FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 6402
American Future Fund	)	

STATEMENT OF REASONS OF
COMMISSIONERS CAROLINE C. HUNTER AND MATTHEW S. PETERSEN

In this matter, we must determine if the American Future Fund ("AFF" or "Respondent"), a social welfare organization exempt from taxation under section 501(c)(4) of the Internal Revenue Code, is a "political committee" under the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"). To ensure that the First Amendment-protected freedoms of speech and association are not infringed upon, courts have narrowly construed the Act's definition of "political committee." These court decisions, which stretch back nearly forty years, properly tailor the Act to afford non-profit issue advocacy groups substantial room to discuss the issues they deem salient and to protect them from burdensome political committee registration, reporting, and regulatory requirements. Such groups may expressly advocate the election or defeat of candidates without losing these protections, as long as the group's major purpose is not the nomination or election of federal candidates.[1]

As this Commission determined previously,[2] Respondent's major purpose is not the nomination or election of a federal candidate. Rather, its public statements, organizational documents, and overall spending history objectively indicate that the organization's major purpose has been issue advocacy and grassroots lobbying and organizing. Accordingly, we could not vote to find that AFF violated the Act by failing to register and report as a political committee.[3]

[1] As the Supreme Court has explained, "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest." *Buckley v. Valeo*, 424 U.S. 1, 42 (1976).

[2] *See* MUR 5988 (American Future Fund), Factual and Legal Analysis at 7 (concluding unanimously that there was no reason to believe the American Future was a political committee under the Act).

[3] MUR 6402 (American Future Fund) ("AFF"), Certification (November 18, 2014).

I. PROCEDURAL BACKGROUND

A. THE COMPLAINT

The Complaint in this matter alleges that AFF violated the Federal Election Campaign Act of 1971, as amended ("the Act"), by failing to register and report as a political committee.[4] Specifically, the Complaint alleges that American Future Fund "reported to the Commission expenditures of more than $1,000 [in calendar year 2010] to influence the 2010 Congressional elections"[5] and that American Future Fund's major purpose in calendar year 2010 was "to influence the 2010 federal elections and to elect Republicans to office."[6] The Complaint concludes that the Commission should "find reason to believe that American Future Fund has violated FECA political committee registration, organization and recordkeeping, and reporting requirements established by 2 U.S.C. 432, 433, and 434."[7]

B. THE RESPONSE

The Respondent denies these allegations, asserting that AFF is *not* a 'political committee.'"[8] AFF does not challenge the Complaint's allegation that it made expenditures aggregating in excess of $1,000 during 2010.[9] Instead, Respondent denies that it had as its major purpose the nomination or election of federal candidates,[10] which courts have required before political committee burdens may be imposed on an organization.[11] In particular, AFF asserts its major purpose is – as the Commission has previously determined[12] – "grassroots issue advocacy and education."[13]

C. COMMISSION ACTION

On November 18, 2014,[14] the Commission considered and voted on this matter.[15] The Complaint failed to convince the required four Commissioners that there is reason to believe

---

4 MUR 6402 (American Future Fund), Complaint ("Complaint").

5 *Id.* at 12.

6 *Id.*

7 *Id.* at 16.

8 MUR 6402 (AFF), Response at 1 (emphasis in original) ("Response").

9 *Id.* at 4, 11.

10 *Id.* at 1, 16.

11 *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976).

12 *See* MUR 5988 (American Future Fund), Factual and Legal Analysis at 7 (concluding unanimously that "AFF's major purpose is not federal campaign activity").

13 Response at 16.

14 We regret the length of time required to resolve this matter. In large part, the delay is attributable to the Office of General Counsel's decision to withdraw its original report and recommendation in order to further consider the applicable legal standards. *See generally* MUR 6402 (AFF) First General Counsel's Report (originally

AFF violated the Act and the matter was dismissed.[16] As the controlling decision makers,[17] we are issuing this Statement of Reasons to set forth the Commission's rationale for not finding reason to believe and dismissing the matter.[18]

II. FACTUAL BACKGROUND

Founded in 2007,[19] AFF is organized under Section 501(c)(4) of the Internal Revenue Code and is incorporated under Iowa law.[20] It describes itself as a "multi-state issues advocacy group," the mission of which is to "effectively communicate conservative and free market ideals" and to be the "voice for conservative principles that sustains free market ideals focused on bolstering America's global competitiveness across the country."[21] AFF acknowledges that it

---

circulated June 22, 2011; withdrawn Sept. 29, 2011). The Commission did not receive a revised report and recommendation from the Office of General Counsel until early 2013, some 27 months after the complaint in this matter was first submitted.

15 *See* MUR 6402 (AFF), Certification (November 18, 2014).

16 *See* 52 U.S.C. § 30109(a)(2) (formerly 2 U.S.C. § 437g(a)(2)) (four-vote requirement).

17 *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("[W]hen the Commission deadlocks 3-3 and so dismisses a complaint, that dismissal, like any other, is judicially reviewable under § 437g(a)(8).... [T]o make judicial review a meaningful exercise, the three Commissioners who voted to dismiss must provide a statement of their reasons for so voting. Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did." (citing *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987))). Only five Commissioners participated in the consideration of this matter, and the vote not to proceed was 2-3. *See* MUR 6402 (AFF), Certification (November 18, 2014) (Vice Chair Ravel and Commissioners Weintraub and Walther voting to find reason to believe AFF violated the Act and Commissioners Hunter and Petersen dissenting). That the group voting not to go forward with enforcement was made up of two Commissioners does not make it any less "a controlling group for purposes of the decision." *Id.; see also Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d at 1133 (addressing a Commission deadlock in which "three Commissioners found "reason to believe" . . .; two voted against such a finding; [and] one abstained"); *Democratic Cong. Campaign Comm. v. FEC*, 918 F. Supp. 1, n. 2 (D.D.C. 1994) (explaining that the focus of judicial review is the stated reasons of the controlling group, even when that group is, itself, split because "whatever the reasoning of the individual commissioners, is it the aggregate of the three members that prevailed under the regulations."). In the event a suit is brought under 52 U.S.C. 30109(a)(8) (formerly 2 U.S.C. 437g(a)(8)), those precedents control the level of judicial deference we will receive for our decision to dismiss the complaint in this matter. *See id.*

18 *See FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d at 1476 ("Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did." (citing *Democratic Cong. Campaign Comm.*, 831 F.2d at 1134–35)).

19 *See* Articles of Incorporation of American Future Fund, *available at* https://sos.iowa.gov/search/business/search.aspx.

20 *See* Response at 2 ("AFF received its IRS approval on October 24, 2008."); *see also* Articles of Incorporation of American Future Fund, *available at* https://sos.iowa.gov/search/business/search.aspx.

21 Response at 12 (quoting American Future Fund, *About AFF*, *available at* http://www.americanfuturefund.com/about-american-future-fund); *see also* Return of Organization Exempt from Income Tax (Form 990) for American Future Fund, 2008 ("AFF 2008 Form 990") 2008; Return of Organization Exempt from Income Tax (Form 990) for American Future Fund,2009 ("AFF 2009 Form 990").

has, since 2010, "engage[d] in a limited amount of express advocacy activity" but does so to "complement its exempt purpose social welfare activities."[22]

From its inception, AFF has actively advanced its mission, spending approximately $8 million in the first two and a half years of its existence "to promote conservative free market principles to the citizens of America."[23] In 2008, for example, its grassroots lobbying and issue advocacy activities included: letters supporting the Columbian Trade Protection Act that was currently pending in the Senate; an advertisement calling for the passage of the bipartisan FISA bill; a release of survey results from Louisiana that found "desperately low congressional approval ratings and growing interest in taxes and economic issues;" press releases that called for a "crack down" on tax evasion, criticism of the Minnesota state legislature for passing the Employee Free Choice Act, and support of articles addressing "entitlement" reform; and the release of national poll results focusing on, among other things, the gas tax.[24] During that year, AFF also aired several radio and television advertisements focused on allowing offshore drilling and calling on Senators to take action on S. 3202, the Gas Price Reduction Act, as well as asking Congressman Mark Udall to vote on H.R. 6018, a similar bill that was pending in the House of Representatives.[25] And, beginning in 2009, AFF "spent considerable time, money, and effort opposing government take-over of healthcare."[26]

From 2010-2011 – the period that is the core of the record in this matter – AFF spent approximately $25 million advancing its mission.[27] According to AFF, the "great majority" of its funds were spent on "grassroots lobbying, issue advocacy, and education activities,[28] including participating in forums, analyzing legislation, and educating the American people on taxes, energy security and independence, and choice in education.[29] In particular, AFF continued its efforts opposing healthcare reform "during the course of the healthcare debate."[30] Throughout 2010, AFF "supported the extension of tax cuts" and engaged in "state-level

---

22 *Id* at *2*.

