



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 6396
Crossroads Grassroots Policy Strategies)

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

In this matter we must determine if Crossroads Grassroots Policy Strategies ("Crossroads GPS" or "Respondent"), a social welfare organization exempt from taxation under section 501(c)(4) of the Internal Revenue Code that made independent expenditures in connection with federal elections in 2010, is a "political committee" under the Federal Election Campaign Act of 1971, as amended ("the Act"). In considering this question, we must heed the limiting constructions that courts have placed on the definition of "political committee"—circumscriptions premised on respect for the First Amendment rights of citizens to associate and speak on political issues and policy.

The agency's controlling statute and court decisions stretching back nearly forty years properly tailor the applicability of campaign finance laws to protect non-profit issue advocacy groups—both large and small—from burdensome political committee registration and reporting requirements. Such groups are afforded substantial room to discuss the issues they deem salient and even to advocate the election of candidates of their choosing as long as their major purpose is not the nomination or election of federal candidates.¹

Under the Commission's case-by-case approach for determining political committee status, Crossroads GPS'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, and continues to be, issue advocacy and grassroots lobbying and organizing.

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).

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Accordingly, we voted not to find reason to believe that Respondent violated the Act by failing to register and report as a political committee.² We reject the Office of the General Counsel's ("OGC") proposal to expand the universe of communications to be considered, while simultaneously contracting the period for evaluating Respondent's spending, in analyzing its major purpose.

I. Factual Background

Crossroads GPS was established in June 2010 as a social welfare organization exempt from taxation under section 501(c)(4) of the Internal Revenue Code.³ Crossroads GPS's Articles of Incorporation declare such a purpose:

Crossroads GPS "is established primarily to further the common good and general welfare of the citizens of the United States of America by engaging in research, education, and communication efforts regarding policy issues of national importance that will impact America's economy and national security in the years ahead."⁴

The organization's policy objectives also are reflected in its Mission Statement:

[Crossroads GPS's] goal is to provide a clear road map for concerned Americans on the most consequential issues facing our country, empowering them to set the direction of policymaking in Washington rather than being the disenfranchised victims of it.

... Crossroads GPS is dedicated to the belief that most Americans don't support the big-government agenda being forced upon them by Washington – and that most people, if equipped with the facts and a road map for action, will work to restore the core principles and values on which this country was founded.⁵

² MUR 6396 (Crossroads GPS), Certification (Dec. 3, 2013).

³ See *Id.*, Response at 7. See also 2 U.S.C. § 501(c)(4); I.R.C. 501(c)(4) (providing an exemption from taxation for "[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").

⁴ MUR 6396 (Crossroads GPS), Response at 15.

⁵ *Id.* at 15-16.

Crossroads GPS pursued this mission throughout 2010 and 2011 by advancing its “7 in ‘11” National Action Plan, a plan that set forth seven policy goals that Crossroads GPS sought for legislative action. The seven policy goals were:

1. Guarantee Low Tax Rates that Encourage American Economic Growth;
2. Stop Congress’ Reckless Waste of Taxpayer Money;
3. Aggressively Attack the National Debt;
4. Reform Health Care Responsibly, Not Ideologically;
5. End the Bailout Culture;
6. Protect our Borders, Enforce our Laws; [and]
7. Prioritize American Energy Development.⁶

In 2010, the organization raised approximately \$43.6 million and spent about \$39.1 million, most of which was for communications and on grants to other groups conducting social welfare activities.⁷ Of that \$39.1 million, it spent less than half on independent expenditures (\$15,445,049.50) and electioneering communications (\$1,104,783.48).⁸

Crossroads GPS did not disband or wind-down after the 2010 election. Rather, according to the Form 990 it filed with the IRS covering its fiscal year (June 1, 2010-May 31, 2011), Crossroads GPS raised an additional \$5 million and spent an additional \$3 million in the first five months of 2011⁹—none of which was for additional independent expenditures.¹⁰ Its total spending during its fiscal year included the following:

- \$1,012,933 on “research to determine how various demographic groups respond to current national policy issues, what priorities and concerns they have, and which public policy issues they might be the most inclined to take action on through grassroots participation,” as well as to “sponsor in-depth policy research on significant issues, especially those that are currently under-reported but are likely to have a substantial impact on government policymaking in the future”;
- \$15,860,000 on grants to “groups that share similar missions”;

⁶ *Id.* at 16.

⁷ *Id.* at 7.

⁸ *Id.* at 7, 9.

⁹ MUR 6396 (Crossroads GPS), Suppl. Resp. (Apr. 23, 2012), Form 990: Return of Organization Exempt from Income Tax (2010). Respondent argues that its fiscal year spending is the appropriate lens through which to determine its major purpose.

¹⁰ In its subsequent Form 990 filing, covering the final seven months of 2011, Crossroads GPS raised \$28.4 million and spent \$22.3 million. MUR 6396 (Crossroads GPS), Suppl. Resp. (Apr. 23, 2012), Form 990: Return of Organization Exempt from Income Tax (2011).

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- \$8,627,439 to “conduct[] public communications and build[] grassroots to influence policymaking outcomes through grassroots mobilization and advocacy,” the focus of which “may include legislation, budget priorities, regulations, public hearings and investigations, and other policymaking activities. The organization also engages citizens to participate in grassroots advocacy on pending legislative issues through paid advertising, mailings, e-mails, and web-based advocacy tools”;
- \$850,234 on “management and general expenses”; and
- \$529,261 on “fundraising expenses.”¹¹

The record before the Commission also includes Crossroads GPS’s financial activity for the remainder of 2011. Between June 1, 2011 and December 31, 2011, Crossroads GPS raised \$28.4 million and spent \$22.3 million.¹² Combined with its earlier financial activity, Crossroads GPS raised a total of approximately \$78,806,799 and spent a total of \$62,740,514. Of this, \$15,445,049.50 -- or less than 25 percent of Crossroads GPS’s total spending -- was spent on independent expenditures. Over \$47,295,464 -- or 75 percent of Crossroads GPS’s total spending -- was devoted to other activities.

Crossroads GPS is not to be confused with American Crossroads, an entity organized under Section 527 of the Internal Revenue Code and registered with the Commission as an independent expenditure-only political committee. While there appears to be some overlap between the employees of the two organizations, the two have separate and distinct functions. According to Steven Law, president of both American Crossroads and Crossroads GPS,

[T]he genesis . . . from our perspective was that there are a number of things that are priorities for us that seemed to fit more into a 501(c)4 than a 527, such as doing very legislatively focused issue advocacy activity which we will be undertaking in the next few months [and also] building out a very substantial grassroots activist network that we plan to organize both around issues and geographically, that we can deploy along with our advertising strategy.¹³

¹¹ MUR 6396 (Crossroads GPS), Suppl. Resp. (Apr. 23, 2012), Form 990: Return of Organization Exempt from Income Tax (2010). The total for “management and general expenses” excludes the portion of general expenses allocated for “political direct” spending, which appears to be Crossroads GPS’s independent expenditures.

¹² *Id.*, Form 990: Return of Organization Exempt from Income Tax (2011).

¹³ Kenneth P. Vogel, *Crossroads hauls in \$8.5 million in June*, Politico, June 30, 2010. OGC properly did not conclude that Crossroads GPS’s relationship with American Crossroads was relevant to an analysis of Crossroads GPS’s major purpose.

Along with Mr. Law, Crossroads GPS listed Heather Wilson, Sally Vastola, Candida Wolf, Bobby Burchfield, Margee Clancy, Caleb Crosby, and Rob Collins as its officers, directors, and key employees in its two IRS filings for 2010-2011.¹⁴ Jonathan Collegio, while not listed on the IRS filings, was the Communications Director for Crossroads GPS.¹⁵

Significantly, three and a half years after its founding, the organization continues in operation and remains active in national policy debates.

