



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

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

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

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

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

Under the Commission's case-by-case approach for determining political committee status, Crossroads GPS's major purpose was not the nomination or election of a federal candidate. Rather, its public statements, organizational documents, and overall spending history objectively indicate that the organization's major purpose has been, and continues to be, issue advocacy and grassroots lobbying and organizing.

¹ As the Supreme Court has explained, "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest." *Buckley v. Valeo*, 424 U.S. 1, 42 (1976).

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

I. Factual Background

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

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

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

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

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

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

³ See *Id.*, Response at 7. See also 2 U.S.C. § 501(c)(4); I.R.C. 501(c)(4) (providing an exemption from taxation for "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes").

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

⁵ *Id.* at 15-16.

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

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

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

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

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

⁶ *Id.* at 16.

⁷ *Id.* at 7.

⁸ *Id.* at 7, 9.

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

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

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

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

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

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

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

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

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

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

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

II. Legal Analysis

Under the Act, the term “political committee” means “any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year.”¹⁶

In response to both vagueness and overbreadth concerns, the Court in *Buckley* limited the scope of the Act’s definition in two ways.¹⁷ First, the Court circumscribed the Act’s statutory threshold by construing the definition of expenditure “to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.”¹⁸ Second, in response to concerns that the broad definition of “political committee” in the Act “could be interpreted to reach groups engaged purely in issue discussion,” the Court held that the term political committee “need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.”¹⁹

A. Expenditures In Excess Of \$1,000

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

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

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

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

¹⁷ 424 U.S. at 79.

¹⁸ *Id.* at 80 (footnotes omitted). According to the Court, “this reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate.” *Id.* Specifically, “communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’” *Id.* at 44 n.52.

¹⁹ *Id.* at 79.

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

B. Major Purpose

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

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

Although the phrase, “for the purpose of . . . influencing” an election or nomination, differs from the language used [to define “expenditure”], it shares the same potential for encompassing both issue discussion and advocacy of a political result. The general requirement that “political committees” and candidates disclose their expenditures could raise similar vagueness problems, for “political committee” is defined only in terms of

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

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

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

²³ 2007 Political Committee Supplemental E&J at 5596.

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

Later, in *FEC v. Massachusetts Citizens for Life*, the Court reaffirmed the major purpose limitation by holding that a nonprofit corporation’s major purpose is not the nomination or election of a federal candidate when its “central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates.”²⁵ The Court noted that “[a]ll unincorporated organizations whose major purpose is not campaign activity, but who occasionally make independent expenditures on behalf of candidates, are subject only to these [independent expenditure reporting] regulations.”²⁶ It elaborated that if a group’s “independent spending become[s] so extensive that the organization’s major purpose may be regarded as campaign activity, the corporation would be classified as a political committee.”²⁷

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

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

²⁵ 479 U.S. 238, 252 n.6 (1986) (“*MCFL*”). The phrase “engages in activities on behalf of political candidates” seems to have been used interchangeably with the term “independent expenditures.” Compare *id.* at 252-253 with *id.* at 252 n.6.

²⁶ *Id.* at 252-253.

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

For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days. . . . And that is just the beginning. PACs must file detailed monthly reports with the FEC, which are due at different times depending on the type of election that is about to occur:

“These reports must contain information regarding the amount of cash on hand; the total amount of receipts, detailed by 10 different categories; the identification of each political committee and candidate’s authorized or affiliated committee making contributions, and any persons making loans, providing rebates, refunds, dividends, or interest or any other offset to operating expenditures in an aggregate amount over \$200; the total amount of all disbursements, detailed over 12 different categories; the names of all authorized or affiliated committees to whom expenditures aggregating over \$200 have been made; persons to whom loan repayments or refunds have been made; the total sum of all contributions, operating expenses, outstanding debts and obligations, and the settlement terms of the retirement of any debt or obligation.”

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

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of the organization's central organizational purpose; or (2) comparison of the organization's electioneering spending with overall spending to determine whether the preponderance of expenditures is for express advocacy or contributions to candidates."²⁸ Under this test, if either prong is satisfied, then the organization's major purpose is the nomination or election of a candidate.²⁹

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

While 'the major purpose' of an organization may be open to interpretation, it provides potentially regulated entities with sufficient direction to determine if they will be designated as a political committee. Basically, if an organization explicitly states, in its bylaws or elsewhere, that influencing elections is its primary objective, or if the organization spends the majority of its money on supporting or opposing candidates, that organization is under 'fair warning' that it may fall within the ambit of *Buckley*'s test.³⁰

As the court also made clear, the nomination or election of a candidate must be *the* (i.e., sole and exclusive) major purpose of an organization, not merely *a* (i.e., one of several) major purpose:

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

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

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

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

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

At the Federal level, the nature and scope of the major purpose test was examined in *FEC v. Malenick*,³² and *FEC v. GOPAC, Inc.*³³ In those cases, district courts reviewed the public and non-public statements of, as well as the spending and contributions by, particular groups. More recently, the Fourth Circuit in *Real Truth About Abortion v. FEC* concluded that “[t]he determination of whether the election or defeat of federal candidates for office is *the* major purpose of an organization, and not simply *a* major purpose, is inherently a comparative task, and in most instances it will require weighing the importance of some of a group’s activities against others.”³⁴

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

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

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

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

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

³⁵ The court in *RTAA* also noted that the inquiry to assess an organization’s major purpose “would not necessarily be an intrusive one” as “[m]uch of the information the Commission would consider would already be available in that organization’s government filings or public statements.” *Id.* at 588.

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

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

1. Central Organizational Purpose

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

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

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

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

³⁸ *RTAA*, 681 F.3d at 557.

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

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

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

⁴² *Id.* at 862.

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

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

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

* * *

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

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

⁴⁴ *Id.* at 164.

⁴⁵ *Id.*

⁴⁶ 72 Fed. Reg. at 5601.

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

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

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

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

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

⁴⁹ Comments of John McCain and Russell D. Feingold on Reg. 2003-07 (Political Committee Status) (Apr. 2, 2004), attached Statement of Senator John McCain, Senate Rules Committee, March 10, 2004 at 2. See 26 U.S.C. § 501(c)(4)(A) (providing tax exempt treatment to “[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes”).

⁵⁰ Comment of Public Citizen on Reg. 2003-07 (Political Committee Status) at 10 (Apr. 5, 2004). Public Citizen further noted that “[e]ntities that do not have as their major purpose the election or defeat of federal candidates, such as 501(c) advocacy groups, but which may well be substantially engaged in political activity, should remain subject to regulation for only the narrow class of activities – express advocacy and electioneering communications – explicitly established by current federal election law, as amended by [McNin-Feingold].” *Id.* at 2.

