IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, *et al.*,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,
Defendant.

Civil Action No: 14-148 (RJL)

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The Plaintiffs, Public Citizen *et al*., by their undersigned counsel, and pursuant to Fed. R. Civ. P. 56, the Federal Election Campaign Act (FECA), 2 U.S.C. § 437g(a)(8)(C), and the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) & (C), respectfully move this Court for a summary judgment declaring that the failure of the Federal Election Commission (FEC) to find "reason to believe" that Crossroads GPS violated FECA and the FEC's subsequent dismissal of Plaintiffs' administrative complaint was arbitrary, capricious, an abuse of discretion and otherwise contrary to law, and directing the Commission to conform with such declaration within 30 days consistent with the Court's judgment.

Support for this motion is set forth in the accompanying Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment; the Declaration of Craig Holman; the Declaration of Kevin Zeese; and the joint appendix containing copies of those portions of the administrative record that are cited or otherwise relied upon, to be filed no later than November 26, 2014. Plaintiffs' requested relief is set forth in the accompanying Proposed Order. Plaintiffs respectfully request oral argument on this motion.

Dated this 30th Day of July, 2014.

Respectfully submitted,

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PRELIMINARY STATEMENT

This lawsuit is brought by Plaintiffs Public Citizen, Inc., ProtectOurElections.org, and two individuals, Craig Holman and Kevin Zeese, who seek a declaration from this Court under 2 U.S.C. § 437g(a)(8)(C) that the Federal Election Commission's (FEC) dismissal of Plaintiffs' administrative complaint against Crossroads GPS was arbitrary, capricious, an abuse of discretion and otherwise contrary to law. On October 14, 2010, Plaintiffs filed an administrative complaint with the Commission alleging that Crossroads GPS had violated various provisions of the Federal Election Campaign Act of 1971 ("FECA" or "the Act"), as amended, 2 U.S.C. § 431 *et seq*., by spending millions of dollars to influence the 2010 congressional elections without registering with the Commission as a "political committee" or complying with attendant campaign finance disclosure requirements. Against the recommendation of its General Counsel, the Commission failed by a vote of 3-3 to authorize an investigation into whether a violation had occurred. Without the four affirmative votes needed to proceed with an investigation, the Commission voted 6-0 to close the case. Because the decision of the three commissioners who voted not to proceed rested on incorrect and unsustainable interpretations of the campaign finance laws, the decision was contrary to law and should be set aside by this Court.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

To serve the electorate's compelling interest in knowing "where political campaign money comes from," *Buckley v. Valeo*, 424 U.S. 1, 66 (1976), federal election law imposes certain disclosure obligations on "political committees." In furtherance of the Act's critical disclosure function, each political committee "must register with the Commission, file periodic reports for disclosure to the public, appoint a treasurer who maintains its records, and identify [itself] through 'disclaimers' on all of [its] political advertising, on [its] websites, and in mass

emails." AR 353 (First General Counsel's Report at 14) (citing 2 U.S.C. §§ 432–434, 11 C.F.R. § 110.11(a)(1)). These reports must also identify each person who in any calendar year contributes to or receives from the committee more than $200, so that voters have information as to the true sources of funds used for campaign spending.

A "political committee" is any "committee, club, association, or other group of persons" that receives more than $1,000 in contributions or makes more than $1,000 in expenditures during a calendar year, 2 U.S.C. § 431(4); *see also* 11 C.F.R. § 100.5(a), and that has the "major purpose" of influencing federal elections.[1] The FEC employs a two-prong test for determining political committee status under the Act. The first prong asks whether an entity or other group of persons has made more than $1,000 in "expenditures" or received more than $1,000 in "contributions" during a calendar year. 2 U.S.C. § 431(4)(A). The second prong asks whether the organization has as its "major purpose . . . the nomination or election of a candidate." *Buckley*, 424 U.S. at 79. The FEC makes political committee status determinations on a case-by-case basis.

Any person may file an administrative complaint with the Commission alleging a violation of FECA. 2 U.S.C. § 437g(a)(1). The Commission, after reviewing the complaint and any response filed by the respondent, may then vote on whether there is sufficient "reason to believe" that a violation has occurred to justify an investigation. FECA requires an affirmative vote of four Commissioners to undertake most agency actions, *id.* § 437c(c), including a "reason to believe" finding necessary to initiate an investigation for violation of the statute. *Id.*

[1] The "major purpose" test was originally derived from the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). In *Buckley*, the Court construed the term "political committee" to "only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* *See* Part III.B, *infra*.

§ 437g(a)(2). After the investigation, the General Counsel can recommend that the Commission vote on whether there is "probable cause" to believe the law has been violated. *Id.* § 437g(a)(3). If the Commission determines, by an affirmative vote of at least four Commissioners, that there is probable cause to believe that a violation of the law has been committed, the Commission attempts to correct such violation and enter a conciliation (i.e., settlement) agreement with the respondent, which may include payment of a civil penalty. *Id.* § 437g(a)(4)–(5). If the Commission is unable to correct the violation and enter a conciliation agreement with the respondent, the Commission may, by the affirmative vote of at least four Commissioners, institute a civil action against the respondent in federal district court. *Id*. § 437g(a)(6)(A).

Because it triggers only the initial phase in a Commission enforcement proceeding, the "reason to believe" standard is a low threshold. Although "reason to believe" is not defined in FECA, the Commission has described its views in a policy statement: "The Commission will find 'reason to believe' in cases where the available evidence in the matter is at least sufficient to warrant conducting an investigation, and where the seriousness of the alleged violation warrants further investigation or immediate conciliation." Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545, 12545 (March 16, 2007). "The Commission finds 'no reason to believe' when the complaint, any response filed by the respondent, and any publicly available information, when taken together, fail to give rise to a reasonable inference that a violation has occurred, or even if the allegations were true, would not constitute a violation of the law." *Id.* at 12,546.

If the Commission dismisses an administrative complaint, the "aggrieved" complainant may file a petition seeking judicial review of the Commission's action in the United States District Court for the District of Columbia. 2 U.S.C. § 437g(a)(8)(A). If the court declares that

the Commission's dismissal of the administrative complaint was "contrary to law," it may order the Commission to conform to the declaration within 30 days. *Id.* § 437g(a)(8)(C).

B. Statement Of Facts

1. *Crossroads GPS*

Crossroads GPS is a nonprofit corporation that was founded in June 2010 and that applied to the Internal Revenue Service (IRS) for recognition of tax-exempt status as a social welfare organization under 26 U.S.C. § 501(c)(4) in September 2010. AR 343 (First General Counsel's Report at 4). Several letters challenging Crossroads GPS' eligibility for section 501(c)(4) status have been filed with the IRS. *Id.* at n. 3. The IRS has yet to rule on Crossroads GPS' application. *Id.*; *see also* Peter Overby, *Debate Endures Over Tax Exempt Status Of Crossroads GPS*, Nat'l Pub. Radio (May 9, 2014), http://www.npr.org/2014/05/09/310947559/debate-endures-over-tax-exempt-status-of-crossroads-gps.

Crossroads GPS has not registered as a federal political committee with the FEC. However, Crossroads GPS shares office space and at least four corporate officers and employees with American Crossroads, a registered federal political committee that Crossroads GPS refers to as its "sister organization." AR 11, 344 (Admin. Compl. at 11, First General Counsel's Report at 5). According to published reports, both were "conceived of" by Karl Rove, "the veteran GOP strategist who helped put George W. Bush in the White House," and "Ed Gillespie, another Republican strategist and former Republican National Committee chairman." AR 12 (Admin. Compl. at 12). According to another published report, both "Crossroads GPS and its affiliate, American Crossroads, . . . receive advice and fundraising support from Rove." AR 12 (Admin. Compl. at 12).

Crossroads GPS has assured its donors that, though "[a]ny person or entity that contributes more than $5,000 to a 501(c)(4) organization must be disclosed to the Internal Revenue Service on Form 990[,] . . . the IRS does not make these donor disclosures available to the general public [and] Crossroads GPS's policy is to not provide the names of its donors to the general public." AR 12 (Admin. Compl. at 12). By contrast, American Crossroads, as a registered federal political committee, must disclose to the public each of its donors that contributes in excess of $200 within a calendar year. *See* 2 U.S.C. § 434(b)(3)(A).

The chairman of the board of American Crossroads, Mike Duncan, told the *Washington Times* in 2010 that American Crossroads, together with Crossroads GPS, planned to raise more than $52 million and "to plow more than $49 million of it into 11 Senate races in anticipation that the Republican Party is within reach of a Senate majority." AR 13 (Admin. Compl. at 13). Karl Rove explained on Fox News that American Crossroads and Crossroads GPS are simply avenues for donors who have "maxed out" to federal Republican political committees to funnel money into the 2010 elections.

