



1776 K STREET NW  
WASHINGTON, DC 20006  
PHONE 202.719.7000  
FAX 202.719.7049

7925 JONES BRANCH DRIVE  
McLEAN, VA 22102  
PHONE 703.905.2800  
FAX 703.905.2820

www.wileyrein.com

RECEIVED  
FEDERAL ELECTION  
COMMISSION

2012 JUL 23 PM 12:25

OFFICE OF LEGAL  
Jan Witold Baran  
202.719.7330  
jbaran@wileyrein.com

RECEIVED  
2012 JUL 20 PM 4:10  
FEC MAIL CENTER

July 20, 2012

**VIA HAND DELIVERY**

Jeff S. Jordan  
Supervisory Attorney  
Complaints Examination & Legal Administration  
Office of the General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington D.C. 20463

**Re: MUR 6589 (American Action Network, Inc.)**

Dear Mr. Jordan:

This office represents the American Action Network, Inc. ("AAN") in connection with the above-titled matter. Attached, please find a copy of AAN's response to the complaint, including (at Exhibits A-D) an analysis of the six electioneering communications that are cited in the complaint.

If I can be of any additional assistance, please do not hesitate to contact me at 202.719.7330 or [jbaran@wileyrein.com](mailto:jbaran@wileyrein.com).

Sincerely,

Jan Witold Baran  
Caleb P. Burns  
Andrew G. Woodson

Attachment

140444041818

RECEIVED  
FEDERAL ELECTION  
COMMISSION

**BEFORE THE FEDERAL ELECTION COMMISSION**

2012 JUL 23 PM 12:25

In the Matter of )  
 ) MUR 6589  
American Action Network, Inc. )

OFFICE OF GENERAL  
COUNSEL

**RESPONSE OF THE AMERICAN ACTION NETWORK, INC.  
TO THE COMPLAINT FILED BY  
CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON**

This office represents the American Action Network, Inc. ("AAN"). On June 12, 2012, the Federal Election Commission ("FEC" or "Commission") notified our client of a complaint ("Complaint") filed by Citizens for Responsibility and Ethics in Washington ("CREW" or "Complainant"). The Complaint alleges, with few details and in conclusory fashion, that AAN should have registered and reported as a federal political committee on account of the organization's disbursements between July 2009 and June 2011. This response is filed pursuant to 2 U.S.C. § 437g(a) and 11 C.F.R. § 111.6. AAN is not a political committee and, for the reasons stated below, the FEC should find no reason to believe that AAN violated the Federal Election Campaign Act of 1971 ("FECA" or "Act"), as amended.

**SUMMARY OF ARGUMENT**

A complaint must contain a "clear and concise recitation of the facts which describe a violation" of the FECA, as amended. 11 C.F.R. § 111.4(d)(3). The CREW Complaint has not done so. The Complaint alleges that AAN is a "political committee." In order to be a political committee, the nomination or election of candidates must be "the major purpose" of an organization. The Complaint provides specifics for a half-dozen public advertisements that it heavily relies on to make its allegations, but those advertisements account for less than 15% of AAN's overall spending. Even ignoring the substantive legal errors contained in the Complaint,

170947460-103-10

its reliance on this minimal amount of spending does not and cannot establish AAN's "major purpose," let alone one that is to nominate or elect candidates.

The Complaint asserts that 66.8% of AAN's spending is to elect candidates. The documents relied upon and attached to the Complaint directly refute the allegation. AAN's tax filings reflect that approximately 21% of AAN's spending was for political "expenditures." The Complaint does not state or claim that AAN's calculations were inaccurate. In fact, the definition of political "expenditures" in the Internal Revenue Code is broader than under the FECA. Therefore, this 21% figure represents an exaggerated approximation of the amount spent to influence candidate elections for the purpose of determining AAN's major purpose. Spending 21% of its outlays on political expenditures is not sufficient to make AAN's major purpose influencing candidate elections. The Complaint does not refute, let alone address, this evidence which directly contradicts the Complaint's allegation that AAN is a political committee.

Moreover, the Complaint rests on a flawed legal understanding about the nature of electioneering communications. First, electioneering communications are not incorporated into the "major purpose" analysis, which focuses on communications containing express advocacy. Second, the Complaint ignores *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL II*"), which ruled that electioneering communications are not necessarily the functional equivalent of candidate advocacy. Many electioneering communications constitute issue advocacy not intended to influence elections. Yet the Complaint presumes that every electioneering communication is evidence of an intent to influence elections. This is error as a matter of law. Because AAN's issue advocacy activities – even those that constitute electioneering communications – cannot be included in its "major purpose" calculation, CREW's entire complaint quickly collapses. An organization cannot be a political committee if it only

allocates a minor portion of its budget for political expenditures while spending multiples of that amount on issue advocacy and other activities.

In sum, the Complaint does not allege sufficient facts to demonstrate that there is “reason to believe” that AAN violated the law by failing to register and report as a political committee. Furthermore, the limited facts that are relied on by the Complaint are belied by other facts included in its attachments. Finally, the Complaint’s understanding of the applicable law is fundamentally flawed and, therefore, cannot support the Complaint’s legal conclusions. These critical deficiencies render the Complaint entirely speculative. Both the FECA and judicial precedent, therefore, require that the Commission find no reason to believe that a violation has occurred and Complaint should be dismissed.

### **FACTUAL BACKGROUND**

#### **I. Background Information About the American Action Network**

The American Action Network is “an independent nonprofit 501(c)(4) organization,” incorporated under Delaware law, that “is not affiliated with or controlled by any political group.” AAN, *About*, available at <http://americanactionnetwork.org/aan/about>. Part of AAN’s stated purpose is to “create, encourage and promote center-right policies based on the principles of freedom, limited government, American exceptionalism, and strong national security . . . by engaging the hearts and minds of the American people and spurring them into active participation in our democracy.” *Id.*

As the Complaint notes, AAN has spent a modest amount of its overall resources on independent expenditures for express candidate advocacy. On its 2010 Form 990, AAN explained that it has “[c]onducted extensive issue advocacy activities, including television and digital advertising focused on fiscal responsibility, healthcare reform, regulatory reform and other federal legislative issues considered by the United States Congress.” Compl. Ex. B,

Schedule O. AAN also has “[h]osted educational activities, including grassroots policy events and [held] interactive policy briefings called ‘Learn and Lead’ with activists and guest speakers, including Senators, Congressmen, former Secretaries and Ambassadors for the US Government.”

*Id.* Such events “educated grassroots leaders about critical issues facing our country with regards to energy, education, tax policy, immigration, national security, spending, health care and other center-right principles.” *Id.* AAN’s website, which is available at

<http://americanactionnetwork.org/>, provides additional details about many of the organization’s other activities. For example, in 2011, AAN “announced an advocacy initiative encouraging select Members of Congress to vote for a Balanced Budget Amendment”<sup>1</sup> and also launched “a \$1.6 million advertising campaign focusing on President Obama’s devastating plan to impose Medicaid-style price controls on the Medicare Prescription Drug Program.”<sup>2</sup>

## II. The Complaint

The Complaint alleges that AAN failed to register and report as a political committee under the FECA. *See* Compl. ¶¶ 7, 28, 31. The factual basis for the allegation is that between July 23, 2009, and June 30, 2011, AAN spent approximately \$18,135,535 on independent expenditures and electioneering communications,<sup>3</sup> purportedly for “producing and broadcasting

<sup>1</sup> Press Release, AAN, *American Action Network Launches Campaign Backing Balanced Budget Amendment*, Nov. 10, 2011, available at <http://americanactionnetwork.org/topic/press-release-american-action-network-launches-campaign-backing-balanced-budget-amendment>.

<sup>2</sup> Press Release, AAN, *New Ad Campaign Highlights Obama’s Medicare Plan to Balance Budget on Backs of Seniors*, Oct. 5, 2011, available at <http://americanactionnetwork.org/topic/new-ad-campaign-highlights-obama%E2%80%99s-medicare-plan-balance-budget-backs-seniors>.

<sup>3</sup> An “electioneering communication” is a television or radio communication that (1) references a clearly identified candidate for federal office; (2) is run with 30 days of a primary or 60 days of a general election; and (3) can be received by more than a certain number of persons in the jurisdiction where the candidate is running for office. *See* 2 U.S.C. § 434(f). Importantly, the term electioneering communication does not include a communication that constitutes an independent expenditure that contains express candidate advocacy. *See id.* § 434(f)(3)(B)(ii).

television and Internet advertisements in 29 primary and general elections.” *Id.* ¶ 9. According to the Complaint, this represented 66.8% of AAN’s total spending during the same period, *id.* ¶ 18, and was thus evidence of AAN’s “major purpose” and sufficient to trigger political committee status under FECA, *id.* ¶ 25.

