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October 6, 2016

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RECEIVED
FEDERAL ELECTION
COMMISSION
2016 OCT -6 PM 3: 15
OFFICE OF GENERAL
COUNSEL

BY HAND DELIVERY AND EMAIL:
PREYNOLDS@FEC.GOV

Mr. Peter Reynolds
Office of the General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Second Supplemental Response in MUR 6589 (American Action Network, Inc.)

Dear Mr. Reynolds:

Enclose herewith is the American Action Network's Second Supplemental Response in the above-captioned matter.

Sincerely,

Caleb P. Burns

cc: Chairman Matthew S. Petersen (by hand delivery and email: mpetersen@fec.gov)
Vice Chairman Steven T. Walther (by hand delivery and email: swalther@fec.gov)
Commissioner Ann M. Ravel (by hand delivery and email: CommissionerRavel@fec.gov)
Commissioner Lee E. Goodman (by hand delivery and email: CommissionerGoodman@fec.gov)
Commissioner Caroline C. Hunter (by hand delivery and email: CommissionerHunter@fec.gov)
Commissioner Ellen L. Weintraub (by hand delivery and email: CommissionerWeintraub@fec.gov)

Enclosure

BEFORE THE FEDERAL ELECTION COMMISSION

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

SECOND SUPPLEMENTAL RESPONSE OF THE AMERICAN ACTION NETWORK, INC.

The American Action Network, Inc. ("AAN") respectfully submits this second supplemental response to request that the Commission again dismiss this matter. The Commission first voted to dismiss in June 2014, finding by a vote of 3-3 that there was no reason to believe that AAN violated the Federal Election Campaign Act of 1971 ("FECA"), as amended, because AAN is an issue advocacy organization that does not have as its "major purpose" the "nomination or election of a candidate" and so cannot be a "political committee" for purposes of FECA. *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976). The Commission's dismissal was challenged in federal district court and the case has now been remanded for further review of AAN's electioneering communications to determine whether they evidence a "major purpose" to nominate or elect candidates. *See Citizens for Responsibility & Ethics in Washington ("CREW") v. FEC*, No. 1:14-CV-01419 (CRC), 2016 WL 5107018, at *11 (D.D.C. Sept. 19, 2016). Dismissal remains appropriate because, even under the district court's analysis—much of which AAN disagrees with—there is no reason to believe that AAN violated FECA because AAN is not a political committee.[1]

INTRODUCTION

The district court did not hold that AAN is a political committee or that there is reason to believe that AAN is a political committee. Nor did the district court preclude the Commission

[1] AAN focuses this second supplemental response on the district court's September 19, 2016 decision, but incorporates by reference AAN's July 20, 2012 response (hereinafter "AAN Response") and October 1, 2012 supplemental response, which provide further confirmation that AAN is not a political committee for purposes of FECA.

from dismissing CREW's complaint on remand. Instead, the court held primarily that the law requires a more particularized analysis and explanation of the nature of AAN's electioneering communications than appeared in the controlling Commissioners' Statement of Reasons (hereinafter "Statement of Reasons"). According to the district court, it was "legal error" to follow a "bright-line rule" under which "only spending on express advocacy was considered indicative of the relevant 'major purpose.'" *Id.* at *4, 11. The court faulted the controlling Commissioners for including only "a few summary sentences" stating that AAN's electioneering communications are "genuine issue ads" instead of a lengthier, fact-specific, case-by-case explanation of why they do not show a "major purpose" to nominate or elect candidates. *Id.* at *4 n.2, *11. The court remanded this matter to the Commission for "reconsideration in light of th[is] correction." *Id.* at *11.[2]

This case must still be dismissed. Under "the FEC's judicially approved case-by-case approach to adjudicating political committee status," *id.*, AAN is not a "political committee." It is not under the control of a candidate. *About AAN*, https://www.americanactionnetwork.org/about-aan/#axzz4M9XEX7Nb. It does not make contributions to candidates. Its organizational documents and website describe it as an issue-centric "action tank" that works to "create, encourage and promote center-right policies." *Id.* It has been recognized by the Internal Revenue Service as a Section 501(c)(4) social welfare organization—a status that is incompatible with a major purpose to nominate or elect candidates. *See* 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii). And the vast majority of its spending—85% during the 2009-2011 time period at issue—was devoted to operational expenses, educational and

[2] The district court rejected challenges to other aspects of the Statement of Reasons, finding that it is *not* contrary to law to decline to adopt a calendar-year time frame when assessing political committee status or to apply a "50%-plus" spending threshold. *CREW*, 2016 WL 5107018, at *11-12. The court also held that the Statement of Reasons did not clearly invoke or explain prosecutorial discretion as a basis for dismissal.

grassroots policy events, issue briefings, and advertisements that sought to influence major policy issues that were then being debated in Congress. As detailed below, these electioneering communications were not campaign-related. The district court's decision, as a result, does not require that they be found indicative of a major purpose to nominate or elect candidates. *See, e.g.*, *CREW*, 2016 WL 5107018, at *11.