> HOST: Some suggest that the money that goes to American Crossroads might otherwise go to an organization like the RNC.
>
> ROVE: Well that's not correct, because American Crossroads is collecting money in excess of the individual contribution limits the RNC has allowed to give. What we've essentially said, is *if you've maxed out [to the] senatorial committee, the congressional committee or the RNC and would like to do more, under the Citizens United decisions, you can give money to the American Crossroads 527, or Crossroads GPS,* so we're not tapping the people who—if you've giving to American Crossroads, you're fully capable, in all likelihood, of giving the maximum to one of the national committee organizations.

AR 13–14 (Admin. Compl. at 13–14) (emphasis added).

Jonathan Collegio, Communications Director and spokesman for both organizations, reportedly stated that the two groups raise funds jointly and that "the fact that we're raising it for two groups instead of one is a distinction without a difference." AR 344–45 (First General

Counsel's Report at 5–6). Furthermore, Crossroads GPS reportedly focused its 2010 "micro-targeting effort" on seven states—Colorado, Florida, Missouri, New Hampshire, Nevada, Ohio and Washington—states with hotly contested Senate races in 2010. AR 14 (Admin. Compl. at 14).

In early October 2010, Crossroads GPS announced a "massive $4.2 million ad buy," together with American Crossroads. According to a press report, the "combined media buy targets hotly contested Senate races in eight states—Colorado, Florida, Illinois, Kentucky, Missouri, Nevada, Pennsylvania and Washington—where either the Democratic incumbent is viewed as vulnerable or there is an open seat considered attainable for Republicans." The report highlights the fact that "nearly 75 percent of the buy [was] paid for by undisclosed donors[.]" AR 14 (Admin. Compl. at 14).

According to the FEC's Office of General Counsel (OGC), Crossroads GPS raised approximately $43.6 million and spent approximately $39.1 million on "communications with the public, pre-production activities in support of these communications, and grants to other non-profit organizations engaged in social welfare activities" from the time of its founding in June 2010 through December 15, 2010. AR 345 (First General Counsel's Report at 6). Of the approximately $39.1 million spent, Crossroads GPS reported spending approximately $15.4 million on "independent expenditures"—i.e., expenditures expressly advocating the election or defeat of a clearly identified candidate, not made in concert or cooperation with a candidate. AR 345–46 (First General Counsel's Report at 6–7); *see also* 2 U.S.C. § 431(17) (defining "independent expenditure"). According to the FEC's OGC, Crossroads GPS spent an additional $5.4 million in 2010 on communications that did not contain express advocacy, but did criticize or oppose a clearly identified federal candidate. AR 356 (First General Counsel's Report at 17).

2. *Plaintiffs' administrative complaint*

Crossroads GPS is an organization that was formed to, and did, expend millions of dollars to influence the 2010 congressional elections. Yet Crossroads GPS did not register as a political committee and, as a result, the identities of its donors were kept hidden from the voting public. Accordingly, Plaintiffs filed an administrative complaint with the Commission on October 14, 2010, alleging that Crossroads GPS had violated the requirement that it register as a political committee and comply with FECA's disclosure requirements.

In November 2012, the FEC's OGC provided the Commission with its First General Counsel's Report and proposed Factual and Legal Analysis, AR 340–93, in which the OGC presented to the Commission many of the above-stated facts together with OGC's legal analysis of Crossroads GPS's political committee status under federal campaign finance law. Because it was uncontested that Crossroads GPS has made well over $1,000 in expenditures in 2010, the First General Counsel's Report focused largely on whether the organization met the "major purpose" criterion for status as a political committee. In discussing whether the organization's activities evinced a major purpose of influencing elections, the Report considered both Crossroads GPS's spending on express advocacy and its spending on advertisements that contained views about candidates but did not include express advocacy.

The First General Counsel's Report explained that the Commission had, in past enforcement actions, "determined that funds spent on communications that support or oppose a clearly identified federal candidate, but do not contain express advocacy, should be considered in determining whether a group has federal campaign activity as its major purpose." AR 356 (First General Counsel's Report at 17). The First General Counsel's Report concluded that, likewise, the "following advertisements on which Crossroads spent some $5.4 million in 2010, . . . though

not express advocacy, oppose or criticize federal candidates and therefore provide evidence that Crossroads GPS had as its major purpose the nomination or election of federal candidates." AR 358 (First General Counsel's Report at 19) (citation omitted). The First General Counsel's Report contains the scripts of the ten advertisements that Crossroads GPS spent approximately $5.4 million to produce and air in 2010.

1. *"Worried"*

> California seniors are worried. Barbara Boxer voted to cut spending on Medicare benefits by $500 billion. Cuts so costly to hospitals and nursing homes that they could stop taking Medicare altogether. Boxer's cuts would sharply reduce benefits for some and could jeopardize access to care for millions of others. And millions of Americans won't be able to keep the plan or doctor they already have. Check the facts and take action. Call Boxer. Stop the Medicare cuts.

2. *"Calendar"*

> Michael Bennet's spending spree. Since his appointment, Bennet has voted to spend $2.5 billion every single day. Spending billions of your tax dollars on everything, from the failed stimulus, billions in government pork, even cash for clunkers. And to pay for some of it? Bennet voted twice in 35 days to increase the national debt. Bennet's way: spend more, borrow more, and then raise our taxes. Michael Bennet's spending spree. Call Senator Bennet. Stop the spending.

3. *"Debt Clock" / "Debt Clock Long"*

> Coloradans are in debt to Washington—deeply in debt. Big spenders like Michael Bennet are spending an average $2.5 billion per day. Wasting billions on pork and the failed stimulus program. The result: over 100,000 Colorado jobs lost. Bankruptcies at a five-year high. And our national debt is hitting numbers that could break this country. Now Bennet has admitted, "in my view, we have nothing to show for it." Ya think? Call. Tell Bennet to stop the spending spree.

4. *"Lawsuit"*

> The message is clear: seventy-one percent of Missouri voters don't want government-mandated health care. We want to make our own health care decisions. But Robin Carnahan disagrees. While seventy-one percent of us voted no, Carnahan sided with lobbyists, big unions, and Washington insiders to force "Obamacare" on us. Missouri's lieutenant governor is suing the federal government so we can keep our health care. Tell Carnahan to get in touch with Missourians and support the health care challenge.

5. *"Wrong Way"*

"Obamacare" is taking health care in the wrong direction, and Jack Conway has gone the wrong way, too. Conway endorsed "Obamacare," with its higher taxes and Medicare cuts, and Conway refused to join thirteen other attorneys general and defend Kentucky from Obama's health care mandate. "Obamacare" and Jack Conway are taking Kentucky's health care down the wrong road. Tell Jack Conway: turn around, stop defending "Obamacare," and protect Kentucky from the federal insurance mandate.

6. *"Thanks Harry"*

"Obamacare" is bad for health care in America. And worse for Nevada. Because when Senator Harry Reid needed votes to push "Obamacare," he cut sweet deals across the country to help Nebraska, to help Louisiana, to even help Florida. What has Nevada gotten from Senator Reid? Record foreclosures and the highest unemployment rate in the nation. And Reid's still pushing for more government control of your health care. Really, Harry, how about some help for Nevada?

7. *"Hurting"*

We're hurting. But what are they doing in Washington? Congressman Joe Sestak voted for Obama's big government health care scheme, billions in job-killing taxes, and higher insurance premiums for hard-hit families. Even worse, Sestak voted to gut Medicare—a $500 billion cut. Reduced benefits for 850,000 Pennsylvania seniors. Higher taxes and premiums. Fewer jobs. Medicare cuts. The Sestak/Obama plan costs us too much. Tell Congressman Sestak: stop the Medicare cuts.

8. *"Bad Sign"*

"Obamacare" is the wrong way for Kentucky. And Jack Conway is going the wrong way, too. "Obamacare" means $525 billion in job-killing taxes. It means higher insurance premiums. $500 billion cut from Medicare. Reduced benefits for 113,000 Kentucky seniors. And intrusive big government mandates. It's the wrong way, Conway.

9. *"Baby"*

She begins her life in the care of others, but what kind of care will be there in her future? Missourians want to make their own health care decisions, but Robin Carnahan disagrees. She supports the "Obamacare" law that could raise our health insurance premiums and cuts billions from Medicare. Now our lieutenant governor is suing so her health care will be there. Tell Carnahan: start fighting for Missouri. Fight against "Obamacare."

10. *"Thanks a Lot"*

> With spending already out of control, Harry Reid spearheaded the stimulus spending bill. Harry's stimulus sent nearly $2 million to California to collect ants in Africa, $25 million for new chairlifts and snowmaking in Vermont, almost $300,000 to Texas to study weather on Venus. Meanwhile, back in Nevada, we still have the highest unemployment and record foreclosures. Really, Harry, how about some help for Nevada?

