

FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL'S REPORT

MUR 7735

DATE COMPLAINT FILED: May 7, 2020

DATE OF NOTIFICATION: May 11, 2020

DATE OF LAST RESPONSE: July 24, 2020

DATE ACTIVATED: Aug. 18, 2020

EXPIRATION OF SOL: Feb. 12 – Mar. 10, 2025

ELECTION CYCLE: 2020

11 **COMPLAINANT:** Campaign Legal Center

14 RELEVANT STATUTE 52 U.S.C. § 30101(4)(A), (13), (17)

15 AND REGULATIONS: 52 U.S.C. § 30102

16 52 U.S.C. § 30103

¹⁷ 52 U.S.C. § 30104(b), (c), (g)

18 11 C.F.R. § 100.5

19 11 C.F.R. § 100.16

20 11 C.F.R. § 100.22

21 11 C.F.R. § 109.10

22 11 C.F.R. § 110.11(a)(1)

23 INTERNAL REPORTS CHECKED: Disclosure Reports

24 FEDERAL AGENCIES CHECKED:

STATE AGENCIES CHECKED:

26 I. INTRODUCTION

27 The Complaint alleges that the Big Tent Project Fund (“Big Tent Project”) and Big Tent
28 Project’s Executive Director Jonathan Kott (collectively, the “Respondents”) violated the Federal
29 Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations (1) by
30 failing to register and report as a political committee, or, in the alternative, by failing to disclose
31 contributors who gave for political purposes and who funded its independent expenditures, and
32 (2) by failing to report certain independent expenditures. In less than a month after its formation,

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1 Big Tent Project reported spending \$4,819,713.56 on independent expenditures in opposition to
2 U.S. Senator Bernie Sanders's campaign for the 2020 Democratic presidential nomination.
3 During that time, Kott, on behalf of Big Tent Project, made numerous media appearances
4 extolling Big Tent Project's fundraising efforts, explaining Big Tent Project's mission to oppose
5 Sanders as the Democratic nominee, and soliciting additional contributions to continue and
6 expand Big Tent Project's independent expenditures in opposition to Sanders.

7 For the reasons set forth below, we recommend that the Commission find reason to
8 believe that the Big Tent Project violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to
9 register and report as a political committee and violated 52 U.S.C. § 30104(b)(4)(H)(iii),
10 (b)(5)(A), and (g)(1) by failing to report independent expenditures. In the alternative, we
11 recommend the Commission find reason to believe that the Big Tent Project violated 52 U.S.C.
12 § 30104(c)(1) and (c)(2) by failing to disclose donors and 52 U.S.C. § 30104(c) and (g)(1) by
13 failing to report independent expenditures. Pending the proposed investigation that could yield
14 additional information about Jonathan Kott's involvement in Big Tent Project, including the
15 extent to which he acted in a personal capacity as opposed to performing official, treasurer
16 functions, we further recommend that the Commission take no action at this time as to any
17 allegations against Kott. Additionally, we recommend that the Commission authorize the use of
18 compulsory process.

19 **II. FACTUAL BACKGROUND**

20 Big Tent Project is a 501(c)(4) organization that registered as a corporation in Delaware

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1 on February 12, 2020.¹ Jonathan Kott is the Executive Director of Big Tent Project.² Big Tent
2 Project is not registered as a political committee with the Commission.

3 Between February 19, 2020, and March 2, 2020, Big Tent Project reported making
4 \$4,819,713.56 in independent expenditures opposing Sanders's campaign for the Democratic
5 presidential nomination, including \$4,448,335.14 in digital and online advertising and
6 \$371,378.42 in "mailing expense[s]."³ According to Facebook's Ad Library, Big Tent Project
7 paid \$164,673 to sponsor approximately 1,900 advertisements on Facebook and Instagram
8 between February 19, 2020, and March 10, 2020, including 58 advertisements in Michigan
9 between March 5, 2020, and March 10, 2020.⁴ Big Tent Project has not reported making any
10 independent expenditures since March 2, 2020.⁵ Generally, the advertisements on Facebook's
11 Ad Library criticize Sanders as a "socialist," portray a vote for Sanders negatively on the basis
12 that such votes would likely lead to the re-election of President Donald Trump, highlight

¹ Compl. ¶¶ 5, 7, 8, 15 (May 7, 2020) (citing news articles' descriptions of Big Tent Project); Resp. at 6 (July 24, 2020); *Entity Search*, STATE OF DEL. DIV. OF CORPS., <https://icis.corp.delaware.gov/ecorp/entitysearch/namesearch.aspx> (search Entity Name for "Big Tent Project Fund" or File Number for "7848378") (last visited May 12, 2021).

² Compl. ¶ 5 (citing Anna Palmer & Jake Sherman, *The Dem Ad Campaign Aimed At Taking Down Bernie*, POLITICO: PLAYBOOK (Feb. 19, 2020) [hereinafter Playbook Article], <https://www.politico.com/newsletters/playbook/2020/02/19/the-dem-ad-campaign-aimed-at-taking-down-bernie-488357>).

³ FEC Form 5, Big Tent Project Fund, Report of Independent Expenditures Made and Contributions Received (Apr. 10, 2020) [hereinafter Big Tent Project Form 5], <https://docquery.fec.gov/pdf/321/202004109216633321/202004109216633321.pdf>; *Independent Expenditures*, FEC.GOV, https://www.fec.gov/data/independent-expenditures/?data_type=processed&committee_id=C90019175&is_notice=true&candidate_id=P60007168&support_oppose_indicator=O&min_date=01%2F01%2F2019&max_date=12%2F31%2F2020 (last visited May 12, 2021) [hereinafter Big Tent Project IEs Website].

⁴ *Ads from Big Tent Project*, FACEBOOK: AD LIBRARY, [https://www.facebook.com/ads/library/?active_status=inactive&ad_type=political_and_issue_ads&country=US&impression_search_field=has_impressions_lifetime&view_all_page_id=112739086975178&sort_data\[direction\]=desc&sort_data\[mode\]=relevancy_monthly_grouped](https://www.facebook.com/ads/library/?active_status=inactive&ad_type=political_and_issue_ads&country=US&impression_search_field=has_impressions_lifetime&view_all_page_id=112739086975178&sort_data[direction]=desc&sort_data[mode]=relevancy_monthly_grouped) (last visited May 12, 2021) [hereinafter Big Tent Project Ad Profile]; *see also* Compl. ¶ 6 & n.5; *id.* ¶ 22. The Complaint alleges and we confirmed that neither the Google nor Snap ad archives reflect any advertisements run under the Big Tent Project name. *See* Compl. at 3 n.5.

⁵ Big Tent Project IEs Website; *see* Compl. ¶ 21.

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1 Sanders's positions as requiring tax increases, and, in some instances, expressly encourage the
 2 viewer to "Say No" to or "Vote No" on Sanders.⁶

3 The Complaint alleges that Big Tent Project violated the Act (1) by failing to register and
 4 report as a political committee, or in the alternative, by failing to disclose contributors who gave
 5 for political purposes and who funded its independent expenditures, and (2) by failing to report
 6 between \$35,124 and \$47,758 in independent expenditures made in early March 2020 in
 7 Michigan.⁷

8 The Complaint cites numerous news reports in which Kott is quoted saying that Big Tent
 9 Project aimed to prevent Sanders from winning the Democratic presidential nomination in favor
 10 of a more moderate candidate.⁸ For example, Kott made statements that Big Tent Project would
 11 make expenditures to ensure Democratic primary voters learned about Sanders's "record of
 12 politically toxic policy proposals . . . before they choose a nominee"⁹ and had information about
 13 Sanders's record and positions "before they vote,"¹⁰ and he characterized Big Tent Project as

⁶ See Big Tent Project Ad Profile.

⁷ Compl. ¶¶ 26-52; Big Tent Project Ad Profile (filter to "Michigan" in "Delivery by Region"). Additionally, the Complaint alleges that Big Tent Project sponsored advertisements in Idaho, Compl. at 9 n.29, but Facebook's Ad Library does not offer an option to filter Idaho advertisements to confirm this allegation. See Big Tent Project Ad Profile.

⁸ See Compl. ¶¶ 7-8, 10, 12-17, 19-20.

⁹ *Id.* ¶ 7 (quoting Playbook Article).

