UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*,	)	
Plaintiffs,	)	Civ. No. 18-76 (RC)
v.	)	
FEDERAL ELECTION COMMISSION,	)	REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S
REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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ARGUMENT

The Federal Election Commission ("FEC" or "Commission") demonstrated in its initial brief that the Court of Appeals's recent decision in *Citizens for Responsibility and Ethics in Washington v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) ("*CREW*"), *pet'n for reh'g en banc filed*, No. 17-5049, Doc. #1742905 (July 27, 2018), requires that the Commission prevail here as a matter of law. *CREW* held that, where, as here, the Commission's dismissal decision is based in part on prosecutorial discretion, that decision is judicially unreviewable. Plaintiffs have failed to demonstrate that any potential exception to this general rule applies.

Even if review were available, the Commission's opening brief further demonstrated that the controlling Commissioners' dismissal decision should be sustained on the merits. Plaintiffs' reply provides no basis for the Court to find otherwise. Their argument for an unprecedented *de novo* standard of review and against deferential review under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), contravenes controlling Circuit authority compelling the Court to apply *Chevron* deference. Further, the controlling Commissioners' analysis regarding (a) whether New Models crossed the statutory threshold for political committee status, and (b) whether it had the requisite major purpose — either of which alone is sufficient to uphold the dismissal decision — passes the deferential standard of review that applies here. The Court thus should grant summary judgment in favor of the Commission.

I. *CREW* PRECLUDES JUDICIAL REVIEW HERE

Because the controlling Commissioners' exercise of prosecutorial discretion was a distinct basis for dismissal of plaintiffs' administrative complaint, *CREW* precludes judicial review here. (FEC Mem. in Supp. of Its Mot. for Summ. J. and in Opp'n to Pls.' Mot. for Summ. J. at 15-18 (Docket No. 13-1) ("FEC Mem.").) Plaintiffs argue that *CREW* does not apply because (a) the controlling Commissioners did not adequately explain their invocation of

prosecutorial discretion; (b) the controlling Commissioners also found that New Models was not a political committee; and (c) the FEC has abdicated enforcement of the Federal Election Campaign Act ("FECA" or "Act"). (Pls.' Reply Br. in Supp. of Pls.' Mot. for Summ. J. and in Opp'n to Def.'s Cross-Mot. for Summ. J. at 25-30 (Docket No. 16) ("Pls. Reply").) Their contentions regarding the inapplicability of *CREW* are incorrect on all fronts.

A. Prosecutorial Discretion Was a Distinct Basis for the Dismissal Decision

CREW held that FEC decisions based even in part on prosecutorial discretion are *not* subject to judicial review. 892 F.3d at 438, 441; FEC Mem. at 16, 18. Detail sufficient to explain the agency's rationale may be required where judicial review is for abuse of discretion (*e.g.*, Pls. Reply at 26 (citing *Antosh v. FEC*, 599 F. Supp. 850, 853 (D.D.C. 1984)), but plaintiffs in the context here are "not entitled to have the court evaluate for abuse of discretion the individual considerations the controlling Commissioners gave in support of their vote not to initiate enforcement proceedings." *CREW*, 892 F.3d at 441. No review means no review.

In any event, plaintiffs err in challenging the sufficiency of the controlling Commissioners' invocation of prosecutorial discretion. The Commissioners expressly noted that they "exercise[d] . . . our prosecutorial discretion" as a basis for their votes not to pursue enforcement and stated their reasons why. (AR 121 & n.136.) This is a legally sufficient invocation of their discretion. *Cf. Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994) (finding agency's exercise of prosecutorial discretion judicially unreviewable even if the agency did not expressly invoke it). The controlling Commissioners explained that "proceeding further would not be an appropriate use of Commission resources" for two reasons — both of which are independent of the merits, are supported by the record, and are recognized as appropriate bases for exercising prosecutorial discretion. (AR 121 n.139.) First, they found that prosecutorial discretion was warranted due to "the age of the activity" at issue. (*Id.*) Citing

the applicable five-year statute of limitations (AR 121 n.139 (citing 28 U.S.C. § 2462)), the Commissioners conveyed their staleness concerns about the transactions underlying plaintiffs' political committee claims, which occurred between January 11, 2012 and October 26, 2012 (AR 35, 38, 39, 42, 60, 96 & nn. 24, 28). *See CREW v. FEC*, 236 F. Supp. 3d 378, 392-93 (D.D.C. 2017) ("*CREW III*"), *aff'd*, 892 F.3d 434 (D.C. Cir. 2018) (finding that impending statute of limitations was a rational basis for exercising prosecutorial discretion). The Commissioners also expressly indicated their specific concern about the "'staleness of evidence.'" AR 121 n.139 (quoting *Nader v. FEC*, 823 F. Supp. 2d 53, 66 (D.D.C. 2011)); *see also Nader*, 823 F. Supp. 2d at 66 ("The passage of time, even within the period, will obviously impair investigations.").

Second, the controlling Commissioners found that exercising prosecutorial discretion was also warranted due to "the fact that the organization appears no longer active." (AR 121 n.139.) The record supported their finding that New Models ceased operating in 2015 (AR 97 & n.32), and the difficulties attendant to investigating and obtaining recovery from a defunct entity are valid reasons for exercising prosecutorial discretion. AR 121 n.139 (citing *Nader*, 823 F. Supp. 2d at 66 (finding dismissal reasonable given, *inter alia*, the defunct nature of the organizations at issue)); *see also CREW III*, 236 F. Supp. 3d at 396 (similar).

These explanations are readily capable of analysis, not "a 'terse' invocation of discretion such as a footnote" that is too inadequate "to enable judicial review." (Pls. Reply at 26.) The controlling invocation of prosecutorial discretion is not an improper attempt to immunize the agency from judicial review (*id.* at 27), but is of a piece with an agency's exercise of its prosecutorial discretion, *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (recognizing that an agency's exercise of prosecutorial discretion "involves a complicated balancing of a number of

factors which are peculiarly within its expertise," including but not limited to "whether agency resources are best spent on this violation or another").

