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,	)	MOTION FOR SUMMARY JUDGMENT
Defendant,	)	
AMERICAN ACTION NETWORK,	)	
Intervenor-Defendant.	)	

FEDERAL ELECTION COMMISSION'S MOTION FOR SUMMARY JUDGMENT

In accordance with the Court's Amended Scheduling Order (Docket No. 27), defendant Federal Election Commission ("Commission") respectfully moves this Court for an order granting summary judgment to the Commission pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Civil Rule 7(h). In support of this motion, the Commission is filing a Memorandum in Support of Its Motion for Summary Judgment, the Declaration of Shanna M. Reulbach, and a Proposed Order.

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August 4, 2017

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FEDERAL ELECTION COMMISSION,	)	MEMORANDUM
Defendant,	)	
AMERICAN ACTION NETWORK,	)	
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FEDERAL ELECTION COMMISSION'S MEMORANDUM
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In this lawsuit, plaintiffs Citizens for Responsibility and Ethics in Washington and Melanie Sloan once again challenge the Federal Election Commission's ("FEC" or "Commission") handling of their administrative complaints alleging certain campaign-finance violations by Americans for Job Security ("AJS") and American Action Network ("AAN"). Plaintiffs' administrative complaints alleged that AJS and AAN violated the Federal Election Campaign Act ("FECA" or "Act") by spending substantial sums of money on advertising referencing federal candidates and legislative issues without registering with the Commission as political committees and complying with the disclosure requirements that apply to such groups. Following the Court's determination, under FECA's relevant judicial review provision, 52 U.S.C. § 30109(a)(8), that certain aspects of the rationales for the earlier dismissals of plaintiffs' administrative complaints were "contrary to law," *Citizens for Responsibility & Ethics in Washington v. FEC*, 209 F. Supp. 3d 77 (D.D.C. 2016) ("*CREW I*"), *appeal dismissed*, Nos. 16-5300, 16-5343 (D.C. Cir. Apr. 4, 2017) (per curiam) (Doc. #1669311), the agency has reconsidered the two matters. Upon such reconsideration, [redacted] the Commission did not find, by the required four affirmative votes, that AAN was subject to FECA's political committee requirements. The [redacted] Commission has dismissed the administrative complaint concerning AAN. Plaintiffs allege that the Commission's failure to take final action on the AJS matter, and its new dismissal of the AAN matter, are contrary to law.

Plaintiffs' contentions are meritless. [redacted]

[redacted]

The Commission's actions regarding the AAN matter were not contrary to law. Following the Court's remand, the Commissioners reconsidered plaintiffs' allegations that AAN was required to register and report as a political committee. Once again, the agency did not have the requisite four votes to find reason to believe that AAN violated the Act, and, in a new statement of reasons, the same controlling group of Commissioners that had previously voted to dismiss plaintiffs' administrative complaints reconsidered and revised their analysis in light of the Court's determination in *CREW I* that AAN's non-express advocacy could be indicative of a major purpose of nominating or electing candidates. Drawing upon their expertise, the Commissioners then performed an ad-by-ad analysis of each of AAN's non-express advocacy electioneering communications that plaintiffs had placed at issue. On reconsideration, these Commissioners agreed that a number of those ads, like AAN's express advocacy communications, should count towards a finding that AAN had the major purpose of nominating or electing candidates. The controlling Commissioners further concluded that a small set of other ads were a closer call and that the remaining ads were more indicative of AAN's pursuit of legislative goals. Because they determined that the proportion of relevant spending indicating a

major purpose of nominating or electing candidates remained well below half of AAN's overall spending — and in fact was closer to one-quarter, even when including those ads the controlling Commissioners viewed as close calls — the controlling group of Commissioners again concluded that there is no reason to believe AAN was a political committee. The controlling Commissioners' revised analysis reflects a careful review of the record and is thoroughly explained in a lengthy statement of reasons that conforms with the Court's remand decision and is not otherwise contrary to law or arbitrary or capricious.

The Court should grant summary judgment to the Commission.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

A. The FEC and FECA's Administrative Enforcement Process

1. The Commission

The FEC is a six-member, independent agency vested with statutory authority over the administration, interpretation, and civil enforcement of FECA. Congress authorized the Commission to "formulate policy" with respect to FECA, 52 U.S.C. § 30106(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA]," *id.* §§ 30107(a)(8), 30111(a)(8); and to investigate possible violations of the Act, *id.* § 30109(a)(1)-(2). The FEC has exclusive jurisdiction to initiate civil enforcement actions for violations of FECA in the United States district courts. *Id.* §§ 30106(b)(1), 30109(a)(6). It is required under FECA to make decisions through majority votes and, for certain actions, including enforcement decisions, with the affirmative vote of at least four Commissioners. *Id.* § 30106(c).

2. FECA's Administrative Enforcement and Judicial-Review Provisions

FECA permits any person to file an administrative complaint with the FEC alleging a violation of the Act. *Id.* § 30109(a)(1); *see also* 11 C.F.R. § 111.4. FEC administrative enforcement matters are required by FECA to be kept confidential until the administrative process is complete. 52 U.S.C. § 30109(a)(12)(A) ("Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made."); 11 C.F.R. § 111.21. After considering an administrative complaint and any response, the FEC determines whether there is "reason to believe" that FECA has been violated. 52 U.S.C. § 30109(a)(2). If at least four of the FEC's six Commissioners vote to find reason to believe, the FEC may investigate the alleged violation; otherwise, it dismisses the administrative complaint. *Id.* §§ 30106(c), 30109(a)(2).

If the FEC proceeds with an investigation, it then must determine whether there is "probable cause" to believe that FECA has been violated. *Id.* § 30109(a)(4)(A)(i). A probable cause determination also requires an affirmative vote of at least four Commissioners. *Id.* §§ 30106(c), 30109(a)(4)(A)(i). If the Commission so votes, it is statutorily required to attempt to reach a conciliation agreement with the respondent. *Id.* The FEC's assent to a conciliation agreement requires an affirmative vote of at least four Commissioners. *Id.* If the FEC is unable to reach a conciliation agreement, FECA authorizes the FEC to institute a de novo civil enforcement action in federal district court, upon an affirmative vote of at least four Commissioners. *Id.* §§ 30106(c), 30109(a)(6)(A).

FECA permits an administrative complainant to challenge the FEC's handling of an administrative complaint in two limited situations, both of which have been invoked here. First,

a party who has filed an administrative complaint may bring a judicial-review action against the Commission in the event of "a failure of the Commission to act on [the administrative] complaint during the 120-day period beginning on the date the [administrative] complaint is filed." 52 U.S.C. § 30109(a)(8)(A). The 120-day period is a jurisdictional threshold, not a timetable within which the Commission must resolve an administrative complaint. *See FEC v. Rose*, 806 F.2d 1081, 1092 (D.C. Cir. 1986).

Second, if, at any point in the administrative process, the Commission determines that no violation has occurred or decides to dismiss the administrative complaint for some other reason, the complainant may file suit in this District against the Commission to obtain judicial review of the Commission's dismissal decision. 52 U.S.C. § 30109(a)(8)(A). Reviewable dismissal decisions include instances in which "the Commission deadlocks 3-3 and so dismisses a complaint." *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("*NRSC*"); *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987) ("*DCCC*"). In such split-vote cases, the three Commissioners who voted to dismiss must provide a statement of their reasons" in order "to make judicial review a meaningful exercise." *NRSC*, 966 F.2d at 1476. "Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did." *Id.*; *see also CREW I*, 209 F. Supp. 3d at 81.

