**UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF COLUMBIA**

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CITIZENS FOR RESPONSIBILITY AND )
ETHICS IN WASHINGTON, *et al.*, )

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 Plaintiffs, ) Civil Action No. 14-1419 (CRC)

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 v. )

 )

FEDERAL ELECTION COMMISSION, )

 )

 Defendant, )

)

AMERICAN ACTION NETWORK, )

)

Intervenor-Defendant. )

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**PLAINTIFFS’ MOTION FOR AN ORDER TO
DEFENDANT FEDERAL ELECTION COMMISSION TO SHOW CAUSE**

Plaintiffs Citizens for Responsibility and Ethics in Washington (“CREW”) and Melanie Sloan (collectively, “Plaintiffs”) hereby respectfully move this Court to issue an order to Defendant the Federal Election Commission (“FEC” or the “Commission”) to show cause why it should not be held to have violated this Court’s September 19, 2016 Order requiring the FEC to conform with the Court’s declaration within thirty days. *See* Mem. Op. at 27, ECF No. 52; Order, ECF No. 53 (collectively, the “September 19 Order”). The Court’s thirty-day period expired on October 19, 2016. Nevertheless, the FEC on remand failed to act in conformity with the September 19 Order on Plaintiffs’ allegations that respondent Americans for Job Security (“AJS”) and intervenor-defendant American Action Network (“AAN”) violated the Federal Election Campaign Act (“FECA” or “Act”) by failing to register and report as political committees. Plaintiffs further request this Court order the FEC to show cause why the FEC’s failure to conform with the Court’s order does not give rise to Plaintiffs’ cause of action against AAN and AJS, pursuant to 52 U.S.C. § 30109(a)(8)(C).[[1]](#footnote-1)

In accordance with the Court’s Local Civil Rule 7(m), counsel for Plaintiffs conferred with Defendants on the relief requested by this motion. Defendants plan to oppose this motion.

# BACKGROUND

On September 19, 2016, the Court granted Plaintiffs’ motion for summary judgment and found that the FEC acted contrary to law by dismissing Plaintiffs’ administrative complaints against AJS and AAN. In particular, the Court “had little trouble concluding” that three FEC commissioners’ (the “controlling commissioners”) determination that none of AAN’s or AJS’s electioneering communications counted toward demonstrating a purpose to nominate or elect federal candidates was “legal error.” Mem. Op. at 22–23. The Court noted that, at a minimum, “*many* or even *most* electioneering communications indicate a campaign-related purpose,” and found that the controlling commissioners’ conclusion “that many of the ads” at issue in this case “were not designed to influence the election or defeat” of a candidate in an ongoing federal race “blinks reality.” *Id.* at 22. The Court further found arbitrary and capricious the controlling commissioners’ “refusal to give any weight whatsoever to an organization’s relative spending in the most recent calendar year,” as compared to its spending over its entire lifetime, in determining its current major purpose. *Id.* at 25. Accordingly, the Court rejected as contrary to law the reasoning of the controlling commissioners which refused to consider AAN’s and AJS’s electioneering communications and gave equal weight to the groups’ historical activities, and it reversed the dismissal of Plaintiffs’ complaints caused by the resulting deadlock at the FEC. *Id.* at 27. The Court provided the FEC thirty days in which to act on remand in conformity with its judgment. *Id.*

The Court’s deadline for corrective action expired on October 19, 2016. Nevertheless, with regard to AJS, the FEC either failed to take any substantive action on Plaintiffs’ complaint or failed to disclose the action it took. With regard to AAN, the FEC once again dismissed Plaintiffs’ administrative complaint after deadlocking on the substance of the allegations. *See* Letter from Kathleen Guith, Acting Assoc. Gen. Counsel for Enf’t, FEC, to Noah Bookbinder, Exec. Dir., CREW, and Melanie Sloan (Oct, 19, 2016), attached as Exhibit 1. The controlling commissioners provided a new statement of reasons explaining their continued refusal to find AAN had the major purpose to nominate or elect federal candidates in 2010.

Despite this Court’s admonition that “*many* or even *most*” electioneering communications indicate an electoral purpose and that it “blinks reality” to conclude that “many of the ads” at issue were not designed to influence elections, the controlling commissioners found only four of AAN’s twenty versions of electioneering communications ads “may reasonably support an inference that their cost may count toward a determination that AAN’s major purpose was the nomination or election of federal candidates.” *See* Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman 12, 15–17, MUR 6589R (Oct. 19, 2016), attached as Exhibit 2 (discussing AAN’s “Bucket,” “New Hampshire,” “Order,” and “Extreme” ads). Incredibly, the controlling commissioners rejected the conclusion that AAN’s “Read This” ad—the ad this Court quoted in full in its Order, *see* Mem. Op. at 1—reflected an electoral purpose, Ex. 2 at 14. Similarly, the controlling commissioners found fifteen other electioneering communications ads were not designed to influence elections. Accordingly, the controlling commissioners found only $1,875,394 of the $13,792,875 AAN spent on electioneering communications—just 13.6%—was election related. *Id.* at 17. Consequently, the controlling commissioners concluded that AAN’s total campaign-related spending in 2010 amounted to only $5,972,304, or about 22% of its overall spending, which the controlling commissioners concluded was insufficient to find AAN’s major purpose was to influence elections. *Id.*[[2]](#footnote-2)

# ARGUMENT

Despite this Court’s clear admonition to the FEC to reconsider Plaintiffs’ complaints against AJS and AAN and to act on those complaints in conformity with the Court’s judgment within thirty days, the FEC failed to do so. With regard to AJS, the FEC completely failed to act, and with regard to AAN, the Commission failed to act in conformity with the September 19 Order and once again dismissed Plaintiffs’ complaint in a manner contrary to law.

