CLARK HILL

Clark Hill PLC
1001 Pennsylvania Avenue NW
Suite 1300 South
Washington, DC 20004
T 202.772.0909
F 202.772.0919

clarkhill.com

Charles R. Spies
T 202.572.8663
F 202.572.8683
Email: cspies@clarkhill.com

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Jeff S. Jordan
Assistant General Counsel
Complaints Examination & Legal Administration
Federal Election Commission
999 E Street, NW
Washington, DC 20463
VIA FACSIMILE: (202) 219-3923

Re: MUR 7181; Independent Women's Voice Response to Complaint

Dear Mr. Jordan:

This letter responds to the notification by the Federal Election Commission (the "Commission") of a complaint (the "Complaint") filed in the above-referenced matter against our client, Independent Women's Voice ("IWV" or "Respondent") by the Center for Media and Democracy ("CMD" or "Complainant"), a liberal activist group masquerading as a non-partisan watchdog. The Complaint was the latest in a long line of frivolous, politically-charged complaints filed by CMD. The Complaint offers nothing more than the same unsupported and hyperbolic allegations and innuendo that have riddled CMD's complaints since its inception—virtually all against conservative organizations. It should be promptly dismissed.

The Commission may find "reason to believe" only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the Federal Election Campaign Act of 1971, as amended (the "Act"). *See* 11 CFR § 111.4(a), (d). Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true. *See* MUR 4960, Commissioners Mason, Sandstrom, Smith and Thomas, Statement of Reasons (Dec. 21, 2001). Moreover, the Commission will dismiss a complaint when the allegations are refuted with sufficiently compelling evidence. *See id.*

The Complaint contains numerous unsubstantiated and specious claims against Respondent. Specifically, the Complaint alleges, with few actual facts and in a conclusory manner, that IWV should have registered and reported as a federal political committee on account of the

organization's disbursements and public statements between 2010 and 2015.[1] The Complaint also erroneously contends that the IWV failed to report independent expenditures for a 2010 special election in Massachusetts. These bogus accusations are not only unsupported by the law and facts, but are also based largely on alleged activities that, even if true, which they are not, would have occurred beyond the five year statute of limitations that governs Commission actions.

IWV is **not** a political committee and it has accurately filed both electioneering communications and independent expenditure reports with the Commission when it has been required to do so. In short, IWV is, and always has been, in full compliance with the Act and the Commission's regulations. For the reasons set forth below, the Complaint has no merit and the Commission should immediately dismiss it.

I. SUMMARY OF ARGUMENT

A complaint must contain a "clear and concise recitation of the facts which describe a violation" of the Act. 11 CFR § 111.4(d)(3). The CMD Complaint has not done so. The Complaint alleges that IWV is a "political committee." In order to be a political committee, the nomination or election of candidates must be "**the** major purpose" of an organization. The Complaint provides brief descriptions for a handful of IWV communications from 2010 and 2012, which it heavily relies on to make its allegations, but the vast majority of such communications did not even qualify as independent expenditures or electioneering communications under the Act—and even if they had, they would have accounted for only a small portion of IWV's overall spending during those years. CMD's reliance on this minimal amount of spending does not and cannot establish IWV's "major purpose" as one that is to nominate or elect candidates.

Instead of acknowledging this fact, CMD spends the majority of the Complaint offering its own speculative theories to support its contention that IWV actually engaged in more political spending than it reported to the Commission and the IRS, and that therefore it should have registered and reported as a political committee. Specifically, on page 2 of the Complaint, CMD argues that IWV "spent at least $6.4 million more to influence federal elections between 2010 and 2014 than was reported to the Commission."[2] As purported evidence to support this hypothesis, CMD pulls a number of selective quotations from a single speech given by IWV's CEO and President, Heather Higgins, in November of 2015, and a handful of press releases, and suggests that those statements somehow transform IWV's non-political, educational, issue advocacy and policy activities, which comprises the majority of its spending, into candidate advocacy disbursements. Perhaps even more egregious, however, is CMD's proposition that IWV's payments to certain vendors and staff members were for political, candidate advocacy

[1] It should be noted that it is the height of hypocrisy for CMD to file a reporting and disclosure complaint against an organization like IWV considering CMD, a self-described "watchdog group," received sixty percent of its funding in 2011 from "dark money" sources. *See* Tori Richards, *Liberal 'media' group gets $520k dark money donation for war on right*, Watchdog.org, Dec. 4, 2013, *available at* http://watchdog.org/118639/dark-money-wisconsin/.
[2] Compl. at 2.

purposes simply because some of the vendors "are known for their political campaign work"[3] and some of the staff have "political consulting backgrounds."[4] CMD even has the audacity to suggest that both IWV's compensation to Higgins as well as IWV's non-earmarked grants to three other nonprofit groups have some sort of probative value in demonstrating a political major purpose. They do not. Such contrived legal theories have no grounding in actual law and do nothing to bolster CMD's spurious allegation that IWV should have registered as a political committee.