II. Legal Analysis

Under the Act, the term “political committee” means “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.”¹⁶

In response to both vagueness and overbreadth concerns, the Court in *Buckley* limited the scope of the Act’s definition in two ways.¹⁷ First, the Court circumscribed the Act’s 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.”¹⁸ Second, in response to 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.”¹⁹

A. Expenditures In Excess Of \$1,000

Based upon its public filings with the Commission, Crossroads GPS has crossed the statutory threshold for political committee status by making over \$1,000 in

¹⁴ According to Crossroads GPS, Mike Duncan and Karl Rove, often mentioned in articles about American Crossroads and Crossroads GPS, do not hold any position within Crossroads GPS. MUR 6396, Response at 17. Neither is listed in the entity’s Form 990s.

¹⁵ Mr. Collegio is also the spokesman for American Crossroads, which also may have led to some confusion in press reports as to which activities were conducted by American Crossroads and which were conducted by Crossroads GPS.

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

¹⁷ 424 U.S. at 79.

¹⁸ *Id.* at 80 (footnotes omitted). According to the Court, “this 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.

¹⁹ *Id.* at 79.

independent expenditures. Thus, the question is whether Crossroads GPS had as its major purpose the election or nomination of a federal candidate.

B. Major Purpose

As noted above, the Court in *Buckley* blessed the narrowing construction applied by lower courts, holding that “[t]o fulfill the purposes of the Act [“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.”²⁰ The Commission’s 2007 Political Committee Supplemental E&J reiterates the major purpose test set forth in *Buckley*.²¹ However, this major purpose test has not been formalized through legislation or rulemaking.²² Rather, “since its enactment in 1971, the determination of political committee status has taken place on a case-by-case basis.”²³

Buckley fashioned the major purpose limitation specifically to protect policy advocacy organizations from being swept into the Commission’s burdensome regulatory scheme:

Although the phrase, “for the purpose of . . . influencing” an election or nomination, differs from the language used [to define “expenditure”], it shares the same potential for encompassing both issue discussion and advocacy of a political result. 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

²⁰ *Id.* Some courts have held that the *Buckley* major purpose test was the product of statutory interpretation, see *Nat’l Org. for Marriage v. McKee*, 649 F.3d 34, 65 (1st Cir. 2011), *cert. denied* (Feb. 27, 2012); *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010), *cert. denied* (Feb. 22, 2011), and thus would constitute the end-point of the Commission’s statutory authority. See also Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5602 (Feb. 7, 2007) (“2007 Political Committee Supplemental E&J”) (“The major purpose doctrine did not supplant the statutory ‘contribution’ and ‘expenditure’ triggers for political committee status, rather it operates to *limit the reach of the statute* in certain circumstances.”) (emphasis added).

²¹ 2007 Political Committee Supplemental E&J at 5597, 5601 (“[T]he Supreme Court mandated that an additional hurdle was necessary to avoid Constitutional vagueness concerns; only organizations whose ‘major purpose’ is the nomination or election of a Federal candidate can be considered ‘political committees’ under the Act.”) (citing *Buckley*, 424 U.S. at 79).

²² See *id.* at 5597 (“Congress has not materially amended the definition of ‘political committee’ since the enactment of section 431(4)(A) in 1971, nor has Congress at any time since required the Commission to adopt or amend its regulations in this area.”); *Shays v. FEC*, 511 F. Supp. 2d 19, 23 (D.D.C. 2007) (“*Shays II*”) (“This ‘major purpose’ test has never been codified in a regulation, but is applied by the FEC in its enforcement actions against individual organizations.”).

²³ 2007 Political Committee Supplemental E&J at 5596.

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amount of annual "contributions" and "expenditures," and could be interpreted to reach groups engaged purely in issue discussion.²⁴

Later, in *FEC v. Massachusetts Citizens for Life*, the Court reaffirmed the major purpose limitation by holding that a nonprofit corporation's major purpose is not the nomination or election of a federal candidate when its "central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates."²⁵ The Court noted that "[a]ll unincorporated organizations whose major purpose is not campaign activity, but who occasionally make independent expenditures on behalf of candidates, are subject only to these [independent expenditure reporting] regulations."²⁶ It elaborated 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."²⁷

Subsequent courts, in reviewing state laws governing political committees, have set forth similar fact-based tests to determine a group's major purpose. In *New Mexico Youth Organized v. Herrera*, the Tenth Circuit articulated the resulting test as follows: "There are two methods to determine an organization's 'major purpose': (1) examination

²⁴ *Buckley*, 424 U.S. at 79 (footnotes omitted).

²⁵ 479 U.S. 238, 252 n.6 (1986) ("*MCFL*"). 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.

²⁶ *Id.* at 252-253.

²⁷ *Id.* at 262 (citing *Buckley*, 424 U.S. at 79). In addition, the Court has consistently mentioned the burden of political committee status. In *Citizens United*, the Court noted that "PACs are burdensome alternatives" that are "expensive to administer and subject to extensive regulations:"

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."

Citizens United v. FEC, 558 U.S. 310, 337-38 (quoting *McConnell v. FEC*, 540 U.S. 93, 331-332 (2003)) (citations omitted).

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of the organization's central organizational purpose; or (2) 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."²⁸ Under this test, if either prong is satisfied, then the organization's major purpose is the nomination or election of a candidate.²⁹

The Fourth Circuit similarly held in *North Carolina Right to Life, Inc. v. Leake* that:

While 'the major purpose' of an organization may be open to interpretation, it provides potentially regulated entities with sufficient direction to determine if they will be designated as a political committee. Basically, if an organization 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.³⁰

As the court also made clear, 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:

[T]he Court in *Buckley* must have been using "the major purpose" test to identify organizations that had the election or opposition of a candidate as their only or primary goal — this ensured that the burdens facing a political committee largely fell on election-related speech, rather than on protected political speech. . . . If organizations were regulable merely for having the support or opposition of a candidate as "a major purpose," political committee burdens could fall on organizations primarily engaged in speech on political issues unrelated to a particular candidate. This would not only contravene both the spirit and the letter of *Buckley*'s

²⁸ 611 F.3d 669, 678 (10th Cir. 2010) ("*NMYO*"). The political committee statutes and regulations at issue in *NMYO* required disclosure, which the court contrasted with statutes that limit or prohibit speech. Thus, the court undertook an "exacting scrutiny" analysis of those statutes and regulations. *Id.* at 677 (citing *Buckley* and *Doe v. Reed*, 130 S. Ct. 2811 (2010)).

²⁹ The Tenth Circuit's subsequent decision in *Free Speech v. FEC*, 730 F.3d 778 (10th Cir. 2013), which upheld the constitutionality of the Commission's case-by-case approach to the major purpose test, did not mention, let alone call into question or otherwise undermine, the prior decision in *NMYO*. Plaintiffs filed a petition for writ of certiorari with the Supreme Court on December 30, 2013.

³⁰ 525 F.3d 274, 289 (4th Cir. 2008) ("*NCRTL*"). OGC places much weight on *NCRTL*'s use of "supporting or opposing" here. It appears, though, that *NCRTL* used this phrase interchangeably with "election or opposition" and "election-related speech," tying all three phrases to *Buckley*'s "unambiguously campaign-related" phraseology. *Id.* at 288-89. In other parts of the opinion, the court used the phrases "pure political speech" and "electoral advocacy" to describe the same type of speech that could trigger political committee status. *Id.* at 290.

