NOT YET SCHEDULED FOR ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON and MELANIE T. SLOAN, Appellees, v. FEDERAL ELECTION COMMISSION, Appellee, AMERICAN ACTION NETWORK, Appellant.	No. 18-5136

APPELLANT AMERICAN ACTION NETWORK'S
MOTION FOR SUMMARY REVERSAL AND VACATUR

American Action Network respectfully moves for summary reversal and vacatur of the district court's March 20, 2018 and September 19, 2016 summary judgment opinions and orders. They contain several substantive flaws, but one is foundational, in direct odds with recent Circuit precedent, and, when corrected, will end this longstanding dispute.

Specifically, the district court held that it could review a decision by the Federal Election Commission to dismiss an enforcement complaint even though the Commission relied on its prosecutorial discretion. *See Citizens for*

Responsibility & Ethics in Washington v. Fed. Election Comm'n, 209 F. Supp. 3d 77, 88 n.7 (D.D.C. 2016). This Court recently held the exact opposite. In a case involving the same administrative complainant, this Court held that Federal Election Commission decisions to dismiss enforcement complaints based on prosecutorial discretion are "not subject to judicial review." *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, No. 17-5049, 2018 WL 2993249, at *5 (D.C. Cir. June 15, 2018). This is true even where the Commission separately articulated a substantive reason for dismissing the matter. *Id.* Because there is a "firmly-established principle" against "carving reviewable legal rulings out from the middle of non-reviewable actions," a plaintiff like "CREW is not entitled to have the court evaluate . . . the individual considerations the controlling Commissioners gave in support of their vote not to initiate enforcement proceedings." *Id.* (collecting authority).

The district court's error has already caused years of unwarranted litigation over allegations from 2010 that the Federal Election Commission chose not to pursue in 2014. The Court should, therefore, correct the district court's error at this early stage, stemming the continued waste of judicial and party resources on litigation that should never have been brought.[1]

[1] In accordance with Federal Rule of Appellate Procedure 27(a)(2)(B)(iii) and Circuit Rule 27(g)(2), the district court's March 20, 2018 and September 19, 2016 opinions and orders are attached as Exhibits 1 and 2, and the Statements of

I. BACKGROUND

This dispute began in 2012 when Citizens for Responsibility and Ethics in Washington and its then-executive director, Melanie Sloan (collectively, "CREW"), filed an administrative complaint at the Federal Election Commission alleging that American Action Network violated the Federal Election Campaign Act of 1971, as amended ("FECA") during the 2010 election cycle. *See CREW*, 209 F. Supp. 3d at 83. CREW's allegations focused on twenty issue advertisements that American Action Network funded in 2010. *Id.* CREW argued that they all demonstrated that American Action Network had the "major purpose" to nominate or elect candidates and that they collectively established that American Action Network was an unregistered political committee during the 2010 election cycle. *Id.* American Action Network, an incorporated not-for-profit social welfare organization, disputed CREW's charges, detailing its issue-centric purpose and relying on caselaw that has long protected issue advocacy groups from political committee regulation. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252 n.6 (1986).

In June 2014, the Commission voted on whether to open an investigation into CREW's allegations. *CREW*, 209 F. Supp. 3d at 83. Three Commissioners

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Reasons issued by the Federal Election Commission on July 30, 2014 and October 19, 2016 are attached as Exhibits 3 and 4.

found there was "reason to believe" the allegations and voted to investigate them, and three Commissioners disagreed. *Id.* This deadlock "meant that the Commission could not proceed: under FECA, the Commission may pursue enforcement only upon 'an affirmative vote of 4 of its members.'" *CREW*, 2018 WL 2993249, at *1 (citing 52 U.S.C. § 30109(a)(2), (a)(4)(A)(i), (a)(6)(A)). As a result, and in accordance with Circuit precedent, the three Commissioners who voted against proceeding with an investigation—the so-called "controlling Commissioners"—supplied a Statement of Reasons to explain the Commission's decision. *See* Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen, Matter Under Review 6589 (July 30, 2014).

The Commissioners provided two interrelated reasons for the decision: (1) they did not think the charges were supported by fact or precedent, and (2) they thought this was an appropriate case for an exercise of prosecutorial discretion. *See, e.g.*, *id.* at 23-24, 27. They explained, for example, that proceeding would be in direct tension with a recent decision from the U.S. Court of Appeals for the Seventh Circuit, which invalidated a law on First Amendment grounds because it imposed similar registration and reporting requirements based on similar advertisements. *Id.* at 23 (citing *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014)). Proceeding with enforcement under a theory that is broader than

existing caselaw, the Commissioners explained, would raise "grave constitutional doubt," particularly given the Seventh Circuit's conclusion that it is "'fatally vague and overbroad'" and imposes "'a serious chill on debate about political issues'" to regulate an entity because it has funded advertisements like American Action Network's. *Id.* (quoting *Barland*, 751 F.3d at 835, 837); *id.* at 23 n.137. These "constitutional doubts," the Commissioners concluded, "militate in favor of cautious exercise of our prosecutorial discretion." *Id.* at 24 (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)). As a result, the Commission dismissed the enforcement matter because they did not think current law justified the charges and because they chose to "exercise . . . prosecutorial discretion." *Id.* at 27.

CREW challenged the Commission's decision pursuant to the judicial review provision in FECA, 52 U.S.C. § 30109(a)(8)(A). In September 2016, the district court entered summary judgment for CREW. *CREW*, 209 F. Supp. 3d at 95. The district court acknowledged that the Commission's dismissal was consistent with Seventh Circuit precedent, but found the dismissal "contrary to law" because, in the district court's view, the Seventh Circuit was "out of step with the legal consensus." *Id.* at 90, 92.

The Federal Election Commission had argued that its exercise of prosecutorial discretion was lawful and precluded review. *See* Mot. for S.J. at 49-50, No. 14-1419 (D.D.C. Mar. 1, 2016) (Dkt. 36); Reply at 24-25, No. 14-1419

(D.D.C. May 23, 2016) (Dkt. 42). But the district court shrugged off the Commission's decision to exercise its prosecutorial discretion in a footnote. *CREW*, 209 F. Supp. 3d at 88 n.7. It found that the Commission's reliance on its prosecutorial discretion was irrelevant, stating:

> "[A]n agency's decision not to take enforcement action . . . is only presumptively unreviewable," and that "presumption may be rebutted [by the relevant] substantive statute." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). Here, FECA's express provision for the judicial review of the FEC's dismissal decisions, as well as a particular standard governing that review, 52 U.S.C. § 30109(a)(8)(C), is just such a rebuttal. The Court will therefore apply the contrary-to-law standard, as Congress has instructed it to.

Id. As explained in more detail below, this is the reasoning that was just rejected by this Court in another case where CREW challenged a dismissal by the Federal Election Commission. *See CREW*, 2018 WL 2993249, at *3.

The district court's decision generated a series of additional regulatory and judicial proceedings about enforcement allegations that the Commission had previously declined to pursue as a matter of prosecutorial discretion. First, on remand in late 2016, the Commission reconsidered the record using the new standard devised by the district court, and voted a second time against proceeding with the enforcement matter in a deadlocked vote. *See* Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman, Matter Under Review 6589 (Oct. 19, 2016). The controlling Commissioners explained that their fact-specific review of American Action

Network's advertisements, using the district court's new standard, still led them to conclude that American Action Network was not a political committee during the 2010 election cycle. *Id.*

Second, in early 2017 when CREW and American Action Network had cross-appealed the district court's order, this Court granted the Federal Election Commission's motion to dismiss, concluding that the cross-appeals were premature. *See* Order, Case Nos. 16-5300, 16-5343 (D.C. Cir. Apr. 4, 2017) (Dkt. 1669311). By then, the Commission had again dismissed the enforcement matter and CREW had filed a second lawsuit in the district court challenging that second dismissal. The Federal Election Commission's motion to dismiss asked the Court to postpone review until it could also review (if necessary) a decision from the district court regarding the second dismissal decision. *See, e.g.*, Mot. to Dismiss at 2, 12, Nos. 16-5300, 16-5343 (D.C. Cir. Dec. 8, 2016) (Dkt. 1650065).

Third, in March 2018, the district court entered summary judgment in favor of CREW in its second lawsuit. *See CREW v. Fed. Election Comm'n*, 299 F. Supp. 3d 83 (D.D.C. 2018). The district court found that the Commission's second dismissal decision was consistent with its prior decision, but was "contrary to law" for a new reason. *Id.* The district court directed the Commission to conform with its new declaration of law "within 30 days" and stated that "[i]f the [Federal Election Commission] does not timely conform with the Court's

declaration, CREW may bring 'a civil action to remedy the violation involved in the original complaint.'" *Id.* at 101 (quoting 52 U.S.C. § 30109(a)(8)(C)).

Fourth, in April 2018, Federal Election Commission Vice Chair Weintraub issued a public statement announcing that she had decided to prevent the Commission from conforming with the district court's order so that CREW could sue American Action Network directly. *See* Statement of Vice Chair Weintraub (Apr. 19, 2018), *available at* https://www.fec.gov/resources/cmscontent/documents/2018-04-19-ELW-statement.pdf. Vice Chair Weintraub had voted on each of the prior two occasions to proceed with the enforcement matter, but saw an opportunity in the two vacancies now at the Commission: as one of four sitting Commissioners, she could prevent the Commission from taking further enforcement action by abstaining because that would deprive the Commission of the legally necessary fourth vote to proceed. Vice Chair Weintraub explained that her vote would bring an end to Commission action and enable CREW to "pursue its complaint directly against American Action Network" "unimpeded by [the] commissioners" who previously had voted to dismiss. *Id.* Vice Chair Weintraub's recalcitrance also appears to have prevented the Commission from appealing the district court's decisions. *See* Statement of Chair Hunter and Commissioner Petersen at 1, 14 (Apr. 26, 2018), *available at* https://www.fec.gov/resources/cms-content/documents/3117_001_v2.pdf.

Fifth, following Vice Chair Weintraub's invitation and the effective end of any further enforcement proceedings at the Federal Election Commission, CREW filed its own complaint directly against American Action Network. *See* Compl., *CREW v. American Action Network*, No. 18-945 (D.D.C. Apr. 23, 2018) (Dkt. 1). CREW relies on the "citizen suit" provision of the FECA which states that certain private parties may seek to "remedy the violation involved in the original [administrative] complaint" in limited circumstances. 52 U.S.C. § 30109(a)(8)(C). Those circumstances, however, do not include cases, like this one, where the Federal Election Commission dismissed the alleged violation in reliance on its prosecutorial discretion. *See CREW*, 2018 WL 2993249, at *4.

Finally, American Action Network filed its Notice of Appeal, having learned from Vice Chair Weintraub's statement that she had done what was necessary to finalize the case between CREW and the Federal Election Commission in order to hand the Commission's enforcement authority to CREW. American Action Network then moved the district court to stay CREW's citizen suit, arguing that this appeal should eliminate any basis for it. *See* Mot. to Stay, No. 18-945 (D.D.C. June 1, 2018) (Dkt. 11). CREW has opposed that stay, seeking to press ahead with allegations of a supposed violation that the Federal Election Commission, in its prosecutorial discretion, chose not to pursue. *See* Opp'n to Mot. to Stay, No. 18-945 (D.D.C. June 22, 2018) (Dkt. 12).

II. ARGUMENT

This Court should summarily reverse and vacate the Court's prior orders because they are irreconcilable with Circuit precedent that prohibits judicial review of dismissal decisions that include an exercise of the Federal Election Commission's "unreviewable prosecutorial discretion." *See CREW*, 2018 WL 2993249, at *2. Correcting this threshold flaw will save the Court, the district court, and the parties substantial time and effort. And CREW will not be prejudiced by the summary ruling, as it already fully briefed and argued the issue in the case that now precludes this one.

Summary reversal is appropriate where "the merits of [the] case are so clear that expedited action is justified." *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987); *see also Miller v. Albright*, No. 98-5511, 1998 WL 846653 (D.C. Cir. 1998) (granting summary reversal). That is this case. The conflict with Circuit precedent is patent and straightforward. This Court held that the district court cannot review Federal Election Commission decisions to dismiss that include an exercise of prosecutorial discretion. *CREW*, 2018 WL 2993249, at *4. The district court below found the exact opposite, *CREW*, 209 F. Supp. 3d at 88 n.7. The district court then subjected the Federal Election Commission's decision to judicial review, and required a series of additional unwarranted regulatory and judicial proceedings.

The conflict between the district court's decision and this Court's precedent is particularly striking in each court's discussion of *Chaney*, 470 U.S. 821 (1985). The Supreme Court in *Chaney* reaffirmed the longstanding principle "that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Id.* at 831. But the Court provided one "caveat," stating that "[a]n agency's decision not to undertake enforcement 'is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers.'" *CREW*, 2018 WL 2993249, at *3 (quoting *Chaney*, 470 U.S. at 832-33).

The district court, like this Court, considered whether the *Chaney* presumption against judicial review was overcome by FECA. This Court held that "[n]othing in the substantive statute overcomes the presumption against judicial review." *Id.* The district court found instead that "FECA's express provision for the judicial review of the FEC's dismissal decisions . . . is just such a rebuttal." *CREW*, 209 F. Supp. 3d at 88 n.7.

This stark word-for-word conflict with Circuit precedent justifies a summary reversal. *See Taxpayers Watchdog*, 819 F.2d at 297. But it is not the only reason to grant a summary reversal here. Summary reversal is also warranted because CREW already briefed and argued this case-dispositive issue before this Court. As

party to the case recently decided, CREW argued, for example, that the Court should find that *Chaney*'s presumption "that agency failures to enforce were nonreviewable" was overcome because "Congress did exactly that in the FECA." *See* Br. of Appellants at 36, No. 17-5049 (D.C. Cir. June 27, 2017) (Dkt. 1681549).

CREW also acknowledged that the Court's decision would apply equally to this litigation, describing the district court's decision in this case as having "rejected" the argument that was "adopted" and on appeal in that case. Reply Br. at 7, No. 17-5049 (D.C. Cir. Aug. 10, 2017) (Dkt. 1688161) (citing *CREW*, 209 F. Supp. at 93). CREW, therefore, cannot point to any "benefit [to] be gained from further briefing and argument" on the same issue. *Taxpayers Watchdog, Inc.*, 819 F.2d at 298. Indeed, this Court found that summary reversal was "dictated" where the issue was previously resolved in an appeal "concerning the same litigants and resolving the same legal issues." *Vietnam Veterans Against the War v. Morton*, 506 F.2d 53, 56 (D.C. Cir. 1974).

Granting summary reversal and vacatur will also result in "a major savings of time, effort, and resources for the parties, counsel, and the Court." D.C. Circuit Handbook at 28. Without such an order, the parties will need to brief numerous issues before this Court, including disputes over the standard of review, the proper application of agency deference, the limitations of the First Amendment, and the due process implications of CREW's effort to penalize American Action Network

for its 2010 issue advocacy based on standards announced years later in this litigation. Absent an order summarily reversing and vacating the district court's decisions, American Action Network would also remain embroiled in CREW's "citizen suit" over contested allegations that the Federal Election Commission, in reliance on prosecutorial discretion, chose not to pursue.

The Court can properly eliminate all further proceedings here and in district court with an order that corrects this one foundational error by the district court. Doing so will respect the Federal Election Commission's prosecutorial authority, will serve the Court's interest in efficiency, and will respect the "most fundamental principle of constitutional adjudication[, which] is not to face constitutional questions but to avoid them, if at all possible." *City of El Paso, v. S.E. Reynolds*, 887 F.2d 1103, 1106 (D.C. Cir. 1989) (internal quotation mark and citation omitted).

III. CONCLUSION

Circuit precedent establishes that the district court did not have authority to review the Federal Election Commission's decision to dismiss CREW's allegations against American Action Network because the Commission did so in reliance on its prosecutorial discretion. *CREW*, 2018 WL 2993249, at *4. In direct conflict with this precedent, the district court inappropriately subjected the Federal Election Commission's decision to judicial review and required additional regulatory and

judicial proceedings. This Court should finally cut off judicial review of an unreviewable agency decision by summarily reversing and vacating the district court's March 20, 2018 and September 19, 2016 opinions and orders.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

I hereby certify, on this 25th day of June, 2018, that:

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. 32(f), this document contains 2,884 words.

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/s/ Claire J. Evans
Claire J. Evans

CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2018, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

/s/ Claire J. Evans
Claire J. Evans

EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*, Plaintiffs, v. **FEDERAL ELECTION COMMISSION,** Defendant, **AMERICAN ACTION NETWORK, INC.,** Intervenor Defendant.	Case No. 16-cv-2255 (CRC)

MEMORANDUM OPINION

This is the second in a series of cases involving the Federal Election Commission and its (non)regulation of American Action Network, Inc. ("AAN"), a self-described "issue-oriented action tank" that ran nearly $18 million in television advertisements just before the 2010 federal midterm elections. Citizens for Responsibility and Ethics in Washington—a watchdog group known as "CREW"—contends that AAN's spending on these ads rendered it a "political committee" as defined in the Federal Election Campaign Act of 1971. And, according to CREW, because AAN did not register as a political committee during the relevant time period, it evaded the Act's recordkeeping and disclosure requirements that apply to those groups.

In 2012, CREW filed an administrative complaint with the Commission to that effect. By an evenly divided vote, the Commission dismissed CREW's complaint because a majority of the Commissioners did not find "reason to believe" that AAN violated the Act. 52 U.S.C. § 30109(a)(2). Specifically, the three controlling Commissioners concluded that AAN did not

qualify as a political committee because it lacked a "major purpose" of nominating or electing a candidate for federal office, Buckley v. Valeo, 424 U.S. 1, 79 (1976). This Court in a previous decision held that dismissal "contrary to law" because it rested on an erroneous premise regarding Buckley's "major purpose" requirement. On remand, the Commission again dismissed CREW's complaint in a deadlocked decision.

CREW then filed this suit challenging the Commission's second dismissal as contrary to law. Because the Court finds that the Commission's analysis was inconsistent with the governing statutes, it will grant summary judgment in favor of CREW and remand this matter to the Commission.

I. Background

A. Legal Background

The Federal Election Campaign Act of 1971 ("FECA"), as substantially amended in 1974, regulates federal elections in two key ways. First, the law sets monetary limits on contributions to political parties and candidates. See 52 U.S.C. § 30116. Second, it imposes disclosure requirements on entities that spend money for the purpose of influencing elections, even when that spending does not go directly to a candidate's coffers. See id. § 30104.

This case is about FECA's disclosure requirements—specifically, those triggered by spending on political advertisements. In broad terms, these disclosure requirements serve "three important interests: providing the electorate with relevant information about the candidates and their supporters; deterring actual corruption and discouraging the use of money for improper purposes; and facilitating enforcement of the prohibitions in the Act." McConnell v. FEC, 540 U.S. 93, 121 (2003) (controlling opinion of Stevens & O'Connor, J.J.).

Some of FECA's disclosure requirements are triggered by certain types of communications. For example, an entity that makes "independent expenditures"—that is, a communication "expressly advocating the election or defeat of a clearly identified candidate," 52 U.S.C. § 30101(17)—of over $250 in a calendar year must file a report with the Commission containing information about itself and its contributors, id. § 30104(c).

FECA also imposes more pervasive disclosure requirements on entities based on their campaign-related spending patterns. As relevant here, "political committees"—commonly referred to as "political action committees" or "PACs"—are subject to extensive, ongoing disclosure requirements. They must appoint a treasurer, keep records with the names and addresses of contributors, and file regular reports during a general election year with accounting information, including the amounts spent on contributions and expenditures. Id. §§ 30102–04. They must also register with the Federal Election Commission or face penalties. Id. §§ 30104(a)–(b), 30109(d)(1).

An entity qualifies as a political committee when it satisfies two separate conditions. The first was imposed by Congress in the text of FECA: the entity must receive or spend more than $1,000 in a calendar year for the purpose of influencing a federal election. Id. § 30101(4)(A), (8)(A)(i), (9)(A)(i).[1] The second condition was imposed by the Supreme Court in Buckley v. Valeo as a narrowing construction of the statutory definition. Under Buckley, political committees are limited to those "organizations that are under the control of a candidate or *the*

[1] More precisely, FECA defines "political committee" 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). "Contributions" and "expenditures" are both restricted to payments made "for the purpose of influencing any election for Federal office." Id. § 30101(8)(A)(i), (9)(A)(i).

major purpose of which is the nomination or election of a candidate." 424 U.S. at 79 (emphasis added). A broader definition of "political committee," the Court explained, could raise problems of vagueness under the First Amendment by threatening the speech of "groups engaged purely in issue discussion" and not just those engaged in "campaign related" activity. Id.

Several decades after Buckley, Congress in the Bipartisan Campaign Reform Act of 2002 ("BCRA") amended FECA to add important new disclosure requirements. BCRA was aimed, among other targets, at the post-Buckley rise of corporate and union spending on ads that were nominally related to political issues but were clearly intended to sway voters in upcoming federal elections. See McConnell, 540 U.S. at 126–32. To capture these "so-called issue ads," id. at 126, Congress created a new category of communications called "electioneering communications"—television advertisements that air within 60 days of a federal election, clearly identify a candidate running for federal office, and target the relevant electorate. 52 U.S.C. § 30104(f)(3)(A)(i). Corporations spending over $10,000 on those communications in a calendar year must file a statement with the Commission that discloses information about the entity, the candidates identified in the communications, the recipients of any disbursements, and any donors who gave over $1,000 toward electioneering communications since the beginning of the preceding calendar year. Id. § 30104(f)(2); 11 C.F.R. § 104.20(c)(9).[2] Ads that qualify as electioneering communications must also include disclaimers with information like the name of

[2] More specifically, FECA requires electioneering communication reports to contain "the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date." 52 U.S.C. § 30104(f)(2)(F). With respect to corporations like AAN, the Commission by regulation has interpreted the statute's reference to such contributors as limited to donations "*made for the purpose of furthering electioneering communications*." 11 C.F.R. § 104.20(c)(9) (emphasis added). The D.C. Circuit has upheld this "purpose requirement" against challenge under the Administrative Procedure Act. Van Hollen, Jr. v. FEC, 811 F.3d 486, 489–90 (D.C. Cir. 2016).

the entity that paid for the ad and whether the ad was authorized by a candidate. 52 U.S.C. § 30120(a); see 11 C.F.R. § 100.11(c)(3).

The Federal Election Commission ("FEC"), an independent agency with six Commissioners, is responsible for enforcing FECA's disclosure requirements. See 52 U.S.C. § 30106(b)(1). The Commission has not adopted a rule that further clarifies the meaning of Buckley's "major purpose" limitation. Rather, it has taken a case-by-case approach by deciding whether particular entities have a major purpose of nominating or electing a candidate. See Shays v. FEC, 511 F. Supp. 2d 19, 30 (D.D.C. 2006). This approach was ultimately upheld by a fellow judge in this District against challenge under the Administrative Procedure Act. See id.