While this case should be dismissed on the merits, the district court has given the Commission another option as well—it may dismiss this case because its allegations relate to conduct that occurred over five years ago. *Id.* at *4 n.3. Should the Commission believe it unwise to devote further resources to this stale dispute, the Commission may choose to dismiss this case pursuant to its general practice of focusing on more recent activity, particularly where—as here—there is no violation (let alone a clear violation) of FECA.

AAN urges the Commission to take prompt action to dismiss. The district court directed the Commission to "conform with [its] declaration within 30 days," *id.* at *12, which requires that the Commission, at a minimum, commence the required "further proceedings consistent with [the] Opinion," *id.* at *1, within those 30 days. *See, e.g.*, *Hagelin v. FEC*, 332 F. Supp. 2d 71, 81-82 (D.D.C. 2004) (holding that FEC must begin compliance within 30 days), *rev'd on other grounds*, 411 F.3d 237 (D.C. Cir. 2005). AAN would, of course, welcome a dismissal within those 30 days (by October 19), as it would provide clear evidence that the Commission has "act[ed] in accordance with the Court's declaration within 30 days." *CREW*, 2016 WL 5107018, at *12. AAN thus requests that the Commissioners issue a Supplemental Statement of Reasons for voting to dismiss this matter on or before October 19. If that is not possible, AAN requests that the Commission issue a preliminary statement to clarify that, in conformance with the

district court's decision, a Supplemental Statement of Reasons is being prepared and will be issued promptly.[3]

ARGUMENT

As detailed below, (1) AAN's electioneering communications, when reviewed in light of the district court's decision, confirm that AAN is not a political committee for purposes of FECA and (2) the allegations, which related to conduct between June 2009 and July 2011, are so stale as to warrant dismissal under the Commission's general enforcement priorities.

I. AAN's Electioneering Communications Were Devoted to Public Policy Issues and Therefore Do Not Evidence an Electoral Purpose.

The district court has asked the Commission to consider whether AAN is a political committee by taking a second look at AAN's electioneering communications to determine whether they are evidence of a major purpose to nominate or elect candidates. In undertaking this analysis, the Commission should (A) adhere to its highly fact-specific approach, which ensures that political committee status is not imposed on organizations with a major purpose of issue advocacy, (B) conclude that AAN's electioneering communications are issue advertisements that are not campaign-related, and (C) to the extent that the Commission concludes that any of the electioneering communications are indicative of a major purpose to nominate or elect candidates, find that the total spending on such advertisements still does not convert AAN into a political committee.

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[3] Given that the Commission has elected not to appeal the judgment of the district court, *see* Press Release, Oct. 4, 2016, http://www.fec.gov/press/press2016/news_releases/20161004release.shtml, AAN makes this submission solely to assist the Commission in conforming to the district court's opinion. In so doing, AAN is not waiving its right to appeal the district court's decision.

A. The Commission Should Conduct A Fact-Intensive Analysis Of AAN's Spending To Determine Whether AAN's "Major Purpose" Is The Nomination Or Election Of Candidates—Or Advocacy On Policy Issues.

The district court's holding was quite narrow. It held that the dismissal of the complaint was contrary to law because the dismissal rested on an "improper legal ground"—namely, "the erroneous understanding that the First Amendment effectively required the agency to exclude from its consideration all non-express advocacy in the context of disclosure." *CREW*, 2016 WL 5107018, at *11. The court did not hold that AAN is a political committee or even that there was "reason to believe" it is a political committee. The court simply remanded the matter to the Commission to adjudicate the complaint without this "erroneous" legal understanding. *Id.*

In remanding, the district court did not prejudge the result of the Commission's review on remand. To the contrary, the district court emphasized that it was *not* adopting a "bright-line rule" under which all electioneering communications indicate a major purpose to nominate or elect candidates. *Id.* Doing so would undermine "the FEC's judicially approved case-by-case approach to adjudicating political committee status." *Id.* (citing 2007 Supplemental Explanation & Justification, 72 Fed. Reg. 5,595 (Feb. 7, 2007) ("Supplemental E&J")).

The district court instead remanded for "a fact-intensive analysis of [AAN]'s campaign activities compared to its activities unrelated to campaigns." Supplemental E&J, 72 Fed. Reg. at 5,601. That analysis remains grounded in *Buckley v. Valeo*, which limits political committee status to groups whose "major purpose" is "the nomination or election of candidates"—as distinct from groups engaged in "issue discussion." 424 U.S. 1, 79 (1976). The district court did not (and could not) disturb this precedent, or the Court's subsequent decision in *FEC v. Massachusetts Citizens for Life, Inc.*, which held that an organization is not a political committee where its "central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates." 479 U.S. 238, 252 n.6 (1986). As the Court

explained in *Buckley*, every expenditure that a political committee makes can be considered "campaign-related," 424 U.S. at 79, so the electoral major purpose must be sufficiently dominant for this presumption to apply. Accordingly, an organization's devotion to other activities, such as issue advocacy, negates a finding that its major purpose is electoral.

