UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*,	)	
Plaintiffs,	)	Case No. 1:18-00076
v.	)	
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Employing an analysis already declared unlawful, two commissioners (the "controlling commissioners") of the Federal Election Commission ("FEC" or "Commission") reached a remarkable conclusion in the administrative proceedings below: that a nonprofit that spent two-thirds of its funds—more than $3 million—to influence the 2012 elections need not disclose anything to voters. Rather, they found that voters' compelling interest in knowing "the funding sources" for those influencing elections, *Citizens United v. FEC*, 558 U.S. 310, 369 (2010), was limited to knowing that nondescript political committees were funded by that nondescript nonprofit, called New Models. The controlling commissioners concluded voters cannot learn the sources of New Models's funds, despite its extensive involvement in influencing federal elections by funding political committees' express advocacy campaign ads. While the controlling commissioners ensured that "the public may not [be] fully informed about the sponsorship" of the election ads they saw, "candidates and officeholders" who benefit from New Models's spending are still quite able to "kn[o]w who their friends"—the donors to New Models—are. *See McConnell v. FEC*, 540 U.S. 93, 128–29 (2003).

The controlling commissioners reached that remarkable and erroneous conclusion by adopting two impermissible interpretations of law, as plaintiffs Citizens for Responsibility and Ethics in Washington and Noah Bookbinder's (together, "CREW") opening brief demonstrated. First, they refused to apply the plain text of the Federal Election Campaign Act ("FECA"), instead finding New Models's disbursements to the political committees were not and could not be "expenditures" under the FECA. Second, they construed *Buckley v. Valeo*, 424 U.S. 1 (1976), to compel a lifetime-of-spending analysis to discern a group's major purpose, in the process contorting caselaw that expressly rejected that reading of *Buckley* and that found the very same

analysis employed below was contrary to law. Nothing in the FEC's opposition brief remedies those impermissible interpretations of law.

To start, the FEC is incorrect that the Court "must accord *Chevron* deference" to the erroneous analysis of the controlling commissioners below. FEC Mem. 19. Rather, that analysis is precisely the sort that warrants no deference, because it (1) relied on the controlling commissioners' interpretations of judicial precedent, and (2) was contained in a statement that was not adopted by the agency and that bears no force of law. Either of those facts are sufficient to deprive the statement of any deference.

On the merits, the FEC fails to justify the controlling commissioners' refusal to follow the plain text of the FECA that defines "distribution[s]," "deposit[s]," and "gift[s]" like those New Models made to the political committees as "expenditures" that can qualify an organization as a political committee. *See* 52 U.S.C. § 30101(4), (9). The FEC fails to show that *Buckley* compels the commissioners' reading, particularly over the contrary holdings of multiple courts in this Circuit, including the D.C. Circuit sitting en banc, rejecting it. Indeed, the FEC makes concessions fatal to the controlling commissioners' analysis: that *Buckley* does not support the two commissioners, and that any particular transaction may both be a "contribution" as to one party and an "expenditure" as to another.

Further, rather than show *Buckley* compels a lifetime-spending analysis to determine a group's major purpose, the FEC simply repeats the controlling commissioners' gross distortions of the holding of *CREW v. FEC*, 209 F. Supp. 3d 77 (D.D.C. 2016), a decision of a court in this district that has already declared that a nearly word-for-word copy of the lifetime-spending analysis used below is contrary to law. The FEC fails to show that *CREW* does not squarely

resolve the issue here and fails to show *CREW* was incorrect in concluding a lifetime-spending analysis is unlawful.

The FEC attempts to dodge judicial review of these errors, committed over the course of a thirty-two page analysis that led to a definitive finding on CREW's allegations, by pointing to a one sentence footnote in the statement of reasons that references prosecutorial discretion. That brief footnote, however, hardly counts as the kind of considered exercise of discretion that would be sufficient to make the entire decision unreviewable, particularly where the controlling commissioners' definitive finding left no room for discretion. Further, even if the footnote were enough to raise prosecutorial discretion, the "terse" reference here is reviewable as a clear abdication of the FEC's statutory responsibilities to investigate violations of the FECA and must be rejected.

Accordingly, CREW respectfully requests that this Court grant summary judgment for CREW and find that the two commissioners' conclusions were contrary to law, in violation of 52 U.S.C. § 30109(a)(8)(C).

ARGUMENT

I. Standard of Review

As explained in CREW's opening brief, Pls. Mem. 18-19, this Court reviews the two controlling commissioners' reasons for dismissal of CREW's complaint to determine whether the dismissal was "contrary to law." 52 U.S.C. § 30109(a)(8)(C). That analysis requires this Court to vacate the dismissal below so long as it is "a result of an impermissible interpretation" of law. *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). That analysis involves no deference, contrary to the FEC's erroneous assertion otherwise, unless the controlling commissioners' interpretation fits within the confines of the doctrine of *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). *Compare Orloski*, 795 F.2d at 161 (applying

Chevron doctrine to FEC interpretation), *and CREW*, 209 F. Supp. 3d at 87 (affording the controlling commissioners "no deference" for interpretation where *Chevron* deference did not apply) (citation omitted), *with* FEC Mem. 19–20 (asserting all review is "extremely deferential," but citing only authority relating to inapplicable "abuse of discretion" review).[1]

Thus, it is not true that this Court "must accord *Chevron* deference" to the two controlling commissioners. FEC Mem. 19. Rather, this Court evaluates the controlling commissioners' interpretation under the well-worn precedents of the *Chevron* doctrine and defers only if it finds that that doctrine applies. Here, however, *Chevron* deference is inapplicable for two reasons: (1) the relevant controlling-commissioners' interpretations are of judicial precedent, and (2) the controlling commissioners' interpretations were not endorsed or adopted by the agency and do not bear force of law. The FEC's pleas fail to show any reason why deference would be available for such interpretations.

A. Interpretations of Judicial Precedent Do Not Warrant Deference.

It is black letter law that courts do not "defer to an agency's interpretation of Supreme Court precedent under *Chevron* or any other principle." *N.Y. N.Y., LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002) (citation omitted); *see also Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1995) (en banc) (affording no deference to FEC's interpretation of *Buckley*), *vacated on other grounds, FEC v. Akins*, 524 U.S. 11 (1998). Nor does a court defer to an agency's interpretation of a statute that "rest[s] on the [agency's] interpretation of Supreme Court opinions." *N.Y. N.Y.*, 313 F.3d at 590; *see also* CREW Mem. 22–23.

[1] In addition, even if the FEC's analysis is totally free of legal error, the Court must still vacate the dismissal and remand if it finds the dismissal was "arbitrary or capricious, or an abuse of discretion." *Orloski*, 795 F.2d at 161. While that particular analysis is deferential, it nonetheless requires a "searching and careful" inquiry that the controlling commissioners' statement of reasons here fails. *FEC v. Rose*, 806 F.2d 1081, 1088 (D.C. Cir. 1986) (citation omitted).