Of this approximately \$18 million purportedly disbursed for advertising, the Complaint alleges that AAN spent \$4,096,910 on independent expenditures for express candidate advocacy and \$14,038,625 on electioneering communications. *Id.* ¶ 10. The Complaint, however, only identifies six specific AAN-sponsored electioneering communications, which account for just 25% (or approximately \$3.6 million) of the organization’s spending on electioneering communications. *Id.* ¶¶ 10, 13-16. The descriptions from the Complaint of the six electioneering communications follow:

1. **Representative Ed Perlmutter #1:** \$725,000 spent on a broadcast advertisement against Representative Perlmutter (D-CO). The ad “express[ed] disbelief that ‘convicted rapists can get Viagra paid for by the new health care bill,’” noted that Rep. Perlmutter voted for the legislation, and “encouraged viewers to ‘tell Congressman Perlmutter [to] vote for repeal in November and to ‘vote yes on H.R. 4903.’”
2. **Representative Dina Titus:** \$705,000 on a similar broadcast advertisement against Representative Dina Titus (D-NV).
3. **Representative Ed Perlmutter #2:** \$725,000 on a “different advertisement encouraging viewers to call Rep. Perlmutter ‘in November’ and tell him to vote to repeal the health care law.”
4. **Representative Mark Schauer:** \$370,000 on a similar broadcast advertisement against Representative Mark Schauer (D-MI).
5. **Annie Kuster:** \$875,000 on an advertisement claiming that Ann Kuster “supported massive tax hikes” and “asserting that Nancy Pelosi is not extreme. Compared to Annie Kuster.”
6. **Mike Oliverio:** \$225,000 on an advertisement noting that candidate Mike Oliverio “supported Mrs. Pelosi and would do whatever she told him to.”

*Id.* ¶¶ 13-16.<sup>4</sup>

The Complaint compares the approximately \$18 million figure – which represents spending on both independent expenditures for express candidate advocacy and electioneering communications – to the overall spending totals included in AAN’s Form 990 filings with the Internal Revenue Service (“IRS”) that are attached to the Complaint. From July 23, 2009, through June 30, 2010, the Complaint asserts that the IRS filings show AAN spent \$1,446,675 on all of its activities. *Id.* ¶ 17. For the period encompassing July 1, 2010, through June 30, 2011, AAN’s total spending is reported as \$25,692,334. *Id.* The Complaint combines these figures to conclude that total spending by AAN during the period covered by the Complaint is \$27,139,009. *Id.* ¶ 18. The Complaint then divides the \$18,135,535 combined amount spent on independent expenditures for express candidate advocacy and electioneering communications by the \$27,139,009 amount of total spending to allege that 66.8% of AAN’s spending was intended to influence elections and, therefore, is indicative of AAN’s major purpose. *Id.* ¶ 18.

Amounts spent by AAN for express candidate advocacy may apply to the “major purpose” calculation. However, the amounts spent for “electioneering communications” – which the Complaint identifies as approximately \$14 million of the \$18 million alleged to have been spent by AAN to influence elections – do not. Even if spending for electioneering communications are not *per se* excluded from the major purpose analysis, the Supreme Court in *WRTL II*, 551 U.S. 449, and the Commission in its implementing regulations, have held that electioneering communications do not necessarily constitute candidate advocacy or its “functional equivalent” as a matter of law. Those that do not, therefore, cannot be evidence of an

---

<sup>4</sup> Storyboards of these six ads have been reproduced from the websites cited in the Complaint and are included with the attached Exhibits A-D.

election-influencing purpose and may not be included in the calculation of an organization's major purpose.

### III. Material Facts Omitted from the Complaint

#### A. Information AAN Disclosed to the IRS in Its Tax Filings.

Although the Complaint cites AAN's Form 990 for purposes of establishing the organization's total spending for the July 2009 through June 2011 period, it ignores other relevant data reported on Schedule C of the same IRS forms. The information contained in those filings shows that AAN's political "expenditures" were \$185,108 and \$5,535,848 for the 2009 and 2010 tax years, respectively. See Compl. Exs. A & B, Schedule C, Part I-A, line 2.

These figures represent AAN's spending which constitutes political advocacy for IRS purposes. The instructions to Form 990 require filers to disclose on this line "[a]ny expenditures made for political campaign activities." IRS, *Instructions for Schedule C (Form 990 or 990-EZ)* at 1 (Dec. 22, 2011), available at <http://www.irs.gov/pub/irs-pdf/i990sc.pdf>. The IRS defines "political campaign activities" to include "[a]ll activities that support or oppose candidates for elective federal, state, or local public office." IRS, *Instructions for Form 990; Return of Organization Exempt From Income Tax - Additional Material; Glossary*, available at <http://www.irs.gov/instructions/i990/ar03.html>. This definitional standard has a "much broader scope [than the FEC's] 'express advocacy standard.'" Judith Kindell and John Francis Reilly, *Election Year Issues*, at 349, available at <http://www.irs.gov/pub/irs-tege/eotopici02.pdf>. Compare *Definition of Political Committee*, 66 Fed. Reg. 13,681 (Advance Notice of Proposed Rulemaking, Mar. 7, 2001) (explaining that the IRS's definition of a "political organization" is "substantially broader than the FECA definition of a 'political committee'"). The Complaint does not mention these figures nor allege that they are inaccurate.



**B. Legislative Developments and AAN's Issue Advertisements.**

As discussed above, the Complaint details its objections to only six of AAN's electioneering communications for the relevant two-year period even though the Complaint heavily relies on AAN's electioneering communication spending to allege AAN's "major purpose." The Complaint fails to provide any information about the remaining electioneering communications, which amount to more than \$10.1 million (or 75%) of AAN's electioneering communication spending. Compl. ¶¶ 10, 13-16. Even for the six that are identified, the Complaint does not distinguish between electioneering communications that may be the "functional equivalent" of express advocacy and those that are not. AAN diligently conducts all of its electioneering communications to comply with all applicable laws. It has appropriately accounted for such spending to ensure that its "major purpose" is social welfare and not to influence elections.

The Complaint attempts to downplay the ads' mention of a health care repeal vote "in November," but concedes that such ads are "ostensibly related to the legislation." *Id.* ¶ 13. In fact, legislative developments that occurred in 2010 provide crucial background for AAN's issue advocacy and rebut any claim that they constitute express candidate advocacy or its functional equivalent.

Democratic lawmakers and President Obama spent most of the summer and early fall of 2010 "defending the law against a Republican push for repeal." Jane Norman, *California Blazes a Trail for Exchange Implementation*, CQ Healthbeat, Oct. 1, 2010; see also Joseph Weber, *Opponents Keep Hope Alive to Kill Health Reform Law*, Washington Times, July 2, 2010. At the time, many organizations and Members of Congress were advocating for action to repeal the entire law or its various provisions, which included \$500 billion in Medicare cuts, \$400 billion in higher taxes, and an individual mandate to purchase health insurance. See David Espo, 219 in

*Favor; 212 Opposed Health Bill Passes*; Associated Press, Mar. 22, 2010; Jane Norman, *Business Outcry over 1099 Rises as Senate Returns to Washington*, CQ Healthbeat, Sept. 10, 2010; Paul Jenks, *Health Overhaul Celebrations Continue*, CQ Healthbeat, Sept. 22, 2010 (noting that 15 bills to repeal or revise the law had been introduced, including H.R. 4903, which was sponsored by Congresswoman Michelle Bachmann).

By mid-September, there were two discharge petitions<sup>5</sup> circulating in the House of Representatives that advocated repeal of either the entire law or a portion of it. Paul Jenks, *Public Health Bills Advance in a House Committee*, CQ Healthbeat, Sept. 17, 2010. On the opposite side of the Capitol, two Democratic Senators introduced their proposal to eliminate an unpopular provision of the health care law, see Emily Ethridge, *Baucus Plans Bill to Repeal 1099 Tax Provision in Health Care Overhaul Law*, Congressional Quarterly, Nov. 12, 2010 (citing an earlier initiative by two other senators), while Senator Jim DeMint introduced his own full-repeal bill in the Senate with 20 co-sponsors. Press Release, Office of Senator DeMint, *DeMint Applauds Rep. King's Discharge Petition Effort to Repeal Obamacare*, July 1, 2010.<sup>6</sup>

“[B]uilding momentum” was important during this period, *id.*, particularly after Democratic Representative Gene Taylor joined 172 Republican House Members in supporting a discharge petition supporting full repeal. Brian Darling, *The “Do-Nothing-Good Congress,”* Human Events, Oct. 4, 2010. Congressman Steve King, the lead proponent of one of the

<sup>5</sup> “A discharge petition [was] the one single tool that the disenfranchised majority opinion in this Congress can use to bring legislation to the floor over the will of the Speaker of the House, Nancy Pelosi.” 156 Cong. Rec. H6140-11 (July 27, 2010) (statement of Rep. King).

