



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

American Action Network

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MUR 6589R

**STATEMENT OF REASONS OF
CHAIRMAN MATTHEW S. PETERSEN AND
COMMISSIONERS CAROLINE C. HUNTER AND LEE E. GOODMAN**

This Statement of Reasons sets forth our reasons for voting to find no reason to believe that American Action Network ("AAN") violated the Federal Election Campaign Act of 1971, as amended (the "Act"). It is issued in accordance with the U.S. District Court's Order and Memorandum Opinion dated September 19, 2016 in *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, No. 1:14-cv-01419 (CRC), 2016 WL 5107018 (D.D.C. Sept. 19, 2016) ("*CREW v. FEC*").

The underlying enforcement matter at issue arose from a complaint filed in 2012 by Citizens for Responsibility and Ethics in Washington and Melanie Sloan ("*CREW*") alleging that AAN—a tax-exempt section 501(c)(4) organization—violated the Act by failing to register and report as a political committee. In 2014, we concluded that AAN did not have as its major purpose the nomination or election of a candidate and, thus, voted against finding reason to believe that AAN violated the Act.¹ Consequently, the matter was dismissed. As the Commissioners whose votes controlled the disposition of this matter, we issued a statement of reasons explaining the basis for our decision.²

CREW challenged the dismissal under 52 U.S.C. § 30109(a)(8)(A).³ On September 19, 2016, the U.S. District Court for the District of Columbia held that the dismissal was contrary to law, finding that our statement of reasons adopted erroneous standards for determining (1) which spending indicated a "major purpose" of nominating or electing a candidate, and (2) the relevant time period for evaluating a group's spending. The court, therefore, remanded the case to the Commission for proceedings consistent with the opinion.

¹ MUR 6589 (AAN), Certification (June 24, 2014).

² MUR 6589 (AAN), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen (Jul. 30, 2014).

³ Under this provision, "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party ... may file a petition with the United States District Court for the District of Columbia."

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Consistent with the court's instructions and guidance, we reconsidered the administrative record in this matter. In the course of this review, we examined in detail each of AAN's electioneering communications to determine which ones are indicative of a major purpose to nominate or elect a candidate. Applying the Commission's case-by-case, fact-intensive standard for determining political committee status,⁴ we conclude that AAN was not a political committee under the Act and Commission regulations because it did not have as its major purpose the nomination or election of candidates. This conclusion is based on the totality of the circumstances, including AAN's mode of organization, official statements, and the fact that less than half of its spending was devoted to communications and activities designed to elect or nominate federal candidates. Accordingly, we could not vote to find that AAN violated the Act by failing to register and report as a political committee.⁵ Our reasoning is set forth below.

I. FACTUAL AND PROCEDURAL BACKGROUND

The full factual and procedural history of the underlying enforcement matter, as well as a fuller treatment of the major purpose test and our reasoning for our original votes, is included in our Statement of Reasons issued on July 30, 2014, and we incorporate by reference that analysis and discussion on all points except for aspects deemed contrary to law by the court. A brief summary of the relevant background is set forth below.

A. Commission Disposition of CREW's Complaint Against AAN

AAN — which describes itself as an “action tank,” the mission of which is to “create, encourage, and promote center-right policies based on the principles of freedom, limited government, American exceptionalism, and strong national policy”⁶ — was founded in 2009 and is recognized by the Internal Revenue Service as a section 501(c)(4) social welfare organization. As a tax-exempt organization, AAN is required to file annually a public financial disclosure report with the Internal Revenue Service on Form 990.

⁴ *Political Committee Status*, Supplemental Explanation and Justification, 72 Fed. Reg. 5,595 (Feb. 7, 2007) (“2007 Supplemental E&J”). An organization's registration as a “political committee” triggers an ongoing reporting requirement for all financial activity until the organization terminates. It also triggers more invasive disclosure requirements than event-triggered disclosure (such as for independent expenditures and electioneering communications) because political committees must identify all contributors who give more than a nominal amount, regardless of the purpose of their contributions or the organization's activities. For these reasons, Congress established two different disclosure schemes and the Supreme Court fashioned the “major purpose” test to capture only those organizations that should be subjected to regular, ongoing disclosure, which entails higher compliance costs than event-specific disclosure.

⁵ MUR 6589R (AAN), Certification (Oct. 17, 2016).

⁶ MUR 6589 (AAN), Complaint at Exhibit A (Form 990: Return of Organization Exempt from Income Tax 2009); MUR 6589 (AAN), Supplemental Response (Form 990: Return of Organization Exempt from Income Tax 2010).

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In the two fiscal years following its establishment, AAN publicly disclosed spending over \$27 million to advance its ideological mission.⁷ Of this amount, roughly \$4 million consisted of independent expenditures (*i.e.*, communications expressly advocating the election or defeat of a federal candidate), while another \$13.7 million was for electioneering communications.⁸

In its complaint against AAN, CREW alleged that "AAN made expenditures aggregating in excess of \$1,000 during 2010"⁹ and that "[a]s demonstrated by its extensive spending on federal campaign activity, AAN's major purpose between July 23, 2009 and June 30, 2011 was the nomination or election of federal candidates."¹⁰ According to the complaint, AAN's "extensive spending on federal campaign activity" categorically included all electioneering communications sponsored by AAN from 2009 to 2011, regardless of their content or discussion of policy or legislation.¹¹

The Commission did not find reason to believe that AAN failed to register as a political committee, because AAN did not have as its "major purpose" the "nomination or election of a candidate."¹² In voting against finding "reason to believe," we constituted the controlling group with respect to the matter's disposition and, thus, issued a statement of reasons in which we applied the Commission's case-by-case analysis for determining political committee status.¹³

⁷ MUR 6589 (AAN), Supplemental Response (Form 990: Return of Organization Exempt from Income Tax 2010).

