



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 6596
Crossroads GPS)
)
)

**STATEMENT OF REASONS OF VICE CHAIRMAN MATTHEW S. PETERSEN AND
COMMISSIONER CAROLINE C. HUNTER**

This is the latest in a series of enforcement matters¹ involving whether a 501(c) organization qualifies as a “political committee” under the Federal Election Campaign Act of 1971, as amended (the “Act”)—a question which turns on whether the organization’s “major purpose” is the nomination or election of federal candidates. In making recommendations in prior matters, the Commission’s Office of General Counsel (“OGC”) has analyzed an organization’s spending on communications over which the Commission has clear regulatory jurisdiction: independent expenditures and electioneering communications.² However, in this matter, OGC trod on shaky legal ground by concluding that speech that neither constitutes express advocacy nor meets the definition of “electioneering communication” might still “support or oppose” the election of a federal candidate and, thus, be indicative of a major purpose to nominate or elect federal candidates.

Using this mode of analysis, OGC recommended that the Commission find reason to believe that Crossroads GPS—a recognized 501(c)(4) tax-exempt organization—violated the Act by failing to register and report as a political committee. Because we disagree with this approach and conclude that the strong majority of Crossroads GPS’s activities fall outside the Commission’s jurisdiction, we did not support OGC’s recommendations in this matter and, instead, voted to close the file. We also concluded that prudential reasons counsel against

¹ See, e.g., MUR 6589 (AAN); MUR 6538 (AJS).

² One district court recently held that “electioneering communications” are presumptively indicative of a major purpose to nominate or elect federal candidates. See *CREW v. FEC*, 299 F. Supp. 3d 83 (D.D.C. 2018) (*CREW II*). This question is still being litigated, and we have previously articulated the reasons why, in our view, the court’s holding and rationale were erroneous in light of BCRA’s text, its legislative history, and post-enactment statements by the very legislators who passed it. See Statement of Chair Caroline C. Hunter and Commissioner Matthew S. Petersen on *CREW v. FEC*, No. 16-CV-02255, https://www.fec.gov/resources/cms-content/documents/3117_001_v2.pdf. Nevertheless, nothing in the district court’s ruling in *CREW* requires the Commission to (as OGC does in this matter) consider communications that *do not* contain express advocacy or constitute electioneering communications when conducting a major-purpose analysis. Moreover, the Fourth Circuit (where Crossroads GPS was organized) held a political committee statute defining “political committee” to require having the “major purpose to ‘support or oppose’ the nomination or election of candidates was unconstitutional because it ‘extends beyond both ‘express advocacy’ and its ‘functional equivalent.’” *North Carolina Right to Life v. Leake* (“*NCRTL IP*”), 525 F.3d 274, 280-90 (4th Cir. 2008).

pursuing this matter further and justify dismissing this matter in an exercise of our prosecutorial discretion. We set forth our reasoning below.

I. FACTUAL BACKGROUND

Crossroads GPS incorporated in the Commonwealth of Virginia on June 2, 2010, as a non-profit social welfare organization under section 501(c)(4) of the Internal Revenue Code.³ Its policy objectives are reflected in its mission statement, included in each publicly available tax return filed with the Internal Revenue Service (“IRS”) since 2010:

Crossroads [GPS] is a non-profit public policy advocacy organization that is dedicated to educating, equipping, and engaging American citizens to take action on important economic and legislative issues that will shape our nation’s future. The vision of Crossroads GPS is to empower private citizens to determine the direction of government policymaking rather than being the disenfranchised victims of it. Through issue research, public communications, events with policymakers, and outreach to interested citizens, Crossroads GPS seeks to elevate understanding of consequential national policy issues, and to build grassroots support for legislative and policy changes that promote private sector economic growth, reduce needless government regulations, impose stronger financial discipline and accountability on government, and strengthen America’s national security.⁴

³ See Commonwealth of Virginia, State Corporation Commission Business Entity Search, <https://sccfile.scc.virginia.gov/Business/0723872>.

⁴ See Resp. (April 23, 2012) (attaching Form 990 Return of Organization Exempt from Income Tax, Crossroads Grassroots Policy Strategies (2010) (“2010 Form 990”) and Form 990 Return of Organization Exempt from Income Tax, Crossroads Grassroots Policy Strategies (2011) (“2011 Form 990”)).

On September 3, 2010, Crossroads GPS filed a Form 1024 application for recognition of tax-exemption with the IRS.⁵ On September 6, 2013, the IRS Exempt Organizations Division issued a proposed adverse determination letter that Crossroads GPS protested.⁶ In November 2013, the IRS published expansive new rules for regulating the political activities of 501(c)(4) organizations, but abandoned the rulemaking in 2014.⁷ In 2015, the IRS Appeals Office determined that Crossroads GPS qualified for tax-exempt status under section 501(c)(4).⁸ The IRS currently recognizes Crossroads GPS as tax-exempt under section 501(c)(4), with an effective date of June 1, 2010.

Crossroads GPS pursued its mission throughout 2010 and 2011 by advancing its “7 in ‘11” National Action Plan, which set forth seven policy goals sought for legislative action.⁹ In early 2012, Crossroads GPS launched its “New Majority Agenda” issues platform for 2012 and

⁵ Plaintiffs’ Reply Mem. in Supp. of Their Motion for Summ. J. and Mem. in Opp. to Crossroads Grassroots Policy Strategies’ Cross-Motion for Summ. J., *Public Citizen v. FEC*, No. 1:14-cv-00148-RJL (D.D.C. filed Mar. 9, 2016) (citing Crossroads Grassroots Policy Strategies, Form 1024 Application of Exemption Under Section 501(a) (September 3, 2010)). Applications for tax exemption under Code section 501(c)(4) must include copies of the applicants’ organizing documents and bylaws in addition to a “full description of the proposed activities of [the] organization.” Revised IRS Publication 557 at 4, *Tax – Exempt Status for Your Organization* (Rev. January 2017), available at <https://www.irs.gov/pub/irs-pdf/p557.pdf>. Form 1024 applications are filed under penalty of perjury. See <https://www.irs.gov/pub/irs-pdf/f1024.pdf>. Crossroads’s Form 1024 application, required by law to be kept confidential until approved, was made public in late 2012. See 26 U.S.C. § 6104(a); Terrell Berkovsky and David Flavin, *Disclosure of Tax Return Information*, 1993 EO CPE TEXT (1993) (“Applications under consideration by the Service or which have been denied are not subject to disclosure under IRC 6104(a).”); see also Dan Berman and Kenneth P. Vogel, *Crossroads: Election not ‘purpose’*, POLITICO (Dec. 14, 2012), <http://www.politico.com/story/2012/12/crossroads-gps-said-elections-wouldnt-be-primary-purpose-085095> (linking to Crossroads’ pending application).