In either scenario, if a court finds that the Commission's failure to act or dismissal was "contrary to law," it may order the Commission to conform to the court's decision within 30 days. 52 U.S.C. § 30109(a)(8)(C); *see In re Nat'l Cong. Club*, Nos. 84-5701, 84-5719, 1984 WL 148396, at *1 (D.C. Cir. Oct. 24, 1984) (per curiam); *Rose*, 806 F.2d at 1084; *CREW I*, 209 F. Supp. 3d at 95.

B. FECA's Registration and Reporting Requirements

One way FECA reduces corruption in politics is by requiring public disclosures concerning the financing of certain kinds of election-related communications. *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam) ("[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity."). Disclosure also "provid[es] the electorate with information about the sources of election-related spending." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1459 (2014) (internal quotation marks omitted). FECA imposes different kinds of disclosure obligations depending upon the nature of the organization making the communications and the timing, form, and content of the communications.

1. Event-Driven Reporting Requirements

FECA's event-driven reporting requirements apply to particular communications meeting certain criteria. *See CREW I*, 209 F. Supp. 3d at 81-82. As relevant here, FECA requires that spending above certain thresholds on "independent expenditures" or "electioneering communications" must be disclosed. An "independent expenditure" is a communication "expressly advocating the election or defeat of a clearly identified candidate" and that is made without coordinating with the candidate or a political party. 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16. An electioneering communication is (1) a "broadcast, cable, or satellite communication" (2) referring to a "clearly identified" federal candidate (3) that is made within a 30- or 60-day run up to an election, convention, or caucus (depending upon what kind of election or other event it is) and (4) is "targeted to the relevant electorate." 52 U.S.C. § 30104(f)(3); 11 C.F.R. § 100.29. The only content requirement to meet that definition is the clear reference to the applicable federal candidate; broadcast communications falling within the 30- or 60-day

statutory windows thus may be "electioneering communications" even if they do not expressly advocate for the identified candidate's election or defeat. *See McConnell v. FEC*, 540 U.S. 93, 189 (2003), *overruled in part by Citizens United v. FEC*, 558 U.S. 310 (2010).

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

2. Regulation of Political Committees

FECA also provides that certain organizations, which qualify as "political committees," are subject to "[m]ore extensive disclosure rules." *CREW I*, 209 F. Supp. 3d at 82. Political committees must, *inter alia*, register with the FEC, appoint a treasurer, maintain names and addresses of contributors, and file periodic reports disclosing most receipts of $200 or more. 52 U.S.C. §§ 30103, 30104(a)-(b).

Under FECA, any "committee, club, association, or other group of persons" that receives more than $1,000 in "contributions" or makes more than $1,000 in "expenditures" in a calendar

year is a "political committee." 52 U.S.C. § 30101(4)(A); 11 C.F.R. § 100.5(a). The Act defines "contribution" and "expenditure" to include any payment of money to or by any person "for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i), (9)(A)(i). In *Buckley*, however, the Supreme Court explained that FECA's definition of political-committee status "only in terms of amount of annual 'contributions' and 'expenditures'" might result in an overbroad application by reaching "groups engaged purely in issue discussion." 424 U.S. at 79. The Court therefore concluded that, in order to "fulfill the purposes of the Act," FECA's political-committee provisions "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.*; *CREW I*, 209 F. Supp. 3d at 82. *Buckley* thus established that an entity that is not controlled by a candidate must register as a political committee only if the group crosses the $1,000 threshold of contributions or expenditures and has as its "major purpose" the nomination or election of federal candidates.

"Rather than adopt a rule specifically defining the contours of this 'major purpose' limitation, the FEC has pursued an adjudicative, case-by-case approach, an implementation choice which has been litigated, scrutinized, and ultimately validated by a fellow court in this District." *CREW I*, 209 F. Supp. 3d at 82. As the Commission explained in 2007, "'determining political committee status . . . requires' a fact-intensive analysis of an organization's 'overall conduct,' meaning 'whether its major purpose is Federal campaign activity (i.e., the nomination or election of a Federal candidate).'" *Id.* (quoting FEC, *Rules and Regulations: Political Committee Status*, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007) ("Supplemental E&J")).

II. FACTUAL BACKGROUND

A. The Commission's Previous Dismissals of Plaintiffs' Administrative Complaints and the Court's Remand

Plaintiffs' March 8, 2012 administrative complaint alleged that "AJS's major purpose in 2010 was the nomination or election of federal candidates," and that, consequently, AJS and its president, Stephen DeMaura, had violated FECA by "failing to register as a political committee" and by "failing to file [the] periodic reports required of political committees." (AR 11-12.) In a separate administrative complaint dated June 7, 2012, plaintiffs alleged that "AAN's major purpose between July 23, 2009 and June 30, 2011 was the nomination or election of federal candidates" and that it likewise had violated FECA by "failing to register as a political committee" and by failing "to file [the] periodic reports" required of political committees. (AR 1486-87.) On June 24, 2014, the Commission, by a vote of 3-3, did not find reason to believe that either AJS or AAN had violated FECA's registration and reporting requirements for political committees. (AR 1434-35; AR 1686-87.)

Plaintiffs sought judicial review of the dismissal decisions, challenging as contrary to law the controlling statements of reasons (AR 1438-69; AR 1690-1723) explaining the votes of the three Commissioners, Commissioners Goodman, Hunter, and Petersen, who had declined to approve finding reason to believe. After briefing and argument, the Court concluded that the controlling statements of reasons contained two legal errors. First, it held that the controlling Commissioners' "understanding that the First Amendment effectively required the agency to exclude from its consideration all non-express advocacy in the context of disclosure" was erroneous. *CREW I*, 209 F. Supp. 3d at 93. Second, it held that the controlling "Commissioners' refusal to give any weight whatsoever to an organizations' relative spending in the most recent calendar year" was arbitrary and contrary to law. *Id.* at 94; *see* Mem. Op. & Order at 2, *CREW v.*

FEC, No. 14-1419 (CRC) (D.D.C. Apr. 6, 2017) (Docket No. 74) ("Show-Cause Decision") (denying motion for order to show cause). The Court then remanded the matters to the FEC with instructions to conform with the Court's opinion. *CREW I*, 209 F. Supp. 3d at 95.

[redacted]

[redacted]

[redacted]

[redacted]

C. The Commission's Dismissal of the AAN Matter on Remand

Following the Court's September 2016 remand order, the Commission also reconsidered the AAN matter and brought it to a close. As part of that reconsideration, the Commission and FEC Counsel reviewed AAN's second supplemental response, which AAN submitted to the Commission on October 6, 2016. (AR 1733-59.) On October 18, 2016, by a vote of 3-3, the Commission did not find reason to believe that AAN had violated FECA's registration and reporting requirements for political committees. (AR 1762.) Commissioners Walther, Ravel, and Weintraub voted to find reason to believe and Commissioners Petersen, Hunter, and

Goodman voted against so finding. (*Id.*) The Commission then voted 5-1 to close the file. (*Id.*) On October 19, 2016, Commissioners Petersen, Hunter, and Goodman issued a statement explaining their October 18 votes concerning the matter. (AR 1763-81.) On December 5, 2016, Commissioners Ravel and Weintraub issued a statement explaining their votes. (AR 1784-89.) Because Commissioners Petersen, Hunter, and Goodman were the Commissioners voting against making the reason-to-believe finding, they remain the "controlling group" of Commissioners with respect to the October 18 dismissal. *NRSC*, 966 F.2d at 1476.