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

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

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

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

2. Extensive Independent Spending on Behalf of Candidates

Reviewing an entity’s organizational documents and official statements does not end the inquiry into major purpose, however. An examination of a group’s major purpose is necessarily an after-the-fact exercise wherein the Commission must determine whether a group properly refrained from registering and reporting as a political committee. Thus, the Commission must determine whether a group’s *ex ante* subjective determination of its major purpose is established *ex post* by its objectively verifiable statements and spending. In *MCFL*, the Supreme Court noted that if a group’s “independent spending become[s] so extensive that the organization’s major purpose may be regarded as campaign activity, the corporation would be classified as a political committee.”⁵⁶

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

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

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

⁵⁵ *Id.*

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

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

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

Likewise, the court in *GOPAC* rejected the use of a fundraising letter lacking express advocacy as evidence that the group’s major purpose was the election or defeat of a candidate: “[a]lthough [a Federal candidate] is mentioned by name, the letter does not advocate his election or defeat nor was it directed at [that candidate’s] constituents. . . . Instead, the letter attacks generally the Democratic Congress, of which [the candidate] was a prominent member, and the franking privilege . . . and requests contributions.”⁵⁹ And in *Malenick*, the court only relied on express advocacy communications, rather than communications that merely mentioned a candidate, in concluding that the major purpose test was met.⁶⁰

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

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

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

⁵⁹ 917 F. Supp. at 863-64.

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

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

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

* * *

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

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

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

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

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

It will not require the invasive disclosure of donors; and

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

Id.

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

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

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

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

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

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

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

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

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

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

⁶⁸ *Id.* at 16-17 (emphasis added).

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

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

⁷¹ *Id.* at 80.

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

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

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

⁷² *Id.*

⁷³ *Id.* at 45.

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

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

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

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

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

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

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

⁷⁷ 551 U.S. at 470-73.

⁷⁸ *Id.*

⁷⁹ 424 U.S. at 79.

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

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

The court rejected this argument, reasoning that "[o]n its own terms, the Commission's plea for a broadening of the *Buckley* concept cannot prevail under the existing authority applicable to the facts of this case."⁸² This was because, in part, "the terms 'partisan electoral politics' and 'electioneering' raise virtually the same vagueness concerns as the language 'influencing any election for Federal office,' the raw application of which the *Buckley* Court determined would impermissibly impinge on First Amendment values."⁸³

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

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

⁸¹ 917 F. Supp. at 859.

⁸² *Id.* at 861.

⁸³ *Id.*

⁸⁴ 424 U.S. at 79-80.

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

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

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

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

But determining an organization's major purpose via a narrow snapshot of time—one calendar year—in contravention to a group's organizational model ignores the point of the major purpose test. The major purpose limitation is intended to act as a constraint, saving the Act's definition of "political committee" by restricting it to groups with the clearest electoral focus -- those with the nomination or election of a candidate for federal office as their major purpose.⁸⁵ While the calendar-year approach superficially attempts to root itself in the statute, it provides precisely the same rigid, "one-size-fits-all rule" roundly rejected in *Buckley* and its progeny.⁸⁶

Assessing the major purpose limitation through the myopic and artificial window of a single calendar year would inevitably subject many issue-based organizations to the burdens of political committee status. As stated above, an examination of a group's major purpose is necessarily an after-the-fact exercise. In these cases, the Commission must determine whether a group properly refrained from registering and reporting as a political committee. Limiting ourselves to short time periods or time periods other than

⁸⁵ See, e.g., 2007 Political Committee Status Supplemental E&J at 5602 ("[E]ven if the Commission were to adopt a regulation encapsulating the judicially created major purpose doctrine, that regulation could only serve to limit, rather than to define or expand, the number or type of organizations regarded as political committees.").

⁸⁶ According to *RTAA*, the Commission is not "foreclose[d] ... from using a more comprehensive methodology." 681 F.3d at 557. But *RTAA* never approved the Commission using a *less* comprehensive, selective methodology that would frustrate the reason for the major purpose test, which is precisely what would happen if the Commission limited the scope of the major purpose analysis to a single calendar year without consideration of any other spending outside that window.

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

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

Another example would be a group created in the middle of an election year that intends to—and in fact does—remain operating after the election ends on a fiscal-year, rather than calendar-year basis. Such an organization could devote 10 percent of its resources to express advocacy prior to the election, then spend the other 90 percent of its resources that fiscal year on post-election issue advocacy, and still be considered a political committee under OGC's proposed approach if its issue advocacy spending occurred in the calendar year following the election. The organization's major purpose determination would be based upon a distinct minority of its spending within the first twelve months of its operation. Despite the group's best efforts to minimize its election-related expenditures, the Commission would ignore the timeframe the group used to determine *ex ante* its major purpose.

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

⁸⁷ The fact that the statutory definition relies upon expenditures or contributions in a calendar year is not relevant to the major purpose for which a group was created. The Act imposes a bright line that, according to *Buckley*, was unconstitutionally over-inclusive, and, thus, the Court imposed an intention-based standard as a further filter. It is unclear why that arbitrary statutory timeframe is appropriate when *RTAA* rejected the argument that "the major purpose test requires a bright-line, two-factor test." 681 F.3d at 557. It makes little sense that a case-by-case standard that, according to *Shays II*, "requires a very close examination of various activities and statements," would reject examination of how an organization decided to organize itself for tax purposes (i.e., on a calendar year versus fiscal year basis). 511 F. Supp. 2d at 31.

⁸⁸ Kirk L. Jowers, *Issue Advocacy: If It Cannot Be Regulated When It Is Least Valuable, It Cannot Be Regulated When It Is Most Valuable*, 50 Cath. U. L. Rev. 65, 76 (Fall 2000).

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

Worse still, if the groups in the examples above were branded as political committees, they would be subjected to the Commission's regulatory and reporting burdens in perpetuity. Under Commission regulations, "only a committee which will no longer receive any contributions or make any disbursements that would otherwise qualify it as a political committee may terminate, provided that such committee has no outstanding debts and obligations."⁹⁰ Thus, in order to stop filing burdensome reports, a committee would have to surrender its political rights and agree to not to make *any* independent expenditures, regardless of the organization's major purpose.⁹¹

In prior enforcement matters, the Commission routinely looked at activity beyond a single calendar year.⁹² For example, in MUR 5751 (The Leadership Forum), OGC cited IRS reports showing receipts and disbursements from 2002-2006 before concluding that the Respondent had not crossed the statutory threshold for political committee status.⁹³ In MUR 5753 (League of Conservation Voters 527, *et al.*), the Commission determined that Respondents "were required to register as political committees and commence filing disclosure reports with the Commission by no later than their initial receipt of contributions of more than \$1,000 in July 2003," citing to Respondents' disbursements "during the *entire 2004 election cycle*" while evaluating their major

⁸⁹ Interestingly, the Commission has, in the past, relied, in part, on the fact that an organization ceased active operations at the end of the election cycle in question when determining that the major purpose test had been met. See 2007 Political Committee Supplemental E&J, 72 Fed. Reg. at 5605 (summarizing MUR 5511 (Swiftboat Vets) and MUR 5754 (MoveOn.org)). If the Commission may consider the lack of activity in the calendar year following an election as relevant for determining major purpose, then certainly it can look at and evaluate actual activity undertaken in the next calendar year.

