy, which it deemed less so" defined what groups *Buckley* excused from political committee reporting. *CREW*, 209 F. Supp. 3d at 89. This Court found that *WRTL II*, which developed "in the context of an outright *ban* on speech," is "not properly applied in the context of less restrictive *disclosure* requirements" like that in the federal political committee reporting regime. *Id.* The Court therefore "ha[d] little trouble concluding that" the controlling commissioners' dismissal was contrary to law." *Id.* at 92. Nevertheless, despite being ordered not to rely on *WRTL II* or to apply its framework on remand, the controlling commissioners did so. They plainly relied on *WRTL II* on remand and "feigned compliance" with the Court's ruling by not specifically citing to the case, AR 1785, as the FEC's briefing has now made abundantly plain.

As Plaintiffs demonstrated in their opening brief, the test adopted by the controlling commissioners parrots the test drawn by *WRTL II* to distinguish between corporate and union funded speech that the Court (then) believed could be banned and speech which it concluded could not. CREW Br. 25. In response, the FEC concedes this, but nonetheless asserts there is no error because the controlling commissioners' test just happens to be "consistent" with *WRTL II* without relying on it. FEC Reply 21. But that minimizes the Court's decision to a mere citation rule. The Court held *WRTL II*'s "*framework*" was inapposite, *CREW*, 209 F. Supp. 3d at 89

(emphasis added), and therefore that it was impermissible to interpret *Buckley* to apply that same framework in deciding what groups lacked the requisite major purpose and thus could be excused from reporting. By applying that same framework below, even without citing *WRTL II*, the controlling commissioners relied on the same impermissible interpretation as before.

Moreover, the FEC's admissions confirm that the controlling commissioners' "major purpose" test created following remand is the same "express advocacy (or its functional equivalent)" test that the Court ordered the FEC to abandon prior to remand. *See CREW*, 209 F. Supp. 3d at 89. In an attempt to identify some basis other than *WRTL II* for the controlling commissioners' test, the FEC points to its regulations defining the functional equivalent of express advocacy. FEC Reply 22–23 (citing 11 C.F.R. § 100.22). Of course, relying on the agency's express advocacy regulations shows that, far from abandoning the bright-line test the Court rejected prior to remand, the controlling commissioners continue to enforce an express advocacy only test. They have simply replaced the phrase "independent expenditure" with a description of the characteristics that make an ad an independent expenditure under their regulations. The only distinction between their previous analysis and the one below is that, rather than taking at face value AAN's own characterization of the ads, the controlling commissioners reviewed AAN's electioneering communications and found that four of the ads were the functional equivalent of express advocacy. AR 1770–79. That means that the controlling commissioners are *still* treating every ad that lacks express advocacy or its functional equivalent as a reason to find that group lacks the requisite major purpose under *Buckley*.[16]

[16] The FEC incorrectly claims that its express advocacy test in 11 C.F.R. § 100.22 has never been challenged as "underinclusive." FEC Br. 23. As the FEC well knows, Congress enacted BCRA

Courts have noted, moreover, that 11 C.F.R. § 100.22(b) "closely correlates" with *WRTL II*'s functional equivalency test. The sole difference is that the regulation is "likely narrower . . . since it requires a communication to have an 'electoral portion' that is 'unmistakable' and 'unambiguous.'" *Free Speech v. FEC*, 720 F.3d 788, 795 (10th Cir. 2013); *accord The Real Truth About Abortion v. FEC*, 681 F.3d 544, 551 (4th Cir. 2012).[17] In other words, the controlling commissioners reliance on the 11 C.F.R. § 100.22 framework is the same as its reliance on *WRTL II*.

Furthermore, subsequent statements in other administrative matters by two of the three controlling commissioners confirm that they continue to interpret *Buckley* in a manner completely at odds with this Court's judgment. In a statement of reasons issued on December 20, 2017, those two controlling commissioners once again interpreted *Buckley* by looking to *WRTL II*, as well as to other authority this Court declared as "out of step with legal consensus" and "flaw[ed]," *CREW*, 209 F. Supp. 3d at 92 (discussing *Wisconsin Right to Life, Inc. v. Barland*, 751 F. 3d 804 (7th Cir. 2014)), and other cases the Court recognized predated *Citizens United* and are thus irrelevant, *see id.* at 90 n.8 (discussing *N.M. Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010); *N. Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir.

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explicitly because the express advocacy rule in the FECA and § 100.22 was "underinclusive." *See McConnell*, 540 U.S. at 122, 126–29 (noting express advocacy rules' failure to capture full scope of ads "advocat[ing] the election or defeat of clearly identified candidates" motivated Congress to enact BCRA).