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“unambiguously campaign related” test, but it would also subject a large quantity of ordinary political speech to regulation.³¹

At the Federal level, the nature and scope of the major purpose test was examined in *FEC v. Malenick*,³² and *FEC v. GOPAC, Inc.*³³ In those cases, district courts reviewed the public and non-public statements of, as well as the spending and contributions by, particular groups. More recently, 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, and 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.”³⁴

Although the Commission has been reluctant to establish a specific set of factors to be applied when making a major purpose determination, the 2007 Political Committee Supplemental E&J endorsed reviewing the same type of information that courts had utilized in their major purpose analyses.³⁵ While these are not the *only* factors that may be considered, assessing a group’s central organizational purpose by examining an organization’s public and non-public statements, like those reviewed by district courts in *Malenick* and *GOPAC*,³⁶ and comparing a group’s spending on campaign activities with its spending on activities unrelated to the election or defeat of a specific candidate to assess whether a group’s “independent spending [has] become so extensive that the

³¹ *Id.* at 287-288 (emphasis in the original). Although other Circuits have articulated different versions of the major purpose test, those decisions were reviewing laws that differed significantly from the Act as construed by *Buckley*. For example, the Ninth Circuit reviewed a state statute that imposed political committee status on groups if their “primary or one of the primary purposes” was “to affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions.” *Brumsickle*, 624 F.3d at 1008.

³² 310 F. Supp. 2d 230, 234-236 (D.D.C. 2005).

³³ 917 F. Supp. 851, 859 (D.D.C. 1996).

³⁴ 681 F.3d 544, 556 (4th Cir. 2012) (emphasis in the original); *see also Real Truth About Obama, Inc. v. FEC*, 796 F. Supp. 2d 736, 751 (E.D. Va. 2011), *aff’d*, *RTAA*, 681 F.3d 544 (“The Commission is not charged with deciding whether the election or defeat of a candidate is *one of* an organization’s major purposes. Isolating one or two factors would, by the very nature of the inquiry, make it impossible to determine whether the organization as a whole, operated with *the* major purpose of electing or defeating a candidate.”) (emphasis in the original); *Unity08 v. FEC*, 596 F.3d 861 (D.C. Cir. 2010) (limiting the definition of political committee to organizations which supported or opposed the nomination or election of a clearly identified federal candidate).

³⁵ The court in *RTAA* 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 588.

³⁶ *RTAA* specifically cited *Malenick* and *GOPAC* as “judicial decisions applying the major purpose, which have used the same fact-intensive analysis that the Commission has adopted.” 681 F.3d at 557.

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organization's major purpose may be regarded as campaign activity,"³⁷ are "important considerations when determining whether an organization qualifies as a PAC."³⁸ Thus, it would be an unusual case for a group whose central organizational purpose is *not* the nomination or election of a candidate and whose spending is *not* predominantly campaign-related to otherwise meet the major purpose test on the basis of other factors.³⁹

1. Central Organizational Purpose

To determine a group's purpose, courts have relied primarily on the materials created and utilized by that group. In *Malenick*, the court reviewed the organization's announced goals, brochures, fundraising letters, and express advocacy communications sent to its members, all of which indicated that the major purpose of the group in question was the election of federal candidates.⁴⁰ In *GOPAC*, the court predominantly reviewed letters GOPAC sent and undisputed discussions that GOPAC had with one of its contributors, none of which indicated that the group's major purpose was the nomination or election of federal candidates, but rather the election of state candidates.⁴¹

Important to our analysis here, the court in *GOPAC* rejected reliance on less formal types of proffered evidence. First, the Commission produced an audiotape and transcript of a meeting between two unidentified individuals as evidence that support for GOPAC was also support for a particular Federal candidate.⁴² The court determined that, without more, "such a transcript ... probably does not constitute significantly probative material evidence upon which a trier of fact could decide for the [Commission]."⁴³

Second, the Commission presented a statement from a magazine article in support of its belief that GOPAC "provid[ed] a forum for candidates to appear and solicit

³⁷ *MCFL*, 479 U.S. at 262; *see also* 2007 Political Committee Supplemental E&J ("The Supreme Court has made it clear that an organization can satisfy the major purpose doctrine through sufficiently extensive spending on Federal campaign activity.").

³⁸ *RTAA*, 681 F.3d at 557.

³⁹ We note that neither OGC nor Complainants argued that any factor other than statements or spending support their conclusions that Crossroads GPS has as its major purpose the nomination or election of a federal candidate. In truth, therefore, the disagreement goes to the scope of applicable statements or spending, not to the number of or types of factors involved in the major purpose determination.

⁴⁰ 310 F. Supp. 2d at 235. The court also noted that the record contained the undisputed testimony of the group's primary donor, who stated that it "was the objective of the whole ... concept to get major donors involved so that the ideally conservative candidates could be elected." *Id.*

⁴¹ 917 F. Supp. at 862-65. The court also cited to deposition testimony and GOPAC's 1989-1990 Political Strategy Campaign Plan and Budget. *Id.* at 866.

⁴² *Id.* at 862.

⁴³ *Id.* (internal citations and quotations omitted).

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contributions” and, thus, made in-kind contributions to those candidates.⁴⁴ While also disputing the article itself, the court stated that “a magazine article is not significantly probative nor is it material evidence on which a trier of fact could reasonably find that GOPAC served as a fundraising mechanism for federal candidates.”⁴⁵

Even taking into account the lower standard of proof likely necessary to find reason to believe, it appears that, under *GOPAC*, official statements from a group, such as a group’s organizing documents or statement of purpose, or other materials put forth under the group’s name, including fundraising documents or press releases, are the primary documents by which an entity’s central organizational purpose is to be determined. According to the 2007 Political Committee Supplemental E&J, “the Commission must evaluate the statements of the organization in a fact-intensive inquiry giving due weight to the form and nature of the statements, as well as the speaker’s position within the organization.”⁴⁶ Thus, under *GOPAC* and the 2007 E&J, these statements must be given significant weight and a stray quote or a paraphrase, in the face of all other evidence, will not transform a group into a political committee. A contrary result would make a mockery of the major purpose test and the reasons that the Court in *Buckley* and *MCFL* narrowed the statutory definition of political committee.

* * *

As explained above, Crossroads GPS’s organizational documents, mission statement, IRS tax status, and its primary political activities since its inception have been focused on advancing public policy objectives. For instance, the “7 in ‘11” national action plan has been a dominant emphasis of the organization’s activities. Furthermore, according to its Articles of Incorporation, Crossroads GPS was incorporated “primarily to further the common good and general welfare of the citizens of the United States of America.”⁴⁷ Its Mission Statement further explains that it “is a policy and grassroots advocacy organization that is committed to educating, equipping, and mobilizing millions of American citizens to take action on the critical economic and legislative issues that will shape our nation’s future in the years ahead.”⁴⁸ Its website highlighted policy goals and legislative priorities for 2010 and 2011.

As noted above, Crossroads GPS registered with the IRS under section 501(c)(4) of the Internal Revenue Code of 1986. According to Senator McCain, the principal Senate sponsor of BCRA, “under existing tax laws, Section 501(c) groups . . . cannot have a major purpose to influence federal elections, and therefore are not required to

⁴⁴ *Id.* at 164.

⁴⁵ *Id.*

⁴⁶ 72 Fed. Reg. at 5601.

⁴⁷ *Id.*, Resp. at 15 (quoting Crossroads GPS’s Article of Incorporation).