⁹⁰ 11 C.F.R. § 102.3(a).

⁹¹ We are aware of only one enforcement matter in which an ongoing state political committee was later deemed to have crossed the line of federal political committee status, and by negotiation in a conciliation agreement, it was allowed to skip registration and reporting with the Commission by submitting its state campaign finance reports on the condition that it forego making federal expenditures and contributions in the future and/or register as a political committee subject to the ongoing reporting rules in perpetuity in the future. See MUR 5492 (Freedom, Inc.), Conciliation Agreement at ¶¶ 3, 4.

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

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

purpose.⁹⁴ Likewise, in MUR 5754 (MoveOn.org Voter Fund), the Commission looked to disbursements “[d]uring the *entire 2004 election cycle*” and cited to specific solicitations and disbursements made during calendar year 2003 in assessing the Respondent’s major purpose.⁹⁵ Similarly, in both *GOPAC*,⁹⁶ and *Malenick*,⁹⁷ courts looked beyond a single calendar year when analyzing major purpose.

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

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

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

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

⁹⁷ 310 F. Supp. 2d at 235 (citing Pl.’s Mem., Ex. 1 (Stipulation of Fact signed and submitted by Malenick and Triad Inc., to the FEC on January 28, 2000, “listing numerous 1995 and 1995 Triad materials announcing these goals”) and Ex. 47 (“Letter from Malenick, to Cone, dated Mar. 30, 1995”) among others); *id.* at n.6 (citing to Triad Stip. ¶¶ 4.16, 5.1-5.4 for the value of checks forwarded to “intended federal candidate or campaign committees in 1995 and 1996.”) (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Procedural Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

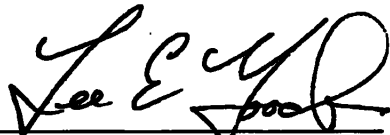
¹¹⁶ *Notice of Proposed Rulemaking*, 78 Fed. Reg. 71535 (Nov. 29, 2013) ("Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities"). Cf. 2 U.S.C. § 438(f) (requiring the Commission and the IRS to work together to ensure that regulations proscribed by each are "mutually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

IV. Conclusion

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

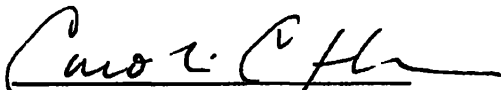
¹¹⁷ We also note that the Commission maintains broad discretion to dismiss matters as our decisions not to enforce "often involve[] a complicated balancing of a number of factors which are peculiarly within [our] expertise." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). For various reasons, including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

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LEE E. GOODMAN
Chairman

1/8/14
Date



CAROLINE C. HUNTER
Commissioner

1/8/14
Date



MATTHEW S. PETERSEN
Commissioner

1/8/2014
Date

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FIRST GENERAL COUNSEL'S REPORT

MUR: 6396

DATE COMPLAINT FILED: 10/14/2010

DATE OF NOTIFICATION: 10/21/2010

LAST RESPONSE RECEIVED: 1/23/2010

DATE ACTIVATED: 2/7/2011

EXPIRATION OF SOL: 9/1/2014

COMPLAINANTS:

Public Citizen

ProtectOurElections.org

ProsperityAgenda.us

AmericanCrossroadsWatch.org

Kevin Zeese

Craig Holman

RESPONDENT:

Crossroads Grassroots Political Strategies

MUR: 6368

DATE COMPLAINT FILED: 9/2/2010

DATE OF NOTIFICATION: 9/8/2010

DATE LAST RESPONSE RECEIVED:
11/1/2010

DATE ACTIVATED: 2/15/2011

EXPIRATION OF SOL: 10/21/2015

COMPLAINANT:

Missouri Democratic Party

RESPONDENTS:

Friends of Roy Blunt and Gordon Elliott, in
his official capacity as Treasurer

Senator Roy Blunt

Crossroads Grassroots Policy Strategies

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 431(4)

2 U.S.C. § 431(8)

2 U.S.C. § 431(9)

1	2 U.S.C. § 431(17)
2	2 U.S.C. § 433
3	2 U.S.C. § 434(b)
4	2 U.S.C. § 434(c)
5	2 U.S.C. §§ 441a(a) & (f)
6	26 U.S.C. § 501(c)
7	11 C.F.R. § 100.22
8	11 C.F.R. § 100.57
9	11 C.F.R. § 109.10(c)
10	11 C.F.R. § 114.10

11
12 INTERNAL REPORTS CHECKED: Disclosure Reports

13
14 FEDERAL AGENCIES CHECKED:

15

16

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42

1 **I. INTRODUCTION**

2
3 These matters involve alleged violations of the Federal Election Campaign Act of
4 1971, as amended (the "Act"), by Crossroads Grassroots Policy Strategies ("Crossroads
5 GPS"), a nonprofit corporation organized under Section 501(c)(4) of the Internal
6 Revenue Code. The complaint in MUR 6396 alleges that Crossroads GPS, whose
7 activities were frequently undertaken in conjunction with those of a "sister" political
8 committee called American Crossroads, failed to organize, register, and report as a
9 political committee after making more than \$15 million in independent expenditures
10 advocating the election or defeat of federal candidates. The complaint in MUR 6368
11 alleges that Crossroads GPS coordinated a communication with, and thus made a
12 prohibited in-kind contribution to, Missouri U.S. Senate candidate Roy Blunt and his
13 committee, Friends of Roy Blunt and Gordon Elliot, in his official capacity as Treasurer,
14 (the "Committee").

15 **II. FACTUAL AND LEGAL ANALYSIS FOR MUR 6396**

16 **A. Facts**

17 **1. Background**

18 Crossroads GPS was founded on June 1, 2010 and is, or has applied to be, a
19 nonprofit corporation organized under section 501(c)(4) of the Internal Revenue Code.
20 See Response at 7; see also Kenneth P. Vogel, *Crossroads hauls in \$8.5M in June*,
21 POLITICO (June 30, 2010); Commonwealth of Virginia, State Corporation Commission
22 Corporate Data Inquiry, <https://cisiweb.scc.virginia.gov> (listing Crossroads GPS as

1 having filed incorporation documents on June 2, 2010).¹ As such, Crossroads GPS lists
2 the sources of its funding, including donors, and categorizes its spending in its filings
3 with the IRS, but the identification of the donors is not made public. *See Internal*
4 *Revenue Service, Exempt Organizations – Contributors’ Identities Not Subject to*
5 *Disclosure, available at <http://www.irs.gov/charities/article/0,,id=135015,00.html>.* As
6 discussed below, during 2010, Crossroads GPS raised and spent approximately \$39.1
7 million, of which over \$15 million was reported to the Commission as independent
8 expenditures. Response at 7.