23 *See* AFF 2008 Form 990 (reporting total expenses of $6,331,949 in fiscal year 2008); AFF 2009 Form 990 (reporting total expenses of $1,913,598 in fiscal year 2009); *see also* Response at 16 (indicating the organization spent "nearly $9 million in 2008-2009").

24 MUR 5988 (American Future Fund), Factual and Legal Analysis at 4-5. The Commission concluded that "AFF's involvement in these activities . . . suggests that AFF's major purpose is not federal campaign activity." *Id.* at 7.

25 *Id.* at 5.

26 Response at 8.

27 Of this amount, AFF spent approximately $21.5 million in 2010 and approximately $3.5 million in 2011. *See* Return of Organization Exempt from Income Tax (Form 990) for American Future Fund, 2011 (*"AFF 2011 Form 990")* (reporting total expenses of $21,352,090 in fiscal year 2010 and $3,637,462 in fiscal year 2011).

28 Response at 8.

29 *See* Return of Organization Exempt from Income Tax (Form 990) for American Future Fund, 2010 ("AFF 2010 Form 990")*.*

30 Response at 8.

advocacy on lower taxes and fiscal responsibility . . . in South Carolina, California, and Tennessee."[31] Additionally, AFF hosted a lecture series, maintained an active blog, and served as an "ethics watchdog, monitoring members of Congress and their campaigns for illegal behavior."[32]

AFF's activity in 2010 also included making communications to the public, including airing television and radio advertisements, posting Internet advertisements, publishing newspaper advertisements, sending mail, and making phone calls to voters regarding policy issues important to AFF.[33] AFF represents that it spent "millions of dollars" on such communications in 2010.[34] Many of these communications focused on issues central to AFF's mission – topics like fiscal responsibility, taxes, agriculture, energy, heath care reform, and other policy matters considered by the United States Congress.[35] Because some of these issue advertisements – approximately $1.74 million worth – were broadcast in close proximity to an election, they were reported to the Commission as "electioneering communications." Other of these communications – approximately 39 of them, created and distributed at a cost of roughly $7 million – advocated the election or defeat of particular federal candidates.[36] That spending, in particular, constituted barely one third of the organization's annual expenses in 2010 and less than a quarter of the organization's total spending to that point.

AFF remained actively involved in advancing its mission in 2011. During the first 10 months of the year, for example, it engaged in numerous activities consistent with its exempt purpose. For example, AFF continued its lecture series, including a major address by Senator Thune; made presentations at various conferences; issued statements regarding current events; and financed advertisements advocating certain legislative actions, including reform of telecommunications laws and IRS rules and passage of Cut, Cap and Balance proposals.[37]

III. LEGAL BACKGROUND

Understanding the responsibilities and burdens that come with political committee status is important to appreciate what is at stake in this case and why groups tailor their spending to

---

31 *Id.*

32 *Id.* at 8.

33 *Id.* at 8.

34 *Id.* at 9.

35 *Id.*, Attachments; *see also* MUR 6402 (AFF), General Counsel's Report at 17-21 (providing transcripts of representative advertisements) ("General Counsel's Report").

36 Response at 10. These advertisements – known as "independent expenditures" – were reported to the Commission in accordance with 2 U.S.C. § 434(c), (g). Information in the record before the Commission indicates that in 2010, AFF reported that it spent $7,358,236.07 on express advocacy "independent expenditures." *See* Response at 2; General Counsel's Report at 25 (indicating that AFF spent "approximately $7.36 million" on independent expenditures in 2010).

37 MUR 6402 (AFF), Supplemental Response at 2 ("Supp. Response").

avoid triggering burdensome regulation. It also helps understand the courts' decisions narrowing the scope and application of the Act.

As the Supreme Court has recognized, "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:
>
> > 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.[38]

Moreover, in addition to the disclosure burdens described above, a political committee — even a so-called "super PAC" that operates independently of a candidate — remains subject to certain prohibitions even in the post-*Citizens United* world.[39]

Characterizing the onerous requirements that attach to political committee status as "just disclosure" does not alleviate the attendant burden. Not all disclosure regimes are created equal. The responsibilities that come with one-time, event-specific disclosure[40] are a far cry from the ongoing, all-encompassing reporting and regulatory burdens faced by FECA political

---

[38] *Citizens United v. FEC*, 558 U.S. 310, 337-338 (2010) (quoting *McConnell v. FEC*, 540 U.S. 93, 331-332 (2003)).

[39] *See* 52 U.S.C. 30121(a)(1) (formerly 2 U.S.C. § 441e(a)(1)) (making it unlawful for a foreign national to directly or indirectly make "a contribution or donation of money or other thing of value . . . in connection with a Federal, State, or local election"); *see also* 11 C.F.R. § 115.2 (prohibiting contributions by Federal contractors).

[40] *See, e.g.*, 52 U.S.C. 30104(c), 30104(f), and 30104(g) (formerly 2 U.S.C. 434(c), 434(f), and 434(g)).

committees.[41] Indeed, it is a "mistake" to interpret the Supreme Court's recent endorsement of event-driven disclosure as "giving the government a green light to impose political-committee status on every person or group that makes a communication about a political issue that also refers to a candidate."[42]

In short, the regulatory obligations, prohibitions, and First Amendment impingements associated with political committee status are weighty and extensive. As shown below, this is why courts have narrowed the reach of the Act's "political committee" definition to ensure that issue advocacy groups are not chilled from engaging in First Amendment-protected speech and association.

A. PRE-*BUCKLEY* JUDICIAL TREATMENT OF THE ACT'S DEFINITION OF "POLITICAL COMMITTEE"

The Act defines a "political committee" as "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."[43]

Soon after FECA's enactment, during the period between 1972 and 1976, several courts considered vagueness and overbreadth challenges to the Act's political committee definition. From the outset, the judiciary warned that absent imposition of a limiting construction on this definition, "[t]he dampening effect on first amendment rights . . . would be intolerable."[44] Particularly troubling, courts admonished, was the prospect that "organizations which express views on topical issues involving . . . positions adopted by office-seekers" would have "their associational rights . . . encroached upon" by the disclosure burdens applicable to political committees.[45] It was "abhorrent" to think that "every position on any issue, major or minor, taken by anyone would be a campaign issue and any comment upon it in, say, . . . an advertisement would" subject an organization to political committee disclosure burdens.[46] This was particularly true for "nonpartisan issue groups which in a sense seek to 'influence' an

---

41 *See Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 824 (7th Cir. 2014) (noting that "[a] one-time, event-driven disclosure rule is far less burdensome than the comprehensive registration and reporting system imposed on political committees"); *cf. Citizens United*, 558 U.S. at 366-371.

42 *Barland*, 751 F.3d at 836-37.

43 52 U.S.C. 30101(4)(A) (formerly 2 U.S.C. § 431(4)(A)); 11 C.F.R. § 100.5.

44 *United States v. Nat'l Comm. for Impeachment*, 469 F.2d at 1142. This opinion was adopted by the D.C. Circuit in *Buckley*, 519 F.2d 821, 863 n.112 (D.C. Cir. 1975) (per curiam), *aff'd in part*, 424 U.S. 1 (1976), and cited by the Supreme Court in *Buckley*, 424 U.S. 1 at 79 n.106.

45 *ACLU v. Jennings*, 366 F. Supp. 1041, 1055 (D.D.C. 1973), vacated as moot sub nom., *Staats v. ACLU*, 422 U.S. 1030 (1975); *see also id.* at 1056 (recognizing that "controversial organizations" like the ACLU must be excluded from coverage as a political committee).

