IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, *et al.*,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,
Defendant,

CROSSROADS GRASSROOTS POLICY STRATEGIES,
Intervenor-Defendant.

Civil Action No. 1:14-cv-00148 (RJL)

MEMORANDUM OF POINTS AND AUTHORITIES

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN OPPOSITION TO CROSSROADS GRASSROOTS POLICY STRATEGIES' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs' summary judgment memorandum contains a full account of the procedural background and factual record in this case. The essential facts material to the issues presented remain undisputed. In considering whether to investigate Defendant-Intervenor Crossroads Grassroots Policy Strategies ("Crossroads"), the Federal Election Commission ("FEC") had before it a record showing that:

- In 2010, Crossroads spent approximately $15.4 million on communications that expressly advocated the election or defeat of federal candidates. AR 345–46.

- During the same year, in the period preceding the November congressional elections, Crossroads spent another $5.4 million on non-express advocacy communications that criticized or opposed clearly identified federal candidates. AR 356.

- Crossroads also made grants of approximately $15.9 million to other organizations; many of those organizations in turn made substantial disbursements for express advocacy and electioneering communications. AR 347 n.16.

- Crossroads claimed to have spent a total of approximately $39.1 million in 2010, AR 345; thus its spending on express advocacy and other advertisements regarding candidates alone accounted for approximately 53 percent of its total spending. AR 365–66.

- Crossroads' fiscal year ended on May 31, 2011; in the months of 2011 that it included in that fiscal year, Crossroads said that it spent another $3 million on non-electoral activities. AR 401.

- Persons associated with Crossroads made repeated statements reported in various media indicating that the purpose of the group was to provide a vehicle for electoral spending without donor disclosure that would parallel the efforts of Crossroads' sister organization, the Super PAC American Crossroads. AR 11–14, 344–45.

The three FEC Commissioners who voted not to find reason to believe that Crossroads may have violated the political committee registration and reporting requirements managed to arrive at the conclusion that Crossroads could not be a political committee only by rejecting the

recommendation of the FEC's General Counsel and previous precedents of the Commission and instead: (1) determining that all Crossroads' electoral spending except express advocacy must be disregarded in considering its major purpose; (2) concluding that the FEC is required to assess an organization's major purpose based on spending in its self-defined fiscal year rather than in the calendar year in which it has allegedly violated the political committee registration and reporting requirements; (3) ignoring altogether the grants made by the organization to other political spending groups; and (4) disregarding all statements evidencing the organization's purpose to influence federal elections except its self-serving, "official" statements of purpose.

The votes of the three controlling Commissioners allowed one of the nation's leading political-spending nonprofit groups to escape the reporting and disclosure obligations that federal law imposes on groups that engage in such spending and have the major purpose of influencing elections. Crossroads' attempt to defend the Commissioners' votes, which largely parrots the FEC's, is unavailing. Contrary to Crossroads' arguments, the Commissioners' reasoning is not entitled to *Chevron* deference, and both the fiscal-year time frame they imposed on the major-purpose determination and their view that only express advocacy may be considered in determining a group's major purpose are contrary to law. And Crossroads' new argument that there is no remaining case or controversy rests on a flawed understanding of the relevant statute of limitations and fails to meet its burden of showing mootness.

ARGUMENT

I. *Chevron* Deference Does Not Apply.

Crossroads relies heavily on the argument that the legal views underlying the controlling Commissioners' vote not to investigate are entitled to *Chevron* deference. That argument fails for two reasons. First, the controlling Commissioners were not exercising gap-filling authority delegated by Congress to construe ambiguous *statutory terms*. Rather, their votes reflected their

views about the proper application of a judicially-created limitation on the statute restricting political committee status to groups whose "major purpose" is supporting or opposing candidates. When agencies construe judicial opinions rather than statutory provisions as to which Congress has delegated them interpretive authority, they receive no *Chevron* deference. *See, e.g.*, *Negusie v. Holder*, 555 U.S. 511, 518–23 (2009).

Second, as the D.C. Circuit has recently made clear, the Supreme Court's limitation of *Chevron* deference to statutory constructions that have the "force of law," *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001), means that an agency's legal interpretations that lack precedential force and have no binding effect beyond the parties to the matter in which they are issued do not receive *Chevron* deference. *Fogo de Chao (Holdings) Inc. v. Dept. of Homeland Security*, 769 F.3d 1127, 1137 (D.C. Cir. 2014). The FEC has recently admitted that its deadlock votes lack the precedential effect essential to actions with the force of law under *Mead* and *Fogo de Chao*: "[S]tatements from declining-to-go-ahead Commissioners in three-three dismissals are '*not law*' and . . . such statements 'would not be binding legal precedent or authority for future cases.'" FEC Reply in Support of Motion to Dismiss, at 4, *Citizens for Responsibility and Ethics in Washington (CREW) v. FEC*, No. 14-1419 (D.D.C. Dec. 16, 2014) (emphasis added by FEC) (quoting *Common Cause v. FEC*, 842 F.2d 436, 449 & n.32 (D.C. Cir. 1988)).

A. The FEC Did Not Construe an Ambiguous Statutory Term That Congress Delegated It Authority to Interpret.

As the Supreme Court and D.C. Circuit have repeatedly explained, *Chevron* deference depends on whether Congress, by employing an ambiguous statutory term, delegated authority to the agency to resolve that ambiguity. *See, e.g.*, *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868, 1874 (2013); *W. Minn. Mun. Power Agency v. FERC*, 806 F.3d 588, 591–93 (D.C. Cir. 2015). "[*Chevron*] deference comes into play, of course, only as a consequence of statutory ambiguity,

and then *only* if the reviewing court finds an implicit delegation of authority to the agency." *Sea-Land Serv., Inc. v. Dept. of Transp.*, 137 F.3d 640, 645 (D.C. Cir. 1998). Crossroads' repeated assertions that the controlling Commissioners' legal views are entitled to *Chevron* deference sidestep this fundamental principle by failing, at any point, to identify the ambiguous statutory term the Commissioners supposedly construed. The reason for the omission is apparent: The Commissioners were not construing any provision of the statute, but instead based their votes on their views of the "major purpose" requirement for political committee status, an extra-textual limiting construction placed on the political committee definition in the Federal Election Campaign Act, as amended ("FECA"), by the Supreme Court, for reasons of constitutional avoidance, in *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

Buckley imposed the major purpose limitation not as a construction of the statute's *language*, but because of perceived problems of vagueness and overbreadth that might result from application of the statute's literal terms, under which "'political committee' is defined only in terms of amount of annual 'contributions' and 'expenditures,' and could be interpreted to reach groups engaged purely in issue discussion." *Id.* To avoid those problems while still "fulfill[ing] the purposes of the Act," the Court held that political committees "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination of election of a candidate." *Id*.

The controlling Commissioners here likewise were not construing ambiguous statutory language. As the FEC has acknowledged, they were "applying the major-purpose test" established in "*Buckley* and its progeny," FEC Mem. Supp. Cross-Mot. for Summ. J. and in Opp'n to Pls.' Mot. for Summ. J. 34 (Dkt. No. 32), based upon their views of "the 'reasons that the Court in *Buckley* and [*FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986)

("*MCFL*")] narrowed the statutory definition of political committee,'" *id*. at 31, their interpretation of "the judicial opinions considering the test," *id*., and "First Amendment concerns that have been expressed by various courts and commentators," *id*. at 29. Crossroads acknowledges the same point when it observes that "the major-purpose test is a product of later Supreme Court interpretation, not congressional drafting." Crossroads GPS Mem. Supp. Cross-Mot. for Summ. J. and in Opp'n to Pls.' Mot. for Summ. J. 21 (Dkt. No. 60) ("Crossroads S.J. Mem.").

Chevron, which is premised on congressional delegation of authority to give authoritative constructions to ambiguous statutory language, does not require or permit deference to an agency's interpretation of judicial opinions, and still less to its views of the constitutional issues underlying them. In *Negusie v. Holder*, for example, the Supreme Court rejected a plea for deference to an agency decision that was based not on the agency's construction of ambiguous statutory language, but on its interpretation of a prior Supreme Court decision. *See* 555 U.S. at 521. The D.C. Circuit has likewise repeatedly held that courts "are not obligated to defer to an agency's interpretation of Supreme Court precedent under *Chevron* or any other principle." *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002) (quoting *Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc), *vacated on other grounds*, 524 U.S. 11 (1998)); *accord*, *New York New York LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002) (same); *see also Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 959 n.17 (D.C. Cir. 2013), *overruled on other grounds*, *Am. Meat Inst. v. Dept. of Ag.*, 760 F.3d 18 (D.C. Cir. 2014); *McDonald Partners, Inc. v. NLRB*, 331 F.3d 1002, 1005 (D.C. Cir. 2003); *Northeast Beverage Corp. v. NLRB*, 554 F.3d 133, 138 n.* (D.C. Cir. 2009). In particular, the D.C. Circuit has emphasized that this principle applies to

agency interpretations of Supreme Court decisions that, like *Buckley*, impose limiting constructions based on constitutional avoidance. *See Great Falls*, 278 F.3d at 1340.

Tellingly, the D.C. Circuit announced this principle in its en banc opinion in *Akins v. FEC*, which concerned the exact issue in this case: whether the FEC's interpretation of the major purpose test is entitled to *Chevron* deference. Although the Supreme Court vacated *Akins* on other grounds, 524 U.S. at 28–29, the D.C. Circuit's subsequent reliance on *Akins* to reject claims for *Chevron* deference to agency interpretations of judicial opinions (*see, e.g.*, *Great Falls*, 278 F.3d at 1341) leaves no doubt that *Akins*' view of *Chevron* is still intact. *Akins*' analysis of the deference question at issue here thus remains persuasive:

> We think the FEC's plea for deference is doctrinally misconceived. 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. The Commission's assertion that Congress and the Court are equivalent in this respect is inconsistent with *Chevron*'s basic premise. *Chevron* recognized that Congress delegates policymaking functions to agencies, so deference by the courts to agencies' statutory interpretations of ambiguous language is appropriate. But the Supreme Court does not, of course, have a similar relationship to agencies, and agencies have no special qualifications of legitimacy in interpreting Court opinions. There is therefore no reason for courts—the supposed experts in analyzing judicial decisions—to defer to agency interpretations of the Court's opinions. This is especially true where, as here, the Supreme Court precedent is based on constitutional concerns, which is an area of presumed judicial competence.