9 American Crossroads, an independent expenditure only political committee
10 registered with the Commission, and Crossroads GPS refer to each other as a “sister
11 organization.” Crossroads GPS, *Crossroads GPS and American Crossroads Pledge \$120*
12 *million for 2012 Election, available at [http://www.crossroadsgps.org/news/crossroads-](http://www.crossroadsgps.org/news/crossroads-gps-and-american-crossroads-pledge-120-million-2012-effort)*
13 *gps-and-american-crossroads-pledge-120-million-2012-effort* (last visited May 16, 2011)
14 (“Crossroads GPS 2012 Press Release”); American Crossroads, *American Crossroads*
15 *and Crossroads GPS Pledge \$120 million for 2012 Election, available at*
16 *[http://www.americancrossroads.org/news/american-crossroads-and-crossroads-gps-](http://www.americancrossroads.org/news/american-crossroads-and-crossroads-gps-pledge-120-million-2012-election)*
17 *pledge-120-million-2012-election* (last visited May 16, 2011) (“American Crossroads
18 2012 Press Release”). As an independent expenditure only political committee,
19 American Crossroads receives unlimited contributions from individuals, corporations,
20 labor organizations, and political committees. *See American Crossroads, Statement of*

¹ Although it has been reported that Crossroads GPS filed its application for 501(c)(4) status in September of 2010, it does not appear that the Internal Revenue Service has acted on that application yet. T.W. Farnam and Dan Eggen, *Lax Internal Revenue Service rules help groups shield campaign donor identities*, WASHINGTON POST (Mar. 20, 2011).

1 Organization (Aug. 9, 2010).² During 2010, American Crossroads reported raising and
2 spending approximately \$25.8 million.

3 Both Crossroads GPS and American Crossroads operate from the same address of
4 1401 New York Avenue, NW, Suite 1200, Washington, DC 20005, and share a number
5 of corporate officers and employees, including: (1) Steven Law, who is President of both
6 organizations; (2) Mike Duncan, who has been referenced in news articles as Chairman
7 of both organizations; (3) Jonathan Collegio, who is the Spokesman for both
8 organizations; (4) Carl Forti, who is the "Political Director" for American Crossroads and
9 the "Advocacy Director" for Crossroads GPS; and (5) Margee Clancy, who is listed as
10 Treasurer and Custodian of Records for both organizations.³ See Steve Peoples, *GOP*
11 *sees flaws in Tea Party candidates*, ROLL CALL (Nov. 3, 2010); see also Peter Overby, *Is*
12 *Michael Steele Ready to Move On?*, NATIONAL PUBLIC RADIO (Dec. 13, 2010); Kenneth
13 P. Vogel and Ben Smith, *RNC weighs outsourcing list*, POLITICO (May 17, 2011).

14 The acknowledged relationship between American Crossroads, a registered
15 independent expenditure only committee, and Crossroads GPS, an unregistered
16 organization, is germane to the issue of whether Crossroads GPS has a "major purpose"
17 of campaign activity because many of the groups' public statements were made with
18 reference to both Crossroads GPS and American Crossroads' activities without
19 distinguishing between the two, and were made by the individuals associated with both
20 groups. While Crossroads GPS has requested recognition by the IRS as a social welfare

² Before filing as a political committee with the Commission, American Crossroads registered and reported as a 527 nonprofit organization with the Internal Revenue Service. See American Crossroads, Notice of Section 527 Status (IRS Form 8871) (Mar. 29, 2010).

³ Additionally, American Crossroads and Crossroads GPS have been described as groups "conceived by" Karl Rove and Ed Gillespie. Kenneth P. Vogel, *Rove-linked group uses secret donors to fund attacks*, POLITICO (July 20, 2010).

1 organization engaged in research, education, and communication efforts regarding policy
2 issues, the leaders of both groups frequently describe its goals in political terms that are
3 jointly achieved with American Crossroads. In numerous statements on its website and
4 to the press, Crossroads GPS and American Crossroads have indicated that both groups
5 were jointly focused on affecting the results of the 2010 midterm elections. For example,
6 in July 2010, Crossroads GPS stated its prospective intentions for the remainder of 2010:
7 “A spokesman . . . said American Crossroads GPS, combined with its parent group
8 [American Crossroads], intended to raise a combined total of ‘approximately \$50 million’
9 to attack Democrats and boost Republicans headed into the 2010 midterm elections.”
10 Kenneth P. Vogel, *Rove-linked group uses secret donors to fund attacks*, POLITICO (July
11 20, 2010).

12 Crossroads GPS and American Crossroads also reportedly engaged in “a monster
13 \$10 million national get-out-the-vote campaign that will include 40 million pieces of
14 political mail and 20 million phone calls to voters in key states.” Michael Crowley, *The*
15 *New GOP Money Stampede*, TIME (Sept. 16, 2010). The press reported that “Crossroads
16 GPS sank \$17 million into ads and turnout communications in a plan to obliterate the
17 Democrats’ Senate and House majorities.” Jeanne Cummings, *GOP groups coordinated*
18 *spending*, POLITICO (Nov. 3, 2010). Reportedly, the inclusion of get-out-the-vote
19 activities was part of the Crossroads groups’ “more ambitious goal: To bring together the
20 disparate new and old GOP political players so they could coordinate their efforts and
21 maximize the damage on the political battlefield.” *Id.* As for 2012, American
22 Crossroads and Crossroads GPS President Steven Law reportedly stated, “‘We’re

1 definitely building a foundation, . . . We hope to be an important player in 2012.'"

2 Michael Crowley, *The New GOP Money Stampede*, TIME (Sept. 16, 2010).

3 **2. 2010 Spending**

4 According to Crossroads GPS, from June 1, 2010 until December 15, 2010, the
5 organization raised approximately \$43.6 million and spent approximately \$39.1 million.⁴

6 Response at 7. Crossroads GPS acknowledges that it spent approximately 39% of its
7 total funds, or \$15.4 million, on federal independent expenditures. Response at 8. This
8 admitted electoral spending includes \$13,259,915.13 of independent expenditures made
9 in support of or opposition to a candidate in seven elections for the United States Senate⁵
10 and \$2,185,124.37 of independent expenditures made in support of or opposition to
11 candidates in eight elections for the United States House of Representatives.⁶

12 Crossroads GPS maintains that it spent its remaining \$23.7 million in 2010 on
13 exempt social welfare activities such as issue advocacy, grassroots lobbying and
14 educational activities relating to seven priorities for legislative action in the fall of 2010
15 or 2011. Response at 7. In describing what it characterizes as nonelectoral spending,
16 Crossroads GPS details spending more than \$5.4 million for advertisements that attacked
17 or promoted specific federal candidates prior to the 2010 elections. These
18 communications, which did not include express advocacy, included \$1,104,783.48 for

⁴ The Response was filed on December 23, 2010, which presumably would explain why Crossroads GPS did not determine its spending for the entire calendar year of 2010.