Nonetheless, the FEC asserts that the D.C. Circuit ignored this black letter law in *Van Hollen v. FEC*, 811 F.3d 486 (D.C. Cir. 2016). FEC Mem. 22–23. But that opinion shows no such thing. Rather, there, the court deferred to the FEC's interpretation of a statutory provision, 52 U.S.C. § 30104(f), which the FEC interpreted to parallel other statutory provisions, *Van Hollen*, 811 F.3d at 492, 493 (relying on 52 U.S.C. § 30104(c)(2)(C)), based on the agency's desire to avoid misleading voters, the burden a broader disclosure rule would impose, and privacy concerns, *id.* at 497–99. Though a judicial decision, *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"), brought about the need for FEC rulemaking by permitting previously prohibited activity, *Van Hollen*, 811 F.3d at 490, that decision "said absolutely nothing" about § 30104(f) or the scope of disclosure that section either permitted or required, *id.* at 496 (citation omitted). Thus, the FEC did not and could not have interpreted *WRTL* in promulgating its interpretation of § 30104(f). Rather, had the FEC's rule rested on its interpretation of *WRTL*, like the two commissioners' reading of 52 U.S.C. § 30101(4) here rests on their interpretation of *Buckley*, the Court would have afforded it no deference. *N.Y. N.Y.,* 313 F.3d at 590.

Next, the FEC argues that it may interpret *Buckley*'s major purpose doctrine free from judicial review because "the Supreme Court did not 'mandate a particular methodology for determining an organization's major purpose.'" FEC Mem. 23 (quoting *The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 556 (4th Cir. 2012) ("*RTAA*")). But it completely misconstrues the import of that point. It is true that *Buckley* did not spell out every application of the major purpose doctrine; but that is true of all judicial authority, which must be expanded and interpreted by subsequent courts. *See, e.g.*, *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) ("*MCFL*") (interpreting *Buckley* to apply "major purpose" status to any group that

"extensive[ly]" spends to influence elections). Merely because the FEC must engage in a "fact-intensive" inquiry to determine whether a major purpose in fact exists, *see, e.g.*, *Shays v. FEC*, 511 F. Supp. 2d 19, 29 (D.D.C. 2007), that does not give it carte blanche to redefine what a "major purpose" is under *Buckley*.

That is why the D.C. Circuit, sitting en banc, expressly rejected this exact same argument when the FEC presented it before. The FEC argued that, "[s]ince the Court [in *Buckley*] did not decide the types of organizations that are within the 'definition' of political committee, . . . the Commission has discretion to flesh out that concept." *Akins*, 101 F.3d at 740. But the D.C. Circuit, sitting en banc, found "the FEC's plea for deference is doctrinally misconceived." *Id.* The full court recognized that the major purpose limitation was a product of Supreme Court precedent, and thus found the courts "are not obliged to defer" to the FEC's "interpretation" or "appli[cation]" of that test. *Id.* at 740–41.[2]

In sum, nothing in the FEC's arguments counters the black letter law that courts do not defer to agency interpretations under *Chevron* where the interpretation is either of, or rests on, judicial precedent. As the doctrine of *Chevron* does not apply here, the FEC's interpretations below warrant no deference.

B. Non-Precedential Views of Two Individual Commissioners Do Not Warrant Deference.

Apart and independent from the subject of the statement of reasons on review, the status of that statement also deprives it of *Chevron* deference. Once again, it is indisputable that

[2] The FEC argues that *Akins* is irrelevant because it was vacated and that is has not "withstood the test of time." FEC Mem. 22 n.9. While the former is true, *Akins* remains "as persuasive [authority] as non-precedential authority can be," *CREW*, 209 F. Supp. 3d at 86, n.6, and its reasoning has been adopted by subsequent D.C. Circuit panels, *see, e.g.*, *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002); *N.Y. N.Y.*, 313 F.3d at 590. With regard to the latter, the FEC merely takes issue with irrelevant aspects of the decision which have no bearing here. Rather, the part that is relevant—the holding that courts do not defer to the FEC's interpretation or application of *Buckley*—remains in force as the binding law of this Circuit. *See Univ. of Great Falls*, 278 F.3d at 1341; *N.Y. N.Y.*, 313 F.3d at 590.

Chevron deference is only available for statements "on behalf of the agency," *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1321 (D.C. Cir. 1998), and then only for those statements that bear "force of law," *United States v. Mead Corp.*, 533 U.S. 218, 237 (2011). But the statement on review here is just a statement of the views of two commissioners; it is neither a statement of the FEC nor a statement that has any force of law.

In response, the FEC cites no authority showing deference to a statement representing only the views of two commissioners. *See* FEC Mem. 20 & n.7 (citing *In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000) (considering views of three commissioners); *FEC v. NRSC*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) (same); *Campaign Legal Ctr. v. FEC*, 312 F. Supp. 3d 153, 158 (D.D.C. 2018) (same)).[3] Rather, it merely cites authority to show that the statement below of two commissioners is the appropriate one for review. *See id.* That, however, is not in dispute, and the authority the FEC cites merely proves that the mere fact that a court reviews a commissioner's statement does not convert that statement into "binding legal precedent or authority" of the agency. *Common Cause v. FEC*, 842 F.2d 436, 449 n.32 (D.C. Cir. 1988). Simply put, such statements are "not law." *Id.* at 449.

The FEC also wrongly asserts that *In re Sealed Case*—which itself relates to statements adopted by three commissioners—remains good authority to support deference to opinions not adopted by the agency and lacking force of law. *See* FEC Mem. 21–22. *In re Sealed Case* predates *Mead*, and therefore did not consider whether the opinion of three commissioners has force of law. *See* 223 F.3d at 779; Daniel Tokaji, *Beyond Repair: FEC Reform and Deadlock Deference* 3, 26 (Ohio State Univ. Moritz College of Law, Ctr. for Interdisciplinary L. & Pol'y Studies, Working Paper No. 440, Mar. 28, 2018), https://bit.ly/2MCDZ88 (recognizing *In re*

[3] As noted in CREW's opening brief, Congress could at least have anticipated three commissioners blocking agency action. Pls. Mem. 26. It could not have expected that two commissioners could do so.

Sealed Case is "not defensible" after *Mead*). The FEC does not dispute that the decisions of fewer than four commissioners lack any binding effect on "third parties," the legally "conclusive[e]" benchmark for a decision to bear "force of law." *Fogo de Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1137 (D.C. Cir. 2014) (citation omitted); *accord Mead*, 533 U.S. at 233 (holding "force of law" turns only on whether decision's "binding character as a ruling stops short of third parties"). The FEC's recognition that the dismissal precludes further FEC action, therefore, is irrelevant. *Compare* FEC Mem. 21 *with Fogo De Chao*, 769 F.3d at 1137 (finding a decision that is "conclusive only as between [the agency] itself and the [petitioner] to whom it was issued" does not bear force of law and does not warrant *Chevron* deference) (citation omitted).[4] It is also irrelevant that the decision here was issued during the course of a purportedly formal process—formal processes are not a "sufficient condition" to confer *Chevron* deference. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967, 1004 (2005) (Breyer, J. concurring); *see also Oceana, Inc. v. Locke*, 831 F. Supp. 2d 95, 116–17 (D.D.C. 2011) (agency interpretation not afforded *Chevron* deference where it did not bear force of law, despite interpretation being product of formal proceedings).[5] Rather, the opinion must itself be an "exercise of [the agency's] authority" to "make rules carrying the force of law" to warrant *Chevron* deference. *Gonzales v. Oregon*, 546 U.S. 243, 255–56 (2006) (citation omitted); *accord Mead*, 533 U.S. at 227; *see also Safari Club Int'l v. Zinke*, 878 F.3d 316, 326 (D.C. Cir. 2017) (*Chevron* deference only available if "agency has

