

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**CITIZENS FOR RESPONSIBILITY
AND ETHICS IN WASHINGTON,**
455 Massachusetts Ave., N.W.
Washington, D.C. 20001,

NOAH BOOKBINDER


Plaintiffs

v.

FEDERAL ELECTION COMMISSION
999 E Street., N.W.
Washington, D.C. 20463,

Defendant.

Civil Action No.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

1. Citizens for Responsibility and Ethics in Washington (“CREW”) and Noah Bookbinder (collectively, “Plaintiffs”) bring this action for injunctive and declaratory relief against the Federal Elections Commission (“FEC”) under the Federal Election Campaign Act of 1971 (“FECA” or “the Act”), 52 U.S.C. § 30109(a)(8)(C), challenging as arbitrary, capricious, an abuse of discretion, and contrary to law the dismissal by the FEC of an administrative complaint by Plaintiffs against New Models for failing to comply with the disclosure requirements the FECA imposes on “political committees.” This action seeks to remedy the injuries to Plaintiffs and the public caused by New Models’ failure to disclose its contributors, thereby denying Plaintiffs and the public information that the FECA entitles Plaintiffs and the public to receive.

2. The FEC's Office of General Counsel ("OGC") concluded that the FEC should find reason to believe New Models violated the FECA by not registering and reporting as a political committee in 2012 when it contributed over \$3 million to separate political committees: groups which "are, by definition, campaign related." *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *see* First General Counsel's Report 5-8, MUR No. 6872 (May 21, 2015) (attached as Exhibit 1). These contributions represented approximately 68.5% of New Models' 2012 spending. *Id.*

3. The FEC, however, splitting 2-2, failed to adopt the OGC's recommendation for the FEC to find reason to believe that New Models violated the FECA by not registering and reporting as a political committee and dismissed the administrative complaint. *See* Certification, MUR No. 6872 (Nov. 16, 2017) (attached as Exhibit 2).

4. On December 20, 2017, over a month after closing the file on Plaintiffs' complaint, the two commissioners who voted against adopting the OGC's recommendation issued the required statement of reasons for their votes. Statement of Reasons of Vice Chair Caroline C. Hunter and Comm'r Lee E. Goodman, MUR No. 6872 (Dec. 20, 2017) (attached as Exhibit 3). According to their statement, the commissioners based their dismissal of the complaint on two grounds. First, they found that New Models did not meet the statutory thresholds to qualify as a political committee. Second, they relied on an interpretation of *Buckley's* "major purpose" requirement for political committee status that this District Court has already found to be contrary to the law. *See* Memorandum Opinion, *CREW v. FEC*, 1:14-cv-01419-CRC 22, 25-26, 209 F. Supp. 3d 77, 93-94 (D.D.C. Sept. 19, 2016) (attached as Exhibit 4).

5. The two commissioners based their decision on impermissible interpretations of the FECA at odds with statutory language and binding agency authority, and on an old,

discredited analysis. As such, it is inherently flawed. Accordingly, their failure to find even reason to believe that New Models was a political committee under the FECA and the consequent dismissal of Plaintiffs' complaint are contrary to law.

JURISDICTION AND VENUE

6. This Court has personal and subject matter jurisdiction over the parties pursuant to 52 U.S.C. § 30109(a)(8)(A) and 5 U.S.C. § 702. This Court also has jurisdiction pursuant to 28 U.S.C. § 1331, 2201(a), and 2202. Venue lies in this district under 52 U.S.C. § 30109(a)(8)(A) and 28 U.S.C. § 1391(e).

PARTIES

7. Plaintiff CREW is a non-profit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code.

8. CREW is committed to protecting the rights of citizens to be informed about the activities of government officials, ensuring the integrity of government officials, protecting our political system against corruption, and reducing the influence of money in politics. CREW works to advance reforms in the areas of campaign finance, lobbying, ethics, and transparency. Further, CREW seeks to ensure that campaign finance laws are properly interpreted, enforced, and implemented.

9. To advance its mission, CREW uses a combination of research, litigation, advocacy, and public education to disseminate information to the public about public officials and their actions, as well as the outside influences that have been brought to bear on those actions. A core part of this work is examining and exposing the special interests that have influenced our elections and elected officials and using that information to educate voters regarding the integrity of public officials, candidates for public office, the electoral process, and our system of government.

10. Toward this end, CREW monitors the activities of those who run for federal office as well as those groups financially supporting candidates for office or advocating for or against their election. CREW regularly reviews campaign finance reports that groups, candidates, and political parties file with the FEC disclosing their expenditures and, in some cases, their contributors. Using the information in those reports, CREW, through its website, press releases, reports, and other methods of distribution, publicizes the role of these individuals and entities in the electoral process and the extent to which they have violated federal campaign finance laws.

11. CREW also files complaints with the FEC when it discovers violations of the FECA. Publicizing violations of the FECA and filing complaints with the FEC serve CREW's mission of keeping the public, and voters in particular, informed about individuals and entities that violate campaign finance laws and deterring future violations of campaign finance laws.

12. CREW is hindered in carrying out its core programmatic activities when those individuals and entities that attempt to influence elections and elected officials are able to keep their identities hidden. Likewise, the FEC's refusal to properly administer the campaign finance laws, particularly the FECA's reporting requirements, hinders CREW in its programmatic activity, as compliance with those reporting requirements often provides CREW with the only source of information about those individuals and groups funding the political process.

13. As part of CREW's work in carrying out its central mission, CREW focuses on so-called "pay-to-play" schemes. Toward that end, CREW looks for correlations between donations to the campaign of a member of Congress or candidate and that member's subsequent congressional activities, including advocating for policies and legislation that serve the interests of the member's donors. Information that an individual or entity made a large-dollar contribution may be very revealing about the influences that donor has brought to bear on the member post-

election. Without information about the individuals and entities funding the political activities of organizations and individuals, CREW is stymied in fulfilling its central mission.

14. As an example, in 2015, CREW issued a report, *Welcome to Washington: New Members of Congress Attract Special Interest Money* that analyzed fundraising by newly elected members of Congress in their first year in office. CREW's analysis was based on FEC campaign contribution records that identified contributions to those members from special interest PACs, including PACs tied to corporations, unions, and issues groups. From this data, CREW determined that new members of the House of Representatives embraced fundraising from special interests after they took office and became more reliant on that money than they had been as candidates. Those members raised nearly \$17.3 million from special interest PACs in 2015, an increase of 15.8% over the amount they raised as candidates during the entire 2014 election cycle. CREW further found that special interest PAC money accounted for an average of 37.6% of total funds raised by the new members in 2015, more than double the 17.3% rate from the 2014 election cycle. CREW was able to obtain this information because of the disclosure requirements to which the organizations receiving those contributions – federal candidates, party committees, PACs, and super PACs – are subject under the FECA.

15. As another example, on August 21, 2017, CREW published a blog post entitled *Synchronized Spending: The Dark Money Phantom's New Illusion*, which highlighted section 501(c)(4) dark money non-profits that fully fund multiple federal super PACs that attack or support the same candidates. By making the work of one group appear to be the work of two independent groups, this tactic misleads the public, exaggerates candidates' outside support, and exacerbates the problems caused by secret money in politics. CREW obtained the information used in this post from information the FECA requires political committees to disclose.

16. CREW requires access to information detailing the true sources of the money used to fund the political activities of federal candidates and outside groups. As a result, CREW is harmed when the FEC fails to properly administer the FECA, particularly the statute's reporting requirements, thereby limiting CREW's ability to obtain and review campaign finance information.

17. Plaintiff Noah Bookbinder is the executive director of CREW. He is a citizen of the United States and a registered voter and resident of the state of Maryland. As a registered voter, Mr. Bookbinder is entitled to receive all the information the FECA requires those engaged in political activities to report publicly. He is further entitled to the FEC's proper administration of the provisions of the FECA. Mr. Bookbinder is harmed in exercising his right to an informed vote when a political committee fails to report the true source of its contributions, as the FECA requires.

18. Defendant FEC is the federal agency established by Congress to oversee the administration and civil enforcement of the FECA. *See* 52 U.S.C. §§ 30106, 30106(b)(1).

STATUTORY AND REGULATORY FRAMEWORK

Registration and Reporting Requirement for Political Committees

19. The FECA defines the term "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); 11 C.F.R. § 100.5(a). Expenditures include "any . . . payment . . . , deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for federal office." 52 U.S.C. § 30101(9)(A)(i); 11 C.F.R. § 100.111. In addition, the Supreme Court in *Buckley v. Valeo* carved out from this definition

organizations that, while meeting one of the statutory thresholds, are (1) not under the control of a candidate and (2) do not have a “major purpose” of “nominat[ing] or elect[ing] . . . candidate[s].” 424 U.S. at 79.

20. All political committees must file a statement of organization within ten days after becoming a political committee within the meaning of 52 U.S.C. § 30101(4). 52 U.S.C. § 30103(a); 11 C.F.R. 102.1.

21. All registered political committees are required to file periodic reports with the FEC that include, among other things, (1) identification of all individuals who contribute an aggregate of more than \$200, (2) identification of all political committees that made a contribution to the political committee at issue, (3) detail of a political committee’s debts and obligations, and (4) listing of all of a political committee’s expenditures. 52 U.S.C. § 30104(b)(2)–(8); 11 C.F.R. § 104.3.

22. Under the FECA, any person who believes there has been a violation of the Act may file a sworn complaint with the FEC. 52 U.S.C. § 30109(a)(1). Based on the complaint, the response from the person or entity alleged to have violated the Act, facts developed by the Office of General Counsel (“OGC”), and any OGC recommendation, the FEC then votes on whether there is “reason to believe” a violation of the FECA has occurred. 52 U.S.C. § 30109(a)(2). A “reason to believe” exists where a complaint “credibly alleges” a violation of the FECA “may have occurred.” FEC, *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12545, 12545 (Mar. 16, 2007). If four commissioners find there is “reason to believe” a violation of the FECA has occurred, the FEC must notify the respondents of that finding and “shall make an investigation of such alleged violation.” 52 U.S.C. § 30109(a)(2).

23. If four commissioners fail to find reason to believe a violation of the FECA has occurred and the Commission then dismisses the matter, the complainant, as a “party aggrieved” by the dismissal, may seek judicial review of the failure to find reason to believe in the United States District Court for the District of Columbia. 52 U.S.C. § 30109(a)(8)(A). All petitions from the dismissal of a complaint by the FEC must be filed “within 60 days after the date of the dismissal.” 52 U.S.C. § 30109(a)(8)(B).

24. The district court reviewing the FEC’s dismissal of a complaint may declare the FEC’s actions “contrary to law.” 52 U.S.C. § 30109(a)(8)(C). The court also may order the FEC “to conform with such declaration within 30 days.” *Id.* If the FEC fails to abide by the court’s order, the FECA provides the complainant with a private right of action, brought in the complainant’s own name, “to remedy the violation involved in the original complaint.” *Id.*

FACTUAL BACKGROUND

25. On September 17, 2014, CREW and its then-executive director Melanie Sloan filed an administrative complaint with the FEC against New Models, a tax-exempt group organized under section 501(c)(4) of the Internal Revenue Code. The matter was given the MUR number 6872. The complaint was subsequently amended to substitute plaintiff Noah Bookbinder for Melanie Sloan.

26. The complaint alleged that New Models failed to register and report as a political committee from 2012 onward as required by the FECA and that New Models failed to report receipt of contributions, its making of contributions, its debts, and its expenditures to the FEC as required under the FECA.

27. The complaint further alleged that New Models made numerous contributions to various separate independent expenditure-only political committees (“super PACs”) with the purpose of influencing federal elections. These contributions totaled more than \$3 million in

2012, constituting approximately 68.5% of New Models' expenditures in 2012. The super PACs that received the contributions from New Models were the Now or Never PAC, Government Integrity Fund Action Network ("GIFAN"), and Citizens for a Working America PAC ("CWA"). Now or Never PAC, GIFAN, and CWA reported receiving the funds from New Models as "contributions" within the meaning of the FECA, namely, gifts or other transfers of money made "for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i). The administrative complaint requested that the FEC conduct an investigation into the allegations and declare that New Models violated the FECA and applicable FEC regulations.

28. On November 5, 2014, New Models responded to Plaintiffs' complaint, admitting that it met the statutory threshold to qualify as a political committee. Nevertheless, New Models contested the allegation that it had the major purpose of nominating of electing candidates.

29. On May 21, 2015, the FEC OGC issued its First General Counsel's Report in the New Models matter. Report, Ex. 1. In addition to the contributions alleged by Plaintiffs, the OGC identified three additional contributions: one \$5,000 contribution in 2012 to "Special Operations OPSEC Political committee" and two contributions in 2010 to CWA totaling \$265,000. OPSEC, like the other organizations to which New Models contributed, is an independent expenditure-only political committee. Based on these and the contributions Plaintiffs alleged, the OGC found New Models satisfied the statutory thresholds for political committee status and, by devoting at least 68.5% of its spending in 2012 to contributions to super PACs, New Models had a major purpose to nominate or elect candidates and thus was not excused from reporting by *Buckley*. Accordingly, the OGC recommended that the FEC should find reason to believe that New Models violated the FECA by failing to register and report as a

political committee in 2012, that the FEC approve the OGC's factual and legal analysis, and that the FEC approve compulsory process.