⁵ These included independent expenditures attacking or supporting Alexander Ginnoulas (IL), Charlie Crist (FL), Marco Rubio (FL), Harry Reid (NV), Sharron Angle (NV), Jack Conway (KY), Joe Sestak (PA), Patty Murray (WA), and Robin Carnahan (MO).

⁶ Each of these independent expenditures was in opposition to candidates for the House of Representatives, including Russ Carnahan (MO-3), Lincoln Davis (TN-4), Joseph Donnelly (IN-2), Joe Boccieri (OH-16), Jim Oberstar (MN-8), Jim Costa (CA-20), Earl Pomeroy (ND), and Ciro Rodriguez (TX-23).

1 electioneering communications that attacked or promoted four federal candidates within
2 60 days of the 2010 elections⁷ and approximately \$4.3 million on advertisements that
3 attacked or promoted specific federal candidates that were run during the summer of
4 2010, prior to beginning of the 60 day period in which electioneering communications
5 must be reported. Response at 8-9.⁸ In addition, Crossroads GPS released a "Concept
6 Paper" to donors describing its activity as focused on achieving, among other things,
7 "shap[ing] citizen attitudes with hard-hitting issue advocacy and usable message tools for
8 Republicans and their supportive activist communities." See American Crossroads GPS,
9 "Concept Paper" available at [http://www.politico.com/static/PPM169](http://www.politico.com/static/PPM169_crossroadsgpsconceptpaper.html)
10 [crossroadsgpsconceptpaper.html](http://www.politico.com/static/PPM169_crossroadsgpsconceptpaper.html) (last visited May 16, 2011) ("Concept Paper").
11 Crossroads GPS also spent an unknown and unitemized amount of money on various
12 post-election activities in November and December 2010. Response at 12.

13 In response to the complaint's allegation that it had a major purpose consistent
14 with that of a federal political committee, Crossroads GPS states that Internal Revenue
15 Service (IRS) standards permit a Section 501(c)(4) organization to engage in some
16 "political activity" so long as the organization's "primary purpose" is not direct or
17 indirect participation or intervention in political campaigns on behalf of or in opposition
18 to any candidate for public office. Response at 2 (citing IRS regulations). Crossroads
19 GPS asserts that "[g]iven the rough equivalence of the IRS 'primary purpose' test and the

⁷ These advertisements featured candidates for the U.S. Senate, including Michael Bennett (CO), Robin Carnahan (MO), Jack Conway (KY), and Harry Reid (NV).

⁸ These advertisements featured candidates for U.S. Senate, including Barbara Boxer (CA), Michael Bennett (CO), Robin Carnahan (MO), Jack Conway (KY), Harry Reid (NV), and Patty Murray (WA). Each of these advertisements' scripts is available in the Appendix of Crossroads GPS's response and can also be viewed on Crossroads GPS's YouTube channel at <http://www.youtube.com/user/CrossroadsGPSChannel>.

FEC's 'major purpose' test, a Section 501(c)(4) organization that is in compliance with IRS standards *should* be found to satisfy the FEC's 'political committee' test."

(Emphasis in original.) *Id.* Crossroads GPS also asserts that its current fiscal year runs from June 1, 2010 through May 31, 2011, and that the Commission should wait until it has completed its first full year of advocacy activity before acting on any complaint. *Id.*

B. Legal Analysis

Under the Act, groups that trigger political committee status are required to comply with certain organizational requirements, register with the Commission, and publicly disclose all of their receipts and disbursements. 2 U.S.C. §§ 432, 433, and 434. The Act defines a "political committee" as any committee, association, or other group of persons that receives "contributions" or makes "expenditures" which aggregate in excess of \$1,000 during a calendar year. 2 U.S.C. § 431(4)(A).⁹ An organization that has made expenditures in excess of \$1,000, however, will not be considered a "political committee" unless, in addition, its "major purpose is Federal campaign activity (*i.e.*, the nomination or election of a Federal candidate)." Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007) ("Supplemental E&J"). *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) ("MCFL").

Political committees that only engage in independent expenditures are not subject to the contribution limits of 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3). *See SpeechNow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010) ("*SpeechNow*"); *see also*

⁹ The term "expenditure" is defined to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i). The term "contribution" is defined by 2 U.S.C. § 431(8)(A)(i).

1 *EMILY's List v. FEC*, 581 F.3d 1, 10 (D.C. Cir. 2009) (“... individual citizens may
2 spend money without limit (apart from the limit on their own contributions to candidates
3 or parties) in support of the election of particular candidates”). The Commission has
4 concluded that it necessarily followed from the decisions in *Citizens United v. Federal
5 Election Commission*, 558 U.S. ___, 130 S.Ct. 876, 916 (2010) (“*Citizens United*”),
6 *SpeechNow*, and *EMILY's List*, that corporations, labor organizations and political
7 committees also may make unlimited contributions to independent expenditure only
8 political committees. See Advisory Opinions 2010-09 (Club for Growth) and 2010-11
9 (Commonsense Ten). Nonetheless, these political committees, often referred to as
10 independent expenditure only political committees, are still subject to the “reporting
11 requirements of 2 U.S.C. §§ 432, 433, and 434(a) and the organizational requirements of
12 2 U.S.C. §§ 431(4) and 431(8).” See *SpeechNow*, 599 F.3d at 689; see also *MCFL*, 479
13 at 266 (O’Connor, J., concurring) (stating that significant burden on MCFL came from
14 contribution restrictions, not disclosure).

15 **1. Crossroads GPS Has Made More than \$1,000 in Expenditures**

16
17 In determining whether an organization makes an expenditure, the Commission
18 “analyzes whether expenditures for any of an organization’s communications made
19 independently of a candidate constitute express advocacy either under 11 C.F.R.
20 § 100.22(a), or the broader definition at 11 C.F.R. § 100.22(b).” 72 Fed. Reg. at 5606.
21 Following the Supreme Court’s decision in *Citizens United v. FEC*, 130 S.Ct. at 916,
22 corporations, including Crossroads GPS, are no longer prohibited from making
23 independent expenditures.

1 As noted above, depending on different figures used in its Response, Crossroads
2 GPS spent either \$15,455,039.50 or \$15,749,171.00 on reported federal independent
3 expenditures in 2010. Response at 7 and 13. Thus, Crossroads GPS exceeded the \$1,000
4 statutory threshold for political committee status. 2 U.S.C. § 431(4)(A). Therefore, the
5 only remaining issue with regard to whether Crossroads GPS is a political committee is
6 whether or not it has the requisite “major purpose” required under *Buckley* and *MCFL*.

