IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, Citizens for Responsibility and Ethics in Washington and Noah Bookbinder (together, "CREW"), by their undersigned counsel, respectfully move this Court, pursuant to Federal Rule of Civil Procedure 56, for summary judgment declaring that the failure of the Federal Election Commission ("FEC") to find "reason to believe" that New Models violated the Federal Election Campaign Act ("FECA"), 52 U.S.C. § 30101, *et seq.*, was contrary to law. Plaintiffs further seek an order directing the FEC to conform with such declaration within 30 days.

Support for this motion is set forth in the accompanying Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment; documents cited herein and to be filed in the forthcoming Joint Appendix; and such further evidence and argument as the Court may permit. Plaintiffs' requested relief is set forth in the accompanying Proposed Order. Plaintiffs respectfully request oral argument on this motion.

Dated June 25, 2018

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In 2012, New Models, a nonprofit organization, gave at least $3,095,000 to super PACs to fund federal election ads, constituting 68.5% of its total spending that year. Federal law requires groups that distribute more than $1,000 in a year to influence federal elections, and that are not excused from reporting because they lack a "major purpose" at that time to elect candidates, register with the Federal Election Commission ("FEC" or "Commission") as political committees and make public disclosures so voters can be fully informed about the sources of money in their elections. Yet, despite devoting more than two-thirds of its funds to influence elections in 2012, New Models did not register or report as a political committee. Despite this clear breach of law, two FEC commissioners subsequently found there was not even a reason to believe New Models need make any political committee disclosures to voters. In doing so, these commissioners relied on impermissible interpretations of law, including interpretations that had been recently rejected by a judge in this district in a decision made under "remarkably similar circumstances." AR123. As only four members of the Commission voted in this case, the two were able to block enforcement against New Models, leading the FEC to dismiss the complaint brought against the group by Plaintiffs Citizens for Responsibility and Ethics and Washington and Noah Bookbinder (together, "CREW").

CREW now comes before this Court to ask it to correct these two commissioners' erroneous understanding of the First Amendment, the Federal Election Campaign Act ("FECA"), and judicial precedent starting with *Buckley v. Valeo*, 424 U.S. 1 (1976). Applying a legally erroneous "lifetime" test, AR111, the two commissioners essentially contended that "a group that gave the majority of its money in a calendar year to a super PAC could [not] *under any circumstances* be considered a political committee that year." AR123. This reasoning so mimicked an analysis previously found contrary to law that another commissioner stated: "It

makes for an unhappy Groundhog Day." AR125. The two commissioners further added a new, equally erroneous argument: that donations to a political committee are not "distribution[s]…deposit[s], or gift[s] of money or anything of value, made . . . for the purpose of influencing any election for Federal office" and thus that they can never qualify the donor as a political committee under the FECA. AR109; *see also* 52 U.S.C. § 30101(4), (9)(A)-(B).

Their conclusions, however, are contrary to law and warrant reversal by this Court. First, the two commissioners' refusal to recognize that gifts, deposits, or distributions to political committees are qualifying expenditures for political committee status under the FECA contradicts plain statutory text, FEC and judicial precedent, and common sense. Further, it relies on a gross misreading of an inapposite portion of *Buckley* entirely unrelated to the FECA's political committee provisions. Second, the two commissioners' "lifetime" test—one that allows a "half-century-old organization with a substantial spending history [to] commence spending handsomely on election-related ads and continue such expenditures" without ever registering as a political committee—has already been rejected by a court in this district. *CREW v. FEC*, 209 F. Supp. 3d 77, 94 (D.D.C. 2016) (Cooper, J.). The test conflicts with the plain text of the FECA, agency and judicial precedent, and would lead to absurd results that only serve to ensure voters never receive information needed to protect the "free functioning of our national institutions." *Buckley*, 424 U.S. at 66.

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

STATEMENT OF FACTS

I. Statutory and Regulatory Background

A. Political Committee Reporting

The FECA and implementing FEC regulations impose obligations on organizations that engage in sufficient politicking. These organizations, called "political committees," must register with the FEC and file periodic reports disclosing, among other things, the sources of their financial support. 52 U.S.C. § 30104(b)(3)(A); 11 C.F.R. § 104.3(a). The FECA both mandates when a group must first register as a political committee, and provides the only course by which a group may terminate its political committee status.

As "straightforwardly spelled out in FECA," *CREW*, 209 F. Supp. 3d at 82, an organization must register as a political committee if it "receives contributions" totaling more than $1,000 in a year, 52 U.S.C. § 30101(4)(A), or "makes expenditures" of the same amount, *id.* The FECA defines an "expenditure" as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing an election for Federal office." 52 U.S.C. § 30101(9)(A). It also excludes a number of transactions not relevant here. *Id.* at § 30101(9)(B). The FECA has a nearly identical definition and list of exceptions for "contribution." *Id.* at § 30101(8)(A)-(B). Notably, the FECA does not exclude a "contribution" from the definition of "expenditure," or vice versa.

Thus, the FECA mandates that a group register and begin reporting as a political committee if it "contribute[s] or expend[s] more than $1,000 in a calendar year for the purposes of influencing a federal election," *CREW*, 209 F. Supp. 3d at 82. "Both definitions [of contribution and expenditure] focus on the use of money or other objects of value 'for the purpose of . . . influencing' the nomination or election of any person to federal office." *Buckley*, 424 U.S. at 63. Once an organization meets the statutory threshold, it must register with the FEC

within ten days and begin to make public disclosures. 52 U.S.C. § 30103(a). The FECA and corresponding regulations also provide the sole way in which a "political committee may terminate," *i.e.*, when that committee "will no longer receive any contributions or make any disbursements" and files a written statement with the FEC. 52 U.S.C. § 30103(d); 11 C.F.R. § 102.3.

In *Buckley*, however, the Supreme Court carved out from the FECA's statutory reporting requirement those organizations that lack a "major purpose" to "nominat[e] or elect[] . . . candidate[s]," and which are not under the control of a candidate at the time they would otherwise be required to register because they meet the statutory qualifications. 424 U.S. at 79. The Court created this exception to the FECA's rule to exclude groups for whom reporting would not "fulfill the purposes of the Act" because disclosure would not provide voters with any information about the sources of funding for campaign related activities. *Id.*; *see also id.* at 66–67 (outlining purposes of disclosure). The Court later specified that for a group to lack a "major purpose" to influence elections, its electoral activity must be insufficiently "extensive." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) ("*MCFL*"). Although neither the courts nor the FEC have definitively decided the threshold for insufficient spending, organizations must at least devote more than half of their spending to non-political activities to be excused from reporting. *See Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 555-57 (4th Cir. 2012) (finding political committee statute does not depend on whether "campaign-related speech amounts to 50% of all expenditures"); FEC, *Political Committee Status*, 72 Fed. Reg. 5595, 5605 (Feb. 7, 2007) (noting group devoting at least "50-75%" of spending to campaign activity qualified as political committee). In other words, after *Buckley*, a group must register as a political committee if it distributes or receives $1,000 in a calendar year to influence elections,

unless it is excused because at that time it is independent of a candidate and its spending on elections is not extensive compared to its other current activities. The FECA, however, still provides the sole means by which a political committee may terminate.

In order for voters to know "who is speaking about a candidate," *Citizens United v. FEC*, 558 U.S. 310, 369 (2010), and to be "fully informed" about "[t]he sources of a candidate's financial support," *Buckley*, 424 U.S. at 67 & 76 (1976), groups that meet the statutory definition of a political committee and who are not excused from reporting under *Buckley* must disclose the identities of the political committee's contributors who contribute more than $200 in a year, 52 U.S.C. § 30104(b)(3)(A). To fulfill the purposes of the FECA, it is essential that voters learn the original source of funds used to influence elections. *See United States v. O'Donnell*, 608 F.3d 546, 553-554 (9th Cir. 2010); *United States v. Hsia*, 30 F. App'x 1, 3 (D.C. Cir. 2001) (the FECA "require[s] political action committees to report the true source of the contributions").

B. Enforcement

The FEC is a "six-member, independent agency charged with administering FECA." *CREW*, 209 F. Supp. 3d at 81 (citing 52 U.S.C. § 30106(b)(1)). No more than three seats on the Commission may be held by members of any one political party. 52 U.S.C. § 30106(a). For the FEC to pursue enforcement, at least four of its commissioners must agree. *Id.* at § 30106(c).

The FECA, however, does not leave sole enforcement authority to the FEC. It sets forth a path through which private parties may seek compliance with the law, subject to administrative gatekeeping. First, third parties may file a complaint with the FEC if they identify a violation of the statute. 52 U.S.C. § 30109(a)(1). The subject of the complaint then submits a response, *id.*, and based on the complaint, the response, and an analysis by the FEC's Office of General Counsel ("OGC"), the FEC commissioners vote on whether they find "reason to believe" the

FECA may have been violated. *Id.* at § 30109(a)(2). The "reason to believe" standard is a low bar that is satisfied as long as "credibl[e] alleg[ations]" of a violation "may" exist. FEC, *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12,545, 12,545 (Mar. 16, 2007). If four commissioners find reason to believe a violation may have occurred, the OGC must investigate "expeditiously" and make a recommendation whether there is probable cause. 52 U.S.C. §§ 30107(a)(9), 30109(a)(2)–(3). If four commissioners find probable cause, the FEC must seek conciliation with the respondents; if the FEC is unable to conciliate, the FEC may pursue a civil action in court. *Id*. at § 30109(a)(4)(A), (6)(A).

Second, in the event the FEC does not pursue the complaint, including due to commissioners' interpretation of law, the FECA provides that a complainant may seek judicial review of that failure. *See id.* at § 30109(a)(8)(A); *Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131, 1132 (D.C. Cir. 1987). While most "'agenc[ies'] decision[s] not to take enforcement action . . . [are] presumptively unreviewable,'" the "FECA's express provision for the judicial review of the FEC's dismissal decisions, as well as a particular standard governing that review" rebuts any presumption of non-reviewability. *CREW*, 209 F. Supp. 3d at 88 n.7 (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)); *see also FEC v. Akins*, 524 U.S. 11, 26 (1998) (holding the FECA "explicitly indicates" judicial review of non-enforcement decisions).