30. Following the OGC's report, the FEC failed to act on Plaintiffs' administrative complaint for over two years.

31. Finally, on November 14, 2017, in a 2-2 vote, the FEC failed to adopt the OGC's factual and legal analysis and thereby failed to find reason to believe that New Models violated the FECA by failing to register and report as a political committee in 2012. Certification, MUR. No. 6872 (Nov. 14, 2017) 1, Ex. 2. Accordingly, the same day, the commissioners voted to close the file and dismiss the Plaintiffs' administrative complaint. *Id.*

32. On December 20, 2017, two commissioners, Vice Chair Caroline C. Hunter and Commissioner Lee E. Goodman, issued a Statement of Reasons setting out their basis for voting against finding reason to believe that New Models violated the FECA by failing to register and report as a political committee. Hunter, Goodman Statement of Reasons, Ex. 3. The two commissioners asserted that New Models' actions did not qualify it as a political committee based on their belief that New Models did not make expenditures over the statutory threshold and that its major purpose was not related to the election of candidates, even in 2012, because it did not devote a majority of its spending in other years to electioneering. *Id.* at 18-25, 31.

33. On December 21, 2017, Commissioner Ellen L. Weintraub issued her own Statement of Reasons. Statement of Reasons of Comm'r Ellen L. Weintraub, MUR 6872 (Dec. 21, 2017) (attached as Exhibit 5). Commissioner Weintraub points out that the major purpose analysis used by Vice Chair Hunter and Commissioner Goodman was already considered and rejected by this Court in *CREW v. FEC*, 209 F. Supp. 3d 77 (D.D.C. 2016). *Id.* at 1; *see also* Mem. Op., Ex. 4. Commissioner Weintraub quoted Judge Christopher R. Cooper's memorandum

opinion in which he stated that in using a lifetime-spending-only approach, the Commission failed to recognize that the major purpose of an organization may change with time.

Commissioner Weintraub commented that it was disappointing to see the other commissioners cite the *CREW* case as support for their view, when in fact the *CREW* decision found the lifetime-only approach contrary to law.

PLAINTIFFS' CLAIM FOR RELIEF

The FEC's Dismissal of Plaintiffs' Complaint Was Arbitrary, Capricious, an Abuse of Discretion, and Contrary to Law

34. Plaintiffs re-allege and incorporate by reference all preceding paragraphs as fully set forth herein.

35. The FEC's dismissal of the complaint was arbitrary, capricious, an abuse of discretion, and contrary to law in violation of 52 U.S.C. § 30109(a)(8)(C). The statement of reasons of the controlling commissioners identified two alternative grounds for dismissal: (1) that New Models did not satisfy either of the statutory thresholds, and (2) that New Models did not a qualifying "major purpose" and therefore was excused from reporting under *Buckley*. Both grounds are contrary to law.

36. First, the controlling commissioners' conclusion that New Models did not satisfy the statutory threshold under 52 U.S.C. § 30101(4) is arbitrary, capricious, an abuse of discretion, and otherwise contrary to law. The interpretation from which that conclusion results, adopted by only two commissioners of the FEC, that contributions to political committees used to fund independent expenditures do not satisfy the FECA's \$1,000 statutory expenditure or contribution thresholds conflicts with binding authority and is thus impermissible.

37. Second, the controlling commissioners' interpretation of *Buckley*'s major purpose test is squarely at odds with judicial authority, including authority from this Court, and thus is impermissible. The controlling commissioners found New Models lacked the requisite major purpose because they compared the organization's political spending against its combined spending from all the years of its decade-plus existence to find the group did not devote a

majority of its lifetime spending to electioneering (while ignoring that, for the first decade of its existence, any electioneering would have been illegal). In *CREW v. FEC*, however, this Court ruled in an indistinguishable situation that “[t]he Commissioners’ refusal to give any weight whatsoever to an organization’s relative spending in the most recent calendar year” before the complaint was contrary to law. *CREW v. FEC*, 209 F.Supp.3d at 94-95. The controlling commissioners, just as before, refused to give any weight to New Models spending in 2012, failing to heed the directive of this Court. Rather, they continue to apply a legally discredited and impermissible interpretation of *Buckley*’s “major purpose” standard when analyzing New Models’ conduct. The dismissal resulting from that impermissible interpretation is therefore arbitrary, capricious, an abuse of discretion, and contrary to law.

38. Therefore, Plaintiffs are entitled to relief in the form of a declaration that the FEC is in violation of its statutory responsibilities under 52 U.S.C. § 30109(a)(8) and has acted arbitrarily and capriciously, abused its discretion, and acted contrary to law in dismissing MUR 6872.

REQUESTED RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Declare that the FEC’s dismissal of Plaintiffs’ complaint against New Models was arbitrary, capricious, an abuse of discretion, and contrary to law.
2. Order the FEC to conform to such declaration within 30 days pursuant to 52 U.S.C. § 30109(a)(8)(C).
3. Award Plaintiffs their costs, expenses, and reasonable attorneys’ fees in this action; and
4. Grant such other and further relief as the Court may deem proper and just.

Respectfully submitted,

/s/ Stuart McPhail

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January 12, 2018
Attorneys for Plaintiffs

Exhibit 1

FEDERAL ELECTION
COMMISSION

2018 MAY 27 11:12:05

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

CELA

SENSITIVE

MUR: 6872
DATE COMPLAINT FILED: 9/18/14
DATE OF NOTIFICATION: 9/24/14
DATE OF LAST RESPONSE: 11/17/14
DATE ACTIVATED: 2/3/15

ELECTION CYCLE: 2012
EARLIEST SOL: 1/10/2017
LATEST SOL: 2/10/2018

COMPLAINANTS:

Citizens for Responsibility and Ethics in
Washington

Melanie Sloan

RESPONDENT:

New Models

RELEVANT STATUTES
AND REGULATIONS:

52 U.S.C. § 30101(4)
52 U.S.C. § 30102
52 U.S.C. § 30103
52 U.S.C. § 30104

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

This matter involves an allegation that New Models violated the Federal Election Campaign Act, as amended (the "Act"), by failing to register and report as a political committee in 2012. As discussed below, in 2012 New Models satisfied the statutory threshold for political committee status and appears to have had the major purpose of federal campaign activity. Accordingly, we recommend that the Commission find reason to believe that New Models

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FEDERAL ELECTION
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1 violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to register and report as a political
2 committee in 2012, and authorize an investigation.

3 **II. FACTS**

4 New Models was organized in 2001 and operates as a 501(c)(4) social welfare
5 organization.¹ New Models states that it has raised \$15,787,616 over the life of the
6 organization.² According to its tax return, New Models spent a total of \$4,506,176 in 2012.³ Of
7 that total, the group spent \$2,840,500 on the following political campaign and lobbying
8 activities⁴:

- 9 • \$2,171,000 to Now or Never PAC, a political committee registered with the
10 Commission⁵
- 11 • \$37,500 to Freedom PAC, at the time a political committee registered with the
12 Commission⁶
- 13 • \$5,000 to Special Operations OPSEC Political Committee⁷
- 14
- 15
- 16

¹ Compl. at 3; Resp., Affidavit of Tim Crawford ¶ 2 ("Crawford Affidavit"). The Crawford Affidavit appears to lack proper notarization.

² Crawford Aff. ¶ 14. New Models does not state how much it has spent over that period.

³ New Models 2012 Form 990 ("2012 Tax Return"), Part I, Line 18; Compl., Ex. A. The group's tax year appears to coincide with the calendar year. *Id.*, Line A.

⁴ 2012 Tax Return, Sched. C, Line 2.

⁵ *See* Statement of Organization (Feb. 21, 2012).

⁶ *See* Statement of Organization (Mar. 30, 2012). The Commission has since approved Freedom PAC's termination. *See* Termination Approval (Feb. 11, 2015). The Complaint does not include this disbursement in calculating New Models's spending for major purpose.

⁷ The recipient is identified only as "OPSEC" in the 2012 Tax Return, but Special Operations OPSEC Political Committee (which is also identified as "Special Operations OPSEC Political Fund" in a Miscellaneous Report to the Commission) reported receiving \$5,000 from New Models on September 21, 2012. *See* Miscellaneous Report to FEC at 32 (Dec. 19, 2012) (this document appears to be a late-filed October 2012 Quarterly Report of Special Operations OPSEC Political Fund). In the October 2012 Quarterly Report, OPSEC requested termination but has not received Commission approval. The Complaint does not include this disbursement in calculating New Models's spending for major purpose.

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- 1 • \$627,000 to Government Integrity Fund Action Network ("GIFAN"), a political
2 committee registered with the Commission⁸

3
4 Additionally, New Models states that in 2012 it disbursed \$292,000 to Citizens for a
5 Working America for issue advocacy.⁹ This disbursement, however, appears to have been made
6 to Citizens for a Working America PAC, an independent expenditure-only political committee
7 ("CWA PAC").¹⁰

8 The Complaint alleges that New Models was a political committee in 2012 because it
9 crossed the Act's \$1,000 threshold for political committees and spent approximately 68.5% of its
10 total spending for 2012 on contributions to independent expenditure-only political committees.¹¹

11 The Complaint does not include the New Models disbursements to Freedom PAC (\$37,500) or
12 OPSEC (\$5,000) in its calculation, but it does include the disbursements to Now or Never PAC
13 (\$2,171,000), GIFAN (\$627,000), and Citizens for a Working America PAC (\$292,000).

14 New Models concedes that it surpassed the statutory threshold for political committee
15 status by making over \$1,000 in contributions during 2012 but states that its major purpose has
16 never been federal campaign activity.¹² New Models (through its President and COO, Tim

⁸ Statement of Organization (July 12, 2011). The 2012 Tax Return states that these funds were given to "Government Integrity Fund," which is a separate 501(c)(4) organization than Government Integrity Fund Action Network. See 2012 Tax Return, Schedule C, Part I-C, Line 5. As the Complaint points out, the employer identification number listed on the 2012 Tax Return is that of GIFAN, and GIFAN reported receiving the New Models contribution in its 2012 Pre-General Report. See Compl. at 4 n.1, Ex. B.

⁹ 2012 Tax Return, Schedule I, Part II, Line 3; Compl., Ex. A.

¹⁰ See Compl. at 4, Ex. D; Statement of Organization of CWA PAC (Sep. 13, 2010).

¹¹ See Compl. at 6-7.

¹² Resp. at 2; Crawford Aff. ¶ 3. The Commission should afford no particular weight to mere legal conclusions made in an affidavit. *A.L. Pickens Co., Inc. v. Youngstown Sheet & Tube Co.*, 650 F.3d 118, 121 (6th Cir. 1981) (giving no weight to legal conclusions in affidavit because "[t]he affidavit is no place for ultimate facts and conclusions of law") (quoting 6 MOORE'S FEDERAL PRACTICE ¶ 56.22(1), at 56-1316 (Supp. 1979)); *Schubert v. Nissan Motor Corp. in U.S.A.*, 148 F.3d 25, 30 (1st Cir. 1998); 2A C.J.S. AFFIDAVITS § 39 ("It is improper for affidavits to embody legal arguments, and legal arguments and summations in affidavits will be disregarded by the courts.").

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1 Crawford) states that it has never made an independent expenditure, electioneering
 2 communication, or public statement advocating the election or defeat of a federal candidate, nor
 3 has its website or any of its materials stated that the organization's purpose is to support the
 4 election or defeat of a federal candidate.¹³ New Models further states that the contributions
 5 identified in the Complaint amount to less than 20% of the group's spending from 2001 to 2014,
 6 and that this is the proper time frame for determining its major purpose.¹⁴

7 II. LEGAL ANALYSIS

8 The Act and Commission regulations define a "political committee" as "any committee,
 9 club, association or other group of persons which receives contributions aggregating in excess of
 10 \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000
 11 during a calendar year."¹⁵ In *Buckley v. Valeo*,¹⁶ the Supreme Court held that the term "political
 12 committee" "need only encompass organizations that are under the control of a candidate or the
 13 major purpose of which is the nomination or election of a candidate."¹⁷ Accordingly, an
 14 organization that is not controlled by a candidate must register as a political committee only if

¹³ *Id.* ¶¶ 4-10. The Crawford Affidavit also states that "New Models has made no federal political contributions in any year other than in 2012." *Id.* ¶ 11; see Resp. at 4. The Commission's records, however, show that New Models made two contributions to Citizens for a Working America PAC ("CWA PAC") on September 3, 2010 (for \$255,000), and October 14, 2010 (for \$10,000). See October 2010 Quarterly Report of CWA PAC at 6-7; Post-General 2010 Report of CWA PAC at 6. CWA PAC is registered with the Commission as an independent expenditure-only political committee. See Statement of Organization of CWA PAC (Sep. 13, 2010). The New Models contributions were the only contributions received by CWA PAC during 2010, and it made only one independent expenditure (for \$254,779) on September 13, 2010. See October 2010 Quarterly Report at 7. The reporting of these contributions in Commission-filed reports appears to be at odds with the Crawford Affidavit and contentions made in the Response. These contributions, however, were not within the 2012 calendar year, which we use to analyze major purpose in this case. See *infra*.

¹⁴ Resp. at 4-5.

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

¹⁶ 424 U.S. 1 (1976)

¹⁷ *Id.*

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1 (1) it crosses the \$1,000 threshold and (2) it has as its "major purpose" the nomination or election
 2 of federal candidates.

3 New Models concedes that it surpassed the Act's threshold for political committee status
 4 by making over \$1,000 in contributions during 2012.¹⁸ Therefore, the sole issue here is whether
 5 New Models also had the requisite major purpose.

6 To determine an entity's "major purpose," the Commission considers a group's "overall
 7 conduct," including its disbursements, activities, and statements.¹⁹ The Commission compares
 8 how much of an organization's spending is for "federal campaign activity" relative to "activities
 9 that [a]re not campaign related."²⁰ In this case, the available information does not include
 10 examples of New Models's public statements or non-contribution activities. With regard to its
 11 known spending, New Models spent a total of \$4,506,176 in 2012.²¹ Approximately \$3,090,000

¹⁸ A contribution to a political committee satisfies the definition of "expenditure," which includes "(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(9)(A); see Advisory Op. 1996-18 (International Association of Fire Fighters) at 2-3 (account would not be "accepting or making contributions for the purposes of the Act" and thus would not constitute a political committee). New Models's contributions to political committees in 2012 satisfy the Act's threshold requirement for political committee status. See 52 U.S.C. § 30101(4)(A); 11 C.F.R. § 100.5.