101 F.3d at 740. Not having enacted the major purpose requirement, Congress could not have delegated to the FEC the authority to construe its meaning, and the FEC has no claim to authority to interpret judicial decisions or their underlying constitutional bases.

B. The Controlling Commissioners' Interpretations Cannot Command Deference Because They Lack the Force of Law.

Crossroads' deference arguments fail for another, independent reason: the legal positions underlying the controlling Commissioners' votes cannot receive *Chevron* deference because they

lack the force of law. In *United States v. Mead Corp.*, the Supreme Court significantly clarified the parameters of *Chevron* deference by limiting it to circumstances where "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." 533 U.S. at 226–27. Both the Supreme Court and the D.C. Circuit have, since *Mead*, confined *Chevron* deference to agency legal interpretations carrying the force of law. *See, e.g.*, *Mayo Foundation for Med. Educ. & Research v. United States*, 562 U.S. 44, 57 (2011); *Gonzales v. Oregon*, 546 U.S. 243, 255–56 (2006); *Anna Jacques Hosp. v. Burwell*, 797 F.3d 1155, 1166 (D.C. Cir. 2015); *Miller v. Clinton*, 687 F.3d 1332, 1340–41 (D.C. Cir. 2012); *Hall v. Sebelius*, 667 F.3d 1293, 1299 (D.C. Cir. 2012); *Pub. Citizen, Inc. v. Dept. of Health & Human Servs.*, 332 F.3d 654, 659–60 (D.C. Cir. 2003); *Am. Fed. of Govt. Employees v. Veneman*, 284 F.3d 125, 129 (D.C. Cir. 2002).

Crossroads does not contend that the legal interpretations underlying the controlling Commissioners' votes have the "force of law," but it argues that this Court is bound by the D.C. Circuit's decision in *In re Sealed Case*, 223 F.3d 775 (D.C. Cir. 2000), to defer to legal positions taken by no-voting Commissioners in three-three deadlocks. As explained in plaintiffs' earlier submissions, *Sealed Case* is distinguishable because of its unique procedural posture. *See* Pub. Cit. Reply/Opp'n to FEC 3–5 (Dkt. No. 38). More importantly, *Sealed Case* was decided before the shift in *Chevron* deference doctrine worked by *Mead*'s holding that agency legal interpretations that lack the force of law are "beyond the *Chevron* pale." 533 U.S. at 234.

Crossroads asserts that *Sealed Case* came after the Supreme Court's ruling in *Christensen v. Harris County*, 529 U.S. 576 (2000), which "foreshadow[ed]" *Mead*. Crossroads S.J. Mem. 17. But while *Christensen* noted that certain agency actions lacking the force of law were not

entitled to deference, *see* 529 U.S. at 587, it was *Mead* that expressly limited deference to agency interpretations promulgated in the exercise of authority to announce rules with the force of law. 533 U.S. at 226–27. Thus, both Supreme Court and D.C. Circuit opinions consistently identify *Mead* as the source of the clarification that only interpretations with the force of law receive deference. *See, e.g.*, *Mayo*, 562 U.S. at 57; *Gonzales*, 546 U.S. at 255–56; *Fox v. Clinton*, 684 F.3d 67, 76 (D.C. Cir. 2012); *Sottera, Inc. v. FDA*, 627 F.3d 891, 903 (D.C. Cir. 2010); *Pub. Citizen*, 332 F.3d at 659; *Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002); *Am. Fed. of Govt. Employees*, 284 F.3d at 129; *see also Mead*, 533 U.S. at 239 (Scalia, J., dissenting) ("Today's opinion makes an avulsive change in judicial review of federal administrative action.").

Sealed Case, issued without the benefit of *Mead*, considered only whether FEC probable cause determinations had some "legal effect," not whether such determinations, when arrived at by three-three deadlocks, actually resulted in legal interpretations with the "force of law." *See* 223 F.3d at 780. By contrast, in an opinion issued a week after *Mead* was decided, the D.C. Circuit determined that FEC advisory opinions were entitled to *Chevron* deference because "they have *binding* legal effect on the Commission" in that they provide a safe harbor against FEC enforcement to any person who relies on them in a "materially indistinguishable" transaction. *FEC v. Nat'l Rifle Ass'n*, 254 F.3d 173, 185 (D.C. Cir. 2001) (emphasis added). Deadlocked Commission votes have no such binding legal effect.[1]

A recent D.C. Circuit decision, combined with admissions made by the FEC, leaves no remaining doubt that binding precedent forecloses affording *Chevron* deference to the legal

[1] The court in *NRA* noted that *Sealed Case* had said that probable cause determinations had sufficient "legal effect" to merit deference under *Christensen*, *see id.*, but *NRA* itself did not address whether *deadlocked* probable cause determinations had the force of law comparable to that of an advisory opinion—and neither case addressed "reason to believe" determinations.

interpretations underlying the votes of three Commissioners in a deadlocked enforcement decision. In *Fogo de Chao*, the D.C. Circuit applied *Mead* to hold that "the expressly non-precedential nature" of a decision "conclusively confirms" that it is not an exercise of authority "to make rules carrying the force of law" that are entitled to deference under *Mead*. 769 F.3d at 1137. A determination whose "binding character as a ruling stops short of third parties" does not, the court held, "set a rule of law with any force" that merits deference under *Mead*. *Id*.[2]

Fogo de Chao is fatal to any claim of *Chevron* deference here, in light of the FEC's recent admission that Commission deadlocks cannot establish rules with precedential effect:

> [L]egal analyses articulated by a group of *three* FEC Commissioners in such a statement of reasons, or anywhere else, *could not* amount to an agency policy or regulation, de facto or otherwise. Under FECA's plain language, a group of three Commissioners lacks the power to conduct the kind of rulemaking or to establish the policy change that plaintiffs allege. *See* 52 U.S.C. § 30106(c) (explaining four-vote requirement for Commission actions and expressly referencing rulemaking authority); *id.* § 30107(a)(8) (describing FEC rulemaking authority). The Court of Appeals has thus explained that these required statements from declining-to-go-ahead Commissioners in three-three dismissals are "*not law*" and that such statements "would not be binding legal precedent or authority for future cases." *Common Cause*, 842 F.2d [at 449 & n.32] (emphasis added). The statute explicitly requires that decisions of the Commission "with respect to the exercise of its duties and powers under the provisions of th[e] Act shall be made by a *majority* vote of the members of the Commission," and that certain specified actions require "the affirmative vote of 4 members of the Commission." 52 U.S.C. § 30106(c) (emphasis added); *id.* § 30107(a)(8) (rulemaking authority).

FEC *CREW* Reply, at 4 (parallel citations omitted). The FEC's admissions, together with the D.C. Circuit's recent definitive limitation of *Mead* to precedential legal rulings, foreclose the possibility that the controlling Commissioners' views reflect exercises of authority to establish rules with the "force of law."

[2] *Fogo de Chao* was decided on the same day our opposition/reply brief responding to the FEC's brief was filed, too late to be included in that brief.

II. Crossroads' Arguments Do Not Redeem the Unlawful Rationale for Dismissal.

As a threshold matter, that the controlling group reached beyond the preliminary "reason to believe" inquiry to make a final determination of political committee status was itself contrary to law.[3] Rather than applying the legal standard applicable to this stage of the Commission's enforcement process—whether there was "reason to believe" that a violation "may" have occurred—the controlling group found conclusively that Crossroads "was not required to register with the committee and file reports . . . as a political committee." AR 427.

According to Crossroads, the controlling Commissioners' premature "major purpose" determination is justifiable for "two *independent* reasons," both of which plaintiffs "must negate" to prove that the dismissal was contrary to law: first, the controlling Commissioners were justified in rejecting the statutory calendar-year analysis; and second, their limitation of the relevant "universe" of Crossroads' spending to "express advocacy" was warranted. Crossroads S.J. Mem. 30. Contrary to Crossroads' argument, both aspects of the controlling Commissioners' explanation are arbitrary and capricious and contrary to law.

A. The Controlling Commissioners' Rejection of a Calendar Year-Based Analysis of Major Purpose Was Arbitrary and Contrary to Law.

Because the controlling Commissioners' determinations concerning the major purpose standard are not entitled to *Chevron* deference, the relevant question here is not whether FECA "unambiguously bars the Commission" from considering activity beyond a single calendar year to "determine" a group's major purpose. *See* Crossroads S.J. Mem. 2. Instead, the appropriate inquiry is whether, in rejecting the "calendar year" analysis provided by the statutory definition of "political committee," the controlling Commissioners departed from the only relevant

[3] *See, e.g.*, Supplemental Statement of Reasons of Commissioner Walther, MUR 6396 (Dec. 30, 2014) (Crossroads GPS), eqs.fec.gov/eqsdocsMUR/14044364941.pdf. *See also* Pub. Cit. Reply/Opp'n to FEC 14–15.

statutory text—they plainly did—and whether they provided a reasoned justification for doing so, which they did not. The controlling Commissioners' categorical rejection of the "short" time frame provided in FECA in favor of another "short" time frame that lacks any statutory foundation, let alone administrable standards or agency precedent, was contrary to law and arbitrary.

1. "Political committee status" under FECA expressly applies to activity "during a calendar year."

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*." 52 U.S.C. § 30101(4)(A) (emphasis added). The FEC Office of General Counsel ("OGC") evaluated Crossroads' political committee status under a calendar year standard, with respect to both the $1,000 "expenditure" threshold and the "major purpose" test, 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 363–64.

The controlling Commissioners, however, took the view that their determination of Crossroads' major purpose must be based on its activities in the course of its own fiscal year rather than during a calendar year, rejecting a calendar-year focus as "myopic" and "distorted." AR 419–20. According to Crossroads, the controlling Commissioners premised this conclusion on a lack of statutory support for the OGC's calendar-year analysis. *See* Crossroads S.J. Mem. 12 (citing AR 419 and noting that the controlling Commissioners found "no support in FECA" for OGC's calendar-year approach). In fact, the controlling Commissioners acknowledged that the only statutory reference on this point is to a "calendar year," but dismissed that fact as either irrelevant or, if relevant, unconstitutional under *Buckley*. AR 420 n.87. They rejected applying

the statute's unambiguous calendar-year metric because, in their estimation, any time frame "in contravention to a group's organizational model" would be "incomplete" and would "ignore[] the point of the major purpose test." AR 419.