B. Judicial Review Is Unavailable Where, As Here, A Controlling Statement Does Not Rest Entirely on Interpretations of FECA

Plaintiffs are also incorrect in contending that the controlling statement's inclusion of reasons for concluding that New Models did not violate the law makes it subject to judicial review. (Pls. Reply at 25-26.) As the D.C. Circuit has explained in rejecting that argument:

> "To demonstrate the falsity of that proposition it is enough to observe that a common reason for failure to prosecute an alleged criminal violation is the prosecutor's belief (sometimes publicly stated) that the law will not sustain a conviction. That is surely an eminently 'reviewable' proposition, in the sense that courts are well qualified to consider the point; yet it is entirely clear that the refusal to prosecute cannot be the subject of judicial review."

Crowley Caribbean Transp., Inc., 37 F.3d at 676 (quoting *I.C.C. v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987)). FECA provides judicial review only where the FEC's dismissal is "based *entirely* on its interpretation of the statute," *CREW*, 892 F.3d at 441 n.11 (citing *FEC v. Akins*, 524 U.S. 11 (1998)) (emphasis added); *see also Ass'n of Civilian Technicians, Inc. v. Fed. Labor Relations Auth.*, 283 F.3d 339, 343 (D.C. Cir. 2002) ("The Supreme Court . . . has generally rejected the principle that if the agency gives a reviewable reason for otherwise unreviewable action, the action becomes reviewable." (internal quotation marks omitted)).

Thus, the controlling Commissioners' conclusion that New Models did not violate the law did not deprive them of discretion to dismiss the complaint and make their determination reviewable. (*See* Pls. Reply at 27.) Judicial review is not available because the controlling Commissioners *also* did not pursue enforcement based on prosecutorial discretion. (AR 121 & n.139.) Indeed, *Heckler* itself involved an agency conclusion that it did not have jurisdiction to pursue enforcement — an argument the agency subsequently asserted in court as well, *Chaney*

v. Heckler, 718 F.2d 1174, 1178-82 (D.C. Cir. 1983), *rev'd on other grounds*, 470 U.S. 821 — but even if the agency had jurisdiction, it claimed it was "authorized to decline to exercise it under [its] inherent discretion to decline to pursue certain enforcement matters." 470 U.S. at 824 (internal quotation marks omitted). The Supreme Court agreed. Though a lack of jurisdiction would have been a sufficient reason to decline enforcement, the Court found that the agency's decision not to pursue enforcement was a judicially unreviewable exercise of prosecutorial discretion. *Heckler*, 470 U.S. at 828 (concluding that "we need not and do not address the thorny question of the [agency]'s jurisdiction" because "this case turns on the important question of the extent to which determinations by the [agency] not to exercise its enforcement authority . . . may be judicially reviewed" (emphasis omitted)).

The cases plaintiffs cite (Pls. Reply at 27-28) do not refute this point. Unlike in this matter, the challenged decisions in *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986), and *Akins* were not based on prosecutorial discretion. The *Orloski* court did not even discuss prosecutorial discretion, and the "[t]he only issue the Court decided in *Akins* dealt with standing." *CREW*, 892 F.3d at 438 n.6 (explaining that *Akins* "held only that the complainants had standing even though, on remand, the Commission might invoke its prosecutorial discretion to dismiss the remaining charge").[1] *See also infra*, p. [x] (discussing other cases plaintiffs cite).

C. The FEC Has Not Abdicated Its Statutory Responsibilities

Plaintiffs' argument that the FEC has abdicated its statutory responsibilities with respect to regulating political committees (Pls. Reply at 28-30) is without basis and must be rejected.

[1] Moreover, having Article III standing to sue, while necessary, is not sufficient. *E.g.*, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014) ("A consumer who is hoodwinked into purchasing a disappointing product may well have an injury-in-fact cognizable under Article III, but he cannot invoke the protection of the Lanham Act[.]").

While the *CREW* court noted that "[*Heckler*] left open the possibility that an agency nonenforcement decision may be reviewed if the agency has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities," the D.C. Circuit in that case also rejected the same argument that abdication had occurred in this context. 892 F.3d at 440 n.9 (internal quotation marks omitted).

In *CREW,* the plaintiffs argued that "the FEC has abdicated enforcement of the political committee laws," relying on a nearly identical chart to that here. *Compare* Br. of Appellant at 41-43, *CREW v. FEC,* No. 17-5049, Doc. # 1681549 (June 27, 2017) ("*CREW* Br."); *id.* at 41 (citing J.A. 244 (chart submitted in that case)), *with* Pls. Reply, Exh. 2 (Docket No. 16-3).)[2] The D.C. Circuit rejected this argument, finding that the plaintiffs' "own submissions [in that case] show that the [FEC] routinely enforces the election law violations alleged in CREW's administrative complaint." *CREW,* 892 F.3d at 440 n.9. That determination is dispositive here.

Plaintiffs' contention that the D.C. Circuit was only opining as to "an organization's failure to file independent expenditure and electioneering communication reports," but not "political committee allegations" (Pls. Reply at 30), is belied by the opinions and the record in that case. *CREW,* 892 F.3d at 440-41 & n.9; *CREW* Br. at 41 (citing *Heckler*, 470 U.S. at 833 n.4); *id.* at 41-43. Indeed, the district court opinion devoted an entire section analyzing "[t]he '[n]ovel [l]egal [i]ssues' [s]urrounding [p]olitical [c]ommittees." *CREW III,* 236 F. Supp. 3d at 393-95. The claim that *CREW* did not involve political committee allegations is inaccurate.

Furthermore, plaintiffs' argument must fail because they have not, and cannot, identify any conscious and *express* general agency policy of nonenforcement. No such policy exists.

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[2] For the Court's convenience, copies of an excerpt of the cited appellate brief and the relevant chart cited therein (J.A. 244) are attached hereto as Exhibits 1 and 2, respectively.