After summarizing the previous dismissal of plaintiffs' administrative complaint concerning AAN and the Court's opinion (AR 1763-67), the controlling Commissioners reexamined AAN's spending of $13.7 million on electioneering communications during 2009-2010 (AR 1768-80). At the outset, the controlling Commissioners explained that evaluation of these communications required "look[ing] at the ad's specific language for references to candidacies, elections, voting, political parties, or other indicia that the costs of the ad should be counted towards a determination that the organization's major purpose is to nominate or elect candidates." (AR 1767-68.) They also explained that additional relevant information included "the extent to which the ad focuses on issues important to the group or merely on the candidates referenced in the ad," "information beyond the content of the ad only to the extent necessary to provide context," and "whether the communication contains a call to action and, if so, whether the call relates to the speaker's issue agenda or . . . to the election or defeat of federal candidates." (AR 1768.)

The controlling Commissioners then engaged in an ad-by-ad analysis that discussed AAN's electioneering communications by the following categories of subject matter: "Bush Tax Cuts"; "Federal Spending"; "Health Care"; "Energy"; and a "Miscellaneous" category containing

the last two advertisements. (AR 1770-79.) In each category, the controlling statement set forth the texts of the ads, AAN's spending on them, and the controlling Commissioners' analysis of the extent to which the ads evinced a purpose of nominating or electing federal candidates. (*Id.*) Those Commissioners concluded that AAN's spending on the five electioneering communications concerning the "Bush Tax Cuts" should not count as relevant spending because "[n]one of [them] refer[red] to candidacies or the upcoming election, nor do they contain other campaign-related indicia." (AR 1770-71.) In addition, "[e]ach of the ads . . . focuses on government spending and tax cuts and calls on viewers to contact the named officeholders to urge them to take specific legislative actions." (AR 1771.) "[T]he action being advocated by the ads is consistent with and furthered AAN's tax-related initiatives," the Commissioners wrote. (AR 1772.) The Commissioners found that the "only content in the ads that is arguably election-related is the mention of November" but those references were "best understood as a reference to the time period in which [Congress's] lame-duck session would commence." (AR 1771.)

Of the five "Federal Spending" communications, the controlling Commissioners found four to be analytically similar to those concerning the Bush tax cuts. (AR 1772-74.) However, they contrasted one ad, "Bucket," which contained "no call to take a particular legislative action" and appeared "to be more about creating a negative impression of [the candidate, Russ Feingold] in the mind of the viewer than on changing Mr. Feingold's legislative behavior." (AR 1773-74.) The Commissioners concluded that the "Bucket" ad "is indicative of a major purpose to nominate or elect federal candidates." (AR 1774; Show-Cause Decision at 3.)

The controlling Commissioners determined that five of AAN's six communications concerning "Health Care" were focused on the repeal of the Affordable Care Act and that AAN's spending on these ads should not count towards indicating that AAN was a political committee.

(AR 1774-76.) The remaining ad, "Read This" (AR 1775), highlighted by the Court itself in its opinion, *CREW I*, 209 F. Supp. 3d at 80, "criticize[d] not only the policy judgment of the named officeholders but also the officeholders' role in the process by which the Affordable Care Act was enacted," and "could be read to ask viewers . . . to act '[i]n November.'" (AR 1776.) However, the Commissioners concluded that, "in light of the ongoing debate in Congress regarding the Affordable Care Act," "Read This" is "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." (*Id.*) Nevertheless, because it was a "close call" (*id.*) the Commissioners counted as relevant AAN's spending on the "Read This" ad in certain of their analyses of AAN's total spending. (AR 1776, 1779.)

Of the four ads making up the last two categories of communications, the controlling Commissioners determined that three could or did indicate an electoral purpose. (AR 1777-79.) One of the "Energy" ads contained no reference to "candidacies or the election," criticized the candidate's role in a "cap-and-trade bill," and included a "call to action focus[ing] on altering [the candidate's] voting stance rather than encouraging viewers to defeat [him] in the election." (AR 1777.) By comparison, the other "Energy" ad, "New Hampshire," contained no "call to action" and contrasted the named candidate's "position with that of Kelly Ayotte," the candidate's "opponent in the 2010 U.S. Senate race held in New Hampshire." (AR 1777-78.) For that reason, the controlling Commissioners counted AAN's spending on "New Hampshire" as relevant spending in the major purpose analysis. The Commissioners likewise counted as relevant AAN's spending on "Order" and "Extreme," which neither contained a "call to action" nor focused on "changing the voting behavior or policy stances of the named individuals now or in the future. . . . In fact, the subtext of both ads is that neither individual is likely to

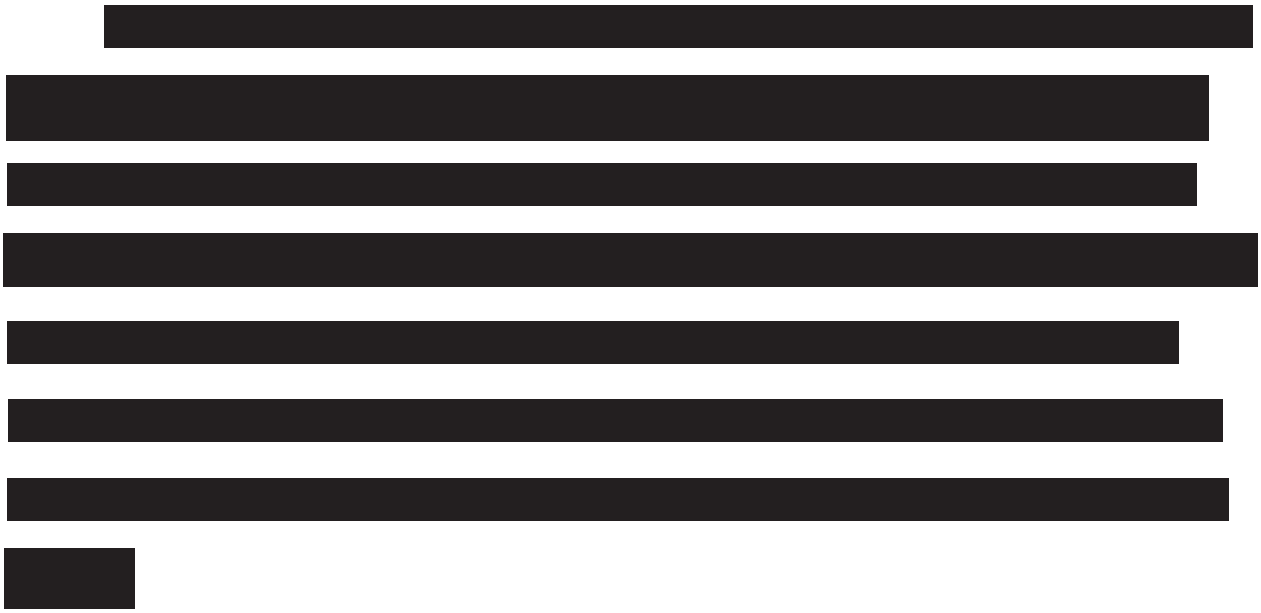
change . . . ." (*Id.*) The Commissioners thus found that the ads "appear to be untethered to an issue and may reasonably support an inference that their cost may count toward a determination that AAN's major purpose was the nomination or election of federal candidates." (AR 1778-79.)