But "*Buckley* and its progeny" have never compelled any particular time frame for the analysis of major purpose, and the controlling group's invocation of this precedent does not justify "ignor[ing]" the statute. *Id.* When the Supreme Court created the major purpose test, it said nothing whatsoever about displacing FECA's designation of "calendar year" as the relevant time period for determining whether a group is a political committee. Crossroads expends significant energy debating the obvious—and undisputed—fact that Congress did not specify the scope of the major purpose test "five years before that test was established" by the Supreme Court. Crossroads S.J. Mem. 21. True enough. But this case also involves the application of the statutory political committee definition, 52 U.S.C. § 30101(4)(A), to which the major-purpose test has been added by judicial construction. That the major purpose test was a "product of later Supreme Court interpretation" rather than "congressional drafting," Crossroads S.J. Mem. 21, does not somehow mean that the statutory "political committee" definition is irrelevant to the implementation of the major purpose test. Neither *Buckley* nor any judicial decision since *Buckley* said anything about a need to alter the federal definition's *temporal* scope, or otherwise applied any temporal requirement to the "major purpose" limitation. Accordingly, the political committee definition's explicit "calendar year" language is not just the best, but the *only*, statutory authority on this question, and the controlling group's refusal to give effect to this plain statutory language was contrary to law.

Crossroads defends the controlling Commissioners' action by echoing their assertion that the OGC's fidelity to the statutory "calendar year" standard amounted to "introduc[ing] a new

legal norm": "that a calendar year and only a calendar year is the necessary time frame for determining an organization's political committee status." AR 515. This charge is inaccurate. First, adhering to the express statutory language that the Commission is bound to implement cannot be tantamount to the "introduction of a new legal norm." Second, employing a calendar year standard is fully consistent with the Commission's approach to political committee status in prior enforcement proceedings—and a fiscal year standard is not. The controlling Commissioners' reliance on Crossroads' self-defined fiscal year for the major-purpose analysis thus deviates from FEC policy. If an agency changes its position, it must acknowledge that it has done so and provide reasons for the new policy. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41–42 (1983); *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009). The controlling Commissioners have failed to do so here.

2. There is no support for the arbitrary alternative time frame upon which the controlling Commissioners relied.

While the controlling Commissioners derided the OGC's analysis for "superficially attempt[ting] to root itself in the statute," their alternative approach—which would reject looking beyond "time periods other than those utilized by the group in question"—is completely untethered from the statute. AR 419–20. For its part, Crossroads is vague about the standard the controlling Commissioners actually applied, suggesting that they weighed spending "through a range of lenses" but ultimately calling the question "mostly academic," Crossroads S.J. Mem. 24, apparently unwilling to defend the fiscal-year standard it called for during administrative proceedings. *See* AR 33, AR 92. But the controlling Commissioners specifically advocated limiting the major purpose analysis to whatever time period is "utilized by the group in question" or is consistent with the group's "organizational model," AR 419—i.e., its fiscal year. Crossroads' failure to identify previous Commission actions using that metric as the exclusive

basis for a major purpose determination underscores that there is no legal support for this temporal standard.

Moreover, the fiscal year is self-evidently manipulable and arbitrary, and therefore "unduly compromise[s] the Act's purposes" and "create[s] the potential for gross abuse." *Orloski v. FEC*, 795 F.2d 156, 165 (D.C. Cir. 1986). Given an organization's ability to determine and change its own fiscal year—as Crossroads itself did in 2011 (AR 364), allowing it to use three different fiscal-year periods in its first few years of existence, *see* AR 240, AR 293—a fiscal-year standard would enable such a group to evade federal law political committee status and attendant disclosure obligations. A fiscal-year standard would also greatly complicate administration of the Act, as it would never be possible to know whether a group was required to report its activities during an election year without knowing what it might do in the future. Political committees are required to register within ten days of becoming a committee. 52 U.S.C. § 30103(a). But under the open-ended major-purpose test advocated in the controlling group's Statement of Reasons, only organizations that freely admit to satisfying the major purpose test would be required to register. Any other organization could simply claim that its future plans did not include any election advocacy, so it would be "unfair" to impose political committee status.[4]

[4] Notwithstanding Crossroads' statements to the contrary, plaintiffs do not contend that FECA "unambiguously bars the Commission from examining an entity's overall spending" in all circumstances. Crossroads S.J. Mem. 2. Nor did the OGC "intentionally omit[] Crossroads' spending" in 2011, as Crossroads asserts. *Id.* at 10. Instead, its First General Counsel's Report reasonably focused on the period for which Crossroads provided specific information and concluded that its spending during that time was "alone sufficient" to warrant further investigation. AR 356. Nor have plaintiffs ever argued that the Commission was "required" to "ignore available information" in the record. Crossroads S.J. Mem. 20. Indeed, if the agency was bound to consider all of the information before it at the time of its decision—which was not issued until December 2013—the appropriate time frame necessarily extends beyond 2011. In 2012, Crossroads reported approximately $71 million in independent expenditures to the FEC. Center for Responsive Politics ("CRP"), *Crossroads GPS Outside Spending Summary 2012*, https://www.opensecrets.org/outsidespending/detail.php?cmte=C90011719&cycle=2012 (last visited Mar. 9, 2016).

As support for the controlling group's reliance on the organization's fiscal year, Crossroads lists a variety of enforcement cases, none of which supports the controlling group's reasoning. For example, Crossroads—like the controlling Commissioners, *see* AR 421—cites MUR 5751 (The Leadership Forum) ("TLF") as support for rejecting a calendar-year analysis because, in analyzing whether TLF violated the Act, the OGC cited tax filings showing the group's receipts and disbursements between 2002 and 2006. Crossroads S.J. Mem 22. But the OGC did not reach the "major purpose" question, because it concluded—*after an investigation* authorized by the Commission's prior finding that TLF may have violated the Act based on its organizational statements of purpose—that none of TLF's 2004 public communications contained express advocacy or even identified a federal candidate, so the $1,000 statutory threshold was not satisfied. *See* Second General Counsel's Report, at 2, 5–6, MUR 5751 (July 13, 2006), http://eqs.fec.gov/eqsdocsMUR/00005930.pdf.

In another such "example," Crossroads highlights "parallels" between the controlling Commissioners' reasoning and the analysis contained in FEC Advisory Opinion 1996-3 (Apr. 19, 1996), alleging that the similarities "are hard to miss." Crossroads S.J. Mem. 23. This "[s]trikingly" similar advisory opinion, *id*. at 22, involved a foundation created to receive, and entirely funded by, a single testamentary distribution. In 1990, its first year of existence, the foundation spent less than half of its $3,137 in total outlays on contributions to federal and state candidates. Adv. Op. 1996-3, at 2. As Crossroads notes, the Commission gave that minimal spending little weight because "'it occurred in the *initial year* of the Foundation's establishment.'" Crossroads S.J. Mem. 22–23. Therefore, to assess its major purpose, the Commission "look[ed] beyond" 1990, analyzing the foundation's activity *within* each of the following five calendar years—ultimately finding it significant that although the absolute

quantity of annual campaign spending remained more or less constant, its overall outlays in each of the five years (about $48,000 per year, on average) dwarfed the $3,137 spent in 1990. *See* Adv. Op. 1996-3, at 3 (further noting that campaign spending in "Congressional election years," as a proportion of total yearly spending, remained roughly consonant with non-election year activity).

Even if the opinion had looked only at the foundation's first year, it does not appear that the outcome would have been any different. In analyzing the foundation's major purpose, the Commission found it relevant that none of the foundation's other spending was "in any way related to election campaigns," or used to distribute "materials that feature candidates or Members of Congress." *Id.* Moreover, the Commission actually considered—unlike the controlling Commissioners in this case, *see* Section II.B.1, *infra*—how grants made to other organizations, if ultimately spent for campaign activity, impacted its major-purpose analysis. *See id.* at 4 n.3 (noting that some grant funds were expended for the benefit of the Democratic Socialists of America and the Communist Party, but that neither Party nominated candidates in the relevant years). At most, therefore, Advisory Opinion 1996-3 stands for the proposition that an organization's entire history can be looked to for guidance if evidence confined to a single calendar year seems inadequate to characterize its purposes; it certainly does not in any way suggest that the fiscal year analysis applied in this case was correct.

Each of the other political committee status MURs that Crossroads offers as justifications for rejecting a calendar-year approach looked to activity over multiple years bounded by calendar years or by election cycles. *See* Crossroads S.J. Mem. 22–23. None refers to a fiscal year that does not coincide with a calendar year, and insofar as the Commission has considered "election cycles" in past political committee status determinations, "election cycle" was not the

time frame used in this case; if it had been, it would have produced exactly the same result as a calendar-year analysis because the election cycle ended in 2010.

Crossroads also duplicates the controlling Commissioners' misplaced reliance on *FEC v. GOPAC, Inc.*, 917 F. Supp. 851 (D.D.C. 1996), and *FEC v. Malenick*, 310 F. Supp. 2d 230 (D.D.C. 2004). First, Crossroads posits that the district court decision in *Malenick* supports the controlling Commissioners' analysis because the court "look[ed] to contributions in 1995 and 1996." Crossroads S.J. Mem. 22. But *Malenick* held that the organization was a political committee because its "major purpose was the nomination or election of specific candidates *in 1996*." 310 F. Supp. 2d at 237 (emphasis added). *See also id.* at 236 n.8 (finding evidence insufficient to establish that the organization accepted $1,000 in contributions "during the 1995 calendar year"). And *GOPAC* looked to an organization's spending in the election cycle from 1989 to 1990, even though the group was formed in 1979, because the allegation was that its major purpose *in that cycle* was influencing three specific elections. *See* 917 F. Supp. at 853. These cases cannot supply the requisite reasoned justification for supplanting clear statutory language with controlling Commissioners' unfounded "fiscal year" standard.