Any person or entity may file a complaint with the Commission asserting a FECA violation. 52 U.S.C. § 30109(a)(1). If four or more Commissioners find "reason to believe" that FECA was or will soon be violated, then the Commission must investigate. Id. § 30109(a)(2). Otherwise, the complaint is dismissed. See id. § 30106(c). In the event of dismissal, the controlling group of Commissioners—here, those voting against enforcement—must provide a statement of reasons explaining the dismissal decision. See FEC v. Nat'l Republican Senatorial Comm. ("NRSC"), 966 F.2d 1471, 1476 (D.C. Cir. 1992). "Any party aggrieved" by an FEC dismissal decision may petition for this Court's review. 52 U.S.C. § 30109(a)(8)(A). If the Court finds the statement of reasons to be contrary to law, it can direct the FEC to take action within 30 days that "conforms with" the Court's ruling. Id. § 30109(a)(8)(C).

B. Factual and Procedural Background

1. The FEC's First Dismissal

American Action Network ("AAN") is a tax-exempt § 501(c)(4) civic organization. Joint Appendix ("J.A.") 1490–91 (ECF No. 46). The group's stated mission is to "create, encourage

and promote center-right policies based on the principles of freedom, limited government, American exceptionalism, and strong national security." J.A. 1490. To advance that mission, AAN has sponsored educational activities and grassroots events. But the majority of its spending throughout the period at issue in this case—July 23, 2009 through June 30, 2011[3]—was on political advertisements. Of its $27.1 million in total spending over that period, just over $4 million was devoted to independent expenditures—*i.e.*, ads expressly advocating for or against a federal candidate. J.A. 1765. An additional $13.7 million was devoted to electioneering communications—*i.e.*, ads run near an election that identify a candidate and target the relevant electorate. Id.

In June 2012, CREW and its then–executive director filed a complaint with the FEC alleging that AAN's spending near the 2010 midterms rendered it an unregistered political committee. J.A. 1480–88. The FEC's Office of General Counsel reviewed the complaint and recommended that the Commission investigate it because there was reason to believe that AAN was indeed a political committee. Id. at 1659. Nevertheless, in June 2014, the Commissioners deadlocked three-to-three on whether to commence an investigation and, accordingly, the Commission dismissed CREW's complaint. Id. at 1689.

The three controlling Commissioners—those voting against investigation—issued a Statement of Reasons explaining that AAN was not a political committee because it did not have a major purpose of nominating or electing a federal candidate. J.A. 1690–723. The Commissioners first explained that, based on AAN's organizational documents, its official public statements, and its tax-exempt status, AAN appeared to have a "central organizational

[3] This timespan covers AAN's spending as reported in two of its tax returns: one return covering July 23, 2009 through June 30, 2010; and the other covering July 1, 2010 through June 30, 2011. J.A. 1490, 1518.

purpose" that was "issue-centric" and not focused on electing candidates. Id. at 1706–07. They then turned to the heart of CREW's complaint: that AAN's spending on advertisements rendered it a political committee. Id. at 1708. In this part of their analysis, the Commissioners relied on a rigid distinction between "express advocacy" for a candidate—which properly counted toward an electoral major purpose—and "issue advocacy"—which categorically did not. See id. at 1709–10. In the Commissioners' view, the Supreme Court had interpreted the First Amendment to require such a categorical distinction—first in Buckley and more recently in FEC v. Wisconsin Right to Life, Inc. ("WRTL II"), 551 U.S. 449 (2007), which held that a statute prohibiting corporations from funding electioneering communications could not, consistent with the First Amendment, be applied to forbid the funding of "genuine issue ads" that are not "the functional equivalent of express advocacy," id. at 480–81.[4] See J.A. 1704–05, 1709.

Relying on the dichotomy between express and issue advocacy from WRTL II, the Commissioners characterized all of AAN's ads that did not expressly advocate for a candidate (*i.e.*, its electioneering communications) as "genuine issue advertisements," the $13.7 million cost of which could not be counted toward an election-related major purpose. J.A. 1709–10. They made this determination wholesale, without discussing the content of any individual ad. Id. The Commissioners also considered AAN's spending over its lifetime—mid-2009 to mid-2011—instead of year-to-year and, in total, found that only the $4.1 million that AAN spent on express advocacy between 2009 and 2011 was aimed to elect a candidate. Id. at 1709. In their view, because that spending accounted for only 15% of AAN's total expenses during that period,

[4] A few years after WRTL II, the Supreme Court in Citizens United, 558 U.S. 310 (2010), "pulled the plug on this ban once and for all, ruling unconstitutional the prohibition on corporate- and union-funded 'express advocacy.'" Van Hollen Jr., 811 F.3d at 490 n.1.

the group necessarily lacked a major purpose of nominating or electing a candidate. Id. at 1709–10, 1716.

CREW filed suit in this Court challenging the FEC's dismissal of the complaint against AAN, as well as the dismissal of a similar complaint against another organization, Americans for Job Security ("AJS"). CREW v. FEC, 209 F. Supp. 3d 77, 80–81 (D.D.C. 2016). CREW alleged that both dismissals violated FECA.[5] AAN and AJS intervened as additional defendants and the parties filed cross-motions for summary judgment. Id. at 85.

In a September 2016 decision, this Court held that both dismissals were contrary to law and remanded them to the Commission for reconsideration. Id. at 95. As the Court explained, the FEC's reliance on a hard distinction between express advocacy and issue advocacy depended on an erroneous premise: that the First Amendment required it to exclude from its consideration all non-express advocacy in the context of *disclosure requirements*. Id. at 93. While the Supreme Court in WRTL II had concededly drawn such a distinction in evaluating a *ban* on corporate-sponsored electioneering communications, in McConnell and Citizens United v. FEC, 558 U.S. 310 (2010), it had expressly declined to take that approach in evaluating disclosure requirements triggered by those communications. Id. at 89–90 (quoting Citizens United, 558 U.S. at 369). And in the wake of those cases, "federal appellate courts ha[d] resoundingly concluded that WRTL II's constitutional division between express advocacy and issue speech is simply inapposite in the disclosure context." Id. at 90.

[5] CREW initially brought a claim under the Administrative Procedure Act ("APA"). This Court dismissed that claim on the ground that FECA provided CREW with an "adequate remedy" and therefore precluded review of the FEC's determination under the APA. CREW v. FEC, 164 F. Supp. 3d 113, 120 (D.D.C. 2015).

This Court nevertheless declined to adopt CREW's proposed rule that, to comply with FECA, the Commission must treat *all* electioneering communications as indicative of an election-related major purpose. As the Court explained:

> CREW's citations to legislative history, past FEC precedent, and court precedent certainly support the conclusion that *many* or even *most* electioneering communications indicate a campaign-related purpose. Indeed, it blinks reality to conclude that many of the ads considered by the Commissioners in this case were not designed to influence the election or defeat of a particular candidate in an ongoing race. However, particularly given the FEC's judicially approved case-by-case approach to adjudicating political committee status, the Court will refrain from replacing the Commissioners' bright-line rule with one of its own.

Id. at 93 (citations omitted).

2. The FEC's Second Dismissal

On remand, the FEC again divided three-to-three and dismissed CREW's complaint against AAN. J.A. 1763. The controlling Commissioners' Statement of Reasons acknowledged that, in light of this Court's decision, it could no longer categorically exclude AAN's electioneering communications from its major-purpose calculation. Id. at 1767–68. Rather, the Commissioners explained that they would proceed ad-by-ad and weigh several factors in deciding whether each electioneering communication should count toward an election-related major purpose. These factors included (1) the extent to which the ad's language focuses on "elections, voting, political parties," and the like; (2) "the extent to which the ad focuses on issues important to the group or merely the candidates referenced in the ad"; (3) the context of the ad (but "only to the extent necessary . . . to understand better the message being conveyed"); and (4) whether the ad "contains a call to action and, if so, whether the call relates to the . . . issue agenda or, rather, to the election or defeat of federal candidates." Id. at 1768.

Before they turned to each ad, the Commissioners explained that all of the ads ran in a time period that—while admittedly near the federal midterm elections—also preceded an

anticipated "lame duck" congressional session. J.A. 1768–70. During that session, Congress was expected to "consider several pieces of major legislation, many involving policy issues of great importance to AAN" like "Bush-era tax cuts, federal spending, health care, and energy." Id. at 1769. And, as the Commission noted, Congress did ultimately convene a lame duck session in December 2010 and considered some of those issues. Id. at 1769–70.

"With that context in mind," the controlling Commissioners then evaluated AAN's twenty electioneering communications. J.A. 1770. They concluded that four of the ads indicated an election-related major purpose: those titled "Bucket,"[6] "New Hampshire," [7] "Order," [8] and "Extreme." [9] Id. at 1779. "Order" and "Extreme," for example, sought to criticize two Democratic congressional candidates—Mike Oliverio and Annie Kuster, respectively—by linking them with Nancy Pelosi in unfavorable ways. Id. at 1778. As the Commissioners

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[6] "We send tax money to Washington and what does Russ Feingold do with it? Eight hundred billion dollars for the jobless stimulus. Two point five million for a healthcare plan that hurts seniors. A budget that forces us to borrow nine million dollars. And when he had a chance at reform, he voted against the Balanced Budget Amendment. Russ Feingold and our money. What a mess. [Superimposed text: Russ Feingold, What a mess.]" J.A. 1773.

[7] "Winter's here soon. Guess Congressman Hodes has never spent nights sleepless, unable to pay utility bills. Why else would he vote for the cap-and-trade tax? Raise electric rates by ninety percent? Increase gas to four dollars? Cost us another two million jobs? Kelly Ayotte would stop the cap-and-trade tax. Cold." J.A. 1777.

[8] "[On screen text:] If Nancy Pelosi gave an order . . . would you follow it? Mike Oliverio would. Oliverio says he would support Pelosi in Washington. After all, Oliverio voted himself a 33% pay raise. Oliverio voted for higher taxes. Even on gas. And Oliverio won't repeal Obama's $500 billion Medicare cuts. So what will Mike Oliverio do in Washington? Whatever Nancy Pelosi tells him to." J.A. 1778.

[9] "[On screen text:] Nancy Pelosi is not extreme. Compared to Annie Kuster. Kuster supported the trillion dollar government Healthcare takeover. But says it didn't go far enough. $525 billion in new taxes for government Healthcare. Now, Kuster wants $700 billion in higher taxes on families and businesses. And $846 billion in job killing taxes for cap and trade. Nancy Pelosi is not extreme. Compared to Annie Kuster." J.A. 1778.

explained, "[n]either ad contains a call to action, nor do they focus on changing the voting behavior or policy stances of the named individuals." Id. Thus, in their view, those ads were best understood as aiming to defeat reelection of the named representatives.

On the other hand, the Commissioners found that AAN's sixteen other electioneering communications did not evince an election-related purpose. Conceding that these ads were critical of the incumbent representatives they identified, the Commissioners focused on the fact that each ad instructed viewers to call the representative and urge him to change his vote on a political issue, if not an actual pending bill. See id. at 1770–79. For example, the Commissioners declined to count the cost of an ad titled "Quit Critz," which accused then-Pennsylvania representative Mark Critz of supporting "the Obama-Pelosi agenda that's left us fourteen trillion in debt." J.A. 1770. The ad concluded with an exhortation to "[t]ell Congressman Critz that Pennsylvania families need tax relief this November, not more government," and it superimposed text that instructed viewers to call Representative Critz and tell him to vote "Yes on H.R. 4746," the House tax-cut bill introduced earlier that year. Id. In evaluating that ad and several similar to it,[10] the Commissioners explained that the ads' references to "November" were "best understood as a reference to the time period in which the

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[10] For example, another tax-related ad titled "Wallpaper":

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

J.A. 1771.

lame-duck session would commence" instead of a reference to the November midterm election, and that "the express point of [their] criticism" was "to marshal public sentiment to persuade the officeholders to alter their voting stances." J.A. 1772.

Combining AAN's spending on the four election-related ads with the $4.1 million it spent on express advocacy yielded a sum of $5.97 million, or 22% of AAN's total spending between mid-2009 and mid-2011. J.A. 1779. The Commissioners ran an alternative calculation by adding the cost of an ad called "Read This"[11]—which they considered issue-focused but close to the line—and by counting AAN's spending over only the most recent year in question (mid-2010 to mid-2011). Id. Under that approach, "the amount of spending that indicate[d] a purpose to nominate or elect federal candidates would constitute less than 28% of [AAN's] total spending in that time period." Id. As a result, the Commissioners concluded that AAN did not have the requisite major purpose of nominating or electing a candidate, and they therefore voted to dismiss CREW's complaint against AAN.[12] Id. at 1779–80.

Soon thereafter, CREW filed a motion for an order to show cause why the FEC's dismissal on remand did not contravene this Court's prior decision. Pls.' Mot. Show Cause, No. 14-cv-1419 (Nov. 14, 2016) (ECF No. 57). The Court denied the motion. Memo. Op. & Order, id. (Apr. 6, 2017) (ECF No. 74). To the extent that CREW's motion relied on *new* legal

[11] "[On screen text:] Rick Boucher wants to keep you in the dark. About his Washington Cap and Trade deal. Boucher sided with Nancy Pelosi. For billions in new energy taxes. That will kill thousands of Virginia jobs. But Rick Boucher didn't just vote for Cap and Trade. The Siena Club called Boucher the "linchpin" of the entire deal. Call Rick Boucher. [Phone number at top of screen.] Tell him no more deals." J.A. 1777.

[12] The three Commissioners who voted to investigate AAN issued their own statement of reasons, in which they excoriated the controlling Commissioners for "ignor[ing] the court's ruling and the plain language of the ads that objectively criticized candidates in the weeks preceding the 2010 elections." J.A. 1785.

arguments—for example, that the Commissioners relied on a misreading of McConnell—the Court explained that those new arguments were "properly taken up in a separate suit." Id. at 5. The Court further found that nothing in the Commissioners' dismissal violated the letter of its prior decision:

> [T]he Court never ordered the FEC to reach a particular result, or to consider any particular ad—or any proportion of electioneering communications—election-related. Instead, the Court directed the FEC to reconsider its decision without "exclud[ing] from its [major purpose] consideration all non-express advocacy." The FEC did just that.

Id. at 6 (citation omitted).

CREW then filed this suit against the FEC. AAN and AJS again intervened as defendants. The parties stipulated to dismissal of the claims against AJS, and thus all that remains is the allegation that the FEC's dismissal of the complaint against AAN was contrary to law. The parties' cross-motions for summary judgment are now ripe.

II. Legal Standards

Where a party challenges an FEC dismissal decision, this Court will grant summary judgment to the challenger only if the agency's decision was "contrary to law," 52 U.S.C. § 30109(a)(8)(C), meaning either that "the FEC dismissed the complaint as a result of an impermissible interpretation of [FECA]," or that "the FEC's dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion." Orloski v. FEC, 795 F.2d 156, 161 (D.C. Cir. 1986). This same standard of review applies to all FEC decisions, whether they be unanimous or determined by tie vote. In re Sealed Case, 223 F.3d 775, 779 (D.C. Cir. 2000). This is because the Commissioners voting for dismissal "constitute a controlling group for purposes of the decision," and so their statement of reasons "necessarily states the agency's reasons for acting as it did." NRSC, 966 F.2d at 1476.

In evaluating whether a group has an election-related major purpose, the Commission is construing the term "political committee" as it appears in FECA—a statute that the Commission is charged with enforcing. The Court thus reviews the Commission's determination of whether an entity is a political committee using the framework set forth in Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). See, e.g., Orloski, 795 F.2d at 161–62. Under Chevron, the Court at "Step 1" must use "traditional tools of statutory interpretation" to decide "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842–43 & n.9; see also Pharm. Research & Mfrs. Of Am. v. Thompson, 251 F.3d 219, 224 (D.C. Cir. 2001) (examining "text, structure, purpose, and legislative history"). If so, then Congress's resolution must be given legal effect no matter what the agency says to the contrary. Chevron, 467 U.S. at 843. If, on the other hand, the statute is silent or ambiguous on an issue, the Court proceeds to "Step 2" and decides whether the agency's resolution of the issue was "a reasonable policy choice for the agency to make." Id. at 845. While the Court's review at Step 1 is plenary, at Step 2 it is "highly deferential." Nat'l Rifle Ass'n of Am., Inc. v. Reno, 216 F.3d 122, 137 (D.C. Cir. 2000).

This Court also reviews whether the FEC's dismissal was "arbitrary or capricious, or an abuse of discretion." Orloski, 795 F.2d at 161. This standard largely overlaps with Chevron Step 2; the same core question is whether the agency analyzed the problem reasonably. See Pharm. Research & Mfrs. of Am. v. FTC, 790 F.3d 198, 209 (D.C. Cir. 2015). The Court will hold an FEC decision unlawful if it "entirely failed to consider an important aspect of the problem," it "offered an explanation for its decision that runs counter to the evidence before [it]," or "is so implausible that it could not be ascribed to a difference in view or the product of agency

expertise." Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Autom. Ins. Co., 463 U.S. 29, 43 (1983).

III. Analysis

CREW contends that the controlling Commissioners' analysis on remand rested on legal errors—some repeated and some new. It first claims that the Commissioners "fabricated" a multifactor test that allowed it to disregard nearly all of AAN's electioneering advertisements, in violation of this Court's prior decision. Pls.' Mot. Summ J. at 22. More fundamentally, says CREW, the Commission's dismissal rested on a misinterpretation of Buckley and McConnell because it invoked those cases as a reason to *exclude* electioneering communications from its major purpose analysis. Id. at 28–33. In CREW's view, those cases require just the opposite "because every electioneering communication, by reason of its being an electioneering communication, is 'specifically intended to affect election results.'" Pls.' Reply at 13–14 (quoting McConnell, 540 U.S. at 127). Finally, CREW argues that the Commission's analysis was arbitrary and capricious because it ignored contextual evidence highly relevant to the ads' purpose and instead "cherry picked information" in order to "excus[e] AAN from political reporting." Pls.' Mot. Summ. J. at 41.

As the Court explained in denying CREW's motion for a show-cause order, the controlling Commissioners did not repeat their mistake of drawing a bright line between express and issue advocacy. The Court nevertheless finds legal error in the Commission's approach to analyzing AAN's status as a political committee. While the controlling Commissioners did not categorically refuse to count AAN's electioneering advertisements as indicative of an election-related major purpose, the Commissioners used a multifactor test that started from a blank slate in considering the content of each ad, with no apparent regard for the highly relevant fact that

each ad fell cleanly within Congress's definition of an "electioneering communication." In the Court's view, that approach violates the unambiguous directive of Congress—made clear in the Bipartisan Campaign Reform Act of 2002—that electioneering communications *presumptively* have an election-related purpose. In turn, to the extent that the Commission considers an entity's spending in assessing its major purpose, it must presumptively treat spending on electioneering ads as indicating a purpose of nominating or electing a candidate.

A. In FECA and BCRA, Congress Made Clear that Electioneering Ads Presumptively Have a Purpose of Nominating or Electing a Federal Candidate

To understand the Court's conclusion, begin with the plain text of FECA. Its definition of "political committee" is unambiguously broad: it covers any entity that receives or spends over $1,000 within one calendar year for the purpose of influencing an election. If this is all the Court had to go on—and if it could disregard Buckley's constitutional concerns—it would conclude that AAN is a political committee under the clear terms of FECA, and therefore that the Commission was bound to determine as much. See Akins v. FEC, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc) (with respect to the definition of "political committee," "it cannot be[] contended that the statutory language *itself* is ambiguous" (emphasis added)), *vacated on other grounds*, 524 U.S. 11 (1998).

Of course, after Buckley the Commission is not free to rely on this broad statutory definition alone. The question, then, is how the Supreme Court's imposition of the major purpose requirement changes things. Here, the context of Buckley's holding is important. The Buckley Court faced a wide-ranging constitutional challenge to FECA after it was amended in 1974. Before reaching the Act's disclosure requirements, the Court first confronted the Act's $1,000 annual limit on expenditures "relative to a clearly identified candidate during a calendar year." 424 U.S. at 39. The Court attempted to narrow this language to avoid vagueness

problems under the First Amendment by construing it "to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." Id. at 44. Even with that narrowing construction, however, the Court found the provision invalid because the government's purported interest "in preventing corruption and the appearance of corruption" did not support such a broad speech restriction. Id. at 45.

By contrast, the Court upheld several of FECA's disclosure requirements. But it imposed narrowing constructions on those requirements to avoid problems of vagueness and overbreadth under the First Amendment. For the disclosure requirements triggered by independent expenditures, the Court worried that the Act's definition of "expenditure"—which required only a purpose of "influencing" an election or nomination—could be read to cover "both issue discussion and advocacy of a political result." Id. at 79. So "[t]o insure that the reach of the [provision] is not impermissibly broad," the Court construed the term "expenditure" "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." Id. at 80. This meant that, to trigger the Act's disclosure requirements, a communication would need to contain "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [or] 'reject,'" Id. at 44 n.52; see id. at 80 & n.108. These expressions have since been called Buckley's "magic words." McConnell, 540 U.S. at 126.

The Buckley Court then reached a similar conclusion with respect to disclosure requirements triggered by "political committee" status. As the Court explained:

> The general requirement that "political committees" and candidates disclose their expenditures could raise similar vagueness problems, for "political committee" is defined only in terms of amount of annual "contributions" and "expenditures," and could be interpreted to reach groups engaged purely in issue discussion. The lower

> courts have construed the words "political committee" more narrowly. To fulfill the purposes of the Act they need 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.

424 U.S. at 79. Thus, the "major purpose" requirement was born.

Absent any congressional action in the decades since Buckley, this Court might find it unclear whether ads (1) mentioning candidates and (2) airing near elections but (3) not using Buckley's "magic words" should count toward an election-related major purpose. But in passing the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Congress unambiguously expressed its will on this issue and foreclosed the approach that the Commission took here.

