FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

STATEMENT ON *CREW v. FEC*, NO. 16-CV-02255

CHAIR CAROLINE C. HUNTER AND
COMMISSIONER MATTHEW S. PETERSEN

Numerous court decisions over nearly a half-century have sought to protect issue advocacy groups from the burdensome registration and reporting requirements for political committees under the Federal Election Campaign Act of 1971, as amended (the "Act"). Most recently, these issues were relitigated in *CREW v. FEC*, where the district court disagreed with our analysis that the non-profit American Action Network ("AAN") is not a political committee and remanded the matter to the Commission to conform with the court's opinion within 30 days — April 19, 2018.

We strongly disagree with the court's decision, as we explain in detail below, and believe the decision should be appealed. It incorrectly substituted the court's judgment for the Commission's on a question falling squarely within the Commission's jurisdiction and expertise. The court also erred in concluding that the Bipartisan Campaign Reform Act ("BCRA") expressed a clear intent to sweep issue advocacy into the Commission's analysis for determining whether a 501(c) organization should be regulated as a political committee. Congress expressed no such intent.

We regret that there does not appear to be four votes to appeal the district court's opinion. Moreover, because a single district court decision has limited precedential value, the state of this important area of law is now less certain.[1] Nevertheless, *we* have acted in conformance with the court's decision, and believe that all Commissioners should do so as well.[2]

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[1] A single district court decision is not binding on the Commission outside the context of that particular case and would not be binding on any other court, including a court in the same district. *See Am. Elec. Power Co., Inc.*, 564 U.S. at 428 ("[F]ederal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court."); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1176 (D.C. Cir. 1987) ("The federal courts spread across the country owe respect to each other's efforts and should strive to avoid conflicts, but each has an obligation to engage independently in reasoned analysis. Binding precedent for all is set only by the Supreme Court, and for the district courts within a circuit, only by the court of appeals for that circuit."), *aff'd sub nom. Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989).

[2] Unfortunately, it appears as though one of our colleagues seeks to remove the Commission from its enforcement role and turn the matter over to a private party. *See* Vice Chair Ellen L. Weintraub, Twitter, https://twitter.com/EllenLWeintraub/status/987101164775919622; Complaint, *CREW v. AAN*, No.1:18-cv-00945 (April 23, 2018). Ill-advised public statements on social media and attempts to obstruct routine Commission operations raise questions of bias and/or prejudgment, which, in turn, implicate serious questions of due process.

I. FACTUAL AND LEGAL BACKGROUND

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.[3] 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.[4] 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.[5] A decade after *Buckley*, the Supreme Court reaffirmed the distinction between PACs and issue groups.[6] Accordingly, the Commission may regulate entities as "political committees" under the Act only if they have as their major purpose the nomination or election of a candidate.[7]

Political committees are subject to regulatory requirements that make them "burdensome alternatives" and "expensive to administer."[8] For instance, political committees must register with the Commission and disclose publicly all of their financial activity in regular, periodic filings, in contrast to other persons who need only file certain limited, event-triggered reports.[9]

A. CREW'S ADMINISTRATIVE COMPLAINT AGAINST AAN

In 2012, Citizens for Responsibility and Ethics in Washington ("CREW") filed with the Commission a complaint against AAN, an organization recognized by the IRS as tax-exempt under section 501(c)(4) of the Internal Revenue Code.[10] AAN aired independent expenditures

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3 52 U.S.C. § 30101(4)(A).

4 *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *see also id.* at 42-43 (discussing identical concern and interpreting "relative to a federal candidate" as requiring words of express advocacy).

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions.

5 *Id.* at 79.

6 *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986).

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

8 *Citizens United v. FEC*, 558 U.S. 310, 337-38 (2010) (listing regulatory requirements).

9 *See generally* 52 U.S.C. §§ 30102-04 (establishing political committees' registration, organization, and ongoing reporting requirement). *Compare* 52 U.S.C. § 30104(a) (establishing a regular, periodic filing schedule for disclosure reports) and (b) (detailing the information to be disclosed on committees' reports), *with* 52 U.S.C. § 30104(c) (providing that persons other than political committees need file independent expenditure reports only upon making certain independent expenditures) and (f) (same as to electioneering communications).

10 Treasury regulations provide that a 501(c)(4) 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." *See* Rev. Rul. 1981-95, 1981-1 C.B. 332 (emphasis added). *See* IRS Exempt Organizations Master File, https://www.irs.gov/charities-non-profits/exempt-organizations-business-master-file-extract-eo-bmf (search in

and electioneering communications in the two fiscal years after its establishment in 2009.[11] CREW alleged that AAN failed to register as a political committee and file attendant disclosure reports.[12] We voted to dismiss the complaint upon concluding that AAN's major purpose was not the nomination or election of a federal candidate.[13] Critical to our analysis — and the ensuing litigation — was our conclusion that "the roughly $13 million that AAN spent on" electioneering communications did not count towards a finding that AAN's major purpose was the nomination or election of federal candidates.[14]

In reaching this conclusion, we used the approach articulated in the Commission's 2004 Explanation and Justification and 2007 Supplemental Explanation and Justification,[15] modified, as necessary, in light of subsequent Supreme Court decisions distinguishing "campaign-related" speech from "genuine issue advocacy"[16] and generally recognizing greater First Amendment rights for associations, such as corporations and labor unions. This tailored application of the "major purpose" test reflected the Commission's unique role in regulating "core constitutionally protected activity — 'the behavior of individuals and groups only insofar as they act, speak and

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District of Columbia for "American Action Network") (continuing to recognize AAN as tax-exempt under section 501(c)(4)).