## The FEC Failed to Take Any Action on AJS

The Court’s September 19 Order reversed the FEC’s dismissal of Plaintiffs’ complaint against AJS and provided the FEC thirty days to correct its error. Mem. Op. at 27. That thirty-day period expired on October 19, 2016. On October 12, 2016, the FEC notified Plaintiffs that they the Commission was “unable to reach agreement by the required four affirmative votes to appeal the matter.” Letter from Kathleen Guith, Acting Assoc. Gen. Counsel for Enf’t, FEC, to Noah Bookbinder, Exec. Dir., CREW, and Melanie Sloan (Oct. 12, 2016), attached as Exhibit 3. Beyond this, the FEC has neither informed Plaintiffs of any further action, filed any notice of action with the Court, nor made available any additional information on its website about the investigation. *See* FEC, Case Search Results, MUR 6538, *at* http://eqs.fec.gov/eqs/searcheqs;
jsessionid=BACB2F12EA376D1977C0942E1C3FD075?SUBMIT=documents (last visited Nov. 7, 2016). Accordingly, the FEC apparently has failed to take *any* action on the AJS matter on remand, despite this Court’s clear order that it do so within thirty days. The FEC’s abject failure to act is not in conformity with the Court’s September 19 Order.

## The Controlling Commissioners’ Analysis of AAN’s Spending on Remand Contravenes this Court’s Order

With regard to AAN, the controlling commissioners on remand recognized that this Court rejected their “erroneous understanding that the First Amendment effectively required the agency to exclude from its consideration all non-express advocacy in the context of disclosure.” Ex. 2 at 4. Nonetheless, they treated the Court’s judgment as at most an order that they begrudgingly consider a handful of ads to be political, while maintaining the status quo on their entirely unreasonable decision to treat the vast majority of AAN’s electioneering communications as non-electoral.

For example, among the ads the controlling commissioners found *not* to have an electoral purpose was AAN’s “Skype” ad, which, like AAN’s “Read This” ad that the Court highlighted, accused sitting members of Congress of voting to support “Viagra for rapists.” Ex. 2 at 14.[[3]](#footnote-3) Similarly excluded was AAN’s ad revealingly titled “*Quit* Critz,” with then-sitting Rep. Mark Critz (D-PA) the subject of the ad. Ex. 2at 8, 10 (emphasis added). Also treated as non-political was AAN’s “Secret” ad, which accused Reps. Mark Schauer (D-MI) and Ed Perlmutter (D-CO) of voting to “spen[d] [the public’s] money on health insurance for illegal immigrants” and urged voters, “[i]n November, tell Congressman [Mark Schauer/Ed Perlmutter] to vote for repeal” of Obamacare. Ex. 2 at 13–14.[[4]](#footnote-4) Indeed, the controlling commissioners excluded *all* of AAN’s ads that pressed voters to take action “in November,” finding the fact that the election was occurring in November to be no more than mere coincidence. *See, e.g.*, Ex. 2 at 9–10 (discussing “Ridiculous” ad that urged voters to “Call Charlie Wilson. Tell him in November. Keep the Tax Cuts. Ditch the Stimulus.” and “Wallpaper” ad that encouraged voters to “Call Congressman [Schrader/Kagen/Donnelly/Perlmutter/Heinrich] this November. Vote to cut taxes.”).

In the end, in direct contravention of this Court’s order, the controlling commissioners once again reached conclusions that “blink[] reality” by finding that nearly all of AAN’s electioneering communications do not indicate a campaign-related purpose. The test they created to determine the electoral purposes of an ad is inconsistent with the Court’s judgment and continues to rest on impermissible interpretations of law. Further, their application of that test is arbitrary and capricious, again in contravention of this Court’s order.

### The Controlling Commissioners’ Legal Standard Is Contrary to Law and Inconsistent with the Court’s Order

The controlling commissioners concluded that the vast majority of AAN’s ads were non-electoral by once again misconstruing the Supreme Court’s case law on the major purpose test and the campaign-related nature of electioneering communications. In relevant part, the controlling commissioners adopted a test that finds that an electioneering communication is not designed to influence elections if it (1) “focuses on issues important to the group” rather than on personal attacks and (2) includes a call to action that “relates to the speaker’s issue agenda” rather than the “election or defeat of federal candidates.” Ex. 2 at 6; *see also id.* at 9 (finding ads that “focus[] on government spending and tax cuts and call[] on viewers to contact the named officeholders to urge them to take specific legislative actions” are not election-related). That conclusion is contrary to law and, to the extent it resulted in the controlling commissioners finding many or even most of AAN’s electioneering communications are not electoral, is inconsistent with the Court’s judgment.

The controlling commissioners crafted their erroneous test by relying on a misleadingly truncated discussion of one of the campaign ads mentioned in *McConnell v. FEC*, 540 U.S. 93 (2003), and by completely ignoring the other ads the Court discussed and found to be election-related. *See* Ex. 2 at 6 n.23.[[5]](#footnote-5) In *McConnell*, the Supreme Court discussed a number of ads clearly designed to influence elections but that had escaped disclosure requirements under then-existing rules that only covered express advocacy. One ad the Court concluded had an electoral purpose, the “Yellowtail” ad, accused a House candidate of hitting his wife and skipping child support. *McConnell*, 540 U.S. at 193 n.78 (finding that “the notion that this advertisement was designed purely to discuss the issue of family values strains credulity”); Ex. 2 at 6 n.23. According to the controlling commissioners, this ad is a “paradigmatic example” of “a critique of the candidate’s personal behavior” that “may indicate a purpose of nominating or electing a candidate”—attributes the controlling commissioners contrast with “a sharp critique of a candidate’s position on legislation or public policy” that is “consistent with an attempt to influence the candidate’s position on the legislation or policy.” Ex. 2 at 6 n.23.

In an attempt to manufacture a distinction between that ad and AAN’s ads, however, the controlling commissioners’ selectively curtailed the ad to its personal attacks, ignoring the fact that the “Yellowtail” ad not only personally attacked the candidate, but also raised the fact that he “voted against child support enforcement” and asked viewers to “[c]all Bill Yellowtail” and to “[t]ell him to support family values.” *McConnell*, 540 U.S. at 193 n.78. Only by ignoring these portions of the ad could the controlling commissioners conclude that the inclusion of a legislative issue relating to the speaker’s agenda and a call on viewers to lobby the candidate means the advertisement’s purpose is non-political. The Supreme Court, however, recognized an ad may be election-related even if it includes those references.