If a court finds the FEC's dismissal of a complaint "contrary to law," it may issue a declaration to that effect and order the FEC to conform with its judgment within thirty days. 52 U.S.C. § 30109(a)(8)(C). The court may not order any relief beyond the correction of the identified error. *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996). The FEC must then choose whether to conform with the court's judgment and either reopen the investigation or adopt a

lawful basis for dismissal, or it may choose not to conform, in which case the FECA provides that the complainant has exhausted its administrative remedies and provides a cause of action to bring its own civil suit. 52 U.S.C. § 30109(a)(8)(C). A judgment that a dismissal was contrary to law under 52 U.S.C. § 30109(a)(8)(C), therefore, is unlike a typical judgment against an agency which may result in compelled agency action; rather it is more akin to administrative exhaustion of a complaint. In other words, in the event that the FEC proves unable or unwilling to enforce the law in the face of a meritorious complaint, judicial review ensures individuals can protect their own interests in the statutory scheme.

II. New Models

New Models is a tax-exempt organization established in 2000, organized under section 501(c)(4) of the Internal Revenue Code, and based in McLean, Virginia. AR056. Between 2002 and 2009,[1] New Models spent on average about $735,000 a year on "research" and "polls" that, while perhaps not campaign activity, were nonetheless politically oriented. *See* AR094–95; *see also* New Models, *March National Survey* (Mar. 4, 2006), https://bit.ly/2LM7io0 (March 2006 poll asking whether voters supported George W. Bush and their support for Republican and Democratic candidates for office).[2] During that period, it was illegal for a corporation like New

[1] The record does not contain any information about New Models's activities between 2000 and 2002.

[2] New Models's website is no longer operational but portions of it were preserved on the Internet Archive Wayback Machine. The controlling commissioners relied on these archived portions of the New Models's website in reaching their conclusion to vote against finding reason to believe. *See* AR95 at n.21, AR114 at nn.110 & 112. Accordingly, although the FEC did not include these items in the record, they are part of the record and the Court may rely on them. *See Natural Res. Def. Council v. Train*, 519 F.2d 287, 291 (D.C. Cir. 1975) (reversible error for district court to issue judgment without considering entire record before agency, even if agency failed to include documents with produced record by design or accident). Further, counsel to the FEC has agreed the archives of New Models's website are properly part of the record.

Models to engage in any federal political activity. That changed in 2010, and New Models's purposes appeared to change along with the new legal landscape.

A. New Models Takes Advantage of *Citizens United* and Adopts Major Purpose of Nominating and Electing Candidates for Federal Office

On January 21, 2010, the Supreme Court issued its decision in *Citizens United v. FEC*, 558 U.S. 310 (2010). That decision ushered in a sea change in campaign finance law, permitting corporations to do what was once unlawful: to fund express political messages to support or oppose candidates for federal office, either directly or through disbursements to other organizations. 52 U.S.C. § 30118; *see also* AR096 (noting prior to 2010, New Models "legally could not make" donations to political committees). In the wake of that decision, and the D.C. Circuit decision in *SpeechNow.org v. FEC*, 599 F.3d 686 (2010), new independent expenditure-only committees,[3] commonly called super PACs, arose which could spend unlimited sums on express electoral advocacy, while accepting unlimited funds from a broader set of donors, including corporations. AO 2010-11 (July 22, 2010), https://bit.ly/2tpqhwD. Nevertheless, despite this new font of spending, the Supreme Court and the D.C. Circuit assured voters that disclosure obligations would still guarantee that voters would "know[] who is speaking about a candidate." *Citizens United*, 558 U.S. at 369; *SpeechNow.org*, 599 F.3d at 698 ("[T]he public has an interest in knowing who is speaking about a candidate and who is funding that speech."); *see also Stop This Insanity Inc. Emp. Leadership Fund v. FEC*, 761 F.3d 10, 17 (D.C. Cir. 2014) (holding "First Amendment rights of the public to know the identity of those who seek to influence their vote" justifies FECA political committee disclosure obligations).

In 2010, New Models apparently decided to take advantage of its new opportunities.

[3] An "independent expenditure" is an "expenditure" that "expressly advocat[es]" for "the election or defeat of a clearly identified candidate" and is not made in cooperation with such candidate. 52 U.S.C. § 30101(17), *see also* 11 C.F.R. § 100.22 (defining express advocacy).

That year, soon after the law changed, New Models made gifts, deposits, or distributions of $265,000—about a third of its typical yearly budget—to a federal super PAC, Citizens for a Working America ("CWA") PAC. AR069, AR095. New Models was CWA PAC's sole contributor, and the super PAC spent that money on independent expenditures in a South Carolina congressional race. *Id.* CWA PAC reported New Models's funds as a "contribution," AR095,[4] meaning it was a transfer made for the purpose of influencing an election, 52 U.S.C. § 30101(8)(A).

New Models then took full advantage of the new law in the next election cycle—the first full cycle under the new legal regime. In 2012, New Models made gifts, deposits, or distributions of at least $3,095,000 to four federal super PACs. AR060–61, AR096. It made a gift, deposit, or distribution in January 2012 of $292,000 to CWA PAC, AR042, and one of $5,000 to a Special Operations OPSEC Political Committee, AR060.[5] Most of those disbursements, however—about $2.8 million—occurred in October, shortly before the election. AR035, AR038–39. That month, New Models made gifts, deposits, or distributions of $2,171,000 to Now or Never PAC, AR038–39, and of $627,000 to the Government Integrity Fund Action Network ("GIFAN"), AR035. All of the super PACs reported New Models's funds were intended to influence elections, *see* AR035, AR038–39, AR042, AR096, and they all in fact engaged in extensive campaign activity that year, AR004–5. Together, New Models's gifts,

[4] *See also* Post General 2010 Report of CWA PAC at 6 (Jan. 31, 2011), https://bit.ly/2lok54m; October Quarterly Report of CWA PAC at 6 (Jan. 31, 2011), https://bit.ly/2JZqAsd. The two commissioners relied on and cited to CWA PAC's FEC submissions, *see* AR095, AR096, and thus they are properly part of the record, notwithstanding the FEC's failure to include the materials in their certified record. *Natural Res. Def. Council*, 519 F.2d at 291. Further, counsel to the FEC has agreed that these FEC reports are properly part of the record.

[5] Plaintiffs had not identified New Models's gift, deposit, or distribution to Special Operations OPSEC Political Committee, but the OGC was able to identify it. AR096. The controlling commissioners described these funds as a "contribution" to the super PAC. *Id.*

deposits, or distributions comprised 68.7% of its expenditures in 2012. AR096. They even comprised 51.7% of New Models's expenditures compared to its spending over the entire 2012 election cycle. *Id.*

B. Procedural History

On September 17, 2014, CREW filed a complaint with the FEC alleging that New Models failed to register and report as a political committee in violation of the FECA. AR001–44.[6] The administrative complaint alleged that New Models failed to register in 2012 when it made expenditures in the form of gifts, deposits, or distributions to influence federal elections in excess of the $1,000 statutory threshold. AR006, AR081. The administrative complaint further alleged that, because these disbursements accounted for 68.5% of New Models's total spending in 2012, New Models had a "major purpose" that year to influence federal elections. AR007, AR082. The FEC notified New Models of CREW's complaint on September 24, 2014. AR046.

It appears that, alerted to the pending complaint against it, New Models chose to cease making disbursements to federal super PACs, as it made no such reported disbursements in 2014. AR096. New Models's reported spending dropped from a high of $4.5 million in 2012—when 68.7% of its disbursements went to elect candidates—to only about $1 million. *Id.* The next year, it ceased doing business entirely. *Id.*

On November 5, 2014, New Models responded to the administrative complaint. New Models admitted that it met the FECA's statutory requirements to register and file as a political committee. AR051, AR052. New Models's sole defense was that it lacked a qualifying major purpose, and thus was excused from reporting obligations, because the disbursements to super PACs constituted only 20% of its spending from 2001 to 2014. AR052, AR055.

[6] CREW filed an amended complaint to substitute complainant Melanie Sloan, CREW's former Executive Director, with Noah Bookbinder, CREW's current Executive Director and Plaintiff here. *See* AR075–84.

On May 21, 2015, the OGC issued a report recommending that the FEC find "reason to believe" that New Models violated the FECA by failing to register and report as a political committee in 2012, and that the FEC authorize an investigation. AR059–66. The OGC made four key points in its report: (1) New Models conceded that it met the statutory threshold for a political committee under the FECA; (2) the law treats money gifted, deposited, or distributed to PACs as expenditures for political committee qualification purposes, and therefore New Models met the statutory threshold to be a political committee; (3) New Models's political spending in the 2012 election cycle was greater than 50% of its overall spending, demonstrating its major purpose that year was to nominate or elect federal candidates and thus it was not excused from its statutory reporting obligations by *Buckley*; and (4) New Models did not submit evidence to substantiate its claim that the disbursements were less than 20% of its lifetime spending, and its lifetime spending was irrelevant anyway. *Id.*

On November 15, 2017, the FEC, by a vote of 2-2 with one recusal, failed to find "reason to believe" that New Models had violated the FECA, failed to approve the Factual and Legal Analysis as recommended by the OGC, and voted 4-0 to close the file, thereby dismissing the case. AR087–88.