In BCRA, Congress sought to mitigate two perceived problems with federal election financing that were prompted (at least in part) by Buckley. Title I of the Act was "Congress' effort to plug the soft-money loophole"—that is, the ability to have money contributed to state and local political parties effectively channeled to national parties while evading FECA's contribution limits and disclosure requirements. McConnell, 540 U.S. at 133. Title II, the provision relevant here, aimed to stem the tide of advertisements nominally targeted at issues but airing near elections—a tide that swelled after Buckley. Id. at 122. Specifically, "[a]s a result of [Buckley's] strict reading of the statute, the use or omission of 'magic words' such as 'Elect John Smith' or 'Vote Against Jane Doe' marked a bright statutory line separating 'express advocacy' from 'issue advocacy.'" Id. at 126. Yet, in Congress's view, those "two categories of advertisements proved functionally identical in important respects. Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words." Id. And, far more than a theoretical problem, the collapsed distinction between express advocacy and issue advocacy allowed entities—mostly corporations and unions—to spend "hundreds of millions of dollars" on ads leading up to elections that "were

unregulated under FECA." Id. at 127–28. "Moreover, though ostensibly independent of the candidates, the ads were often actually coordinated with, and controlled by, the campaigns." Id. at 131. The Senate Committee on Governmental Affairs conducted "an extensive investigation into the campaign practices in the 1996 federal elections" and—while divided along party lines regarding some of these practices—agreed that the proliferation of so-called issue ads was a serious problem. Id. at 129.

In response, BCRA created a new category of political communications called "electioneering communications." The statute's definition of these communications "replace[d] the narrowing construction of FECA's disclosure provisions adopted by this Court in Buckley" by providing three clear criteria that triggered regulation. Id. at 189. Instead of covering only "communications expressly advocating the election or defeat of particular candidates," the new disclosure requirements covered ads that (1) referenced to a candidate for federal office, (2) ran within 60 days of a federal election, and (3) targeted the relevant electorate. And the Act imposed disclosure requirements on entities who funded those communications. Id. at 190–91.

This legislative history leaves little doubt that Congress saw electioneering communications as generally aimed at swaying voters. The Supreme Court relied heavily on this history in McConnell, where it upheld BCRA's disclosure requirements against First Amendment challenge. 540 U.S. at 189–202 (controlling opinion of Stevens & O'Connor, JJ.). The Court's reasons for doing so further suggest that electioneering communications presumptively have an electioneering purpose. In rejecting the argument that BCRA's definition of "electioneering communications" was unconstitutionally vague and overbroad, the Court explained that Buckley's distinction between express and issue advocacy "was the product of statutory interpretation rather than a constitutional command." Id. at 192. In the Court's view,

BCRA's definition of electioneering communications created no similar issues of vagueness or overbreadth—its requirements were "easily understood and objectively determinable." Id. at 194. Moreover, putting aside Buckley and starting from first principles, the Court explained that the notion of "a rigid barrier between express advocacy and so-called issue advocacy" could not be "squared with [its] longstanding recognition that the presence or absence of magic words [*i.e.*, "vote for Jane Doe" or "vote Jane Doe out of office"] cannot meaningfully distinguish electioneering speech from a true issue ad." Id. at 193. As evidenced by their timing, their identification of a specific candidate, and their targeting of the relevant electorate, it was clear that electioneering communications—magic words or not—"were specifically intended to affect election results." Id. at 127. In short, the Supreme Court's reading of BCRA corroborates that Congress deemed electioneering communications as paradigmatically aimed at swaying voters.[13]

Even ignoring all of this legislative history and Supreme Court analysis, Congress's intent regarding these ads is manifest in its very choice of labelling them "electioneering communications." Instead of using a neutral term like "communications made near federal elections," Congress chose a label that by its plain meaning deems the ads to "take part actively and energetically in a campaign to be elected to public office." Electioneer, Oxford Dictionary of English 565 (3d ed. 2010); see also Electioneer, American Heritage Dictionary (5th ed. 2018) ("To work actively for a candidate or political party."). Congress's terms, like its statutory

[13] While McConnell was a fractured decision, a majority of the Justices voted to uphold the disclosure requirements for the reasons stated in the controlling opinion written by Justices Stevens and O'Connor. See 540 U.S. at 201 (opinion of Stevens & O'Connor, J.J., joined by Souter, Ginsburg & Breyer, J.J.); see also id. at 286 n.*, 321 (opinion of Kennedy, J., joined by Rehnquist, C.J., and Scalia, J.) (voting to uphold the relevant disclosure provisions). And all but one of the Justices in Citizens United relied on the same rationale in rejecting a challenge to BCRA's electioneering-related disclosure requirements as applied to certain political ads. 558 U.S. at 368–69; id. at 396 (Stevens, J., concurring in part and dissenting in part).

headings, surely "supply clues" about its intent. Yates v. United States, 135 S. Ct. 1074, 1083 (2015); see also, e.g., Trainmen v. Baltimore & Ohio R.R. Co., 331 U.S. 519, 528–29 (1947) (explaining that "the title of a statute and the heading of a section" are "tools available for the resolution of a doubt"). Here, the clue is hardly subtle: Why would Congress call something an "electioneering communication" if that thing did not generally have a "purpose to nominate or elect a candidate," in the sense meant by Buckley?

It is true that BCRA did not touch the text of FECA's definition of "political committee." But a later congressional act can inform the meaning of an earlier one and, importantly here, can clarify existing ambiguities. "At the time a statute is enacted, it may have a range of plausible meanings," but "subsequent acts can shape or focus those meanings. . . . This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143 (2000); see also United States v. Estate of Romani, 523 U.S. 517, 530–31 (1998) ("[A] specific policy embodied in a later federal statute should control our construction of the priority statute, even though it had not been expressly amended."). Here, by declaring that (by and large) electioneering communications have an inherent purpose of influencing a federal election, Congress has clarified that the broad term "political committee"—even after Buckley—should presumptively include organizations that are primarily in the business of funding electioneering communications.

Why only "presumptively"? Despite the foregoing evidence of Congress's intent regarding electioneering ads, the Court is not convinced that Congress intended to *categorically* foreclose the Commission from declining to treat a particular electioneering ad as supporting an election-related major purpose. In rejecting a facial challenge to BCRA's electioneering

restrictions, McConnell recognized that some ads falling within BCRA's definition of "electioneering advertisements" may not have a true "electioneering purpose," even if "the vast majority of ads clearly had such a purpose." 540 U.S. at 206 ("The precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief preelection timespans but had no electioneering purpose is a matter of dispute between the parties and among the judges on the District Court [below].").

In other words, Congress seems to have left open a small interpretive gap after BCRA: one that allows the Commission, using its case-by-case approach, to deem an extraordinary "electioneering communication" as lacking an election-related purpose. The following ad, for example, would seem to fall within the letter of BCRA's definition: It runs 60 days before a midterm election; it does not mention the election or even indirectly reference it (*e.g.*, by cabining the message's timeframe to "this November"); the meat of the ad discusses the substance of a proposed bill; the ad urges the viewer to call a named incumbent representative and request that she vote for the bill; but it does not make any reference to the incumbent's prior voting history or otherwise criticize her. See 52 U.S.C. § 30104(f)(3)(A). That might be the sort of electioneering communication that could, under the Commission's case-by-case approach, properly be deemed lacking an election-related purpose under Buckley despite meeting BCRA's definition of "electioneering communication."

But the Court expects such an ad to be a rare exception. Congress has made a judgment that run-of-the-mill electioneering communications have the purpose of influencing an election;

an ad meeting the statutory definition of an electioneering communication generally indicates a purpose of nominating or electing a candidate.

B. The Commission's Analysis Did Not Give Effect to Congress's Clear Intent

The controlling Commissioners' multifactor analysis ignores Congress's expressed intent regarding electioneering advertisements. The very first sentence of their multifactor test speaks volumes: "In evaluating major purpose, our starting point is the language of the communication itself." J.A. 1767. Starting with the language of a political ad might be justifiable if the ad aired nowhere near a federal election, or if it did not mention a candidate. But, as just explained, when it comes to electioneering communications Congress has already determined that they are presumptively designed to influence elections. The remainder of the Commission's test in no way accounts for that fact:

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

J.A. 1767–68. The Commission may be permitted to use these or similar factors in assessing whether an electioneering ad *overcomes* the presumption that it is aimed to elect a candidate. But engaging in a holistic, *de novo* review of the ad based on those factors allows the Commission to treat run-of-the-mill electioneering ads—those highly critical of a candidate's positions but lacking the "magic words" directing viewers to vote him out of office—as not

indicating an electioneering purpose. That framework cannot be squared with Congress's views on the issue.

Indeed, the controlling Commissioners' analysis of AAN's ads in this case is strong evidence that their multifactor approach, if anything, builds in a presumption that runs in the *opposite* direction of what Congress intended—*i.e.*, that it tilts the balance in favor of finding that electioneering communications do *not* have an electioneering purpose. Take the ad titled "Skype," which identified Congresswoman Dina Titus, a Democrat from Nevada who was narrowly defeated in her 2010 reelection bid:

> Person l: Hey, what's up?
>
> Person 2: Hey. You have to check out the article I just sent you. Apparently convicted rapists can get Viagra paid for by the new health care bill.
>
> Person 1: Are you serious?
>
> Person 2: Yep. I mean, Viagra for rapists? With my tax dollars? And Congresswoman Titus voted for it.
>
> Person 1: Titus voted for it?
>
> Person 2: Yep. I mean, what is going on in Washington?
>
> Person 1: In November, we need to tell Titus to repeal it. [Superimposed text: "Tell Congresswoman Titus to vote for repeal in November. Vote Yes on H.R. 4903. (202) 225-3252."]

J.A. 1776.

The controlling Commissioners did not find that this ad (nor any others mentioning healthcare) had an election-related purpose. "The criticisms contained in the ads," they explained, "are couched in terms of past votes taken by the named officeholder and are accompanied by calls to action designed to influence the officeholders' votes in the lame-duck session." J.A. 1776. Seriously? Is it really plausible that the attack on Titus's past vote for the

Affordable Care Act—for supplying "Viagra to rapists" no less—was designed to mobilize Titus's constituents to change her view on the Obama Administration's signature legislative initiative, rather than to oust her from office for casting that vote? And would a sophisticated organization like AAN conceivably invest millions of dollars on ads in an effort to get the Democratic-controlled House that had just passed the Act to turn around and repeal it only months later? Perhaps the ad could be charitably read as having a dual purpose—maybe some viewers would indeed be motivated to call Titus and tell her to vote for a healthcare repeal bill if it came up in the anticipated lame-duck session. (That turned out to be a big "if"—the Commission cites no evidence, and the Court is aware of none, that the House actually considered a repeal bill during the December lame-duck session.) But surely the primary purpose of this ad was to convince viewers to vote against Titus. Indeed, the ad is awfully close to the hypothetical posed by the Supreme Court in McConnell to highlight the illusory distinction between express advocacy and issue advocacy: An ad that, instead of urging viewers to "vote against Jane Doe," "condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" 540 U.S. at 127 (quoting 251 F. Supp. 2d 176, 304 (D.D.C. 2003) (Henderson, J., concurring in the judgment in part and dissenting in part)). That the Commissioners readily characterized "Skype" and similar ads as unrelated to elections demonstrates the mismatch between their framework and Congress's understanding of electioneering ads. Their approach in fact flirts with a *reverse* "magic words" test: electioneering communications that harangue a candidate are exempt so long as they instruct the viewer to "call" her representative rather than to "vote against" him.

None of the Commission's arguments in favor of its approach are availing. As it did when justifying its first dismissal, the Commission cites WRTL II, which (again) found that

spending on electioneering communications could be restricted only if the ads were, as an objective matter, "the functional equivalent of express advocacy," id. at 469. Relying on that case, the Commission insists that even if it may not apply a categorical rule that turns on whether the ad contains express advocacy (or the functional equivalent), it may *consider* whether the ad resembles express advocacy in deciding whether it has an election-related purpose. FEC's Mot. Summ. J. at 40 ("[The Court's] determination did not preclude Commissioners from analyzing AAN's communications by reference to their content, consistent with the Supreme Court's analysis in WRTL, when considering whether the ads were electoral in nature."). That's true so far as it goes: the Commission is not outright forbidden from considering the content of an electioneering communication. But because of BCRA, that consideration must follow a strong presumption that an electioneering communication indicates a purpose of electing a candidate.

More fundamentally, the Commission continues to overread WRTL II for the idea that the primary goal in evaluating AAN's ads should be to determine whether the ads' *content* bears "indicia of express advocacy." FEC's Mot. Summ. J. at 39 (quoting WRTL II, 551 U.S. at 470). WRTL II focused narrowly on an electioneering communication's content, to the exclusion of "contextual factors" like the ad's timing, for a particular reason: the First Amendment demanded an objective, narrowly tailored standard for *bans* on speech. 551 U.S. at 473; see id. at 469–70 (examining whether ad's content had "indicia of express advocacy"). But, again, McConnell and Citizens United v. FEC—the latter of which came after WRTL II—foreclose any argument that *in the disclosure setting* the First Amendment requires that a regulated communication contain the functional equivalent of express advocacy. See also Independence Institute v. FEC, 216 F. Supp. 3d 176, 193 (D.D.C. 2016) (Millett, J.) (in rejecting a constitutional challenge to the donor disclosure requirement as applied to a particular electioneering communication, explaining that

the challenger's "proposed constitutional exception for 'genuine' issue advocacy is entirely unworkable as a constitutional rule"). In other words, the Supreme Court has seen no problem with disclosure requirements triggered solely by an electioneering communication's context: its timing, its reference to a candidate, and its viewership. And Congress's view, made plain in BCRA, is that the presence of those contextual factors inherently suggests an election-related purpose.

The Commission falls back on Buckley. In the Commission's view, the fact that Buckley read FECA to avoid regulating "groups engaged purely in issue discussion," 424 U.S. at 79, means that the Commission must evaluate the content of an entity's political ads to determine whether the ads are, in fact, "issue discussion." But again, Congress in BCRA cabined some of the Commission's discretion by defining a subset of political ads—electioneering communications—that by definition are related to federal elections. After BCRA, the Commission cannot review electioneering communications *de novo* to determine whether they qualify as pure issue discussion. The statute emphatically placed electioneering advertisements on the election-related side of Buckley's line, and the Commission must pay heed to that placement when evaluating the major purpose of an entity that spends money on electioneering communications.

Finally, the Commission emphasizes this Court's prior refusal to impose a bright-line rule—one that would require it to count all electioneering communications toward an election-related major purpose. According to the Commission, that refusal implicitly endorsed its approach to electioneering communications. FEC's Mot. Summ. J. at 36. Not so. To be sure, the Court continues to believe that an inflexible rule would be incompatible with the FEC's recognized power to resolve major-purpose questions on a case-by-case basis. Such a rule would

also conflict with the Supreme Court's recognition in McConnell that some "issue ads" might really be just that, even if run near elections. That does not mean, though, that the Commission has unfettered discretion to judge electioneering ads. Rather, FECA and BCRA make clear that Congress intended to foreclose the Commission from applying a major-purpose framework that does not, at a minimum, presumptively consider spending on electioneering ads as indicating an election-related major purpose.[14] The Commission may in special circumstances conclude that an electioneering ad does not have such a purpose. But given Congress's recognition that the "vast majority" of electioneering ads have the purpose of electing a candidate, the Commission's exclusion of electioneering ads from its major-purpose analysis should be the rare exception, not the rule. McConnell, 540 U.S. at 206; see also CREW, 209 F. Supp. 3d at 93 ("[I]t blinks reality to conclude that many of the ads considered by the Commissioners in this case were not designed to influence the election or defeat of a particular candidate in an ongoing race.").

Having found a legal error in the Commissioners' approach, the appropriate remedy here is to remand this matter to the Commission. The Court appreciates that the Commission may, on remand, yet again exclude from its analysis some of the ads that it previously excluded. But because the controlling Commissioners did not begin with a presumption that an electioneering ad evinces an election-related purpose, the Court is not so confident that they would reach the

[14] This is not to say that spending on advertisements is the sole relevant factor in determining an entity's major purpose. The point here is that to the extent that spending on advertising *is* relevant—and surely it is to some degree—the Commission must account for spending in a way that reflects an electioneering ad's presumptive purpose of affecting an upcoming election.

same outcome on remand to warrant affirming their decision under the principle of "harmless error."[15]

IV. Conclusion

The Court recognizes that the Commission, like all executive agencies, must comply with directives from the two other branches of government—directives that sometimes push the agency in opposite directions. The problem here is that the FEC has equated two directives that are plainly unequal in their relevance to the issue at hand. Congress decades ago laid down a clear, broad definition of the term "political committee" in FECA that would obviously capture AAN; the Supreme Court in Buckley then cabined that definition in a way that requires the Commission to conduct a major purpose analysis. But Congress later clarified, through BCRA, that it viewed the vast majority of electioneering communications as corroborating a purpose of electing candidates to federal office. And while the Supreme Court in several cases has struck down *other* aspects of FECA and BCRA, it has never suggested that its constitutional concerns apply in the realm of disclosure requirements. Indeed, the Supreme Court has now twice reaffirmed that there is no constitutional distinction between issue-based and express advocacy in the disclosure context. Absent such a distinction, FECA and BCRA require the agency to presume that spending on electioneering communications contributes to a "major purpose" of

[15] Because the Administrative Procedure Act instructs courts to take "due account . . . of the rule of prejudicial error," 5 U.S.C. § 706, courts reviewing agency action under that Act will not remand to the agency if "the agency's mistake did not affect the outcome." PDK Labs., Inc. v. DEA, 362 F.3d 786, 799 (D.C. Cir. 2004). Though FECA contains no express requirement of prejudice, courts have invoked the principle in reviewing an FEC decision. See, e.g., Level the Playing Field v. FEC, 232 F. Supp. 3d 130, 142–43 (D.D.C. 2017). The Court therefore assumes that, in theory, a harmless legal error would not require remanding this case to the Commission.

nominating or electing a candidate for federal office, and, in turn, to presume that such spending supports designating an entity as a "political committee" under FECA.

Because the Commission failed to apply those presumptions, its dismissal of CREW's complaints against AAN was "contrary to law." The Court, accordingly, will grant CREW's motion for summary judgment, deny the FEC's and AAN's cross-motions, and direct the Commission to conform with this declaration within 30 days. 52 U.S.C. § 30109(a)(8)(C). If the FEC does not timely conform with the Court's declaration, CREW may bring "a civil action to remedy the violation involved in the original complaint." Id. A separate Order accompanies this Memorandum Opinion.

CHRISTOPHER R. COOPER
United States District Judge

Date: March 20, 2018

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*, Plaintiffs, v. **FEDERAL ELECTION COMMISSION,** Defendant, **AMERICAN ACTION NETWORK, INC.,** Intervenor Defendant.	Case No. 16-cv-2255 (CRC)

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby **ORDERED** that:

1. Defendant Federal Election Commission's Motion for Summary Judgment (ECF No. 28) is DENIED.

2. Intervenor-Defendant American Action Network's Motion for Summary Judgment (ECF No. 30) is DENIED.

3. Plaintiffs' Cross-Motion for Summary Judgment (ECF Nos. 31 & 32) is GRANTED.

4. Defendant Federal Election Commission shall conform with the Court's declaration within 30 days, in accordance with 52 U.S.C. § 30109.

SO ORDERED.

CHRISTOPHER R. COOPER
United States District Judge

Date: March 20, 2018

EXHIBIT 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, et al., Plaintiff, v. **FEDERAL ELECTION COMMISSION,** Defendant, **AMERICAN ACTION NETWORK, INC.,** Intervenor Defendant.	Case No. 1:14-cv-01419 (CRC)

MEMORANDUM OPINION

In 2010, American Action Network ("AAN")—a tax-exempt section 501(c)(4) organization—spent $1,065,000 on three versions of the following television advertisement, which ran in the districts of three different candidates for Congress in the lead-up to that year's election:

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

A.R. 1722. The Federal Election Commission ("FEC") reviewed this ad, along with nineteen other AAN-sponsored communications and nine similar "electioneering communications" sponsored by another non-profit, Americans for Job Security ("AJS"). Three Commissioners concluded that the organizations' spending on these ads should not be considered in evaluating whether either entity's "major purpose" was "the nomination or election of a candidate."

Buckley v. Valeo, 424 U.S. 1, 79 (1976). On the basis of that analysis, the FEC—in accordance with the controlling votes of the three Commissioners—dismissed complaints against AJS and AAN, concluding that neither organization was an unregistered political committee in violation of the Federal Election Campaign Act ("FECA").

Plaintiff, Citizens for Responsibility and Ethics in Washington ("CREW"), which lodged the complaints, now challenges those dismissal decisions. This Court previously dismissed CREW's claims to the extent that they relied on the Administrative Procedure Act ("APA"), but that same opinion recognized that CREW had an "adequate, alternative means to challenge" the FEC's decision through FECA's particularized judicial review mechanisms. See CREW v. FEC, __ F. Supp. 3d __, 2015 WL 10354778, at *1 (D.D.C. Aug. 13, 2015). The Court now considers cross-motions for summary judgment, the central dispute in which is whether the FEC's conclusion—that there was no "reason to believe" the organizations in question had as their "major purpose" the "nomination or election of a candidate"—was "contrary to law," 52 U.S.C. § 30109(a)(8)(C). Finding that the controlling Commissioners premised their conclusion on an erroneous interpretation of Supreme Court precedent and the First Amendment, the Court agrees with CREW that the dismissals were contrary to law. It will, accordingly, grant CREW's motion for summary judgment, deny the FEC's and AAN's cross-motions, and remand the case to the FEC for further proceedings consistent with this Opinion.

I. Background

A. Statutory and Regulatory Framework

The FEC is a six-member, independent agency charged with administering FECA. See 52 U.S.C. § 30106(b)(1) (tasking the Commission with "administer[ing], seek[ing] to obtain compliance with, and formulat[ing] policy with respect to" FECA). Any person or entity may

file a complaint with the Commission asserting a FECA violation, following which the alleged violator is given an opportunity to respond in writing. Id. § 30109(a)(1). If four or more Commission members subsequently find there is "reason to believe" that FECA was or will soon be violated, then the FEC must investigate. Id. § 30109(a)(2). Otherwise—i.e., where three or fewer Commission members have "reason to believe" FECA has been violated—the complaint is dismissed. See id. § 30106(c) ("[T]he affirmative vote of 4 members of the Commission shall be required in order for the Commission to take any [enforcement or other authoritative] action."). In the event of dismissal, the controlling group of Commissioners—here, those voting against enforcement—must provide a statement of reasons explaining the dismissal decision. See FEC v. Nat'l Republican Senatorial Comm. (NRSC), 966 F.2d 1471, 1476 (D.C. Cir. 1992). Any "party aggrieved" by an FEC dismissal decision "may file a petition" for this Court's review. Id. § 30109(a)(8)(A).