AR 359–61 (First General Counsel's Report at 20–22) (footnotes omitted).

Included within the $5.4 million spent by Crossroads GPS to produce and air these advertisements opposing federal candidates was more than $1.1 million spent to air four of these ads—*Debt Clock Long*, *Bad Sign*, *Baby* and *Thanks a Lot*—within 30 days of the named candidate's primary election or within 60 days of the named candidate's general election, bringing the $1.1 million in payments within the federal law definition of "electioneering communication[s]" at 2 U.S.C. § 434(f)(3)(A). AR 346 (First General Counsel's Report at 7).

The Commission's OGC concluded:

> In short, taking into account all of its spending in 2010, Crossroads GPS appears to have spent approximately $20.8 million on the type of communications that the Commission considers to be federal campaign activity—approximately $15.4 million on express advocacy communications and $5.4 million on non-express advocacy communications that criticize or oppose a clearly identified federal candidate. This total of $20.8 million represents approximately 53 percent of the $39.1 million Crossroads GPS reported spending during 2010. Therefore, Crossroads GPS's spending by itself shows that the group's major purpose during 2010 was federal campaign activity (i.e., the nomination or election of a federal candidate).

AR 365–66 (First General Counsel's Report at 26–27). Accordingly, the OGC "recommend[ed] that the Commission find reason to believe that Crossroads GPS violated 2 U.S.C. §§ 432, 433, and 434, by failing to organize, register, and report as a political committee, and that the Commission authorize an investigation." AR 366 (First General Counsel's Report at 367).

Despite the Office of the General Counsel's strongly worded recommendation to the Commission to investigate Crossroads GPS, on December 3, 2013, the Commission "failed by a

vote of 3-3 to . . . [f]ind reason to believe" that Crossroads GPS violated 2 U.S.C. §§ 432, 433 and 434 and subsequently closed the file, dismissing Plaintiffs' administrative complaint. AR 395 (Certification, Dec. 5, 2013).

By letter dated December 12, 2013, the FEC advised Plaintiff Kevin Zeese that the Commission had an "insufficient number of votes" to find reason to believe that Crossroads GPS violated the political committee provisions of FECA. AR 397 (Letter from William Powers, Ass't General Counsel, FEC, to Kevin Zeese, Dec. 12, 2013). The Commission sent a similar letter of notification to Plaintiff Craig Holman on December 23, 2013. AR 399 (Letter from William Powers, Ass't General Counsel, FEC, to Craig Holman, Dec. 23, 2013).

The FEC subsequently issued two separate Statements of Reasons: one by the three Commissioners who voted to dismiss Plaintiffs' administrative complaint, and another by the three Commissioners who voted to find reason to believe that Crossroads GPS had violated FECA. AR 400–28 (Statement of Reasons of FEC Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen); AR 505–09 (Statement of Reasons of FEC Vice Chair Ann M. Ravel, Commissioner Steven T. Walther and Commissioner Ellen L. Weintraub). The Commissioners who voted to find "reason to believe" agreed with the OGC's legal analysis and argued that Plaintiffs' complaint provided "a clear-cut case for further investigation[.]" AR 505 (Ravel, Walther, Weintraub Statement of Reasons at 1). FEC Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen concluded that there was no reason to believe a violation had occurred because Crossroads GPS did not meet the "major purpose" test for political committee status, and explained their legal analysis in a separate Statement of Reasons. They opined that (1) only express advocacy spending could be considered in applying the "major purpose" test, (2) such express advocacy

spending must exceed 50% of an organization's budget to support a major purpose finding; (3) a group's spending must be considered according to the group's own accounting practices, rather than the "calendar year" period specified in FECA; and (4) an entity's articles of incorporation or mission statement and tax status are almost exclusively determinative of its "central organizational purpose." AR 409–24 (Goodman, Hunter, Petersen Statement of Reasons at 10–25).

ARGUMENT

I. JURISDICTION

This action arises under the Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. § 431 *et seq*., and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551–706. This Court has jurisdiction pursuant to 2 U.S.C. § 437g(a)(8)(A) and 28 U.S.C. § 1331.

When the FEC's General Counsel recommends that the Commission pursue an administrative complaint, but the complaint is dismissed because of a deadlock vote among the Commissioners, the Commission's dismissal of the complaint is reviewable by this Court under 2 U.S.C. § 437g(a)(8)(A). *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1132 (D.C. Cir. 1987). Furthermore, when "the FEC does not act in conformity with its General Counsel's reading of Commission precedent, it is incumbent upon the Commissioners to state their reasons why." *Id.*; *see also Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988) ("Requiring a statement of reasons by the declining-to-go-ahead Commissioners at the time when a deadlock vote results in an order of dismissal also contributes to reasoned decisionmaking by the agency; it ensures reflection and creates an opportunity for self-correction.").

Plaintiffs have standing under *FEC v. Akins*, 524 U.S. 11 (1998), because they are not receiving disclosure of information mandated by FECA. In *Akins*, a group of voters filed an

administrative complaint with the FEC alleging that the American Israel Public Affairs Committee (AIPAC) had violated federal law by failing to comply with FECA's political committee registration, organization and recordkeeping, and disclosure requirements—allegations identical to those at issue in this case. *Id.* at 15–16. The FEC concluded that AIPAC did not meet the "major purpose" requirement of political committee status and, consequently, dismissed the voters' complaint. *Id.* at 18. The group of voters filed a petition in federal district court under 2 U.S.C. § 437g(a)(8)(A), seeking review of the FEC's dismissal of the administrative complaint. The FEC challenged the group of voters' standing, and the Supreme Court granted the FEC's petition for certiorari on the question of "[w]hether respondents had standing to challenge the Federal Election Commission's decision not to bring an enforcement action in this case." *Id.*

The *Akins* Court rejected the FEC's standing claim, recognizing that the "injury of which respondents complain—their failure to obtain relevant information—is injury of a kind that FECA seeks to address." *Id.* at 20. The *Akins* Court reasoned: "Given the language of the statute and the nature of the injury, we conclude that Congress, intending to protect voters such as respondents from suffering the kind of injury here at issue, intended to authorize this kind of suit." *Id.* "[A] plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *Id.* at 21 (citing *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989)). The Court continued: "We conclude that, similarly, the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific" and is "'fairly traceable' to the FEC's decision about which respondents complain." *Id.* at 24–25. On these bases, the *Akins* Court held that the group of voters had "satisfied both prudential and constitutional standing requirements" and that they

were permitted to "bring [a] petition for a declaration that the FEC's dismissal of their complaint was unlawful." *Id.* at 26; *see also Shays v. FEC*, 528 F.3d 914, 923 (D.C. Cir. 2008) ("*Shays III*").

Plaintiffs in the instant case likewise satisfy both prudential and constitutional standing requirements. Crossroads GPS has not complied with FECA's political committee organizational, recordkeeping, registration and reporting requirements established by 2 U.S.C. §§ 432, 433 and 434. Consequently, Plaintiffs are not receiving the full, accurate, and timely disclosures regarding contributors to Crossroads GPS and other information required under FECA. *See* Declaration of Craig Holman in Support of Motion for Summary Judgment ¶¶ 2, 4, 5, 6; *see also* Declaration of Kevin Zeese in Support of Motion for Summary Judgment ¶¶ 2, 5, 6. This informational injury is sufficiently concrete and specific and is traceable to the FEC's decision about which Plaintiffs complain. Plaintiffs' injury in fact would be redressed were this Court to declare that the Commission's decision to dismiss Plaintiffs' administrative complaint was arbitrary, capricious, an abuse of discretion, based on an impermissible interpretation of FECA, and otherwise contrary to law—and to order the FEC to conform to such declaration. Consequently, Plaintiffs satisfy both standing requirements.

II. STANDARD OF REVIEW

The standard to be applied by this Court in reviewing the FEC's dismissal of Plaintiffs' administrative complaint is whether the Commission acted "contrary to law." *See Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986); *see also* 2 U.S.C. § 437g(a)(8)(C) ("[T]he court may declare that the dismissal of the complaint or the failure to act is contrary to law[.]"). Where the FEC's General Counsel recommends that the Commission pursue an administrative complaint, but the complaint is dismissed due to a deadlock vote among the Commissioners, the three Commissioners who voted to dismiss "constitute a controlling group for purposes of the

decision, [and] their rationale necessarily states the agency's reasons for acting as it did." *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("*NRSC*"). The Commission's dismissal of a complaint is therefore "contrary to law" if the controlling Commissioners' rationale for voting to dismiss (1) rests on an impermissible interpretation of FECA, or (2) is "arbitrary or capricious, or an abuse of discretion." *Orloski*, 795 F.2d at 161.