¹⁹ Political Committee Status, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007).

²⁰ *Id.* at 5601, 5605.

²¹ The time frame used for determining major purpose has been considered in previous matters before the Commission, including MURs 6081 (American Issues Project), 6396 (Crossroads GPS), 6402 (American Future Fund), 6538 (Americans for Job Security), and 6589 (American Action Network). As we have noted, we believe that a calendar year provides the firmest statutory footing for the Commission's major purpose determination and is consistent with the Act's plain language and prior decisions of those courts that have previously addressed questions of political committee status. The Act defines "political committee" in terms of expenditures made or contributions received "during a calendar year." 52 U.S.C. § 30101(4); see *FEC v. Malenick*, 310 F. Supp. 2d 230, 237 (D.D.C. 2004) ("Accordingly, because Triad and then Triad Inc.'s major purpose was the nomination or election of specific candidates in 1996, and because Triad received contributions aggregating more than \$1,000 in 1996, I find that Triad and Triad, Inc., operated as a 'political committee' in 1996.") (emphasis added); *FEC v. GOPAC*, 917 F.Supp. 851, 853 (D.D.C. 1996) (group founded in 1979, yet court discusses major purpose only in 1989 and 1990); see also MUR 5492 (Freedom, Inc.) (analyzing group's admitted major purpose in 2004 even though group was formed in 1962); MURs 5577, 5620 (National Association of Realtors – 527 Fund) (analyzing NAR-527 Fund's 2004 spending even though group had registered with IRS since 2000); MUR 5755 (New Democrat Network) (analyzing New Democrat Network's 2004 spending while group had existed since at least 1996); MUR 5753 (League of

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 First General Counsel's Report
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1 (or 68.5%) of that total was spent on the contributions identified in the Complaint, an amount
 2 that is sufficient to establish that the group's major purpose in 2012 was the nomination or
 3 election of federal candidates.²²

4 Although we maintain that a calendar year is the most appropriate time frame for
 5 analyzing major purpose. under the facts here New Models's spending over the 2011-2012
 6 election cycle also indicates that its major purpose may be federal campaign activity. New
 7 Models spent \$1,480,065 in 2011.²³ and thus a total of \$5,986,241 during 2011-2012. The
 8 contributions identified in the complaint make up 51.6% of New Models's spending over that
 9 period.²⁴ Thus, whether the analytical time frame for major purpose is a calendar year, the
 10 group's fiscal year,²⁵ or the relevant election cycle, New Models's spending on federal campaign
 11 activity appears to constitute the majority of its overall spending.

12 New Models argues that it lacks major purpose because the contributions identified in the
 13 Complaint amount to "less than 20%" of its overall spending since the group's inception in
 14 2001.²⁶ Even assuming that this is the proper time frame for analyzing its major purpose, the
 15 available information does not provide an adequate basis for such an assessment. New Models

Conservation Voters) (analyzing LCV's 2004 spending even though one of LCV's funds had registered with the IRS as early as 2000); MURs 5694, 5910 (Americans for Job Security) (analyzing activity from 2000 through 2006 in determining group's major purpose in 2006, despite the fact that the group was founded in 1997); MUR 5487 (Progress for America VF) (analyzing group's major purpose based on 2004 disbursements where group had raised \$4.6 million and spent \$11.2 million through 2006).

²² The total rises to \$3,132,500 (69.5%) if the contributions to Freedom PAC and OPSEC are included.

²³ Compl. Ex. E. 2011 Tax Return of New Models, Line 18.

²⁴ The total rises to 52.3% if the contributions to Freedom PAC and OPSEC are included.

²⁵ In this case, the fiscal year aligns with the calendar year. *See supra* note 3.

²⁶ Resp. at 4-5.

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1 includes in its Response a list of annual fundraising totals for each year from 2002-2014,²⁷ but
2 does not include any summary of its spending over that period. Given that omission — and
3 recognizing also that the Response appears to have mistaken certain material facts concerning its
4 past spending²⁸ — New Model's assertion concerning the character of its spending since the date
5 of its formation does not discredit the record evidence that suggests that its major purpose
6 appears to have been federal campaign activity, as alleged.²⁹

7 Thus, based on the currently available information, it reasonably appears that New
8 Models made over \$1,000 in expenditures in 2012 and had the major purpose of nominating or
9 electing federal candidates. Accordingly, we recommend that the Commission find reason to
10 believe that New Models violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to register
11 and report as a political committee in 2012.

12 III. INVESTIGATION

13 We plan to seek information to afford the Commission the ability to determine the scope
14 of New Models's reporting obligations and to identify potential witnesses who may have
15 relevant knowledge of those facts. Although we intend to seek information through voluntary
16 means, we also request that the Commission authorize the use of compulsory process, including

²⁷ Crawford Aff., Attach. 1. According to Crawford, these fundraising totals are drawn from federal tax returns, with the exception of 2003, which is based on "expenditures from bank records" and 2014, which is based on year-to-date bank records. *Id.* ¶ 14, Attach. 1.

²⁸ *See supra* notes 8, 13.

²⁹ A reason to believe determination is not conclusive that an allegation is true, but rather recognizes the seriousness of the allegations and provides an opportunity to conduct an administrative fact-finding inquiry to resolve whether in fact a violation occurred. *See* Statement of Policy Regarding Commission Act in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545 (Mar. 16, 2007) (A reason-to-believe finding indicates "only that the Commission found sufficient legal justification to open an investigation to determine whether a violation of the Act has occurred."). Thus, the Commission previously has determined as a matter of policy that a reason-to-believe finding is appropriate "in cases where the available evidence in the matter is at least sufficient to warrant conducting an investigation." *See id.* (reason-to-believe finding appropriate where complaint "credibly alleges that a significant violation may have occurred, but further investigation is required to determine whether a violation in fact occurred and, if so, its exact scope").

Exhibit 2

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BEFORE THE FEDERAL ELECTION COMMISSION

CELA

In the Matter of

)

) MUR 6872

New Models

)

CERTIFICATION

I, Laura E. Sinram, recording secretary of the Federal Election Commission executive session, do hereby certify that on November 14, 2017, the Commission took the following actions in the above-captioned matter:

1. Failed by a vote of 2-2 to:

- a. Find reason to believe that New Models violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to register and report as a political committee in 2012.
- b. Approve the Factual and Legal Analysis, as recommended in the First General Counsel's Report dated May 21, 2015, subject to the edits first circulated by Commissioner Ravel's office and Commissioner Weintraub's office on December 8, 2015 and recirculated September 12, 2017.
- c. Approve compulsory process, as necessary.
- d. Approve the appropriate letters.

Commissioners Walther and Weintraub voted affirmatively for the motion.

Commissioners Goodman and Hunter dissented. Commissioner Petersen was recused and did not vote.

11-03-18-00076-1-2

Federal Election Commission
Certification for MUR 6872
November 14, 2017

Page 2

2. Decided by a vote of 4-0 to:

- a. Close the file.
- b. Send the appropriate letters.

Commissioners Goodman, Hunter, Walther, and Weintraub voted affirmatively for the decision. Commissioner Petersen was recused and did not vote.

Attest:

11/15/17

Date



Laura E. Sinram
Deputy Secretary of the Commission

11/15/17

Exhibit 3



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
New Models) MUR 6872
)

**STATEMENT OF REASONS OF
VICE CHAIR CAROLINE C. HUNTER AND COMMISSIONER LEE E. GOODMAN**

In this matter the Commission was called upon to determine whether New Models, a social welfare organization incorporated under section 501(c)(4) of the Internal Revenue Code (“IRC”), failed to register and report as a “political committee” under the Federal Election Campaign Act of 1971, as amended (the “Act”).

This agency’s controlling statute and court decisions stretching back over forty years properly tailor the applicability of campaign finance laws to protect non-profit issue advocacy groups from burdensome political committee registration and reporting requirements.¹ Organizations such as New Models do not become political committees under the Act merely as a result of making incidental or occasional campaign contributions. Rather, such organizations may be regulated as political committees only if their “major purpose” is the nomination or election of federal candidates.² Determining an organization’s major purpose requires a comprehensive, case-specific inquiry that focuses on the organization’s public statements, organizational documents, and overall spending history.³ The Commission has settled on a “case-by-case analysis of an organization’s conduct” in applying the major purpose doctrine.⁴

Publicly available tax returns indicate that for over 15 years, from 2000 to 2015, New Models engaged almost exclusively in policy research, polling and public policy discussion. That was consistent with New Models’s social welfare mission and maintenance of its tax-

¹ *Accord* Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 1, MUR 6538 (Americans for Job Security, *et al.*); Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 1, MUR 6396 (Crossroads GPS).

² *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

³ Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 1, MUR 6538 (Americans for Job Security, *et al.*).

⁴ *Supplemental Explanation and Justification, Political Committee Status*, 72 Fed. Reg. 5,596, 5,601 (Feb. 7, 2007) (“2007 Supplemental E&J”). *See also Real Truth About Abortion v. FEC*, 681 F.3d 544, 556-57 (4th Cir. 2012), *cert. denied*, 81 U.S.L.W. 3127 (U.S. Jan. 7, 2013) (No. 12-311) (“RTAA”).

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exempt status. Over that time period, New Models received no contributions under the Act and made no disbursements to fund “expenditures” expressly advocating the election or defeat of federal candidates. The main allegation that New Models nonetheless was, or became, a political committee was based on the fact that it contributed \$3 million—all publicly disclosed—to three political committees that made independent expenditures in 2012. Based on that financial activity in one year, the allegation was that New Models was a federal political committee required to register with the Commission, submit to extensive regulatory requirements, and file ongoing financial disclosure reports.

Applying our case-by-case analysis and agency expertise to the facts in the record, and consistent with numerous court decisions applying the major purpose test, we concluded that New Models’s major purpose was not the nomination or election of federal candidates over the course of its existence, that New Models’s major purpose did not change to become the nomination or election of federal candidates based upon its contributions to political committees in one calendar year, and that New Models was not a political committee. Accordingly, we voted against finding reason to believe that New Models violated the Act.

I. PROCEDURAL BACKGROUND

A. THE COMPLAINT

The Complaint in this matter was filed by Citizens for Responsibility and Ethics in Washington (“CREW”) on September 18, 2014. The Complaint alleges New Models was a political committee in 2012 because it made \$3,090,000 in contributions to three independent expenditure-only committees: Now or Never PAC, Government Integrity Fund Action Network (“GIFAN”), and Citizens for a Working America PAC (“CWA PAC”).⁵ In support of the allegation, CREW cites New Models’s 2012 tax return in which New Models disclosed grants of \$2,171,000 to Now or Never PAC and \$627,000 to GIFAN, in addition to reports filed with the Commission by Now or Never PAC and GIFAN disclosing New Models as the source of the PACs’ contributions received for those respective amounts.⁶ CREW also includes an April Quarterly Report from CWA PAC disclosing New Models as the source of \$292,000.⁷ These amounts, when added together, constituted 68.5% of New Models’s total disbursements for its 2012 fiscal year and 51.6% for fiscal years 2011 and 2012 (the 2012 election cycle).⁸ As a result, CREW argues that New Models was required to register and report as a “political committee” under the Act.

⁵ See Complaint at 5-7, MUR 6872 (New Models).

⁶ *Id.* at Exs. A, B & C.

⁷ *Id.* at Ex. D.

⁸ See *id.* at Ex. E. (including the cover page of New Models’s 2011 Form 990).

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B. THE RESPONSE

New Models responded on November 17, 2014, claiming it was a social welfare policy-oriented organization established in 2000 and was never a political committee. New Models does not dispute that it contributed funds to Now or Never PAC, GIFAN, and CWA PAC. Rather, New Models denies it had the requisite major purpose, stating that it “did not [in 2012], and never has had, the major purpose of nominating or electing federal candidates” and that such a determination should not be based on its federal contributions in a single calendar year.⁹

The Response included an affidavit signed by New Models President and Chief Operating Officer Tim Crawford representing that New Models never advocated the election or defeat of a candidate for federal office through public statements, advertisements, or its website; New Models never made an independent expenditure or electioneering communication, never stated its purpose was the election or defeat of candidates, and that New Models’s solicitation materials never expressed an intent to elect or defeat candidates.¹⁰

C. OFFICE OF GENERAL COUNSEL RECOMMENDATION

The Commission’s Office of General Counsel (“OGC”) recommended the Commission find reason to believe New Models violated the Act by not registering as a political committee in 2012, the year in which it contributed \$3,090,000 to three separate independent expenditure-only committees, representing approximately 68.5% of its 2012 spending.¹¹ OGC proposed an analysis of New Models’s spending which focused principally on one calendar year, thereby concentrating on New Models’s contributions to political committees in 2012 while ignoring New Models’s extensive policy research and discussion activities over the course of its existence from 2000 to 2015.¹²

D. COMMISSION ACTION

On November 14, 2017, the Commission considered and voted on this matter.¹³ The available information failed to convince the required four Commissioners there was reason to

⁹ Response at 2.

¹⁰ Resp., Affidavit of Tim Crawford ¶¶ 4-10.

¹¹ See First Gen. Counsel’s Rpt. at 5-6, MUR 6872 (New Models). Independent expenditure-only committees are non-connected committees registered with the Commission which “may solicit and accept unlimited contributions from individuals, political committees, corporations, and labor organizations,” for the purpose of making independent expenditures. See Advisory Opinion 2010-11 at 3 (Commonsense Ten).

¹² See First Gen. Counsel’s Rpt., MUR 6872 (New Models).

¹³ MUR 6872 (New Models), Certification (Nov. 14, 2017).

