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,	)	MEMORANDUM
Defendant.	)	

FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Lisa J. Stevenson (D.C. Bar No. 457628)
Acting General Counsel
lstevenson@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

Charles Kitcher (D.C. Bar No. 986226)
Acting Assistant General Counsel
ckitcher@fec.gov

Haven G. Ward (D.C. Bar No. 976090)
Attorney
hward@fec.gov

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
1050 First Street NE
Washington, D.C. 20463
(202) 694-1650

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INTRODUCTION

Plaintiffs Citizens for Responsibility and Ethics in Washington and Noah Bookbinder (collectively, "CREW") challenge the Federal Election Commission's ("FEC" or "Commission") dismissal of their administrative complaints alleging certain campaign finance violations by New Models. Plaintiffs alleged that New Models violated the Federal Election Campaign Act ("FECA" or "Act") due to three contributions to independent-expenditure-only committees it made in 2012 without registering with the Commission as a "political committee" and complying with the disclosure requirements that apply to such groups. After duly considering plaintiffs' allegations, the Commission did not approve pursuing the matter further by the requisite votes, and so voted to close its file, thereby dismissing plaintiffs' administrative complaint.

Though plaintiffs may disagree with the dismissal of their administrative complaint, judicial review is not available where, as here, the controlling statement providing the agency's rationale includes an independent justification based on prosecutorial discretion. In a recent D.C. Circuit case, the Court of Appeals held that FEC dismissals of administrative complaints based, in whole or in part, on prosecutorial discretion are "not subject to judicial review." *CREW v. FEC*, 892 F.3d 434, 441 (D.C. Cir. 2018) ("*CREW*"), *petition for rehearing en banc filed*, No. 17-5049, Doc. # 1742905 (July 27, 2018). Because the FEC has "unreviewable prosecutorial discretion," *id.* at 438, which it exercised in the underlying matter here, the Court should summarily award summary judgment in the Commission's favor and need not reach the case's merits.

But even if the agency's reasoning was reviewable, plaintiffs cannot meet their heavy burden of demonstrating that the dismissal was contrary to law. Instead, plaintiffs urge the Court to disregard the well-established standard of review and recent authority in favor of a results-

oriented analysis that plaintiffs claim is necessary to protect the government's interest in disclosure. The undisputed importance of the government's disclosure interest supporting each of FECA's disclosure provisions, however, does not provide exact guidance on whether the provisions apply in different circumstances. The specific value of the information New Models in particular would have to disclose were it found to be a political committee is not part of the general tests that Congress and the Supreme Court designed to determine political-committee status in the first place. Plaintiffs' disclosure argument wholly begs the question.

At issue here is whether the controlling analysis of New Models' political-committee status and concomitant dismissal of plaintiffs' administrative complaint was contrary to law. It was not. The decision of the Commissioners who voted not to proceed was thoroughly explained in a statement of reasons, was grounded in the administrative record, and reflects a reasonable application of the FEC's repeatedly upheld case-by-case method for determining political-committee status using the Supreme Court's "major purpose" test. It is also consistent with courts' repeated admonitions to interpret the Act with sensitivity to the First Amendment area in which the Commission regulates. The analysis readily satisfies the review under heightened deference applicable here and should be affirmed. The Court accordingly should deny plaintiffs' motion for summary judgment and grant the Commission's cross-motion.

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). FECA requires the Commission 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). After considering these allegations and any response, the FEC determines whether there is "reason to believe" that the respondent violated FECA. *Id.* § 30109(a)(2). If the Commission so finds, it then conducts an investigation to determine whether there is "probable cause to believe" that FECA was violated. *Id.* § 30109(a)(2), (4). If the Commission so finds, it must attempt conciliation before pursuing the matter in court. *Id.* § 30109(a)(4)(A)(i). If the Commission is unable to reach a conciliation agreement, the FEC may institute a *de novo* civil enforcement action in federal district court. *Id.* § 30109(a)(6)(A). At each stage, the affirmative vote of at least four Commissioners is required for the agency to proceed. *Id.* § 30109(a)(2), (4)(A), (6)(A).

If the Commission dismisses the matter, the complainant may file suit to obtain judicial review to determine whether the agency's dismissal decision was "contrary to law." *Id.* § 30109(a)(8)(A), (C); *but see CREW*, 892 F.3d at 438 (holding that "federal administrative agencies in general and the Federal Election Commission in particular have unreviewable prosecutorial discretion to determine whether to bring an enforcement action") (internal citations omitted). Reviewable dismissal decisions include instances in which the Commission dismisses

a complaint due to a lack of four votes to proceed. *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). In such split-vote cases, the "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.*; *CREW*, 892 F.3d at 437-38 (explaining that under Circuit precedent, "for purposes of judicial review, the statement or statements of those naysayers — the so-called 'controlling Commissioners' — will be treated as if they were expressing the Commission's rationale for dismissal" (quoting *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988))).

Should the court find the Commission's dismissal to be unlawful, FECA requires the court to "direct the Commission to conform" with the court's ruling "within 30 days." 52 U.S.C. § 30109(a)(8)(C). If, and only if, the Commission fails to conform within that time period, the complainant may bring "a civil action to remedy the violation involved in the original [administrative] complaint." *Id.*

B. Regulation of "Political Committees"

FECA imposes distinct disclosure requirements on organizations qualifying as a "political committee." Such groups must, *inter alia*, register with the Commission, appoint a treasurer, file periodic reports identifying those who have contributed in excess of $200 to the organization, and meet other organizational, record-keeping, and public filing requirements. 52 U.S.C. §§ 30102, 30103, 30104(a)-(b); AR 97-98. Once an organization becomes a political committee, its ability to terminate its status as a political committee is restricted. An

organization can only terminate by itself if it "will no longer receive any contributions or make any disbursements" and "has no outstanding debts or obligations," 52 U.S.C. § 30103(d)(1), or with the permission of the Commission if it meets the criteria for "administrative termination," which includes as factors receipt of no contributions in the previous year or minimal expenditures in a recent report, 11 C.F.R. § 102.4. To terminate under the self-executing procedure, a qualifying organization must file a notice with the Commission, as well as "a final report of receipts and disbursements, which report shall include a statement as to the purpose for which such residual funds will be used," among other things. *Id.* § 102.3(a)(1).

FECA defines a "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 52 U.S.C. § 30101(4)(A). "This broad definition, however, is less universally encompassing than at first it may seem, for [FECA's] definitional subsections limit" the scope of "the key terms 'contribution' and 'expenditure.'" *FEC v. Akins*, 524 U.S. 11, 15 (1998). Those terms cover "only those contributions and expenditures that are made 'for the purpose of influencing any election for Federal office.'" *Id.* (quoting statutory definitions recodified at 52 U.S.C. § 30101(8)(A)(i), (9)(A)(i)). Concerned that the bare statutory definition might reach too far into protected First Amendment activity by covering "groups engaged purely in issue discussion," the Supreme Court further limited the definition of political committee so that it would "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." *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (per curiam).

Buckley, however, provided only limited guidance regarding the key question of how to determine an organization's "major purpose." *See id.*; *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 556 (4th Cir. 2012) ("*RTAA*"). To fill this gap, the Commission has adopted a policy of determining political committee status through case-by-case adjudication. *See Rules & Regulations: Political Comm. Status*, 72 Fed. Reg. 5595 (Feb. 7, 2007) ("Supplemental E&J"); *RTAA*, 681 F.3d at 551 (upholding the Commission's case-by-case approach to the major purpose test). Under this approach, the Commission determines through a fact-specific analysis whether a group's spending on "Federal campaign activity" is "sufficiently extensive," including by comparison to its activities "unrelated to campaigns." Supplemental E&J, 72 Fed. Reg. at 5601. In addition, the Commission analyzes the group's "public statements," which "can also be instructive in determining an organization's major purpose," and may examine internal statements of purpose as well. *Id.*

II. FACTUAL BACKGROUND

A. The Administrative Complaint

In an administrative complaint dated September 17, 2014, plaintiffs alleged that "New Models' major purpose in 2012 was the nomination or election of federal candidates," and that, consequently, New Models had violated FECA by failing to register and report as a "political committee." (AR 7-8.) In its response dated November 5, 2014, New Models did not dispute that it made more than $1,000 in "contributions" in 2012; but denied that it then, or ever, had the "major purpose" of nominating or electing federal candidates. (AR 52.) On May 27, 2015, the FEC's Office of General Counsel recommended that the Commission find reason to believe that

New Models violated FECA by failing to register and report as a political committee in 2012. (AR 59-60.)