[17] For that reason, the controlling commissioners' omission of § 100.22(b)(1)'s requirement that an ad have an "unmistakable, unambiguous" "electoral portion" does not show the controlling commissioners applied a broader test than *WRTL II*'s framework imposes, *cf.* FEC Reply 22—rather it merely shows they imposed the *WRTL II* version of the functional equivalency test which does not impose that requirement.

2008); *FEC v. Malenick*, 310 F. Supp. 2d 230 (D.D.C. 2004); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851 (D.D.C. 1996)). Despite this Court's admonition, the two controlling commissioners explained that they continue to interpret *Buckley* in reliance on that authority in a statement of reasons that is largely cut-and-paste from the statement this Court already rejected as unlawful. *See* McPhail Decl. Ex. 8 (Statement of Reasons of Vice Chair Caroline C. Hunter and Comm'r Lee E. Goodman at 8 n.35, 13–17 & nn.59, 60, MUR 6872 (New Models) (Dec. 20, 2017), https://www.fec.gov/files/legal/murs/current/100487860.pdf (relying on *WRTL II*, *Barland*, *Leake*, *Malenick*, and *GOPAC* to interpret *Buckley*)); *see also* AR 1690–1723. This new statement admits what the statement, following remand, of the controlling commissioners in this case tried to hide: the controlling commissioners continue to apply *WRTL II's* express-advocacy-only framework when interpreting *Buckley*.

This is now the controlling commissioners' second time using *WRTL II*'s framework to excuse AAN from political committee reporting, to the detriment of Plaintiffs and the public. The Court was right to reject the application of the framework before, and should do so again because the FECA's disclosure requirements, political committee reporting included, are not "limited to speech that is the functional equivalent of express advocacy." *Citizens United*, 540 U.S. at 369.

2. Courts Have Rejected the "Issue Advocacy" Line as Unworkable and Inapposite to the Campaign Finance Disclosure Regimes.

In the disclosure context, other courts have similarly rejected calls to draw the line at express advocacy or narrow the electioneering communication category to "issue ads." *Cf.* AR 1780; *WRTL II*, 551 U.S. at 457 (drawing line to exclude "issue advocacy" from regulation). A three-judge panel in *Independence Institute v. FEC* explicitly rejected the very test the

controlling commissioners adopted below to distinguish between electioneering communications legally subject to regulation and "issue advocacy" electioneering communications. 216 F. Supp. 3d 176 (D.D.C. 2016). That decision was upheld by the Supreme Court. *Indep. Inst. v. FEC*, 137 S. Ct. 1204 (2017) (Mem.). The FEC attempts to cabin this decision as relating solely to the one-time event disclosure triggered when a group runs an electioneering communication. FEC Reply 28. That attempt to distinguish *Independence Institute* is meritless. The FEC fails to explain how a definition that is "entirely unworkable" and that "blink[s] reality" in the context of event-driven disclosure, 216 F. Supp. 3d at 188, could be workable or sensible when applied in the political committee context.

Nor does the FEC wrestle with the inherent contradiction between its position and the holding of *Independence Institute*. The very characteristics that the controlling commissioners' test uses to describe an electioneering communication as so-called "issue speech"—such as the ad's "link[ing] an electoral candidate to a political issue" like "pending federal legislation" and "solicit[ing] voters to press the legislative candidate for his position on the legislation in the run up to an election"—are the same characteristics that the court in *Independence Institute* found proved voters have an informational interest in learning the financial source of the ad. *Id.* at 190–91 ("Providing the electorate with information about the source of the advertisement will allow voters to evaluate the message more critically and to more fairly determine the weight it should carry in their electoral judgments."). The FEC does not and cannot reconcile *Independence Institute* with the controlling commissioners' decision to use those characteristics to deny voters access to information.

The FEC's own argument on this topic further reinforces the unworkable nature of their

position. The FEC relies on the fact that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *See* FEC Reply at 21, 27–28, 30 (quoting *Buckley*, 424 U.S. at 42). While true, the import of that fact is not that the FEC must therefore treat ads that have the purpose of electing or defeating candidates as unrelated to elections because they discuss issues, as the FEC concludes. Rather, it shows the distinction between the "discussion of issues" and "advocacy of election or defeat of candidates" is not a useful basis to determine the scope of voters' interest in electoral transparency. *See McConnell*, 540 U.S. at 126. "[T]he two categories of advertisements prove[] functionally identical in important respects." *Id.* That is because someone seeking to persuade a viewer to vote for or against a candidate must provide the viewer with a reason to vote, and that reason will almost always be that it will advance or halt some issue like legislation that will impact the viewer's life or, at least, that the viewer cares about. The fact these electioneering communications have an "impact on an election . . . after the voters hear the information and choose—uninvited by the ad—to factor it into their voting decisions" rather than making an explicit appeal to vote for or against a candidate is irrelevant when it comes to the reasons for requiring disclosure. *Cf.* FEC Reply 31 (relying on the inapposite authority of *WRTL II*, 551 U.S. at 470, to argue such ads may not be trigger disclosure); *see also* McPhail Decl. Ex. 1 at 7 (statement of BCRA sponsors that electioneering communications which mention the "name of a bill" must still be treated political).[18] Disclosure of the ads'