Having considered each of AAN's electioneering communications, the Commissioners then compared AAN's spending indicating a major purpose of nominating or electing candidates to its total spending in July 2009 through June 2011. (AR 1779.) Of the reported $27,139,009 AAN spent during that period, it spent $4,096,910 on independent expenditures — *i.e.*, express advocacy. To that base of relevant spending, the controlling Commissioners added the $1,875,394 AAN spent on "'Bucket,' 'New Hampshire,' 'Order,' and 'Extreme'" in order to conclude that the total of $5,972,304 represented "22% of AAN's overall spending." (*Id.*) They also determined that "[e]ven if we were to add in the costs for the 'Read This' ad ($1,065,000), 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." (*Id.*) The Commissioners further noted that, "[e]ven if we considered AAN's spending solely in a single year (the July 1, 2010 to June 30, 2011 fiscal year disclosed on its 2010 IRS Form 990)," the amount of AAN's "spending that indicates a purpose to nominate or elect federal candidates would constitute less than 28% of its total spending in that time period ($7,037,304 of $25,692,334)." (*Id.* n.52.) Thus, the Commissioners found that upon conducting their "fact-intensive" analysis, which they noted included consideration of "AAN's mode of organization, official statements, and the fact that less than half of its spending indicates a major purpose of nominating or electing candidates, . . . there is no reason to believe that AAN violated [FECA] by failing to register with the Commission as a political committee." (AR 1780.)

D. Post-Remand Procedural History

On November 14, 2016, the same day plaintiffs filed this new action for judicial review under 52 U.S.C. § 30109(a)(8) (Docket No. 1), both AAN and plaintiffs sought to appeal the Court's remand decision in *CREW I*. Those appeals were dismissed for lack of jurisdiction. *Citizens for Responsibility & Ethics in Wash. v. FEC*, Nos. 16-5300, 16-5343 (D.C. Cir. Apr. 4, 2017) (per curiam) (Doc. #1669311).

In addition, and also on that date, plaintiffs filed a motion in *CREW I* asking the Court to order the Commission to show cause why the agency should not be held to have violated the Court's remand order. Pls.' Mot. for an Order to Def. FEC to Show Cause, at 1, 25, *CREW v. FEC*, No. 14-1419 (CRC) (D.D.C. Nov. 14, 2016) (Docket No. 57) ("Show-Cause Motion"). In their Show-Cause Motion, plaintiffs argued that the Commission failed to act in conformity with the Court's remand of their administrative complaint concerning AJS and that the agency's prompt post-remand dismissal of their similar allegations concerning AAN was contrary to law, including this Court's opinion in *CREW I*. This Court denied that motion and rejected plaintiffs' arguments. (Show-Cause Decision at 4-6.)



Regarding AAN, the Court explained that "[o]n remand, and within the 30-day window set out in the [remand] Order, the FEC reopened the AAN matter, notified the parties, and reconsidered the record in light of the Court's Order." (Show-Cause Decision at 2.) The Court described the controlling Commissioners' revised statement of reasons, citing its "nineteen single-spaced pages," which "summarize[] this Court's September Opinion," including the two legal errors identified in that opinion; "outline[] a new framework for evaluating whether AAN's electioneering communications (i.e., non-express advocacy) indicated a major purpose to nominate or elect a federal candidate; and then appl[y] that framework in a fact-intensive manner to *each* of AAN's electioneering communications." (*Id.* at 3.) The Court also distinguished the controlling group's original and post-remand analyses: "Whereas prior to the Court's [remand] Order, the [controlling group of Commissioners] had found *no* electioneering communications to indicate an election-related major purpose," in reconsidering the matter on remand, those Commissioners "identified four." (*Id.*) The Court observed that the revised controlling statement of reasons "developed a new framework for evaluating which expenditures suggested an election-related purpose, and applied that new framework to AAN's ads," and "[c]ritically, th[at] new framework . . . was free of the legal errors identified in this Court's previous Opinion and Order." (*Id.* at 5.) The Court also clarified that it had "never ordered the FEC to reach a particular result, or to consider any particular ad — or any proportion of electioneering communications — election-related," and had merely "directed the FEC to reconsider its decision without 'exclud[ing] from its [major purpose] consideration all non-express advocacy." (*Id.* at 6 (alterations in original).) The Court found that "[t]he FEC did just that." (*Id.*)

In this action, plaintiffs again seek judicial review of the FEC's dismissal of plaintiffs' administrative complaint regarding AAN and the Commission's supposed "failure to act" regarding the AJS matter. (Docket No. 8 ("Am. Compl.").)

ARGUMENT

The Commission's post-remand actions on the AJS and AAN matters should be sustained. Such actions are free from the errors identified in the Court's remand opinion and are not otherwise contrary to law or arbitrary or capricious. [redacted]

In addition, the Commission's post-remand dismissal of the AAN matter is not contrary to law. The controlling group of Commissioners' new statement of reasons reflects their thorough review of AAN's electioneering communications and their assessment, based on the Commissioners' expertise and experience, of which communications appropriately should be counted towards a finding that AAN's spending made it a political committee. In light of the congressionally designated and judicially approved deference owed to the Commission's implementation choices in conducting this analysis, as well as the courts' repeated instructions that FECA must be interpreted in a manner that is sensitive to the First Amendment, the dismissal decision is neither contrary to law nor arbitrary or capricious.

I. STANDARDS OF REVIEW

In this action for judicial review pursuant to 52 U.S.C. § 30109(a)(8), the Court's review is based on the AJS chronology set forth in the accompanying declaration and the AAN administrative record. The Court should grant summary judgment to the Commission unless plaintiffs can carry their burden to demonstrate that the Commission's actions on the AJS and AAN matters were "contrary to law." 52 U.S.C. § 30109(a)(8)(C). As explained below, the contrary-to-law standard of section 30109(a)(8) entails distinct judicial considerations with respect to plaintiffs' contentions that the agency has (1) failed to act on the AJS matter and (2) made substantive legal errors in dismissing the AAN matter.

A. Standard of Review for Plaintiffs' Failure-to-Act Claim

In the context of a "failure to act" claim, FECA's contrary-to-law standard means "action which is arbitrary and capricious." *Common Cause v. FEC*, 489 F. Supp. 738, 744 (D.D.C. 1980). The Court of Appeals has explained that "in using the language 'contrary to law,' Congress appears to have intended that the unreasonableness of the Commission's delay in completing its task be tested under standards generally applicable to review of agency inaction." *In re Nat'l Cong. Club*, 1984 WL 148396, at *1. To make this determination, the Court of Appeals has instructed district courts to consider the four factors used in *Common Cause* — "'[1] the credibility of the allegation, [2] the nature of the threat posed, [3] the resources available to the agency, and [4] the information available to it, as well as the novelty of the issues involved,'" *id.* (quoting *Common Cause*, 489 F. Supp. at 744) — as well as the six factors discussed in *Telecommunications Research & Action Center v. FCC*:

> (1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply

> content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

750 F.2d 70, 80 (D.C. Cir. 1984) (citations and internal quotation marks omitted) ("*TRAC*").

Although section 30109(a)(8)(A) authorizes a cause of action based on an alleged "failure of the Commission to act on [an administrative] complaint during the 120-day period beginning on the date the complaint is filed," the Court of Appeals has made clear that FECA does not impose some particular time period within which FEC administrative enforcement matters must be fully resolved. *See, e.g.*, *Rose*, 806 F.2d at 1091-92 & n.17 (citing Court of Appeals's "unequivocal[] reject[ion]" of argument that FECA required the FEC to act on an administrative complaint within 120 days and embracing the FEC's "entirely correct" view that "the Commission's handling of a complaint should be judged under the deferential standards of review prescribed in the APA"); *In re Nat'l Cong. Club*, 1984 WL 148396, at *1 (rejecting presumption that the Commission has acted contrary to law whenever it fails to resolve a complaint within the two-year period between elections); *accord Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996) (explaining the Congressional understanding that some complaints would not be investigated or reviewed by the judiciary until after the election at issue).[3]