¹⁰ *Id.* ¶¶ 14-15 (quoting Michael Warren, Jeff Zeleny, Lauren Fox & Fredreka Schouten, *Bernie Sanders' Rise Has Moderate Democrats Wondering If It's Too Late to Stop Him*, CNN (Feb. 25, 2020, 4:22PM) [hereinafter February CNN Article], <https://www.cnn.com/2020/02/25/politics/bernie-sanders-2020-rise/index.html>; and Alana Abramson, *Big-Money Democratic Donors Are Trying to Stop Bernie Sanders. But Even They Worry It Could Be Too Late*, TIME (Feb. 27, 2020, 2:56PM) [hereinafter Time Article], <https://time.com/5791185/bernie-sanders-democratic-party-donors/>).

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1 the ““largest anti-Sanders group””¹¹ and a project launching a ““debate about [Sanders’s]
 2 socialism and electability.””¹²

3 Big Tent Project, in its Response, describes its primary purpose as “educating the public
 4 on current events and policy issues such as healthcare, tax energy, [and] education.”¹³

5 Respondents argue that Big Tent Project is not a political committee because it is a 501(c)(4)
 6 organization with issue-related social welfare purposes as just described, it has made and plans to
 7 continue to make significant expenditures related to those issue-related primary purposes, and
 8 statements by Kott and the press about Big Tent Project’s mission are not dispositive.¹⁴

9 Furthermore, Big Tent Project contends that it was not required to report its contributors because
 10 none of the donations it received were earmarked for the purpose of influencing federal elections
 11 and it contends that the reporting requirements apply only when donations are earmarked for
 12 independent expenditures pursuant to a “written proposal or some other specific indication.”¹⁵

13 Finally, Big Tent Project appears not to contest that it did not report certain independent
 14 expenditures, but stated that it would amend its April 2020 Quarterly Report and asks that such
 15 omission should be handled pursuant to the Commission’s Administrative Fines program.¹⁶ As

¹¹ *Id.* ¶ 17 (quoting Jacqueline Alemany, *Power Up: Your Complete Guide to Everything Super Tuesday*, WASH. POST (Mar. 2, 2020, 6:26AM) [hereinafter Washington Post Article], <https://www.washingtonpost.com/news/powerpost/paloma/powerup/2020/03/02/powerup-your-complete-guide-to-everything-super-tuesday/5e58202188e0fa101a73b860/>).

¹² *Id.* ¶ 8 (quoting NPR Staff, *Nevada Democratic Debate: Live Updates and Analysis*, NPR (Feb. 19, 2020) [hereinafter NPR Article], <https://will.illinois.edu/news/story/nevada-democratic-debate-live-updates-and-analysis>).

¹³ Resp. at 6.

¹⁴ *Id.* at 5-7.

¹⁵ *Id.* at 7-8.

¹⁶ *Id.* at 2 n.1 (acknowledging without elaboration “one minor reporting omission from the April quarterly report, which was discovered in preparation of” the Response).

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1 of May 12, 2021, Big Tent Project its April 2020 Quarterly Report nor had it filed any
 2 subsequent quarterly reports.¹⁷

3 The Complaint also alleges Big Tent Project spent approximately \$72,000 on anti-
 4 Sanders communications on Facebook under the group name "United We Succeed."¹⁸ The
 5 Facebook Ad Library confirms that a "political organization" page entitled United We Succeed
 6 spent \$71,763 on advertisements opposing Sanders's presidential campaign beginning in
 7 March 2020.¹⁹ United We Succeed's Facebook profile and the organization's website state that
 8 it is "[a] campaign in partnership with the Big Tent Project Fund."²⁰ Big Tent Project denies that
 9 it made expenditures associated with United We Succeed.²¹

10 **III. LEGAL ANALYSIS**

11 **A. The Commission Should Find Reason to Believe That Big Tent Project Fund**
 12 **Improperly Failed to Register and Report as a Political Committee**

13 Political committees must register with the Commission, file periodic reports for
 14 disclosure to the public, appoint a treasurer who maintains its records, and identify themselves
 15 through "disclaimers" on all of their political advertising, on their websites, and in mass

¹⁷ *Big Tent Project Fund: Committee Filings*, FEC.GOV, <https://www.fec.gov/data/committee/C90019175/?tab=filings> (last visited May 12, 2021).

¹⁸ Compl. ¶ 23. The Complaint makes this allegation in context of its political committee violation as part of the argument that Big Tent Project's major purpose was the election or nomination of federal candidates; it does not make a specific allegation that Big Tent Project failed to report these communications as independent expenditures like it does regarding the Michigan advertisements. *See id.* ¶¶ 23, 38, 39(d), 50-52.

¹⁹ *Ads from United We Succeed*, FACEBOOK: AD LIBRARY, [https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US&impression_search_field=has_impressions_lifetime&view_all_page_id=100926438191751&sort_data\[direction\]=desc&sort_data\[mode\]=relevancy_monthly_grouped](https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US&impression_search_field=has_impressions_lifetime&view_all_page_id=100926438191751&sort_data[direction]=desc&sort_data[mode]=relevancy_monthly_grouped) (last visited May 12, 2021).

²⁰ *See* Compl. at 9 n.32; *United We Succeed*, FACEBOOK, <https://www.facebook.com/pg/United-We-Succeed-100926438191751/about/> (last visited May 12, 2021); UNITED WE SUCCEED (June 29, 2020), <https://web.archive.org/web/20200629134349/https://www.unitedwesucceed.org/>.

²¹ Resp. at 2 n.1.

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1 e-mails.²² The Act and Commission regulations define a “political committee” as “any
 2 committee, club, association or other group of persons which receives contributions aggregating
 3 in excess of \$1,000 during a calendar year or which makes expenditures in excess of \$1,000
 4 during a calendar year.”²³ In *Buckley v. Valeo*,²⁴ the Supreme Court held that defining political
 5 committee status “only in terms of the annual amount of ‘contributions’ and ‘expenditures’” was
 6 overbroad, reaching “groups engaged purely in issue discussion.”²⁵ To cure that infirmity, the
 7 Court concluded that the term “political committee” “need only encompass organizations that are
 8 under the control of a candidate or *the major purpose of which is the nomination or election of a*
 9 *candidate.*”²⁶ Accordingly, under the statute as thus construed, an organization that is not
 10 controlled by a candidate must register as a political committee only if (1) it crosses the \$1,000
 11 threshold and (2) it has as its “major purpose” the nomination or election of federal candidates.

12 Although *Buckley* established the major purpose test, it provided no guidance as to the
 13 proper approach to determine an organization’s major purpose.²⁷ After *Buckley*, the Commission
 14 adopted a policy of determining on a case-by-case basis whether an organization is a political
 15 committee, including whether its major purpose is the nomination or election of federal
 16 candidates. Though it has periodically considered crafting a bright-line rule through rulemaking,

²² See 52 U.S.C. §§ 30102-30104; 11 C.F.R. § 110.11(a)(1).

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

²⁴ 424 U.S. 1 (1976).

²⁵ *Id.* at 79.

²⁶ *Id.* (emphasis added).

²⁷ See, e.g., *Real Truth About Abortion, Inc. v. FEC* (RTAA; formerly *Real Truth About Obama v. FEC*), 681 F.3d 544, 556 (4th Cir. 2012), cert. denied, 568 U.S. 1114 (2013).

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1 the Commission has consistently declined to do so.²⁸ Instead, the Commission determined that
 2 determining an organization's major purpose "requires the flexibility of a case-by-case analysis
 3 of an organization's conduct that is incompatible with a one-size fits-all rule," and that "any list
 4 of factors developed by the Commission would not likely be exhaustive in any event, as
 5 evidenced by the multitude of fact patterns at issue in the Commission's enforcement actions
 6 considering the political committee status of various entities."²⁹

7 **1. Statutory Threshold**

8 To assess whether an organization has made an "expenditure," the Commission analyzes
 9 whether spending on any of an organization's communications made independently of a
 10 candidate constitute express advocacy under 11 C.F.R. § 100.22.³⁰ In 2020, Big Tent Project
 11 reported that it spent \$4,819,713.56 on independent expenditures.³¹ Therefore, Big Tent
 12 Project's expenditures well exceeded the \$1,000 statutory threshold set forth in the Act's
 13 political committee definition, which Big Tent Project acknowledges.³²

14 **2. Major Purpose**

15 To determine an entity's "major purpose," the Commission considers a group's "overall
 16 conduct," including, among other factors, public statements about its mission, organizational

²⁸ See, e.g., Independent Expenditures; Corporate and Labor Organization Expenditures, 57 Fed. Reg. 33,548, 33,558-59 (July 29, 1992) (Notice of Proposed Rulemaking); Definition of Political Committee, 66 Fed. Reg. 13,681, 13,685-86 (Mar. 7, 2001) (Advance Notice of Proposed Rulemaking); *see also* Summary of Comments and Possible Options on the Advance Notice of Proposed Rulemaking on the Definition of "Political Committee," Certification (Sept. 27, 2001) (voting 6-0 to hold proposed rulemaking in abeyance).