[18] In their opening brief, Plaintiffs noted that AAN's express advocacy ads—ads clearly intended to influence elections—also discussed legislation and other "issues" and yet are still recognizably election related. CREW Br. 35. In response, the FEC contends that AAN's express advocacy ads would not be issue ads because, even though they mentioned legislation and discussed issues,

financial backing will still "allow voters to evaluate the message more critically and to more fairly determine the weight it should carry in their electoral judgments," *Indep. Inst.*, 216 Supp. 3d at 191, to monitor if the named representative or her opponent is "'in the pocket' of so-called moneyed interests," *McConnell*, 540 U.S. at 259, and to know "who is speaking about a candidate shortly before an election," *CREW*, 209 F. Supp. 3d at 90 (emphasis omitted) (quoting *Citizens United*, 558 U.S. at 369). That is why the First Amendment does not "erect[] a rigid barrier between express advocacy and so-called issue advocacy." *McConnell*, 540 U.S. at 193.[19]

The FEC concedes as much, as it must, admitting one-time event disclosure need not discriminate between so-called "issue" ads and others, but maintains that the distinction is nonetheless relevant in the application of political committee reporting regimes like that in the FECA. *See* FEC Reply 28. But the same informational interest justifying one-time event

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they named a candidate that was not a current officeholder. FEC Reply 31. But some of AAN's express advocacy ads did identify a current officeholder. *See*, *e.g.*, McPhail Decl. Ex. 9 (AAN Form 5 (Aug. 24, 2010), http://docquery.fec.gov/pdf/688/10991119688/10991119688.pdf (express advocacy ad targeting Sen. Murkowski)). Regardless, there is nothing incompatible with discussing an issue or legislation in connection with a current officeholder and candidate and furthering the purpose of electing of defeating the named candidate.

[19] AAN contends that this means the FECA will extend to cover all "advocacy groups" and all speech, regardless of its relation to elections. AAN Reply 21. Similarly, the FEC suggests that electioneering communications may be subject to one-time event disclosures simply because it may regulate "certain kinds of speech." FEC Reply 29. Not so—disclosure under the FECA extends only to those communications substantially related to an election, otherwise the regulation would fail exacting scrutiny. *Citizens United*, 558 U.S. at 366–67. The FEC may regulate electioneering communications *because* they are election related—because voters' interest in knowing "who is speaking about a candidate shortly before an election" is "substantially related" to disclosure of electioneering communications. *Id.* at 366, 369. In other words, it is because all electioneering communications have the "purpose of nominating or electing a federal candidate," FEC Reply 29—as evidenced by the facts that make them an electioneering communication—that they may be constitutionally regulated, *McConnell*, 540 U.S. at 127, 196.

disclosure also justifies the application of political committee reporting. *See SpeechNow v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010) (political committee reporting serves public's "interest in knowing who is speaking about a candidate and who is funding that speech"). That is why courts have found that the issue advocacy distinction is similarly irrelevant to political committee disclosure regimes. *See Nat'l Assoc. of Gun Rights, Inc. v. Motl*, CV 16-23-H-DLC, 2017 WL 3908078, *5 (D. Mont. Sept. 6, 2017) (finding group's electioneering communications, defined similarly under state law as under federal law, may subject the group to political committee reporting even if the ads were "issue advocacy"); *see also Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 54–55, 59 (1st Cir. 2011) (rejecting issue advocacy dichotomy had any relevance to state's political committee reporting regime); *Human Life of Washington v. Brumsickle*, 624 F.3d 990, 997, 1016–17 (9th Cir. 2010) (rejecting issue advocacy distinction in defining covered "expenditures" that trigger political committee reporting).