Contrary to plaintiffs' notion that "the controlling [C]ommissioners refused to apply the FECA's political committee laws to *any group* that qualifies under the statute as a result of its contributions to other political committees, or as the result of an analysis of less than its lifetime of spending" (Pls. Reply at 29 (emphasis added)), the controlling Commissioners in fact applied the fact-intensive, case-by-case approach here to conclude that the facts and circumstances of the particular case before them did not warrant moving forward with enforcement. (AR 108-21; FEC Mem. at 24-41.) Plaintiffs' claim that any enforcement less than what they prefer constitutes abdication reflects a fundamental misconception of prosecutorial discretion.

CREW v. FEC, 316 F. Supp. 3d 349 (D.D.C. 2018), is inapposite. That case involved a regulation of general applicability, which that court held violated the Administrative Procedure Act by impermissibly narrowing FECA's unambiguous disclosure requirements. *Id.* at 423. The court then remanded a related enforcement matter, finding that the discrepancy between the challenged regulation and statutory disclosure obligations "had been acknowledged without remedial action by the FEC for years prior to dismissal" of the administrative complaint, and thus "rais[ed] the issue" of potential abdication due to the identified flaw in the FEC's existing regulation. *Id.* at 422. No similar issue arises here. This single application of political committee standards to the facts of a particular respondent was not a flawed regulation or other law binding in future matters. (FEC Mem. at 20 n.7.)

Plaintiffs' remaining arguments are equally unavailing. In *NAACP v. Trump*, the court recognized that "an agency's refusal to act on a *single complaint*" is unreviewable, even if "'an agency's statement of a *general enforcement policy*' that was either 'expressed . . . as a formal regulation after the full rulemaking process . . . or . . . otherwise articulated . . . in some form of universal policy statement'" may be subject to judicial review. 298 F. Supp. 3d 209, 229

(D.D.C. 2018) (quoting *Crowley*, 37 F.3d at 676). This Court should join others in rejecting plaintiffs' effort to broaden the scope of this section 30109(a)(8) challenge to include other enforcement matters (Pls. Reply at 29 & Exh. 2) and information outside the administrative record, which in any event would not constitute an expressly adopted policy. *CREW v. FEC*, 164 F. Supp. 3d 113, 118, 120 (D.D.C. 2015) (rejecting improper attempt to mount "'an across-the-board challenge'" to the Commission's treatment of previous matters). And their suggestion that Commissioners will use prosecutorial discretion to immunize dismissals improperly (Pls. Reply at 27) contravenes the presumption of regularity of government officials. *E.g.*, *United Steelworkers, AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1980).

II. IN THE ALTERNATIVE, THE DISMISSAL DECISION SHOULD BE SUSTAINED BECAUSE IT WAS NOT CONTRARY TO LAW

A. Plaintiffs' Arguments in Favor of *De Novo* Review Contravene Binding Precedent Requiring *Chevron* Deference Here

Where judicial review is available, the parties agree that the standard for review of an FEC dismissal under FECA is whether the dismissal is "contrary to law," (FEC Mem. at 19 (quoting 52 U.S.C. § 30109(a)(8)(C)); Pls. Reply at 3 (same)), a standard that "is itself deferential." *Campaign Legal Ctr. v. FEC*, 312 F. Supp. 3d 153, 160 (D.D.C. 2018). As the Supreme Court has explained, "Congress wisely provided that the Commission's dismissal of a complaint should be reversed only if 'contrary to law'" because "the Commission is precisely the type of agency to which deference should presumptively be afforded." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 45 (1981) ("*DSCC*").

Plaintiffs nevertheless request that the Court disregard the longstanding, controlling authority requiring deferential review (FEC Mem. at 19-20) in favor of "*de novo*" review, arguing that: (1) split-vote dismissals do not get deference; and (2) the Commissioners were interpreting judicial precedent. (Pls. Reply at 4-9.) Both arguments are unavailing.

1. *Chevron* Deference Is Required By the *Sealed Case* Precedent

This Court remains bound by *In re Sealed Case*, 223 F.3d 775 (D.C. Cir. 2001), which held that a controlling statement of reasons deserves *Chevron* deference, even if not joined by four or more Commissioners. *See United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997) (explaining the obligation of district judges to follow controlling circuit precedent).

Contrary to plaintiffs' argument, *Sealed Case* is consistent with *United States v. Mead*, 533 U.S. 218 (2011). The *Mead* Court considered whether the 10,000-15,000 tariff classification rulings issued by 46 different Customs offices per year — that were *not* the product of a formal administrative procedure — were nonetheless owed *Chevron* deference. 533 U.S. at 231. Following *Christensen v. Harris County*, 529 U.S. 576 (2000), *Mead* held that these cursory Customs classification rulings were "beyond the *Chevron* pale" because they were "best treated like 'interpretations contained in policy statements, agency manuals, and enforcement guidelines.'" 533 U.S. at 234 (quoting *Christensen*, 529 U.S. at 587).

In *Sealed Case*, the D.C. Circuit likewise expressly considered whether controlling statements by declining-to-go-ahead FEC Commissioners were like the "'interpretations'" discussed in *Christensen*, "'all of which *lack the force of law*.'" *Sealed Case*, 223 F.3d at 780 (quoting *Christensen*, 529 U.S. at 587). The court determined that they were not like such interpretations. Rather, controlling statements are issued pursuant to "a detailed statutory framework for civil enforcement . . . analogous to a formal adjudication, which itself falls on the *Chevron* side of the line." 223 F.3d at 780.[3] Given that framework and the FEC's unique

[3] As the Court of Appeals explained, "[t]he General Counsel advocates and the respondent opposes a finding of [reason-to-believe]"; "through this statutorily mandated adversarial process the agency gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication"; and "the no-action decision [t]here was made by the Commission itself, not the staff, and precludes further enforcement." *Sealed Case*, 223 F.3d at 780.