²⁹ Political Committee Status, 72 Fed. Reg. 5595, 5602 (Feb. 7, 2007) [hereinafter Supplemental E&J].

³⁰ *Id.* at 5606.

³¹ Big Tent Project Form 5; *see also* Compl. ¶¶ 2, 24.

³² Resp. at 5 ("[Big Tent Project] made independent expenditures aggregating in excess of \$1,000, satisfying the first prong of the political committee test.").

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1 documents, government filings (*e.g.*, IRS notices), and the proportion of spending related to
 2 “Federal campaign activity (*i.e.*, the nomination or election of a Federal candidate).”³³ The
 3 Commission has stated that it compares how much of an organization’s spending is for “*federal*
 4 *campaign activity*” relative to “activities that [a]re not campaign related.”³⁴ Under the
 5 Commission’s case-by-case approach, Big Tent Project’s “overall conduct,” including its
 6 proportion of spending on federal campaign activity, the timing of its expenditures relative to its
 7 formation and the Democratic presidential primary elections, and its public statements about its
 8 purpose, raises a reasonable inference that Big Tent Project’s major purpose was the nomination
 9 or election of federal candidates.

10 Addressing the comparative spending analysis first, the proportion of Big Tent Project’s
 11 spending related to federal campaign activity compared to its total spending indicates that Big
 12 Tent Project’s major purpose was the nomination or election of federal candidates.³⁵ Big Tent
 13 Project reported \$4,819,713.56 in independent expenditures opposing Sanders’s campaign for
 14 the Democratic presidential nomination.³⁶ Although it has not yet filed any tax return with the
 15 IRS, Big Tent Project states in its Response that, as of July 24, 2020, it had made approximately
 16 \$3.75 million in “primary purpose expenditures,” which it represents includes issue advocacy,

³³ Supplemental E&J, 72 Fed. Reg. at 5597, 5605.

³⁴ *Id.* at 5597, 5605-06. This approach was subsequently challenged and upheld in federal district court. *See Shays v. FEC*, 511 F. Supp. 2d 19 (D.D.C. 2007). In 2012, the Fourth Circuit upheld the Commission’s case-by-case approach in the face of a constitutional challenge. *See RTAA*, 681 F.3d 544; *see also Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013) (quoting *RTAA* and upholding Commission’s case-by-case method of determining political committee status), *cert. denied*, 572 U.S. 1114 (2014).

³⁵ *See FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) (“[S]hould [a corporation’s] independent spending become so extensive that the organization’s major purpose may be regarded as campaign activity, the corporation would be classified as a political committee.”) (citing *Buckley v. Valeo*, 424 U.S. 1, 79 (1976)).

³⁶ Big Tent Project Form 5; *see also* Compl. ¶¶ 2, 24.

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1 educational communications, primary purpose grants to other organizations, and other
 2 expenditures consistent with the Internal Revenue Code.³⁷ Big Tent Project's Response is not
 3 clear on whether the alleged \$3.75 million in "primary purpose expenditures" are entirely
 4 independent of the \$4.8 million in reported independent expenditures, or whether there is some
 5 overlap between those categories.

6 Regardless, Big Tent Project appears to acknowledge that its expenditures on federal
 7 campaign activity constituted at least 56% of its total expenditures in the first six months of its
 8 existence. If Big Tent Project's "primary purpose expenditures" were mutually exclusive of its
 9 independent expenditures as reported to the Commission and Big Tent Project made no other
 10 expenditures during its first six months of existence, approximately 56% of its total expenditures
 11 were on federal campaign activity³⁸ If there is overlap between the two categories, the total
 12 amount of Big Tent Project's known expenditures is lower, but the amount of reported
 13 independent expenditures remains the same, which would make the proportion spent on federal
 14 campaign activity higher than 56%.³⁹ While the Commission has never set a threshold on the

³⁷ Resp. at 6. Big Tent Project states that the organization "timely filed" its Notice 8976 intent to operate as a social welfare organization with the IRS. *Id.* A review of the IRS's public tax exempt organization search database does not show any filed returns or Notice 8976 as of May 12, 2021.

³⁸ This percentage is calculated as follows: $\$4,819,714 / (\$3,750,000 + \$4,819,714) = 56\%$. We presently exclude the alleged unreported independent expenditures from Michigan and United We Succeed, *see infra*, from this calculation. However, we note that even with the addition of the low or high range for Michigan advertisements, the United We Succeed advertisements, or any combination thereof, the proportion of spending on federal campaign activity ranges between 56% and 57%.

³⁹ Big Tent Project suggests that it "may have overreported certain expenditures that did not contain express advocacy, which therefore were not in furtherance of an electoral major purpose." Resp. at 6 n.17. However, Big Tent Project does not offer any example of a reported independent expenditure that did not contain express advocacy. Furthermore, even if some of the communications reported as independent expenditures did not, in fact, contain express advocacy, the advertisements available on Facebook's Ad Library and mailers described in news articles all appear to indicate, at a minimum, a "campaign-related purpose," which also indicates an electoral major purpose. *See* Big Tent Project Ad Profile; Factual & Legal Analysis ("F&LA") at 9, MUR 6538R (Americans for Job Security, *et al.*) (finding reason to believe after "look[ing] beyond express advocacy and consider[ing] whether the other communications at issue indicate[d] a 'campaign-related purpose'").

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1 proportion of spending on federal campaign activity required to satisfy the major purpose
 2 analysis, it has previously found reason to believe in matters where the organization's proportion
 3 was comparable or less than the apparent minimum 56% proportion present here.⁴⁰

4 Additionally, the true proportion of Big Tent Project's spending on federal campaign
 5 activity relative to its non-campaign related expenditures may be even higher. The Complaint
 6 quotes a March 6, 2020, press article, reporting that Kott stated that Big Tent Project ““ha[d]
 7 spent nearly \$7 million in South Carolina, Super Tuesday and now Michigan, Washington, and
 8 Idaho exposing Bernie’s radical record and ideas,”” and that ““[o]nce voters learn more about
 9 him, they overwhelmingly reject his candidacy””⁴¹ Whether Kott’s statement was referring
 10 to the \$4.8 million in reported independent expenditures up to that point plus some combination
 11 of (1) Big Tent Project’s \$3.75 million in “primary purpose expenditures,” (2) the alleged
 12 unreported independent expenditures in Michigan, (3) the alleged unreported independent
 13 expenditures tied to United We Succeed, or (4) other unknown and unreported campaign-related
 14 expenditures, it suggests that Big Tent Project’s reported independent expenditure activity may

⁴⁰ See, e.g., F&LA at 8-10, MUR 7465 (Freedom Vote, Inc.) (finding reason to believe where an organization’s campaign activity constituted 61% of total expenditures one year, and nearly 47% over the span of two later years, with an open question about accounting irregularities in those years) [REDACTED] F&LA at 15, MUR 6538R (Americans for Job Security, *et al.*) (“More than half of [AJS’s total spending] was for independent expenditures . . . and the electioneering communications analyzed above The Commission has never set a threshold on the proportion of spending on major purpose activities required for political committee status and declines to do so now. Without determining whether it is *necessary* to cross a 50 percent threshold to determine an organization’s major purpose, it is *sufficient* in this case, based on the available information, to find reason to believe that AJS’s major purpose had become the nomination or election of federal candidates.” (emphasis in original)).

⁴¹ Compl. ¶ 20 (citing Jackie Kucinich, *An Anti-Sanders Group That’s Ticking Off Bernie Plans Another Round of Ads*, DAILY BEAST (Mar. 6, 2020, 2:28PM) [hereinafter Daily Beast Article], <https://www.thedailybeast.com/an-anti-sanders-group-thats-ticking-off-bernie-plans-another-round-of-ads?ref=scroll>).