[3] Indeed, in the 1979 amendments to FECA, Congress deleted (1) a previously existing requirement that the Commission conduct its investigations "expeditiously" and (2) a previously existing portion of section 30109(a)(8)(B) that had required delay cases to be brought "no later than" 150 days after the filing of an administrative complaint, while retaining the Commission's authority to "conduct investigations and hearings expeditiously." *Compare* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 109, 90 Stat. 483-85, *with* Federal

B. Standard of Review for Plaintiffs' Challenge to the AAN Dismissal Decision

In the context of the dismissal of plaintiffs' administrative complaint regarding AAN, the contrary-to-law standard allows "limited" review of the Commission's decisions not to pursue an administrative enforcement action. *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988); *Citizens for Responsibility & Ethics in Wash. v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007) (explaining that judicial review under section 30109(a)(8) "is limited to correcting errors of law"). As this Court recently observed, relief is appropriate under the contrary-to-law standard only if "'the FEC dismissed the complaint as a result of an impermissible interpretation of [FECA],' or . . . 'the FEC's dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion.'" *CREW I*, 209 F. Supp. 3d at 85 (quoting *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986)).

"To satisfy [the contrary-to-law] standard it is not necessary for [the Court] to find that the agency's construction was the only reasonable one or even the reading the [C]ourt would have reached" on its own "if the question initially had arisen in a judicial proceeding." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981) ("*DSCC*"). Thus, when faced with challenges to its dismissal decisions, the Commission generally receives deference pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), even if

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Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 108, 93 Stat. 1358-61, *and id.* § 106, 93 Stat. 1356-57. "If Congress had intended that final action occur in all cases within 120 days of a complainant's filing, it would have made sense to leave in the" abandoned 150-day limitations period. *Common Cause*, 489 F. Supp. at 743. Thus, as explained by the then-Chairman of the Committee on Rules and Administration which reported the Senate bill to amend FECA, section 30109(a)(8) is there "'to assure that the Commission does not shirk its responsibility'" and "'provides that a total failure to address a complaint within 120 days is a basis for a court action. But (this basis) for judicial intervention (is) not intended to work a transfer of prosecutorial discretion from the Commission to the courts.'" *Id.* at 743-44 (quoting 125 Cong. Rec. S19099 (daily ed. Dec. 18, 1979) (statement of Sen. Pell)).

the dismissal decision resulted from an equally divided vote of Commissioners. *CREW I*, 209 F. Supp. 3d at 85-86 & n.5.[4] The Commission's dismissal decisions are also subject to arbitrary and capricious review. To meet that standard, plaintiffs must show that "the agency . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *CREW I*, 209 F. Supp. 3d at 88.

As the D.C. Circuit has explained, the standard for determining whether a Commission determination "was arbitrary or capricious or otherwise an abuse of discretion" is "extremely deferential" and "requires affirmance if a rational basis for the agency's decision is shown." *Orloski*, 795 F.2d at 167; *Van Hollen v. FEC*, 811 F.3d 486, 495 (D.C. Cir. 2016) ("*State Farm* entails a very deferential scope of review that forbids a court from substitut[ing] its judgment for that of the agency." (internal quotation marks omitted)).

With respect to the AAN dismissal, the controlling Commissioners' "implementation choices" "regarding the timeframe and spending amounts relevant in applying the 'major purpose' test . . . warrant the Court's deference" because such matters are "within the agency's sphere of competence." *CREW I*, 209 F. Supp. 3d at 88. Indeed, this Court has joined other courts in observing that "[t]he Supreme Court has described the FEC as 'precisely the type of

[4] As the Court previously explained, the D.C. Circuit applied the contrary-to-law standard in *Orloski* by engaging in "the familiar two-step framework outlined in *Chevron*." *CREW I*, 209 F. Supp. 3d at 86 (citing *Orloski*, 795 F.2d at 161-62). In *In re Sealed Case*, the D.C. Circuit reiterated the propriety of *Chevron* deference after a "thorough consideration" of FECA's "'detailed statutory framework for civil enforcement . . . analogous to a formal adjudication.'" *Id.* at 85 & n.5 (quoting *In re Sealed Case*, 223 F.3d 775, 780 (D.C. Cir. 2000)).

agency to which deference should presumptively be afforded.'" *Id.* at 87 (quoting *DSCC*, 454 U.S. at 37).

The deference that is accorded to the Commissioners' implementation choices is rooted in Congress's design of the agency to take action with care and without the appearance of partisan politics. The Commission can "initiate investigations, . . . and take other steps of comparable importance only upon the affirmative vote of four . . . members. The four-vote requirement serves to assure that enforcement actions, as to which the Congress has no continuing voice, will be the product of a mature and considered judgment." H.R. 12406, H. Rep. No. 94-917, 94th Cong., 2d Sess. at 3 (1976). The Court of Appeals has repeatedly emphasized this important element of the FEC's decision-making. *E.g.*, *Combat Veterans for Cong. Political Action Comm. v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015) (quoting legislative history); *Public Citizen, Inc. v. Fed. Energy Regulatory Comm'n*, 839 F.3d 1165, 1171 (D.C. Cir. 2016) ("The [FEC's] voting and membership requirements mean that, unlike other agencies — where deadlocks are rather atypical — FEC will regularly deadlock as part of its *modus operandi*.").

While a split-vote FEC decision "is not binding legal precedent or authority in future cases," *CREW I*, 209 F. Supp. 3d at 85 n.5 (internal quotation marks omitted); *Common Cause*, 842 F.2d at 449 n.32, a judicial failure to "accord *Chevron* deference to a prevailing decision that specific conduct is not a violation," potentially subjecting "parties . . . to criminal penalties," would be inconsistent with Congress's intent that enforcement decisions be non-partisan. *In re Sealed Case*, 223 F.3d 775, 780 (D.C. Cir. 2000); *accord DCCC*, 831 F.2d at 1135 n.5 (noting

that "judicial deference" to the agency's "initial decision or indecision" on areas of law is "at its zenith," including in split-vote cases).[5]

[redacted]

[5] The Court previously held that certain parts of the controlling reasoning at issue in the earlier action were primarily about what *Buckley* means rather than how it should be implemented, and thus not subject to *Chevron* deference. *CREW I*, 209 F. Supp. 3d at 86-88. The Commission incorporates by reference here and preserves for appeal its argument that the major purpose test is now incorporated into FECA's definition of "political committee," 52 U.S.C. § 30101(4)(A), and that all agency interpretations of that term should be accorded *Chevron* deference. *Id.* (considering argument). In any event, arbitrary and capricious review is similar to the second step of *Chevron* review. *E.g.*, *Pharm. Research & Mfrs. of Am. v. F.T.C.*, 790 F.3d 198, 209 (D.C. Cir. 2015) ("The analysis of disputed agency action under *Chevron* Step Two and arbitrary and capricious review is often 'the same, because under *Chevron* step two, [the court asks] whether an agency interpretation is arbitrary or capricious in substance.'" (quoting *Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011)); *Agape Church, Inc. v. F.C.C.*, 738 F.3d 397, 410 (D.C. Cir. 2013) (same).