⁸ An "electioneering communication" is defined as any broadcast, cable, or satellite communication which (a) refers to a clearly identified candidate for federal office, (b) is publicly distributed within 60 days before a general election or 30 days before a primary election, and (c) is targeted to the relevant electorate. 52 U.S.C. § 30104(f)(3); 11 C.F.R. § 100.29. Electioneering communications by definition do not expressly advocate the election or defeat of candidates; any such communication would be a separately reportable independent expenditure. 11 C.F.R. § 100.29(c)(3). A communication is "targeted to the relevant electorate" when it can be received by 50,000 or more persons in the congressional district the candidate seeks to represent. 11 C.F.R. § 100.29(b)(5)(i). No other content, such as praise or criticism, is required for an ad to be deemed an electioneering communication.

⁹ MUR 6589 (AAN), Complaint at 6.

¹⁰ *Id.* at 7.

¹¹ *Id.*

¹² In *Buckley v. Valeo*, 424 U.S. 1, 79 (1976), the Supreme Court narrowly construed the definition of "political committee" to encompass only groups that both (1) receive contributions or make expenditures in excess of \$1,000 and (2) have as their major purpose the nomination or election of a federal candidate.

¹³ When the Commission first considered this matter, we performed the case-by-case analysis called for in the Commission's 2007 Supplemental E&J. Thus, we decided that the most relevant factors in determining AAN's political committee status — but not the only factors that could be considered — were AAN's central organizational purpose as articulated in its public and non-public statements and AAN's spending on campaign activities versus its spending on other activities. In analyzing AAN's spending, we used First Amendment jurisprudence and judicial decisions distinguishing campaign speech from issue advocacy as a guide. *See, e.g., FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986); *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014). We believed this approach to be reasonable. *See Van Hollen, Jr. v. Fed. Election Comm'n*, 811 F.3d 486, 499, 501 (D.C. Cir. 2016) (recognizing that, "more than other agencies whose primary task may be limited to administering a particular statute, every action the FEC takes implicates fundamental rights" and referring

CREW brought a case in United State District Court under 52 U.S.C. § 30109(a)(8)(A) challenging our basis for dismissal.

B. The District Court's Opinion and Order

The District Court granted CREW's motion for summary judgment. In its opinion, the court addressed CREW's three objections to our statement of reasons: (1) "that only expenditures on express advocacy — and no expenditures on electioneering communications — were deemed relevant to the 'major purpose' inquiry"; (2) that a group's activities were evaluated over its entire existence, rather than in a single calendar year; and (3) that "a group's campaign-related spending [must] constitute at least 50% of total spending before concluding that such spending indicated the entity's 'major purpose.'"¹⁴

As to the first objection, the court held that our Statement of Reasons contained an "erroneous understanding that the First Amendment effectively required the agency to exclude from its consideration all non-express advocacy in the context of disclosure."¹⁵ However, the court rejected CREW's argument that the Commission must consider "all electioneering communications as indicative of a purpose to nominate or elect a candidate."¹⁶ Instead of establishing its own bright-line rule, the court instructed the Commission to reconsider this question under "the FEC's judicially approved case-by-case approach to adjudicating political committee status."¹⁷

As for the proper time period for evaluating a group's activities, the court concluded that "[g]iven the FEC's embrace of a totality-of-the-circumstances approach to divining an organization's 'major purpose,' it is not *per se* unreasonable that the Commissioners would consider a particular organization's full spending history as relevant to its analysis."¹⁸ Thus, according to the court, the Commission is not limited to considering a group's spending in a single calendar year when conducting a "major purpose" inquiry. However, the court concluded that a "lifetime-only rule" is contrary to law when it "tends to ignore crucial facts indicating

to the FEC's "unique prerogative to safeguard the First Amendment when implementing its congressional directives"). Furthermore, we understood that our decision regarding AAN's political committee status was not a choice between non-disclosure and disclosure but, rather, a choice between two alternative and statutorily distinct disclosure regimes: event-specific disclosure versus registration as a political committee with the ongoing reporting obligations and other burdens that that would entail. Although several federal circuit court decisions have addressed the outer constitutional limits of state disclosure laws, we did not understand those decisions to compel us to go to the same outer limits in implementing the Act's disclosure regimes.

¹⁴ *CREW v. FEC*, 2016 WL 517018 at *7.

¹⁵ *Id.* at *11.

¹⁶ *Id.* (citations and internal quotations omitted).

¹⁷ *Id.* at *11 (citations omitted).

¹⁸ *Id.*

whether an organization's major purpose has changed."¹⁹ Therefore, under the court's holding, the Commission may, when examining major purpose, consider a group's full spending history provided it also considers whether the group's major purpose has changed as evidenced by its recent spending activity.

Finally, the court rejected CREW's argument that applying a 50-percent spending threshold was legally erroneous. According to the court, the Commission is entitled to deference on the question of spending thresholds, and it concluded that "[a] reasonable application of a 50%-plus rule would not appear to be arbitrary and capricious."²⁰

The court thus remanded the case to the Commission with instructions to act in accordance with its declaration. Having reopened the MUR, notified the complainant and respondents, received a supplemental response from AAN, and reconsidered the matter in full by reviewing the record anew and scrutinizing the ads in light of the court's decision, we again voted not to find reason to believe the respondent AAN violated the Act by failing to register as a political committee.

II. ANALYSIS

In conformance with the court's remand order and pursuant to the Commission's judicially sanctioned case-by-case, fact-intensive approach to evaluating political committee status, below we examine AAN's electioneering communications — on which AAN spent a total of \$13.7 million — to determine whether they support a conclusion that AAN's "major purpose is Federal campaign activity (*i.e.*, the nomination or election of a Federal candidate.)"²¹

A. Analytical Framework for Evaluating Electioneering Communications

As noted above, the court identified as legal error in our Statement of Reasons "the erroneous understanding that the First Amendment effectively required the agency to exclude from its consideration all non-express advocacy in the context of disclosure."²² Thus, in conformance with the court's declaration, we consider AAN's electioneering communications — which by definition do not contain express advocacy — in our analysis. The court, however, did not prescribe a rule or standard by which we must conduct this analysis but instead deferred to the Commission's expertise in applying its judicially approved case-by-case, fact-intensive approach to determining whether AAN is a political committee.