Although the standard of review is deferential and requires a court to sustain an action reasonably explained by the agency, *Akins v. FEC*, 736 F. Supp. 2d 9, 21 (D.D.C. 2010), deference in the circumstances of this case should not extend to the three controlling Commissioners' *legal conclusions* concerning the construction of FECA. Such deference with respect to matters of statutory construction—generally referred to as "*Chevron* deference" after the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)—is called for when Congress has delegated authority to an agency to promulgate rules or otherwise take action with the effect of law to fill in gaps or ambiguities in a statutory scheme. *See United States v. Mead Corp.*, 533 U.S. 218, 229–30 (2001).

When the FEC exercises such authority, its actions are entitled to deference. Indeed, the Supreme Court has held that the Commission "is precisely the type of agency to which deference should presumptively be afforded," given that the Commission "is inherently bipartisan in that no more than three of its six voting members may be of the same political party." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) ("*DSCC*"). Thus, when the Commission operates by four-vote majority—as it was designed to do in nearly all of its functions—its actions are presumptively worthy of the judicial deference described in *DSCC*. *Chevron* deference, however, is confined to circumstances "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and . . . the

agency interpretation claiming deference *was promulgated in the exercise of that authority*." *Mead*, 533 U.S. at 226–27 (emphasis added); *accord Gonzales v. Oregon*, 546 U.S. 243, 255–56 (2006). When the agency has not mustered a majority to take any action, it has not exercised any delegated authority to construe the law, but has failed to do so. In such circumstance, there has been no cognizable agency action for *Chevron* purposes, and no authoritative construction of the statute by the agency: three commissioners of the FEC have no authority to adopt a construction of FECA, and three commissioners certainly cannot adopt a regulation or override prior agency constructions of the law, such as the policy statement issued in 2007 setting forth the agency's most recent—and controlling—interpretation of the "major purpose" test.[2] Moreover, according deference to legal principles "adopted" only by one faction of a deadlocked Commission would frustrate the purposes of the Act, because while four-vote majority decisions at the FEC are "inherently bipartisan," 3-3 deadlocks almost always are not.[3] In short, "here there is no ruling,

[2] *See* Political Committee Status, 72 Fed. Reg. 5595 (Feb. 7, 2007) (Supplemental Explanation and Justification) ("2007 SE&J"). Indeed, if there is any agency determination to which this Court should defer under *Chevron*, it is the "major purpose" construction adopted by a majority of the Commission in the 2007 SE&J. *See* Part III.B, *infra*.

[3] In *NRSC*, the D.C. Circuit did indicate that a construction of one of the Commission's own regulations underlying a decision not to proceed supported by only three Commissioners should receive "*Seminole Rock*" deference. *See* 966 F.2d at 1475–76 (citing *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945)). But the rationale for such deference is decidedly different from that of *Chevron* deference: it is grounded largely in the view that a court should accept an agency's word for what its own regulations mean. *See Decker v. Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013). That is a very different proposition from whether an agency action reflects a lawful, affirmative exercise of power delegated by Congress to fill statutory gaps. In any event, "[n]either *NRSC* nor any other decision of the D.C. Circuit has explained the reasoning behind this 'deadlock deference,' other than a brief and conclusory note in *NRSC* that agencies are '[o]rdinarily' granted deference. . . . As a whole, a deadlocked vote is capable of sending only two collective messages: (1) that the 'experts' disagree; and (2) that the agency vested with the authority to 'reconcile competing political interests' in this area of the law has failed to do so." Statement of Vice Chair Ann M. Ravel and Commissioner Ellen L. Weintraub on Judicial Review of Deadlocked Votes, at 5 (June 17, 2014), http://eqs.fec.gov/eqsdocsMUR/14044354045.pdf (footnote omitted) (citing *NRSC*, 966 F.2d at 1476; *Chevron*, 467 U.S. at 865).

interpretation, nor opinion of the agency; there is only a deadlocked FEC and there is no reason to defer to the reasoning or conclusion of one side of the deadlock as opposed to the other." *Hispanic Leadership Fund, Inc. v. FEC*, 897 F. Supp. 2d 407, 429 (E.D. Va. 2012).

Absent a basis for invocation of *Chevron* deference to an authoritative exercise of agency power to construe a statute, any agency's legal interpretation is due only that deference to which the persuasiveness of its reasoning entitles it. *See Mead*, 533 U.S. at 234–35; *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). That is the principle applicable where, as here, the legal views underlying an agency action "do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court"—or a majority vote of the Commission—"might do." *Skidmore*, 323 U.S. at 139. In such circumstances, the weight given by a court to views on matters of statutory construction advanced to support an agency's actions "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 140.

Thus, absent a statutory construction entitled to *Chevron* deference, this Court must ultimately decide for itself issues of statutory interpretation that bear on the soundness of the agency's action, informed by whatever persuasive force the agency's views may have, and then determine whether, in light of applicable statutory standards, the agency has advanced a reasoned explanation for its decision to dismiss the complaint. In making that determination of whether the Commission's action was "arbitrary or capricious, or an abuse of discretion" under *Orloski*, the Court should apply a standard analytically similar to the "arbitrary and capricious" standard applied under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *See In re Carter-*

Mondale Reelection Committee, 642 F.2d 538, 550–51, 551 n.6 (D.C. Cir. 1980) (Wald, J., concurring). Under this standard, the Court determines whether the agency has "articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*") (internal quotation marks and citation omitted). If the agency has changed its position, it must satisfactorily explain why it has done so. *See id.* at 41–42; *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.").

We address the application of these standards in Part IV below, and show that the FEC's interpretation of the statute and the consequent dismissal of Plaintiffs' administrative complaint based on such interpretation are contrary to law, arbitrary, capricious, and an abuse of discretion under *Orloski*, *State Farm* and 2 U.S.C. § 437g(a)(8)(C).

III. DETERMINATION OF "POLITICAL COMMITTEE" STATUS IS VITAL TO ENFORCEMENT OF DISCLOSURE REQUIREMENTS THAT SERVE COMPELLING GOVERNMENTAL INTERESTS.

The issue ultimately to be decided in this case is whether the Commission must inquire further into Crossroads GPS's status as a political committee. Whether Crossroads GPS is a political committee, in turn, decides the critical question of whether its massive political expenditures must be accompanied by the full disclosures required under FECA, including the disclosure of its donors who give more than $200. Because the Commission failed to proceed with an investigation, none of these disclosure obligations—despite their clear centrality to the FEC's statutory mission—can be applied to Crossroads GPS.

A. Disclosure Requirements Serve Compelling Governmental Interests.

Disclosure has been a feature of American campaign finance law for more than a century. The first federal disclosure law, enacted in 1910, required organizations that "spent more than

$50 annually for the purpose of influencing congressional elections in more than one State" to disclose each contributor giving over $100 and each expenditure over $10. *See United States v. Auto. Workers*, 352 U.S. 567, 575–76 (1957).

The Supreme Court has repeatedly acknowledged that political disclosure laws both reflect and advance important First Amendment precepts. Indeed, disclosure has been called a "cornerstone" of campaign finance regulation. *See Buckley v. Am. Const. Law Found.*, 525 U.S. 182, 222–23 (1999) (O'Connor, J., dissenting). As Justice Brandeis famously recognized nearly a century ago, "Sunlight is . . . the best . . . disinfectant," and "electric light the most efficient policeman." *See Buckley*, 424 U.S. at 67 (quoting Louis Brandeis, *Other People's Money* 62 (Nat'l Home Library Found. ed. 1933)). Disclosure also secures broader access to the information that citizens need to make political choices, thereby enhancing the overall quality of public discourse. And, as the Supreme Court noted in *Citizens United v. FEC*, 558 U.S. 310 (2010), disclosure requirements "'impose no ceiling on campaign-related activities' and 'do not prevent anyone from speaking.'" *Id.* at 366 (internal citations omitted) (quoting *Buckley*, 424 U.S. at 65 and *McConnell v. FEC*, 540 U.S. 93, 201 (2003)).

The Supreme Court has held that disclosure serves several "important state interests": "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell*, 540 U.S. at 196. The first of these, the public's informational interest, is "alone . . . sufficient to justify" disclosure laws. *Citizens United*, 558 U.S. at 369. The campaign finance case law provides rich evidence of organizations with "misleading," or "mysterious" names that participate in elections while disguising funding sources. *McConnell*, 540 U.S. at 128 & n.23. "[O]nly disclosure of the sources of the[se groups'] funding may enable

the electorate to ascertain the identities of the real speakers." *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 481 (7th Cir. 2012); *see also McConnell*, 540 U.S. at 128 ("'Citizens for Better Medicare' . . . was not a grassroots organization of citizens, as its name might suggest, but was instead a platform for an association of drug manufacturers."). Disclosure laws ensure that voters are "'fully informed' about the person or group who is speaking" and "able to evaluate the arguments to which they are being subjected." *Citizens United*, 558 U.S. at 368 (citations and internal quotation marks omitted). The Supreme Court and lower courts have repeatedly found this informational interest alone sufficient to justify disclosure requirements. *See, e.g.*, *id.* at 369; *Madigan*, 697 F.3d at 477–78; *Human Life of Washington v. Brumsickle*, 624 F.3d 990, 1017 (9th Cir. 2010).