⁶ See Crossroads Grassroots Policy Strategies’ Reply Mem. in Supp. of its Cross-Motion for Summ. J. at Ex. A, *Public Citizen v. FEC*, No. 1:14-cv-00148-RJL (D.D.C. filed Apr. 7, 2016) (attaching Crossroads GPS Revised Protest Letter dated February 28, 2014). As was widely reported and later confirmed in a U.S. Treasury Inspector General for Tax Administration (TIGTA) report, the IRS’ Tax Exempt and Government Entities Division began using inappropriate criteria in 2010 to identify and review organizations applying for tax-exempt status. Treasury Inspector General for Tax Administration, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review* (May 14, 2013); see also Letter to Attorney General Eric Holder, House Committee on Ways and Means (Apr. 9, 2017), https://waysandmeans.house.gov/UploadedFiles/4.9.14_Lerner_Referral_and_Exhibits.pdf (stating “documents IRS produced to the Committee show an aggressive and improper pursuit of Crossroads”).

⁷ See Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71,535 (Nov. 29, 2013); see also Internal Revenue Service, *IRS Update on the Proposed New Regulation on 501(c)(4) Organizations* (May 22, 2014), <https://www.irs.gov/newsroom/irs-update-on-the-proposed-new-regulation-on-501c4-organizations>.

⁸ See Crossroads Grassroots Policy Strategies’ Reply Mem. in Supp. of its Cross-Motion for Summ. J. at Exhibit B, *Public Citizen v. FEC*, No. 1:14-cv-00148-RJL (D.D.C. filed Apr. 7, 2016) (attaching Crossroads GPS IRS Determination Letter dated Nov. 17, 2015); see also IRS Exempt Organizations Business Master File Extract (last visited Mar. 25, 2019), available at <https://www.irs.gov/charities-non-profits/exempt-organizations-business-master-file-extract-co-bmf>.

⁹ The seven policy goals were: Guarantee Low Tax Rates that Encourage American Economic Growth; Stop Congress’ Reckless Waste of Taxpayer Money; Aggressively Attack the National Debt; Reform Health Care Responsibly, Not Ideologically; End the Bailout Culture; Protect our Borders, Enforce our Laws; [and] Prioritize American Energy Development. Resp., Ex. B at 3. In 2010, Crossroads GPS raised approximately \$43.6 million and spent about \$39.1 million, most of which was for communications and on grants to other groups. See Figure 2 *infra*.

2013, which outlined six policy initiatives the group sought to promote through “effective, targeted advocacy.”¹⁰ The six policy initiatives were: (1) Craft a Lean, Pro-Growth Tax System, (2) Clean Up Washington’s “Downgraded” Finances, (3) Ensure Quality Health Care for Seniors and Families, (4) Restore America’s Energy Leadership, (5) Break the Regulatory Chokehold on Economic Recovery; and (6) Make America a Respected Global Leader Again.¹¹

In 2012, Crossroads GPS spent \$188,897,560, mostly on grassroots lobbying and on grants to other groups recognized as tax-exempt by the IRS.¹² Of that amount, it spent well less than half on independent expenditures (\$70,968,864) and electioneering communications (\$192,973); to be precise, 37.7 percent of its overall spending in 2012. Its independent expenditures and electioneering communications were publicly reported.

Crossroads GPS states that, in 2012, it engaged in the following activities in furtherance of its exempt purpose:

- Submitting FOIA requests and subsequently posting the documents online;
- Providing “endorsements and policy commentary” on a variety of “regulatory activities, policy proposals, and other current events”¹³;
- Creating two websites for citizens to contact their representatives;
- Distributing a series of email newsletters to supporters¹⁴;
- Giving grants to section 501(c)(4) organizations for activities consistent with each organization’s exempt purpose¹⁵;
- Co-hosting policy forums entitled “How Does the Executive Branch’s Abuse of Power Threaten Our Economy?” and “Obamacare: Then and Now”; and
- Producing and airing ads that do not contain express advocacy or its functional equivalent, including December 2012 ads relating to the “fiscal cliff” negotiations.¹⁶

¹⁰ See Resp., Ex. C.

¹¹ See Resp., Ex. C at 4.

¹² See Suppl. Resp. at 9; 2012 Form 990. Crossroads GPS cited to and attached its 2010 and 2011 annual returns in its response and cited its total spending for calendar year 2012 in its supplemental response. See Resp. (April 23, 2012); Suppl. Resp. at 8-9.

¹³ See Resp., Ex. E. Examples of legislation and policy endorsements include Crossroads GPS’s endorsement of the Hoeven Amendment (relating to the Keystone XL pipeline).

¹⁴ None of the examples of Crossroads GPS’s “Issue Directions” emails attached to its response contain express advocacy.

¹⁵ Crossroads GPS states that “[g]rants are accompanied by a letter of transmittal stating that the funds are to be used only for tax-exempt purposes of the grantee organization and not to be used in connection with any political or non-exempt activity.” Resp., Ex. E. There is no information in the record to the contrary.

¹⁶ Suppl. Resp. at 7.

In short, Crossroads GPS’s spending has primarily been directed towards policy research,¹⁷ grants for social welfare purposes,¹⁸ and issue-oriented advocacy/lobbying.¹⁹ Figures 1 and 2 depict Crossroads’s reported spending on independent expenditures and electioneering communications compared with total spending.²⁰

Year	Total Expenses²¹	Independent Expenditures	Electioneering Communications	Campaign-Related
2010	\$42,344,884	\$15,445,039.50	\$1,288,338.00	39.5%
2011	\$22,375,630	\$0.00	\$20,245.00	0.1%
2012	\$188,897,560	\$70,968,864.46	\$192,973.00	37.7%
2013	\$4,093,650	\$0.00	\$0.00	0.0%
2014	\$65,851,939	\$26,015,171.86	\$0.00	39.5%
2015	\$5,052,483	\$0.00	\$0.00	0.0%
2016	\$15,485,402	\$0.00	\$0.00	0.0%
TOTAL	\$344,101,548	\$112,429,075.82	\$1,501,566.00	33.11%