B. Dismissal of the Administrative Complaint

On November 14, 2017, the Commission voted 2-2 on whether there was reason to believe that New Models violated FECA. (AR 87.) Then-Vice Chair Caroline C. Hunter and Commissioner Lee E. Goodman voted against finding reason to believe, while then-Chair Steven T. Walther and then-Commissioner Ellen L. Weintraub voted for finding reason to believe and to authorize an investigation. (*Id.*) Commissioner Matthew S. Petersen was recused and did not vote. (*Id.*) Lacking the required votes to open an investigation, the Commission then voted 4-0 to close the file. (AR 88.) Vice Chair Hunter and Commissioner Goodman issued the controlling statement of reasons on December 20, 2017. (AR 91-122.) The next day, Commissioner Weintraub also issued a statement of reasons. (AR 123-25.)

The controlling Commissioners found that, examining New Models' "public statements, organizational documents, and overall spending history" and applying "agency expertise," New Models was not a political committee. (AR 91-92.) Based on certain key facts set forth below, and which are not materially disputed, the controlling Commissioners analyzed the group's central organizational purpose, public statements, and its federal campaign spending as compared to their other spending, and concluded that New Models had not "violated the Act by failing to register and report as a political committee." (AR 121.) "For these reasons, and in exercise of our prosecutorial discretion," these Commissioners voted to dismiss the matter. (*Id.*)

1. New Models

New Models is a tax-exempt social welfare organization established in 2000 under section 501(c)(4) of the Internal Revenue Code. (AR 94.) Its Form 990 tax returns from 2004

through 2015 consistently described New Models' "primary purpose" as "studying and advocating policy issues of national importance." (AR 94.) The year 2012 was no exception. Its 2012 Form 990 tax return stated that New Models' mission was to "research[] national issues and support[] efforts to highlight or advocate for those issues," including conducting issue-related polling and "participat[ing] in issue advocacy when appropriate." (*Id.* (quoting AR 93 (some alterations in original)).)

The description of the organization's activities on reports filed with the Internal Revenue Service and the organization's website provided some confirmation that New Models had pursued its stated mission by conducting and making available issue-related polling results, sponsoring and making available research papers, publishing information about public policy on its website, and making grants to other organizations. (AR 95.) In 2012, for example, New Models conducted issue-related focus groups and polling, as well as gave a grant for "[i]ssue advocacy on the economy and jobs." (AR 12.)

New Models did not make any independent expenditures in 2012 or any other year.[1] (AR 93.) It did, however, make contributions to several independent-expenditure-only political committees, also known as super PACs, in 2012 — all of which were publicly disclosed. (AR 96.) Specifically, New Models gave $2,171,000 to Now or Never PAC, $627,000 to Government Integrity Fund Action Network, $292,000 to Citizens for a Working America PAC, and $5,000 to OPSEC PAC. (AR 92; AR 96 n.24.) The total, $3,095,000, constituted 68.7% of

[1] 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.

New Models' spending for the year. (AR 96.) Other than a small donation in 2010,[2] New Models did not make any other contributions between 2000 and 2015. (AR 95-96.) Between 2002 and 2015, New Models spent 19.5% of its total spending on contributions to super PACs. (AR 96.) Its financials for this period are summarized as follows:

Year	Total Revenue	Total Expenses	Contribution to Super PACs	Relative Spending
2002	$89,700	$89,700	$0	0%
2003	$332,500	$332,500	$0	0%
2004	$768,886.91	$754,802.21	$0	0%
2005	$581,136.39	$564,908	$0	0%
2006	$830,000	$702,025	$0	0%
2007	$656,516.54	$745,323	$0	0%
2008	$647,045.73	$599,638.59	$0	0%
2009	$2,049,110.10	$2,088,372.59	$0	0%
2010	$2,511,000	$2,326,991.10	$265,000[3]	11.4%
2011	$1,388,291.50	$1,480,065.53	$0	0%
2012	$4,523,850	$4,506,176.20	$3,095,000	68.7%
2013	$922,500	$1,025,833.22	$0	0%
2014	$885,000	$954,604.34	$0	0%
2015	$1,035,000	$1,057,073.40	$0	0%
Total	**$17,220,537.17**	**$17,228,016.27**	**$3,360,000**	**19.5%**

(AR 95-96.)

2. The Controlling Commissioners' Approach to Determining Political Committee Status

The controlling Commissioners began by detailing FECA's reporting requirements for political committees, which impose "significant burdens on First Amendment associational

[2] New Models made a $265,000 donation to Citizens for a Working America PAC in 2010. There was conflicting evidence in the record regarding whether this 2010 payment was election-related or for issue advocacy. (AR 95 n.23.) Because its inclusion did not alter their conclusion, the controlling group included it as a contribution. (*Id.*)

[3] *See* n.2, *supra*.

rights," and explaining that FECA had accordingly been narrowly construed to avoid impinging upon issue-related advocacy. (AR 98-105.)

The controlling Commissioners reviewed the major-purpose test's origins and establishment in *Buckley*, (AR 99-103), and concluded that *Buckley* further limited FECA's definition of "political committee" by construing the $1,000 statutory threshold for expenditures to "'reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.'" (AR 102 (quoting *Buckley*, 424 U.S. at 80).)

3. The Controlling Group's Analysis of New Models

"Upon thorough consideration of various facts indicative of political committee status: organizational documents, public statements of purpose, tax status, and independent spending," the controlling Commissioners concluded that New Models was not a political committee for two independent reasons. (AR 108.) First, they concluded that New Models did not meet the statutory threshold requirement for a political committee of receiving $1,000 in contributions or making $1,000 in expenditures. (*Id.*) Second, the controlling Commissioners found that New Models did not have the major purpose of nominating or electing federal candidates. (*Id.*) The Commissioners noted that "[e]ach ground is independently sufficient to substantiate [their] conclusion." (AR 111 n.95.)

a. New Models and the Statutory Threshold

The controlling Commissioners concluded that New Models did not receive "contributions" or make "expenditures" and thus did not satisfy the statutory threshold requirement for being a political committee. (AR 108-09.) While both terms are defined to

include a gift of money "made . . . for the purpose of influencing any election for Federal office," they found that the Supreme Court had interpreted this phrase narrowly.

The term "contribution," they reasoned, was limited to (1) direct donations to candidates, parties, or campaign committees, (2) coordinated expenditures, and (3) donations to non-candidate or party groups but "'earmarked for political purposes.'" (AR 109 (quoting *Buckley*, 424 U.S. at 23, n.24, 78).) Because the Commissioners found that New Models did not make any expenditures, coordinated or otherwise, they concluded that "none of its funding seems earmarked for a political purpose" and thus would not constitute "contributions." (AR 109.)

The term "expenditure," they reasoned, was limited even further to reach only express advocacy of a clearly identified candidate. (*Id.* (citing *Buckley*, 424 U.S. at 79-80).) There were no allegations that New Models itself made any independent expenditures, only that New Models donated money to political committees who themselves made independent expenditures. (AR 109-10.) The controlling Commissioners found that contributions to these super PACs would indicate New Models' support for those groups, "but not necessarily any particular candidate." (AR 110.) They reasoned that holding that these "contributions" were also "expenditures" would "ignor[e] how the Act differentiates between [these terms] throughout its provisions." (*Id.*) Accordingly, they concluded that New Models did not "make expenditures" and thus did not satisfy the statutory threshold to be deemed a political committee. (*Id.*)

b. New Models' Major Purpose

Even if New Models met the statutory threshold though, the controlling group concluded that New Models did not have the major purpose of nominating or electing federal candidates. (*Id.*) To reach this conclusion, they considered New Models' central organizational purpose, public statements, and spending, as well as "the First Amendment implications" of classifying an

organization as a political committee "based solely on a handful of contributions in a brief snapshot in time." (AR 111.)