Indeed, the Court has upheld challenged political disclosure laws three times by 8 to 1 votes in the past eleven years alone. After upholding all of the federal law disclosure provisions challenged in *McConnell* by an 8 to 1 vote, *see* 540 U.S. at 194–99, the Court—again voting 8 to 1—upheld the FECA disclosure requirements at issue in *Citizens United*, 558 U.S. at 366–71, and reiterated the value of transparency in "[enabling] the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at 371. Importantly, with respect to this case, the *Citizens United* Court explicitly rejected the argument that disclosure requirements must be confined to speech that is express candidate advocacy—a holding at odds with the controlling Commissioners' attempt to import the very same "express advocacy" limitation into the FEC's "major purpose" analysis. *See id.* at 915; *see also* Part IV.C.2, *infra*.

Finally, in *Doe No. 1 v. Reed*, 561 U.S. 186 (2010), the Court again voiced its strong support of disclosure laws, upholding by another 8 to 1 vote a Washington State law providing disclosure of ballot measure petition signatories, reasoning that "[p]ublic disclosure . . . promotes

transparency and accountability in the electoral process to an extent other measures cannot." *Id.* at 199. As Justice Scalia also explained in concurrence, "Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed." *Id.* at 228 (Scalia, J., concurring).

The Court most recently extolled the importance of campaign finance disclosure in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), where Chief Justice Roberts explained at length:

> Disclosure requirements are in part "justified based on a governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending." They may also "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." Disclosure requirements burden speech, but—unlike the aggregate limits—they do not impose a ceiling on speech. For that reason, disclosure often represents a less restrictive alternative to flat bans on certain types or quantities of speech.
>
> With modern technology, disclosure now offers a particularly effective means of arming the voting public with information. . . . Today, given the Internet, disclosure offers much more robust protections against corruption.

Id. at 1459–60 (internal citations omitted).

The FECA political committee disclosure requirements established by 2 U.S.C. § 434—at the heart of Plaintiffs' administrative complaint—directly advance the compelling governmental interests in "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell*, 540 U.S. at 196. Any assessment of the adequacy of the FEC's reasons for its decision in this case must consider that the decision has the effect of depriving the public of this critical information concerning millions of dollars of expenditures aimed at influencing the 2010 elections.

B. An Organization That Makes Expenditures Exceeding $1,000 In A Calendar Year And Has The Major Purpose Of Influencing Elections Is A "Political Committee" Subject to Comprehensive Disclosure Requirements.

FECA defines "political committee" to mean "any committee, club, association or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4); *see also* 11 C.F.R. § 100.5(a). A "contribution" is defined as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A). An "expenditure" is defined 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 any election for Federal office." 2 U.S.C. § 431(9)(A).

In *Buckley*, to prevent the statute from reaching groups "engaged purely in issue discussion," the Supreme Court construed the term "political committee" to "only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U.S.at 79. The Court has subsequently affirmed *Buckley*'s "major purpose" test. *See, e.g.*, *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 252–53 n.6 (1986) ("*MCFL*"); *McConnell*, 540 U.S. at 170 n.64.

Thus, there is a two-prong test for political committee status under FECA. The first prong asks whether an entity or other group of persons has made more than $1,000 in "expenditures" or received more than $1,000 in "contributions" during a calendar year. 2 U.S.C. § 431(4)(A). The second prong asks whether the organization has as its "major purpose . . . the nomination or election of a candidate." *Buckley*, 424 U.S. at 79.

The FEC makes "political committee" status determinations on a case-by-case basis—an approach that has consistently been upheld against legal challenge. *See Free Speech v. FEC*, 720 F.3d 788, 798 (10th Cir. 2013), *cert. denied*, 134 S. Ct. 2288 (May 19, 2014); *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 556 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 841 (2013); *Shays v. FEC*, 511 F. Supp. 2d 19, 29–31 (D.D.C. 2007) ("*Shays II*"). In 2007, the FEC provided additional guidance to organizations about the factors used to determine whether an organization is a political committee. *See* 2007 SE&J, 72 Fed. Reg. at 5596–97. The Commission explained:

> [D]etermining political committee status under FECA, as modified by the Supreme Court, requires an analysis of both an organization's specific conduct—whether it received $1,000 in contributions or made $1,000 in expenditures—as well as its overall conduct—whether its major purpose is *Federal campaign activity* (i.e., the nomination or election of a Federal candidate).

Id. at 5597 (emphasis added).

While the Commission explained in its 2007 SE&J that it employs an "express advocacy" construction of the statutory definition of "expenditure" when determining whether an organization has met the $1,000 expenditure threshold for political committee status, the Commission also made clear that the "express advocacy" standard is *not* determinative of the "major purpose" analysis, notwithstanding the controlling Commissioners' unjustifiable attempt to argue otherwise in their Statement of Reasons.[4] Instead, as noted above, the "major purpose" analysis requires a determination of whether the organization's major purpose is "Federal campaign activity"—a term not construed by the Commission to mean "express advocacy." The Commission refers to the "Federal campaign activity" standard for the "major purpose" determination nine times in its 2007 SE&J, without once suggesting that such activity is limited

[4] *See* Part IV.C.2, *infra*.

to "express advocacy" or otherwise mentioning "express advocacy" in connection with the "major purpose" determination. *See id*. at 5597 (one reference), 5601 (four references), 5604 (one reference), 5605 (three references).

The Commission explained that in determining whether an organization's major purpose is Federal campaign activity, it considers indicia such as: public and non-public statements about the organization's purposes and activities; public and non-public fundraising appeals; and the proportion of spending related to "federal campaign activity" compared to the proportion spent on "activities that [a]re not campaign related." *Id.* at 5601, 5604–05.

The U.S. Court of Appeals for the Fourth Circuit recently upheld the Commission's case-by-case approach to determining political committee status in *Real Truth About Abortion*, explaining: "Real Truth has failed to explain why the Commission's test would prevent any party from speaking, especially in view of the fact that the application of the test to find that an organization is a PAC would subject the organization only to 'minimal' reporting and organizational obligations." 681 F.3d at 557–58 (citing *SpeechNow.org v. FEC*, 599 F.3d 686, 697–98 (D.C. Cir. 2010)). More recently, in *Free Speech*, the Tenth Circuit likewise upheld the Commission's approach to determining political committee status, "agree[ing] with the assessment of the Fourth Circuit" in *Real Truth About Abortion*. 720 F.3d at 798. This case-by-case approach requires the FEC to examine the specific activities of an organization when presented with credible evidence that its major purpose is undertaking Federal campaign activity.

IV. THE COMMISSION'S DISMISSAL OF PLAINTIFFS' ADMINISTRATIVE COMPLAINT WAS CONTRARY TO LAW.

The Commission's failure to find reason to believe that Crossroads GPS violated the law by failing to register as a political committee cannot be squared with either the legal standards governing the major purpose determination or the undemanding "reason to believe" standard

applicable at this preliminary stage in the enforcement proceedings. As the Statement of Reasons issued by the three Commissioners who voted not to proceed makes plain, the bases for the votes to dismiss by Chairman Goodman and Commissioners Hunter and Petersen (1) rested on impermissible or unreasonable interpretations of FECA and (2) were arbitrary, capricious and an abuse of discretion. *See* 2 U.S.C. § 437g(a)(8)(C); *Orloski*, 795 F.2d at 161.

A. Plaintiffs' Administrative Complaint Provided Ample 'Reason To Believe' That Crossroads GPS Is A Political Committee, And Further Investigation By The Commission Was Warranted.

The FEC's OGC applied the two-prong test for political committee status to Crossroads GPS and correctly concluded that there is reason to believe that Crossroads GPS is a political committee under FECA and has violated the political committee organizational, registration and disclosure requirements of 2 U.S.C. §§ 432, 433 and 434. AR 355–66 (First General Counsel's Report at 16–27). The Statement of Reasons issued by the three controlling Commissioners provided no reasonable grounds for rejecting this recommendation.

With respect to the statutory test for political committee status established by 2 U.S.C. § 431(4), Crossroads GPS reported more than $15 million of independent expenditures—i.e., payments for communications expressly advocating the election or defeat of candidates in elections for the U.S. Senate and U.S. House of Representatives—to the FEC in the calendar year 2010. AR 345–46 (First General Counsel's Report at 6–7). Crossroads GPS, therefore, indisputably met the $1,000 expenditure threshold of 2 U.S.C. § 431(4)(A).