<sup>6</sup> Available at [http://www.demint.senate.gov/public/index.cfm?p=PressReleases&ContentRecord\\_id=f1d529ce-d007-419c-8141-80d488dd69ce&ContentType\\_id=a2165b4b-3970-4d37-97e5-4832fcc68398&Group\\_id=9ee606ce-9200-47af-90a5-024143e9974c&MonthDisplay=7&YearDisplay=2010](http://www.demint.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=f1d529ce-d007-419c-8141-80d488dd69ce&ContentType_id=a2165b4b-3970-4d37-97e5-4832fcc68398&Group_id=9ee606ce-9200-47af-90a5-024143e9974c&MonthDisplay=7&YearDisplay=2010).

discharge petitions, took to the airways to challenge allegedly independent-minded Democratic House Members who were refusing to sign his discharge petition, observing that:

Gene Taylor's signature . . . on the discharge petition says we have now bipartisan support to repeal Obamacare and there will be much pressure on many Democrats, now that the 34 that voted no, there are 33 out there, that are hearing from their constituents today . . .

[E]very Democrat voted for Nancy Pelosi to start the 111 Congress. Many of them in their campaigns implied they may not vote for her as speaker. Well, every, single one did vote for Nancy Pelosi and she left some of them off on the votes to go back home and posture themselves as independent representatives of their constituents. But the truth the most important vote is the one for the speaker of the house and that enables the San Francisco President Obama agenda.

And so this is the dividing line. The discharge petition separates the women from the girls and the men from the boys, if you really meant your no vote on Obamacare, sign the discharge petition. If the speaker let you off so you can tell your constituents, you are independent, like say [Congressman] Jason Altmire, lets' [sic] find out. If Jason doesn't sign that discharge petition he shouldn't be advertising that he's willing to challenge Obama and Pelosi because he's not.

Transcript of Fox News Interview with Congressman Steve King of Iowa, Sept. 17, 2010, available at 2010 WLNR 18664302. Congressman King also pressed his petition-signing arguments on the House floor, asking whether Speaker Pelosi had told Democratic Members to "[g]o ahead and vote 'no,' and then [travel back to] your district as someone who is against ObamaCare and as someone who is not necessarily doing the bidding of the Speaker of the House from San Francisco." 156 Cong. Rec. at H6140. Challenging his colleagues, Representative King then argued forcefully that if such Members "are sincere [in their opposition], they will sign the discharge petition." *Id.*<sup>7</sup>

<sup>7</sup> In addition to a significant push to repeal or amend the new health care law in the lame duck session of Congress in November and December of 2010, efforts also were made to lay the

During its lame duck session in November, Congress did in fact consider specific proposals to undo or amend provisions of the health care law. *See, e.g.*, Press Release, Office of Senator Mike Johanns, *Vote Scheduled for Johanns 1099 Repeal Legislation*, Nov. 19, 2010;<sup>8</sup> Emily Ethridge, *Bipartisan Bill Would Allow State Waivers from Health Law Provisions*, Congressional Quarterly, Nov. 18, 2010. Members also considered other legislative vehicles as mechanisms for undoing the President's health care law. *See, e.g.*, David Hogberg, Investor's Business Daily, *GOP Might Target ObamaCare As Part of a Medicare "Doc Fix"*, Nov. 23, 2010 (discussing potential for using lame duck legislation as a vehicle for partial repeal of health care provisions). One Democratic Congressman even responded with his own November legislation challenging Republicans to repeal provisions of the new law that appeared to have popular support. Tom Brune, *Rep. Calls Out GOP on Health Agenda*, Newsday, Nov. 24, 2010.

### LEGAL STANDARDS

#### **I. There Are Minimum Standards for Making a "Reason to Believe" Finding.**

The Complaint alleges that AAN is a federal political committee required to register and report with the FEC because the AAN's major purpose is to influence elections. At this stage of the proceedings, the FEC may rely on two sources to determine whether it "has reason to believe that a person has committed . . . a violation of [FECA]." 2 U.S.C. § 437g. First, the FEC may

---

legislative groundwork for repeal in the new session of Congress convening in 2011. *See, e.g.*, 156 Cong. Rec. H4770 (June 23, 2010) (statement of Rep. King); Scott Atlas, *Don't Tweak ObamaCare; Repeal It*, Forbes, Dec. 13, 2010, available at <http://www.forbes.com/2010/12/13/obamacare-constitutional-court-opinions-contributors-scott-atlas.html> (noting uncertainty about whether "this lame duck Congress or the new one convening in January" would follow through on repeal). The House of Representatives ultimately passed repeal legislation in January of 2011. *See* David Herszenhorn and Robert Pear, *As Vowed, House Votes to Repeal Health Care Law*, New York Times, Jan. 20, 2011.

<sup>8</sup> Available at [http://www.johanns.senate.gov/public/?p=PressReleases&ContentRecord\\_id=13765648-f435-4c2e-ac69-ea357e04bae0](http://www.johanns.senate.gov/public/?p=PressReleases&ContentRecord_id=13765648-f435-4c2e-ac69-ea357e04bae0). *See also* Kent Hoover, *Senate to Vote on 1099 Paperwork Burden*, Business Journal, Nov. 23, 2010.

review the allegations in the complaint itself. *See id.* Second, the FEC may review “information ascertained in the normal course of its supervisory responsibilities.” *Id.* This second provision is narrow, as the FEC has no “roving statutory functions” to “gather and compile information and to conduct periodic investigations.” *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981) (“*Machinists*”); *see also Democratic Senatorial Campaign Comm. v. FEC*, No. Civ. A. 95-0349, 1996 WL 34301203, at \*3 (D.D.C. Apr. 17, 1996) (noting focused nature of inquiry). Instead, this statutory prong permits the FEC to review only information included in “other sworn complaints” or from evidence of actual “wrongdoing” learned in its routine review of reporting data. *In re Fed. Election Campaign Act Litig.*, 474 F. Supp. 1044, 1046 (D.D.C. 1979); *see also FEC v. Nat’l Republican Senatorial Comm.*, 877 F. Supp. 15, 18 (D.D.C. 1995) (“*NRSC*”). *Compare with Jones v. Unknown Agents of FEC*, 613 F.2d 864, 877 (D.C. Cir. 1979) (the “supervisory responsibilities” prong applied to situations where an FEC audit uncovered “patent irregularities suggesting the possibility of fraud”).<sup>9</sup>

As the preceding paragraph reflects, a “reason to believe” determination must be made “without any investigation” by the FEC, which precludes any type of independent inquiry into the substance of the allegations. *Stockman v. FEC*, 138 F.3d 144, 147 n.2 (5th Cir. 1998).<sup>10</sup> The

<sup>9</sup> The FEC itself acknowledges that, in voting on the “reason to believe” finding, FEC Commissioners may consider only “the complaint, the respondent’s reply, relevant committee reports on the public record, and the General Counsel’s analyses and recommendations.” *FEC, Guidebook for Complainants and Respondents on the FEC Enforcement Process* at 12, May 2012, available at [http://www.fec.gov/em/respondent\\_guide.pdf](http://www.fec.gov/em/respondent_guide.pdf) (“*FEC Guidebook*”).

<sup>10</sup> *See also Common Cause v. FEC*, 842 F.2d 436, 438 n.1 (D.C. Cir. 1988) (“The FECA requires an affirmative vote of four Commissioners to undertake any agency action, . . . including a ‘reason to believe’ finding necessary to initiate an investigation for violation of the statute.”) (emphasis added); *U.S. Def. Comm. v. FEC*, 861 F.2d 765, 770 (2d Cir. 1988) (an investigation occurs only after FEC makes its “reason to believe” finding); *Judicial Watch, Inc. v. FEC*, No. Civ. A. 01-1747, 2005 WL 433344, at \*5 (D.D.C. Feb. 17, 2005) (the FEC is “directed to conduct an investigation” “[o]nly” after making a reason to believe finding); *NRSC*, 877 F. Supp. at 18 (“The FEC may not begin an enforcement investigation until after it finds reason to believe a violation has occurred.”) (emphasis in original).