Similarly ignored by the controlling commissioners was *McConnell*’s discussion of other ads that contained no ad hominem attacks but rather “focused on the speakers’ issues” and included a “call to action” that did not explicitly include voting for or against the candidate. For example, the Court characterized as quintessentially campaign-related an ad that, while lacking express advocacy, “condemned [candidate] Jane Doe’s record on a particular issue before exhorting viewers to ‘call Jane Doe and tell her what you think.’” 540 U.S. at 127.

The Court also pointed to real-life examples of ads run by Republicans for Clean Air and Citizen for Better Medicare. *Id.* at 128. The Republicans for Clean Air ad contrasted then-candidates for the Republican presidential nomination Senator John McCain and Governor George Bush on their positions on solar and other renewable energy versus coal-burning power plants. MUR 4982, Statement of Reasons of Commissioners Scott E. Thomas and Danny Lee McDonald, at 2 (Apr. 24, 2002), *available at* <http://eqs.fec.gov/eqsdocsMUR/00000127.pdf> (cited by *McConnell v. FEC*, 251 F. Supp. 2d 176, 232 (D.D.C. 2003) (cited by *McConnell*, 540 U.S. at 128 n.23)). The ad contained no express advocacy, *id.* at 4, and reflected the speaker’s purported agenda to “advocat[e ]national environmental matters, including pending and proposed federal legislation on clean air issues.” MUR 4982, First General Counsel’s Report, at 15 (Dec. 20, 2001), *available at* <http://eqs.fec.gov/eqsdocsMUR/00000124.pdf>. Under the controlling commissioners’ proposed test, therefore, the ad would be an “issue” ad and would have had no election-related purpose. The Supreme Court, however, recognized this “so-called issue ad[]” was sufficiently election-related to justify regulation under the FECA. *McConnell*, 540 U.S. at 128, 196.

Similarly, the Court found ads by Citizens for Better Medicare were electoral despite the fact that they would be classified as non-political under the controlling commissioners’ proposed test. Citizens for Better Medicare’s stated mission was to “represent[] the interests of patients, seniors, disabled Americans, small businesses, pharmaceutical research companies and many others concerned with Medicare reform,” though in truth it was financed by the pharmaceutical industry. *McConnell*, 251 F. Supp. 2d at 546, 561. Between September 2000 and the election, the group ran “advertising focused on specific federal candidates,” “supporting [Republican] members and attacking Democratic candidates.” *Id.* at 546, 561. The ads “urg[ed] people to call [the named representatives] and support” proposed policies related to a prescription drug benefit bill. Dep. of Alex Castellanos 65:1–3, *McConnell v. FEC*, No. 02-cv-0582 (D.D.C. Sept. 27, 2002), *available at* <http://www.campaignlegalcenter.org/sites/default/files/833.pdf> (“Castellanos Dep.”) (noting ads “vari[ed] in the different areas” in which they ran) (cited by *McConnell*, 251 F. Supp. 2d at 546). For example, one ad referred to Rep. Ernie Fletcher (R-KY), stated Rep. Fletcher “voted to strengthen and improve healthcare for seniors,” then went on to ask viewers to “[c]all Congressman Fletcher and see what you can do to support his prescription drug plan for seniors.” *See* The Campaign Finance Institute, Issue Ad Disclosure, Recommendations for a New Approach app. A9 (Feb. 2001), *available at* [http://www.cfinst.org/disclosure/pdf/
issueads\_rpt.pdf](http://www.cfinst.org/disclosure/pdf/issueads_rpt.pdf); *see also* Castellanos Dep. at 65:19–22 (referencing “Ardell Miracles” ad). Even though the ads referenced an “issue” consistent with the speaker’s purported agenda and included a call to action to call the representative and express support—facts that would cause the controlling commissioners to deem these ads non-political “issue” ads—the Court understood the ads were election-related. *McConnell*, 540 U.S. at 128, 196.

*McConnell*’s conclusion was recently used by a three-judge panel in this district to reject a test similar to the one proposed by the controlling commissioners. *See Indep. Inst. v. FEC*, No. 14-cv-1500, 2016 U.S. Dist. LEXIS 152623 (D.D.C. Nov. 3, 2016). In that case, the three-judge panel considered a challenge to the FECA’s electioneering communication disclosure provisions. *Id.* at \*7. The plaintiff argued that because its ad “focused on pending legislation,” it was a “genuine” issue ad and could not subject the plaintiff to disclosure even if it also referenced a clearly identified candidate and was distributed to that candidate’s electorate shortly before the election. *Id.* at \*23, 26. The three-judge panel found the plaintiff’s proposed distinction—the one adopted by the controlling commissioners here—was “entirely unworkable,” and found that it would “blink reality to try to divorce speech about legislative candidates from speech about the legislative issues for which they were responsible.” *Id.* at \*26–27. Importantly, the panel noted that the challenger’s “advertisement triggers those same informational interests” of “providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions” held to justify disclosure because its ads “links an electoral candidate to a political issue—pending federal legislation . . . —and solicits voters to press the legislative candidate for his position on the legislation in the run up to an election.” *Id.* at \*33. “Providing the electorate with information about the source of the advertisement,” the panel found, including information about the ad’s financial backers, “will allow voters to evaluate the message more critically and to more fairly determine the weight it should carry in their electoral judgments.” *Id.* at \*34.

The panel’s rejection of the distinction between supposed “genuine” issue ads that mention a legislative issue while still clearly identifying a candidate close to an election and other types of electioneering communications applies squarely to the controlling commissioners’ flawed test. As the panel noted, both *McConnell* and *Citizens United* recognized voters’ important interest in knowing “who is speaking about a candidate shorty before an election,” and that interest equally justifies disclosure as to those ads that engage “in a critique of the candidate’s personal behavior” as well as those ads that engage in “a sharp critique of a candidate’s position on legislation or public policy.” *Compare id.* at \*25–26 *with* Ex. 2 at 6 n.23.