According to the district court, the Commission must reconsider AAN's status because the controlling Commissioners applied this standard using a "bright-line rule" that "only spending on express advocacy was considered indicative of the relevant 'major purpose.'" 2016 WL 5107018, at *4, 11. The district court concluded that this "bright-line rule" was the result of a flawed conclusion that the Supreme Court's decision in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007), requires the FEC to limit its major-purpose analysis to express advocacy and its functional equivalent. That interpretation, according to the district court, is incompatible with *Citizens United v. FEC*, 558 U.S. 310 (2010), which held that "disclosure requirements can . . . reach beyond express advocacy to at least some forms of issue speech." *CREW*, 2016 WL 5107018, at *8 (citation omitted). At the same time, the district court acknowledged that electioneering communications do not necessarily have an electoral purpose, *id.* at *11, echoing *Buckley*'s observations that election season generates issue discussion and candidates—particularly incumbents—are "intimately tied to public issues involving legislative proposals and governmental actions." *Buckley*, 424 U.S. at 42-44.

The Commission's role on remand, therefore, is to conduct a fact-specific analysis of each electioneering communication in the record to determine whether the advertisement is campaign-related and indicative of a major purpose to nominate or elect candidates—or is an advertisement that relates to public policy. This distinction between "issue discussion and advocacy of a political result" may present "line-drawing problems" in some cases, *Buckley*, 424

U.S. at 79, but it should not in this case where AAN's electioneering communications all fall on the issue discussion side of the line, *see* section I.B, below. In any event, the Commission has the experience and expertise to conduct this "fact-intensive analysis" and implement the major-purpose test in a manner that warrants deference from the district court. *See CREW*, 2016 WL 5107018, at *7.

Such a fact-based analysis is consistent with *Citizens United* and the federal appellate decisions cited by the district court, *see CREW*, 2016 WL 5107018, at *8, as each acknowledges that the government *may* require disclosures in the electioneering communications context—not that the government *must* do so. In other words, where a State has taken affirmative action to impose disclosure requirements on electioneering communications, courts have found the regulations consistent with the First Amendment. *Id.* (citing cases). That does not mean, however, that the Commission is *required* to impose political committee status based on electioneering communications. The Commission retains the authority to determine whether political committee status should attach based on a fact-intensive, case-specific analysis of the electioneering communications at issue.

The Commission is justified in following a cautious approach given the First Amendment concerns implicated and the relevant legislative history. *See, e.g., CREW*, 2016 WL 5107018, at *11 (noting relevance of legislative history); *Blount v. SEC*, 61 F.3d 938, 946 (D.C. Cir. 1995) ("The First Amendment does not require the government to curtail as much speech as may conceivably serve its goals."). When Congress adopted event-driven disclosure requirements for electioneering communications, it left intact the definition of "political committee," which turns on a group's *expenditures*. *See* 52 U.S.C. § 30101(4). Because electioneering communications are by definition not expenditures under the FECA, the disclosure requirements for

electioneering communications were not intended to "require . . . groups [like the National Right to Life Committee or the Sierra Club] to create a PAC or another separate entity" or to "require the invasive disclosure of all donors." Statement of Sen. Jeffords, 147 Cong. Rec. S2812-13 (Mar. 23, 2001). Congress also set a far higher event-driven reporting threshold for electioneering communications ($10,000) than for independent expenditures ($250), which is consistent with a lesser informational interest justifying disclosure requirements for electioneering communications. *See* 52 U.S.C. § 30104(c)(2), (f)(1). As a result, while the Commission may consider some electioneering communications as relevant to an entity's major purpose to nominate or elect candidates, it is justified in following a case-specific approach that excludes advertisements that relate to public policy.

The Commission's case-by-case approach may also look to "past FEC precedent, and court precedent," *see CREW*, 2016 WL 5107018, at *11, particularly precedent that pre-dates the Court's decision in *Wisconsin Right to Life*. Much of this precedent is discussed in the Supplemental E&J, where the Commission illuminated the types of activities that might cause an organization to become a political committee by citing prior Matters Under Review ("MUR"). In MUR 5511 (SwiftVets), for example, the organization operated solely prior to the 2004 election and funded advertisements that attacked "the character, qualifications, and fitness for office" of presidential candidate John Kerry and did not discuss policy issues. *See* MUR 5511, Conciliation Agreement ¶¶ 15, 36; *see also* Supplemental E&J, 72 Fed. Reg. at 5,605. In MUR 5753 (League of Conservation Voters), the organization described itself as "committing everything we've got to defeating George W. Bush" and pledged that up to 70 percent of its funds would be used for the "defeat of George W. Bush." *See* MUR 5753, Factual and Legal Analysis at 18-19; *see also* Supplemental E&J, 72 Fed. Reg. at 5,605. In MUR 5754

(MoveOn.org Voter Fund), the organization operated solely prior to the 2004 election, solicited funds to "defeat George Bush in the 2004 general election," and ran advertisements that accused President Bush of exhibiting a "failure of leadership." *See* MUR 5754, Conciliation Agreement ¶¶ 12, 15; *see also* Supplemental E&J, 72 Fed. Reg. at 5,605.

