FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 6081
American Issues Project, Inc.	)	

STATEMENT OF REASONS OF
VICE CHAIRMAN DONALD F. McGAHN AND
COMMISSIONERS CAROLINE C. HUNTER AND MATTHEW S. PETERSEN

The Complaints in this matter take issue with an advertisement aired around the time of the 2008 Democratic National Convention by the American Issues Project, Inc. ("AIP" or "Respondent"), a corporation organized under section 501(c)(4) of the Internal Revenue Code.[1] According to the Complaints, the advertisement began to air in Ohio, Michigan, Pennsylvania, and Virginia on August 21, 2008, and expressly advocated the defeat of then-candidate Barack Obama. AIP filed an independent expenditure report on August 19, 2008, disclosing (1) that it spent $2,878,872.75 on the ad in connection with the convention, and (2) that AIP had received the same amount of money from an individual, Harold Simmons, on August 12, 2008.

Based upon these facts, the Complaints conclude the following: (1) AIP ought to have registered as a political committee because, as of the date of the complaint (September 8, 2008), it had only engaged in express electoral advocacy; (2) since the advertisement continued to air after the convention, AIP should have filed a second

[1] MUR 6081 (AIP), Complaint (Sep. 26, 2008); MUR 6094 (AIP), Complaint (Oct. 10, 2008). Because both complaints contained substantially similar allegations, allegations against AIP were administratively severed from MUR 6094 and merged into MUR 6081.

independent expenditure report showing that portion of the ad buy to be in connection with the general election; and (3) the money contributed by Simmons exceeded both the $5,000 contribution limit applicable to political committees and his own individual biennial limit.

Simmons and AIP each filed a response to the Complaint. Simmons "generally and specifically" denied the allegations against him, and asserted that his contribution was "in advancement of or related to American Issues Project's exempt function," and that he "had no control over how the funds were used by AIP."[2] AIP's response also denied wrongdoing, and claimed that its activities were lawful since it is a Qualified Nonprofit Corporation under the Supreme Court's decision in *FEC v. Massachusetts Citizens for Life*, where the Court struck the Act's corporate ban as applied to certain nonprofit corporations.[3] AIP further states that it "complies with each and every one of the provisions outlined by the Supreme Court in the *MCFL* case" and Commission regulations: (1) AIP was formed "for the express purpose of promoting political ideas, and cannot engage in business activities;" (2) AIP has "no shareholders or other persons affiliated so as to have a claim on its assets or earnings;" and (3) AIP was not "established by a business corporation or labor union," has a policy "not to accept contributions from such entities," and "has *never* accepted any contributions from a corporate source, directly or indirectly."[4]

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[2] MUR 6081 (AIP), Reply of Harold Simmons to the Complaint Filed in MUR 6081 (Nov. 18, 2008).

[3] 479 U.S. 238 (1986) ("*MCFL*").

[4] MURs 6081 & 6094 (AIP), Response (Nov. 24, 2008) at 1-2 (emphasis in the original).

Finally, AIP states that "[t]he majority of [its] annual expenditures are devoted to grassroots lobbying and education on issues, public policies and other communications, activities and programs appropriate to a 501(c)(4) social welfare organization," and that its "expenditures for communications or activities subject to disclosure to the Commission have fully complied with Commission regulations."[5] According to their Form 990s filed with the Internal Revenue Service, AIP spent $2,876,753 on independent expenditures out of $8,814,634 in total spending from AIP's fiscal year 2007-2010.[6]

Intervening events have mooted several of the Complaint's allegations. Whether AIP was a Qualified Nonprofit Corporation under *MCFL* has been rendered moot in light of the Court's 2010 decision, *Citizens United v. FEC*, where the Court struck the corporate expenditure ban entirely.[7] Thus, all corporate entities like AIP may now expressly advocate the election or defeat of candidates regardless of whether they are Qualified Nonprofit Corporations. Similarly, following the D.C. Circuit's decision in *SpeechNow.org v. FEC*, even if AIP were a political committee, the $5,000 individual contribution limit could no longer be applied to it.[8] Likewise, in the wake of *SpeechNow.org*, the Commission made clear that the Act's biennial limit could not be

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[5] *Id.* at 2.

[6] *See* Form 990-EZ: Short Form Return of Organization Exempt from Income Tax (covering period from May 1, 2010 to April 30, 2011), *available at* http://www.guidestar.org/FinDocuments/2011/260/196/2011-260196975-075c349f-ZO.pdf; Form 990-EZ: Short Form Return of Organization Exempt from Income Tax (covering the period of May 1, 2009 to April 30, 2010), *available at* http://www.guidestar.org/FinDocuments/2010/260/196/2010-260196975-06db9ee4-ZO.pdf; MUR 6081, Response (Oct. 17, 2011), Form 990: Return of Organization Exempt from Income Tax (covering the period of May 1, 2008 to April 30, 2009); Form 990: Return of Organization Exempt from Income Tax); Form 990: Return of Organization Exempt from Income Tax (covering the period of May 1, 2007 to April 30, 2008), *available at* http://dynamodata.fdncenter.org/990_pdf_archive/260/260196975/260196975_200804_990O.pdf.

[7] 130 S. Ct. 876 (2010).

[8] 599 F.3d 686 (D.C. Cir. 2010).

applied to contributions made to such independent political committees.[9] Thus, *even if AIP were a political committee*, the allegations as to Simmons are now moot. All that remains in this matter, then, is the accusation that AIP was required to register and report as a political committee under the Act.

I. Political Committee Determinations Are Narrowed by Case Law

Under the Act, a "political committee" is "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."[10] In response to both vagueness and overbreadth concerns, the Court in *Buckley v. Valeo* limited the "political committee" definition in two pertinent ways: (1) the definition of "expenditure" may only reach communications that in express terms advocate the election or defeat of a federal candidate; and (2) the term political committee "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate."[11]

Following *Buckley*, the Supreme Court reaffirmed the major purpose test in *MCFL*, in which there it determined that a particular nonprofit corporation's "central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates."[12] The Court noted that "[a]ll unincorporated organizations whose major purpose is not campaign activity, but who occasionally make

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[9] *See, e.g.*, Advisory Opinion 2010-11 (Commonsense Ten).

[10] 2 U.S.C. § 431(4)(A). *See also* 11 C.F.R. § 100.5.

[11] 424 U.S. 1, 79 (1976).