The FEC fails to meaningfully distinguish this authority. The FEC argues that *Motl* addresses only a state political committee regime, and therefore does not involve an application of *Buckley*. FEC Reply 29 n.8. While true, that misses the mark. The point is that the attempt to distinguish electoral from non-electoral electioneering communications based on the "issue advocacy" characterization in the application of a political committee regime has been rejected. Rather, courts have found the informational interests served by political committee reporting regimes is equally served when applied to groups making either type of electioneering communication. That fact is equally true for the federal political committee reporting regime. Therefore, because *Buckley* only excuses groups from reporting where their disclosure would not "fulfill the purposes of the Act" to provide voters with information "about where political

campaign money comes from" 424 U.S. at 66, and because courts have found requiring groups to report as political committees even though they run "issue" electioneering communications fulfills that purpose, *Buckley* does not excuse those groups from reporting. In other words, there is no permissible interpretation of *Buckley* that would require the FEC to excuse groups from political committee reporting *because* they run such ads.

3. Neither This Court, Nor Buckley, *Compel the Controlling Commissioners to Draw a Line at Electioneering Communications that Discuss "Issues."*

Nevertheless, the FEC and AAN argue that the controlling commissioners had to distinguish between electioneering communications on remand because either this Court, or *Buckley* itself, compelled them to. But they simply misconstrue statements in both decisions. Neither compel the result below.

First, the FEC argues that, because this Court refrained from "replacing the Commissioners' bright-line rule with one of its own" that would have ordered the FEC to cease excusing AAN from reporting because it ran electioneering communications, the commissioners could not adopt their own "bright line" test recognizing that *Buckley* does not excuse groups from reporting solely because they make electioneering communications. FEC Reply 29 (quoting *CREW*, 209 F. Supp. 3d at 93). The FEC misconstrues the Court's statement, however, and introduces legal error into the Court's judgment where there was none. Far from ordering the FEC to foreswear all "bright-line[s]," the Court "limit[ed]" its holding "to identifying the legal error in the Commissioners' statements" and did not go further into describing the test the FEC must adopt on remand. *CREW*, 209 F. Supp. 3d at 93 (stating Court would "refrain" from outlining its own rule). In other words, the Court simply did not reach the question of whether *Buckley* permits a group to evade reporting because it runs an electioneering communication. At

no point did the Court order the FEC to craft an arbitrary and unworkable rule to artificially segregate electioneering communications without any basis in jurisprudence.

Second, AAN argues that *Buckley* itself required the commissioners to try to identify purported "issue advocacy" among its electioneering communications. *Buckley*'s carve-out for "group[s] engaged purely in issue discussion," however, is inapplicable to AAN. AAN Reply 14 (quoting *Buckley*, 424 U.S. at 79). As a preliminary matter, having spent over $4 million in independent expenditures, AAN is far from a group engaged "purely" in non-election-related issue discussion. More importantly, *Buckley*'s recognition that the FECA does not require organizations engaged "purely in issue discussion" to disclose as political committees is informed by the fact that *Buckley* recognized requiring such groups to report would not "fulfill the purposes of the Act." 424 U.S. at 79. In other words, *Buckley*'s "issue discussion" is, by definition, discussion that is so unrelated to elections that the government could not justify a reporting requirement by pointing to voters' informational interests. *Citizens United*, 558 U.S. at 366–67 (communications must be "substantial[ly] relat[ed]" to elections for disclosure to constitutionally serve important government interest in ensuring an informed electorate). Accordingly, neither express advocacy nor electioneering communications *can* constitute "issue discussion" as *Buckley* meant it: both types of communication are subject to disclosure because they are substantially related to elections. *See McConnell*, 540 U.S. at 196. Any *Buckley* carve-out for "issue discussion" does not apply where that ad is substantially related to elections, as is the case with all of AAN's ads at issue here.[20]

[20] Moreover, *Buckley* must be interpreted in light of subsequent precedent holding that disclosure requirements like the political committee reporting regime need not adhere to "a rigid barrier

In sum, the issue advocacy/express advocacy and its functional equivalent framework is completely inapposite to interpreting *Buckley*'s command to excuse groups without a qualifying major purpose from the congressionally commanded reporting regime. The Court was right to reject that framework when it was expressly adopted and applied by the controlling commissioners the first time, and should reject that framework when it was surreptitiously adopted and applied by the controlling commissioners on remand. It has no application in defining the contours of a disclosure regime like the political committee reporting regime imposed by the FECA. There is no permissible interpretation of *Buckley* that would excuse a group from reporting because it runs ads otherwise indistinguishable from indisputable election advocacy.