46 *Nat'l Comm. for Impeachment*, 469 F.2d at 1142 (footnote omitted); *see also id.* at 1139, 1142 (applying "fundamental principles of freedom of expression" in explaining that "every little Audubon Society chapter [should not] be a 'political committee,' [simply because] 'environment' is an issue in one campaign after another").

election, *but only by influencing the public to demand of candidates that they take certain stands on the issues.*"[47]

There was not a "shred of history in the Act that would tend to indicate that Congress meant to go so far" as to require issue groups to register as political committees.[48] A thorough review of the legislative history showed that, with respect to the political committee definition, "[c]ongressional concern was with political campaign financing, not with the funding of movements dealing with national policy."[49] In fact, Congress elected not to regulate directly as political committees many "liberal, labor, environmental, business and conservative organizations,"[50] including those who "frequently and necessarily refer to, praise, criticize, set forth, describe or rate the conduct or actions of clearly identified public officials who may also happen to be candidates for federal office."[51] Instead, Congress subjected these organizations to separate disclosure requirements under an independent provision of the Act, 2 U.S.C. § 437a (1974).[52] The D.C. Circuit, however, declared this statute unconstitutional in *Buckley* in a ruling that was not appealed to the Supreme Court[53] and "apparently accept[ed]" by lawmakers.[54] Thus, Congress and the courts made clear that the political committee disclosure burdens did not apply to issue-advocacy organizations.

As a result, even racially-tinged, character-assaulting advertisements like the following — published *less than two weeks* before the 1972 presidential election — did not and could not trigger political committee status:

---

47 *Buckley*, 519 F.2d at 863 n.112 (emphasis added).

48 *Nat'l Comm. for Impeachment*, 469 F.2d at 1142.

49 *ACLU*, 366 F. Supp. at 1141-42.

50 120 Cong. Rec. H10333 (daily ed., Oct. 10, 1974).

51 *Buckley*, 519 F.2d at 871 (internal quotation marks omitted).

52 Congress "made it abundantly clear that it intended section 437a to reach beyond the other disclosure provisions of the Act." *Buckley*, 519 F.2d at 876. The statute provided that "[a]ny person (other than an individual) who expends any funds or commits any act directed to the public for the purpose of influencing the outcome of an election, or who publishes or broadcasts to the public any material referring to a candidate (by name, description, or other reference) advocating the election or defeat of such candidate, setting forth the candidate's position on any public issue, his voting record, or other official acts (in the case of a candidate who holds or has held Federal office), or otherwise designed to influence individuals to cast their votes for or against such candidate or to withhold their votes from such candidate shall file reports with the Commission as if such person were a political committee. The reports filed by such person shall set forth the source of the funds used in carrying out any activity described in the preceding sentence in the same detail as if the funds were contributions . . . ." 2 U.S.C. § 437a (1974).

53 *See Buckley v. Valeo*, 424 U.S. at 10 & n.7. In so holding, the court rejected congressional concerns that the law was necessary to demand disclosure from organizations that "use their resources for political purposes, [but which] conceal the interests they represent solely because [of] the technical definitions of political committee, contribution, and expenditure." H.R.Rep.No.93-1438, 93d Cong., 2d Sess. 83 (1974); *see also id.* (explaining that the provision would "require any organization which expends any funds or commits any act directed to the public for the purpose of influencing the outcome of an election").

54 *See Buckley*, 519 F.2d at 863 n.112 (observing that, while making other changes to the political committee definition, Congress did not materially alter the provision in response to the narrowing constructions imposed by *Jennings* and *National Committee for Impeachment*).

AN OPEN LETTER TO PRESIDENT RICHARD M. NIXON IN OPPOSITION TO HIS STAND ON SCHOOL SEGREGATION

Dear Mr. President:

We write because we believe that you are taking steps to create an American apartheid. That, we know, is a nasty charge. Yet that is the direction the House of Representatives took us on August 17, 1972. On that date, the House voted 282-102 to prohibit federal courts from taking effective action to end school segregation. . . .

We believe instead that the ultimate source of pressure behind this shameful bill has been you, Mr. President.

During the last six months, you have encouraged the resentments and fears of whites, and made open enemies of blacks. You have made scapegoats of the federal courts, and attacked the rule of law itself. You have cut the middle ground out from under the feet of reasonable men. We find it hard to imagine a more cynical use of presidential power.

In the House of Representatives only 102 members stood fast against you.** Now the issue is before the Senate. We urge you to back off from the path to apartheid, and withdraw your support for this bill.

** [To readers:] Let them hear from you. They deserve your support in their resistance to the Nixon administration's bill.[55]

Other, similar advertisements likewise did not count toward political committee status, including one that was "derogatory to the President's stand on the Vietnam war," even though "the President is a candidate for re-election . . . and the war is a campaign issue."[56]

Thus, from the outset, courts recognized that although "[p]ublic discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct,"[57] such discussions do not convert an organization into a political committee. To the contrary, courts have emphazied how "the interest of a group engaging in nonpartisan discussion ascends to a high plane, while the governmental interest in disclosure correspondingly diminishes.[58]

---

55 *ACLU*, 366 F. Supp. at 1058; *see also Buckley*, 519 F.2d at 873 (referencing this discussion).

56 *Nat'l Comm. for Impeachment*, 469 F.2d at 1138, 1142.

57 *Buckley*, 519 F.2d at 875.

58 *Id.* at 873.

B. *BUCKLEY'S* "MAJOR PURPOSE" TEST

In response to both vagueness and overbreadth concerns, the Court in *Buckley* limited the scope of the Act's definition in two ways.[59] First, the Court circumscribed the Act's $1,000 statutory threshold by construing the definition of expenditure "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."[60] Second, to address concerns that the broad definition of "political committee" in the Act "could be interpreted to reach groups engaged purely in issue discussion," the Court held that 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."[61]

Buckley fashioned these limitations to prevent the Act from "encompassing both issue discussion and advocacy of a political result"; thus, the major purpose limitation ensures that issue advocacy organizations are not swept into the Act's burdensome regulatory scheme.[62] Regulation of electoral groups, the Court held, was constitutionally acceptable; regulation of issue groups was not. Therefore, the major purpose test serves to distinguish between the two.

The Court reaffirmed this distinction in *FEC v. Massachusetts Citizens for Life*,[63] noting that all "organizations whose major purpose is not campaign advocacy, but who occasionally make independent expenditures on behalf of candidates, are subject only to these [independent expenditure-specific reporting] regulations."[64] Then, with respect to the nonprofit corporation at issue, the Court held that its "central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates,"[65] elaborating that if a group's "independent spending become[s] so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee."[66]

---

59 *Buckley*, 424 U.S. at 79.

60 *Id.* at 80 (footnote omitted). According to the Court, "[t]his reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate." *Id.* Specifically, "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52.

61 *Id.* at 79.

62 *Id.* (footnotes omitted).

63 479 U.S. 238 (1986) ("*MCFL*").

64 *Id.* at 252-253.

65 *Id.* at 252 n.6. The phrase "engages in activities on behalf of political candidates" seems to have been used interchangeably with the term "independent expenditures." *Compare id.* at 252-253 with *id.* at 252 n.6.

66 *Id.* at 262 (citing *Buckley*, 424 U.S. at 79). *See also North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 287-88 (4th Cir. 2008) ("*NCRTL*") (explaining that Buckley's major purpose test requires that the nomination or election of a candidate must be *the* (*i.e.*, sole and exclusive) major purpose of an organization, not merely *a* (*i.e.*, one of several) major purpose).

C. LOWER COURT CLARIFICATIONS OF THE "MAJOR PURPOSE" TEST

Since *Buckley*, lower courts have further clarified the contours of the major purpose test. For instance, in *Wisconsin Right to Life, Inc. v. Barland*,[67] the Seventh Circuit summed up the Supreme Court's precedent as requiring the major purpose of "express election advocacy" before Wisconsin could impose state-level political committee burdens.[68] According to the Seventh Circuit, "[t]o avoid overbreadth concerns in this sensitive area, *Buckley* held that independent groups not engaged in express election advocacy as their major purpose cannot be subjected to the complex and extensive regulatory requirements that accompany the PAC designation."[69] Because of similarities between the Act's political committee disclosure provisions and the regulation at issue, the court held that the major purpose construction limiting the Act similarly limited the state's regulation. Therefore, the rule at issue was only "a reasonably tailored disclosure rule for independent organizations engaged in express election advocacy as their major purpose."[70]

Other courts have applied the major purpose doctrine in a similar manner. In *New Mexico Youth Organized v. Herrera*,[71] the Tenth Circuit identified two methods for determining a group's major purpose: "an examination of the organization's central organizational purpose"; or a "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."[72] Relying on both *MCFL* and *Colorado Right to Life Comm., Inc. v. Coffman*,[73] the *NMYO* court held that not only was there no preponderance of spending on express advocacy, there was no indication of any spending on express advocacy at all.[74] Thus, the defendant could not be forced to register and report as a political committee.