Crossroads GPS likewise met the "major purpose" test for political committee status established by *Buckley*—i.e., whether the organization has federal campaign activity as its major purpose. In 2010, the year it was founded, Crossroads GPS spent approximately $39.1 million, paying for "communications with the public, pre-production activities in support of these communications, and grants to other non-profit organizations engaged in social welfare

activities." AR 345 (First General Counsel's Report at 6). Of that amount, Crossroads GPS reported spending approximately $15.4 million directly on independent expenditures (i.e., express candidate advocacy), along with an additional $5.4 million directly on communications that did not contain express advocacy, but did criticize or oppose clearly identified federal candidates in the months and weeks leading up to the 2010 federal elections. AR 345–46, 356 (First General Counsel's Report at 6–7, 17). Specifically, the $5.4 million in spending targeted Senators Barbara Boxer, Michael Bennet, and Harry Reid, Senate candidate Robin Carnahan, and U.S. Representatives Jack Conway and Joe Sestak with highly negative advertising within the five months before the November general elections, in which all of them were candidates for office.

Under the Commission's well-established "major purpose" test, funds spent on communications that support or oppose a clearly identified federal candidate—even those that do not contain express advocacy—are considered federal campaign activity. AR 356 (First General Counsel's Report at 17); *see also* 2007 SE&J, 72 Fed. Reg. at 5605 (considering the proportion of spending related to "federal campaign activity" compared to the proportion spent on "activities that [a]re not campaign related").[5] The OGC applied the test and explained that, of its total spending in 2010, "Crossroads GPS appears to have spent approximately $20.8 million on

[5] FECA was amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, to define the term "federal election activity" for the purpose of the BCRA requirement that state political party committees use only funds raised under federal limits to pay for such "federal election activity." *See* 2 U.S.C. §§ 431(20) (definition) and 441i(b) (state party requirements). Congress' definition of "federal election activity" is not limited to express advocacy. "Federal election activity" includes voter registration activity within 120 days of a federal election, certain voter identification and get-out-the-vote activity conducted in connection with an election in which a candidate for federal office is on the ballot; public communication that promotes, supports, attacks or opposes a federal candidate "regardless of whether the communication expressly advocates a vote for or against a candidate," and certain services provided by state party staff. *Id*. at 431(20)(A).

the type of communications that the Commission considers to be federal campaign activity—approximately $15.4 million on express advocacy communications and $5.4 million on non-express advocacy communications that criticize or oppose a clearly identified federal candidate." AR 365 (First General Counsel's Report at 26). The OGC correctly concluded: "This total of $20.8 million represents approximately 53 percent of the $39.1 million Crossroads GPS reported spending during 2010. Therefore, Crossroads GPS's spending by itself shows that the group's major purpose during 2010 was federal campaign activity (i.e., the nomination or election of a federal candidate)." *Id.*[6]

In sum, Crossroads GPS self-reported more than $15 million in independent expenditures in 2010, easily satisfying the $1,000 expenditure threshold for political committee status under 2 U.S.C. § 431(4)(A). And Crossroads GPS spent approximately 53 percent of its 2010 budget on federal campaign activity in 2010, satisfying the "major purpose" prong of political committee status as construed by *Buckley* and its progeny. AR 365 (First General Counsel's Report at 26). Consequently, there is reason to believe that Crossroads GPS has been a political committee under FECA since it was founded in 2010 and continues to operate in violation of federal law political committee organizational, registration and disclosure requirements.

B. The Dismissal Of Plaintiffs' Administrative Complaint Rested On An Impermissible Interpretation of FECA.

In their Statement of Reasons, the controlling Commissioners chose to analyze whether Crossroads GPS had satisfied the major purpose test on the basis of the organization's self-

[6] Some portion of the remaining $18.3 million in spending by Crossroads GPS—including grants to other nonprofit organizations—may have likewise been for federal campaign activity. Without an investigation, the OGC had insufficient information to make that determination and such determination was unnecessary to the OGC's determination that the group's major purpose was federal campaign activity. *See* AR 365–66, 366 n.47 (First General Counsel's Report at 26–27).

selected fiscal year, instead of a calendar year. But FECA's definition of "political committee" unambiguously turns on a group's activity in a *calendar year*, and the Statement of Reasons provides no reasoned justification for departing from the clear language of the statute. The Commission's action must be set aside because the explanation offered by the three Commissioners who voted not to proceed is contrary to law—that is, it rested on impermissible interpretations of FECA.

FECA defines "political committee" to mean "any committee, club, association or other group of persons which receives contributions aggregating in excess of $1,000 *during a calendar year* or which makes expenditures aggregating in excess of $1,000 *during a calendar year*." 2 U.S.C. § 431(4)(A) (emphasis added). Here, the controlling Commissioners acknowledged that Crossroads GPS had "crossed the statutory threshold for political committee status by making over $1,000 in independent expenditures." AR 404–05 (Goodman, Hunter, Petersen Statement of Reasons at 5–6). However, they rejected the OGC's analysis with respect to Crossroads GPS' major purpose—including the OGC's analysis of Crossroads GPS' spending in the 2010 calendar year in determining the organization's major purpose. In so doing, the controlling Commissioners took the view that the determination whether Crossroads GPS had a major purpose of influencing elections must be based on a consideration of its activities in the course of its own fiscal year rather than during a calendar year. That holding is contrary to FECA, under which political committee status is determined by an organization's actions during a calendar year.

In considering whether the Commission's dismissal of Plaintiffs' complaint rested on an impermissible interpretation of FECA, the Court should employ "the traditional tools of statutory construction, including examination of the statute's text, legislative history, and structure, as well

as its purpose," *Shays v. FEC*, 414 F.3d 76, 105 (D.C. Cir. 2005) ("*Shays I*") (citations omitted), to determine whether Congress has addressed the issue arising from the challenge to the agency's action. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. This holds true whether or not the Court believes that the action at issue is one that otherwise would merit deference under *Chevron*. *See DSCC*, 454 U.S. at 32 (noting that with or without deferential review, "the courts are the final authorities on issues of statutory construction" and "must reject administrative constructions of the statute . . . that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement").

FECA's definition of "political committee" makes clear that the relevant time period for the determination of political committee status is "a calendar year." 2 U.S.C. § 431(4)(A). The OGC analyzed Crossroads GPS' political committee status under a calendar year standard, both with respect to the $1,000 "expenditure" threshold and with respect to the major purpose test. The OGC rejected Crossroads GPS' argument that the Commission's determination of whether the organization's major purpose is campaign activity should instead be analyzed on the basis of the organization's self-selected fiscal year, reasoning that a calendar year, "not a self-selected fiscal year, provides the firmest statutory footing for the Commission's major purpose determination—and is consistent with FECA's plain language." AR 364 (First General Counsel's Report at 25).

The language of the statutory definition of "political committee" at 2 U.S.C. § 431(4)(A) is unambiguous—Congress intended that political committee status be determined on a calendar-year basis. Moreover, in creating the "major purpose" test as a gloss on the statutory definition of "political committee" in *Buckley*, the Supreme Court nowhere expressed an intention to

displace the statute's focus on the calendar year as the relevant time period for determining whether an organization is a political committee. The Commission, therefore, is required to give effect to this "unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. The controlling Commissioners and, therefore, the Commission, acted contrary to law by misinterpreting 2 U.S.C. § 431(4)(A) as permitting a fiscal year-based analysis of political committee status and basing the decision to dismiss Plaintiffs' administrative complaint on this impermissible interpretation of FECA.

C. The Dismissal of Plaintiffs' Administrative Complaint Was Arbitrary, Capricious, An Abuse Of Discretion And Otherwise Contrary To Law.

Applying the "arbitrary and capricious" standard set forth in *State Farm*, the Court must determine whether, in light of the substantive statutory requirements applicable to political committees,[7] the agency has "articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (internal quotation marks and citation omitted). If the agency has changed its position, it must acknowledge that it has done so and offer a satisfactory explanation for the new position. *See id.* at 41–42; *Fox Television*, 556 U.S. at 515 ("An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."). The agency's explanation must satisfy the criteria set out by the Supreme Court in *State Farm*:

[7] For the reasons stated in Part II *supra*, *Chevron* deference is inapplicable to this case. But to the extent it may be applicable here, the *Chevron* Step Two inquiry as applied to FEC dismissals of administrative complaints under *Orloski* when they rest on constructions of ambiguous statutory language overlaps with the APA "arbitrary and capricious" standard applied to such dismissals under *In re Carter-Mondale Reelection Committee*, 642 F.2d at 550-551 & n.6, "for whether a statute is unreasonably interpreted is close analytically to the issue whether an agency's actions under a statute are unreasonable." *Shays v. FEC*, 414 F.3d 76, 96 (D.C. Cir. 2005) ("*Shays I*") (internal quotation marks, citation, and brackets omitted). A federal agency interpretation of a statute is impermissible if it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844.