In contrast, AAN continues to function as a group that is focused on policy issues rather than campaigns. The district court, for example, acknowledged that AAN's "stated mission is to create[ ], encourage[,] and promote center-right policies based on the principles of freedom, limited government, American exceptionalism, and strong national security." *CREW*, 2016 WL 5107018, at *3 (quoting Administrative Record ("AR") 1490). Consistent with that mission, the district court agrees that AAN "has sponsored 'educational activities' and 'grassroots policy events,'" *id.* (quoting AR 1563), and has obtained tax-exempt status as a section 501(c)(4) social welfare organization, *id.* at *1, 3. And, as next detailed, AAN has funded electioneering communications that have been policy-oriented advertisements akin to the issue advertisements that have historically been insufficient to trigger political committee status. *See, e.g., ACLU v. Jennings*, 366 F. Supp. 1041, 1058 (D.D.C. 1973) (subsequent history omitted) and *U.S. v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1138 (2d Cir. 1972) (cited at *Buckley v. Valeo*, 519 F.2d 821, 873 (D.C. Cir. 1975)) (subsequent history omitted) (pointing to advertisements that criticized a candidate's stance on hotly contested issues in the weeks leading up to a presidential election).

B. AAN's Electioneering Communications Evidence Its Issue-Centric Purpose.

The district court has asked the Commission to reconsider twenty electioneering communications in the administrative record to determine whether any of them evidence a major purpose to nominate or elect candidates. *See CREW*, 2016 WL 5107018, at *11. They do not. Instead, as next detailed, the advertisements focus on four issues that were the subjects of

prominent public policy debates when they were aired in the fall of 2010: federal government spending (5 advertisements), the reauthorization of the Bush-era tax cuts (5 advertisements), health care policy (6 advertisements), cap-and-trade (2 advertisements), and catchall advertisements that refer to more than one of these issues (2 advertisements). When these advertisements aired, it was expected that Congress would vote on pivotal legislation on these issues during the upcoming lame-duck session, which began on November 15. *See* CNN, *Lame duck Congress convenes*, Nov. 15, 2010, http://www.cnn.com/2010/POLITICS/11/15/lame.duck.congress/. With two exceptions, all the advertisements reference sitting officeholders who were going to vote on these issues during that lame-duck session of Congress, regardless of the results of the election, and advocated that they vote consistent with AAN's policy positions.

1. Advertisements addressing federal spending

AAN ran five advertisements during the 60-day electioneering communications window that addressed the issue of federal spending. News reports from that time period demonstrate conclusively that there was substantial debate surrounding a number of federal spending packages. For example, in early September, President Obama proposed an infrastructure spending package that generated vocal support and opposition across the country. *See* Sheryl Gay Stolberg & Mary Williams Walsh, *Obama Offers a Transit Plan to Create Jobs*, N.Y. Times, Sept. 6, 2010, http://www.nytimes.com/2010/09/07/us/politics/07obama.html. Republican officeholders characterized the proposal as "another government stimulus effort." *Id.* Even vulnerable Democratic incumbents characterized the proposal the same way in an effort to distinguish themselves on the spending issue. *See* Meredith Shiner, *Bennet bucks Obama's $50B plan*, Politico, Sept. 8, 2010, http://www.politico.com/story/2010/09/bennet-bucks-obamas-50b-plan-041887. Significantly, it was widely understood that Congress was

unlikely to act on the proposed spending package before it recessed at the end of September and would take it up "after elections in a lame-duck Congress" in November. *Id.* Moreover, when Congress recessed, "all spending bills for the fiscal year beginning Oct. 1" were left undone and would have to be addressed during the same lame-duck session. Russell Chaddock, *Congress adjourns, but spending bills and Bush tax cuts still loom*, Christian Science Monitor, Sept. 30, 2010, http://www.csmonitor.com/USA/Politics/2010/0930/Congress-adjourns-but-spending-bills-and-Bush-tax-cuts-still-loom. It was not until the November lame-duck session that the budget fight was resolved. *See* David Rogers, *Dems concede budget fight to GOP*, Politico, Dec. 16, 2010, http://www.politico.com/story/2010/12/dems-concede-budget-fight-to-gop-046520.

In the midst of these significant public policy debates, AAN vigorously advocated its position that Congress should curtail federal spending. It sponsored advertisements encouraging constituents to contact their representatives and advocate for the same position, applying pressure on these officials to vote for less federal spending when considering the various spending packages during the November lame-duck session. The following five advertisements, amounting to about $3.8 million of AAN's spending, addressed the federal spending issue:

(1) Back Pack:

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

(2) Naked:

> [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 bear with more spending. Call Congressman Connolly. Tell him: vote to cut spending this November.

(3) Promise:

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

(4) Wasted:

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.

(5) Bucket:

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. [SUPER: Russ Feingold. What a mess.].