[12] 479 U.S. at 252 n.6 (1986). The phrase "engages in activities on behalf of political candidates" is used interchangeably with the term "independent expenditures." *Compare id.* at 252-253 *with id.* at 252 n.6.

independent expenditures on behalf of candidates, are subject only to these [independent expenditure reporting] regulations."[13] However, if a group's "independent spending become[s] so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee."[14]

The major purpose limitation has been further explored in the courts of appeals. In *New Mexico Youth Organized v. Herrera*, the Tenth Circuit stated:

> There are two methods to determine an organization's 'major purpose': (1) examination of the organization's central organizational purpose; or (2) comparison of the organization's electioneering spending with overall spending to determine whether the preponderance of expenditures is for express advocacy or contributions to candidates.[15]

And the Fourth Circuit in *North Carolina Right to Life, Inc. v. Leake* explained:

> [T]he Court in *Buckley* must have been using "*the* major purpose" test to identify organizations that had the election or opposition of a candidate as

[13] *Id.* at 252-253.

[14] *Id.* at 262 (citing *Buckley*, 424 U.S. at 79). In addition, the Court has consistently mentioned the burden of political committee status. In *Citizens United*, the Court noted that "PACs are burdensome alternatives" that are "expensive to administer and subject to extensive regulations:"

> For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days. . . . And that is just the beginning. PACs must file detailed monthly reports with the FEC, which are due at different times depending on the type of election that is about to occur:
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> "These reports must contain information regarding the amount of cash on hand; the total amount of receipts, detailed by 10 different categories; the identification of each political committee and candidate's authorized or affiliated committee making contributions, and any persons making loans, providing rebates, refunds, dividends, or interest or any other offset to operating expenditures in an aggregate amount over $200; the total amount of all disbursements, detailed over 12 different categories; the names of all authorized or affiliated committees to whom expenditures aggregating over $200 have been made; persons to whom loan repayments or refunds have been made; the total sum of all contributions, operating expenses, outstanding debts and obligations, and the settlement terms of the retirement of any debt or obligation."

130 S. Ct. at 897 (quoting *McConnell v. FEC*, 540 U.S. 93, 331-332 (2003)) (citations omitted).

[15] 611 F.3d 669, 678 (10th Cir. 2010) ("*NMYO*").

> their only or primary goal — this ensured that the burdens facing a political committee largely fell on election-related speech, rather than on protected political speech. . . .If organizations were regulable merely for having the support or opposition of a candidate as "*a* major purpose," political committee burdens could fall on organizations primarily engaged in speech on political issues unrelated to a particular candidate. This would not only contravene both the spirit and the letter of *Buckley*'s "unambiguously campaign related" test, but it would also subject a large quantity of ordinary political speech to regulation.[16]

The court in *NCRTL* went on to articulate a test similar to that in *NMYO*, stating:

> Basically, if an organization explicitly states, in its bylaws or elsewhere, that influencing elections is its primary objective, or if the organization spends the majority of its money on supporting or opposing candidates, that organization is under 'fair warning' that it may fall within the ambit of *Buckley*'s test.[17]

The nature and scope of the major purpose test as applied to the Act was further examined in *FEC v. Malenick*,[18] and *FEC v. GOPAC, Inc.*[19] In those cases, federal district courts examined the public and non-public statements, as well as the electoral spending, of particular groups. More recently, the Fourth Circuit in *RTAA* cited to a narrow understanding of the major purpose test, noting that "[t]he expenditure or contribution threshold means that some groups whose 'major purpose' was *indisputably the nomination or election of federal candidates* would not be designated PACs."[20]

[16] 525 F.3d 274, 287-288 (4th Cir. 2008) ("*NCRTL*") (emphasis in the original).

[17] *Id.* at 289. *See also Real Truth About Abortion v. FEC*, 681 F.3d 544, 558 (4th Cir. 2012) ("*RTAA*") (quoting *NCTRL*). Based on these considerations, the inquiry to assess an organization's major purpose "would not necessarily be an intrusive one" as "[m]uch of the information the Commission would consider would already be available in that organization's government filings or public statements." *RTAA*, 681 F.3d at 558.

[18] 310 F. Supp. 2d 230, 234-236 (D.D.C. 2005).

[19] 917 F. Supp. 851, 859 (D.D.C. 1996).

[20] 681 F.3d at 558 (emphasis added).

Although the Commission has in the past strayed from the confines of the major purpose limitation,[21] more recently it has remained true to *Buckley*'s mandate: that major purpose encompasses only activity directed at the nomination or election of federal candidates.[22] Moreover, it has averred in its briefs that the Commission's approach to

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[21] At times, the Commission has erroneously looked to the general notion of vague "campaign activity," rather than the more limited nomination or election of federal candidates. *See, e.g.*, MUR 5365 (Club for Growth), General Counsel's Report #2 at 3, 5 ("[T]he vast majority of CFG's disbursements are for federal campaign activity" and concluding CFG "has the major purpose of federal campaign activity."); MUR 5542 (Texans for Truth), Conciliation Agreement at ¶ 3 ("[O]nly organizations whose major purpose is campaign activity can be considered political committees under the Act" and "[i]t is well settled that an organization can satisfy *Buckley*'s 'major purpose' test through sufficient spending on campaign activity."); *see also* MURs 5403, 5427, 5440, & 5466 (Americans Coming Together, *et al*), First General Counsel's Report at 7-8; MURs 5511 & 5525 (Swift Boat Veterans and POWs for Truth), Conciliation Agreement at ¶ 6. Given that these were erroneous legal theories, they are of limited precedential value with respect to the type of spending examined as part of a major purpose inquiry. In any event, their predicate legal theories have been overruled by subsequent case law. *See Citizens United v. FEC*, 130 S. Ct. 876 (2010); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 471 (2007); *SpeechNow.org*, 599 F.3d at 692-96; *EMILY's List v. FEC*, 581 F.3d 1, 12-14 (D.C. Cir. 2009).