⁴⁸ *Id.* (quoting Mission Statement of Crossroads GPS).

register as federal political committees, as long as they comply with their tax law requirements.”⁴⁹ Thus, although tax status is not dispositive, it is certainly relevant in this context, and, along with Respondent’s organizational statement, constitutes evidence against finding that Crossroads GPS was a political committee. As Public Citizen, the main complainant in this matter, has previously noted, “a legitimate 501(c) organization should not have to fear that it will become a political committee simply by engaging in political issue-related criticisms of public officials.”⁵⁰

While OGC apparently did conduct research into how Crossroads GPS was described in the media and what people may or may not have been affiliated with or employed by Crossroads GPS said about the group, neither that extra-curricular research nor the few articles included in the Complaint provide sufficient evidence to undermine Crossroads GPS’s official statements of purpose. As noted above, stray quotes in newspaper articles cannot undermine the stated purpose of a group. Moreover, as shown below, the Respondent has adequately explained that nothing in those articles transform Crossroads GPS into a political committee.

As Crossroads GPS notes, many of the articles conflate it with American Crossroads, a separate organization.⁵¹ The activities of American Crossroads may not be imputed to Crossroads GPS for the purposes of assessing Crossroads GPS’s major organizing purpose. For that reason, for example, one cannot impute the statements of a

⁴⁹ 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”).

⁵⁰ Comment of Public Citizen on Reg. 2003-07 (Political Committee Status) at 10 (Apr. 5, 2004). Public Citizen further noted 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 by current federal election law, as amended by [McNin-Feingold].” *Id.* at 2.

⁵¹ MUR 6396 (Crossroads GPS), 2nd Suppl. Resp. at 2, 4, 9. The IRS allows non-profit organizations to affiliate with other non-profit organizations in order to achieve complimentary goals while maintaining compliance with their respective tax exempt limitations. Ward L. Thomas & Judith E. Kindell, *Affiliations Among Political, Lobbying and Educational Organizations*, Exempt Organizations Continuing Professional Education Technical Instruction Program for FY 2000 (July 1999), at 255-65, available at <http://www.irs.gov/pub/irs-tege/eotopics00.pdf> (last visited Jan. 7, 2014). The IRS countenances co-location and office sharing, employee sharing, and coordination between affiliated organizations so long as each organization maintains separate finances, funds permissible activities, and pays its fair share of overhead. *Id.* Many charities (501(c)(3)), social welfare organizations (501(c)(4)), business leagues (501(c)(6)), and electoral organizations (527) affiliate with each other while maintaining their corporate and organizational distinctiveness. Thus, Crossroads GPS’s relationship (including employee sharing) with a section 527 political organization, American Crossroads, does not make the two organizations the same.

board member of American Crossroads to Crossroads GPS, an entity for which he is not a board member.⁵²

In addition, Crossroads GPS points out numerous instances where a newspaper article misrepresents the position of or a statement by a representative of Crossroads GPS. For example, one article states that “American Crossroads and Crossroads GPS disclosed in an annual report sent to donors this week that they spent 96% of the money raised on campaigns.”⁵³ According to Respondent, “[t]he organization’s supporters were informed that over 96% of the organizations’ funds had been spent on activities *other than* fundraising expenses and administrative/overhead costs.”⁵⁴ Respondent correctly notes that “[t]his certainly does not mean that all other spending was ‘on campaigns.’”⁵⁵

In short, nothing in Crossroads GPS’s official documents—including its articles of incorporation, mission statement, and website—indicates that its central organizational purpose was the nomination or election of a federal candidate. The various articles discussing American Crossroads and Crossroads GPS do not undermine these documents, especially in light of Crossroads GPS’s explanations. Therefore, Crossroads GPS clearly did not trip the central organizational purpose prong (and OGC does not contend otherwise).

2. Extensive Independent Spending on Behalf of Candidates

Reviewing an entity’s organizational documents and official statements does not end the inquiry into major purpose, however. An examination of a group’s major purpose is necessarily an after-the-fact exercise wherein the Commission must determine whether a group properly refrained from registering and reporting as a political committee. Thus, the Commission must determine whether a group’s *ex ante* subjective determination of its major purpose is established *ex post* by its objectively verifiable statements and spending. In *MCFL*, the Supreme Court noted 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.”⁵⁶

⁵² MUR 6396 (Crossroads GPS), 2nd Suppl. Resp. at 4. *See also* Resp. at 17. One also cannot automatically assume that a statement made by a person involved in both groups was on behalf of Crossroads GPS and not American Crossroads. *See id.* 2nd Suppl. Resp. at 4, 8.

⁵³ Brody Mullins, *2012 Election Spending Race Heats Up*, Wall Street Journal, March 1, 2011.

⁵⁴ MUR 6396 (Crossroads GPS), 2nd Suppl. Resp. at 9 (emphasis in original).

⁵⁵ *Id.*

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

i. The Relevant Spending May Not Encompass Non-Electoral Communications

To determine whether “independent spending” has “become so extensive,” the Commission must compare a group’s spending on express advocacy against its spending on activities unrelated to campaigns.⁵⁷ Courts that have examined spending ratios in political committee cases have focused on express advocacy spending. As noted above, in *NMYO*, the circuit court conducted its major purpose analysis in part by comparing spending on express advocacy or contributions to candidates with total spending to determine whether a preponderance of the latter was spent on the former. In doing so, it relied on both *MCFL* and *Colorado Right to Life Comm., Inc. v. Coffman*,⁵⁸ and held that not only was there no preponderance of spending on express advocacy; in fact, there was no indication of any spending on express advocacy at all.

Likewise, the court in *GOPAC* 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: “[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.”⁵⁹ And in *Malenick*, the court only relied on express advocacy communications, rather than communications that merely mentioned a candidate, in concluding that the major purpose test was met.⁶⁰

Legislative history indicates that Congress did not contemplate that engaging in electioneering communications could trigger political committee status. Senator Jeffords, one of the leading sponsors of the electioneering communication provisions, stated that the provision “will not require such groups [such as National Right to Life Committee or the Sierra Club] to create a PAC or another separate entity.”⁶¹ But even assuming

⁵⁷ See *Buckley*, 424 U.S. at 79 (“To fulfill the purposes of the Act they [the words ‘political committees’] 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. Expenditures of candidates and of ‘political committees’ so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.”) & 80 (noting that by construing “expenditure” “to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate” ensures that the term only captures “spending that is unambiguously related to the campaign of a particular federal candidate.”).

⁵⁸ 498 F.3d 1137, 1152 (10th Cir. 2007) (“*CRLC*”).

⁵⁹ 917 F. Supp. at 863-64.

⁶⁰ 310 F. Supp. 2d at 235 (noting the 60 fax alerts that the group sent in which it “advocated for the election of specific federal candidates”).

⁶¹ 147 Cong. Rec. S2813 (Mar. 27, 2001). Senator Jeffords explained that Congress did not intend to require groups that run electioneering communications to register as PACs:

arguendo that non-express advocacy communications could be considered when determining political committee status, the outer limit would have to be drawn at electioneering communications that are the functional equivalent of express advocacy, as that term was defined in *FEC v. Wisconsin Right to Life*⁶² and applied in *Citizens United v. FEC*.⁶³

* * *

Crossroads GPS was founded on June 1, 2010.⁶⁴ During its first fiscal year, from its founding on June 1, 2010 to May 31, 2011, Crossroads GPS reported \$42,344,884 in “total expenses.”⁶⁵ During this same period, Crossroads GPS filed reports with the Commission showing \$15,445,039 in independent expenditures.⁶⁶ Thus, under *NMYO*, *CRLC*, *Malenick*, and *GOPAC*, Crossroads GPS spent \$15.4 million on communications that are properly considered to be evidence that an organization has as its major purpose the nomination or election of a federal candidate. Accordingly, independent expenditures

Now let me explain what the Snowe-Jeffords provision will not do: The Snowe-Jeffords provision will not prohibit groups like the National Right to Life Committee or the Sierra Club from disseminating electioneering communications;

It will not prohibit such groups from accepting corporate or labor funds;

It will not require such groups to create a PAC or another separate entity;

It will not bar or require disclosure of communications by print media, direct mail, or other non-broadcast media;

It will not require the invasive disclosure of donors; and

Finally, it will not affect the ability of any organization to urge grassroots contacts with lawmakers on upcoming votes.