CMD's unsubstantiated allegations do not stop there. CMD concludes its complaint by claiming that IWV also "failed to report approximately $250,000 in independent expenditures on behalf of Scott Brown in the 2010 special election to fill the Massachusetts U.S. Senate seat left vacant by the death of Senator Ted Kennedy."[5] Setting aside the fact that IWV accurately filed independent expenditure reports for its participation in this special election,[6] it appears that CMD and its team of self-proclaimed campaign finance "experts" both ignored the inconvenient counter-factual public record and were indifferent to the five year statute of limitations that governs Commission actions. Otherwise, it would have surely understood that citing alleged activity that occurred six years and nine months before the Complaint was even filed to support its allegations is frivolous on its face and must be dismissed as a matter of law. It is remarkable that Lisa Graves—CMD's Executive Director and a law professor, who boasts on CMD's website of her previous role as Deputy Assistant Attorney General in the Clinton Administration Department of Justice's Office of Legal Policy—would allow such frivolous and borderline sanctionable allegations to actually be filed with a government agency.

In sum, the Complaint does not allege sufficient facts to demonstrate that there is "reason to believe" that IWV violated the law by failing to register and report as a political committee. Furthermore, the limited evidence that is relied on by CMD is belied by other facts included in the Complaint and its attachments—namely that IWV's filings with the Commission and the IRS clearly reflect that IWV's spending to influence federal elections never exceeded 35% of its overall spending between 2010 and 2014.[7] Finally, the Complaint's understanding of the applicable law is fundamentally flawed and, therefore, cannot support the Complaint's legal conclusions. These critical deficiencies render the Complaint entirely speculative. The Act, the Commission's regulations, and judicial precedent, therefore, require that the Commission find no reason to believe that a violation has occurred and the Complaint should be dismissed.

[3] Compl. at 13-14.
[4] Compl. at 13.
[5] Compl. at cover page.
[6] *See* Independent Women's Voice (C90011115), 24 Hour Independent Expenditure Reports, filed Jan. 16, 2010 and Jan. 18, 2010.
[7] The percentage of IWV's spending to influence federal elections, as reflected in its filings with the Commission and its overall spending in its IRS tax filings, was limited to 35% in 2010, 3% in 2011, 19% in 2012, 7% in 2013, and 14% in 2014.

II. FACTUAL BACKGROUND

IWV is a nonpartisan, nonprofit organization for mainstream women, men and families dedicated to promoting limited government, free markets, and personal responsibility. IWV is organized under Section 501(c)(4) of the Internal Revenue Code as a social welfare organization and received its Internal Revenue Service ("IRS") determination of exempt status letter on November 5, 2004. It is **not** a Section 527 political organization, nor a Commission-regulated "political committee." IWV's primary purposes, as set forth in its Articles of Incorporation, include:

1. To educate women on public policy issues important to their lives;
2. To keep elected officials informed of [IWV's] views on critical public policy matters;
3. To mobilize women to bridge ideas with action and get involved in the public debate;
4. To prepare educational materials and conduct educational activities in support of the general purposes of the corporation
5. To conduct and sponsor forums, lectures, debates and similar programs; and,
6. To assist other charitable, educational and social welfare organizations in the conduct of similar activities.[8]

IWV's Form 990 filings state that it "is an educational and issues advocacy organization engaged in reaching conservative and mainstream independents and women on the most important policy and legislative battles of the day."[9] Its Form 990 tax filings make clear that "IWV focuses on identifying messages that work with those key target audiences and then reaches them with multi-faceted issue campaigns, which can include paid advertising, social media outreach, phone calls, tele-townhalls, websites, polling, videos, and other viral media efforts."[10] IWV further explains on its website that it "continually seeks to support women and Independents by increasing their awareness of key policy and legislation that can have a profound impact on themselves, their families and their communities," and "work[s] diligently to inform the American people about the real facts about the economy and the impact of public policies."[11] In short, IWV's major purpose, as demonstrated both by its statements and by its allocation of its time and resources, is not campaigns, but outreach, education, and persuasion on policy issues.

One of IWV's primary education and policy focuses over the last seven years has been the repeal of the Affordable Care Act, known as "Obamacare," which was signed into law in March of 2010. IWV has spent significant resources on educating the public about the substantive perils of Obamacare and how the law negatively affects every day Americans. For example, in 2010, IWV established the "Repeal Pledge," a project modeled after the famous taxpayer-protection

[8] Articles of Incorporation for Independent Women's Voice, filed June 26, 2003, attached to Complaint as Exhibit 1.
[9] Independent Women's Voice, Form 990 Return of Organization Exempt from Income Tax (2013).
[10] *Id*.
[11] Independent Women's Voice Website, Who We Are, http://www.iwvoices.com/about.

pledge of Americans for Tax Reform, under which incumbents and candidates make a public promise to vote against tax increases. The tax pledge debuted in 1986 with the endorsement of Ronald Reagan and has helped to steel opposition to antigrowth policies. The repeal pledge aims to do the same for Obamacare. IWV's "Repeal Pledge" project has involved the creation of a website,[12] and the production of numerous advertisements[13] and communications aimed at pressuring various federal, state and local officials to repeal Obamacare.