[4] The FEC argues that *Fogo de Chao* has no application because it involved an informal agency proceeding, FEC Mem. 21, but that distinction fails to show the case does not govern here. First, *Fogo de Chao* distinguished the "informal adjudication within the [agency]" from "formal notice-and-comment rulemaking," *Fogo de Chao*, 769 F.3d at 1136. Here, the proceeding below is far closer to the former than the latter: it did not allow for outside comment or even argument from CREW after the complaint was filed. Second, *Fogo de Chao* recognized the formality of proceedings is an issue that only "weighs" on the question of *Chevron* deference. *Id.* at 1137. In contrast, it found the lack of binding effect on third parties "conclusive[]" as to that question. *Id.*

[5] *Accord Guindon v. Pritzker*, 240 F. Supp. 3d 181, 193 n.3 (D.D.C. 2017); *Guindon v. Pritzker*, 31 F. Supp. 3d 169, 198 (D.D.C. 2014).

acted pursuant to congressionally delegated authority to make law and with the intent to act with the force of law"). There is no dispute that the statement on review here was not an exercise of the FEC's law-making power, and therefore *Chevron* deference is unavailable.[6]

C. The Court May Consider the Materials in CREW's Brief.

The FEC also briefly asserts that the Court may not consider items cited in CREW's brief that are not part of the record it certified. FEC Mem. 23. Yet the FEC's counsel admitted that they failed to include in that record evidence considered by the Commissioners, and FEC counsel has conceded that such materials may be considered by this Court. *See* FEC Mem. 13, 24 n.10; *see also Natural Res. Def. Council v. Train*, 519 F.2d 287, 291 (D.C. Cir. 1975). Other materials are cited to "elucidat[e] the standard by which the Court should judge the facts of this case," and thus may be considered even if not in the administrative record. *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 305 F.R.D. 256, 298 (D.N.M. 2015); *accord Beach Commc'ns, Inc. v. FCC*, 959 F.2d 975, 987 (D.C. Cir. 1992); Fed. R. Evid. 201 advisory committee's note to 1972 proposed rule.

II. The Two Controlling Commissioners' Legal Interpretations Are Contrary to Law

As discussed in the opening brief, the two controlling commissioners purported to justify their dismissal of CREW's complaint on the basis of two impermissible interpretations of law: (1) that New Models's gifts and distributions to other political committees did not count towards

[6] The FEC asserts that post-*Mead* authority shows the continuing validity of *In re Sealed Case*, but the cited authority shows nothing of the sort. FEC Mem. 21 (citing *FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 184–86 (D.C. Cir. 2001) ("*NRA*")). The cited decision, issued only ten days after *Mead*, considered the propriety of deference to an FEC advisory opinion, approved by a *majority* of the commissioners, and which thus had "binding legal effect." *NRA*, 254 F.3d at 185; *see also* Advisory Opinion 1984-24 (SCCOPE) at 6 (July 13, 1984), https://bit.ly/2NxhnFc (noting only two dissents from advisory opinion). It thus did not consider deference to non-majority decisions, and it cited *In re Sealed Case* simply for the proposition that *Chevron* deference is available to positions adopted by the majority of the Commission. *See NRA*, 254 F.3d at 185–86. Indeed, the FEC's briefing in *NRA* wrongly identified *In re Sealed Case* as addressing a decision adopted by the full Commission. *See* Declaration of Stuart C. McPhail filed herewith ("McPhail Decl.") Ex. 1 (Brief of the FEC 18 & n.9, *NRA*, 00-5163 (D.C. Cir. Nov. 21, 2000) (referring to decision at issue in *In re Sealed Case* as the "agency's interpretation")).

the FECA's $1,000 threshold for political committee status, and (2) that New Models was excused from reporting under *Buckley*'s "major purpose" test because a majority of its spending over its entire lifetime was not devoted to contributing to political committees or other election advocacy. *See* Pls. Mem. 28-40. Nothing in the FEC's opposition brief remedies either of the controlling commissioners' impermissible interpretations of law.

A. The FECA Plainly Defines "Expenditure" to Include New Models's Gifts and Distributions to Political Committees.

An organization is a political committee if it makes more than $1,000 in "expenditures" in a calendar year. 52 U.S.C. § 30101(4). The FECA defines "expenditure" to mean "any purchase, payment, distribution, loan, advance, deposit, or gift of money, or anything of value, made by any person for the purpose of influencing any election for federal office." 52 U.S.C. § 30101(9)(B). A disbursement to a political committee plainly meets this definition—as New Models's own attorneys conceded to the Commission. AR035, AR038–39, AR042; *see also* AR052, AR095–96. Thus, the plain text of the FECA commands the FEC to treat New Models's distributions to the super PACs as New Models's expenditures. The FEC's attempts to ignore this plain text to bolster the two controlling commissioners' impermissible interpretations fail.

The FEC first asserts that *Buckley* held that all references to "expenditure" in the FECA are ambiguous. FEC Mem. 26. *Buckley* held no such thing. Rather, *Buckley* interpreted a specific provision of the FECA which explicitly did not apply to political committees and which was triggered by expenditures as little as $100. *See* 424 U.S at 79. In that situation the Court found the "relation of the information sought to the purposes of the Act may be too remote," and thus construed "'expenditure' *for the purposes of that section*" to be limited to express advocacy. *Id.* at 80 (emphasis added). Congress ratified that narrowing of "expenditure" for that provision in subsequent amendments by explicitly limiting it to "independent expenditures." *See* 52

U.S.C. § 30104(c). Notably, however, Congress did not alter other references to "expenditure" in the statute, including in 52 U.S.C. § 30101(4), the provision relevant here.

With regard to the FECA's political committee rules, however, *Buckley* imposed an entirely different limitation. The type of "expenditure" that would qualify a group under § 30101(4) was not limited to express advocacy, but the groups would need pass a new test to qualify: they would have to be either under the control of a candidate or possess a "major purpose" to "nominat[e] or elect[]" federal candidates. *Buckley*, 424 U.S. at 79.

That is why a fellow court in this district already rejected the controlling commissioners' interpretation of "expenditure" in § 30101(4) as limited to express advocacy. In *Shays*, 511 F. Supp. 2d at 26–27, Judge Sullivan considered the FEC's interpretation of *Buckley* to limit the expenditures that would qualify a group as a political committee to express advocacy, *id.* at 26. The court called that a "misreading of *Buckley*." *Id.* Judge Sullivan recognized that *Buckley* addressed constitutional concerns in the FECA "by imposing two different limiting constructions." *Id.* First, with regard to one-time reports by any person making independent expenditures, Judge Sullivan recognized *Buckley* "imposed the narrowing gloss" on expenditures "only with regard" to 52 U.S.C. § 30104(c). *Id.* at 27. With regard to political committees, however, he found *Buckley* only imposed the candidate control or major purpose requirement. *Id.* at 26. Judge Sullivan therefore found the FEC's narrowing of "expenditure" in § 30101(4) to express advocacy to be without legal basis. *Id.* at 27.