C. The Court's Review of the Controlling Commissioners' Interpretation of *Buckley* is *De Novo*.

The Court previously rejected the legal analysis of the controlling commissioners in deciding which ads would excuse AAN from political reporting based on a *de novo* review of the case law. *CREW*, 209 F. Supp. 3d at 87 ("[T]he Court will not afford deference to the FEC's interpretation of judicial precedent defining the protections of the First Amendment and the related contours of *Buckley*'s major purpose test."). The controlling commissioners have engaged in the same legal analysis below to once again excuse AAN from political committee reporting. AR 1780. Just as before, the Court reviews the propriety of that analysis *de novo*. *CREW*, 209 F. Supp. 3d at 87; *see also Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (en

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between express advocacy and so-called issue advocacy." *McConnell*, 540 U.S. at 192; *see also Citizens United*, 558 U.S. at 369 (disclosure is not "limited to speech that is the functional equivalent of express advocacy").

banc), *vacated on other grounds*, 524 U.S. 11 (1998) ("In sum, since it is not, and cannot be, contended that the statutory language itself is ambiguous, and the asserted 'ambiguity' only arises because of the Supreme Court's narrowing opinions, we must decide *de novo* the precise impact of those opinions.").

Nonetheless, the FEC and AAN argue that this Court should apply deferential analysis under *Chevron USA Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), because the Court found that not "every judicial challenge to an FEC action linked in any way to the major purpose test" is an "issue for the courts' *de novo* review." FEC Reply 7 (quoting *CREW*, 209 F. Supp. 3d at 88); *accord* AAN Reply 5. Yet the FEC and AAN ignore the fact that the question before the Court is identical to the question presented before: whether the controlling commissioners properly interpret the scope of activities *Buckley* contemplated would excuse a group from political committee reporting. While the Court recognized some gap-filling decisions by the FEC could be subject to discretion, *see CREW*, 209 F. Supp. 3d at 88 (citing *Shays v. FEC*, 511 F. Supp. 2d 19, 31 (D.D.C. 2007) (noting agency has discretion about whether to interpret *Buckley* in the course of adjudication or rulemaking)), it squarely held the question on review here is subject to *de novo* review. Neither the FEC nor AAN raise any meritorious grounds to distinguish the issue on review here, nor do they make any argument worthy of consideration showing error in the Court's previous judgment.

Furthermore, in response to Plaintiffs' argument that no deference is available because the statement on review is not the statement of the agency but only the statement of three commissioners, the FEC argues that the D.C. Circuit has held the statement of three commissioners receives *Chevron* deference even after *United States v. Mead Corp*, 533 U.S. 218

(2001). FEC Reply 9. But the FEC mispresents the case on which it relies. While *FEC v. National Rifle Association of America*, 254 F.3d 173 (D.C. Cir. 2001), indeed postdated *Mead* and cited *In re Sealed Case*, 223 F.3d 775 (D.C. Cir. 2000), *see FEC v. NRA of Am.*, 254 F.3d at 185, the actual agency decision on review there was an advisory opinion adopted by a majority of the Commission, *see id.* at 184 (discussing Advisory Opinion 1984-24); McPhail Decl. Ex. 10 (AO 1984-24, at 6 (July 13, 1984), http://saos.fec.gov/aodocs/1984-24.pdf (noting only two dissents from advisory opinion)): *see also id.* Ex. 11 (Dissenting Op. of Cmm'r Lee Ann Elliott in AO 1984-24, at 1 (Aug. 17, 1984), https://www.fec.gov/files/legal/aos/79908.pdf (describing "majority opinion of the Commission in AO 1984-24")). The court's discussion of *In re Sealed Case* makes no mention of the fact that the statement on review there was not adopted by the agency and that it lacked force of law. *See NRA*, 254 F.3d at 185 (erroneously stating statement on review in *In re Sealed Case* was that of the "Commission"). Indeed, it appears that the FEC neglected to inform the court in *National Rifle Association* that *In re Sealed Case* considered a statement not adopted by the Commission. *See* McPhail Decl. Ex. 12 (Brief of the FEC 18 & n.9, *FEC v. NRA of Am.*, 00-5163 (D.C. Cir. Nov. 21, 2000) (citing *In re Sealed Case* to support proposition that deference is given to the "agency's interpretation")). Accordingly, *National Rifle Association* stands for only the unremarkable proposition that a statement adopted by a majority of the Commission reflects the decision of the agency and, if it has force of law, may be afforded *Chevron* deference. *See* 52 U.S.C. § 30108(c) (providing advisory opinions are binding on FEC action as to third parties involved in "indistinguishable" activities).[21] It does not show *In*

[21] For its part, AAN simply resorts to misstating the record, claiming that the statement on review here is the statement of the "Commission." *See* AAN Reply 4 (asserting the

re Sealed Case survives *Mead*, and does not show an agency decision that lacks force of law because it has no binding effect beyond the parties before the agency warrants *Chevron* deference. *See Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1137 (D.C. Cir. 2014) (decision must be "binding [as to] . . . third parties," and not merely "conclusive" as to the parties to warrant *Chevron* deference).[22]

III. The Controlling Commissioners' *Buckley* Analysis is Also Arbitrary and Capricious.

The "unworkable" nature of the controlling commissioner's analysis goes hand-in-hand with its arbitrary and capricious nature. The controlling commissioners' analysis ignores evidence that contradicts their predetermined conclusion, looking only to the self-serving materials submitted by AAN and other materials they gathered in service of their goal to excuse AAN from reporting. Further, the FEC fails to show the controlling commissioners considered any of the items identified by Plaintiffs or show they are not relevant to an analysis of the ads' electoral purpose. Accordingly, the FEC fails to show the analysis was not arbitrary and capricious.