[22] *See, e.g.*, Brief for the Respondents in Opposition at 4, *The Real Truth About Obama, Inc. v. FEC*, 130 S. Ct. 2371 (2010) (No. 09-724) ("*RTAO III*") ("[A]n entity that is not controlled by a candidate need not register as a political committee unless its 'major purpose' is the nomination or election of federal candidates."); Brief for the Respondents at 4, *RTAO III* ("[A]n entity that is not controlled by a candidate need not register as a political committee -- and may therefore receive contributions of more than $5000 per year from each donor -- unless its 'major purpose' is the nomination or election of federal candidates."); Brief of Appellees Federal Election Commission and United States Department of Justice at 5, *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342 (4th Cir. 2009) ("*RTAO II*") ("[A] non-candidate-controlled entity must register as a political committee -- thereby becoming subject to limits on the sources and amounts of its contributions received -- only if the entity crosses the $1,000 threshold of contributions or expenditures and its 'major purpose' is the nomination or election of federal candidates."); Federal Election Commission's Opposition to Appellant's Motion for Injunction Pending Appeal at 11, *RTAO II* ("[A] non-candidate organization must register as a political committee and be subject to contribution limits only if the entity crosses the $1,000 threshold of contributions or expenditures and its 'major purpose' is the nomination or election of candidates."); Defendant Federal Election Commission's Memorandum in Support of Motion for Summary Judgment and Opposition to Plaintiffs Motion for Preliminary Injunction and Summary Judgment at 10, *Real Truth About Obama, Inc. v. FEC*, No. 3:08- CV-00483-JRS, 796 F. Supp. 2d 736 (E.D. Va. 2011) ("*RTAO IV*") ("[A] non-candidate-controlled entity must register as a political committee only if it crosses one of the $1,000 statutory thresholds and its 'major purpose' is the nomination or election of federal candidates."); Defendant Federal Election Commission's Reply in Support of the Commission's Motion for Summary Judgment at 20, *RTAO IV* ("In *Buckley*, the Supreme Court established the 'major purpose' test to limit the definition of 'political committee' to organizations controlled by a candidate or whose major purpose is the nomination or election of a candidate."); Federal Election Commission's Memorandum in Opposition to Plaintiffs Motion for Preliminary Injunction at 4, *Real Truth About Obama, Inc. v. FEC*, No. 3:08-cv-00483-JRS, 2008 WL 4416282 (E.D. Va. 2008) ("*RTAO I*") ("[A] non-candidate-controlled entity must register as a political committee -- thereby becoming subject to limits on the sources and amounts of its contributions received -- only if the entity crosses the $1,000 threshold of contributions or expenditures and its 'major purpose' is the nomination or election of federal candidates."); Political Committee Status, Supplemental Explanation and Justification ("2007 Political Committee E&J"), 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007) ("[T]he Supreme Court

applying the major purpose limitation is "entirely consistent with the Tenth Circuit's understanding of the major purpose test," which:

> [C]ited the Supreme Court's endorsement of "two methods to determine an organization's 'major purpose': (1) examination of the organization's central organizational purpose; or (2) comparison of the organization's independent [express advocacy] spending with overall spending.[23]

The Commission has not further refined this approach through rulemaking, opting instead to evaluate the major purpose limitation on a case-by-case basis.[24] That the Commission can use a case-by-case analysis was upheld by the Fourth Circuit in *RTAA*, which concluded that "[t]he determination of whether the election or defeat of federal candidates for office is *the* major purpose of an organization, and not simply *a* major purpose, is inherently a comparative task, and in most instances it will require weighing the importance of some of a group's activities against others."[25]

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mandated that an additional hurdle was necessary to avoid Constitutional vagueness concerns; only organizations whose 'major purpose' is the nomination or election of a Federal candidate can be considered 'political committees' under the Act") (citing *Buckley*, 424 U.S. at 79).

[23] Defendant Federal Election Commission's Opposition to Plaintiff's Motion for Preliminary Injunction at 35, *Free Speech v. FEC*, Case 2:12-cv-00127-SWS (D. Wyo. 2012) ("*Free Speech*") (quoting *Colo. Right To Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1152 (10th Cir. 2007)).

[24] 2007 Political Committee E&J at 5597 ("Congress has not materially amended the definition of 'political committee' since the enactment of section 431(4)(A) in 1971, nor has Congress at any time since required the Commission to adopt or amend its regulations in this area. Indeed, in 2002, when Congress made sweeping changes in campaign finance law pursuant to BCRA, it left the definition of 'political committee' undisturbed and political committee status to be determined on a case-by-case basis."). This approach was recently reaffirmed in the Commission's briefs in *Free Speech*. *See* Defendant Federal Election Commission's Opposition to Plaintiff's Motion for Preliminary Injunction at 33, *Free Speech* ("Instead of creating categorical regulations that might have led to overbroad or underinclusive PAC determinations . . . the Commission, in an exercise of discretion, decided to continue its practice of implementing the major purpose test on a case-by-case basis.") (citations omitted).

[25] *RTAA*, 681 F.3d at 556 (emphasis in original).

According to the court in *RTAA*, examining an organization's statements, like those reviewed by district courts in *Malenick* and *GOPAC*,[26] and comparing its electoral spending with its non-electoral spending are "important considerations when determining whether an organization qualifies as a PAC."[27]

Thus, whether AIP is a "political committee" is determined by a two part test: (1) has it made sufficient contributions or expenditures and (2) is its major purpose is the nomination or election of a candidate? In turn, a determination of a group's major purpose requires the examination of the following: (1) a group's central organizational purpose; and (2) a comparison of a group's spending on the nomination or election of federal candidates (*i.e.*, express advocacy) with its other spending.

The Complaint claims that AIP had the requisite major purpose because "AIP has done nothing other than collect and spend funds to defeat Barack Obama's candidacy," relying solely on the already-disclosed independent expenditure of August 2008.[28] Certainly, AIP satisfies the first part of the test, as it self-reported making an independent

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[26] *RTAA* specifically cited *Malenick* and *GOPAC* as "judicial decisions applying the major purpose test, which have used the same fact-intensive analysis that the Commission has adopted." 681 F.3d at 557.

[27] *RTAA*, 681 F.3d at 557. There is a split between the Tenth Circuit and the Fourth Circuit as to whether these are the only factors that may be considered. *Compare NYMO*, 611 F.3d at 678 (providing that organizational statements or comparing express advocacy spending with all other spending are the only two ways to meet the major purpose test) *with RTAA*, 681 F.3d at 557 ("[A]lthough cases since *Buckley* have indicated that [expenditure ratios and organizational documents] may be particularly relevant when assessing an organization's major purpose, those decisions do not foreclose the Commission from using a more comprehensive methodology."). Even in the Fourth Circuit, however, the *RTAA* court noted that any considerations should not entail extensive discovery. 681 F.3d at 558 ("And even if an organization were to find itself subject to a major-purpose investigation, that investigation would not necessarily be an intrusive one. Much of the information the Commission would consider would already be available in that organization's government filings or public statements.").

[28] MUR 6081 (AIP), Complaint at 3.

expenditure in excess of $1,000.[29] But the complaint ignores – and OGC fails to give proper weight to – AIP's public statements of purpose and the other, non-election related spending of AIP, both of which are critical to a proper application of the test.