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1 not fully encompass all of its spending on federal campaign activity and warrants further
 2 inquiry.⁴²

3 Moreover, the timing of Big Tent Project's independent expenditures further indicates
 4 that the organization's major purpose was the election or nomination of federal candidates. Big
 5 Tent Project formed on February 12, 2020 — the day after Sanders won the New Hampshire
 6 Democratic presidential primary election.⁴³ In less than a month after formation, Big Tent
 7 Project had raised and spent at least \$4.8 million — and potentially as much as \$7 million — on
 8 expenditures indicating a major purpose of nominating or electing federal candidates.⁴⁴ After
 9 Sanders suffered significant losses in the mid-March primary elections, which effectively ended
 10 his chances of capturing the nomination, it appears that Big Tent Project ceased making and

⁴² Even if not all of the expenditures were on communications that contain express advocacy, Kott's statement linking \$7 million in expenditures to efforts to "expose" Sanders's record, after which time voters "reject his candidacy," at minimum contain a campaign-related purpose that indicate a major purpose of electing or nominating federal candidates. *See* F&LA at 9, MUR 6538R (Americans for Job Security, *et al.*) (finding reason to believe after considering spending on independent expenditures and electioneering communications with a "campaign-related purpose," although lacking express advocacy).

⁴³ Compl. ¶ 5.; *Entity Search*, STATE OF DEL. DIV. OF CORPS., <https://icis.corp.delaware.gov/ecorp/entitysearch/namesearch.aspx> (search Entity Name field for "Big Tent Project Fund" or File Number field for "7848378") (last visited May 12, 2021). On at least two occasions, Kott made statements to the press indicating this timing was no coincidence and Big Tent Project formed in response to Sanders's win in New Hampshire. *See* Compl. ¶¶ 13-14 (citing February CNN Article; Brian Slodysko, *Can Bernie Be Stopped? Some Democratic Donors Are Trying*, ABC NEWS (Feb. 25, 2020, 5:27PM) [hereinafter ABC News Article], <https://abcnews.go.com/Politics/wireStory/bernie-stopped-democratic-donors-69213107>); *see also* *infra* note 52.

⁴⁴ Big Tent Project reported independent expenditures in Nevada, which staged a caucus on February 22, South Carolina, which conducted a primary election on February 29, and the following states with primary elections on March 3: Arkansas, California, Colorado, Maine, Massachusetts, Minnesota, North Carolina, Oklahoma, Tennessee, Texas, and Virginia. *See* Big Tent Project Form 5. In addition, Kott told *The Daily Beast* that Big Tent Project spent money in Michigan, Idaho, and Washington, *see* Compl. ¶ 20 (quoting Daily Beast Article), which all held primaries on March 10, 2020. The Facebook Ad Library's "Delivery by Region" filter indicates Big Tent Project's advertisements reached yet more states, but it appears that information is not limited to states Big Tent Project specifically targeted but rather states in which the advertisements were viewed. *About the Ad Library*, FACEBOOK FOR BUSINESS, <https://www.facebook.com/business/help/2405092116183307?id=288762101909005> (last visited May 12, 2021) ("Location: People can see information about the location(s) where the ad was viewed.").

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1 reporting independent expenditures.⁴⁵ The Commission has previously considered the fact that
 2 organizations cease to function after an election cycle in its major purpose analysis.⁴⁶

3 As for Big Tent Project's overall conduct, for which the Commission considers public
 4 statements about an organization's purpose, Big Tent Project's contemporaneous public
 5 statements appear to confirm the organization's major purpose was the election or nomination of
 6 federal candidates.⁴⁷ Big Tent Project's Executive Director Jonathan Kott provided numerous
 7 direct quotes or other statements to news organizations during the month of Big Tent Project's
 8 independent expenditure campaign that evince Big Tent Project's animating purpose was the
 9 defeat of Sanders in the Democratic primaries.⁴⁸ The Complaint cites at least 14 news reports
 10 containing quotes by and statements attributed to Kott that, *inter alia*, acknowledge Big Tent

⁴⁵ See Big Tent Project Form 5; Big Tent Project Ad Profile; Compl. ¶¶ 23-24 (asserting that Big Tent Project has not run Facebook advertisements from its own page or the United We Succeed page since March 10 and March 17, respectively, and that the latter date hosted elections that "effectively ended [Sanders's] chance of a comeback") (quoting Reid J. Epstein, Lisa Lerer & Thomas Kaplan, *Joe Biden Wins Primaries in Florida, Illinois and Arizona: Highlights*, N.Y. TIMES (Mar. 17, 2020), <https://www.nytimes.com/2020/03/17/us/politics/march-17-democratic-primary.html>).

⁴⁶ See, e.g., F&LA at 13 (Aug. 9, 2006), MUR 5754 (MoveOn.org Voter Fund) (noting the organization "ha[d] been virtually inactive since the 2004 general election"); Conciliation Agreement ¶ 16, MUR 5754 (MoveOn.org Voter Fund) (noting the organization had "effectively ceased active operations," by no longer updating its website or accepting donations); Conciliation Agreement ¶ 36, MURs 5511/5525 (Swiftboat Veterans and POWs for Truth) (same); Supplemental E&J, 72 Fed. Reg. at 5605 (noting the relevant organizations' cessation of activity after the relevant election cycle in MUR 5754 and MUR 5511 as factors reflective of the "comprehensive analysis required to determine an organization's major purpose").

⁴⁷ See Supplemental E&J, 72 Fed. Reg. at 5601 ("An analysis of public statements can also be instructive in determining an organization's major purpose."); *see also*, e.g., *FEC v. Malenick*, 310 F. Supp. 2d 230, 234-36 (D.D.C. 2004) (finding organization evidenced its major purpose through its own materials, which stated the organization's main goal of supporting the election of candidates for federal office and through efforts to get prospective donors to consider supporting federal candidates); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996) ("The organization's purpose may be evidenced by its public statements of its purpose or by other means") (citing *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 262 (1986)).

⁴⁸ See generally Compl. ¶¶ 7-9, 13-17, 20. Big Tent Project's public website does not contain a mission statement or other purpose description, but its homepage features two videos criticizing Sanders. See BIG TENT PROJECT FUND, <https://www.bigtentprojectfund.com/> (last visited May 12, 2021) [hereinafter Big Tent Project Website]; *see also* Supplemental E&J, 72 Fed. Reg. at 5601, 5605 (citing authorities that assessed an organization's major purpose by reviewing public statements on the organization's website). As of the date of this Report, the homepage is the only navigable page on Big Tent Project's website. See Big Tent Project Website.

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1 Project's advertisements target Sanders and convey that more contributions to Big Tent Project
 2 would yield more such advertisements critical of Sanders.⁴⁹

3 For instance, as mentioned previously, Kott characterized Big Tent Project as an ““anti-
 4 Sanders group””⁵⁰ and described its intent to inform Democratic primary voters of Sanders’s
 5 record and positions ““before they vote.””⁵¹ He also explained that Big Tent Project was formed
 6 as a response to Sanders’s win in New Hampshire, saying ““people got very concerned [about
 7 Sanders’s chance at winning the nomination] and reacted.””⁵² The Commission has considered
 8 these types of public statements, by organization leaders on news programs and describing the
 9 organization’s activities, as indicative of a major purpose of federal campaign activity.⁵³

10 Big Tent Project’s name itself appears to reflect a purpose of opposing Sanders’s
 11 candidacy. Reference to a “big tent” is a way of characterizing a group or political party as
 12 broadly inclusive, and here that usage is consistent with Kott’s expressed statements that
 13 Democratic candidates who have more moderate views or positions within the political
 14 mainstream — *i.e.*, those who appeal more to the Democratic Party’s “big tent” — would be

⁴⁹ See Compl. ¶¶ 8-9, 13, 15, 19.

⁵⁰ *Id.* ¶ 17 (quoting Washington Post Article).

⁵¹ *Id.* ¶ 7 (quoting Playbook Article); *id.* ¶ 14 (quoting February CNN Article); *id.* ¶ 15 (quoting Time Article); *id.* ¶ 8 (quoting NPR Article); *see also supra* notes 9-11.