To complement its Obamacare repeal efforts, IWV has also engaged in significant and comprehensive policy education campaigns regarding healthcare reform. For example, in 2012, IWV used interactive calls, online advertising, and mail to ask "Health Reform Questions" to help raise awareness for North Carolinians about the facts of our healthcare predicament and to dispel false assumptions that had been used to sell Obamacare to the American people. No candidates for public office were ever mentioned or depicted in these communications. When individuals were educated about the real facts about Obamacare, their support for the law fell significantly.[14] Although these are just a few examples, these are the types of educational, policy-oriented projects that have been hallmarks of IWV since its establishment. Numerous other examples of IWV's educational and policy initiatives can be found on its website.[15]

IWV has also engaged in a limited amount of independent expenditures and electioneering communications since 2010, which it has fully disclosed to the Commission, and which it believes complements its exempt purpose social welfare activities. Such activities are in full compliance with the Act, the Commission's regulations, and applicable IRS standards. IRS standards permit a Section 501(c)(4) organization to engage in "political activity" so long as the organization's primary purpose is not the "direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office."[16] Given the rough equivalence of the IRS "primary purpose" test and the Commission's "major purpose" test, a Section 501(c)(4) organization that is in compliance with IRS standards, which is the case here, cannot qualify as a "political committee" under the Commission's test.

III. LEGAL FRAMEWORK

A. The Commission's Standards for Making a "Reason to Believe" Finding

The Commission may only rely on two sources to determine whether it "has reason to believe that a person has committed ... a violation of [the Act]." 52 U.S.C. § 30109(a). First, the Commission may review the allegations in the complaint itself. *See id*. Second, the Commission may review "information ascertained in the normal course of its supervisory responsibilities." *Id*.

[12] *See* http://www.therepealpledge.com/.
[13] Two examples of Repeal Pledge issue advocacy advertisements include the ads, "Repeal" and "Mandate," both of which depict female physicians speaking directly to the camera urging lawmakers to repeal Obamacare. *See* http://www.therepealpledge.com/take-action/ads.
[14] Independent Women's Voice Website, Success Stories, http://www.iwvoice.org/success.
[15] *See* Independent Women's Voice Website, http://www.iwvoice.org/.
[16] *See* Rev. Rul. 81-95; Treas. Reg. § 1.501(c)(4)-l(a)(2)(ii).

This second provision is narrow, as the Commission has no "roving statutory functions" to "gather and compile information and to conduct periodic investigations." *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981) ("Machinists"). Instead, this statutory prong permits the Commission to review only information included in "other sworn complaints" or from evidence of actual "wrongdoing" learned in its routine review of reporting data. *In re Fed. Election Campaign Act Litig.*, 474 F. Supp. 1044, 1046 (D.D.C. 1979); *see also FEC v. Nat. Republican Senatorial Comm.*, 877 F. Supp. 15, 18 (D.D.C. 1995) ("NRSC").

Accordingly, a "reason to believe" determination must be made "without any investigation" by the Commission, which precludes any type of independent inquiry into the substance of the allegations. *Stockman v. FEC*, 138 F.3d 144,147 n.2 (5th Cir. 1998).[17] The Supreme Court reaffirmed that adjudications involving political speech must not entail "burdensome" inquiries, *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) ("WRTL II"), should "resolve disputes quickly without chilling speech," *id*, and "avoid threats of criminal liability and the heavy costs of defending against FEC enforcement" due to the uncertain application of federal law. *Citizens United v. FEC*, 558 U.S. 310, 335 (2010). This is particularly true even at the earliest stages of the Commission's enforcement process, where a "reason to believe" finding can be treated as evidence of at least some guilt and stigmatizes a respondent in the public's eye.

A "reason to believe" finding requires "a minimum evidentiary threshold [providing] at least 'some legally significant facts' to distinguish the circumstances from every other" situation where an entity engages in independent speech. *Democratic Senatorial Campaign Comm. v. FEC*, 745 F. Supp. 742, 745-46 (D.D.C. 1990). Complaints that state charges "only in the most conclusory fashion," without supporting evidence, are dismissed by the Commission. *In re Fed. Election Campaign Act Litig.*, 474 F. Supp. at 1047. And where "the record did not suggest" a violation had occurred and "respondents' answers to the complaint adequately refuted the complainant's allegations as to any presumed," dismissal is likewise warranted. *Democratic Senatorial Campaign Comm.*, 745 F. Supp. at 744.[18]

B. The Commission's Determination of Political Committee Status

1. Major Purpose Test

To be a "political committee," an organization must satisfy both a statutory and a constitutional test. As to the statutory component, the Act defines "political committee," in pertinent part, as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $ 1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 52 U.S.C. § 30101(4)(A).

[17] *See also NRSC*, 877 F. Supp. at 18 ("The FEC may not begin an enforcement investigation until after it finds reason to believe a violation has occurred.").

[18] The Commission's Guidebook explains that "a no reason to believe finding would be appropriate when (1) a violation has been alleged, but the respondent's response or other evidence demonstrates that no violation has occurred, (2) a complaint alleges a violation but is either not credible or is so vague that an investigation would be unwarranted, or (3) a complaint fails to describe a violation of the Act."