AAN’s electioneering communications are nearly identical to the ads Citizens for Better Medicare and Republicans for Clean Air ran and to the Supreme Court’s hypothetical “Jane Doe” ad, all discussed in the *McConnell* decision, as well as the ad recently before the three-judge panel in *Independence Institute*. Nevertheless, while the controlling commissioners apparently now concede that the First Amendment does not bar treating even a single electioneering communications as election-related, they continue to misinterpret judicial precedent to treat many or even most of AAN’s electioneering communication as non-political merely because those ads also mention legislation. That misinterpretation is contrary to law, however, and contravenes the Court’s September 19 Order.

### The Controlling Commissioners’ Application of Their Test Is Arbitrary and Capricious

Even putting aside the impermissible interpretations on which controlling commissioners relied to craft their legally erroneous test, their application of that test was arbitrary and capricious and not in conformity with the Court’s September 19 Order. In particular, in concluding that AAN’s ads were focused not on the election but rather on pushing legislation in an upcoming lame duck session of Congress, the controlling commissioners erred in several ways warranting reversal. First, they limited themselves to each “ad’s specific language,” while ignoring the full content communicated by the ad. Ex. 2 at 5. Further, while the controlling commissioners stated they would “consider information beyond the content of the ad . . . to the extent necessary to provide context to better understand the message being conveyed,” *id.* at 6, they arbitrarily and capriciously limited the information used to provide context solely to facts about what legislation might be considered in the lame duck session, ignoring other equally relevant contextual information about the ads that indicate their electoral purposes. Finally, the controlling commissioners’ factual conclusion that AAN’s ads were related to legislation being considered in the lame duck session is arbitrary and capricious because no reasonable interpretation of the ads would support a conclusion that they actually were focused on the lame duck session.[[6]](#footnote-6) These errors affect the controlling commissioners’ consideration of each and every one of AAN’s electioneering communications deemed nonpolitical, but at the very least affect enough ads to push AAN’s share of campaign activity well over fifty percent.

First, in looking at the “language of the communication” to discern its purpose, the controlling commissioners ignored the complete picture presented in AAN’s ads. The controlling commissioners relied solely on dry transcripts which, while evidencing a political purpose in their own right, are divorced from the full message conveyed by the videos of the ads. Those videos often include grainy images of the referenced candidate and ominous music, and messages are conveyed in disapproving tones. *See* http://www.citizensforethics.org/american-action-network-aan-ads*/*. When considering the complete ads as they were seen by viewers, their electoral purposes are readily apparent. The controlling commissioners provide no justification for arbitrarily ignoring the visual and auditory portions of the ads even though those portions were communicated along with the language.

Further, the controlling commissioners take only the most cursory notice of the ads’ discussion of the policies that these commissioners deem so essential to their analysis. They note the fact that the ads urge viewers to ask their representative to take a certain position, but ignore the fact that the same ads also informed viewers that the representative opposed that position, that the representative previously took highly criticized actions in opposition to that position, and that the representative wanted to further harm the voters by acting contrary to that position in the future. *See, e.g.*, Ex. 2 at 9, 11, 12 (discussing AAN’s “Wallpaper,” “Back Pack,” and “Naked” ads, which ads asked voters to tell the candidate to “vote for a tax cut” or “vote to cut spending” despite the ad informing voters that the candidate “spent nearly eight hundred billion on the wasteful stimulus,” “loaded our kids up with nearly eight hundred billion in wasteful stimulus spending,” and “spent the shirt of our backs”; and despite further informing the voters that the candidate “wants to raise taxes,” “wants to pile on more spending,” and “wants to strip [his constituents] bare with more spending,” respectively). All of that negative discussion of the representatives would be quite unnecessary if the point of the ads was to convince viewers to favor AAN’s preferred policies and to communicate that view to their representative. Yet the controlling commissioners simply declare, without explanation or justification, that “criticizing an officeholder’s past positions on legislative issues” does not indicate an electoral purpose. Ex. 2 at 10.

 Second, while the controlling commissioners asserted that an ad’s context can be considered, they unreasonably limited the information used to provide that context. The objective of an ad-by-ad analysis is to determine if the purpose of each ad was the nomination or election of a candidate. The controlling commissioners, however, only considered contextual information regarding legislation that might be voted on in the lame duck session, *see, e.g.*, Ex. 2 at 6–8 nn. 27–37, while completely ignoring facts indicating the ads were electoral. Any reasonable review of the context of AAN’s ads would take into account that all of the ads referred only to Democratic incumbents in closely-contested races—save the few that referred to Democratic challengers who held no office at the time and one reference to a Republican candidate to contrast positively with her opponent—even though a much larger number of House members and Senators (indeed, all then-sitting members) would be voting in the lame duck session. This context is critical to understanding how the messages in the ads were received.

The ads AAN ran in Virginia are instructive. While AAN ran ads against three Virginia Democratic congressmen up for re-election, *see* Ex. 2 at 11, 15 (discussing “Back Pack” ad run against Reps. Gerry Connolly and Tom Perriello and “Read This (Boucher)” ad run against Rep. Rick Boucher), the record shows no AAN ad asking Virginians to contact their Senators, neither of whom were up for election that year but who would nevertheless be voting on any legislation arising in November. Nor does the record show AAN asked Virginians to contact any of the state’s other House members, all of whom would be voting in the lame duck session, including Republican Reps. Rob Wittman, Randy Forbes, Bob Goodlatte, Eric Cantor, and Frank Wolf, and Democratic Reps. Robert Scott and Jim Moran. Notably, the two Democratic congressmen ignored by AAN handily won their reelections, while the three targeted by AAN were in close races. *See* FEC, Official Election Results for the House of Representatives, 2010 U.S. House Campaigns 142–43, *available at* <http://www.fec.gov/pubrec/fe2010/2010house.pdf>; Battle for the House, Real Clear Politics, *available at* [http://www.realclearpolitics.com/epolls/2010/house/
2010\_elections\_house\_map.html](http://www.realclearpolitics.com/epolls/2010/house/2010_elections_house_map.html). This contextual information indicates AAN chose its targets not for their openness to persuasion but for their risk of electoral defeat, and viewers of AAN’s ads surely would have noticed which of their representatives AAN chose to highlight.[[7]](#footnote-7)