In evaluating major purpose, our starting point is the language of the communication itself. In other words, we look at the ad's specific language for references to candidacies,

¹⁹ *Id.* at *12.

²⁰ *Id.*

²¹ 2007 Supplemental E&J at 5597.

²² *CREW v. FEC*, 2016 WL 517018 at *11.

elections, voting, political parties, or other indicia that the costs of the ad should be counted towards a determination that the organization's major purpose is to nominate or elect candidates. We also examine the extent to which the ad focuses on issues important to the group or merely on the candidates referenced in the ad.²³ Additionally, we consider information beyond the content of the ad only to the extent necessary to provide context to understand better the message being conveyed. Finally, we ascertain whether the communication contains a call to action and, if so, whether the call relates to the speaker's issue agenda or, rather, to the election or defeat of federal candidates.²⁴

In conducting this analysis, we are mindful of the essential need for objectivity, clarity, and consistency in administering and enforcing the Act and providing meaningful guidance to the regulated community about which factors will be deemed relevant in a major purpose inquiry.²⁵ We avoid speculating about the subjective motivations of a speaker, since doing otherwise could lead to identical communications being treated differently based on perceptions of intent. We are also mindful of the fact that electioneering communications, by definition, must refer to a clearly identified federal candidate; such references, by themselves, do not make the communications electoral.²⁶

B. Ad-by-Ad Analyses

Consideration of the context in which the electioneering communications were run allows for better understanding and more accurate assessments of them. At the time, not only was a federal midterm election in the offing, but it was also widely anticipated that Congress would meet in a post-election "lame duck" session in November 2010 to consider several pieces of major legislation,²⁷ many involving policy issues of great importance to AAN. Congress was

²³ For example, a sharp critique of a candidate's position on legislation or public policy differs markedly from a critique of the candidate's personal behavior. The former would be consistent with an attempt to influence the candidate's position on the legislation or policy at issue, while the latter may indicate a purpose of nominating or electing a candidate. The "Yellowtail" ad discussed in *McConnell v. FEC* is a paradigmatic example of the latter approach. 124 S.Ct. 619, 689 n.78. That ad accused candidate Bill Yellowtail of hitting his wife, skipping child support payments, and being a convicted felon. The Court stated that "the notion that this advertisement was designed purely to discuss the issue of family values strains credulity." *Id.* Thus, ads like the Yellowtail ad may evidence an electoral purpose.

²⁴ "[T]he major purpose doctrine requires a fact-intensive analysis of a group's campaign activities compared to its activities unrelated to campaigns" 2007 Supplemental E&J at 5601.

²⁵ "Any organization can look to the public files for the Political Committee Status Matters and other closed enforcement matters, as well as advisory opinions and filings in civil enforcement cases, for guidance as to how the Commission has applied the statutory definition of 'political committee' together with the major purpose doctrine." 2007 Supplemental E&J at 5604.

²⁶ 52 U.S.C. 30104(f)(4)(A)(i)(I).

²⁷ See, e.g., Alexander Bolton, *Democrats to Stuff 20 Bills Into Post-election Lame-duck Session*, The Hill, Sept. 28, 2010, <http://thehill.com/homenews/senate/121223-dems-stuff-lame-duck>.

expected to address *inter alia* the expiring Bush-era tax cuts,²⁸ federal spending,²⁹ health care,³⁰ and energy (including potential cap-and-trade bills).³¹ Due to the possibility that party control of Congress could change as a result of the 2010 midterm elections, it was generally believed that there would be attempts to pass controversial legislation before the swearing-in of a new Congress in January 2011.³² Thus, in the lead-up to the elections, there was great interest in, and much speculation about, the legislative proposals that Congress would take up during the lame-duck session.

It is worth noting that Congress did, in fact, meet in lame-duck session in November and December of 2010.³³ At least one publication deemed the session "the most productive of the

²⁸ See, e.g., *id.* ("The highest-profile item for November and December is the tax cuts of 2001 and 2003, passed under President George W. Bush, which expire at year's end."); Jackie Calmes, *Obama is Against a Compromise on Bush Tax Cuts*, N.Y. Times, Sept. 7, 2010, <http://www.nytimes.com/2010/09/08/us/politics/08obama.html> ("President Obama on Wednesday will make clear that he opposes any compromise that would extend the Bush-era tax cuts for the wealthy beyond this year [T]he administration acknowledges that its blueprint might not pass before Election Day, or even in the lame-duck Congress afterward.").

²⁹ During the lame-duck session, Congress was set to address the Fiscal Year 2011 appropriations process, since the federal government was operating under a continuing resolution (H.R. 3081) that passed on September 30, 2010, and expired on December 3, 2010. In addition, President Obama proposed in the fall of 2010 a controversial infrastructure spending package that was expected to be taken up during the lame-duck session. Meredith Shiner, *Bennet Bucks Obama's \$50B Plan*, Politico, Sept. 8, 2010, <http://www.politico.com/story/2010/09/bennet-bucks-obamas-50b-plan-041887>.

³⁰ By the fall of 2010, numerous bills had been introduced in Congress to repeal or substantially modify the Affordable Care Act. See Paul Jenks, *Health Overhaul Celebrations Continue*, CQ Healthbeat, Sept. 22, 2010.

³¹ See, e.g., Bolton, *supra* note 27 ("Sen. Jay Rockefeller (D-W.Va.) says he intends to hold Majority Leader Harry Reid (D-Nev.) to a promise to schedule a vote on legislation that would bar the Environmental Protection Agency from taking action to curb carbon gas emissions for two years."); Robin Bravender, *Cap-and-Trade Prospects Shaky in Lame Duck*, N.Y. Times, Jul. 29, 2010, <http://www.nytimes.com/cwire/2010/07/29/29climatewire-cap-and-trade-prospects-shaky-in-lame-duck-38854.html> ("[M]any climate advocates have turned their hopes to slipping cap and trade into a House and Senate conference bill after the elections").