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III. THE COMMISSION'S DISMISSAL OF THE AAN MATTER CONFORMS WITH THE COURT'S REMAND OPINION AND IS NOT OTHERWISE CONTRARY TO LAW OR ARBITRARY OR CAPRICIOUS

The controlling Commissioners' dismissal of the AAN matter should be upheld. It is consistent with judicial guidance and the agency's Supplemental E&J. It is also consistent with the Court's remand decision. In a change from their prior analysis found to be contrary to law, the Commissioners found that certain of AAN's non-express advocacy could be viewed as evincing a purpose to nominate or elect candidates, and they applied their knowledge of candidate and legislative advocacy campaigns to review all of AAN's electioneering communications afresh. (AR 1767-79.) The revised dismissal was not contrary to law or arbitrary or capricious.

A. The Controlling Dismissal Decision Is Supported by Courts' Narrow Interpretations of FECA's Political-Committee Definition and Based Upon the Commissioners' Fact-Intensive Analysis of AAN's Communications

In establishing the major-purpose test, the Supreme Court imposed a "narrowing construction" on FECA's political-committee definition in 52 U.S.C. § 30101(4)(A). *CREW I*, 209 F. Supp. 3d at 82. "If not controlled directly by a political candidate, the entity's 'major purpose' must be 'the nomination or election of a candidate.'" *Id.* (quoting *Buckley*, 424 U.S. at 79 and citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986)). The Court in *Buckley* imposed that construction to ensure that the Act would not be applied to reach "groups engaged purely in issue discussion." 424 U.S. at 79. Following the Supreme Court's lead, the

D.C. Circuit has explained that because evaluating political-committee status arises in the "delicate" First Amendment area, "there is no imperative" to stretch the statute or to "read into it oblique inferences of Congressional intent." *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 394 (D.C. Cir. 1981); *accord Van Hollen*, 811 F.3d at 501 (noting the FEC's "unique prerogative to safeguard the First Amendment" and upholding an FEC regulation as an "able attempt to balance the competing values that lie at the heart of campaign finance law"). Here, the controlling Commissioners' approach of distinguishing between communications "relat[ing] to the speaker's issue agenda," on the one hand, and "the election or defeat of federal candidates," on the other (AR 1768), is consistent with guidance from the Supreme Court in *Buckley* and the D.C. Circuit in *Machinists* and *Van Hollen*.

The controlling Commissioners' approach is also consistent with the agency's Supplemental E&J, which explained why the FEC has eschewed regulating political-committee status through rulemaking, adhering instead to its approved "adjudicative, case-by-case approach" to the major-purpose test. *CREW I*, 209 F. Supp. 3d at 82 (citing *Shays v. FEC*, 424 F. Supp. 2d 100 (D.D.C. 2006)). In addition to continuing to analyze AAN's organizational documents, AR 1780; *accord* Supplemental E&J, 72 Fed. Reg. at 5601 ("[a]n analysis of [an organization's] public statements can . . . be instructive in determining an organization's purpose"), the Commissioners evaluated AAN's "spending on Federal campaign activity, as well as any other spending by the organization," Supplemental E&J, 72 Fed. Reg. at 5601. In so doing, the controlling Commissioners performed the required "fact-intensive analysis of [AAN's] 'overall conduct,'" *CREW I*, 209 F. Supp. 3d at 82 (quoting Supplemental E&J, 72 Fed. Reg. at 5597), engaging in a "holistic analysis" of AAN, "incorporating a fact-intensive

comparison of organizational documents, activities, and communications in the administrative record." (AR 1780.)

Indeed, drawing "heavily on [their] expertise and experience regulating political activities" (AR 1780), the controlling Commissioners devoted more than ten single-spaced pages to analyzing each of AAN's electioneering communications that plaintiffs placed at issue (AR 1767-79). They distinguished between those communications aimed at changing officeholders' legislative behavior by urging constituent pressure and those closer to express advocacy urging the election or defeat of candidates. For example, the controlling Commissioners determined that AAN's "Ridiculous" ad, which criticized the stimulus, urged voters to contact former Ohio Representative Charlie Wilson to "'[t]ell him to keep the tax cuts [and] ditch the stimulus,'" and provided contact information and identified a pending bill for callers to reference, did not indicate a major purpose of electing or nominating a candidate. (AR 1771.) By contrast, the controlling Commissioners determined that AAN's "New Hampshire," "Order," and "Extreme" ads were more electoral in nature. These communications contained no "call to action," no "focus on changing the voting behavior" of the named candidates (and in fact had the opposite "subtext," suggesting that the named candidates were unlikely to change views), and the "New Hampshire" communication specifically contrasted the officeholder's views with those of former Senator Kelly Ayotte, his then-opponent ("'Kelly Ayotte would stop the cap-and-trade tax. Cold.'"). (AR 1777-78.) The controlling Commissioners' determinations that an ad such as "New Hampshire" is more indicative of a major purpose of nominating or electing candidates than one like "Ridiculous" is consistent with the Court's own suggestion that a number of the AJS and AAN ads appeared to be "designed to influence the election or defeat of a particular candidate in an ongoing race." *CREW I*, 209 F. Supp. 3d at 93.

The controlling Commissioners further acknowledged that certain of AAN's ads referencing "November" — "the month in which the midterm election took place" — made them appear arguably more "election-related." (AR 1771.) In scrutinizing these references, however, the Commissioners determined that "the word 'November' is used only in calls to take specific legislative actions" in "a lame-duck session [of Congress that] was widely expected to take place in November and, in fact, did begin on November 15, 2010." (*Id.*) In AAN's "Taxes" communication, for example, the script references "November" in just this way: "'Tell Congressman Mark Critz to vote to extend the tax cuts in November.'" (*Id.*) The Commissioners concluded that "the use of 'November' in the ads is best understood as a reference to the time period in which the lame-duck session would commence." (*Id.*; *see* AR 1774, 1776.) This assessment accords with the controlling Commissioners' stated commitment to "the essential need for objectivity, clarity, and consistency in administering and enforcing the Act" and avoidance of "speculating about the subjective motivations of a speaker, since doing otherwise could lead to identical communications being treated differently based on perceptions of intent." (AR 1768.)

After completing their ad-by-ad review, the Commissioners calculated that AAN's spending indicating a major purpose of nominating or electing candidates constituted 22 percent, 26 percent, or at most "less than 28 [percent]" of its total spending, depending on the inclusion of the "Read This" ad and whether the time period used was the entire two-year record or AAN's 2010 fiscal year. (AR 1779 & n.52.) They thus found that because "AAN's total outlay on ads indicating a purpose to nominate or elect federal candidates would still constitute" less than 30 percent or "well under half" of its overall spending, there was no reason to believe that AAN violated FECA by failing to register and report as a political committee. (AR 1779.) The

controlling statement includes conscientious, expert evaluations of each AAN communication and heeds binding judicial precedent to use sensitivity when determining the extent to which communications discuss issues of importance to a group or indicate a major purpose of nominating or electing a candidate. It reasonably concluded AAN did not have as its major purpose federal campaign activity.

B. The Controlling Dismissal Decision Is Not Contrary to Law

No aspect of the controlling analysis is contrary to law. No law — not this Court's remand decision or any other authority — 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. The Court has already determined that the controlling Commissioners' revised statement of reasons is "free of the legal errors identified in this Court's [remand] Opinion and Order." (Show-Cause Decision at 5.) "With respect to the AAN matter, the FEC reopened it, developed a new framework for evaluating which expenditures suggested an election-related purpose, and applied that new framework to AAN's ads." (*Id.*) They "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.*) In addition, the Commissioners' revised analysis is not only supported by the Supreme Court's treatment of ads that are similar to those at issue here, but, critically, plaintiffs have not identified any law compelling the Commissioners to analyze AAN's major purpose in their preferred way.