structure, the court concluded that controlling statements by declining-to-go-ahead Commissioners thus warrant *Chevron* deference. *Id.*; *see also FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("*NRSC*"). That conclusion accords with *Mead*, which reiterated that "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." 533 U.S. at 230; *accord City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 306 (2013) ("What the [plaintiffs] need[], and [have] fail[ed] to produce, is a single case in which a general conferral of rulemaking or *adjudicative authority* has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field.").[4]

Therefore, *Sealed Case* remains good law and the controlling Commissioners' statement of reasons warrants *Chevron* deference. *FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 185 (D.C. Cir. 2001) ("*NRA*") (relying on *Sealed Case* post-*Mead*)[5]; *CREW v. FEC*, 209 F. Supp. 3d 77, 85 n.5 (D.D.C. 2016) ("*CREW II*") (rejecting plaintiffs' identical argument in that case and

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[4] The only other binding Supreme Court case plaintiffs cite, *Gonzales v. Oregon*, 546 U.S. 243 (2006), involved statutory interpretation beyond the administrative body's designated authority, *id.* at 260, unlike here where the FEC has broad authority to interpret FECA.

[5] Plaintiffs falsely accuse the FEC of misrepresentations in its *NRA* D.C. Circuit brief by "referring to [the] decision at issue in *In re Sealed Case* as the 'agency's interpretation.'" (Pls. Reply at 9 n.6.) But, "for purposes of judicial review, the statement or statements of . . . the so-called 'controlling Commissioners' [are] treated as if they were expressing *the Commission's* rationale for dismissal." *CREW*, 892 F.3d at 437 (emphasis added); *see also 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." (emphasis added)).

following controlling precedent); *cf. Mead*, 533 U.S. at 232 (explaining that "precedential value alone does not add up to *Chevron* entitlement").[6]

2. The Court Must Accord Deference to the Controlling Interpretation of FECA and Implementation of the Major Purpose Test Here

As the Commission explained in its opening brief, when the controlling Commissioners interpreted FECA's statutory threshold for political committees in 52 U.S.C. § 30101(4)(A), they did just that — interpret the statute. (FEC Mem. at 24-32.) Plaintiffs counter by contending that the controlling Commissioners did not actually interpret FECA. (Pls. Reply at 4-6.) Plaintiffs' own brief undermines this claim, however, by devoting six pages to their criticism of the controlling Commissioners' interpretation in light of FECA's "plain text." (Pls. Reply at 10-16 (arguing against the "two controlling [C]ommissioners' impermissible interpretations"); *see also* FEC Mem. at 24-32 (discussing controlling Commissioners' interpretation of FECA's statutory threshold for political committees).) Contrary to plaintiffs' claim (Pls. Reply at 4), the controlling Commissioners' discussion of *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), as part of their overall statutory analysis (AR 108-10) does not reduce or eliminate the requirement of applying *Chevron* deference to their interpretation of section 30101(4)(A).

Moreover, the Commissioners' determination of whether New Models had the requisite major purpose did not "turn[] directly and almost exclusively on judicial precedent." *CREW II*, 209 F. Supp. at 86. On the contrary, as the *CREW II* court explained, plaintiffs' challenge to "the

[6] Nor is *Sealed Case* rendered inapplicable here because the instant dismissal resulted from a 2-2 split vote, rather than the 3-3 split vote there. Regardless of the number of Commissioners voting against pursuing a matter, under the FEC's unique structure, the agency can dismiss an administrative complaint if there are not four affirmative votes to proceed. 52 U.S.C. § 30109(a)(2), (a)(4)(A)(i), (a)(6)(A). Thus, in either case, the statement of the controlling Commissioners explains why the complaint was dismissed. And, in either case, that dismissal decision was made during the course of a relatively formal adjudication.

FEC's choice of relevant timespan for assessing an organization's spending activity" does "not primarily challenge the FEC's interpretation of Supreme Court doctrine." *Id.* at 87. "Rather," such "attacks on the FEC's choice of relevant timespan for assessing an organization's spending activity . . . are less about *what Buckley* (and subsequent precedent) means and more about *how Buckley* (and the test it created) should be implemented." *Id.* "Such implementation choices, which call on the FEC's special regulatory expertise, were the types of judgments that Congress committed to the sound discretion of the agency." *Id*. The controlling timeframe analysis in this case warrants deference.[7]

The vacated decision in *Akins v. FEC* does not support plaintiffs' position either, as that opinion addressed whether the major purpose test even applied. 101 F.3d 731, 740-41 (D.C. Cir. 1996) (en banc), *vacated on other grounds*, 524 U.S. 11 (1998); *CREW II*, 209 F. Supp. 3d at 86 (noting that *Akins* "rejected the FEC's 'plea for deference' on the question of whether the Supreme Court had imposed the major purpose test in the first place"); *id.* at 86 n.6 ("[T]he Court does not read *Akins* broadly to prescribe de novo review for all FEC actions implicating the major purpose test."). Here, the parties agree that, contrary to the principal holding of the *Akins* opinion and in accordance with legal developments over two decades since that decision, only organizations that have met the statutory threshold and that also have as their major purpose campaign related activity must register and report as political committees. (Pls. Mem. at 4; FEC Mem. at 5-6.) In the controlling Commissioners' major purpose analysis, they assumed New

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[7] Plaintiffs' attempt to distinguish *Van Hollen v. FEC*, 811 F.3d 486 (D.C. Cir. 2016), on the basis that the regulation at issue there did not implement *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"), is unavailing. (*Compare* Pls. Reply at 5, *with* FEC Mem. at 22-23.) As the *Van Hollen* court stated, "[t]he FEC published a Notice of Proposed Rulemaking . . . and requested comments on proposed rules that 'would *implement* the Supreme Court's decision in [*WRTL*].'" 811 F.3d at 491 (quoting *Electioneering Commc'ns*, 72 Fed. Reg. 50261, 50262 (proposed Aug. 31, 2007) (emphasis added))).