Nor does the fact that *Buckley* narrowed that particular use of "expenditure" in § 30104(c) under the doctrine of constitutional avoidance imply that the term is ambiguous for *Chevron* purposes. *Cf.* FEC Mem. 26. Once again, the D.C. Circuit sitting en banc has already expressly rejected the FEC's suggestion otherwise. In *Akins*, the FEC argued that "[a]t a

minimum . . . [*Buckley* and its progeny] created an ambiguity in the statutory definition of 'political committee' so that the Commission's subsequent interpretation of the term is owed deference—and passes muster—under *Chevron* Step II." 101 F.3d at 740. Yet the full D.C. Circuit rejected that argument, finding that *Buckley*'s application of the constitutional avoidance doctrine did not mean there was ambiguity for the agency to resolve. *Id.* In fact, it ruled that it "cannot be[] contended" that 52 U.S.C. § 30101(4) is "ambiguous." *Id.*

The D.C. Circuit's en banc decision reflects the fact that before a court can afford *Chevron* deference, it must apply the "traditional tools of statutory construction," among which is the doctrine of "constitutional avoidance." *AFL-CIO v. FEC*, 333 F.3d 168, 183 (D.C. Cir. 2003) (Henderson, J., concurring) (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coat Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988)). A court's application of the constitutional avoidance doctrine thus does not imply that the statute is ambiguous under *Chevron* Step I. *Id.* Rather, a court will apply constitutional avoidance so long as the adopted interpretation is not "plainly contrary to the intent of Congress." *DeBartolo*, 485 U.S. at 575; *cf. Warger v. Shauers*, 135 S. Ct. 521 (2014) (refusing to apply constitutional avoidance where interpretation would be plainly contrary to the intent of Congress; not considering *Chevron* deference). A court will afford *Chevron* deference in far more limited cases, however; only where the statute is "silent or ambiguous" after applying traditional rules of statutory construction. *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296 (2013) (citation omitted). Thus, a court's application of constitutional avoidance to interpret a statute does not imply the statute is ambiguous for *Chevron* purposes.

Further, the FEC also concedes that *Buckley* cannot support the two controlling commissioners' interpretation. The controlling commissioners justified their limitation of "expenditure" in § 30101(4) by relying on *Buckley*, reading that case's discussion of

"expenditure" in § 30104(c) to bind their reading of it elsewhere in the statute. AR109 (stating that "[t]he Court circumscribed the definition of 'expenditure'"). However, by admitting that the commissioners "did not purport to limit 'expenditure' to 'independent expenditure' for all purposes under [the] FECA," FEC Mem. 31, the FEC agrees that *Buckley* did not compel its limitation on § 30104(c) to apply to all of the FECA. The FEC's concession is thus fatal to its argument and proves the controlling commissioners' interpretation rested on an impermissible interpretation of law.

The FEC's other arguments are similarly misplaced. It oddly contends that the FECA's treatment of coordinated expenditures favors its claims, FEC Mem. 28, but that treatment in fact directly disproves the two controlling commissioners' reading. Far from proving that any given transaction must be treated exclusively as a contribution or an expenditure as the two commissioners contended, AR. 110 n.93, 52 U.S.C. § 30116(a)(7)(C)(ii) provides that a single transaction is *both* a contribution as to the maker, *and* an expenditure as to the candidate. That is exactly what § 30101(4) recognizes as well. New Models's gifts and distributions to the super PACs are contributions as to the super PACs, which must report them as contributions, 52 U.S.C. § 30104(b)(3), *and* expenditures as to New Models under 52 U.S.C. § 30101(4).[7]

Nor does 52 U.S.C. § 30104(b)(4)(H)(i) or (b)(6)(B)(i) undermine this plain reading. *Cf.* FEC Mem. 31. While those provisions do require political committees to segregate "contributions made to other political committees" from their "other disbursements," *see* 52 U.S.C. § 30104(b)(4)(H), they notably do not treat those distributions as something distinct and apart from the group's "expenditures" *in toto*, but rather only distinct from certain *other* types of expenditures, *see id.* (distinguishing contributions to other committees from other types of

[7] *See also* 11 C.F.R. § 102.6(a)(2) (providing "making transfers" to an affiliated committee "count . . . against the reporting thresholds of the Act for determining whether an organization . . . is a political committee").

expenditures, including "independent expenditures" and national or state committee expenditures); *id.* at § 30104(b)(4)(A) ("expenditures made to meet candidate or committee operating expenses"); *id.* at § 30104(b)(5) (same). Rather, the cited section merely reinforces the fact that a "contribution made to other political committees" and an "expenditure" are not mutually exclusive concepts. *See also Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) (holding statutory "redundancies" and "overlap" do not compel mutually exclusive meanings).

The Commission previously recognized that plain reading of § 30101(4) in prior advisory opinions, and the FEC fails to show they do not apply here. For example, as CREW's opening brief showed, the Commission unanimously adopted an advisory opinion informing an LLC that it would become a political committee under 52 U.S.C. § 30101(4)(A) if it made in-kind contributions to political committees. Advisory Opinion 1996-13 (Townhouse Associates, LLC) at 4 (June 10, 1996), https://bit.ly/2M25JSo. The FEC's brief never responds to this authority. Nor is that authority an outlier. *See* Advisory Opinion 2000-25 (Minnesota House DFL Caucus) at 4 (Oct. 13, 2000), https://bit.ly/2RufXP3 ("An organization that makes expenditures in excess of $1,000 during a calendar year is a political committee. [52 U.S.C. § 30101](4), 11 CFR [§] 100.5(a). Thus, by making these transfers [to a federal political committee], the Caucus' nonfederal account would become a Federal political committee."); Advisory Opinion 1987-12 (Costello) at 2 (June 12, 1987), https://bit.ly/2Ob5tpD (advising that if "the proposed transfer to the Federal committee is in an amount greater than $1,000, the state committee would become a political committee under the Act upon transferring the funds. *See* [52 U.S.C. § 30101](4)(A); 11 C.F.R. 100.5(a) and 102.6(a)."). Finally, the FEC fails to distinguish Advisory Opinion 1996-18 (Int'l Ass'n of Fire Fighters) (July 14, 1996), https://bit.ly/2IiKfhE, authority on which its OGC relied below in recommending finding reason to believe New Models exceeded the

statutory threshold, AR070 n.18. That opinion follows the above precedent to find that the organization's "making contributions" would qualify it as a political committee. AO 1996-18, at 2–3. The FEC points to the advisory opinion's discussion about the status of separate segregated funds ("SSF") under § 30101(4)(B), FEC Mem. 28–29, but the Commission has recognized that the distinction between § 30101(4)(A) and (4)(B) is that "a [SSF] becomes a political committee whether it contributes or transfers $1 or $1,000," Advisory Opinion 1983-03 (Phila. Elec. Co.) at 2 (Feb. 24, 1983), https://bit.ly/2E6F9bv, while other groups "become political committees when they make contributions aggregating in excess of $1,000 per calendar year." Advisory Opinion 2003-29 (Fraternal Order of Police) at 6 (Nov. 25, 2003), https://bit.ly/2ObkrMy; *see also* Advisory Opinion 1982-46 (Tex. Manufactured Housing Assoc.) at 1–2 (July 29, 1982), https://bit.ly/2PkNfOV (comparing [§ 30101](4)(A) to (4)(B)).[8]

