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SENSITIVE FEDERAL ELECTION COMMISSION

999 E Street, N.W.
Washington, D.C. 20463

CELA

FIRST GENERAL COUNSEL'S REPORT

MUR: 6589

DATE OF COMPLAINT: 6/7/12

DATE OF NOTIFICATION: 6/12/12

DATE OF LAST RESPONSE: 10/1/12

DATE ACTIVATED: 8/20/12

EXPIRATION OF SOL: 7/23/14

COMPLAINANTS:

Citizens for Responsibility and Ethics in
Washington

Melanie Sloan

RESPONDENT:

American Action Network and Stephanie Fenjiro in
her capacity as treasurer

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 431(4)

2 U.S.C. § 432

2 U.S.C. § 433

2 U.S.C. § 434

26 U.S.C. § 501(c)

11 C.F.R. § 100.22

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

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1 **I. INTRODUCTION**

2 This matter involves allegations that American Action Network (“AAN”) violated the
3 Federal Election Campaign Act of 1971, as amended (“the Act”), by failing to organize, register,
4 and report as a political committee after spending over \$17 million on independent expenditures
5 and electioneering communications between July 2009 and June 2011. *See* Compl. at ¶¶ 19-31.

6 AAN concedes that it exceeded the Act’s \$1,000 threshold for expenditures or
7 contributions triggering political committee status. 2 U.S.C. § 431(4). AAN argues, however,
8 that it is not a political committee because it lacks the requisite major purpose: the nomination
9 or election of federal candidates. Resp. at 1-2. AAN’s argument rests on the assertion that it
10 spent greater sums on activity not considered express advocacy than it did on independent
11 expenditures. Resp. at 2-3. In our view, the argument is wide of the mark.

12 As discussed below, the available information regarding AAN’s overall conduct supports
13 a finding that there is reason to believe that AAN had as its major purpose the nomination or
14 election of federal candidates during 2010. Accordingly, we recommend that the Commission
15 find reason to believe that AAN violated 2 U.S.C. §§ 432, 433, and 434 by failing to organize,
16 register, and report as a political committee, and authorize an investigation.

17 **II. FACTUAL AND LEGAL ANALYSIS**

18 **A. Facts**

19 1. AAN

20 AAN, formed in 2009, is a nonprofit corporation organized under section 501(c)(4) of the
21 Internal Revenue Code. Resp. at 3. AAN describes as its mission to “create, encourage and
22 promote center-right policies based on the principles of freedom, limited government, American
23 exceptionalism, and strong national security,” and states that its “primary goal is to put our

1 center-right ideas into action by engaging the hearts and minds of the American people and
2 spurring them into active participation in our democracy.”
3 <http://americanactionnetwork.org/about>. Its Board Members are Norm Coleman, Fred Malek,
4 Isaac Applbaum, Dylan Glenn, Boyden Gray, Mel Martinez, Jim Nussle, Tom
5 Reynolds, Gregory Slayton, and Vin Weber. *Id.*

6 2. AAN's Activities

7 According to its publicly-available tax returns, AAN received \$30,229,735 and spent
8 \$27,139,009 over its fiscal years 2009 and 2010, a period which ran from July 23, 2009, through
9 June 30, 2011. *See* Form 990, 2009 Tax Return of American Action Network at 1; Form 990,
10 2010 Tax Return of American Action Network at 1.

11 According to AAN, approximately 19% (\$5,221,061) of its spending over the two-year
12 period was for “political campaign activities” as defined by the IRS, and only about 15%
13 (\$4,096,910¹) was for “independent expenditures” as defined by the Act and Commission
14 regulations. *Supp. Resp.* at 1. Electioneering communications comprised the largest category of
15 AAN's expenses over the two-year span of the complaint and totals approximately \$13,792,875
16 — all spent in calendar year 2010. AAN states that it has engaged in “extensive issue advocacy
17 activities, including television and digital advertising focused on fiscal responsibility, healthcare
18 reform, regulatory reform and other federal legislative issues....” *Resp.* at 3. AAN also has
19 hosted “educational activities, including grassroots policy events and [held] interactive policy
20 briefings called ‘Learn and Lead’ with activists and guest speakers....” *Id.* at 4.²

¹ The Commission's records put the total at \$4,097,962.29 for the two-year period. Approximately \$4,044,572 of that total was spent during 2010.

² The “Learn and Lead” articles and accompanying clips are available at <http://americanactionnetwork.org/learn-and-lead>.

1 **B. Analysis**

2 1. The Test for Political Committee Status

3 The Act and Commission regulations define a “political committee” as “any committee,
4 club, association or other group of persons which receives contributions aggregating in excess of
5 \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000
6 during a calendar year.” 2 U.S.C. § 431(4)(A); 11 C.F.R. § 100.5. In *Buckley v. Valeo*, 424 U.S.
7 1 (1976), the Supreme Court held that defining political committee status “only in terms of the
8 annual amount of ‘contributions’ and ‘expenditures’” might be overbroad, reaching “groups
9 engaged purely in issue discussion.” *Id.* at 79. To cure that infirmity, the Court concluded that
10 the term “political committee” “need only encompass organizations that are under the control of
11 a candidate or the *major purpose of which is the nomination or election of a candidate.*” *Id.*
12 (emphasis added). Accordingly, under the statute as thus construed, an organization that is not
13 controlled by a candidate must register as a political committee only if (1) it crosses the \$1,000
14 threshold and (2) it has as its “major purpose” the nomination or election of federal candidates.

15 a. The Commission’s Case-By-Case Approach to Major Purpose

16 Although *Buckley* established the major purpose test, it provided no guidance as to the
17 proper approach to determine an organization’s major purpose. *See, e.g., Real Truth About*
18 *Abortion, Inc. v. FEC*, 681 F.3d 544, 556 (4th Cir. 2012), *cert. denied*, 81 U.S.L.W. 3127 (U.S.
19 Jan. 7, 2013) (No. 12-311) (“*RTAA*”). The Supreme Court’s discussion of major purpose in a
20 subsequent opinion, *Massachusetts Citizens for Life v. FEC*, 479 U.S. 238 (1986) (“*MCFL*”),
21 was similarly sparse. *See id.* at 262. In that case, the Court identified an organization’s
22 independent spending as a relevant factor in determining an organization’s major purpose, but
23 examined the entire record as part of its analysis and did not chart the outer bounds of the test.

1 479 U.S. at 238. Following *Buckley* and *MCFL*, lower courts have refined the major purpose test
2 — but only to a limited extent.³ In large measure, the contours of political committee status —
3 and the major purpose test — have been left to the Commission.⁴

4 Following *Buckley*, the Commission adopted a policy of determining on a case-by-case
5 basis whether an organization is a political committee, including whether its major purpose is the
6 nomination or election of federal candidates. Political Committee Status, 72 Fed. Reg. 5,596
7 (Feb. 7, 2007) (Supplemental Explanation and Justification). The Commission has periodically
8 considered proposed rulemakings that would have determined major purpose by reference to a
9 bright-line rule — such as proportional (*i.e.*, 50%) or aggregate threshold amounts spent by an
10 organization on federal campaign activity. But the Commission consistently has declined to
11 adopt such bright-line rules. *See* Independent Expenditures; Corporate and Labor Organization
12 Expenditures, 57 Fed. Reg. 33,548, 33,558-59 (July 29, 1992) (Notice of Proposed Rulemaking);
13 Definition of Political Committee, 66 Fed. Reg. 13,681, 13,685-86 (Mar. 7, 2001) (Advance
14 Notice of Proposed Rulemaking); *see also* Summary of Comments and Possible Options on the
15 Advance Notice of Proposed Rulemaking on the Definition of “Political Committee,”
16 Certification (Sept. 27, 2001) (voting 6-0 to hold proposed rulemaking in abeyance).

³ *See* *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 396 (D.C. Cir. 1981) (stating that political committee “contribution limitations did not apply to . . . groups whose activities did not support an existing ‘candidate’” and finding Commission’s subpoena was overly intrusive where directed toward “draft” group lacking a “candidate” to support); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 861-62 (D.D.C. 1996) (holding that a group’s support of a “farm team” of future potential federal candidates at the state and local level did not make it a political committee under the Act); *see also* *Unity08 v. FEC*, 596 F.3d 861, 869 (D.C. Cir. 2010) (concluding that an organization “is not subject to regulation as a political committee unless and until it selects a ‘clearly identified’ candidate”).

⁴ Like other administrative agencies, the Commission has the inherent authority to interpret its statute through a case-by-case approach. *See* *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947) (“[T]he choice made between proceeding by general rule or by individual . . . litigation is one that lies primarily in the informed discretion of the administrative agency.”).

1 In 2004, for example, the Commission issued a notice of proposed rulemaking asking
2 whether the agency should adopt a regulatory definition of “political committee.” *See* Political
3 Committee Status, 69 Fed. Reg. 11,736, 11,745-49 (Mar. 11, 2004) (Notice of Proposed
4 Rulemaking). The Commission declined to adopt a bright-line rule, noting that it had been
5 applying the major purpose test “for many years without additional regulatory definitions,” and
6 concluded that “it will continue to do so in the future.” *See* Final Rules on Political Committee
7 Status, Definition of Contribution, and Allocation for Separate Segregated Funds and
8 Nonconnected Committees, 69 Fed. Reg. 68,056, 68,064-65 (Nov. 23, 2004).

9 b. Challenges to the Commission’s Major Purpose Test and the
10 Supplemental E&J
11

12 When the Commission’s 2004 decision not to adopt a regulatory definition was
13 challenged in litigation, the court rejected plaintiffs’ request that the Commission initiate a new
14 rulemaking. *Shays v. FEC*, 424 F. Supp. 2d 100, 117 (D.D.C. 2006) (“*Shays I*”). The district
15 court found, however, that the Commission had “failed to present a reasoned explanation for its
16 decision” to engage in case-by-case decision-making, rather than rulemaking, and remanded the
17 case to the Commission to explain its decision. *Id.* at 116-17.