7 **2. Crossroads GPS Appears to Have Federal Campaign Activity as**
8 **its Major Purpose**

9
10 **a. The Major Purpose Test**

11 The U.S. Supreme Court first articulated the “major purpose” test in *Buckley*
12 when it construed the Act’s reporting requirements. 424 U.S. at 78-81. After expressing
13 concern that the phrase “for the purpose of . . . influencing” an election could be vague as
14 applied to certain individuals or groups (besides candidates and political committees) that
15 must report their “expenditures,” the Court concluded that the definition of “political
16 committee” could raise similar vagueness problems to the extent it could be construed to
17 “reach groups engaged *purely* in issue discussion.” *Id.* at 79 (emphasis added). The
18 Court, however, addressed these vagueness concerns using two distinct narrowing
19 constructions: one for the definition of “expenditure” for reporting by certain individuals
20 and another through its interpretation of the term “political committee.” The Court first
21 discussed the definition of a “political committee” and adapted the lower courts’

1 narrowing construction of that term:¹⁰ “[t]o fulfill the purposes of the Act,” political
2 committees “need only encompass organizations that are under the control of a candidate
3 or the major purpose of which is the nomination or election of a candidate.” *Id.* By
4 limiting “political committees” to groups whose “major purpose” was the nomination or
5 election of a candidate, the Court was satisfied that the definition of “political committee”
6 was not vague because “[e]xpenditures . . . of ‘political committees’ so construed can be
7 assumed to fall within the core area sought to be addressed by Congress. They are, by
8 definition, campaign related.” *Id.* As discussed below, this construction is in stark
9 contrast to what the Court did to narrow the definition of “expenditures” made by
10 individual persons or groups that lacked the requisite major purpose to “communications
11 that expressly advocate[d] the election or defeat” of a federal candidate. *Id.* at 80.

12 The Court did not apply the “express advocacy” narrowing construction to the
13 term “political committee” — nor to the expenditures made by such groups — because
14 political committees act within the “core area sought to be addressed by Congress” by
15 virtue of their “major purpose.” *See id.* at 78-80. For example, an organization may
16 satisfy the “major purpose” test, and therefore act within that “core area,” based on the
17 organization’s stated purpose. *See FEC v. Malenick*, 310 F. Supp. 2d 230, 234-35
18 (D.D.C. 2004); *see also infra* Part II.B.2.c. So long as the “major purpose” test is met,
19 the *Buckley* court’s vagueness concerns about the definition of “political committee” are
20 satisfied, and in turn, the test eliminates vagueness concerns that might otherwise arise

¹⁰ *See United States v. Nat’l Comm. For Impeachment*, 469 F.2d 1135, 1141 (2d Cir. 1972) (construing “the Act to apply only to committees soliciting contributions or making expenditures the major purpose of which is the nomination or election of candidates”) (“under this interpretation, enforcement of the Act may be made somewhat more burdensome, as the supervisory officials will be forced to glean the principal or major purpose of the organizations they seek to have comply with the Act”); *see also American Civil Liberties Union v. Jennings*, 366 F.Supp. 1041, 1057 (D.D.C. 1973), *citing Nat’l Comm. For Impeachment*, 469 F.2d at 1141.

1 from requiring political committees to report all of their “expenditures” — even those
2 that do not include express advocacy. Thus, the “express advocacy” narrowing
3 construction cannot be considered part of *Buckley*’s narrowing of the definition of
4 “political committee” through the “major purpose” test.

5 Far from relying on “express advocacy” as part of the narrowing construction
6 established through the “major purpose” test, the Court indicated that the activities
7 relevant to determining major purpose went beyond express advocacy communications.¹¹
8 See *Buckley*, 424 U.S. at 78-80. Indeed, the Court explicitly avoided equating express
9 advocacy with broader types of activity that (if undertaken by a political committee or
10 candidate, and not an individual) could be required to be reported under the Act. For
11 example, the Court contrasted the potential for the individual disclosure requirements to
12 encompass “both issue discussion and advocacy of a political result.” *Id.* at 77.
13 Significantly, the former would have fallen outside of the definition of “expenditure” as
14 narrowed by *Buckley*, while the latter would not. Likewise, the Court emphasized that
15 the narrower “express advocacy” standard was necessary in the context of the Act’s
16 individual reporting requirements, but that it did not encompass “all partisan discussion,”
17 a broader category of speech reported by political committees and candidates. *Id.* at 80.
18 In sum, by relying on the express advocacy construction only for groups and individuals

¹¹ Other courts have rejected using “express advocacy” as a narrowing construction for “major purpose.” See, e.g., *Real Truth About Obama v. FEC*, No. 3:08-CV-483 at 22 (E.D. Va. June 16, 2011) (rejecting the argument that a multi-factored approach fails to provide fair notice, and stating that “the FEC is entitled to consider the full range of an organization’s activities in deciding whether it is a political committee”). The *Real Truth About Obama* court’s rejection of such a narrowing of “major purpose” is consistent with the decision in *North Carolina Right to Life v. Leake*, 525 F.3d 274, 289 (4th Cir. 2008) (major purpose test is to be implemented by examining, *inter alia*, “if the organization spends the majority of its money on supporting or opposing candidates”). But cf. *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 678 (10th Cir. 2010) (“comparison of the organization’s electioneering spending with overall spending to determine whether the preponderance of expenditures is for express advocacy or contributions to candidates” was relevant in evaluating state statute in which the definition of political committee was limited to groups organized “primarily” for political purposes).

1 *other than* political committees (or candidates), and by doing so in the immediate
2 paragraph following its discussion of the “major purpose” test, the Court clearly
3 eschewed reliance on an organization’s express advocacy communications as the
4 touchstone for whether it has met the “major purpose” standard.

5 Ten years after *Buckley*, the Supreme Court addressed the concept of “major
6 purpose” in holding that section 441b, prohibiting corporate expenditures from general
7 treasury funds, was unconstitutional as applied to MCFL, a nonprofit, nonstock
8 corporation which engaged in no more than occasional electoral advocacy. *See MCFL*,
9 479 U.S. at 241-42, 262. The Commission argued that section 441b should apply to
10 MCFL because it was free to set up a separate segregated fund through which it could
11 conduct campaign activity. *Id.* at 242. In rejecting this argument, the Court pointed out
12 that if MCFL were not incorporated, it would be subject only to the independent
13 expenditure reporting requirements applicable to persons other than political committees,
14 as were “[a]ll unincorporated organizations whose major purpose is not campaign
15 advocacy, but who occasionally make independent expenditures on behalf of candidates.”
16 *Id.* at 252-253. In the Court’s view, if an organization like MCFL had to set up a separate
17 segregated fund, it would be subject to organizational and reporting obligations that
18 might cause a disincentive to engage in political speech. *Id.* at 253-255.

19 The Court concluded, however, that MCFL was not a political committee, but
20 rather that “[i]ts central organizational purpose is issue advocacy, although it occasionally
21 engages in activity on behalf of political candidates.” *Id.* at 252, n.6. Nonetheless, the
22 Court noted that MCFL would still be subject to independent expenditure reporting, so

1 the state's interest in disclosure could be met by less restrictive means. *Id.* at 262. The

2 Court then added:

3 Furthermore, should MCFL's independent spending become so
4 extensive that the organization's major purpose may be regarded
5 as campaign activity, the corporation would be classified as a
6 political committee. *See Buckley*, 424 U.S., at 79, 96 S.Ct., at
7 663. As such, it would automatically be subject to the obligations
8 and restrictions applicable to those groups whose primary
9 objective is to influence political campaigns.