Models had crossed the statutory threshold and then, as plaintiffs agree is appropriate, applied the major purpose test to New Models. (AR 110 & n.95; AR 110-21.) Thus, the dispute here is not whether *Buckley*'s major purpose test applies at all, but rather whether the controlling Commissioners used the appropriate timeframe when applying that test to New Models. As such, the controlling Commissioners' statement receives deference for this application of the "FEC's special regulatory expertise." *CREW II*, 209 F. Supp. 3d at 87.

3. Plaintiffs Cannot Rely on Material Not In the Administrative Record

Plaintiffs do not seriously dispute the black-letter law that courts should not consider materials that were not considered by the Commission. *CTS Corp. v. E.P.A.*, 759 F.3d 52, 64 (D.C. Cir. 2014); FEC Mem. at 23-24. And they have failed to demonstrate that an exception to this black-letter rule applies. *United Student Aid Funds, Inc. v. Devos*, 237 F. Supp. 3d 1, 3-4 (D.D.C. 2017) (noting that currently exceptions are "'primarily limited to cases where the procedural validity of the agency's action remains in serious question, or the agency affirmatively excluded relevant evidence'" (quoting *CTS Corp.*, 759 F.3d at 64)). The FEC agreed not to contest plaintiffs' citation in court of a narrow set of distinguishable materials. (*Compare* Pls. Reply at 9, *with* FEC Reply, Exh. 3 (email correspondence memorializing the parties' agreement).) The extra-record materials the Commission objected to (FEC Mem. at 23-24) were not included, and the Court should reject plaintiffs' request that it rely on the challenged materials.

B. The Controlling Commissioners' Interpretation of FECA's Statutory Threshold for Political Committees Was Not Contrary to Law

The FEC's opening brief explained why the controlling Commissioners' analysis of the statutory threshold respecting contributions or expenditures for political committee status was not contrary to law. (FEC Mem. at 24-32.) Plaintiffs' reiterated argument that FECA's

definition of "expenditure" is unambiguous by virtue of the "commands" of FECA's "plain text" (Pls. Reply at 10) is foreclosed by Supreme Court precedent. In *Buckley*, the Supreme Court explained that it was the "ambiguity of this phrase" "'for the purpose of . . . influencing'" in the definitions of "contribution" and "expenditure" that "pose[d] constitutional problems." 424 U.S. at 77. And this is the same definitional provision applicable to the word "expenditure" used in FECA's definition of political committee. The Supreme Court's narrowing of the term political committee was in accordance with the doctrine of constitutional avoidance, a context in which "'competing plausible interpretations of a provision'" are inherently present. *McFadden v. United States*, 135 S. Ct. 2298, 2307 (2015) (quoting *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014) (holding that this canon "has no application in the absence of . . . ambiguity") (quoting *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001))); *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (holding that this canon "enters in only 'where a statute is susceptible of two constructions'" (quoting *United States ex rel. Atty. Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909))).[8]

[8] Contrary to plaintiffs' reliance (Pls. Reply at 12) on the concurring opinion in *AFL-CIO v. FEC*, 333 F.3d 168, 183 (D.C. Cir. 2003) (Henderson, J., concurring in judgment) (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988)), the majority in *AFL-CIO* held that "*DeBartolo*'s mandate that 'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality,' suggests merely that an agency acts unreasonably if, instead of choosing among constitutionally permissible alternatives, it interprets ambiguous statutory language as indicating that Congress intended to authorize infringements on constitutional rights." 333 F.3d at 179 (quoting *DeBartolo*, 485 U.S. at 575) (internal citation omitted); *see also DeBartolo*, 485 U.S. at 577. The majority thus concluded that "the constitutional issues raised by the Commission's disclosure policy are properly addressed at *Chevron* step two." *AFL-CIO*, 333 F.3d at 179. And in the vacated opinion in *Akins* (*see* Pls. Reply at 11-12), it was "undisputed that the statutory *language* is not in issue, but only the limitation — or really the extent of the limitation — put on this language by the Supreme Court decisions," *i.e.*, *Buckley*'s major purpose test. 101 F.3d at 740. But as to the question concerning the political committee threshold, *only* the statutory language is at issue.

Importantly, plaintiffs' gloss on *Buckley*'s discussion of expenditures in the context of the expenditure disclosure requirements for candidates and political committees fails to demonstrate that the controlling analysis was contrary to law. (Pls. Reply at 11 (arguing that *Buckley* decided that "[t]he type of 'expenditure' that would qualify a group [as a 'political committee'] was not limited to express advocacy").) In the cited portion of *Buckley*, however, the Court discussed the information that political committees needed to disclose — not the meaning of "expenditure" for purposes of determining whether a group is a political committee in the first instance. Indeed, the Court's upholding of general disclosure requirements for "[e]xpenditures of candidates and of 'political committees' so construed" — *i.e.*, groups satisfying the major purpose test, *Buckley*, 424 U.S. at 79 — distinguishes that context from the one here, which is the determination of *whether* the group is, in fact, a political committee, *accord McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003) (describing *Buckley* as "noting that *a general requirement* that political committees *disclose their expenditures* raised no vagueness problems because [under its narrowed definition] a *political committee's* expenditures 'are, by definition, campaign related'" (quoting 424 U.S. at 79) (emphases added)).[9] For non-political-committee groups, by contrast, the Court could not assume that the expenditures required to be disclosed would be similarly campaign related. 424 U.S. at 79-80. It thus limited the disclosure requirements for "expenditures" by non-political committee groups to "expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80; *see also* FEC Mem. at 25-27.

[9] Moreover, even if *Buckley* did not find limiting "expenditures" to independent expenditures for purposes of the monetary threshold for political committees to be compelled as a matter of constitutional vagueness, the agency still may interpret the ambiguous term "expenditures" using other interpretational doctrines. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.").