A. AIP's Central Organizational Purpose Relates to Issues, not Federal Candidates

AIP has stated its purpose as follows: "to act for any lawful purpose for a social welfare organization pursuant to section 501(c)(4) of the Internal Revenue Code of 1986 (or the corresponding section of any future federal tax code)."[30] Other official filings describe AIP's mission as:

> To advocate for and promote the core conservative principles of our founding fathers and Ronald Reagan; including: limited government, lower taxes, free markets, constitutional freedoms, and a strong national defense. To educate and inform the general public and policymakers about these principles and alert them to the importance of the need for conservative principles in governance.[31]

As Senator McCain, the principal Senate sponsor of BCRA, has stated, "under existing tax laws, Section 501(c) groups . . . cannot have a major purpose to influence federal elections, and therefore are not required to register as federal political committees, as long as they comply with their tax law requirements."[32] Thus, although tax status is not

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[29] *See* FEC Form 5: Report of Independent Expenditures Made and Contributions Received (Aug. 19, 2008), *available at* http://images.nictusa.com/pdf/101/28039820101/28039820101.pdf.

[30] MUR 6081 (AIP), Complaint; MUR 6094 (AIP), Complaint at Exhibit A (State of Delaware Certificate of Incorporation: A Non-Stock Corporation of Citizens for the Republic, Inc. (May 17, 2007)).

[31] MUR 6081 (AIP), Response (Oct. 17, 2011), Form 990: Return of Organization Exempt from Income Tax (covering the period of May 1, 2008 to April 30, 2009).

[32] Comments of John McCain and Russell D. Feingold on Reg. 2003-07 (Political Committee Status) (Apr. 2, 2004), attached Statement of Senator John McCain, Senate Rules Committee, March 10, 2004 at 2. *See* 26 U.S.C. § 501(c)(4)(A) (providing tax exempt treatment to "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes").

dispositive, it is certainly relevant, and along with AIP's organizational statement, counsels against political committee status. As Public Citizen has noted, "a legitimate 501(c) organization should not have to fear that it will become a political committee simply by engaging in political issue-related criticisms of public officials."[33]

B. AIP's Spending Demonstrates Its Major Purpose is Not the Nomination or Election of a Federal Candidate

Based upon AIP's spending record, while nominating or electing candidates may be *a* purpose, it is not *the* major purpose of AIP.[34] AIP was formed in 2007.[35] During its fiscal year 2007, which ran from May 1, 2007 to April 30, 2008, AIP reported $496,083

[33] Comment of Public Citizen on Reg. 2003-07 (Political Committee Status) at 10 (Apr. 5, 2004). Public Citizen further noted that "[e]ntities that do not have as their major purpose the election or defeat of federal candidates, such as 501(c) advocacy groups, but which may well be substantially engaged in political activity, should remain subject to regulation for only the narrow class of activities – express advocacy and electioneering communications – explicitly established by current federal election law, as amended by [McCain-Feingold]." *Id.* at 2.

[34] *See RTAA*, 681 F.3d at 556 (The determination of whether the election or defeat of federal candidates for office is *the* major purpose of an organization, and not simply *a* major purpose, is inherently a comparative task, and in most instances it will require weighing the importance of some of a group's activities against others.") (emphasis in original). *See also NCRTL*, 525 F.3d at 287-88 ("If organizations were regulable merely for having the support or opposition of a candidate as '*a* major purpose,' political committee burdens could fall on organizations primarily engaged in speech on political issues unrelated to a particular candidate. This would not only contravene both the spirit and the letter of *Buckley*'s 'unambiguously campaign related' test, but it would also subject a large quantity of ordinary political speech to regulation.").

[35] AIP was originally organized under the name Citizens for the Republic, Inc., in 2007, and changed its name first to Avenger, Inc., in March 2008, and subsequently to American Issues Project, Inc., in August 2008. *See* MUR 6081 (AIP), Complaint; MUR 6094 (AIP), Complaint at Exhibit A (State of Delaware Certificate of Incorporation A Non-Stock Corporation of Citizens for the Republic, Inc.); MUR 6081 (AIP), Complaint; MUR 6094 (AIP), Complaint at Exhibit C (State of Delaware Certificate of Amendment (A Corporation Without Capital Stock) (March 19, 2008)); MUR 6081 (AIP), Complaint; MUR 6094, Complaint at Exhibit D (State of Delaware Certificate of Amendment (A Corporation Without Capital Stock) (Aug. 4, 2008)). Although the Complaint places great emphasis on this fact, it was in the context of whether or not AIP was properly considered a QNC – a question that, as noted above, was rendered moot by the Court's decision in *Citizens United*. *See* MUR 6081 (AIP), Complaint at 3 ("AIP's corporate history also raises the question of whether AIP, under its previous name 'Citizens for the Republic' ever accepted any direct or indirect corporate funding. QNCs are forbidden from taking such donations . . . ."); *supra* n.7.

in expenses.[36] Of this, AIP reported spending $111,767 for "management and general" expenses, $71,632 for "fundraising," and $312,684 for "program services."[37] Of its spending on "program services," AIP reported spending $87,378 for an "online advocacy project" through which:

> The organization developed a sophisticated plan for online grassroots outreach to support its mission and to attract and mobilize a new generation of conservative activists coordinated with traditional public relations and marketing to recruit members and donors and to empower the conservative grassroots.[38]

AIP also reported spending $85,498 for "educational research and media" that went toward "develop[ing] a national media educational program to support three core issues of its mission: taxes and economics, global warming and national defense."[39] Finally, AIP reporting spending $139,808 for "a series of meetings and conversations with economic and business leaders, conservative activists and political leaders [that] were held at various places and times throughout the year to chart the course of the organization," which AIP categorized as "strategic outreach to conservative political leaders and economic thought leaders."[40] AIP reported no spending on independent expenditures in 2007.[41]

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[36] Form 990: Return of Organization Exempt from Income Tax (covering the period of May 1, 2007 to April 30, 2008). Rather than look to total expenses, OGC limits its inquiry to "non-overhead" expenses. Such a presumptive approach poses significant constitutional and statutory concerns. *See EMILY's List*, 581 F.3d at 17 (striking on constitutional and statutory grounds a requirement that certain groups fund their administrative expenses with at least 50% "hard," federally permissible funds regardless of total activity).

[37] Form 990: Return of Organization Exempt from Income Tax (covering the period of May 1, 2007 to April 30, 2008).

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

During fiscal year 2008, AIP reported $7,824,950 in total expenditures, of which $2,876,753 was for independent expenditures.[42] Of the remaining $4,948,197, AIP spent $1,719,354 on "management and general expenses," $208,289 on "fundraising expenses," and $3,020,554 on other "program service[s]," including $788,599 on its online advocacy project and $2,231,955 on educational research and media.[43] AIP reported $475,060 in expenses, including an additional $195,119 on its online advocacy project in fiscal year 2009.[44] AIP reported only $18,541 in expenses in 2010, none of which were for program services.[45] AIP has reported no subsequent independent expenditures.[46]

Thus, during the period in which AIP was clearly active, from 2007 through 2010, AIP reported $8,814,634 in expenses, of which only $2,876,753 (less than one-third of AIP's total expenses) was devoted to the nomination or election of a federal candidate. Therefore, in light of AIP's statements of organizational purpose, and given that a "preponderance" of AIP's spending was not for the nomination or election of a federal

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[42] MUR 6081 (AIP), Response (Oct. 17, 2011), Form 990: Return of Organization Exempt from Income Tax (covering the period of May 1, 2008 to April 30, 2009).