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believe New Models violated the Act and the matter was dismissed.¹⁴ As the controlling group of Commissioners,¹⁵ we are issuing this Statement of Reasons to set forth the Commission's rationale for not finding reason to believe and dismissing the matter.¹⁶

II. FACTUAL BACKGROUND

New Models appears to have incorporated in Washington, DC on August 17, 2000, as a non-profit entity under section 501(c)(4) of the IRC.¹⁷ For more than a decade, New Models' primary purpose consisted of studying and advocating policy issues of national importance.¹⁸ Its mission in 2012, according to its annual return filed with the IRS, was to:

"research[] national issues and support[] efforts to highlight or advocate for those issues. New Models polls to determine what issues the state, local and national public care about and what messages they may be hearing about those issues. New Models polls and focus groups to find out what philosophy can best handle the issues of the day. Ne [sic] models participates in issue advocacy when appropriate."¹⁹

¹⁴ See 2 U.S.C. § 437g(a)(2) (four-vote requirement).

¹⁵ *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 [52 U.S.C. § 30109(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*, 931 F.2d 1131, 1133 (D.C. Cir. 1987))).

¹⁶ 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.*, 931 F.2d at 1134-35)).

¹⁷ See 26 U.S.C. § 501(c)(4)(A) (providing an exemption from taxation for "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare"). The Response's identification of New Models as a Virginia Corporation appears to be mistaken. See Resp., Affidavit of Tim Crawford ¶2. While New Models was licensed to do business in Virginia, the Virginia State Corporation Commission's online database identifies New Models as a foreign corporation (*i.e.*, not a Virginia corporation) formed in DC. See Commonwealth of Virginia, State Corporation Commission Business Entity Search, <https://sccfile.scc.virginia.gov/Find/Business> (search in search bar for "New Models"); DC Department of Consumer and Regulatory Affairs, <https://corponline.dcr.dc.gov/Home.aspx> (search in search bar for "New Models").

¹⁸ See New Models, 2004 Return of Organization Exempt from Income Tax ("Form 990"); New Models, 2005 Form 990; New Models, 2006 Form 990; New Models, 2007 Form 990; New Models, 2008 Form 990; New Models, 2009 Form 990; New Models, 2010 Form 990; New Models, 2011 Form 990; New Models, 2012 Form 990; New Models, 2013 Form 990; New Models, 2014 Form 990; and New Models, 2015 Form 990 (collectively "Form 990s").

¹⁹ 2012 Form 990, Part III 1.

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The evidence indicates that New Models pursued this mission consistently throughout its lifetime, including before and after 2012.²⁰ New Models conducted polls, maintained a website that published information about public policy, sponsored and made available polling results and research papers, and made grants to other organizations.²¹ From 2002 through 2015, New Models spent approximately \$17.2 million. A chart of New Models's revenue and expenses is below.

FIGURE 1: New Models's Revenue and Spending 2002-2015

Year	Total Revenue	Total Expenses ²²	Super PAC Contributions	Super PAC Contributions As % of Total Expenses - Calendar Year	Super PAC Contributions As % of Total Expenses - Lifetime
2000					
2001					
2002	\$89,700.00	\$89,700.00	\$ 0	0.0%	
2003	\$332,500.00	\$332,500.00	\$ 0	0.0%	0.0%
2004	\$768,886.91	\$754,805.21	\$ 0	0.0%	0.0%
2005	\$581,136.39	\$564,908.00	\$ 0	0.0%	0.0%
2006	\$830,000.00	\$702,025.00	\$ 0	0.0%	0.0%
2007	\$656,516.54	\$745,323.00	\$ 0	0.0%	0.0%
2008	\$647,045.73	\$599,638.68	\$ 0	0.0%	0.0%
2009	\$2,049,110.10	\$2,088,372.59	\$ 0	0.0%	0.0%
2010	\$2,511,000.00	\$2,326,991.10	\$ 265,000 ²³	11.4%	3.2 %

²⁰ See 2004, 2005, 2006, & 2007 Form 990s ¶77; 2008, 2009, 2010, 2011, 2012, 2013, 2014 & 2015 Form 990s.

²¹ See Form 990s, Part III 4a-c (describing 501(c)(4) program services engaged in during the reporting year). See also Wayback Machine, Internet Archive (search for "http://newmodelsusa.org") (revealing published research and polling reports from 2003 to early 2016 that was available on New Models's "http://newmodelsusa.org" website).

²² This amount is derived from the New Models' reported "total expenses" on its annual returns, excluding 2001, 2002, and 2003 which do not appear to be available online. See Form 990s. Fundraising amounts for 2002 and 2003 are listed in New Models's response and we use those figures as a proxy for expenses for those years. See Resp., Aff. of Tim Crawford Attachment I.

²³ OGC references, but does not include this \$265,000 contribution in its analysis because it was not within the 2012 calendar year. See First Gen. Counsel's Rpt. at 4 n.8. We include it because the timeframe for our analysis is not and has never been limited to a single calendar year. New Models was CWA PAC's sole contributor in 2010. That same year CWA PAC reported making a \$254,779 independent expenditure communication in opposition to South Carolina Congressman John Spratt. See October 2010 Quarterly Report of CWA PAC at 6-7; Post General 2010 Report of CWA PAC at 6. New Models, however, reported to the IRS that it did not engage in direct or indirect political campaign activities during 2010. See 2010 Form 990 Part IV, Question 3. Furthermore, New Models disclosed a grant of \$692,500 to Citizens for a Working America, a 501(c)(4) corporation, to fund a "legal battle in Ohio on the casino petition drive" and that the grantee "also did issue advocacy on the spending and taxation issue in South Carolina." See *id.* at Part III, 4c. The Complaint did not address the 2010 contribution and

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2011	\$1,388,291.50	\$1,480,065.53	\$ 0	0.0%	2.7%
2012	\$4,523,850.00	\$4,506,176.20	\$3,095,000 ²⁴	68.7% ²⁵	23.7%
2013	\$922,500.00	\$1,025,833.22	\$ 0	0.0%	22.1%
2014	\$885,000.00	\$954,604.34	\$ 0	0.0%	20.8%
2015	\$1,035,000.00	\$ 1,057,073.40	\$ 0	0.0%	19.5%
Total	\$ 17,220,537.17	\$17,228,016.27	\$3,360,000		19.5%

As shown in Figure 1, over 80% of New Models's lifetime spending was devoted to purposes other than the nomination or election of federal candidates. New Models never made (and legally could not make) contributions to independent expenditure-only committees until it contributed \$265,000 to CWA PAC in 2010, the first year its First Amendment right to do so was recognized.²⁶ This contribution was reported publicly by CWA PAC.²⁷

Contributions to Now or Never PAC, GIFAN, and CWA PAC in 2012 represent the only other contributions to independent expenditure-only committees made by New Models over its lifetime.²⁸ These contributions also were disclosed publicly.²⁹ Thus, contributions made by New Models to independent expenditure-only committees from 2002 to 2015 total \$3,360,000, or

New Models has not been afforded the notice or opportunity to explain, nor have we had the opportunity to view the content of the communications. The inclusion of \$265,000 in our analysis of New Models' total campaign spending, however, does not change our determination that New Models is not a political committee under the Act. Therefore it is unnecessary to speculate whether the TV ad made by CWA PAC subsequent to New Models's contribution contained express advocacy, was misreported, or whether the discrepancy in filings was a result of an administrative or accounting error.

²⁴ The Complaint did not address New Models's reported \$5,000 contribution to OPSEC PAC. As we did for the 2010 CWA PAC contribution, we include it because it does not alter our conclusion as to New Models's status.

²⁵ The \$3,095,000 constituted 51.7% of total expenses for 2011 and 2012. *See discussion*, *infra* at n.96.

²⁶ *See Citizens United v. FEC*, 558 U.S. 310 (2010); *SpeechNOW v. FEC*, 559 F.3d 686 (D.C. Cir. 2010).

²⁷ *See* October 2010 Quarterly Report of CWA PAC at 6-7; Post Gen. 2010 Report of CWA PAC at 6.

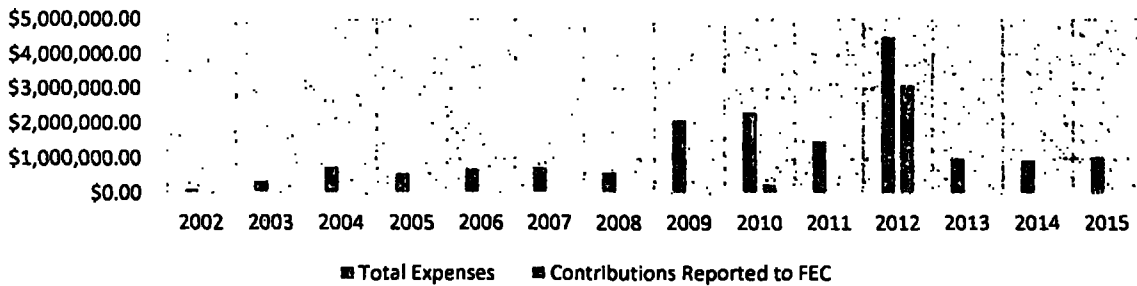
²⁸ *See* Compl. at 3-5. We note that OGC appears willing to include an additional \$37,500 based on a grant by New Models to an organization named Freedom PAC that was disclosed on the 2012 Form 990. *See* First Gen. Counsel's Rpt. at 2, 5, MUR 6872 (New Models); 2012 Form 990 Schedule C. We reject including this amount in an analysis of New Models' major purpose in this matter because the committee which received the \$37,500 grant is not a political committee registered with the Commission. Instead, it is a committee registered with the Missouri Ethics Commission. *Compare* Missouri Ethics Commission: Electronic Reports, 8 Day Before General Election Report, *available at* http://www.mec.mo.gov/MEC/Campaign_Finance/CF11_CommInfo.aspx (listing the same address and amount as information listed on 2012 Form 990), *with* First Gen. Counsel's Rpt. at 2 n.6 (citing Freedom PAC, Statement of Organization (Mar. 30, 2012), <http://docquery.fec.gov/pdf/316/12030762316/12030762316.pdf> (listing different information)).

²⁹ *See* 2012 30-Day Post-General Election Report of Now or Never PAC at 8-9; 2012 12-Day Pre-Election Report of GIFAN at 6; April 2012 Quarterly Report of CWA PAC at 6.

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approximately 19.5% of the organization’s spending during that period (and this figure overstates the statistic because New Models was established in 2000 and operated for a year and a half before our record of spending begins in 2002).³⁰ Significantly, New Models has never made any independent expenditures nor has it ever funded any electioneering communications.³¹ In 2015 New Models ceased operations.³² The graph at Figure 2 depicts New Models’s contributions relative to its total expenses.³³

Figure 2: New Models' Spending 2002-2015



III. LEGAL BACKGROUND

The Supreme Court consistently has recognized 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 . . .

³⁰ The 19.5% figure overstates New Model's lifetime political spending given the omission of 2000 and 2001 fundraising and spending information in New Models' response and the absence of publicly available IRS Form 990s for those years.

³¹ See Resp., Affidavit of Tim Crawford ¶¶5-6. Commission records also reveal no independent expenditures or electioneering communications by New Models.

³² See New Models, 2015 Form 990 Part IV, Question 31 (representing that the organization liquidated, terminated, dissolved, or otherwise ceased operations).

³³ The data used in Figure 2 comes directly from FEC reports filed by CWA PAC, GIFAN, and Now or Never PAC and New Models's Form 990s, except for 2002 and 2003 expenses, where fundraising amounts given in New Models' response are used as a proxy. See Resp., Affidavit of Tim Crawford Attachment 1 (listing fundraising amounts from 2002-2014).

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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 by 12 different categories; the names of all authorized or affiliated committees to whom expenditures aggregating over \$200 have been made; persons to whom loan payments 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.³⁴

Thus, characterizing the onerous requirements that attach to political-committee status as "just disclosure" understates the significant burdens on First Amendment associational rights. Balancing those rights, the Act requires non-political committees that make independent expenditures that exceed certain amounts to report each of those expenditures on forms tailored to disclosing one-time events. Congress determined that such event-specific disclosures provide the public adequate disclosure of the financing of federal elections.

By comparison, the Act imposes more comprehensive, perpetual organizational and disclosure obligations to report all financial activity on "political committees." The Act requires political committees that receive contributions to disclose each contributor over \$200. The Supreme Court has limited the definition of "political committee" to include only those organizations that have the major purpose of nominating and electing federal candidates.

It is a matter of First Amendment significance that the burdens attendant to one-time, event-specific disclosure³⁵ differ dramatically from the ongoing, all-encompassing reporting and regulatory burdens faced by political committees under the Act.³⁶ Political committee status and its attendant disclosure requirements impose significant burdens on the exercise of constitutionally protected political activities. The Supreme Court has found that "compelled

³⁴ *Citizens United v. FEC*, 558 U.S. at 338 (quoting *McConnell v. FEC*, 540 U.S. 93, 331-32 (2003)).

³⁵ *See, e.g.*, 52 U.S.C. §§ 30104(c), (f) & 30104(g).

³⁶ *See Wisconsin Right to Life v. Barland*, 751 F.3d 804, 811 (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 366-71.

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disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment³⁷ and “the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for ‘financial transactions can reveal much about a person’s activities, associations, and beliefs.’”³⁸ Mandatory ongoing disclosure of the names, addresses, occupations, and employers of *all* donors contributing over \$200—required of political committees but not of non-political committees filing independent expenditure reports³⁹—chills donors from using their contributions to associate with one another through the recipient organization. We are cautious to avoid compounding this chilling effect by imposing political committee status on issue groups that may occasionally make contributions to independent expenditure-only committees, but which make no such communications themselves.

In sum, regulatory obligations, prohibitions, and First Amendment impingements associated with political-committee status are weighty and extensive. As we have stated before, this is why courts have narrowed the reach of the Act’s “political committee” definition to ensure that groups engaged in discussion of issues 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 and Commission regulations define 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.”⁴⁰

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.”⁴¹

³⁷ *Davis v. FEC*, 554 U.S. 724, 744 (2008) (quoting *Buckley*, 424 U.S. at 64).

