FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**BEFORE THE FEDERAL ELECTION COMMISSION**

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

**STATEMENT OF REASONS**
**OF VICE CHAIR ANN M. RAVEL, COMMISSIONER STEVEN T. WALTHER, AND COMMISSIONER ELLEN L. WEINTRAUB**

On December 3, 2013, we voted to find reason to believe that Crossroad Grassroots Policy Strategies ("Crossroads GPS"), a 501(c)(4) "social welfare organization,"[1] should have registered and reported as a political committee under the Federal Election Campaign Act (the "Act") and Commission regulations.[2] We believe that the facts in this matter gave rise to a clear-cut case for further investigation by the Commission, as recommended by our Office of General Counsel.[3] Nevertheless, the Commission did not attain the four affirmative votes required to proceed.[4] The Commission has unfortunately failed to adhere to its own policy on political committee status or to recent judicial decisions finding that policy to be valid and constitutional.

As a result of *Citizens United v. FEC*[5] and *SpeechNow.org v. FEC*,[6] the consequences of political committee status on an organization's operations are limited. An organization like Crossroads GPS, which does not make direct contributions to candidates, would in no way be restricted from accepting unlimited contributions or from continuing to engage in multi-million dollar political advocacy campaigns. The transparency that political committee status brings,

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[1] *See* 26 U.S.C. § 501(c)(4).

[2] We voted to approve the recommendations in the First General Counsel's Report. *See* Certification in MUR 6396, dated Dec. 3, 2013. Then-Vice Chairman Goodman and Commissioners Hunter and Petersen dissented, and the vote failed 3-3. *Id.*

[3] *See* First General Counsel's Report in MUR 6396 (Crossroads Grassroots Policy Strategies), dated Nov. 21, 2012 ("FGCR").

[4] *See* note 2 above.

[5] 558 U.S. 310 (2010).

[6] 599 F.3d 686 (D.C. Cir. 2010).

however, has important consequences for the voting public. As the Supreme Court has stated: "This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[7] The FEC has a statutory responsibility to enforce the law so as to protect the rights of the voters to the information to which they are entitled. To honor that responsibility and foster an informed electorate, the Commission should have opened an investigation in this matter.

## The Test for Political Committee Status

Any organization or "group of persons" that satisfies the two-part test for political committee status must register and file periodic reports with the Commission. The first part of the test, set forth in the Act, requires that the entity make more than $1,000 in political expenditures or receive more than $1,000 in contributions during a calendar year.[8] Crossroads GPS concedes that its activity surpasses this threshold.[9]

The second part of the test, created by the Supreme Court in *Buckley v. Valeo*,[10] requires that the organization have as its "major purpose . . . the nomination or election of a candidate."[11] The Court applied this narrowing construction because it was concerned that the statutory definition, taken by itself, "could be interpreted to reach groups engaged purely in issue discussion."[12] However, the Court "did not mandate a particular methodology for determining an organization's major purpose."[13]

Since *Buckley*, the Commission has made major purpose determinations on a case-by-case basis, examining an organization's public statements as well as its "full range of campaign activities."[14] In the early-to-mid 2000s, the Commission undertook a series of rulemakings in which it considered adopting a new regulatory test for political committee status.[15] Ultimately,

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[7] *Citizens United v. FEC*, 558 U.S. 310, 371 (2010).

[8] 2 U.S.C. § 431(4)(A).

[9] FGCR at 3.

[10] 424 U.S. 1 (1976) (*per curiam*).

[11] *Id.* at 79.

[12] *Id.*

[13] *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d. 544, 556 (4th Cir. 2012) ("*RTAA*"), *cert. denied*, 133 S. Ct. 841 (2013).

[14] *See* Political Committee Status, 72 Fed. Reg. 5595, 5596-7 (Feb. 7, 2007) (Supplemental Explanation and Justification) ("2007 E&J"), *available at* http://sers.fec.gov/fosers/showpdf.htm?docid=34789.

[15] *See* Definition of Political Committee, 66 Fed. Reg. 13691 (Mar. 7, 2001) (Advance Notice of Proposed Rulemaking) ("Political Committee ANPRM"), *available at* http://sers.fec.gov/fosers/showpdf.htm?docid=5677; Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68056, 68056–63 (Nov. 23, 2004) (Final Rules) ("Political Committee Status Final Rules"), *available at* http://sers.fec.gov/fosers/showpdf.htm?docid=34788; 2007 E&J.

however, the Commission did not adopt any of the proposed rules. The decision to continue to determine political committee status on a case-by-case basis was challenged in the United States District Court for the District of Columbia.[16] The court remanded the case to the FEC to "articulate its reasoning for its decision to proceed by case-by-case adjudication or to promulgate a rule if necessary."[17] In response, the Commission published a detailed Supplemental Explanation and Justification providing its reasons for adhering to the existing practice and providing additional guidance to the public regarding the political committee status test.[18] This "2007 E&J" is the most comprehensive and most recent document explaining how the Commission determines an organization's major purpose. Since 2007, every court that has been asked to rule upon the constitutionality of the policy embodied in the 2007 E&J has found the policy to be valid and constitutional.[19]