Indeed, AAN chose to communicate its “issues” solely to voters in battleground races. Its three electioneering communications referencing Senate candidates ran in a toss-up state (Washington) and two states that either initially or in the end only leaned Republican (Wisconsin, New Hampshire). *See* Election 2010: Senate Balance of Power, Rasmussen Reports (Nov. 1, 2010), *available at* [http://www.rasmussenreports.com/public\_content/
politics/elections/election\_2010/election\_2010\_senate\_elections/election\_2010\_senate\_balance\_of\_power](http://www.rasmussenreports.com/public_content/politics/elections/election_2010/election_2010_senate_elections/election_2010_senate_balance_of_power). The ads referencing House candidates similarly were communicated only to voters in tightly contested districts. *See* Battle for the House, Real Clear Politics, *available at* <http://www.realclearpolitics.com/epolls/2010/house/2010_elections_house_map.html> (listing as “Toss Up” or “Leans” Republican or Democratic races for PA-12 (Critz), OH-6 (Wilson), OR-5 (Schrader), WI-8 (Kagen), IN-2 (Donnelly), CO-7 (Perlmutter), NM-1 (Heinrich), VA-11 (Connolly), VA-5 (Perriello), SD-AL (Herseth Sandlin), CT-5 (Murphy), CT-4 (Himes), MI-7 (Schauer), NV-3 (Titus), VA-9 (Boucher), WV-1 (Oliverio), NH-2 (Kuster), and MN-1 (Walz)). Nor does the record show any ad by AAN advocating its preferred policy positions *after* the election and during the lame duck session, even though a voter’s call would have been particularly timely then. AAN’s selective targeting is simply incompatible with the conclusion that the ads’ purposes were solely to inform citizens or ask voters to lobby their representatives.

Third, the controlling commissioners’ conclusion that the ads may reasonably be interpreted as focused on the lame duck legislative agenda and not the impending election is arbitrary, capricious, and an abuse of discretion. They weakly attempt to explain away the fact that the ads do not mention the lame duck session but rather continually point to “November,” when the election would occur as the ads’ viewers would be well aware, as the time for action. Yet they ignore the fact that there is no reference to any other time period that would seem relevant if the focus was on pending legislation. The clear implication of that emphasis is that voters should send their message at the ballot box. Moreover, the available evidence demonstrates that contemporaneous viewers understood “the message[s] being conveyed” were campaign focused. Ex. 2 at 6. The controlling commissions failed to cite even a single news report from the period when the ads ran that discussed them in the context of the lame duck session, and Plaintiffs could not locate any, either. To the contrary, nearly every news report that mentioned the ads discussed them in the context of the upcoming election, with several describing them as “campaign” or “political” ads. *See, e.g.*, Lynn Bartels, 9News removes anti-Perlmutter ad deemed a “whopper”, Denver Post (Oct. 26, 2010), *available at* <http://www.denverpost.com/2010/10/26/9news-removes-anti-perlmutter-ad-deemed-a-whopper/> (describing AAN’s “Skype” “campaign ad”); Daniela Altimari, Television Pulls Ad Against Murphy, Citing Unsubstantiated Claims, Hartford Courant (Oct. 26, 2010), *available at* <http://articles.courant.com/2010-10-26/news/hc-viagra-ad-pulled-1027-20101026_1_political-ads-review-commercials-murphy> (discussing AAN’s “Mess” “political ad”); Jake Gibson, Connolly, Like Many House Dems in Swing Districts, Faces tough Re-election campaign, Fox News (Oct. 25, 2010), *available at* <http://www.foxnews.com/politics/2010/10/25/connolly-like-many-house-dems-in-swing-districts-faces-tough-re-election.html> (stating AAN spent $900,000 to “run [the ‘Back Pack’ ad] against Connolly” in election). Indeed, the ads were understood as electoral despite AAN’s transparent attempts to cast the ads as focused on the lame duck session. *See, e.g.*, AAN, AAN Statement of Issue Advocacy Campaign in Congressional Districts Nationwide (Oct. 18, 2010), *available at* [https://web.archive.org/web/20101025085516/http:/americanactionnetwork.org/
news/aan-statement-issue-advocacy-campaign-congressional-districts-nationwide](https://web.archive.org/web/20101025085516/http%3A/americanactionnetwork.org/news/aan-statement-issue-advocacy-campaign-congressional-districts-nationwide) (asserting AAN’s ads were “issue advocacy” supporting “items Congress must address during the upcoming lame duck session”).

The viewers’ correct understanding of the purpose of the ads is not undermined, and is in fact supported, by the materials cited by the controlling commissioners to show that the lame duck session of Congress was likely to consider AAN’s favored policies—a likelihood the controlling commissioners deemed important to their analysis. *See* Ex. 2 at 6, 12. For example, the controlling commissioners asserted that the lame duck session was expected to address the repeal of Obamacare which AAN favored, *see* Ex. 2 at 12–14 (quoting ads advocating “repeal[]” of “Obamacare” or “government healthcare”), but the controlling commissioners could only cite a single news article discussing Republican-led repeal measures brought in the summer of 2010, Ex. 2 at 12 n. 44 (citing Paul Jenks, Health Overhaul Celebrations Continue, CQ HealthBeat (Sept. 22, 2010), attached as Exhibit 5). They offered no evidence, moreover, that the lame duck session, in which the same Democrats who passed Obamacare without a single Republican vote would be in the majority in both the House and the Senate, was going to consider repealing the landmark healthcare legislation. In fact, the evidence the controlling commissioners cited shows the opposite: that the Democratic-controlled Congress “plan[ned] an ambitious, lame-duck session to muscle through bills” and wanted to use it “as a way to achieve even more liberal measures that many of their members dare not even talk about” before the election, plans at odds with an intention to repeal Obamacare. Ex. 2 at 7 n.32 (quoting John Fund, The Obama-Pelosi Lame Duck Strategy, Wall Street Journal (July 9, 2010), attached as Exhibit 6; Charles Krauthammer, Beware the Lame Duck, Washington Post (July 23, 2010), *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/22/AR2010072204029.html>). The fallacy that there could be action on the repeal measures is further demonstrated by the bill AAN chose to focus on, H.R. 4903. Ex. 2 at 13. That bill was introduced on March 22, 2010, and the last action taken on it—being referred to a committee—was on April 30, 2010. *See* Library of Congress, H.R. 4903 – To repeal the Patient Protection and Affordable Care Act, *available at* [https://www.congress.gov/bill/111th-congress/house-bill/4903?q=%7B%22
search%22%3A%5B%22H.R.+4903%22%5D%7D&resultIndex=4](https://www.congress.gov/bill/111th-congress/house-bill/4903?q=%7B%22search%22%3A%5B%22H.R.+4903%22%5D%7D&resultIndex=4). Simply put, there was no chance of repeal of Obamacare in the lame duck session, and no reasonable voter would have understood AAN’s ads as suggesting that contacting their representatives was a viable option to win repeal. Any voter who saw AAN’s ad would instead understand the only way to achieve repeal would be to vote out the referenced representative “in November.” [[8]](#footnote-8)