11 *See* Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen, MUR 6589 (American Action Network); Complaint, MUR 6589 (American Action Network) (June 7, 2012).

An independent expenditure is an expenditure that "expressly advocat[es] the election or defeat of a clearly identified candidate" and is not coordinated with that candidate. 52 U.S.C. § 30101(17). An "electioneering communication" is "any broadcast, cable, or satellite communication which (I) refers to a clearly identified candidate for Federal office (II) . . . within 60 days before a general . . . or 30 days before a primary [election] and (III) . . . is targeted to the relevant electorate" except for, among other things, "a communication which constitutes an expenditure or independent expenditure under this Act." 52 U.S.C. § 30104(f)(3)(A), (B).

12 Complaint, MUR 6589 (American Action Network).

13 *See* Statement of Reasons, MUR 6589.

14 *Id.* at 19-20.

15 *Id.* at 17-21; *see also* Political Committee Status, 72 Fed. Reg. 5596 (Feb. 7, 2007) (supplementing original explanation and justification); Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68056 (Nov. 23, 2004).

16 *Citizens United*, 558 U.S. at 336 ("*WRTL* said that First Amendment standards must eschew the open-ended rough-and-tumble of factors, which invit[es] complex argument in a trial court and a virtually inevitable appeal.") (internal quotes omitted); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469-70 (2007) ("*WRTL II*") ("[A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.").

associate for political purposes,'"[17] and balanced the sometimes competing values of associational privacy and the public's interest in disclosure.[18]

B. First Legal Challenge To Commission Action

CREW challenged the dismissal in federal court and persuaded the court that the Commission erred in excluding all non-express advocacy communications in its major purpose analysis.[19] But recognizing the Commission's "judicially approved case-by-case approach" to determine an entity's major purpose, the court refused to "replac[e] the Commissioners' bright-line rule with one of its own" that considers "*all* electioneering communications as indicative of a 'purpose' to 'nominat[e] or elect[] . . . a candidate.'"[20] Instead, the court remanded the matter

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[17] *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003) (quoting *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981)).

[18] *See Van Hollen v. FEC*, 811 F.3d 486, 501 (D.C. Cir. 2016) (citing *AFL-CIO*, 333 F.3d at 170 and holding the Commission's "tailoring was an able attempt to balance the competing values that lie at the heart of campaign finance law.").

[19] *CREW v. FEC*, 209 F. Supp. 3d 77, 89-93 (D.D.C. 2017); *see also* Complaint, *CREW v. FEC*, No. 1:14-cv-021419 (Sept. 19, 2016). To support its holding, the court relies on two separate lines of authority: one addressed whether event-specific disclosure requirements are constitutional for non-express advocacy speech (they are), and the other addressed whether registration, reporting, and other requirements are constitutional for political committees (they also are). *Id.* For several reasons, this misses the mark. For example, it is not correct to conclude that the "division between express advocacy [or its functional equivalent] and issue speech is simply inapposite in the disclosure context." *Id.* at 90. Even opinions the court cites in support demonstrate that the opposite is true. *See e.g., Yamada v. Snipes*, 786 F.3d 1182, 1189 (9th Cir. 2015) (statute is constitutional where "[u]nder the [state] Commission's interpretation, 'influence' refers only to 'communications or activities that constitute express advocacy or its functional equivalent.' This interpretation significantly narrows the statutory language."); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 66-67 (1st Cir. 2011) (disclosure statutes are constitutional because"[a]s narrowed, the terms 'influencing' and 'influence' as used in the statutes at issue here would include only 'communications and activities that expressly advocate for or against a candidate or that clearly identify a candidate by apparent and unambiguous reference and are susceptible of no reasonable interpretation other than to promote or oppose the candidate'"). Further, it is not obvious how these two lines of authority (i.e. that event-driven disclosure laws and political committee requirements both survive judicial review) support a conclusion that the Commission must count electioneering communications toward political committee status. The circuit court decisions that are most clearly on point to this precise issue are the ones we cited originally, and come to the conclusion opposite that of the district court. *See* Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 7-11, MUR 6589 (American Action Network) (citing *Wisconsin Right to Life v. Barland*, 751 F.3d 804 (7th Cir. 2014); *New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010); *N.C. Right to Life Inc. v. Leake*, 525 F.3d 274, 287-88 (4th Cir. 2008); *Colorado Right to Life Committee, Inc. v. Coffman*, 498 F.3d 1137 (10th Cir. 2007); *United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1142 (2d Cir. 1972); *ACLU v. Jennings*, 366 F. Supp. 1041, 1055 (D.D.C. 1973), vacated as moot sub nom., *Staats v. ACLU*, 422 U.S. 1030 (1975)). Of these, the district court dismissed the most recent as an "outlier," and the rest ostensibly because they pre-dated *Citizens United*. *Id.* at 90-91, 90 n.8. That is also incorrect. Both the Seventh Circuit *Barland* and the Tenth Circuit *Herrera* opinions were issued after and referenced *Citizens United*. As a result, at least two circuit courts (in addition to the administering agency) meet the district court's standard for acting "contrary to law."