³⁸ *Buckley*, 424 U.S. at 66 (quoting *Cal. Bankers Ass’n v. Shulz*, 416 U.S. 21, 78-94 (1974) (Powell, J., concurring)).

³⁹ However, an organization’s independent expenditure reports requires the identification of every person who made a contribution in excess of \$200 specifically for the purpose of furthering the reported independent expenditure. See 11 C.F.R. § 109.10(e)(1)(vi); FEC Form 5 Instructions, available at <http://www.fec.gov/pdf/forms/fecfrm5i.pdf>.

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

⁴¹ *United States v. Nat’l Comm. for Impeachment*, 469 F.2d 1135, 1142 (2d Cir. 1972). This opinion was adopted by the D.C. Circuit in *Buckley v. Valeo*, 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 its opinion in *Buckley v. Valeo*, 424 U.S. 1, 79 n.106

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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.”⁴² 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.⁴³

There was not a “shred of evidence in the legislative history of the Act that would tend to indicate that Congress meant to go so far” as to require issue groups to register as political committees.⁴⁴ 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.”⁴⁵ In fact, Congress elected not to regulate directly as political committees many “liberal labor, environmental, business and conservative organizations,”⁴⁶ 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.”⁴⁷ Instead, Congress subjected these organizations to separate disclosure requirements under an independent provision of the Act, 2 U.S.C. § 437a (1974).⁴⁸ The D.C. Circuit, however, declared this statute unconstitutional in

(1976).

⁴² *ACLU v. Jennings*, 366 F. Supp. 1041, 1055, 1057 (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).

⁴³ *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”).

⁴⁴ *Nat'l Comm. for Impeachment*, 469 F.2d at 1142.

⁴⁵ *Id.* at 1441-42.

⁴⁶ 120 CONG. REC. H10333 (daily ed., Oct. 10, 1974).

⁴⁷ *Buckley*, 519 F.2d at 871 (internal quotation marks omitted).

⁴⁸ Congress “made it abundantly clear that it intended section 437a to reach beyond the other disclosure provisions of the Act.” *Id.* 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).

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Buckley v. Valeo, in a ruling that was not appealed to the Supreme Court⁴⁹ and “apparently accept[ed]” by lawmakers.⁵⁰ 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:

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 resentment 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.

⁴⁹ See *Buckley*, 424 U.S. at 10 & n.7. In so holding, the D.C. Circuit 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”).

⁵⁰ 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*).

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****[To readers:] Let them hear from you. They deserve your support in their resistance to the Nixon administration's bill.⁵¹**

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."⁵²

Thus, from the outset, courts recognized that although "[p]ublic discussion of public issues which are also campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct,"⁵³ such discussions do not convert the organization into a political committee. To the contrary, courts have emphasized how "the interest of a group engaging in nonpartisan discussion ascends to a high plane, while the governmental interest in disclosure correspondingly diminishes."⁵⁴

B. BUCKLEY'S "MAJOR PURPOSE" TEST

In response to both vagueness and overbreadth concerns, the Supreme Court in *Buckley v. Valeo* limited the scope of the Act's definition of "political committee" in two important ways.⁵⁵ 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."⁵⁶ 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."⁵⁷

Buckley fashioned these limitations to prevent the Act from "encompassing both issue discussion and advocacy of a political result"; thus, the major purpose limitation protects important First Amendment rights, particularly the right of associational privacy, by ensuring

⁵¹ *Jennings*, 366 F. Supp. at 1058 App'x; see also *Buckley*, 519 F.2d at 873-74 (referencing this discussion).

⁵² *Nat'l Comm. for Impeachment*, 469 F.2d at 1138.

⁵³ *Buckley*, 519 F.2d at 875.

⁵⁴ *Id.* at 873.

⁵⁵ 424 U.S. at 79.

⁵⁶ *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.

⁵⁷ *Id.* at 79.

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issue-advocacy organizations are not swept into the Act's burdensome regulatory scheme.⁵⁸ 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 and protect the latter.

C. MASSACHUSETTS CITIZENS FOR LIFE AND "INDEPENDENT SPENDING"

A decade after *Buckley*, in *FEC v. Massachusetts Citizens for Life* ("MCFL"), the Supreme Court reaffirmed the distinction between electoral groups and issue groups while acknowledging that the extent of an organization's "independent spending" —which the Supreme Court's logic in *Buckley* and *MCFL* strongly suggests is limited to spending on communications containing express advocacy—could cause an organization's major purpose to become the nomination or election of candidates and, thus, the organization would be classified as a political committee.⁵⁹ Then, with respect to the nonprofit organization MCFL, the Court

⁵⁸ *Id.* at 66, 79.

⁵⁹ 479 U.S. 238, 248, 262 (1986) ("MCFL"). In *Buckley*, the Supreme Court upheld the disclosure requirements for organizations making independent expenditures by limiting the Act's definition of an "expenditure" to express advocacy. *Id.* at 248; *Buckley*, 424 U.S. at 80. The Court reasoned this limitation is necessary to avoid unconstitutional overbreadth because "the distinction between discussion of issues and candidates and the advocacy of election or defeat of candidates may often dissolve in practical application." *MCFL*, at 249; *Buckley* at 42. The practical difficulty in distinguishing between "discussion of issues and candidates" and "advocacy of election or defeat of candidates" is not ameliorated by the purpose of the applicable regulation. Whether the regulation requires filing a one-time disclosure regarding a single communication, prohibits the communication, or requires registration and comprehensive ongoing financial reporting by the sponsor of the communication, fine distinctions between ambiguous texts are just as difficult. For this reason, in *MCFL* the Supreme Court again limited the prohibition against corporate independent expenditures to express advocacy. *MCFL* at 249. Accordingly, when the Court stated in *MCFL* that "should MCFL's *independent spending* become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee," *id.* at 262 (italics added), there is little doubt that the "independent spending" to which the Court referred was express advocacy. Any remaining doubt is resolved by the Court's numerous references in the decision to a group's independent expenditures (construed as express advocacy communications) as the group's "independent spending." *See id.* at 261-63. It is unlikely the Court used the term "independent spending" throughout the same decision to refer to two entirely different kinds of political speech without indicating it was doing so. Indeed, it would strain logic, if not qualify as absurd, for the Supreme Court to have limited disclosure requirements for independent expenditures to communications containing express advocacy while imposing political committee registration, organization, and reporting requirements on committees because they sponsored non-express advocacy communications.

The enduring significance of the Supreme Court's jurisprudence arising from the practical difficulty identified in *MCFL* is confirmed by its holding in *Citizens United*. In that case, the Court rejected an argument that the FEC must further parse the content or meaning of electioneering communications (which lack express advocacy) to determine whether the Act's disclosure provisions applied. This understanding of *MCFL* is consistent with the holdings of the Seventh Circuit in *Wisconsin Right to Life v. Barland*, 751 F.3d 804 (7th Cir. 2014), the Tenth Circuit in *New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010) ("*Herrera*"), and the District of Columbia District Court panel in *Independence Institute v. FEC*, 216 F. Supp. 3d 176 (D.D.C. 2016).

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held that its “central organizational purpose is issue advocacy, although it occasionally engage[d] in activities on behalf of political candidates.”⁶⁰

D. LOWER COURT CLARIFICATIONS OF THE “MAJOR PURPOSE” TEST.

Since *Buckley* and *MCFL*, various courts of appeals have further explored the major purpose limitation. In *New Mexico Youth Organized v. Herrera*, the Tenth Circuit stated:

There are two methods to determine an organization’s ‘major purpose’: (1) examination 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.⁶¹

And the Fourth Circuit in *North Carolina Right to Life, Inc. v. Leake* explained:

[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 letter of *Buckley*’s “unambiguously campaign

⁶⁰ *MCFL*, 479 U.S. at 252 n.6. The phrase “engage[d] in activities on behalf of political candidates” seems to have been used interchangeably with the term “independent expenditures.” *Compare id.* at 252-53, *with id.* at 252 n.6. Independent expenditures are reported to the Commission on Form 5 and are subject to three separate reporting requirements. First, a report is required when independent expenditures aggregate in excess of \$250 in any quarterly reporting period. In addition to the quarterly report, a 48-hour report is required when independent expenditures aggregate \$10,000 or more any time during the calendar year up to and including the twentieth day before an election. Each time subsequent independent expenditures relating to the same election aggregate \$10,000 or more, a new 48-hour report is required to be filed. Each 48-hour report is due within forty-eight hours of when the communication is publicly distributed or otherwise publicly disseminated. Finally, a 24-hour report is required when independent expenditures aggregate \$1,000 or more, less than twenty days but more than twenty-four hours before an election. Each time subsequent independent expenditures relating to the same election aggregate \$1,000 or more, a new 24-hour report is required to be filed. Each 24-hour report is due within twenty-four hours of when the communication is publicly distributed or otherwise publicly disseminated. For purposes of determining whether 24- and 48-hour reports are required to be filed, aggregation is based on all independent expenditures during a calendar year that are made with respect to the same election for a Federal office. 11 C.F.R. § 109.10 (b), (c) & (d).

⁶¹ 611 F.3d at 678.

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related” test, but it would also subject a large quantity of ordinary political speech to regulation.⁶²

The Fourth Circuit in *Real Truth About Abortion v. FEC* cited to a narrow understanding of the major purpose test, noting that “[t]he expenditure or contribution threshold means that some groups whose ‘major purpose’ was *indisputably the nomination or election of federal candidates* would not be designated PACs.”⁶³

The nature and scope of the major purpose test as applied to the Act was further examined in *FEC v. Malenick*,⁶⁴ and *FEC v. GOPAC, Inc.*⁶⁵ In those cases, federal district courts examined the public and non-public statements, as well as the electoral spending, of particular groups to determine if the major purpose of each organization was the nomination or election of a federal candidate.

E. COMMISSION RULEMAKING & APPLICATION OF THE “MAJOR PURPOSE” TEST

Although *Buckley* established the major purpose test, it “did not mandate a particular methodology for determining an organization’s major purpose,” delegating such determinations and methodology to the Commission “either through categorical rules or through individualized adjudications.”⁶⁶ The Commission opted for the latter. 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,”⁶⁷ and in particular, whether the regulatory definition of political committee “should be amended by incorporating the major purpose requirement.”⁶⁸ The Commission sought comment on four tests for determining whether an entity had the requisite major purpose.⁶⁹ These proposed tests would

⁶² 525 F.3d 274, 287-88 (4th Cir. 2008) (“*NCRTL*”) (emphasis in original).

⁶³ 681 F.3d 544, 558 (4th Cir. 2012), *cert. denied*, 81 U.S.L.W. 3127 (U.S. Jan. 7, 2013) (No. 12-311) (“*RTAA*”).

⁶⁴ 310 F. Supp. 2d 230, 234-36 (D.D.C. 2005).

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

⁶⁶ *RTAA*, 681 F.3d at 556.

⁶⁷ *Notice of Proposed Rulemaking on Political Committee Status*, 69 Fed. Reg. 11,736, 11,736 (Mar. 11, 2004).

⁶⁸ *Id.* at 11,743.

⁶⁹ *Id.* at 11,745.

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have examined — to varying degrees — an organization’s avowed purpose, its spending, and its tax status.⁷⁰

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.⁷¹ 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.⁷² In response, the Commission issued a Supplemental Explanation and Justification in 2007.⁷³ This Supplemental E&J did not issue or explain a new rule. Rather, it elaborated on the Commission’s case-by-case approach, 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,” and that “any list of factors developed by the Commission would not likely be exhaustive in any event, as evidenced by the multitude of fact patterns at issue in the Commission’s enforcement matters considering the political committee status of various entities.”⁷⁴

The U.S. District Court for the District of Columbia upheld the Commission’s case-by-case approach as further explained in the Supplemental E&J.⁷⁵ More recently, the Fourth and Tenth Circuits upheld the constitutionality of the Commission’s case-by-case approach.⁷⁶ The

⁷⁰ See *id.* at 11745-49; see also *Final Rules on Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees*, 69 Fed. Reg. 68,056, 68,064-65 (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).

⁷¹ 2004 E&J, 69 Fed. Reg. at 68,065.

⁷² 424 F. Supp. 2d 100, 115-16 (D.D.C. 2006).

⁷³ 2007 Supplemental E&J, 72 Fed. Reg. 5,596.

⁷⁴ *Id.* at 5,601-02. The Commission has periodically considered proposed rulemakings that would have determined major purpose by reference to a bright-line rule — such as proportional (*i.e.*, 50%) or aggregate threshold amounts spent by an organization on federal campaign activity. But the Commission consistently has declined to adopt such bright-line rules. See *Independent Expenditures; Corporate and Labor Organization Expenditures*, 57 Fed. Reg. 33,548, 33,558-59 (July 29, 1992) (Notice of Proposed Rulemaking); *Definition of Political Committee*, 66 Fed. Reg. 13,681, 13,685-86 (Mar. 7, 2001) (Advance Notice of Proposed Rulemaking); see also *Summary of Comments and Possible Options on the Advance Notice of Proposed Rulemaking on the Definition of “Political Committee,” Certification* (Sept. 27, 2001) (voting 6-0 to hold proposed rulemaking in abeyance).

⁷⁵ *Shays v. FEC*, 511 F. Supp. 2d 19, 29-31 (D.D.C. 2007) (holding that the Commission’s choice to regulate “political organizations” as defined by 26 U.S.C. § 527 on a case-by-case basis was neither arbitrary nor capricious and was “exactly the type of question generally left to the expertise of [the] agency”).