The plain terms of these advertisements speak directly to the vigorous debate surrounding federal spending in the fall of 2010 and ask constituents to contact their representative about that issue. They do not reference a candidacy for office or any upcoming election and they are careful to connect any reference to "November" to the spending issue that arose during that lame-duck session. They thus furthered AAN's continuing interest in federal spending policy. *See, e.g.*, Norm Coleman, *A Better Way to a Stronger Economy*, Aug. 5, 2016, https://americanactionnetwork.org/notes-from-norm-a-better-way-to-a-stronger-

economy/#axzz4M3KftahJ ("Burdened with $19 trillion in national debt – roughly $60,000 in debt for every American citizen – over $162,000 for every American taxpayer – we know that spending our way to a brighter economic future is not the solution."). Under its fact-intensive approach, the Commission should conclude that these federal spending advertisements are issue advertisements that do not indicate a major purpose to nominate or elect candidates.

2. Advertisements addressing the Bush-era tax cuts

AAN also ran five advertisements during the relevant time period that addressed the looming expiration of the Bush-era tax cuts. The tax cuts were set to expire on December 31, 2010, such that the question of whether Congress should reauthorize the tax cuts was a focal point of debate in the fall of 2010 in anticipation of the November lame-duck session of Congress. The President took the position that the cuts to the highest marginal rates should be allowed to lapse, while the tax cuts for other income brackets should be extended. *See* Jackie Calmes, *Obama Is Against a Compromise on Bush Tax Cuts*, N.Y. Times, Sept. 7, 2010, http://www.nytimes.com/2010/09/08/us/politics/08obama.html. Republicans quickly came out against raising any tax rates. *See* CBS News, *Senate Republicans Vow No Tax Hike on Rich*, Sept. 14, 2010, http://www.cbsnews.com/news/senate-republicans-vow-no-tax-hike-on-rich/. And Republicans criticized Democratic congressional leadership for allowing Congress to recess without having voted on the tax cuts. *See* N.Y. Daily News, *President Obama warns voters that election Republicans will lead to cuts in education*, Oct. 9, 2010, http://www.nydailynews.com/news/politics/president-obama-warns-voters-election-republicans-lead-cuts-education-article-1.189178. Congress ultimately took up the issue during the lame-duck session in November and December, when the cuts were reauthorized in their entirety. *See* Brian Montopoli, *Obama Signs Bill to Extend Bush Tax Cuts*, CBS News, Dec. 17, 2010, http://www.cbsnews.com/news/obama-signs-bill-to-extend-bush-tax-cuts/.

The looming expiration of the Bush-era tax cuts was a significant issue in the fall of 2010, and the issue remained unresolved going into the recess, leaving it for expected resolution during the November lame-duck session. AAN was a strong supporter of reauthorizing the tax cuts and sponsored advertisements advocating this message and encouraging constituents to contact their representatives to advocate the same position. The following five advertisements, amounting to about $3.37 million of AAN's spending, addressed the tax cut issue:

(1) Ouch:

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

(2) Quit Critz:

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

(3) Ridiculous:

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.

(4) Taxes:

Congressman Mark Critz. We know he opposes repealing Obamacare, which means five hundred billion in new job-killing taxes. Now Congressman Critz wants to raise taxes on small businesses, a devastating blow to the weak economy. Congressman Critz even voted to delay

extending child tax credits for families. Tell Congressman Mark Critz to vote to extend the tax cuts in November.

(5) Wallpaper:

Congressman Kurt Schrader is wallpapering Washington with our tax money. Schrader spent nearly eight hundred billion on the wasteful stimulus that created few jobs but allowed big executive bonuses. He threw nearly a trillion at Pelosi's health care takeover and voted to raise the national debt to over fourteen trillion. Now Congress wants to raise taxes. Call Congressman Schrader. Tell him to vote for a tax cut this November to stop wallpapering Washington with our tax dollars.

The plain terms of these advertisements speak directly to the debate surrounding the reauthorization of the Bush-era tax cuts in the fall of 2010 and ask constituents to contact their representative about that issue. They do not reference their candidacy for office or any upcoming election and they are careful to connect any reference to "November" to the tax issue that arose during that lame-duck session. They thus furthered AAN's continuing interest in tax reform. *See, e.g.*, Getting America Back to Work, https://americanactionnetwork.org/category/economy/#axzz4M3KftahJ ("We believe in a job-creating economy unfettered from Washington's detrimental regulations and a punishing tax code."). Under its fact-intensive approach, the Commission should conclude that these tax reform advertisements are issue advertisements that do not indicate a major purpose to nominate or elect candidates.

3. Advertisements addressing health care policy

AAN ran six advertisements during the relevant time period that supported efforts to repeal the entirety or parts of the Affordable Care Act, which were underway in the fall of 2010. *See* AAN Response at 8-11. As detailed in AAN's initial response, there had been fifteen bills introduced by late September 2010 to repeal or revise the law, including H.R. 4903, which called for the repeal of the entire Affordable Care Act. *See* Paul Jenks, *Health Overhaul Celebrations*

Continue, CQ Healthbeat, Sept. 22, 2010. Additionally, two discharge petitions were circulating in the House during this time, which would have forced bills advocating repeal to the floor, and Republicans used these petitions to leverage support from Democratic members to repeal the law. *See* AAN Response at 9-10. During the lame-duck session in November, Congress considered several proposals to amend parts of the health care law. *See* Press Release, Office of Senator Mike Johanns, *Vote Scheduled for Johanns 1099 Repeal Legislation*, Nov. 19, 2010, https://votesmart.org/public-statement/569966/vote-scheduled-for-johanns-1099-repeal-legislation#.V_P7MfkrKUk; Emily Ethridge, *Bipartisan Bill Would Allow State Waivers from Health Law Provisions*, Congressional Quarterly, Nov. 18, 2010, http://www.cq.com/doc/news-3765494?21&search=BTjKjM4D.