Id.

⁶² 551 U.S. 449, 469-70 (2007) (“*WRTL*”) (“[A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”).

⁶³ 558 U.S. at 324-326. Though the Court’s decision in *Citizens United* lessened the importance of the functional equivalent of express advocacy concept, it still remains a legally relevant term in Commission regulations. For instance, a communication that is the functional equivalent of express advocacy meets the content prong of the coordinated communications test. 11 C.F.R. § 109.21(c)(5).

⁶⁴ MUR 6396 (Crossroads GPS), Response at 7.

⁶⁵ *Id.*, Suppl. Resp. (Apr. 23, 2012), Form 990: Return of Organization Exempt from Income Tax (2010).

⁶⁶ See 2010 Committee Information: Crossroads Grassroots Policy Strategy, available at <http://www.fec.gov/fecviewer/CandidateCommitteeDetail.do>. Crossroads GPS avers, and Commission records confirm, that “Crossroads GPS has not engaged in any express advocacy during 2011.” MUR 6396 (Crossroads GPS), Supl. Resp. (Sept. 9, 2011) at 1. There is a slight discrepancy in the amount of independent expenditures reported by Crossroads GPS in 2010. Crossroads GPS’s filings with the FEC indicate that it spent \$15,445,039, however, its response asserts that it actually spent \$15,749,171. See MUR 6396 (Crossroads GPS), Resp. at 13. We agree with OGC that “the discrepancy is not material.” *Id.*, First General Counsel’s Report at 8 n.15.

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accounted for 36 percent of Crossroads GPS's total spending, well below the threshold for spending necessary to meet the major purpose test. Moreover, if one considers Crossroads GPS's expenditures for all of 2010 and 2011 (data also before the Commission), Crossroads GPS spent \$62,740,514, and only 25 percent, or \$15,445,050, on independent expenditures.

OGC proposed an alternative legal theory: "[i]n past enforcement actions, the Commission has determined that funds spent on communications that support or oppose a clearly identified federal candidate, but do not contain express advocacy, should be considered in determining whether that group has federal campaign activity as its major purpose."⁶⁷ Thus, in contrast to the aforementioned court cases that limit the scope of communications under consideration to express advocacy, OGC looked to "Crossroads GPS's proportion of spending *related to federal campaign activity*" to assess its major purpose⁶⁸. And, thus, added to the amount spent by Crossroads GPS on independent expenditures "approximately \$5.4 million [that Crossroads GPS spent] in 2010 on communications *that do not contain express advocacy but criticize or oppose* a clearly identified federal candidate."⁶⁹

This approach is problematic for two reasons. First, it would undermine the function of the major purpose limitation as well as the Supreme Court's conclusions, in *Buckley* and *MCFL*, that issue advocacy organizations may not be regulated as political committees. Second, it would count spending wholly outside of the Commission's regulatory jurisdiction for the explicit purpose of asserting that very regulatory jurisdiction over the organization.

Again, the "major purpose" test is designed to ensure that groups whose major purpose is advocating issues related to public policy are not regulated as political committees. In *Buckley*, the Court was concerned that "[t]he general requirement that 'political committees' and candidates disclose their expenditures could raise . . . 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."⁷⁰ In order to prevent overreaching regulation of groups and individuals engaged predominantly in issue discussions, the Court in *Buckley* adopted the major purpose limitation for political committee status, and held that reporting for individuals and groups who were not candidates or political committees was limited to "only funds used for communications that expressly advocate the election or defeat of a clearly identified federal candidate."⁷¹ According to the Court, "[t]his reading

⁶⁷ MUR 6396 (Crossroads GPS), First General Counsel's Report at 17.

⁶⁸ *Id.* at 16-17 (emphasis added).

⁶⁹ *Id.* at 17 (emphasis added). OGC does not argue, nor could it, that these additional communications were the functional equivalent of express advocacy.

⁷⁰ 424 U.S. at 79 (footnotes omitted).

⁷¹ *Id.* at 80.

is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate."⁷²

Buckley limited the definition of "expenditure" to ensure that, "[s]o long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views."⁷³ If political committee status could be imposed on groups that "eschew expenditures," it is unclear how they would be "free to spend as much as they want to promote" any candidate. Thus, in light of the reasoning underlying the narrowing of "expenditure" and "political committee," and without any judicial holding to the contrary, the Commission should not consider more than express advocacy communications when examining a group's spending as part of its major purpose analysis.⁷⁴

Providing no case law in support, and with no acknowledgment of *Malenick* or *GOPAC* and scant acknowledgment of *NMYO* and *CRLC*, OGC relies, instead, on past Commission MURs from 2004 to 2007 that relied on non-express advocacy to find political committee status.⁷⁵ But MURs do not trump consistent judicial application of the law. Nowhere does OGC cite to any court that has taken non-express advocacy communications as evidence of political committee status. Nor does OGC acknowledge that *NMYO* was decided in 2010, three years after the matters upon which OGC solely relies were concluded. Thus, to the extent that prior MURs do provide precedential

⁷² *Id.*

⁷³ *Id.* at 45.

⁷⁴ As noted by Public Citizen, if major purpose is met "whenever an organization spends a certain amount of money . . . on communications that 'attack' or 'support' a candidate, precisely what the *Buckley* Court feared would have come to pass: An organization may become subject to regulation as a 'political committee' simply by engaging in political issue-related criticisms of public officials, and communications that would not otherwise have qualified as covered expenditures *will become covered by a process of bootstrapping*." Comment of Public Citizen on Reg. 2003-07 at 10 (emphasis added).

⁷⁵ MUR 6396 (Crossroads GPS), First General Counsel's Report at 17-19. As noted earlier, our conclusion in this matter follows applicable case law and the 2007 Political Committee Status Supplemental E&J. Even if the legal foundation for the MURs cited in the E&J had not been undermined by subsequent case law, looking to that document for what slim guidance it does provide as to prior MURs would not lead a group like Crossroads GPS to conclude its major purpose was campaign activity. Several of the MURs involved organizations deemed political committees with a substantially higher percentage of "federal campaign activity" than present here. For example, even accepting OGC's characterizations of the activity in the prior MURs, one group deemed a political committee had over "91% of its reported disbursements" spent on "advertisements directed to Presidential battleground states and direct mail attacking or expressly advocating the defeat of a Presidential candidate." 2007 Political Committee Supplemental E&J at 5605. Another group "spent over 68% of its total 2004 disbursements on television advertisements opposing a Federal candidate in Presidential battleground states." *Id.* For a third group, 75 percent of its political budget "was intended for the Presidential election." *Id.* In this matter, however, my calculation results in such a high percentage, and Crossroads GPS, consulting the E&J, could reasonably conclude that its major purpose was not federal campaign activity, even with OGC's broader view of "federal campaign activity."

authority, they have been at least called into question, if not undermined altogether, by the Tenth Circuit's decision.⁷⁶