10
11 *Id.* Moreover, as in *Buckley*, the *MCFL* court suggested that activities considered as
12 indicators for the major purpose test go beyond "expenditures" containing express
13 advocacy. *See MCFL*, 479 U.S. at 252-253, 262 (political committee requirements
14 inapplicable to "organizations whose major purpose is not *campaign advocacy*," but
15 "political committee" does include organizations with a major purpose of "*campaign*
16 *activity*") (emphasis added); *see also Real Truth About Obama v. FEC*, No. 3:08-CV-483
17 at 22-23 (E.D. Va. June 16, 2011) (concluding that *MCFL* did *not* hold that an
18 organization's expenditures and the central purpose revealed in its organic documents
19 "are the exclusive indicia of an organization's status as a political committee").

20 **b. The Commission's Case-By-Case Approach to**
21 **Major Purpose**
22

23 In examining the "major purpose" of organizations, the Commission has adopted
24 a "case-by-case" approach that requires a fact-intensive analysis of a group's
25 organizational documents and public statements, as well as the group's spending. *See*
26 Supplemental E&J, 72 Fed. Reg. at 5601. The Commission's decision was the result of a
27 nearly decade-long examination of the major purpose test through rulemakings, litigation,
28 and enforcement actions. During this time, the Commission weighed the benefits of a
29 case-by-case approach against the benefits of a bright-line rule, including rules that

1 would have established major purpose through a proportional (such as 50%) or aggregate
2 threshold (such as \$50,000) amount spent by an organization. *See* Definition of Political
3 Committee: Advance Notice of Proposed Rulemaking, 66 Fed. Reg. 13681, 13682
4 (March 7, 2001); Political Committee Status: Notice of Proposed Rulemaking, 69 Fed.
5 Reg. 11736, 11746 (March 11, 2004); *See* Final Rules on Political Committee Status,
6 Definition of Contribution, and Allocation for Separate Segregated Funds and
7 Nonconnected Committees, 69 Fed. Reg. 68056, 68064-65 (November 23, 2004)
8 (explaining that the Commission would not promulgate a regulation codifying a “major
9 purpose” test for the political committee definition, and noting that the Commission had
10 determined the “major purpose” test on a case-by-case basis for many years and would
11 continue to do so in the future).

12 In its 2007 Supplemental E&J, the Commission explained that its decision to
13 make political committee status determinations through enforcement actions, rather than
14 by regulation, was necessary because the major purpose doctrine “requires the flexibility
15 of a case-by-case analysis of an organization’s conduct that is incompatible with a one-
16 size fits-all rule.” 72 Fed. Reg. at 5601. *See Shays v. FEC*, 511 F. Supp. 2d 19, 29
17 (D.D.C. 2007) (“*Shays II*”) (upholding the Commission’s Supplemental E&J as an
18 appropriate exercise of agency’s ability to engage in case-by-case determination of
19 political committee status, and noting that “*Buckley* established the major purpose test,
20 but did not describe its application in any fashion”). In applying the case-by-case
21 approach, the Commission has indicated that it will analyze two primary factors when
22 examining whether a group has the requisite major purpose to trigger political committee
23 status: (1) a group’s stated purpose, as revealed through its public statements and internal

1 documents and communications and (2) a group's spending, particularly whether its
2 electoral spending has become "extensive." *See* Supplemental E&J, 72 Fed. Reg. at
3 5601. As discussed below, a group can satisfy the major purpose test through either a
4 single factor or a combination of both factors. *Id.*

5 **c. Stated Purpose**

6 The Commission has indicated that an organization's "major purpose" may be
7 established through public statements of its purpose. *See* Supplemental E&J, 72 Fed.
8 Reg. at 560. Additionally, "[b]ecause such statements may not be inherently conclusive,
9 the Commission must evaluate the statements of the organization in a fact-intensive
10 inquiry giving due weight to the form and nature of the statements, as well as the
11 speaker's position within the organization." *Id.* Moreover, the Commission's
12 examination of a group's major purpose "may reach well beyond publicly available
13 advertisements . . . to examine statements by the organization that characterize its
14 activities and purposes." *Id.* (citations omitted).

15 The courts have endorsed the evaluation of public and non-public statements and
16 an organization's spending and contributions to determine its major purpose. *See, e.g.,*
17 *FEC v. Malenick*, 310 F. Supp. 2d 230, 234-37 (D.D.C. 2004) (court considered
18 organization's statements in brochures, "fax alerts" sent to potential and actual
19 contributors, and letter from president to organization's primary contributor, as well as its
20 spending influencing federal elections); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859,
21 864, 866 (D.D.C. 1996) ("The organization's purpose may be evidenced by its public
22 statements of its purpose or by other means;" court considered organization's meetings
23 attended by national leaders and the organization's "Political Strategy Campaign Plan

1 and Budget”). Additionally, “[a] declaration by the organization that they are *not*
2 incorporated for an electioneering purpose is not dispositive.” *The Real Truth About*
3 *Obama v. Federal Election Commission*, No. 3:08-cv-00483, 2008 WL 4416282, at 14
4 (E.D. Va. Sept. 24, 2008) (denying motion for preliminary injunction against FEC’s
5 enforcement of political committee status) (emphasis in original), *aff’d*, 575 F.3d 342 (4th
6 Cir. 2009), *vacated*, 130 S. Ct. 2371 (2010), *remanded to and decided*, No. 3:08-cv-
7 00483, __ WL __ (E.D. Va. Jun. 16, 2011) (granting FEC’s motion for summary
8 judgment).

9 Crossroads GPS’s response indicates it has at least four objectives: (1) electoral
10 spending; (2) grassroots lobbying; (3) issue advocacy; and (4) education of the general
11 public. *See* Response at 7. Notwithstanding its stated social welfare purposes,
12 Crossroads GPS appears to have the major purpose of partisan campaign activity to
13 support or defeat specifically identified federal candidates. Crossroads GPS has made
14 public statements that demonstrate that the organization’s goal is to influence federal
15 elections. Almost immediately after its formation, Crossroads GPS reportedly announced
16 its intent to raise approximately \$50 million “to attack Democrats and boost Republicans
17 headed into the 2010 midterm election.” *See* Kenneth P. Vogel, *Rove-linked group uses*
18 *secret donors to fund attacks*, POLITICO (July 20, 2010). In addition, Mike Duncan (who
19 has been referenced in news sources as the Chairman of both Crossroads GPS and
20 American Crossroads) reportedly stated that both organizations “plan[ned] to plow more
21 than \$49 million . . . into 11 Senate races in anticipation that the Republican Party is
22 within reach of a Senate majority,” and that the races were being targeted because they
23 could help switch the control of the majority in the Senate to the Republican Party.