Nor is *Shays v. FEC*, 511 F. Supp. 2d 19 (D.D.C. 2007), an authority contravened by the controlling analysis. Initially, the portion of the opinion plaintiffs rely upon is dicta. *Compare* Pls. Reply at 11, *with Shays*, 511 F. Supp. 2d at 27 ("[T]he decision of whether to codify detailed standards for the 'major purpose' test in a general rule — the subject of this suit — is separate and apart from the question of the proper interpretation of 'expenditure.'"). *Shays* also pre-dates *Citizens United v. FEC*, 558 U.S. 310 (2010), and *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), which led to the instant context of super PACs and certain non-person contributors such as New Models. (AR 110 n. 92 (noting that "New Model[s]'s contributions to these political committees are only permissible because" of *Citizens United* and *SpeechNow.org*).) As the D.C. Circuit has recognized, "[c]onstitutional decisions of this magnitude unquestionably justify an agency in updating its existing [regulatory approach] to appropriately compensate for changed circumstances." *Van Hollen*, 811 F.3d at 496.[10] In addition, the controlling Commissioners' interpretation of "expenditure" in the statutory definition of "political committee" was not solely based on *Buckley*, as in *Shays*, so greater deference is warranted here. *Compare* AR 109-10; FEC Mem. at 24-32, *with Shays*, 511 F. Supp. 2d at 26-27. And the *Shays* court did not address *Buckley*'s discussion of how the monetary threshold for expenditures would work under its major purpose limitation. *Buckley*, 424 U.S. at 79 n.107; FEC Mem. at 27-28. In this respect, rather than being necessarily contrary

[10] Plaintiffs' reliance upon advisory opinions issued prior to *Citizens United* and *SpeechNow.org* (Pls. Reply at 14-15) is similarly misplaced. FEC Mem. at 29-30; *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("[An agency] need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible . . . , that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates.").

to law, the controlling Commissioners reasonably viewed their approach as being more consistent with *Buckley*. (FEC Mem. at 27 (discussing *Buckley*, 424 U.S. at 79 n.107).)

More broadly, construing "contributions" to a super PAC not to constitute "expenditures" for purposes of the statutory monetary threshold for "political committees" is not contrary to law, regardless of whether the specific expenditures at issue are express advocacy. As the controlling Commissioners found, FECA "defines the term 'contribution' and never includes that term in a definition or modification of the term 'expenditure.'" (AR 110.) In relevant part, the statutory definitions of "contribution" and "expenditure" are nearly identical. *Compare* 52 U.S.C. § 30101(8)(A) ("any gift, . . . loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office"), *with id.* § 30101(9)(A) ("any . . . loan, advance, deposit, or gift of money or anything of value made by any person for the purpose of influencing any election for Federal office"). Yet, as the Commissioners found, "the Act differentiates between 'contributions' and 'expenditures' throughout its provisions." (AR 110.) As but one example among many, they cited 52 U.S.C. § 30118, which prohibits "contributions *or* expenditures" by national banks, corporations, and labor unions. (AR 110 n.94 (quoting 52 U.S.C. § 30118).) As the Supreme Court has recognized, "['or'] is almost always disjunctive, that is, the words it connects are to be given separate meanings." *United States v. Woods*, 571 U.S. 31, 45 (2013) (internal quotation marks omitted); *see also Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018) (same). Thus, both for section 30118 and FECA's political committee definition in section 30101(4)(A), the use of "or" defines the extent of the prohibited conduct and the manner in which an organization may qualify as a political committee. The controlling Commissioners' interpretation that a "contribution" by an entity cannot also be an "expenditure" accords with the

well-established case law recognizing not only that the terms are different, but also that the difference between them is constitutionally significant. (FEC Mem. at 28.)

In the context of coordinated expenditures, the FEC previously explained that "a payment that would, at first blush, appear to be an 'expenditure' by the person paying for the coordinated expenditure is in fact '*treated as a contribution*' by the payor under the Act, *not* as an expenditure"; "[i]nstead, the payment is treated as an expenditure by the candidate." (FEC Mem. at 28 (quoting 52 U.S.C. § 30116(a)(7)(C)(ii); 11 C.F.R. § 109.20(b)).)[11] Plaintiffs' response misses the mark. Whether a single transaction could be an expenditure as to one entity and a contribution to a different entity for reporting purposes (Pls. Reply at 13) is irrelevant. Plaintiffs have already conceded that New Models made "contributions." (*E.g.*, Pls. Mem. at 29-30). The question is whether a single transaction can be both an expenditure and a contribution *by the same entity* under FECA. The provisions governing coordinated expenditures support the controlling Commissioners' conclusion that it should not.

Accordingly, plaintiffs have failed to meet their burden of showing that the controlling interpretation of the ambiguous term "expenditure," as incorporated into "political committee," to not also include "contributions," is contrary to law. Plaintiffs' remaining arguments are policy arguments (Pls. Reply at 15-16), but Congress has given the FEC the authority to "'formulate general policy with respect to the administration of [the] Act.'" *DSCC*, 454 U.S. at 37 (quoting now-52 U.S.C. § 30107(a)(9)). Though plaintiffs may have weighed competing concerns differently, "federal judges . . . have a duty to respect legitimate policy choices made by" the

[11] 11 C.F.R. § 102.6(a)(2) is not inconsistent with this approach. For example, unless it qualifies as a collecting agent under § 102.6(b), if an affiliated committee receives contributions that it then transfers to the committee with which it is affiliated under § 102.6(a)(1)(i), the affiliated committee will be deemed to have "receive[d] contributions" for purposes of political committee status under § 100.5(a) and 52 U.S.C. § 30101(4). *Accord* 11 C.F.R. § 110.3(a)(1).

agency. *Chevron*, 467 U.S. at 866; *see also DSCC*, 454 U.S. at 39 (holding that the decision need not be "the only reasonable one or even the" decision "the [C]ourt would have reached" on its own in a judicial proceeding).