On December 20, 2017, the two commissioners who voted against proceeding, and thus whose votes controlled the outcome (the "controlling commissioners"), issued a statement of reasons to explain their vote. AR091–122. Vice Chair Caroline C. Hunter and then-Commissioner Lee E. Goodman concluded that gifts, deposits, and distributions to independent expenditure-only political action committees were not "expenditures" under the FECA, and thus New Models did not meet the statutory qualifications for political committee status. AR099–100, AR108–20. The controlling commissioners also found that New Models lacked a "major

purpose" of nominating or electing federal candidates. AR121. They first interpreted *Buckley*'s "major purpose" carve out to excuse groups from reporting if its campaign spending is less than a majority of its total expenditures over its *entire life*. AR111. Thus, they reasoned, a group was free to spend as much as it likes to influence elections in any given year without reporting, so long as its previous spending and/or its subsequent spending ensured the amounts spent on elections did not exceed 50% of its total lifetime spending. *Id.* Applying that test, they found the sums New Models distributed to super PACs comprised only about 19.5% of New Models's total spending between 2002 and 2015. AR094–96.[7]

Remarkably, the controlling commissioners issued this finding nearly a full year after Judge Cooper held in *CREW* that the controlling commissioners' "lifetime" test to evaluate political committees was contrary to law. 209 F. Supp. 3d, at 93–94.[8] As Judge Cooper said in his opinion: "Looking *only* at relative spending over an organization's lifetime runs the risk of ignoring the not unlikely possibility, contemplated by the Supreme Court, that an organization's major purpose can *change*." *CREW*, 209 F. Supp. 3d at 94–95 (citing *MCFL*, 479 U.S. at 262 (stating organizations "spending [may] *become* so extensive" that it adopts a qualifying major purpose (emphasis added))). Not only did the controlling commissioners apply the test rejected by Judge Cooper, they did so without even acknowledging the holding in *CREW*. Indeed, the controlling commissioners' analysis supporting their lifetime test is a near word-for-word copy

[7] No party submitted evidence of New Models's spending outside of 2012, yet the controlling commissioners gathered the evidence *sua sponte* to reach their conclusion. *Id.* The controlling commissioners' actions were in apparent violation of one of their own stated policies prohibiting the agency from looking beyond the four corners of a complaint and response to evaluate whether a complaint states a reason to believe. *See* Statement of Reasons [of] Vice Chairman Donald F. McGahn and Comm'r Caroline C. Hunter at 3–7, MUR 6462 (Sept. 18, 2013), https://bit.ly/2yjUzqf (stating agency is limited to considering "sworn complaint" to determine reason to believe).

[8] Judge Cooper held that the lifetime test was contrary to law even after determining that the FEC's controlling opinion warranted deference under *Chevron*. *Id.* at 85–88.

of the analysis that was found unlawful in *CREW*. *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), https://bit.ly/2K1WWCA.

On December 21, 2017, Commissioner Ellen Weintraub filed a separate Statement of Reasons supporting her vote in favor of finding reason to believe New Models was a political committee. AR123–25. Commissioner Weintraub recognized that Judge Cooper had rejected the "lifetime" test in 2016 in the *CREW* case, noting that it "takes some real chutzpah for [the controlling commissioners] to now cite that very decision to try to make the exact legal point upon which they had been smacked down." AR125.

CREW filed the present judicial action on January 12, 2018.

III. Dark Money and Dead-End Disclosure

New Models is far from a unique entity in the campaign finance world. It represents but one example of a type of organization that has become ubiquitous—dark money nonprofits that are being used to allow super PACs to evade disclosure obligations.

Citizens United had a number of far reaching effects on campaign finance law. Most directly, by permitting corporate entities to engage in express campaign advocacy, it resulted in an explosion of campaign spending by "outside" groups—groups that are not political parties or candidate committees. *See* Center for Responsive Politics ("CRP"), *Outside Spending by Election Cycle, Excluding Party Committees*, OpenSecrets.org (last visited May 31, 2018), https://bit.ly/2tfwr28 (showing increase in independent expenditures in presidential election cycle from $143.7 million in 2008, to $1 billion in 2012, and $1.4 billion in 2016; and increase in off-year cycle of $37.8 million in 2006, to $205.5 million in 2010, to $549.4 million in 2014).

Citizens United, however, assured the public that they would still receive "prompt" and "adequate disclosure." 558 U.S. at 370–71. Yet, in the wake of *Citizens United* and its progeny, organizations have exploited loopholes and taken advantage of the FEC's dysfunction to evade the disclosure the Court (and Congress) intended.

First, groups may directly spend on campaign commercials without disclosing the source of their funds. *See, e.g.*, *CREW*, 209 F. Supp. 3d at 93 (discussing groups which spent millions on campaign ads without registering as political committees). These so-called "dark money groups" spend significant sums to nominate or elect federal candidates—oftentimes millions of dollars—yet avoid disclosure of their donors by taking advantage of their corporate form and evading political committee reporting requirements. Total spending by these outside groups that evade disclosure rose from just about $5 million in 2006 to over $312 million in 2012. CRP, *Outside Spending by Disclosure, Excluding Party Committees, Cycle Totals* (last visited May 31, 2018), https://bit.ly/2MDHV8H (settling to about $178 million in the non-presidential 2014 cycle and idiosyncratic 2016 election cycle).

Second, super PACs accept money from non-reporting entities that hide the identities of the original source of the funds. Although the super PACs report the identities of their most immediate transferees, that transferee may itself be a dark money corporation that does not report its own donors. This "dead-end disclosure" means that voters, despite knowing a super PAC paid for the ad and that its money came from a corporation, in fact have no better idea who is "funding that speech" than they would if the dark money group simply spent the funds directly. *SpeechNow.org*, 599 F.3d at 698. Voters are not "fully informed" about the "sources of a candidate's financial support," *Buckley*, 424 U.S. at 67, 76.

Just as spending on campaign ads by dark money groups rapidly climbed after *Citizens United*, so too has dead-end disclosure. One study of super PACs between 2010 and 2016 found, despite being only 11% of political committees, super PACs that raised all or a significant portion of their funds from nontransparent sources collected 23% of all super PAC contributions. *See* Paul S. Hernson, *The Impact of Organizational Characteristics on Super PAC Financing and Independent Expenditures* 24, Table 3 (Apr. 21, 2017), https://bit.ly/2JXnVvQ ("Groups that raised all of their funds from nontransparent sources and those that raised their money from a combination of transparent and nontransparent sources collected proportionally more funds than the others."). That equates to about $824 million in campaign spending from groups of which the public is not fully informed. *Id.* (approximately 23% of $3.5836 billion). Another study noted that donations to PACs from section 501(c)(4) organizations that don't disclose their donors is growing, quadrupling between 2014 and 2016. *See* The Conference Board, *The Landscape of Campaign Contributions: Campaign Finance after Citizens United* 17 (July 2017), https://bit.ly/2tkkKqQ.

Examples of these groups are plentiful. For example, one of the super PACs that received funds from New Models, GIFAN, spent more than $1 million on ads supporting a Senate candidate in Arkansas in 2014. *See* FEC May Report of GIFAN 7 (May 20, 2014), https://bit.ly/2t7KTKt. While GIFAN reported its contributors for that year, as was legally required, the reported contributors turned out to be a single entity, the Government Integrity Fund, *id.*, a section 501(c)(4) group that itself does not report its contributors, AR061. Another super PAC, the Senate Leadership Fund, received $11 million from One Nation, a dark money nonprofit that does not itself disclose donors. *See* Matt Corley, *Rove Group Makes Largest Ever Dark Money Contribution to a Super PAC*, CREW (Oct. 31, 2016), https://bit.ly/2t7OTdP. As

another example, a federal super PAC spent about $4 million on a Missouri race while reporting that its entire $4.37 million in contributions came from a non-reporting nonprofit. *See* Matt Corley, *Non-Profits Funding Super PACs Benefitting Greitens Have Links Behind the Scenes*, CREW (Nov. 1, 2016), https://bit.ly/2LY57x9. Recent sworn testimony from an official affiliated with that campaign and with knowledge of the campaign's plan to use nonprofits stated that the "purpose of a 501(c)(4)" as a contributor in a political campaign is "to conceal the identities of donors." Special Investigative Committee on Oversight Hearing, Interview of Michael Hafner at 1:51:55–1:54:20 (May 29, 2018), https://bit.ly/2Jq9jbu; *see also* Bryan Lowry and Steve Vockrodt, Greitens campaign sought to conceal donors' identities, former staffer testifies, *Kansas City Star*, May 2, 2018, https://bit.ly/2IbkWlK (describing Hafner's relation to campaign). These examples are not unique. *See* Theodoric Meyer, Secret Donors Behind Some Super PACs Funneling Millions into Midterms, *ProPublica*, Oct. 31, 2014, https://bit.ly/2leHOnk (discussing other examples).

Dark money organizations like New Models that help political committees evade disclosure obligations are an increasing presence in our elections. Their ability to prevent voters from learning who is speaking presents an increasing threat to our democracy.

ARGUMENT

Contrary to the opinion of the controlling commissioners of the FEC, there is ample reason to believe that New Models is a political committee, a classification that would further the FECA's purposes of informing voters about the source of the millions of dollars that were spent in elections. Both of the rationalizations for not enforcing here offered by the two commissioners are contrary to law. First, based only on their misreading of *Buckley*, they erroneously interpret the FECA's definition of expenditure, conflicting with the statute's plain text and judicial and FEC precedent, and narrowing it to the point that it defeats its goals.

Second, they interpret *Buckley*'s major purpose test in a manner already declared unlawful by a court of law, and in conflict with the plain terms and purposes of the FECA. Because the two commissioners' analysis relies on impermissible interpretations of law, the dismissal is contrary to law.

I. Jurisdiction

The present action arises under the FECA, 52 U.S.C. § 30101, *et seq.* *See* 52 U.S.C. 30109(a)(8)(A) ("[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party" may seek judicial review). This Court has jurisdiction under 28 U.S.C. § 1331 and venue is appropriate per 28 U.S.C. § 1391(c). Plaintiffs have standing pursuant to *FEC v. Akins*, 524 U.S. 11 (1998), because they have not received information to which they are legally entitled under the FECA, *id.* at 21; *see also CREW v. FEC*, 243 F. Supp. 3d 91, 101–02 & n.5 (D.D.C. 2017).[9]

II. Standard of Review

A court reviews an FEC dismissal to determine whether it is "contrary to law." 52 U.S.C. § 30109(a)(8)(C). Most relevant here, as the dismissal below rested on the two controlling commissioners' interpretations of law, the court reviews the rationale for the dismissal for legal error. That review is conducted *de novo* because the controlling commissioners' interpretations under review here rest wholly on their analysis of judicial precedent and because they are only the opinions of two commissioners which were neither adopted by the FEC nor carry force of law.