[20] *CREW v. FEC*, 209 F. Supp. 3d at 93. The court, however, agreed that it was not unreasonable to consider a particular organization's "full spending history." *Id.* at 94. However, the court also concluded that "refusal to give

to the Commission to reconsider its analysis without "exclud[ing] from its [major purpose] consideration all non-express advocacy in the context of disclosure."[21] The court left "how *Buckley* (and the test it created) should be implemented" to the Commission, where "[s]uch 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."[22]

C. COMMISSION ACTION ON REMAND

On remand, we engaged in a text-centric, ad-by-ad analysis of AAN's electioneering communications to determine which ads evidenced a campaign-related focus — that is, which ads included references to candidacies, elections, voting, political parties, or other indicia that the costs of the ad should count towards a determination that the organization's major purpose is to nominate or elect candidates.[23] We also examined the extent to which each of AAN's ads focused on issues important to the group or were merely vehicles to address the candidates referenced in the ad in an effort to influence a federal election.[24] Under this framework, we determined that an additional $1,875,394 of AAN's spending on electioneering communications could evidence the major purpose of nominating or electing federal candidates.[25] However, AAN's election-related spending still amounted to only "26% — well under half — of its overall spending."[26] Accordingly, we again concluded that there was not reason to believe that AAN

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any weight whatsoever to an organizations' [sic] relative spending *in the most recent calendar year*" was arbitrary and capricious. *Id.* (emphasis added). The court also rejected a single calendar year approach as "inflexible." *Id.*

21 *Id.* at 93.

22 *Id.* at 87.

23 *See* Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman, MUR 6589R (American Action Network). We further ascertained whether the communication contained a call to action and, if so, whether the call related to the speaker's issue agenda or, rather, to the election or defeat of federal candidates. We considered information beyond the content of the ad only to the extent necessary to provide context to understand better the message being conveyed. In the absence of more detailed judicial guidance, we felt this analysis best satisfied the essential need for objectivity, clarity, and consistency in administering and enforcing the Act and providing meaningful guidance to the regulated community about which factors would be deemed relevant in a major purpose inquiry. Our analysis also avoided speculating about the subjective motivations of the speaker in determining which ads were sufficiently "campaign related." *See WRTL II*, 551 U.S. at 467 ("After noting the difficulty of distinguishing between discussion of issues on the one hand and advocacy of election or defeat of candidates on the other, the *Buckley* Court explained that analyzing the question in terms of intent and of effect would afford no security for free discussion. . . . *McConnell* did not purport to overrule *Buckley* on this point") (citing *Buckley*, 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945) (quotation omitted))).

24 The "Yellowtail" ad discussed in *McConnell v. FEC* is a paradigmatic example. 540 U.S. 93, 193-94 n.78 (2003). That ad accused a candidate of hitting his wife, skipping child support payments, and being a convicted felon. *Id.* The Court stated that "[t]he notion that this advertisement was designed purely to discuss the issue of family values strains credulity." *Id.*

25 *See* Statement of Reasons at 17, MUR 6589R.

26 *See id.* at 17. In *CREW*, the court stated that "[a] reasonable application of a 50%-plus rule would not appear to be arbitrary and capricious." 209 F. Supp. 3d at 95.

violated the Act by failing to register and report with the Commission as a political committee and dismissed the administrative complaint.[27]

D. SECOND LEGAL CHALLENGE TO COMMISSION ACTION

CREW responded twofold. First, it moved the court to order the Commission to show why its dismissal did not violate the court's prior decision.[28] On the same day, CREW also filed a new complaint under 52 U.S.C. § 30109(a)(8) alleging that the Commission's second dismissal was contrary to law.[29]

The Court denied the show-cause motion. The court explained that the Commission did "just" what the court had instructed it to do — that is, "reconsider its decision without 'exclud[ing] from its [major purpose] consideration all non-express advocacy.'"[30]

The court, however, found on CREW's section 30109(a)(8) claim that the use of "a multifactor test that started from a blank slate" failed to take into account that each ad fell "cleanly" within Congress's definition of an electioneering communication.[31] The court noted that if there had been no congressional action since *Buckley*, the court may have found it unclear whether nonexpress advocacy ads that mention a candidate run near elections should count towards political committee status.[32] However, according to the court, in passing BCRA, Congress expressed an "unambiguous directive" that "electioneering communications *presumptively* have an election-related major purpose,"[33] which "require[d] the agency to presume that spending on electioneering communications contributes to a 'major purpose' of nominating or electing a candidate for federal office, and, in turn, to presume that such spending supports designating an entity as a 'political committee.'"[34] The court did not foreclose that a

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27 Statement of Reasons at 18, MUR 6589R.