C. The Controlling Commissioners' Application of the Commission's Judicially-Approved, Case-by-Case Approach When Determining New Models's Major Purpose Was Not Contrary to Law

Plaintiffs have failed to rebut the FEC's showing that the controlling analysis of New Models's major purpose was not contrary to law. (FEC Mem. at 32-41.) Initially, it is incorrect to argue that similarities between the statement of reasons at issue in *CREW II* and the one under review here (especially with respect to background discussion of the evolution of the major purpose test) renders the most relevant portion of the controlling Commissioners' analysis, covering twelve single-spaced pages, of specific findings and conclusions as to New Models, an analysis that "has already been held to be contrary to law." (*Compare* Pls. Reply at 17 (citing AR 97-108), *with* AR 110-21.) It has not. To the contrary, as the FEC has shown, the controlling group specifically addressed the *CREW II* court's concern about a "lifetime-*only* rule" and reasonably applied the FEC's judicially-upheld, case-by-case approach for determining a group's major purpose to New Models's unique circumstances. (FEC Mem. at 32-41.)

1. The Controlling Commissioners Reasonably Considered *All* of the Commission's Major Purpose Analysis Factors

Plaintiffs have not demonstrated that the controlling Commissioners' application of the FEC's judicially-upheld, multi-factored approach was contrary to law. Under this approach, the Commission conducts a fact-intensive inquiry and weighs a number of factors as appropriate to the circumstances of the particular case before it, including a group's organizational focus, public statements, and the proportion of its spending on federal campaign activity versus that unrelated to campaigns. *Rules & Regulations: Political Comm. Status*, 72 Fed. Reg. 5595 (Feb.

7, 2007); *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 556 (4th Cir. 2012); *Shays*, 511 F. Supp. 2d at 30. That is precisely what the controlling Commissioners did here. (AR 108-21 (considering and weighing New Models's organizational statements and public statements, as well as its spending).)

First, they found that "New Models's organizational documents weigh against finding reason to believe that its major purpose was the nomination or election of federal candidates." (AR 112.) They reasoned that, "[a]lthough an organization's tax status is not dispositive of the question, it is certainly a relevant consideration." (AR 111.) New Models was a tax-exempt 501(c)(4) social welfare organization (AR 94), which "may carry on lawful political activities and remain exempt . . . as long as it is primarily engaged in activities that promote social welfare." (AR 112 n.99 (quoting Rev. Rul. 81-95, 1981-1 C.B. 332).) And the administrative complaint did "not allege that New Models's organizational documents reveal its purpose to be the nomination or election of federal candidates." (AR 112.) Plaintiffs thus do not, and cannot, demonstrate that the controlling analysis of New Models's organizational statements was arbitrary or capricious.

Second, the controlling Commissioners found that "New Models's public statements weigh against finding reason to believe New Models was a political committee" — and "place[d] much weight on this factor in [thei]r analysis." (AR 114.) They conducted an analysis of New Models's website and the documents accessible thereon, which they found "indicate[d] that New Models's major purpose was to conduct and sponsor research on public policy." (*Id.*) They considered the sworn declaration from New Models's President and Chief Operating Officer, attesting that New Models "never made an independent expenditure, nor publicly advocated the election or defeat of a federal candidate." (AR 113 (footnote omitted).) They searched

Commission archives for independent expenditure reports filed by New Models and examined New Models's statements on its website. (AR 114.) The Commissioners also noted that "[t]he Complaint does not identify *a single statement* in over 15 years where a representative of New Models indicated the major purpose of the organization was to nominate or elect federal candidates." (AR 113-14 (emphasis added).) Plaintiffs thus similarly fail to demonstrate that the controlling analysis of New Models's public statements was arbitrary or capricious.

Plaintiffs thus largely ignore that the FEC's judicially-approved major purpose analysis is multi-factored. In focusing exclusively on New Models's relative spending (AR 114-21), discussed *infra*, plaintiffs have conceded that the controlling Commissioners' conclusion as to two of the three factors — including New Models's public statements, to which they gave particularly heavy weight — weigh in favor of concluding that New Models did not have the requisite major purpose. *Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 260-61 & n.7 (D.D.C. 2015) (holding that argument not raised in plaintiffs' opening brief was waived).

2. The Controlling Commissioners Did Not Apply a Lifetime-*Only* Test When They Considered New Models's Relative Spending

As explained in the FEC's opening brief (FEC Mem. at 32-41), the controlling Commissioners did not apply the "lifetime-*only* rule" that the *CREW II* found contrary to law, 209 F. Supp. 3d at 94 (emphasis added). (*See also, e.g.*, AR 121 ("For all of these reasons, the Commission's analysis of an organization's major purpose has avoided setting a definitive time frame for judging each organization's activities.").) As many of the excerpts cited in plaintiffs' brief demonstrate (Pls. Reply at 19-20), the Commissioners declined to adopt a categorical, rigid calendar-year only approach — a decision the *CREW II* found to be within the Commission's discretion, 209 F. Supp. 3d at 94. The *CREW II* court's concern was that the analysis in that case had "*gone further* than merely eschewing the calendar-year approach as a 'rigid, one-size-fits-all

rule' at odds with the FEC's chosen case-by-case method." *Id.* (emphasis added). There, "the Commissioners considered spending *only* over the 'lifetime' of the organization in question," *i.e.*, "a different — but equally inflexible — metric." *Id.* (emphasis added).

Here, however, while the controlling Commissioners considered the percentage of New Models's lifetime spending on election-related expenditures, this number was not dispositive. (*E.g.*, AR 117 & n.123; AR 120-21; FEC Mem. at 34-36.) They instead considered New Models's relative spending in 2012, but ultimately concluded that it was an outlier rather than showed a change in the organization's major purpose — a factual finding supported by the record. (*E.g.*, FEC Mem. at 35-36.) Indeed, plaintiffs highlight one such fact in their reply: "the controlling [C]ommissioners' recognition that New Models spent $1.5 million in 2012 on non-election activities." (Pls. Reply at 20 (citing AR 94-96).) Demonstrating that New Models still devoted a large amount of its budget to non-election activities supports the controlling Commissioners' conclusion that, while "nominating or defeating a federal candidate may have been *a* purpose of the organization in 2012" (AR 117), the group continued pursuing issue advocacy, which remained its major purpose. Unlike the rigid "lifetime-only rule" at issue in *CREW II*, the controlling Commissioners' spending analysis based on this and numerous other facts in the record thus was consistent "with the FEC's stated fact-intensive approach to the 'major purpose' inquiry.'" 209 F. Supp. 3d at 94.