Finally, Crossroads, like the controlling Commissioners,[5] purports to rely on past statements of reasons in matters that deadlocked. *See, e.g.*, Crossroads S.J. Mem. 22 (citing

[5] *See* AR 421, AR 423 (citing Statement of Reasons of Commissioners McGahn, Hunter and Petersen, MUR 6081 (July 25, 2013) (American Issues Project)); AR 425 (citing Statement of Reasons of Commissioners Petersen, Hunter, McGahn, MUR 5541 (Jan. 22, 2009) (The November Fund)). The controlling Commissioners cited the statement from MUR 6081 as support for the proposition that "the Commission's past political committee status MURs are assailable on other grounds." AR 421. In MUR 6081, three Commissioners denounced several cases discussed in its 2007 Supplemental Explanation and Justification, *see* Political Committee Status, 72 Fed. Reg. 5595 (Feb. 7, 2007) ("SE&J"), for having "strayed from the confines of the major purpose limitation," and claimed they were therefore "of limited precedential value with respect to the type of spending examined as part of a major purpose inquiry." *Id.* at 7 & n.21 (citing MURs 5511 and 5525). But the Commission justified its decision not to engage in rulemaking in 2007 by express reference to these MURs, which its SE&J offered up as representative applications of the Commission's approach to major-purpose determinations that would "provide[] considerable guidance to all organizations" and "reduce any claim of uncertainty." 72 Fed. Reg. at 5595,

Statement of Reasons of Commissioners Petersen and Hunter, MUR 5842 (June 10, 2009) (Economic Freedom Fund)); *see also id.* at 38 (citing Statement of Reasons of Commissioners Petersen, Hunter and McGahn, MURs 5977 & 6005 (May 1, 2009) (American Leadership Project)). But, as the FEC itself has admitted, *see supra* Section I.B, the statements of reasons generated by deadlock dismissals are not official positions of the FEC, and they do not provide authority upon which the controlling Commissioners can justify their decision.

The statutory text and purpose, prior Commission actions, and common sense all demonstrate that a calendar-year analysis was the correct approach in this case. But even if Crossroads were correct that an alternative approach focusing either on election cycles or on a group's entire history could also reflect a lawful way of determining major purpose, that would not provide a basis for upholding the controlling Commissioners' insistence on an unprecedented and blinkered examination only of the organization's self-selected fiscal year. Of course, under the principle of *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), this Court can "sustain an agency action only upon a ground upon which the agency itself relied." *Lacson v. Dept. of Homeland Sec.*, 726 F.3d 170, 177 (D.C. Cir. 2013). The controlling Commissioners did not consider Crossroads' entire history: They did not address its extensive spending in the 2012 elections even though the dismissal occurred well after the conclusion of that election cycle and they acknowledged that "[i]t ma[de] little sense to blind [them]selves to such spending." AR 423. Thus, if Crossroads' view of the time frame for major purpose determinations were correct, a

5604. The fact that three Commissioners later opined that these MURs were based on "erroneous legal theories," *id.* at 7 n.21, is not authority upon which the controlling Commissioners can justify their reasoning as to Crossroads in this case.

remand would be required for the FEC to consider its subsequent electoral spending—which would now include Crossroads' spending in the 2012, 2014, and 2016 elections.[6]

B. The Controlling Commissioners' Review of Crossroads' "Relevant" Spending in Evaluating its Major Purpose Was Arbitrary and Capricious and Contrary to Law.

At the heart of this case is the standard that should be applied in determining what types of spending conducted by Crossroads constitute "federal campaign activity" for the purpose of analyzing whether the group's major purpose was campaign-related.

To determine whether there was reason to believe Crossroads had the requisite "major purpose," the OGC calculated that the group in 2010 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." AR 365. Because this $20.8 million represented approximately 53 percent of the total $39.1 million Crossroads reported spending during 2010, the OGC concluded that Crossroads met the major purpose test for political committee status. AR 365–66. The OGC further noted that Crossroads' 2010 Tax Return stated that it gave grants totaling approximately $15.9 million to other nonprofit organizations, AR 347 n.16, at least five of which reported making independent expenditures or electioneering communications in 2010, *see* Section II.B.2 *infra*. It made no findings regarding these grants with respect to Crossroads' major purpose.

[6] From 2010 to 2014, Crossroads reported approximately $114 million of spending to the FEC, making it the top election spender among non-disclosing nonprofit groups in this time period. *See* CRP, *Crossroads GPS Organization Summary*, https://www.opensecrets.org/outsidespending/nonprof_contrib_summ.php?id=272753378 (last visited Mar. 9, 2016). In addition, its grant recipients spent $73.4 million on FEC-reportable communications in that period, of which $28.6 million was mathematically attributable to Crossroads GPS. *Id*.

The controlling Commissioners objected to the inclusion of the $5.4 million of non-express advocacy communications that promoted or opposed a candidate in the calculation of total federal campaign activity, arguing that the OGC's approach is "inconsistent with *Buckley*'s limiting construction" and "not supported by the relevant case law and is, in fact, contrary to it." AR 417, 419. Crossroads now defends that exclusion, and, in addition, argues that the $15.9 million in grants to politically-active nonprofits should not be counted towards Crossroads' federal campaign activity. But the controlling Commissioners' stance represents a departure from the Commission's longstanding approach to major-purpose determinations and cannot be defended regardless of the level of deference applied, as it "unduly compromise[s] the Act's purposes" and "create[s] the potential for gross abuse." *Orloski*, 795 F.2d at 165.

1. The controlling Commissioners' analysis of Crossroads' spending cannot be sustained under any level of review.

Crossroads' attempt to defend the controlling Commissioners' legal approach to analyzing its spending rests largely on its assertion that the Commissioners' views are subject to an "extremely deferential" standard of review under *Chevron*, Crossroads S.J. Mem. 27–28, but, as explained above, *Chevron* does not apply here. Considered, as it must be, without the thumb on the scales of *Chevron* deference, the controlling Commissioners' analysis of *Buckley* and subsequent case law is contrary to law.

The controlling Commissioners interpreted *Buckley*'s major purpose test to require the application of an express advocacy standard in the analysis of whether a group's "independent spending [is] so extensive that the organization's major purpose may be regarded as campaign activity." *MCFL*, 479 U.S. at 262. The sole justification they provided for this approach—and for their break from the Commission's past policy of considering all "non-express advocacy communications that criticize or oppose a clearly identified federal candidate" in this analysis,

see AR 365—was their interpretation of the "relevant case law," in particular a 2010 decision by the Tenth Circuit Court of Appeals. AR 406–07, AR 413, AR 416. Thus, the controlling Commissioners were doubly outside the area of the FEC's delegated role: they based their dismissal of the complaint on their analysis of a *judicial* test—the "major purpose" test—in light of recent *judicial* decisions. They have "no special qualifications of legitimacy" in this arena, *Akins*, 101 F.3d at 740.

But even if *Chevron* deference were accorded to the legal reasoning underlying the controlling Commissioners' decision, the decision lacks even a rational basis for three reasons:

(1) The controlling Commissioners misapprehend the relevant judicial authority, and in particular, fail to appreciate that the Supreme Court criticized the express advocacy test as "functionally meaningless" in determining the boundaries of permissible campaign finance regulation. A misunderstanding of Supreme Court precedent is not a "rational basis" for agency action.

(2) The controlling Commissioners' analysis is incomplete even as measured by their adopted standard. They failed to consider whether Crossroads' spending on ads that criticized federal candidates and aired more than 30 days before a primary or 60 days before a general election constituted the "*functional equivalent*" of express advocacy.

(3) The controlling Commissioners failed to consider whether Crossroads' other spending, specifically its grants to other nonprofit organizations, may have reflected a purpose of engaging in federal campaign activity by supporting the recipient groups' campaign-related spending.

Crossroads begins its attempt to defend the controlling Commissioners' by misstating the legal test applicable to the review of their decision to depart from the FEC's existing policy. Citing *Fox Television*, 556 U.S. at 515, Crossroads asserts that the controlling Commissioners need only "display awareness that it is changing position," and have no obligation to "'provide reasons' for their competing interpretation." Crossroads S.J. Mem. 37. But Crossroads' argument is contradicted by the very Supreme Court decision it cites: *Fox Television* goes on to make clear that when an agency changes its policy, "of course the agency must show that there are *good*

reasons for the new policy." 556 U.S. at 515 (emphasis added). It is untenable to claim that reasoned agency decision-making can permissibly proceed without any reasons whatsoever.

Crossroads' insistence that FEC policy can be altered without justification seeks to direct attention away from the controlling Commissioners' wholly inadequate reasoning for their change of course. The chief reason those Commissioners' views do not pass muster under even deferential review is their failure to provide any legal support for their position. As Crossroads acknowledges, plaintiffs have devoted many pages to "exhaustively" distinguishing the "precedent cited in the Commissioners' statement of reasons," *see* Crossroads S.J. Mem. 32 (citing Pls.' Mem. Supp. Mot. for Summ. J. 33–36); *see also* Pub. Cit. Reply/Opp'n to FEC 7–14. And Crossroads makes no attempt to resurrect *Buckley* or any of the other decisions cited by the controlling Commissioners as a basis for the dismissal. AR 405–09. Its reticence is well-founded: none of these cases held that the "major purpose" analysis must be limited to a review of express advocacy spending. Indeed, some indicate the opposite. *See, e.g.*, *MCFL*, 479 U.S. at 262 (describing political committees as "those groups whose primary objective is to *influence political campaigns*") (emphasis added); *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 288 (4th Cir. 2008) (holding that, under *Buckley*, "an entity must have 'the major purpose' of *supporting or opposing* a candidate to be designated a political committee") (emphasis added).