The controlling Commissioners found that New Models' organizational documents weighed against finding they had the requisite major purpose. (AR 111-12.) The Commissioners noted that, although an organization's tax status "is not dispositive," it was relevant. (*Id.*) With no allegations or evidence to the contrary in the record, the Commissioners determined that they could reasonably assume that New Models' organizational documents were consistent with the requirements for establishing and maintaining a 501(c)(4) organization with the Internal Revenue Service, *i.e.*, their organizational purpose was social welfare activities and not primarily campaign-related. (*Id.*)

The controlling Commissioners also found that New Models' public statements weighed heavily against finding that they had the requisite major purpose. (AR 112-14.) The Commissioners explained that court decisions, as well as the Supplemental E&J, had held that a group's major purpose could be determined by examining its public and official statements. (AR 113 (discussing *FEC v. Malenick*, 310 F. Supp. 2d 230 (D.D.C. 2004), and *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996)).) These statements must be evaluated "'in a fact-intensive inquiry giving due weight to the form and nature of the statements, as well as the speaker's position within the organization.'" (AR 113 (quoting Supplemental E&J, 72 Fed. Reg. at 5601).) Here, the Commissioners noted that the administrative complaint did not "identify a single statement in over 15 years" by New Models indicating it had the requisite major purpose. (AR 113-14.) Further, in New Models' response to the administrative complaint and accompanying sworn declaration from its President and Chief Operating Officer, New Models stated that it never "publicly advocated [for] the election or defeat of a federal candidate," has

never stated that its purpose was campaign-related, never made any independent expenditures, and its fundraising materials did not "suggest to prospective donors that funds will be used to elect or defeat federal candidates." (AR 113.) The controlling Commissioners concluded that the evidence indicated that New Models' "major purpose was to conduct and sponsor research on public policy." (AR 114.) These Commissioners based this finding on a review of archives of New Models' website, including the research and reports the organization had made available there. *Id.*

Finally, the Commissioners considered New Models' history of campaign-related spending. They noted that a judge in this District recently found that considering "a particular organization's full spending history as relevant" was not "*per se* unreasonable." (AR 115 n.114 (quoting *CREW v. FEC*, 209 F. Supp. 3d 77, 94 (D.D.C. 2016) ("*CREW II*")).) The controlling group went on to explain why considering New Models' 2012 spending within the broader context of the organization's overall spending history was appropriate. "Having considered New Models's history, and the contributions it made in 2012 in the context of that history and the long-term mission, as well as its activities in the years immediately preceding and following 2012," the Commissioners found that "the facts and circumstances do not provide reason to believe that New Models' major purpose changed from public policy discussion to nominating or electing federal candidates." (AR 115 n.114.) New Models continued pursuing its "traditional policy mission" in 2012, spending $1.5 million. (AR 117.) The Commissioners also found it significant that, during the three years following 2012, New Models made "*zero* contributions to federal political committees." (*Id.*; *see also* AR 120 ("[I]f a group resumes its issue advocacy after the election date, such spending is also evidence of its true purpose.").) Finally, they noted that if New Models was deemed a political committee in 2012, it could have been subjected to

the Commission's regulatory and reporting burdens in perpetuity if it had not met the criteria for termination. (AR 120; *see also* p.5, *supra*.)

In short, the controlling statement found that New Models' "isolated contributions to three Super PACs" did not demonstrate a fundamental shift in the organization's major purpose. (AR 117; *see also* AR 120.) Based upon the controlling Commissioners' "review of New Models' spending, nominating or defeating a federal candidate may have been *a* purpose of the organization in 2012, but was not *the* major purpose of the organization." (*Id.*; *see also* AR 120 (discussing example where an organization's "foremost [policy] issue becomes highly visible in a federal election," so the organization temporarily devotes its resources to campaign-related spending but then resumes its issue focus).) New Models, they concluded, "is an issue discussion organization that made sporadic contributions to independent expenditure-only committees," and thus "is precisely the type of group [that] *Buckley* . . . sought to exclude from the definition of political committee through the major purpose limitation." (AR 117.)

Weighing New Models' organizational documents, public statements, and spending history, the controlling group concluded that New Models did not have the requisite major purpose. (AR 121.)

4. Dismissal on the Basis of Prosecutorial Discretion

The controlling group also voted not to pursue the New Models matter further "in exercise of [their] prosecutorial discretion." (AR 121 (citing *Heckler v. Chaney*, 470 U.S. 821 (1985)).) They found that New Models had ceased operations in 2015 based upon its 2015 tax form, which represented that it had "liquidated, terminated, dissolved, or otherwise ceased operations." (AR 97 & n.32.) Because "the organization appears no longer active," as well as

"the age of the activity," the controlling Commissioners concluded that "proceeding further would not be an appropriate use of Commission resources." (AR 121 n.139.)

ARGUMENT

This Court should deny plaintiffs' motion for summary judgment and grant the Commission's cross-motion because dismissal decisions based in whole or in part on prosecutorial discretion are presumptively unreviewable under recent D.C. Circuit law. Because the controlling Commissioners expressly invoked and exercised their prosecutorial discretion as an independent basis for their decision to dismiss CREW's administrative complaint against New Models, CREW is unable to obtain judicial review of that decision.

In the alternative, the dismissal of plaintiffs' administrative complaint must be sustained because it was not contrary to law. The rationale of the Commissioners who voted not to find reason to believe that New Models violated FECA reflects their thorough review of the records before the Commission, including careful analyses of the organization's documents, statements, and financial activities. It also accords with courts' instructions that FECA be interpreted in a manner that is sensitive to the First Amendment activity regulated by the statute. Those Commissioners' analysis was reasonable and concern an area in which the Commission's inquiry is necessarily both flexible and accorded heightened deference. The agency's dismissal of the matter therefore should be affirmed.

I. THE DISMISSAL BASED ON PROSECUTORIAL DISCRETION IS NOT JUDICIALLY REVIEWABLE

As the D.C. Circuit recently held, "federal administrative agencies in general and the Federal Election Commission in particular have unreviewable prosecutorial discretion to determine whether to bring an enforcement action." *CREW*, 892 F.3d at 438 (citing *Chaney*, 470 U.S. at 831, and *Akins*, 524 U.S. at 25). In that case, the D.C. Circuit likewise considered a split-

vote dismissal decision in which the controlling Commissioners voted against proceeding further on the basis of prosecutorial discretion. *Id.* at 437. Specifically, the controlling group had found that the "case did not warrant further use of Commission resources" because, *inter alia*, "the association named in CREW's complaint no longer existed" and had "filed termination papers with the IRS four years earlier." *Id.* at 438.

The D.C. Circuit held that this dismissal was judicially unreviewable even if it was based in part on "a misinterpretation[] of 'political committee' as used in FECA." *Id.* at 441. Because there is a "firmly-established principle" against "carving reviewable legal rulings out from the middle of non-reviewable actions," an administrative complainant "is not entitled to have the court evaluate . . . the individual considerations the controlling Commissioners gave in support of their vote not to initiate enforcement proceedings." *Id.* at 441-42.

This recent D.C. Circuit decision is dispositive here. The controlling statement expressly invoked prosecutorial discretion as a basis for the dismissal. (AR 121 & n.139.) And like other agency decisions not to enforce, their decision "'involve[d] a complicated balancing of a number of factors which are peculiarly within its expertise.'"[4] *CREW*, 892 F.3d at 439 n.7 (quoting *Chaney*, 470 U.S. at 831).) That part of the controlling group's analysis was set forth in a footnote is of no moment. The fact that the point was made succinctly does not mean that it was undeveloped or not actually relied upon in the Commissioners' decision. Rather, as the Supreme Court noted in *Chaney*, the controlling Commissioners considered whether "proceeding further

[4] "[T]he agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Chaney*, 470 U.S. at 831.

would . . . be an appropriate use of Commission resources." *Compare* AR 121 n.139, *with Chaney*, 470 U.S. at 831 (enumerating discretionary factors, including "whether agency resources are best spent on this violation or another"). They found that proceeding here would not be the best use of the Commission's resources due to "the age of the activity" and "the fact that the organization appears no longer active." (AR 121 n.139) As the Commissioners pointed out, these are valid, rational reasons for exercising prosecutorial discretion. The Commissioners cited *Nader v. FEC*, 823 F. Supp. 2d 53 (D.D.C. 2011), which, they explained, found that the "Commission decision to dismiss allegations that several groups were political committees was not contrary to law, and 'represents a reasonable exercise of the agency's considerable prosecutorial discretion' given the 'staleness of evidence and the defunctness of several of the groups.'" AR 121 n.139 (quoting *Nader*, 823 F. Supp. 2d at 65-66); *see also CREW v. FEC*, 236 F. Supp. 3d 378, 396 (D.D.C. 2017) (recognizing that the defunct nature of an organization is a rational and proper basis for the Commission's exercise of prosecutorial discretion), *aff'd*, 892 F.3d 434 (D.C. Cir. 2018).