⁷⁶ *RTAA*, 681 F.3d at 556. The court observed that the Commission’s approach was “sensible . . . [and] consistent with Supreme Court precedent”. *Id.* at 558. See also *Free Speech v. FEC*, Case No. 12-CV-127-S, 2013 WL 12142583, at *7 (D. Wyoming Mar. 19, 2013) (“*Free Speech*”) (“[A]gree[ing] with the assessment of the

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Fourth Circuit in *Real Truth About Abortion v. FEC*,⁷⁷ for example, 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.”⁷⁸

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,⁷⁹ many of the enforcement matters contained therein have been undermined by subsequent judicial decisions. For example, the 2007 Supplemental E&J was issued prior to the Court’s decision in *FEC v. Wisconsin Right to Life, Inc.*,⁸⁰ which clarified the distinction between issue and electoral advocacy.⁸¹ And recently, the Seventh Circuit in *Wisconsin Right to Life v. Barland* reinforced *WRTL II*’s holding that genuine issue advertisements cannot be regulated — through disclosure rules — as electoral advocacy.⁸² The Commission has adapted to such developments in the law through its case-by-case approach.

* * * *

In sum:

- Under the Act, an organization must (1) receive “contributions” or make “expenditures” expressly advocating the election or defeat of a federal candidate aggregating at least \$1,000 in a calendar year and (2) have as its “major purpose” the nomination or election of federal candidates.
- The major purpose of an organization must be nominating or electing federal candidates; a group that has as its major purpose the discussion of public policy, or political issues, may not be regulated as a political committee under the Act.

Fourth Circuit in *RTAA*”) (adopted in full as the opinion for the U.S. Court of Appeals for the Tenth Circuit in *Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013). *cert. denied* 134 S. Ct. 2288, No. 13-772 (2014)).

⁷⁷ *RTAA*, 681 F.3d at 556.

⁷⁸ *Id.* (emphasis in original). The *RTAA* court also noted that the inquiry to assess an organization’s major purpose “would not necessarily be an intrusive one” since “[m]uch of the information the Commission would consider would already be available in that organization’s government filings or public statements.” *Id.*

⁷⁹ 2007 Supplemental E&J, 72 Fed. Reg. at 5,601.

⁸⁰ The 2007 Supplemental E&J was issued on February 7, 2007. See 72 Fed. Reg. 5595. *WRTL II* was decided on June 25, 2007. 511 U.S. 449 (2007) (“*WRTL I*”).

⁸¹ See *WRTL II*, 551 U.S. at 478-79 (“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.”).

⁸² *Barland*, 751 F.3d at 834-35.

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- 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.⁸³

With these principles in mind, we turn to New Models.

IV. ANALYSIS OF NEW MODELS' MAJOR PURPOSE

As explained above, since its adoption, the Act's definition of "political committee" has been subject to 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. Congress also required a threshold predicate to distinguish between ordinary contributors and political committees – that as a threshold matter an organization receives contributions or makes expenditures. Upon thorough consideration of various facts indicative of political committee status: organizational documents, public statements of purpose, tax status, and independent spending, we do not have reason to believe that New Models met the threshold of receiving \$1,000 in contributions or making \$1,000 in expenditures under the first prong, or that New Models had the major purpose of nominating or electing federal candidates under the second prong.

A. NEW MODELS HAS NOT MET THE STATUTORY THRESHOLD FOR POLITICAL COMMITTEE STATUS

New Models made several contributions to political committees, but did not *receive contributions* as defined by the Act. There is also no evidence that New Models *made expenditures* as defined by the Act. Therefore, New Models did not meet the statutory threshold for becoming a political committee.

The Act defines the term "contribution" to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any

⁸³ While the Commission does look at the facts and circumstances to determine the organization's true purpose—such as its organizational documents, public statements of purpose, tax status, and the amount spent on express advocacy over the course of the organization's history—the Commission cannot (and should not) consider the facts and circumstances of speech itself. See 2007 Supplemental E&J, 72 Fed. Reg. 5,595, 5,598 (Feb. 7, 2007) (citing Rev. Rul. 2004-06, 2004-1 C.B. and noting the IRS's facts and circumstances test, if applied to the Act, "clearly would violate the Supreme Court's Constitutional parameters established in *Buckley*, and reiterated in *MCFL* and *McConnell*, that campaign finance rules must avoid vagueness"); see also *Citizens United*, 558 U.S. at 337; *WRTL II*, 551 U.S. at 473-74 (contextual factors of the sort invoked by [the Commission] should seldom play a significant role . . . the need to consider such background should not become an excuse for discovery or a broader inquiry").

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election for Federal office.”⁸⁴ It defines “expenditure” to include “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value; made by any person for the purpose of influencing any election for Federal office.”⁸⁵ With regard to both of these definitions, the Supreme Court clarified and, especially for non-candidates and non-political parties, limited the scope of what counts as “made . . . for the purpose of influencing any election for Federal office.”⁸⁶

In *Buckley*, the Court upheld regulations on contributions, noting that “[a] contribution to [a Federal candidate] serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support.”⁸⁷ Even so, the Act limits contributions or requires their disclosure only when they are sufficiently “connected to a candidate or his campaign.”⁸⁸ Specifically, *Buckley* narrowed the definition of contribution to encompass only (1) donations to candidates, political parties, or campaign committees; (2) expenditures made in coordination with a candidate or campaign committee; and (3) donations given to other persons or organizations but “earmarked for political purposes.”⁸⁹ New Models was not a candidate, party, or campaign committee and, as explained below, did not make any expenditures – coordinated or otherwise. Therefore, none of its funding seems earmarked for a political purpose and would not be counted as a “contribution” for purposes of the Act.

The Court circumscribed the definition of “expenditure” even more than it did the term “contribution.” The Court held that the term “expenditure” is construed “to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified federal candidate.”⁹⁰ This is to limit regulation – including disclosure requirements – to “spending that is unambiguously related to the campaign of a particular federal candidate.”⁹¹

There is no claim that New Models made any independent expenditures of its own expressly advocating the election or defeat of a clearly identified candidate. New Models’s spending on political activities consisted only of making contributions to several organizations,

⁸⁴ 52 U.S.C. § 30101(8)(A)(i).

⁸⁵ 52 U.S.C. § 30101 (9)(A)(i).

⁸⁶ See, e.g., *Buckley*, 424 U.S. at 78-80.

⁸⁷ *Id.* at 424 U.S. at 21.

⁸⁸ *Id.* at 78.

⁸⁹ *Id.* at 23, n.24, 78. The United States Court of Appeals for the Second Circuit interpreted the phrase “earmarked for political purposes” to include only donations “that will be converted to expenditures subject to regulation under [the Act].” *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995).

⁹⁰ *Id.* at 79-80.

⁹¹ *Id.* at 80.

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most of which were registered as political committees with the Commission. Those committees made expenditures independent of candidates and political parties.⁹² The contributions to these political committees would be “generalized expressions of support” for those committees, but not necessarily any particular candidate. They would not be “expenditures made” under the Act. To find otherwise requires ignoring how the Act differentiates between “contributions” and “expenditures” throughout its provisions.⁹³ Moreover, the Act defines the term “contribution” and never includes that term in a definition or modification of the term “expenditure.”⁹⁴ Thus, under the plain language of the Act, New Models did not receive contributions or make expenditures of more than \$1,000. As a result, they were not required to register and report as a political committee with the Commission.

The threshold inquiry is not a trivial technicality. It indicates a fundamental distinction between a political committee, on the one hand, versus a contributor to political committees, on the other. New Models was a contributor, not a political committee.

B. THERE IS NO REASON TO BELIEVE NEW MODELS HAS THE MAJOR PURPOSE FOR POLITICAL COMMITTEE STATUS

Whether or not New Models met the threshold inquiry, it nonetheless did not have the requisite major purpose to be a political committee.⁹⁵ The Complaint bases its allegation upon a

⁹² Indeed, New Model’s contributions to these political committees are only permissible because, as the Court of Appeals for the District of Columbia held, “the government has no anti-corruption interest in limiting contributions to an independent expenditure group.” *SpeechNow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010). Thus, “limits on [such] contributions . . . cannot stand.” *Id.* at 696. This follows from the Supreme Court’s holding that spending for communications made independent of a candidate “do not give rise to corruption or appearance of corruption.” *Citizens United*, 558 U.S. 310, 357. As “general expressions[s] of support” for the independent expenditure committees, New Models’ contributions here bear even less risk of corruption than the committees’ expenditures do. [To paraphrase *Buckley*, these contributions “do not communicate the underlying basis for the support” of these independent groups, much less a clearly identified federal candidate.] This is another reason contributions to such groups should not count as “expenditures made” toward the statutory trigger of § 30101(4)(A).

⁹³ OGC argued that contributions to a political committee should qualify as expenditures for purposes of the statutory threshold. We think the better course is to maintain the distinction between contributions and expenditures that exists throughout the Act, Commission regulations, and case law. Seemingly contrary precedents can be distinguished by candidate involvement. Political committees are the *only* organizations that can contribute to federal candidates. 52 U.S.C. § 30116(a); *cf.* 11 C.F.R. § 110.1(e) (permitting contributions by partnerships, provided they are attributed to individual partners). This lends weight to the argument that giving money to candidates may trigger political committee status. Whatever the merits of this argument when candidates are involved, however, they lose all force in context of contributions to independent expenditure groups, which have no potential for corruption or the appearance of corruption.

⁹⁴ *See e.g.*, 52 U.S.C. § 30118. Contributions *or* expenditures by national banks, corporations, or labor organizations (modifying definitions of the terms “contribution” or “expenditure” for purposes of this subsection (emphasis added)).

⁹⁵ Our conclusion that the available evidence does not support finding reason to believe that New Models is not a political committee is based upon two independent grounds. First, New Models did not cross the statutory

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comparison of New Models's 2012 campaign spending with its 2012 spending on activities unrelated to the election or defeat of federal candidates, a comparison showing 68.5% of New Models's total disbursements in 2012 went towards contributions to independent expenditure-only committees.⁹⁶ We do not believe contributions in one year establish this organization's major purpose. Instead, we compare New Models's isolated contributions with other activities both in 2012 and during its lifetime. Our analysis also considers the First Amendment implications of overreaching to regulate a policy organization as a political committee—and subjecting it to the burdens attendant to such classification—based solely on a handful of contributions in a brief snapshot in time.⁹⁷

1. *New Models' Central Organizational Purpose Focused on Public Policy and Issues, not Federal Candidates*

A finding of reason to believe requires significant evidence a violation of the Act occurred. Here, the Complaint does not allege or provide evidence indicating New Models organized for purposes other than the promotion of social welfare consistent with 26 U.S.C. § 501(c)(4) and Department of the Treasury regulations. Discussion of organizational purpose is likewise absent from OGC's analysis.

Although an organization's tax status is not dispositive of the question, it is certainly a relevant consideration. As Senator McCain, a principal Senate sponsor of BCRA, has stated, "under existing tax laws, Section 501(c) groups . . . cannot have a major purpose to influence federal elections, and therefore are not required to register as federal political committees, as

threshold of \$1,000 in contributions received or expenditures made. Second, New Models's major purpose is not nominating or electing federal candidates. Each ground is independently sufficient to substantiate our conclusion..

⁹⁶ Compl. at 4-5, 7. Similarly, OGC—while noting that the "Commission considers a group's overall conduct, including its disbursements, activities, and statements" when determining major purpose—devotes its analysis almost exclusively to New Models' spending in calendar year 2012, ignoring other conduct over 15 years. First Gen. Counsel's Rpt. at 5, MUR 6872. OGC also supports its recommendation by reference to New Models's 2011-2012 *election cycle* spending. *Id.* at 6. That argument fails for the same reason as an analysis based solely on one calendar year. New Models made no contributions or expenditures in 2011, indicating it was not a political committee in 2011. Counting its 2012 contributions as a percentage of its 2011 and 2012 spending still uses a single year of activity to define the organization. Even counting the 2012 spending over that two-year period represents a departure, or temporary anomaly, from the organization's usual issue-related spending over the course of multiple years and election cycles and that snapshot does not, based upon our expertise in judging organizations, and considering all other facts and circumstances, represent the organization's major purpose. And arguing that New Models's major purpose "changed" in 2012 is a different rhetorical way to justify a focus on one year. We have consistently rejected OGC's myopic focus on one year of spending, no matter how OGC rhetorically describes one year of spending. The fundamental flaw in OGC's one-year approach – which is a recent creation by OGC – is that it ignores an organization's history and other activities. Here, New Models's history, before and after 2012, evidences a classic issue organization.

⁹⁷ See Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 1, MUR 6538 (Americans for Job Security, *et al.*); Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 1, MUR 6396 (Crossroads GPS).

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long as they comply with their tax law requirements.”⁹⁸ 501(c)(4) groups, specifically, are permitted to engage in a substantial amount of political campaign activity without losing their exempt status.⁹⁹

The Complaint does not allege that New Models’s organizational documents reveal its purpose to be the nomination or election of federal candidates.¹⁰⁰ Without allegations or evidence to the contrary we may assume such documents were properly drafted in order to incorporate and operate as a non-profit organization and obtain and maintain 501(c)(4) status with the IRS.¹⁰¹ Thus, we weigh this factor in favor of New Models absent evidence that its articles of incorporation or bylaws manifest an organizational purpose other than engaging in legitimate 501(c)(4) social welfare activities, or evidence that its 501(c)(4) status has been violated or revoked. Accordingly, we find that New Models’s organizational documents weigh against finding reason to believe that its major purpose was the nomination or election of federal candidates.

2. *New Models’ Public Statements Do Not Indicate That Its Major Purpose Was the Nomination or Election of Federal Candidates*

Some courts have asserted that an organization’s major purpose may be established through “public statements of purpose.”¹⁰² In *Malenick*, the court reviewed the organization’s

⁹⁸ 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 an exemption from taxation for “[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare”). See also Comment of Public Citizen on Reg. 2003-07 (Political Committee Status) at 10 (Apr. 5, 2004) (“[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”).