AAN was strongly opposed to the Affordable Care Act and, since its passage, advocated for legislation that repeals the law in its entirety or partially as well as legislation that fixes some of its major problems. Amidst the debate raging over the Affordable Care Act in the fall of 2010, AAN ran six advertisements that advocated its position against the law and encouraged citizens to ask their representatives to vote to fix or repeal the law. These advertisements amounted to about $3.58 million of AAN's spending:

(1) Leadership:

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

(2) Mess:

> 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.

(3) Read This:

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

(4) Repeal:

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

(5) Secret:

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

(6) Skype:

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.

These advertisements explain some provisions of the Affordable Care Act that AAN found problematic, advocate AAN's position with respect to the Act, and encourage viewers to contact members of Congress to vote to fix or repeal the law when the House reconvened in November. Several of the advertisements contained on-screen text that encouraged constituents to contact their representatives to push them to support H.R. 4903, *see* AAN Response Ex. A & B, which was a bill pending in the fall of 2010 in the House of Representatives that would have repealed the entirety of the Affordable Care Act. The advertisements do not reference anyone's candidacy for office or any upcoming election, and they are careful to connect any reference to "November" to the "vote" to repeal the law that was expected during the lame-duck session. They thus furthered AAN's continuing interest in health care reform. *See, e.g.*, Providing Affordable Health Care Solutions, https://americanactionnetwork.org/category/health-care/#axzz4M3KftahJ ("Health care should be a physician-patient decision, not a government decision. . . . We believe in patient-centered health care solutions that provide Americans access to quality, affordable health care of their choice."). Under its fact-intensive approach, the Commission should conclude that these health care reform advertisements are issue advertisements that do not indicate a major purpose to nominate or elect candidates.[4]

[4] The district court seemed skeptical that AAN's electioneering communication, titled "Read This," *see supra* at 17, was issue-focused. *See CREW*, 2016 WL 5107018, at *1. But that skepticism was rooted in the court's mischaracterization of the advertisement. First, the court substitutes the names of the referenced officeholders with the word "candidate" in brackets. Second, the court does not acknowledge that the reference to "November" was to the lame-duck session of Congress and, therefore, implies that it refers to the election. It is only by replacing and contorting the plain language of the advertisement that the court is able to imply that the advertisement is "campaign-related." *Id.* at *11. But, as explained above, the plain words of the advertisement demonstrate that it was an issue advertisement. The advertisement explained provisions of the health care law that AAN opposed, advocated AAN's position against the law, and encouraged viewers to ask their representatives to vote to fix the law in the November lame-duck session. Although the court might consider the advertisement "neither high art nor a fair discussion" of the Affordable Care Act, *Citizens United*, 558 U.S. at 372, the combative language is fully consistent with AAN's practice of aggressive issue advocacy.

4. Advertisements addressing cap-and-trade

AAN ran two advertisements during the pertinent period that opposed efforts to implement a cap-and-trade system regulating carbon emissions. In 2009, the House of Representatives passed legislation that established a cap-and-trade system by a vote of 219-212. *See* John M. Broder, *House Passes Bill to Address Threat of Climate Change*, June 26, 2009, http://www.nytimes.com/2009/06/27/us/politics/27climate.html. The bill eventually died in the Senate but not before the bill's proponents met in November to discuss the bill's fate and that of other energy legislation during the lame-duck session and beyond. *See* Robin Bravender, *Dems move on from cap-and-trade*, Politico, Nov. 17, 2010, http://www.politico.com/story/2010/11/dems-move-on-from-cap-and-trade-045241. In fact, cap-and-trade was widely expected to be an issue for the next Congress to address, and members of Congress campaigned on the issue in 2010. *See* "Dead Aim," Joe Manchin for West Virginia, https://www.youtube.com/watch?v=xIJORBRpOPM ("I'll take dead aim at the cap-and-trade bill."); Debate Between Richard Blumenthal and Linda McMahon (Oct. 7, 2010), https://www.youtube.com/watch?v=DKI5jEz3npM (noting that cap-and-trade would be one of President Obama's priorities in the next Congress).

AAN sponsored two advertisements that asked constituents to apply pressure to two sitting members of Congress who had voted in favor of cap-and-trade in 2009 so that they would abandon their positions as Congress continued to consider the legislation. These advertisements amounted to about $711,000 of AAN's spending:

(1) Read This:

> [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.