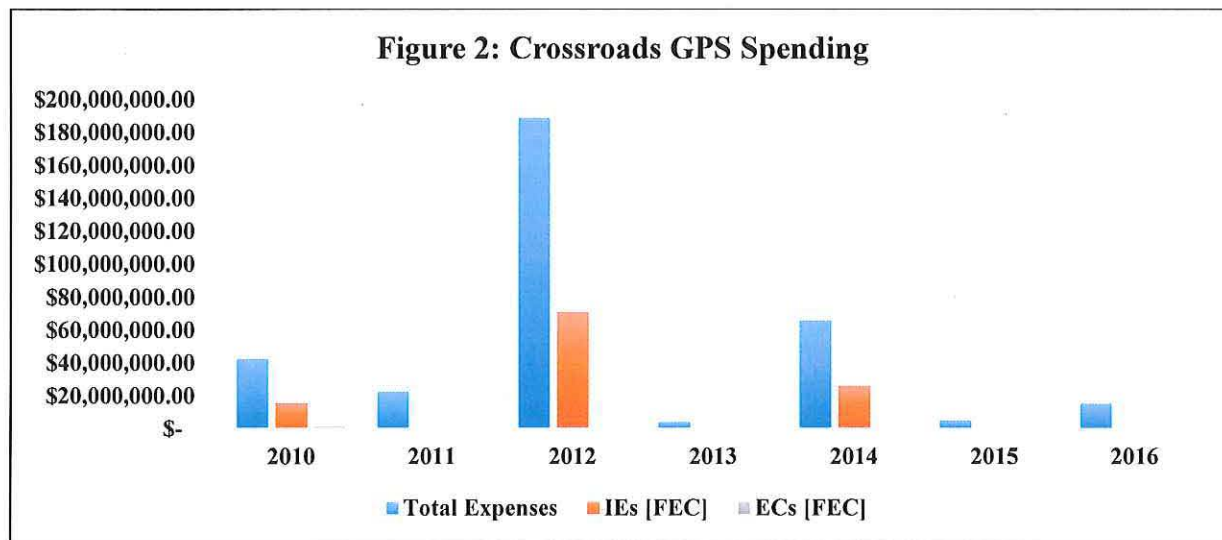
¹⁷ See, e.g., 2012 Form 990 at Part III, 4c (“Crossroads GPS conducts research to determine how various demographic groups respond to current national policy issues, what priorities and concerns they have, and which public policy issues they might be most inclined to take action on through grassroots participation.”).

¹⁸ See, e.g., 2012 Form 990 at Part III, 4b (Crossroads GPS “promotes social welfare purposes of nonprofit 501(c) groups that share similar missions.”). Making such grants appears to be an acceptable way for a 501(c)(4) organization to achieve its own exempt purpose. See, e.g., Priv. Ltr. Rul. 200911042 (Mar. 13, 2009).

¹⁹ See, e.g., 2012 Form 990 at Part III, 4a. (“conduct public communications and build[] grassroots to influence policymaking outcomes through grassroots mobilization and advocacy,” the focus of which “may include legislation, budget priorities, regulations, public hearings and investigations, and other policymaking activities”).

²⁰ The data used in Figures 1 and 2 for “total expenses” is taken from Crossroads GPS’s Form 990s filed with the IRS, but the amounts spent on independent expenditures and electioneering communications are from filings with the Commission.

²¹ This amount is derived from the Crossroads GPS’s reported “total expenses” on its annual returns. See 2010, 2011, 2012, 2013, 2014, 2015, 2016 Form 990s. Additional annual returns (collectively “Form 990s”) are easily accessible. See Foundation Center 990 Finder; ProPublica Nonprofit Explorer; OpenSecrets Nonprofit Data Search.



II. PROCEDURAL BACKGROUND

A. THE COMPLAINT

The complaint in this matter was filed on June 20, 2012 by the Democratic National Committee and Obama for America, the principal campaign committee of then-President Barack Obama.²² It alleges that Crossroads GPS is a political committee under the Act because its “true purpose” is to “elect candidates of its choice to the Presidency and the Congress” and that the group satisfies the Commission’s two-part test for political committee status.²³ The complaint argues Crossroads GPS met the statutory threshold by receiving contributions aggregating in excess of \$1,000 in a calendar year or making expenditures aggregating in excess of \$1,000 in a calendar year.²⁴ Next, it describes Crossroads GPS’s major purpose as electing or defeating federal candidates, as shown by the “electoral purpose” and “electoral aim” of its non-express advocacy advertisements, which (a) “consist[] overwhelmingly of communications to influence the outcome of elections,” and (b) were “targeted” to swing or battleground states.²⁵ Finally, the complaint includes one example of a public statement by Crossroads GPS’s communications director, who said that if a particular senator ran for re-election, the organization wanted him to know it “will be an extraordinarily grueling proposition.”²⁶ The complaint includes transcripts of several non-express advocacy ads Crossroads GPS allegedly ran that criticized the voting records of members of Congress and the policies of President Obama and asking viewers to support the

²² See MUR 6596 (Crossroads GPS), Complaint; Obama for America, FEC Form 1, Amended Statement of Organization (Apr. 27, 2012). The Response points out that portions of the complaint were published in the media and included in fundraising emails from the Obama campaign on June 19, 2012. See Resp. at 1.

²³ Complaint at 1.

²⁴ *Id.* at 2-3.

²⁵ *Id.* at 3-7.

²⁶ *Id.* at 7.

“New Majority Agenda.”²⁷ Relying heavily on a Fourth Circuit decision handed down one week earlier,²⁸ the complaint alleges that these ads are illustrative of Crossroads GPS’s other non-express advocacy communications because they came from a “political template.”²⁹

B. THE RESPONSE

Crossroads GPS’s response argues that the complaint’s legal conclusion are “erroneous” and designed to “publicly smear, harass and boycott . . . Crossroads GPS’s supporters.”³⁰ Crossroads GPS acknowledges that it met the statutory threshold for political committee status by making expenditures aggregating in excess of \$1,000 during the calendar year.³¹ However, Crossroads GPS challenges the allegation that its major purpose is something other than “advancing its policy and legislative agenda through grassroots communications and outreach.” It argues that (a) as a matter of law, issue advocacy cannot demonstrate the requisite major purpose of nominating or electing federal candidates, and (b) “timing” and “targeting” are subjective intent-based factors deemed irrelevant by the Supreme Court in *FEC v. Wisconsin Right to Life*.³²

C. THE FIRST GENERAL COUNSEL’S REPORT

OGC recommended that the Commission find reason to believe Crossroads GPS has as its major purpose the nomination or election of federal candidates because its “proportion of spending related to *federal campaign activity* is alone sufficient to establish that its major purpose in 2012 was the nomination or election of federal candidates.”³³ OGC included within its concept of “federal campaign activity”—a term not found either in the Act or in Commission regulations—“at least \$67,678,000 [Crossroads GPS spent] in 2012 on communications that *support or oppose* a clearly identified Federal candidate, but do not contain express advocacy.”³⁴ Including these communications was necessary to bring Crossroads GPS’s proportion of campaign spending above 50 percent for 2012. In support of including non-express advocacy/non-electioneering communications as “federal campaign activity,” OGC cited several

²⁷ The complaint conveniently omits the word “agenda” in its allegation that the ads have an electoral purpose. See Complaint at 4 (“Crossroads has built all the ads in question around the promise of a ‘new majority’. In an election year, it is obvious how a ‘majority’ comes to pass: via the ballot box . . . [Crossroads] makes clear the ‘new majority’ will bring ‘change’ to Washington”).