Supreme Court has recently reaffirmed that adjudications involving political speech must not entail “burdensome” inquiries, *WRTL II*, 551 U.S. at 469, should “resolve disputes quickly without chilling speech,” *id.*, and “avoid threats of criminal liability and the heavy costs of defending against FEC enforcement” due to the uncertain application of federal law, *Citizens United v. FEC*, 130 S. Ct. 876, 895 (2010). This is particularly true even at the earliest stages of the FEC enforcement process, where a “reason to believe” finding can be treated as evidence of at least some guilt and stigmatizes a respondent in the public’s eye. See, e.g., Ryan Reilly, *Vern Buchanan’s Lawyers Also Represented Witness*, TPMuckraker, Jan. 23, 2012, available at [http://tpmmuckraker.talkingpointsmemo.com/2012/01/vern\\_buchanans\\_lawyers\\_also\\_represented\\_witnesses.php#more](http://tpmmuckraker.talkingpointsmemo.com/2012/01/vern_buchanans_lawyers_also_represented_witnesses.php#more); see also 11 C.F.R. § 111.9 (a “reason to believe” finding means that the FEC “has reason to believe that a respondent has violated a statute or regulation over which the Commission has jurisdiction”).

As to the requisite evidentiary showing, a “reason to believe” finding requires “a minimum evidentiary threshold [providing] at least ‘some legally significant facts’ to distinguish the circumstances from every other” situation where an entity engages in independent speech. *Democratic Senatorial Campaign Comm. v. FEC*, 745 F. Supp. 742, 745-46 (D.D.C. 1990) (quoting Supporting Memorandum for the Statement of Reasons (Commissioner Josefiak)). “At this stage of the proceedings, complaints certainly do not have to prove violations occurred, . . . but the alleged facts must present something that is, in the broad sense, ‘incriminating’ and not satisfactorily answered by the respondents.” *Id.* at 746 (internal brackets omitted), (emphasis in original). Complaints that state charges “only in the most conclusory fashion,” without supporting evidence, are dismissed by the Commission. *In re Fed. Election Campaign Act Litig.*, 474 F. Supp. at 1047. And where “the record did not suggest” a violation had occurred and

“respondents’ answers to the complaint adequately refuted the complainant’s allegations as to any presumed,” dismissal is likewise warranted. *Democratic Senatorial Campaign Comm.*, 745 F. Supp. at 744. *See also* MUR 5565, First General Counsel’s Report (Feb. 4, 2005) (dismissal where the “sole factual basis for the complaint’s allegations . . . has been disproved”).<sup>11</sup>

## II. The Legal Test for Determining Whether an Organization Is a Political Committee.

To be a “political committee,” an organization must satisfy both a statutory and a constitutional test. As to the statutory component, FECA defines “political committee,” in relevant part, 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.” 2 U.S.C. § 431(4)(A).

Beyond the statutory requirements, however, the Supreme Court and lower federal courts consistently have “construed the words ‘political committee’ . . . narrowly [to] only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.” *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (emphasis added); *see also* *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252 n.6 (1986) (“*MCFL*”) (reaffirming *Buckley*);<sup>12</sup> Compl. ¶ 23 (citing *Buckley*). *Buckley* “explicitly recognized the potentially vague and overbroad character of the ‘political committee’ definition in the context of

<sup>11</sup> The *FEC Guidebook* (at 13) explains that “a no reason to believe finding would be appropriate when (1) a violation has been alleged, but the respondent’s response or other evidence demonstrates that no violation has occurred, (2) a complaint alleges a violation but is either not credible or is so vague that an investigation would be unwarranted, or (3) a complaint fails to describe a violation of the Act.”

<sup>12</sup> While most of the Court’s *MCFL* opinion represents the views of a five-Justice majority, technically this section of the opinion only represents a four-Justice plurality. In her opinion concurring in part and concurring in the judgment, Justice O’Connor (the swing vote) does not dispute the majority’s “major purpose” analysis but has a different view on a separate legal issue contained within the same section.

2014-01-04 14:04:00

UNCLASSIFIED

FECA's disclosure requirements." *Machinists*, 655 F.2d at 391.<sup>13</sup> To "avoid questions of unconstitutionality," *Buckley*, 424 U.S. at 79 n.106, and to limit the "chilling effects worked upon" speakers, *ACLU v. Jennings*, 366 F. Supp. 1041, 1056-57 (D.D.C. 1973) (three-judge court), *vacated as moot sub nom., Staats v. ACLU*, 422 U.S. 1030 (1975),<sup>14</sup> the Supreme Court incorporated the "major purpose" requirement as a *sine qua non* that regulators must consider in determining an organization's status. Otherwise, Congress would subject many organizations "to an elaborate panoply of FEC regulations requiring the filing of dozens of forms [and] the disclosing of various activities" without adequate justification or concern for "First Amendment values." *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 858 (D.D.C. 1996) (quoting *Machinists*, 655 F.2d at 392), 859 (quoting *Buckley*, 424 U.S. at 79); *see also N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 287 (4th Cir. 2008) ("*NCRL III*") (noting that "designation as a political committee often entails a significant regulatory burden").

*Buckley* made clear that only organizations that have "the major purpose" of electing candidates may be regulated as political committees. 424 U.S. at 79 (emphasis added). *MCFL* repeats *Buckley*'s general formulation, *see* 479 U.S. at 252 n.6, and each of the three remaining "major purpose" references in *MCFL* likewise confirm that an organization has only one major purpose. *See, e.g., id.* at 253 (activity is "regulated as though the organization's major purpose is

<sup>13</sup> Importantly, as this quotation indicates, the Court held that the "major purpose" narrowing construction was necessary to save the statute not only from vagueness concerns, but also from overbreadth. The definition of "political committee" was "defined in this way by the [*Buckley*] Court for the purpose of 'focusing precisely' FECA's broadly worded provisions on 'the narrow aspect of political association' which could constitutionally be restricted." *GOPAC*, 917 F. Supp. at 859 (quoting *Machinists*, 655 F.2d at 392) (alteration in original) (emphasis added); *see also Buckley*, 424 U.S. at 79 (explaining that to "fulfill the purposes of the [FECA]," the political committee definition need "only encompass organizations . . . the major purpose of which is the nomination or election of a candidate").

<sup>14</sup> Notwithstanding the fact that this opinion was vacated, the Supreme Court subsequently cited this decision approvingly in *Buckley*, 424 U.S. at 79 n.106.



to further the election of candidates”) (emphasis added). The Supreme Court’s choice of words is significant, as it has used other similar – but clearly different – words to describe entities with multiple “major purposes.” See, e.g., *CBS, Inc. v. FCC*, 453 U.S. 367, 405 n.2. (1981) (“One of the major purposes of the Federal Election Campaign Act . . .”) (emphasis added); *Bowsher v. Merck & Co.*, 460 U.S. 824, 833 (1983) (“the two major purposes of the bill”) (emphasis added); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 592 (1980) (“a major purpose of the First Amendment”) (emphasis added). Other federal courts agree that the FEC does not ask “whether influencing campaigns is [only] ‘a major purpose’ of the group,” see *Koerber v. FEC*, 583 F. Supp. 2d 740, 748 (E.D.N.C.),<sup>15</sup> and the FEC itself has explained that an organization “must . . . have the major purpose of engaging in Federal campaign activity” before it may be regulated as a political committee, *Supplemental Explanation and Justification*, 72 Fed. Reg. 5595, 5601 (Feb. 7, 2007) (emphasis added); see also Br. of Def. FEC in Opp. to Pl. Mot. for Preliminary Injunction at 27, *Koerber v. FEC*, Civ. A. No. 2:08-cv-00039 (filed Oct. 14, 2008).