⁵² See Compl. ¶¶ 13-14; ABC News Article (quoting Kott that “we all woke up after New Hampshire and realized that we now had a front-runner who has not received any scrutiny over his policy positions and people got very concerned and reacted”); *see also* February CNN Article (stating that Kott told CNN he started Big Tent Project when donors approached him after Sanders won the New Hampshire primary).

⁵³ Conciliation Agreement ¶ 33, MURs 5511/5525 (Swiftboat Veterans and POWs for Truth) (citing statement by organization steering committee member on news program that organization’s advertisements were made to influence a federal election); Supplemental E&J, 72 Fed. Reg. at 5605 (citing the Commission’s consideration of “statements by a member of the organization’s Steering Committee on a news program” in MURs 5511/5525 (Swiftboat Veterans and POWs for Truth) and “statements in letters from the organizations’ President describing the organizations’ activities” in MUR 5754 (MoveOn.org Voter Fund, *et al.*)).

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1 more likely to prevail in the general election than Sanders.⁵⁴ Thus, Big Tent Project's name is
 2 consistent with the foregoing analysis of its major purpose being the nomination or election of
 3 federal candidates, including with how Kott contemporaneously and publicly described that
 4 purpose.

5 Respondents argue that Kott's statements indicating an electoral major purpose are not
 6 dispositive of such a major purpose.⁵⁵ However, Kott's statements are not the sole indication of
 7 an electoral major purpose here; it appears a majority of Big Tent Project's reported expenditures
 8 were spent on independent expenditures in opposition to the nomination of Sanders, a federal
 9 candidate.⁵⁶ Respondents likewise contend that Big Tent Project's tax status as a 501(c)(4)
 10 organization entitles it to a "rebuttable presumption of non-political committee status."⁵⁷ An
 11 organization's tax status is relevant to the major purpose analysis, but the Commission has

⁵⁴ Cf., e.g., *Big Tent*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/big-tent> (last visited May 12, 2021) (defining "big tent" as "a political party or group that includes many different groups or ideas, and so can attract a wide range of supporters"); *Big Tent*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/big%20tent> (last visited May 12, 2021) (defining "big tent" as "a widely inclusive composition or character that allows people of differing backgrounds, opinions, and interests to be members of a group or organization (such as a political party)"); James S. Wrona & L. Francis Cissna, *Switching Sides: Is Party Affiliation A Tie That Binds?*, 28 ARIZ. ST. L.J. 735, 772 (1996) (describing the "big tent" philosophy as "both major parties attempt[ing] to accommodate views covering a broad spectrum"); Gur Bligh, *Extremism in the Electoral Arena: Challenging the Myth of American Exceptionalism*, 2008 B.Y.U. L. REV. 1367, 1379 (describing the "big tent" approach of interest groups and factions battling for influence within a political party).

⁵⁵ Resp. at 7.

⁵⁶ In MUR 6538R (Americans for Job Security, *et al.*), the Commission found an organization to be a political committee, despite the organization's statements that it had a non-electoral major purpose, where its total spending and proportion on federal campaign activity was "alone sufficient" to indicate an electoral major purpose. F&LA at 10-11, MUR 6538R (Americans for Job Security, *et al.*). While the proportion of Big Tent Project's total spending on federal campaign activity is also "alone sufficient" to satisfy the major purpose test, the indication of an electoral major purpose is stronger here where some of Big Tent Project's public statements, through Kott's media appearances, further indicate that the organization had the nomination or election of federal candidates as its major purpose. See F&LA at 10-11 (Apr. 13, 2005), MUR 5024R (Council for Responsible Government, Inc., *et al.*) (finding reason to believe an organization was a political committee despite its response and articles of incorporation denying an electoral major purpose where the organization's spending and some public statements by officials and advertising materials "evidence[d] an attempt to influence elections").

⁵⁷ Resp. at 5-6.

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1 previously determined that “neither FECA, as amended, nor any judicial decision interpreting it,
 2 has substituted tax status for the conduct-based determination required for political committee
 3 status,” and the Commission has accordingly followed a well-established case-by-case
 4 analysis.⁵⁸ Here, a “detailed examination of [Big Tent Project’s] contributions, expenditures,
 5 and major purpose” is sufficient to outweigh its tax designation.⁵⁹

6 For the foregoing reasons, Big Tent Project’s significant independent expenditures in
 7 opposition to Sanders, the timing thereof, and Kott’s public statements about Big Tent Project’s
 8 mission indicate that Big Tent Project’s major purpose was the nomination or election of federal
 9 candidates. Accordingly, we recommend the Commission find reason to believe that Big Tent
 10 Project violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to register and report as a
 11 political committee.

12 **B. In the Alternative, the Commission Should Find Reason to Believe that Big**
 13 **Tent Project Fund Improperly Failed to Disclose Contributions, as Required**

14 The Act places reporting requirements on any person other than a political committee
 15 making independent expenditures aggregating greater than \$250 in a calendar year.⁶⁰ Persons,
 16 other than political committees, must disclose certain information about their disbursements for
 17 independent expenditures, including the name and address of each person who receives
 18 disbursements aggregating over \$200 in connection with an independent expenditure, and

⁵⁸ Supplemental E&J, 72 Fed. Reg. at 5598.

⁵⁹ *Id.* at 5599.

⁶⁰ See 52 U.S.C. § 30104(c), (g); 11 C.F.R. § 109.10.

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1 indicate the candidates the independent expenditures support or oppose.⁶¹ In addition, the Act
 2 requires that any person, other than a political committee, reporting over \$250 in independent
 3 expenditures must disclose the identity of each contributor who makes contributions of \$200 in
 4 aggregate, along with the date and amount of each such contribution.⁶² Furthermore, any person,
 5 other than a political committee, reporting independent expenditures must also identify
 6 contributors who made contributions in excess of \$200 for the purpose of “furthering *an*
 7 independent expenditure.”⁶³

8 The Commission’s implementing regulation at 11 C.F.R. § 109.1(e)(1)(vi) required “[t]he
 9 identification of each person who made a contribution in excess of \$200 to the person filing such
 10 report, which contribution was made for the purpose of furthering *the reported* independent
 11 expenditure.”⁶⁴ On August 3, 2018, the District Court for the District of Columbia in *Citizens*
 12 *for Responsibility and Ethics in Washington v. FEC* (“CREW I”) vacated 11 C.F.R.
 13 § 109.10(e)(1)(vi) because it conflicted with 52 U.S.C. § 30104(c)(1) and (c)(2)(C), which, the
 14 District Court clarified, “unambiguously require separate and complementary requirements to
 15 identify individuals who contribute over \$200 to reporting non-political committees and mandate

⁶¹ 52 U.S.C. § 30104(c)(1) (incorporating the requirements of 52 U.S.C. § 30104(b)(3)(A)); *id.* § 30104(c)(2)(A) (incorporating the requirements of 52 U.S.C. § 30104(b)(6)(B)(iii)); *see also id.* § 30101(13) (defining “identification” to include name, address, and, for individuals, occupation and employer).

⁶² 52 U.S.C. § 30104(c)(1); *Citizens for Responsibility & Ethics in Wash. v. FEC* (CREW II), 971 F.3d 340, 354 (D.C. Cir. 2020) (“[Section 30104(c)(1)] unambiguously requires an entity making over \$250 in [independent expenditures] to disclose the name of any contributor whose contributions during the relevant reporting period total \$200, along with the date and amount of each contribution.”).

⁶³ 52 U.S.C. § 30104(c)(2)(C) (emphasis added); *CREW II*, 971 F.3d at 350-51 (explaining that Section 30104(c)(2)(C) “is naturally read to cover contributions intended to support any [independent expenditure] made by the recipient”).

⁶⁴ 11 C.F.R. § 109.10(e)(1)(vi) (emphasis added).