"Commission" engaged in an "ad-by-ad analysis"); *id.* at 11 (stating the "Commission changed its characterization of four out of twenty disputed electioneering communications"); *id.* at 12–13 (stating the "Commission . . . classified nearly $1.9 million spent by AAN on non-express advocacy as indicative of a major purpose"). Since no more than three commissioners did any of these things, the "Commission" did not adopt any of these positions. *See* 52 U.S.C. § 30106(c) (four votes necessary for Commission action).

[22] Similarly, the FEC's contention that the fact that the three commissioners' statement arose in the course of a formal adjudication is sufficient to warrant deference, FEC Reply 9, misses the mark. *See Mead Corp.*, 533 U.S. at 229 (agency interpretation arising from formal adjudication is only an "indicator" that interpretation has force of law warranting *Chevron* deference). If that were all that were required, then the Court would also owe deference to the statement of the two commissioners who found reason to believe AAN was a political committee and interpreted *Buckley* to permit that, AR 1784–89, because it also was the product of the same adjudication.

In their analysis, the controlling commissioners cherry pick news articles to confirm their preexisting conclusion, but utterly ignore "important aspect[s] of the problem." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 633, 658 (2007). First, when conducting an inquiry into whether an ad "intend[s] to affect election results," *McConnell*, 540 U.S. at 127, an important aspect of the inquiry would be to look to see if the ads are in fact *aimed at elections*, *see* CREW Br. 36–39. The controlling commissioners, however, gave that consideration no thought. "Underinclusiveness raises serious doubts about whether the [actor] is in fact pursuing the interest it invokes," *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 802 (2011), but the controlling commissioners were unperturbed by the fact that AAN's ads did not target even one officeholder not facing serious risk of defeat at the polls "in November." *See, e.g.*, AR 1775. Ignoring so many relevant members of Congress calls into question whether AAN's purpose could credibly have been to lobby for legislation and gives rise to at least a "reason to believe" AAN's ads sought to elect or defeat the named candidates.[23]

Second, the controlling commissioners ignore the most logical explanation for AAN's laser-like focus on "November," instead asserting that it is *best* interpreted as a reference to a possible lame-duck legislative session. AR 1769–70. However, they made absolutely no attempt to explain why AAN would direct voters to register their displeasure in "November" but *never at any other time*, despite the fact that AAN's ads ran in October or earlier, a lame-duck

[23] AAN contends one of the candidates it targeted for election was not in a close race, but one was rated "Solid Republican." AAN Reply 25. But AAN's electioneering communications ran in October or earlier, McPhail Decl. Ex. 13, when the race was rated "lean GOP," *see* McPhail Decl. Ex. 14 *Election 2010: Senate Balance of Power*, Rasmussen Reports (Nov. 1, 2010), http://bit.ly/2fcd0k0). Anyway, the controlling commissioner now agree this ad exhibits the purpose of nominating or electing candidates. AR 1777–78 (addressing "New Hampshire" ad).

would be equally as likely in December, references to "this winter" or "after the election" or "in the lame duck" would equally suffice, and despite the fact that the referenced legislative issues were not limited to the lame duck and some were not even raised in the lame duck. *See* CREW Br. 39–40; *see also* McPhail Ex. 13 (FEC, Details for Committee ID: C30001648 (AAN) (showing under "From Date" and "End Date" columns that AAN's 2010 electioneering communications started in August, with most running October). AAN's sole focus on "November" is exceedingly strange if its purpose was to lobby; it makes perfect sense, however, if AAN's purpose was to influence the elections. The controlling commissioners' willful ignorance of relevant contrary information renders their analysis farcical.[24]

In response to all this, the FEC tries to view each fact showing the ad's electoral purpose in isolation, asserting no single one conclusively shows that the ad's purpose was solely to influence an election. But the FEC utterly failed to address the fact that AAN's ads possessed *all* of the indicators Plaintiffs identified that demonstrated their electoral purpose, and thus failed in its duty to review the "record . . . as a whole." *Defenders of Wildlife and Cntr. for Biological Diversity v. Jewell*, 815 F.3d 1, 9 (D.C. Cir. 2016). And its isolated defenses—consisting of a scant three pages of briefing—are wholly unreasoned and meritless. For example, the FEC