³² See, e.g., John Fund, "The Obama-Pelosi Lame Duck Strategy," Wall St. J., Jul. 9, 2010, <http://www.wsj.com/articles/SB10001424052748704293604575343262629361470> ("Democratic House members are so worried about the fall elections they're leaving Washington on July 30, a full week earlier than normal [T]here have been signs in recent weeks that party leaders are planning an ambitious, lame-duck session to muscle through bills in December they don't want to defend before November."); Charles Krauthammer, *Beware the Lame Duck*, Wash. Post, Jul. 23, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/22/AR2010072204029.html> ("Leading Democrats are already considering [a lame-duck Congress] as a way to achieve even more liberal measures that many of their members dare not even talk about, let alone enact, on the eve of an election in which they face a widespread popular backlash to the already enacted elements of the Obama-Pelosi-Reid agenda. That backlash will express itself on Election Day and result, as most Democrats and Republicans currently expect, in major Democratic losses.").

³³ Liz Halloran, *Congress Braces for Hectic Lame-Duck Session*, NPR, Nov. 14, 2010, <http://www.npr.org/2010/11/11/131252273/congress-braces-for-hecktic-lame-duck-session> ("The brief session is expected to be dominated by debate over the fate of the Bush tax cuts of 2001 and 2003").

lame duck Congressional sessions ever.”³⁴ Among the matters taken up by Congress were a “tax cut compromise extending the Bush tax cuts, creating new Obama tax cuts and extending unemployment insurance.”³⁵ With that context in mind, we proceed to consider each of AAN’s electioneering communications, grouping them by subject matter and listing the cost of each.

1. Bush Tax Cuts

During the 60-day electioneering communications window, AAN spent approximately \$3.37 million on ads focused on the pending expiration of the Bush-era tax cuts, which was considered the most prominent issue of the lame-duck session.³⁶ Congress ultimately took up the issue during the session, resulting in the tax cuts being reauthorized in their entirety.³⁷

The following five AAN advertisements favor reauthorizing the tax cuts and urge viewers to lobby the named officeholders — all of whom would participate in the lame-duck session — to support the position advanced by AAN:

(a) *Ouch* (\$652,584.69):

During her eighteen years in Washington, Patty Murray voted for the largest tax increase in history, and repeatedly against tax relief. But this November, Murray promises to vote for a huge tax hike on small businesses. Ever heard of helping small businesses, Patty? Tell Senator Murray “ouch!” We can’t afford more tax hikes. [Superimposed text: “Call Senator Patty Murray. Say vote NO on any tax increase. (202)224-2621.”]

(b) *Quit Critz* (\$177,310):

He was our district economic development director when we lost jobs and unemployment skyrocketed. Mark Critz. He supports the Obama-Pelosi agenda that’s left us fourteen trillion in debt. Mark Critz. And instead of extending tax cuts for Pennsylvania families and businesses, he voted with Nancy Pelosi to quit working and leave town. Mark Critz. Tell Congressman Critz that Pennsylvania families need tax relief this November, not more government. [Ends with superscript over photo: “Tell Congressman Critz vote to cut taxes this November. Yes on H.R. 4746 (202)224-3121.”]

³⁴ Garance Franke-Ruta, *The Most Productive Lame Duck Since WWII—and Maybe Ever*, The Atlantic, Dec. 22, 2010, <http://www.theatlantic.com/politics/archive/2010/12/the-most-productive-lame-duck-since-wwii-and-maybe-ever/68442/>.

³⁵ *Id.*; see also CNN, *Not Such a Lame-Duck Session: What Congress Passed, Obama Signed in Week*, Dec. 23, 2010, <http://news.blogs.cnn.com/2010/12/23/not-such-a-lame-duck-session-what-congress-passed-obama-signed-in-week/>.

³⁶ See Bolton, *supra* note 27 (“The highest-profile item for November and December is the tax cuts of 2001 and 2003, passed under President George W. Bush, which expire at year’s end.”).

³⁷ See Franke-Ruta, *supra* note 34.

(c) *Ridiculous* (\$505,000):

Ridiculous stimulus! Courtesy of Charlie Wilson and Nancy Pelosi. Three million for a turtle tunnel. Two hundred thousand for Siberian lobbyists. Half a million to study Neptune. Two million to photograph exotic ants and one hundred fifty thousand to watch monkeys on drugs. The only thing Wilson and Pelosi's stimulus didn't do? Fix Ohio's economy. Call Charlie Wilson. Tell him to keep the tax cuts, ditch the stimulus. [Superimposed text: "Call Charlie Wilson. Tell him in November keep the tax cuts. Ditch the Stimulus." Phone number "(202)225-5705" and "VOTE FOR H.R. 4746."]

(d) *Taxes* (\$435,000):

Congressman Mark Critz. We know he opposes repealing Obamacare, which means five hundred billion in new job-killing taxes. Now Congressman Critz wants to raise taxes on small businesses, a devastating blow to a weak economy. Congressman Critz even voted to delay extending child tax credits for families. Tell Congressman Mark Critz to vote to extend the tax cuts in November.

(e) *Wallpaper*³⁸ (\$1,600,000):

Congressman Kurt Schrader is wallpapering Washington with our tax money. Schrader spent nearly eight hundred billion on the wasteful stimulus that created few jobs but allowed big executive bonuses. He threw nearly a trillion at Pelosi's health care takeover and voted to raise the national debt to over fourteen trillion. Now Congress wants to raise taxes. Call Congressman Schrader. Tell him to vote for a tax cut this November to stop wallpapering Washington with our tax dollars. [Superimposed text: "Call Congressman Schrader this November. Vote to cut taxes. Yes on H.R. 4746. (202)224-3121."]