The Fourth Circuit also has expounded upon how to assess a group's central organizational purpose in *NCRTL*.[75] The Fourth Circuit explained that "if an organization explicitly states, in its bylaws or elsewhere, that influencing elections is its primary objective, or

---

67 751 F.3d 804 (7th Cir. 2014)

68 *Id.* at 838, 839.

69 *Id.* at 839.

70 *Id.* at 842.

71 611 F.3d 669 (10th Cir. 2010) ("*NMYO*").

72 *Id.* at 678.

73 498 F.3d 1137 (10th Cir. 2007).

74 *NMYO*, 611 F.3d at 678; *see also Free Speech v. FEC*, 720 F. 3d 788, 797 (10th Cir. 2013), *cert. denied* -- S. Ct. --, No. 13-772 (May 19, 2014) ("The determination of whether the election or defeat of federal candidates for office is *the* major purpose of an organization, 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.") (quoting *Real Truth About Abortion v. FEC*, 681 F.3d 544, 556 (4th Cir. 2012)).

75 525 F.3d at 289.

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."[76]

At the district court level, the court in *FEC v. GOPAC, Inc.*[77] rejected the use of a fundraising letter lacking express advocacy as evidence that the group's major purpose was the election or defeat of a candidate, finding that "[a]lthough [a Federal candidate] is mentioned by name, the letter does not advocate his election or defeat nor was it directed at [that candidate's] constituents. . . . Instead, the letter attacks generally the Democratic Congress, of which [the candidate] was a prominent member, and the franking privilege . . . and requests contributions."[78] In *FEC v. Malenick*,[79] the court relied on only express advocacy communications, rather than communications that merely mentioned a candidate, in concluding that the major purpose test was met.[80] In both *Malenick* and *GOPAC* the courts examined the public and non-public statements, as well as the spending and contributions, by particular groups to determine if the major purpose of each organization was the nomination or election of a federal candidate.

D. THE STANDARD FOR IDENTIFYING GENUINE ISSUE SPEECH

The courts have appropriately rejected attempts to count issue speech — even that which references federal candidates — as evidence that a group has met *Buckley's* major purpose test. A contrary conclusion would undermine the objective of the major purpose limitation: to ensure that issue advocacy organizations are not regulated as political committees. In *Buckley*, the Supreme Court observed:

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest.[81]

The Supreme Court in *FEC v. Wisconsin Right to Life, Inc.*[82] provided explicit guidance regarding how to distinguish electoral advocacy from issue speech. As the Court explained, "[i]ssue advocacy conveys information and educates. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose — uninvited by the

---

76 *Id.*

77 917 F. Supp. 851 (D.D.C. 1996).

78 *Id.*. at 863-64.

79 310 F. Supp. 2d 230 (D.D.C. 2005).

80 *Id.* at 234-236 (noting the 60 fax alerts that the group sent in which it "advocated for the election of specific federal candidates").

81 424 U.S. at 42.

82 551 U.S. 449 (2007) ("*WRTL II*").

ad — to factor it into their voting decisions."[83] The Court went on to conclude that "[d]iscussion of issues cannot be suppressed simply because the issues may also be pertinent in an election."[84]

In holding that the ads at issue in *WRTL II* were genuine issue ads, the Court noted that they "focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter,"[85] and rejected the notion that any of the following characteristics would render a communication electoral advocacy:

- If it contains an appeal to contact a candidate;
- If it mentions a candidate in relation to an issue;
- If it is disseminated in close proximity to elections, rather than near actual legislative votes on issues;
- If it is aired when the Congress is not in session;
- If it cross-references a website that contains express advocacy;
- If the group running the communication had in the past expressly advocated the election or defeat of the candidate referenced in the advertisement; or
- If it merely mentions — or even promotes or criticizes — a federal candidate.[86]

The Seventh Circuit reinforced the importance of broad protections for issue-related speech in *Barland* — a case involving state regulations that were "specifically designed to bring issue advocacy within the scope of the state's PAC regulatory system."[87] Applying *Buckley*, the court found the regulation to be "fatally vague and overbroad"[88] and "a serious chill on debate about political issues,"[89] noting that the "pervasive" regulatory burdens of political committee status are not "relevantly correlated and reasonably tailored to the public's informational interest for "issue-advocacy groups that only occasionally engage in express advocacy."[90]

---

83 *Id.* at 470.

84 *Id.* at 474.

85 *Id.* at 470.

86 *Id.* at 470-73.

87 751 F.3d 804, 834 (7th Cir. 2014).

88 *Id.* at 835.

89 *Id.* at 837.

90 *Id.* at 841.

E. THE COMMISSION'S APPLICATION OF THE "MAJOR PURPOSE" TEST

Since *Buckley*, the Commission has determined the major purpose of an organization on a case-by-case basis, rejecting on multiple occasions the invitation to adopt a bright line rule governing the analysis. In 2004, the Commission published a Notice of Proposed Rulemaking to "explore[] whether and how [it] should amend its regulations defining whether an entity is a . . . political committee"[91] and in particular whether the regulatory definition of political committee "should be amended by incorporating the major purpose requirement."[92] The Commission sought comment on four tests for determining whether an entity had the requisite major purpose.[93] These proposed tests would have examined — to varying degrees — an organization's avowed purpose, its spending, and its tax status.[94]

The Commission concluded that "incorporating a 'major purpose' test into the definition of 'political committee' [was] inadvisable" and declined to adopt any of the proposed standards.[95] This decision was challenged in federal district court. The court found that the Commission's decision was not arbitrary and capricious but did order the Commission to provide a more detailed explanation of that decision.[96] In response, the Commission issued a Supplemental Explanation and Justification in 2007.[97] This Supplemental E&J did not issue or explain a new rule. Rather, it elaborated upon the Commission's ongoing case-by-case approach to the major purpose test, explaining that "[a]pplying the major purpose doctrine . . . requires the flexibility of a case-by-case analysis of an organization's conduct that is incompatible with a one-size-fits-all rule."[98] To that end, the Commission indicated that determining a group's major purpose requires "flexiblity" and a "fact-intensive," "case-by-case" consideration of a number of indicators unique to each organization.[99]

---

91 *Notice of Proposed Rulemaking on Political Committee Status*, 69 Fed. Reg. 11736, 11736 (Mar. 11, 2004).

92 *Id.* at 11743.

93 *Id.* at 11745.

94 *See Id.* at 11745-11749; *see also Final Rules on Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees*, 69 Fed. Reg. 68056, 68064-68065 (Nov. 23, 2004) ("2004 E&J") (explaining that the Commission considered – and rejected – two additional tests (for a total of six) prior to adopting the E&J.

95 2004 E&J, 69 Fed. Reg. at 68065.

96 *Shays v. FEC*, 424 F.Supp.2d 100, 115-16 (D.D.C. 2006).

97 *Supplemental Explanation and Justification, Political Committee Status*, 72 Fed. Reg. 5596 (Feb. 7, 2007) ("2007 Supplemental E&J").

98 *Id.* at 5601.

99 *Id.* at 5601-05.

This central premise of the 2007 Supplemental E&J has been upheld by several courts. [100] For example, the Fourth Circuit in *Real Truth About Abortion v. FEC* concluded that "[t]he determination of whether the election or defeat of federal candidates for office is *the* major purpose of an organization . . . is inherently a comparative task, and in most instances it will require weighing the importance of some of a group's activities against others."[101] This flexible, comparative approach remains at the core of the Commission's major purpose analysis today.