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1 significantly more disclosure than that required by the challenged regulation.”⁶⁵ The
 2 Commission issued guidance on October 4, 2018, notifying the regulated community that it
 3 would enforce the Act “[i]n accordance with the district court’s interpretation of the reporting
 4 requirements at 52 U.S.C. § 30104(c)(1) and (c)(2)(C).”⁶⁶ On August 21, 2020, the D.C. Circuit
 5 affirmed the District Court’s decision (“*CREW II*”).⁶⁷

6 Big Tent Project did not disclose any information on its donors on its April 2020
 7 Quarterly Report or anytime thereafter.⁶⁸ However, Big Tent Project reported over
 8 \$4,819,713.56 in independent expenditures opposing Sanders’s campaign for the 2020
 9 Democratic presidential nomination, all of which occurred over a year after the District Court’s
 10 decision in *CREW I* and the Commission’s subsequent guidance regarding its enforcement
 11 thereof.⁶⁹ Therefore, even if it were not a political committee, Big Tent Project should have
 12 disclosed donor information for those persons who contributed at least \$200 pursuant to
 13 52 U.S.C. § 30104(c)(1) because it reported over \$250 in independent expenditures.

⁶⁵ *Citizens for Responsibility & Ethics in Wash. v. FEC (CREW I)*, 316 F. Supp. 3d 349, 357, 410 (D.D.C. 2018), *aff’d*, 971 F.3d 340 (D.C. Cir. 2020). After a brief stay, the vacatur of this regulation took effect on September 18, 2018. Press Release, FEC Provides Guidance Following U.S. District Court Decision in *CREW v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018) (Oct. 4, 2018) [hereinafter *CREW Guidance*], <https://www.fec.gov/updates/fec-provides-guidance-following-us-district-court-decision-crew-v-fec-316-f-supp-3d-349-ddc-2018/>.

⁶⁶ See *CREW Guidance*.

⁶⁷ *CREW II*, 971 F.3d at 343, 354.

⁶⁸ Big Tent Project Form 5. In Response to a Request for Additional Information from the Commission’s Reports Analysis Division on May 7, 2020, regarding the apparent missing donor information, Big Tent Project stated that it “did not receive reportable contributions” because it did not receive contributions that were “earmarked for political purposes” or “intended to influence elections,” and that it did not have information to report for itemized contributors who gave “for the purpose of furthering an independent expenditure.” FEC Form 99, Big Tent Project Fund, Miscellaneous Report (June 11, 2020), <https://docquery.fec.gov/pdf/336/202006119239762336/202006119239762336.pdf>.

⁶⁹ See Big Tent Project Form 5; Big Tent Project IEs Website; *supra* note 3. It appears that Big Tent Project made unreported independent expenditures in addition to the nearly \$5 million in independent expenditures it reported to the Commission. See *infra* Section III.C.

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1 Furthermore, the available information suggests that Big Tent Project received at least

2 some contributions of \$200 or more in aggregate for the purpose of financing independent

3 expenditures. Big Tent Project made nearly \$5 million in independent expenditures shortly

4 before, during, and after Kott, as Big Tent Project's Executive Director, made repeated public

5 statements touting Big Tent Project's fundraising and explicitly linking additional funds with

6 additional advertisements opposing Sanders, demonstrating a strong nexus between donor

7 solicitations and contributions received for the purpose of financing independent expenditures.⁷⁰

8 The record appears to confirm what Kott publicly and repeatedly claimed: as Big Tent Project

9 raised additional funds, it made more independent expenditures opposing Sanders in states with

10 upcoming primary elections.⁷¹ Therefore, even if it were not a political committee, Big Tent

11 Project should have disclosed donor information for those persons who contributed at least \$200

12 for the purpose of financing independent expenditures pursuant to 52 U.S.C. § 30104(c)(2)(C)

13 because the available information raises a reasonable inference that at least some donors

14 contributed over \$200 for the purpose of financing Big Tent Project's nearly \$5 million in

⁷⁰ See, e.g., Compl. ¶¶ 8, 13-15, 19 (citing news articles). Compare February CNN Article ("Kott says [Big Tent Project] already raised close to \$2 million [as of February 25, 2020], and plans to spend it delving into Sanders [sic] record and views."), and Time Article ("Kott . . . says [Big Tent Project has] steadily been receiving more six- and seven-figure donations and is closing in on \$3 million [as of February 27, 2020]."), with NPR Article (citing Kott's statements that "ad buys could expand as the group continues to raise funds" and "any future ads will continue to target Sanders"), ABC News Article ("Kott says [Big Tent Project is] looking to expand its ad campaign to other states and is expecting to take in more checks soon."), and Veronica Rocha, Amanda Wills, Mike Hayes & Meg Wagner, *Super Tuesday 2020*, CNN (Mar. 4, 2020, 4:03PM), https://www.cnn.com/politics/live-news/super-tuesday-results-2020/h_7862117d2a088e09f58d95cc422e91f6 ("Kott told CNN on [March 2, 2020] that... [Big Tent Project] raised an additional \$4 million. Nearly all of that, Kott said was going to digital ads targeting voters in Super Tuesday States."). Cf. *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995) (finding a letter to be a solicitation earmarked for political purposes and thus subject to the disclaimer requirement where it "le[ft] no doubt that the funds contributed would be used to advocate [an officeholder's] defeat at the polls, not simply to criticize his policies during the election year"); Supplemental E&J, 72 Fed. Reg. at 5604 ("[I]f any of the solicitations clearly indicated that the funds received would be used to support or defeat a Federal candidate, then the funds received were given 'for the purpose of influencing' a Federal election and therefore constituted 'contributions' under [the Act].").

⁷¹ See Compl. ¶¶ 5-25, 39 (detailing timeline of press statements and independent expenditures).

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1 independent expenditures.⁷²

2 In Response to the Complaint, Big Tent Project argues that reporting pursuant to

3 52 U.S.C. § 30104(c)(1) and (c)(2)(C) is required “only where donations are made pursuant to a

4 written proposal or some other specific indication that a donor earmarked a donation or

5 otherwise made a donation to further an independent expenditure.”⁷³ The District Court’s

6 decision in *CREW I*, which pre-dated Big Tent Project’s independent expenditure activity and its

7 Response to this Complaint, forecloses this interpretation of 52 U.S.C. § 30104(c)’s disclosure

8 requirements. There, the District Court observed that section 30104(c)(1) sets “[n]o

9 parameters . . . that the contributions be earmarked for a specific or single political purpose so

10 long as the purpose is in connection with a federal election” and that section 30104(c)(2)(C)

11 requires disclosure “even when the donor has not expressly directed that the funds be used in the

12 precise manner reported.”⁷⁴ While the District Court recognized that the reporting entity has

13 discretion to determine how to identify disclosable donations for political purposes, it was clear

14 on the requirement to report all contributions over \$200, unless there is an indication that the

15 contribution was made exclusively for non-political purposes and the further requirement that the

⁷² See *CREW I*, 316 F. Supp. 3d at 377 (“[I]n addition to identifying donors of over \$200, . . . for ‘all contributions’ intended to influence federal elections (with the *Buckley* gloss of ‘earmarked for political purposes’), the reporting not-political committee must also identify those donors contributing over \$200 for the more targeted purpose of furthering an independent expenditure.”); *CREW II*, 971 F.3d at 354 (“[52 U.S.C. § 30104(c)(2)(C)] requires ‘the identification of each person who made a contribution in excess of \$200 to the [IE maker] which was made for the purpose of furthering an independent expenditure.’”); *see also* *CREW Guidance* ¶ 4 (stating the Commission “will enforce [52 U.S.C. § 30104(c)(2)(C)] for independent expenditures made on or after Sept. 18, 2018 by persons (other than political committees),” requiring the identification of ““those donors of over \$200 who contribute ‘for the purpose of furthering an independent expenditure.’””) (quoting *CREW I*, 316 F. Supp. 3d at 423).

⁷³ Resp. at 7-8.

⁷⁴ *CREW I*, 316 F. Supp. 3d at 423; *see CREW II*, 971 F.3d at 354.