In addition to being inconsistent with *Buckley*'s limiting construction, OGC's interpretation would extend Commission jurisdiction over communications it otherwise lacks the statutory authority to regulate. The *WRTL* Court determined that merely mentioning a Federal candidate in a critical communication does not necessarily make that communication electoral in nature.⁷⁷ In fact, the Court held that the electioneering communications at issue in *WRTL* were issue advertisements and rejected the following arguments suggesting that they could be the functional equivalent of express advocacy: (1) that an appeal to contact a candidate is the same as an appeal to elect or defeat that candidate; (2) that mentioning a candidate in relation to an issue is a more effective type of electioneering than express advocacy; (3) that the group running the communication had in the past actively opposed the candidate being referenced; (4) that the advertisements at issue ran in close proximity to elections, rather than near actual legislative votes on issues; (5) that advertisements aired when the Congress was not in session; and (6) that the advertisements cross-referenced a website that contained express advocacy.⁷⁸

Therefore, it is unclear why paying for communications containing such characteristics but not express advocacy would be relevant for determining political committee status. Otherwise, a group that runs only communications with these characteristics but do not contain express advocacy—spending that is, by definition, not campaign related—could nevertheless become a political committee, whose spending is, as *Buckley* notes, “by definition, campaign related,” merely by spending \$1,001 to distribute an independent expenditure or receiving \$1,001 in contributions. Thus, using such communications to determine a group's major purpose could result in the Commission doing exactly what *Buckley* warned against – interpreting the definition of political committee “to reach groups engaged purely in issue discussion.”⁷⁹

OGC argues, notwithstanding abundant case law to the contrary, that express advocacy only applies to the definition of “expenditure” and “independent expenditure,” and not to the major purpose test. Thus, according to OGC, it is appropriate to consider spending on communications that “support,” “praise,” “oppose,” or “criticize” a federal

⁷⁶ As noted above, the Tenth Circuit's subsequent decision in *Free Speech*, which upheld the constitutionality of the Commission's major purpose test, did not upset the prior decision in *NMYO*.

⁷⁷ 551 U.S. at 470-73.

⁷⁸ *Id.*

⁷⁹ 424 U.S. at 79.

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candidate as evidence that a group's major purpose is the nomination or election of a candidate.⁸⁰ But this misunderstands *Buckley* and was rejected in *GOPAC*. There,

The Commission argue[d] essentially that the constitutional considerations addressed in *Buckley* concern "only groups primarily devoted to issue advocacy or other non-electoral pursuits." . . . Under the Commission's interpretation, an organization need not support the "nomination or election of a candidate," but need only engage in "partisan politics" or "electoral activity." The Commission defends this interpretation on the ground that a "loophole" would be opened if an organization could make unreported expenditures for partisan political purposes, so long as they were not traceable to a federal candidate.⁸¹

The court rejected this argument, reasoning that "[o]n its own terms, the Commission's plea for a broadening of the *Buckley* concept cannot prevail under the existing authority applicable to the facts of this case."⁸² This was because, in part, "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."⁸³

Though *Buckley* did not construe "expenditure" to mean "express advocacy" with respect to groups that are already political committees, it does not follow that the "express advocacy" construction is not, or should not be, part of the major purpose test in order to determine whether a group is a political committee in the first instance. In *Buckley*, the Court was concerned that a group would qualify as a political committee simply because it made \$1,001 worth of expenditures or contributions. Therefore, it held that only those groups whose major purpose was the nomination or election of a Federal candidate qualified as a political committee. While the Court did state that political committees "fall within the core area sought to be addressed by Congress," it approved the "major purpose" limitation because groups engaged in issue advocacy did not fall into that same core area.⁸⁴ And the "major purpose" test is designed to ensure that issue groups would not be considered political committees. Thus, to argue that more than express advocacy (and perhaps the functional equivalent of express advocacy) may be

⁸⁰ Note that even Public Citizen has rejected such a reading of the law. It argued in comments during the 2003 political committee rulemaking that finding major purpose if "more than 50% of an entity's budget [was] spent on activities that promote, supports, oppose or attack federal candidates ... [would be] far too sweeping and could unjustly capture legitimate advocacy organizations." Comment of Public Citizen on Reg. 2003-07 at 12.

⁸¹ 917 F. Supp. at 859.

⁸² *Id.* at 861.

⁸³ *Id.*

⁸⁴ 424 U.S. at 79-80.

analyzed when determining a group's major purpose ignores the reasoning behind narrowing the definition of "expenditure."

In sum, by including in its comparative analysis of Crossroads GPS's spending any communication that is "related to federal campaign activity"—regardless of whether such communication contains express advocacy or even falls within the Commission's regulatory authority—OGC increased the numerator. However, as demonstrated above, this approach is not supported by the relevant case law and is, in fact, contrary to it.

ii. A Myopic Focus on Calendar-Year Spending is Improper

In addition to attempting to expand the universe of relevant political communications that count toward determining Crossroad GPS's major purpose, OGC also artificially narrowed the relevant time period for comparing Crossroads GPS's spending ratios to the 2010 calendar year. That very brief snapshot of time would decrease the denominator. Only by increasing the numerator (noted above) and decreasing the denominator can OGC claim that a majority of Crossroads GPS's spending was electoral in nature and, thus, triggered political committee status.

But determining an organization's major purpose via a narrow snapshot of time—one calendar year—in contravention to a group's organizational model 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 purpose.⁸⁵ 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 in *Buckley* and its progeny.⁸⁶

Assessing the major purpose limitation through the myopic and artificial window of a single calendar year would inevitably subject many issue-based organizations to the burdens of political committee status. As stated above, 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. Limiting ourselves to short time periods or time periods other than

⁸⁵ See, e.g., 2007 Political Committee Status 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.").

⁸⁶ 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.

those utilized by the group in question provides an incomplete and distorted picture of that group's major purpose.⁸⁷

For example, consider a group that exists for eight years, spending one million dollars per year. For four years, it spends over 90 percent of its resources on issue advocacy and 10 percent on express advocacy. In year five, the organization's foremost issue becomes highly visible in a federal election. As a result, it devotes 90 percent of its resources that year to expressly advocate the election or defeat of clearly identified federal candidates and only 10 percent on issue advocacy. In years six, seven, and eight, it returns to spending between 90 percent of their funds on issue advocacy and 10 percent on express advocacy. Under OGC's approach, this organization would be a federal political committee in its fifth year of operation, and would remain a federal political committee every year thereafter, despite the fact that over 78 percent of its total resources, and 90 percent of its resources in seven of its eight years of existence, were spent on issue advocacy. Denning this organization's major purpose to be nominating and electing federal candidates would be an absurd finding.

Another example would be 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. 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 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.

In both examples, a group concerned about federal issues would focus some of its time and spending on federal elections in the months preceding a federal election. As one reputable commentator has stated, "[u]nsurprisingly, most citizens begin to focus on and become engaged in political debate once election day approaches."⁸⁸ Thus, linking issues to candidates and elections is quite common. But if a group continues to be active past

⁸⁷ 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 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 examination of how an organization decided to organize itself for tax purposes (i.e., on a calendar year versus fiscal year basis). 511 F. Supp. 2d at 31.

⁸⁸ 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).

that election date, such spending is also evidence of its true purpose.⁸⁹ The Commission must take that reality into account. Anything less is contrived and does not yield a true or accurate understanding of the group's *raison d'être*.

Worse still, if the groups in the examples above were branded as political committees, they 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."⁹⁰ Thus, in order to stop filing burdensome reports, a committee would have to surrender its political rights and agree to not to make *any* independent expenditures, regardless of the organization's major purpose.⁹¹

In prior enforcement matters, the Commission routinely looked at activity beyond a single calendar year.⁹² For example, in MUR 5751 (The Leadership Forum), 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.⁹³ In MUR 5753 (League of Conservation Voters 527, *et al.*), 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

⁸⁹ 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 can look at and evaluate actual activity undertaken in the next calendar year.