28 *See Pls.' Mot. for an Order to Def. FEC to Show Cause*, *CREW v. FEC*, No. 1:14-cv-1419 (D.D.C. Nov. 14, 2016) (Docket No. 57); *CREW v. FEC*, No. 1:14-cv-1419 (D.D.C. Apr. 6, 2017) (Docket No. 74) (redacted version).

29 *See* Complaint, *CREW v. FEC*, No. 1:16-cv-2255 (Nov. 14, 2016).

30 *CREW v. FEC*, No. 1:14-cv-1419, slip op. at 5-6 (Docket No. 74).

31 *CREW*, 2018 WL 1401262 at *7.

32 *Id.* at *9.

33 *Id.* at *7.

34 *Id.* at *14. In reaching this conclusion, the court states that "the Commission continues to overread *WRTL II* for the idea that the primary goal in evaluating AAN's ads should be to determine whether the ads' *content* bears 'indicia of express advocacy.'" *Id.* at *12. We do not think this analysis correctly captures our consideration of *WRTL II*. Nowhere have we argued that, under the First Amendment, disclosure requirements may only apply to communications containing express advocacy (or the functional equivalent thereof). Indeed, we agree with the court that "the Supreme Court has seen no problem with disclosure requirements triggered solely by an electioneering communication's context." *Id.* Instead, the question we have sought to answer in this matter is not whether, but rather which type of, disclosure is required — the event-driven disclosure regime for electioneering communications or the more comprehensive disclosure requirements for political committees. And *WRTL II* is instructive on this

particular electioneering communication might lack an election purpose, but expected that such ads would be "the rare exception, not the rule."[35]

We believe that the decision should be appealed. It appears that at least one of our colleagues disagrees. We write to express our concerns with the opinion.

II. ANALYSIS

An examination of the text of the Act, BCRA's legislative history, and post-enactment comments made during the course of a Commission rulemaking makes clear that Congress has not addressed how the Commission must approach major purpose or political committee determinations.

A. THE TEXT OF THE ACT

The text of the Act — "[t]he starting point in discerning congressional intent"[36] — is silent as to "major purpose." What Congress did in BCRA, as relevant here, was to define certain types of ads as "electioneering communications,"[37] establish an event-driven disclosure regime for the ads,[38] mandate that the ads carry disclaimers,[39] and ban corporations and labor organizations from running the ads.[40] But what Congress never did, as the court itself admitted,[41] is amend the statutory definition of "political committee" or otherwise codify

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point in that it includes an illuminative discussion on the differences between issue discussion and electoral speech, which helps inform the Commission's major-purpose analysis.

35 *CREW*, 2018 WL 1401262 at *13. Indeed, the court indicated that an organization's electioneering communications might not count toward political committee status if they do not "mention [an] election or indirectly reference it," do not "discuss[] the substance [of legislation]," and do not "make any reference to [an] incumbent's prior voting history or otherwise criticize [them]" when calling for viewers to contact their elected representatives. *Id.* at *11.

36 *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004).

37 52 U.S.C. § 30104(f)(3). An "electioneering communication" is "any broadcast, cable, or satellite communication which (I) refers to a clearly identified candidate for Federal office (II) . . . within 60 days before a general . . . or 30 days before a primary [election] and (III) . . . is targeted to the relevant electorate" except for, among other things, "a communication which constitutes an expenditure or independent expenditure under this Act." 52 U.S.C. § 30104(f)(3)(A), (B).

38 52 U.S.C. § 30104(f)(1) ("Every person who makes a disbursement for . . . airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement . . . .").

39 52 U.S.C. § 30120(a) (requiring disclaimers for electioneering communications).

40 52 U.S.C. § 30118. BCRA's ban on corporate electioneering communications was ruled unconstitutional as applied in *WRTL II* and unconstitutional on its face in *Citizens United*.

41 *CREW*, 2018 WL 1401262 at *10 ("It is true that BCRA did not touch the text of FECA's definition of 'political committee.'").

Buckley's "major purpose" test.[42] Congress has never identified a methodology, rule, or factors for the Commission to consider when analyzing whether an entity is a political committee,[43] let alone linked the Act's definition of "political committee" to electioneering communications. There is thus no textual evidence that Congress intended a group's spending on electioneering communications to be considered evidence of a group's major purpose.