None of the above ads refers to candidacies or the upcoming election, nor do they contain other campaign-related indicia. The only content in the ads that is arguably election-related is the mention of November — the month in which the midterm election took place. However, the word "November" is used only in calls to take specific legislative actions. As mentioned above, a lame-duck session was widely expected to take place in November and, in fact, did begin on November 15, 2010.³⁹ Thus, the use of "November" in the ads is best understood as a reference to the time period in which the lame-duck session would commence.

Each of the ads above focuses on government spending and tax cuts and calls on viewers to contact the named officeholders to urge them to take specific legislative actions — namely, "[V]ote NO on any tax increase" (Ouch); "[V]ote to cut taxes" (Quit Critz); "[K]eep the tax cuts"

³⁸ AAN ran five versions of this advertisement. The text provided is from a representative version that referenced Congressman Kurt Schrader.

³⁹ See CNN, *Lame Duck Congress Convened*, Nov. 15, 2010, <http://www.cnn.com/2010/POLITICS/11/15/lame.duck.congress/>.

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(Ridiculous); "[V]ote to extend the tax cuts" (Taxes); and "[V]ote for a tax cut" (Wallpaper). Three of the ads — "Quit Critz," "Ridiculous," and "Wallpaper" — even identify the specific bill (H.R. 4746) that AAN wanted the named officeholders to support. Furthermore, the action being advocated by the ads is consistent with and furthered AAN's tax-related initiatives.⁴⁰

While the ads criticize past legislative positions taken by the named officeholders (and, in the case of Critz, his prior public service), the express point of that criticism — as demonstrated by the calls to action — is to marshal public sentiment to persuade the officeholders to alter their voting stances. Merely criticizing an officeholder's past positions on legislative issues important to the organization sponsoring the ad does not, on its own, indicate a purpose of nominating or electing a candidate, especially where the calls to action have an express legislative focus.

In short, the above ads are more indicative of grassroots lobbying (*i.e.*, exhorting constituents to contact their representatives about specific policy proposals) than of election-influencing activity. Accordingly, we conclude that these ads are not indicative of a major purpose to nominate or elect federal candidates.

2. Federal Spending

AAN spent roughly \$3.8 million on five electioneering communications concerning federal spending. As noted above, in the fall of 2010, several federal spending packages were being considered, including an infrastructure spending proposal that was described by its critics as a second stimulus bill.⁴¹ Moreover, it was expected that Congress would not act before it recessed at the end of September and would take up these spending bills in the lame-duck session,⁴² which is what happened.⁴³

The following five advertisements advanced AAN's position that Congress should curtail federal spending and encouraged viewers to contact the named officeholders to advocate for this position:

(a) *Back Pack* (\$1,210,000):

⁴⁰ See, e.g., Getting America Back to Work, <https://americanactionnetwork.org/category/economy/#axzz4M3KftahI> ("We believe in a job creating economy unfettered from Washington's detrimental regulations and punishing tax code.").

⁴¹ See Sheryl Gay Stolberg & Mary Williams Walsh, *Obama Offers a Transit Plan to Create Jobs*, N.Y. Times, Sept. 6, 2010, <http://www.nytimes.com/2010/09/07/us/politics/07obama.html>; Meredith Shiner, *Bennet Bucks Obama's \$50B Plan*, Politico, Sept. 8, 2010, <http://www.politico.com/story/2010/09/bennet-bucks-obamas-50b-plan-041887>.

⁴² See Russell Chaddock, *Congress adjourns, but spending bills and Bush tax cuts still loom*, Christian Science Monitor, Sept. 30, 2010, <http://www.csmonitor.com/USAPolitics/2010/0930/Congress-adjourns-but-spending-bills-and-Bush-tax-cuts-still-loom>.

⁴³ See David Rogers, *Dems concede budget fight to GOP*, Politico, Dec. 16, 2010, <http://www.politico.com/story/2010/12/dems-concede-budget-fight-to-gop-046520>.

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There's a lot on the backs of our kids today, thanks to Congressman [Gerry Connolly/Tom Perriello/Tim Walz]. [Connolly/Perriello/Walz] loaded our kids up with nearly eight hundred billion in wasteful stimulus spending. Then added nearly a trillion more for Pelosi's health care takeover. A debt of fourteen trillion. Now Congress wants to pile on more spending. How much more can our children take? Call Congressman [Connolly/Perriello/Walz]. Tell him to vote to cut spending this November. It's just too much.

(b) *Naked* (\$2,092,975):

[Announcer:] How can you tell the taxpayers in Congressman Gerry Connolly's district? We're not so tough to spot. Connolly stripped us with a wasteful stimulus, spent the shirts off our backs. [On-Screen Text:] \$14 Trillion Debt. [Announcer:] Connolly is taking money from our pockets to put in Washington's pockets. [Actor:] "Now I don't have any pockets." [Announcer:] Now, Congress wants to strip us bare with more spending. Call Congressman Connolly. Tell him: vote to cut spending this November. [Superimposed text: "Call Congressman Connolly. Vote to cut spending this November. Yes to H.R. 5542 (202)224-3121"]

(c) *Promise* (\$14,896.34):

Spending in Washington is out of control . . . Representative Hodes promised he'd fight wasteful spending. Hodes hasn't kept that promise. He voted for Pelosi's Stimulus bill . . . For the auto bailout . . . For massive government-run health care. Trillions in new spending. As New Hampshire families struggle . . . Paul Hodes continues the wasteful spending spree with our tax dollars. Tell Congressman Hodes to stop voting for reckless spending.

(d) *Wasted* (\$231,000):

America is thirteen trillion in debt yet Congresswoman Herseth Sandlin keeps on spending, voting for the eight hundred billion stimulus they promised would create jobs. Instead, our money was wasted upgrading offices for DC bureaucrats, studying African ants, and building road crossings for turtles. Now they want to do it again. Tell Congresswoman Herseth Sandlin to vote "no" on a second, wasteful stimulus in November.