⁹⁰ 11 C.F.R. § 102.3(a).

⁹¹ 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.

⁹² As has been noted in other contexts, the Commission's past political committee status MURs are assailable on other grounds. See MUR 6081 (American Issues Project), Statement of Vice Chairman Donald F. McGahn II, Commissioner Caroline C. Hunter, and Commissioner Matthew S. Petersen at 7, n.21. From a due process perspective, however, they provide notice to the public as to the scope of activity the Commission considers when conducting a case-by-case political committee status analysis. And, it is notable that, even then, the Commission did not apply the calendar-year approach now advanced by OGC.

⁹³ MUR 5751 (The Leadership Forum), General Counsel's Report #2 at 3.

purpose.⁹⁴ Likewise, in MUR 5754 (MoveOn.org Voter Fund), 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.⁹⁵ Similarly, in both *GOPAC*,⁹⁶ and *Malenick*,⁹⁷ courts looked beyond a single calendar year when analyzing major purpose.

OGC provides no explanation for how such prior enforcement actions and court decisions are consistent with its proposed new calendar-year standard.⁹⁸ Moreover, the Commission has made no public statement, either before or after Crossroads GPS acted, that would put Crossroads GPS on notice that it would be judged based solely upon its activities in calendar year 2010. The proposed rule sprung into existence in the second First General Counsel’s Report issued by OGC in this matter. Accordingly, even assuming *arguendo* that a single calendar-year approach is the proper one to apply, due process would preclude the Commission from seeking to enact a new legal norm now, without prior notice, behind closed doors in a confidential enforcement action and apply it retroactively.⁹⁹

⁹⁴ MUR 5753 (League of Conservation Voters 527, *et al.*), Factual and Legal Analysis at 11 & 18 (emphasis added). The legal underpinnings of this MUR have been undermined for other reasons by *EMILY’s List v. FEC*, 581 F.3d 1, 12-14 (D.C. Cir. 2009).

⁹⁵ MUR 5754 (MoveOn.org Voter Fund), Factual and Legal Analysis at 12 & 13 (emphasis added). The legal underpinnings of this MUR have been subsequently undermined by *EMILY’s List*, 581 F.3d at 12-14.

⁹⁶ 917 F. Supp. at 862-66 (reviewing, among other things, GOPAC’s 1989-1990 Political Strategy Campaign Plan and Budget) (emphasis added).

⁹⁷ 310 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).

⁹⁸ Indeed, given the Commission’s prior announcement that the public has, through other enforcement actions, been given “notice of the state of the law regarding . . . the major purpose doctrine,” 2007 Political Committee E&J at 5606, it is unclear how the Commission could, consistent with the Administrative Procedure Act, adopt OGC’s proposed calendar-year approach without first engaging in notice and comment rulemaking.

⁹⁹ See generally *FCC v. Fox Television Station*, 132 S. Ct. 2307, 2315-2316, 2317 (2012) (quoting *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009)) (“In the context of a change in policy . . . an agency, in the ordinary course, should acknowledge that it is in fact changing its position and ‘show that there are good reasons for the new policy.’ . . . A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.”).

iii. Both Of OGC's Interpretations are Necessary to Support Its Conclusion

As shown above, in order to reach the conclusion that Crossroads GPS's major purpose was the nomination or election of a federal candidate, OGC had to expand the universe of communications that could be considered, while simultaneously contracting the time period for evaluating Crossroads GPS's spending. Without one of these approaches, the other standing alone would be inadequate to show that Crossroads GPS's spending was sufficiently extensive.

To reiterate, Crossroads GPS was founded six months before the 2010 election and was active during that election cycle. But it continued spending on activities into 2011, just as it claimed it had intended. It makes little sense to blind ourselves to such spending.

Respondent asserts that it managed its affairs and programs around its fiscal year, June 1, 2010 through May 31, 2011.¹⁰⁰ Crossroads GPS's 990 form indicates that it spent \$42.3 million, of which \$15.4 million was spent on independent expenditures.¹⁰¹ Thus, only 36 percent of its total spending constitutes campaign spending. The record also includes Crossroads GPS's spending for the entire period June 1, 2010 through December 31, 2011. Considering that time frame, Crossroads GPS devoted only 25 percent of its spending to relevant expenditures. Thus, in no way can that be considered "so extensive that the organization's major purpose may be regarded as campaign activity."¹⁰² By contrast, only with a narrow view of total spending and an expansive view of campaign spending can OGC conjure a scenario where Crossroads GPS's campaign spending exceeds 50 percent of its total spending. We cannot agree that such an easily manipulable standard is appropriate. For example, even if calendar year was the proper basis for calculation, Crossroads GPS's spending still could not be considered excessive. From June 1, 2010 through December 31, 2010, Crossroads GPS spent \$39.1 million, of which \$15.4 million paid for independent expenditures. Thus, only 39 percent of its spending was for independent expenditures.

¹⁰⁰ See MUR 6396 (Crossroads GPS), Response at 2.

¹⁰¹ As noted above, it is this window of time – its fiscal year – that Respondent asserts to be the relevant time frame for determining its major purpose. We do not believe that fiscal year is the required time frame in all analyses any more than we believe calendar year is. Rather, the facts in the case before us will determine the appropriate time frame for analysis. Often one can assess an organization's true major purpose only by reference to its entire history. In other instances, shorter time frames, such as an election cycle, might suffice. For example, in MUR 6081 (American Issues Project), the controlling block of Commissioners looked at four years of an organization's history (2007-2010). See MUR 6081 (American Issues Project), Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen.

¹⁰² *MCFL*, 479 U.S. at 262 (citing *Buckley*, 424 U.S. at 79).

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And even if one were also to consider all electioneering communication spending as indicative of one's major purpose,¹⁰³ while also limiting the scope of review to calendar year spending, Crossroads GPS still would not be considered a political committee. In addition to the \$15.4 million spent on independent expenditures, Crossroads GPS also spent \$1.1 million on electioneering communications, for a total of \$16.5 million. That is still only 42 percent of total spending -- hardly "so extensive."

And finally, if one were to consider the full amount spent during the fiscal year, rather than calendar year, which was \$42.3 million, the \$20.8 million that OGC proposes to be generalized federal campaign activity (independent expenditures, electioneering communications, and communications that merely criticize or oppose a federal candidate) would only constitute 49 percent of Crossroads GPS spending. As noted above, even 49 percent of total spending is significantly lower than the percentages found in the MURs summarized in the 2007 Political Committee Supplemental E&J, when the Commission determined that political committee status existed.¹⁰⁴

Only by manipulating a broad numerator and a narrow denominator could the 50 percent threshold be crossed. Given the facts in this case, as well as case law stretching back three decades, we do not agree that such mathematics or methods are appropriate, let alone permitted.

For all the reasons stated above, Crossroads GPS cannot be considered a political committee based on its spending.

III. Procedural Background

Finally, we wish to explain why it took over three years to resolve this MUR.¹⁰⁵ This matter arose from two complaints filed with the Commission in the fall of 2010, one on September 2, 2010, and one on October 14, 2010, that alleged *inter alia* that Respondents failed to file as a political committee with the Commission.¹⁰⁶ Respondents

¹⁰³ As stated in the text accompanying notes 61 and 62, the only electioneering communication spending that might potentially be legitimate for the Commission to consider in determining political committee status would be that for communications that are the functional equivalent of express advocacy.

¹⁰⁴ See *supra* n. 75 and accompanying text. And remember, as noted therein, in those cases, the time frame at issue was significantly longer than a mere calendar year.

¹⁰⁵ Chairman Goodman did not serve on the Commission during the time of the procedural actions discussed here.