⁹⁹ See Rev. Rul. 81-85, 1981-1 C.B. 332 (“[T]he regulations do not impose a complete ban on [political campaign activities] for section 501(c)(4) organizations. Thus, an organization may carry on lawful political activities and remain exempt under section 501(c)(4) as long as it is primarily engaged in activities that promote social welfare.”). Whether an organization is in fact “primarily” engaged in promoting social welfare under the IRC and Treasury Department regulations is a different (and broader) “facts and circumstances test,” than the “major purpose” test articulated in *Buckley*. See 2007 Supplemental E&J at 5,598.

¹⁰⁰ See Statement of Reasons of Commissioners Darryl R. Wold, David M. Mason, and Scott E. Thomas at 2, MUR 4850 (Deloitte & Touche, LLP, *et al.*) (“The burden of proof does not shift to a respondent merely because a complaint is filed.”).

¹⁰¹ See Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (“The 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.”); Rev. Rul. 81-85, 1981-1 C.B. 332 (“In order to qualify for exemption under section 501(c)(4) of the [Internal Revenue] Code, an organization must be primarily engaged in activities that promote social welfare within the meaning of section 1.501(c)(4)-1.”). See also D.C. CODE § 29-402.02 (requiring articles of incorporation to set forth that the corporation is incorporated as a nonprofit.).

¹⁰² *FEC v. Malenick*, 310 F. Supp. 2d 230, 234-36 (D.D.C. 2004) (citing *GOPAC*, 917 F. Supp. at 859) (discussing *FEC v. Machinists Non-Partisan League*, 655 F.2d 380, 392 (D.C. Cir. 1981)). But see *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) (“*WRTL II*”); *North Carolina Right to Life v. Leake* (“*NCRTL II*”), 525

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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.¹⁰³ In *GOPAC*, the court predominantly focused on letters GOPAC sent to citizens as well as discussions 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.¹⁰⁴

Under *GOPAC*, official statements from a group, such as a group's organizing documents and official statement of purpose, or other materials issued under the group's name, including fundraising documents or press releases, are the primary public statements by which an entity's central organizational purpose is determined. According to the 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."¹⁰⁵ Thus, under the Supplemental E&J and federal court decisions, these statements must be given significant weight and a stray quote or a paraphrase, in the face of all the other evidence, will not transform a group into a political committee.

Here New Models denies that the organization has the requisite major purpose for political committee status.¹⁰⁶ New Models claims it never made an independent expenditure,¹⁰⁷ nor publicly advocated the election or defeat of a federal candidate.¹⁰⁸ Its fundraising materials do not state that the organization's goal is to elect federal candidates nor do they suggest to prospective donors that funds will be used to elect or defeat federal candidates; and New Models has never stated that its purpose was the election or defeat of a federal candidate.¹⁰⁹

The Complaint does not identify a single statement in over 15 years where a representative of New Models indicated the major purpose of the organization was to nominate

F.3d 274 (cautioning against looking to subjective or contextual factors), which cast serious doubt on the validity of examining anything other than the amount of express advocacy in the major purpose test analysis.

¹⁰³ 310 F. Supp. 2d at 235.

¹⁰⁴ 917 F. Supp. at 862-65.

¹⁰⁵ 72 Fed. Reg. at 5,601.

¹⁰⁶ Resp. at 3-4; Resp., Aff. of Tim Crawford at ¶ 3.

¹⁰⁷ Resp., Aff. of Tim Crawford at ¶ 5. A review of Commission filings reveals no independent expenditure reports ever filed by New Models. Federal Election Commission, Independent Expenditures, https://www.fec.gov/data/independent-expenditures/?data_type=processed&is_notice=false&max_date=08%2F29%2F2017

¹⁰⁸ *Id.* at 4, 7.

¹⁰⁹ *Id.* at 9-10.

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or elect federal candidates.¹¹⁰ Public statements available in our record indicate that New Models's major purpose was to conduct and sponsor research on public policy. As set forth on its website, "New Models provides public opinion research on key issues facing the American people." The website even maintains an "[a]rchives" page allowing the public to view the research New Models engaged in or commissioned since 2003.¹¹¹ No online report that we reviewed contains language advocating the election or defeat of a candidate.¹¹² Therefore, New Models's public statements weigh against finding reason to believe New Models was a political committee and we place much weight on this factor in our analysis.

3. *New Models' Independent Spending Demonstrates Its Major Purpose Was Not the Nomination or Election of a Federal Candidate*

In applying the Commission's case-by-case approach, we place significant weight upon an organization's history of activities and spending. This approach gives the most complete picture of an organization's major purpose.¹¹³ One federal court recently ruled that this approach

¹¹⁰ OGC's Report does not identify a single statement evincing a purpose to nominate or elect federal candidates. OGC's analysis states that "the available information does not include examples of New Model's public statements or non-contribution activities." First Gen. Counsel's Rpt., at 5, MUR 6872. This statement is inaccurate. New Models' 2012 Form 990 was attached to the Complaint and describes New Models' "program service accomplishments." See Compl. Ex. A, 2012 Form 990 Part III (listing program service activities including focus groups, national issues polling and branding). "A program service is an activity of an organization that accomplishes its exempt purpose." 2016 Instructions for Form 990 Return of Organization Exempt from Income Tax at 10, <https://www.irs.gov/pub/irs-pdf/i990.pdf>. Because "[t]he promotion of social welfare does not include direct or indirect participation or intervention in political campaigns . . ." program service activities are by definition "non-contribution activities." 26 C.F.R. 1.501(c)(4)-1(a)(2)(ii). New Models' program service accomplishments are apparent throughout its lifetime. See Form 990s, Part III; NEW MODELS, <http://newmodelsusa.org/>. Because newmodelsusa.org website is no longer functioning we utilized an internet archive to review New Models's reports. See Wayback Machine, Internet Archive (search for "<http://newmodelsusa.org>") (revealing published monthly research results from 2003 to early 2016). Additionally, New Models' website is listed on the front page of the 2012 Form 990 and 2011 Form 990, both of which were attached to the Complaint. See Compl. at Exs. A, E. A check of that website would easily have given OGC examples of New Models' public statements in addition to the polling research it funded for over a decade.

¹¹¹ See Wayback Machine, Internet Archive (search for "<http://newmodelsusa.org>").

¹¹² See *id.*; see e.g., NEW MODELS, Messaging on Immigration Reform and the Fiscal Cliff (December 2012), <https://web.archive.org/web/20160503062835/http://newmodelsusa.org/wp-content/uploads/2012/12/NewModelsDecember2012Report.pdf>. Even if New Models had engaged in express advocacy on its own website, such internet communications are not expenditures under the Act and have no relevance to an analysis of political committee status. See 11 C.F.R. § 100.153 (exempting uncompensated internet activity from the definition of "expenditure").

¹¹³ See Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen, MUR 6538 (Americans for Job Security, *et al.*) (looking at organization's spending over its lifetime); Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 24 n.101, MUR 6396 ("Often one can assess an organization's true major purpose only by reference to its entire history."); see also Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners

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is reasonable.¹¹⁴ The Commission and courts have resolved major purpose analyses by examining each organization as a whole, considering varying years of activity ranging from two to ten years, and often the organization's entire history.

For example, in MUR 5365 (Club for Growth, Inc.) the Commission cited "CFG's activities, including its candidate research and advertising campaigns discussed above [from 2000 to 2004]."¹¹⁵ In MUR 5751 (The Leadership Forum), OGC cited IRS reports showing receipts and disbursements over a five-year period, from 2002 through 2006, before concluding that the Respondent had not crossed the statutory threshold for political committee status.¹¹⁶

In MUR 2804, the Commission considered whether the American Israel Public Affairs Committee ("AIPAC") was a political committee. The Commission based its conclusion that AIPAC was not a political committee upon the General Counsel's analysis of a full decade, from 1983 to 1992, of varied political activities, which included some electoral expenditures.¹¹⁷ After the Commission's conclusion was challenged in court and remanded, the Commission ratified that conclusion again in 2000.¹¹⁸ The Commission's determination that AIPAC was not a

Caroline C. Hunter and Matthew S. Petersen, MUR 6081 (American Issues Project, Inc.) (looking at four years of an organization's history).

¹¹⁴ *CREW v. FEC*, 209 F. Supp. 3d. 77, 94 (D.D.C. 2017) ("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."). The district court in *CREW* went on to rule that the Commission should consider whether an organization's major purpose fundamentally *changed* over time, and to consider whether a spike in electoral spending in one year indicates such a fundamental change in the organization. *Id.* at 94. Having considered New Models's history, and the contributions it made in 2012 in the context of that history and the long-term mission, as well as its activities in the years immediately preceding and following 2012, the facts and circumstances do not provide reason to believe that New Models's major purpose changed from public policy discussion to nominating or electing federal candidates. This conclusion is depicted graphically in Figure 2 above.

¹¹⁵ General Counsel's Brief at 24, MUR 5365 (Club For Growth, Inc.); *see id.* at 4 ("every CFG membership solicitation between 2000-2004 confirms [] the mission of the organization") & 12 ("charting CFG's "annual advertising disbursements compared to its total disbursements for each year since 2000."). *See also* Stipulation for Entry of Consent Judgment ¶ 22, *FEC v. Citizens Club for Growth, Inc.*, Civ. No. 1:05-01851 (Sept. 6, 2007) ("Defendant's disbursements also show that its major purpose is influencing federal elections. Between August 30, 2000 and December 31, 2004, Defendant made disbursements totaling approximately \$15.1 million, the vast majority of which were made *in connection with* federal elections, including . . . public communications *referencing* a clearly identified candidate.") (emphasis added). The legal underpinnings of this MUR, including its consideration of spending on activity merely "in connection with" federal elections have been undermined by *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) and *Emily's List v. FEC*, 581 F.3d 1, 12-14 (D.C. Cir. 2009).

¹¹⁶ General Counsel's Report #2 at 3, MUR 5751 (The Leadership Forum).

¹¹⁷ *See* General Counsel's Brief (Jan. 30, 1992), MUR 2804 (American Israel Public Affairs Committee).

¹¹⁸ *See* Vote Certification (Mar. 22, 2000), MUR 2804R, *approving recommendations in* General Counsel's Report (Mar. 8, 2000) at 19-22, MUR 2804R ("This was the conclusion reached in MUR 2804 with regard to AIPAC, with the result that the Commission found no probable cause to believe that the organization had violated 2

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political committee also was the basis for the Commission's conclusion, resolving a related allegation, that AIPAC was a bona fide membership organization.¹¹⁹ The Commission's two determinations – that AIPAC was not a political committee and was a membership organization – were conflated because classification as a membership organization turned on whether the organization was a political committee. When the issue was again reviewed by the U.S. District Court for the District of Columbia, the court affirmed the Commission's conclusion that AIPAC was not a political committee, even expanding the scope to AIPAC's "more than forty years" history:

AIPAC was incorporated in 1963 as a non-profit organization with the "sole function," as a registered domestic lobby, to encourage close U.S.-Israel relations and to provide services to its own members. Based on a careful review of the administrative record and the parties' arguments, I find no evidence that AIPAC's focus on lobbying for more than forty years has been a sham perpetrated to circumvent the Act's contribution and expenditure limits.¹²⁰

The Commission has analyzed other matters according to several years of activity. In MUR 3669, the Commission considered nearly the entire five-year lifetime of the Christian Coalition.¹²¹

Here, the Complaint alleges New Models was a political committee in 2012 because it made contributions in excess of \$1,000 to independent expenditure-only political committees,

U.S.C. §§ 433 and 434. . . . Therefore, the Commission's determination that there was no probable cause to believe AIPAC had violated 2 U.S.C. §§ 433 and 434 by failing to register and report as a political committee should remain undisturbed.").

¹¹⁹ General Counsel's Report at 19-20 (Mar. 8, 2000), MUR 2804R.

¹²⁰ *Akins v. FEC*, 736 F. Supp. 2d 9, 20 (D.D.C. 2010).

¹²¹ *See, e.g.*, Gen. Counsel's Brief at 13-169 (July 28, 1995), MUR 3669 (Christian Coalition) (considering activities over five years, 1990, 1991, 1992, 1993 and 1994). The Christian Coalition was created in 1989. *See FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 49 (D.D.C. 1999). So the Commission's consideration of activities over five years, 1990, 1991, 1992, 1993 and 1994, constituted practically the entire lifespan of the organization. *See* Statement of Reasons of Commissioner Scott E. Thomas, Vice Chairman John Warren McGarry, and Commissioner Danny Lee McDonald, MUR 3669 at 6-11 (Christian Coalition) (citing to OGC's 192-page brief and arguing the Christian Coalition's major purpose was "election-related activities" as shown by various activities and statements from 1990 to 1994). *See also* General Counsel's Report (Mar. 18, 1999) at 6, MUR 3669 (Christian Coalition) (expanding proposed investigation to "new areas of inquiry" including TV and newspaper ads from 1990, 1991, 1992, and 1993); First Gen. Counsel's Rpt. at 12, 18-30, MUR 3669 (Christian Coalition) (analyzing activities from 1990 through 1992 and determining that the organization's activities were "designed" to influence federal elections). The legal underpinnings of this MUR, including consideration of spending on "election-related" activities "designed" to influence federal elections have been undermined by *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007).

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representing approximately 68.5% of its total spending during the 2012 calendar year.¹²² We disagree. Based upon our review of New Models's spending, nominating or defeating a federal candidate may have been a purpose of the organization in 2012, but was not *the* major purpose of the organization.¹²³ New Models never received contributions or made independent expenditures. New Models's federal electoral activity was limited to making isolated contributions to three Super PACs. Over its lifetime, these contributions amounted to just 19.5% of the organization's total spending.¹²⁴ Even in 2012, New Models spent \$1.5 million on its traditional policy mission. Thus, the contributions it made to other organizations in 2012 does not support a finding that its the major purpose was nominating or electing candidates to federal office.