18 Responding to the remand, the Commission issued a Supplemental Explanation and
19 Justification for its final rules on political committee status to further explain its case-by-case
20 approach and provide the public with additional guidance as to its process for determining
21 political committee status. Political Committee Status, 72 Fed. Reg. 5595 (Feb. 7, 2007)
22 (“Supplemental E&J”). The Supplemental E&J explained that “the major purpose doctrine
23 requires fact-intensive analysis of a group’s campaign activities compared to its activities
24 unrelated to campaigns.” *Id.* at 5601-02. The Commission concluded that the determination of
25 an organization’s major purpose “requires the flexibility of a case-by-case analysis of an

1 organization's conduct that is incompatible with a one-size fits-all rule," and that "any list of
2 factors developed by the Commission would not likely be exhaustive in any event, as evidenced
3 by the multitude of fact patterns at issue in the Commission's enforcement actions considering
4 the political committee status of various entities." *Id.*

5 To determine an entity's "major purpose," the Commission explained that it considers a
6 group's "overall conduct," including public statements about its mission, organizational
7 documents, government filings (*e.g.*, IRS notices), the proportion of spending related to "federal
8 campaign activity," and the extent to which fundraising solicitations indicate funds raised will be
9 used to support or oppose specific candidates. *Id.* at 5597, 5605. Among other things, the
10 Commission informed the public that it compares how much of an organization's spending is for
11 "*federal campaign activity*" relative to "activities that [a]re not campaign related." *Id.* at 5601,
12 5605 (emphasis added).

13 To provide the public with additional guidance, the Supplemental E&J referenced
14 enforcement actions on the public record, as well as advisory opinions and filings in civil
15 enforcement cases following the 2004 rulemaking. *Id.* at 5604-05. The Commission noted that
16 the settlements in several MURs involving section 527 organizations "provide considerable
17 guidance to all organizations" regarding the application of the major purpose test and "reduce
18 any claim of uncertainty because concrete factual examples of the Committee's political
19 committee analysis are now part of the public record." *Id.* at 5595, 5604.

20 After the Commission issued the Supplemental E&J, the *Shays I* plaintiffs again
21 challenged, under the Administrative Procedure Act, 5 U.S.C. §§ 551-59, the Commission's
22 case-by-case approach to political committee status. The court rejected the challenge, upholding
23 the Commission's case-by-case approach as an appropriate exercise of the agency's discretion.

1 *Shays v. FEC*, 511 F. Supp. 2d 19, 24 (D.D.C. 2007) (“*Shays II*”). The court recognized that “an
2 organization . . . may engage in many non-electoral activities so that determining its major
3 purpose requires a very close examination of various activities and statements.” *Id.* at 31.

4 Recently, the Fourth Circuit rejected a constitutional challenge to the Commission’s case-
5 by-case determination of major purpose. The court upheld the Commission’s approach, finding
6 that *Buckley* “did not mandate a particular methodology for determining an organization’s major
7 purpose,” and so the Commission was free to make that determination “either through
8 categorical rules or through individualized adjudications.” *RTAA*, 681 F.3d at 556. The court
9 concluded that the Commission’s case-by-case approach was “sensible, . . . consistent with
10 Supreme Court precedent and does not unlawfully deter protected speech.” *Id.* at 558.⁵ The
11 Fourth Circuit concluded that the Supplemental E&J provides “ample guidance as to the criteria
12 the Commission might consider” in determining an organization’s political committee status and
13 therefore is not unconstitutionally vague. *Id.*; see Transcript of Telephonic Oral Ruling, *Free*
14 *Speech v. FEC*, No. 12-CV-127-SWS, at 21-22 (D. Wy. Oct. 3, 2012) (citing *RTAA* and finding

⁵ The *RTAA* court rejected an argument — similar to the one made by AAN here — that the major purpose test must be confined to “(1) examining an organization’s expenditures to see if campaign-related speech amounts to 50% of all expenditures; or (2) reviewing ‘the organization’s central purpose revealed by its organic documents.’” *RTAA*, 681 F.3d at 555. The Fourth Circuit recognized that determining an organization’s major purpose “is inherently a comparative task, and in most instances it will require weighing some of the group’s activities against others.” *Id.* at 556; see also *Koerber v. FEC*, 483 F. Supp. 2d 740 (E.D.N.C. 2008) (denying preliminary relief in challenge to Commission’s approach to determining political committee status, and noting that “an organization’s ‘major purpose’ is inherently comparative and necessarily requires an understanding of an organization’s overall activities, as opposed to its stated purpose”); *FEC v. Malenick*, 310 F. Supp. 2d 230, 234-37 (D.D.C. 2004) (considering organization’s statements in brochures and “fax alerts” sent to potential and actual contributors, as well as its spending influencing federal elections); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996) (“The organization’s purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates.”); *id.* at 864, 866 (applying a fact-intensive inquiry, including review of organizations’ meetings attended by national leaders and organization’s “Political Strategy Campaign Plan and Budget,” and concluding that organization did not have as its major purpose the election of federal candidates).

1 Commission's method of determining political committee status to be constitutional), *appeal*
 2 *docketed*, No. 12-8078 (10th Cir. Oct. 19, 2012).⁶

3 c. Organizational and Reporting Requirements for Political
 4 Committees
 5

6 Political committees — commonly known as “PACs” — must comply with certain
 7 organizational and reporting requirements set forth in the Act. PACs must register with the
 8 Commission, file periodic reports for disclosure to the public, appoint a treasurer who maintains
 9 its records, and identify themselves through “disclaimers” on all of their political advertising, on
 10 their websites, and in mass e-mails. *See* 2 U.S.C. §§ 432-34; 11 C.F.R. §110.11(a)(1).⁷ The
 11 Act's reporting requirements “are minimal” and the organizational requirements are not “much
 12 of an additional burden.” *SpeechNow.org v. FEC*, F.3d 686, 696 (D.C. Cir. 2010)
 13 (“*SpeechNow*”). These requirements, which promote disclosure, do not, of course, prohibit
 14 speech. *RTAA*, 681 F.3d at 552 n.3.

15 In the wake of the Supreme Court's decision in *Citizens United v. FEC*, 130 S. Ct. 876
 16 (2010), which struck down the Act's prohibitions on corporate independent expenditures and
 17 electioneering communications, the D.C. Circuit held in *SpeechNow* that political committees
 18 that engage only in independent expenditures are not subject to contribution limits. *See* 599 F.3d
 19 at 696. These political committees, often referred to as independent expenditure-only political

⁶ The Supreme Court's decision in *FCC v. Fox Television Stations, Inc.* is not to the contrary. *See* 132 S. Ct. 2307, 2317 (2012) (“[A] regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved”). In that case, the FCC's indecency standard was held to be vague for lack of notice when it applied a new stricter standard, ex post facto, to the Fox defendants, and when it relied on a single “isolated and ambiguous statement” from a 50-year old administrative decision to support its finding of indecency against the ABC defendants. *Id.* at 2319. Here, in sharp contrast, the Supplemental E&J — which was issued several years before the conduct at issue — provides extensive guidance on the Commission's approach to major purpose and has withstood both APA and constitutional challenges. *See also Center for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. 2012) (“*Madigan*”) (rejecting vagueness challenge to the definition of “political committee” in the Illinois campaign finance statute).

⁷ An organization must register as a political committee when it crosses the \$1,000 threshold and determines, based on the guidance in the Supplemental E&J, that it has the requisite major purpose.

1 committees or Super PACs, continue to be subject, however, to the “minimal” “reporting
2 requirements of 2 U.S.C. §§ 432, 433, and 434(a), and the organizational requirements of
3 2 U.S.C. §§ 431(4) and 431(8).” *Id.* at 689.

4 Notably, the Supreme Court has stressed that such requirements serve the vital role of
5 disclosure in political discourse. *See Citizens United*, 130 S. Ct. at 916 (recognizing that
6 increased “transparency” resulting from FECA disclosure requirements “enables the electorate to
7 make informed decisions and give proper weight to different speakers and messages”); *Doe v.*
8 *Reed*, 561 U.S. ___, 130 S. Ct. 2811, 2820 (2010) (holding that public disclosure of state
9 referendum petitions serves important government interest of “promot[ing] transparency and
10 accountability in the electoral process,” and “preserving the integrity of the electoral process”);
11 *Madigan*, 697 F.3d at ___ (upholding Illinois’s campaign finance disclosure provisions against
12 constitutional facial challenge, finding a substantial relation to “Illinois’s interest in informing its
13 electorate about who is speaking before an election”); *see also Doe*, 130 S. Ct. at 2837 (Scalia,
14 J., concurring) (“Requiring people to stand up in public for their political acts fosters civic
15 courage, without which democracy is doomed.”).⁸

16 2. Application of the Test for Political Committee Status to AAN

17 a. Statutory Threshold

18
19 To assess whether an organization has made an “expenditure,” the Commission “analyzes
20 whether expenditures for any of an organization’s communications made independently of a
21 candidate constitute express advocacy either under 11 C.F.R. § 100.22(a), or the broader
22 definition at 11 C.F.R. § 100.22(b).” Supplemental E&J at 5606. AAN states that it spent

⁸ *But cf. Minn. Citizens for Life, Inc. v. Swanson*, 692 F.3d 864, 876 (8th Cir. 2012) (striking down certain registration and disclosure provisions of Minnesota’s campaign finance law, finding that those obligations as applied to associations that do *not* meet Buckley’s “major purpose test” are unduly burdensome and do not match any “sufficiently important disclosure interest”).