While the basic approach to political committee status outlined in the 2007 Supplemental E&J remains valid, some portions of the guidance contained therein have been superseded by subsequent case law and Commission interpretations. Among these portions is the reference to certain older administrative matters which were cited as relevant examples. Though the 2007 Supplemental E&J does not articulate a rule defining the major purpose test, it points to the public files of closed enforcement cases as historical "guidance as to how the Commission has applied the statutory definition of 'political committee' together with the major purpose doctrine."[102] However, the value of a number of the Commission's past political committee enforcement matters cited in the 2007 Supplemental E&J has been diminished by intervening decisions both by courts and by the Commission.

For example, the 2007 Supplemental E&J was issued prior to the Court's decision in *WRTL II*,[103] which clarified the distinction between issue and electoral advocacy.[104] And recently, *Barland* reinforced *WRTL II*'s holding that genuine issue advertisements cannot be regulated as electoral advocacy.[105] Wisconsin's rule defining political committees was narrower in some respects than the federal definition of "electioneering communication." It applied only to communications made within 30 days of a primary election or 60 days of a general election that name or depict a federal candidate and "refers to the candidate's 'personal qualities, character, or fitness' or 'supports or condemns' the candidate's record or 'position or stance on issues.'"[106] Nevertheless, *Barland* rejected this approach, holding that Wisconsin's provision improperly captured genuine issue advertisements and "under *Buckley* and *Wisconsin Right to Life II* must be narrowly construed to apply only to independent spending for express advocacy

---

[100] *See, e.g., Free Speech v. FEC*, 720 F. 3d 788 (10th Cir. 2013), *cert. denied* 134 S. Ct.2288, No. 13-772 (2014); *Real Truth About Abortion v. FEC*, 681 F.3d 544 (4th Cir. 2012) ("*RTAA*"); *Shays v. FEC*, 511 F. Supp.2d 19 (D.D.C. 2007) ("*Shays II*").

[101] 681 F.3d at 556 (emphasis in the original). The *RTAA* court also noted that 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." *Id.* at 558.

[102] 2007 Supplemental E&J, 72 Fed. Reg. at 5604

[103] The 2007 Supplemental E&J was issued on February 7, 2007. *See* 72 Fed. Reg. 5595. *WRTL II* was decided on June 25, 2007. 551 U.S. 449 (2007).

[104] *See WRTL II*, 551 U.S. at 478-479 ("Issue ads like WRTL's are by no means equivalent to contributions, and the quid-pro-quo corruption interest cannot justify regulating them. To equate WRTL's ads with contributions is to ignore their value as political speech.").

[105] *Barland*, 751 F.3d at 834-35.

[106] *Id.* at 834 (quoting GAB § 1.28(3)(b)).

and its functional equivalent."[107] Thus, reliance on the advertisements cited in the 2007 Supplemental E&J is undermined to the extent that the advertisements cited therein constitute issue advocacy, as later clarified by the Court in *WRTL II* and the Seventh Circuit in *Barland.*[108]

While the fundamental approach to determining political committee status set forth in the 2007 Supplemental E&J – *i.e.*, a flexible, fact-intensive analysis of relevant factors – remains sound,[109] many of the enforcement matters contained therein have been undermined by subsequent judicial decisions, a development the Commission has adapted to through its case-by-case approach over time.

* * * *

In sum:

- The Act's definition of political committee only reaches those groups that have as their only major purpose the nomination or election of a federal candidate; a group that has as its major purpose the discussion of issues, including political issues, may not be regulated as a political committee under the Act.

- Genuine issue speech does not lose its character merely by mentioning – or even promoting or criticizing – a federal candidate.

- The Commission will apply the major purpose doctrine on a case-by-case basis, taking into consideration the unique facts and circumstances involved with a particular group.

With those principles in mind, we turn to AFF.

IV. ANALYSIS OF AFF'S MAJOR PURPOSE

As explained above, since its adoption, the Act's definition of "political committee" has been the subject of judicial scrutiny. The Supreme Court held in *Buckley* that the definition as adopted by Congress impermissibly swept within its ambit groups engaged primarily in issue discussion. For this reason, the Court narrowly construed the definition of political committee to reach only groups that (1) meet the statutory definition *and* (2) have as their major purpose the *nomination or election* of a federal candidate. AFF's major purpose is not the nomination or election of a federal candidate under the second prong.

A. AFF MET THE STATUTORY THRESHOLD FOR POLITICAL COMMITTEE STATUS

[107] *Id.* at 835. None of AFF's advertisements are the "functional equivalent" of express advocacy. Moreover, after *WRTL II*, almost all electioneering communications are genuine issue ads.

[108] *Free Speech* and *RTAA* are fully consistent with this limitation. *Free Speech* and *RTAA* upheld the case-by-case approach outlined in the 2007 Supplemental E&J. *Barland* and other cases such as *NMYO* clarified the application of the major purpose test within the case-by-case approach upheld in *Free Speech* and *RTAA*.

[109] 2007 Supplemental E&J, 72 Fed. Reg. at 5601.

Based upon its filings with the Commission, and as noted above, AFF clearly crossed the statutory threshold for political committee status by making over $1,000 in independent expenditures in calendar year 2010.[110] The question, thus, is whether AFF's singular major purpose is the nomination or election of a federal candidate.

B. AFF Does Not Have the Requisite Major Purpose for Political Committee Status

While not the only factors that may be considered, the following two factors are most relevant in this case: (1) assessing AFF's central organizational purpose by examining its public and non-public statements; and (2) analyzing AFF's spending on campaign activities with its spending on activities unrelated to the election or defeat of a federal candidate, including the group's genuine issue speech.[111]

1. AFF's Central Organizational Purpose is Not the Nomination or Election of a Federal Candidate

AFF's organizational documents and official public statements indicate that AFF was organized to promote public policy and engage in issue advocacy. AFF's stated organizational purpose is to "provide Americans with a conservative and free market viewpoint to have a mechanism to communicate and advocate on the issues that most interest and concern them."[112] AFF's stated purpose is thus issue-centric: to create, encourage, and promote a set of policy preferences.

Furthermore, AFF is a 501(c)(4) nonprofit organization.[113] Electing this tax status is a significant public statement of purpose. By law, organizations claiming tax exempt status under section 501(c)(4) must be "operated exclusively for the promotion of social welfare."[114] Under Internal Revenue Service regulations, "[t]he promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office."[115] Thus, section 501(c)(4) organizations may not have "participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office" as their primary purpose. Senator McCain, one of the principal Senate sponsors of the Bipartisan Campaign Reform Act ("BCRA"), stated in comments to the

---

110 AFF states – and Commission records confirm – that the organization spent $7,358,236.07 on express advocacy "independent expenditures" in 2010. *See* Response at 2; General Counsel's Report at 25.

111 We note that neither OGC nor Complainants argued that any factor other than statements or spending support their conclusions that AFF has as its major purpose the nomination or election of a federal candidate.

112 Response at 12 (quoting American Future Fund, *About AFF, available at* http://americanfuturefund.com/about-american-future-fund); *see also* Articles of Incorporation of American Future Fund, *available at* https://sos.iowa.gov/search/business/search.aspx..

113 *Id.*

114 26 U.S.C. § 501(c)(4)(2).

115 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii).

Commission during its political committee rulemaking that "under existing tax laws, Section 501(c) groups . . . cannot have a major purpose to influence federal elections, and are therefore not required to register as federal political committees, as long as they comply with their tax law requirements."[116] Even the Complainant in this matter has acknowledged that "a legitimate 501(c) organization should not have to fear that it will become a political committee simply by engaging in political issue-related criticism of public officials."[117] Thus, while tax status is not dispositive, it is relevant, particularly given that the Respondents were well aware of their limitations under a 501(c) exemption.[118] Based upon AFF's official public statements and chosen tax status, AFF's central organizational purpose is not the nomination or election of a candidate to federal office.

2. The Majority of AFF's Activity was Focused on the Discussion of Issues, Not the Nomination or Election of a Federal Candidate

The Complaint's conclusion relies entirely upon AFF's spending, alleging that "American Future Fund satisfies the major purpose test 'through sufficiently extensive spending on Federal campaign activity.'"[119] This allegation is flawed in that it is based on an impermissibly broad test to assess AFF's relative spending and major purpose.