Relying on two dictionaries, the court claimed to find a textual "clue" of congressional intent in the use of the term "*electioneering* communications": "Congress chose a label that by its plain meaning deems the ads to 'take part actively and energetically in a campaign to be elected to public office.'"[44] This reliance ignores the D.C. Circuit's objection to the use of dictionaries in the context of interpreting BCRA's electioneering communications provisions. In *Ctr. for Indiv. Freedom v. Van Hollen*, the D.C. Circuit rejected a district court's analysis partially on the grounds that "citing to dictionaries creates a sort of optical illusion, conveying the existence of certainty — or 'plainness' — when appearance may be all there is."[45]

The court, moreover, overlooks a textual clue in the definition of "electioneering communication" at 52 U.S.C. § 30104(f) that cuts against the court's conclusion. Congress could have added the definition of electioneering communication to the general definition of "expenditure," the making of $1,000 or more of which during a calendar year satisfies the Act's definition of political committee. Indeed, the earliest BCRA proposals included such provisions.[46] Congress, however, instead placed the definition of "electioneering communication" among the reporting rules of the Act, codified at section 30104, and clarified

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[42] Generally, when Congress revises a statute, its decision to leave certain sections unamended constitutes at least acceptance, if not explicit endorsement, of the preexisting construction and application of the unamended terms. *See Cottage Save Ass'n v. Comm'r*, 499 U.S. 554, 562 (1991). The court cited *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), in support of its argument that BCRA clarified FECA's definition of "political committee." *CREW*, 2018 WL 1401262 at *10. But in *Williamson* the Court identified numerous pieces of legislation, as well as other rejected legislative proposals, that created a "distinct scheme to regulate the sale of tobacco products," 529 U.S. at 155-56, which "effectively ratified the FDA's previous position that it lacks jurisdiction to regulate tobacco." *Id.* at 156. No such legislative track record on major purpose is present here.

[43] Congress is of course aware of *Buckley*'s major purpose test: Congress responded to *Buckley* in 1976 by amending FECA to include, among other provisions, a definition of independent expenditure, a *Buckley* construction on the definition of "expenditure" that serves to distinguish issue-speech from regulable express advocacy. Further, several legislative proposals have been made to codify or flesh out the major purpose test, particularly with respect to section 527 organizations. *See, e.g.*, 527 Reform Act of 2004, S. 2828, 108th Cong. § 2(a) (proposing to codify without defining "major purpose" into FECA's definition of "political committee") and (b) (proposing to define "major purpose" for section 527 organizations).

[44] *CREW*, 2018 WL 1401262 at *10 (citing Oxford Dictionary of English 565 (3d ed. 2010) and American Heritage Dictionary (5th ed. 2018)).

[45] 694 F. 3d 108, 111 (D.C. Cir. 2012) (quoting A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 71, 72 (1994)).

[46] *See, e.g.*, Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. § 201(a) and (b) (redefining "independent expenditure" and "express advocacy" to include certain broadcast communications that refer to a clearly identified candidate within 60 days of an election); Bipartisan Campaign Reform Act of 1998, H.R. 3526, 105th Cong. § 201(a) and (b) (1998) (same).

that "[t]he term 'electioneering communication' *does not* include . . . a communication which constitutes an expenditure or an independent expenditure under this Act."[47] This carve-out of electioneering communications from the definition of expenditure — which is defined as "any . . . payment . . . made by any person *for the purpose of influencing any election for Federal office*"[48] — contradicts the court's presumption that "electioneering communications have an inherent purpose of influencing a federal election,"[49] such that they must be presumptively equated with independent expenditures in a major purpose analysis. In so doing, the court erases the statutory distinction between expenditures and electioneering communications.

The text also includes clues as to congressional intent with respect to 501(c)(4) organizations. At 52 U.S.C. § 30118(c)(2), Congress created a fallback mechanism for 501(c)(4) and 527 organizations in the event that the ban on *all* corporate electioneering communications, including 501(c)(4) corporations, was found unconstitutional. Congress's fallback would have allowed such organizations to run the ads, using funds from individuals.[50] Therefore, the text of the Act makes clear that Congress's preferred "fix" was to ban 501(c)(4) organizations from running ads. And as for those persons who could air electioneering communications, Congress amended the Act to mandate a specific, event-based disclosure regime, but did not link the running of electioneering communications to the broader, status-driven disclosure regime of political committees.

B. LEGISLATIVE HISTORY

In the absence of clear statutory text to support its conclusion,[51] the court relies heavily on the description of BCRA's legislative history in *McConnell v. FEC*,[52] particularly emphasizing that Congress considered electioneering communications to be "sham" issue ads

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47 2 U.S.C. § 30104(f)(3)(B)(ii) (emphasis added). Further, for purposes of the ban on electioneering communications by corporations, Congress included the term "applicable electioneering communication" under the definition of "expenditure" at section 30118. This further muddies congressional intent, as the definition of "political committee" at section 30101(4) refers to "expenditures" as defined at section 30101(9).