Beyond the statutory requirements, however, the Supreme Court and lower federal courts consistently have "construed the words 'political committee' ... narrowly [to] only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *see also FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252 n.6 (1986) ("MCFL") (reaffirming *Buckley*). *Buckley* "explicitly recognized the potentially vague and overbroad character of the 'political committee' definition in the context of FECA's disclosure requirements.'" *Machinists*, 655 F.2d at 391.[19] To "avoid questions of unconstitutionality,"[20] and to limit the "chilling effects worked upon"[21] speakers, the Supreme Court incorporated the "major purpose" requirement as a prerequisite that regulators must consider in determining an organization's status. Otherwise, Congress would subject many organizations "to an elaborate panoply of FEC regulations requiring the filing of dozens of forms [and] the disclosing of various activities" without adequate justification or concern for "First Amendment values." *GOPAC*, 917 F. Supp. at 858 (D.D.C. 1996) (quoting *Machinists*, 655 F.2d at 392), 859 (quoting *Buckley*, 424 U.S. at 79); *see also N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 287 (4th Cir. 2008) ("NCRL III") (noting that "designation as a political committee often entails a significant regulatory burden").

Buckley made clear that only organizations that have "the major purpose" of electing candidates may be regulated as political committees. 424 U.S. at 79 (emphasis added). The Commission has also explained that an organization "must…have the major purpose of engaging in Federal campaign activity" before it may be regulated as a political committee. *Supplemental Explanation and Justification*, 72 Fed. Reg. 5595, 5601 (Feb. 7, 2007) (emphasis added).

When determining an organization's major purpose, courts have repeatedly cautioned that issue advocacy must be excluded from the calculation. In *Buckley v. Valeo*, 519 F.2d 821, 863 (D.C. Cir. 1975) (en banc), *aff'd in part and reversed in part*, 424 U.S. 1 (1976), the United States Court of Appeals for the District of Columbia Circuit emphasized that the political committee definition had to be narrowly construed "since it potentially reaches ... the activities of nonpartisan issue groups which [are limited to] influencing the public to demand of candidates that they take certain stands on the issues." In citing this language approvingly, the Supreme Court confirmed that the political committee definition should not be stretched to apply "to reach groups engaged purely in issue discussion." *Buckley*, 424 U.S. at 79. Instead, *Buckley* defined a "political committee as including only those entities that have as [the] major purpose engaging in express advocacy in support of a candidate ... by using words such as 'vote for,' 'elect,'

[19] The Court held that the "major purpose" narrowing construction, was necessary to save the statute not only from vagueness concerns, but also from overbreadth. The definition of "political committee" was "defined in this way by the [*Buckley*] Court for the purpose of 'focusing precisely' FECA's broadly worded provisions on 'the narrow aspect of political association' which could constitutionally be restricted." *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996) (quoting *Machinists*, 655 F.2d at 392) ("GOPAC"); *see also Buckley*, 424 U.S. at 79 (explaining that to "fulfill the purposes of the [FECA]," the political committee definition need "only encompass organizations ... the major purpose of which is the nomination or election of a candidate").
[20] *Buckley*, 424 U.S. at 79 n.106.
[21] *ACLU v. Jennings*, 366 F. Supp. 1041, 1056-57 (D.D.C. 1973) (three-judge court), *vacated as moot sub nom., Staats v. ACLU*, 422 U.S. 1030 (1975).

'support,' 'vote against,' 'defeat,' or 'reject.'" *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712 (4th Cir. 1999).

While *Buckley* excluded organizations that engaged "purely" in issue advocacy, subsequent cases made clear that an organization need not refrain from all candidate advocacy in order to be exempted from the definition of a political committee. In *MCFL*, the Court emphasized that *Buckley*'s teaching would exclude from regulation an entity whose "central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates." *MCFL*, 479 U.S. at 252 n.6. *Machinists* similarly cautioned that "issue-oriented groups, lobbying organizations,... and other groups concerned with the open discourse of views on prominent national issues" should be excluded from the definition of a political committee. 655 F.2d at 391, 394; *see also N.M. Youth Organized v. Herrera*, 611 F.3d 669, 678 (10th Cir. 2010) (evaluating whether a "group spends a preponderance of its expenditures on express advocacy") (emphasis added). Moreover, placing political committee burdens on organizations "primarily engaged in speech on political issues unrelated to a particular candidate" would "not only contravene both the spirit and the letter of *Buckley*'s 'unambiguously campaign related' test, but it would also subject a large quantity of ordinary political speech to regulation." *NCRL III*, 525 F.3d at 288.

Until recently, relevant case law strongly suggested that the Commission's major purpose test was limited solely to an examination of an organization's express advocacy activities.[22] However, the U.S. District Court for the District of Columbia, in a case involving a challenge to the Commission's dismissal of another political committee status-related complaint, recently stated that the controlling Commissioners' Statement of Reasons justifying the dismissal contained an "erroneous understanding that the First Amendment effectively required the agency to exclude from its consideration all non-express advocacy in the context of disclosure."[23] The District Court remanded the case back to the Commission "for its reconsideration in light of the correction,"[24] effectively forcing the Commission to analyze electioneering communications, in addition to express advocacy communications, in performing the Commission's "judicially approved case-by-case approach to adjudicating political committee status."[25]

With that said, even if electioneering communications are not per se excluded from the major purpose analysis, many electioneering communications still would not count against the major purpose threshold. The Supreme Court, "made clear in [*WRTL II*] that the distinction between issue advocacy and express advocacy can be paramount in the context of electioneering communications." *Colo. Right to Life Comm.*, 498 F.3d at 1153 n.11. In *WRTL II*, the Supreme Court held that an electioneering communication can advocate for issues or candidates. *See* 551

[22] *See* MUR 5541, Statement of Reasons of Vice Chairman Matthew S. Peterson and Commissioners Caroline C. Hunter and Donald F. McGahn, at 14 n.63 (Jan. 22, 2009) (stating that there is "serious doubt on the validity of examining anything other than the amount of express advocacy in the major purpose test analysis").
[23] *CREW v. FEC*, 2016 U.S. Dist. LEXIS 127308, at *37-38.
[24] *Id*. at *38.
[25] *Id*. at *37; *see also Supplemental Explanation and Justification on Political Committee Status*, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007).