(2) New Hampshire:

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

As previously explained, these advertisements ran at a time when members of Congress were posturing in anticipation of confronting the cap-and-trade issue in the November lame-duck session and in the next Congress. They sought to provide viewers relevant information to try to influence their representatives' positions going forward. They thus furthered AAN's continuing interest in energy reform. *See, e.g.*, Empowering American-Made Energy, https://americanactionnetwork.org/category/energy/#axzz4M3KftahJ ("America is blessed with abundant energy resources – oil, natural gas, wind, solar, water and more. Along with clean energy technologies, our economy should be fueled by an all-of-the-above energy policy – not choked by detrimental Washington regulations and energy bans."). Under its fact-intensive approach, the Commission should conclude that these energy reform advertisements are issue advertisements that do not indicate a major purpose to nominate or elect candidates.

5. Catchall advertisements

AAN ran two other advertisements that generally sought to shape the views of candidates to align with AAN's policy positions on each of the above-referenced issues. They urged the named candidates to distinguish themselves from party leadership by pointing to Speaker Pelosi's record and urging them to adopt a different position on these policy issues that were then being debated. These advertisements amounted to about $1.1 million of AAN's spending:

(1) Order:

> [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. Oliviero 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.

(2) Extreme:

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

As explained previously, these advertisements ran at a time when each of the referenced policy issues—federal spending, tax reform, health care reform, energy reform—was subject to vigorous public debate. With action by Congress considered to be imminent, the advertisements sought to focus on two individuals who may be persuaded to adopt AAN's positions on these critical policy issues. They thus furthered center-right policies on the issues that are salient to AAN's major purpose. Under its fact-intensive approach, the Commission should conclude that these catchall advertisements are issue advertisements that do not indicate a major purpose to nominate or elect candidates.

C. The Complaint Should Be Dismissed Even If The Commission Concludes That A Select Few Of AAN's Electioneering Communications Are Indicative Of A Major Purpose To Nominate Or Elect Candidates.

The district court confirmed that the Commission may rely on a "50%-plus rule" under which a "group's campaign-related spending [must] constitute at least 50% of total spending before concluding that such spending indicated the entity's 'major purpose.'" *CREW*, 2016 WL 5107018, at *7, 12. The district court also found that during "the period in question—mid-2009 through mid-2011— . . . AAN spent roughly $27.1 million in total." *Id.* at *3. And it is

undisputed that "of that, a little more than $4 million was devoted to independent expenditures (i.e., express advocacy for or against political candidates)." *Id.* As a result, the Commission would have to find that issue advertisements amounting to over $9 million in spending indicate a major purpose to nominate or elect candidates in order to conclude that AAN's spending establishes that "major purpose."

The advertisements do not support that conclusion. As detailed above, each informs viewers about a policy dispute that was then on the minds of the public and subject to action by the individuals named in the advertisements. Therefore, none of the advertisements should count in the major-purpose analysis. But, even if the Commission found that some subset of the advertisements was indicative of a major purpose to nominate or elect candidates, there was not enough spending on those advertisements to amount to a major purpose to nominate or elect candidates. The catchall advertisements, for example, amounted to just $1.1 million of AAN's spending. There simply is not sufficient spending in this case to change the controlling Commissioners' initial conclusion: AAN "is an issue advocacy group that occasionally speaks out on federal elections. This is precisely the type of group the major-purpose test was adopted to spare the 'burdensome alternative' of political committee status." Statement of Reasons at 21.

II. The Commission Should Dismiss The Complaint Under Its Enforcement Priority System.

The Commission's Enforcement Priority System ("EPS") "rates all incoming cases against objective criteria to determine whether they warrant use of the Commission's limited resources." Press Release, *FEC Completes Action on Six Enforcement Cases*, Feb. 13, 2007, http://www.fec.gov/press/press2007/20070213mur.html. Among the criteria is whether a case has become stale, such that an investigation would not be an efficient use of the Commission's resources. Consequently, it is a well-established and longstanding policy of the Commission to

dismiss such cases and to "[f]ocus[] investigative efforts on more recent and more significant activity" because it "has a more positive effect on the electoral process and the regulated community." General Counsel's Report, Agenda Document No. X02-27 (April 3, 2002). EPS is based on the recognition that "[e]ffective enforcement relies upon the timely pursuit of complaints and referrals" and that "[t]he utility of commencing an investigation declines" as a case ages. *Id.* Cases are dismissed as stale under this system because "citizens ought not have the threat of an investigation hanging over them for a lengthy time," and "the Commission should focus resources on important cases of more recent vintage, with fresher evidence and more important to current campaigns." Statement of Reasons of Commissioners Mason, Smith, and Wold in Pre-MUR 395, at 2 (Feb. 27, 2002).