[43] *Id.*

[44] Form 990-EZ: Short Form Return of Organization Exempt from Income Tax (covering the period of May 1, 2009 to April 30, 2010).

[45] Form 990-EZ: Short Form Return of Organization Exempt from Income Tax (covering period from May 1, 2010 to April 30, 2011). AIP indicated that it had less than $50,000 in gross receipts for fiscal year 2011. *See* Form 990-N (e-Postcard) (covering the period of May 1, 2011 to April 30, 2012), *available at* http://apps.irs.gov/app/eos/displayEPostcard.do?dispatchMethod=displayEpostInfo&ePostcardId=1895340&ein=260196975&exemptTypeCode=&isDescending=false&totalResults=1&postDateTo=&ein1=26-0196975&state=All...&dispatchMethod=searchEpostcard&postDateFrom=&country=US&city=&searchChoice=ePostcard&indexOfFirstRow=0&sortColumn=ein&resultsPerPage=25&names=&zipCode=&deductibility=.

[46] *See* Details for Committee ID: C90010562 (American Issues Project, Inc.), FEC Candidate and Committee Viewer Project, available at http://www.fec.gov/fecviewer/CandidateCommitteeDetail.do.

candidate,[47] AIP is not a political committee.[48] Rather, AIP is an issue-based organization that made a single independent expenditure over four years. In other words, it is precisely the type of group the *Buckley* court sought to exclude from the definition of political committee through the major purpose limitation.[49]

II. OGC's Calendar-Year Approach Is Improper

Although not alleged in the complaints, OGC advances a novel theory for applying major purpose: the major purpose inquiry involves only a single calendar year, regardless of tax filing status or the group's overall activities over time. This calendar-year approach, which the Commission has never before applied, is wrong for two reasons: (1) it avoids a proper application of the major purpose limitation; and (2) it creates serious due process concerns.

A. The Calendar-Year Approach Swallows the Major Purpose Limitation

The calendar-year approach creates the illusion of implementing the major purpose limitation while creating precisely the sort of problems the Court sought to avoid

[47] This remains true, even under OGC's approach of looking only to "non-overhead" expenses. AIP reported spending $6,405,110 on non-overhead expenses, of which only $2,876,753, or just less than 45% of AIP's total "non-overhead" spending, was devoted to the nomination or election of a federal candidate. *See NMYO*, 611 F.3d at 678 (concluding that two groups were not political committees because "there is no indication that either group spends a preponderance of its expenditures on express advocacy or contributions to candidates.").

[48] As noted above, the *RTAA* court "[did] not foreclose the Commission from using a more comprehensive methodology" for determining political committee status. 681 F.3d at 557. Even under such a methodology, however, AIP still would not be a political committee because the record before us lacks any additional information suggesting that AIP's major purpose was the nomination or election of a federal candidate. *But see NYMO*, 611 F.3d at 678 (providing that organizational statements or comparing express advocacy spending with all other spending are the only two ways to meet the major purpose test).

[49] As the Eighth Circuit recently observed: "Requiring a group to file perpetual, ongoing reports 'regardless of [its] purpose,' and regardless of whether it ever makes more than a single independent expenditure, is 'no more than tenuously related to' [the state's] informational interest." *Iowa Right to Life Committee, Inc. v. Tooker*, -- F.3d --, 2013 WL 2631177 at *16 (8th Cir. 2013) (*quoting Minnesota Citizens Concerned for Life v. Swanson*, 692 F.3d 684, 876-77 (8th Cir. 2012)).

in *Buckley*. The major purpose limitation is a *constraint*, saving the Act's definition of political committee by restricting it to only those entities that cross the statutory thresholds and have as their major purpose the nomination or election of federal candidates.[50] Because the Act's definition of a political committee rigidly focused only on a set amount of contributions and expenditures, the Supreme Court determined that this was vague and overbroad and adopted the major purpose limitation to correct these deficiencies. In the words of the Supreme Court:

> The general requirement that 'political committees' and candidates disclose their expenditures could raise similar vagueness problems, for '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 discussions. . . . To fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.[51]

Thus, the major purpose test is intended to save the statutory definition of political committee by creating flexibility to consider an entity as a whole, even if the entity engages in some political spending that is unambiguously directed at the nomination or election of a candidate.[52]

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[50] *See, e.g.*, 2007 Political Committee E&J at 5602 ("[E]ven if the Commission were to adopt a regulation encapsulating the judicially created major purpose doctrine, that regulation could only serve to limit, rather than to define or expand, the number or type of organizations regarded as political committees.").

[51] *Buckley*, 424 U.S. at 79 (footnotes omitted).

[52] Not surprisingly, the Commission has stated as much. *See* 2007 Political Committee E&J at 5601-5602 ("Applying the major purpose doctrine, however, requires the flexibility of a case-by-case analysis of an organization's conduct that is incompatible with a one-size-fits-all rule. . . . Because *Buckley* and *MCFL* make clear that the major purpose doctrine requires a fact-intensive analysis of a group's campaign activities compared to its activities unrelated to campaigns, any rule must permit the Commission the flexibility to apply the doctrine to a particular organization's conduct."); Federal Election Commission's Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction 24, *RTAQ I* ("The assessment of an organization's 'major' purpose is inherently comparative and necessarily requires an understanding of an organization's *overall activities*.") (emphasis added). *See also* Defendant Federal Election Commission's Memorandum in Support of Motion for Summary Judgment and Opposition to Plaintiff's

The calendar-year approach now advanced by OGC would subvert the underlying reason for the major purpose test. While the calendar-year approach superficially attempts to root itself in the statute, it provides precisely the same rigid, "one-size-fits-all rule" roundly rejected in *Buckley* and its progeny. In the case at hand, the calendar-year approach fails to consider AIP as a whole by excluding activity in 2007 and 2009. Instead, OGC focuses solely on a single calendar year. Groups that wish to communicate their message when citizens are most receptive are likely to support or oppose federal candidates during an election year. Thus, by focusing on a single calendar year, OGC's approach artificially limits the major purpose analysis to the time period when spending to support or oppose the nomination of candidates for federal office is likely to be at its highest and disregards all of an organization's non-election activities, undertaken in off-years, regardless of how substantial they may be. As one reputable commentator stated, "[u]nsurprisingly, most citizens begin to focus on and become engaged in political debate once election day approaches."[53]

Assessing a group's major purpose through the myopic window of a single calendar year presents the same problems with the statute that prompted the Supreme Court to adopt a limiting statutory construction: it will inevitably subject many issue-based organizations to the burdens of being a political committee. This problem is illustrated by the following hypothetical. Imagine a group is established and then spends $5,000 in the fall of an election year, $3,000 for independent expenditures and $2,000 for

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Motion for Preliminary Injunction and Summary Judgment 42, *RTAO IV* (making a substantially identical statement).