When determining an organization’s major purpose, courts have repeatedly cautioned that issue advocacy must be excluded from the calculation. In *Buckley v. Valeo*, 519 F.2d 821, 863 (D.C. Cir. 1975) (en banc), *aff’d in part and reversed in part*, 424 U.S. 1 (1976), the United States Court of Appeals for the District of Columbia Circuit emphasized that the political committee definition had to be narrowly construed “since it potentially reaches . . . the activities of nonpartisan issue groups which [are limited to] influencing the public to demand of candidates that they take certain stands on the issues.” In citing this language approvingly, the Supreme Court confirmed that the political committee definition should not be stretched to apply “to reach

---

<sup>15</sup> See also *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 556-57 (4th Cir. 2012) (“*Real Truth*”); *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 679 (10th Cir. 2010); *NCRL III*, 525 F.3d at 287-90.

groups engaged purely in issue discussion.” *Buckley*, 424 U.S. at 79. Instead, *Buckley* defined a “political committee as including only those entities that have as [the] major purpose engaging in express advocacy in support of a candidate . . . by using words such as ‘vote for,’ ‘elect,’ ‘support,’ ‘vote against,’ ‘defeat,’ or ‘reject.’” *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712 (4th Cir. 1999).<sup>16</sup>

While *Buckley* excluded organizations that engaged “purely” in issue advocacy, subsequent cases made clear that an organization need not refrain from all candidate advocacy in order to be exempted from the definition of a political committee. In *MCFL*, 479 U.S. at 252 n.6, the Court emphasized that *Buckley*’s teaching would exclude from regulation an entity whose “central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates.” And *Machinists* similarly cautioned that “issue-oriented groups, lobbying organizations, . . . and other groups concerned with the open discourse of views on prominent national issues” should be excluded from the definition of a political committee. 655 F.2d at 391, 394; *see also N.M. Youth Organized*, 611 F.3d at 678 (evaluating whether a “group spends a preponderance of its expenditures on express advocacy”) (emphasis added).<sup>17</sup> The alternative – i.e., placing political committee burdens on organizations “primarily engaged in speech on political issues unrelated to a particular candidate” – 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.” *NCRL III*, 525

<sup>16</sup> Although the excerpt from the opinion originally used the phrase “a major purpose,” the Fourth Circuit later explained this was “miscommunication” made in error. *NCRL III*, 525 F.3d at 288 n.5 (emphasis added); *see also id.* at 287-90.

<sup>17</sup> *See also Fla. Right to Life, Inc. v. Mortham*, No. 98-770CIVORL19A, 1999 WL 33204523, at \*4 (M.D. Fla. Dec. 15, 1999), *aff’d in relevant part on appeal sub nom.*, *Fla. Right to Life, Inc. v. Lamar*, 238 F.3d 1288 (11th Cir. 2001) (political committee statute could only be applied “to organizations whose major purpose is engaging in ‘express advocacy,’” as that term is defined in *Buckley*) (emphasis in original).

140441010010

F.3d at 288; *see also* MUR 5541, Statement of Reasons of Vice Chairman Matthew S. Peterson and Commissioners Caroline C. Hunter and Donald F. McGahn, at 14 n.63 (Jan. 22, 2009) (stating that there is “serious doubt on the validity of examining anything other than the amount of express advocacy in the major purpose test analysis”).

Although Congress enacted major amendments to FECA in the Bipartisan Campaign Reform Act of 2002 (“BCRA”), “there is little question that *Buckley*’s ‘major purpose test’ [was] left unaltered.” *Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1153 (10th Cir. 2007); *see also Shays v. FEC*, 424 F. Supp. 2d 100, 106 (D.D.C. 2006) (noting that “[s]ince the 1970s, Congress has not amended the definition of ‘political committee’”). As the FEC itself has explained, “[n]either BCRA, *McConnell*, nor any other legislative, regulatory, or judicial action has eliminated [the] major purpose test,” which was “necessary to avoid the regulation of activity ‘encompassing both issue discussion and advocacy of a political result.’” *Supplemental Explanation and Justification*, 72 Fed. Reg. at 5597.<sup>18</sup> Accordingly, independent expenditures for express candidate advocacy continue to be the only spending relevant to calculating an organization’s major purpose; electioneering communications are not incorporated into the analysis.

One thing that changed through the years is the FEC’s definition of “express advocacy.” Subsequent to *Buckley*, the FEC created a two-part test for determining whether a communication contains “express advocacy” and is, therefore, an “expenditure.” Part (a) of the FEC’s definition includes communications that use explicit words of express advocacy such as

<sup>18</sup> *See also Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees*, 69 Fed. Reg. 68056, 68065 (Nov. 23, 2004) (no change through regulation of the definition of “political committee” is mandated by BCRA or the Supreme Court’s decision in *McConnell*).

“vote for,” “elect,” “defeat,” etc. 11 C.F.R. § 100.22(a). Part (b) is broader and incorporates a communication that,

When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because –

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidates(s) or encourages some other kind of action.

*Id.* § 100.22(b). Subsection 100.22(b)'s definition of express advocacy has been controversial since its enactment because it is vague and provides little objective, bright-line guidance to speakers in contravention of core First Amendment principles. *See, e.g., Maine Right to Life Comm., Inc. v. FEC*, 914 F. Supp. 8 (D. Me. 1996) (“MRLC”); *Right to Life of Dutchess Cnty., Inc. v. FEC*, 6 F. Supp. 2d 248, 253-54 (S.D.N.Y. 1998); MUR 5974, Statement of Reasons of Vice Chairman Matthew S. Peterson and Commissioners Caroline C. Hunter and Donald F. McGahn, at 4 n.10 (May 29, 2009) (collecting case law and FEC authority questioning and/or invalidating this subsection).<sup>19</sup>

<sup>19</sup> Among other authorities cited by the three Commissioners are the following: “MUR 5874 (Gun Owners of America, Inc.), Statement of Reasons of Vice Chairman David Mason; MUR 5154 (Sierra Club, Inc.), Statement of Reasons of Vice Chairman Bradley Smith and Commissioners David Mason and Michael Toner; MUR 5024R (Council for Good Government), Statement of Reasons of Commissioner Bradley Smith; and MUR 4922 (Illinois Suburban O’Hare Commission), Statement of Reasons of Commissioners David Mason and Bradley Smith. *See also* MUR 4922, First General Counsel Report at 5, n. 5 (Recognizing that “[t]wo appellate courts have determined that part (b) of [11 C.F.R. 100.22] is invalid” (citing the decision of the First Circuit in *MRLC*, 98 F.3d 1, and *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997)), that “[o]n September 22, 1999, the Commission unanimously adopted a statement formalizing a pre-existing policy of not enforcing subsection (b) in the First and Fourth Circuits,” and that “[i]n January 2000, a district court in Virginia issued a nationwide injunction preventing the Commission from enforcing 11 C.F.R. 100.22(b) anywhere in the country.”

Even if electioneering communications are not *per se* excluded from the major purpose analysis, many electioneering communications still would not count against the major purpose threshold. The Supreme Court “made clear in [*WRTL II*] that the distinction between issue advocacy and express advocacy can be paramount in the context of electioneering communications.” *Colo. Right to Life Comm.*, 498 F.3d at 1153 n.11. In *WRTL II*, the Supreme Court held that an electioneering communication can advocate for issues or candidates. See 551 U.S. at 470-71. The Court determined that an electioneering communication would constitute candidate advocacy only if the ad “is the functional equivalent of express advocacy,” which occurs “only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *WRTL II*, 551 U.S. at 469-70. The Court explicitly rejected the FEC’s view that “any ad” that fits within the statutory definition of an electioneering communication “is the ‘functional equivalent’ of an ad saying defeat or elect that candidate.” *Id.* at 470 (emphasis in original). To hold otherwise “would effectively eliminate First Amendment protection for genuine issue ads.” *Id.* at 471.

Following the *WRTL II* decision, the FEC adopted a regulation providing guidance on when communications are not the “functional equivalent” of express advocacy. The FEC concluded that communications meeting the following three criteria fall within a “safe harbor” and are “susceptible of [a] reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate”:

---

Subsection 100.22(b)’s definition of express advocacy was, however, recently upheld by the Fourth Circuit in the *Real Truth*, 681 F.3d at 544. Even in that instance, however, Judge Niemeyer’s opinion for the *Real Truth* panel must be read in conjunction with his opinion for the court in *United States v. White*, 670 F.3d 498 (4th Cir. 2012), decided just a few months earlier. Citing *WRTL II*, Judge Niemeyer emphasized that “First Amendment principles distinguish protected speech from unprotected speech based on an objective view of the speech, not its mens rea. . . . [U]nder well-accepted First Amendment doctrine, a speaker’s motivation is entirely irrelevant to the question of constitutional protection.” *White*, 670 F.3d at 511 (emphasis in original).

CONFIDENTIAL

- (1) Does not mention any election, candidacy, political party, opposing candidate, or voting by the general public;
- (2) Does not take a position on any candidate's or officeholder's character, qualifications, or fitness for office; and
- (3) Either:

(i) Focuses on a legislative, executive or judicial matter or issue; and

(A) Urges a candidate to take a particular position or action with respect to the matter or issue, or

(B) Urges the public to adopt a particular position and to contact the candidate with respect to the matter or issue; or

(ii) Proposes a commercial transaction, such as purchase of a book, video, or other product or service, or such as attendance (for a fee) at a film exhibition or other event.