U.S. at 470-71. The Court determined that an electioneering communication would constitute candidate advocacy only if the ad "is the functional equivalent of express advocacy," which occurs "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL II*, 551 U.S. at 469-70. The Court explicitly rejected the Commission's view that "any ad" that fits within the statutory definition of an electioneering communication "is the 'functional equivalent' of an ad saying defeat or elect that candidate." *Id*. at 470. To hold otherwise "would effectively eliminate First Amendment protection for genuine issue ads." *Id*. at 471.

The District Court in *CREW v. FEC*[26] also spoke to the timeframe that may be considered when performing a major purpose analysis, stating that "[g]iven the FEC's embrace of a totality-of-the circumstances approach to divining an organization's 'major purpose,' it is not *per se* unreasonable that the Commissioners would consider a particular organization's full spending history as relevant to its analysis."[27] Thus, according to the court, the Commission is not limited to considering a group's spending in a single calendar year when conducting a "major purpose" inquiry. However, the court concluded that a "lifetime-only rule" is contrary to law when it "tends to ignore crucial facts indicating whether an organization's major purpose has changed."[28] Therefore, under the court's holding, the Commission may, when examining major purpose, consider a group's full spending history provided it also considers whether the group's major purpose has changed as evidenced by its recent spending activity.[29]

Lastly, the District Court rejected CREW's argument that applying a 50-percent spending threshold was legally erroneous. According to the court, the Commission is entitled to deference on the question of spending thresholds, and it concluded that "[a] reasonable application of a 50%-plus rule would not appear to be arbitrary and capricious."[30]

2. Case-by-Case Analysis

Although *Buckley* established the major purpose test, it provided no guidance as to the proper approach to determine an organization's major purpose. *See, e.g., Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 556 (4th Cir. 2012) ("RTAA"). The Supreme Court's discussion of major purpose in a subsequent opinion, *MCFL*, 479 U.S. 238, was similarly sparse. *See id*. at 262. In that case, the Court identified an organizations independent spending as a relevant factor in determining an organization's major purpose, but examined the entire record as part of its analysis and did not chart the outer bounds of the test. 479 U.S. at 238. Following *Buckley* and *MCFL*, lower courts have refined the major purpose test—but only to a limited extent.[31] In large

[26] *CREW v. FEC*, 2016 U.S. Dist. LEXIS 127308.
[27] *Id*. at *39.
[28] *Id*. at *41.
[29] *See* MUR 6589 , Statement of Reasons of Chairman Matthew S. Peterson and Commissioners Caroline C. Hunter and Lee E. Goodman, at 4-5 (Oct. 19, 2016).
[30] *Id*. at 5 (quoting *CREW v. FEC*, 2016 U.S. Dist. LEXIS 127308, at *42.)
[31] *See Machinists*, 655 F.2d at 396 (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

measure, the contours of political committee status—and the major purpose test—have been left to the Commission.

Following *Buckley*, the Commission adopted a policy of determining on a case-by-case basis whether an organization is a political committee, including whether its major purpose is the nomination or election of federal candidates. *Political Committee Status*, 72 Fed. Reg. 5596 (Feb. 7, 2007) (*Supplemental Explanation and Justification*). To determine an entity's "major purpose," the Commission explained that it considers a group's "overall conduct," including public statements about its mission, organizational documents, government filings (e.g., IRS notices), the proportion of spending related to "federal campaign activity," and the extent to which fundraising solicitations indicate funds raised will be used to support or oppose specific candidates. *Id*. at 5597, 5605. Among other things, the Commission informed the public that it compares how much of an organization's spending is for "federal campaign activity" relative to "activities that are not campaign elated." *Id*. at 5601, 5605.

IV. ANALYSIS

A. The Complaint is Factually and Legally Deficient on its Face and Should be Dismissed at the Outset

As stated above, a "reason to believe" finding must be based on the complaint, information included in "other sworn complaints," or evidence from actual "wrongdoing" learned in the Commission's routine review of the reporting data. Complaints may not be "conclusory" and must contain "legally significant facts" to support the charges alleged in the complaint.[32]

The Complaint fails to meet even this most basic of tests. Despite its significant resources and budget, CMD, which describes itself as "a national watchdog group that conducts in-depth investigations," has failed to provide any "legally significant facts" to prove its allegations. CMD reaches its conclusion that "IWV's major purpose since 2010 has been to influence elections," and that "the group spent at least $6.4 million more to influence federal elections between 2010 and 2014 than was reported to the Commission"[33] by citing an array of entirely extraneous facts and making a series of self-serving and speculative inferences based on those facts. CMD attempts to break this so-called evidence down into categories, stating that it "has reason to believe that [IWV's] spending for the purpose of influencing federal elections is much greater than what it files with federal agencies, based on IWV's public statements and news accounts, its

intrusive where directed toward "draft" group lacking a "candidate" to support); *GOPAC*, 917 F. Supp. at 861-62 (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").