48 *Id.* at § 30101(9) (emphasis added).

49 *CREW*, 2018 WL 1401262 at *10.

50 *Compare* 52 U.S.C. § 30118(c)(1)-(4), *with* (c)(6); *see infra* notes 59-65 and accompanying text.

51 *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, No. 16-1362, __ U.S. __, 2018 WL 1568025 at *7 (Apr. 2, 2018) ("If the text is clear, it needs no repetition in the legislative history; and if the text is ambiguous, silence in the legislative history cannot lend any clarity.") (citing *Avco v. U.S. Dep't of Justice*, 884 F.2d. 621 (D.C. Cir. 1989)); *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 93 (2007) ("[N]ormally neither the legislative history nor the reasonableness of the [agency interpretation] would be determinative if the plain language of the statute unambiguously indicated [Congress's intent]."); *id.* at 108-09 (Scalia, J., dissenting) ("The very structure of the Court's opinion provides an obvious clue as to what is afoot. The opinion purports to place a premium on the plain text of the [statute] but it first takes us instead on a roundabout tour of considerations *other* than language . . . [t]his is a most suspicious order of proceeding.").

52 540 U.S. 93 (2003).

that are intended to influence elections.[53] But in reviewing the BCRA legislative history, we find no "unambiguous directive" that electioneering communications should be factored into the Commission's major purpose analysis, let alone how that analysis should be applied to a 501(c)(4) organization. Instead, we see that Congress intended to ban all corporations — including 501(c)(4) organizations — from making electioneering communications and, where not banned, require discrete, event-driven disclosure.

Significant legislative history suggests that Congress *did not* intend for electioneering communications to count toward political committee status for 501(c) tax-exempt organizations. For example, Senator Jeffords, one of the leading sponsors of the initial electioneering communication proposal, stated that the amendment would "not require such groups [such as National Right to Life Committee or the Sierra Club] to create a PAC or another separate entity."[54] Another sponsor, Senator Snowe, entered into the record her position that the electioneering communications provision was constitutional "[a]s long as the [electioneering disclosure provisions] doesn't produce the chilling effect of requiring an organization to disclose all of its donors, *which Snowe-Jeffords avoids*, it clearly meets court guidelines."[55]

Rather, when first introducing the Snowe-Jeffords Amendment, Senator Snowe explained that the "very simple, very direct, . . . very narrow"[56] proposal would "require . . . the sponsors' disclosure and also the donors on such ads because we think it is important that donors who

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53 *CREW*, 2018 WL 1401262 at *9-10. But at least two members of the Court have questioned interpreting *all* electioneering communications as being presumptively made "in connection with" an election. 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., a point repeated in *Citizens United*. *See* 558 U.S. at 334 ("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.").

54 147 CONG. REC. S2813 (Mar. 27, 2001). In explaining that Congress did not intend to require groups that run electioneering communications to register as PACs or force "invasive disclosure" of donors, Senator Jeffords also stated:

> The Snowe-Jeffords provisions will not prohibit groups like the National Right to Life Committee or the Sierra Club from disseminating electioneering communications; . . . . *It will not require the invasive disclosure of donors*; and . . . *it will not affect the ability of any organization to urge grassroots contacts with lawmakers on upcoming votes.*

Id. at S2812-13 (emphasis added). At least one Commissioner has found these statements "pretty persuasive coming from the guy who wrote the language" as to whether "such groups [must] create a PAC or another separate entity" to run electioneering communications. *See* Hearing Transcript, NPRM on Political Committee Status at 170-71 (April 15, 2004) (statement of then-Vice Chair Ellen Weintraub); *see also* Statement for the Record of Vice Chair Ellen L. Weintraub, NPRM on Political Committee Status at 7 ("[N]othing in BCRA requires that all entities that . . . produce Electioneering Communications (defined term[] under the law) register with the Commission. The Supreme Court [in *McConnell*] understood that.").

55 147 CONG. REC. S3038 (Mar. 28, 2001) (emphasis added).

56 144 CONG. REC. S912 (Feb. 24, 1998) (discussing Senate Amendment No. 1647).

contribute more than $500 to such ads should be disclosed by these organizations."[57] Animating the "limiting" nature of the proposal was the sponsors' concern with passing legislation that would "withstand constitutional scrutiny."[58]

Beyond event-driven disclosure, the BCRA sponsors intended to ban "direct or indirect use of corporation or union money to fund the ads,"[59] including the corporate funds of 501(c)(4) organizations. The first Snowe-Jeffords Amendment, as well as the initial 2001 BCRA bill first proposed in the Senate[60] included a narrower electioneering communications ban that exempted 501(c)(4) and 527 organizations if the communications were paid for by funds provided by individuals.[61] Subsequently, however, the Senate adopted the "Wellstone Amendment,"[62] which effectively eliminated the exception for 501(c)(4) and 527 organizations. Senator Wellstone explained that he intended to put 501(c)(4) and 527 organizations in the same shoes as other corporations and labor organizations.[63] In his floor speech, Senator Wellstone cited *MCFL* for the proposition that "the election communications of nonprofit corporations, such as the one[s] [sic] covered in this amendment, could be regulated once it reached a certain level."[64] But he did not mean treated as political committees; he meant that, under *MCFL*, "they could clearly be banned from running these sham issue ads."[65]