Finally, CREW's opening brief recognized that disclosure provisions like those reflected in the FECA's political committee status are supported by a number of public interests beyond combating corruption, and whatever risk of corruption exists to support disclosure of independent expenditures similarly supports disclosure of their financial sources. Pls. Mem. 34–35. The FEC responds only by repeating a quote from *Citizens United v. FEC*, FEC Mem. 30 (quoting 558 U.S. 310, 357 (2010)), yet misses the point entirely. Even if independent expenditures "do not give rise to corruption," *Citizens United*, 558 U.S. at 357, the public still has an interesting in knowing "who is funding that speech," *SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010); *see also Citizens United*, 558 U.S. at 369 (public has interest in "the funding sources for the ads"); *Buckley*, 424 U.S. at 67, 76 (public has interest in being "fully informed" about the "sources of a candidate's financial support"). Substituting the "misleading

[8] SSFs are organizations under the control of a corporation or union. *See* 11 C.F.R. § 114.5(d).

name" of a political committee that airs the ad with the "misleading name" of a nonprofit that is its most immediate funder does nothing to ensure voters know "the source of the funding behind broadcast advertisements." *McConnell*, 540 U.S. at 128, 196–97 (citation omitted). Even worse, while voters are unable to peer through the misleading name of the nonprofit, there is no reason to think "candidates and officeholders" are similarly limited in finding out "who their friends [are]." *Id.* at 128–29. Whether or not the money used may be a bribe does not mitigate the injury from that lack of information or obviate voters' legitimate interest in it, and thus any lack of corruption has no bearing on the scope or application of the FECA's disclosure obligations.

In short, the plain text of the FECA refutes the two controlling commissioners' cramped interpretation based on wholly inapposite judicial precedent. As the FECA and FEC precedent make clear, New Models's gifts and distributions to other political committees meets the definition of an "expenditure" under the FECA. As those expenditures exceeded the $1,000 statutory threshold, New Models qualified as a political committee under 52 U.S.C. § 30101(4).

B. The FEC's Misstatements and Misquotations Do Not Cure the Two Controlling Commissioners' "Lifetime" Major Purpose Test Previously Struck Down.

Despite a fellow court of this district rejecting the exact lifetime-spending test applied here, and despite that test's conflict with statutory text, precedent, and common sense, the controlling commissioners once again applied it below to dismiss CREW's complaint against New Models. The test remains contrary to law, however, and nothing in the FEC's brief cures its defects. Indeed, the FEC merely resorts to gross misquotations and false characterizations to defend the indefensible.

1. The Exact Analysis Below Has Been Declared Contrary to Law.

The two controlling commissioners' analysis below is a near word-for-word reproduction of the analysis the same commissioners employed to dismiss CREW's complaint against two

other dark money groups. *Compare* AR097–108 *with* Statement of Reasons of Chairman Lee E. Goodman and Comm'rs Caroline C. Hunter and Matthew S. Petersen at 6–16, MUR 6538 (July 30, 2014) ("AJS Statement"), https://bit.ly/2K1WWCA. That analysis has already been held to be contrary to law. *CREW*, 209 F. Supp. 3d at 94. Nonetheless, the two controlling commissioners ignored the order of a court of this district, copied-and-pasted their analysis to justify dismissal here, and then went so far as to falsely claim that the *CREW* decision upheld their prior analysis. *See* AR114–15. As CREW's opening brief showed, the two controlling commissioners simply misrepresented the *CREW* decision and did nothing to try to correct the errors it identified, Pls. Mem. 38, and the FEC's brief simply resorts to the same gross misrepresentations.

To begin with, the FEC places inordinate weight on *CREW*'s recognition that consideration of a group's lifetime spending is not "*per se* unreasonable." FEC Mem. 38 (citing *CREW*, 209 F. Supp. 3d at 94). Yet to say it is not *per se* unreasonable is not to say the lifetime test—the same test applied below—is consistent with law under the FECA, as *CREW* found it not to be. *CREW*, 209 F. Supp. 3d at 94.

The FEC tries to evade this conclusion by asserting that the court in *CREW* engaged in its own lifetime test, and that the two controlling commissioners below didn't engage in the equal weighting of years that *CREW* found unlawful. Yet the FEC simply resorts to distorting *CREW* and the analysis below.

First, it is false to assert that *CREW* engaged in any type of "lifetime" spending test. For example, the FEC falsely asserts *CREW* treated two groups' pre-2010 activity as relevant to the proper analysis of the groups' major purpose in 2010. *See* FEC Mem. 36. The portion the FEC quotes, however, was from the court's discussion about why pre-2010 activity was *irrelevant* to a

lawful major purpose analysis. *See CREW*, 209 F. Supp. 3d. at 94 (recognizing that looking "at relative spending over an organization's lifetime runs the risk of ignoring . . . that an organization's purpose can *change*," which is "precisely the trajectory" of the group in question). If the court had treated that activity as relevant, as the FEC asserts, then it would not have declared the FEC's analysis of a "half-century-old organization with a substantial spending history" contrary to law, but it did. *Id*. Similarly, New Models's pre-2012 spending is irrelevant to determine its major purpose in 2012: the prior activity merely shows that New Models's major purpose changed in 2012.

Second, the FEC also incorrectly asserts that *CREW* says nothing about the relevancy of activity that post-dates the year in which a group exceeds the FECA's statutory threshold. FEC Mem. 36. In *CREW*, the administrative complaints asserted two groups met the statutory thresholds in 2010, and the court's discussion of the major purpose analysis focused on the groups' activities in that calendar year. *See CREW*, 209 F. Supp. 3d at 83 (looking at group's 2010 spending to find "over three-fourths of its spending was in some way tied to elections").[9] That calendar year focus is notable given that CREW filed its complaints in 2012, *id.*, the Commission voted to dismiss in 2014, *id.*, and the court issued its decision in 2016. Yet the court never suggested that any spending in those later years was at all relevant to a proper major purpose analysis. Similarly, New Models's post-2012 spending is irrelevant to determining its major purpose in 2012.[10] Indeed, the FEC's proposal would lead to grave injustice—a group's

[9] With regard to the other group, data was not available for its calendar year spending, since the group did not report on a calendar year schedule. Accordingly, the closest data available covered a span from mid-2009 to mid-2011. *Id.* at 83.

[10] The FEC argues that it is relevant that the president of New Models asserted in 2014 that it had no plans to make further independent expenditures or contributions. FEC Mem. 38. New Models's 2014 plans have no bearing, however, on what New Models actually *did* in 2012 and its major purpose that year. Further, it is far from clear whether New Models would have made contributions in 2014 absent CREW's complaint—New Models received notice of CREW's complaint earlier in the 2014 election cycle than when New Models made the vast majority of its

major purpose would depend not on its actions, but solely on when the Commission got around to voting on a complaint.