[9] *See also* Compl. ¶¶ 12, 16, 17; FEC Answer ¶¶ 12, 16, 17, ECF No. 8; FED. R. CIV. P. 8(b)(6) (failure to deny allegation is admission).

A. Dismissals Contrary to Law

The FEC's dismissal of a case is contrary to law "if (1) the FEC dismissed the complaint as a result of an impermissible interpretation of [law], or (2) if the FEC's dismissal of the complaint, under a permissible interpretation of the [law], was arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986) (internal citations omitted). Where the dismissal results from an FEC deadlock, the statement of reasons of the commissioners voting against proceeding is the subject of judicial review, even though that statement does not represent the authoritative position of the agency, because it nonetheless explains the failure to enforce. *Democratic Cong. Campaign Comm. v. FEC ("DCCC")*, 831 F.2d 1131, 1133 (D.C. Cir. 1987); *see also* 52 U.S.C. § 30106(c) (providing decision of any fewer than four commissioners in an enforcement proceeding is not a decision of the agency).

1. Review of Impermissible Interpretations of Law.

Under the first prong of the analysis, the court looks to see if the FEC's justification for dismissal is "a result of an impermissible interpretation of [law]." *Orloski*, 795 F.2d at 161. Plaintiffs need not identify law compelling an opposite result from that reached by the commissioners; rather, plaintiffs need only identify a legal error in the controlling commissioners' analysis. *See Akins*, 524 U.S. at 25 (finding plaintiffs may bring action to complain that FEC "based its decision upon an improper legal ground"); *CREW*, 209 F. Supp. 3d at 93 (finding dismissal contrary to law where FEC "based its decision upon an improper legal ground"). In determining whether the FEC's proffered interpretation is "impermissible," a court may provide deference where appropriate under the doctrine in *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). *Chevron* deference is unwarranted, however, where the court is merely reviewing the view of a minority of a commission and not the official position of the agency, *Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1137

& n.6 (D.C. Cir. 2014), where the interpretation lacks force of law, *United States v. Mead Corp.*, 533 U.S. 218, 221–23, 233–34 (2001), or where the interpretation is of or based on judicial precedent, *N.Y. N.Y., LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002). In such cases—like the one here—the court reviews the question of law *de novo.*

2. Arbitrary and Capricious, or an Abuse of Discretion.

Even if the controlling commissioners' statement contains no legal errors, a dismissal is contrary to law if the proffered statement was "arbitrary or capricious, or an abuse of discretion." *Orloski*, 795 F.2d at 161. In conducting this analysis, courts employ the same standard as under the Administrative Procedure Act. *In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538, 550-51, 551 n.6 (D.C. Cir. 1980) (Wald, J., concurring); *see also CREW*, 209 F. Supp. 3d at 88. An agency decision is arbitrary, capricious, or an abuse of discretion if the agency "entirely failed to consider an important aspect of the [relevant] problem" or has "offered an explanation for its decision that runs counter to the evidence before [it]." *CREW*, 209 F. Supp. 3d at 88 (quoting *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007)). "At the very least, '[t]he agency must articulate a rational connection between the facts found and the choice made.'" *Id.* (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys. Inc.*, 419 U.S. 281, 285-86 (1974)). "While a court ought to 'uphold a decision of less than ideal clarity if [an] agency's path may reasonably be discerned,' the court should also insist on a 'reasonable explanation of the specific analysis and evidence upon which the agency relied.'" *Id.* (quoting *Bluewater Network v. EPA*, 370 F.3d 1, 21 (D.C. Cir. 2004)).

B. Review Here is *De Novo*

The primary question before the Court is whether two commissioners properly interpreted the law as it applies to political committees when they found no reason to believe

New Models could qualify as a political committee. Their analysis interpreted two provisions of law: the FECA's statutory threshold found in 52 U.S.C. § 30101(4) and the judicially-created "major purpose" test from *Buckley v. Valeo*, 424 U.S. at 79. *Chevron* deference is inappropriate for either interpretation for two reasons, and thus review here is *de novo.*

***1. Interpretations of Judicial Precedent are Reviewed* De Novo.**

First, 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); *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002) ("[N]o reason for courts . . . to defer to agency interpretations of the Court's opinions."). Here, the controlling commissioners' analysis of both questions relies on their interpretations of judicial precedent.

First, in interpreting the scope and application of *Buckley*'s "major purpose" test, the two controlling commissioners were indisputably involved in the interpretation of judicial precedent. They understood the "major purpose" requirement is solely the product of the judiciary. *See* AR091 & n.2 (citing *Buckley* as sole authority for "major purpose" test), AR098 (stating "[t]he Supreme Court has limited the definition of 'political committee' to include only those organizations that have the major purpose of nominating or electing federal candidates"), AR102 ("*Buckley*'s 'major purpose' test"), AR118–19 ("[T]he major purpose test is not expressed in the statute. The major purpose test was fashioned by the Supreme Court."). The two commissioners cite only that decision and judicial authority interpreting it in order to determine what the test is and how to apply it. *See* AR103 (discussing *MCFL*, 479 U.S. 238 and its interpretation of *Buckley*); AR104–05 (discussing lower court interpretations of *Buckley*).[10]

[10] Although the two commissioners discuss rulemaking, AR105–07, they do so only to note that the Commission has not adopted any rules interpreting *Buckley* or providing their own "major purpose" test.

Chevron deference, however, does not extend to interpretations of matters over which the commissioners have no authority, such as judicial precedent. *NE. Bev. Corp. v. NLRB*, 554 F.3d 133, 138 n* (D.C. Cir. 2009); *N.Y. N.Y., LLC*, 313 F.3d at 590; *Univ. of Great Falls v. NLRB*, 278 F.3d at 1341. That is true of the FEC's interpretation of *Buckley*'s major purpose test, which the D.C. Circuit sitting *en banc* found deserved no deference. *See Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1995) (*en banc*), *vacated on other grounds, FEC v. Akins*, 524 U.S. 11 (1998).[11] In that case, the D.C. Circuit confronted the FEC's interpretation and application of *Buckley*'s "major purpose" test, which the FEC argued was entitled to *Chevron* deference. 101 F.3d at 740. The D.C. Circuit, however, found "the FEC's plea for deference [was] doctrinally misconceived." *Id.* As the full court said then, and is true here:

> It is undisputed that the statutory *language* is not in issue, but only the limitation—or really the extent of the limitation—put on this language by Supreme Court decisions. We are not obliged to defer to an agency's interpretation of Supreme Court precedent under *Chevron* or any other principle. . . . This is especially true where, as here, the Supreme Court precedent is based on constitutional concerns, which is an area of presumed judicial competence.

Id. The *en banc* court concluded, "[i]n sum, since it is not, and cannot be, contended that the statutory language itself is ambiguous, and the asserted 'ambiguity' only arises because of the Supreme Court's narrowing opinions, we must decide *de novo* the precise impact of those opinions." *Id.* Moreover, the *en banc* court rejected any contention that deciding "how the major purpose test applies" is the same as interpreting *Buckley*. *Id.* at 740–41. The "key

[11] While the *en banc* court's opinion was subsequently vacated, the Supreme Court did not question the level of deference the D.C. Circuit imposed. Indeed, the Supreme Court also refused to afford any deference to the agency's interpretation, rather remanding the case back to the FEC to decide a separate question that would moot the case. *Akins*, 524 U.S. at 29. Moreover, even vacated, the *en banc* decision is "as persuasive as non-precedential authority can be." *CREW*, 209 F. Supp. 3d at 86 n.6 (noting "reasoning" of *en banc* court "has been adopted by subsequent D.C. Circuit panels (citing *Univ. of Great Falls*, 278 F.3d at 1341; *N.Y. N.Y., LLC*, 313 F.3d at 590)).

question" for the court was "whether the Supreme Court's major purpose limitation imposed in certain circumstances for constitutional reasons applies in another circumstance—this case—in which the same constitutional concerns may not be implicated." *Id.* at 741. Similarly, here, the Court must decide, *de novo*, whether *Buckley* applies here to exclude New Models from reporting.[12]

The same is true, moreover, about the two commissioners' interpretation of 52 U.S.C. § 30101(4). While a court would generally defer to an agency interpretation of its administering statute, where that interpretation "purport[s] to rest on the [agency's] interpretation of Supreme Court opinions," it receives no deference. *N.Y.N.Y., LLC*, 313 F.3d at 590 (D.C. Cir. 2002). In *N.Y. N.Y.*, for example, the court faced a National Labors Relations Board ("NLRB") interpretation of the National Labor Relations Act ("NLRA"). *Id.* at 587. Typically, such interpretations would receive *Chevron* deference. *See UC Health v. NLRB*, 803 F.3d 669, 672 (D.C. Cir. 2015). However, rather than simply affording the NLRB's interpretation deference because it interpreted the NLRA, the court looked to the justification provided by the NLRB, noting that its rationale "relied upon two of its previous decisions" which themselves "purport to rest on the Board's interpretation of Supreme Court opinions." *N.Y. N.Y., LLC*, 313 F.3d at 588,

[12] Judge Cooper recently found that commissioners' interpretation of *Buckley* did not deserve *Chevron* deference. *CREW*, 209 F. Supp. 3d at 86 (holding "[u]nder such circumstances, *Chevron* can have no sound place in evaluating whether an FEC interpretation is 'contrary to law'"). Judge Cooper, however, erroneously found deference was appropriate for the commissioners' interpretation of the temporal scope of *Buckley*'s major purpose test and whether it permitted a lifetime of existence test like the one applied here. *Id.* at 87–88 (construing interpretation to be about "how *Buckley* (and the test it created) should be implemented"). As Judge Cooper found that test was contrary to law even with this deference, *id.* at 94, that particular discussion of *Chevron* proved to be dicta. Moreover, it conflicts with *Akins* conclusion that a decision about "how the major purpose test applies" is the equivalent of interpreting *Buckley* and is afforded no deference. *Akins*, 101 F.3d at 741.