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1 reporting entity identify the subset of those contributors whose donations are made for the
 2 purpose of furthering an independent expenditure.⁷⁵

3 Big Tent Project also broadly denies that any of the donations it received were
 4 “earmarked for the purpose of influencing federal elections.”⁷⁶ The courts in *CREW I* and
 5 *CREW II* and the Commission in its *CREW* Guidance use the phrase “earmarked for political
 6 purposes,” based on the Supreme Court’s gloss on the meaning of “contributions” in *Buckley*,⁷⁷
 7 but none of those authorities nor Commission regulations define that phrase. Commission
 8 regulations define the term “earmarked” for the purpose of 11 C.F.R. § 110.6’s regulation of
 9 “contributions . . . earmarked or otherwise directed to the candidate through an intermediary” as
 10 “a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral
 11 or written, which results in all or any part of a contribution or expenditure being made to, or
 12 expended on behalf of, a clearly identified candidate or a candidate’s authorized committee.”⁷⁸
 13 However, the Commission has declined to extend the application of 11 C.F.R. § 110.6 beyond
 14 the statutory provision it implements, *i.e.*, the limits applicable to contributions to candidates and

⁷⁵ See, e.g., *CREW I*, 316 F. Supp. 3d at 376, 389, 423; see also *id.* at 394 (rejecting the challenged regulation for impermissibly narrowing 30104(c)(2)(C)’s donor disclosure requirement to situations involving “a direct link or specific intent by the donor to spend the contribution in the precise manner reported”); *id.* at 400-01 (“[D]onors to not-political committees, who want to fund only the organization’s administrative expenses or not-political activities, may do so without being identified. On the other hand, those donors funding the not-political committee’s political activities to influence a federal election . . . must be identified”); *CREW II*, 971 F.3d at 351 (describing 52 U.S.C. § 30104(c)(1)’s requirement that the reporting entity “disclose each donation from contributors who give more than \$200, regardless of any connection to [independent expenditures] eventually made,” and 52 U.S.C. § 30104(c)(2)(C)’s requirement that the reporting entity identify contributors whose donations are ““made for the purpose of furthering *an* independent expenditure””).

⁷⁶ See, e.g., Resp. at 7.

⁷⁷ See, e.g., *CREW I*, 316 F. Supp. 3d at 377, 380 (citing *Buckley v. Valeo*, 424 U.S. 1, 80 (1976)); *CREW II*, 904 F.3d at 1016 (same); *CREW* Guidance (quoting *CREW I*, 316 F. Supp. 3d at 389)

⁷⁸ 11 C.F.R. § 110.6(a), (b)(1). This definition relates to the requirements of 52 U.S.C. § 30116(a)(8), which includes within a contributor’s contribution limits those contributions made to a candidate through an intermediary or conduit. Advisory Op. 2019-01 (It Starts Today) at 3 (citing 52 U.S.C. § 30116(a)(8); 11 C.F.R. § 110.6(a)).

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1 their authorized committees when made through conduits or intermediaries.⁷⁹ Moreover, to
 2 apply the definition of “earmarked” in 11 C.F.R § 110.6 to this context would contravene the
 3 courts’ decisions in *CREW I* and *CREW II*, which contemplate broad disclosure under 52 U.S.C.
 4 § 30104(c), as described above.⁸⁰

5 The available information thus indicates that Big Tent Project should have disclosed
 6 donor information for those who contributed over \$200 pursuant to 52 U.S.C. § 30104(c)(1) and
 7 further specified who among those donors contributed over \$200 to finance Big Tent Project’s
 8 independent expenditures pursuant to 52 U.S.C. § 30104(c)(2)(C).⁸¹ Big Tent Project made over
 9 \$4.8 million in independent expenditures to oppose Sanders — all of which occurred after the
 10 District Court’s decision in *CREW I* and the Commission’s guidance — and Kott made repeated
 11 public statements about Big Tent Project’s advertisements and the intent to use additional funds
 12 raised to fund additional independent expenditures against Sanders. Nevertheless, Big Tent
 13 Project failed to disclose any donors, let alone identify any of its donors who contributed to
 14 support Big Tent Project’s independent expenditures. Therefore, if the Commission does not
 15 find that Big Tent Project qualified as a political committee, we recommend in the alternative

⁷⁹ Affiliated Committees, Transfers, Prohibited Contributions, Annual Contribution Limitations and Earmarked Contributions, 54 Fed. Reg. 34,098, 34,105 (Aug. 17, 1989) (explaining application of rule to only candidate committees and further explaining that other political committees must still comply with requirements as to the forwarding of contributions and the reporting of the original contributor).

⁸⁰ See *supra* notes 74-75.

⁸¹ See *CREW I*, 316 F. Supp. 3d at 423 (“[I]n addition to identifying donors of over \$200, with the date and amount contributed, for ‘all contributions’ intended to influence federal elections (with the Buckley gloss of ‘earmarked for political purposes’) [pursuant to 52 U.S.C. § 30104(c)(1)], the reporting not-political committee must also identify those donors contributing over \$200 for the more targeted purpose of furthering an independent expenditure [pursuant to 52 U.S.C. § 30104(c)(2)(C)].”); *CREW II*, 971 F.3d at 356 (“While it is true that every contributor who must be identified under (c)(2)(C) must also be disclosed under (c)(1), that does not make the two subsections completely coextensive or render (c)(2)(C) superfluous. [Section 30104(c)(2)(C)] still calls for providing information that (c)(1) does not — namely, whether a disclosed ‘contribution’ was intended to support [independent expenditures] or instead aimed only at supporting the recipient’s other election-related activities.”).

1 that the Commission find reason to believe that the Big Tent Project violated 52 U.S.C.
 2 § 30104(c)(1) by failing to disclose donors who contributed at least \$200 for political purposes
 3 and 52 U.S.C. § 30104(c)(2)(C) by failing to identify and disclose donors who contributed for
 4 the purpose of funding independent expenditures.

5 **C. The Commission Should Find Reason to Believe That Big Tent Project Fund
 6 Failed to Report Independent Expenditures**

7 An “independent expenditure” is an expenditure made by any person for a
 8 communication that (1) expressly advocates the election or defeat of a clearly identified
 9 candidate,⁸² and (2) is not coordinated with the candidate, her authorized committee, her agents,
 10 or a political committee or its agents.⁸³ The Act requires both political committees and persons
 11 other than political committees to report their independent expenditures.⁸⁴ Political committees
 12 other than authorized committees must disclose their independent expenditures and itemize such
 13 expenditures with information including the name and address of each person who receives
 14 disbursements in connection with an independent expenditure, as well as the date, amount,
 15 purpose, and identity of the candidate in support of or opposition to for which the independent
 16 expenditure is made.⁸⁵ The Act places similar reporting requirements on non-political

⁸² Under the Commission’s regulations, a communication can expressly advocate for the election or defeat of a clearly identified federal candidate if it uses certain “magic words,” such as “vote for” or “elect.” 11 C.F.R. § 100.22(a). A communication may also be express advocacy if it “[w]hen taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because — (1) [t]he electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) [r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.” *Id.* § 100.22(b).

⁸³ 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16.

⁸⁴ See 52 U.S.C. § 30104.

⁸⁵ 52 U.S.C. § 30104(b)(3)(B)(iii), (g); 11 C.F.R. § 109.10.

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1 committee persons making independent expenditures aggregating greater than \$250 in a calendar
 2 year.⁸⁶ A person, including a political committee, also may have to file additional disclosure
 3 reports depending on the amount and timing of an independent expenditure.⁸⁷

4 Facebook's Ad Library reflects that Big Tent Project sponsored 58 versions of three
 5 unique advertisements in the five days before Michigan's primary on March 10, 2020.⁸⁸ Two of
 6 the Michigan advertisements are static advertisements that equate "Socialist Bernie Sanders"
 7 with "Four More Years of Trump," and explicitly advocate the viewer "Vote NO on Bernie
 8 Sanders," respectively, and the third is a video advertisement that criticizes Sanders's platform
 9 and states that voting for him would cost "another four years of Donald Trump."⁸⁹

10 The available information thus indicates that, in addition to evidencing Big Tent Project's
 11 major purpose of nominating or electing a federal candidate, Big Tent Project failed to report
 12 these advertisements as independent expenditures. Big Tent Project does not dispute that it
 13 failed to report some independent expenditures, which appear to correspond to the Michigan
 14 advertisements alleged in the Complaint.⁹⁰ The Michigan advertisements were independent
 15 expenditures for which reporting was required because they contained express advocacy and

⁸⁶ 52 U.S.C. § 30104(c), (g); 11 C.F.R. § 109.10.

⁸⁷ *See, e.g.*, 52 U.S.C. § 30104(g)(1) (requiring reports within 24 hours from persons making independent expenditures aggregating \$1,000 or more after the 20th day, but more than 24 hours, before an election).

⁸⁸ *See* Big Tent Project Ad Profile (filter to "Michigan" in "Delivery by Region").