The controlling commissioners similarly stretch other legislative possibilities to try to shoehorn AAN’s ads into potential legislation. For example, the controlling commissioners conclude that all of AAN’s ads that mention “tax cuts” and “tax hikes” would have been understood as calling for action in the lame duck session for extending the Bush-era tax cuts, even though a number of ads had no apparent connection to those tax cuts other than the fact that they address taxes. *See, e.g.*, Ex. 2 at 8–9 (analyzing ads discussing the possibility of a “huge tax hike on small businesses” and criticizing a candidate for voting to “delay extending child tax credits for families”). One ad was so muddled that it asserted “Congress wants to raise taxes,” then urged viewers to call a congressman and “tell him to vote for a tax cut in November.” Ex. 2 at 9 (discussing “Wallpaper” ad). Ads like these simply cannot be understood as advocating actual legislative action to extend the Bush-era tax cuts.

The controlling commissioners’ analysis of AAN’s ads addressing other legislation that ostensibly could come to a vote in the lame duck session is similarly flawed. They are only able to cast the ads as addressing pressing legislation by characterizing them at such a high level of generality that it would be impossible to find a legislative-focused ad that doesn’t relate to a pending bill. One would be hard pressed to think of a time in the modern age in which Congress did not have before it some bill related to taxes, spending, health care, or energy.

The controlling commissioners similarly depend on a high level of generality in comparing the policy discussed in an ad to the “speaker’s issue agenda.” Ex. 2 at 6. The controlling commissioners assert that, if a group limits the policies discussed to those that fit within their mission statement or those that appear on their website, *see, e.g.*, *id.* at 2, 10 & n.40, 15 & n.49, then the ads are not electoral but are rather “issue” based. As the controlling commissioners note, however, AAN’s stated agenda is to “create, encourage, and promote center-right policies based on the principles of freedom, limited government, American exceptionalism, and strong national policy.” *Id.* at 2. That agenda is so broad that it is difficult to conceive of an issue that would *not* be part of it. .

The controlling commissioners arbitrarily and capriciously ignore portions of the communications and context that would have been readily apparent to any viewer of AAN’s ads. They provide no justification for neglecting these relevant portions of the ad in any “fact-intensive” “[a]d-by-[a]d” analysis, and provide no justification for their revisionist history of the 2010 lame duck session. Accordingly, their insistence on reaching conclusions that “blink[] reality” contravenes this Court’s order and renders the dismissal of Plaintiffs’ complaint contrary to law.

## The Controlling Commissioners Misconstrued the Court’s Order as Barring Treatment of All AAN’s Ads as Having an Electoral Purpose

In formulating their impermissible and unreasonable analysis, the controlling commissioners apparently construed this Court’s order as prohibiting them from considering “*all* electioneering communications as indicative of a purpose to nominate or elect a candidate.” Ex. 2 at 4. The Court reached no such sweeping conclusion, however, and only “refrain[ed] from replacing the Commissioners’ bright-line rule [excluding all non-express advocacy communications] with its own.” Mem. Op. at 23. Despite the controlling commissioners’ belief otherwise, the Court made no finding about whether it would be impermissible to treat all ads meeting the narrow definition of an electioneering communication and not falling within one of the statutory exceptions as designed to influence an election.

There would be nothing contrary to law, moreover, in the FEC’s conforming with the conclusion already reached by Congress and upheld by the Supreme Court: all ads that are broadcast shortly before an election, refer to a clearly identified candidate, target that candidate’s electorate, and do not qualify as a “news story, commentary, or editorial” or fall under one of the other exceptions are deemed election-related. *See* 52 U.S.C. § 30104(f)(3) (defining “electioneering communication” and providing exceptions). Congress chose to regulate these ads under the FECA because it understood that ads that met these qualities were sufficiently election-related to be regulated as campaign ads. *See* Pls.’ Mot. for Summ. J. 26–27 & n.15, ECF No. 33. That test further has the benefits of “objectivity, clarity, and consistency,” Ex. 2 at 6, as well as being narrowly defined, requiring only disclosure substantially related to serving voters’ important interest in electoral transparency, *see McConnell*, 540 U.S. at 194, 196–97 (finding the definition of electioneering communication was not vague and disclosure triggered by the ads was substantially related to voters’ interest in transparency).[[9]](#footnote-9)

Conforming with Congress’s conclusion that all ads that meet the narrow definition of an electioneering communication are election-related is not inconsistent with the FEC’s “case-by-case, fact-intensive approach” to applying *Buckley*’s “major purpose” test through adjudication. *Cf.* Ex. 2 at 5. Recognizing the electoral purposes of electioneering communications would not require the agency to engage in rulemaking or supplant its adjudicative process. *See* *Shays v. FEC*, 511 F. Supp. 2d 19, 31 (D.D.C. 2007) (rejecting argument that FEC must apply “major purpose” test through rulemaking); 2007 Suppl. E&J, 72 Fed. Reg. at 5,597 (same). After all, the FEC already treats all express advocacy advertisements as election-related, applying a “rule” as part of with a fact-intensive adjudicative approach. The existence of election-related ads are just facts that the FEC must consider in deciding whether a group’s major purpose is to nominate or elect candidates. The FEC would still need to engage in a fact-intensive analysis to determine the sums spent on the group’s express advocacy and electioneering communications and compare a group’s election-related spending that to its total spending. The FEC also may need to consider other facts on a case-by-case basis, including whether other ads (such as non-express advocacy ads that promote, attack, support, or oppose candidate outside of the electioneering communications windows) are election-related, whether contributions to political committees or other groups that engage in political activity are election-related, whether and how to count voter registration and get-out-the-vote activity, whether and how to count time spent by volunteers, and the relevance of a group’s public and private statements about its mission and goals. Accordingly, there is nothing inconsistent between the FEC’s fact-intensive case-by-case method and agreeing with Congress and the Supreme Court that electioneering communications are electoral in nature.