One way that FECA regulates federal campaign financing is by requiring disclosures for certain types of election-related communications. The Supreme Court has repeatedly recognized that such disclosure regimes accomplish much while costing relatively little. On the one hand, disclosure "open[s] the basic process of our federal election[s] to public view," Buckley, 424 U.S. at 82, by "provid[ing] the electorate with information" concerning the sources and outlets for campaign money, id. at 66, and thus "minimiz[ing] the potential for abuse of the campaign finance system," McCutcheon v. FEC, 134 S. Ct. 1434, 1459 (2014). On the other hand, disclosure imposes a relatively "less restrictive"—though not negligible—First Amendment burden on those subject to its requirements. McCutcheon, 134 S. Ct. at 1460; see also Citizens United v. FEC, 558 U.S. 310, 369 (2010); FEC v. Massachusetts Citizens for Life, Inc. (MCFL), 479 U.S. 238, 262 (1986).

FECA's disclosure requirements can be triggered by one-time events. When any entity spends more than $250 on an "independent expenditure"—a communication not coordinated with a candidacy but "expressly advocating the election or defeat of a clearly identified candidate," 52 U.S.C. § 30101—the organization must disclose the date and amount of that expenditure, as well as the identities of those who contributed and earmarked more than $200 for the communication. Similar reporting requirements apply when an entity spends more than $10,000 on "electioneering communications," a broader category including "broadcast, cable, or satellite" communications that "occur less than 60 days before a general [election or] 30 days before a primary," are "targeted to the relevant electorate," and which "refer[,]" without expressly advocating for or against, "a clearly identified [federal] candidate." Id. § 30104(f)(1)–(3). For expenditures on electioneering communications meeting the $10,000 threshold, the entity must disclose the identities of those who contributed and earmarked an aggregate of $1,000 or more for that expenditure. 52 U.S.C. § 30104(f)(2)(F).

More extensive disclosure rules govern "political committees." 52 U.S.C. § 30101. Political committees must, for example, appoint a treasurer, keep records with the names and addresses of contributors, and file with the FEC regular reports during a general election year with certain accounting information, including amounts spent on contributions and expenditures. Id. §§ 30102–04. An entity must register as a political committee when it satisfies two separate conditions. The first is straightforwardly spelled out in FECA: The entity in question must contribute or expend more than $1,000 in a calendar year for the purpose of influencing a federal election. Id. § 30101(4)(A). The second condition, imposed pursuant to a Supreme Court-authored narrowing construction, is at issue here and has previously been the subject of much dispute: If not controlled directly by a political candidate, the entity's "major purpose" must be

"the nomination or election of a candidate." Buckley, 424 U.S. at 79; see also MCFL, 479 U.S. at 262.

Rather than adopt a rule specifically defining the contours of this "major purpose" limitation, the FEC has pursued an adjudicative, case-by-case approach, an implementation choice which has been litigated, scrutinized, and ultimately validated by a fellow court in this District. Shays v. FEC, 424 F. Supp. 2d 100 (D.D.C. 2006). In response to a remand for further explanation regarding why adjudication and not rulemaking was the proper enforcement method, see id. at 108, the Commission explained in a notice published in the Federal Register that "determining political committee status . . . requires" a fact-intensive analysis of an organization's "overall conduct," meaning "whether its major purpose is Federal campaign activity (i.e., the nomination or election of a Federal candidate)." Political Committee Status, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007) (Supplemental Explanation and Justification ("SE & J")). The court accepted that explanation, deferring to the FEC's judgment that evaluating an organization's major purpose required "a very close examination of various activities and statements." Shays v. FEC, 511 F. Supp. 2d 19, 30 (D.D.C. 2007).

B. Factual and Procedural History

AJS, one of two organizations alleged by CREW to be an unregistered political committee, was founded as a tax-exempt section 501(c)(6) organization, or "[b]usiness league," in 1997. A.R. 48–50; 26 U.S.C. § 501(c)(6). Since then, as AJS explained in its response to CREW's administrative complaint, the organization's consistent "message has been a simple one: free markets and pro-paycheck public policy are fundamental to building a strong economy and creating more and better paying jobs." A.R. 50, 98 (citing AJS's website). To spread that message, AJS spent millions on "television, radio, newspaper[,] and direct mail advertising[,]

amongst other forms" of communication. A.R. 19 (2009 Form 990 Tax Return). During its early years, AJS's efforts were not closely tied to elections: For instance, between 2004 and 2006, AJS ran a series of advertisements, none published or broadcast in the 30- or 60-day lead-up to primaries or elections, promoting the repeal of the estate tax, and others advocating against an asbestos trust fund. A.R. 50–52. However, over time, AJS shifted to a more election-focused approach: In 2008, the organization started funding "electioneering communications," and in 2010, it started funding "independent expenditures," i.e., express advocacy for or against certain candidates. A.R. 52, 1393. Indeed, in 2010, out of roughly $12.4 million in overall expenditures,[1] AJS spent approximately $4.9 million on express advocacy advertising and an additional $4.5 million on electioneering communications, meaning that over three-fourths of its spending was in some way tied to elections. A.R. 1393–94.

AAN, the other organization challenged by CREW, is a tax-exempt section 501(c)(4) "[c]ivic" organization, founded in 2009. A.R. 1490–91, 1562; 26 U.S.C. § 501(c)(4). The organization's stated mission is to "create[], encourage[,] and promote center-right policies based on the principles of freedom, limited government, American exceptionalism, and strong national security." A.R. 1490. To advance that mission, AAN has sponsored "educational activities" and "grassroots policy events," A.R. 1563, but the majority of its spending throughout the period in question—mid-2009 through mid-2011—was on election-related advertising. Over those two years, AAN spent roughly $27.1 million in total; of that, a little more than $4 million was devoted to independent expenditures (i.e., express advocacy for or against political candidates),

[1] Lacking data on AJS's overall receipts and expenditures for the 2010 calendar year, the FEC used AJS's fiscal-year information—i.e., covering a period from November 1, 2009 to October 31, 2010—as a proxy. See A.R. 1463 n.151; A.R. 18.

and an additional $13.7 million was devoted to electioneering communications. A.R. 1638. In other words, well over half of its spending during the period was election-related.

Neither AJS nor AAN registered with the FEC as a "political committee." CREW filed a complaint with the FEC against AJS in March 2012 alleging that due to AJS's extensive campaign-related spending, primarily leading up to the 2010 federal election, the organization was an unregistered political committee in violation of FECA. A.R. 1–39. In June 2012, CREW filed a complaint with the FEC against AAN, similarly alleging that its predominantly campaign-related spending between 2009 and 2011 made it an unregistered political committee. A.R. 1480–1552. The FEC's Office of General Counsel separately reviewed the complaints, as well as answers from AJS and AAN, and recommended concluding that there was "reason to believe" both organizations were political committees, having as their "major purpose federal campaign activity," and therefore in violation of FECA. A.R. 1411, 1659. Nevertheless, in June 2014, the Commissioners deadlocked 3-to-3 with respect to both AJS and AAN on whether to commence an investigation, dismissing CREW's complaints accordingly. A.R. 1434–35, 1686–87.

The controlling group of Commissioners issued separate but similar statements, for both AJS and AAN, explaining their conclusions that there was no "reason to believe" either organization was an unregistered political committee. A.R. 1438–69 (Controlling Commissioners' Statement of Reasons Regarding Dismissal of Complaint Against AJS) ("AJS SOR"); A.R. 1690–1723 (Controlling Commissioners' Statement of Reasons Regarding Dismissal of Complaint Against AAN) ("AAN SOR"). First, the Commissioners found—and no party here contests—that both organizations "crossed the statutory threshold for political-committee status by making over $1,000 in independent expenditures" in at least one calendar year. A.R. 1454, 1706. However, after considering each organization's statements of purpose

and evaluating each entity's "spending on campaign activities [as compared to] its spending on activities unrelated to the election or defeat of a federal candidate," the Commissioners concluded that neither organization's "major purpose" was the "nomination or election of a federal candidate." A.R. 1455, 1706.

To reach those conclusions, the Commissioners made two key analytical decisions. First, they excluded from their "major purpose" inquiry *all* of AJS's and AAN's spending on electioneering communications, considering *all* of those communications to be "genuine issue advertisements" unrelated to the election of candidates. A.R. 1457–58, 1709–10.[2] As a result, only spending on express advocacy was considered indicative of the relevant "major purpose." Id. Second, the Commissioners considered spending only over the "lifetime" of the organization in question, which for AJS implicated a span of fifteen years. A.R. 1457–58, 1708–09. Together, these choices left the Commissioners, when calculating the overall proportion of spending reflecting the groups' relevant "major purpose," with a relatively small numerator and a relatively large denominator. Thus, the Commissioners calculated that "during the course of its history dating back to 1997, AJS spent over $50 million [to support its mission generally] but

[2] AAN contends that the controlling Commissioners "did not . . . draw the line at independent expenditures [i.e., express advocacy] in this case [but] instead left open the possibility that electioneering communications that are the 'functional equivalent' of express advocacy may be relevant to an organization's 'major purpose.'" AAN's Mem. Supp. Mot. Summ. J. ("AAN's MSJ") 19. That may be true as a technical matter, but as discussed below, the Commissioners never defined—properly or otherwise—the "functional equivalent" category. See infra note 10. Moreover, the whole of the Commissioners' analysis regarding whether nine separate electioneering communications sponsored by AJS and twenty such communications sponsored by AAN were "genuine issue ads" amounted to a few summary sentences, or about one paragraph for each organization. See A.R. 1457 (AJS SOR), 1709 (AAN SOR). Perhaps this is why the FEC itself acknowledges that "Commissioners determined that the relevant universe of spending for determining the groups' federal campaign spending was their independent expenditures [i.e., on express advocacy]." FEC's Mem. Supp. Mot. Summ. J. ("FEC's MSJ") 36.

only $4.9 million—or a mere 9.8 percent—of that spending was on express advocacy." A.R. 1458. Similarly, the Commissioners concluded that the "roughly $4.1 million that AAN spent on independent expenditures [i.e., express advocacy] between [its founding in] 2009 and 2011 was the totality of its spending . . . for the purpose of nominating or influencing the election of a federal candidate and represented [only] approximately 15% of its total expenses during the same period." A.R. 1709.

Following the FEC's dismissal of the above complaints, CREW filed a four-count complaint in this Court alleging violations of FECA and the APA, and seeking a declaration that the FEC's dismissal decisions were contrary to law because they applied an incorrect interpretation of the "major purpose" test. Compl. at 28–33. Mainly, CREW challenged the Commissioners' decision to exclude on First Amendment grounds an organization's expenditures that were not express advocacy from the category of spending indicating a campaign-related "major purpose." CREW also challenged the Commissioners' consideration of relative spending over the course of an organization's lifetime—as opposed to within the most recent calendar year—as well as the Commissioners' purported application of a 50%-plus spending threshold for relevant expenditures.

This Court subsequently granted the FEC's Motion to Dismiss all APA-related counts, and granted AAN's Motion to Intervene as an additional Defendant. CREW has now moved and Defendants have cross-moved for summary judgment on the remaining, FECA-related counts.[3]

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[3] AAN—and not the FEC—argues that CREW lacks Article III standing before this Court. The argument is that the five-year statute of limitations has run on CREW's administrative complaints, and that therefore CREW cannot "demonstrate a significant likelihood that a decision of [this] Court would redress its alleged injury," Spectrum Five LLC v. FCC, 758 F.3d 254, 256 (D.C. Cir. 2014), since the FEC has a practice of not pursuing stale enforcement actions even to obtain equitable relief such as political committee registration. AAN's MSJ 38–43. But, as CREW points out, the AAN cites no "authoritative policy or rule of

Oppositions and replies have been filed, and a hearing was held on the motions.[4]

II. Legal Standards

The Court will grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Under these circumstances, where summary judgment is sought regarding certain of the FEC's dismissal decisions, this Court will grant summary judgment to the challenger only if the agency's decisions are "contrary to law," 52 U.S.C. § 30109(a)(8)(C), meaning either that "the FEC dismissed the complaint as a result of an impermissible interpretation of [FECA]," or that "the FEC's dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion." Orloski v. FEC, 795 F.2d 156, 161 (D.C. Cir. 1986).

This same standard of review applies to all FEC decisions, whether they be unanimous or determined by tie vote. In re Sealed Case, 223 F.3d 775, 779 (D.C. Cir. 2000) ("We have . . . held that we owe deference to a legal interpretation [issued by the FEC] supporting a negative probable cause determination that prevails on a 3–3 deadlock."); NRSC, 966 F.2d at 1476 ("[I]f the meaning of [FECA] is not clear, a reviewing court should accord deference to the Commission's rationale . . . [even in] situations in which the Commission deadlocks and

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the FEC that would bar equitable enforcement" of its claim. Pls.' Reply Mot. Summ. J. ("Pls.' Reply") 48 n.25. Nor has the FEC admitted to such a practice or addressed this issue in its briefing or at the motions hearing. This is fatal to AAN's standing argument. Finally, the mere fact that the FEC has discretion to dismiss CREW's complaint for another reason does not vitiate the redressability of CREW's claim. See FEC v. Akins, 524 U.S. 11, 25 (1998) ("Akins II") ("If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case—even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason.").

[4] CREW made clear at the hearing on the parties' motions that its challenges are limited to the FEC's articulation of the "major purpose" *standard*, as opposed to the agency's *application* of that standard. The Court will limit the scope of its review accordingly.

dismisses." (citing Democratic Cong. Campaign Comm. v. FEC, 831 F.2d 1131, 1135 n.5 (D.C. Cir. 1987) and Common Cause v. FEC, 842 F.2d 436, 439 (D.C. Cir. 1988))). This follows because the Commissioners voting for dismissal "constitute a controlling group for purposes of the decision," and so "their rationale necessarily states the agency's reasons for acting as it did." NRSC, 966 F.2d at 1476.[5]

Usually, when a court's review turns on an interpretation of FECA's terms, the "contrary to law" standard involves a straightforward application of the familiar two-step framework outlined in Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842–43. See Orloski, 795 F.2d at 161–62 (D.C. Cir. 1986) (applying Chevron analysis to evaluate the FEC's interpretation of the terms "contribution" and "expenditure" as defined by FECA).

But this is not a usual case. CREW's primary challenge regards the FEC's understanding of the constitutional dimensions of a Supreme Court-authored test which was itself developed to

[5] CREW contends that none of the above precedent is good law after United States v. Mead Corp., 533 U.S. 218 (2001), which held it improper to afford a tariff classification Chevron deference because there was "no indication that Congress intended such a ruling to carry the force of law." Id. at 221. The controlling Commissioners' statement of reasons is akin to a tariff ruling, CREW reasons, since their decision "is not binding legal precedent or authority in future cases and is not law." Pls.' Reply 8–9. That might be so, but the prospective, binding nature of an agency's interpretation is not the sole consideration regarding the applicability of Chevron. As the Mead Court noted, the type of delegated authority warranting Chevron deference "may be shown in a variety of ways, as by an agency's power to engage in adjudication . . . or by some other indication of comparable congressional intent." Mead, 533 U.S. at 227. The court in Sealed Case engaged in a thorough consideration of just such "indication[s]," observing that an FEC enforcement decision, even one produced by deadlock, is "part of a detailed statutory framework for civil enforcement . . . analogous to a formal adjudication," that it "assumes a form expressly provided for by Congress," and that ultimately it can result in the imposition of criminal penalties. 223 F.3d at 780 (internal citations omitted). All of those considerations led the court to conclude that an FEC enforcement decision "falls on the Chevron side of the line." Id. In sum, seeing nothing in Mead that directly contradicts Sealed Case, the Court will abide its "obligat[ion] to follow controlling circuit precedent." United States v. Torres, 115 F.3d 1033, 1036 (D.C. Cir. 1997).

avoid potential constitutional infirmities. In other words, the challenge turns directly and almost exclusively on judicial precedent—Buckley itself, but even more so a long line of First Amendment-related cases in Buckley's shadow. Under such circumstances, Chevron can have no sound place in evaluating whether an FEC interpretation is "contrary to law." This is why a near-unanimous D.C. Circuit, sitting *en banc*, rejected the FEC's "plea for deference" on the question of whether the Supreme Court had imposed the major purpose test in the first place, concluding that the deference argument was "doctrinally misconceived." Akins v. FEC, 101 F.3d 731, 740 (D.C. Cir. 1996), vacated on other grounds, 524 U.S. 11 (1998).[6] The court elaborated that it was

> not obliged to defer to an agency's interpretation of Supreme Court precedent under Chevron or any other principle. The Commission's assertion that Congress and the Court are equivalent in this respect is inconsistent with Chevron's basic premise. Chevron recognized that Congress delegates policymaking functions to agencies, so deference by the courts to agencies' statutory interpretations of ambiguous language is appropriate. But the Supreme Court does not, of course, have a similar relationship to agencies, and agencies have no special qualifications of legitimacy in interpreting Court opinions. There is therefore no reason for courts—the supposed experts in analyzing judicial decisions—to defer to agency interpretations of the Court's opinions. This is especially true where, as here, the Supreme Court precedent is based on constitutional concerns, which is an area of presumed judicial competence.

[6] Defendants highlight that Akins was vacated and therefore has no binding effect. See FEC's Reply Mot. Summ. J. ("FEC's Reply") 7; AAN's Reply 6. True, but its reasoning has been adopted by subsequent D.C. Circuit panels, see, e.g., Univ. of Great Falls v. N.L.R.B., 278 F.3d 1335, 1341 (D.C. Cir. 2002); N.Y. N.Y., LLC v. N.L.R.B., 313 F.3d 585, 590 (D.C. Cir. 2002), and as an expression of the views of nine judges in this circuit, it is as persuasive as non-precedential authority can be. AAN further argues that Akins "reached only the question of '*whether* the Court established a major purpose test,' and not '*how* such a test is to be implemented.'" AAN's Reply 7 (citing Akins, 101 F.3d at 740–41). That is far from clear, especially given that the language AAN quotes comes from a portion of the Akins opinion that is merely describing an argument put forth by the FEC (and an argument that is not directly returned to). In any event, as described below, the Court does not read Akins broadly to prescribe de novo review for all FEC actions implicating the major purpose test.

Id. In case after case, courts have affirmed this fairly intuitive principle, that courts need not, and should not, defer to agency interpretations of opinions written by courts. See, e.g., Nat'l Ass'n of Mfrs. v. N.L.R.B., 717 F.3d 947, 959 n.17 (D.C. Cir. 2013) ("[W]e owe no deference to an agency's interpretation of judicial precedent."), overruled on other grounds, Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014); Univ. of Great Falls v. N.L.R.B., 278 F.3d 1335, 1340–41 (D.C. Cir. 2002) (declining to apply deference where "interpretation of precedent, rather than a statute" was at issue, especially where that precedent was "based on constitutional concerns, an area of presumed judicial . . . competence"); N.Y. N.Y., LLC v. N.L.R.B., 313 F.3d 585, 590 (D.C. Cir. 2002) (concluding that, as the agency's "decisions . . . purport to rest on [its] interpretation of Supreme Court opinions," those "judgment[s] [are] not entitled to judicial deference."); Piersall v. Winter, 507 F. Supp. 2d 23, 38 (D.D.C. 2007) ("The Court will not defer to [an] agency, however, where the task at hand is judicial interpretation of judicial decisions[.]"); Mudd v. Caldera, 134 F. Supp. 2d 138, 144 (D.D.C. 2001) ("[T]here is no law that supports the . . . position that an Article III judge must defer to an agency or department of the Executive Branch or the head of such an agency or department . . . on interpretations of decisions of the United States Supreme Court; for that is quintessentially a judicial function."). Accordingly, the Court will not afford deference to the FEC's interpretation of judicial precedent defining the protections of the First Amendment and the related contours of Buckley's major purpose test.

Certain of CREW's arguments in this case, however, do not primarily challenge the FEC's interpretation of Supreme Court doctrine, constitutional or otherwise. Rather, CREW's attacks on the FEC's choice of relevant timespan for assessing an organization's spending activity, and on the agency's purported 50%-plus spending threshold for finding major purpose

based on expenditures, are less about *what* Buckley (and subsequent precedent) means and more about *how* Buckley (and the test it created) should be implemented. Such implementation choices, which call on the FEC's special regulatory expertise, were the types of judgments that Congress committed to the sound discretion of the agency. The Supreme Court has described the FEC as "precisely the type of agency to which deference should presumptively be afforded," FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 37 (1981), since it is vested with "primary and substantial responsibility for administering and enforcing [FECA]," including the "sole discretionary power" to initiate enforcement actions, Buckley, 424 U.S. at 109, 112 n.153. The statute that the FEC was charged to implement has since been "construe[d]" by the Supreme Court to incorporate the "major purpose" limitation on political committee status. See Buckley, 424 U.S. at 79, 109; Ctr. For Individual Freedom v. Madigan, 697 F.3d 464, 487 (7th Cir. 2012) ("[T]he 'major purpose' limitation . . . was a creature of statutory interpretation."). But the Supreme Court's revised construction of the statute did not convert every judicial challenge to an FEC action linked in any way to the major purpose test into an issue for the courts' de novo review. If it had, this Court would not have deferred to the FEC when the agency decided to adjudicate political committee status—and the major purpose test—rather than promulgate a rule defining it. But the Court did defer, and rightly so, reasoning that this implementation choice was "exactly the type of question generally left to the expertise of an agency." Shays, 511 F. Supp. 2d at 31 (citing American Gas Ass'n v. FERC, 912 F.2d 1496, 1519 (D.C. Cir. 1990)).

Of course, those implementation decisions are still reviewable under the "contrary to law" standard, 52 U.S.C. § 30109(a)(8)(C), for a determination of whether "the FEC's dismissal of the complaint . . . was arbitrary or capricious, or an abuse of discretion." Orloski, 795 F.2d at

161.[7] In other words, the FEC's decisions are reversible if the Court determines that the agency "entirely failed to consider an important aspect of the [relevant] problem" or has "offered an explanation for its decision that runs counter to the evidence before [it]." Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 658 (2007) (quoting Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983)). At the very least, "[t]he agency must articulate a 'rational connection between the facts found and the choice made.'" Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285–86 (1974) (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)). While a court ought to "uphold a decision of less than ideal clarity if [an] agency's path may reasonably be discerned," Defs. of Wildlife, 551 U.S. at 658 (quoting Bowman, 419 U.S. at 286), the court should also insist on a "reasonable explanation of the specific analysis and evidence upon which the [a]gency relied," Bluewater Network v. E.P.A., 370 F.3d 1, 21 (D.C. Cir. 2004).

In short, unlike the FEC's views on the Supreme Court's First Amendment jurisprudence, the FEC's choices regarding the timeframe and spending amounts relevant in applying the "major purpose" test are implementation choices within the agency's sphere of competence, and therefore warrant the Court's deference.