1 \$4,096,910⁹ on reported independent expenditures between July 2009 and June 2011. Resp.
2 at 25. According to the Commission's records, approximately \$4,044,572 of that total was spent
3 in 2010. Thus, AAN far exceeded the \$1,000 statutory threshold for political committee status.
4 *See* 2 U.S.C. § 431(4)(A); 11 C.F.R. § 100.5.

5 b. Major Purpose

6
7 AAN states in its response, on its website, and in its tax returns, that its major purpose is
8 not federal campaign activity, but rather advocating issues and educating the public. *See* Resp. at
9 3-4; <http://americanactionnetwork.com/about>; 2009 Tax Return at 2; 2010 Tax Return at 2,
10 Schedule O. The Commission noted in the Supplemental E&J that it may consider such
11 statements in its analysis of an organization's major purpose, Supplemental E&J at 5606, but that
12 such statements are not necessarily dispositive. *See Real Truth About Obama v. FEC*, No. 3:08-
13 cv-00483, 2008 WL 4416282, at *14 (E.D. Va. Sept. 24, 2008) ("A declaration by the
14 organization that they are *not* [organized] for an electioneering purpose is not dispositive.")
15 (emphasis in original, alteration added), *aff'd*, 575 F.3d 342 (4th Cir. 2009), *vacated on other*
16 *grounds*, 130 S. Ct. 2371 (2010), *remanded and decided*, 796 F. Supp. 2d 736, *affirmed sub nom.*
17 *Real Truth About Abortion v. FEC*, 681 F.3d 544 (4th Cir. 2012), *cert. denied*, 81 U.S.L.W. 3127
18 (U.S. Jan. 7, 2013) (No. 12-311). Under the Commission's case-by-case approach, the
19 Commission considers the organization's "overall conduct," including its disbursements,
20 activities, and statements. Supplemental E&J at 5597. In this case, AAN's proportion of
21 spending related to federal campaign activity is alone sufficient to establish that its major
22 purpose in 2010 was the nomination or election of federal candidates.

⁹ Again, the Commission's records put the total at \$4,097,962.

1 AAN reported spending approximately \$4,044,572 on independent expenditures in 2010.
2 In addition, the available information indicates that AAN spent at least \$12,968,445 in 2010 on
3 communications that support or oppose a clearly identified Federal candidate, but do not contain
4 express advocacy. In past enforcement actions, the Commission has determined that funds spent
5 on communications that support or oppose a clearly identified federal candidate, but do not
6 contain express advocacy, should be considered in determining whether that group has federal
7 campaign activity as its major purpose.¹⁰

8 For example, the Commission has relied, in part, on the following advertisements in
9 determining that an entity was a political committee:

- 10 • **“Child’s Pay”**: The advertisement contains “images of children performing
11 labor-intensive jobs: washing dishes in a restaurant kitchen, vacuuming a hotel
12 hallway, working on an assembly line in a factory, collecting garbage, working at
13 an auto repair shop, and checking groceries,” and concludes with the question:
14 “Guess who’s going to pay off President Bush’s \$1 trillion deficit?”¹¹
15
- 16 • **“70 Billion More”**: The advertisement shows images of a young boy sitting at a
17 school desk and a young girl with a thermometer in her mouth. The voice-over
18 states: “We could build thousands of new schools, or hire a million new teachers.
19 We could make sure every child has insurance. Instead, George Bush has spent
20 \$150 billion in Iraq and has a secret plan to ask for \$70 billion more. But after

¹⁰ See Conciliation Agreement ¶ IV.11, MUR 5754 (MoveOn.org Voter Fund) (relying on funds used for advertisements that “opposed” or “criticized” George W. Bush to establish political committee status); Factual and Legal Analysis at 2, MUR 5753 (League of Conservation Voters 527) (finding major purpose satisfied where funds spent on door-to-door and phone bank express advocacy campaign, and also on advertisements “supporting or opposing clearly identified federal candidates, some of which contained express advocacy”); Conciliation Agreement ¶ IV.14, MUR 5487 (Progress for America Voter Fund) (concluding that PFA VF had met the major purpose test after spending 60% of its funds on communications that “praised George W. Bush’s leadership as President and/or criticized Senator Kerry’s ability to provide similar leadership”); see also Stipulation for Entry of Consent Judgment ¶ 22, *FEC v. Citizens Club for Growth, Inc.*, Civ. No. 1:05-01851 (Sept. 6, 2007) (entering stipulation of Commission, approved as part of a consent judgment, where organization was treated as a political committee because “the vast majority of [the group’s disbursements] were made in connection with federal elections, including, but not limited to, funding for candidate research, polling, and advertisements and other public communications referencing a clearly identified federal candidate”).

¹¹ Factual and Legal Analysis at 3-4, 12-13, MUR 5754 (MoveOn.Org Voter Fund). The full communication can be viewed at <http://www.youtube.com/watch?v=A9WKimKIyUQ>.

1 four years it's now clear: George Bush has no plan for taking care of America.
 2 Face it. George Bush is not on our side.”¹²
 3

- 4 • **“Jobs”**: “Is George Bush listening to us? Since taking office, he’s let oil and
 5 energy companies call the shots. Special exemptions from the Clean Water and
 6 Clean Air Acts. Halliburton collecting billions in no-bid contracts. Here in
 7 Wisconsin, 52,500 manufacturing jobs lost. America is going in the wrong
 8 direction. And George Bush just listens to the special interests.”¹³
 9
- 10 • **“Yucca You Decide”**: “Yucca Mountain. While everyone plays politics, who’s
 11 looking out for Nevada? Eighty-five percent of the nuclear waste could come
 12 through Las Vegas. Past businesses. Through communities. By our schools.
 13 Accidents happen, and if so, how could Las Vegas, a city and economy built on
 14 tourism, recover? Who would come visit us then? The question: did George W.
 15 Bush really try and stop Yucca Mountain? Or was he just playing politics?”¹⁴
 16
- 17 • **“Finish It”**: [On screen: Images of Mohammed Atta, Osama bin Laden, Khalid
 18 Sheik Mohammed, Nick Berg’s killers, and victims of terrorist attacks.] “These
 19 people want to kill us. They killed hundreds of innocent children in Russia. Two
 20 hundred innocent commuters in Spain. And 3,000 innocent Americans. John
 21 Kerry has a 30-year record of supporting cuts in defense and intelligence and
 22 endlessly changed positions on Iraq. Would you trust Kerry against these fanatic
 23 killers? President Bush didn’t start this war, but he will finish it.”¹⁵
 24
- 25 • **“Ashley’s Story”**: This advertisement recounts the story of Ashley Faulkner,
 26 whose mother was killed in the September 11, 2001, terrorist attacks, and the
 27 interaction she had with President George W. Bush during a visit to Ohio. It
 28 closes with Ashley Faulkner’s father stating: “What I saw was what I want to see
 29 in the heart and in the soul of the man who sits in the highest elected office in our
 30 country.”¹⁶
 31

32 The Commission found that each of these advertisements — though not express advocacy

33 — indicated that the respondents had as their major purpose the nomination or election of federal

¹² *Id.* at 4, 12-13. The full communication can be viewed at <http://archive.org/details/movf70billionmore>.

¹³ Factual and Legal Analysis at 5, 18, MUR 5753 (League of Conservation Voters 527). The full communication can be viewed at http://archive.org/details/lcv_jobs_102604.

¹⁴ *Id.* at 5, 18. The full communication can be viewed at http://archive.org/details/lcv_yucca_decide.

¹⁵ Conciliation Agreement ¶ IV.14, MUR 5487 (Progress for America Voter Fund). The full communication can be viewed at <http://www.livingroomcandidate.org/commercials/2004/finish-it>.

¹⁶ *Id.* The full communication can be viewed at <http://www.livingroomcandidate.org/commercials/2004/ashleys-story>.

1 candidates. These ads evidenced that the organization's major purpose was federal campaign
 2 activity because they "support," "oppose," "praise," or "criticize" the federal candidates. *See*
 3 *supra* n.10-16.

4 Likewise, the following electioneering communications on which AAN spent
 5 approximately \$12,968,445, though not express advocacy, oppose or criticize federal candidates
 6 and therefore provide evidence that AAN had as its major purpose the nomination or election of
 7 federal candidates.¹⁷

8 i. "Bucket"¹⁸

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

15 ii. "Naked"¹⁹

17 [Announcer:] How can you tell the taxpayers in Congressman Gerry
 18 Connolly's district? We're not so tough to spot. Connolly stripped us with
 19 a wasteful stimulus, spent the shirts off our backs. [On-Screen Text:] *\$14*
 20 *Trillion Debt*. [Announcer:] Connolly is taking money from our pockets

¹⁷ AAN spent approximately \$13,792,875 on electioneering communications during 2010. The communications collected here are available online in video or transcript form. We were unable to locate two advertisements on which AAN spent approximately \$824,430, that were reported to the Commission as electioneering communications: "First," which identifies Mike Oliverio (WV-01) (two separate reports of \$149,700 and \$225,000) and "Remember," which identifies Martin Heinrich (NM-01) (\$449,730). Although six of these advertisements are specifically identified in the Complaint, all of the advertisements identified in this report are included in the Complaint's allegations. *See* Compl. at 3 ("AAN reported to the FEC it spent . . . \$14,038,625 million [*sic*] on electioneering communications between July 23, 2009 and June 30, 2011"), 7 ("All of AAN's spending on . . . electioneering communications were for the purpose of the nomination or election of federal candidate [*sic*]").

¹⁸ AAN reported spending \$290,395 on this electioneering communication. This ad (or a similar ad with the same title) was also reported as an independent expenditure. A transcript is available at <http://americanactionnetwork.org/content/aan-releases-new-campaign-wisconsin>.

¹⁹ AAN reported spending a total of \$2,092,975 on seven versions of this communication featuring the following candidates: Gerry Connolly (VA-11); Joe Donnelly (IN-02); Tom Perriello (VA-05); Tim Walz (MN-01); Martin Heinrich (NM-01); Steve Kagen (WI-08); and Kurt Schrader (OR-05).