¹⁰⁶ MUR 6396 (Crossroads GPS), Complaint 1 at 5; Complaint 2 at 1. The Complaint filed on September 2, 2010, made the bare allegation that "[i]f the ad [at issue] was coordinated with [a U.S. Senate candidate], Crossroads GPS would have made an expenditure well in excess of \$1,000 and, thus, would have been required to register as a political committee." *Id.*, Complaint 1 at 5. Complaint 2 included additional legal argument and factual representations. Accordingly, when this statement refers to "the Complaint," it is referring to the document filed on October 14, 2010.

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filed their initial response on December 23, 2010.¹⁰⁷ OGC then prepared its first First General Counsel's Report, which was circulated to the Commission on June 22, 2011.¹⁰⁸ Before the Commission was scheduled to consider the matter in an Executive Session on September 27, 2011, Respondents filed a supplemental response with the Commission detailing its activities in 2011 and arguing that this information further rebutted the allegation that its major purpose was the nomination, election, or defeat of federal candidates.¹⁰⁹ OGC circulated a memo to the Commission stating that the supplemental response did not change its recommendation, did not require any edits to its report, and that it was still prepared to discuss the matter at the scheduled Executive Session.¹¹⁰

The discussion during that meeting apparently caused OGC to reconsider its legal theories regarding this matter. Recognizing the need to address the questions raised, the General Counsel requested permission to withdraw the original First General Counsel's Report.¹¹¹ On November 21, 2012, over a year after that Executive Session, OGC circulated its second First General Counsel's Report.¹¹² The second First General Counsel's Report recommended an entirely new rule for determining political committee status—the "calendar year" rule. In addition to the significant problems with applying this rule discussed above, we have routinely objected to creating new legal norms in an enforcement context to be applied retroactively upon respondents because doing so would raise serious due process concerns.¹¹³ The case-by-case method of determining

¹⁰⁷ *Id.*, Response dated December 22, 2010.

¹⁰⁸ *Id.*, First General Counsel's Report dated June 22, 2011.

¹⁰⁹ *Id.*, Supplemental Response dated September 9, 2011.

¹¹⁰ *Id.*, Memo to the Commission dated September 23, 2011.

¹¹¹ It has been suggested that when a First General Counsel's Report is withdrawn and resubmitted, it is as if that prior document never existed and will not be placed on the public record, even if it has been voted on by the Commission. We believe this frustrates the purpose behind the Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record. 74 Fed. Reg. 66132 (Dec. 14, 2009) ("In the interest in of promoting transparency, the Commission is resuming the practice of placing *all* First General Counsel's Reports on the public record, whether or not the recommendation in these First General Counsel's Reports are adopted by the Commission) (emphasis added). Since the first First General Counsel's Report in this matter, dated June 22, 2011, informed our decision and in the interest of assuring compliance with the Policy, we are attaching that First General Counsel's Report and the accompanying proposed Factual and Legal Analysis.

¹¹² MUR 6396 (Crossroads GPS), First General Counsel's Report dated November 21, 2012. In the interim, Crossroads GPS filed two additional supplemental responses. The first was filed on October 10, 2011, in response to a series of newspaper articles discovered when "the Office of the General Counsel (OGC) conducted a broad investigation into [Crossroads GPS's] activities prior to the Commission making a formal reason to believe finding." MUR 6936 (Crossroads GPS), Response dated October 10, 2011 at 2. The second additional supplemental response was dated April 23, 2012, and included Crossroads GPS's IRS Form 990s for 2010 and 2011. MUR 6396 (Crossroads GPS), Suppl. Resp. (Apr. 23, 2012).

¹¹³ See, e.g., MUR 5541 (The November Fund), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn at 2 ("[U]sing enforcement as a

political committee status does not allow for the creation of new legal rules on a case-by-case basis; rather, the Commission must apply a consistent legal standard while fleshing out the relevant facts on a case-by-case basis. That is, the Commission need not provide an exhaustive list of which factors will cause a committee to meet the major purpose test, but it must provide a comprehensive legal framework that does not morph from case to case. Creating the "calendar year" rule within an enforcement context is inappropriate in part because it is not one that has ever been applied before.

The legal machinations only explain part of the delay. There were two Executive Sessions remaining after the circulation of the second First General Counsel's Report in 2012. The first, held on November 28, 2012, was only seven days later, and the second was an Executive Session dedicated exclusively to over forty items relating to a subset of internally generated matters concerning the same issue.

Throughout 2013, various Commissioners formally requested that the Chair place the matter on an Executive Session agenda. Such requests were refused, and without explanation. It was not until new Commissioners had been confirmed that this item was finally placed on an Executive Session agenda, in December 2013.¹¹⁴

The determination over whether an entity is a political committee is a fundamental part of the Commission's jurisdiction over the Act, and a topic that the agency and courts have been considering for decades. In particular, the applicability of political committee status of groups who file as social welfare groups under 501(c)(4) of the Internal Revenue Code has been widely debated in recent years.¹¹⁵ While the Commission should have been resolving this and other like cases, and providing continuing guidance as to which activities may implicate political committee status, the IRS issued a Notice of Proposed Rulemaking that could restrict the activities of Respondent and other similar tax-exempt entities.¹¹⁶ This case was not resolved at a pace the public deserves.

vehicle for establishing new legal precedent while aware that the novel underlying theory is highly questionable creates unnecessary constitutional doubt regarding the Commission's posture.").

¹¹⁴ After a thorough discussion, the matter was decided during that same Executive Session. MUR 6396 (Crossroads GPS), Certification dated December 3, 2013.

¹¹⁵ See, e.g., CRS Report R40183, *501(c)(4)s and Campaign Activity: Analysis Under Tax and Campaign Finance Laws*, by Erika K. Lunder and L. Paige Whitaker; Tarini Party and Kenneth P. Vogel, *New Obama Group Organizing for America Says It's Non-Partisan*, February 7, 2013, Politico, <http://www.politico.com/story/2013/02/new-obama-group-organizing-for-action-says-its-non-partisan-87345.html>; Kim Barker, *How Nonprofits Spend Millions on Elections and Call it Public Welfare*, August 9, 2012, ProPublica.

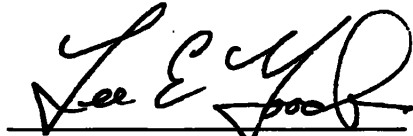
¹¹⁶ *Notice of Proposed Rulemaking*, 78 Fed. Reg. 71535 (Nov. 29, 2013) ("Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities"). Cf. 2 U.S.C. § 438(f) (requiring the Commission and the IRS to work together to ensure that regulations proscribed by each are "mutually consistent").

IV. Conclusion

For the above reasons, we voted against the recommendations of the First General Counsel's Report in MUR 6396.¹¹⁷ Given the facts before us, Crossroads GPS was not required to register with the Commission and file reports with the Commission as a political committee.

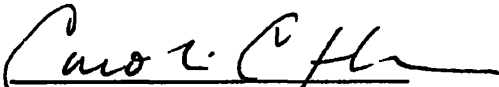
¹¹⁷ We also note that the Commission maintains broad discretion to dismiss matters as our decisions not to enforce "often involve[] a complicated balancing of a number of factors which are peculiarly within [our] expertise." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). For various reasons, including OGC's introduction of new legal theories that attempt to expand the universe of an organization's communications while contracting the period of time for evaluating an organization's spending for that analysis -- neither of which were properly noticed, we believe that discretion could properly be applied here.

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LEE E. GOODMAN
Chairman

1/8/14
Date



CAROLINE C. HUNTER
Commissioner

1/8/14
Date



MATTHEW S. PETERSEN
Commissioner

1/8/2014
Date

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