590. Consequently, the D.C. Circuit found "the Board's judgment is not entitled to judicial deference." *Id.* at 590.

Similarly, here, the two commissioners rested their interpretation of 52 U.S.C. § 30101(4) entirely on their interpretation of judicial authority. *See* AR109–10. In concluding § 30101(4)'s expenditure qualification for political committee status exclude gifts, deposits, or distributions the group makes to other political committees, even if they are for the purpose of influencing elections, *see* AR110, the two commissioners relied exclusively on case law, reading *Buckley* to define "expenditure" to "'reach only funds used for communications that expressly advocate the election or defeat of a clearly identified federal candidate,'" notwithstanding the plain text of the statute. AR109. (quoting *Buckley*, 424 U.S. at 79–80). Based solely on that interpretation of *Buckley*, they found New Models made no qualifying expenditures. *Id.* Consequently, their interpretation "rests on [their] interpretation of Supreme Court opinions" and "is not entitled to deference." *N.Y. N.Y., LLC*, 313 F.3d at 590.

In sum, because both legal analyses at issue here involve or rest on the interpretations of judicial precedent, neither warrants any deference from this Court.[13]

2. Review of Non-Precedential Views of Two Commissioners is De Novo.

The statement of reasons for dismissal on review here is not the statement of the FEC. Rather, it is a statement of the views of two commissioners who were able to deprive the Commission of the four votes necessary to take action or adopt a position. *See* AR091 (admitting statement is only joined by Commissioners Hunter and Goodman); AR122 (same); 52 U.S.C. § 30106(c) (four commissioners must adopt position to be considered view of agency).

[13] The two commissioners also at times cite their interpretation of the First Amendment, *see* AR098–99, to which the Court also owes no deference, *Public Citizen v. Burke*, 843 F.2d 1473, 1478 (D.C. Cir. 1988) ("The federal Judiciary does not, however, owe deference to the Executive Branch's interpretation of the Constitution.").

Although the court reviews that statement to determine whether the FEC's failure to act was contrary to law, because it provides the sole explanation for that decision, *see DCCC*, 831 F.2d at 1133, the statement is not and may not legally be considered a statement by the agency. Nor, for similar reasons, does the statement have force of law, a prerequisite for any agency statement to earn *Chevron* deference. Accordingly, the Court owes this statement no deference.

First, it is a bedrock principle that "*Chevron* deference is [only] owed to the decisionmaker *authorized to speak on behalf of the agency*." *Serono Labs, Inc. v. Shalala*, 158 F.3d 1313, 1321 (D.C. Cir. 1998) (emphasis added). Two commissioners, however, are not lawfully authorized to speak on behalf of the FEC in enforcement actions. Rather, "[t]he [FECA] clearly requires that for any *official* Commission decision there must be at least a 4-2 majority vote." *Common Cause v. FEC*, 842 F.2d 436, 449 n.32 (D.C. Cir. 1988). Accordingly, two commissioners cannot unilaterally issue a statement that could warrant *Chevron* deference.

Where an agency is headed by a multimember commission and a majority of the commission is required for action, the "opinions issued by one member . . . are not entitled to *Chevron* deference." *Fogo De Chao (Holdings) Inc.*, 769 F.3d at 1138 (citing *Martinez v. Holder*, 740 F.3d 902, 909–10 (4th Cir. 2014)). For example, the Board of Immigration Appeals ("BIA") is a multimember agency body and by law a minimum of three members are required to issue precedential agency opinions. *Martinez*, 740 F.3d at 909. Where courts review decisions that do not meet that required threshold, they do not afford those decisions any deference. *Id.* at 909–10; *accord Ramirez v. Sessions*, 887 F.3d 693, 702 (4th Cir. 2018) ("[T]he BIA's one-member decision . . . . is not eligible for *Chevron* deference."); *Rodriguez-Avalos v. Holder*, 788 F.3d 444, 449 n.8 (5th Cir. 2015) ("Single-judge decisions of the BIA . . . [are] not entitled to *Chevron* deference."). Accordingly, here, the statement on review is only the non-precedential

views of two commissioners, not the view of the FEC, and does not warrant *Chevron* deference.[14]

For similar reasons, the statement of two commissioners cannot bear force of law, a necessary condition for any agency decision to receive *Chevron* deference. *United States v. Mead Corp.*, 533 U.S. 218, 237 (2001) (*Chevron* deference inapplicable where authority to make rules with "force of law . . . was not invoked"); *see also Mayo Found. For Med. Educ. & Research v. United States*, 562 U.S. 44, 57 (2011) (*Chevron* deference only justified where agency's decision has "force of law" with "binding" effect); Daniel Tokaji, *Beyond Repair: FEC Reform and Deadlock Deference* at 3 (Mar. 28, 2018), https://bit.ly/2MCDZ88 ("Where the FEC declines to take action due to the absence of a majority, it is not acting with the 'force of law' and its decisions are therefore not entitled to judicial deference at *Chevron* 'Step Zero.'"). To warrant deference, it is not enough for the agency to generally have authority to make rules with force of law or for the decision to arise in the course of formal proceedings; the decision on review must itself have force of law. *Mead*, 533 U.S. at 237 (despite agency's general authority to issue decisions with force of law, because particular agency decision on review did not bear force of law, *Chevron* deference was unwarranted); *Gonzales v. Oregon*, 546 U.S. 243, 255–56 (2006) (agency decision must be "promulgated in the exercise of" agency's authority to make "rules carrying force of law" to warrant *Chevron* deference); *see also Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967, 1004 (2005) (Breyer, J. concurring) (stating formal procedures like rulemaking are "neither a necessary nor a sufficient condition for

[14] The two commissioners on review have themselves admitted that their minority opinions are not those of the agency. *See* Statement of Chairman Lee E. Goodman and Comm'rs Caroline C. Hunter and Matthew S. Petersen Re. the Comm'n's Vote to Authorize Defense of Suit in *Public Citizen, et al. v. FEC*, Case No. 14-cv-00148 (RJL) at 3–4 (Apr. 10, 2014), https://bit.ly/2ylO1am (recognizing agency's defense of rationale does not equate to "endorsement of the controlling group's legal rationale regarding the merits of the case").

according *Chevron* deference"). If a "decision's binding character as a ruling stops short of third parties and is conclusive only as between [the agency] itself and the [petitioner] to whom it was issued," then it is not entitled to *Chevron* deference. *Fogo De Chao (Holdings) Inc.*, 769 F.3d at 1137 ("[T]he expressly non-precedential nature of the Appeals Office's decision *conclusively* confirms that the Department was not exercising through the Appeals Office any authority it had to make rules carrying the force of law." (emphasis added)); *accord Mead*, 533 U.S. at 233 (holding if an agency decision's "binding character as a ruling stops short of third parties," then it lacks "force of law" and must be reviewed *de novo*).

"[A] statement of reasons [of less than four commissioners]," however, is "not . . . binding legal precedent or authority for future cases." *Common Cause*, 842 F.2d at 449 n.32 (discussing 52 U.S.C. § 30106(c)). Such statements are "not law," even if they are necessary for judicial review. *Id.* at 453. "To ignore this requirement would be to undermine the carefully balanced bipartisan structure which Congress has erected." *Id.* at 449 n.32. Consequently, a decision by two commissioners is ineligible for *Chevron* deference.

In re Sealed Case, 223 F.3d 775 (D.C. Cir. 2000)—a case the FEC has previously cited as contrary authority because the court there deferred to a statement joined by three members of the Commission—is both inapplicable and no longer good law. First, regardless of whatever authority *In re Sealed Case* provides for deference to three-member statements, it provides no basis to defer to a two-member statement like the one on review here. At the very least, Congress contemplated that three commissioners could block agency action, *see* 52 U.S.C. § 30106(c); Congress could have had no such expectation about two members.

Deferring to two-member statements has absurd results. First, it would mean the court must treat the views of only two commissioners as binding even when they have been rejected by

a majority of the Commission. If, for example, three commissioners found reason to believe a violation occurred and voted to enforce, one commissioner found reason to believe but still wished to dismiss for prudential reasons, and two commissioners found no reason to believe, a reviewing court could end up deferring to the opinion of the two commissioners despite it being squarely rejected by a bipartisan coalition of four others. Second, where the Commission is not fully staffed—as is true now, AR087[15]—it would give a single commissioner immense power that would upend the careful congressional structure of the FEC. Currently, a single member can prevent the Commission from reaching the four-vote threshold for action. Deferring to the opinion of that single member simply because he or she prevents action allows one commissioner to single-handedly rewrite law over the objections of three others.

Beyond the inapplicability of *In re Sealed Case*, it is also no longer good law. That case afforded deference to the three-member opinion solely because the court found that the FEC generally has authority to make decisions with force of law, without examining whether the decision on review had force of law. 223 F.3d at 780. The Supreme Court in *Mead* rejected that analysis, holding that the general grant of rulemaking authority is insufficient to afford *Chevron* deference to any particular agency decision. 533 U.S. at 237. Moreover, the D.C. Circuit in *Fogo De Chao (Holdings) LLC*, confirmed that a decision's lack of binding authority on third parties (regardless of any general authority on behalf of the agency to issue decisions with binding authority) "*conclusively* confirms" the decision is not to be afforded *Chevron* deference. 769 F.3d at 1137 (emphasis added). *In re Sealed Case* predated *Mead* and *Fogo De Chao (Holdings) LLC* and is directly in conflict with both of them. It therefore no longer has any

[15] Commissioner Goodman has resigned his office. Michelle Ye Hee Lee, FEC commissioner's departure leaves panel with bare-minimum quorum, *The Washington Post* (Feb. 7, 2018), https://wapo.st/2ti5XwU.

force. *See Am. Fed'n. of Gov't Emps. v. Veneman*, 284 F.3d 125, 129 (D.C. Cir. 2002) (holding it to be "plain error" to rely on pre-*Mead* jurisprudence affording *Chevron* deference without examining whether decision on review had force of law); Tokaji, *Beyond Repair* at 26 (*In re Sealed Case* is "not defensible under current law").