The only case Crossroads offers in support of the controlling Commissioners is *New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010) ("*NMYO*"), which mentioned that one approach to the major-purpose analysis was to compare "the organization's electioneering spending with overall spending to determine whether the preponderance of expenditures is for express advocacy or contributions to candidates." *Id.* at 678. But the dispositive issue in the case was the failure of New Mexico's statutory definition of "political

committee" to include *any* major purpose test at all.[7] The Tenth Circuit did not purport to review the constitutionality of including a group's non-express advocacy in calculating its "electioneering spending," and indeed, three years later, it upheld the broader approach set forth in the FEC's 2007 SE&J in *Free Speech v. FEC*, 720 F.3d 788, 797–98 (10th Cir. 2013), *cert. denied*, 134 S. Ct. 2288 (May 19, 2014). To Crossroads' credit, it acknowledges that *NMYO* does not "compel" the controlling Commissioners' use of an express advocacy standard. Crossroads S.J. Mem. 32. Instead, it argues merely that the Tenth Circuit decision is an "example[] of courts' adopting a First Amendment-sensitive approach similar to" that of the controlling Commissioners. *Id*. But a single allegedly "similar" case is hardly a reasonable basis for the controlling Commissioners' break with Commission policy and adoption of a standard that frustrates the goal of meaningful transparency in campaign-related spending.

The inadequacy of *NYMO* as a basis for the controlling Commissioners' approach is underscored by the great weight of current case law holding that political committee status is not restricted by the express advocacy standard. First, the FEC's broader policy of analyzing "federal campaign activity" has been upheld by two courts of appeals against constitutional challenge. *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d. 544, 556 (4th Cir. 2012) (formerly known as *Real Truth About Obama, Inc. v. FEC*), *cert. denied*, 133 S. Ct. 841 (2013); *Free Speech*, 720 F.3d at 797–98. And an additional four Circuits have upheld state laws that classify a group as a "political committee" based on non-express advocacy spending. *Nat'l Org. for Marriage, Inc. v. McKee*, 649 F.3d 34, 62–63 (1st Cir. 2011) (rejecting vagueness challenge to Maine definition of

[7] The election-related activity at issue involved two organizations, NMYO and Southwest Organizing Project ("SWOP"), which respectively spent $15,000 and $6,000—of annual budgets totaling $225,000 and $1.1 million—on direct mail campaigns that mentioned candidates in 2008. Neither made *any* express advocacy expenditures, and there was no suggestion that even their non-express advocacy communications mentioning candidates came close to constituting the major part of their activities. 611 F.3d at 671.

PAC that included terms "promoting" and "defeating"), *cert. denied*, 132 S. Ct. 1635 (2012); *Vermont Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 134 (2d Cir. 2014) ("*VRTL*") (rejecting argument that "the phrases 'supporting or opposing' . . . are unconstitutionally vague as used in the PAC definition"), *cert. denied*, 135 S. Ct. 949 (2015); *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 485–86 (7th Cir. 2012) (rejecting challenge to Illinois law that required groups that spent over $3,000 "on behalf of or in opposition to" any candidate or ballot question to register and report as a political committee)[8]; *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 997 (9th Cir. 2010) (upholding state law defining political committees to include group that spend "in support of, or opposition to, any candidate or any ballot proposition"), *cert. denied*, 562 U.S. 1217 (2011).

The consensus in these courts of appeals on this issue reflects the Supreme Court's disavowal of the "express advocacy" standard for the purpose of delineating what communications can permissibly be subject to regulation. As reviewed in greater detail in Public Citizen's previous submissions, *see* Pub. Cit. Reply/Opp'n to FEC 7–11, the Supreme Court's decision in *McConnell v. FEC*, 540 U.S. 93 (2003), made clear that the express advocacy test was "functionally meaningless" in distinguishing election-related speech from issue advocacy. *Id.* at 193. In *Citizens United v. FEC*, 558 U.S. 310 (2010), the Court then explicitly rejected the

[8] Crossroads claims that a different Seventh Circuit decision, *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014), also supports aspects of the controlling Commissioners' approach, *see* Crossroads S.J. Mem. at 29, 36, but this decision post-dated the dismissal and could not have provided grounds for the decision. Further, *Barland* considered a Wisconsin state "political committee" law that differed from current federal law in multiple material respects: (1) the state definition of "political committee" included *no* major purpose test; and (2) the state law instead premised committee status upon a low $300 threshold for "contributions" or "disbursements" made for a "political purpose." 751 F.3d at 812, 816, 817–18. It is fair to say that any reservation the Seventh Circuit may have expressed about this state law has but the most tenuous connection to the controlling Commissioners' construction of federal law here. Moreover, the Seventh Circuit also explicitly stated that non-express advocacy could be subject to disclosure, noting that that *Citizens United* held (as had the Seventh Circuit itself in an earlier decision) "that the 'distinction between express advocacy and issue discussion does not apply in the disclosure context.'" *Id.* at 836 (quoting *Madigan*, 697 F.3d at 484).

"contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." *Id.* at 369. Furthermore, according to the Supreme Court, in addition to not being constitutionally compelled, adherence to the express advocacy test also frustrates the achievement of political transparency. The *McConnell* Court noted that because federal disclosure requirements for independent spending were limited to express advocacy prior to amendment by the 2002 McCain-Feingold Act, corporations and unions could "fund broadcast advertisements designed to influence federal elections" "while concealing their identities from the public" and "hiding behind dubious and misleading names like . . . 'The Coalition-Americans Working for Real Change' (funded by business organizations opposed to organized labor) [and] 'Citizens for Better Medicare' (funded by the pharmaceutical industry)." 540 U.S. at 196–97. In an analogous manner, the controlling Commissioners' insistence on importing an express advocacy limitation into the "major purpose" inquiry stymies the goal of obtaining disclosure of the identities of those who fund advocacy for or against the election of federal candidates.

Second, the controlling Commissioners' approach does not clear even "extremely deferential" review because they failed to assess whether any of Crossroads' advertisements were the "functional equivalent" of express advocacy. Thus, even as measured by their chosen standard, their analysis of Crossroads' spending was fatally incomplete. Nowhere in their statement of reasons did they review the $5.4 million in ads that "criticize or oppose a clearly identified federal candidate" to determine if any met the standard for the "functional equivalent of express advocacy." *See, e.g.*, *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 469–70 (2007). Crossroads neither addresses this failure, nor defends it.

Finally, as Crossroads acknowledges, the controlling Commissioners conducted no analysis of whether Crossroads' $15.9 million in grants to other nonprofit organizations as

reported in its 2010 Tax Return constituted federal campaign activity. Crossroads justifies this failure based on the allegation that each grant was sent with an accompanying "letter of transmittal stating that the funds are to be used only for exempt purposes, and not for political expenditures." Crossroads S.J. Mem. 42 (citing AR 279, 326, 347). However, Crossroads makes no claim that it conducted any type of due diligence to ensure that the grantees in fact did not use their transfers for political expenditures, and there is no basis without further inquiry for concluding that these purported restrictions were anything more than fig leaves. The controlling Commissioners in turn made no attempt to corroborate any of Crossroads' allegations regarding its grantees' use of its transfers.

The Commissioners' failure was all the more glaring because the recipient groups spent massive amounts on express advocacy and electioneering communications in 2010, a fact within the Commission's knowledge because the *recipients reported the spending to the FEC*. Examples include:

- 60 Plus Association received $50,000 from Crossroads according to its 2010 Tax Return (AR 277) and reported spending $6,719,073 on independent expenditures and $397,838 on electioneering communications in 2010.[9]

- American Action Network received $500,000 from Crossroads (AR 277) and reported spending $19,121,624 on electioneering communications and $4,031,977 on express advocacy in 2010,[10] giving rise to litigation regarding whether it also should have registered as a federal political committee. *CREW v. FEC*, No. 14-1419 (D.D.C. filed Aug. 20, 2014).

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[9] *See* CRP, *60 Plus Ass'n Outside Spending Summary 2010*, https://www.opensecrets.org/outsidespending/detail.php?cmte=60+Plus+Assn&cycle=2010 (last visited Mar. 9, 2016). Spending figures for all grantees can also be found by accessing the FEC's online "Candidate and Committee Viewer," http://www.fec.gov/finance/disclosure/candcmte_info.shtml, and searching for each group's name and the election cycle (2010).

[10] *See* CRP, *American Action Network Outside Spending Summary 2010*, https://www.opensecrets.org/outsidespending/detail.php?cmte=American+Action+Network&cycle=2010 (last visited Mar. 9, 2016).

- Americans for Tax Reform received $4 million from Crossroads (AR 277) and reported spending $4,160,299 on independent expenditures in 2010.[11]

- The Center for Individual Freedom received a $2.75 million from Crossroads (AR 277)—amounting to almost half of CIF's total revenue for that tax year—and also reported spending more than $2,500,610 on electioneering communications in 2010.[12]

- Republican Jewish Coalition received $250,000 from Crossroads (AR 278) and reported spending $1,143,465 on independent expenditures in 2010.[13]

Even applying the controlling Commissioners' chosen "express advocacy" standard to an assessment of Crossroads' major purpose, it was necessary to evaluate whether Crossroads' grants financed communications by Americans for Tax Reform and other recipients that constituted express advocacy or its functional equivalent. Indeed, it does not appear that the controlling Commissioners weighed the significance of these grants at all; their Statement of Reasons refers to them only as part of a recitation of facts (AR 402), and contains no further discussion or analysis. Had the Commissioners undertaken even the most minimal of inquiries, they would have learned, as the IRS did, that Crossroads could not produce and "may not have sent" transmittal letters to four of its twelve 2010 grantees: 60 Plus Association, American Action Network, Americans for Tax Reform (as to its first grant of $1,300,000), and Republican Jewish Coalition (as to its second grant of $100,000). *See* Revised Protest Letter, Application for Recognition of Exemption of Crossroads GPS (27-2753378) (Feb. 28, 2014).[14] Notably, these

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[11] *See* CRP, *Americans for Tax Reform Outside Spending Summary 2010*, http://www.opensecrets.org/outsidespending/detail.php?cycle=2010&cmte=C90011289 (last visited Mar. 9, 2016).

[12] *See* CRP, *Center for Individual Freedom Outside Spending Summary 2010*, http://www.opensecrets.org/outsidespending/detail.php?cmte=C30001747&cycle=2010 (last visited Mar. 9, 2016).

[13] *See* CRP, *Republican Jewish Coalition Outside Spending Summary 2010*, https://www.opensecrets.org/outsidespending/detail.php?cmte=C90012063&cycle=2010 (last visited Mar. 9, 2016).