1 to put in Washington's pockets. [Actor:] "Now I don't have any pockets."
 2 [Announcer:] Now, Congress wants to strip us bare with more spending.
 3 Call Congressman Connolly. Tell him: vote to cut spending this
 4 November.

5
 6 iii. "Leadership"²⁰

7 [Announcer:] Herseth Sandlin on health care: [Herseth Sandlin:] "I stood
 8 up to my party leadership and voted no." [Announcer:] The truth is
 9 Herseth Sandlin supports keeping Obamacare, a trillion dollar health care
 10 debacle, billions in new job-killing taxes. It cuts five hundred billion from
 11 Medicare for seniors then spends our money on health care for illegal
 12 immigrants. Tell Congresswoman Herseth Sandlin to vote for repeal in
 13 November.

14
 15 iv. "Quit Critz"²¹

16 He was our district economic development director when we lost jobs and
 17 unemployment skyrocketed. Mark Critz. He supports the Obama-Pelosi
 18 agenda that's left us fourteen trillion in debt. Mark Critz. And instead of
 19 extending tax cuts for Pennsylvania families and businesses, he voted with
 20 Nancy Pelosi to quit working and leave town. Mark Critz. Tell
 21 Congressman Critz that Pennsylvania families need tax relief this
 22 November, not more government.

23
 24 v. "Taxes"²²

25 Congressman Mark Critz. We know he opposes repealing Obamacare,
 26 which means five hundred billion in new job-killing taxes. Now
 27 Congressman Critz wants to raise taxes on small businesses, a devastating
 28 blow to a weak economy. Congressman Critz even voted to delay
 29 extending child tax credits for families. Tell Congressman Mark Critz to
 30 vote to extend the tax cuts in November.
 31

²⁰ AAN reported spending \$146,135 on this communication.

²¹ AAN reported spending \$177,310 on this communication.

²² AAN reported spending \$435,000 on this communication. A transcript is available at <http://politicalcorrection.org/adcheck/201010240001>.

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vi. "Ridiculous"²³

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.

vii. "Mess"²⁴

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.

viii. "Wasted"²⁵

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.

²³ AAN reported spending \$505,000 on this communication.

²⁴ AAN reported spending \$137,900 on this communication. AAN filed two separate reports for "Mess" and "Mess revised," both of which identify Chris Murphy. The reports were filed, respectively on October 27, 2010, and October 28, 2010. The covering periods, respectively, are October 12-26 and October 12-28. The amounts, respectively, are \$14,750 and \$123,150. Both are marked as "new" reports. AAN also reported spending \$379,000 on "47," which may be the same as (or similar to) "Mess".

²⁵ AAN reported spending \$231,000 on this communication. The transcript is available at <http://politicalcorrection.org/adcheck/201010250013>.

ix. "Skype"²⁶

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 voted for it.

Person 1: Perlmutter voted for it?

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

Person 1: We need to tell Perlmutter to repeal it in November.

x. "Order"²⁷

[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.*

xi. "Read This"²⁸

[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. Tell him no more deals.*

xii. "Wallpaper"²⁹

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

²⁶ AAN reported spending a total of \$1,430,000 on two versions of this communication featuring Dana Titus (NV-03) and Ed Perlmutter (CO-07).

²⁷ AAN reported spending \$225,000 on this communication.

²⁸ AAN reported spending \$226,000 on this communication.

²⁹ AAN reported spending a total of \$1,600,000 on five versions of this communication identifying the following candidates: Steve Kagen (WI-08); Kurt Schrader (OR-05); Joe Donnelly (IN-02); Ed Perlmutter (CO-07); and Martin Heinrich (NM-01).

1 threw nearly a trillion at Pelosi's health care takeover and voted to raise
 2 the national debt to over fourteen trillion. Now Congress wants to raise
 3 taxes. Call Congressman Schrader. Tell him to vote for a tax cut this
 4 November to stop wallpapering Washington with our tax dollars.

5
 6 xiii. "Ouch"³⁰

7 During her eighteen years in Washington, Patty Murray voted for the
 8 largest tax increase in history, and repeatedly against tax relief. But this
 9 November, Murray promises to vote for a huge tax hike on small
 10 businesses. Ever heard of helping small businesses, Patty? Tell Senator
 11 Murray "ouch!" We can't afford more tax hikes.

12
 13 xiv. "Back Pack"³¹

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

22
 23 xv. "Read This"³²

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

³⁰ AAN reported spending \$652,584.69 on this communication.

³¹ AAN reported spending a total of \$1,210,000 on three versions of this communication identifying the following candidates: Tim Walz (MN-01); Gerry Connolly (VA-11); and Tom Perriello (VA-05).

³² AAN reported spending a total of \$1,065,000 on three versions of this communication identifying the following candidates: Charlie Wilson (OH-06); Jim Hines (CT-04); and Chris Murphy (CT-05). These three versions of "Read This" are distinct from the Rick Boucher version of "Read This". See *supra* n.28.

1 xvi. "Extreme"³³

2 [On-Screen Text:] *Nancy Pelosi is not extreme. Compared to Annie*
 3 *Kuster. Kuster supported the trillion dollar government Healthcare*
 4 *takeover. But says it didn't go far enough. \$525 billion in new taxes for*
 5 *government Healthcare. Now, Kuster wants \$700 billion in higher taxes*
 6 *on families and businesses. And \$846 billion in job killing taxes for cap*
 7 *and trade. Nancy Pelosi is not extreme. Compared to Annie Kuster.*

8 xvii. "Secret"³⁴

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

16 xviii. "Repeal"³⁵

18 Obamacare. A trillion-dollar health care debacle. Yet Congressman Critz
 19 says he opposes repealing it. It means five hundred billion in new job-
 20 killing taxes. Cuts billions from Medicare for seniors. And spends our tax
 21 dollars on health insurance for illegal immigrants. Yet Congressman Critz
 22 says he wants to keep it. Tell Congressman Mark Critz to vote for repeal
 23 in November.

24 xix. "New Hampshire"³⁶

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

31

³³ AAN reported spending \$875,000 on this communication.

³⁴ AAN reported spending \$370,000 on this communication.

³⁵ AAN reported spending \$435,000 on this communication.

³⁶ AAN reported spending \$484,999 on this communication. The transcript is available at <http://politicalcorrection.org/adcheck/201008050003>.

1 By contrast, limiting which expenditures *political committees* would have to disclose, the Court
2 held that the term “political committee” — as defined in Section 431(d) — “need only
3 encompass organizations that are under the control of a candidate or the major purpose of which
4 is the nomination or election of a candidate.” *Id.* at 79. Thus, the two limitations were imposed
5 on two different terms in two different sections of the Act: (1) “express advocacy” as a
6 limitation on “expenditures” made by persons other than political committees pursuant to Section
7 434(e); and (2) “major purpose” as a limitation on the definition of “political committee”
8 pursuant to Section 431(d). The opinion could have articulated a test that linked the limitations
9 — requiring, for example, that to be considered a political committee an organization’s “major
10 purposed must be to *expressly advocate* the nomination or election of a candidate.” But the
11 Court did not take that tack. Indeed, the Court noted that even “*partisan committees*,” which
12 include “groups within the control of the candidate or *primarily organized for political*
13 *activities*” would fall outside the definition of “political committee” *only* if they fail to meet the
14 statutory spending threshold. *Id.* at 80 (emphasis added).

15 Similarly, in *MCFL*, the Court’s opinion nowhere suggests that express advocacy
16 communications are the only kind of “campaign activity” that can satisfy the major purpose test.
17 *See MCFL*, 479 U.S. at 252-53, 262 (political committee requirements inapplicable to
18 “organizations whose major purpose is not *campaign advocacy*,” but “political committee” does
19 include organizations with a major purpose of “*campaign activity*”) (emphasis added). And
20 many lower federal courts have likewise decided that a determination of major purpose is not
21 restricted to consideration of a group’s express advocacy as compared to its other activities.³⁹

³⁹ *See North Carolina Right to Life v. Leake*, 525 F.3d 274, 289 (4th Cir. 2008) (major purpose test may be implemented by examining, *inter alia*, “if the organization spends the majority of its money on *supporting* or *opposing* candidates”) (emphasis added); *Akins v. FEC*, 101 F.3d 731, 742 (D.C. Cir. 1997) (“an organization

1 AAN also argues that the IRS's definition of "political campaign activities" — and the
2 figures reported as such in AAN's tax filings — should inform the Commission's determination
3 of AAN's major purpose. Resp. at 7, 27; Supp. Resp. at 1. The Commission has determined
4 previously, however, that "neither FECA, as amended, nor any judicial decision interpreting it,
5 has substituted tax status for the conduct-based determination required for political committee
6 status." Supplemental E&J at 5999. Rather, when interpreting and applying the Act, the
7 Commission has concluded that "a detailed examination of each organization's contributions,
8 expenditures, and major purpose" is the proper approach, as described in detail above. *Id.*