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[7] The FEC asserts that "the challenged dismissal decisions are independently justified by the Commission's broad prosecutorial discretion." FEC's MSJ 49–50. But "an agency's decision not to take enforcement action . . . is only presumptively unreviewable," and that "presumption may be rebutted [by the relevant] substantive statute." Heckler v. Chaney, 470 U.S. 821, 832 (1985). Here, FECA's express provision for the judicial review of the FEC's dismissal decisions, as well as a particular standard governing that review, 52 U.S.C. § 30109(a)(8)(C), is just such a rebuttal. The Court will therefore apply the contrary-to-law standard, as Congress has instructed it to.

III. Analysis

CREW advances three main objections to the Commissioners' rationale for dismissal. Primarily, it faults the Commissioners for applying an exceedingly narrow definition of "political committee," such that only expenditures on express advocacy—and no expenditures on electioneering communications—were deemed relevant to the "major purpose" inquiry. Pls.' Mem. Supp. Mot. Summ. J. ("Pls.' MSJ") 17. Second, CREW argues that the Commissioners "impermissibly interpreted the 'major purpose' test to require an evaluation of a group's activities over its entire existence," as opposed to applying a calendar-year approach. Id. Finally, CREW asserts that the Commissioners erroneously required a group's campaign-related spending to constitute at least 50% of total spending before concluding that such spending indicated the entity's "major purpose." Id. The Court will consider each challenge in turn.

A. Spending Relevant to the "Major Purpose" Analysis

CREW principally argues that the controlling Commissioners improperly "interpreted the 'major purpose' test to capture only those groups who spend a majority of their budget on express advocacy, to the exclusion of all other campaign activity, including electioneering communications." Pls.' MSJ 25. The FEC concedes that the "Commissioners determined that the relevant universe of spending for determining the groups' federal campaign spending was their independent expenditures [i.e., on express advocacy]," but the agency insists that this decision was consistent with judicial precedent and therefore "reasonable and not contrary to law." FEC's Mem. Supp. Mot. Summ. J. ("FEC's MSJ") 36.

The Commissioners grounded their decision to separate express advocacy ads from issue ads, and to count only spending on the first category as indicating a "major purpose" to "nominat[e] or elect[] . . . a candidate," Buckley, 424 U.S. at 79, in FEC v. Wisconsin Right To

Life, Inc. (WRTL II), 551 U.S. 449 (2007). A.R. 1450–51 (AJS SOR); A.R. 1702 (AAN SOR). That case considered an as-applied challenge to the constitutionality of Section 203 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), 52 U.S.C. § 30118, which criminalized the broadcasting of electioneering communications by corporations. Id. at 455–56. The Court explained that "the interests held to justify the regulation of campaign speech and its 'functional equivalent' 'might not apply' to the regulation of issue advocacy," and it went on to invalidate the ban on corporate electioneering communications as it applied to advertisements that were *not* the "functional equivalent" of express advocacy. Id. 457, 481 (quoting McConnell v. FEC, 540 U.S. 93, 206 & n.88). The Court further clarified that an electioneering communication could be the functional equivalent of express advocacy—and therefore subject to more substantial regulation consistent with the First Amendment—if "the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." Id. at 469–70.

WRTL II, then, drew a bold line between express advocacy (and its functional equivalent), which it deemed more regulable, and issue advocacy, which it deemed less so. Crucially, though, the Court developed that distinction in the context of an outright *ban* on speech. Since then, the overwhelming weight of legal authority, beginning with the Supreme Court itself, has concluded that the WRTL II framework is not properly applied in the context of less restrictive *disclosure* requirements.

In Citizens United, the plaintiff argued that certain of BCRA's disclosure requirements should "be confined to speech that is the functional equivalent of express advocacy," seeking to "import [WRTL II's] distinction into BCRA's disclosure requirements." 558 U.S. at 368–69. The Court flatly "reject[ed] th[at] contention." Id. at 369. Collecting cases in support of the proposition that "disclosure is a less restrictive alternative to more comprehensive regulations of

speech," the Court went on to engage in a point-by-point refutation of the arguments Citizens United advanced in favor of a broader application of WRTL II's dichotomy. Id. In doing so, the Court framed the public's informational interest justifying disclosure in especially broad terms, emphasizing that "the public has an interest in knowing *who is speaking about a candidate* shortly before an election." Id. (emphasis added).

In the wake of Citizens United, federal appellate courts have resoundingly concluded that WRTL II's constitutional division between express advocacy and issue speech is simply inapposite in the disclosure context. See, e.g., Indep. Inst. v. Williams, 812 F.3d 787, 795 (10th Cir. 2016) ("It follows from Citizens United that disclosure requirements can . . . reach beyond express advocacy to at least some forms of issue speech."); Del. Strong Families v. Att'y Gen. of Del., 793 F.3d 304, 308 (3d Cir. 2015), cert. denied sub nom., Del. Strong Families v. Denn, 136 S. Ct. 2376 (2016) ("Any possibility that the Constitution limits the reach of disclosure to express advocacy or its functional equivalent is surely repudiated by Citizens United v. FEC."); Vt. Right to Life Comm., Inc. v. Sorrell (VRTL), 758 F.3d 118, 132 (2d Cir. 2014), cert. denied, 135 S. Ct. 949 (2015) ("In Citizens United, the Supreme Court expressly rejected [limiting] disclosure requirements . . . to speech that is the functional equivalent of express advocacy," thereby "remov[ing] any lingering uncertainty concerning the reach of constitutional limitations in [the disclosure] context." (internal citations omitted)); Ctr. for Individual Freedom v. Madigan, 697 F.3d 464, 484 (7th Cir. 2012) ("Whatever the status of the express advocacy/issue discussion distinction may be in *other* areas of campaign finance law, Citizens United left no doubt that disclosure requirements need not hew to it to survive First Amendment scrutiny." (emphasis added)); Nat'l Org. for Marriage v. McKee, 649 F.3d 34, 54–55 (1st Cir. 2011) ("[T]he issue/express advocacy dichotomy has only arisen in a narrow set of circumstances not

present here. . . . We find it reasonably clear, in light of Citizens United, that [this] distinction . . . has no place in First Amendment review of these sorts of disclosure-oriented laws."); Human Life of Wash., Inc. v. Brumsickle, 624 F.3d 990, 1016 (9th Cir. 2010) ("[In Citizens United,] the Court explained that the distinction between express and issue advocacy . . . did not translate into the disclosure context. Given the Court's . . . holding that the government may impose disclosure requirements on speech, the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable."); cf. Iowa Right To Life Comm., Inc. v. Tooker, 717 F.3d 576, 591 (8th Cir. 2013) (suggesting and declining to resolve a "split" among pre- *and* post-Citizens United appellate decisions regarding "whether state campaign-finance disclosure laws can impose PAC status or burdens on groups lacking Buckley's major purpose").

Faced with this weight of contrary legal authority, the controlling Commissioners grounded their decision to apply WRTL II's framework on an outlier: a single case that examined Citizens United's treatment of BCRA's disclosure requirements and nevertheless concluded that WRTL II's framework retains some proper applicability in the disclosure context.[8] A.R. 1448 (AJS SOR); A.R. 1700 (AAN SOR); FEC's MSJ 37; AAN's AAN's Mem.

[8] Defendants, and the controlling Commissioners in their statement of reasons, also cite New Mexico Youth Organized v. Herrera, 611 F.3d 669 (10th Cir. 2010), in support of the decision to apply the express advocacy limitation in the political committee context. A.R. 1448–49 (AJS SOR); A.R. 1700 (AAN SOR); FEC's MSJ 38. Although Herrera was decided after Citizens United, the briefing the case relied on was completed before that decision. Accordingly, Herrera's only reference to the Supreme Court's opinion is the statement, included in a footnote, that "[a]lthough [Citizens United] left many issues unresolved, we believe [the opinion did not change the] requirement . . . that for a regulation of campaign related speech to be constitutional [that speech] must be unambiguously campaign related." Id. at 676 n.4. Given Herrera's cursory treatment of the decision, it is best considered a pre- rather than a post-Citizens United case. All other cases cited by the controlling Commissioners for their exclusion of non-express advocacy from the major purpose analysis predate Citizens United. See A.R. 1448–49 (AJS SOR) (citing N. Carolina Right to Life, Inc. v. Leake, 525 F.3d 274 (4th Cir. 2008); Col. Right To Life Comm., Inc. v. Coffman, 498 F.3d 1137 (10th Cir. 2007); FEC v. Malenick, 310 F.

Supp. Mot. Summ. J. ("AAN's MSJ") 28. That case, Wisconsin Right To Life, Inc. v. Barland, 751 F.3d 804 (7th Cir. 2014), sought to limit Citizens United's rejection of the express advocacy limitation "to the specifics of the disclosure requirement [there] at issue." Id. at 836. The Barland court surmised that Citizens United was only "addressing the onetime, event-driven disclosure rule for federal electioneering communications, [and not] the comprehensive, continuous reporting regime imposed on federal PACs." Id. This cramped interpretation placed Barland in conflict with the vast majority of appellate courts, including a prior panel in its own circuit, see Madigan, 697 F.3d at 484 (rejecting the "express advocacy/issue discussion distinction" as applied to political committee-related "disclosure requirements"), and the opinion has since been roundly criticized, see VRTL, 758 F.3d at 132 (faulting Barland's attempt to "confine[] [Citizens United] to its 'specific and narrow context,'" as the Supreme Court provided "no indication that [its] ruling depended on the type of disclosure requirement it upheld").

Barland is out of step with the legal consensus not only because it read nonexistent qualifiers into a Supreme Court opinion, but also because it rested on a flawed premise: that the "event-driven disclosure rule[s] [considered in Citizens United] are *far less burdensome* than the comprehensive registration and reporting system imposed on political committees." 751 F.3d at 824 (emphasis added). Defendants, too, make much of the "burdensome" nature of "registration, reporting, and regulatory obligations that attach to political committee status under FECA." AAN's Reply Mot. Summ. J. ("AAN's Reply") 12; see also FEC's Reply Mot. Summ. J. ("FEC's Reply") 20; AAN's MSJ 28. But these characterizations are not on firm doctrinal footing. Courts, including the D.C. Circuit sitting *en banc*, have repeatedly classed periodic

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Supp. 2d 230 (D.D.C. 2004); FEC v. GOPAC, Inc., 917 F. Supp. 851 (D.D.C. 1996)); A.R. 1700–01 (AAN SOR) (same).

reporting and registration requirements with other disclosure regimes, applying to them the very same, less-stringent level of constitutional scrutiny. SpeechNow.org v. FEC, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc) (categorizing the FEC's "organizational and reporting requirements" as "disclosure requirements," which "inhibit speech less than do contribution and expenditure limits"). In particular, to justify disclosure requirements, including those attending political committee status, "the government may point to any 'sufficiently important' governmental interest that bears a 'substantial relation' to the disclosure requirement." Id. (quoting Citizens United, 130 S. Ct. at 914)); see also, e.g., VRTL, 758 F.3d at 137 (applying lower level of scrutiny to registration and reporting requirements attending political committee status); Catholic Leadership Coal. of Texas v. Reisman, 764 F.3d 409, 424–25 (5th Cir. 2014) (same); Worley v. Florida Sec'y of State, 717 F.3d 1238, 1243–44 (11th Cir. 2013) (same); Human Life, 624 F.3d at 1012–14 (2010) (same).

Applying this standard of review, the D.C. Circuit described the additional burdens of "designating a treasurer and retaining records" as not "impos[ing] much of an additional burden on" political committees, particularly where—as is the case here—those entities "intend[] to comply with the [event-driven] disclosure requirements that . . . apply even [in the absence of] political committee" status. SpeechNow, 599 F.3d at 696–97. The court balanced these relatively modest burdens of registration and reporting against the broad public interest in knowing "who is speaking about a candidate and who is funding that speech," which "deters and helps expose violations of other campaign finance restrictions." 599 F.3d at 698. As might be

expected, the court concluded that "[t]hese are sufficiently important governmental interests to justify requiring [a political committee] to organize and report to the FEC." Id.

Other courts have applied the same analysis, and arrived at the same result. "[T]he majority of circuits have concluded that . . . disclosure requirements [related to registration and reporting] are not unduly burdensome." Yamada v. Snipes, 786 F.3d 1182, 1195 (9th Cir.), cert. denied sub nom., Yamada v. Shoda, 136 S. Ct. 569 (2015); see also, e.g., VRTL, 758 F.3d at 137–38 (upholding against constitutional attack political committee "registration, recordkeeping . . . and reporting requirements," and rejecting the argument that such "burdens that are 'onerous' as a matter of law"); Worley, 717 F.3d at 1250 (concluding that the state's "PAC regulations do not generally impose an undue burden"); McKee, 649 F.3d at 56 (noting that the state's PAC burdens "do not prohibit, limit, or impose any onerous burdens on speech").[9] Considering the weight of the above precedent, the Court has little trouble concluding that the Commissioners' decision to apply WRTL II's express advocacy/issue speech distinction in the realm of disclosure, thereby excluding *all* non-express advocacy speech from consideration, was "contrary to law." 52 U.S.C. § 30109(a)(8)(C).[10]

The Court will not go further, however, as urged by CREW, and declare contrary to law *any* approach taken by the FEC that does not assess political committee status by considering *all*

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[9] Defendants seek additional support in language from Citizens United describing the burdens associated with political committees. 558 U.S. at 339. See, e.g., A.R. 1443 (AJS SOR); A.R. 1694–95 (AAN SOR); FEC's MSJ 32; AAN's Reply 12. But that discussion "consider[ed] a regime that required corporations to set up a *separate* legal entity and create a segregated fund *prior to engaging in any direct political speech*." McKee, 649 F.3d at 56 (emphasis added). No such requirements are implicated here. In any event, the Court does not presume to say that the burdens on a political committee are negligible, only that "sufficiently important governmental interests" may "justify" a political committee definition broader than the one applied by the controlling Commissioners. SpeechNow, 599 F.3d at 698.

[10] Furthermore, although this was not an issue briefed by the parties, the Court notes that the FEC's decision was "contrary to law" for an additional, independent reason. Having chosen

electioneering communications as indicative of a "purpose" to "nominat[e] or elect[] . . . a candidate." Buckley, 424 U.S. at 79. See Pls.' MSJ 26. CREW's citations to legislative history, past FEC precedent, and court precedent certainly support the conclusion that *many* or even *most* electioneering communications indicate a campaign-related purpose. Id. at 26–30. Indeed, it blinks reality to conclude that many of the ads considered by the Commissioners in this case were not designed to influence the election or defeat of a particular candidate in an ongoing race. However, particularly given the FEC's judicially approved case-by-case approach to adjudicating political committee status, see SE & J, 72 Fed. Reg. at 5597; Shays, 511 F. Supp. 2d at 3, the Court will refrain from replacing the Commissioners' bright-line rule with one of its own.

Instead, the Court will limit itself to identifying the legal error in the Commissioners' statements—that is, the erroneous understanding that the First Amendment effectively required the agency to exclude from its consideration all non-express advocacy in the context of disclosure. Since the FEC "based its decision upon an improper legal ground," the Court "will

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to incorporate WRTL II as a framework for conducting their major purpose analysis, the Commissioners articulated a partial—and ultimately inaccurate—version of that standard. The Commissioners did not draw from WRTL II its key test for identifying functional equivalents of express advocacy, i.e., those ads that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 551 U.S. at 469–70. Indeed, that standard appears nowhere in the Commissioners' statements of reasons. Instead, the Commissioners drew from the case a long list of characteristics that were *in*sufficient to place an ad in the "functional equivalent" category. See A.R. 1450–51, 1702 (identifying, *inter alia*, "appeal[s] to contact a candidate" or "promot[ing] or criticiz[ing]" a candidate as inadequate to "render a communication electoral advocacy"). Similarly, the Commissioners indicated that only "genuine" issue speech should be excluded from the "major purpose" analysis, but never did they explain how an electioneering communication could ever fail to be a "genuine" issue ad. That concept, too, was defined in the negative. See A.R. 1454, 1705 ("Genuine issue speech does not lose its character merely by mentioning—or even promoting or criticizing—a federal candidate."). In short, not only did the Commissioners improperly import a standard, they also stated an incomplete version of that standard.

set aside the agency's action and remand the case" for its reconsideration in light of the correction. FEC v. Akins, 524 U.S. 11, 25 (1998) ("Akins II").

B. Relevant Time Period for Measuring Expenditures

CREW also contends that the controlling Commissioners erred by evaluating the challenged groups' spending over their entire existence, as opposed to confining their analysis to spending within the most recent calendar year. Pls.' MSJ 37–40. There is no doubt that the controlling Commissioners focused almost exclusively on lifetime, and not calendar-year, spending. See, e.g., A.R. 1438 (AJS SOR) ("[W]e believe AJS—an organization that has spent less than ten percent of its funds on express advocacy *during its entire existence*—is an issue-advocacy organization that cannot be regulated as a political committee[.]" (emphasis added)); A.R. 1439 (AJS SOR) ("The overwhelming majority of [AJS's] spending *since inception* has related to pure issue advocacy[.]" (emphasis added)); A.R. 1456–57 (AJS SOR) ("[T]he Commission assesses an organization's major purpose by *reference to its entire history*." (emphasis added)); A.R. 1709 (AAN SOR) (evaluating AAN's spending "between 2009 and 2011," i.e., since the organization's founding). Indeed, the Commissioners expressly rejected the calendar-year approach, advanced by the FEC's Office of General Counsel, as "myopic, distortive, and legally erroneous." A.R. 1461 (AJS SOR); A.R. 1713 (AAN SOR).

The FEC argues that the "Commissioners' decision to use the entire record before it was neither unreasonable nor contrary to law," since "[n]either FECA nor any judicial decision specifies a particular time period for determining a group's major purpose." FEC's MSJ 41–45. The Court agrees, as a general matter. Given 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.

However, the Commissioners have gone further than merely eschewing the calendar-year approach as a "rigid, one-size-fits-all rule" at odds with the FEC's chosen case-by-case method. A.R. 1462. Rather, they have replaced that rule with a different—but equally inflexible—metric. Looking *only* at relative spending over an organization's lifetime runs the risk of ignoring the not unlikely possibility, contemplated by the Supreme Court, that an organization's major purpose can *change*. See MCFL, 479 U.S. at 262 (recognizing that a group's "spending [may] *become* so extensive that the organization's major purpose may be regarded as campaign activity [such that] the corporation would be classified as a political committee." (emphasis added)). That is precisely the trajectory that AJS appears to have followed. It spent no money on election-related spending until 2008, but then shifted its expenditures towards electioneering communications and express advocacy over the following several years.

The Commissioners' refusal to give any weight whatsoever to an organizations' relative spending in the most recent calendar year—particularly in the case of a fifteen-year-old organization like AJS—indicates an arbitrary "fail[ure] to consider an important aspect of the [relevant] problem." Defs. of Wildlife, 551 U.S. at 658. The seriousness of that failure would only increase with the lifespan of the challenged organization: A half-century-old organization with a substantial spending history could commence spending handsomely on election-related ads and continue such expenditures for decades before its new "major purpose" would be detected by the controlling Commissioners' lifetime-only approach. Surely, that cannot be what Congress contemplated in defining "political committee" in terms of calendar-year spending under FECA, see 52 U.S.C. § 30101(4) (defining political committee as an entity with more than

$1,000 in contributions or expenditures *in a calendar year*), nor can it be what the Supreme Court intended with its "major purpose" narrowing instruction, see MCFL, 479 U.S. at 262.

The Court therefore concludes that the Commissioners' lifetime-only rule—at least as applied to AJS—is "contrary to law," 52 U.S.C. § 30109(a)(8)(C), in that it tends to ignore crucial facts indicating whether an organization's major purpose has changed, and is inconsistent with the FEC's stated fact-intensive approach to the "major purpose" inquiry.

C. The 50%-of-Total-Spending Threshold

Finally, CREW contends that the controlling Commissioners erred in applying a "rigid 50% [spending] threshold" when evaluating an entity's major purpose. Pls.' MSJ 40–41. CREW points mainly to a footnote, where the Commissioners state that AJS would still fail the major purpose test following the calendar-year approach because even then "only $4.9 million (or approximately 40%)" of AJS's spending in 2010 was allocated to independent expenditures, and "[s]uch spending does not clearly signify a major purpose of engaging in express advocacy." A.R. 1463 n.151.

There are multiple flaws in CREW's argument, but most importantly, it is far from apparent that the Commissioners did apply any such 50%-plus spending threshold for defining major purpose. Neither the AJS nor the AAN statement specifically identifies a 50%-plus threshold. The Commissioners merely said, with respect to AJS, that 40% of spending "does not clearly signify a major purpose," A.R. 1463, and the proportion of AAN's spending on express advocacy was so low—roughly 15%—that any purported 50% threshold was irrelevant, A.R. 1709. In any event, CREW's argument also fails because "[r]eview under the arbitrary and

capricious standard is deferential." Defs. of Wildlife, 551 U.S. at 658. A reasonable application of a 50%-plus rule would not appear to be arbitrary and capricious.

IV. Remedy and Conclusion

In sum, notwithstanding the likely permissibility of a 50%-plus spending threshold (if such a threshold was even applied), the Court concludes that the controlling Commissioners relied on a faulty legal premise in applying the "major purpose" test. In particular, the Commissioners incorrectly determined that WRTL II's framework applied in the context of a less restrictive disclosure regime. Likewise, the Commissioners' decision to give *full* weight to the relative spending of the challenged organizations over their entire lifetimes, as a "fail[ure] to consider an important aspect of the [relevant] problem," Defs. of Wildlife, 551 U.S. at 658, was arbitrary and capricious.

The Commissioners' decisions to dismiss CREW's complaints against AJS and AAN were thus "contrary to law," and the Court accordingly "direct[s] the Commission to conform with [this] declaration within 30 days." 52 U.S.C. § 30109. See also Akins II, 524 U.S. at 25 ("If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case[.]"); Gonzales v. Thomas, 547 U.S. 183, 186 (2006) ("[After deeming an agency's action arbitrary and capricious,] the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." (quoting I.N.S. v. Orlando Ventura, 537 U.S. 12, 16 (2002)). If the FEC does not appeal this decision or act in accordance with the Court's declaration within 30 days, "the complainant may bring . . . a civil action to remedy the violation involved in the original complaint." 52 U.S.C. § 30109.

The Court will grant CREW's motion for summary judgment and deny the FEC's and AAN's cross-motions. An Order accompanies this Memorandum Opinion.

CHRISTOPHER R. COOPER
United States District Judge

Date: September 19, 2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, et al.,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant,

AMERICAN ACTION NETWORK, INC.,

Intervenor Defendant.

Case No. 1:14-cv-01419 (CRC)

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that [33] Plaintiffs' Motion for Summary Judgment shall be **GRANTED**. It is further

ORDERED that [36] Defendant Federal Election Commission's Cross-Motion for Summary Judgment and [38] Intervenor American Action Network's Cross-Motion for Summary Judgment shall be **DENIED**. It is further

ORDERED that Defendant Federal Election Commission conform with the Court's declaration within 30 days, in accordance with 52 U.S.C. § 30109.