[53] Kirk L. Jowers, *Issue Advocacy: If It Cannot Be Regulated When It Is Least Valuable, It Cannot Be Regulated When It Is Most Valuable*, 50 Cath. U. L. Rev. 65, 76 (Fall 2000).

issue advocacy related to a specific bill pending before Congress. In January of the following year, this same group spends $25,000 on issue advocacy related to the same pending legislation. Two months after that, it spends yet another $25,000 on additional issue advocacy. Under OGC's proffered approach, the Commission would never look at the additional $50,000 spent in January and beyond. Rather, since 60% of this group's outlays for the calendar year during which a federal election occurred were for independent expenditures, it would be required to report as a political committee, notwithstanding the fact that only 5% of its total disbursements were for independent expenditures.[54] By failing to consider an entity as a whole, the calendar-year approach misses the larger picture of a group's true major purpose and can easily reach groups engaged primarily in issue advocacy – precisely the outcome the Court in *Buckley* sought to avoid by adopting the major purpose limitation.[55]

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[54] OGC's proposed approach also arbitrarily classifies similarly situated groups differently, based solely on the times at which money is spent. Assume, for example, that another group is established and spends a similar $5,000 in the fall of an election year, but only $2,000 is for an independent expenditure. Assume further that, from January to March of the following year, this other group also spends an additional $50,000, of which $1,000 finances a second independent expenditure and $49,000 finances an issue-oriented legislative effort. Though the overall spending of this group would be identical to the group described above – $3,000 for express advocacy and $52,000 for issue advocacy – under OGC's proposed approach one would be a political committee and one would not. Certainly, the *Buckley* Court would not have endorsed such arbitrary standard nor would it have tolerated the disparate treatment of similarly situated groups under the major purpose test it announced.

[55] According to *RTAA*, the Commission is not "foreclose[d] ... from using a more comprehensive methodology." 681 F.3d at 557. But *RTAA* never approved the Commission using a *less* comprehensive, selective methodology that would frustrate the reason for the major purpose test, which is precisely what would happen if the Commission limited the scope of the major purpose analysis to a single calendar year without consideration of any other spending outside that window.

The calendar-year approach would also give rise to numerous practical difficulties. If a group is a political committee, it must file a statement of organization within ten days of becoming a political committee. Since a group may not know its overall spending *a priori*, there is no way for a group to know when the ten-day period begins to run, or when the first filing is due. Thus, to avoid the risk of finding themselves in a long, drawn-out enforcement action, groups may have to undertake the burdens of a registering and reporting as a political committee during the calendar year as a precaution, or avoid engaging in election-related speech altogether.

Rather than focus on the limiting language in *Buckley* and its progeny, OGC instead suggests that a contrary interpretation would be inconsistent with the Act, concluding that "a calendar year . . . provides the firmest statutory footing for the Commission's major purpose determination."[56] Never mentioned is that this is the exact opposite of what OGC has recommended in the past, and that the Commission and OGC have routinely looked at activity beyond a single calendar year in its prior enforcement actions.[57] For example, in MUR 5751 (The Leadership Forum), OGC cited to IRS reports showing receipts and disbursements from 2002-2006 before concluding that the Respondent had not crossed the statutory threshold for political committee status.[58] In MUR 5753 (League of Conservation Voters 527, *et al.*), the Commission determined that Respondents "were required to register as political committees and commence filing disclosure reports with the Commission by no later than their initial receipt of contributions of more than $1,000 in July 2003," citing to Respondents' disbursements "during the *entire 2004 election cycle*" while evaluating their major purpose.[59] Likewise, in MUR 5754 (MoveOn.org Voter Fund), the Commission looked to disbursements "[d]uring the *entire 2004 election cycle*" and cited to specific solicitations and

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[56] MUR 6081 (AIP), First General Counsel's Report at 16. OGC reasons that this window is "consistent with the Act's plain language" that evaluates the statutory threshold for political committee status upon aggregate contributions or expenditures during a single calendar year. *Id.*

[57] In the past, the Commission has also relied on inactivity post-election cycle when determining that the major purpose test had been met. *See* 2007 Political Committee Supplemental E&J, 72 Fed. Reg. at 5605 (summarizing MUR 5511 (Swiftboat Vets) and MUR 5754 (MoveOn.org)). It is unclear why lack of activity in the next calendar year may be evidence of sufficiently electoral major purpose but actual activity undertaken in the next calendar year should not even be considered.

[58] MUR 5751 (The Leadership Forum), General Counsel's Report #2 at 3.

[59] MUR 5753 (League of Conservation Voters 527, *et al.*), Factual and Legal Analysis at 11 & 18 (emphasis added). The legal underpinnings of this MUR have been undermined for other reasons by *EMILY's List*, 581 F.3d at 12-14.

disbursements made during calendar year 2003 in assessing the Respondent's major purpose.[60] Similarly, in both *GOPAC*,[61] and *Malenick*,[62] courts looked beyond a single calendar year when analyzing major purpose. OGC provides no explanation now for how such prior enforcement actions are consistent with the Act under its new reading.[63] Under OGC's logic – that not using calendar year as a proxy for the major purpose test is contrary to the Act – all past MURs on the topic are legally erroneous. Rather than place the major purpose limitation on firmer statutory footing, OGC's approach repudiates decades of Commission actions in favor of a more expansive regulatory sweep without any prior notice to the public.[64]

B. The Calendar-Year Approach Raises Serious Due Process Concerns

OGC temporal calendar-year approach to this matter would be a standardless sweep that poses an acute risk for inappropriate targeting of respondents and reverse engineering. During the four and a half years this matter was pending, OGC submitted

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[60] MUR 5754 (MoveOn.org Voter Fund), Factual and Legal Analysis at 12 &13 (emphasis added). The legal underpinnings of this MUR have been subsequently undermined by *EMILY's List*, 581 F.3d at 12-14.

[61] *GOPAC*, 917 F. Supp. at 862-66 (reviewing, among other things, GOPAC's *1989-1990* Political Strategy Campaign Plan and Budget) (emphasis added).