Here, in order to determine whether "independent spending" has "become so extensive," the Commission must compare a group's spending on electoral advocacy against its spending on activities unrelated to campaigns, including genuine issue advocacy.[120] A review of AFF's record of spending during the time period generally covered by the administrative record indicates that while nominating or electing candidates has been *a* purpose of the organization, it has never been *the* major purpose of the organization. [121]

---

[116] 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.").

[117] Comment of Public Citizen on Reg. 2003-07 (Political Committee Status) at 10 (Apr. 5, 2004). Public Citizen went on to observe 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 under current federal election law, as amended by [McCain-Feingold]." *Id.* at 2.

[118] *See* Response at 2 ("Under applicable Internal Revenue Service ("IRS") standards, AFF conducts itself appropriately.").

[119] Complaint at 12 (citing 2007 Supplemental E&J, 72 Fed. Reg. at 5601).

[120] *MCFL*, 479 U.S. at 262.

[121] As a general rule, the Commission assesses an organization's major purpose by reference to its entire history. *See* MUR 6396 (Crossroads GPS), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 24 n.101 ("Often one can assess an organization's true major purpose only by reference to its entire history"); *see also* MUR 6081 (American Issues Project), Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen (looking at four years of an organization's history). The Commission has, however, looked at narrower time frames when the

As noted above, AFF was formed in 2007.[122] In its first two full fiscal years of existence, AFF spent over $8 million[123] to finance myriad activities in furtherance of its mission, including letter-writing campaigns in support of the Columbian Trade Protection Act; polling and surveys on a number of issues; numerous press releases addressing legislative actions; and advertisements calling for action on pending legislation.[124] Some of these advertisements clearly identified candidates, calling on them to take a particular action.[125] And, beginning in 2009, AFF "spent considerable time, money, and effort opposing government take-over of healthcare."[126]

We may presume that all of this spending was devoted to activities unrelated to campaigns, because at the time, AFF – as a corporation – was prohibited from financing express advocacy communications.[127] Though AFF financed approximately $1.8 million of reportable electioneering communications in 2008, those would have been necessarily genuine issue advertisements because, again – at the time – AFF was permitted to finance only those

administrative record covered shorter periods. See *generally GOPAC*, 917 F. Supp. at 862-66 (reviewing, among other things, GOPAC's *1989-1990* Political Strategy Campaign Plan and Budget) (emphasis added); *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)MUR 5751 (The Leadership Forum), General Counsel's Report #2 at 3 (OGC cited IRS reports showing receipts and disbursements from 2002-2006 before concluding that the Respondent had not crossed the statutory threshold for political committee status); MUR 5753 (League of Conservation Voters 527, *et al.*), Factual and Legal Analysis at 11, 18 (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) (emphasis added); MUR 5754 (MoveOn.org Voter Fund), Factual and Legal Analysis at 12-13 (the Commission looked to disbursements "[d]uring the *entire 2004 election cycle*" and cited to specific solicitations and disbursements made during calendar year 2003 in assessing the Respondent's major purpose) (emphasis added). Note, the legal underpinnings of MURs 5754 (MoveOn.org Voter Fund) and 5753 (League of Conservation Voters 527, *et al.*) have been undermined for other reasons by *EMILY's List v. FEC*, 581 F.3d 1, 12-14 (D.C. Cir. 2009). Here, the record includes, either explicitly or by cross-references, information regarding AFF's activities from its inception through the first 10 months of fiscal and calendar year 2011, and so our analysis is focused accordingly.

[122] *See* Articles of Incorporation of American Future Fund, *available at* https://sos.iowa.gov/search/business/search.aspx.

[123] *See* AFF 2008 Form 990 (reporting total expenses of $6,331,949 in fiscal year 2008); AFF 2009 Form 990 (reporting total expenses of $1,913,598 in fiscal year 2009).

[124] MUR 5988 (American Future Fund), Factual and Legal Analysis at 4-5. The Commission concluded that "AFF's involvement in these activities . . . suggests that AFF's major purpose is not federal campaign activity." *Id.* at 7.

[125] *Id.*

[126] Response at 8.

[127] *See* 2 U.S.C. 441b (2008); *see also* MUR 5988 (American Future Fund), Certification (dismissing allegation that a communication financed by AFF contained express advocacy and was required to be reported as an independent expenditure).

electioneering communications that were not the functional equivalent of express advocacy.[128] Indeed, it was during this time period that the Commission rejected an allegation that AFF was a political committee, concluding that it had "engaged in a wide range of activities that [were] not directly related to federal campaign activity" and, accordingly, "that AFF's major purpose [was] not federal campaign activity."[129]

Indisputably, AFF's spending increased – dramatically so – in 2010, but an increase in overall spending alone does not change an organization's major purpose. And, while AFF acknowledges that in both 2010 and 2011 it "engage[d] in a limited amount of express advocacy activity" to "complement[] its exempt purpose social welfare activities,"[130] the record demonstrates that such spending hardly constituted *the* "major" component of its overall activities.

In fiscal year 2010, for example, AFF reported spending $21,352,090, and in fiscal year 2011, AFF reported spending 3,637,462.[131] Of those totals, AFF reported spending $7,358,236 and $9,631, respectively, on independent expenditures – less than a third of the organization's spending over the two-year period and barely more than one fifth of the organization's total spending to that point.[132] Even focusing on calendar year 2010 – as Complainant and OGC improperly do[133] – AFF's spending on such activity constituted barely one third of the organization's annual expenses.

The "great majority" — if not all — of AFF's remaining spending during this period went to further purposes other than the nomination or election of a candidate.[134] As detailed above, AFF's activities during this period were predominately devoted to grassroots lobbying, issue advocacy, and education activities, including generating materials for public distribution, participating in forums, analyzing legislation, and educating the American people on taxes, energy security and independence, and choice in education.[135] In particular, AFF continued its

---

128 *See WRTL II*, 551 U.S. at 481.

129 MUR 5988 (American Future Fund), Factual and Legal Analysis at 7.

130 Response at *2*.

131 *See* AFF 2010 Form 990 (reporting total expenses of $21,352,090 in fiscal year 2010); AFF 2011 Form 990 (reporting total expenses of $3,637,462 in fiscal year 2011).

132 *See* Response at 2; MUR 6402 (AFF), First General Counsel's Report at 25 (indicating that AFF spent "approximately $7.36 million" on independent expenditures in 2010). We acknowledge that Respondent disseminated press releases about some of its express advocacy communications. *See, e.g.*, Response at 13 (discussing press release regarding four independent expenditures "Targeting Liberal Politicians"). Costs associated with such activities could potentially count toward the organization's major purpose being the nomination or election of a federal candidate. To the extent that such costs were not included in the totals reported to the Commission, the numbers and percentages as part of our analysis would need to be adjusted accordingly. It is, however, exceedingly unlikely that the cost of press releases discussing independent expenditures would materially affect the comparative cost analysis here.

133 *See infra* Section V.B; Complaint at 12; General Counsel's Report at 24-25.

134 Response at 8.

135 *See* AFF 2010 Form 990.

efforts opposing healthcare reform "during the course of the healthcare debate."[136] Throughout 2010, AFF "supported the extension of tax cuts" and engaged in "state-level advocacy on lower taxes and fiscal responsibility . . . in South Carolina, California, and Tennessee."[137] Additionally, AFF hosted a lecture series, maintained an active blog, and served as an "ethics watchdog, monitoring members of Congress and their campaigns for illegal behavior."[138] In the first 10 months of 2011 alone, AFF engaged in numerous activities consistent with its exempt purpose: continuing its lecture series, including a major address by Senator Thune; presenting at various conferences; and issuing statements regarding current events.[139]

"[M]illions" of this spending was devoted to making communications to the public, including airing television and radio advertisements, posting issue-related Internet advertisements, publishing newspaper advertisements, sending mail, and making phone calls to voters.[140] These communications focused on issues central to AFF's mission – topics like fiscal responsibility, taxes, agriculture, energy, telecommunications, IRS rules, heath care reform, and other policy matters considered by the United States Congress.[141] Roughly $2 million worth of these communications were made in close proximity to an election and were, thus, reported to the Commission as electioneering communications, which by definition do not contain express advocacy.