[14] The Revised Protest Letter is available via CRP's website at https://www.documentcloud.org/documents/2713778-Revised-Protest-2-28-2014.html. *See generally* Robert Maguire, *How Crossroads GPS beat the IRS and became a social welfare group*, CRP (Feb. 12, 2016), http://www.opensecrets.org/news/2016/02/how-crossroads-gps-beat-the-irs-and-became-a-social-welfare-group/. Although the IRS

four entities were also the only four Crossroads grantees in 2010 that reported spending significant amounts on independent expenditures in that election cycle: collectively, they reported spending more than $16 million on express advocacy alone. Although of course the IRS documents are not part of the administrative record in this case, the very fact that this information is not present underscores how inadequate—or better put, nonexistent—the controlling Commissioners' review of this grant-making activity was. Crossroads' invocation of the "letters of transmittal" in no way justifies the controlling Commissioners' abdication of their responsibility to address this $15.9 million of Crossroads' spending in their analysis of the group's major purpose.

2. Crossroads' attack on the broader standard used by the FEC's General Counsel in evaluating the group's major purpose is without merit.

Crossroads devotes a number of pages to inveighing against "Public Citizen's broad vision of 'federal campaign activity,'" which it alleges improperly encompasses electioneering communications and communications that "promote-attack-support-oppose" federal candidates. Crossroads S.J. Mem. 26.[15] But this is not a standard that plaintiffs have invented. It was the standard applied by the OGC in its First General Counsel's Report and reflects the 2007 SE&J and the FEC's enforcement history. *See* AR 356 ("In past enforcement actions, the Commission has determined that funds spent on communications that support or oppose a clearly identified

made an initial finding that Crossroads was not entitled to exempt status, upon Crossroads' protest, this finding was subsequently reversed. No reasons for the reversal were released. *Id.*

[15] Crossroads attempts to sow confusion by claiming that "Public Citizen does not appear to argue that the controlling Commissioners should have counted all electioneering communications toward Crossroads' major purpose." Crossroads S.J. Mem. at 39. But Public Citizen has from the outset made clear that it supports the OGC's approach to the major purpose analysis as set forth in the First General Counsel Report—which obviously "counted" Crossroads' electioneering communications in the group's federal campaign activity. *See, e.g.*, Pub. Cit. Reply/Opp'n to FEC 15, 20. As for Crossroads' assertion that Public Citizen's previous comments about the major purpose test are inconsistent with its position in this case, that argument was also thoroughly refuted in our Reply/Opposition to the FEC, at 23–24.

federal candidate, but do not contain express advocacy, should be considered in determining whether that group has federal campaign activity as its major activity."). And this standard relies on definitions that have been upheld by the Supreme Court against vagueness and overbreadth challenges on multiple occasions.

Crossroads asserts that a "promote-attack-support-oppose" standard "raises obvious vagueness problems," Crossroads S.J. Mem. 31, but simultaneously acknowledges that the only Supreme Court case to have reviewed this standard upheld it. Reviewing one prong of the definition of "federal election activity," 52 U.S.C. § 30101(20)(A)(iii), the Court in *McConnell* concluded that words like "'promote,' 'oppose,' 'attack,' and 'support' [PASO] . . . 'provide explicit standards for those who apply them' and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.'" 540 U.S. at 170 n.64 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)). Crossroads attempts to sidestep this precedent by claiming that the Supreme Court upheld this provision only with respect to political parties. *See* Crossroads S.J. Mem. 33. But § 30101(20)(A)(iii), by its terms, applied only to parties; the Supreme Court did not require this limit as a narrowing construction. It merely noted that any vagueness concerns regarding the "promote-attack-support-oppose" language were particularly attenuated in connection to parties "since actions taken by political parties are presumed to be in connection with election campaigns." 540 U.S. at 170 n.64. But "*McConnell* indicates that the result did not depend on the presumption," *VRTL*, 758 F.3d at 129, and consequently its approval of "promote-attack-support-oppose" language was not limited to parties, as Crossroads suggests.

A string of recent appellate decisions have rejected Crossroads' reading of *McConnell* and have sustained "promote-attack-support-oppose" language in various disclosure laws applicable to non-party speakers. The Second Circuit, for example, recently rejected a vagueness

claim involving a Vermont statute applicable to independent groups containing analogous terminology, i.e., "promotes," "supports," "attacks," and "opposes," noting that "the Supreme Court explained that these terms are not unconstitutionally vague in a similar context." *VRTL*, 758 F.3d at 128–29 (citing *McConnell*, 540 U.S. at 170 n. 64). The First, Fourth and Ninth Circuits have followed suit. *See McKee*, 649 F.3d at 62–64 (1st Cir. 2011) (rejecting vagueness challenge to Maine law containing the words "promoting," "support," and "opposition," and noting that "*McConnell* remains the leading authority relevant to interpretation of the terms before us"); *Nat'l Org. for Marriage v. Daluz, Inc.*, 654 F.3d 115, 120 (1st Cir. 2011) (rejecting a vagueness challenge to Rhode Island law containing the phrase "to support or defeat a candidate"); *Center for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 287 (4th Cir. 2013) (holding that "pursuant to *McConnell*, the words 'promote' and 'oppose'" in a disclosure law are not vague); *Yamada v. Snipes*, 786 F.3d 1182, 1192–93 (9th Cir.) (holding that "*McConnell* supports the conclusion" that a Hawaii law using terminology such as "advocates or supports" and "opposition" to define political advertisements that are subject to disclosure requirements is not vague), *cert. denied sub nom. Yamada v. Shoda*, 136 S. Ct. 569 (2015); *Human Life*, No. 08-cv-0590, 2009 WL 62144, at *14–*15 (W.D. Wash. Jan. 8, 2009) (citing *McConnell* to uphold state statute defining "political committee" as a group that receives contributions or makes expenditures "in support of, or opposition to, any candidate or any ballot proposition"), *aff'd*, 624 F.3d 990 (9th Cir. 2010)).

Nevertheless, Crossroads attempts to prove that the "promote-attack-support-oppose" standard "can both inculpate and exonerate similarly situated speakers" by plucking two ads out of two different enforcement actions, seemingly at random, and then alleging that the Commission's different treatment of these ads demonstrates the unworkability of the standard.

Crossroads S.J. Mem. 31 (citing First General Counsel's Report, MUR 4940 (Dec. 19, 2000) (Campaign for America)). But this conclusion begs so many questions as to be meaningless. There is no reason to believe that the 1998 ad referencing former Speaker Gingrich that was the subject of MUR 4940 and Crossroads' 2010 ad referencing former Representative Sestak were "similarly situated": they concerned different subject matters, referenced different candidates and ran at different times during different elections. That Crossroads believes them similar does not make them so. More importantly, the Commission's current approach to major-purpose determinations, which includes analysis of a group's electioneering communications and "promote-attack-support-oppose" communications, reflects its policy statement in the 2007 SE&J. There is no reason to think that the Commission analyzed a Gingrich ad that predated the SE&J by almost 10 years with reference to this standard, so the analysis of MUR 4940 is irrelevant to this case.

Crossroads also objects to the OGC's inclusion of electioneering communications in the calculus of its federal campaign activity, arguing that "there is no reason to think Congress intended even electioneering communications to count toward a group's major purpose." Crossroads S.J. Mem. 36. The very nature of this argument betrays the confusion in Crossroads' analysis of the major purpose test. This test is a judicially-created standard. Congress has never "intended" to "count" any particular type of communication to a group's major purpose because it did not create the test, nor has it adopted the test into FECA or otherwise addressed the test in legislation. Crossroads' focus on Congressional intent with respect to electioneering communications underscores that the controlling Commissioners' analysis of the major purpose test is neither within its zone of regulatory authority, nor deserving of deference.

Further, Crossroads does not attempt to argue that the electioneering communications definition is overbroad or vague—which is unsurprising, as the Supreme Court has twice rejected such challenges. *McConnell*, 540 U.S. at 194–202; *Citizens United*, 558 U.S. at 369. Crossroads suggests, however, that this category of speech is only appropriate in "a narrowly tailored, event-driven reporting regime." Crossroads S.J. Mem. 36. But this ignores that the Supreme Court twice found the definition of "electioneering communications" an appropriate boundary for delineating the appropriate scope of disclosure—while simultaneously criticizing the express advocacy "line" that the controlling Commissioners adopted in their decision. The Court in no way limited its approval of the "electioneering communications" definition to the specific reporting mechanism set forth in the federal statute, and Crossroads can reference no statement in *McConnell* or *Citizens United* to the contrary.

Finally, Crossroads argues that the standard applied in the First General Counsel's Report did not rise to the level of a Commission "'policy' on the question whether express advocacy or some other category of spending should count toward an organization's major purpose." Crossroads S.J. Mem. 37–38. But the 2007 SE&J makes clear that the FEC's established procedure for determining an organization's major purpose considers the organization's "federal campaign activity"—a term the FEC construes to encompass "funds spent on communications that support or oppose a clearly identified federal candidate, but do not contain express advocacy." AR 356. *See also* 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"). Indeed, the FEC acknowledges in its papers here that that it has defended—successfully—this broader approach to major-purpose determinations as its "policy" in multiple courts of appeals against constitutional challenge. *See, e.g.*, Brief of Appellees FEC

and U.S. Dept. of Justice at 59–60, *Real Truth About Obama v. FEC*, 681 F.3d 544 (4th Cir. 2012) (No. 11-1760) (arguing that neither "law nor logic" supports plaintiffs' claim that FEC may consider *only* spending on "magic-words express advocacy" and "contributions to candidates" in major purpose inquiry under 2007 SE&J); *Free Speech*, 720 F.3d at 797–98.

Crossroads also complains that the FEC has no "settled course of adjudication" on the major purpose inquiry, but points to enforcement actions and litigation *preceding* the 2007 SE&J as support for this proposition. Indeed, most of the cited authority is drawn from the 1990s. Even if there were inconsistencies in the FEC's analysis of major purpose prior to the 2007 SE&J, it does not follow that the FEC did not establish a policy on this issue in the SE&J and adhere to that policy in enforcement proceedings thereafter. The only "authority" cited by Crossroads in the Commission's post-2007 docket was another Statement of Reasons in a deadlocked enforcement case authored by several of the same Commissioners in the control group here. Crossroads S.J. Mem. 38 (citing Statement of Reasons of Commissioners Petersen, Hunter, and McGahn, MURs 5977 & 6005). That statement stands for nothing but that three Commissioners broke from Commission policy in another enforcement action.