(e) *Bucket* (\$290,395):

We send tax money to Washington and what does Russ Feingold do with it? Eight hundred billion dollars for the jobless stimulus. Two point five trillion for a healthcare plan that hurts seniors. A budget that forces us to borrow nine trillion dollars. And when he had a chance at reform, he voted against the Balanced Budget Amendment. Russ Feingold and our money. What a mess. [Superimposed text: Russ Feingold. What a mess.]

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Like the ads pertaining to the Bush tax cuts, the use of "November" in AAN's federal spending ads appears to refer to the upcoming lame-duck session. Otherwise, these ads contain no references to elections, candidacies, or the campaign process. Instead, they address the federal spending debate occurring in 2010 and (other than the "Bucket" ad) ask viewers to contact the named officeholders and tell them to "vote to cut spending" (Back Pack and Naked); "stop voting for reckless spending" (Promise); and "vote 'no' on a second, wasteful stimulus" (Wasted). The "Naked" ad specifically references a bill that AAN wants the named officeholder to support.

The criticisms directed toward the named officeholders focus on past actions related to federal spending increases and, in nearly every ad, culminate in calls for the officeholders to change their voting behavior in the upcoming lame-duck session. Because their content and calls to action are focused on legislative issues likely to arise in the lame-duck session, we conclude that "Back Pack," "Naked," "Promise," and "Wasted" do not indicate a major purpose to nominate or elect federal candidates.

"Bucket," by contrast, contains no call to take a particular legislative action. Rather, it begins with policy-based criticisms of then-Senator Feingold's voting record and then concludes with: "Russ Feingold. What a mess." Although this ad could be viewed as an issue ad because it does not reference Mr. Feingold's candidacy, the upcoming election, or any electoral actions that the viewer could take, and it focuses on policy issues and past votes, for purposes of this analysis we will deem the ad to be indicative of the purpose to nominate or elect a federal candidate. We make this decision because the ad does not urge Mr. Feingold to take a particular legislative action, ask viewers to contact Mr. Feingold to urge him to take action or provide contact information for viewers to contact Mr. Feingold on their own initiative, nor does it reference a particular bill or proposal pending in Congress. In sum, the ad's purpose appears to be more about creating a negative impression of Mr. Feingold in the mind of the viewer than on changing Mr. Feingold's legislative behavior. Therefore, we conclude that "Bucket" is indicative of a major purpose to nominate or elect federal candidates.

3. Health Care

In the fall of 2010, Congress was engaged in a lengthy debate over efforts to repeal the Affordable Care Act. By September of that year, 15 bills had been introduced in Congress to repeal or revise the law.⁴⁴ AAN described itself as "strongly opposed" to the Affordable Care Act. During the ongoing debate, AAN spent about \$3.58 million on six advertisements advocating its position and urging viewers to lobby their congressional representatives to fix or repeal the law:

(1) *Leadership* (\$146,135):

[Announcer:] Herseth Sandlin on health care: [Herseth Sandlin:] "I stood up to my party leadership and voted no." [Announcer:] The truth is Herseth Sandlin supports keeping

⁴⁴ See Jenks, *supra* note 30.

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Obamacare, a trillion dollar health care debacle, billions in new job-killing taxes. It cuts five hundred billion from Medicare for seniors then spends our money on health care for illegal immigrants. Tell Congresswoman Herseth Sandlin to vote for repeal in November. [Superimposed text: "Tell Congresswoman Herseth Sandlin to vote for repeal in November H.R. 4903 (202)225-2801"].

(2) *Mess* (\$137,900):

A government health care mess thanks to Nancy Pelosi and Chris Murphy. Five hundred billion in Medicare cuts, free health care for illegal immigrants, thousands of new IRS agents, jail time for anyone without coverage, and now a forty-seven percent increase in Connecticut health care premiums. Forty-seven percent! Call Chris Murphy. Tell him to repeal his government health care mess. [Superimposed text: "Call Chris Murphy. In November, tell him to repeal his government healthcare mess. Vote for H.R. 4903."]

(3) *Read This* (\$1,065,000):

[On-screen text:] Congress doesn't want you to read this. Just like [Charlie Wilson/Jim Himes/Chris Murphy]. [Charlie Wilson/Jim Himes/Chris Murphy] & Nancy Pelosi rammed through government healthcare. Without Congress reading all the details. \$500 billion in Medicare cuts. Free healthcare for illegal immigrants. Even Viagra for convicted sex offenders. So tell [Charlie Wilson/Jim Himes/Chris Murphy] to read this: In November, fix the healthcare mess Congress made.

(4) *Repeal* (\$435,000):

Obamacare. A trillion-dollar health care debacle. Yet Congressman Critz says he opposes repealing it. It means five hundred billion in new job-killing taxes. Cuts billions from Medicare for seniors. And spends our tax dollars on health insurance for illegal immigrants. Yet Congressman Critz says he wants to keep it. Tell Congressman Mark Critz to vote for repeal in November. [Superimposed text: "Tell Congressman Critz, Vote for Repeal in November. H.R. 4903. (202)225-2065"].

(5) *Secret* (\$370,000):

Remember this? [PELOSI:] "We have to pass the bill so that you can, uh, find out what is in it." Now we know what Pelosi and Mark Schauer were hiding. A trillion-dollar health care debacle. Billions in new job-killing taxes. They cut five hundred billion from Medicare for seniors, then spent our money on health insurance for illegal immigrants. In November, tell Congressman Mark Schauer to vote for repeal. [Superimposed text: "In November, tell Schauer to vote for repeal H.R. 4903 (202)225-6276"].

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(6) *Skype*⁴⁵ (\$1,430,000):

Person 1: Hey, what's up?

Person 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.

Person 1: Are you serious?

Person 2: Yep. I mean, Viagra for rapists? With my tax dollars? And Congressman Perlmutter [Congresswoman Titus] voted for it.

Person 1: Perlmutter [Titus] voted for it?

Person 2: Yep. I mean, what is going on in Washington?