²⁸ *Id.* at 1-6 (citing *Real Truth About Abortion v. FEC*, 681 F.3d 544 (4th Cir. 2012) (“RTAA”)). *But see id.* at 556-58 (noting 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.”). Neither the Act nor Commission regulations require 501(c) organizations to file disclosure statements for communications that do not expressly advocate or which are not electioneering communications.

²⁹ *Id.* at 5.

³⁰ Resp. at 2.

³¹ Resp. at 9 (“Crossroads GPS has previously acknowledged making express advocacy communications, and those acknowledgements are reflected on publicly-available independent expenditure reports filed with the Commission.”).

³² 551 U.S. 449 (2007) (“*WRTL II*”).

³³ MUR 6596 (Crossroads GPS), First Gen. Counsel’s Rpt. at 14 (emphasis added).

³⁴ *Id.* (emphasis added).

enforcement cases against 527 political organizations³⁵ decided immediately after *McConnell v. FEC*.³⁶ OGC also appears to misinterpret several appellate decisions as approving consideration of a group's non-express advocacy communications.³⁷ Finally, OGC proposed conducting an investigation to, among other things, "establish the extent, nature, and cost of Crossroads GPS's federal campaign activity."³⁸

D. COMMISSION ACTION

On March 26, 2019, the Commission considered and voted on this matter.³⁹ Because Crossroads GPS did not have the requisite major purpose of nominating or electing federal candidates, we voted against finding reason to believe that Crossroads GPS was a political committee under the Act. As the controlling group of Commissioners,⁴⁰ we are issuing this Statement of Reasons to set forth the Commission's rationale for this determination.⁴¹

³⁵ Unlike 501(c)(4) groups, "political organizations" under section 527 of the Internal Revenue Code by definition exist for the purpose of influencing elections. *See* 26 U.S.C. § 527(e)(1)–(2); *see also* *McConnell v. FEC*, 540 U.S. 93, 171 n.64 (2003) (upholding BCRA's PASO provision because "actions taken by *political parties* [a type of 527 political organization] are presumed to be in connection with election campaigns") (emphasis added).

³⁶ MUR 6596 (Crossroads GPS), First Gen. Counsel's Rpt. at 14 n.10 (citing MUR 5754 (MoveOn.org Voter Fund); MUR 5753 (League of Conservation Voters 527); MUR 5487 (Progress for America Voter Fund); Stipulation for Entry of Consent Judgment, ¶ 22, *FEC v. Citizens Club for Growth, Inc.*, Civ. No. 1:05-01851 (Sept. 6, 2007)).

³⁷ *See id.* at 27 n.54. These decisions stand for precisely the *opposite* proposition. *See RTAA*, 681 F.3d at 557 (indicating Commission is *not* foreclosed from limiting test for political committee status to just the statutory threshold and an examination of an organization's expenditures (*i.e.*, express advocacy) to see if campaign-related speech amounts to more than 50% of all spending); *NCRTL II*, 525 F.3d at 280-90 (holding state political committee statute defining "support or oppos[ition]," was unconstitutional because its scope "extends beyond both 'express advocacy' and its 'functional equivalent.' . . . and its *ad hoc*, context-based, totality of the circumstances approach is 'susceptible' of interpretations 'other than as an appeal to vote for or against a specific candidate.'"); *Akins v. FEC*, 101 F.3d 731,742 (D.C. Cir. 1997) (basing decision on the fact AIPAC had made *contributions*), *vacated*, 524 U.S. 11 (1998); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 393 (D.C. Cir. 1981) (decided prior to *MCFL* which narrowed Commission jurisdiction under then-existing corporate expenditure ban to only express advocacy communications). Other circuits have also rejected including non-express advocacy communications as part of a major purpose analysis. *See Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 839 (7th Cir. 2014) ("*Buckley* held that independent groups not engaged in express election advocacy as their major purpose cannot be subjected to the complex and extensive regulatory requirements that accompany the PAC designation."); *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 678 (10th Cir. 2010) ("*NYMO*") (looking to whether "preponderance of expenditures is for express advocacy").

³⁸ MUR 6596 (Crossroads GPS), First Gen. Counsel's Rpt. at 33.

³⁹ MUR 6596 (Crossroads GPS), Certification (Mar. 26, 2019).

⁴⁰ 52 U.S.C. § 30109(a)(2) (four-vote requirement); *see 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))).

⁴¹ *See Nat'l Republican Senatorial Comm.*, 966 F.2d at 1476 ("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).

III. LEGAL ANALYSIS

The Act defines a “political committee” to include any group of persons that within a calendar year receives more than \$1,000 in contributions or makes more than \$1,000 in expenditures.⁴² In *Buckley v. Valeo*, the Supreme Court held that the Act’s definition of “political committee” impermissibly swept within its ambit groups engaged primarily in issue discussion.⁴³ For this reason, the Court narrowly construed the definition of political committee to reach only groups that have as their major purpose the nomination or election of a federal candidate.⁴⁴ A decade after *Buckley*, the Supreme Court in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*⁴⁵ reaffirmed the major purpose requirement. Accordingly, the Commission may regulate entities as “political committees” under the Act only if they, first, meet the statutory definition of the term and then, second, have as their major purpose the nomination or election of a federal candidate.

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.”⁴⁶ The Commission has chosen the latter approach, making determinations about an organization’s major purpose on a case-by-case basis. As explained by the Commission in its 2007 Supplemental E&J, this involves analyzing organizational documents, statements of purpose, and overall spending history.⁴⁷

A. UNDER THE COMMISSION’S CASE-BY-CASE APPROACH, CROSSROADS GPS DOES NOT HAVE THE MAJOR PURPOSE OF NOMINATING OR ELECTING FEDERAL CANDIDATES

1. *Crossroads GPS’s Central Organizational Purpose Relates to Issues*

Crossroads GPS agrees it made expenditures aggregating in excess of \$1,000 during 2012, thus satisfying the statutory definition.⁴⁸ Our focus, therefore, shifts to analyzing Crossroads GPS’s major purpose.

⁴² 52 U.S.C. § 30101(4)(A).

⁴³ 424 U.S. 1, 79 (1976); see Political Committee Status, 72 Fed. Reg. 5,595, 5,597 (Feb. 7, 2007) (“2007 Supplemental E&J”) (“[T]he Supreme Court mandated that an additional hurdle was necessary to avoid Constitutional vagueness concerns; only organizations whose ‘major purpose’ is the nomination or election of a Federal candidate can be considered ‘political committees’ under the Act. The court deemed this necessary to avoid the regulation of activity ‘encompassing both issue discussion and advocacy of a political result.’”).