Further, "[e]ven though the Commission did not explicitly rely on . . . likelihood of success to support its decision, this decision still involved 'a complicated balancing of a number of factors which are peculiarly within [the Commission's] expertise,' including 'whether the particular enforcement action requested best fits the agency's overall policies.'" *Campaign Legal Center v. FEC*, 312 F. Supp. 3d 153, 160-61 (D.D.C. 2018) ("*CLC*") (quoting *Chaney*, 470 U.S. at 831) (internal citation omitted). As the controlling group noted, they were "cautious to avoid compounding this chilling effect by imposing political committee status on issue groups that may occasionally make contributions to independent expenditure-only committees, but which make no such communications themselves." (AR 99.) Moreover, the controlling

Commissioners' analysis that New Models was not a political committee "implicitly raise[s] questions about the likelihood of success in a legal challenge" should the Commission have instead determined to proceed with investigating New Models. *CLC*, 312 F. Supp. 3d at 161.[5]

While the controlling Commissioners spent the bulk of their statement discussing their interpretation of FECA's requirements for political committees, there "can be no judicial review for abuse of discretion, or otherwise" unless "the agency's action was based *entirely* on its interpretation of the statute." *CREW*, 892 F.3d at 441 & n.11 (emphasis added); *see also CREW v. FEC*, -- F. Supp. 3d --, No. 16-259, 2018 WL 3719268, at *49 (D.D.C. Aug. 3, 2018) ("*CREW III*") (noting potential reviewability where action based on interpretation of FECA). That is plainly not the case here where the controlling Commissioners expressly invoked prosecutorial discretion as one basis for their dismissal decision. (AR 121.) Because this Court cannot "carv[e] reviewable legal rulings out from the middle of non-reviewable actions," the dismissal decision thus is not judicially reviewable. *CREW*, 892 F.3d at 442 (internal quotation marks omitted).

[5] The Court of Appeals noted in its recent decision that "*Chaney* 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." *CREW*, 892 F.3d at 440 n.9; *see also CREW III*, 2018 WL 3719268, at *49. The Court of Appeals also found that submissions by CREW demonstrated that "the Commission routinely enforces the election law violations alleged in CREW's administrative complaint." *CREW*, 892 F.3d at 440 n.9. Significantly, that case — like here — involved an administrative complaint alleging that a group violated FECA by failing to register and report as a political committee. *Id.* at 441.

II. IN THE ALTERNATIVE, THE DISMISSAL WAS NOT CONTRARY TO LAW

A. Standard of Review

1. FECA's Contrary to Law Standard of Review for Reviewable Decisions Is "Limited" and "Extremely Deferential"

It has long been established that judicial review of Commission dismissal decisions under FECA is "limited." *Common Cause*, 842 F.2d at 448; *CREW v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007). A court may only set aside a reviewable dismissal decision if it is "contrary to law." 52 U.S.C. § 30109(a)(8)(C). This means that the Commission's decision cannot be disturbed unless it was based on an "impermissible interpretation of" FECA or was otherwise "arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986).

When the FEC interprets FECA in the context of a section 30109(a)(8) dismissal, the D.C. Circuit has held that courts must accord *Chevron* deference to that decision.[6] *E.g.*, *FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 185 (D.C. Cir. 2001); *In re Sealed Case*, 223 F.3d 775, 779-81 (D.C. Cir. 2000); *Orloski*, 795 F.2d at 161-62; *NRSC*, 966 F.2d at 1476 ("[I]f the meaning of the statute is not clear, a reviewing court should accord deference to the Commission's rationale."). The Commission's decision need only be "sufficiently reasonable to be accepted." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981) ("*DSCC*") (internal quotation marks omitted). It does not need not be "the only reasonable one or even the" decision "the [C]ourt would have reached" on its own "if the question initially had arisen in a judicial proceeding." *Id.*

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[6] The familiar two-step *Chevron* framework requires the Court to first to determine "whether Congress has directly spoken to the precise question at issue" and, if not, to defer to the agency's interpretation as long as it is "based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

When determining whether an FEC decision was arbitrary, capricious, or otherwise an abuse of discretion, the Court must be "extremely deferential" to the agency's decision, which "requires affirmance if a rational basis . . . is shown." *Orloski*, 795 F.2d at 167 (internal quotation marks omitted). Courts must defer to the FEC unless the agency fails to meet the "minimal burden of showing a coherent and reasonable explanation [for] its exercise of discretion." *Carter/Mondale Presidential Comm., Inc. v. FEC*, 775 F.2d 1182, 1185 (D.C. Cir. 1985) (internal quotation marks omitted).

2. Deference Applies Equally to Split-Vote Decisions

The deferential standard of review is not altered by the nature of the dismissal, which resulted from a 2-2 split vote, rather than from a majority vote of 4 or more Commissioners. The D.C. Circuit has squarely held that it owes deference to an FEC decision not to proceed on an enforcement matter, even if it only occurs due to a lack of four votes to proceed.[7] *Sealed Case*, 223 F.3d at 779; *see also NRSC*, 966 F.2d at 1476; *CLC*, 312 F. Supp. 3d at 160 (in a split-vote dismissal case, holding that "applicable case law requires" deference to the Commission's decision because, *inter alia*, "the 'contrary to law' standard is itself deferential").

[7] That the particular dismissal here resulted from a 2-2 split vote instead of a 3-3 split vote is irrelevant. In either instance, "the Commission dismissed the complaint for lack of the requisite four votes in favor of pursuing the investigation." *Common Cause*, 842 F.2d at 449. The statement of reasons of the two Commissioners voting against proceeding thus likewise "necessarily states the agency's reasons for acting as it did." *NRSC*, 966 F.2d at 1476. Indeed, while *Common Cause* ultimately involved a 3-3 split vote, the D.C. Circuit wanted a statement of reasons from one Commissioner because "[h]is unexplained shift" from voting to proceed in a 4-2 vote to voting against proceeding "caused the 3–3 deadlock among the Commissioners that resulted in a dismissal." 842 F.2d at 438; *id.* at 449 ("[S]ome statement from [that Commissioner], while not law, would have informed [the administrative complainant] of the evidence practically necessary to convince a majority of the Commission to proceed with an investigation of a committee"); *id.* at 450 (deciding not to remand the matter to the Commission to require a statement of reasons because the Commissioner at issue was no longer on the FEC).

Plaintiffs nonetheless argue that this court can ignore this binding precedent because it pre-dates *United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Security*, 769 F.3d 1127, 1137 (D.C. Cir. 2014). (Pls. Br. at 24-28.) As to *Mead*, the D.C. Circuit reaffirmed the validity of *Sealed Case* in a post-*Mead* decision. *Nat'l Rifle Assoc. of Am.*, 254 F.3d at 184-86. Indeed, the Court of Appeals relied extensively upon *Sealed Case* as the basis for its holding in that post-*Mead* case. *Id.* Accordingly, *Sealed Case* remains good law. *CREW II*, 209 F. Supp. 3d at 85 n.5 (holding that *Sealed Case* remains binding precedent post-*Mead*).

Plaintiffs' argument as to *Fogo De Chao* likewise fails. As an initial matter, "[o]ne three judge panel . . . does not have the authority to overrule another three-judge panel of the court." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393, 1395 (D.C. Cir. 1996) (en banc). And because *Sealed Case* came first, it controls. *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011). But more importantly, *Fogo De Chao* is not inconsistent with *Sealed Case*. In contrast to the agency action in *Fogo De Chao*, which was "the product of *informal* adjudication," 769 F.3d at 1136 (emphasis added), the dismissal here deserves deference because it was "analogous to a formal adjudication." *Sealed Case*, 223 F.3d at 780. In any event, the dismissal here has legal force, despite the split vote, because it resolved the underlying matter and precludes further enforcement proceedings. *See Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 316, 319 (D.C. Cir. 2015). Plaintiffs' force-of-law argument thus is incorrect.[8] *Cf. Public Citizen, Inc. v. FERC*, 839 F.3d 1165, 1171 (D.C. Cir. 2016) (distinguishing FECA from other organic statutes because Commission dismissals resulting from a split vote of Commissioners

[8] Even if the Court could ignore D.C. Circuit precedent and not accord *Chevron* deference, the standard of review would not be *de novo*. *E.g.*, *Fogo De Chao*, 769 F.3d at 1137 (applying deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1994)).

constitute "final agency action" due to the FEC's unique "structural design and FECA's legal requirement to dismiss complaints in deadlock situations").

3. The Controlling Commissioners' Rationale Does Not Change the Deference Accorded Their Dismissal Decision

As the Supreme Court explained decades ago, "the Commission is precisely the type of agency to which deference should presumptively be afforded." *DSCC*, 454 U.S. at 37. That the controlling Commissioners' rationale here touched upon constitutional concerns or otherwise implemented *Buckley*'s major purpose test does not alter that deference, as plaintiffs suggest. (*See* Pls.' Mem. at 19-23 (advocating for *de novo* review).)