The FEC next oddly asserts that the error *CREW* identified was only that the controlling commissioners there refused to give "any weight" to the groups' spending in the calendar year the groups exceeded the statutory threshold, which the FEC says the controlling commissioners solved below by "compar[ing] New Models's isolated contributions [in 2012] with other activities both in 2012 and during its lifetime." FEC Mem. 32, 34–35. Yet it was this exact equal weighting—this "lifetime" test that treats spending in the relevant year equally to other years, even decades earlier, in evaluating a group's major purpose in the relevant year—that *CREW* found contrary to law. *CREW*, 209 F. Supp. 3d at 94. Just as here, the controlling commissioners' analysis in *CREW* compared the group's expenditures in the calendar year to its other activities both in the relevant year and during its lifetime, leading the commissioners to conclude that one group was not a political committee because "'during the course of its history dating back to 1997, [it] spent over $50 million . . . but only $4.9 million [in 2010] . . . on express advocacy.'" *Id.* at 84 (quoting statement of reasons below). The FEC's distortions about what *CREW* held are simply incorrect.

Having failed to twist *CREW* into authority endorsing the lifetime test, the FEC next attempts to reconcile the two controlling commissioners' analysis below with *CREW* by reimagining the lifetime-spending analysis applied here. That arguments fails on the facts, however, as any reading of the statement of reasons amply demonstrates that the controlling commissioners gave conclusive weight to New Models's lifetime spending. *See* AR094–96 (laying out New Models's lifetime of spending); AR111 n.96 ("We have consistently rejected

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expenditures in the 2012 cycle. *See* AR046 (New Models received notice of complaint in September2014); AR035, AR038–39 (New Models's 2012 contributions mostly occurred October 2014).

OGC's myopic focus on one year of spending."); AR117 (placing conclusive weight on fact New Models's 2012 election-related spending "amounted to just 19.5% of the organization's total spending"); AR118 ("[D]etermining an organization's major purpose by reference to its activity in a narrow snapshot of time—one calendar year or two—overlooks the point of the major purpose test."); *see also* AR120 (stating that even spending "90%" of funds in a calendar year on express advocacy would not qualify a group as a political committee over the group's lifetime of spending). The FEC's arguments simply try to obfuscate that fact. For example, the controlling commissioners' recognition that New Models spent $1.5 million in 2012 on non-election activities, FEC Mem. 34, less than half of what it spent on expenditures that year, is only noteworthy because they found that non-election related spending, *when combined with spending in every other year*, outweighed New Models's 2012 political expenditures. AR094–96. Similarly, looking to New Models's entire post-*Citizens United* lifetime spending, FEC Mem. 34, is the exact "lifetime" approach that *CREW* found improper.[11] Finally, the FEC asserts that the controlling commissioners concluded 2012 was an "outlier," FEC Mem. 35, but that judgment can only be made by looking at a group's lifetime spending, including irrelevant spending in years after the group qualified as a political committee under the FECA. A group's expenditures in one year will only not be an outlier, apparently, if those expenditures constitute a majority of the group's spending over its lifetime.[12]

[11] While the change in law in *Citizens United* can help explain why a group's purpose might change, it is of course not the only reason a group might change its purpose. Nor is 2010 the only time at which that purpose could change. Thus 2010 does not provide some singularly-unique cutoff that renders all post-2010 activity relevant to a major purpose analysis.

[12] The only other possibility is indeed a far more extreme interpretation of *Buckley*—one that would ignore the relevant-calendar year entirely if it was sufficiently distinct from its spending in other years. That test, however, would allow a group to evade reporting even if expenditures constituted more than half of its lifetime spending if those expenditures clustered in one or a few years. For example, under this proposed "outlier" test, a group could spend as little as $100 for a few years, then spend millions on an election, and then go back to spending trivial amounts in following years. Under the FEC's proposed test, the single year of expenditures would be an "outlier,"

Finally, the FEC asserts that the controlling commissioners' analysis was consistent with *CREW* because they also considered the absence of public statements from the organization admitting to an electoral purpose. FEC Mem. 33–34. That argument both fails to distinguish *CREW* and is irrelevant. First, the organizations at issue in *CREW* also had not made any public statements admitting that their major purpose was to influence elections, a fact the controlling commissioners had considered in their analysis. *CREW*, 209 F. Supp. 3d at 84; AJS Statement at 18–19. Nevertheless, the court in *CREW* found the analysis was contrary to law. Second, the FEC would apparently make the lack of a signed confession determinative. Groups that evade disclosure, however, will likely never release a statement confessing that they are spending to influence elections, even as they do so. Therefore, while a group's statements may prove its major purpose is to influence elections, those statements can never disprove that electoral purpose where its actions show otherwise. *See MCFL*, 479 U.S. at 262 (stating group would become a political committee when its spending on elections became "extensive[]," without requiring any confirmation in a public statement); *CREW*, 209 F. Supp. 3d at 95 (finding dismissals contrary to law based on erroneous treatment of spending, despite analysis also finding lack of electoral purpose expressed in public statements); *supra* at 14–15 (discussing advisory opinions holding same); *cf. Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013) (finding extensive spending was not necessary for political committee status, but sufficient for it); *RTAA*, 681 F.3d at 557 (same).

The FEC fails to show that the controlling commissioners' analysis is anything but an abject refusal to abide by the law as declared by a court in this district. The FEC simply resorts to a tortured reading of *CREW* that ignores its central holding—that the very same analysis

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and voters would have no access to any information about from where those funds originated.

employed below here is contrary to law.

2. The Lifetime Test is Contrary to Law.

Putting aside *CREW*, the lifetime test employed below is contrary to law for a number of other reasons, too. Statutory text, as well as judicial and regulatory precedent, all support a calendar year focus.[13]

First, the plain text of the FECA provides the temporal scope for political committee examinations—a group's spending "during a calendar year." 52 U.S.C. § 30101(4). Given that *Buckley* neither commented on nor altered that focus, neither *Buckley* nor its progeny provides any basis for the Commission to depart from that congressionally commanded focus.

The FEC attempts to escape this fact by asserting that *Buckley* authorized a "fact-intensive" inquiry, and thus that the Supreme Court delegated to the FEC the power to rewrite the law on political committee status. FEC Mem. 39. Yet, once again, the FEC's argument has already been squarely rejected by the D.C. Circuit sitting en banc. The full D.C. Circuit found the FEC's assertion that *Buckley* gave it free reign to "flesh out" the rules for political committee status was "doctrinally misconceived." *Akins*, 101 F.3d at 740. Thus, while the FEC has discretion whether "to administer FECA political committee regulations either through categorical rules or through individualized adjudications," *Free Speech*, 720 F.3d at 797 (citing *RTAA*, 681 F.3d at 556); *Shays*, 511 F. Supp. 2d at 26 (same), the substance of any interpretation of *Buckley* is solely with the purview of the judiciary, *Akins*, 101 F.3d at 740; *Shays*, 511 F. Supp. 2d at 27. As discussed above, judicial precedent does not support the controlling

[13] The FEC argues CREW has not shown its definition is "arbitrary or capricious." FEC Mem. 41. That is not CREW's burden; rather CREW need only show its definition is erroneous as determined by this court *de novo*. *Orloski*, 795 F.2d at 161 (court to determine whether dismissal is arbitrary or capricious only after confirming no legal error in the analysis). Moreover, even if CREW were required to show the definition fails under *Chevron* step II, it has also met that burden. *See CREW*, 209 F. Supp. 3d at 94 (striking lifetime test as unlawful under *Chevron* step II after erroneously affording *Chevron* deference).

commissioners' lifetime test. *See CREW*, 209 F. Supp. 3d at 94 (citing *MCFL*, 479 U.S. at 262).[14]