As the record demonstrates, these communications were genuine issue advertisements.[142] They "focus on a legislative issue" – *e.g.*, federal spending, the stimulus, tax relief, and health care – "take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter."[143] Moreover, they contain no references to elections, candidacies, or political parties. Consistent with what the Court has said, advertisements that mention a candidate in the course of discussing an issue and, in some cases, contain an appeal to contact that candidate are still genuine issue advertisements.[144] Nor do the advertisements lose their character as genuine issue advertisements to the extent they were disseminated in close proximity to an election or aired when Congress was not in session.[145] The Court has made clear: the "[d]iscussion of issues cannot be suppressed simply because the issues

---

136 Response at 8.

137 *Id.*

138 *Id.* at 8, 10.

139 Supp. Response at 2.

140 Response at 8.

141 *Id.*, Attachments; *see also* General Counsel's Report at 17-21 (providing transcripts of representative advertisements).

142 *Id.*

143 *WRTL II*, 551 U.S. at 470.

144 *Id.* at 470-473.

145 *Id.* at 470-473.

may also be pertinent in an election."[146] Thus, even if these advertisements may have been relevant to an election, they are still genuine issue advertisements.

Accordingly, the "millions" that AFF spent on these genuine issue advertisements indicate that its purpose was something other than the nomination or election of a federal candidate. Indeed, the roughly $7.3 million that AFF spent on independent expenditures from its inception through 2011 appears to be the totality of its spending that was for the purpose of nominating or influencing the election of a federal candidate. This spending represented approximately 22% of its total expenses during the same period.[147] This is hardly "so extensive that the organization's major purpose may be regarded as campaign activity."[148]

Since AFF's central organizational purpose is not the nomination or election of a federal candidate and its independent spending to support the nomination or election of a federal candidate is not so extensive that its major purpose may be regarded as campaign activity, AFF's major purpose is not the nomination or election of a federal candidate. Accordingly, AFF is not a political committee. Rather, it is an issue advocacy group that occasionally speaks out on federal elections. This is precisely the type of group the major purpose test was adopted to spare the "burdensome alternative" of political committee status.[149]

V. THE FIRST GENERAL COUNSEL'S REPORT

Based on the above facts, OGC nevertheless recommended that the Commission find reason to believe that "AFF had as its major purpose the nomination or election of federal candidates during 2010" and, accordingly, should have "organiz[ed], register[ed], and report[ed] as a political committee."[150] OGC largely based this recommendation on two flawed premises:

---

[146] *Id.* at 474.

[147] Some of the examples of Respondent's issue advocacy communications contain a disclaimer that they were "Paid for by the American Future Fund Political Action." *See* Response, Attachments. As noted in the General Counsel's report, though, many of these disclaimers were subsequently changed to read "Paid for by the American Future Fund. http://www.americanfuturefund.com. Not authorized by any candidate or candidate's committee." *See* General Counsel's Report at n. 3-7. Respondent asserts that these materials were "AFF's issue advocacy communications." *See* Response at 10. We have no reason to question this representation and assume that the original disclaimers were attached in error. *See* 18 U.S.C. §1001. Even if those communications were financed by a group other than Respondent, though, we do not see how that would materially affect the analysis in this matter. First, there is no basis to conclude – as OGC does – that the inclusion of these materials in the response means that Respondent's spending in 2010 was less than $21 million. *See* General Counsel's Report at 25-26. Respondent has repeatedly represented to the government that its spending in 2010 was approximately $21 million, *see, e.g.*, AFF 2010 Form 990, and those representations are not undermined by an erroneous disclaimer on a few communications representative of the Respondent's activities over the entire year. And second, assuming *arguendo* that Respondent did include in the total of its 2010 spending activities financed by another entity, we do not see how that inclusion would materially affect the percentage of Respondent's spending that was devoted to the nomination or election of a federal candidate given the apparent low cost of those activities (*e.g.*, press releases).

[148] *MCFL*, 479 U.S. at 262 (citing *Buckley*, 424 U.S. at 79).

[149] *See Citizens United*, 558 U.S. at 337 (describing generally the burdens associated with political committee status); *see also supra* Part III (discussing burdens on political committees under the Act).

[150] General Counsel's Report at 3. While the Commission has erroneously strayed into the vague notion of generalized "campaign activity," rather than *Buckley*'s 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

first, that any communication that supports or opposes a clearly identified federal candidate but does not contain express advocacy is indicative of major purpose; and second, that an organization's spending is evaluated through the limited lens of a single calendar year.

A. THE RELEVANT SPENDING MAY NOT ENCOMPASS GENUINE ISSUE ADVERTISEMENTS

The legal theory proposed in the First General Counsel's Report ostensibly relies on the Commission's 2007 Supplemental E&J,[151] which explained the Commission's decision *not* to adopt a bright-line rule for applying the major purpose analysis. In particular, OGC cites to a series of decade-old enforcement matters (and the communications at issue therein), to arrive at its recommendation, that for purposes of determining political committee status, "communications that support or oppose a clearly identified Federal candidate, but do not contain express advocacy"[152] are indicative of a major purpose of nominating or electing a federal candidate. Relying on vague, ambiguous terms, it appears that the relevant criteria for OGC's determination are: (1) a reference to clearly identified federal candidate; (2) criticism of or opposition to that candidate; and (3) the timing of the communication being shortly before the election.[153]

OGC's analysis fails to distinguish between advertisements that support or oppose the election of a candidate and those that reference a candidate in the course of supporting or opposing an issue with which that candidate is involved. Nor does OGC acknowledge that such a distinction exists, notwithstanding judicial precedent that stands precisely for that proposition.[154] Indeed, the illustrative value of the Commission's past political committee enforcement matters cited in the 2007 Supplemental E&J has, in large part, been diminished by intervening decisions both by courts and by the Commission. Under *WRTL II*, many of the

---

disbursements are for federal campaign activity" and concluding CFG "has the major purpose of federal campaign activity."), the Commission more recently has abided by *Buckley*'s mandate: that major purpose encompasses only activity expressly directed at the nomination or election of federal candidates. *See, e.g.*, MUR 6538 (AJS), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen; MUR 6589 (AAN), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen; MUR 6396 (Crossroads GPS), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen; MUR 6081 (American Issues Project), Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen; MUR 5541 (The November Fund), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn; Federal Election Commission's 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*") ("[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 of Appellees Federal Election Commission and United States Department of Justice at 5, *RTAO*, 575 F.3d 342 (4th Cir. 2009) (No. 08-1977) ("[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.").

151 2007 Supplemental E&J, 72 Fed. Reg. at 5601.

152 General Counsel's Report at 15.

153 *Id.* at 21.

154 *See, e.g., WRTL II*, 551 U.S. at 470-473.

advertisements and communications at issue in those cases were genuine issue speech and, therefore, may not serve as the trigger to political committee status.

Moreover, as noted above, the *Barland* court reviewed a provision that required groups to register and report as political committees if they spent a small amount on certain communications prior to an election. This provision is remarkably similar to the standard advocated by OGC to determine which of AFF's admittedly non-express advocacy communications nevertheless "supported or opposed" a federal candidate.

	PROVISION REVIEWED IN *BARLAND*[155]	OGC STANDARD[156]
Candidate Reference	"[A] clearly identified candidate"	"[A] clearly identified federal candidate"
Content	"[R]efers to the candidate's personal qualities, character, or fitness or supports or condemns the candidate's record or position or stance on issues"	"[S]upports or opposes a candidate"
Timing	"[W]ithin 30 days of a primary, or 60 days of a general election"	"[R]un in the candidate's respective state shortly before a primary or election"

In particular, OGC looks to whether an advertisement has "a clearly identified federal candidate," "criticizes or opposes a candidate," or is "run in the candidate's respective state shortly before a primary or election."[157] In *Barland*, the Court held that a law requiring registration and reporting based on advertisements that had "a clearly identified candidate," "refers to the candidate's personal qualities, character, or fitness or supports or condemns the candidate's record or position or stance on issues," and is aired "within 30 days of a primary, or 60 days of a general election"[158] on the grounds that such provision "is fatally vague and overbroad"[159] and "is a serious chill on debate about political issues."[160] Considering the similarities between the Wisconsin's standard and OGC's proposed standard here, the Seventh Circuit's holding is a rejection of the approach recommended by OGC.[161]

---

155 *Barland*, 751 F.3d at 834.