Indeed, it is not contrary to *Buckley* to treat groups that engage in extensive electioneering communications as having as their major purpose the election or nomination of candidates. *Buckley* only excluded from the reach of the FECA’s political committee rules those groups that were so insufficiently political that regulating them would not “fulfill the purposes of the act.” *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). *Buckley* therefore asked what groups should *not* be considered to be political committees despite meeting the congressionally-approved tests. *Buckley* called on the FEC to evaluate whether a group’s activities justify *denying* voters the statutorily authorized transparency to which they would otherwise be entitled. Clearly, nothing in *Buckley* would require the FEC to deny voters the transparency to which they would be entitled simply because an organization runs ads that Congress has deemed, with the Court’s approval, to be designed to influence elections and that trigger disclosure in their own right.

The controlling commissioners, however, continue to interpret *Buckley* and this Court’s Order to require otherwise, proposing a test that actually would deny voters transparency *because* the group runs electioneering communications. Under their test, a group can dilute its express advocacy and other election-related expenses by running electioneering communications (at least ones that mention a bill and ask viewers to call their representative), thereby increasing its total expenses without increasing its share of election-related spending and making it appear as if campaign spending is only a marginal portion of its expenses. Nothing in *Buckley* requires departing from the plain terms of the FECA, however. Groups that meet the statutory threshold can be obligated to register and report as political committees and their extensive spending on electioneering communications does not provide reason to excuse them from those obligations.[[10]](#footnote-10)

The controlling commissioners misinterpreted this Court’s judgment and once again misinterpreted *Buckley* to prohibit them from finding all of AAN’s electioneering communications were political. Nothing in the Court’s September 19 Order or *Buckley* requires that conclusion however, and therefore nothing justifies the controlling commissioners’ departure from the plain terms of the FECA.

# CONCLUSION

On remand, rather that act in conformity with this Court’s September 19 Order, the controlling commissioners once again misinterpreted legal precedent and arbitrarily and capriciously applied the legally erroneous test they created to find thevast majority of AAN’s electioneering communications ads were *not* electoral. Indeed, applying the legally incorrect test, the controlling commissioners even found the ad that this Court quoted in full was not, as they saw it, election-related. Moreover, the FEC failed to take action at all with respect to AJS, despite the Court’s clear thirty-day deadline for them to do so. Accordingly, Plaintiffs ask this Court to order the FEC to show cause why the Court should not find the agency’s new dismissal of Plaintiffs’ complaint against AAN and its complete failure to act on AJS on remand were not in conformity with this Court’s September 19 Order. Plaintiffs further ask this Court to order the FEC to show cause why the Court should not find that the FEC’s failure to act in conformity has triggered the FECA’s citizen suit provision, giving rise to Plaintiffs’ direct cause of action against AAN and AJS. Alternatively, if the Court believes more briefing than might be available on an order to show cause would be useful, Plaintiffs ask the Court reopen this case and authorize Plaintiffs to file a new motion for summary judgment.

Dated: November \_\_, 2016.