[62] *Malenick*, 310 F. Supp. 2d at 235 (citing Pl.'s Mem., Ex. 1 (Stipulation of Fact signed and submitted by Malenick and Triad Inc., to the FEC on January 28, 2000, "listing numerous 1995 and 1995 Triad materials announcing these goals") and Ex. 47 ("Letter from Malenick, to Cone, dated Mar. 30, 1995") among others); *id.* at n.6 (citing to Triad Stip. ¶¶ 4.16, 5.1-5.4 for the value of checks forwarded to "intended federal candidate or campaign committees in *1995 and 1996*.") (emphasis added).

[63] As noted above, the Commission's past political committee status MURs are assailable on other grounds. *See supra* n. 21. From a due process perspective, however, they provide notice to the public as to the scope of activity the Commission considers when conducting a case-by-case political committee status analysis. And, it is notable that, even at the height of its regulatory zeal, the Commission did not believe that the calendar-year approach now advanced by OGC was the proper analysis under *Buckley* or the Act.

[64] Indeed, given the Commission's prior announcement that the public has, through other enforcement actions, been given "notice of the state of the law regarding . . . the major purpose doctrine," 2007 Political Committee E&J at 5606, it is unclear how the Commission could, consistent with the Administrative Procedure Act, adopt OGC's proposed calendar-year approach without first engaging in notice and comment rulemaking.

three different First General Counsel's Reports,[65] each one applying a different legal theory. In its first First General Counsel's Report circulated to the Commission in April 2009, OGC stated that "the cost to air the 'Know Enough' advertisement and to conduct subsequent polling appears to be significantly greater than *all other known spending of the organization combined.*"[66] In its second First General Counsel's Report, circulated to the Commission in September 2011, OGC once again asserted that the cost of AIP's independent expenditure and subsequent polling "appears to be significantly greater than *all other known spending of the organization combined,*"[67] and introduced a new

[65] OGC prepared and circulated its first First General Counsel's Report in this matter just over six months after receiving the first complaint. MUR 6081 (AIP), First General Counsel's Report (dated April 16, 2009). Note that during those six months, OGC conducted research beyond what was included in the complaint without providing any of the information found to AIP. At that time, *Citizens United* was pending decision by the Supreme Court. On June 29, 2009, the Court issued an order for supplemental briefing and reargument which placed several issues pending in this matter squarely before the Court. Thus, it was not an efficient use of Commission resources to pursue this matter pending the outcome of that case. The Court issued its opinion in *Citizens United* on January 21, 2010. *Citizens United v. FEC*, 130 S.Ct. 876 (2010). Just over three weeks later, on February 16, 2010, OGC withdrew its First General Counsel's Report in light of the Court's decision in *Citizens United*. MUR 6081, Informational Memo (Feb. 16, 2010). In spite of the fact that the *Citizens United* decision was issued in January 2010, OGC took over eighteen months to prepare a revised First General Counsel's Report, which was dated September 13, 2011. MUR 6081 (AIP), First General Counsel's Report (Sep. 13, 2011). During that eighteen months, OGC did not provide the results of its additional research to AIP. The second report was quickly withdrawn "to provide further analysis of various issues the Commission discussed at the September 27, 2011 Executive Session." MUR 6081 (AIP), Memorandum (Oct. 3, 2011). Only after this second withdrawal did OGC finally provide the results of its additional research to AIP in a letter stating that "[t]he Office of the General Counsel has reviewed the attached publicly available articles as part of its consideration of this matter," including several referencing spending after 2008, and "is providing you this information so that your client may supplement its submission by responding to it, if it so chooses." MUR 6081 (AIP), letter from Roy Q. Luckett, Acting Assistant General Counsel for Enforcement to Cleta Mitchell (Oct. 5, 2011). AIP submitted a supplemental response on October 17, 2011, pointing to exculpatory news coverage that OGC subsequently neglected to reference in its final report. MUR 6081 (AIP), Response (Oct. 17, 2011) ("The fact [that AIP is not a political committee] is further underscored by the documents contained in [OGC's] October 6, 2011 letter, in which there are multiple articles about issue-related communications by AIP well after the November 2008 election."). Nearly a year and a half after receiving this response, over three years after the Court's decision in *Citizens United*, four and a half years after the original complaint in this matter, and three federal elections after the first complaint was submitted to the Commission, OGC submitted its third and final First General Counsel's Report to the Commission. MUR 6081 (AIP), First General Counsel's Report (circulated March 13, 2013).

[66] MUR 6081 (AIP), First General Counsel's Report at 14 (dated April 16, 2009) (emphasis added).

[67] MUR 6081 (AIP), First General Counsel's Report at 20 (Sep. 13, 2011) (emphasis added).

argument, asserting that "allowing organizations to use their own fiscal tax year would permit them to manipulate the timeline for activity that can be considered by the Commission."[68]

While both the first and second First General Counsel's Report submitted by OGC focus heavily on spending in 2008, neither explicitly articulates the calendar-year theory OGC now proffers.[69] Rather, both purport to reach their conclusion based on a comparison of "all other known spending of the organization combined." However, in its most recent report in this matter, OGC turns its focus from *all* of AIP's spending to its calendar-year approach.

Ironically, the *ex post facto* development of a legal theory that is then applied to known facts poses the precise risk OGC warned about in its second First General Counsel's Report: that one may "manipulate the timeline for activity that can be considered by the Commission."[70] Here, OGC could be seen as manipulating the timeline to reach the conclusion that AIP is a political committee. As noted above, the

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[68] *Id.* at 24.

[69] Both earlier reports seek to exclude AIP's spending in 2009, stating "[t]he fact that AIP's known spending in 2009 was less substantial than its spending in 2008 and was not directly related to an election does not change that it may have had federal campaign activity as its major purpose and should have registered and reported as a political committee with the Commission in 2008." MUR 6081 (AIP), First General Counsel's Report at 14 (April 16, 2009); MUR 6081, First General Counsel's Report at 20 (Sep. 13, 2011) ("The fact that AIP's known spending in 2009 was less substantial than its spending in 2008 and was not directly related to an election does not change that it may have had federal campaign activity as its major purpose."). However, they both also purport to compare AIP's expenditures to "all other known spending," including at least some of AIP's spending during the 2007 calendar year. *See* MUR 6081, First General Counsel's Report at 22 n.13 (Sep. 13, 2011). Thus, while the calendar year approach may have evolved out of earlier versions of OGC's reports in this matter, it did not emerge as a clearly articulated doctrine until the third and final First General Counsel's Report. As noted above, even if OGC's calendar year approach had been clearly articulated in its first First General Counsel's Report, it would still have been a wholly inappropriate change from the Commission's prior approach to the major purpose limitation. *See supra* at 15-21.