9 Although both the complaint and response discuss AAN's activities over a two-year
10 period coinciding with AAN's fiscal tax years (July 2009 – June 2011), a calendar year test
11 provides the firmest statutory footing for the Commission's major purpose determination — and
12 is consistent with FECA's plain language. The Act defines "political committee" in terms of

devoted almost entirely to *campaign spending* could not plead that the administrative burdens associated with such spending were unconstitutional as applied to it") (emphasis added), *vacated on other grounds*, 524 U.S. 11 (1998); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 393 (D.C. Cir. 1981) (recognizing "the grave constitutional difficulties inherent in construing the term 'political committee' to include groups whose activities are not . . . directly related to *promoting* or *defeating* a clearly identified 'candidate' for federal office") (emphasis added); *RTAA*, 796 F. Supp. 2d 736, 751 (E.D. Va. 2011) (Recognizing that "the FEC considers whether the group spends money extensively on campaign activities such as canvassing or phone banks, or on express advocacy communications" and "the FEC is entitled to consider the full range of an organization's activities in deciding whether it is a political committee"), *affirmed by* 681 F.3d 544 (4th Cir. June 12, 2012); Transcript of Telephonic Oral Ruling, *Free Speech v. FEC*, No. 12-CV-127-SWS, at 21-22 (D. Wy. Oct. 3, 2012) (quoting *RTAA* and upholding Commission's case-by-case method of determining political committee status), *appeal docketed*, No. 12-8078 (10th Cir. Oct. 19, 2012). *But see New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 678 (10th Cir. 2010) (interpreting *Buckley*'s major purpose test as establishing that regulation as a political committee is only constitutionally permissible (1) when an organization's central purpose is "campaign or election related"; or (2) when a "preponderance of [the organization's] expenditures is for express advocacy or contributions to candidates."); Statement of Reasons, Comm'rs. Petersen and Hunter at 6, MUR 5842 (Economic Freedom Fund) (interpreting the Court's major purpose requirement to mean that "the Act does not reach those 'engaged purely in issue discussion,' but instead can only reach . . . 'communications that expressly advocate the election or defeat of a clearly identified candidate'") (citing *Buckley*, 424 U.S. at 79-80); *see also Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1154 (10th Cir. 2007) (holding a Colorado statute unconstitutional as applied because it "would, as a matter of common sense, operate to encompass a variety of entities based on an expenditure that is insubstantial in relation to their overall budgets").

1 expenditures made or contributions received “*during a calendar year.*” 2 U.S.C. § 431(4)
2 (emphasis added).

3 Moreover, using a calendar year as the statutory basis for defining “political committee”
4 as required by the Act but not as the basis for examining major purpose, could lead to absurd
5 results. For example, two groups with identical spending patterns could be evaluated differently
6 if one group ended its fiscal tax year on May 31 and the other’s fiscal tax year ended on
7 December 31. The possibility of such an incongruous result is underscored by the ability of a
8 nonprofit organization to change its tax filing period with the IRS.

9 Finally, examining a group’s spending with reference to a calendar year, rather than a
10 fiscal year, is consistent with the Commission’s actions in the enforcement matters cited as
11 guidance in the 2007 Supplemental E&J. In two matters cited by the 2007 Supplemental E&J —
12 and in one concluded shortly thereafter — the Commission focused on the group’s activity
13 during the 2004 calendar year for that election to determine major purpose, and only used the
14 groups’ later activity to assess their ongoing reporting obligations as political committees.⁴⁰ The
15 Commission, however, has not routinely examined a group’s post-election activity unless such
16 activity implicated its ongoing obligations under the Act.⁴¹

⁴⁰ For example, in MUR 5487 (Progress for America Voter Fund), the Commission’s major purpose analysis of the group’s spending was based on the funds raised and spent “before the 2004 General Election.” *See* Conciliation Agreement ¶¶ 33-36, MUR 5487 (Progress for America Voter Fund). The Commission limited its analysis to activity during 2004 even though Progress for America Voter Fund had raised approximately \$4.6 million and spent approximately \$11.2 million since the 2004 presidential election. *See id.* ¶ 18. The Commission has also noted when groups cease to function after an election cycle. *See* Conciliation Agreement ¶ 16, MUR 5754 (MoveOn.org Voter Fund); Conciliation Agreement ¶ 36, MURs 5511, 5525 (Swift Boat Veterans and POWs for Truth).

⁴¹ Not surprisingly, many political committee enforcement matters involve groups that only spend funds during the calendar year of an election, and that spending thus necessarily forms the sole basis for major purpose analysis.

1 cause conciliation based solely on AAN's spending for advertisements, as detailed herein, an
2 investigation of AAN's additional 2010 activity, including examination of its fundraising
3 solicitations and advocacy mailings, may furnish evidence of additional spending on federal
4 campaign activity that will enhance the public record and establish definitively the date by which
5 AAN should have registered as a political committee.

6 **III. PROPOSED DISCOVERY**

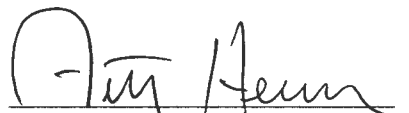
7 We plan to seek information (1) to establish the extent, nature, and cost of American
8 Action Network's federal campaign activity and (2) to identify potential witnesses who may
9 have relevant knowledge of these facts. We also request that the Commission authorize the use
10 of compulsory process, including the issuance of appropriate interrogatories, document
11 subpoenas, and deposition subpoenas, as necessary. The information sought through any
12 discovery would be focused on ascertaining the scope of American Action Network's reporting
13 obligations, and would be consistent with the type of information that the Commission seeks in
14 its analysis of a group's requirements as a political committee.

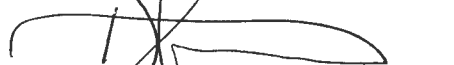
15

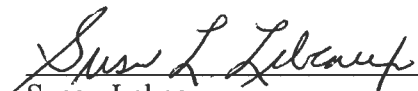
1 **IV. RECOMMENDATIONS**


- 2 1. Find reason to believe that American Action Network violated 2 U.S.C.
- 3 §§ 432, 433, and 434.
- 4
- 5 2. Approve the attached Factual and Legal Analysis.
- 6
- 7 3. Authorize the use of compulsory process in this matter.
- 8
- 9 4. Approve the appropriate letter.
- 10

11 01/17/13
12 Date


13 Anthony Herman
14 General Counsel


15 Daniel A. Petalas
16 Associate General Counsel for Enforcement


17 Susan Lebeaux
18 Assistant General Counsel


19 Peter Reynolds
20 Attorney

21

22

23

24

25

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30

1 **FEDERAL ELECTION COMMISSION**
2 **FACTUAL AND LEGAL ANALYSIS**
3
4

5 Respondent: American Action Network and Stephanie MUR: 6589R
6 Fenjiro in her official capacity as treasurer
7
8

9 **I. INTRODUCTION**

10 This matter was generated by a complaint filed by Citizens for Responsibility and Ethics
11 in Washington and Melanie Sloan.¹ The complaint alleges that American Action Network
12 (“AAN”) violated the Federal Election Campaign Act of 1971, as amended (the “Act”) by failing
13 to organize, register, and report as a political committee.

14 The Commission originally considered the complaint in MUR 6589 (American Action
15 Network), but there was an insufficient number of votes to find reason to believe that AAN
16 violated 52 U.S.C. §§ 30102 (“Organization of political committees”), 30103 (“Registration of
17 political committees”), and 30104 (“Reporting requirements”).² Accordingly, the Commission
18 closed its file in MUR 6589.³ The Commission’s decision was challenged in *CREW v. FEC, et*
19 *al.*, No. 1:14-cv-01419 (“*CREW I*”). On September 19, 2016, the district court held that the
20 dismissal was contrary to law, and remanded the case to the Commission for proceedings
21 consistent with that opinion. Pursuant to the court’s remand, the matter was reopened and
22 numbered MUR 6589R.⁴

23 Following the remand, the Commission reconsidered the complaint, and there was again
24 an insufficient number of votes to find reason to believe that AAN had violated 52 U.S.C.

¹ See 52 U.S.C. § 30109(a)(1).

² Certification ¶ 1(a), MUR 6589 (American Action Network) (June 26, 2014).

³ *Id.* ¶ (2)(a).

⁴ *CREW I*, 209 F. Supp. 3d 77 (D.D.C. 2016).

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1 §§ 30102, 30103, and 30104.⁵ Accordingly, the Commission closed its file.⁶ The Commission’s
2 decision was challenged in *CREW v. FEC, et al.*, No. 1:16-cv-2255 (“*CREW II*”). On March 20,
3 2018, the district court held that the second dismissal was contrary to law, and again remanded
4 the case to the Commission for proceedings consistent with that opinion.⁷ Pursuant to the court’s
5 remand, this matter was reopened and is still numbered MUR 6589R.

6 As discussed below, consistent with the court’s instructions in *CREW II*, the Commission
7 finds reason to believe that AAN violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to
8 organize, register, and report as a political committee.

9 II. FACTUAL AND LEGAL ANALYSIS

10 A. Factual Background

11 1. AAN

12 AAN, formed in 2009, is a nonprofit corporation organized under section 501(c)(4) of the
13 Internal Revenue Code.⁸ On its website, AAN states that its mission is to “create, encourage and
14 promote center-right policies based on the principles of freedom, limited government, American
15 exceptionalism, and strong national security,” and that its “primary goal is to put our center-right
16 ideas into action by engaging the hearts and minds of the American people and spurring them
17 into active participation in our democracy.”⁹ In its response, AAN states that it has “[c]onducted
18 extensive issue advocacy activities, including television and digital advertising focused on fiscal

⁵ Certification ¶ 1(a), MUR 6589R (American Action Network) (Oct. 19, 2016).

⁶ *Id.* ¶ 2.

⁷ *CREW II*, No. 16-cv-2255 (CRC), 2018 WL 1401262 (D.D.C. Mar. 20, 2018).

⁸ Resp. at 3 (July 20, 2012).

⁹ *About AAN*, AMERICANACTIONNETWORK.ORG, <http://www.americanactionnetwork.org/about> (last visited Apr. 10, 2018); *see also* <https://web.archive.org/web/20120814104437/http://www.americanactionnetwork.org/about> (same) (archived version from Aug. 14, 2012).