Plaintiffs maintain that the controlling Commissioners' "continued refusal" to treat *all* electioneering communications "as indicative of a group's purpose to nominate or elect federal candidates is based on an impermissible interpretation of *Buckley* and [the Court's] judgment." (Am. Compl. ¶ 79.) In plaintiffs' view, the controlling Commissioners "erroneously interpreted"

the Court's remand opinion "to prohibit the conclusion that all of AAN's electioneering communications were political." (*Id.*) But the Commissioners did no such thing, and the Court explicitly refrained from mandating that "*all* electioneering communications" must be counted as election-related. *CREW I*, 209 F. Supp. 3d at 93. That choice accords with Congress's and the courts' recognition of the FEC's unique structure constraining the potential for partisan action. *DSCC*, 454 U.S. at 37; *Combat Veterans for Cong. Political Action Comm.*, 795 F.3d at 153; *Pub. Citizen, Inc.*, 839 F.3d at 1171; H.R. 12406, H. Rep. No. 94-917, 94th Cong., 2d Sess. at 3 (1976). It also respects the agency's own choice of a "flexib[le] . . . case-by-case" method of determining an organization's major purpose, *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d. 544, 556 (4th Cir. 2012), and allows it to employ the "practical . . . expertise" upon which the principles of agency deference are based, *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990); *CREW I*, 209 F. Supp. 3d at 87-88 (referring to the FEC's "special regulatory expertise" and observing that the *Shays* court was right to defer to the agency's implementation choice of adjudication in lieu of rulemaking).

Plaintiffs' insistence that it was "impermissible" for the FEC not to treat all electioneering communications "as indicative of a group's purpose to nominate or elect federal candidates" (Am. Compl. ¶ 79) is itself discordant with the Court's determination not to draw bright lines regarding the treatment of non-express advocacy in the political-committee context. Plaintiffs appear to believe that there is no material difference between the "'Yellowtail'" ad, a paradigmatic example of sham issue advocacy from *McConnell*, and AAN's electioneering communications. (*Id.* ¶ 78.)[6] Yet the controlling Commissioners themselves quoted with

[6] The text of the Yellowtail ad is as follows:

approval the Supreme Court's assessment that "'the notion that th[e Yellowtail] advertisement was designed purely to discuss the issue of family values strains credulity'" and explained that "ads like the Yellowtail ad may evidence an electoral purpose." (AR 1768 n.23 (quoting *McConnell*, 540 U.S. at 193 n.78).) Accordingly, those Commissioners concluded that AAN's "Bucket" ad would be deemed indicative of a major purpose to nominate or elect a federal candidate because, like the Yellowtail ad, it in part "appears to be more about creating a negative impression of [the candidate] in the mind of the viewer than on changing [his] legislative behavior." (AR 1774; *accord* AR 1777-79.)

Contrary to plaintiffs' suggestion (Am. Compl. ¶¶ 58, 78), the controlling Commissioners did not categorically exclude all communications that, like the Yellowtail ad, "call[] on viewers to contact the named officeholders to urge them to take specific legislative actions" (*see* AR 1775-76, 1779 (acknowledging that communication urging viewers to "'tell [Charlie Wilson/Jim Himes/Chris Murphy] to read this'" could arguably be counted towards finding that AAN has the major purpose of nominating or electing candidates).) Rather, over the course of many pages analyzing the ads according to their subject matter, the Commissioners applied the new "framework in a fact-intensive manner to *each* of AAN's electioneering communications." (Show-Cause Decision at 3.) It was not contrary to law for the Commissioners to distinguish between a message to "[c]all Bill Yellowtail" (who "took a swing at his wife") to "[t]ell him to

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> Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But "her nose was not broken." He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments — then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.

McConnell, 540 U.S. at 193 n.78 (some internal quotation marks omitted).

support family values," *McConnell*, 540 U.S. at 193 n.78 (some internal quotation marks omitted), and an ad AAN ran criticizing health care reform and urging viewers: "'In November, tell [Congressman Mark] Shauer to vote for repeal H.R. 4903 (202)225-6276'" (AR 1775).

Consistent with the controlling Commissioners' nuanced approach, the Supreme Court has recognized that not all electioneering communications are sham issue ads. Some electioneering communications may constitute genuine issue advocacy. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007) ("*WRTL*") ("An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose — uninvited by the ad — to factor it into their voting decisions."); *McConnell*, 540 U.S. at 206 (suggesting that at least some of the ads in the *McConnell* record that would have met the statutory electioneering communication definition likely "had no electioneering purpose"). And although the line between campaign advocacy and issue advocacy can "'dissolve in practical application,'" *WRTL*, 551 U.S. at 456-57, the distinction matters in the context of determining an organization's political-committee status because the major-purpose test was established to exclude "groups engaged purely in issue discussion" from the registration and more substantial reporting requirements that apply to groups that *do* have the major purpose of nominating or electing federal candidates. *Buckley*, 424 U.S. at 79. Thus, while a group's electioneering communications may obligate it to file certain disclosure reports, 52 U.S.C. § 30104(f)(3); 11 C.F.R. § 100.29, as AAN has done, the potential for electioneering communications to constitute genuine issue speech supports the controlling Commissioners' approach of analyzing AAN's ads beyond simply asking, as plaintiffs apparently prefer, whether they are electioneering communications.

WRTL is instructive in assessing the nature of such communications. There, the Supreme Court considered three ads with the same general format:

> "PASTOR: And who gives this woman to be married to this man?
>
> BRIDE'S FATHER: Well, as father of the bride, I certainly could. But instead, I'd like to share a few tips on how to properly install drywall. Now you put the drywall up . . .
>
> VOICE-OVER: Sometimes it's just not fair to delay an important decision. But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple 'yes' or 'no' vote. So qualified candidates don't get a chance to serve.
>
> It's politics at work, causing gridlock and backing up some of our courts to a state of emergency.
>
> Contact Senators Feingold and Kohl and tell them to oppose the filibuster.
>
> Visit: BeFair.org.
>
> Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee."

WRTL, 551 U.S. at 458-59; *see also id.* at 459 & nn.2-3 (noting similarities to other ads). The Supreme Court held that these ads were issue speech, concluding that "their content is consistent with that of a genuine issue ad." *Id.* at 470. They "focus[ed] on a legislative issue, t[ook] a position on the issue, exhort[ed] the public to adopt that position, and urg[ed] the public to contact public officials with respect to the matter." *Id.* In addition, "their content lack[ed] indicia of express advocacy" because they did "not mention an election, candidacy, political party, or challenger; and they d[id] not take a position on a candidate's character, qualifications, or fitness for office." *Id.* Here, the controlling Commissioners' similar assessments were not contrary to law. (AR 1767-68 (explaining that the controlling Commissioners "look[ed] at the

ad's specific language for references to candidacies, elections, voting, political parties, or other indicia that the costs of the ad should be counted towards a determination that the organization's major purpose is to nominate or elect candidates").)