[32] *See* Commission Guidebook, *supra* n.18.

[33] Compl. at 2.

tax returns, an analysis of its political ads, and discrepancies in reporting."[34] We will therefore address each category in turn below.

1. IWV's IRS and FEC Filings

CMD's primary contention in the Complaint is that IWV's "spending for the purpose of influencing federal elections is much greater than what it filed with federal elections," and specifically, that IWV "spent at least $6.4 million more to influence federal elections than was reported to the Commission." However, the documents relied upon and attached to the Complaint, including IWV's Form 990 IRS filings[35] and its independent expenditure and electioneering communication reports filed with the Commission,[36] directly refute this allegation. In fact, when comparing IWV's spending to influence federal elections with its overall spending, its federal spending never even comes close to satisfying the 50%-plus rule applied by the Commission[37] to determine an organization's major purpose. As set forth in the chart below, from 2010 through 2014, IWV's spending to influence federal elections never exceeded 35% of its overall spending.

IWV Total Spending v. Spending to Influence Federal Elections[38]			
Year	**Total Spending Reflected on IWV's IRS Form 990s**	**Spending Reflected on IWV's FEC Filings**	**Percentage of Overall Spending Made for the Purpose of Influencing Federal Elections**
2010	$1,986,937.00	$686,425.00[39]	35%
2011	$984,378.00	$28,600.00	3%
2012	$5,040,110.00	$961,018.00	19%
2013	$2,318,795.00	$160,287.31	7%
2014	$5,490,529.00	$783,403.00	14%

It should also be noted that between 2004 and 2009, IWV did not make any political expenditures and therefore did not report any political activities with the Commission or the IRS.[40]

[34] Compl. at 9.
[35] *See* Compl., Ex. 4-12.
[36] *See* Compl., Ex. 13-23.
[37] *CREW v. FEC*, 2016 U.S. Dist. LEXIS 127308, at *42.
[38] *See* IWV's Form 990 Filings from 2010-2014, attached to CMD's Complaint as Exhibits 8-12.
[39] This includes a total of $299,177 in "electioneering communications" that IWV reported on May 7, 2010 and September 23, 2010. These electioneering communications arguably did not rise to the level of express advocacy or its functional equivalent, and CMD has provided no proof to the contrary, so they should technically not be included in IWV's spending to influence federal elections that year. However, even when this spending is included in the 2010 overall amount of federal spending, IWV's federal election spending that year still did not come close to 50%-plus of its overall spending. Furthermore, this amount includes all of IWV's spending in the 2010 U.S. Senate special election in Massachusetts, which CMD falsely alleges was not reported.

CMD argues that IWV's increased spending in 2010, and its decision to start making a limited amount it political expenditures that year, resulted from an "organizational shift" and the Supreme Court's decision in *Citizens United*, and that IWV's major purpose therefore changed in 2010 to "influence federal elections."[41] But an organization's decision to engage in a limited amount of political activity aimed at influencing federal elections does not transform that organization's major purpose into one that is to influence the election or defeat of federal candidates. The Supreme Court has recognized that a group's major purpose can change over its lifetime, but only when its "spending become[s] 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."[42] That is simply not the case here.

In reality, IWV began making a limited amount of political expenditures in 2010 not because of an organizational shift or the new freedoms it enjoyed after *Citizens United*, but rather because President Obama signed the Affordable Care Act into law in 2010 and IWV felt strongly that it needed to educate people about the dire consequences of the law, try to prevent its passage, and once it had, inform the public about which candidates pledged to repeal it. IWV's limited amount of spending to influence federal elections that year—35% of its overall spending—can hardly be considered "so extensive" to warrant a conclusion that its major purpose changed in 2010. Moreover, because IWV's major purpose has never changed since its creation in 2004,[43] "it is not *per se* unreasonable" that the Commission "would consider [IWV's] full spending history," including spending from 2004 through 2009, "as relevant to its [major purpose] analysis."[44]

CMD also pursues the novel theory that IWV's payments to certain vendors, as reflected in its Form 990 filings, were made entirely to influence federal elections simply because some of these vendors "are known for their political campaign work."[45] This argument is not rooted in any actual legal authority and has no probative value in a "major purpose" analysis. Of course, CMD fails to mention that all of the four vendors cited, Victory Media Group, Campaign Grid, GEB International, and Antietam Communications,[46] provide a diverse portfolio of consulting services to a wide range of organizations, and are not limited to providing political services. For example, Victory Media, which the Complaint notes was IWV's largest vendor in 2012, states on its LinkedIn page that it "provides voter contact, issue advocacy, and public relations solutions for corporate, association, political and nonprofit clients."[47] The mere fact that these vendors offer political consulting services as part of larger portfolios does not mean that any and all payments