C. The Record Does Not Support Crossroads' Defense of the Controlling Commissioners' Reasoning as "Comprehensive" and "Fact-Intensive."

Crossroads repeatedly characterizes the controlling Commissioners' analysis as "inclusive" and "fact-dependent," *see, e.g.*, Crossroads S.J. Mem. 8, 14, 24, 40, but the record in this case does not support that characterization. Instead, the controlling Commissioners explicitly disavowed, and/or silently ignored, information in the record that the Commission has long considered relevant to the analysis of major purpose.

For instance, the controlling Commissioners did not comprehensively analyze the record in determining Crossroads' "central organizing purpose," instead denouncing any consideration

of Crossroads' public statements to the extent the information was drawn from media reports. According to Crossroads, the controlling Commissioners fully "explained why the media reports were inaccurate and thus entitled to less weight." Crossroads S.J. Mem. 41. In fact, the controlling Commissioners addressed only one of the media reports specifically, and their overall analysis was limited to a finding that Crossroads had "adequately explained" why the articles did not "transform Crossroads into a political committee." AR 411. At the preliminary reason to believe stage, it was plainly unreasonable to discount Crossroads' statements in *all* media reports, particularly as to statements that Crossroads did not address or disavow.

For instance, Crossroads' submission to the FEC criticized one of the articles solely because it "refer[red] to American Action Network as 'a Crossroads affiliate,'" and appeared to include "non-express advocacy communications" in reporting that Crossroads "sank $17 million into ads and turnout communications." AR 235 (discussing Jeanne Cummings, *GOP groups coordinated spending*, Politico, Nov. 3, 2010 (AR 204–09)). American Action Network —one of Crossroads' 2010 grantees—reported $4,031,977 in independent expenditures to the Commission in 2010, as well as $19,121,624 of electioneering communications. *See* n.10 *supra*. But neither Crossroads nor the controlling Commissioners addressed any of the other statements in the article, including its reporting of apparent coordination of spending between Crossroads and certain of its 2010 grantees. Indeed, Crossroads itself included an extract from the article highlighting the close coordination among spending groups in the 2010 elections in a "2010–11 Interim Performance Report" it sent to donors:

> [A] cadre of big-money Republican outside groups worked together to spend millions to take down the Democratic House majority, carefully coordinating their ad buys and political messages through a series of regular meetings and phone calls aimed at picking off selected Democrats. The groups – including familiar names like the U.S. Chamber of Commerce and American Crossroads – shared their target lists and TV-time data to ensure vulnerable Democrats got the full

> brunt of GOP spending. Republican groups had never coordinated like this before . . . The joint efforts were designed to spread the damage to as many of the majority Democrats as possible, without wasting money by doubling-up in races where others were already playing.

Resp. and Suppl. Materials, Ex. 3-a-2, Crossroads IRS Application (May 21, 2012).[16] Its use of the article in its donor report both belies its claims that the article is unreliable, and raises questions regarding the coordination of express advocacy communication between Crossroads and grantees such as American Action Network. The controlling Commissioners' failed to even address, let alone explain, why these uncontroverted statements did not merit further review.

In short, the controlling Commissioners unreasonably discounted or ignored the evidence of Crossroads' purposes in the articles describing its activities, and instead placed near-dispositive weight on Crossroads' self-serving, self-generated articles of incorporation, mission statement, website and other documents as determinative of the group's central organizational purpose. Their rationale cannot be squared with the FEC's longstanding approach to political committee status determinations. The full Commission has characterized that approach as both flexible and *comprehensive*, and expressly noted that evaluating major purpose "requires the Commission to conduct investigations into the conduct of specific organizations that may reach well beyond publicly available advertisements." SE&J at 5601; *see also id.* at 5605 (noting "comprehensive analysis required to determine an organization's major purpose"). The FEC defended its decision to make case-specific political committee status determinations in *Shays v. FEC*, 511 F. Supp. 2d 19 (D.D.C. 2007), on the basis that the "major purpose" doctrine "requires the flexibility of a case-by-case analysis of an organization's conduct," including not only the "the content of [a group's] *public* statements," but also the "*internal* statements of the

[16] Available via CRP's website at http://www.documentcloud.org/documents/2712075-Application-for-Recognition-of-Exemption-and.html. *See generally* Maguire, *How Crossroads GPS beat the IRS*, http://www.opensecrets.org/news/2016/02/how-crossroads-gps-beat-the-irs-and-became-a-social-welfare-group/.

organization," and "the organization's fundraising appeals." *Id.* at 29 (emphasis added). The district court approved that approach, noting that "*Buckley* established the major purpose test, but did not describe its application in any fashion." *Id.* The controlling Commissioners have offered no justification for their retreat from this more comprehensive approach to the review of "central organizational purpose," an approach that is particularly appropriate at the reason-to-believe stage.

Finally, neither the Commission nor the Supreme Court has ever ruled that a "major purpose" finding requires an organization to spend a majority of its total budget directly on federal campaign activity, let alone that the inquiry is contingent on whether the group meets a 50 percent threshold of express advocacy expenditures. Indeed, the Commission was asked to adopt a 50 percent expenditure threshold, and expressly declined to do so. *See* Final Rules on Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056, 68,064–65 (Nov. 23, 2004).

Ultimately, under the controlling Commissioners' analysis, the only permissible basis for a finding of major purpose is (1) total spending on federal express-advocacy expenditures, but only if that spending amounts to at least 50 percent of the group's budget over whatever time period is consistent with the group's chosen "organizational model," which it is free to change at any time; or (2) a voluntary, official admission of having the necessary "major purpose." The Commission has never interpreted the major purpose test as setting such an impossible bar, nor has any court.

III. This Case Is Not Moot.

Crossroads asserts that its appeal of this Court's denial of intervention, and its subsequent litigation over access to the withdrawn version of the general counsel's report recommending a finding of reason to believe, ran out the clock on the applicable statute of limitations for any

enforcement action against it. Thus, Crossroads argues, the plaintiffs now lack "standing" to pursue this action because, regardless of the outcome of this case, the FEC can no longer proceed against it. Crossroads' argument begins by confusing mootness and standing, and thus misallocating the burden of proof, and proceeds to misconstrue the statute of limitations on which Crossroads relies. Because Crossroads has not shown that claims against it would be barred by the statute of limitations, this case is not moot.

A. Crossroads' Argument Confuses Standing with Mootness.

Crossroads does not contend that the plaintiffs lacked standing when they filed suit—that is, that they lacked an injury caused by the FEC's action that could be redressed by the Court. It concedes that their showing of injury, causation, and redressability as of the time they brought this action coincides with the requisites for standing in suits of this type established by the Supreme Court's decision in *Akins*. *See* Crossroads S.J. Mem. 45. Crossroads asserts, however, that "the facts are different now" and that the plaintiffs no longer have standing because the passage of time prevents effective redress. *Id*. at 46.

Crossroads' argument "confuses standing with mootness." *Loughlin v. United States*, 393 F.3d 155, 169 (D.C. Cir. 2004). Mootness doctrine, not standing doctrine, enforces the Article III requirement that a case or controversy "must continue throughout [the litigation's] existence." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189 (2000) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997)); *see also, e.g.*, *Decker v. N.W. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1335 (2013). An assertion that changed circumstances since the filing of an action make it impossible for a court to grant effective relief is not, as Crossroads argues, a standing argument, but one of mootness: "[m]ootness doctrine encompasses the circumstances that destroy the justiciability of a suit previously suitable for determination." *Loughlin*, 393 F.3d at 169 (alteration in original) (citation omitted). Thus, "where litigation poses

a live controversy when filed," it is "mootness doctrine" that "requires a federal court to refrain from deciding it if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." *LaRoque v. Holder*, 679 F.3d 905, 907 (D.C. Cir. 2012) (brackets and citation omitted). In particular, claims that a court cannot grant effectual relief "because a period or deadline has passed" present issues of mootness, not standing. *Honeywell Int'l, Inc. v. NRC*, 628 F.3d 568, 576 (D.C. Cir. 2010); *see also AstraZeneca Pharms. LP v. FDA*, 713 F.3d 1134, 1138 (D.C. Cir. 2013).

B. Crossroads Bears a Heavy Burden to Establish Mootness.

The proper characterization of the issue makes a difference because, as Judge Tatel has observed, standing and mootness "are cousins, not twins." *Entergy Servs., Inc. v. FERC*, 391 F.3d 1240, 1255 (D.C. Cir. 2004) (concurring opinion). As the Supreme Court has emphasized, the two doctrines are significantly different, and the greater flexibility of mootness doctrine reflects that "by the time mootness is an issue, the case has been brought and litigated, often (as here) for years," and "[t]o abandon the case at an advanced stage may prove more wasteful than frugal." *Laidlaw*, 528 U.S. at 191–92. Thus, while the burden of proving standing rests on the plaintiff, "[t]he initial 'heavy burden' of establishing mootness lies with the party asserting a case is moot." *Honeywell*, 628 F.3d at 576 (citation omitted); *see also Kifafi v. Hilton Hotels Retirement Plan*, 701 F.3d 718, 724 (D.C. Cir. 2012); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 569–70 (1984). A party carries that burden, moreover, only by demonstrating that it is "impossible for a court to grant any effectual relief whatever to the prevailing party." *Campbell-Ewald v. Gomez*, 136 S. Ct. 663, 669 (2016) (citation omitted); *see also Decker*, 133 S. Ct. at 1335; *AstraZeneca*, 713 F.3d at 1138; *Honeywell*, 628 F.3d at 576.

C. Crossroads Has Not Shown That the Five-Year Limitations Period for Statutory Penalties Makes Effectual Relief Impossible in This Case.

Crossroads falls far short of carrying its burden. Its statute of limitations argument fails to establish that the FEC would be barred from pursuing claims against it if this court found that its decision not to investigate were contrary to law, for several reasons.