Also incorrect are plaintiffs' assertions that the controlling Commissioners "once again applied [*WRTL*'s] 'express advocacy/issue speech distinction' despite [the Court's] decision finding such application in a disclosure case was legal error," and that this distinction has "no relevancy to the FECA's disclosure obligations." (Am. Compl. ¶¶ 4, 57, 80.) In its remand opinion, the Court determined that the controlling Commissioners' earlier "decision to apply *WRTL*['s] express advocacy/issue speech distinction in the realm of disclosure, thereby excluding *all* non-express advocacy speech from consideration, was 'contrary to law.'" *CREW I*, 209 F. Supp. 3d at 92. But that determination did not preclude Commissioners from analyzing AAN's communications by reference to their content, consistent with the Supreme Court's analysis in *WRTL*, when considering whether the ads were electoral in nature. Accordingly, when plaintiffs argued that "the controlling commissioners relied on the inapposite authority of *WRTL* [] in a disclosure context," in "[d]irect[] contravention" of the Court's remand opinion Pls.' Reply in Supp. of the Mot. for an Order to Def. Federal Election Commission to Show Cause at 8, *Citizens for Responsibility & Ethics in Wash. v. FEC*, No. 14-1419 (Docket No. 68) (D.D.C. Jan. 20, 2017), the Court explained that, in fact, the FEC's "new framework . . . was free of the legal errors identified in [the remand opinion]." (Show-Cause Decision at 5.) The Commissioners thus did not "impermissibly exclud[e] relevant ads by relying on inapposite authority." (Am. Compl. ¶ 3.)

Plaintiffs similarly err in maintaining that a statement in the Court's remand opinion — that "it 'blinks reality to conclude that many of the ads considered by the Commissioners in this

case were not designed to influence the election or defeat of a particular candidate in an ongoing race'" — demonstrates that it was "erroneous" for the controlling Commissioners to find "only four of AAN's twenty electioneering communications" election related. (Am. Compl. ¶ 77 (quoting *CREW I*, 209 F. Supp. 3d at 93).) [redacted] More importantly, the Court "never ordered the FEC to reach a particular result, or to consider any particular ad — or any proportion of electioneering communications — election-related." (Show-Cause Decision at 6.)[7]

In sum, plaintiffs have identified no law that the controlling statement of reasons contravenes. While plaintiffs may prefer their proposed standard that "*all* electioneering communications" should be construed to be "indicative of a purpose to nominat[e] or elect[ ] . . . a candidate," the Court has already declined to impose that standard on the Commission. *CREW I*, 209 F. Supp. 3d at 93 (alterations in original) (internal quotation marks omitted). It instead directed the "FEC to reconsider its decision without exclud[ing] from its [major purpose] consideration all non-express advocacy." (Show-Cause Decision at 6 (alterations in original)

[7] And any suggestion that the controlling Commissioners failed to use the proper time period in analyzing AAN's activity (*e.g.*, Am. Compl. ¶¶ 43-44) is meritless. As the Court noted, "[t]he Commissioners also made clear that their determination did not turn on the application of the 'lifetime-only' rule." (Show-Cause Decision at 5 n.4 (citing AR 1779 n.52).)

(internal quotation marks omitted).) The Commission "did just that." (*Id.*) The controlling Commissioners' revised dismissal decision is not contrary to law.

C. The Controlling Statement Is Not Arbitrary or Capricious

Finally, the controlling Commissioners' analysis of the AAN matter is not arbitrary or capricious. Plaintiffs cannot meet their burden of showing that the Commissioners "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. As explained above, *see supra* pp. 31-35, the Commissioners carefully scrutinized AAN's communications and drew reasonable comparisons explaining why certain ads were more indicative of a major purpose than others, thus showing the requisite "rational basis for the agency's decision," *Orloski*, 795 F.2d at 167 (internal quotation marks omitted). In this context, the Court has recognized that "[a] reasonable application of a 50%-plus rule would not appear to be arbitrary and capricious." *CREW I*, 209 F. Supp. 3d at 95. Here, AAN's relevant spending fell far short of that threshold, making the dismissal neither arbitrary nor capricious.

Plaintiffs hardly contend otherwise. First, they argue that the controlling Commissioners "unreasonably limit[ed] the context that could be admitted for consideration, ignoring relevant evidence instructive as to the advertisement's purposes, and drawing unsupported conclusions about what legislation could or would be before Congress." (Am. Compl. ¶ 81.) But in *WRTL*, the Supreme Court explained that "contextual factors . . . should seldom play a significant role" in determining whether an ad is the functional equivalent of express advocacy. 551 U.S. at 473-74. The Court did note, however, that "[c]ourts need not ignore basic background information that may be necessary to put an ad in context — such as whether an ad describes a legislative

issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future." *Id.* at 474 (internal quotation marks omitted); *accord* AR 1768 ("Consideration of the context in which the electioneering communications were run allows for better understanding and more accurate assessments of them."). Further, rather than making "unsupported conclusions about what legislation could or would be before Congress" (Am. Compl. ¶ 81), the controlling Commissioners cited news reports about potential legislative activity (AR 1768-70 & nn. 27-37) and explained, for example, that "Congress ultimately took up the issue [of re-authorizing the Bush-era tax cuts] during the [2010 lame duck] session, resulting in the tax cuts being reauthorized in their entirety" (AR 1770). AAN's ads on this subject specifically urged viewers to "'[c]all Charlie Wilson. Tell him to keep the tax cuts'" or "'[t]ell Congressman Mark Critz to vote to extend the tax cuts in November.'" (AR 1771.) Both Congressmen Wilson and Critz did vote in favor of extending the tax cuts by voting "yea" on H.R. 4853. FINAL VOTE RESULTS FOR ROLL CALL 647, http://clerk.house.gov/evs/2010/roll647.xml.

Plaintiffs' other contentions (Am. Compl. ¶ 81), that the controlling Commissioners allegedly failed to account for certain of AAN's ads, are unpersuasive. Their claim (*id.* ¶¶ 41, 81) that the controlling Commissioners failed to include $725,000 worth of spending on AAN's "'Secret'" communication mentioning Rep. Perlmutter, *see* FEC, *24 HOUR NOTICE OF DISBURSEMENTS/OBLIGATIONS FOR ELECTIONEERING COMMUNICATIONS (AAN)* at 3 http://docquery.fec.gov/pdf/170/10931541170/10931541170.pdf, even if correct, would only reinforce the Commissioners' conclusion that AAN was not a political committee because they viewed the ad as not indicating a major purpose of nominating or electing candidates (AR 1775-76). Additional spending on that ad would thus *decrease* AAN's ratio of relevant spending.

Lastly, plaintiffs claim that the Commissioners failed to consider approximately $1.25 million in AAN's political spending based on figures in AAN's tax returns (Am. Compl. ¶¶ 45, 47, 81), but the controlling Commissioners' conclusion that $5,972,304 of AAN's spending could be counted as relevant (AR 1779) indicates that they considered $751,243 more of AAN's spending to count as relevant than the amount AAN itself identified on the subject tax returns (*see* AR 1598 (identifying a corrected total of $5,221,061 as AAN's "total spending on political campaign activity" from July 2009 to June 2011)). And in the controlling Commissioners' alternative analysis, they counted more than another $1 million as potentially relevant (AR 1779). Thus, the Commissioners considered roughly $1.75 million more of AAN's spending to be relevant or potentially relevant campaign activity, not $1.25 million less.

CONCLUSION

For the foregoing reasons, the Court should grant the Commission's motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August, 2017, I served the unredacted version of the FEC's Memorandum in Support of Its Motion for Summary Judgment and the unredacted version of the accompanying declaration of Shanna M. Reulbach that were filed with the Court under seal, by sending these materials by email to the following counsel:

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