In sum, because the decision below was not adopted by the Commission and lacks any binding effect on third parties, it is not a decision to which the Court may afford *Chevron* deference. Accordingly, the Court reviews the legal questions here *de novo.*

III. The FEC's Dismissal is Contrary to Law

The FEC dismissed Plaintiffs' complaint against New Models because two commissioners impermissibly interpreted the law, concluding that (1) New Models's gifts, deposits, or distributions to other political committees did not count towards the FECA's $1,000 threshold for political committee status, and that (2) New Models was excused from reporting under *Buckley*'s "major purpose" test because a majority of its spending over its entire existence was not devoted to contributing to political committees or election advocacy. Those interpretations, however, are impermissible, and therefore the dismissal based on them is contrary to law. *See CREW*, 209 F. Supp. 3d at 95 (finding dismissal contrary to law where premised on impermissible interpretation of law); *see also Akins*, 101 F.3d at 744 (finding dismissal contrary to law where it was based on legal error, regardless of any role discretion may play).

A. The Two Commissioners' Statutory Analysis is Contrary to Law

The first reason the two commissioners found there was not even a reason to believe New Models was a political committee is because they concluded that New Models's $3 million gifted to, deposited with, or distributed to political committees, which New Models and the political

committees admitted was for the purpose of influencing elections, nevertheless could not satisfy the FECA's statutory test for political committees. AR108–10. To reach that conclusion, the two commissioners, in reliance on *Buckley*, interpreted the $1,000 expenditure threshold in 52 U.S.C. § 30101(4) to look only to "express[] advoca[cy]," and to ignore any other type of political spending. AR109. This interpretation contravenes the law, precedent, and reason, and is based on an egregious misreading of *Buckley*.

1. The Two Commissioners' Interpretation Conflicts with Plain Text, Precedent, and Purpose.

The FECA provides that any group that makes more than $1,000 in "expenditures" in a year is a political committee and thus subject to the obligations of such committees. 52 U.S.C. § 30101(4)(A). 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." *Id.* at § 30101(9)(A). The FECA also provides express exclusions from the definition of "expenditure," none of which, however, exclude deposits or gifts to another political committee or, for that matter, "contributions." *Id.* at § 30101(9)(B).

There is no reasonable dispute here that the money transferred from New Models to other political committees was "for the purpose of influencing any election for Federal office." New Models and the recipients both called the funds "contributions." AR035, AR038–39, AR042, *see also* AR052 ("New Models does not dispute that it made contributions."), AR095–96 (describing transfers as "contributions"); 52 U.S.C. § 30104(b)(2) (political committees must report "contributions"). Contributions, as defined by the FECA, are transfers "for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i); *see also Buckley*, 424 U.S. at 79 (political committees "are, by definition, campaign related").

Nor is there any serious dispute that the money provided by New Models to the political committees were in fact "gift[s]," "deposit[s]," or "distribution[s]." 52 U.S.C. § 30101(9)(A). Once again, by admitting the transfers were contributions to the political committees, all parties concede that the transfers were either a "gift, subscription, loan, advance, or deposit of money or anything of value." *See id.* at § 30101(8)(A). All of those types of exchanges, except "subscription," are also defined by the FECA to be expenditures. *See id.* at § 30101(9)(A).[16] Thus, here, the law and undisputed facts expressly provide that the funds in question meet the plain terms of an "expenditure." Perhaps that is why New Models conceded from the start that it met the FECA's statutory threshold. *See* AR052, AR056 ¶ 3, AR061.

That is also why the FEC has previously found a group's distributions to political committees can qualify the distributor as a political committee under the FECA, as the OGC recognized. AR063 (citing Advisory Opinion 1996-18 (Int'l Ass'n of Fire Fighters) (July 14, 1996)). In Advisory Opinion 1996-18, https://bit.ly/2IiKfhE, the Commission considered a request from an organization that wanted to set up a conduit organization that would accept funds from individual donors and pass them through to a political committee, but only at the request and direction of the individual donor. *See* AO 1996-18 at 2. Of relevance here, the Commission found that if the conduit account exercised any control over the funds, then the conduit organization would itself qualify as a political committee. *Id.* at 2–3. That is because the conduit would be "making contributions" itself to the political committee, which the FEC understood would be qualifying activity (*i.e.*, an expenditure) under the FECA. *Id.* The advisory opinion was adopted unanimously. Certification, Draft AO 1996-18 (June 13, 1996), https://bit.ly/2KcmsoR, *see also* Advisory Opinion 1996-13 (Townhouse Associates),

[16] There is no suggestion in the record that the two commissioners understood the transfers were "subscriptions," nor would the cash transfers meet any typical definition of "subscription."

https://bit.ly/2M25JSo (noting that group's in-kind contributions to political committees by hosting rent-free "political committee events" could qualify group as political committee itself).[17]

Similarly, in *Akins*, the D.C. Circuit sitting *en banc* approvingly noted an interpretation of § 30101(4)'s "expenditure" that was not limited to independent expenditures. In that case, the *en banc* court reviewed the FEC's failure to find probable cause that the American Israel Public Affairs committee ("AIPAC") was a political committee. 101 F.3d at 734. The FEC had found that AIPAC had satisfied the FECA's $1,000 expenditure threshold because "[t]he Commission determined that AIPAC likely had made campaign *contributions* exceeding the $1,000 threshold." *Id.* (emphasis added) (discussing candidate contributions); *see also id.* at 744 (noting "[t]here is no contention that AIPAC's disbursements were independent expenditures"); *see also Akins v. FEC*, 66 F.3d 348, 350 (D.C. Cir. 1995) ("[T]he FEC found that AIPAC has made contributions that likely crossed the $1,000 threshold . . . ."), *rev'd by Akins*, 101 F.3d 731. While the FEC's application of the "major purpose" test was the focus of the court's attention, *see Akins*, 101 F.3d at 735, the court found that the $1,000 in "campaign contributions" would have qualified AIPAC as a political committee but for an erroneous major purpose analysis, *see id.* at 744.

As this authority shows, the overlap between "contribution" and "expenditure" is baked into the FECA. The FECA expressly contemplates that certain types of transactions will (or would, if not exempted) meet either definition. As noted above, the FECA uses nearly identical definitions for "contribution" and "expenditure," and expressly treats some transfers (like

[17] The two commissioners attempted to distinguish this precedent by asserting it concerned "candidate involvement." AR110. AO 1996-18 and 1996-13 involve contributions to political committees, however, not contributions directly to candidates.

"gift[s]" and "deposit[s]") as satisfying both definitions. Similarly, Congress carved out from either definition certain transactions that otherwise would qualify under both terms. *Compare* 52 U.S.C. § 30101(8)(B)(v) *with id.* § 30101(9)(B)(iv) (sample ballots); *compare id.* § 30118(b) *with id.* § 30101(8)(B)(vi) (payments which are not expenditures under § 30118(b) are not contributions); *compare id.* § 30101(8)(B)(ix) *with id*. § 30101(9)(B)(viii) (payments for materials for volunteer activities); *compare id.* § 30101(8)(B)(xi) *with id.* § 30101(9)(B)(ix) (voter registration and get out the vote). Indeed, certain expenditures are explicitly treated as contributions if they are coordinated with a candidate. 52 U.S.C. § 30116(a)(7)(C)(ii); 11 C.F.R. § 109.20 ("Any expenditure that is coordinated . . . is either an in-kind contribution, or a coordinated party expenditure with respect to, the candidate"). In fact, they are reported *both* as expenditures and contributions. *See* 11 C.F.R. § 109.21(b). The two commissioners themselves admitted that contributions can count as expenditures. AR110; *see also Akins*, 101 F.3d at 734 ("Expenditures have been classified by caselaw and FEC interpretation to include . . . direct contributions to a candidate.").

Treating disbursements to political committees as qualifying expenditures under 52 U.S.C. § 30101(4) also serves the purpose of the FECA's disclosure requirements: to ensure voters are "fully informed" about "[t]he sources of a candidate's financial support . . . ." *Buckley*, 424 U.S. at 67, 76 (1976). It is that justification which requires those who make expenditures on campaign ads to report the source of funds used to create those ads. *See, e.g.*, *Citizens United*, 558 U.S. at 369; *Stop This Insanity*, 761 F.3d at 16–17. Voters have an equal interest in knowing who is funding a group that spends significantly on campaign ads as they do in knowing who is funding a group that spends significantly on funding other groups to create campaign ads. That interest is severely frustrated if qualifying expenditures that trigger political

committee status exclude the funding of other politically active groups. Voters would never learn the "sources of a candidate's financial support," *Buckley*, 424 U.S. at 76, if the source could be hidden behind a non-reporting entity who contributors know will spend their funds on political activities.

2. The Two Commissioners' Reliance on Buckley *is Misplaced.*

The two commissioners ignored the FECA's clear terms, prior applications, and purpose because they impermissibly interpreted *Buckley* to compel their desired result. They read *Buckley* to construe "expenditure," wherever that term is used in the statute, "'to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified federal candidate.'" AR109 (citing *Buckley*, 424 U.S. at 79-80). In other words, they treat the word as the equivalent of an "independent expenditure." *Id.* According to them, as New Models did not itself expend funds "for communications that expressly advocate," its spending could not qualify it as a political committee. AR109–10. *Buckley*, however, compels no such absurd conclusion; the two commissioners simply rely on inapposite parts of the case.

In the portion of the opinion quoted by the two commissioners, the Court was construing a provision of the FECA not relevant here, 2 U.S.C. § 434(e) (codified as amended at 52 U.S.C. § 30104(c)). *Buckley*, 424 U.S. at 74. That provision required anyone making more than $100 in expenditures to file a report with the FEC. *Id.* at 74–75. The Court, concerned that a reporting requirement for any person and any type of expenditure of as little as $100 would sweep too broadly, construed that provision to incorporate the meaning of expenditure it provided to yet a third section, 18 U.S.C. § 608(e), which limited individual expenditures. *Id.* at 39, 78–80. That section, 608(e), limited expenditures "relative to a clearly identified candidate," which "key language" the court found limited the scope of the provision to ads "advocating the election or

defeat of a candidate." *Id.* at 42–34 (quotation marks omitted). To address the Court's concerns about the breadth of § 434(e), the Court imported that language into § 434(e), and thus limited § 434(e) to expenditures "relative to a clearly identified candidate," *i.e.*, those that "expressly advocate." *Id.* at 80 ("To insure that the reach of § 434(e) is not impermissibly broad, we construe 'expenditure' for the purposes *of that section* in the same way we construed the terms of § 608(e)." (emphasis added)).