⁴⁴ *Buckley*, 424 U.S. at 79. Thus, the term “political committee” is a misnomer, in that the definition does not encompass all groups engaging in “political” discussion (*i.e.*, encompassing anything “of or relating to government . . . or the conduct of governmental affairs”). WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1755 (2002).

⁴⁵ 479 U.S. 238, 262 (1986).

⁴⁶ *RTAA*, 681 F.3d at 556.

⁴⁷ 72 Fed. Reg. 5,596.

⁴⁸ Resp. at 9 (“Crossroads GPS has previously acknowledged making express advocacy communications, and those acknowledgements are reflected on publicly-available independent expenditure reports filed with the Commission.”).

Although an organization's tax status is not dispositive when conducting a political committee analysis, it is certainly a relevant consideration. Indeed, Senator John McCain, one of the principal sponsors of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), stated that "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 long as they comply with their tax law requirements."⁴⁹ Even groups that traditionally lobby for greater regulation of political speech have noted that "a legitimate 501(c) organization should not have to fear that it will become a political committee simply by engaging in political issue-related criticisms of public officials."⁵⁰

Crossroads GPS's organizational documents and IRS tax status demonstrate that its primary focus is on advancing public policy objectives that align with its ideological mission. According to its Articles of Incorporation, Crossroads GPS was incorporated "primarily to further the common good and general welfare of the citizens of the United States of America."⁵¹ Moreover, its articles prohibit the organization from carrying on any activity "not permitted to be carried on by an organization exempt from federal income tax under section 501(c)(4) of the [Code]."⁵²

⁴⁹ Comments of John McCain and Russell D. Feingold on Reg. 2003-07 (Political Committee Status) (Apr. 2, 2004), attached statement of Senator John McCain, Senate Rules Committee, March 10, 2004 at 2. See 26 U.S.C. § 501(c)(4)(A) (providing an exemption from taxation for "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare").

⁵⁰ Comment of Public Citizen on Reg. 2003-07 (Political Committee Status) at 10 (Apr. 5, 2004). Public Citizen further noted that "[e]ntities that do not have as their major purpose the election or defeat of federal candidates, such as 501(c) advocacy groups, but which may well be substantially engaged in political activity, should remain subject to regulation for only the narrow class of activities — express advocacy and electioneering communications — explicitly established by current federal election law, as amended by [McCain-Feingold]." *Id.* at 2; see also Comments of 324 Nonprofit Organizations on FEC Draft Advisory Opinion 2003-37 at 2 (Feb. 4, 2004) ("[T]he organizations represented here have criticized Congress' and the Administration's policies and actions concerning such issues as tax cuts . . . Medicare . . . and numerous other issues. There is little doubt, we fear, that these communications would be perceived . . . as 'opposing', or even 'attacking,' President Bush and other federal officeholders . . . Making it unlawful to criticize [these] policies and actions . . . except under the auspices of a registered political committee is one of the most fundamental attacks on the freedom of speech and freedom of association of American citizens ever contemplated by a governmental agency."); Democracy 21, Campaign Legal Center, Center for Responsive Politics, Comments on Draft Advisory Opinion 2003-37 at 2, 6 (Feb. 4, 2004) (arguing the Commission could regulate 527 organizations as political committees under a PASO standard since, "unlike 501(c) groups, [527s are] organized for the express purpose of engaging in partisan political activity"); Comments of Public Citizen, Inc., on FEC Draft Advisory Opinion 2003-37 (Feb. 4, 2004) (criticizing the draft advisory opinion because "any organization that spends at least \$1,000 on communications with some significant amount of activity that criticizes (or praises) a federal candidate would turn itself into a 'political committee' . . . and all of its issue advocacy could therefore become subject to FECA's requirements") (emphasis added); Comments of the Brennan Center for Justice at NYU School of Law and Common Cause on FEC Draft Advisory Opinion 2003-37 (Feb. 17, 2004) (criticizing the draft advisory opinion because "interest group fundraising and spending that was plainly left outside the scope of BCRA, because it was for neither express advocacy nor electioneering communications, would be swept within the purview of campaign finance law under the approach taken by the Jan. 29 Draft.").

⁵¹ Crossroads Form 1024 at 14.

⁵² *Id.*

It is relevant that Crossroads consistently represented in its annual returns (under penalty of perjury) that it *was* tax-exempt under section 501(c)(4) and that it did not make significant changes to its governing documents.⁵³ Furthermore, the IRS recognized Crossroads GPS's primary purpose to be social welfare in 2015 after a lengthy application process and appeal. Presumably, its assessment of whether Crossroads GPS was organized and operated for social welfare (*i.e.*, non-campaign-related) purposes encompassed the activities complained of in this matter. Thus, the IRS's recognition of Crossroads GPS as tax-exempt under section 501(c)(4), when viewed in combination with its organizational documents, indicates that it is not a political committee.⁵⁴ According to the latest IRS data available, Crossroads GPS continues to maintain its tax exempt status as a social welfare organization in good standing.⁵⁵

Discussion of organizational purpose is absent from OGC's analysis in this matter, as is any acknowledgement that the IRS Appeals Office appears to have already reviewed the activities underlying this enforcement matter and concluded they do not cause Crossroads GPS's "primary purpose" to be campaign activity under the broader IRS facts and circumstances test.⁵⁶ A reason to believe finding requires evidence a violation of the Act occurred.⁵⁷ Here, the complaint does not provide sufficient evidence indicating Crossroads GPS 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.⁵⁸ Accordingly, an examination of Crossroads GPS's

⁵³ See Form 990s at Part VI.A.4 (inquiring whether the organization made "any significant changes to its governing documents since the prior Form 990 was filed").

⁵⁴ While not necessarily dispositive, the IRS's conferral of tax-exempt status is significant. By awarding tax-exempt status to Crossroads GPS, the IRS effectively determined its primary purpose was not "direct or indirect participation or intervention in political campaigns." 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.").

⁵⁵ See IRS Exempt Organizations Business Master File Extract (last visited Mar. 25, 2019), available at <https://www.irs.gov/charities-non-profits/exempt-organizations-business-master-file-extract-eo-bmf>.

⁵⁶ But see 2007 Supplemental E&J, 72 Fed. Reg. at 5,598 (citing Rev. Rul. 2004-06, 2004-1 C.B. and noting if applied to the Act, the IRS facts and circumstances test 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").

⁵⁷ See MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee, Inc.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 1-2 ("The Commission may find reason to believe only if a complaint sets forth sufficient facts, which, if proven true, would constitute a violation of the FECA. Complaints not based upon personal knowledge must identify a source of information that reasonably gives rise to a belief in the truth of the allegations presented.... In addition, ... a complaint may be dismissed if it consists of factual allegations that are refuted with sufficiently compelling evidence provided in the response to the complaint.").