11 C.F.R. § 114.15(b).

Even if a communication does not satisfy the safe harbor, it may still constitute issue advocacy, not express advocacy or its equivalent. The FEC "consider[s] whether the communication includes any indicia of express advocacy and whether the communication has an interpretation other than as an appeal to vote for or against a clearly identified Federal candidate in order to determine whether, on balance, the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." *Id.* § 114.15(c). According to the regulation:

(1) A communication includes indicia of express advocacy if it:

(i) Mentions any election, candidacy, political party, opposing candidate, or voting by the general public; or

(ii) Takes a position on any candidate's or officeholder's character, qualifications, or fitness for office.

(2) Content that would support a determination that a communication has an interpretation other than as an appeal to

vote for or against a clearly identified Federal candidate includes content that:

- (i) Focuses on a public policy issue and either urges a candidate to take a position on the issue or urges the public to contact the candidate about the issue; or
- (ii) Proposes a commercial transaction, such as purchase of a book, video or other product or service, or such as attendance (for a fee) at a film exhibition or other event; or
- (iii) Includes a call to action or other appeal that interpreted in conjunction with the rest of the communication urges an action other than voting for or against or contributing to a clearly identified Federal candidate or political party.

*Id.*

Citing *Citizens United*, 130 S. Ct. at 889-90, the Complaint claims that “an[y] advertisement that qualifies as an electioneering communication is the functional equivalent of express advocacy.” Compl. ¶ 24. That is inaccurate; *Citizens United* says just the opposite. In *Citizens United*, the named plaintiff argued that its film, *Hillary*, was exempt from regulation as an electioneering communication because it was “just ‘a documentary film that examines certain historical events.’” *Citizens United*, 130 S. Ct. at 890. But after reaffirming the continuing validity of *WRTL II*’s “functional equivalence” test, *id.* at 889-90, the Court concluded that the movie was the functional equivalent of express advocacy because there was “no reasonable interpretation of *Hillary* other than as an appeal to vote against Senator Clinton,” *id.* at 890. It was precisely because the film was the “functional equivalent” of express advocacy that it was subject to the then-existing prohibition on electioneering communications. *Id.* Nothing in *Citizens United* undercuts the now well-established distinction from *WRTL II* between electioneering communications that are the functional equivalent of express advocacy and those that are not.

## DISCUSSION

### I. This Case Should Be Dismissed At the Threshold.

A “reason to believe” finding must be based on the complaint, information included in “other sworn complaints,” or evidence from actual “wrongdoing” learned in the FEC’s routine review of the reporting data. Complaints may not be “conclusory” and must contain “legally significant facts” to support the charges alleged in the complaint. *See supra* at 11-14.

The Complaint fails to meet even this most basic of tests. Despite its vast budget, resources, and self-proclaimed capabilities for “in-depth research and investigation,”<sup>20</sup> CREW has cobbled together a document devoid of critical facts. The Complaint reaches its conclusion that 66.8% of AAN’s total spending was for candidate advocacy by adding the total amounts spent by AAN for independent expenditures for express candidate advocacy and electioneering communications – approximately \$4 million and \$14 million, respectively – and compares that amount to AAN’s total spending. Notwithstanding the heavy weight of electioneering communications in this calculation, the Complaint cites only six electioneering communications that account for \$3,625,000, or approximately 25%, of the \$14 million in electioneering communication spending critical to the Complaint’s calculation. This very limited and incomplete data set – even when it is coupled with the approximately \$4 million in express candidate advocacy alleged in the Complaint – simply cannot meaningfully support a claim

---

<sup>20</sup> As its own website notes, CREW is a sophisticated entity whose stated mission combines “in-depth research and investigation with hard-charging legal action and an aggressive communications strategy.” CREW, *Mission*, available at <http://www.citizensforethics.org/pages/mission>. CREW devotes significant resources to monitoring and tracking spending on politics and policy; its annual budget rivals that of the Pennsylvania and Maryland State Ethics Commissions combined. Compare *See* CREW, *2011 Annual Report*, at 29, available at <http://www.citizensforethics.org/pages/crew-2011-annual-report/> with Dennis Owens, *Pa. Ethics Chief Says Budget Cuts Hurting Investigations*, Apr. 19, 2012, available at <http://www.abc27.com/story/17588228/pa-ethics-chief-says-budget-cuts-hurling-investigations>; Md. State Ethics Comm’n, *Budget*, available at <http://www.msa.md.gov/msa/mdmanual/25ind/html/35ethicb.html>.



about AAN's major purpose when the amount is compared to AAN's overall spending of \$27,139,009. Therefore, the Complaint's allegation that AAN's major purpose is to influence elections is conclusory and cannot justify further inquiry by the Commission.

Furthermore, CREW's factual allegations are directly refuted by the Form 990 IRS filings attached to its own Complaint. The Complaint's conclusions rest entirely on the fact that AAN spent \$18,135,535 on both independent expenditures for express candidate advocacy and electioneering communications, but ignores the tax documents that state that AAN's total political "expenditures" were only \$5,720,956 (or 21% of its total spending). The Complaint does not cite, much less distinguish or refute, these figures. As previously explained, the IRS definition of political "expenditure" is broader than the FEC's express advocacy standard and, therefore, can and does include spending for electioneering communications that are candidate advocacy.

AAN's limited spending on political "expenditures" – identified in the attachments to the Complaint as 21% of AAN's total spending – did not make AAN's "major purpose" to nominate or elect candidates which would have subjected it to the FECA definition of "political committee." It was CREW's burden to demonstrate in its Complaint that AAN's tax disclosures were inaccurate, inapplicable, or did not otherwise belie the allegation that AAN spent 66.8% of its funds on candidate advocacy. The Complaint fails to explain, let alone address, this direct evidence that refutes the allegations in the Complaint. This failure underscores the factual and evidentiary deficiencies of the Complaint that necessitate dismissal.

## **II. AAN Is Not a Political Committee.**

Even if the FEC were to determine that the Complaint has alleged sufficient, non-contradictory facts to support its allegations, there is no reason to believe that AAN is a "political committee." As explained above, *see supra* at 14-15, "political committee" status must satisfy

both a statutory and a constitutional test. AAN does not have the type of “major purpose” that *Buckley* and other cases require before political committee burdens may be imposed on an organization.<sup>21</sup>

Although the Fourth Circuit recently stated that the FEC may determine a political committee’s status on a “case-by-case” basis, *see Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 556 (2012), *Buckley* nevertheless held that the definition of a “political committee” only encompasses “organizations . . . the major purpose of which is the nomination or election of a candidate.” 424 U.S. at 79 (emphasis added). Courts have repeatedly warned that issue advocacy is excluded from this calculation. *See supra* at 16-18. *Buckley* itself defined a “political committee as including only those entities that have as [the] major purpose engaging in express advocacy in support of a candidate . . . by using words such as ‘vote for,’ ‘elect,’ ‘support,’ ‘vote against,’ ‘defeat,’ or ‘reject,’” *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712 (4th Cir. 1999),<sup>22</sup> and other federal courts subsequently confirmed this limited scope of the major purpose analysis. While the FEC may have promulgated a controversial and legally suspect definition of express advocacy in the years since *Buckley*, *see* 11 C.F.R. § 100.22(b), the agency and others have repeatedly explained that the essential framework of the major purpose test has not changed. *See supra* at 18-19 & nn.18, 19.

Accordingly, only \$4,096,910 in independent expenditures by AAN count toward the “major purpose” calculation. As detailed in the attached Exhibits A-D, none of the six electioneering communications cited by CREW qualify as express advocacy because they do not

<sup>21</sup> While the FEC may theoretically take into account factors other than expenditure ratios in determining AAN’s status (e.g., the organization’s public statements), *see Real Truth*, 681 F.3d at 557, the Complaint has not cited to or alleged that such materials would support its position here. To the contrary, AAN’s public statements, as quoted in this response, demonstrate that it is a social welfare organization and not a political committee.

<sup>22</sup> *See* note 16, *supra*.

14034100-100511

use explicit words of express candidate advocacy as required by *Buckley*, 424 U.S. at 44 n.52, and 11 C.F.R. § 100.22(a). Even under subpart (b) of 11 C.F.R. § 100.22, the legitimacy of which is in serious doubt, the ads do not qualify as express advocacy.