1 responsibility, healthcare reform, regulatory reform and other federal legislative issues
2 considered by the United States Congress.”¹⁰ AAN also states in its response that it has
3 “[h]osted educational activities, including grassroots policy events and . . . interactive policy
4 briefings called ‘Learn and Lead’ with activists and guest speakers, including Senators,
5 Congressmen, former Secretaries and Ambassadors of the US Government.”¹¹

6 2. AAN’s Receipts and Spending

7 AAN disclosed receipts of \$30.2 million and spending of \$27.1 million over its fiscal
8 years 2009 and 2010, a period which ran from July 23, 2009, through June 30, 2011.¹² AAN
9 disclosed independent expenditures¹³ of \$4.1 million (\$4.0 million in 2010), and also disclosed
10 electioneering communications¹⁴ of \$13.8 million (all in 2010).

11 B. Analysis

12 1. The Test for Political Committee Status

13 The Act and Commission regulations define a “political committee” as “any committee,
14 club, association or other group of persons which receives contributions aggregating in excess of
15 \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000
16 during a calendar year.”¹⁵ In *Buckley v. Valeo*,¹⁶ the Supreme Court held that defining political

¹⁰ Resp. at 3.

¹¹ *Id.* at 4.

¹² Form 990, 2009 Tax Return of American Action Network at 1; Form 990, 2010 Tax Return of American Action Network at 1.

¹³ *See* 52 U.S.C. § 30101(17) (definition of independent expenditure).

¹⁴ An “electioneering communication” is “any broadcast, cable, or satellite communication which — (I) refers to a clearly identified candidate for federal office; (II) is made within [30 or 60 days of certain elections]; and (III) in the case of a communication which refers to a candidate for an office other than President and Vice President, is targeted to the relevant electorate.” *Id.* § 30104(f)(3)(A).

¹⁵ 52 U.S.C. § 30101(4)(A); 11 C.F.R. § 100.5.

¹⁶ 424 U.S. 1 (1976).

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1 committee status “only in terms of the annual amount of ‘contributions’ and ‘expenditures’”
2 might be overbroad, reaching “groups engaged purely in issue discussion.”¹⁷ To cure that
3 infirmity, the Court concluded that the term “political committee” “need only encompass
4 organizations that are under the control of a candidate or the *major purpose of which is the*
5 *nomination or election of a candidate.*”¹⁸ Accordingly, under the statute as thus construed, an
6 organization that is not controlled by a candidate must register as a political committee only if
7 (1) it crosses the \$1,000 threshold and (2) it has as its “major purpose” the nomination or election
8 of federal candidates.

9 **a. The Commission’s Case-by-Case Approach to Major Purpose**

10 Although *Buckley* established the major purpose test, it provided no guidance as to the
11 proper approach to determine an organization’s major purpose.¹⁹ In *Massachusetts Citizens for*
12 *Life v. FEC* (“*MCFL*”),²⁰ the Supreme Court identified an organization’s independent spending
13 as a relevant factor in determining an organization’s major purpose.²¹

14 Following *Buckley*, the Commission adopted a policy of determining on a case-by-case
15 basis whether an organization is a political committee, including whether its major purpose is the
16 nomination or election of federal candidates.²² The Commission has since periodically

¹⁷ *Id.* at 79.

¹⁸ *Id.* (emphasis added).

¹⁹ *See, e.g., Real Truth About Abortion, Inc. v. FEC* (formerly *Real Truth About Obama v. FEC*), 681 F.3d 544, 556 (4th Cir. 2012), *cert. denied*, 81 U.S.L.W. 3127 (U.S. Jan. 7, 2013) (No. 12-311) (“*RTAA*”).

²⁰ 479 U.S. 241, 249, 263 (1986).

²¹ *Id.* at 249, 262.

²² Political Committee Status, 72 Fed. Reg. 5,596 (Feb. 7, 2007) (Supplemental Explanation and Justification) (“Supplemental E&J”).

1 considered proposed rulemakings to craft a bright-line rule regarding the major purpose test;
2 however, the Commission consistently has declined to do so.²³

3 In 2004, for example, the Commission issued a notice of proposed rulemaking asking
4 whether the agency should adopt a regulatory definition of “political committee.”²⁴ The
5 Commission declined to adopt a bright-line rule, noting that it had been applying the major
6 purpose test “for many years without additional regulatory definitions,” and concluded that “it
7 will continue to do so in the future.”²⁵

8 ***b. Challenges to the Commission’s Major Purpose Test and the***
9 ***Supplemental E&J***

10 When the Commission’s decision in the 2004 rulemaking not to adopt a regulatory
11 definition was challenged in litigation, the district court in *Shays v. FEC* rejected plaintiffs’
12 request that the Commission initiate a new rulemaking.²⁶ The court found, however, that the
13 Commission had “failed to present a reasoned explanation for its decision” to engage in case-by-
14 case decision-making, rather than rulemaking, and remanded the case to the Commission to
15 explain its decision.²⁷

16 Responding to the remand, the Commission issued a Supplemental E&J to further
17 elaborate on its 2004 decision to apply a case-by-case approach and to provide the public with

²³ See, e.g., Independent Expenditures; Corporate and Labor Organization Expenditures, 57 Fed. Reg. 33,548, 33,558-59 (July 29, 1992) (Notice of Proposed Rulemaking); Definition of Political Committee, 66 Fed. Reg. 13,681, 13,685-86 (Mar. 7, 2001) (Advance Notice of Proposed Rulemaking); see also Summary of Comments and Possible Options on the Advance Notice of Proposed Rulemaking on the Definition of “Political Committee,” Certification (Sept. 27, 2001) (voting 6-0 to hold proposed rulemaking in abeyance).

²⁴ See Political Committee Status, 69 Fed. Reg. 11,736, 11,745-49 (Mar. 11, 2004) (Notice of Proposed Rulemaking).

²⁵ See Final Rules on Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056, 68,064-65 (Nov. 23, 2004).

²⁶ *Shays v. FEC*, 424 F. Supp. 2d 100, 117 (D.D.C. 2006) (“*Shays P*”).

²⁷ *Id.* at 116-17.

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1 additional guidance as to its process for determining political committee status.²⁸ The
2 Supplemental E&J explained that “the major purpose doctrine requires fact-intensive analysis of
3 a group’s campaign activities compared to its activities unrelated to campaigns.”²⁹ The
4 Commission stated that the determination of an organization’s major purpose “requires the
5 flexibility of a case-by-case analysis of an organization’s conduct that is incompatible with a
6 one-size fits-all rule,” and that “any list of factors developed by the Commission would not likely
7 be exhaustive in any event, as evidenced by the multitude of fact patterns at issue in the
8 Commission’s enforcement actions considering the political committee status of various
9 entities.”³⁰

10 To determine an entity’s “major purpose,” the Commission explained that it considers a
11 group’s “overall conduct,” including public statements about its mission, organizational
12 documents, government filings (*e.g.*, IRS notices), the proportion of spending related to “Federal
13 campaign activity (*i.e.*, the nomination or election of a Federal candidate),” and the extent to
14 which fundraising solicitations indicate funds raised will be used to support or oppose specific
15 candidates.³¹ The Commission stated in the Supplemental E&J that it compares how much of an
16 organization’s spending is for “*federal campaign activity*” relative to “activities that [a]re not
17 campaign related.”³²

²⁸ Supplemental E&J, 72 Fed. Reg. 5595.

²⁹ *Id.* at 5601-02.

³⁰ *Id.* at 5602.

³¹ *Id.* at 5597, 5605.

³² *Id.* at 5601, 5605 (emphasis added).

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1 After the Commission issued the Supplemental E&J, the *Shays I* plaintiffs again
2 challenged, under the Administrative Procedure Act,³³ the Commission’s case-by-case approach
3 to political committee status. In *Shays II*, the district court rejected the challenge, upholding the
4 Commission’s case-by-case approach as an appropriate exercise of the agency’s discretion.³⁴
5 The court recognized that “an organization . . . may engage in many non-electoral activities so
6 that determining its major purpose requires a very close examination of various activities and
7 statements.”³⁵

8 In 2012, in *Real Truth About Abortion, Inc. v. FEC*, the Fourth Circuit rejected a
9 constitutional challenge to the Commission’s case-by-case determination of major purpose.³⁶
10 The court upheld the Commission’s approach, holding that *Buckley* “did not mandate a particular
11 methodology for determining an organization’s major purpose,” and therefore the Commission
12 was free to make that determination “either through categorical rules or through individualized
13 adjudications.”³⁷ The court concluded that the Commission’s case-by-case approach was
14 “sensible, . . . consistent with Supreme Court precedent and does not unlawfully deter protected
15 speech.”³⁸ The Fourth Circuit concluded that the Supplemental E&J provides “ample guidance
16 as to the criteria the Commission might consider” in determining an organization’s political
17 committee status and therefore is not unconstitutionally vague.³⁹

³³ See 5 U.S.C. §§ 551-59.

³⁴ *Shays v. FEC*, 511 F. Supp. 2d 19, 24 (D.D.C. 2007) (“*Shays II*”).

³⁵ *Id.* at 31.

³⁶ *RTAA*, 681 F.3d 544.

³⁷ *Id.* at 556.

³⁸ *Id.* at 558.

³⁹ *Id.*; see also *Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013) (quoting *RTAA* and upholding Commission’s case-by-case method of determining political committee status), *cert. denied*, 134 S. Ct. 2288 (2014).