Person 1: [In November] We need to tell Perlmutter [Titus] to repeal it in November. [Superimposed text: "Tell Congresswoman Titus to vote for repeal in November. Vote Yes on H.R. 4903. (202)225-3252"]

Each of these ads criticizes provisions of the Affordable Care Act and advocates for its repeal. Five of the six ads specifically identify H.R. 4903, which called for repeal of the entire Affordable Care Act, and urge viewers to lobby their representatives to vote for it. None of these ads makes any reference to candidacies or the election. Similar to the ads discussed above, the references to "November" in the healthcare ads relate to officeholders participating in the lame-duck session of Congress. The criticisms contained in the ads are couched in terms of past votes taken by the named officeholders and are accompanied by calls to action designed to influence the officeholders' votes in the lame-duck session. And regardless of whether they won reelection, every named officeholder would be participating in the lame-duck session. For these reasons, we conclude that these ads do not indicate a major purpose to nominate or elect federal candidates.

As the court suggested, a close call among these ads is "Read This." The ad criticizes not only the policy judgment of the named officeholders but also the officeholders' role in the process by which the Affordable Care Act was enacted. And one could argue that the call to action — "fix the healthcare mess Congress made" — could be read to ask viewers (rather than the named officeholders) to act "[i]n November." However, in light of the ongoing debate in Congress regarding the Affordable Care Act and the fact that Congress would meet in November, we conclude that this ad is best understood as a call to action to motivate viewers to contact the named officeholders and tell them to "fix the healthcare mess" during the lame-duck session. Nevertheless, as explained further below, even if the spending for this ad were considered indicative of a major purpose to nominate or elect federal candidates, AAN's overall spending still would not trigger the major purpose threshold.

⁴⁵ The text below was from the version that identified Congressman Perlmutter with brackets around text that differed in the version that identified Congresswoman Titus.

1-9047410-10415

4. Energy

In 2009, the House of Representatives passed a cap-and-trade bill that quickly generated considerable controversy.⁴⁶ Presumably because of the politically charged debate surrounding cap-and-trade, the Senate did not take up the House bill before going into recess prior to the election,⁴⁷ leading to speculation that Congress might attempt to vote on it during the lame-duck session.⁴⁸ It is against this background that AAN spent \$711,000 on two ads opposing the cap-and-trade legislation, which was consistent with the group's position on energy issues in general.⁴⁹

(a) *Read This (Boucher)* (\$226,000):

[On screen text] Rick Boucher wants to keep you in the dark. About his Washington Cap and Trade deal. Boucher sided with Nancy Pelosi. For billions in new energy taxes. That will kill thousands of Virginia jobs. But Rick Boucher didn't just vote for Cap and Trade. The Sierra Club called Boucher the "linchpin" of the entire deal. Call Rick Boucher. [Phone number at top of screen] Tell him no more deals.

(b) *New Hampshire* (\$484,999):

Winter's here soon. Guess Congressman Hodes has never spent nights sleepless, unable to pay utility bills. Why else would he vote for the cap-and-trade tax? Raise electric rates by ninety percent? Increase gas to four dollars? Cost us another two million jobs? Kelly Ayotte would stop the cap-and-trade tax. Cold.

"Read This (Boucher)" contains no references to candidacies or the election. Rather, it criticizes the cap-and-trade bill and Mr. Boucher's role in its passage. It urges viewers to call Mr. Boucher to "[t]ell him no more deals." Thus, the call to action focuses on altering Mr. Boucher's voting stance rather than encouraging viewers to defeat Mr. Boucher in the election.

⁴⁶ The House passed the American Clean Energy and Security Act of 2009 (H.R. 2454) on June 26, 2009 by a vote of 219-212. <https://www.govtrack.us/congress/bills/111/hr2454>.

⁴⁷ During the summer of 2010, The Hill reported that "[o]ne issue that apparently won't creep back onto the agenda is legislation to impose a cap on greenhouse gas emissions. 'It doesn't appear so at this stage,' [then-Senate Majority Leader Harry] Reid said when asked whether a cap-and-trade plan could be revived. 'It doesn't have the traction that a lot of us wish it had.'" Ben Geman, *Reid Puts Renewables Mandate in Play, Eyes Lame-Duck Energy Bill*, The Hill, Aug. 31, 2010, <http://thehill.com/policy/energy-environment/116633-reid-put-renewables-mandate-back-in-play-eyes-lame-duck-energy-bill>.

⁴⁸ *Id.* ("Reid also suggested passing energy legislation could be more likely during a lame-duck session").

⁴⁹ Empowering American-Made Energy, <https://americanactionnetwork.org/category/energy/#axzz4M3Kftah> ("America is blessed with abundant energy resources—oil, natural gas, wind, solar, water and more. Along with clean energy technologies, our economy should be fueled by an all-of-the-above policy—not choked by detrimental Washington regulations and energy bans.").

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Considering the possibility that cap-and-trade legislation would be considered by Congress during the lame-duck session, Mr. Boucher's participation in the debate on cap-and-trade if it were to be considered, and AAN's position on this issue, we conclude that "Read This" is best categorized as a grassroots lobbying ad.

Similar to "Read This (Boucher)," "New Hampshire" also contains criticisms of a sitting officeholder's past votes on cap-and-trade legislation. However, it does not contain a call to action. And while the ad contains no express references to candidacies or the election, it contrasts Mr. Hodes' position with that of Kelly Ayotte, who was Mr. Hodes' opponent in the 2010 U.S. Senate race held in New Hampshire. This contrast may indicate an electoral purpose. Accordingly, the funds spent on "New Hampshire" will be added to the amounts AAN spent on independent expenditures for purposes of determining the group's major purpose.

5. Miscellaneous

The following two ads do not have a specific issue-oriented focus but rather assess several different policy positions taken by the named individuals. Since neither individual mentioned in the ads was a sitting officeholder at the time the ads ran, the prospect of a lame-duck session in November 2010 is an irrelevant factor when evaluating their content.