Courts give deference to FEC decisions implementing Supreme Court decisions, as well as those interpreting FECA in light of constitutional considerations.[9] In *Van Hollen v. FEC*, for example, the D.C. Circuit considered regulations promulgated by the FEC to "'implement the Supreme Court's decision in [*FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*")].'" 811 F.3d 486, 491 (D.C. Cir. 2016) (quoting *Electioneering Commc'ns.*, 72 Fed. Reg. 50261, 50262 (Aug. 31, 2007)). And the court applied *Chevron* deference — even though the FEC not only was implementing *WRTL*, but also took into consideration constitutional concerns when so doing. *Id.* at 499. Indeed, far from providing a reason to undercut the deference provided to the FEC, the D.C. Circuit held that, by tailoring the regulation to satisfy

[9] Plaintiffs' reliance on the D.C. Circuit's opinion in *Akins v. FEC*, 101 F.3d 731 (D.C. Cir. 1996) (en banc), *vacated on other grounds*, *FEC v. Akins*, 524 U.S. 11 (1998), is misplaced. (Pls. Mem. at 21-22.) That opinion not only was vacated, but also it otherwise has not withstood the test of time — as plaintiffs' own brief recognizes. *Compare* Pls. Mem. at 4 (describing the major purpose requirement as applying to both contributions and expenditures), *with Akins*, 101 F.3d at 742 (limiting the major purpose requirement to only independent expenditures). Further, *Akins* found that it would be inappropriate to examine the purpose of the organization itself as opposed to the purpose of the particular disbursements — yet plaintiffs plainly recognize that the key inquiry is the organization's major purpose. *Compare Akins*, 101 F.3d at 743, with Pls. Mem. at 4-5.

constitutional interests, "the FEC fulfilled its unique mandate." *Id.*; *see also Common Cause*, 842 F.2d at 448 (according *Chevron* deference where FEC narrowly interpreted FECA due to constitutional concerns).

More fundamentally, plaintiffs' argument misconceives the relative domains of expertise of the FEC and the courts upon which deference is based. The Supreme Court did not "mandate a particular methodology for determining an organization's major purpose." *RTAA*, 681 F.3d. at 556. And courts do not possess special expertise regarding whether the nomination or election of a candidate is the major purpose of an organization. Rather, that determination is centrally within the ambit of the FEC's expertise and regulatory authority. Courts thus have repeatedly found the FEC's multi-factored, case-by-case method of determining an organization's major purpose is a reasonable exercise of that authority: "[T]he Commission, in its policy, adopted a sensible approach," and its "multi-factor major-purpose test is consistent with Supreme Court precedent." *Id.* at 556, 558; *see also Free Speech v. FEC*, 720 F.3d 788, 798 (10th Cir. 2013) (same); *CREW II*, 209 F. Supp. 3d at 88 (finding that "the FEC's choices regarding the timeframe and spending amounts relevant in applying the 'major purpose' test are implementation choices within the agency's sphere of competence, and therefore warrant the Court's deference").

4. The Court Reviews the Dismissal Based Solely on the Administrative Record

Finally, plaintiffs rely on news stories and other extra-record material about purported campaign finance trends and other organizations that were not considered by the Commission in making the underlying dismissal decisions on review here. (Pls. Mem. at 13-16.) Such material, and plaintiffs' arguments premised upon it, should thus be disregarded. Indeed, it is "black-letter administrative law that . . . a reviewing court should have before it neither more nor less

information than did the agency when it made its decision." *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013) (per curiam) (internal quotation marks omitted).[10]

B. Under the Applicable Deferential Standard of Review, the Dismissal Was Not Contrary to Law

Even if, *arguendo*, judicial review is appropriate in this case, the dismissal of plaintiffs' administrative complaint was not contrary to law and thus must be affirmed. In addition to prosecutorial discretion, the controlling Commissioners voted to dismiss on two independent grounds (AR 110 n.95) — each of which requires affirmance. To be deemed a "political committee" under FECA, an organization must (a) meet the $1,000 statutory threshold for receiving contributions or making expenditures, and (b) have the requisite major purpose. *Buckley*, 424 U.S. at 79. The controlling group concluded that New Models did not satisfy either prong of this test. While their conclusion was reasonable as to each, finding even one basis reasonable mandates that the Court affirm the closure of the administrative matter.

1. The Controlling Commissioners' Interpretation of FECA's Statutory Threshold for Political Committees Was Reasonable

Under FECA, an organization is a "political committee" only if it "receives contributions" or "makes expenditures" in excess of $1,000 in a calendar year.[11] 52 U.S.C. § 30101(4)(A). The parties do not dispute that New Models made "contributions," as that term is defined in FECA, to super PACS in 2012 in excess of $1,000. Rather, they dispute whether the

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[10] This material contrasts with information about New Models available online which, though copies are not contained in official agency files, were relied on by Commissioners in reaching their decision. Plaintiffs accurately recite the Commission's agreement that such materials may considered here. (*See* Pls. Mem. at 7 n.2, 9 n.4.)

[11] Plaintiffs do not contest (*see* Pls. Mem. at 29-36), and thus have waived the right to challenge, the controlling Commissioners' conclusion that New Models did not "receive[] contributions" in excess of $1,000 (AR 108-09). *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).

controlling Commissioners reasonably determined that those "contributions" should not be treated as "expenditures" when deciding whether New Models crossed the statutory threshold for political committee status. (*Compare* AR 108-10, *with* Pls. Mem. at 29-36.)

In short, plaintiffs argue that the controlling Commissioners' interpretation violates the express language of the Act because the definitions of "contribution" and "expenditure," which are set forth in 52 U.S.C. § 30101(8)(A)(i), (9)(A)(i), both include a gift of money made for the purpose of influencing a federal election, and thus any gift qualifying as a "contribution" must be treated as an "expenditure" for purposes of determining an organization's political committee status. (Pls. Mem. at 29-30.)

It has long been recognized, however, that FECA's definitions of "contribution," "expenditure," and "political committee" are ambiguous in some respects. *Buckley*, 424 U.S. at 77. In *Buckley*, the Court considered a vagueness challenge to a provision imposing disclosure requirements on "'(e)very person (other than a political committee or candidate) who makes contributions or expenditures'" in excess of $100 in a calendar year. *Id.* at 74-75 (quoting 2 U.S.C. § 434(e) (amended and recodified at 52 U.S.C. § 30104(c)). While that disclosure provision did not apply to "political committees," as defined in 2 U.S.C. § 431(d) (now in its current form at 52 U.S.C. § 30101(4)(A)), both shared the definition of "contribution" and "expenditure" set forth in 2 U.S.C. § 431(e) and (f) (now 52 U.S.C. § 30101(8)(A)(i) and (9)(A)(i)). Like the plaintiffs here, the Supreme Court noted that "'[c]ontributions' and 'expenditures' are defined in parallel provisions in terms of the use of money or other valuable

assets 'for the purpose of . . . influencing' the nomination or election of candidates for federal office." *Buckley*, 424 U.S. at 77.

Where the Supreme Court and plaintiffs diverge, however, is that the Court found the phrase "for the purpose . . . of influencing" — and thus "contribution," "expenditure," and "political committee" — to be ambiguous: "It is the ambiguity of this phrase that poses constitutional problems." *Id.* As to the meaning of "expenditure," the Court found that, while the term was defined differently for disclosure purposes than for purposes of FECA's contribution and expenditure limits, the phrase "'for the purpose of . . . influencing' an election . . . shares the same potential for encompassing both issue discussion and advocacy of a political result." *Id.* at 79. To avert constitutional issues, the Court "construe[d] 'expenditure' for purposes of" the disclosure provision governing non-political committees "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80. Recognizing that FECA's disclosure requirements for "expenditures" made by "political committees" raised similar vagueness / "line-drawing problems" as another provision of FECA addressed earlier in the opinion by potentially "reach[ing] groups engaged purely in issue discussion," the Court interpreted "political committee" to "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.* at 79. Because the canon of constitutional avoidance can only be employed when a statutory provision is ambiguous, plaintiffs' argument that merely the statutory definitions of "contribution," "expenditure," and "political committee" resolve the parties' dispute fails. *See Warger v. Shauers*, 135 S. Ct. 521, 529 (2014) (holding that the canon of constitutional avoidance "is a tool for choosing between competing plausible interpretations of

a provision," and "has no application in the absence of . . . ambiguity") (alteration in the original; internal quotation marks omitted).

Because the reach of the statute is not clear, the controlling Commissioners' interpretation that a "contribution" to an independent-expenditure-only political committee should not be treated as an "expenditure" for purposes of the statutory threshold for "political committees" warrants deference. *Orloski*, 795 F.2d at 161-62. First, these Commissioners reasonably interpreted FECA's $1,000 expenditure threshold for political committees to serve as a dividing line "to distinguish between ordinary contributors and political committees," in addition to *Buckley*'s major purpose requirement. (AR 108.) This is in part a monetary threshold. If a group that is under the control of a candidate or has the requisite major purpose makes independent expenditures in excess of $250 (the current statutory threshold for disclosures by non-political committees), but no more than $1,000, it is not a "political committee." 52 U.S.C. §§ 30101(4)(A), 30104(c); AR 98; AR 105. If that same group makes independent expenditures in excess of $1,000, then it is a "political committee." (AR 109-10.) This interpretation is consistent with *Buckley*, which explained:

> Some partisan committees groups within the control of the candidate or primarily organized for political activities will fall within [the disclosure provision governing non-political committees] because their contributions and expenditures fall in the $100-to-$1,000 range. Groups of this sort that do not have contributions and expenditures over $1,000 are not "political committees" within the definition in § 431(d) [(now § 30101(4)(A))] . . . .