1 The Commission’s application of the case-by-case major purpose inquiry was recently
2 considered by the U.S. District Court for the District of Columbia in *CREW I*, following the
3 Commission’s dismissal of allegations in MUR 6589 that two organizations, including AAN,
4 were required to register and report as political committees. The court held that the dismissal
5 was contrary to law, finding that the controlling Commissioners’ statement of reasons adopted
6 erroneous standards for determining (1) which spending indicates the “major purpose” of
7 nominating or electing a candidate, and (2) the relevant time period for evaluating a group’s
8 spending.⁴⁰ The court instructed the Commission, when examining the organization’s major
9 purpose, to look beyond express advocacy and consider whether the other communications at
10 issue indicate a “campaign-related purpose.”⁴¹ The court also held that the Commission’s
11 analysis of the relevant time period for evaluating a group’s spending must retain the flexibility
12 to account for changes in an organization’s major purpose over time.⁴² The court remanded the
13 case to the Commission for further proceedings consistent with its opinion.⁴³

14 Following the remand order in *CREW I*, the Commission reconsidered the facts in MUR
15 6589 and, again, there was an insufficient number of votes to find reason to believe that AAN
16 had violated the Act. The same district court held in *CREW II* that the Commission’s application
17 of its case-by-case major purpose inquiry was contrary to law because the controlling
18 Commissioners’ statement of reasons failed “to presume that spending on electioneering
19 communications contributes to a ‘major purpose’ of nominating or electing a candidate for

⁴⁰ *CREW I*, 209 F. Supp. 3d at 89-95.

⁴¹ *Id.* at 93.

⁴² *Id.* at 94 (citing *MCFL*, 479 U.S. at 262 (“recognizing that a group’s ‘spending [may] become so extensive that the organization’s major purpose may be regarded as campaign activity [such that] the corporation would be classified as a political committee.’ (emphasis added)”).

⁴³ *Id.* at 81.

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1 federal office, and, in turn, to presume that such spending supports designating an entity as a
2 ‘political committee’ under [the Act].”⁴⁴ The court concluded that the legislative history and
3 statutory text require these presumptions.⁴⁵

4 **c. Organizational and Reporting Requirements for Political**
5 **Committees**

6 Political committees — commonly known as “PACs” — must comply with certain
7 organizational and reporting requirements set forth in the Act. PACs must register with the
8 Commission, file periodic reports for disclosure to the public, appoint a treasurer who maintains
9 their records, and identify themselves through disclaimers on all of their political advertising, on
10 their websites, and in mass emails.⁴⁶

11 In the wake of the Supreme Court’s decision in *Citizens United v. FEC*, 558 U.S. 310
12 (2010), which struck down the Act’s prohibitions on corporate independent expenditures and
13 electioneering communications, the D.C. Circuit held in *SpeechNow.org v. FEC*, 599 F.3d 686,
14 696 (D.C. Cir. 2010) (*en banc*) that political committees that engage only in independent
15 expenditures are not subject to contribution limits. These political committees, often referred to
16 as independent-expenditure-only political committees or Super PACs, continue, however, to be
17 subject to the reporting requirements of 52 U.S.C. §§ 30102, 30103, and 30104(a), and the
18 organizational requirements of 52 U.S.C. §§ 30101(4) and 30101(8). In *CREW I*, the district
19 court concluded that “[t]he majority of circuits have concluded that . . . disclosure requirements
20 [related to registration and reporting] are not unduly burdensome.”⁴⁷

⁴⁴ *CREW II*, 2018 WL 1401262 at *14.

⁴⁵ *Id.* at *10.

⁴⁶ *See* 52 U.S.C. §§ 30102, 30103, and 30104; 11 C.F.R. §110.11(a)(1).

⁴⁷ 209 F. Supp. 3d at 92 (quoting *Yamada v. Snipes*, 786 F.3d 1182, 1195 (9th Cir. 2015), *cert. denied sub nom.*, *Yamada v. Shoda*, 136 S. Ct. 569 (2015)).

1 2. Application of the Test for Political Committee Status to AAN

2 **a. Statutory Threshold**

3 To assess whether an organization has made an “expenditure,” the Commission analyzes
4 whether spending on any of an organization’s communications made independently of a
5 candidate constitutes express advocacy under 11 C.F.R. § 100.22.⁴⁸ AAN reported independent
6 expenditures in 2010 totaling approximately \$4 million. Therefore, AAN far exceeded the
7 statutory threshold, which requires that a committee, club, association, or other group of persons
8 to receive \$1,000 in contributions or make \$1,000 in expenditures during a calendar year.⁴⁹

9 **b. Major Purpose**

10 AAN states in its response, on its website, and in its tax returns, that its major purpose is
11 not federal campaign activity, but rather advocating issues and educating the public. The
12 Commission noted in the Supplemental E&J that it may consider such statements made by an
13 organization in its analysis of an organization’s major purpose,⁵⁰ but that such statements are not
14 necessarily dispositive.⁵¹ Here, AAN’s proportion of spending related to federal campaign
15 activity compared to its total spending is alone sufficient to indicate that its major purpose was
16 the election or nomination of federal candidates.

17 Between 2009 and 2011, AAN reported total expenses of \$27.1 million. Of that amount,
18 \$4.1 million was spent on independent expenditures (of which \$4.0 million occurred in 2010)

⁴⁸ See Supplemental E&J at 5606.

⁴⁹ See 52 U.S.C. § 30101(4)(A); Supplemental E&J at 5606; *see also* 11 C.F.R. § 100.5.

⁵⁰ Supplemental E&J at 5606.

⁵¹ See *Real Truth About Obama v. FEC*, No. 3:08-cv-00483, 2008 WL 4416282, at *14 (E.D. Va. Sept. 24, 2008) (“A declaration by the organization that they are *not* incorporated for an electioneering purpose is not dispositive.”) (emphasis in original), *aff’d*, 575 F.3d 342 (4th Cir. 2009), *vacated on other grounds*, 130 S. Ct. 2371 (2010), *remanded and decided*, 796 F. Supp. 2d 736, *affirmed sub nom. Real Truth About Abortion v. FEC*, 681 F.3d 544 (4th Cir. 2012), *cert. denied*, 81 U.S.L.W. 3127 (U.S. Jan. 7, 2013) (No. 12-311).

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1 which clearly indicates a purpose to elect or nominate federal candidates.⁵² Further, AAN
2 reported electioneering communications of \$13.8 million (all during 2010). The central issue in
3 this matter has been whether and to what degree the electioneering communications should be
4 considered as indicative of AAN’s major purpose being the nomination or election of federal
5 candidates.

6 In *CREW I*, the district court held that electioneering communications must not be
7 categorically excluded from the Commission’s major purpose inquiry. In *CREW II*, the court
8 held that electioneering communications are *presumptively* indicative of an organization’s major
9 purpose being the election or nomination of federal candidates, and opined that electioneering
10 communications lacking such an election-related purpose “should be the rare exception, not the
11 rule.”⁵³

12 The court in *CREW II* provided guidance on factors relevant in determining whether the
13 content of an electioneering communication may rebut the presumption of having an election-
14 related purpose. For instance, it presented the following example that “could, under the
15 Commission’s case-by-case approach, properly be deemed lacking an election-related purpose
16 under *Buckley* despite meeting [the] definition of electioneering communication”:

17 It runs 60 days before a midterm election; it does not mention the election or even
18 indirectly reference it (*e.g.*, by cabining the message’s timeframe to “this
19 November”); the meat of the ad discusses the substance of a proposed bill; the ad
20 urges the viewer to call a named incumbent representative and request that she
21 vote for the bill; but it does not make any reference to the incumbent’s prior
22 voting history or otherwise criticize her.⁵⁴

⁵² See 52 U.S.C. § 30101(27) (defining independent expenditure as an expenditure that expressly advocates for the “election or defeat of a clearly identified candidate”).

⁵³ *CREW II*, 2018 WL 1401262, at *7, *13.

⁵⁴ *Id.* at *11 (quotations omitted) (emphasis added).

1 In contrast, the court analyzed a specific ad titled “Skype,” opining that “the primary purpose of
2 this ad was to convince viewers to vote against [the candidate].”⁵⁵

3 **Person 1:** *Hey, what’s up?*

4 **Person 2:** *Hey. You have to check out the article I just sent you.
5 Apparently convicted rapists can get Viagra paid for by the new
6 health care bill.*

7 **Person 1:** *Are you serious?*

8 **Person 2:** *Yep. I mean, Viagra for rapists? With my tax dollars? And
9 Congresswoman Titus voted for it.*

10 **Person 1:** *Titus voted for it?*

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

12 **Person 1:** *In November, we need to tell Titus to repeal it. [Superimposed
13 text: “Tell Congresswoman Titus to vote for repeal in
14 November. Vote Yes on H.R. 4903. (202) 225-3252.”].*

15 The court described “Skype” and other “similar ads” as “electioneering communications that
16 harangue a candidate,” arguing that they do not overcome the presumption of having an election-
17 related purpose simply because “they instruct the viewer to ‘call’ her representative rather than to
18 ‘vote against’ him.”⁵⁶ The court said that “Skype” is “awfully close” to the hypothetical posed
19 by the Supreme Court in *McConnell* of an ad that is functionally identical to express advocacy.⁵⁷

20 Following the district court’s instructions, and pursuant to the Commission’s case-by-
21 case, fact-intensive approach to evaluating political committee status and major purpose, the
22 Commission determines that AAN ran electioneering communications that should be considered
23 as indicative of an election-related major purpose. The amount spent on those electioneering

⁵⁵ *Id.* at *12.

⁵⁶ *Id.*

⁵⁷ *Id.* (“An ad that, instead of urging viewers to vote against Jane Doe, condemned Jane Doe’s record on a particular issue before exhorting viewers to ‘call Jane Doe and tell her what you think.’”) (quoting *McConnell v. FEC*, 540 U.S. 93, 127 (2003) (internal quotations and citations omitted)).

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1 communications combined with its spending on independent expenditures, as compared to
2 AAN's total spending, supports the conclusion that there is reason to believe that AAN's major
3 purpose is the nomination or election of federal candidates.