Respectfully submitted,

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1. To ensure that this matter is brought before the Court, contemporaneously with this motion Plaintiffs filed suit against the FEC, challenging as contrary to law the FEC’s dismissal of the AAN complaint on remand and its failure to act on the AJS matter. [↑](#footnote-ref-1)
2. As they had previously—and in contravention of the September 19 Order—the controlling commissioners treated all of AAN’s spending over its entire life as equally relevant. SeeEx. 2 at 17. As discussed below, even looking to AAN’s entire lifetime of spending, they spent a sufficient amount on campaign activity that their major purpose was electing or nominating federal candidates. [↑](#footnote-ref-2)
3. Plaintiffs’ administrative complaint noted that AAN removed most of its ads from its YouTube page after CREW filed an IRS complaint against the group, and directed the FEC to a website where some of the ads remained. *See* Joint App’x at AR 1483 n.2, ECF No. 46-5. CREW has now assembled all of AAN’s electioneering communications ads it could locate on the Internet. *See* CREW, American Action Network (AAN) Ads, *available at* http://www.citizensforethics.org/american-action-network-aan-ads/. [↑](#footnote-ref-3)
4. The controlling commissioners appear to have ignored the version of the AAN’s “Secret” ad (also called “Hiding”) targeting Rep. Perlmutter even though it was expressly referenced in Plaintiffs’ administrative complaint, Joint App’x at AR 1484 ¶ 15, and included among the ads AAN described in its response, *id.* at AR 1590. AAN reported spending $725,000 on the Rep. Perlmutter version of the ad. *Id.* at 1484 ¶ 15; <http://docquery.fec.gov/cgi-bin/fecimg/?10931541172>. The controlling commissioners’ failure to even reasonably account for all of AAN’s electioneering communications simply proves the haphazard and arbitrary nature of their analysis and demonstrates the need for a full investigation. [↑](#footnote-ref-4)
5. The controlling commissioners cite no other authority or basis for their test beyond *McConnell*. While they refer to the FEC’s 2007 Supplemental Explanation and Justification in a footnote, they do so only for the purpose of stating that their analysis is “fact-intensive” and for the proposition that groups can gain guidance on the FEC’s application of the test by consulting the FEC’s files. Ex. 2 at 6 nn.24, 25 (citing Political Committee Status, Supplemental Explanation and Justification, 72 Fed. Reg. 5,595, 5,597 (Feb. 7, 2007)). They also cite 52 U.S.C. § 30104(f)(4)(A)(i)(I), Ex. 2 at 6 n.26—which Plaintiffs assume is a typo and that the controlling commissioners meant 52 U.S.C. § 30104(f)(3)(A)(i)(I) as there is no section 30104(f)(4)(A)(i)(I)—but that statutory subsection merely provides one of the requirements for an ad to be deemed an electioneering communication: that it reference a clearly identified candidate for federal office. Accordingly, the controlling commissioners’ sole purported support for their new test is *McConnell*, which they unreasonably and impermissibly interpret. [↑](#footnote-ref-5)
6. In addition to improperly excluding most of AAN’s electioneering communications from their calculation of the group’s political spending, the controlling commissioners may have erroneously excluded another $1.1 million in unidentified political spending. On its 2009 and 2010 Form 990 tax returns, AAN reported spending a total of $5,221,061 on political activity. *See* Joint App’x at AR 1598. In computing AAN’s political spending, however, the controlling commissioners started with the $4,096,910 AAN reported to the FEC it spent on independent expenditures and added the $1,875,394 they assert AAN spent on electioneering communications that qualify as electoral. Ex. 2 at 17. The controlling commissioners, however, did not address the $1,124,151 difference between the amount of political spending AAN reported to the IRS and the amount it reported spending on independent expenditures, and AAN has not provided any explanation for it. The controlling commissioners’ failure to account for this spending further demonstrates the defects in their review. [↑](#footnote-ref-6)
7. The context of AAN’s other ads is similar. In Connecticut, for example, AAN ran ads targeting two Democratic congressmen—Reps. Chris Murphy and Rep. Jim Himes, Ex. 2 at 13—but the record shows no ad asking Connecticut voters to contact their other representatives, even though they would vote in any lame duck session and were covered by the same broadcast markets. FCC, Coverage Map WTIC-TV, attached as Exhibit 4 (showing coverage of WTIC-TV, station on which AAN ran its ads); Mark Pazniokas, Fox Affiliate bans ad attacking Murphy, CT Mirror (Oct. 26, 2010), *available at* <http://ctmirror.org/2010/10/26/fox-affiliate-bans-ad-attacking-murphy/> (discussing AAN’s ad against Rep. Murphy running on WTIC). Notably, the three other incumbent House members, all Democrats, were in safe seats, *see* Official Election Results 59 (showing election results of 61.25%, 59.86%, and 65.06%), and the sitting Senator, Chris Dodd, was retiring, *see* Chris Cillizza, Connecticut Sen. Christopher Dodd won’t seek reelection, will retire at end of term, Washington Post (Jan. 6, 2010), *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/06/AR2010010600023.html>. In Ohio, AAN ran the “Ridiculous” and “Read This” ads targeting Democratic Rep. Charlie Wilson, *see* Ex. 2 at 9, 13, but the record shows no ad by AAN urging Ohio voters to contact any of the state’s other House members, or their retiring Senator, George Voinovich, even though he would vote in a lame duck session, Stephen Koff, U.S. Sen. George Voinovich reflects on his career as he prepares to retire, Cleveland Plain Dealer (Nov. 29, 2010), *available at* <http://www.cleveland.com/open/index.ssf/2010/11/us_sen_george_voinovich_reflec.html>. Nor does the record show that AAN asked Colorado voters to contact either of their incumbent Republican congressmen, even though they exhorted voters to contact Rep. Perlmutter in the “Wallpaper,” “Skype,” and “Secret” ads. Ex. 2 at 9, 13–14. [↑](#footnote-ref-7)
8. Though not cited by the controlling commissioners, the other measures AAN mentioned in its response to the FEC that were addressed during the lame duck session have only the most fleeting connection with their “repeal” strategy. *See* Joint App’x at AR 1567–70. The only bills AAN referenced were dead-on-arrival proposals from the minority Republicans that were never apparently placed on the House or Senate agendas, *id.* at 1568, and votes on minor reform measures relating to paperwork reduction, a change in the availability of state waivers, and a political stunt to put Republicans on the record as opposing the ban on pre-existing conditions and other popular measures, *id.* at 1570. None of those bills has any relation with AAN’s purported “issue” ads calling for a full repeal of Obamacare beyond the fact that they relate to health care. [↑](#footnote-ref-8)
9. Further, Congress provided the FEC with a mechanism to carve out ads that would meet this test in the event it proved over-expansive: the FEC may adopt rules that exclude electioneering communications from regulation so long as the exempted ads don’t promote, attack, support, or oppose candidates. *Id.* at § 30104(f)(3)(B)(iv) (incorporating 52 U.S.C. § 30101(20)(A)(iii)). The FEC has not done so, however, and even if it had, AAN’s ads would qualify under any reasonable application of section 30101(20)(A)(iii). [↑](#footnote-ref-9)
10. In addition to misinterpreting *Buckley* and the Court’s judgment in an attempt to justify their decision to hamstring the FECA, the controlling commissioners make an obscure appeal to their interpretation of circuit precedent. The controlling commissioners state that, “[a]lthough several federal circuit court decisions have addressed the outer constitutional limits of state disclosure laws, [they] did not understand those decisions to compel [them] to go to the same outer limits in implementing the Act’s disclosure regimes.” Ex. 2 at 4 n.13. Of course, as the Court found, what the circuit decisions *do* compel is the conclusion that the controlling commissioners’ refusal to consider non-express advocacy as electoral was contrary to law. Mem. Op. at 18–19, 22. Thus, even if the cases do not compel the controlling commissioners to go to the “outer constitutional limits” in “implementing the Act’s disclosure regimes,” *cf.* Ex. 2 at 4 n.13, they squarely reject the controlling commissioners’ refusal to implement the Act’s disclosure regime to the extent the statute plainly proscribes. After all, it is not judicial precedent which compels disclosure; it is the FECA, and there is no dispute that under the plain terms of the FECA, AAN and AJS meet the statutory test to qualify as political committees. Mem. Op. at 7. Neither Plaintiffs nor the Court have called on the FEC to go any further than the FECA commands. But neither does judicial precedent nor the Constitution justify the controlling commissioners’ refusal to do as the FECA commands. Consequently, their refusal to carry out the FECA according to its plain terms is contrary to law and contrary to the Court’s judgment. [↑](#footnote-ref-10)