424 U.S. at 79 n.107.

The Supreme Court interpreted "expenditure" for purposes of the disclosure provision for non-political committees to only reach independent expenditures. *Id.* at 80. Given that rationale, "expenditure" for purposes of the statutory definition of "political committee" reasonably could be interpreted in the same way, *i.e.*, to apply only to independent expenditures. Here, New

Models undisputedly made no independent expenditures itself. (AR 109 ("There is no claim that New Models made any independent expenditures of its own expressly advocating the election or defeat of a clearly identified candidate.").)

Second, the Commissioners also reasoned that treating a "contribution" to a super PAC as an "expenditure" for purposes of the statutory threshold would "ignor[e] how the Act differentiates between 'contributions' and 'expenditures' throughout its provisions." (AR 110.) In *Buckley*, for example, the Court held that "the Act operates to treat all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate as contributions" for purposes of FECA's contribution and expenditure limits. 424 U.S. at 46 n.53. Such coordinated expenditures "are to be treated as expenditures of the candidate and contributions by the person or group making the expenditure." *Id.* As the Commissioners here noted, the Court interpreted "contribution" for disclosure purposes in the same way. (AR 109 (citing *Buckley*, 424 U.S. at 78).)

Indeed, plaintiffs admit that "certain expenditures are explicitly treated as contributions if they are coordinated with a candidate." (Pls. Mem. at 32 (citing 52 U.S.C. § 30116(a)(7)(C)(ii) and 11 C.F.R. § 109.20).) What they seem to miss, however, is the significance of their statement — 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. Instead, the payment is treated as an expenditure by the candidate. *E.g.*, 52 U.S.C. § 30116(a)(7)(C)(ii); 11 C.F.R. § 109.20(b).

Plaintiffs' contention that Advisory Opinion 1996-18 (In'tl Ass'n of Fire Firefighters) (July 14, 1996) can only be read to support their position is similarly misplaced. (Pls. Mem. at 30.) That matter involved a separate segregated fund of a union, which is a "political

committee." 52 U.S.C. § 30101(4)(B). The Commission considered whether a contribution to the union's separate segregated fund from an account established by its state affiliate under state law as a conduit for supporting candidates "would be a contribution from the individual only" or "from the conduit account acting as a political committee." Adv. Op. 1996-18 at 2, 3. The Commission found significant that the "[union] and [its separate segregated fund] do not control the funds received and do not determine when or to whom such funds are disbursed." *Id.* at 2.[12] The conduit was determined not to be "accepting or making contributions for the purposes of the Act" and thus not a "political committee," but that was in part because the conduit was "simply an accounting process by which funds donated by individual [union] members are set aside, awaiting their future direction for disbursement as contributions." *Id.* at 2-3. The Commission provided no detailed analysis in that advisory opinion regarding the specific issue here, whether contributions should be considered as expenditures for purposes of the statutory threshold. The opinion does not constitute an example of the Commission actually deeming an entity to be a political committee on the basis of expenditures it has made. Indeed, like here, it provides an example of an entity reasonably not deemed to be a political committee after a holistic evaluation of the circumstances presented even where a statutory definition arguably applies.

In any event, to the extent prior Commission precedent is inconsistent with the controlling Commissioners' approach, the Commission remains free to revisit its policies.

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[12] If they had exercised control, then the contribution would be considered a contribution by both the individual union member and the conduit, which would be acting as an affiliated committee rather than a collecting agent. Adv. Op. 1996-18 at 3-4; 11 C.F.R. §§ 102.6, 110.6(d)(2); *Amendments to FECA of 1971*, 45 Fed. Reg. 15080, 15084 (Mar. 7, 1980); Adv. Op. 1984-31 (First Bank & Trust Co.) (Aug. 22, 1984); Adv. Op. 1983-3 (Philadelphia Elec. Co.) (Feb. 24, 1983). "Although the Act and Commission regulations specifically address contributions earmarked only to the authorized committees of candidates [and candidates], the Commission has concluded that contributions may also be earmarked to nonconnected committees." Adv. Op. 2014-13 (ActBlue) (Sept. 12, 2014).

FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009). The Commissioners acknowledged "contrary precedents," but nonetheless found that intervening case law and preserving the distinction between contributions and expenditures recognized in previous authorities and the Act warranted the approach taken here. (AR 110 nn. 92 & 93.) Indeed, as plaintiffs recognize, New Models' contributions were only possible in the wake of *Citizens United v. FEC*, 558 U.S. 310 (2010), which "ushered in a sea change in campaign finance law." (Pls. Mem. at 8.) "Constitutional 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.

Prior to *Citizens United*, the Supreme Court had left open the possibility that independent expenditures could give rise to corruption or the appearance of corruption. *SpeechNow.org v. FEC*, 599 F.3d 686, 693-94 (D.C. Cir. 2010). *Citizens United* held, however, that "independent expenditures . . . do not give rise to corruption or the appearance of corruption." 558 U.S. at 357. Plaintiffs' arguments about possible corruption from New Models' contributions to independent-expenditure-only groups (Pls. Mem. at 35) thus fail. *SpeechNow.org*, 599 F.3d at 696 ("[B]ecause *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations.").

And while true that *Citizens United* recognized the public's interest in "knowing who is speaking about a candidate" (Pls. Mem. at 35 (quoting *Citizens United*, 558 U.S. at 369)), as the controlling Commissioners point out, New Models did not itself speak about any candidates. (AR 92.) Rather, New Models contributed to super PACs that, in turn, expressly advocated the election or defeat of a federal candidate — which contributions were publicly disclosed.

(AR 96-97.) While it is permissible to require disclosure of such contributions to super PACs, *SpeechNow.org*, 599 F.3d at 696-97, the controlling group reasonably determined that there was a reduced risk of corruption because New Models merely made contributions that were "general expressions of support" for the super PACs, and not necessarily a "clearly identified federal candidate." (AR 110 n.92.) If New Models did "receive contributions" in excess of $1,000, then it would satisfy the threshold for political committee status and its contributors would need to be disclosed. But Plaintiffs did not allege below any contributions that were made to New Models, nor did they challenge the controlling group's determination that New Models did not receive contributions. (AR 108-09.)

In addition, contrary to plaintiffs' argument (Pls. Mem. at 34), the controlling Commissioners did not purport to limit "expenditures" to "independent expenditures" for all purposes under FECA, only the provision at issue. Plaintiffs' argument that the Commissioners' interpretation renders certain statutory provision superfluous thus is a red herring. Moreover, FECA's current provisions regarding "independent expenditures" were enacted after *Buckley* to narrow the information required to be disclosed by groups that were not political committees, and are thus less relevant to the present inquiry of how to interpret the statutory threshold for political committee status than the applicable discussion in *Buckley* itself. *See* FECA Amendments of 1976, Pub. L. 94-283, § 104(e), 90 Stat. 475, 481 (1976). Further, while deemed a "disbursement" that political committees must disclose and total, "contributions made to other political committees" are not characterized in one part of the Act as "expenditures." 52 U.S.C. § 30104(b)(4)(H)(i), (b)(6)(B)(i).

Accordingly, the controlling Commissioners' determination that New Models' contributions did not also constitute expenditures for purposes of determining political

committee status, and thus that New Models did not satisfy the statutory threshold required to be deemed a "political committee," was reasonable and not contrary to law.

2. The Controlling Commissioners' Fact-Based Application of Its Major Purpose Test Was Reasonable and Not Contrary to Law

The controlling Commissioners' application of its multi-factor, case-by-case major purpose test — one that has been uniformly upheld by numerous courts — was reasonable given the particular facts in the New Models matter. Therefore, regardless of whether New Models satisfied FECA's statutory threshold, the dismissal of the matter must be affirmed.

Plaintiffs' arguments to the contrary rest heavily upon a mischaracterization of both a recent decision by a court in this District and the Commissioners' rationale. (*See* Pls. Mem. at 36-40.) Further, by advocating for a bright-line spending rule (Pls. Mem. at 40-45), plaintiffs wrongfully disregard the numerous cases upholding the Commission's case-by-case approach, as well as the well-recognized discretion the Commission has in this area.