SO ORDERED.

CHRISTOPHER R. COOPER
United States District Judge

Date: September 19, 2016

EXHIBIT 3

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 6589
American Action Network	)	

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

In this matter, we must determine if the American Action Network ("AAN" or "Respondent"), a social welfare organization exempt from taxation under section 501(c)(4) of the Internal Revenue Code, is a "political committee" under the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"). To ensure that the First Amendment-protected freedoms of speech and association are not infringed upon, courts have narrowly construed the Act's definition of "political committee." These court decisions, which stretch back nearly forty years, properly tailor the Act to afford non-profit issue advocacy groups substantial room to discuss the issues they deem salient and to protect them from burdensome political committee registration, reporting, and regulatory requirements. Such groups may expressly advocate the election or defeat of candidates without losing these protections, as long as the group's major purpose is not the nomination or election of federal candidates.[1]

In this matter, Respondent's major purpose was not the nomination or election of a federal candidate. Rather, its public statements, organizational documents, and overall spending history objectively indicate that the organization's major purpose has been issue advocacy and grassroots lobbying and organizing. Accordingly, we could not vote to find that AAN violated the Act by failing to register and report as a political committee.[2]

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[1] As the Supreme Court has explained, "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest." *Buckley v. Valeo*, 424 U.S. 1, 42 (1976).

[2] MUR 6589 (AAN), Certification (June 24, 2014).

I. PROCEDURAL BACKGROUND

A. THE COMPLAINT

The Complaint in this matter alleges that AAN violated the Federal Election Campaign Act of 1971, as amended ("the Act"), by failing to register and report as a political committee.[3] Specifically, the Complaint alleges that "AAN made expenditures aggregating in excess of $1,000 during 2010"[4] and that "[a]s demonstrated by its extensive spending on federal campaign activity, AAN's major purpose between July 23, 2009 and June 30, 2011 was the nomination or election of federal candidates."[5] The Complaint concludes that "[b]y failing to register as a political committee, AAN violated 2 U.S.C. § 433(a) and 11 C.F.R. § 102.1(d),"[6] and that "[b]y failing to file [periodic] reports, AAN violated 2 U.S.C. § 434(a)(4) and 11 C.F.R. § 104.1(a)."[7]

B. THE RESPONSE

The Respondent denies these allegations, asserting that "AAN is not a political committee."[8] AAN does not challenge the Complaint's allegation that it made expenditures aggregating in excess of $1,000 during 2010. Rather, the Respondent denies that it had the requisite major purpose, stating "AAN does not have the type of 'major purpose' that *Buckley* [*v. Valeo*] and other cases require before political committee burdens may be imposed on an organization."[9]

Specifically, the Response rejects the Complaint's "flawed legal understanding" that "every electioneering communication is evidence of an intent to influence elections" and is therefore indicative of a major purpose to nominate or elect candidates to federal office.[10] The Response instead notes that "[m]any electioneering communications constitute issue advocacy" and asserts that "AAN's issue advocacy activities — even those that constitute electioneering communications — cannot be included in its 'major purpose' calculation."[11]

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3 MUR 6589 (American Action Network), Complaint.

4 *Id.* at 6.

5 *Id.* at 7. The Complaint specifically alleges that "66.8 percent" of AAN's spending during the first two years of its existence was for independent expenditures and electioneering communications. *Id.*

6 *Id.*

7 *Id.* at 8.

8 MUR 6589 (AAN), Response at 1.

9 *Id.* at 25 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)).

10 *Id.* at 2.

11 MUR 6589 (AAN), Response at 2.

C. COMMISSION ACTION

On June 24, 2014, the Commission considered and voted on this matter.[12] The Complaint failed to convince the required four Commissioners that there is reason to believe AAN violated the Act and the matter was dismissed.[13] As the controlling decision makers,[14] we are issuing this Statement of Reasons to set forth the Commission's rationale for not finding reason to believe and dismissing the matter.[15]

II. FACTUAL BACKGROUND

AAN is "'an independent nonprofit 501(c)(4) organization' incorporated under Delaware law, that 'is not affiliated with or controlled by any political group.'"[16] AAN describes itself as an "action tank," the mission of which is to "create, encourage and promote center-right policies based on the principles of freedom, limited government, American exceptionalism, and strong national policy."[17]

AAN was founded in 2009.[18] In the two fiscal years following its establishment that are in the record before us, AAN reports that it spent over $27 million.[19] AAN built a "premier grassroots advocacy organization"; developed a "clear mission statement"; organized a "high-caliber Board of Directors"; and promulgated "clear internal procedures, reviews, and

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12 *See* MUR 6589 (AAN), Certification (June 24, 2014).

13 *See* 2 U.S.C. § 437g(a)(2) (four-vote requirement).

14 *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("[W]hen the Commission deadlocks 3-3 and so dismisses a complaint, that dismissal, like any other, is judicially reviewable under § 437g(a)(8). . . . [T]o make judicial review a meaningful exercise, the three Commissioners who voted to dismiss must provide a statement of their reasons for so voting." (citing *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987))).

15 *See id.* ("Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did." (citing *Democratic Cong. Campaign Comm.*, 831 F.2d at 1134–35)).

16 MUR 6589 (AAN), Response at 3 (quoting AAN, *About, available at* http://americanactionnetwork.org/aan/about).

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

18 MUR 6589 (AAN), Complaint at 3.

19 *See* MUR 6589 (AAN), Supplemental Response (Form 990: Return of Organization Exempt from Income Tax 2010) (reporting total expenses of $1,446,675 in fiscal year 2009 and $25,692,334 in fiscal year 2010).

legal processes."[20] AAN hired staff, established core policy areas of interest, and created what it describes as a "cutting edge technological platform for grassroots advocacy."[21]

In furtherance of its mission, AAN hosted educational activities and grassroots policy events.[22] For example, it conducted over twenty interactive "Learn and Lead" issue briefings with over 1000 activists from around the country and guest speakers — including Senators, Congressmen, former Secretaries and Ambassadors for the U.S. Government — to educate grassroots leaders about "critical issues" facing our country with regard to energy, education, tax policy, immigration, national security, spending and health care, and other center-right principles.[23]

A significant amount of AAN's activity during this time period was television and digital advertising to educate the public on subjects important to AAN. Commission records indicate that AAN spent at least $17 million on such advertisements in the first two years of its existence.[24] A small portion of these advertisements — roughly $4 million worth — advocated the election or defeat of particular federal candidates.[25] The vast majority of AAN's advertisements, though, focused on issues central to AAN's mission – topics like fiscal responsibility, heath care reform, regulatory reform and other policy matters considered by the United States Congress.[26] Because some of these issue advertisements were broadcast in close proximity to an election, they were reported to the Commission as "electioneering communications."[27] All told, AAN spent approximately $13 million on issue advertisements

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

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] MUR 6589 (AAN), First General Counsel's Report at 4 (indicating that AAN spent over $4 million on independent expenditures and over $13 million on electioneering communications between 2009-2011).

[25] These advertisements – known as "independent expenditures" – were reported to the Commission in accordance with 2 U.S.C. § 434(c), (g). Information in the record before the Commission indicates that from 2009-2010, AAN reported that it spent $4,097,962.29 on express advocacy "independent expenditures." *Id.* at 4 n.1. AAN and Complainant report the figure as $4,096,910.

[26] MUR 6589 (AAN), Complaint at Exhibit A (Form 990: Return of Organization Exempt from Income Tax 2009); MUR 6589 (AAN), Supplemental Response (Form 990: Return of Organization Exempt from Income Tax 2010); *see* Appendix A (transcript of advertisements citing in the Complaint).

[27] An "electioneering communication" is defined as any broadcast, cable, or satellite communication which (a) refers to a clearly identified candidate for federal office, (b) is publicly distributed within 60 days before a general election or 30 days before a primary election, and (c) is targeted to the relevant electorate. 2 U.S.C. § 434(f)(3); 11 C.F .R. § 100.29. The term "electioneering communication" does not include a communication that constitutes an expenditure or an independent expenditure. 2 U.S.C. § 434(f)(3)(B)(ii). A communication is "targeted to the relevant electorate" when it can be received by 50,000 or more persons in the congressional district the candidate seeks to represent. 11 C.F.R. § 100.29(b)(5)(i).

during its first two fiscal years. That spending alone constituted nearly half of the organization's $27 million in total disbursements over the same time period.[28] Coupled with its other mission-specific spending (*e.g.*, its extensive "Learn and Lead" program), the vast majority of AAN's spending was devoted to the discussion of issues central to its organizational mission and not to the nomination or election of a federal candidate.

III. Legal Background

Understanding the responsibilities and burdens that come with political committee status is important to appreciate what is at stake in this case and why groups tailor their spending to avoid triggering burdensome regulation. It also helps understand the courts' decisions narrowing the scope and application of the Act.

As the Supreme Court has recognized, "PACs are burdensome alternatives" that are "expensive to administer and subject to extensive regulations":

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28 As a general rule, the Commission assesses an organization's major purpose by reference to its entire history. *See* MUR 6396 (Crossroads GPS), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 24 n.101 ("Often one can assess an organization's true major purpose only by reference to its entire history"); *see also* MUR 6081 (American Issues Project), Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen (looking at four years of an organization's history). However, here the administrative record before the Commission includes only the organization's first two years of spending history. From its founding in July 2009 through June 2011, AAN reported spending $27,139,009. During its fiscal year 2009, which ran from July 23, 2009 to June 30, 2010, AAN reported spending $1,446,675. *See* MUR 6589 (AAN), Complaint at Exhibit A (Form 990: Return of Organization Exempt from income Tax 2009). Of this, $987,251 was spent on the "program services expenses," while $164,555 went to "management and general expenses" and $294,869 went to "fundraising expenses." *Id.* In fiscal year 2010, AAN raised $27,479,384 and spent $25,692,334. *See* MUR 6589 (AAN), Supplemental Response (Form 990: Return of Organization Exempt from income Tax 2010). Of this, $25,255,343 was spent on "program service expenses," while $191,329 was spent on "management and general expenses" and $245,662 was spent on "fundraising expenses." *Id.* The Commission has looked at narrower two-year time frames when the administrative record covered shorter periods. S*ee generally GOPAC*, 917 F. Supp. at 862-66 (reviewing, among other things, GOPAC's *1989-1990* Political Strategy Campaign Plan and Budget) (emphasis added); *Malenick*, 310 F. Supp. 2d at 235 (citing Pl.'s Mem., Ex. 1 (Stipulation of Fact signed and submitted by Malenick and Triad Inc., to the FEC on January 28, 2000, "listing numerous 1995 and 1995 Triad materials announcing these goals") and Ex. 47 ("Letter from Malenick, to Cone, dated Mar. 30, 1995") among others); *id.* at n.6 (citing to Triad Stip. ¶¶ 4.16, 5.1-5.4 for the value of checks forwarded to "intended federal candidate or campaign committees in *1995 and 1996*.") (emphasis added)MUR 5751 (The Leadership Forum), General Counsel's Report #2 at 3 (OGC cited IRS reports showing receipts and disbursements from 2002-2006 before concluding that the Respondent had not crossed the statutory threshold for political committee status); MUR 5753 (League of Conservation Voters 527, *et al.*), Factual and Legal Analysis at 11 & 18 (the Commission determined that Respondents "were required to register as political committees and commence filing disclosure reports with the Commission by no later than their initial receipt of contributions of more than $1,000 in July 2003," citing to Respondents' disbursements "during the *entire 2004 election cycle*" while evaluating their major purpose) (emphasis added); MUR 5754 (MoveOn.org Voter Fund), Factual and Legal Analysis at 12 &13 (the Commission looked to disbursements "[d]uring the *entire 2004 election cycle*" and cited to specific solicitations and disbursements made during calendar year 2003 in assessing the Respondent's major purpose) (emphasis added). Note, the legal underpinnings of MURs 5754 (MoveOn.org Voter Fund) and 5753 (League of Conservation Voters 527, *et al.*) have been undermined for other reasons by *EMILY's List v. FEC*, 581 F.3d 1, 12-14 (D.C. Cir. 2009).

> For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days. . . .
>
> And that is just the beginning. PACs must file detailed monthly reports with the FEC, which are due at different times depending on the type of election that is about to occur:
>
> > These reports must contain information regarding the amount of cash on hand; the total amount of receipts, detailed by 10 different categories; the identification of each political committee and candidate's authorized or affiliated committee making contributions, and any persons making loans, providing rebates, refunds, dividends, or interest or any other offset to operating expenditures in an aggregate amount over $200; the total amount of all disbursements, detailed over 12 different categories; the names of all authorized or affiliated committees to whom expenditures aggregating over $200 have been made; persons to whom loan repayments or refunds have been made; the total sum of all contributions, operating expenses, outstanding debts and obligations, and the settlement terms of the retirement of any debt or obligation.[29]

Moreover, in addition to the disclosure burdens described above, a political committee — even a so-called "super PAC" that operates independently of a candidate — remains subject to certain prohibitions even in the post-*Citizens United* world.[30]

Characterizing the onerous requirements that attach to political committee status as "just disclosure" does not alleviate the attendant burden. Not all disclosure regimes are created equal. The responsibilities that come with one-time, event-specific disclosure[31] are a far cry from the ongoing, all-encompassing reporting and regulatory burdens faced by FECA political committees.[32] Indeed, it is a "mistake" to interpret the Supreme Court's recent endorsement of event-driven disclosure as "giving the government a green light to impose political-committee

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[29] *Citizens United v. FEC*, 558 U.S. 310, 337-338 (2010) (quoting *McConnell v. FEC*, 540 U.S. 93, 331-332 (2003)).

[30] *See* 2 U.S.C. § 441e(a)(1) (making it unlawful for a foreign national to directly or indirectly make "a contribution or donation of money or other thing of value . . . in connection with a Federal, State, or local election"); *see also* 11 C.F.R. § 115.2 (prohibiting contributions by Federal contractors).

[31] *See, e.g.*, 434(c), 434(f), and 434(g).

[32] *See Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 824 (7th Cir. 2014) (noting that "[a] one-time, event-driven disclosure rule is far less burdensome than the comprehensive registration and reporting system imposed on political committees"); *cf. Citizens United*, 558 U.S. at 366-371.

status on every person or group that makes a communication about a political issue that also refers to a candidate."[33]

In short, the regulatory obligations, prohibitions, and First Amendment impingements associated with political committee status are weighty and extensive. As shown below, this is why courts have narrowed the reach of the Act's "political committee" definition to ensure that issue advocacy groups are not chilled from engaging in First Amendment-protected speech and association.

A. Pre-*Buckley* Judicial Treatment of the Act's Definition of "Political Committee"

The Act defines a "political committee" 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."[34]

Soon after FECA's enactment, during the period between 1972 and 1976, several courts considered vagueness and overbreadth challenges to the Act's political committee definition. From the outset, the judiciary warned that absent imposition of a limiting construction on this definition, "[t]he dampening effect on first amendment rights . . . would be intolerable."[35] Particularly troubling, courts admonished, was the prospect that "organizations which express views on topical issues involving . . . positions adopted by office-seekers" would have "their associational rights . . . encroached upon" by the disclosure burdens applicable to political committees.[36] It was "abhorrent" to think that "every position on any issue, major or minor, taken by anyone would be a campaign issue and any comment upon it in, say, . . . an advertisement would" subject an organization to political committee disclosure burdens.[37] This was particularly true for "nonpartisan issue groups which in a sense seek to 'influence' an election, *but only by influencing the public to demand of candidates that they take certain stands on the issues*."[38]

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[33] *Barland*, 751 F.3d at 836-37.

[34] 2 U.S.C. § 431(4)(A); 11 C.F.R. § 100.5.

[35] *United States v. Nat'l Comm. for Impeachment*, 469 F.2d at 1142. This opinion was adopted by the D.C. Circuit in *Buckley*, 519 F.2d 821, 863 n.112 (D.C. Cir. 1975) (per curiam), *aff'd in part*, 424 U.S. 1 (1976), and cited by the Supreme Court in *Buckley*, 424 U.S. 1 at 79 n.106.

[36] *ACLU v. Jennings*, 366 F. Supp. 1041, 1055 (D.D.C. 1973), vacated as moot sub nom., *Staats v. ACLU*, 422 U.S. 1030 (1975); *see also id.* at 1056 (recognizing that "controversial organizations" like the ACLU must be excluded from coverage as a political committee).

[37] *Nat'l Comm. for Impeachment*, 469 F.2d at 1142 (footnote omitted); *see also id.* at 1139, 1142 (applying "fundamental principles of freedom of expression" in explaining that "every little Audubon Society chapter [should not] be a 'political committee,' [simply because] 'environment' is an issue in one campaign after another").

[38] *Buckley*, 519 F.2d at 863 n.112 (emphasis added).

There was not a "shred of history in the Act that would tend to indicate that Congress meant to go so far" as to require issue groups to register as political committees.[39] A thorough review of the legislative history showed that, with respect to the political committee definition, "[c]ongressional concern was with political campaign financing, not with the funding of movements dealing with national policy."[40] In fact, Congress elected not to regulate directly as political committees many "liberal, labor, environmental, business and conservative organizations,"[41] including those who "frequently and necessarily refer to, praise, criticize, set forth, describe or rate the conduct or actions of clearly identified public officials who may also happen to be candidates for federal office."[42] Instead, Congress subjected these organizations to separate disclosure requirements under an independent provision of the Act, 2 U.S.C. § 437a (1974).[43] The D.C. Circuit, however, declared this statute unconstitutional in *Buckley* in a ruling that was not appealed to the Supreme Court[44] and "apparently accept[ed]" by lawmakers.[45] Thus, Congress and the courts made clear that the political committee disclosure burdens did not apply to issue-advocacy organizations.

As a result, even racially-tinged, character-assaulting advertisements like the following — published *less than two weeks* before the 1972 presidential election — did not and could not trigger political committee status:

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39 *Nat'l Comm. for Impeachment*, 469 F.2d at 1142.

40 *ACLU*, 366 F. Supp. at 1141-42.

41 120 Cong. Rec. H10333 (daily ed., Oct. 10, 1974).

42 *Buckley*, 519 F.2d at 871 (internal quotation marks omitted).

43 Congress "made it abundantly clear that it intended section 437a to reach beyond the other disclosure provisions of the Act." *Buckley*, 519 F.2d at 876. The statute provided that "[a]ny person (other than an individual) who expends any funds or commits any act directed to the public for the purpose of influencing the outcome of an election, or who publishes or broadcasts to the public any material referring to a candidate (by name, description, or other reference) advocating the election or defeat of such candidate, setting forth the candidate's position on any public issue, his voting record, or other official acts (in the case of a candidate who holds or has held Federal office), or otherwise designed to influence individuals to cast their votes for or against such candidate or to withhold their votes from such candidate shall file reports with the Commission as if such person were a political committee. The reports filed by such person shall set forth the source of the funds used in carrying out any activity described in the preceding sentence in the same detail as if the funds were contributions . . . ." 2 U.S.C. § 437a (1974).

44 *See Buckley v. Valeo*, 424 U.S. at 10 & n.7. In so holding, the court rejected congressional concerns that the law was necessary to demand disclosure from organizations that "use their resources for political purposes, [but which] conceal the interests they represent solely because [of] the technical definitions of political committee, contribution, and expenditure." H.R.Rep.No.93-1438, 93d Cong., 2d Sess. 83 (1974); *see also id.* (explaining that the provision would "require any organization which expends any funds or commits any act directed to the public for the purpose of influencing the outcome of an election").

45 *See Buckley*, 519 F.2d at 863 n.112 (observing that, while making other changes to the political committee definition, Congress did not materially alter the provision in response to the narrowing constructions imposed by *Jennings* and *National Committee for Impeachment*).

> AN OPEN LETTER TO PRESIDENT RICHARD M. NIXON IN OPPOSITION TO HIS STAND ON SCHOOL SEGREGATION
>
> Dear Mr. President:
>
> We write because we believe that you are taking steps to create an American apartheid. That, we know, is a nasty charge. Yet that is the direction the House of Representatives took us on August 17, 1972. On that date, the House voted 282-102 to prohibit federal courts from taking effective action to end school segregation. . . .
>
> We believe instead that the ultimate source of pressure behind this shameful bill has been you, Mr. President.
>
> During the last six months, you have encouraged the resentments and fears of whites, and made open enemies of blacks. You have made scapegoats of the federal courts, and attacked the rule of law itself. You have cut the middle ground out from under the feet of reasonable men. We find it hard to imagine a more cynical use of presidential power.
>
> In the House of Representatives only 102 members stood fast against you.** Now the issue is before the Senate. We urge you to back off from the path to apartheid, and withdraw your support for this bill.
>
> ** [To readers:] Let them hear from you. They deserve your support in their resistance to the Nixon administration's bill.[46]

Other, similar advertisements likewise did not count toward political committee status, including one that was "derogatory to the President's stand on the Vietnam war," even though "the President is a candidate for re-election . . . and the war is a campaign issue."[47]

Thus, from the outset, courts recognized that although "[p]ublic discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct,"[48] such discussions do not convert an organization into a political committee. To the contrary, courts have emphazied how "the interest of a group engaging in nonpartisan discussion ascends to a high plane, while the governmental interest in disclosure correspondingly diminishes.[49]

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46 *ACLU*, 366 F. Supp. at 1058; *see also Buckley*, 519 F.2d at 873 (referencing this discussion).

47 *Nat'l Comm. for Impeachment*, 469 F.2d at 1138, 1142.

48 *Buckley*, 519 F.2d at 875.

49 *Id.* at 873.

B. *Buckley's* "Major Purpose" Test

In response to both vagueness and overbreadth concerns, the Court in *Buckley* limited the scope of the Act's definition in two ways.[50] First, the Court circumscribed the Act's $1,000 statutory threshold by construing the definition of expenditure "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."[51] Second, to address concerns that the broad definition of "political committee" in the Act "could be interpreted to reach groups engaged purely in issue discussion," the Court held that the term political committee "need 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."[52]

Buckley fashioned these limitations to prevent the Act from "encompassing both issue discussion and advocacy of a political result"; thus, the major purpose limitation ensures that issue advocacy organizations are not swept into the Act's burdensome regulatory scheme.[53] Regulation of electoral groups, the Court held, was constitutionally acceptable; regulation of issue groups was not. Therefore, the major purpose test serves to distinguish between the two.