Although the district court stated that dismissals based on prosecutorial discretion may be subject to review in certain circumstances, *CREW*, 2016 WL 5107018, at *7 n.7, it left open the possibility that the Commission may choose to exercise its discretion in this case to dismiss based on the EPS, *id.* at *4 n.3. And, if the Commission were to exercise its prosecutorial discretion here with an explicit reliance on the EPS, the Commission should be accorded great deference if its dismissal is again challenged. CREW would then bear a "substantial burden" that the dismissal based on its prosecutorial discretion was contrary to law or an abuse of discretion. *La Botz v. FEC*, 61 F. Supp. 3d 21, 33-34 (D.D.C. 2014). This is so because an "agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985). Whether the FEC should pursue an enforcement action "involves a complicated balancing of factors which are appropriately within its expertise, including whether agency resources are better spent elsewhere, whether its action would result in success, and whether there are sufficient resources

to undertake the action at all." *La Botz*, 61 F. Supp. 3d at 33-34. "Absent a clear showing of abuse of discretion, it is not the court's place to direct the FEC how to expend its resources, and it is certainly not the plaintiffs'." *Id.* at 34 (alterations, citations, and internal quotation marks omitted).

Of course, as the district court noted, "'an agency's decision not to take enforcement action . . . is only presumptively unreviewable,' and that 'presumption may be rebutted [by the relevant] substantive statute.'" *CREW*, 2016 WL 5107018, at *7 n.7 (quoting *Heckler*, 470 U.S. at 832-33). But dismissal based on the agency's allocation of resources and independent judgment of its enforcement priorities may only be overturned by a reviewing court if Congress has "set[] substantive priorities" or "otherwise circumscrib[ed] an agency's power to discriminate among issues or cases it will pursue." *Heckler*, 470 U.S. at 833. Deference to an agency's decision not to proceed with an enforcement action is at its height when "[n]one of the statutes' enforcement provisions gives any indication that violators must be pursued in every case, or that one particular enforcement strategy must be chosen over another." *Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1033 (D.C. Cir. 2007). "[A]bsent some 'law to apply,'" an agency's enforcement priorities "should not be second-guessed by a court." *Schering Corp. v. Heckler*, 779 F.2d 683, 687 (D.C. Cir. 1985) (quoting *Heckler v. Chaney*, 470 U.S. at 834-35).

Here, Congress has not prescribed how the FEC should set its enforcement priorities or allocate its limited resources, nor has it "give[n] any indication that violators must be pursued in every case." *Ass'n of Irritated Residents*, 494 F.3d at 1033. As a result, while a plaintiff may challenge a dismissal based on the FEC's exercise of prosecutorial discretion, the plaintiff faces a "substantial burden" to show that the dismissal was a "clear" abuse of discretion. *La Botz*, 61

F. Supp. 3d at 34. That standard is particularly hard to satisfy given the district court's regular recognition that "[t]he FEC is in a better position than is [a plaintiff] to evaluate the strength of his complaint, its own enforcement priorities, the difficulties it expects to encounter in investigating [the plaintiff's] allegations, and its own resources." *Nader v. FEC*, 823 F. Supp. 2d 53, 65 (D.D.C. 2011); *see also Akins v. FEC*, 736 F. Supp. 2d 9, 21 (D.D.C. 2010) ("The FEC has broad discretionary power in determining whether to investigate a claim, and how, and whether to pursue civil enforcement under the Act. Indeed, the prosecutorial discretion given to the Commission is entitled to great deference as to the manner in which it conducts investigations and its decisions to dismiss complaints, provided it supplies reasonable grounds."); *In re Fed. Election Campaign Act Litig.*, 474 F. Supp. 1044, 1045-46 (D.D.C. 1979) ("The issue of whether a particular charge merits an investigation is a sensitive and complex matter calling for an evaluation of the credibility of the allegation, the nature of the threat posed by the offense, the resources available to the agency, and numerous other factors. Congress has wisely entrusted this matter to the discretion of the Federal Election Commission . . . .").

The FEC has more than adequate reasons to dismiss AAN's complaint pursuant to the EPS. This complaint was filed over four years ago and pertains to activities that primarily took place in 2010—six years and three election cycles ago. There has been no allegation in the years since that AAN is a political committee or is operating in any way other than as the issue advocacy organization it has been since its inception.

Dismissing this stale complaint would allow the Commission to "focus resources on important cases of more recent vintage, with fresher evidence and more important to current campaigns," Statement of Reasons of Commissioners Mason, Smith, and Wold in Pre-MUR 395, at 2, which would "ha[ve] a more positive effect on the electoral process and the regulated

community," General Counsel's Report, Agenda Document No. X02-27. This is especially true where, as here, the five-year statute of limitations has expired and the Commission could not institute an enforcement action. *Cf.* Statement of Reasons of Commissioners Mason, Smith, and Wold in Pre-MUR 395, at 2-3 ("Given the five year statute of limitations . . . any investigation would have had to be conducted in a hasty and less than thorough fashion in order to beat the statute of limitations."). The time has come to end this outdated case and devote the Commission's limited resources to more timely and relevant cases. The Commission should dismiss this case as stale.

CONCLUSION

For the foregoing reasons and those detailed in AAN's prior responses, AAN requests that the Commission dismiss CREW's administrative complaint because (1) AAN is not a political committee and (2) this case is sufficiently stale to warrant dismissal pursuant to the Commission's Enforcement Priority System.

Respectfully submitted,

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