⁸⁹ *See id.*

⁹⁰ *See* Resp. at 2 n.1 (acknowledging "one minor reporting omission" discovered in the course of preparing the Response, but denying the Complaint's allegations that Big Tent Project was involved in advertisements under the name "United We Succeed"). Respondents stated they would amend Big Tent Project's April 2020 Quarterly Report to correct the acknowledged omission, and argued that omission should be handled through the Administrative Fines program and that none of the expenditures involved required 24-Hour Reports. *Id.* As of the date of this Report, Big Tent Project has not filed an Amended April 2020 Quarterly Report. *Supra* note 17.

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1 there is no indication they were coordinated with any candidate's campaign. At least one
 2 advertisement constitutes express advocacy under 11 C.F.R. § 100.22(a) because it explicitly
 3 encourages the viewer to vote against Sanders, and all three appear to constitute express
 4 advocacy under 11 C.F.R. § 100.22(b) because they criticize a clearly identified federal
 5 candidate, Sen. Bernie Sanders, for the cost of his campaign's policy proposals and the tax hikes
 6 required to finance them, and negatively imply that supporting him in the Democratic
 7 presidential primary would likely lead to the re-election of Trump in the general election.⁹¹

8 It appears the Michigan advertisements cost over \$1,000 and were made in the week

9 leading up to the Democratic primary election in that state; therefore, Big Tent Project was
 10 required to file 24-Hour Reports disclosing those expenditures.⁹² Furthermore, because the
 11 available information indicates that Big Tent Project is a political committee, it was required to
 12 report the Michigan advertisements because it appears that these were independent expenditures.

13 Therefore, we recommend the Commission find reason to believe that the Big Tent Project
 14 violated 52 U.S.C. § 30104(b)(4)(H)(iii), (b)(5)(A), and (g)(1) by failing to report independent
 15 expenditures as a political committee. However, even if Big Tent Project were not a political
 16 committee, it was still required to report the Michigan advertisements as independent

⁹¹ See Big Tent Project Ad Profile; 11 C.F.R. § 100.22(a) (defining express advocacy as a communication using a phrase such as "vote for the President" and "vote against [candidate's name]"); *see also, e.g., FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 470 (2007) (describing the "indicia of express advocacy" as mentioning "an election, candidacy, political party, or challenger" and taking a "position on a candidate's character, qualifications, or fitness for office"); F&LA at 5-6, MUR 5854 (The Lantern Project) (finding advertisements did not constitute express advocacy in part because they "never mention[ed] the candidate's] candidacy or his political opponent"); *FEC v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 49 (2d Cir. 1980) (noting that advertisement lacked express advocacy in part because it lacked reference to "any particular federal election, the political affiliation of any congressman, the fact that he is or is not a candidate for elective office, or the name or views of any electoral opponent").

⁹² See 52 U.S.C. § 30104(g)(1) (requiring persons, including political committees, that make independent expenditures aggregating \$1,000 or more less than 20 days, but more than 24 hours, before an election to report those expenditures within 24 hours); 11 C.F.R. § 109.10(d) (same).

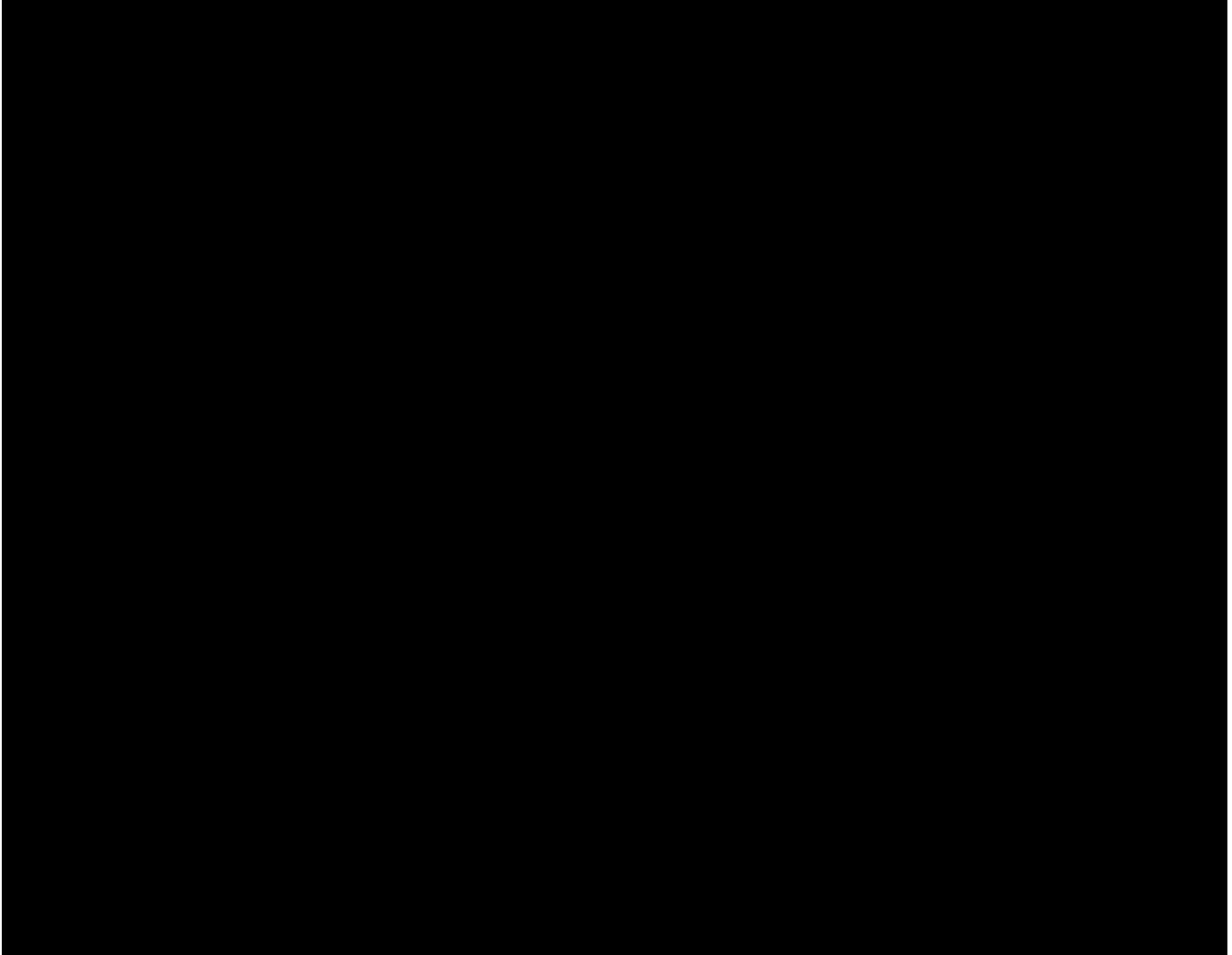
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1 expenditures. Therefore, if the Commission does not find that Big Tent Project qualified as a
2 political committee, we recommend in the alternative that the Commission find reason to believe
3 that the Big Tent Project violated 52 U.S.C. § 30104(c) and (g)(1) by failing to report
4 independent expenditures as a person other than a political committee.

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1 V. RECOMMENDATIONS

1. Find reason to believe that Big Tent Project Fund violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to register and report as a political committee and report its independent expenditures as a political committee; or, in the alternative, find reason to believe that Big Tent Project Fund violated 52 U.S.C. § 30104(c)(1) by failing to disclose donors who contributed for political purposes and violated 52 U.S.C. § 30104(c)(2)(C) by failing to identify donors who contributed for the purpose of funding independent expenditures;
2. Find reason to believe that Big Tent Project Fund violated 52 U.S.C. § 30104(b)(4)(H)(iii), (b)(5)(A), and (g)(1) by failing to report independent expenditures as a political committee; or, in the alternative, find reason to believe that Big Tent Project Fund violated 52 U.S.C. § 30104(c) and (g)(1) by failing to report independent expenditures as a person other than a political committee;
3. Take no action at this time as to Jonathan Kott;
4. Authorize the use of compulsory process;
5. Approve the attached Factual and Legal Analysis; and
6. Approve the appropriate letters.

Lisa J. Stevenson
Acting General Counsel

May 13, 2021

Date

Charles Kitcher

Charles Kitcher

Acting Associate General Counsel for Enforcement

Mark Allen

Mark Allen

Assistant General Counsel

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