[24] Similarly ignored by the controlling commissioners was the $1.1 million AAN reported to the IRS that it spent on politics above what it spent on express advocacy. While both the FEC and AAN assume that money is subsumed within the $1.75 million the controlling commissioners begrudgingly now recognize was spent on the elections, *see* FEC Reply 37; AAN Reply 30, there is nothing in the record to support that assumption because the FEC never bothered to ask AAN on what it spent that $1.1 million. It may have been part of the funds AAN spent on electioneering communications, or it may have been spent on other federal election activity, like partisan voter registration drives, etc., 52 U.S.C. § 30101(20). If the latter, such funds could not count in favor of excusing AAN from reporting as a political committee. Surely, $1.1 million in election activity is an "important aspect" of the question on remand, yet the controlling commissioners never considered it. *Nat'l Ass'n of Home Builders*, 551 U.S. at 658.

guesses AAN exclusively focused on close races because AAN "viewed officeholders in tight races as susceptible to constituent demands." FEC Reply 34. Of course, they would be susceptible to constituent demands *because they are at risk of losing their election.* AAN's desire to use possible influence on the elections to advance its policy goals hardly demonstrates the ads are not substantially related to impacting elections—rather it proves they were.

Moreover, in addressing each of these facts, the FEC can only guess what the controlling commissioners would say about them because nothing in the record shows the controlling commissioners considered these issues at all. As with all the "important aspects" of the question on remand ignored by the controlling commissioners, the FEC is left to attempt post-hoc rationalizations. But its attempts are as irrelevant as they are unmeritorious: the court "must judge the propriety of . . . [the controlling commissioners'] action solely by the grounds invoked by [them]," *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947), and "may not accept[] counsel's *post hoc* rationalizations for agency action," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). It is indisputable the controlling commissioners "entirely failed to consider" the factors identified by Plaintiffs and that such factors are clearly "important aspect[s]" of the ads' electoral nature. That renders their analysis arbitrary and capricious. *Nat'l Ass'n of Home Builders*, 551 U.S. at 657.

In addition to failing to consider these aspects, what the controlling commissioners *did* do is equally damning. They relied solely on the selected materials and analysis submitted by AAN, failing to even ask their own Office of General Counsel for an analysis of the Court's opinion.[25]

[25] The FEC asserts that "plaintiffs themselves chose not to provide any further context of their own, thus choosing to leave the administrative record devoid of the information they now claim

Moreover, even with respect to the evidence they apparently thought was relevant—newspaper articles discussing the elections and legislation—the record does not reveal an evenhanded or comprehensive review. Rather, they selected evidence confirming their preexisting conclusion while ignoring other contemporary news reports recognizing AAN's ads were "campaign" or "political" ads.[26] "Such cherry-picking embodies arbitrary and capricious conduct." *Sierra Club v. Salazar*, 177 F. Supp. 3d 512, 540 (D.D.C. 2016) (citing *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008)).

In sum, the controlling commissioners have adopted an "unworkable" test that allows them to cherry pick evidence to excuse groups they favor, while ignoring the most relevant evidence to determining whether ads are aimed at influencing elections. That their test is arbitrary and capricious only proves Congress's wisdom in creating a clear but narrowly tailored category to demark ads intended to influence elections: those that are electioneering

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to be essential." FEC Reply 33. The facts Plaintiffs cite, however, are either apparent on the face of the ads, were submitted with the record on remand, or come from the agency's own records or other public sources the FEC would have gathered in any unbiased investigation. Furthermore, the FEC's notice that they were not appealing this Court's decision did not invite Plaintiffs to submit any materials, *see* AR 1761, nor would it have provided a reasonable opportunity as the Commission voted on the case mere days later, *see* AR 1762.

[26] *See, e.g.*, McPhail Decl. Ex. 15 (Lynn Bartels, 9News removes anti-Perlmutter ad deemed a "whopper", *Denver Post* (Oct. 26, 2010), http://www.denverpost.com/2010/10/26/9news-removes-anti-perlmutter-ad-deemed-a-whopper/ (describing AAN's "Skype" "campaign ad")); *id.* Ex. 16 (Daniela Altimari, Television Pulls Ad Against Murphy, Citing Unsubstantiated Claims, *Hartford Courant* (Oct. 26, 2010), http://articles.courant.com/2010-10-26/news/hc-viagra-ad-pulled-1027-20101026_1_politicalads-review-commercials-murphy (discussing AAN's "Mess" "political ad")); *id.* Ex. 17 (Jake Gibson, Connolly, Like Many House Dems in Swing Districts, Faces tough Re-election campaign, *Fox News* (Oct. 25, 2010), http://www.foxnews.com/politics/2010/10/25/connolly-like-many-house-dems-in-swing-districts-faces-tough-re-election.html (stating AAN spent $900,000 to "run [the 'Back Pack' ad] against Connolly" in election)).

communications.