The quoted portion of *Buckley* thus was expressly considering the scope of "expenditure" only for the purposes "of that section" 434(e). *Id.* at 80. *Buckley* plainly did not limit the term "expenditure" to express advocacy wherever the term was to be found in the Act. It was therefore impermissible for the two commissioners to interpret *Buckley* to do just that and to limit "expenditure" in § 30101(4) to express advocacy alone.

Indeed, interpreting *Buckley* to limit "expenditure" wherever it appears in the statute to mean "independent expenditure," as the two commissioners propose, places the decision in conflict with the text of the FECA. For example, the FECA itself is clear that an "independent expenditure" is just a type of "expenditure." 52 U.S.C. § 30101(17). The two commissioners' proposed gloss on "expenditure" would thus make the definition of "independent expenditure" circular. In addition, other provisions of the statute which treat "expenditure," "independent expenditure," and "express advoca[cy]" as distinct concepts would be rendered superfluous. *See* 52 U.S.C. § 30101(9)(B)(iii) (excluding from definition of "expenditure" expenses for membership communications that do not "expressly advocate[e]"); *id.* at § 30104(b)(4) (groups must separately report both "expenditures" and "independent expenditures").

The two commissioners also make a passing assertion in a footnote that *Buckley*, *Citizens United*, and *SpeechNow.org*, put New Models's gifts, deposits, or distributions to the super PACs

beyond the reach of the FECA because they "bear even less risk of corruption than the committees' expenditures do." AR110. But this argument is based on a nonsensical reading of the case law. First, there is no dispute that contributions to super PACs are within the reach of the FECA—the two commissioners themselves recognize New Models's disbursements fall under disclosure requirements when they characterize those funds as "super PAC contributions." AR095. Second, the case law does not support an assumption that transfers from a group like New Models to a super PAC raise less corruption risk than a super PAC's expenditures. The risk of corruption, even for independent campaign activities, arises from a candidate's willingness to trade favors with the individual responsible for financially supporting them. *See Citizens United*, 558 U.S. at 357. There is no reason why that risk would be lessened if that financial support first flowed through an entity like New Models on its way to the group that finally uses it to make a campaign ad. Finally, and most importantly, the two commissioners simply ignore the fact that the case law shows that reporting obligations like the FECA's political committee regime serve purposes beyond combating the risk of corruption. *See Buckley*, 424 U.S. at 66–67 (identifying three disclosure interests, including "provid[ing] the electorate with information 'as to where political campaign money comes from'"); *Citizens United*, 558 U.S. at 369 ("[T]he public has an interest in knowing who is speaking about a candidate," which "interest alone is sufficient to justify" disclosure); *SpeechNow.org*, 599 F.3d at 698 ("[T]he public has an interest in knowing who is speaking about a candidate and who is funding that speech."). Regardless of whether any potential for corruption is lessened, the interest in disclosure fully justifies application of the plain terms of the law.

The two commissioners' reliance on *Buckley* is misplaced. The plain terms of the law, as well as agency and judicial precedent, confirm that New Models's gifts to or deposits with the

super PACs qualify as "expenditures" under 52 U.S.C. § 30101(4). The two commissioners' interpretation otherwise is impermissible.

B. The Two Commissioners' Lifetime-Focused Test for "Major Purpose" is Contrary to Law

Putting aside the two commissioners' erroneous analysis of 52 U.S.C. § 30101(4), the majority of their statement of reasons focused on their conclusion that New Models is excused from reporting under *Buckley*'s major purport test. AR110. In reaching that conclusion, they stated that the proper scope of analysis for New Models's purpose in 2012 was New Models's activities "during its lifetime." AR111 (rejecting OGC's calendar year focus as "myopic"); AR119 (same). Employing this understanding, they found that, even though New Models's donations counted towards finding the group's major purpose was to elect candidates and even though they accounted for 68.5% of New Models's total spending in 2012, that New Models was excused from reporting because, they found, the donations accounted for about 19.5% of New Models total spending between 2002 and 2015. *See* AR095–97.[18] The two commissioners' lifetime test, however, is contrary to law. In fact, it had been struck down as contrary to law by a judge in this district in a decision issued only one year before the Commission's vote in this case. AR087. Moreover, even without the benefit of that decision, the two commissioners' test is contrary to law because it has no basis in *Buckley*, it conflicts with the plain text of the FECA, and leads to absurd results.

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

In *CREW v. FEC*, Judge Cooper confronted an identical legal analysis adopted by the same two commissioners here that was used to justify a vote to dismiss CREW's complaint against an organization that had devoted millions to elections in recent years, but which had a

[18] The two commissioners would have apparently also considered New Models's activity in 2000 and 2001, but lacked data for those years. AR097.

long prior existence that left its recent political activities at less 50% of its lifetime spending. *CREW*, 209 F. Supp. 3d at 84; *see also* 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), https://bit.ly/2K1WWCA. Just as here, the three commissioners interpreted *Buckley* to require them to give equal weight to all of the organization's activity over its lifetime rather than to focus on its activity within the calendar year in question. *CREW*, 209 F. Supp. 3d at 84. Judge Cooper, even erroneously applying a deferential standard, held that the test was "contrary to law." *Id.* at 94. He found that looking at a group's "relative spending over an organization's lifetime runs the risk of ignoring the not unlikely possibility, contemplated by the Supreme Court, that an organization's major purpose can *change*." *Id.* (citing *MCFL*, 479 U.S. at 262). He quoted the Supreme Court's recognition that "a group's 'spending [may] *become* so extensive that the organization's major purpose may be regarded as campaign activity [such that] the corporation would be classified as a political committee.'" *Id.* (quoting *MCFL*, 479 U.S. at 262). Judge Cooper noted a changed purpose described the activities of the group before him, which "spent no money on election-related spending until 2008," when *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), first allowed some limited corporate political activity, "but then shifted its expenditures towards electioneering communications and express advocacy over the following several years." *CREW*, 209 F. Supp. 3d at 94. He noted that the commissioners' test meant that "[a] half-century old organization with a substantial spending history could commence spending handsomely on election-related ads and continue such expenditures for decades before its new 'major purpose' would be detected by the controlling Commissioners' lifetime-only approach." *Id.* "Surely, that cannot be what Congress contemplated in defining 'political committee' in terms of calendar-year spending under FECA." *Id.*

Judge Cooper's decision applies squarely to the two commissioners' analysis here, which repeated nearly verbatim the analysis he rejected before. *See* AR123–25 (quoting decision at length to oppose statement on review here). Indeed, it is shocking that the two commissioners' statement never even acknowledges Judge Cooper's rejection of their test or makes any attempt to address the legal infirmities he identifies. Rather, they miscite the case to say that he actually upheld their lifetime test, because he noted that it is "not *per se* unreasonable" to look at a group's overall activities. AR115, AR119.

No reasonable reading of Judge Cooper's opinion could find it to be an endorsement of the commissioners' lifetime test. The two commissioners' flagrant attempts to misconstrue it merely betray the fact that the test remains contrary to law, as Judge Cooper found. At best, the two commissioners engage in a cursory analysis in a footnote to find no "reason to believe that New Models's major purpose changed," AR115, and that New Models's "most recent calendar year spending"—which they construed to mean whatever year they finally decided to look at a complaint—included "zero contributions to federal political committees." AR117. These conclusions are based on absurd and impermissible interpretations of Judge Cooper's decision and *Buckley*'s test, and an arbitrary and capricious review of the facts.

With respect to their finding that New Models's activity did not change, the controlling commissioners merely restate their lifetime test—they found that New Models's purpose did not change because its 2012 activities did not exceed 50% of its lifetime spending. AR115. This is the very equal weighting of past and current spending Judge Cooper found unlawful. *CREW*, 209 F. Supp. 3d at 94.

In obstinately sticking to their unlawful test, the two commissioners fail to address the different contexts for New Models's spending outside of 2012 that show such years are not

instructive. New Models's pre-2010 spending understandably does not involve contributions to political groups because prior to that time, that activity was illegal. Observing that a group spent no money on such activity at one time, but began to do so when the law changed, indicates the group's purpose changed with the changing landscape. *CREW*, 209 F. Supp. 3d at 94. New Models made its first foray into campaigning in late 2010, making a $265,000 gift, deposit, or distribution to CWA PAC shortly after it was first legal to do so. AR095. Confirming this change in purpose, in the next election year, 2012, New Models spent twice as much on campaign activity as it did on other activity, and twice as much as New Models had spent in the entire previous year. AR096. That activity proves the purpose of the group changed.

New Models did not engage in political activity after 2012, but its activity after that time is also irrelevant. First, the issue here is what New Models's major purpose was in 2012, the year CREW alleged it hit the $1,000 expenditure threshold. AR096. Second, a group's behavior is very likely to change after it is aware that a complaint has been filed against it solely to evade its legal obligations, without any concomitant change in purpose. *See* AR046 (New Models notified of complaint in September 2014). Third, even if these following years could show that New Models's purpose reverted back to non-campaign activity after 2012, the FECA already expressly provides the remedy for that: the group may terminate its political committee status. *See* 52 U.S.C. § 30103(d). Absent that, a group does not cease to be a political committee just because its purpose changes from nominating or electing candidates.

Thus the only potentially relevant years in even a "lifetime" test are 2011 and 2012, the only full years in which New Models could have legally spent money on campaign activity but before its political committee status was to be evaluated. Over the course of those two years,

New Models's expenditures amounted to over 51% of its activity, and thus its major purpose even over those two years was to elect candidates.