1. The statute does not bar claims for equitable relief.

The statute on which Crossroads relies, 28 U.S.C. § 2462, provides a five-year limitations period only for "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise."[17] As the D.C. Circuit has held, however, § 2462 bars only actions by the government to impose "punishment," *Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996), and not to actions brought for "purely remedial and preventative" relief, such as cease-and-desist orders or other equitable relief to remedy or prevent violations. *Riordan v. SEC*, 627 F.3d 1230, 1234 (D.C. Cir. 2010); *see also SEC v. Brown*, 740 F. Supp. 2d 148, 156–57 (D.D.C. 2010). Thus, as Crossroads itself acknowledges, district courts in the District of Columbia have held that the FEC is not barred from seeking equitable relief to remedy FECA violations even where penalties for those violations would be barred by § 2462. *FEC v. Christian Coalition*, 965 F. Supp. 66, 71–72 (D.D.C. 1997); *FEC v. Nat'l Repub. Sen. Campaign Comm.*, 877 F. Supp. 15, 20–21 (D.D.C. 1995).[18] And Crossroads does not contest that equitable relief to remedy violations of political committee registration and reporting requirements by ordering compliance is available under FECA.

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[17] Crossroads points out that the FEC General Counsel's Report includes on its first page the notation "EXPIRATION OF SOL: 9/1/2014." Crossroads S.J. Mem. 47. However, a five-year limitations period for any claims against Crossroads could not have expired before 2015.

[18] Crossroads cites *FEC v. Nat'l Right to Work Comm., Inc.*, 916 F. Supp. 10 (D.D.C. 1996), as a counterexample. The court's opinion in that case suggested the possibility that equitable relief might be barred, but ultimately denied relief on the ground that "injunctive relief [was] both unnecessary and unwarranted at this time" because the government had not shown any likelihood that the defendant would again engage in the unlawful surveillance of campaign opponents of which it was accused. *Id*. at 15.

Crossroads argues, however, that under the Ninth Circuit's ruling in *FEC v. Williams*, 104 F.3d 237 (9th Cir. 1996), § 2462 precludes equitable relief for FECA violations as to which its five-year limitations period would bar an action seeking penalties. *Williams* based its holding on the so-called "concurrent remedy" doctrine, under which "equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy," or, "[i]n other words, because the claim for injunctive relief is connected to the claim for legal relief, the statute of limitations applies to both." *See id*. at 240 (citation omitted).

Williams, however, is not the law of this Circuit, and Judge Joyce Hens Green declined to adopt its cursory analysis of the concurrent remedy doctrine in *Christian Coalition*. There, she extensively addressed the inapplicability of that doctrine to cases where equitable relief is not based on "concurrent" equitable jurisdiction to supplement or facilitate legal relief, but where "the nature of the remedy is an injunction that is independent of the legal relief available"—as under FECA, where the FEC "has the authority to seek injunctive relief wholly separate and apart from its authority to seek a legal remedy." 965 F. Supp. at 71–72. Moreover, *Williams* has been widely criticized, and explicitly rejected by two circuits, for its failure to recognize that actions brought by the government in its sovereign capacity to seek penalties or injunctive relief are not subject to the concurrent legal remedy doctrine, and thus that injunctive claims may proceed even where penalties are time-barred. *See United States v. Telluride Co.*, 146 F.3d 1241, 1248–49 (10th Cir. 1998); *United States v. Banks*, 115 F.3d 916, 919 (11th Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998).[19] Most tellingly, *Williams*' holding is squarely at odds with the

[19] Crossroads asserts that "circuits are split on whether *Williams*' concurrent equitable remedies doctrine applies to government actions for equitable relief," and cites *United States v. Midwest Generation, LLC*, 720 F.3d 644, 647–48 (7th Cir. 2013) as the lone decision on *Williams*' side of the "split." Crossroads S.J. Mem. 48. But the Seventh Circuit's opinion in *Midwest* does not mention either *Williams* or the concurrent remedy doctrine, nor does it contain any discussion of whether or under what circumstances § 2462 bars injunctive relief or other equitable remedies. The decision is best read as a

D.C. Circuit's decision in *Riordan*, where the D.C. Circuit held that § 2462 did not bar the SEC's claims for remedial equitable relief *even though it would bar claims for civil penalties arising from the same violations*. *See* 627 F.3d at 1234–35.

Crossroads asserts that it does not matter whether *Williams* is correct or would be followed by courts in this Circuit because, "since *Williams* was decided, the FEC has not sought equitable remedies where actions for civil penalties have become time-barred." Crossroads S.J. Mem. 49. That unsubstantiated statement is contradicted by *Christian Coalition*, where the FEC did just that. Crossroads' opinion that it is unlikely that the FEC would do so in this case falls far short of carrying its burden of demonstrating that it is now *impossible* for this Court to grant effectual relief. Indeed, if the FEC on remand were to decide not to pursue this case because equitable relief would be time-barred, that decision itself would be contrary to law and subject to judicial review. The possibility that the FEC might take another unlawful position (which itself could be judicially corrected) does not make effectual judicial relief in this case impossible.

2. The limitations period has not run.

Even if § 2462 would apply to potential claims for equitable relief as well as penalties, the five-year period should not be viewed as having expired in this case, for three reasons. First, the filing of this action itself should stop the running of the statute during its pendency. The filing of a legal proceeding that is a necessary prerequisite to the filing of an action subject to a statute of limitations periods may, in appropriate circumstances, suspend the running of a limitations period. *See, e.g., Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394, 396–400 (9th Cir. 1980); *see also Seattle Audubon Soc'y v. Robertson*, 931 F.2d 590, 596–97 (9th Cir.

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holding about the nature of violations of the particular Clean Air Act provisions at issue in the case, which the court viewed as incompatible with any relief other than penalties for past violations that were time-barred in that case.

1991). Here, in light of the Commission's deadlock, the filing and successful prosecution of this action is a necessary prerequisite to the filing of an action against Crossroads based on the alleged violations at issue. Moreover, the filing of this action has fulfilled the purpose of the statute of limitations by providing Crossroads with notice of the potential claims against it well within the limitations period (as evidenced by Crossroads' filing of its motion to intervene little more than two months after the complaint was filed, and before the FEC filed its answer). *See Mt. Hood*, 616 F.2d at 400–01.[20]

Second, if this case ultimately resulted in the initiation of an action against Crossroads by the FEC, Crossroads would be equitably estopped from asserting a limitations defense because the delay in resolution of this action was of its own making. As the D.C. Circuit has explained, "equitable estoppel in the statute of limitations context prevents a defendant from asserting untimeliness where the *defendant* has taken active steps to prevent the plaintiff from litigating in time." *Currier v. Radio Free Europe/Radio Liberty, Inc.*, 159 F.3d 1363, 1367 (D.C. Cir. 1998). Here, Crossroads sought intervention on the assurance that its involvement "threatens no prejudice to the FEC or to the plaintiffs in this action." Crossroads Mot. to Intervene 4 (Dkt. No. 8). The plaintiffs, for their part, sought to avoid any delay by not contesting Crossroads' right to intervene either in this Court or on appeal, while at the same time objecting to any delays in this litigation that might result from the FEC's decision to contest intervention. When Crossroads appealed the denial of its motion, it sought and obtained a stay of the action from the court of appeals, over plaintiffs' objection that it could adequately protect its rights pending appeal by presenting its arguments to this court as an amicus curiae, and it again represented that "no

[20] In *FEC v. Nat'l Repub. Sen. Comm.*, 877 F. Supp. 15, 19 (D.D.C. 1995), the court held that an FEC investigation did not stop the running of the statute because it lacked "adjudicatory procedures," but the court did not address whether the commencement of a suit such as this one would have a tolling effect.

party . . . could point to any prejudice it would suffer by suspending the proceeding until all interested parties are present." Crossroads Mot. for Stay 19, No. 14-5199 (D.C. Cir. Sept. 12, 2014). Moreover, after the case returned to this Court, Crossroads litigated for several months over access to the withdrawn general counsel's report, which it claimed was essential to its defense of this action, before the parties could resume summary judgment briefing.

The plaintiffs do not begrudge Crossroads its right to appeal the denial of intervention, nor did they resist its efforts to supplement the record. But having insisted that its "right to appear as a party" take precedence over "expediting . . . judicial action" (Crossroads Stay Reply 10, No. 14-5199 (D.C. Cir. Oct. 3, 2014)), and having successfully taken steps to prevent timely litigation of this case while insisting that those steps would do nothing but ensure its right to participate, Crossroads cannot now claim to have run out the clock on the underlying allegations that it violated the law.[21]

Finally, if, as the plaintiffs allege, Crossroads should have registered as a political committee in 2010, it would have had reporting obligations under FECA not only in the fall of 2010, but thereafter until its status was terminated based upon a demonstration that it "will no longer receive any contributions or make any disbursements that would otherwise qualify it as a political committee." 11 C.F.R. § 102.3(a)(1). Crossroads has not argued, let alone shown, that if it were required to register in 2010, it would have been able to terminate its political committee status in order to avoid reporting requirements for time periods that would fall within the five-year limitations period under § 2462. Because a finding that Crossroads' failure to register in

[21] Crossroads suggests that Public Citizen should have brought a delay suit against the FEC instead of waiting for its decision. That argument overlooks that a successful delay action requires much more than a mere failure of the agency to act within 120 days, *see In re Nat'l Cong. Club*, 1984 WL 148396, at *1 (D.C. Cir. 1984), and filing such an action likely would only have contributed to delay. Public Citizen acted responsibly in allowing the FEC to reach a decision and then challenging it well within the 5-year period. And, of course, Public Citizen had no way of knowing that the OGC spent more than a year revising its report and interacting with Crossroads. *See* Crossroads S.J. Mem. 47 n.16.

2010 was unlawful would lead to the conclusion that Crossroads engaged in ongoing reporting violations within the limitations period, § 2462 would not bar all possible relief even under Crossroads' broad view of the statute.

In sum, the case or controversy over Crossroads' status remains very much alive, and Crossroads has not carried its burden of demonstrating mootness by showing that § 2642 makes it impossible for this Court to grant any effectual relief in this case.

CONCLUSION

This Court should grant plaintiffs' motion for summary judgment; deny Crossroads' cross-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.

Dated: March 9, 2016

Respectfully submitted,

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