Each ad references the health care law and, in one of two ways, is designed to encourage each individual identified to change his or her opinion and support repeal legislation. The Complaint acknowledges that many of the ads are “ostensibly related to . . . legislation.” Compl. ¶ 13. None of these ads refer to an election, defeat, voting or candidacy for election. Since (1) such ads can be interpreted by a reasonable person as something other than “advocacy of the election or defeat of one or more clearly identified candidates,” (2) there is no “unmistakable” electoral message, and (3) “reasonable minds” could very well differ as to whether the ads “encourage[] actions to elect or defeat one or more clearly identified candidates(s) or encourage[] some other kind of action,” the amount spent on these ads cannot be used to support a finding that AAN’s major purpose is candidate advocacy. *See supra* at 20-22. Because the independent expenditures for express candidate advocacy only amount to approximately 15% of AAN’s spending and are greatly exceeded by AAN’s other spending, AAN does not have “the major purpose” necessary to be a political committee.

If, on the other hand, electioneering communications that are the “functional equivalent” of express advocacy can be included along with independent expenditures for express candidate advocacy in the “major purpose” calculation, CREW’s inclusion of all electioneering communications goes too far. *WRTL II* held that not all electioneering communications are “the ‘functional equivalent’ of an ad saying defeat or elect that candidate,” 551 U.S. at 470, and that decision has not been overruled. In fact, the Complaint’s concession that the electioneering communications were “ostensibly related to the legislation” acknowledges that all electioneering

14024710-10044

communications are not the same. Again, Exhibits A-D, attached to this Complaint, illustrate in greater detail why the six electioneering communications cited in the Complaint are not the functional equivalent of express advocacy and may not be included in the "major purpose" calculation. With these six advertisements excluded, the Complaint is left to allege that 15% of AAN's total spending, i.e., spending on independent expenditures for express candidate advocacy, was for the purpose of influencing elections. This amount of spending does not represent AAN's major purpose. Therefore, AAN is not a political committee.

**CONCLUSION**

The Complaint does not allege sufficient facts to find reason to believe that AAN is a political committee. Furthermore, the facts that are alleged in the Complaint are contradicted by the IRS filings attached to the Complaint. The allegations in the Complaint are fundamentally flawed as a matter of law and fact. Finally, the FEC should find no reason to believe that AAN is a political committee and dismiss the Complaint.

Respectfully submitted,



Jan Witold Baran  
Caleb P. Burns  
Andrew G. Woodson  
WILEY REIN LLP  
1776 K St., NW  
Washington, D.C. 20006  
202.719.7000

*Counsel for the American Action Network*

**EXHIBIT A – Advertisements 1 (Perlmutter Ad #1) & 2 (Titus Ad)**

According to the Complaint, the first two advertisements were similar and “express[ed] disbelief that ‘convicted rapists can get Viagra paid for by the new health care bill,’” noted that Representatives Perlmutter and Titus voted for the legislation, and “encouraged viewers to ‘tell [Representatives Perlmutter and Titus to] vote for repeal in November and to ‘vote yes on H.R. 4903.’” The following are audio/video storyboards of the advertisements taken from the ads as they appear on the website identified in the Complaint.

**Perlmutter Ad #1**

Audio	Video
<p>Woman #1: “Hey, what’s up?”</p> <p>Woman #2: “Hey, you have to check out the article I just sent you. Apparently convicted rapists can get Viagra paid for by the new health care bill.”</p>	<p>We are viewing the desktop of a computer. Woman #1 clicks to open window/file to reveal chat</p>
<p>Woman #1: “Are you serious?”</p> <p>Woman #2: “Yup. I mean, Viagra for rapists? With my tax dollars?”</p>	<p>Woman #1 clicks to open article and Perlmutter.gov website while Woman #2 continues talking.</p>
<p>“And Congressman Perlmutter voted for it.”</p> <p>Woman #1: “Perlmutter voted for it?”</p> <p>Woman #2: “Yup. I mean, what is going on in Washington?”</p>	
<p>Woman #1: “We need to tell Perlmutter to repeal it in November.”</p>	<p>Tell Congressman Perlmutter to vote for repeal in November. Vote yes on H.R. 4903 (202) 225-6276</p>
<p>Legal: [the on-line version of the ad ends before the oral disclaimer is complete]</p>	<p>On-screen disclaimer [not legible on website version of advertisement]</p>

014001-0144041

**Titus Ad**

Audio	Video
<p><b>Woman #1:</b> "Hey, what's up?"</p> <p><b>Woman #2:</b> "Hey, you have to check out the article I just sent you. Apparently convicted rapists can get Viagra paid for by the new health care bill."</p>	<p>We are viewing the desktop of a computer. Woman #1 clicks to open window/file to reveal chat</p>
<p><b>Woman #1:</b> "Are you serious?"</p> <p><b>Woman #2:</b> "Yup. I mean, Viagra for rapists? With my tax dollars?"</p>	<p>Woman #1 clicks to open article and Titus.gov website while Woman #2 continues talking.</p>
<p>"And Congresswoman Titus voted for it."</p> <p><b>Woman #1:</b> "Titus voted for it?"</p> <p><b>Woman #2:</b> "Yup. I mean, what is going on in Washington?"</p>	
<p><b>Woman #1:</b> "In November, we need to tell Titus to repeal it."</p>	<p>Tell Congresswoman Titus to vote for repeal in November. Vote yes on H.R. 4903 (202) 225-3252</p>
<p><b>Legal:</b> [the on-line version of the ad ends before the oral disclaimer is complete]</p>	<p>On-screen disclaimer [not legible on website version of advertisement]</p>

***Functional Equivalent Analysis.*** These ads clearly and unmistakably qualify as issue advertisements under both *WRTL II* and 11 C.F.R. § 114.15(b) and are not the functional equivalent of express advocacy. *First*, the advertisements do not mention an "election, candidacy, political party, opposing candidate, or voting by the general public." *Second*, the advertisements do not take a position on either Representative's "character, qualifications, or fitness for office." The focus is on one of the effects of the recently enacted health care legislation and the fact that the two Representatives voted for the law. *Third*, the advertisements

focus "on a legislative . . . issue [and urge] the public to adopt a particular position and to contact the candidate with respect to the matter or issue." As discussed above, *see supra* at 8-11, throughout the summer and fall of 2010, numerous proposals to repeal all or a portion of the health care legislation were pending in Congress, with the primary sponsors and their supporters working hard to get additional Members to sign-on or vote for their bills. One of these proposals was H.R. 4903, which was explicitly identified in the advertisement. Repeal efforts continued into the lame duck session in November, when Congress considered bills to address the issue. Since the advertisement meets each of the "safe harbor" elements contained in the regulation, it is not the functional equivalent of express advocacy.

*Express Advocacy Analysis.* These ads do not meet the definition of express advocacy under subsection (a) because they do not use explicit words of advocacy (e.g., "vote for," "support," etc.); These ads also do not fall under subsection (b) as they can be interpreted by a reasonable person as something other than "advocacy of the election or defeat of one or more clearly identified candidates." As discussed in the preceding paragraph, these ads discuss a legislative effort pending in Congress and ask the representatives to support that effort. The Complaint itself acknowledges that the ads are "ostensibly related to . . . legislation." Thus, there is no "unmistakable" electoral message, and reasonable minds could very well differ as to whether the ads "encourage[] actions to elect or defeat one or more clearly identified candidates(s) or encourage[] some other kind of action."

**EXHIBIT B – Advertisements 3 (Perlmutter Ad #2) & 4 (Schauer Ad)**

The Complaint explains that the second pair of advertisements encouraged viewers “to call [Representatives Perlmutter and Schauer] ‘in November’ and tell [them] to vote to repeal the health care law.” The following are audio/video storyboards of the advertisements taken from the ads as they appear on the website identified in the Complaint.

**Perlmutter Ad #2**

Audio	Video
AVO: “Remember this?”	
Pelosi Video: “We have to pass the bill so that you can find out what is in it.”	In an office, looking at TV/monitor Pelosi Video Clip:
AVO: “Now we know what Pelosi and Perlmutter were hiding.	In an office, looking at folder on desk labeled “Health Care Legislation; Pelosi Perlmutter; Top Secret.”
“A trillion dollar health care debacle.	Graphic: Cost \$1 Trillion
“Billions in new job-killing taxes.	\$500 billion: Job-killing Taxes
“They cut \$500 billion from Medicare for seniors	Cut Medicare by \$500 billion
“then spent our money on health insurance for illegal immigrants.	Health insurance for illegal immigrants.
“In November, tell Congressman Ed Perlmutter to vote for repeal.”	Super: In November Tell Perlmutter To Vote For Repeal. H.R. 4903. (202) 225-2645
Legal: “American Action Network is responsible for the content of this advertising.”	Paid for by the American Action Network.  AmericanActionNetwork.org and not authorized by any candidate or candidates committee. The American Action Network is responsible for the content of this advertising.