Nor does the other judicial authority cited by the FEC support their lifetime-spending approach. Far from endorsing a lifetime test, *FEC v. GOPAC, Inc.*, 917 F. Supp. 851 (D.D.C. 1996), found a group was not a political committee because its "major purpose in 1989 and 1990" as determined by the group's activities in each of those years was not to elect federal candidates, *id.* at 858. The FEC makes much of the discussion of the group's post-1990 activity, *see* FEC Mem. 37–38, but the activity noted was that the group registered as a political committee in 1991, and the court gave no weight to that fact when deciding the group's purpose in 1989 and 1989, *GOPAC*, 917 F. Supp. at 853. The FEC also fails to distinguish *FEC v. Malenick*, 310 F. Supp. 2d 230 (D.D.C. 2004), *see* FEC Mem. 39 n.14, because the court there expressly determined the group's "major purpose was the nomination or election of specific candidates in 1996," a calendar year, *Malenick*, 310 F. Supp. 2d at 237.[15]

Unable to distinguish this authority or cite any supporting authority,[16] the FEC resorts to arguing that its prior use of a calendar year approach does not "foreclose the Commission from using a more comprehensive methodology" whenever it suits the whims of certain commissioners. FEC Mem. 39–40 (quoting *RTAA*, 681 F.3d at 557). Yet far from a holistic analysis which recognizes that a group may exhibit a major purpose to influence an election in a

[14] Further, even if *Buckley* conferred any discretion on the FEC to interpret "major purpose," the lifetime test employed below is not a reasonable interpretation of it. *See CREW*, 209 F. Supp. 3d at 94.

[15] While the court also considered materials from 1995, those materials evidenced the group's 1996 purpose. *Id.* at 235 (quoting 1995 material stating group's goal "in the next two years"). Finally, noting materials outside a calendar year confirm the group's major purpose is a far cry from excusing a group from reporting despite its possessing a qualifying major purpose in the relevant year merely due to activity outside that year.

[16] CREW's opening brief showed the analysis below was not supported by FEC precedent, CREW Mem. 44–45, and the FEC makes no attempt to show otherwise. Moreover, one of those precedents cited by the two commissioners, MUR 3669, is not available on the FEC's website or elsewhere, despite CREW's repeated requests to the FEC *since this May* to make the materials available. The commissioners may not rely on this "secret law" to defend their opinion. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 858 (1980).

number of ways, *cf. RTAA*, 681 F.3d at 557, the FEC's arbitrary switching of the temporal focus by which it will evaluate a group's purpose "in itself raises First Amendment concerns," *Akins*, 101 F.3d at 744 (striking FEC's "variable major purpose standard"). The FECA's calendar year test, on the other hand, is a clear standard, well supported in law.

Lastly, the FEC essentially argues that the Constitution prohibits applying political committee status to an organization based on its single year of activities because political committee status "impose[s] significant burdens on the exercise of constitutionally protected political activities." FEC Mem. 40 (citation omitted). For example, the FEC apparently disagrees with the statute's provision for the only way by which political committees may terminate, *id.*, and argues the controlling commissioners were thus free to exclude groups from political committee reporting to evade the burden imposed by that clear congressional command. Courts, however, have routinely upheld political committee burdens against First Amendment challenge. *See SpeechNow.org*, 599 F.3d at 696–97 (holding political committee status does not "impose much of an additional burden"); *CREW*, 209 F. Supp. 3d at 92 (rejecting controlling commissioners' argument that political committee burdens justified lifetime test for major purpose). Those burdens are more than justified by the public's compelling interest in knowing "who is funding" election-related speech, *SpeechNow.org.* 599 F.3d a 698, something the public can only learn if groups like New Models are subject to political committee reporting as Congress intended and the FECA commands. Congress already declared that any group that spends more than $1,000 in expenditures in a calendar year must qualify as a political committee. 52 U.S.C. § 30101(4). The Supreme Court narrowed that application by imposing a major purpose test, resolving any constitutional concerns. *Buckley*, 424 U.S. at 79. The controlling commissioners are not free to disregard statutory text and congressional intent to add

additional limitations, no matter how much they believe Congress erred.

In sum, the lifetime spending test imposed below has already been declared unlawful, and the controlling commissioners blatantly ignored that declaration by copying-and-pasting that analysis here. A fellow court correctly surmised that the controlling commissioners' lifetime test is not supported by *Buckley* or other precedent, and in fact runs contrary to law and reason, even while erroneously affording that interpretation deference. The FEC fails to cure any of the errors already found in the analysis, and thus the lifetime test remains contrary to law.

III. A Terse Reference Does Not Immunize the Controlling Commissioners' Legal Error from Judicial Correction.

The statement of reasons below spans thirty-two pages. AR091–122. It provides eleven pages of "legal background" that purports to recount the changes in the law on political committee status from 1972 until today, discussing more than a dozen judicial precedents and numerous sections of code and regulation. AR097–108. Based on that analysis, the controlling commissioners reached a firm decision on CREW's allegations, "conclud[ing] . . . that New Models was *not* a political committee." AR92 (emphasis added); *accord* AR110 & n.95, AR121. That result was required by their finding that "New Models did *not* meet the statutory threshold for becoming a political committee," AR108 (emphasis added), and that New Models "did *not* have the requisite major purpose," AR 110 (emphasis added).

Nevertheless, the FEC asserts that the controlling commissioners' extensive legal analysis is essentially dicta and is immune from judicial review because appended to that lengthy analysis that led to firm conclusions is a brief reference to "prosecutorial discretion" in a footnote. FEC Mem. 15–18. The FEC argues that a recent decision, currently pending en banc review, prevents any judicial review of the controlling commissioners' legal error because of that short incantation. *Id.* (citing *CREW v. FEC*, 892 F.3d 434, 438 (D.C. Cir. 2018)

("*CREW/CHGO*"), *en banc petition filed* No. 17-5049 (D.C. Cir. July 27, 2018)). But the words "prosecutorial discretion" do not magically deprive CREW of its congressionally provided right to judicial review. The FEC fails to show that prosecutorial discretion actually played any part in the dismissal below or, even if it did, it would work to prevent review here.

A. The Dismissal Below was Not Discretionary.

As noted above, the controlling commissioners' analysis reached a firm conclusion about the merits of CREW's complaint, a conclusion that could only have been based on their lengthy (albeit erroneous) legal and factual analysis. In contrast, the controlling commissioners' entire discussion of prosecutorial discretion can be found in one footnote, appended at the end of the opinion, citing *Heckler v Chaney*, 470 U.S. 821 (1985) and *Nader v. FEC*, 823 F. Supp. 2d 53 (D.D.C. 2011), and containing a single sentence. A "terse" invocation of discretion such as a footnote, however, does not meet the agency's obligations adequately explain its justifications to enable judicial review. *See Robertson v. FEC*, 45 F.3d 486, 493 (D.C. Cir. 1995) (rejecting terse explanation in statement of reasons as failing to "meet the standard of reasoned agency decisionmaking"); *see also Antosh v. FEC*, 599 F. Supp. 850, 853 (D.D.C. 1984) (holding "meekly" asserted grounds do not adequately explain agency action). Even the FEC's brief only devotes a single paragraph to describing the purported exercise of discretion below, FEC Mem. 14–15, compared to the four pages it spends recounting the controlling commissioners' legal analysis, *id.* at 10–14.