In addition to their lifetime test, the two commissioners also purport to place special emphasis on the "most recent . . . year" spending—which they interpret to be whatever year they decide to vote. AR117. But that is a similarly absurd reading of *Buckley* and inconsistent with *CREW*. In *CREW*, the court looked at the group's spending in 2010, the most recent election year for which data was available *before* the complaint was filed. *See CREW*, 209 F. Supp. 3d at 83. In that case, even though the FEC only voted on CREW's complaint in 2014, *id.*, neither the FEC nor Judge Cooper thought the group's 2013 or 2014 spending was relevant. Effectively, what the two commissioners propose is to allow a group to become alerted that it is under suspicion, and then provide the group with a year or more to take time off from campaign spending, and thus evade any application of the FECA. Such an interpretation of *Buckley* would not ensure political committee reporting "fulfill[s] the purposes of the Act." *Buckley*, 242 U.S. at 79.

A court of law has already declared the analysis employed here contrary to law. The two commissioners blatantly disregard that opinion and even resort to misciting it. There is no way to reconcile their opinion with Judge Cooper's decision and, for the same reasons Judge Cooper threw out the prior analysis, the Court here should throw out this analysis.

2. Only a Calendar Year Test Comports with the Statute, Precedent, and Common Sense.

Putting aside Judge Cooper's opinion, a calendar year focus for the major purpose test is the only test that accords with the test provided for by Congress and applied in precedent, and there is no indication that the Court in *Buckley* intended to supplant that focus. The commissioners' unpersuasive hypotheticals and inapposite authority do not show otherwise.

The FECA expressly provides that a group's political committee status depends on that group's activity "during a calendar year." 52 U.S.C. § 30101(4). Nothing in *Buckley* questioned that focus or suggested that a group's major purpose was to be determined outside of that time frame.

Further, a calendar year test accords with the statute's provision that a political committee report information for each "calendar year," 52 U.S.C. § 30104(b), and its provision that a group may only terminate its status by ceasing campaign activity and filing a report with the FEC, *id.* at § 30103(d). With respect to the last provision, under the two commissioners' test, a political committee could simply choose to ignore the termination requirements and instead reduce (but not eliminate) its campaign spending. After enough time, the group would cease to be a political committee under their framework without needing to file any termination paperwork. In fact, the result would not only be that the group gets to change its future status, but its new activity under a lifetime test would have the result of changing history—erasing the group's prior major purpose.

The FECA's clear calendar year focus explains agency and judicial precedents' focus on a group's activities in a single year to determine its major purpose, at least where that information is available. For example, in *FEC v. Malenick*, the court held the organization was a political committee because its activities in a single calendar year established its major purpose. 310 F. Supp. 2d 230, 235–37 (D.D.C. 2004) ("[B]ecause [the group's] major purpose was the nomination or election of specific candidates in 1996 . . . I find [the group] operated as a 'political committee' in 1996."). Similarly, the FEC has found groups' major purposes are to influence elections based only on their activities in a calendar year. *See* Conciliation Agreement ¶¶ 1, 25, MUR 5492 (Oct. 32, 2006), https://bit.ly/2MC3E0F (finding group's major purpose was

to influence campaigns because the "majority [of its] disbursements during the period" from August 2004 to November 2004 "were for allocable federal/nonfederal activities," despite fact group was founded in 1962); *see also* AR071 (OGC report listing other agency precedents).

This calendar year focus is supported by common sense—both because groups' purposes can change, *MCFL*, 479 U.S. at 262, and because voters have a "First Amendment right[] to know the identity of those who seek to influence their vote" now, regardless of the influencer's past activities. *Stop This Insanity*, 761 F.3d at 16–17. A calendar year test allows voters to learn "who is funding [campaign] speech" at the time it is occurring, disclosing the identities of donors who would have given to New Models that year. *SpeechNow.org*, 599 F.3d at 698.

This test also avoids absurdities like where "[a] half-century old organization with a substantial spending history . . . spend[s] handsomely on election-related ads and continue[s] such expenditures for decades," without triggering the FECA's political committee provisions. *CREW*, 209 F. Supp. 3d at 94. Such a group would rather become a political committee when it spent over $1,000 and when its non-campaign spending ceased to be its primary activity for that year. It also avoids treating groups differently based solely on long past spending.[19]

In response, the two commissioners spin hypothetical cases which they assume show a calendar approach fails "to act as a constraint." AR118. But *Buckley* did not fashion the major purpose test to exclude the maximal amount of organizations from reporting; rather it sought only to exclude groups for whom reporting would not "fulfill the purposes of the Act." *Buckley*,

[19] The two commissioners lament that a group may not know its total calendar year spending when it first crosses the $1,000 threshold. AR120. Of course, a group would also not know its "lifetime" spending, particularly as the two commissioners would consider *future* spending as well. *Id.* But the test is also quite workable. If, at the time a group meets the FECA's statutory thresholds, its campaign spending is over the requisite proportion of its total spending for that year, it would register. If it is less, then the group could continue without registering until it hit the requisite proportion.

424 U.S. at 79. The two commissioners fail to show why voters have no legitimate interest in any of the groups they conjure and why disclosure would not fulfill the FECA's purposes.

Where a group makes a "handful of contributions in a brief snapshot in time," and those "handfuls" are in fact the majority of that group's spending in a year, AR111, voters have a legitimate interest in knowing who is behind the money so they can know who is ultimately funding the activity to support or oppose candidates. *SpeechNow.org*, 599 F.3d at 698. Similarly, despite the two commissioners' unsupported assumption otherwise, voters have the same interest in identifying the donors behind a group that spends "*90%*" of its funds in a year on express advocacy, and that interest is not lessened merely because the group devoted only "10% [to] express advocacy" in other years. AR120 (emphasis added). Clearly, its major purpose that year was to influence the elections, and voters have a right to know where its funds came from, even the group was motivated by its larger ideological goals. Further, if after spending 90% of its funds to elect or defeat candidates, it wished to cease reporting, *id.*, it could simply follow the procedures set out by the FECA, 52 U.S.C. § 30103(d). Finally, voters are entitled to know who funds a group which springs out of nowhere and then immediately spends heavily on elections, regardless of the fact that the group has hopes to spend on other issues in the future. AR120.

The two commissioners assume, without explanation, that subjecting these groups to reporting would not fulfill the purposes of the Act and are excluded by *Buckley* because they simply read *Buckley* as a command to "constrain[]." AR118. But *Buckley* squarely upheld reporting rules where they serve voters' informational interests. 424 U.S. at 66–67. The two commissioners fail to show how the FECA's calendar year test is not so connected.

Without any articulable support in reason, the two commissioners resort to misciting legal authority to support their lifetime test. For example, they rely on *FEC v. GOPAC, Inc.*, 917

F. Supp. 851 (D.D.C. 1996); *see* AR071, AR105, AR119. But *GOPAC* considered whether the FECA could apply to a group whose focus was state and local—but not federal—elections, and found that it could not. 917 F. Supp. at 858. *GOPAC* also considered the group's two-year budget, from 1989-1990, even though the group was formed in 1979—thus supporting a more limited window for analysis than the controlling commissioners propose. *Id.* at 853. They also cite *Akins v. FEC*, but there was no indication in that case that the group's spending approached a significant portion of its activities in any year. *See* 736 F. Supp. 2d 9, 19 (D.D.C. 2010). The two commissioners also oddly cite two authorities that flatly reject their approach. They cite *Malenick*, which, as discussed above, held a group qualified as a political committee due to its activities in a single year, 310 F. Supp. 2d at 235–37. And they cite *CREW*, 209 F. Supp. 3d at 94—the decision that squarely rejected the approach they have taken here. AR112

The two commissioners pair this inapposite judicial authority with inapposite agency authority. They cite agency decisions that evaluated the groups' purposes in each year, either finding it met that purpose in every year, *see* AR115, AR119; *see also* General Counsel's Br. at 12, 18, 26, MUR 5365 (Club for Growth, Inc.) (Apr. 25, 2005), https://bit.ly/2ymjNnP (evaluating spending each year separately, finding group became political committee in first year evaluated when campaign spending exceed 97% of its annual budget), or decisions where the group did not have a qualifying major purpose in any single year, *see* AR115–16, AR119; *see also* General Counsel's Report #2 at 3, 5–6, MUR 5751 (The Leadership Forum) (July 13, 2006), https://bit.ly/2t9pVuF (finding group did not make $1,000 in expenditures or accept $1,000 in contributions in any year); General Counsel's Br. at 102, MUR 2804 (AIPAC) (Jan. 30, 1992), https://classic.fec.gov/disclosure_data/mur/2804_B.pdf (engaging in no major purpose analysis, but finding that, despite likely crossing $1,000 threshold, campaign activity constituted "only a

small portion of [AIPAC's] overall activities"). The two commissioners further cite MUR 3669 (Christian Coalition), but admit that the analysis of the group's major purpose involved evaluation of activities in each of five years separately. AR116.[20] Lastly, they cite MUR 5511 (Swiftboat Vets) and MUR 5754 (MoveOn.org) to note the Commission observed their post-election cessation of activities, AR120, but notably the FEC ignored these groups' post-election spending on "legal and administrative costs," Conciliation Agreement ¶ 16, MUR 5754 (Dec. 12, 2016), https://bit.ly/2M76vxh, and "charitable contributions," Conciliation Agreement ¶ 36, MUR 5511 (Dec. 3, 2006), https://bit.ly/2yrmxQI.

In sum, Judge Cooper was correct in finding the commissioners' lifetime spending test was contrary to law, a conclusion equally applicable here. The two commissioners' obstinate refusal to accord with the law despite this correction is alarming. The authority they cite is no more relevant than when Judge Cooper rejected it, and simply cannot contravene the fact that the FECA is expressly written to cover groups because of their spending in a "calendar year." 52 U.S.C. § 30101(4). An interpretation of *Buckley* that supplants that is impermissible. In sum, the two commissioners' justification, and the dismissal that resulted, is contrary to law.

CONCLUSION

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

[20] The FEC has not made the materials from MUR 3669 publicly available, so Plaintiffs are unable to verify the two commissioners' representations about this MUR.

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Respectfully submitted,

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