Our conclusion is further supported by looking at New Models's activities in the wake of *Citizens United* and *Speech Now*. From 2010 through 2015, the amount allocated to independent expenditure-only committees totaled just 29.6% of New Models's overall spending. Furthermore, the three most recent calendar years show *zero* contributions to federal political committees.¹²⁵ Accordingly, we do not have reason to believe that New Models's major purpose is the nomination or election of federal candidates. Rather, we believe New Models is an issue discussion organization that made sporadic contributions to independent expenditure-only committees. In other words, New Models is precisely the type of group the *Buckley* court sought to exclude from the definition of political committee through the major purpose limitation.

Recently, in the last five years, OGC has conceived a new timeframe for determining an organization's major purpose by reference to a single calendar year. Although that argument has not persuaded the Commission, or any federal court, OGC nonetheless continues to advance it

¹²² See Compl. at 6-7.

¹²³ Nor does New Models's spending after 2012 indicate a shift in the organization's spending pattern. To the contrary, the 2012 contributions deviate from New Models' usual spending practices both before and after 2012. Furthermore, New Models affirmed under penalty of perjury that no significant changes to its governing documents—and by extension the exempt purposes under IRC section 501(c)(4) required to be denoted in those documents—took place in 2012 or in the years following. See New Models' 2011, 2012, 2013, 2014, 2015 Form 990s.

¹²⁴ OGC stated in its First General Counsel's Report that "the available information does not provide an adequate basis" to assess New Models's representation that its contributions amount to "'less than 20%' of its overall spending since the group's inception." First Gen. Counsel's Rpt. at 5. Again, OGC's Report was inaccurate. New Models' annual returns are publicly available. See Foundation Center 990 Finder, http://990finder.foundationcenter.org/990results.aspx?990_type=A&fn=New+Models&st=&zp=&ei=&fy=&action=Find; ProPublica Nonprofit Explorer, <https://projects.propublica.org/nonprofits/organizations/522267268>; OpenSecrets Nonprofit Data Search, https://www.opensecrets.org/outside-spending/political-nonprofits/990_tax_forms?id=522267268

¹²⁵ 209 F. Supp. 3d 77, 94 (D.D.C. 2017) (stating that the Commission should have given additional weight to an organization's most recent calendar year).

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here.¹²⁶ According to OGC's report, "whether the analytical time frame for major purpose is a calendar year, the group's fiscal year, or the relevant election cycle, New Models' spending on federal campaign activity¹²⁷ appears to constitute the majority of its overall spending."¹²⁸ Because the only year in which New Models made significant political contributions was 2012, OGC's analysis, whether phrased as calendar year, fiscal year, or election-cycle, turns on the contributions made in the single calendar year 2012.

However, determining an organization's major purpose by reference to its activity in a narrow snapshot of time—one calendar year or two—overlooks 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 that exist to elect or defeat federal candidates.¹²⁹ Other regulatory rules apply to groups that occasionally, or incidentally, act to nominate or elect candidates. While OGC attempts to root the single calendar year approach in the statute,¹³⁰ the major purpose test is not expressed in the statute. The major purpose test was

¹²⁶ See First Gen. Counsel's Rpt. at 5, 6872 (New Models).

¹²⁷ While the Commission has erroneously strayed into the vague notion of generalized "campaign activity," rather than *Buckley's* strict concept of 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 that 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., Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen, MUR 6396 (Crossroads GPS); Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen, MUR 6081 (American Issues Project); Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn, MUR 5541 (The November Fund); 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").

¹²⁸ First Gen. Counsel's Rpt. at 6, 8, MUR 6872 (New Models). New Models's fiscal year is the calendar year. See Form 990s.

¹²⁹ See, e.g., 2007 Political Committee Status Supplemental E&J at 5,602 ("[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.").

¹³⁰ OGC argues that "[a] calendar year provides the firmest statutory footing for the Commission's major purpose determination . . ." First Gen. Counsel's Rpt. at 5 n.21, MUR 6872 (New Models). However, 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 and operates. The Act imposes a bright line that, according to *Buckley*, was unconstitutionally over-inclusive, and thus, the Court imposed the major purpose limitation as a further filter. It is

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fashioned by the Supreme Court precisely to avoid a rigid, “one-size-fits-all rule” rule.¹³¹ The Commission has chosen a more comprehensive set of factors in a case-by-case approach. Moreover, a rigid calendar year approach or election cycle approach conflicts with multiple decisions by the U.S. District Court for the District of Columbia upholding Commission consideration of an organization’s multi-year spending history.¹³² For these reasons, the Commission has never formally adopted such an approach¹³³ and has eschewed limiting its analysis to a single calendar year in prior enforcement matters – matters OGC chose not to cite.¹³⁴

Assessing the major purpose limitation through the myopic and artificial window of an organization’s political contributions in a single calendar year would inevitably subject many issue-based organizations to the burdens of political committee status.¹³⁵ 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. Like any snapshot analysis, limiting ourselves to short time periods in the life of an organization provides an incomplete and distorted picture of a group’s actual major purpose.

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.

¹³¹ According to *RTAA*, the Commission is not “foreclose[d] . . . from using a more comprehensive methodology.” 681 F.3d at 557. But *RTAA* never approved of 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.

¹³² See *CREW v. FEC*, 209 F. Supp. 3d 77, 94 (D.D.C. 2017) (reasonable for the Commission to consider organization’s “full spending history”); *Akins v. FEC*, 736 F. Supp. 2d 9, 20 (D.D.C. 2010) (considering organization’s “focus on lobbying for more than forty years”). See also *FEC v. Malenick*, 310 F. Supp. 2d 230, 233 (D.D.C. 2004) (citing Pl.’s Mem., Ex. 1 (Stipulation of Fact signed and submitted Malenick and Triad Inc., to the FEC on January 28, 2000, listing numerous 1995 and 1996 Triad materials) and Ex. 47 (“Letter from Malenick to Cone, dated Mar. 30, 1993” 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); *FEC v. GOPAC*, 917 F. Supp. 851, 862-66 (D.D.C. 1996) (reviewing, among other things, GOPAC’s 1989-1990 Political Strategy Campaign Plan and Budget).

¹³³ 2007 Supplemental E&J, 72 Fed. Reg. 5,595 (Feb. 7, 2007).

¹³⁴ See MUR 5751 (The Leadership Forum); MUR 5365 (Club for Growth); MUR 3669 (Christian Coalition); MURs 2804 & 2804R (AIPAC).

¹³⁵ A calendar-year approach also presents practical difficulties. If a group is a political committee, it must file a statement of organization within ten days of becoming a political committee. Since a group may not know its overall spending *a priori*, there is no way for a group to know when the ten-day period begins to run, or when the first filing is due.

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For example, consider a group that exists for eight years, spending one million dollars per year. For four years, it spends 90% of its resources on issue advocacy and 10% on express advocacy. In year five, the organization's foremost issue becomes highly visible in a federal election. As a result, it devotes 90% of its resources that year to expressly advocate the election or defeat of clearly identified federal candidates and only 10% on issue advocacy. In years six, seven, and eight, it returns to spending 90% of its funds on issue advocacy and 10% 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% of its total resources, and 90% of its resources in seven of its eight years of existence, were spent on issue advocacy. Deeming 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 a calendar-year basis. Such an organization could devote 10% of its resources to express advocacy prior to the election, then spend the other 90% 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 on a distinct minority of its spending within the first twelve months of its operation. Despite the group's best efforts to minimize its 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 policies and other legislative *issues* would focus some of its time and spending 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.”¹³⁶ Thus, linking issues to candidates and elections is quite common. But if a group resumes its issue advocacy after the election date, such spending is also evidence of its true purpose.¹³⁷ 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*.

Also problematic, if the groups in the examples above were regulated 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

¹³⁶ 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).

¹³⁷ Interestingly, in the past the Commission has relied, in part, on the fact that an organization ceased active operations after 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 5,605 (summarizing MUR 5511 (Swiftboat Vets) and MUR 5754 (MoveOn.org Voter Fund)). If the Commission may consider the lack of activity in the calendar year following an election as relevant for determining major purpose, then it certainly it can look at and evaluate actual activity undertaken in the next calendar year.

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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.”¹³⁸ Thus, in order to stop filing burdensome and invasive financial reports, a committee would have to surrender its political rights and agree to not make *any* independent expenditures, regardless of the organization’s major purpose.

For all of these reasons, the Commission’s analysis of an organization’s major purpose has avoided setting a definitive time frame for judging each organization’s activities. Here, applying our expertise in the context of the Commission’s well-established case-by-case framework, we considered New Models’s contributions in 2012 in the context of the organization’s history, before and after its contributions in 2012, to conclude that New Models’s overall spending history did not support finding reason to believe that it had the major purpose of nominating or election federal candidates to office. Nor do we conclude that New Models’s contributions in 2012, by themselves, support finding reason to believe that New Models fundamentally changed its organizational purpose.

V: CONCLUSION

Based on our review of the evidence in the record, New Models is an organization that made permissible contributions to independent expenditure-only political committees. These occasions were irregular, occurring in 2010 and 2012 and totaled less than 20% of the organization’s total lifetime expenses. As the 2007 Supplemental E&J made clear, however, to be considered a political committee under the Act, the nomination or election of a candidate must be the major purpose of the organization. Here, New Models’s organizational purpose, tax exempt status, public statements, and overall spending evidence an issue discussion organization, not a political committee having the major purpose of nominating or electing candidates. As a result, it cannot (nor should it) be subject to the “pervasive” and “burdensome” requirements of registering and reporting as a political committee. For these reasons, and in exercise of our prosecutorial discretion,¹³⁹ we voted against finding reason to believe that New Models violated the Act by failing to register and report as a political committee and to dismiss the matter.

¹³⁸ 11 C.F.R. § 102.3(a).

¹³⁹ See *Heckler v Chaney*, 470 U.S. 821 (1985). Given the age of the activity and the fact that the organization appears no longer active, proceeding further would not be an appropriate use of Commission resources. See 28 U.S.C. § 2462. See also *Nader v. FEC*, 823 F. Supp. 2d 53, 65-66 (D.D.C. 2011) (finding Commission decision to dismiss allegations that several groups were political committees was not contrary to law, and “represents a reasonable exercise of the agency’s considerable prosecutorial discretion” given the “staleness of evidence and the defunctness of several of the groups”).

Exhibit 4

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiff,

v.

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

FEDERAL ELECTION COMMISSION,

Defendant,

AMERICAN ACTION NETWORK, INC.,

Intervenor Defendant.

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

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

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.

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

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*

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

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 *insufficient* 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

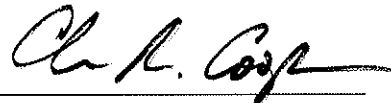
capricious standard is deferential.” Defs. of Wildlife, 551 U.S. at 658. A reasonable application of a 50%-plus rule would not appear to be arbitrary and capricious.

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

Exhibit 5



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

New Models

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MUR 6872

**STATEMENT OF REASONS OF
COMMISSIONER ELLEN L. WEINTRAUB**

I did not expect to be celebrating Groundhog Day between Hanukah and Christmas this week. But here I am; once again, faced with pages upon pages of analysis from my Republican colleagues on why, once again, they couldn't *possibly* find that a group that gave the majority of its money in a calendar year to a super PAC could *under any circumstances* be considered a political committee that year.

Their argument, in a nutshell, is that one can determine the political-committee status of an organization only by looking at the group's spending over its entire lifetime. But over the course of 32 pages and 139 footnotes,¹ my colleagues fail to mention that this exact argument was evaluated – and resoundingly rejected – by a court *just last year*, in remarkably similar circumstances, in the *CREW v. FEC* matter regarding the American Action Network.²

My colleagues *do* cite the case, pulling out the parenthetical that it's "reasonable for the Commission to consider organization's 'full spending history.'"³ But for some reason they fail to note that the opinion's next paragraph starts with the word "However," and it all goes downhill from there.

¹ Statement of Vice Chair Caroline C. Hunter and Commissioner Lee E. Goodman, dated Dec. 20, 2017.

² 209 F.Supp.3d 77 (2016).

³ Statement of Vice Chair Caroline C. Hunter and Commissioner Lee E. Goodman, dated Dec. 20, 2017, at n.132.

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MUR 6872 (New Models)
Statement of Commissioner Ellen L. Weintraub

Way downhill. Let's recap: Judge Christopher R. Cooper of the U.S. District Court for the District of Columbia called the Republicans' reasoning on this point "arbitrary"⁴ and "contrary to law"⁵ and awarded summary judgment to CREW.⁶

It is difficult to make the case against my Republican colleagues' political-committee analysis more clearly than Judge Cooper did last year, so I'll let him take it from here:

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... 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, 107 S.Ct. 616 (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))...

The Commissioners' refusal to give any weight whatsoever to an organization's 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."... 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, 107 S.Ct. 616.

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

⁴ 209 F.Supp.3d 77 at 94.

⁵ *Id.*

⁶ *Id.* at 95.

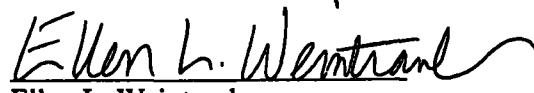
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purpose has changed, and is inconsistent with the FEC's stated fact-intensive approach to the "major purpose" inquiry.⁷

The 2016 *CREW v. FEC* decision was an embarrassing legal smackdown for my Republican colleagues. It takes some real chutzpah for them to now cite that very decision to try to make the exact legal point upon which they had been smacked down.

It is disappointing to see that my Republican colleagues failed to learn anything from the experience and that they are willing to make the exact same legal mistake again, likely with the exact same legal consequences when the 2018 version of *CREW v. FEC* undoubtedly hits the courts. It's *déjà vu* all over again, and it makes for an unhappy Groundhog Day.

12-21-17
Date


Ellen L. Weintraub
Commissioner

⁷ *Id.* at 94-95.

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