> [T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Normally, an agency [action] would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies: "We may not supply a reasoned basis for the agency's action that the agency itself has not given."

463 U.S. at 43 (internal quotation marks and citation omitted). Under *Orloski*, this Court should also consider whether the FEC's dismissal of Plaintiffs' administrative complaint "unduly compromise[s] the Act's purposes" or "create[s] the potential for gross abuse," and whether the "FEC has consistently adhered to this interpretation" of FECA. *Orloski*, 795 F.2d at 165–66.

Applying these standards here, the Court should conclude that the controlling Commissioners' interpretation of FECA, and their dismissal of Plaintiffs' administrative complaint based on such interpretation, were arbitrary, capricious, an abuse of discretion and contrary to law under *Orloski*, *Chevron*, *State Farm* and 2 U.S.C. § 437g(a)(8)(C) in three key respects: their exclusive reliance on the organization's own fiscal year, their refusal to consider non-express advocacy expenditures as evidence of a major purpose to influence elections, and their reliance on the organization's own self-serving statement of its purpose. For all of these reasons, the dismissal should be set aside.

1. *The controlling Commissioners' analysis of political committee status under a fiscal year standard, rather than the statutory calendar year standard, is arbitrary and capricious and contrary to law.*

As argued in Part IV.B. *supra*, FECA unambiguously uses a calendar year analysis rather than a fiscal year analysis in determining an organization's status as a political committee. But even if FECA were ambiguous, the controlling Commissioners' interpretation of FECA as

permitting a fiscal year-based analysis of political committee status was arbitrary, capricious, an abuse of discretion or otherwise contrary to law.

The OGC explained precisely why employment of a fiscal year analysis to determine an organization's major purpose under FECA's political committee provisions is arbitrary and capricious:

> [U]sing a calendar year as the statutory basis for defining "political committee" as required by the Act but not as the basis for examining major purpose, as Crossroads GPS suggests, could lead to absurd results. For example, two groups with identical spending patterns could be evaluated differently if one group ended its fiscal tax year on May 31 and the other's fiscal tax year ended on December 31.

AR 364 (First General Counsel's Report at 25).

Furthermore, employment of a fiscal year analysis for determination of an organization's major purpose "unduly compromise[s] the Act's purposes" and "create[s] the potential for gross abuse." *Orloski*, 795 F.2d at 165. The potential for gross abuse "is underscored by the ability of a nonprofit organization to change its tax filing period with the IRS—Crossroads GPS in fact did so in 2011. Crossroads GPS's fiscal tax year now coincides with the calendar year." AR 364 (First General Counsel's Report at 25). An organization's ability to manipulate its own fiscal year empowers such an organization evade federal law political committee status and attendant disclosure obligations, which clearly and unduly compromises the purposes of FECA.

Finally, this Court should consider whether the "FEC has consistently adhered to" the controlling Commissioners' fiscal year interpretation of political committee status." *Orloski*, 795 F.2d at 166. As the OGC explained, determining an organization's political committee status with respect to a calendar year, rather than a fiscal year, is "consistent with the Commission's actions in the enforcement matters cited as guidance in the 2007 Supplemental E&J." AR 364 (First General Counsel's Report at 25). The OGC explained:

> In two matters cited by the 2007 Supplemental E&J—and in one concluded shortly thereafter—the Commission focused on the group's activity during the 2004 calendar year for that election to determine major purpose, and only used the groups' later activity to assess their ongoing reporting obligations as political committees.

Id. (footnote omitted). As Vice Chair Ravel and Commissioners Walther and Weintraub explained in their Statement of Reasons, the 2007 SE&J is the "most comprehensive and most recent document explaining how the Commission determines an organization's major purpose." AR 507 (Ravel, Walther, Weintraub Statement of Reasons at 3). The controlling Commissioners' reliance on Crossroads GPS' self-defined fiscal year for the major purpose analysis constitutes a change in FEC policy. If the agency has changed its position, it must acknowledge that it has done so and provide reasons for the new policy. *See State Farm*, 463 U.S. at 41–42; *Fox Television*, 556 U.S. at 515. The controlling Commissioners have failed to do so here.

For all of these reasons, the Court should conclude that the controlling Commissioners' interpretation of FECA as permitting a fiscal year-based analysis of political committee status is arbitrary, capricious, and abuse of discretion or otherwise contrary to law.

2. *The controlling Commissioners' limitation of the major purpose analysis to spending on express advocacy, rather than spending on federal campaign activity, is arbitrary and capricious and contrary to law.*

Disregarding the Commission's longstanding practice of considering an organization's "full range of campaign activities" in determining the organization's major purpose, the controlling Commissioners instead devised a new major purpose analysis limited to consideration of an organization's spending on express advocacy (and possibly its functional equivalent), based on misapplication of a Tenth Circuit opinion analyzing a New Mexico state law, together with misinterpretations of the Supreme Court's decision in *MCFL* and some district

court decisions analyzing federal law.[8] AR 412–19, 506 (Goodman, Hunter, Petersen Statement of Reasons at 13–20; Ravel, Walther, Weintraub Statement of Reasons at 2).

The controlling Commissioners began their analysis of the major purpose inquiry into an organization's spending by noting that in *MCFL* the Supreme Court stated that if a group's "independent spending become[s] so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." AR 412 (Goodman, Hunter, Petersen Statement of Reasons at 13) (citing *MCFL*, 479 U.S. at 262). While it is indeed true that, if express advocacy independent expenditures become so extensive as to become the group's major purpose, that group is a political committee under federal law, this passage from *MCFL* does not stand for the proposition that express advocacy expenditures are the *only* way an organization can establish that its major purpose is federal campaign activity. The Supreme Court's dictum in *MCFL*, a case that did not even involve the issue of what activities were sufficient to satisfy the major purpose test, provides no reasonable basis for the controlling Commissioner's attempt to change FEC policy.

The controlling Commissioners went on to state that the "relevant spending may not encompass non-electoral communications" and then, without basis in reason, fact or law, characterized millions of dollars of Crossroads GPS spending on ads criticizing federal candidates in the weeks and months leading up to the 2010 federal election as non-electoral communications and "spending on activities unrelated to campaigns." AR 413 (Goodman,

[8] To the extent the Commissioners rested their decision on their understanding of various judicial decisions, their reasoning would receive no *Chevron* deference even if it were an action of a Commission majority that might otherwise claim such deference. An agency receives *Chevron* deference when it exercises its own discretion to adopt an interpretation of a statute when it has been delegated authority to do so. However, no deference is due when an agency bases an action on its interpretation of judicial decisions that it believes compel particular readings of the law. *See Negusie v. Holder*, 555 U.S. 511, 522–23 (2009).

Hunter, Petersen Statement of Reasons at 14). The controlling Commissioners based this dubious argument on the Tenth Circuit's decision in *New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010)—a challenge to a New Mexico state law having nothing to do with the Commission's longstanding analysis of political committee status under FECA. AR 413 (Goodman, Hunter, Petersen Statement of Reasons at 14).

The controlling Commissioners also inexplicably cited *FEC v. GOPAC, Inc.*, 917 F. Supp. 851 (D.D.C. 1996), for the proposition that the Commission's major purpose analysis must be confined to spending on express advocacy. In *GOPAC*, the court's decision makes no mention whatsoever of express advocacy and, in fact, turned on the court's conclusion that the organization's specific expenditures were made for the purpose of influencing state and local—not federal—elections:

> Although GOPAC's ultimate major purpose was to influence the election of Republican candidates for the House of Representatives, GOPAC's immediate major purpose in 1989 and 1990 was to elect state and local candidates and to develop ideas and circulate them generally to Republican party candidates and supporters including, but not limited to, unidentified Republican candidates for federal office.

GOPAC, 917 F. Supp. at 858. GOPAC was raising and spending money to support state and local candidates who might one day run for federal office. The court in *GOPAC* held that "an organization whose major purpose did not involve support for any particular federal candidate, either because there was no candidate running at the time, or because the support was not directed to the election of any particular candidate but was more in the nature of general party support," could not be regulated as a federal political committee. *Id*. at 862 (citation omitted). GOPAC was a far cry from Crossroads GPS, which spent more than $20 million on ads criticizing federal candidates during the 2010 federal elections—and the controlling Commissioners' reliance on *GOPAC* is misplaced.

Finally, the controlling Commissioners cited the district court decision in *FEC v. Malenick*, 310 F. Supp. 2d 230 (D.D.C. 2004), for the proposition that the Commission must limit its consideration of an organization's spending in the context of the major purpose analysis to express advocacy. AR 413 (Goodman, Hunter, Petersen Statement of Reasons at 14). And again the controlling Commissioners misconstrued a court decision to bolster their dubious analysis. The court in *Malenick* held that an organization was a political committee because its "major purpose was the nomination or election of specific candidates in 1996, and because [it] received contributions aggregating more than $1,000 in 1996." 310 F. Supp. 2d at 237. Nowhere in its decision did the district court state that the major purpose analysis must be limited to spending on express advocacy. The simple fact that an organization that engaged in extensive express advocacy was found by a court to be a political committee does not stand for the converse proposition that the Commission must limit its major purpose analysis to express advocacy spending.