The two commissioners' brief reference here contrasts sharply to similar cases in which the controlling commissioners provided an actual explanation for exercising prosecutorial discretion. *See CREW/CHGO*, 892 F.3d at 438 (commissioners "placed their judgment squarely on the ground of prosecutorial discretion" after discussing over the course of many paragraphs the statute of limitations, group's lack of funds, and other practical difficulties with

enforcement); *Nader*, 823 F. Supp. 2d 53, 65–66 (D.D.C. 2011), *vacated* 725 F.3d 226 (D.C. Cir. 2013) (holding FEC's prosecutorial discretion was reasonable only after evaluating factors such as staleness of evidence and complainant's undue delay before filing administrative complaint); *see also La Botz v. FEC*, 61 F. Supp. 3d 21, 35 (D.D.C. 2014) ("After conducting *a thorough review* . . . , the Commission ultimately decided its resources would be better utilized elsewhere, a decision entirely within its discretion." (emphasis added)).

The terse reference is no more than a tag-on to the actual analysis employed by the commissioners; one that in fact definitively "resolve[d] the political committee issue." *Cf. CREW v. FEC*, 236 F. Supp. 3d 378, 389 (D.D.C. 2017) (finding dismissal was discretionary where "the controlling opinion did not resolve the political committee issue" and where entire opinion explained exercise of prosecutorial discretion). Given that the two controlling commissioners definitively resolved New Models's political committee status in the negative, stating it was "not a political committee," AR092, there was in fact no room for discretion. Given the firm conclusion, the only work the reference to prosecutorial discretion appears to be doing is to attempt to insulate the decision below from any judicial review. *See* Statement of Vice Chair Ellen L Weintraub on the D.C. Circuit's Decision in *CREW v. FEC* (June 22, 1018), https://bit.ly/2zmAKz5 (predicting the controlling commissioners will cite prosecutorial discretion in bad faith, simply to evade legally mandated review).

Because the statement of reasons for dismissal of CREW's complaint against New Models was, in fact, one that based dismissal on the controlling commissioners' legal and factual analysis, that analysis is subject to judicial review. *See CREW/CHGO*, 892 F.3d at 441 n.11 (recognizing the "interpretation an agency gives to a statute is not committed to the agency's unreviewable discretion"); *Orloski*, 795 F.2d at 161 (permitting reversal if dismissal involved

"impermissible interpretation" of law, even if not otherwise arbitrary or capricious); *CREW v. FEC*, 316 F. Supp. 3d 349, 421–22 (D.D.C. 2018) (applying *CREW/CHGO*, finding reversal under FECA warranted despite reference to prosecutorial discretion because that discretion was based on erroneous interpretation of law); *see also Akins*, 524 U.S. at 25 ("[T]hose adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground."); *NAACP v. Trump*, 298 F. Supp. 3d 209, 234 (D.D.C. 2018) (holding *Chaney* does not prevent review of dismissal "expressed as a general enforcement policy" and relies on "the agency's view of what the law requires"). That fact cannot be altered by a terse reference to prosecutorial discretion, tagged on as no more than an afterthought, that could have no application where the matter at issue had been definitively resolved, and which could then have no other purpose than to evade congressionally intended judicial review.

The FEC argues that a one sentence incantation in a footnote renders the entire action unreviewable under prosecutorial discretion. FEC Mem. 15-16. But the magic words of "prosecutorial discretion" do not allow the FEC to avoid judicial review of its actions. That would contravene the very purpose of the FEC's judicial review provision and allow the FEC, with a rote recitation, to circumvent all judicial review of even blatantly incorrect interpretations of the law. A brief invocation of prosecutorial discretion in a footnote does not render the statement below immune from judicial review.

B. *CREW/CHGO* Would Not Bar Review of The Dismissal Even if Applicable.

Even if the terse reference to prosecutorial discretion were enough to bring the statement of reasons below within the control of *CREW/CHGO*, that still would not prevent review of the dismissal below. *CREW/CHGO* recognized that, even if the controlling commissioners squarely based their dismissal on prosecutorial discretion, judicial review would remain available if it

reflected an "abdication of its statutory responsibilities" to enforce any provision of federal election law. *CREW/CHGO*, 892 F.3d at 440 n.9 (citation omitted). The dismissal below, even if based on prosecutorial discretion, reflects just such an abdication.

In dismissing CREW's complaint, the controlling commissioners refused to apply the FECA's political committee laws to any group that qualifies under the statute as a result of its contributions to other political committees, or as the result of an analysis of less than its lifetime of spending. AR109, AR117. For the reasons explained above, those are impermissible interpretations of the applicable law. Assuming, however, that such statements merely reflect a discretionary choice by the controlling commissioners not to enforce the law in such situations, then they have "consciously and expressly adopted a general policy" of nonenforcement. *See CREW*, 316 F. Supp. 3d at 421 (holding agency abdicated enforcement where adopted enforcement policy conflicted with statutory requirements), *stay denied* No. 18A274, 2018 WL 4441781 (U.S. Sept. 18, 2018).

That abdication is also reflected in years of complaints against groups who failed to register as political committees being dismissed by these controlling commissioners, even where the FEC's staff recognizes the complaints are meritorious. *See CREW*, 209 F. Supp. 3d at 83–84 (same commissioners dismissed complaints against two groups over OGC's recommendation based on same general policy of abdication applied here). Indeed, CREW could not identify a *single* case in which the controlling commissioners agreed with an OGC recommendation to impose political committee status on an organization that contested its election-related purposes. *See* McPhail Decl. Exhibit 2.

The FEC tries to dodge this abdication by relying on an inapposite portion of the *CREW/CHGO* decision that found "the Commission routinely enforces the election law alleged

in CREW's administrative complaint." *CREW/CHGO*, 892 F.3d at 440 n.9. But the only enforcement referenced in that case for which even the most minimal steps were taken did not relate to the political committee allegations, but rather to an organization's failure to file independent expenditure and electioneering communication reports. *See CREW*, 236 F. Supp. 3d at 387 (noting Commission deadlocked on political committee allegations, but unanimously found reason to believe the group failed to file required disclosures for its independent expenditures and electioneering communications). CREW's allegations against New Models did not involve a failure to file independent expenditure or electioneering communication reports, so the Commission's enforcement of those provisions, anemic as they are, has no relevancy here.

In sum, an agency may not invoke prosecutorial discretion to abdicate its enforcement duties. *Chaney*, 470 U.S. at 843 (Marshall, J., concurring in the judgment). The controlling commissioners here have committed to a policy of abdicating enforcement of the FECA's political committee laws against organizations that do not meet their legally baseless and overly narrow test, regardless of any particularities of the group in question, and even then enforcement is apparently nonexistent. The dismissal below of CREW's complaint against New Models, even if erroneously viewed as a discretionary action, is merely one in a long line of dismissals evincing the controlling commissioners' abdication of enforcement. As such, it is reviewable and warrants reversal by this court.

CONCLUSION

For the foregoing reasons, CREW respectfully requests that the Court enter summary judgment for CREW, declare the dismissals contrary to law, and order the FEC to conform to that declaration within 30 days.

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Respectfully submitted,
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