The Court reaffirmed this distinction in *FEC v. Massachusetts Citizens for Life*,[54] noting that all "organizations whose major purpose is not campaign advocacy, but who occasionally make independent expenditures on behalf of candidates, are subject only to these [independent expenditure-specific reporting] regulations."[55] Then, with respect to the nonprofit corporation at issue, the Court held that its "central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates,"[56] elaborating that if a group's "independent spending become[s] so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee."[57]

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50 *Buckley*, 424 U.S. at 79.

51 *Id.* at 80 (footnote omitted). According to the Court, "[t]his reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate." *Id.* Specifically, "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52.

52 *Id.* at 79.

53 *Id.* (footnotes omitted).

54 479 U.S. 238 (1986) ("*MCFL*").

55 *Id.* at 252-253.

56 *Id.* at 252 n.6. The phrase "engages in activities on behalf of political candidates" seems to have been used interchangeably with the term "independent expenditures." *Compare id.* at 252-253 with *id.* at 252 n.6.

57 *Id.* at 262 (citing *Buckley*, 424 U.S. at 79). *See also North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 287-88 (4th Cir. 2008) ("*NCRTL*") (explaining that Buckley's major purpose test requires that the nomination or election of a candidate must be *the* (*i.e.*, sole and exclusive) major purpose of an organization, not merely *a* (*i.e.*, one of several) major purpose).

C. <u>Lower Court Clarifications of the "Major Purpose" Test</u>

Since *Buckley*, lower courts have further clarified the contours of the major purpose test. For instance, in *Wisconsin Right to Life, Inc. v. Barland*,[58] the Seventh Circuit summed up the Supreme Court's precedent as requiring the major purpose of "express election advocacy" before Wisconsin could impose state-level political committee burdens.[59] According to the Seventh Circuit, "[t]o avoid overbreadth concerns in this sensitive area, *Buckley* held that independent groups not engaged in express election advocacy as their major purpose cannot be subjected to the complex and extensive regulatory requirements that accompany the PAC designation."[60] Because of similarities between the Act's political committee disclosure provisions and the regulation at issue, the court held that the major purpose construction limiting the Act similarly limited the state's regulation. Therefore, the rule at issue was only "a reasonably tailored disclosure rule for independent organizations engaged in express election advocacy as their major purpose."[61]

Other courts have applied the major purpose doctrine in a similar manner. In *New Mexico Youth Organized v. Herrera*,[62] the Tenth Circuit identified two methods for determining a group's major purpose: "an examination of the organization's central organizational purpose"; or a "comparison of the organization's electioneering spending with overall spending to determine whether the preponderance of expenditures is for express advocacy or contributions to candidates."[63] Relying on both *MCFL* and *Colorado Right to Life Comm., Inc. v. Coffman*,[64] the *NMYO* court held that not only was there no preponderance of spending on express advocacy, there was no indication of any spending on express advocacy at all.[65] Thus, the defendant could not be forced to register and report as a political committee.

The Fourth Circuit also has expounded upon how to assess a group's central organizational purpose in *NCRTL*.[66] The Fourth Circuit explained that "if an organization

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58 751 F.3d 804 (7th Cir. 2014)

59 *Id.* at 838, 839.

60 *Id.* at 839.

61 *Id.* at 842.

62 611 F.3d 669 (10th Cir. 2010) ("*NMYO*").

63 *Id.* at 678.

64 498 F.3d 1137 (10th Cir. 2007).

65 *NMYO*, 611 F.3d at 678; *see also Free Speech v. FEC*, 720 F. 3d 788, 797 (10th Cir. 2013), *cert. denied* –S. Ct. --, No. 13-772 (May 19, 2014) ("The determination of whether the election or defeat of federal candidates for office is *the* major purpose of an organization, not simply *a* major purpose, is inherently a comparative task, and in most instances it will require weighing the importance of some of a group's activities against others.") (quoting *Real Truth About Abortion v. FEC*, 681 F.3d 544, 556 (4th Cir. 2012)).

66 525 F.3d at 289.

explicitly states, in its bylaws or elsewhere, that influencing elections is its primary objective, or if the organization spends the majority of its money on supporting or opposing candidates, that organization is under 'fair warning' that it may fall within the ambit of *Buckley*'s test."[67]

At the district court level, the court in *FEC v. GOPAC, Inc.*[68] rejected the use of a fundraising letter lacking express advocacy as evidence that the group's major purpose was the election or defeat of a candidate, finding that "[a]lthough [a Federal candidate] is mentioned by name, the letter does not advocate his election or defeat nor was it directed at [that candidate's] constituents. . . . Instead, the letter attacks generally the Democratic Congress, of which [the candidate] was a prominent member, and the franking privilege . . . and requests contributions."[69] In *FEC v. Malenick*,[70] the court relied on only express advocacy communications, rather than communications that merely mentioned a candidate, in concluding that the major purpose test was met.[71] In both *Malenick* and *GOPAC* the courts examined the public and non-public statements, as well as the spending and contributions, by particular groups to determine if the major purpose of each organization was the nomination or election of a federal candidate.

D. The Standard for Identifying Genuine Issue Speech

The courts have appropriately rejected attempts to count issue speech — even that which references federal candidates — as evidence that a group has met *Buckley's* major purpose test. A contrary conclusion would undermine the objective of the major purpose limitation: to ensure that issue advocacy organizations are not regulated as political committees. In *Buckley*, the Supreme Court observed:

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest.[72]

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67 *Id.*

68 917 F. Supp. 851 (D.D.C. 1996).

69 *Id.*. at 863-64.

70 310 F. Supp. 2d 230 (D.D.C. 2005).

71 *Id.* at 234-236 (noting the 60 fax alerts that the group sent in which it "advocated for the election of specific federal candidates").

72 424 U.S. at 42.

The Supreme Court in *FEC v. Wisconsin Right to Life, Inc.*[73] provided explicit guidance regarding how to distinguish electoral advocacy from issue speech. As the Court explained, "[i]ssue advocacy conveys information and educates. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose — uninvited by the ad — to factor it into their voting decisions."[74] The Court went on to conclude that "[d]iscussion of issues cannot be suppressed simply because the issues may also be pertinent in an election."[75]

In holding that the ads at issue in *WRTL II* were genuine issue ads, the Court noted that they "focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter,"[76] and rejected the notion that any of the following characteristics would render a communication electoral advocacy:

- If it contains an appeal to contact a candidate;
- If it mentions a candidate in relation to an issue;
- If it is disseminated in close proximity to elections, rather than near actual legislative votes on issues;
- If it is aired when the Congress is not in session;
- If it cross-references a website that contains express advocacy;
- If the group running the communication had in the past expressly advocated the election or defeat of the candidate referenced in the advertisement; or
- If it merely mentions — or even promotes or criticizes — a federal candidate.[77]

The Seventh Circuit reinforced the importance of broad protections for issue-related speech in *Barland* — a case involving state regulations that were "specifically designed to bring issue advocacy within the scope of the state's PAC regulatory system."[78] Applying *Buckley*, the court found the regulation to be "fatally vague and overbroad"[79] and "a serious chill on debate

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73 551 U.S. 449 (2007) ("*WRTL II*").

74 *Id.* at 470.

75 *Id.* at 474.

76 *Id.* at 470.

77 *Id.* at 470-73.

78 751 F.3d 804, 834 (7th Cir. 2014).

79 *Id.* at 835.

about political issues,"[80] noting that the "pervasive" regulatory burdens of political committee status are not "relevantly correlated and reasonably tailored to the public's informational interest for "issue-advocacy groups that only occasionally engage in express advocacy."[81]

E. The Commission's Application of the "Major Purpose" Test

Since *Buckley*, the Commission has determined the major purpose of an organization on a case-by-case basis, rejecting on multiple occasions the invitation to adopt a bright line rule governing the analysis. In 2004, the Commission published a Notice of Proposed Rulemaking to "explore[] whether and how [it] should amend its regulations defining whether an entity is a . . . political committee"[82] and in particular whether the regulatory definition of political committee "should be amended by incorporating the major purpose requirement."[83] The Commission sought comment on four tests for determining whether an entity had the requisite major purpose.[84] These proposed tests would have examined — to varying degrees — an organization's avowed purpose, its spending, and its tax status.[85]

The Commission concluded that "incorporating a 'major purpose' test into the definition of 'political committee' [was] inadvisable" and declined to adopt any of the proposed standards.[86] This decision was challenged in federal district court. The court found that the Commission's decision was not arbitrary and capricious but did order the Commission to provide a more detailed explanation of that decision.[87] In response, the Commission issued a Supplemental Explanation and Justification in 2007.[88] This Supplemental E&J did not issue or explain a new rule. Rather, it elaborated upon the Commission's ongoing case-by-case approach to the major purpose test, explaining that "[a]pplying the major purpose doctrine . . . requires the flexibility of a case-by-case analysis of an organization's conduct that is incompatible with a one-size-fits-all rule."[89] To that end, the Commission indicated that determining a group's major

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[80] *Id.* at 837.

[81] *Id.* at 841.

[82] *Notice of Proposed Rulemaking on Political Committee Status*, 69 Fed. Reg. 11736, 11736 (Mar. 11, 2004).

[83] *Id.* at 11743.

[84] *Id.* at 11745.

[85] *See Id.* at 11745-11749; *see also Final Rules on Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees*, 69 Fed. Reg. 68056, 68064-68065 (Nov. 23, 2004) ("2004 E&J") (explaining that the Commission considered – and rejected – two additional tests (for a total of six) prior to adopting the E&J.

[86] 2004 E&J, 69 Fed. Reg. at 68065.

[87] *Shays v. FEC*, 424 F.Supp.2d 100, 115-16 (D.D.C. 2006).

[88] *Supplemental Explanation and Justification, Political Committee Status*, 72 Fed. Reg. 5596 (Feb. 7, 2007) ("2007 Supplemental E&J").

[89] *Id.* at 5601.

purpose requires "flexiblity" and a "fact-intensive," "case-by-case" consideration of a number of indicators unique to each organization.[90]

This central premise of the 2007 Supplemental E&J has been upheld by several courts.[91] For example, the Fourth Circuit in *Real Truth About Abortion v. FEC* concluded that "[t]he determination of whether the election or defeat of federal candidates for office is *the* major purpose of an organization . . . is inherently a comparative task, and in most instances it will require weighing the importance of some of a group's activities against others."[92] This flexible, comparative approach remains at the core of the Commission's major purpose analysis today.

While the basic approach to political committee status outlined in the 2007 Supplemental E&J remains valid, some portions of the guidance contained therein have been superseded by subsequent case law and Commission interpretations. Among these portions is the reference to certain older administrative matters which were cited as relevant examples. Though the 2007 Supplemental E&J does not articulate a rule defining the major purpose test, it points to the public files of closed enforcement cases as historical "guidance as to how the Commission has applied the statutory definition of 'political committee' together with the major purpose doctrine."[93] However, the value of a number of the Commission's past political committee enforcement matters cited in the 2007 Supplemental E&J has been diminished by intervening decisions both by courts and by the Commission.

For example, the 2007 Supplemental E&J was issued prior to the Court's decision in *WRTL II*,[94] which clarified the distinction between issue and electoral advocacy.[95] And recently, *Barland* reinforced *WRTL II*'s holding that genuine issue advertisements cannot be regulated as electoral advocacy.[96] Wisconsin's rule defining political committees was narrower in some respects than the federal definition of "electioneering communication." It applied only to

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90 *Id.* at 5601-05.

91 *See, e.g., Free Speech v. FEC*, 720 F. 3d 788 (10th Cir. 2013), *cert. denied* 134 S. Ct.2288, No. 13-772 (2014); *Real Truth About Abortion v. FEC*, 681 F.3d 544 (4th Cir. 2012) ("*RTAA*"); *Shays v. FEC*, 511 F. Supp.2d 19 (D.D.C. 2007) ("*Shays II*").

92 681 F.3d at 556 (emphasis in the original). The *RTAA* court also noted that the inquiry to assess an organization's major purpose "would not necessarily be an intrusive one" as "[m]uch of the information the Commission would consider would already be available in that organization's government filings or public statements." *Id.* at 558.

93 2007 Supplemental E&J, 72 Fed. Reg. at 5604

94 The 2007 Supplemental E&J was issued on February 7, 2007. *See* 72 Fed. Reg. 5595. *WRTL II* was decided on June 25, 2007. 551 U.S. 449 (2007).

95 *See WRTL II*, 551 U.S. at 478-479 ("Issue ads like WRTL's are by no means equivalent to contributions, and the quid-pro-quo corruption interest cannot justify regulating them. To equate WRTL's ads with contributions is to ignore their value as political speech.").

96 *Barland*, 751 F.3d at 834-35.

communications made within 30 days of a primary election or 60 days of a general election that name or depict a federal candidate and "refers to the candidate's 'personal qualities, character, or fitness' or 'supports or condemns' the candidate's record or 'position or stance on issues.'"[97] Nevertheless, *Barland* rejected this approach, holding that Wisconsin's provision improperly captured genuine issue advertisements and "under *Buckley* and *Wisconsin Right to Life II* must be narrowly construed to apply only to independent spending for express advocacy and its functional equivalent."[98] Thus, reliance on the advertisements cited in the 2007 Supplemental E&J is undermined to the extent that the advertisements cited therein constitute issue advocacy, as later clarified by the Court in *WRTL II* and the Seventh Circuit in *Barland*.[99]

While the fundamental approach to determining political committee status set forth in the 2007 Supplemental E&J —*i.e.*, a flexible, fact-intensive analysis of relevant factors — remains sound,[100] many of the enforcement matters contained therein have been undermined by subsequent judicial decisions, a development the Commission has adapted to through its case-by-case approach over time.

* * * *

In sum:

- The Act's definition of political committee only reaches those groups that have as their only major purpose the nomination or election of a federal candidate; a group that has as its major purpose the discussion of issues, including political issues, may not be regulated as a political committee under the Act.

- Genuine issue speech does not lose its character merely by mentioning – or even promoting or criticizing – a federal candidate.

- The Commission will apply the major purpose doctrine on a case-by-case basis, taking into consideration the unique facts and circumstances involved with a particular group.

With those principles in mind, we turn to AAN.

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97 *Id.* at 834 (quoting GAB § 1.28(3)(b)).

98 *Id.* at 835. None of AAN's advertisements are the "functional equivalent" of express advocacy. Moreover, after *WRTL II*, almost all electioneering communications are genuine issue ads.

99 *Free Speech* and *RTAA* are fully consistent with this limitation. *Free Speech* and *RTAA* upheld the case-by-case approach outlined in the 2007 Supplemental E&J. *Barland* and other cases such as *NMYO* clarified the application of the major purpose test within the case-by-case approach upheld in *Free Speech* and *RTAA*.

100 2007 Supplemental E&J, 72 Fed. Reg. at 5601.

IV. ANALYSIS OF AAN'S MAJOR PURPOSE

As explained above, since its adoption, the Act's definition of "political committee" has been the subject of judicial scrutiny. The Supreme Court held in *Buckley* that the definition as adopted by Congress impermissibly swept within its ambit groups engaged primarily in issue discussion. For this reason, the Court narrowly construed the definition of political committee to reach only groups that (1) meet the statutory definition *and* (2) have as their major purpose the *nomination or election* of a federal candidate. AAN's major purpose is not the nomination or election of a federal candidate under the second prong.

A. AAN Met the Statutory Threshold for Political Committee Status

Based upon its filings with the Commission, AAN clearly crossed the statutory threshold for political committee status by making over $1,000 in independent expenditures in both calendar year 2009 and calendar year 2010.[101] The question thus is whether AAN's singular major purpose is the nomination or election of a federal candidate.

B. AAN Does not have the Requisite Major Purpose for Political Committee Status

While not the only factors that may be considered, the following two factors are most relevant in this case: (1) assessing AAN's central organizational purpose by examining its public and non-public statements; and (2) analyzing AAN's spending on campaign activities with its spending on activities unrelated to the election or defeat of a federal candidate, including the group's genuine issue speech.[102]

1. AAN's Central Organization Purpose is Not the Nomination or Election of a Federal Candidate

AAN's organizational documents and official public statements indicate that AAN was organized to promote public policy and engage in issue advocacy. AAN's stated organizational purpose is to "create, encourage and promote center-right policies based on the principles of freedom, limited government, American exceptionalism, and strong national security . . . by engaging the hearts and minds of the American people and spurring them into active participation in our democracy."[103] AAN's stated purpose is thus issue-centric: to create, encourage, and promote a set of policy preferences.

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[101] While the Complaint does not distinguish between 2009 and 2010 spending, OGC notes that "[t]he Commission's records put the total [spending on independent expenditures] at $4,097,962.29 for the two year period. Approximately $4,044,572 of that total was spent during 2010," meaning approximately $53,390 was spent on independent expenditures in 2009. MUR 6589 (AAN), First General Counsel's Report at 4 n.1.

[102] We note that neither OGC nor Complainants argued that any factor other than statements or spending support their conclusions that AAN has as its major purpose the nomination or election of a federal candidate.

[103] MUR 6589 (AAN), Response at 3 (quoting AAN, *About, available at* http://americanactionnetwork.org/aan/about); *see also* MUR 6589 (AAN), Complaint at Exhibit A (Form 990:

Furthermore, AAN is a 501(c)(4) nonprofit organization.[104] Electing this tax status is a significant public statement of purpose. By law, organizations claiming tax exempt status under section 501(c)(4) must be "operated exclusively for the promotion of social welfare."[105] Under Internal Revenue Service regulations, "[t]he promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office."[106] Thus, section 501(c)(4) organizations may not have "participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office" as their primary purpose. Senator McCain, one of the principal Senate sponsors of the Bipartisan Campaign Reform Act ("BCRA"), stated in comments to the Commission during its political committee rulemaking that "under existing tax laws, Section 501(c) groups . . . cannot have a major purpose to influence federal elections, and are therefore not required to register as federal political committees, as long as they comply with their tax law requirements."[107] Similarly, reform groups such as Public Citizen have noted that "a legitimate 501(c) organization should not have to fear that it will become a political committee simply by engaging in political issue-related criticism of public officials."[108] Thus, while tax status is not dispositive, it is relevant, particularly given that the Respondents were well aware of their limitations under a 501(c) exemption.[109] Based upon AAN's official public statements and chosen tax status, AAN's central organizational purpose is not the nomination or election of a candidate to federal office.

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

104 *Id.*

105 26 U.S.C. § 501(c)(4)(2).

106 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii).

107 Comments of John McCain and Russell D. Feingold on Reg. 2003-07 (Political Committee Status) (Apr. 2, 2004), attached Statement of Senator John McCain, Senate Rules Committee, March 10, 2004 at 2. *See* 26 U.S.C. § 501(c)(4)(A) (providing tax exempt treatment to "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.").

108 Comment of Public Citizen on Reg. 2003-07 (Political Committee Status) at 10 (Apr. 5, 2004). Public Citizen went on to observe that "[e]ntities that do not have as their major purpose the election or defeat of federal candidates, *such as 501(c) advocacy groups*, but which may well be substantially engaged in political activity, should remain subject to regulation for only the narrow class of activities – express advocacy and electioneering communications – explicitly established under current federal election law, as amended by [McCain-Feingold]." *Id.* at 2.

109 *See, e.g.*, MUR 6589 (AAN), Supplemental Response at 1-2 (noting that between 2009-2011 "at most, only 19% of AAN's spending was for political activities" as the IRS defines them, "a phrase that is broader in scope than the FEC's express advocacy standard.").

2. The Majority of AAN's Activity was Focused on the Discussion of Issues, Not the Nomination or Election of a Federal Candidate

The Complaint's conclusion relies entirely upon AAN's spending pattern, alleging that "[a]s demonstrated by its extensive spending on federal campaign activity, AAN's major purpose between July 23, 2009 and June 30, 2011 was the nomination or election of federal candidates."[110] This allegation is flawed in that it is based on an impermissibly broad test to assess AAN's relative spending and major purpose.

Here, in order to determine whether "independent spending" has "become so extensive," the Commission must compare a group's spending on electoral advocacy against its spending on activities unrelated to campaigns, including genuine issue advocacy.[111] AAN's record of spending indicates that while nominating or electing candidates may have been *a* purpose of the organization in the time period in question, it was not *the* major purpose of the organization.

As noted above, AAN was formed in July 2009.[112] During its fiscal year 2009, which ran from July 23, 2009 to June 30, 2010, AAN reported spending $1,446,675.[113] In fiscal year 2010, AAN reported raising $27,479,384 and spending $25,692,334.[114] In total, AAN reported spending $27,139,009 from its founding in July 2009 through June 2011. Of that, AAN reported spending approximately $4,096,910 on independent expenditures.[115]

The vast majority — if not all — of AAN's remaining spending went to further purposes other than the nomination or election of a candidate. For example, AAN reports on tax returns filed for both years, that some of that spending went towards"[f]ound[ing] and buil[ding] a premier grassroots advocacy organization with a clear mission statement," which included recruiting a high caliber Board of Directors, developing clear internal procedures, reviews and legal processes, hiring staff, establishing core policy areas of interest, and creating a "cutting edge technological platform for grassroots advocacy."[116]

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110 MUR 6589 (AAN), Complaint at 7.

111 *MCFL*, 479 U.S. at 262.

112 MUR 6589 (AAN), Complaint at 3.

113 MUR 6589 (AAN), Complaint at Exhibit A (Form 990: Return of Organization Exempt from Income Tax 2009). Of this, $987,251 was spent on the "program services expenses," while $164,555 went to "management and general expenses" and $294,869 went to "fundraising expenses." *Id.*

114 MUR 6589 (AAN), Supplemental Response (Form 990: Return of Organization Exempt from Income Tax 2010). Of this, $25,255,343 was spent on "program service expenses," while $191,329 was spent on "management and general expenses" and $245,662 was spent on "fundraising expenses." *Id.*

115 MUR 6589 (AAN), First General Counsel's Report at 4 n.1.

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

AAN also spent its funds on conducting over 20 policy interactive briefings called "Learn and Lead," which featured Senators, Congressmen, and former Secretaries and Ambassadors for the U.S. Government about critical issues facing our country with regards to energy, education, tax policy, immigration, national security, spending and health care.[117]

Most significantly, AAN expended substantial sums on sponsoring grassroots issue advocacy, including producing and airing television and digital advertising, "focused on fiscal responsibility, [health care] reform, regulatory reform and other federal legislative issues considered by the United States Congress."[118]

Specifically, AAN reported spending roughly $13 million on issue advertisements. These are genuine issue advertisements.[119] They "focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter,"[120] discussing a number of salient policy issues including federal spending, the stimulus, tax relief, health care, and cap and trade. Moreover, they contain no references to elections, candidacies, or political parties. Consistent with what the Court has said, advertisements that mention a candidate in the course of discussing an issue and, in some cases, contained an appeal to contact that candidate are still genuine issue advertisements.[121] Nor do the advertisements lose their character as genuine issue advertisements merely because they were disseminated in close proximity to an election or aired when Congress was not in session.[122] The Court has made clear: the "[d]iscussion of issues cannot be suppressed simply because the issues may also be pertinent in an election."[123] Thus, even if these advertisements may have been relevant to an election, they are still genuine issue advertisements.