Moreover, while the controlling Commissioners cited the Fourth Circuit decision in *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008) ("*NCRL*"), for the court's discussion of whether the relevant "major purpose" must be only *a* major purpose or *the* major purpose, *see* AR 407 (Goodman, Hunter, Petersen Statement of Reasons at 8), the controlling Commissioners failed to note in the section of their Statement of Reasons pertaining to limiting the major purpose analysis to express advocacy that the Fourth Circuit in *NCRL* held that, under *Buckley*, "an entity must have 'the major purpose' *of supporting or opposing a candidate* to be designated a political committee." *NCRL*, 525 F. 3d at 288 (emphasis added). The Fourth Circuit understood that the *Buckley* Court did not limit the major purpose analysis to express advocacy.

The First General Counsel's Report details and applies to Crossroads GPS the Commission's well-established policy for determining whether an organization's major purpose is federal campaign activity, a policy that has long considered spending and other activity that does not entail express advocacy. The Commission's 2007 SE&J notes at least nine times that the relevant legal standard is whether an organization's major purpose is federal campaign activity and makes no mention of express advocacy. Multiple courts have explicitly upheld against constitutional challenge the Commission's approach to determining major purpose reflected in the 2007 SE&J and applied in the First General Counsel's Report in the instant matter. *See Free Speech*, 720 F.3d at 798; *Real Truth About Abortion, Inc.*, 681 F.3d at 556.

Nevertheless, the controlling Commissioners fabricated a new Commission policy to limit the major purpose analysis to spending on express advocacy (and possibly its functional equivalent). The controlling Commissioners' assertion that all non-express advocacy is necessarily unrelated to federal elections is contradicted by FECA in at least two ways: (1) the Act's regulation of "electioneering communication," defined to include any broadcast advertisement that clearly identifies a federal candidate within 30 days of a primary or 60 days of a general election, 2 U.S.C. § 434(f)(3); and (2) the Act's definition of non-express advocacy advertising that promotes, supports, attacks or opposes candidates as "federal election activity," 2 U.S.C. § 431(20)(A). The controlling Commissioners' analysis limiting the major purpose test to spending on express advocacy "unduly compromise[s] the Act's purposes" and "create[s] the potential for gross abuse." *Orloski*, 795 F. 2d at 165. The controlling Commissioners' dismissal of Plaintiffs' administrative complaint based on this unreasonable interpretation of FECA was therefore arbitrary, capricious, an abuse of discretion and contrary to law under *Orloski*, *Chevron*, *State Farm* and 2 U.S.C. § 437g(a)(8)(C).

3. *The controlling Commissioners' near-exclusive reliance on Crossroads GPS' articles of incorporation, mission statement, website, and other self-generated documents as determinative of the group's central organizational purpose is arbitrary and capricious and contrary to law.*

Finally, the controlling Commissioners asserted that, to "determine a group's purpose, courts have relied primarily on the materials created and utilized by that group." AR 409 (Goodman, Hunter, Petersen Statement of Reasons at 10). They went on to cite *Malenick* for this proposition, noting that in "*Malenick*, the court reviewed the organization's announced goals, brochures, fundraising letters, and express advocacy communications sent to its members, all of which indicated that the major purpose of the group in question was the election of federal candidates." *Id.* What the controlling Commissioners seemingly fail to appreciate is that, in *Malenick*, these documents and communications by the organization were reliable evidence of the organization's major purpose because they belied the organization's representations to the Commission and the court—namely, that the group *did not* have the major purpose of influencing elections. 310 F. Supp. 2d at 234 ("The FEC asserts that, '[b]ased on Triad's own statements and actions, it is clear that its major, if not sole, purpose during the 1996 election cycle was to support particular candidates for federal office both in Republican Party primaries and in the general election.' . . . Malenick disputes this assertion . . . ."). As a general matter, statements against interest are considered more reliable evidence than statements in self-interest. For example, the Federal Rules of Evidence contain an exception to the rule against hearsay for statements against interest—allowing for admission as evidence in a criminal proceeding a statement that "a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability[.]" Fed. R. of Evid.

804(b)(3). In this case, the statements relied on by the controlling Commissioners are self-serving ones that are undermined by numerous other statements and activities indicating that the organization's real purpose was to engage in campaign activity.

The controlling Commissioners also cite *GOPAC* for the proposition that, in determining an organization's major purpose, the court "rejected reliance on less formal types of proffered evidence" such as "an audiotape and transcript of a meeting between two unidentified individuals" that conflicted with the overwhelming majority of evidence in the case. AR 409 (Goodman, Hunter, Petersen Statement of Reasons at 10); *see also GOPAC*, 917 F. Supp. at 862–65. With respect to Crossroads GPS, however, the OGC's recommendation to find "reason to believe" that Crossroads GPS was in violation of FECA did not rely on informal evidence that contradicted the majority of the evidence in the case but, instead, relied on more than $20 million of spending on public advertising and on public statements that corroborated the intentions manifested by that spending and contradicted Crossroads GPS's "formal" disclaimers of a purpose to influence elections.

Among the documents produced by Crossroads GPS in its effort to dissuade the Commission that its major purpose was to influence elections, the controlling Commissioners placed great reliance on the organization's claim of tax-exempt status under section 501(c)(4) of the Internal Revenue Code as a "social welfare" organization. AR 410–11 (Goodman, Hunter, Petersen Statement of Reasons at 11–12). Though the controlling Commissioners stated that Crossroads GPS "registered" with the IRS under section 501(c)(4), AR 410 (Goodman, Hunter, Petersen Statement of Reasons at 11), in fact, Crossroads GPS applied to the IRS for recognition of the group's claimed 501(c)(4) status—and the IRS has yet to rule on Crossroads GPS' application. *See* AR 343 (First General Counsel's Report at 4); *see also* Peter Overby, *Debate*

Endures Over Tax Exempt Status Of Crossroads GPS, Nat'l Pub. Radio (May 9, 2014), http://www.npr.org/2014/05/09/310947559/debate-endures-over-tax-exempt-status-of-crossroads-gps.

The controlling Commissioners further note that, under existing tax laws, section 501(c) groups cannot have the primary purpose of influencing elections, so they are "not required to register as federal political committees, *as long as they comply with their tax law requirements*." AR 410–11 (Goodman, Hunter, Petersen Statement of Reasons at 11–12) (emphasis added). The controlling Commissioners surely know, though they fail to acknowledge, that organizations do sometimes violate their tax law requirements and the FEC has in the past found such organizations to likewise have violated FECA by failing to register and report as political committees. The Commission explained in the 2007 SE&J:

> The Commission has demonstrated through the finding of political committee status for a 501(c)(4) organization and the dismissal of a complaint against a 527 organization, that tax status did not establish whether an organization was required to register with the FEC. Rather, the Commission's findings were based on a detailed examination of each organization's contributions, expenditures, and major purpose, as required by FECA and the Supreme Court.

72 Fed. Reg. at 5599; *see also id.* at 5604 n.19, 5605 (noting the Commission's determinations that two 501(c)(4) organizations, the Sierra Club and Freedom Inc., violated FECA by failing to register and report as political committees).

For all of these reasons, the controlling Commissioners' near-exclusive reliance on Crossroads GPS' self-serving, self-generated articles of incorporation, mission statement, website and other documents as determinative of the group's central organizational purpose is arbitrary and capricious and contrary to law.

V. THE COURT SHOULD DECLARE THAT THE COMMISSION'S DISMISSAL OF PLAINTIFFS' ADMINISTRATIVE COMPLAINT WAS UNLAWFUL AND DIRECT THE FEC TO CONFORM WITH SUCH DECLARATION WITHIN 30 DAYS.

The Court has authority to declare that the FEC's dismissal of Plaintiffs' administrative complaint was contrary to law and direct the FEC to conform with such declaration within 30 days. *See* 2 U.S.C. § 437g(a)(8)(C).

The question before this Court is not whether the FEC should have found that Crossroads violated the law. Instead, this Court must determine whether the FEC's rationale for refusing to even investigate that *possibility*, based on the law and on the record before it, was arbitrary and capricious. In light of the foregoing discussion, the Court should answer that question in the affirmative, and issue a declaration to that effect.

CONCLUSION

For the reasons stated, we respectfully urge the Court to grant Plaintiffs' motion for summary judgment; declare that the FEC's dismissal of Plaintiffs' administrative complaint is contrary to law and arbitrary and capricious; and direct the Commission to conform with such declaration within 30 days consistent with the Court's judgment.

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Respectfully submitted,

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