Contrary to plaintiffs' suggestion, the *CREW II* court did not find that "pre-2010 activity was *irrelevant* to a lawful major purpose analysis." (Pls. Reply at 17-18.) Rather, it explained that "[l]ooking *only* at relative spending over an organization's lifetime runs the risk of ignoring . . . that an organization's major purpose can *change*." *CREW II*, 209 F. Supp. 3d at 94. *A fortiorari* the Commission cannot consider whether a group's major purpose has *changed* unless

it can compare different years. *Compare id.* (finding that a "lifetime-only rule" "tends to ignore crucial facts indicating whether an organization's major purpose has changed"), *with* Pls. Reply at 17-18. The court found a lifetime-only rule contrary to law — "at least as applied to [the organization there]" — because the factual record indicated that the group's major purpose had, in fact, changed. *CREW II*, 209 F. Supp. 3d at 94 (finding that the group "spent no money on election-related spending until 2008, but then shifted its expenditures towards electioneering communications and express advocacy over the following several years").

The controlling Commissioners also did not purport to be announcing an "outlier test" or "mak[ing] the lack of a signed confession determinative." (Pls. Reply at 20 & n.12, 21.) To the contrary, they repeatedly emphasized the case-by-case nature of their major purpose analysis and their refusal to adopt rigid, bright-line rules. (AR 91-92; AR 105-08; AR 111; AR 114-15; AR 118-19; AR 121.) Under the facts here, for example, the controlling Commissioners "place[d] much weight" on the fact that there was not "a single statement in over 15 years where a representative of New Models indicated the major purpose of the organization was to nominate or elect federal candidates." (AR 113-14.) While spending on express advocacy and electioneering communications might have also so indicated, the controlling Commissioners found it "[s]ignificant[]" that "New Models has never made any independent expenditures nor . . . funded any electioneering communications." (AR 97; *see also* AR 113; AR 117.)

Nor was it improper for the controlling Commissioners to consider the sworn declaration submitted on behalf of New Models, particularly as they did not blindly accept the statements therein, but also examined, *inter alia*, New Models's tax records, New Models's website and reports, and Commission materials. (AR 94-97; AR 111-13.) Whether the plaintiffs would have given the declaration less weight is irrelevant. As the D.C. Circuit has held, "it is not a valid

objection that conflicts in the evidence might conceivably have been resolved differently, or other inferences drawn from the same record." *D.C. Transit Sys. Inc. v. Wash. Metro. Area Transit Comm'n*, 466 F.2d 394, 414 (D.C. Cir. 1972) (internal quotation marks omitted). Rather, the FEC's decision "requires affirmance if a rational basis . . . is shown." *Orloski*, 795 F.2d at 167 (internal quotation marks omitted). Here, the controlling Commissioners readily met that standard by weighing all the evidence before the FEC.

Considering New Models's post-2012 spending did not "lead to grave injustice." (Pls. Reply at 18.) Indeed, in this case, FECA required the Commission to provide New Models with the opportunity to demonstrate why no action should be taken against it, 52 U.S.C. § 30109(a)(1), and New Models specifically submitted evidence of its post-2012 spending as part of its asserted defense in this matter. (AR 57-58.) Considering post-2012 spending thus was not due to "solely on when the Commission got around to voting on a complaint" (Pls. Reply at 19), but rather part of the Commission's obligation to consider the full record before it in accordance with the rights of respondents. *See CREW II*, 209 F. Supp. 3d at 93 (agreeing that generally the "Commissioners' decision to use the entire record before it was neither unreasonable nor contrary to law, since [n]either FECA nor any judicial decision specifies a particular time period for determining a group's major purpose" (internal quotation marks omitted)).

3. Other Courts Have Already Rejected Imposing Bright-Line Rules for Determining an Organization's Major Purpose and This Court Should Too

In *CREW II*, the court refused to mandate a calendar-year only rule: "Given the FEC's embrace of a totality-of-the-circumstances approach to divining an organization's 'major purpose,' it is not *per se* unreasonable that the Commissioners would consider a particular organization's full spending history as relevant to its analysis." 209 F. Supp. 3d at 94. This Court should do the same. *Cf. Free Speech v. FEC*, 720 F.3d 788, 797-98 (10th Cir. 2013)

(upholding the Commission's discretion to determine an organization's major purpose based on a flexible, case-by-case analysis rather than through categorical rules); *Real Truth About Abortion, Inc.*, 681 F.3d at 556 (same); *Shays*, 511 F. Supp. 2d at 31 (same).

Buckley's major purpose test narrowed FECA's definition of a "political committee" after it was enacted, so Congress could not have had the intent to limit the Commission's analysis of a group's major purpose to a calendar year, *Center for Individual Freedom v. Van Hollen*, 694 F.3d 108, 111 (D.C. Cir. 2012) (per curiam), and plaintiffs admit that *Buckley* does not dictate an appropriate timeframe (Pls. Reply at 22).

Plaintiffs' remaining policy arguments assert why they believe a calendar-year only rule is preferable to the Commission's more flexible, judicially-upheld case-by-case approach. (*E.g.*, Pls. Reply at 24 (arguing for "a clear standard").) But "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones," but belong to the agency. *Chevron*, 467 U.S. at 866. And as *Van Hollen* demonstrates, the controlling Commissioners' application of their discretion in a manner sensitive to constitutional concerns is permissible. 811 F.3d at 499 (deferring to the FEC and approving of the "tailoring" of its approach "to satisfy constitutional interests").

CONCLUSION

For the foregoing reasons, and those stated in the FEC's opening brief, the Court should deny plaintiffs' motion for summary judgment and award summary judgment to the FEC.

Respectfully submitted,

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