(a) *Order* (\$225,000):

[On screen text:] If Nancy Pelosi gave an order . . . would you follow it? Mike Oliverio would. Oliverio says he would support Pelosi in Washington. After all, Oliverio voted himself a 33% pay raise. Oliverio voted for higher taxes. Even on gas. And Oliverio won't repeal Obama's \$500 billion Medicare cuts. So what will Mike Oliverio do in Washington? Whatever Nancy Pelosi tells him to.

(b) *Extreme* (\$875,000):

[On screen 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 businesses. And \$846 billion in job killing taxes for cap and trade. Nancy Pelosi is not extreme. Compared to Annie Kuster.

Neither ad contains a call to action, nor do they focus on changing the voting behavior or policy stances of the named individuals now or in the future. Thus, they do not appear to be grassroots lobbying communications. In fact, the subtext of both ads is that neither individual is likely to change since, in the case of Mr. Oliverio, he will do "[w]hatever Nancy Pelosi tells him to," while in the case of Ms. Kuster, she is more extreme than Nancy Pelosi. And though there is no express election-related content in either ad, "Order" criticizes what Mr. Oliverio would "do in Washington" — namely, "support Nancy Pelosi — while "Extreme" criticizes Ms. Kuster's positions on federal policies. The ads thus appear to be untethered to an issue and may

reasonably support an inference that their cost may count toward a determination that AAN's major purpose was the nomination or election of federal candidates.

C. Spending Analysis Conclusion

From its founding in July 2009 through June 2011, AAN reported spending \$27,139,009. Of that amount, AAN spent approximately \$4,096,910 on independent expenditures (15% of its overall spending).⁵⁰ As explained above, we add to this dollar figure the spending associated with the "Bucket," "New Hampshire," "Order," and "Extreme" (\$1,875,394) ads, which yields a total of \$5,972,304 or 22% of AAN's overall spending. Even if we were to add in the costs for the "Read This" ad (\$1,065,000),⁵¹ AAN's total outlay on ads indicating a purpose to nominate or elect federal candidates would still constitute only 26% — well under half — of its overall spending.⁵²

III. CONCLUSION

The Supreme Court has held that the Commission may regulate entities as "political committees" within the meaning of the Act only if they have as their major purpose the nomination or election of a candidate.⁵³ Our judicially approved case-by-case approach to determining political committee status involves a fact-intensive analysis of an organization's "overall conduct" to determine "whether its major purpose is Federal campaign activity (*i.e.*, the nomination or election of a candidate)."⁵⁴ According to the 2007 Supplemental E&J, "[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."⁵⁵

As noted above, the Court here refrained from establishing a "bright-line rule" of its own.⁵⁶ The Court found that "the FEC's choices regarding the timeframe and spending amounts relevant in applying the major purpose test are implementation choices within the agency's sphere of competence, and therefore warrant deference."⁵⁷ The Court also acknowledged that the

⁵⁰ MUR 6589 (AAN), Supplemental Response (Form 990: Return of Organization Exempt from Income Tax 2010).

⁵¹ For the reasons discussed above, we conclude that this ad is better categorized as a grassroots lobbying communication.

⁵² Even if we considered AAN's spending solely in a single year (the July 1, 2010 to June 30, 2011 fiscal year disclosed on its 2010 IRS Form 990), the amount of its spending that indicates a purpose to nominate or elect federal candidates would constitute less than 28% of its total spending in that time period (\$7,037,304 of \$25,692,334).

⁵³ *Buckley*, 424 U.S., at 79.

⁵⁴ Supplemental E&J at 5597.

⁵⁵ *Id.* at 5601.

⁵⁶ *CREW v. FEC*, 2016 WL 5107018 at *10.

⁵⁷ *Id.* at *7.

Commission's "adjudicative, case-by-case approach" to determining a group's political committee status is "an implementation choice which has been litigated, scrutinized, and ultimately validated by a fellow court in this District."⁵⁸

Accordingly, we have endeavored to implement our case-by-case approach in conformity with the analytical standards addressed in the Court's opinion to adjudicate AAN's political committee status. This entailed a holistic analysis, incorporating a fact-intensive comparison of organizational documents, activities, and communications in the administrative record.⁵⁹ We relied heavily on our expertise and experience regulating political activities and non-political committees, while remaining mindful of the challenges we face when administering and enforcing the Act's requirements against a broad range of groups and political activities, and in consideration of the public's need and right to understand prospectively the law and regulatory consequences of its political speech.

One aspect of an organization's "overall conduct" that we evaluate is its spending on communications that clearly manifest the purpose to nominate or elect a federal candidate. When we first considered this matter, we concluded that AAN's electioneering communications at issue in this matter were issue ads that did not contain express advocacy and, therefore, did not count towards the amount of its spending that could indicate that its major purpose was the nomination or election of candidates. On remand, we considered all electioneering communications on an ad-by-ad basis. We counted the costs of those that communicated a clear purpose of nominating or electing federal candidates and compared those expenditures to AAN's overall spending. In this case, such spending totaled no more than 26% of AAN's overall spending.

In sum, upon conducting our fact-intensive case-by-case analysis, which included consideration of AAN's mode of organization, official statements, and the fact that less than half of its spending indicates a major purpose of nominating or electing candidates, we conclude that there is no reason to believe that AAN violated the Act by failing to register with the Commission as a political committee.

⁵⁸ *Id.* at *2 (citing *Shays v. FEC*, 424 F.Supp.2d 100 (D.D.C. 2006); *Shays v. FEC*, 511 F.Supp.2d 19, 30 (D.D.C.2007)).

⁵⁹ MUR 6589 (American Action Network), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 17-20.

Oct. 19, 2016
Date

Matthew S. Petersen
Matthew S. Petersen
Chairman

October 19, 2016
Date

Lee E. Goodman
Lee E. Goodman
Commissioner

October 19, 2016
Date

Caroline C. Hunter
Caroline C. Hunter
Commissioner

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