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57 144 CONG. REC. S912 (Feb. 24, 1998); *id.* at S913 ("Congress is permitted to demand the sponsor of an electioneering message to disclose the amount spent on the message and the source of funds."); *id.* ("We are saying in a very narrow period, right before the election, those groups who identify candidates in their ads or use a likeness are required to disclose their donors who donated more than $500.").

58 *Id.* at S913; *id.* at S912-14; *see also Van Hollen*, 811 F.3d at 494 ("That BCRA seeks more robust disclosure does not mean Congress wasn't also concerned with, say, the conflicting privacy interests that hang in the balance. In fact, Congress 'took great care in crafting . . . language to avoid violating the important principles in the First Amendment.'") (quoting 147 CONG. REC. S3033 (Mar. 28, 2001) (statement of Sen. Jeffords)).

59 *Id.* at S912.

60 *See* 144 CONG. REC. S906-07 (Feb. 24, 1998) (reproducing Snowe-Jeffords as Amendment No. 1647); Bipartisan Campaign Reform Act of 2001, S. 27, 107th Cong. § 203.

61 Bipartisan Campaign Reform Act of 2001, S. 27, 107th Cong. § 203.

62 147 CONG. REC. S2907 (March 26, 2001) (reproducing text of Amendment No. 145); United States Senate Roll Call 107th Congress—1st Session, Vote No. 48 (March 26, 2001) (passing Amendment No. 145), *available at* https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=1&vote=00048.

63 147 CONG. REC. S2845, S2487 (March 26, 2001).

64 *Id.* at S2848. In *McConnell*, however, the controlling opinion construed the provision as inapplicable to *MCFL* corporations "to avoid constitutional concerns." *McConnell*, 540 U.S. at 210-11. Justice Kennedy wrote that "[w]ere we to indulge the presumption that Congress understood the law when it legislated, the Wellstone Amendment could be understood only as a frontal challenge to *MCFL*." *Id.* at 339 (Kennedy, J., dissenting in part).

65 147 CONG. REC. S2488 (March 26, 2001).

C. POST-ENACTMENT STATEMENTS

Last, we turn to comments and testimony that the Commission received during its post-BCRA rulemaking on political committee status. In that rulemaking, the Commission sought comment on whether and how to count electioneering communications towards a group's major purpose[66] and congressional intent with respect to treating payments for electioneering communications as "expenditures" under its regulations.[67] And in the context of a proposed major purpose test that looked to a group's spending on, among other things, electioneering communications, the Commission acknowledged that some electioneering communications by 501(c) organizations are "confined to advocating action regarding a particular legislative or executive decision."[68] The Commission sought comment on whether a "more focused content analysis for the major purpose test" was needed.[69]

One-hundred and forty BCRA supporters in the House and 19 Senators submitted comments to the Commission indicating that they *did not* intend BCRA to broaden the statutory term "political committee" to encompass 501(c) organizations.[70] They stated that "[t]here has been absolutely no case made to Congress, or record established by the Commission, to support any notion that tax-exempt organizations and other independent groups threaten the legitimacy of our government when criticizing its policies."[71]

Significantly, BCRA's primary sponsors wrote separately:

> It is wholly appropriate for the Commission to undertake in this rulemaking to regulate 527s, whose major purpose *is* to influence elections, but not 501 (c) organizations, whose major purpose, under the tax laws, must be something other than influencing elections. . . . We oppose the proposals for regulation of 501(c) organizations contained in the Commission's Notice. The Commission should instead focus on deciding when a 527 is required to register as a political committee.[72]

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66 Political Committee Status, 69 Fed. Reg. 11736, 11738-39, 11746 (March 11, 2004) (proposing alternative revisions to the definition of "political committee").

67 *Id.* at 11739.

68 *Id.* at 11746.

69 *Id.*

70 *See* Comment of 140 Members of the House of Representatives on Reg. 2003-07 (Political Committee Status) at 2 (Mar. 24, 2004); Comment of 19 Members of the U.S. Senate on Reg. 2003-07 (Political Committee Status) at 2 (Apr. 7, 2004).

71 *See supra* note 70.