4 The controlling Commissioners' prior statement of reasons had already determined that at
5 least four other of AAN's electioneering communications evince an election-related purpose,
6 even without applying the presumption articulated by the court in *CREW II*.⁵⁸ These include the
7 ads titled "Bucket," "New Hampshire," "Order," and "Extreme" (which were reported as costing
8 a total of \$1.9 million).⁵⁹ Further, the district court in *CREW II* observed that, by "cabining their
9 timing" to "this November," AAN's electioneering ads were making a reference to the election.⁶⁰
10 The Commission has identified fifteen electioneering communications which reference the
11 election by mentioning November (totaling \$10.7 million).⁶¹

12 In sum, and beginning with the principle mandated by the district court in *CREW II* that
13 electioneering communications presumptively evince an election-related purpose, absent "special
14 circumstances," the Commission has determined that AAN ran electioneering communications in
15 2010 that support a conclusion that there is reason to believe that the group's major purpose is
16 the nomination or election of federal candidates. The Commission does not have definitive
17 information that allows for a specific breakdown of AAN's total spending in 2010 at this time.

⁵⁸ *See id.* at *5.

⁵⁹ *Id.*

⁶⁰ *Id.* at *11.

⁶¹ "Naked," "Leadership," "Quit Critz," "Taxes," "Ridiculous," "Mess," "Wasted," "Skype," "Read This [I],"
"Wallpaper," "Ouch," "Back Pack," "Read This [II]," "Secret," and "Repeal." For instance, the ad titled "Quit
Critz" ends with: "Tell Congressman Critz that Pennsylvania families need tax relief this November, not more
government." The ad titled "Wallpaper" ends with: "Tell [Rep. Schrader] to vote for a tax cut this November to stop
wallpapering Washington with our tax dollars." The ad titled "Read This [I]," ends with: "Call Rick Boucher. Tell
him no more deals. In November, support common sense energy policy."

1 For the purposes of this analysis, however, the Commission assumes that total spending in 2010
2 was \$27.1 million.⁶² Even considering, at a minimum, independent expenditures (\$4 million);
3 the four electioneering communications that the Commission already determined to have an
4 election-related purpose (\$1.9 million); and the electioneering communications that reference an
5 election (\$10.7 million), it appears that AAN's total campaign-related spending in 2010 would
6 equal \$16.6 million — equivalent to 61% of the organization's overall spending.

7 The Commission has never set a threshold on the proportion of spending on major
8 purpose activities required for political committee status and continues to decline to do so.
9 Without determining whether it is *necessary* to cross a 50 percent threshold to determine an
10 organization's major purpose, it is *sufficient* in this case, based on the available information, to
11 find reason to believe that AAN's major purpose had become the nomination or election of
12 federal candidates.⁶³

13 C. Conclusion

14 Because AAN made over \$1,000 in expenditures during calendar year 2010, and the
15 available information indicates that its major purpose was the nomination or election of federal
16 candidates, the Commission finds reason to believe that AAN violated 52 U.S.C. §§ 30102,
17 30103, and 30104 by failing to organize, register, and report as a political committee.

⁶² AAN's available tax returns reflect total spending over fiscal years 2009 and 2010, which run from July 23, 2009, through June 30, 2011, and therefore a 2010-specific breakdown is not possible with this information. The \$27.1 million figure assumes that all spending during that period occurred in 2010 — the assumption most favorable to AAN.

⁶³ Since (as shown above) AAN spent a sufficient proportion of its funds on both express advocacy communications and electioneering communications indicating a "campaign-related purpose" to justify a reason-to-believe finding, it is not necessary to analyze each ad.

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Appendix⁶⁴

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i. “Bucket”⁶⁵

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ii. “Naked”⁶⁶

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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.]

[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.”]

⁶⁴ The electioneering communications collected here were available online in video or transcript form. The Commission was unable to locate two communications on which AAN spent approximately \$824,430, that were reported to the Commission as electioneering communications: “First,” which identifies Mike Oliverio (WV-01) (two separate reports of \$149,700 and \$225,000) and “Remember,” which identifies Martin Heinrich (NM-01) (\$449,730).

⁶⁵ AAN reported spending \$290,395 on this electioneering communication. This ad (or a similar ad with the same title) was also reported as an independent expenditure.

⁶⁶ AAN reported spending a total of \$2,092,975 on seven versions of this communication featuring the following candidates: Gerry Connolly (VA-11); Joe Donnelly (IN-02); Tom Perriello (VA-05); Tim Walz (MN-01); Martin Heinrich (NM-01); Steve Kagen (WI-08); and Kurt Schrader (OR-05).

1 vi. “Ridiculous”⁷⁰

2 Ridiculous stimulus! Courtesy of Charlie Wilson and Nancy Pelosi. Three
3 million for a turtle tunnel. Two hundred thousand for Siberian lobbyists. Half a
4 million to study Neptune. Two million to photograph exotic ants and one hundred
5 fifty thousand to watch monkeys on drugs. The only thing Wilson and Pelosi’s
6 stimulus didn’t do? Fix Ohio’s economy. Call Charlie Wilson. Tell him to keep
7 the tax cuts, ditch the stimulus. [Superimposed text: “Call Charlie Wilson. Tell
8 him in November keep the tax cuts. Ditch the Stimulus.” Phone number “(202)
9 (225-5705” and “VOTE FOR H.R. 4746.”]

11 vii. “Mess”⁷¹

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

20 viii. “Wasted”⁷²

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

⁷⁰ AAN reported spending \$505,000 on this communication.

⁷¹ AAN reported spending \$137,900 on this communication. AAN filed two separate reports for “Mess” and “Mess Revised,” both of which identify Chris Murphy. The reports were filed, respectively on October 27, 2010, and October 28, 2010. The covering periods, respectively, are October 12-26 and October 12-28. The amounts, respectively, are \$14,750 and \$123,150. Both are marked as “new” reports. AAN also reported spending \$379,000 on “47,” which may be the same as (or similar to) “Mess.”

⁷² AAN reported spending \$231,000 on this communication. The transcript is available at <http://politicalcorrection.org/adcheck/201010250013>.

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30ix. “Skype”⁷³

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 Congresswoman Titus voted for it.

Person 1: Titus voted for it?

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

Person 1: In November, we need to tell Titus to repeal it.

[Superimposed text: “Tell Congresswoman Titus to vote for repeal in November. Vote Yes on H.R. 4903. (202) 225-3252”]

x. “Order”⁷⁴

[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.*

xi. “Read This” [I]⁷⁵

[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. Tell him no more deals. In November, support common sense energy policy.*

⁷³ AAN reported spending a total of \$1,430,000 on two versions of this communication featuring Dana Titus (NV-03) and Ed Perlmutter (CO-07).

⁷⁴ AAN reported spending \$225,000 on this communication.

⁷⁵ AAN reported spending \$226,000 on this communication.

1 xii. “Wallpaper”⁷⁶

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

10
11 xiii. “Ouch”⁷⁷

12 [Superimposed text: Patty Murray. 18 Years on our backs. Huge Tax Vote in
13 November!] During her eighteen years in Washington, Patty Murray voted for the
14 largest tax increase in history, and repeatedly against tax relief. But this
15 November, Murray promises to vote for a huge tax hike on small businesses. Ever
16 heard of helping small businesses, Patty? Tell Senator Murray “ouch!” We can’t
17 afford more tax hikes. [Superimposed text: “Call Senator Patty Murray. Say vote
18 NO on any tax increase (202) 224-2621.”]

19
20 xiv. “Back Pack”⁷⁸

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

⁷⁶ AAN reported spending a total of \$1,600,000 on five versions of this communication identifying the following candidates: Steve Kagen (WI-08); Kurt Schrader (OR-05); Joe Donnelly (IN-02); Ed Perlmutter (CO-07); and Martin Heinrich (NM-01).

⁷⁷ AAN reported spending \$652,584.69 on this communication.

⁷⁸ AAN reported spending a total of \$1,210,000 on three versions of this communication identifying the following candidates: Tim Walz (MN-01); Gerry Connolly (VA-11); and Tom Perriello (VA-05).

1 xv. “Read This” [II]⁷⁹

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

9
10 xvi. “Extreme”⁸⁰

11 [On-screen text:] *Nancy Pelosi is not extreme. Compared to Annie Kuster. Kuster*
12 *supported the trillion dollar government Healthcare takeover. But says it didn’t*
13 *go far enough. \$525 billion in new taxes for government Healthcare. Now, Kuster*
14 *wants \$700 billion in higher taxes on families and businesses. And \$846 billion*
15 *in job killing taxes for cap and trade. Nancy Pelosi is not extreme. Compared to*
16 *Annie Kuster.*

17
18 xvii. “Secret”⁸¹

19 Remember this? [PELOSI:] “We have to pass the bill so that you can, uh, find
20 out what is in it.” Now we know what Pelosi and Mark Schauer were hiding. A
21 trillion-dollar health care debacle. Billions in new job-killing taxes. They cut five
22 hundred billion from Medicare for seniors, then spent our money on health
23 insurance for illegal immigrants. In November, tell Congressman Mark Schauer
24 to vote for repeal. [Superimposed text: “In November tell Congressman Critz to
25 Vote for Repeal. H.R. 4903 - (202) 225-2065.”]

26
27 xviii. “Repeal”⁸²

28 Obamacare. A trillion-dollar health care debacle. Yet Congressman Critz says
29 he opposes repealing it. It means five hundred billion in new job-killing taxes.
30 Cuts billions from Medicare for seniors. And spends our tax dollars on health
31 insurance for illegal immigrants. Yet Congressman Critz says he wants to keep
32 it. Tell Congressman Mark Critz to vote for repeal in November.
33

⁷⁹ AAN reported spending a total of \$1,065,000 on three versions of this communication identifying the following candidates: Charlie Wilson (OH-06); Jim Hines (CT-04); and Chris Murphy (CT-05). These three versions of “Read This” are distinct from the Rick Boucher version of “Read This.”

⁸⁰ AAN reported spending \$875,000 on this communication.

⁸¹ AAN reported spending \$370,000 on this communication.

⁸² AAN reported spending \$435,000 on this communication.