⁵⁸ See MUR 6277 (Robert E. Kirkland), Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen at 10 ("[I]nitiating an investigation on the basis that the [responses] contain general denials . . . would be especially inappropriate, since it would essentially shift the burden of proof to respondents"); MUR 4850 (Deloitte & Touche, LLP, *el al.*), Statement of Reasons of Commissioners Darryl R. Wold, David M. Mason, and Scott E. Thomas at 2, ("The burden of proof does not shift to a respondent merely because a complaint is filed.").

organizational purpose weighs against finding that its major purpose was the nomination or election of federal candidates.

2. *Crossroads GPS's Public Statements Do Not Indicate its Major Purpose was the Nomination or Election of Federal Candidates*

Courts have held that an organization's major purpose may be established through "public statements of purpose."⁵⁹ In *FEC v. Malenick*, for example, the district court reviewed an organization's announced goals, brochures, fundraising letters, and express advocacy communications sent to its members, all of which indicated that the group's major purpose was the nomination or election of federal candidates.⁶⁰ On the other hand, in *FEC v. GOPAC*, the court predominantly reviewed letters the defendant organization sent and undisputed discussions it had with a contributor, which indicated that the group's major purpose was not the nomination or election of federal candidates, but rather the election of state candidates.⁶¹ Therefore, under precedents like these, a group's official statements, such as its organizing documents or statement of purpose, or other materials disseminated under its name, including fundraising documents or press releases, are the primary public statements by which a group's central organization purpose is to be determined.

Similarly, according to the 2007 Supplemental E&J, "the Commission must evaluate organizational statements 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."⁶² Thus, these statements must be evaluated in their totality, and a stray quote or a paraphrase, in the face of all the other evidence, should not transform a group into a political committee.

Here, the complaint ignores—and OGC fails to give proper (if any) any weight to—Crossroads GPS's own public statements of its purpose, including documents filed with the IRS under penalty of perjury.⁶³ Neither the complaint nor the General Counsel's Report identifies a statement—either in a press release, "issue directions" email, or on Crossroads GPS's website—where a representative indicated the organization's major purpose was nominating or electing federal candidates. Instead, the available record of public statements by Crossroads GPS indicates that its major purpose was advancing its public policy objectives (as listed in its national action plan documents), conducting and sponsoring research, providing grants to other tax-exempt organizations specifically limited to 501(c)(4) purposes, and running grassroots lobbying and other issue advocacy communications. As set forth on its website, "Crossroads GPS is dedicated to holding Washington's feet to the fire on the practical issues that will actually

⁵⁹ *FEC v. Malenick*, 310 F. Supp. 2d 230, 234-36 (D.D.C. 2004) (citing *FEC v. GOPAC*, 917 F. Supp. 851, 859 (D.D.C. 1996)). *But see WRTL II*, 551 U.S. 449; *NCRTL II*, 525 F.3d 274 (2008) (cautioning against subjective or contextual factors)).

⁶⁰ 310 F. Supp. 2d at 235.

⁶¹ 917 F. Supp. at 862-65

⁶² 72 Fed. Reg. at 5,601.

⁶³ *See* MUR 6596 (Crossroads GPS), First Gen. Counsel's Rpt. at 13-14 (noting only that, according to the 2007 Supplemental E&J, statements of purpose are "not necessarily dispositive"). While statements of purpose alone are not necessarily dispositive, dismissing them with a passing reference to the Supplemental E&J is not appropriate.

improve our country and our lives. We use every available means – from TV ads to constituent letters – to help educate busy people and urge our leaders to take action.”⁶⁴ Crossroads GPS’s website maintains a “learn about the issues” page allowing the public to view the policy polls of registered voters on topics such as healthcare, energy, taxes, national debt, and immigration. No poll contains language advocating the election or defeat of a candidate. Therefore, Crossroads GPS’s public statements weigh against finding its major purpose was the nomination or election of federal candidates.

3. *Crossroads GPS’s Independent Spending Demonstrates Its Major Purpose was Not the Nomination or Election of Federal Candidates*

An examination of a group’s major purpose is necessarily an after-the fact exercise wherein the Commission must determine whether a group’s *ex ante* subjective determination of its major purpose is established *ex post* by its objectively verifiable statements and spending. In applying the Commission’s case-by-case approach, we place significant weight upon an organization’s total spending history.⁶⁵ 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.

As shown in below, and even assuming *arguendo* that all of its electioneering communications are indicative of a major purpose to nominate or elect federal candidates, Crossroads GPS’s spending on independent expenditures and electioneering communications never reached 40 percent of its overall spending in *any* calendar year (including the year in which the complaint in this matter was filed).⁶⁶ Accordingly, given that its election-related spending fell well below the majority of its total spending in any calendar year (let alone over the course of its existence), Crossroads GPS’s spending history weighs against finding its major purpose was the nomination of federal candidates.

⁶⁴ CROSSROADS GRASSROOTS POLICY STRATEGIES, <https://www.crossroadsgps.org/about/>.

⁶⁵ See *CREW v. FEC*, 209 F. Supp. 3d, 77, 94 (D.D.C. 2017) (*CREW I*) (“Given the FEC’s embrace of a totality-of-the-circumstances approach to divining an organizations ‘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 Crossroads’s history, and the independent expenditures it made in 2012 in the context of that history and the group’s mission, as well as its activities in the years immediately preceding and following 2012, we do not conclude there is reason to believe that Crossroads’s major purpose changed to electing federal candidates. This conclusion is depicted graphically in Figures 1 and 2 above.

⁶⁶ See *CREW I*, 209 F. Supp. 3d at 95 (D.D.C. 2017) (“A reasonable application of a 50%-plus rule would not appear to be arbitrary and capricious.”).

Crossroads GPS Spending				
Year	Total Expenses	Independent Expenditures	Electioneering Communications	Campaign-Related
2010	\$42,344,884	\$15,445,039.50	\$1,288,338.00	39.5%
2011	\$22,375,630	\$0.00	\$20,245.00	0.1%
2012	\$188,897,560	\$70,968,864.46	\$192,973.00	37.7%
2013	\$4,093,650	\$0.00	\$0.00	0.0%
2014	\$65,851,939	\$26,015,171.86	\$0.00	39.5%
2015	\$5,052,483	\$0.00	\$0.00	0.0%
2016	\$15,485,402	\$0.00	\$0.00	0.0%
TOTAL	\$344,101,548	\$112,429,075.82	\$1,501,566.00	33.11%

* * *

Our application of the judicially approved case-by-case approach for determining major purpose set forth in the 2007 Supplemental E&J—under which we examine organizational purpose, public statements, and the proportion of campaign spending versus non-campaign spending—necessarily leads to the conclusion that Crossroads GPS’s major purpose is *not* the nomination or election of federal candidates and, therefore, that it is not a political committee under the Act.