When determining an organization's major purpose, the Commission stated in the 2007 E&J that it will consider the organization's statements, including public and non-public statements related to its activities and purpose, as well as the proportion of spending related to "federal campaign activity" relative to "activities that [a]re not campaign related."[20] The assessment of an organization's spending requires a "fact-intensive analysis of a group's campaign activities compared to its activities unrelated to campaigns."[21] In order to demonstrate what activities the Commission considered to be "campaign activities," the 2007 E&J includes a list of examples from prior matters, such as: "direct mail attacking *or* expressly advocating the defeat of a Presidential candidate," "television advertising opposing a Federal candidate," spending on "candidate research" and polling, and "other spending . . . for public communications mentioning Federal candidates."[22]

**Crossroads GPS**

Under the test outlined in the 2007 E&J, the available information, as set forth in the FGCR, is more than sufficient to find reason to believe that Crossroads GPS should have registered and reported as a political committee. Crossroads GPS's spending on campaign activity is vast, both in absolute terms and as a proportion of its total spending. In 2010, the organization spent at least $15,445,039 on independent expenditures[23] – that is, communications

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

[17] *Id.* at 103.

[18] *See* note 14 above.

[19] *Free Speech v. FEC*, 720 F.3d 788, 798 (10th Cir. 2013); *RTAA*, 681 F.3d. at 556; *Shays v. FEC*, 511 F. Supp. 2d 19, 29-31 (D.D.C. 2007).

[20] 72 Fed. Reg. at 5601, 5604-5.

[21] *Id.* at 5601.

[22] *Id.* at 5605 (emphasis added).

[23] FGCR at 16.

expressly advocating the election or defeat of a clearly identified federal candidate.[24] Additionally, Crossroads GPS spent approximately $5.4 million on communications that did not contain express advocacy, but that nonetheless criticized or opposed a clearly identified federal candidate[25] – one of the types of campaign activity included in the 2007 E&J. Combined, these communications total approximately $20.9 million, 53% of what Crossroads GPS reported spending in 2010 – and that is without making any judgments about whether any of the other activity engaged in by Crossroads GPS may have constituted federal campaign activity.[26]

Nonetheless, Crossroads GPS states that its major purpose is not campaign activity. In doing so, Crossroads GPS appears to assume: (1) that the only activities that can be considered "federal campaign activity" are communications containing express advocacy; (2) that an organization does not have the major purpose of federal campaign activity unless its spending on such communications constitutes a *majority* of the organization's total spending; and (3) that such spending will be analyzed from the perspective of an organization's self-selected *fiscal year*.

As stated by our Office of General Counsel, the first of these arguments "fails to come to terms with the Commission's longstanding view – upheld by the courts – that the required major purpose test is not limited solely to express advocacy (or the functional equivalent of express advocacy)."[27] The second fails to acknowledge that the Commission has never ruled that a finding of major purpose requires clearance of a 50 percent threshold.[28] It has been suggested that the Commission adopt a regulatory definition of the major purpose test that contained these two narrowing requirements.[29] The Commission declined to do so. And, finally, the Commission has never suggested – in a regulation, policy, enforcement matter, or elsewhere – that the "fiscal year" is a relevant timeframe for determining an organization's major purpose.

The response Crossroads GPS offered in this matter does not address the test as it currently exists – the test established by Congress, interpreted by the courts, and implemented by the Commission. For that reason, we fully supported OGC's recommendation to investigate this matter.[30]

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[24] *See* 2 U.S.C. § 431(17).

[25] FGCR at 17. The First General Counsel's Report contains the text of these advertisements. *See id.* at 19-22.

[26] The Commission possesses limited information about the remainder of Crossroads GPS's activity. *See* FGCR at 7-8.

[27] *Id.* at 22.

[28] *See also id.* at note 48.

[29] *See* Political Committee ANPRM, 66 Fed. Reg. at 13682; Political Committee Status: Notice of Proposed Rulemaking, 69 Fed. Reg. 11736, 11746 (Mar. 11, 2004), *available at* http://sers.fec.gov/fosers/showpdf.htm?docid=34787; Political Committee Status Rules, 69 Fed. Reg. at 68064-65.

[30] Given that political committee status now serves largely a transparency function, courts have begun to question the constitutional necessity of imposing a major purpose test at all. *See, e.g. Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 59 (1st Cir. 2011), *cert. denied*, 132 S.Ct. 1635 (2012); *Vermont Right to Life Comm.* v. *Sorrell*, 875 F.

At their core, the political committee registration and reporting requirements at issue here are disclosure requirements, and, as Justice Scalia has reminded us, "[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."[31] Providing public disclosure is a central part of the mission that Congress entrusted to the Commission. We will continue to advocate for enforcement practices that vindicate that mission.

1/10/14
Date

Ann M. Ravel
Ann M. Ravel
Vice Chair

1/10/14
Date

Steven T. Walther
Steven T. Walther
Commissioner

1/9/14
Date

Ellen L. Weintraub
Ellen L. Weintraub
Commissioner



Supp. 2d 376, 392-5 (D. Vt. 2012). In light of these decisions, it is particularly difficult to justify a newly crimped interpretation of the major purpose test that can only result in less disclosure and a less well-informed electorate.

[31] *Doe v. Reed*, 130 S. Ct. 2811, 2837 (2010) (Scalia, J. concurring).