First, the controlling Commissioners' rationale has not "already been declared contrary to law" because the Commissioners considered New Models' spending beyond solely 2012. (Pls. Mem. at 36 (citing *CREW II*).) To the contrary, the *CREW II* court expressly held that "the FEC's choice of relevant timespan for assessing an organization's spending activity" falls squarely within the Commission's discretion, and that "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 87, 94 (emphasis added).

That court merely took issue with "[t]he Commissioners' refusal to give *any weight whatsoever* to an organizations' relative spending in the most recent calendar year." *Id.* at 94 (emphasis added). The court expressed concern that, under a lifetime-only approach, a very old organization "could commence spending handsomely on election-related ads and continue such

expenditures for decades before its new 'major purpose' would be detected by the controlling Commissioners' lifetime-only approach." *Id.* The court thus held that "[l]ooking *only* at relative spending over an organization's lifetime" improperly failed to consider the possibility of the organization's major purpose changing, and was "inconsistent with the FEC's stated fact-intensive approach to the 'major purpose' inquiry." *Id.* And it concluded that employing a "rigid, one-size-fits-all" lifetime-only approach was an abuse of discretion "at least as to AJS," which "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." *Id.*

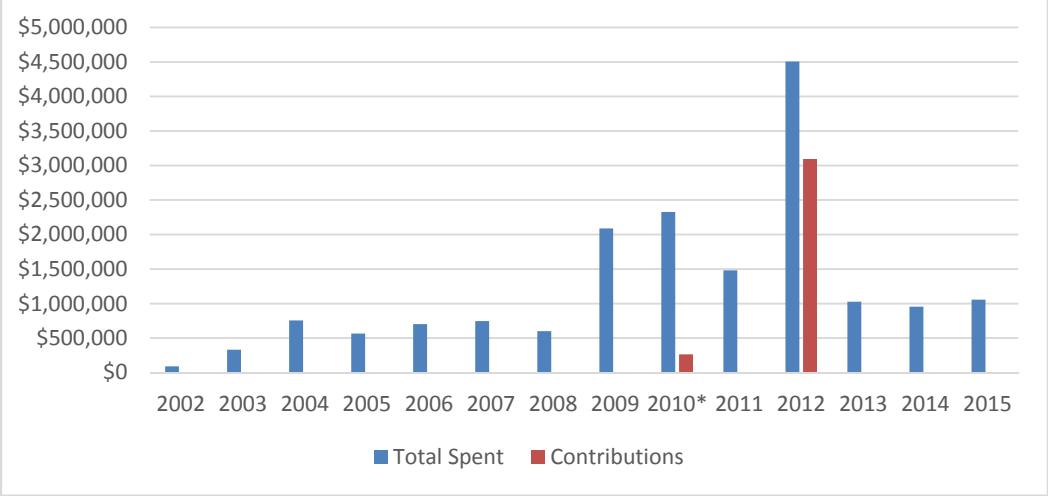
Second, contrary to plaintiffs' arguments based on *CREW II*, in the instant matter, the controlling Commissioners simply did not apply a rigid lifetime-only approach to determining New Models' major purpose, nor did they fail to consider whether the organization's major purpose had changed. Rather, and in accordance with the Commission's judicially approved case-by-case approach, these Commissioners carefully and thoroughly considered New Models' organizational documents and tax status (AR 111-12), public statements (AR 112-14), as well as its spending in both 2012 and in other years (AR 114-21). *See* Supplemental E&J, 72 Fed. Reg. at 5601. And their conclusion ultimately rested upon *all* these factors. (AR 121 ("New Models's organizational purpose, tax exempt status, public statements, *and* overall spending evidence an issue discussion organization, not a political committee having the major purpose of nominating or electing candidates." (emphasis added)); AR 108 ("Upon thorough considerations of various facts indicative of political committee status: organizational documents, public statements of purpose, tax status, *and* independent spending, we do not have reason to believe . . . that New Models had the major purpose of nominating or electing federal candidates." (emphasis added)).)

Plaintiffs do not contest that the Commissioners reasonably found that New Models' organizational documents, tax status, and public statements weighed against finding New Models had the requisite major purpose. (*E.g.*, AR 113-14 ("The 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.").) Nor could they, as those findings were well-grounded in the record. (AR 93-97; AR 111-14.)

While the controlling Commissioners discussed New Models' relative lifetime spending as *a* consideration, they nowhere indicated that it was their *only*, or even the dispositive, consideration in determining New Models' major purpose. For example, the Commissioners "place[d] much weight" on their finding that none of New Models' public statements indicated it was a "political committee." (AR 114; *see also* AR 113 (stating that an organization's public statements "must be given significant weight").) Even isolating their spending analysis, the controlling Commissioners did not focus exclusively on New Models' lifetime spending. They examined the nature of New Models' spending, finding significant that the organization "never made any independent expenditures nor has it ever funded any electioneering communications." (AR 97; *see also* AR 92; AR 113; AR 117.) Instead, "New Models's federal electoral activity was limited to making isolated contributions to three Super PACs." (AR 117.) The controlling group also considered New Models' non-election-related spending in 2012: "Even in 2012, New Models spent $1.5 million on its traditional policy mission." (*Id.*) And they examined New Models' post-*Citizens United* spending, finding that, "[f]rom 2010 through 2015, the amount allocated to [super PACs] totaled just 29.6% of New Models' overall spending," and that, from 2013 through 2015, it made "*zero* contributions to federal political committees." (*Id.*)

Nor did the controlling Commissioners "refus[e] to give any weight whatsoever" to New

Models' 2012 spending. *Compare CREW II*, 209 F. Supp. 3d at 94, *with* AR 111 & AR 114-21. They merely found that, when viewed "in the context of the organization's history[] before and after" 2012, New Models' 2012 spending alone did not demonstrate that it had the requisite major purpose. (AR 121; *see also* AR 111 ("[W]e compare New Models's isolated contributions [in 2012] with other activities both in 2012 and during its lifetime.").) Unlike in *CREW II*, the controlling group expressly considered whether New Models' extensive 2012 election-related spending indicated that the group's major purpose had changed. *Compare CREW II*, 209 F. Supp. 3d at 94, *with* AR 115 n.114 & AR 117 n.123. Rather than signaling a fundamental shift in the group's major purpose, however, they concluded that 2012 was an outlier. (AR 117 n.123 ("[T]he 2012 contributions deviate from New Models' usual spending practices both before and after 2012."); *see also* AR 115 n.114.) This conclusion is well-supported by the record, as the following graphical representation of New Models' relative spending illustrates[13]:



(AR 97; *see also* AR 115 n.114 (citing chart).) Their conclusion was also supported by New Models' "affirm[ation] under penalty of perjury" that its primary mission continued to be social

[13] The record is unclear whether New Models' 2010 donation was a "contribution." *See* p. 9 n.2, *supra*.

welfare in 2012 and thereafter. (AR 117 n.123; *see also* AR 95 ("The evidence indicates that New Models pursued [its issue-based] mission consistently throughout its lifetime, including before and after 2012.").) And their conclusion is yet further supported through an analysis of New Models' public statements. (AR 95; AR 113-14.) The controlling group reasonably expected that, if New Models was changing its primary focus from issue-based advocacy and research to nominating or electing federal candidates, there would be at least some statement indicating that this was the case. Yet plaintiffs did not identify a single statement so indicating; neither New Models' website nor its research reports available thereon so indicate; its fundraising materials reportedly did not so indicate; and New Models' President swore that it had never "publicly advocated the election or defeat of a federal candidate" or "stated that its purpose was the election or defeat of a federal candidate." (AR 113-14.) Accordingly, the controlling Commissioners' conclusion that New Models' major purpose did not change in 2012 was not an abuse of discretion.

Finally, nothing in *CREW II* indicates that it was improper for the controlling group to consider New Models' spending before 2010 or after 2012. (*See* Pls. Mem. at 38-40.) Plaintiffs first argue that considering New Models' pre-2010 spending when trying to determine its major purpose is improper because, prior to 2010, it was illegal for the organization to contribute to "political groups." (Pls. Mem. at 39.) But, in *CREW II*, the court considered an organization's pre-2010 spending as relevant to its major-purpose analysis. 209 F. Supp. 3d at 94 (finding significant 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"). While New Models may not have been able to contribute to super PACs prior to 2010, there were other activities available to it that have been considered to

indicate that an organization was pursuing "the nomination or election of a candidate," but plaintiffs present little if any of such evidence. *Buckley*, 424 U.S. at 79.