B. ADOPTING A VAGUE “SUPPORT OR OPPOSE” STANDARD WOULD CREATE SIGNIFICANT LINE-DRAWING PROBLEMS AND WOULD RESULT IN ARBITRARY APPLICATIONS IN POLITICAL COMMITTEE MATTERS

By asserting that Crossroads GPS was a political committee because the majority of its spending constituted “federal campaign activity”—an undefined term with nebulous boundaries—OGC necessarily looked well beyond Crossroads GPS’s spending on independent expenditures and electioneering communications. In doing so, OGC lumped in spending on communications that, in OGC’s opinion, “support or oppose” the election of federal candidates.

Using a “support or oppose” standard when determining major purpose raises serious concerns, as it would necessarily place the Commission in the untenable position of attempting to decipher a speaker’s “true” intent. Because a “support or oppose” standard goes beyond express words of advocacy or the objective definition for electioneering communications, its adoption would result in the Commission examining speech lacking any references to elections or candidates or containing any calls to electoral action, leaving the Commission to search for clues, hints, and “nods and winks” indicating that a communication without any election-related language nevertheless has an electoral purpose. How the Commission could maintain any semblance of consistency and avoid arbitrary determinations while applying a “support or

oppose” standard is extraordinarily difficult, if not impossible, to imagine.⁶⁷ Even complainant’s counsel has stated that in the context of 501(c) groups, a “promotes,” “attacks,” “supports,” or “opposes” (PASO) standard is “unworkable” and “without any doubt, a standard that leads to a parade of terminological vagueness.”⁶⁸ We agree.⁶⁹

For many nonprofit groups, legislative and issue advocacy is at the core of their organizational mission. They actively seek to sway public opinion on a wide range of issues, such as tax policy, trade, healthcare, energy, environment, and immigration, to name a few. These efforts necessarily involve communications that identify public officials and candidates, describe their positions on issues important to the group, and urge the group’s members and the public to contact those officials.

A vague “support or oppose” standard would empower the Commission to make *post hoc* judgments that large swaths of this issue speech fall within the Commission’s regulatory jurisdiction and, in the process, would raise serious First Amendment⁷⁰ and due process concerns.⁷¹ Crossroads GPS, like all 501(c) groups, has the right to rely upon a clear standard to

⁶⁷ *WRTL II*, 551 U.S. at 493 (Scalia, J., concurring) (“Does attacking the king’s position attack the king? . . . [Such determinations] rest upon consideration of innumerable surrounding circumstances which the speaker may not even be aware of, and that lends itself to distortion by reason of the decisionmaker’s subjective evaluation”).

⁶⁸ Hearing Transcript, NPRM on Electioneering Communications at 35-36 (Oct. 20, 2005); *see also id.* at 48 (former Commissioner Sandstrom detailing how in 2002 the Commission “had no desire [to define PASO] . . . because the standard is so inherently vague.”).

⁶⁹ *See Buckley*, 424 at 44 n.52 (“This construction would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, such as . . . ‘support’”). The Commission and OGC often use “support or oppose” interchangeably with express advocacy communications and some states explicitly define “support or oppose” as express advocacy. *See* 11 C.F.R. § 109.10(e)(requiring statement to indicate whether independent expenditure was made “in support of, or opposition to a candidate”); FEC Form 5, Report of Independent Expenditures and Contributions Received (same); FEC Campaign Guide, Corporations and Labor Organizations at 77 (Jan. 2018) (same). *See generally* MUR 4940 (Campaign for America), First Gen. Counsel’s Rpt. at 25 (determining ad aired in July 1998 which said “Speaker [Newt] Gingrich, stop sweeping campaign finance reform under the rug” did not “call on the public to support or oppose the election of any candidate” because the “thrust is to urge . . . support for campaign finance reform”); MONT. CODE ANN. § 13-1-101(49); N.C. GEN. STAT. § 163-278.14A(a); *NCRTL II*, 525 F.3d at 280-90; *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 665-66 (5th Cir. 2006) (determining Louisiana law defining expenditure as made “for the purpose of *supporting, opposing, or otherwise influencing the nomination or election*” of candidates to be unconstitutionally vague and construing the statute to reach only express advocacy communications.”) (emphasis added).

⁷⁰ *Citizens United v. FEC*, 558 U.S. 310, 324 (2010) (“The First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People “of common intelligence must necessarily guess at [the law’s] meaning and differ as to its application.”) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)); *see also Buckley*, 424 U.S. at 77 (“Where First Amendment rights are involved, an even greater degree of specificity is required.”) (internal quotations omitted); *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (“Where a vague statute abut[s] upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.”).

⁷¹ *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012) (“[L]aws . . . must give fair notice of conduct that is forbidden or required . . . [T]wo connected but discrete due process concerns [are]: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so

discern — before it makes any communication — whether its speech activities will subject it to the burdens of registering and reporting as a federal political committee. Only well-defined standards provide the requisite certainty. A “support or oppose” standard, which no court has ever held to be relevant in a political committee analysis, falls well short of the mark.

C. LIMITING THE MAJOR PURPOSE ANALYSIS TO A SINGLE CALENDAR YEAR UNDERMINES THE PURPOSE OF THE COMMISSION’S CASE-BY-CASE APPROACH IN POLITICAL COMMITTEE MATTERS

At the same time that it expanded the universe of relevant communications that count toward determining Crossroads GPS’s major purpose, OGC simultaneously narrowed the relevant time period for analyzing the group’s spending to the 2012 calendar year.⁷² Regardless of which approach is applied to this particular matter—calendar year or total spending history—the result is the same: Crossroads GPS is not a political committee under the Act. Nevertheless, it is still worth mentioning that a calendar-year approach is neither required by courts nor is its slavish application wise policy.

First of all, determining an organization’s major purpose via a narrow snapshot — one calendar year — as opposed to looking at its history and organizational model undercuts the whole point of the major purpose test, which saves the Act’s definition of “political committee” by limiting it to groups whose focus is on federal elections.⁷³ While the calendar year approach superficially attempts to root itself in the Act, it is the type of rigid, “one-size-fits-all” rule that has been roundly rejected in *Buckley* and its progeny.⁷⁴ Moreover, a calendar-year approach conflicts with multiple court decisions upholding Commission consideration of an organization’s multi-year spending history.⁷⁵ For these reasons, the Commission has never formally adopted

that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.” (citations omitted)). Under OGC’s approach, an organization making these sorts of non-express advocacy/non-electioneering communications could nevertheless become a political committee merely by spending \$1,001 to distribute an independent expenditure. This does exactly what *Buckley* warned against—interpreting the definition of political committee “to reach groups engaged purely in issue discussion.” *Buckley*, 424 U.S. at 79.