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[40] *See* IWV's Form 990 Filings from 2004-2009, attached to CMD's Complaint as Exhibits 4-7.
[41] Compl. at 22.
[42] *CREW v. FEC*, 2016 U.S. Dist. LEXIS 127308, at *40 (quoting *MCFL*, 479 U.S. at 262).
[43] IWV's major purpose continues to be social welfare activities in line with Section 501(c)(4) of the Internal Revenue Code and IWV's primary purposes set forth in its Articles of Incorporation still hold true today. *See* IWV's Articles of Incorporation, *supra* n.8.
[44] *CREW v. FEC*, 2016 U.S. Dist. LEXIS 127308, at *39.
[45] Compl. at 13.
[46] Compl. at 14.
[47] *See* Victory Media Group LinkedIn Page, https://www.linkedin.com/company-beta/1604709/?pathWildcard=1604709.

to these firms constitutes political activity, nor should such payments be automatically considered "expenditures" relevant to a major purpose analysis. In reality, IWV uses its vendors to perform a wide array of services, the vast majority of which is in furtherance of IWV's major purpose of education and social welfare.

Lastly, CMD cites three grants made by IWV in 2014 to other nonprofit organizations and argues that these grants should be considered political activity for purposes of the major purpose test.[48] Once again, there is no legal authority to support this contention. In fact, CMD does not even allege that IWV earmarked these grants for political purposes, let alone for the purpose of influencing federal elections. Instead, CMD argues that because two of the recipient organizations have at times engaged in some political activities to influence federal elections, that IWV's grants must therefore be considered to have been made to support federal elections, as well. This illogical argument is contrary to law and appears to be of value only in making politically motivated allegations against those who do not support CMD's far-left, anti-First Amendment agenda. To be clear, IWV has a strict policy whereby grants or contributions to other organizations must be used for a group's charitable or social welfare major purpose (i.e. major purpose). All of the grants cited in the Complaint were accompanied by correspondence making clear that the grants must be used for major purpose, and not political activities.

In short, despite CMD's conclusory statements to the contrary, the Complaint's allegation that IWV's major purpose is to influence federal elections is not supported by any reasonable review of IWV's FEC and IRS filings and cannot justify further inquiry by the Commission.

2. IWV's Public Statements, Website, and Press Releases

Because CMD cannot back up its allegations using actual facts or real spending figures, it resorts to making speculative, conclusory statements about a handful of IWV public statements, and then applies concocted legal theories to these conclusory statements as if they were facts. Such an application is not supported by the Act or the Commission's regulations and is frivolous on its face.

For example, CMD spends at least four pages of the Complaint pulling selective quotations from a single speech that Heather Higgins gave at the David Horowitz Freedom Center's Restoration Weekend in November of 2015,[49] and then uses these quotations to argue that they somehow magically convert IWV's educational and policy-oriented (i.e. major purpose) spending into political expenditures. Specifically, CMD chooses a few short passages from Higgins' forty minute speech, in which she talks generally about strategy, issues, candidates, and some of IWV's limited amount of political activities, and uses these passages to argue that:

[48] Compl. at 15-16.
[49] Compl. at 9-12; Ex. 34.

> the lion's share of [IWV's] expenditures for public opinion research, data development, message testing, and grassroots targeting since 2010 have been for the sole purpose of increasing the effectiveness of its political ads, robocalls, and voter engagement in support of or opposition to federal candidates, and should therefore be taken into account in the Commission's application of the major purpose test.

Importantly, payments for activities like "public opinion research, data development, message testing, and grassroots targeting" by a corporation are not considered "expenditures" under the Act[50] because they are not made "for the purpose of influencing any election for Federal office."[51] Any consideration of such payments in a major purpose analysis is therefore not permitted under the Act and applicable case law. As stated above, *Buckley* defined a "political committee as including only those entities that have as [the] major purpose engaging in express advocacy in support of a candidate ... by using words such as 'vote for,' 'elect,' 'support,' 'vote against,' 'defeat,' or 'reject.'" *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712 (4th Cir. 1999). Public opinion research, data development, message testing, and grassroots targeting are by nature not express advocacy communications, as they do not contain so-called "magic words," or any language that could be construed as the functional equivalent of express advocacy.[52] Furthermore, none of these activities fall under the category of electioneering communications, which the District Court in *CREW* said must not be *per se* excluded from consideration in a major purpose analysis.[53] Therefore, it is factually and legally flawed for CMD to argue that such payments should be considered federal political activity and factored into a major purpose analysis. They should not.

The Complaint also points to portions of IWV's website it believes to be indicative of a political major purpose. Once again, CMD's arguments do not pass muster. First, CMD singles out several IWV staffers, and contends that their "political consulting backgrounds"[54] is evidence that IWV's major purpose is influencing federal elections. If this was actually a metric for consideration in a major purpose analysis, then perhaps CMD should register as a political committee in light of its member, Richard Eskow, formerly serving as a writer and editor for Bernie Sanders' presidential campaign.[55] Of course, the work history of an organization's staff has no bearing on a group's major purpose and CMD's argument to the contrary is just further proof that the Complaint is baseless.