140547M10-100309



**Schauer Ad**

Audio	Video
AVO: "Remember this?"	
Pelosi Video: "We have to pass the bill so that you can find out what is in it."	In an office, looking at TV/monitor. Pelosi Video Clip:
AVO: "Now we know what Pelosi and Mark Schauer were hiding.	In an office, looking at folder on desk labeled "Health Care Legislation; Pelosi Schauer; Top Secret."
"A trillion dollar health care debacle.	Graphic: Cost \$1 Trillion
"Billions in new job-killing taxes.	\$500 billion: Job-killing Taxes
"They cut \$500 billion from Medicare for seniors	Cut Medicare by \$500 billion
"then spent our money on health insurance for illegal immigrants.	Health insurance for illegal immigrants.
"In November, tell Congressman Mark Schauer to vote for repeal."	Super: In November Tell Schauer To Vote For Repeal. H.R. 4903. (202) 225-6276
Legal: "American Action Network is responsible for the content of this advertising."	Paid for by the American Action Network.  AmericanActionNetwork.org and not authorized by any candidate or candidates committee. The American Action Network is responsible for the content of this advertising.

***Functional Equivalent Analysis.*** Like the ads discussed in Exhibit A, these advertisements also clearly and unmistakably qualify as issue advertisements under both *WRTL II* and 11 C.F.R. § 114.15(b) and are not the functional equivalent of express advocacy. *First*, the advertisements do not mention an "election, candidacy, political party, opposing candidate, or voting by the general public." *Second*, the advertisements do not take a position on either Representative's "character, qualifications, or fitness for office." The focus is on the

recently enacted health care legislation and that the two Representatives voted for the new law. *Third*, the advertisements focus “on a legislative . . . issue [and urge] the public to adopt a particular position and to contact the candidate with respect to the matter or issue.” As discussed above, *see supra* at 8-11, throughout the summer and fall of 2010, numerous proposals to repeal all or a portion of the health care legislation were pending in Congress, with the primary sponsors and their supporters working hard to get additional Members to sign on or vote for their bills. One of the proposals was H.R. 4903, which was explicitly identified in the advertisement. Repeal efforts continued into the lame duck session in November, when Congress considered bills to address the issue. Since the advertisement meets each of the “safe harbor” elements contained in the regulation, it is not the functional equivalent of express advocacy.

*Express Advocacy Analysis.* These ads do not meet the definition of express advocacy under subsection (a) because they do not use explicit words of advocacy (e.g., “vote for,” “support,” etc.). These ads also do not fall under subsection (b) as they can be interpreted by a reasonable person as something other than “advocacy of the election or defeat of one or more clearly identified candidates.” As discussed in the preceding paragraph, these ads concern a legislative effort pending in Congress and ask the representatives to support that effort. The Complaint itself even acknowledges that ads of this type are “ostensibly related to . . . legislation.” Thus, there is no “unmistakable” electoral message, and reasonable minds could very well differ as to whether the ads “encourage[] actions to elect or defeat one or more clearly identified candidates(s) or encourage[] some other kind of action.”

**EXHIBIT C – Advertisement 5 (Kuster Ad)**

The Complaint states that the fifth advertisement described how Ann Kuster “supported massive tax hikes” and “that Nancy Pelosi is not extreme. Compared to Annie Kuster.” The following is an audio/video storyboard of the advertisement taken from the ad as it appears on the website identified in the complaint.

**Kuster Ad**<sup>23</sup>

Audio	Video
	Text: “Nancy Pelosi is not extreme. Compared to Annie Kuster; Kuster supported the trillion dollar government Healthcare takeover.
	“But says it didn’t go far enough.
	“\$525 billion in new taxes for government Healthcare.
	“Now, Kuster wants \$700 billion in higher taxes on families and business.
	“And \$846 billion in job killing taxes for cap and trade.
	“Nancy Pelosi is not extreme. Compared to Annie Kuster.”
Legal: [the on-line version of the ad ends before the oral disclaimer is complete]	

**Functional Equivalent Analysis.** This advertisement fits within the boundaries of the general *WRTL II* test articulated by the FEC. *See* 11 C.F.R. § 114.15. It does not mention an election or candidacy. Instead, it focuses on Ms. Kuster’s relationship to Speaker Pelosi on

<sup>23</sup> The ad also includes citations to various sources for the factual positions stated therein, although these are not easily discernible on the website CREW cites.

14047410-10001

legislative policy matters. An advertisement like this is consistent with the legislative approach taken by Members of Congress on the House floor and elsewhere to obtain support for their health care repeal efforts. As Congressman King noted, *see supra* at 9-10, many Democratic Members were trying to position themselves as independent, initially voting against the health care bill, but refusing to sign onto the discharge petition in lock-step with Speaker Pelosi. This advertisement echoed those themes by comparing Ms. Kuster to Speaker Pelosi with the aim of shaping her views if she voted on repeal of the health care law and other matters of importance to AAN.

*Express Advocacy Analysis.* This ad does not meet the definition of express advocacy under subsection (a) because they do not use explicit words of advocacy (e.g., “vote for,” “support,” etc.). This ad also does not fall under subsection (b) because it can be interpreted by a reasonable person as something other than “advocacy of the election or defeat of one or more clearly identified candidates.” As discussed in the preceding paragraph, this ad concerns a legislative effort pending in Congress and other matters of policy. It challenges Ms. Kuster to break from Speaker Pelosi and her fellow Democrats on substantive legislative issues like health care repeal. Thus, there is no “unmistakable” electoral message, and reasonable minds could very well differ as to whether the ad “encourages actions to elect or defeat one or more clearly identified candidates(s) or encourages some other kind of action.”

**EXHIBIT D – Advertisement 6 (Oliverio Ad)**

The Complaint states that the sixth advertisement described how Mike Oliverio “supported Mrs. Pelosi and would do whatever she told him to.” The following is an audio/video storyboard of the advertisement taken from the ad as it appears on the website identified in the Complaint.

**Oliverio Ad**

Audio	Graphics
	Text: “If Nancy Pelosi gave an order . . . would you follow it? Mike Oliverio would. Oliverio says he would support Pelosi in Washington. If he was told to. (Politico, 5/27/10)
	“After all, Oliverio voted himself a 33% pay raise. (H.B. 4076, 2/29/08)
	“Oliverio voted for higher taxes. Even on gas. (H.B. 2303, 3/26/93; S.B. 1004, 1/29/05.)
	“And Oliverio won’t repeal Obama’s \$500 billion Medicare cuts. (Times West Virginian, 4/4/10)
	“So what will Mike Oliverio do in Washington? Whatever Nancy Pelosi tells him to.”
VO: “The American Action Network is responsible for the content of this advertising.”	Paid for by the American Action Network. AmericanActionNetwork.org. Not authorized by any candidate or candidate’s committee. American Action Network is responsible for the content of this advertising.

**Functional Equivalent Analysis.** This advertisement fits within the boundaries of the general *WRTL II* test articulated by the FEC. See 11 C.F.R. § 114.15. It does not mention an election or candidacy. Instead, it focuses on Mr. Oliverio’s relationship to Speaker Pelosi on legislative policy matters. An advertisement like this is consistent with the legislative approach taken by Members of Congress on the House floor and elsewhere to obtain support for their

health care repeal efforts. As Congressman King noted, *see supra* at 9-10, many Democratic Members were trying to position themselves as independent, initially voting against the health care bill, but refusing to sign onto the discharge petition in lock-step with Speaker Pelosi. This advertisement echoed those themes by comparing Mr. Oliverio to Speaker Pelosi with the aim of shaping his views if he voted on repeal of the health care law and other matters of importance to AAN.

*Express Advocacy Analysis.* This ad does not meet the definition of express advocacy under subsection (a) because it does not use explicit words of advocacy (e.g., “vote for,” “support,” etc.). This ad also does not fall under subsection (b) because it can be interpreted by a reasonable person as something other than “advocacy of the election or defeat of one or more clearly identified candidates.” As discussed in the preceding paragraph, this ad concerns a legislative effort pending in Congress and other matters of policy. It challenges Mr. Oliverio to break from Speaker Pelosi and fellow Democrats on substantive legislative issues like health care repeal. Thus, there is no “unmistakable” electoral message, and reasonable minds could very well differ as to whether the ad “encourages actions to elect or defeat one or more clearly identified candidates(s) or encourages some other kind of action.”