Plaintiffs' arguments as to why it was improper for the controlling group to consider New Models' post-2012 spending likewise fail. (Pls. Mem. at 39-40.) The *CREW II* court did not address whether the Commission could consider an organization's later spending. (Pls. Mem. at 40; *see also generally CREW II*, 209 F. Supp. 3d at 82-84.) Here, New Models' response to plaintiffs' administrative complaint included certain information regarding the years following 2012, which the controlling group subsequently confirmed using New Models' tax forms. (AR 57-58; AR 95-96.) That an organization's later spending was deemed relevant in one matter and not in another underscores, not undercuts, the need for a flexible, case-by-case approach rather than a "rigid, one-size-fits-all rule." Indeed, the *CREW II* decision was motivated by the court's concern that an organization "could commence spending handsomely on election-related ads and continue such expenditures for decades before its new 'major purpose' would be detected." 209 F. Supp. 3d at 94. By considering New Models' spending in the years after the year it spent "handsomely" on groups who ran election-related ads, *i.e.*, 2012, the controlling Commissioners were able to address that concern. In contrast to the hypothetical in *CREW II*, New Models made "*zero* contributions to federal political committees" in the several years following 2012. (AR 117.)

Considering New Models' post-2012 activity is also consistent with *GOPAC, Inc.*, 917 F. Supp. 851, in which the court considered an organization's activity after the date the administrative complaint was filed when determining its major purpose. In that case, the administrative complaint was filed in September 1990, alleging that an organization was a political committee in 1989 and 1990 because it had the major purpose of electing federal

candidates. *Id.* at 852. Rather than disregarding the group's post-1990 activity, the court made several findings of "material facts" regarding that activity, which in that case involved the group's decision to ultimately register as a political committee. *Id.* at 853-54, 857-58.

Nor is there any evidence to support plaintiffs' assertion that New Models changed its behavior in the years following 2012 due to the plaintiffs' filing of their administrative complaint on September 18, 2014. (Pls. Mem. at 39, 40; AR 1.) New Models received notice of the administrative complaint less than a month before the 2014 election, yet had not spent any money on campaign-related activity up until that point. (AR 48; AR 96.) Further, in New Models' President and Chief Operating Officer's declaration dated November 5, 2014, he averred: "New Models did not and does not intend to make any contributions nor expenditures for or to any federal candidate or political committee in the 2013/2014 election cycle." (AR 57.)

Plaintiffs' remaining points merely recycle the argument that the Commission can only consider New Models' 2012 spending (Pls. Mem. at 39-45) — an argument that the *CREW II* court flatly rejected. 209 F. Supp. 3d at 94 (holding that considering "a particular organization's full spending history as relevant" was not "*per se* unreasonable"). Plaintiffs nonetheless contend that a rigid, one-size-fits-all calendar-year approach is preferable to the approach the controlling group used here, which considered New Models' spending in 2012 as a factor, but not the only factor in determining the group's major purpose. Whatever the merits of their argument, plaintiffs cannot demonstrate that the controlling Commissioners' more flexible approach was contrary to law. Plaintiffs do not identify any authority mandating a bright-line rule like the calendar-year test they advocate. While it is true that FECA's political committee definition refers to a "calendar year" for purposes of the statutory threshold, the major-purpose test is an "'additional hurdle to establishing political committee status'" that the Supreme Court

established in *Buckley*. *Free Speech*, 720 F.3d at 797 (quoting Supplemental E&J, 72 Fed. Reg. at 5601). And *Buckley* did not specify a timeframe for determining an organization's major purpose. 424 U.S. at 79.

Given this room for refinement, "the FEC's choices regarding the timeframe and spending amounts relevant in applying the 'major purpose' test are implementation choices within the agency's sphere of competence, and therefore warrant the Court's deference." *CREW II*, 209 F. Supp. 3d at 88. The controlling group's decision to eschew a bright-line calendar-year-only approach is consistent with the fact-intensive, case-by-case approach adopted by the Commission for determining an organization's major purpose, which has been upheld by multiple courts. Supplemental E&J, 72 Fed. Reg. at 5601 ("Applying the major purpose doctrine . . . requires the flexibility of a case-by-case analysis of an organization's conduct that is incompatible with a one-size-fits-all rule."); *Free Speech*, 720 F.3d at 798; *RTAA*, 681 F.3d at 558; *Shays v. FEC*, 511 F. Supp. 2d 19, 31 (D.D.C. 2007). Plaintiffs rely heavily on cases where the court or the Commission purportedly examined "a group's activities in a single year to determine its major purpose."[14] (Pls. Mem. at 41-42.) But determining that it is possible or appropriate in a particular case to determine an organization's major purpose based solely on its spending in a single calendar year "do[es] not foreclose the Commission from using a more

[14] Contrary to plaintiffs' representation, the court in *Malenick*, 310 F. Supp. 2d 230, did not find the organization's "activities in a single calendar year established its major purpose," (Pls. Mem. at 41). When determining whether the organization satisfied the statutory threshold for 1995 and 1996, the court limited its analysis to a single calendar year, as FECA requires, concluding that the organization had crossed the threshold in 1996, but not in 1995. *Malenick*, 310 F. Supp. 2d at 236 & n.8. The court, however, did not limit its inquiry to only the organization's activities in 1996 when determining whether the organization satisfied *Buckley*'s major purpose test. *Id.* at 235 & n.6 (citing materials from 1995 and 1996 indicating the organization's goals, a 1995 letter, and a stipulated fact regarding checks received and forwarded in 1995 and 1996).

comprehensive methodology." *RTAA*, 681 F.3d at 557. It is eminently reasonable and consistent with the Commission's overall case-by-case approach to examine an organization's relevant electoral spending in the context of its greater operations, including in other years, if that information is available.

Plaintiffs' arguments that the controlling Commissioners' approach "does not go far enough" to vindicate voters' interest in disclosure "provides no basis for this Court to expand it."[15] *Akins v. FEC*, 736 F. Supp. 2d 9, 19 (D.D.C. 2010). Whether the FEC's decision was contrary to law is the only question before the Court and the answer to *that* question is what determines whether plaintiffs or the public were potentially deprived of information to which they were entitled, not the other way around. *See Van Hollen*, 811 F.3d at 494 ("Just because *one* of [the statute]'s purposes (even *chief* purposes) was broader disclosure does not mean that anything less than maximal disclosure is subversive."). Plaintiffs' backwards, results-oriented approach places the cart before the horse, and must be rejected.

As the controlling group discussed, "[p]olitical committee status and its attendant disclosure requirements impose significant burdens on the exercise of constitutionally protected political activities." AR 98-99; *see also Citizens United*, 558 U.S. at 337; *CLC*, 312 F. Supp. 3d at 165 n.7. Plaintiffs dismiss these burdens, contending that an organization like New Models, which is dedicated to issue-advocacy but which spends significantly on campaign-related expenditures in only a single calendar year, can simply terminate its political committee status the following year. (Pls. Mem. at 39, 43.) As the Commissioners noted, however, only committees which will no longer make any disbursements that would otherwise qualify it as a political committee may by itself terminate, AR 121 (citing 11 C.F.R. § 102.3(a)); *see also*

[15] New Models' contributions were publicly disclosed. (AR 96.)

52 U.S.C. § 30103(d)(1), and the criteria for Commission approval of other committee terminations are also limited, 11 C.F.R. § 102.4. The Commission has a "unique prerogative to safeguard the First Amendment when implementing its congressional directives." *Van Hollen*, 811 F.3d at 501. Balancing all the various interests, the controlling group thus reasonably concluded that it was not appropriate to apply a calendar-year only approach when determining New Models' major purpose. *See id.* at 499 ("By tailoring the disclosure requirements to satisfy constitutional interests in privacy, the FEC fulfilled its unique mandate."); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 394 (D.C. Cir. 1981) (holding that, because evaluating political-committee status arises in the "delicate" First Amendment area, "there is no imperative" to stretch the statute).

In sum, the controlling Commissioners' analysis of New Models' major purpose was not arbitrary or capricious. Plaintiffs have not met 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." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). In accordance with the FEC's fact-intensive, case-by-case approach for determining a group's major purpose, the Commissioners carefully scrutinized New Models' organizational documents, public statements, and spending history and drew reasonable conclusions that were well-grounded in the record, thus showing the requisite "rational basis for the agency's decision." *Orloski*, 795 F.2d at 167.

CONCLUSION

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

Respectfully submitted,

/s/ Haven G. Ward
Haven G. Ward (D.C. Bar No. 976090)
Attorney
hward@fec.gov

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
1050 First Street NE
Washington, D.C. 20463
(202) 694-1650

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Lisa J. Stevenson (D.C. Bar No. 457628)
Acting General Counsel
lstevenson@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

Charles Kitcher (D.C. Bar No. 986226)
Acting Assistant General Counsel
ckitcher@fec.gov