[70] MUR 6081 (AIP), First General Counsel's Report at 24 (Sep. 13, 2011).

calendar-year framework was developed after the activity had already taken place, complaints were filed, and the pertinent facts were known.[71] Such after-the-fact determinations create the appearance of impropriety, whether or not such impropriety actually exists.[72]

The potential for such targeting is wholly inappropriate, particularly in an agency that regulates core First Amendment activity.[73] As the Fourth Circuit stated, "[u]nguided regulatory discretion and the potential for regulatory abuse are the very burdens to which political speech must never be subject."[74] As the agency tasked with reducing even the appearance of impropriety in the campaign finance system, the FEC must, at a minimum, hold itself to the same standard and reject any approach that may risk such abuse.

Due process ought to prevent such shenanigans. In *FCC v. Fox Television Station*, the Court admonished that "[i]n the context of a change in policy . . . an agency, in the ordinary course, should acknowledge that it is in fact changing its position and 'show that there are good reasons for the new policy.'"[75] The Court went on to note that

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[71] *See also supra* at 15-21.

[72] This risk is particularly acute in light of recent revelations that officials at the Internal Revenue Service developed screening criteria that targeted certain political groups seeking non-profit status. *See, e.g.*, David Sherfinski and Stephen Dinan, *IRS Auditor Reaffirms That Conservatives, Not Liberals, Were Targeted*, Wash. Times (June 27, 2013) *available at* http://www.washingtontimes.com/news/2013/jun/27/irs-auditor-reaffirms-conservatives-not-liberals-w/?page=all; Stephanie Condon, *IRS: Progressive groups flagged, but tea party bigger target*, CBS News (June 27, 2013) *available at* http://www.cbsnews.com/8301-250_162-57591358/irs-progressive-groups-flagged-but-tea-party-bigger-target/.

[73] *See Mills v. Alabama*, 383 U.S. 214, 218-219 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.").

[74] *NCRTL*, 525 F.3d at 290.

[75] 132 S. Ct. 2307, 2315-2316 (2012) (*quoting FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009) ("*Fox I*")).

"[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."[76] Thus, due process requires that the public know what is required *ex ante*, and that the Commission acknowledge and provide the public with prior notice of any regulatory change.

In the absence of such notice from the Commission, the public should be able to rely upon past Commission actions and statements when attempting to comply with the law. Even though for decades the Commission has not limited its major purpose analysis to a single calendar year,[77] OGC offers no legislative or regulatory change that would justify altering its approach now. For example, BCRA certainly did not change the definition of "political committee." In the words of Senators McCain and Feingold:

> McCain-Feingold didn't directly deal with [political committee status]. Our bill was concerned with the raising and spending of soft money by the political parties, and with phony issue ads run by any organization in proximity to an election. The question of whether and how 527s should be regulated in their fundraising and in their spending on other activities is a question that has to be answered under the Federal Election Campaign Act passed by Congress in 1974, and reviewed by the Supreme Court in the *Buckley* case.[78]

Other supporters of McCain-Feingold made the same point, stating, "Congress, of course, did not amend in [McCain-Feingold] the definition of 'expenditure' or, for that

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[76] *Id.* at 2317.

[77] As noted above, the Commission has routinely looked beyond a single calendar year in its past enforcement actions. *See supra* at 19-21.

[78] Comment of John McCain and Russell D. Feingold on Reg. 2003-07 (Political Committee Status) (Apr. 2, 2004), attached Statement of U.S. Senator Russ Feingold Before the Senate Rules Committee Hearing on Examining the Scope and Operation of Organizations Registered under Section 527 of the Internal Revenue Code March 10, 2004 at 2-3. Although not at issue in this matter, since McCain-Feingold did not alter political committee status, it follows that electioneering communications, a category of communications created by McCain-Feingold, cannot be used to show that an organization has the nomination or election of a federal candidate as its major purpose. To the contrary, such communications, which are not expenditures and so are not for the purpose of influencing a federal election, show a purpose other than the nomination or election of a candidate.

matter, the definition of 'political committee.'"[79] Thus, as the Commission has publicly acknowledged, "Congress has not materially amended the definition of 'political committee' since the enactment of section 431(4)(A) in 1971, nor has Congress at any time since required the Commission to adopt or amend its regulations in this area."[80]

The spending in question in this matter took place in 2008. At that time, groups such as AIP had no reason to suspect that any determination as to its status as a political committee would be based on an arbitrary calendar-year window as OGC has suggested. Had they known, they might have altered their behavior to avoid what the Supreme Court has repeatedly deemed the "burdensome" requirements associated with political committee status.[81] To change the norm now, in a confidential enforcement action, is to move the goalposts in the middle of the game, punish groups who have tried in good faith to comply with the law, and introduce uncertainty into the political process, which can chill independent speech.[82] Due process and our respect for the First Amendment permit none of these outcomes. As we have already said, "Self-serving efforts to unilaterally expand the Commission's jurisdiction and reach so as to generate issues that will create

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[79] Comment of Nancy Pelosi, Steny H. Hoyer, John B. Larson, Janice Schakowsky, *et al.* on Reg. 2003-07 (Political Committee Status) at 2 (Mar. 24, 2004) (signed by one-hundred and forty elected representatives).

[80] 2007 Political Committee E&J at 5597.

[81] *Citizens United*, 130 S. Ct. at 897. *See also MCFL*, 479 U.S. at 253-255 (describing the reporting requirements for political committees).

[82] *See Citizens United*, 130 S. Ct. at 896 ("When the FEC issues advisory opinions that prohibit speech, '[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech – harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.'") (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)) (citation omitted).

new test cases is not something that an agency is generally required to do nor is it appropriate unless required."[83]

III. Conclusion

Given that AIP did make a large independent expenditure, it seems clear that *one* of its purposes may have been the nomination or election of a candidate. As *Buckley* made clear, and as *Leake* and *RTAA* reaffirmed, however, to be considered a political committee under federal law, the nomination or election of a candidate must be *the* major purpose of an organization. Here, AIP's public statements, as well as a comparison of its overall spending, show that the nomination or election of candidates is not *the* major purpose of AIP.

For the above reasons, we voted against OGC's recommendations in MUR 6081, since AIP was not required to register with the Commission and file reports with the Commission as a political committee.

[83] MUR 5541 (The November Fund), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn at 18 (footnotes and citations omitted).

DONALD F. MCGAHN II
Vice-Chairman

7/25/13
Date

CAROLINE C. HUNTER
Commissioner

7/25/13
Date

MATTHEW S. PETERSEN
Commissioner

Jul. 25, 2013
Date