⁷² See MUR 6596 (Crossroads GPS), First Gen. Counsel’s Rpt. at 31 (concluding that Crossroads’s major purpose should be determined by “reference to its activities during the 2012 calendar year”).

⁷³ See, e.g., 2007 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.”).

⁷⁴ 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.

⁷⁵ See *CREW I*, 209 F. Supp. 3d at 94 (reasonable for the Commission to consider organization’s “full spending history” and describing a calendar year-only approach as “inflexible”); *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

such an approach⁷⁶ and has eschewed limiting its analysis to a single calendar year in prior enforcement matters.⁷⁷

It is more sensible to use a holistic approach when evaluating a group's major purpose for the simple reason that advocacy groups often intensify their activities on legislative *issues* in the months preceding a federal election. They do so precisely because the pre-election period is when the public is most focused on public policy issues.⁷⁸ For this reason, advocacy groups frequently will advance their issue agenda by linking issues to candidates and elections. However, if a group remains active past Election Day, that is relevant evidence of its true purpose,⁷⁹ and the Commission must take that into account.

In the enforcement matters cited in the 2007 Supplemental E&J, the Commission routinely analyzed activity beyond a single calendar year. 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]."⁸⁰ And in MUR 5751 (The Leadership Forum), OGC cited IRS reports showing receipts and disbursements from 2002-2006 before concluding that the Respondent had not crossed the statutory threshold for political

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).

⁷⁶ 2007 Supplemental E&J, 72 Fed. Reg. 5,595 (Feb. 7, 2007).

⁷⁷ See, e.g., MUR 5751 (The Leadership Forum); MUR 5365 (Club for Growth); MUR 3669 (Christian Coalition); MURs 2804 & 2804R (AIPAC).

⁷⁸ Justices Kennedy and Scalia pointed out that "the public only tunes in to the political dialogue shortly before the election" and that "[t]he Senator who is, who is at risk is likely to listen. The Senator who has a safe seat is not." Transcript of Oral Argument at 14, 17, *WRTL II*, 551 U.S. 449 (2007) (No. 06-969), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2006/06-969.pdf; see also *Citizens United v. FEC*, 558 U.S. 310, 334 (2010) ("It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence."); 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) ("Unsurprisingly, most citizens begin to focus on and become engaged in political debate once election day approaches.").

⁷⁹ 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)). 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.

⁸⁰ MUR 5365 (Club For Growth, Inc.), General Counsel's Brief at 24; 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). As noted, the legal underpinnings of this MUR have been undermined for other reasons 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).

committee status.⁸¹ Furthermore, in MUR 5753 (League of Conservation Voters 527, *et al.*), the Commission determined that Respondents “were required to register as political committees and commence filing disclosure reports with the Commission by no later than their initial receipt of contributions of more than \$1,000 in July 2003,” citing to Respondents’ disbursements “during the *entire 2004 election cycle*” while evaluating their major purpose.⁸² Likewise, in MUR 5754 (MoveOn.org Voter Fund), the Commission looked to disbursements “[d]uring the *entire 2004 election cycle*.”⁸³

Another matter of significance in which the Commission analyzed a group’s activities over a significant length of time is MUR 2804, involving whether the American Israel Public Affairs Committee (“AIPAC”) was a federal political committee. In concluding that AIPAC was not a political committee, the Commission relied heavily on an analysis of the group’s activities, which included some electoral expenditures, over nearly a full decade (1983-1992).⁸⁴ After its determination was challenged in court and later remanded, the Commission in 2000 reiterated its earlier conclusion, which in turn led the Commission to find in a related matter that AIPAC was a bona fide membership organization.⁸⁵ 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 year[]” 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.⁸⁶

For it to be meaningful, the Commission’s case-by-case approach to political committee matters must have the flexibility to determine the appropriate time frame when examining whether a group’s activities meet the major purpose test. A dogmatic insistence on looking only at a single calendar year would, in many instances, thwart the underlying purpose of the case-by-case approach and, thus, should not be the only time period the Commission is allowed to consider.

⁸¹ MUR 5751 (The Leadership Forum), General Counsel’s Report #2 at 3.

⁸² MUR 5753 (League of Conservation Voters 527, *et al.*), Factual and Legal Analysis at 11, 18 (emphasis added). As noted, the legal underpinnings of this MUR have been undermined for other reasons by *Emily’s List v. FEC*, 581 F.3d 1, 12-14 (D.C. Cir. 2009).

⁸³ MUR 5754 (MoveOn.org Voter Fund), Factual & Legal Analysis at 12-13. As noted, the legal underpinnings of this MUR have been undermined for other reasons by *Emily’s List v. FEC*, 581 F.3d at 12-14.

⁸⁴ See General Counsel’s Brief (Jan. 30, 1992), MUR 2804 (American Israel Public Affairs Committee).

⁸⁵ General Counsel’s Report at 19-20 (Mar. 8, 2000), MUR 2804R.

⁸⁶ *Akins v. FEC*, 736 F. Supp. 2d 9, 20 (D.D.C. 2010).

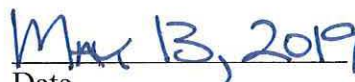
D. THIS MATTER MERITS DISMISSAL PURSUANT TO THE COMMISSION'S EXERCISE OF PROSECUTORIAL DISCRETION


The Commission postponed resolution of this matter pending the outcome in *Public Citizen v. FEC*,⁸⁷ which involves the same Respondent and the identical legal issues, in the belief that the court's opinion would have direct bearing upon the Commission's decisions in this matter and provide useful guidance. Though that case still remains pending, we decided that in light of the lapse of time since the events at issue in this matter occurred, it would also be a proper exercise of the Commission's prosecutorial discretion to dismiss this matter so that Commission enforcement resources can be better allocated.⁸⁸

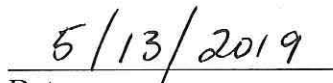
IV. CONCLUSION

Based on our review of the record evidence, Crossroads GPS—whose spending on independent expenditures and electioneering communications did not reach 40 percent of its total spending in 2012 or in any other year—did *not* have as its major purpose the nomination or election of a federal candidate and, therefore, was not a political committee under the Act. Accordingly, we did not support OGC's recommendations in this matter and, instead, voted to close the file.


Matthew S. Petersen
Vice Chairman


Date


Caroline C. Hunter
Commissioner


Date

⁸⁷ See *Public Citizen v. FEC*, No. 14-148 (RJL) (D.D.C. filed Jan. 31, 2014).

⁸⁸ See *Heckler v. Chaney*, 470 U.S. 821 (1985).