72 Comment of Senator Russell D. Feingold, Senator John McCain, Representative Martin T. Meehan, and Representative Christopher Shays on Reg. 2003-07 (Political Committee Status) at 2 (Apr. 9, 2004); *id.* at 1 ("Our conviction that many 527 organizations must register as political committees is based not on BCRA, but on FECA."). Senators McCain and Feingold also submitted testimony that they gave before the Senate Rules Committee in which they explain the material difference between section 527 and 501(c) organizations. Comment

Finally, certain exchanges between Commissioners and witnesses at a rulemaking hearing reveal a common understanding that Congress had not spoken to how a 501(c)(4)'s electioneering communications should factor into a major purpose analysis. For example, then-Chairman Brad Smith asked former Chairman Trevor Potter whether the applicable standard when analyzing a section 501(c)(4)'s major purpose should be express advocacy or something more. Potter replied that "[i]n *McConnell*, the Court said express advocacy is not constitutionally required, so Congress could come up with some other formula, but they have not done so."[73]

* * *

Reviewing the evidence above, we cannot agree with the district court that "FECA and BCRA make clear that Congress *intended* to foreclose the Commission from applying a major-purpose framework that does not, at a minimum, presumptively consider spending on electioneering ads as indicating an election-related major purpose."[74] Instead, we find a clear intent to ban corporate entities from making electioneering communications, while establishing an event-based disclosure regime of reports and disclaimers for those permitted to run such ads.

In BCRA, Congress assumed the continued existence of a hard money system, and sought to reinforce it. Since BCRA, however, the campaign finance landscape has changed dramatically. The courts, culminating in *Citizens United*, have reshaped that system so that corporations, including section 501(c)(4) organizations, may now make independent expenditures and electioneering communications. Given the intervening decisions of *WRTL II* and *Citizens United*, we do not see how Congress *could* have spoken clearly to the precise question here, where the Commission is wrestling with a "class of speakers Congress never expected would have anything to disclose."[75] In that regard, the *CREW* decision is analogous to the *Van Hollen* case litigated before the D.C. Circuit.

There, then-Representative Chris Van Hollen challenged the Commission's electioneering disclosure regime, which the Commission promulgated after *WRTL II*. While the district court (in its first decision) found for Van Hollen at *Chevron*-step one,[76] the D.C. Circuit

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of Senators Russell D. Feingold and John McCain on Reg. 2003-07 (Political Committee Status) at 2-5 (April 2, 2004) ("[U]nder existing tax laws, Section 501(c) groups — unlike section 527 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."); *id* at 8 ("[C]are must be taken not to chill the legitimate activities of 501(c) advocacy organizations that do not have the primary purpose of influencing elections.").

73 Hearing Transcript, NPRM on Political Committee Status at 162 (April 15, 2004).

74 *CREW*, 2018 WL 1401262 at *13.

75 *Van Hollen*, 811 F. 3d at 490-91.

76 *Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984). Under *Chevron*, a court looks to determine whether Congress "has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. . . . If, however, the court determines Congress has not directly addressed the precise question at issue . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

reversed on appeal, holding that: "The statute is anything but clear, especially when viewed in the light of the Supreme Court's decisions in" *Citizens United* and *WRTL II*.[77]

Here, as in *Van Hollen*, Congress could not have "had an intention on the precise question at issue" because "it is doubtful that, in enacting [52 U.S.C. § 30104(f)], Congress even anticipated the circumstances that the FEC faced."[78] Rather, "[i]t was due to the complicated situation that confronted the agency in 2007 and the absence of plain meaning in the statute that the FEC acted, . . . reflect[ing] an attempt by the agency to provide regulatory guidance . . . following the partial invalidation of the speech prohibition imposed on corporations and labor unions in the context of electioneering communications."[79]

III. CONCLUSION

Contrary to the court's holding in *CREW v. FEC*, Congress has not directly addressed how electioneering communication spending impacts the major-purpose analysis that the Commission must undertake when determining whether an organization is a political committee. Quite the opposite. As the court's analysis acknowledges, BCRA did not amend or otherwise touch FECA's definition of "political committee." But not only is BCRA silent as to how electioneering communications factor into the major-purpose test, there is nary a word in the accompanying legislative record that speaks directly to this issue. And to the extent the legislative record and post-enactment history contain clues about congressional thinking on the subject, they cut against the court's conclusion that electioneering communications must presumptively count towards finding a group's major purpose to be the nomination or election of federal candidates. Thus, the court's conclusion that Congress unambiguously *intended* to foreclose the Commission from applying the major purpose test without first presuming electioneering communication spending to have an election-related purpose is entirely without support and is clearly erroneous. Accordingly, the Commission properly exercises its discretion and expertise in considering which electioneering communications count when determining the political committee status of an organization.

However, because our colleague's statement indicates that there may not be four votes to appeal the district court's opinion, we believe that all Commissioners should act to conform with it.[80]

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77 *Ctr. for Indiv. Freedom*, 694 F. 3d at 110; *see also Van Hollen*, 811 F. 3d at 490-91(upholding the Commission's electioneering communications regulations as consistent with congressional intent).

78 *Ctr. for Indiv. Freedom*, 694 F. 3d at 111.

79 *Id.*

80 We also support the Commission making public the record of our efforts to conform with the court's decision, along with the Office of General Counsel's memorandum setting forth its recommendation whether to appeal.