IV. The Court May Consider Submitted Materials.

Finally, the FEC asks the Court to ignore indisputably relevant materials that can assist the Court in interpreting *Buckley*, FEC Reply 32–34, but does not show any such materials are not properly before the Court. Much of this material, consisting of the FEC's own reports and filings with the agency or summaries of such materials, was submitted when this matter was before the Court initially, and thus are part of the record the Court "remand[ed] . . . to the FEC." *CREW*, 209 F. Supp. 3d at 81; *accord* FEC, Certified List of Contends of Administrative Record, ECF No. 18 (recognizing record was "remanded to the Commission"). Even if they were not part of the remanded record, the Court may consider these materials where they show the agency "failed to examine all relevant factors." *Oceana, Inc. v. Locke*, 674 F. Supp. 2d 39, 45 (D.D.C. 2009); *see Blair v. Cal. State Dep't of Transp.*, 867 F. Supp. 2d 1058, 1068 (N.D. Cal. 2012) (admitting extra-evidence to prove agency failed to examine relevant facts); *cf. Nat'l Treasury Emp. Union v. Hove*, 840 F. Supp. 165, 169 (D.D.C. 1994) (refusing to consider outside record evidence for purpose of showing agency failed to consider all relevant factors when the information "concern[ed] factors actually considered by" the agency). If a plaintiff were limited to evidence concerning the aspects the agency *did* consider, as the FEC proposes, a plaintiff could never show an agency "failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43. Finally, all materials are relevant to the Court's interpretation of *Buckley*, a "rule of domestic law," and so the Court "is unrestricted in his investigation and conclusion."

FED. R. EVID. 201 (cmmt).[27] The FEC's complaint that that exception swallows the rule against considering extra-record evidence, FEC Reply 33, confuses the various inquiries before the Court. When the Court asks what the law is rather than say what the respondent did, the Court may consider any matter it deems relevant. The latter question is not in dispute here, and the Court may consider any and all materials it deems relevant in its resolution of the former.[28]

CONCLUSION

The controlling commissioners once again misinterpreted *Buckley* to reach their predetermined conclusion: that AAN must be excused from political committee reporting. Just as before, however, that interpretation is impermissible because it rests on an interpretation of *Buckley* that excuses organizations from reporting *because* they disseminate ads that are "specifically intended to affect election results." *McConnell*, 540 U.S. at 127. They contrive an "unworkable" test, *Indep. Inst.* 216 F. Supp. 3d at 188, to segregate ads in line with an "inapposite" framework that has no application "in the disclosure context," *CREW*, 209 F. Supp. 3d at 90. They chose to rely on an arbitrary and capricious cherry picking of facts, while ignoring the most relevant facts about the ads; facts of which this Court rightly took notice when

[27] *See also Beach Commc'n, Inc. v. FCC*, 959 F.2d 975, 987 (D.C. Cir. 1992) ("'[I]t may sometimes be appropriate to resort to extra-record information to enable judicial review of agency action to become effective.' . . . In the instant case, we require additional 'legislative facts' . . . ." (citations omitted)); *see also Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 305 F.R.D. 256, 298 (D.N.M. 2015) ("To the extent that materials go towards elucidating the standard by which the Court should judge the facts of this case, rather than elucidating the facts themselves, the Court may look to, and the parties may cite to, evidence outside the record.").

[28] In contrast, AAN cites materials related to its activities in 2017, *see* AAN Reply 24 n.5, but these materials have no relation to the proper interpretation of *Buckley* or any other rule of domestic law and, dating more than seven years after the relevant time-period in question here, are wholly irrelevant. *See CREW*, 209 F. Supp. 3d at 94 (expenditures in the requisite "calendar year" are most relevant).

it declared that it "blinks reality to conclude" the ads were "not designed to influence the election or defeat of a particular candidate." *Id.* at 93. The controlling commissioners' new analysis leaves one still blinking. Thus, the dismissal below was, as was the case previously, contrary to law. Plaintiffs therefore respectfully request the Court enter summary judgment in their favor, declare that it is impermissible to interpret *Buckley* to excuse organizations from reporting as political committees *because* they run electioneering communications, and remand for further consideration in light of that declaration.

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