Accordingly, the roughly $13 million that AAN spent on these genuine issue advertisements indicate that its purpose was something other than the nomination or election of a federal candidate. Indeed, the roughly $4.1 million that AAN spent on independent expenditures between 2009 and 2011 was the totality of its spending that was for the purpose of nominating or influencing the election of a federal candidate and represented approximately 15% of its total expenses during the same period. This is hardly "so extensive that the organization's major purpose may be regarded as campaign activity."[124]

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117 *Id.*

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

119 *See* Appendix A (transcript of advertisements cited in the Complaint).

120 *WRTL II*, 551 U.S. at 470.

121 *Id.* at 470-473.

122 *Id.* at 470-473.

123 *Id.* at 474.

124 *MCFL*, 479 U.S. at 262 (citing *Buckley*, 424 U.S. at 79).

Since AAN's central organizational purpose is not the nomination or election of a federal candidate and its independent spending to support the nomination or election of a federal candidate is not so extensive that its major purpose may be regarded as campaign activity, AAN's major purpose is not the nomination or election of a federal candidate. Accordingly, AAN is not a political committee. Rather, it is an issue advocacy group that occasionally speaks out on federal elections. This is precisely the type of group the major purpose test was adopted to spare the "burdensome alternative" of political committee status.[125]

V. THE FIRST GENERAL COUNSEL'S REPORT

Based on the above facts, OGC nevertheless recommend that the Commission find reason to believe that "AAN had as its major purpose the nomination or election of federal candidates during 2010" and, accordingly, should have "organiz[ed], register[ed], and report[ed] as a political committee."[126] OGC largely based this recommendation on two flawed premises: first, that any communication that supports or opposes a clearly identified federal candidate but does not contain express advocacy is indicative of major purpose; and second, that an organization's spending is evaluated through the limited lens of a single calendar year.

A. THE RELEVANT SPENDING MAY NOT ENCOMPASS GENUINE ISSUE ADVERTISEMENTS

The legal theory proposed in the First General Counsel's Report ostensibly relies on the Commission's 2007 Supplemental E&J,[127] which explained the Commission's decision *not* to adopt a bright-line rule for applying the major purpose analysis. In particular, OGC cites to a

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125 *See Citizens United*, 558 U.S. at 337 (describing generally the burdens associated with political committee status); *see also supra* Part III (discussing burdens on political committees under the Act).

126 MUR 6589 (American Action Network), First General Counsel's Report at 3. While the Commission has erroneously strayed into the vague notion of generalized "campaign activity," rather than *Buckley*'s more limited nomination or election of federal candidates, *see, e.g.*, MUR 5365 (Club for Growth), General Counsel's Report #2 at 3, 5 ("[T]he vast majority of CFG's disbursements are for federal campaign activity" and concluding CFG "has the major purpose of federal campaign activity."), the Commission more recently has abided by *Buckley*'s mandate: that major purpose encompasses only activity expressly directed at the nomination or election of federal candidates. *See, e.g.*, MUR 6396 (Crossroads GPS), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen; MUR 6081 (American Issues Project), Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen; MUR 5541 (The November Fund), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn; Federal Election Commission's Brief for the Respondents in Opposition at 4, *The Real Truth About Obama, Inc., v. FEC*, 130 S. Ct. 2371 (2010) (No. 09-724) ("*RTAO*") ("[A]n entity that is not controlled by a candidate need not register as a political committee unless its 'major purpose' is the nomination or election of federal candidates."); Brief of Appellees Federal Election Commission and United States Department of Justice at 5, *RTAO*, 575 F.3d 342 (4th Cir. 2009) (No. 08-1977) ("[A] non-candidate-controlled entity must register as a political committee -- thereby becoming subject to limits on the sources and amounts of its contributions received -- only if the entity crosses the $1,000 threshold of contributions or expenditures and its 'major purpose' is the nomination or election of federal candidates.").

127 2007 Supplemental E&J, 72 Fed. Reg. at 5601.

series of decade-old enforcement matters (and the communications at issue therein), to arrive at its recommendation, that for purposes of determining political committee status, "communications that support or oppose a clearly identified Federal candidate, but do not contain express advocacy"[128] are indicative of a major purpose of nominating or electing a federal candidate. Relying on vague, ambiguous terms, it appears that the relevant criteria for OGC's determination are: (1) a reference to clearly identified federal candidate, (2) criticism of or opposition to that candidate, and (3) the timing of the communication being shortly before the election.[129]

OGC's analysis fails to distinguish between advertisements that support or oppose the election of a candidate and those that reference a candidate in the course of supporting or opposing an issue with which that candidate is involved. Nor does OGC acknowledge that such a distinction exists, notwithstanding judicial precedent that stands precisely for that proposition.[130] Indeed, the illustrative value of the Commission's past political committee enforcement matters cited in the 2007 Supplemental E&J has, in large part, been diminished by intervening decisions both by courts and by the Commission. Under *WRTL II*, many of the advertisements and communications at issue in those cases were genuine issue speech and, therefore, may not serve as the trigger to political committee status.

Indeed, as noted above, the *Barland* court reviewed a provision that required groups to register and report as political committees if they spent a small amount on certain communications prior to an election. This provision is remarkably similar to the standard advocated by OGC to determine which of AAN's admittedly non-express advocacy communications nevertheless "supported or opposed" a federal candidate.

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128 MUR 6589 (AAN), First General Counsel's Report at 13.

129 *Id.* at 21.

130 *See, e.g.*, *WRTL II*, 551 U.S. at 470-473.

	PROVISION REVIEWED IN *BARLAND*[131]	OGC STANDARD[132]
Candidate Reference	"[A] clearly identified candidate"	"[A] clearly identified federal candidate"
Content	"[R]efers to the candidate's personal qualities, character, or fitness or supports or condemns the candidate's record or position or stance on issues"	"[C]riticizes or opposes a candidate"
Timing	"[W]ithin 30 days of a primary, or 60 days of a general election"	"[R]un in the candidate's respective state shortly before a primary or election"

In particular, OGC looks to whether an advertisement has "a clearly identified federal candidate," "criticizes or opposes a candidate," or is "run in the candidate's respective state shortly before a primary or election."[133] In *Barland*, the Court held that a law requiring registration and reporting based on advertisements that had "a clearly identified candidate," "refers to the candidate's personal qualities, character, or fitness or supports or condemns the candidate's record or position or stance on issues," and is aired "within 30 days of a primary, or 60 days of a general election"[134] on the grounds that such provision "is fatally vague and overbroad"[135] and "is a serious chill on debate about political issues."[136] Considering the similarities between the Wisconsin's standard and OGC's proposed standard here, the Seventh Circuit's holding is a rejection of the approach recommended by OGC.[137]

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131 *Barland*, 751 F.3d at 834.

132 MUR 6589 (AAN), First General Counsel's Report at 13.

133 *Id.*

134 *Barland*, 751 F.3d at 834.

135 *Id.* at 835.

136 *Id.* at 837.

137 At minimum, this explicit rejection casts grave constitutional doubt on OGC's expansive approach. As the Court has recently stated, "by analogy to the rule of statutory interpretation that avoids questionable constitutionality -- validly conferred discretionary executive authority is properly exercised . . . to avoid serious constitutional doubt." *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2259 (2013); *see also Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Contr. Trades Council*, 485 U.S. 568, 575 (1988) (although a regulatory agency's interpretation of its own statute is generally accorded deference, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.") (citing *NLRB v. Catholic Bishops of Chicago*, 440 U.S. 490, 500 (1979)); *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 346 (2000)

Similarly, the court in *GOPAC* rejected "the Commission's plea for a broadening of the *Buckley* concept,"[138] reasoning that "the terms 'partisan electoral politics' and 'electioneering' raise virtually the same vagueness concerns as the language 'influencing any election for Federal office,' the raw application of which the *Buckley* Court determined would impermissibly impinge on First Amendment values."[139]

In short, the approach adopted by OGC in this matter cannot be squared with these court holdings.

B. IT IS INAPPROPRIATE AND ARBITRARY TO FOCUS AAN'S MAJOR PURPOSE ANALYSIS ON A SINGLE CALENDAR YEAR

Furthermore, OGC continues to advance a calendar year approach to apply the major purpose analysis.[140] This approach has never been formally adopted by the Commission, and we have previously explained why such an approach is myopic, distortive, and legally erroneous.[141]

OGC contends that a calendar year test "provides the firmest statutory footing for the Commission's major purpose determination" because the Act defines political committee "in terms of expenditures made or contributions received '*during a calendar year*.'"[142] However, determining an organization's major purpose via a narrow snapshot of time ignores the point of the major purpose test. The major purpose limitation is intended to act as a constraint, saving the Act's definition of "political committee" by restricting it to groups with the clearest electoral focus – those with the nomination or election of a candidate for federal office as their major

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(Scalia, J., concurring in part) ("[I]t is our practice to construe the text [of a statute] in such fashion as to avoid serious constitutional doubt.").

Moreover, the constitutional doubts raised here militate in favor of cautious exercise of our prosecutorial discretion. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.").

138 *GOPAC*, 917 F. Supp. at 861.

139 *Id.* Similarly, in *Malenick* the court held that the major purpose test was met, only relied on express advocacy communications, rather than communications that merely mentioned a candidate. 310 F. Supp. 2d at 235 (noting the sixty fax alerts that the group sent in which it "advocated for the election of specific federal candidates").

140 MUR 6589 (AAN), First General Counsel's Report at 23.

141 This is not the first occasion for OGC's novel calendar year theory. We have written extensively about our views on this theory and, in particular, the problems it presents. *See* MUR 6396 (Crossroads GPS), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 20-23; MUR 6081 (American Issues Project), Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen at 14-25.

142 MUR 6589 (AAN), First General Counsel's Report at 23-24 (quoting 2 U.S.C. § 431(4)).

purpose.[143] While the calendar-year approach superficially attempts to root itself in the statute, it provides precisely the same rigid, "one-size-fits-all rule" roundly rejected by the Commission.[144]

Assessing an organization's major purpose by reference to its activities in a single calendar year renders an artificial and indeed distorted picture of the organization.[145] *Buckley*'s concept of an "organization" manifests its major purpose over its lifetime of existence and activities.[146]

Moreover, the artificial window of a single calendar year would inevitably subject many issue-based organizations to the burdens of political committee status. An examination of a group's major purpose is necessarily an after-the-fact exercise. In these cases, the Commission must determine whether a group properly refrained from registering and reporting as a political committee. A short artificial time period such as a calendar year often provides an incomplete and distorted picture of that group's major purpose.[147] For example, imagine a group created in the middle of an election year that intends to — and in fact does — remain operating after the election ends on a fiscal-year, rather than calendar-year basis. Assume such an organization could devote 10 percent of its resources to express advocacy prior to the election, then spend the other 90 percent of its resources that fiscal year on post-election issue advocacy, and still be considered a political committee under OGC's proposed approach if its issue advocacy spending occurred in the calendar year following the election. The organization's major purpose

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[143] *See, e.g.*, 2007 Supplemental E&J at 5602 ("[E]ven if the Commission were to adopt a regulation encapsulating the judicially created major purpose doctrine, that regulation could only serve to limit, rather than to define or expand, the number or type of organizations regarded as political committees.").

[144] *Id.* According to *RTAA*, the Commission is not "foreclose[d] … from using a more comprehensive methodology." 681 F.3d at 557. But *RTAA* never approved the Commission using a *less* comprehensive, selective methodology that would frustrate the reason for the major purpose test, which is precisely what would happen if the Commission limited the scope of the major purpose analysis to a single calendar year without consideration of any other spending outside that window.

[145] The fact that the statutory definition of political committee relies upon $1,000 of expenditures or contributions in a calendar year is not relevant to an assessment of that organization's longstanding major purpose for which it was created and as manifested throughout its existence. The Act imposes a bright line that, according to *Buckley*, was unconstitutionally over-inclusive, and, thus, the Court imposed an intention-based standard as a further filter. It is unclear why that arbitrary statutory timeframe is appropriate when *RTAA* rejected the argument that "the major purpose test requires a bright-line, two-factor test." 681 F.3d at 557. It makes little sense that a case-by-case standard that, according to *Shays II*, "requires a very close examination of various activities and statements," would reject a broader examination. 511 F. Supp. 2d at 31.

[146] "Often one can assess an organization's true major purpose only by reference to its entire history." MUR 6396 (Crossroads GPS), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 24 n.101; *see also* MUR 6081 (American Issues Project), Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen (looking at four years of an organization's history).

[147] The fact that the statutory definition relies upon expenditures or contributions in a calendar year is not relevant to the major purpose for which a group was created. The Act as originally written imposes a bright line that, according to *Buckley*, was unconstitutionally over-inclusive, and, thus, the Court imposed an intention-based standard as a further filter. It is unclear why that arbitrary statutory timeframe is appropriate when *RTAA* rejected the argument that "the major purpose test requires a bright-line, two-factor test." 681 F.3d at 557.

determination would be based upon a distinct minority of its spending within the first twelve months of its operation. Despite the group's best efforts to minimize its election-related expenditures, the Commission would ignore the timeframe the group used to determine *ex ante* its major purpose.

If the group in the example above were branded as a political committee, it would be subjected to the Commission's regulatory and reporting burdens in perpetuity. Under Commission regulations, "only a committee which will no longer receive any contributions or make any disbursements that would otherwise qualify it as a political committee may terminate, provided that such committee has no outstanding debts and obligations."[148] Thus, in order to stop filing burdensome reports, a committee would have to surrender its political rights and agree not to make *any* independent expenditures, regardless of the organization's major purpose.[149]

As one reputable commentator has stated, "[u]nsurprisingly, most citizens begin to focus on and become engaged in political debate once election day approaches."[150] Thus, linking issues to candidates and elections is quite common. But if a group continues to be active past that election date, such spending is also evidence of its true purpose.[151] The Commission must take that reality into account.

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148 11 C.F.R. § 102.3(a).

149 We are aware of only one enforcement matter in which an ongoing state political committee was later deemed to have crossed the line of federal political committee status, and by negotiation in a conciliation agreement, it was allowed to skip registration and reporting with the Commission by submitting its state campaign finance reports on the condition that it forego making federal expenditures and contributions in the future and/or register as a political committee subject to the ongoing reporting rules in perpetuity in the future. *See* MUR 5492 (Freedom, Inc.), Conciliation Agreement at ¶¶ 3, 4.

150 Kirk L. Jowers, *Issue Advocacy: If It Cannot Be Regulated When It Is Least Valuable, It Cannot Be Regulated When It Is Most Valuable*, 50 Cath. U. L. Rev. 65, 76 (Fall 2000).

151 Interestingly, the Commission has, in the past, relied, in part, on the fact that an organization ceased active operations at the end of the election cycle in question when determining that the major purpose test had been met. *See* 2007 Political Committee Supplemental E&J, 72 Fed. Reg. at 5605 (summarizing MUR 5511 (Swiftboat Vets) and MUR 5754 (MoveOn.org)). If the Commission may consider the lack of activity in the calendar year following an election as relevant for determining major purpose, then certainly it must look at and evaluate actual activity undertaken in the next calendar year.

VI. CONCLUSION

AAN is an "issue-advocacy groups that only occasionally engage[d] in express advocacy."[152] As such, it cannot and should not be subject to the "pervasive" and burdensome" requirements of registering and reporting as a political committee. For that reason, and in exercise of our prosecutorial discretion,[153] we voted against finding reason to believe AAN violated the Act by failing to register and report as a political committee.

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[152] *Barland*, 751 F.3d at 841, 842.

[153] *See Heckler* at 831; *see also supra* note 137.

LEE E. GOODMAN
Chairman

7/30/14
Date

CAROLINE C. HUNTER
Commissioner

7/30/14
Date

MATTHEW S. PETERSEN
Commissioner

7/30/14
Date

Appendix A

1. "Back Pack"

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

AAN reported spending $1,210,000 on three versions of this communication.

2. "Bucket"

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

AAN reported spending $290,395 on seven versions of this communication.

3. "Extreme"

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

AAN reported spending $875,000 on this communication.

4. "Leadership"

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

AAN reported spending $146,135 on this communication.

5. "Mess"

> A government health care mess thanks to Nancy Pelosi and Chris Murphy. Five hundred billion in Medicare cuts, free health care for illegal immigrants, thousands of new IRS agents, jail time for anyone without coverage, and now a forty-seven percent increase in Connecticut health care premiums. Forty-seven percent! Call Chris Murphy. Tell him to repeal his government health care mess.

AAN reported spending $137,900 on this communication.

6. "Naked"

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

AAN reported spending $2,092,975 on this communication.

7. "New Hampshire"

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

AAN reported spending $484,999 on this communication.

8. "Order"

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

AAN reported spending $225,000 on this communication.

9. "Ouch"

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

AAN reported spending $652,584.69 on this communication.

10. "Promise"

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

AAN reported spending $14,896.34 on this communication.

11. "Quit Critz"

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

AAN reported spending $177,310 on this communication.

12. "Read This" (Rick Boucher)

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

AAN reported spending $226,000 on this communication.

13. "Read This" (Health Care)

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

AAN reported spending $1,065,000 on three versions of this communication.

14. "Repeal"

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

AAN reported spending $435,000 on this communication.

15. "Ridiculous"

> Ridiculous stimulus! Courtesy of Charlie Wilson and Nancy Pelosi. Three million for a turtle tunnel. Two hundred thousand for Siberian lobbyists. Half a million to study Neptune. Two million to photograph exotic ants and one hundred fifty thousand to watch monkeys on drugs. The only thing Wilson and Pelosi's stimulus didn't do? Fix Ohio's economy. Call Charlie Wilson. Tell him to keep the tax cuts, ditch the stimulus.

AAN reported spending $505,000 on this communication.

16. "Secret"

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

AAN reported spending $370,000 on this communication.

17. "Skype"

> Person 1: Hey, what's up?
> Person 2: Hey. You have to check out the article I just sent you. Apparently, convicted rapists can get Viagra paid for by the new health care bill.
> Person 1: Are you serious?
> Person 2: Yep. I mean, Viagra for rapists? With my tax dollars? And Congressman Perlmutter voted for it.
> Person 1: Perlmutter voted for it?
> Person 2: Yep. I mean, what is going on in Washington?
> Person 1: We need to tell Perlmutter to repeal it in November.

AAN reported spending $1,430,000 on two versions of this communication.

18. "Taxes"

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

AAN reported spending $435,000 on this communication.

19. "Wallpaper"

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

AAN reported spending $1,600,000 on five versions of this communication

20. "Wasted"

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

AAN reported spending $231,000 on this communication.

EXHIBIT 4

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 6589R
American Action Network	)	

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

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

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

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

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

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

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

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

I. FACTUAL AND PROCEDURAL BACKGROUND

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

A. Commission Disposition of CREW's Complaint Against AAN

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

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

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

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

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

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

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

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

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

9 MUR 6589 (AAN), Complaint at 6.

10 *Id.* at 7.

11 *Id.*

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

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

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

B. The District Court's Opinion and Order

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

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

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

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

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

15 *Id.* at *11.

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

17 *Id.* at *11 (citations omitted).

18 *Id.*

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

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

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

II. ANALYSIS

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

A. Analytical Framework for Evaluating Electioneering Communications

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

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

19 *Id.* at *12.

20 *Id.*

21 2007 Supplemental E&J at 5597.

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

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

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

B. Ad-by-Ad Analyses

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

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

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

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

26 52 U.S.C. 30104(f)(4)(A)(i)(I).

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

expected to address *inter alia* the expiring Bush-era tax cuts,[28] federal spending,[29] health care,[30] and energy (including potential cap-and-trade bills).[31] Due to the possibility that party control of Congress could change as a result of the 2010 midterm elections, it was generally believed that there would be attempts to pass controversial legislation before the swearing-in of a new Congress in January 2011.[32] Thus, in the lead-up to the elections, there was great interest in, and much speculation about, the legislative proposals that Congress would take up during the lame-duck session.

It is worth noting that Congress did, in fact, meet in lame-duck session in November and December of 2010.[33] At least one publication deemed the session "the most productive of the

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

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

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

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

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

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

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

1. Bush Tax Cuts

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

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

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

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

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

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

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

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

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

37 *See* Franke-Ruta, *supra* note 34.

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

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

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

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

(e) ***Wallpaper***[38] ($1,600,000):

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

None of the above ads refers to candidacies or the upcoming election, nor do they contain other campaign-related indicia. The only content in the ads that is arguably election-related is the mention of November — the month in which the midterm election took place. However, the word "November" is used only in calls to take specific legislative actions. As mentioned above, a lame-duck session was widely expected to take place in November and, in fact, did begin on November 15, 2010.[39] Thus, the use of "November" in the ads is best understood as a reference to the time period in which the lame-duck session would commence.

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

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

[39] *See* CNN, *Lame Duck Congress Convenes*, Nov. 15, 2010, http://www.cnn.com/2010/POLITICS/11/15/lame.duck.congress/.

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

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

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

2. Federal Spending

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

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

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

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[40] *See, e.g.*, Getting America Back to Work, https://americanactionnetwork.org/category/economy/#axzz4M3KftahJ ("We believe in a job creating economy unfettered from Washington's detrimental regulations and punishing tax code.").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Health Care

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

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

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

[44] *See* Jenks, *supra* note 30.

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

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

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

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

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

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

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

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

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

(6) ***Skype***[45] ($1,430,000):

Person 1: Hey, what's up?

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

Person 1: Are you serious?

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

Person 1: Perlmutter [Titus] voted for it?

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

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

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

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

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

4. Energy

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

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

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

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

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

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

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

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

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

[49] Empowering American-Made Energy, https://americanactionnetwork.org/category/energy/#axzz4M3KftahJ ("America is blessed with abundant energy resources—oil, natural gas, wind, solar, water and more. Along with clean energy technologies, our economy *should be fueled by an all-of-the-above policy—not choked by detrimental Washington regulations and energy* bans.").

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

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

5. Miscellaneous

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

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

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

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

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

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

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

C. Spending Analysis Conclusion

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

III. CONCLUSION

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

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

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

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

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

53 *Buckley*, 424 U.S., at 79.

54 Supplemental E&J at 5597.

55 *Id.* at 5601.

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

57 *Id.* at *7.

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

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

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

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

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

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

Oct. 19, 2016
Date

Matthew S. Petersen
Chairman

October 19, 2016
Date

Lee E. Goodman
Commissioner

October 19, 2016
Date

Caroline C. Hunter
Commissioner