156 General Counsel's Report at 21.

157 *Id.*

158 *Barland*, 751 F.3d at 834.

159 *Id.* at 835.

160 *Id.* at 837.

161 At minimum, this explicit rejection casts grave constitutional doubt on OGC's expansive approach. As the Court has recently stated, "by analogy to the rule of statutory interpretation that avoids questionable constitutionality

Similarly, the court in *GOPAC* rejected "the Commission's plea for a broadening of the *Buckley* concept,"[162] reasoning that "the terms 'partisan electoral politics' and 'electioneering' raise virtually the same vagueness concerns as the language 'influencing any election for Federal office,' the raw application of which the *Buckley* Court determined would impermissibly impinge on First Amendment values."[163]

In short, the approach adopted by OGC in this matter cannot be squared with these court holdings.

B. IT IS INAPPROPRIATE AND ARBITRARY TO FOCUS AFF'S MAJOR PURPOSE ANALYSIS ON A SINGLE CALENDAR YEAR

Furthermore, OGC continues to advance a calendar year approach to apply the major purpose analysis.[164] This approach has never been formally adopted by the Commission, and we have previously explained why such an approach is myopic, distortive, and legally erroneous.[165]

OGC contends that a calendar year test "provides the firmest statutory footing for the Commission's major purpose determination" because the Act defines political committee "in terms of expenditures made or contributions received '*during a calendar year.*'"[166] However, determining an organization's major purpose via a narrow snapshot of time ignores the point of

---

-- validly conferred discretionary executive authority is properly exercised . . . to avoid serious constitutional doubt." *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2259 (2013); *see also Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Contr. Trades Council*, 485 U.S. 568, 575 (1988) (although a regulatory agency's interpretation of its own statute is generally accorded deference, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.") (citing *NLRB v. Catholic Bishops of Chicago*, 440 U.S. 490, 500 (1979)); *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 346 (2000) (Scalia, J., concurring in part) ("[I]t is our practice to construe the text [of a statute] in such fashion as to avoid serious constitutional doubt.").

Moreover, the constitutional doubts raised here militate in favor of cautious exercise of our prosecutorial discretion. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.").

[162] *GOPAC*, 917 F. Supp. at 861.

[163] *Id.* Similarly, in *Malenick* the court held that the major purpose test was met, only relied on express advocacy communications, rather than communications that merely mentioned a candidate. 310 F. Supp. 2d at 235 (noting the sixty fax alerts that the group sent in which it "advocated for the election of specific federal candidates").

[164] General Counsel's Report at 24-25.

[165] This is not the first occasion for OGC's novel calendar year theory. We have written extensively about our views on this theory and, in particular, the problems it presents. *See* MUR 6396 (Crossroads GPS), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 20-23; MUR 6081 (American Issues Project), Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen at 14-25; *see also* Supplemental Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen; MUR 6396 (Crossroads Grassroots Policy Strategies)

[166] General Counsel's Report at 24 (quoting 2 U.S.C. § 431(4)).

the major purpose test. The major purpose limitation is intended to act as a constraint, saving the Act's definition of "political committee" by restricting it to groups with the clearest electoral focus – those with the nomination or election of a candidate for federal office as their major purpose.[167] 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 by the Commission.[168]

Assessing an organization's major purpose by reference to its activities in a single, calendar year renders an artificial and indeed distorted picture of the organization.[169] *Buckley*'s concept of an "organization" manifests its major purpose over its lifetime of existence and activities.[170]

Moreover, the artificial window of a single, calendar year would inevitably subject many issue-based organizations to the burdens of political committee status. An examination of a group's major purpose is necessarily an after-the-fact exercise. In these cases, the Commission must determine whether a group properly refrained from registering and reporting as a political committee. A short, artificial time period, such as a calendar year, often provides an incomplete and distorted picture of that group's major purpose.[171] For example, imagine a group created in the middle of an election year that intends to — and in fact does — remain operating after the election ends on a fiscal-year, rather than calendar-year basis. Assume such an organization could devote 10 percent of its resources to express advocacy prior to the election, then spend the other 90 percent of its resources that fiscal year on post-election issue advocacy, and still be considered a political committee under OGC's proposed approach if its issue advocacy spending

[167] *See, e.g.*, 2007 Supplemental 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.").

[168] *Id.* 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.

[169] The fact that the statutory definition of political committee relies upon $1,000 of expenditures or contributions in a calendar year is not relevant to an assessment of that organization's longstanding major purpose for which it was created and as manifested throughout its existence. The Act imposes a bright line that, according to *Buckley*, was unconstitutionally over-inclusive, and, thus, the Court imposed an intention-based standard as a further filter. It is unclear why that arbitrary statutory timeframe is appropriate when *RTAA* rejected the argument that "the major purpose test requires a bright-line, two-factor test." 681 F.3d at 557. It makes little sense that a case-by-case standard that, according to *Shays II*, "requires a very close examination of various activities and statements," would reject a broader examination. 511 F. Supp. 2d at 31.

[170] "Often one can assess an organization's true major purpose only by reference to its entire history." MUR 6396 (Crossroads GPS), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 24 n.101; *see also* MUR 6081 (American Issues Project), Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen (looking at four years of an organization's history).

[171] The fact that the statutory definition relies upon expenditures or contributions in a calendar year is not relevant to the major purpose for which a group was created. The Act as originally written imposes a bright line that, according to *Buckley*, was unconstitutionally over-inclusive, and, thus, the Court imposed an intention-based standard as a further filter. It is unclear why that arbitrary statutory timeframe is appropriate when *RTAA* rejected the argument that "the major purpose test requires a bright-line, two-factor test." 681 F.3d at 557.

occurred in the calendar year following the election. The organization's major purpose determination would be based upon a distinct minority of its spending within the first twelve months of its operation. Despite the group's best efforts to minimize its election-related expenditures, the Commission would ignore the timeframe the group used to determine *ex ante* its major purpose.

If the group in the example above were branded as a political committee, it would be subjected to the Commission's regulatory and reporting burdens in perpetuity. Under Commission regulations, "only a committee which will no longer receive any contributions or make any disbursements that would otherwise qualify it as a political committee may terminate, provided that such committee has no outstanding debts and obligations."[172] Thus, in order to stop filing burdensome reports, a committee would have to surrender its political rights and agree not to make *any* independent expenditures, regardless of the organization's major purpose.[173]

As one reputable commentator has stated, "[u]nsurprisingly, most citizens begin to focus on and become engaged in political debate once election day approaches."[174] Thus, linking issues to candidates and elections is quite common. But if a group continues to be active past that election date, such spending is also evidence of its true purpose.[175] The Commission must take that reality into account.

[172] 11 C.F.R. § 102.3(a).

[173] We are aware of only one enforcement matter in which an ongoing state political committee was later deemed to have crossed the line of federal political committee status, and by negotiation in a conciliation agreement, it was allowed to skip registration and reporting with the Commission by submitting its state campaign finance reports on the condition that it forego making federal expenditures and contributions in the future and/or register as a political committee subject to the ongoing reporting rules in perpetuity in the future. *See* MUR 5492 (Freedom, Inc.), Conciliation Agreement at ¶¶ 3, 4.

[174] 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).

[175] Interestingly, the Commission has, in the past, relied, in part, on the fact that an organization ceased active operations at the end of the election cycle in question 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)). If the Commission may consider the lack of activity in the calendar year following an election as relevant for determining major purpose, then certainly it must look at and evaluate actual activity undertaken in the next calendar year.

VI. CONCLUSION

AFF is an "issue-advocacy group[] that only occasionally engage[d] in express advocacy."[176] As such, it cannot and should not be subject to the "pervasive" and burdensome" requirements of registering and reporting as a political committee. For that reason, and in exercise of our prosecutorial discretion,[177] we voted against finding reason to believe AFF violated the Act by failing to register and report as a political committee.

[176] *Barland*, 751 F.3d at 841, 842.

[177] *See Heckler* at 831; *see also supra* note 161.

12/23/14

CAROLINE C. HUNTER Date

Commissioner

12/23/14

MATTHEW S. PETERSEN Date

Commissioner