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[50] Under the Act, the term "expenditure" does not include "any payment made or obligation incurred by a corporation or a labor organization which, under section 30118(b) of this title, would not constitute an expenditure by such corporation or labor organization." 52 U.S.C. § 30101(9)(B)(v).
[51] 52 U.S.C. § 30101(9)(A)(i).
[52] *See* 11 CFR § 100.22(b). A communication cannot constitute even the functional equivalent of express advocacy — let alone express advocacy itself — unless the communication "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL II* at 2667.
[53] *CREW v. FEC*, 2016 U.S. Dist. LEXIS 127308, at *37-38.
[54] Compl. at 13.
[55] *See* CMD's Website, Bio for Richard Eskow, http://www.prwatch.org/users/35514/richard-eskow.

Equally meritless is CMD's contention that several press releases on IWV's website announcing that two of its vendors received Pollie Awards in 2014 are evidence of IWV's federal election major purpose. What CMD conveniently ignores, however, is the fact that the vendors, Victory Media Group and Antietam Communications, received these awards for IWV communications made in South Carolina's First Congressional District special election that were fully reported with the Commission,[56] and that have already been factored into IWV's federal political spending in the chart above. Even when including these expenditures in a major purpose analysis, IWV's spending to influence federal elections in 2013 constituted only 7% of its overall spending that year, far below the 50% threshold. In sum, the public statements cited in the Complaint do nothing to bolster CMD's claim that IWV's major purpose is federal political activities. Such speculative hyperbole should be immediately dismissed.

3. IWV's Communications

IWV has engaged in a wide range of communications since its inception, the vast majority of which has been in furtherance of its educational, social welfare major purpose. As stated above, IWV has also engaged in a limited amount of independent expenditures and electioneering communications since 2010, which it has fully disclosed to the Commission, and which it believes complements its exempt purpose social welfare activities. Remarkably, despite the fact that CMD's primary allegation in the Complaint is that IWV's "spending for the purpose of influencing federal elections is much greater than what it files"[57] with the Commission, all of the specific advertisements cited in the Complaint were fully and accurately reported by IWV.[58] This means that the costs associated with each advertisement have already been factored into IWV's spending to influence federal elections reflected in the spending chart above.

The Complaint fails to present any additional IWV communications that should have been reported to the Commission or that should have factored into IWV's overall spending to influence federal elections. In sum, CMD's references to specific IWV communications provide no support to either its claim that that "IWV's major purpose since 2010 has been to influence elections," or that IWV "spent at least $6.4 million more to influence federal elections between 2010 to 2014 than was reported to the Commission."[59]

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[56] *See* Independent Women's Voice (C90011115), 24 Hour Independent Expenditure Reports, filed Apr. 30, 2013, May 3, 2013, May 5, 2013, and May 6, 2013; *see also* 2013 July Quarterly Report, filed July 12, 2013.
[57] Compl. at 9.
[58] *See* Independent Women's Voice (C30001572), Electioneering Communication Notice, filed May 7, 2010 (reflecting payments for "Case Closed" (Compl. at 18-19)); *see also* Independent Women's Voice (C90011115), 24 Hour Independent Expenditure Reports, filed Jan. 16, 2010 and Jan. 18, 2010 (reflecting payments for Scott Brown advertisements (Compl. at 19)); 24 Hour Independent Expenditure Report, filed May 17, 2010 (reflecting payments for Tim Burns robocalls (Compl. at 19)); 2012 Year-End Report, filed Jan. 24, 2013 (reflecting payments for advertisements referencing Barack Obama (Compl. at 21-22).
[59] Compl. at 2.

B. CMD's Allegation that IWV Failed to Report Independent Expenditures is Barred by the Statute of Limitations.

As further evidence that the Complaint was filed for political purposes and to injure IWV, and not to redress violations of the Act, CMD's allegation that IWV failed to report independent expenditures is based on alleged activity that occurred beyond the five year statute of limitations that governs Commission actions. *See NRSC*, 877 F. Supp. at 17.[60]

CMD maintains that "IWV did not report making any independent expenditures or electioneering communications in the 2010 special election for the Massachusetts U.S. Senate seat left vacant by Sen. Kennedy's death."[61] As an initial matter, this is simply not true. IWV accurately filed independent expenditure reports for its participation in this 2010 special election.[62] However, even assuming arguendo that IWV did not file reports with the Commission reflecting its participation in this race, which it did, the Commission is barred from considering this allegation because it is based on activity that occurred six years and nine months before the Complaint was filed. Accordingly, this claim must be dismissed as a matter of law.

V. CONCLUSION

As explained fully above, there is no factual or legal basis to the allegations contained in the Complaint. IWV therefore respectfully requests that the Office of General Counsel recommend, and the Commission find, that there is no reason to believe that a violation of the Act or the Commission's regulations was committed in this matter, dismiss the Complaint, and take no further action.

Respectfully submitted,

Charles R. Spies
James E. Tyrrell III

Counsel to Independent Women's Voice

[60] In *NRSC*, the District Court stated that "[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued." *NRSC*, 877 F. Supp. at 17 (quoting 28 U.S.C. § 2462); *see also FEC v. Williams*, 104 F.3d 237, 239-40 (9th Cir. 1996), *cert. denied*, 522 U.S. 1015 (1997).
[61] Compl. at 22-23.
[62] *See* Independent Women's Voice (C90011115), 24 Hour Independent Expenditure Reports, filed Jan. 16, 2010 and Jan. 18, 2010.