1 Ralph Hallow, *Pro-GOP Nonprofits Kick in Millions: Cash to target 11 Senate races*,
2 WASHINGTON TIMES (Aug. 19, 2010).

3 In the weeks before the November 2010 election, Crossroads GPS reportedly also
4 sought to impact the outcome of House of Representative races by participating in a
5 “House Surge Strategy” with American Crossroads and other nonprofit organizations:
6 “American Crossroads and its related advocacy group, Crossroads GPS, the American
7 Action Network and the Commission on Hope, Growth and Opportunity — began a
8 ‘House surge strategy,’ pouring \$50 million into several dozen competitive House races.”
9 See Ashley Parker, *The Caucus: Big Spending by Republican-Friendly Group*, NEW
10 YORK TIMES (Oct. 13, 2010); see also Dan Eggen, *Conservative group, flush with funds,*
11 *turns to House*, WASHINGTON POST (Oct. 14, 2010). “The blitz will mainly focus on races
12 where Democrats have a financial advantage. Crossroads is contributing \$10 million to
13 the joint effort, including \$2 million behind an initial set of ads that will go up Friday in
14 eight House races. The group said it anticipates that its investment would cover at least
15 15 races.” *Id.* Crossroads GPS President Steven Law further explained the goal of the
16 “House Surge Strategy,” reportedly saying that the effort was “aimed at putting
17 Republicans over the top by evening out the financial disparities and dramatically
18 expanding the field of battle.” Brody Mullins and Danny Yadron, *GOP Groups Launch*
19 *Massive Ad Blitz*, WALL STREET JOURNAL (Oct. 13, 2010).

20 In addition to its statements regarding its general intended level of spending for
21 2010, Crossroads GPS reportedly also stated its reasons for running advertisements in
22 specific races. “Carl Forti, who helped orchestrate spending decisions for American
23 Crossroads and Crossroads GPS . . . said the goal all along was to expand the political

1 map, putting Democrats on the defensive. Even if Democratic candidates ultimately won
2 some of those races, he said, the spending by Republican-leaning groups was still useful.
3 'All of those things impact the whole playing field,' Mr. Forti said. 'It's not just wins
4 and losses.'" Michael Luo and Griff Palmer, *Outside Groups on the Right Flexed*
5 *Muscles*, NEW YORK TIMES (Nov. 4, 2010). Despite spending about \$4 million on the
6 2010 Nevada Senate race, in which the Democratic candidate still won, "Mr. Forti said
7 the Crossroads groups' investment was hardly wasted, because it diverted Democratic
8 attention and resources from other races. 'In Nevada, we made a difference,' he said.
9 'We didn't win, no. But we definitely made a difference.'" *Id.* Further, Mr. Forti
10 explained why American Crossroads and Crossroads GPS placed so much focus on the
11 Nevada race: "We were the only group that advertised all summer. . . . We've been on
12 [television] since the week after the primary, driving Harry [Reid]'s negatives and trying
13 to keep that race competitive, trying to keep [Sharron Angle] in it." See Steve Peoples,
14 *GOP sees flaws in Tea Party candidates*, ROLL CALL (Nov. 3, 2010). In describing the
15 advertisement run in late August in Kentucky featuring the Democratic candidate for the
16 U.S. Senate, Jack Conway, Crossroads GPS spokesman Jonathan Collegio explained that
17 the reason for the advertisement was "Kentucky is a key state for control of the Senate."
18 Bill Estep, *Conservative group fires first shot in U.S. Senate race ad war*, LEXINGTON
19 HERALD-LEADER (Aug. 26, 2010). The press reported that in February 2011, "American
20 Crossroads and Crossroads GPS disclosed in an annual report sent to donors . . . that they
21 spent 96% of the money raised on campaigns." Brody Mullins, *2012 Election Spending*
22 *Race Heats Up: Independent Conservative Groups Set Goal of \$120 million*, WALL
23 STREET JOURNAL (Mar. 1, 2011) ("2012 Spending Race Heats Up").

1 Finally, Crossroads GPS's stated intent to influence elections is not limited to the
2 2010 election cycle. As the presidential election cycle of 2012 began, Crossroads GPS
3 and American Crossroads have set a combined goal of "raising \$120 million in the effort
4 to defeat President Barack Obama, win a GOP majority in the Senate and protect the
5 party's grip on the House in the 2012 election." *See* 2012 Spending Race Heats Up,
6 *supra*. *See also* American Crossroads and Crossroads GPS 2012 Press Releases, *supra*
7 Part II.A. In addition, they announced that the two Crossroads groups "will focus on
8 television advertising and other election activities, which could complement the
9 Republican National Committee's focus on rallying Republican voters and funding state
10 parties." 2012 Spending Race Heats Up, *supra*. *See also*, Dan Eggen, *Political groups,*
11 *now free of limits, spending heavily ahead of 2012*, WASHINGTON POST (May 21, 2011)
12 ("The Crossroads groups have stated that we'll be involved heavily in 2012, both in
13 congressional races and the presidential side as well," Collegio said.)

14 Based on the above statements made by, and attributed to, Crossroads GPS, it
15 appears that its major purpose is federal campaign activity.

16 **d. Extensive Spending**

17 The Commission also establishes an organization's "major purpose" through an
18 evaluation of its spending on federal campaign activities, as well as any other spending
19 by the organization. *See* Supplemental E&J, 72 Fed. Reg. at 5601. The Commission has
20 stated that it will make a fact-intensive analysis of a group's campaign activities
21 compared to its activities unrelated to campaigns. *Id.*

22 An evaluation of Crossroads GPS's spending on activities during 2010 establishes
23 that its major purpose is federal campaign activity. Crossroads GPS's public statements

1 to its donors that Crossroads GPS and American Crossroads spent 96% of the money
2 raised in 2010 on “campaigns” provides strong support for concluding that Crossroads
3 GPS’s spending was so extensive that its major purpose was federal campaign activity.
4 Further, Crossroads GPS’s known spending on election-related activities corroborates its
5 statement to its donors. An evaluation of Crossroads GPS’s known spending
6 demonstrates that a clear majority of its 2010 spending was for federal campaign activity:
7 at least \$26 million of Crossroads GPS’s \$39.1 million spent in 2010 (or 66.6% of its
8 total spending) was on federal campaign activity. The spending on these activities
9 includes \$15,749,171.00 worth of independent expenditures,¹² \$1,104,783.48 worth of
10 electioneering communications, \$4.3 million worth of advertisements before the
11 electioneering communication period that appear to support or oppose a federal
12 candidate,¹³ and at least \$4.6 million worth of partisan get-out-the-vote activity.
13 Although we do not know the full extent of Crossroads GPS’s spending because it is a
14 501(c)(4) organization, a fact-intensive analysis of the group’s known spending
15 establishes that Crossroads GPS has federal campaign activity as its major purpose.

16 To rebut the claim that its major purpose is federal campaign activity, Crossroads
17 GPS attempts to establish express advocacy as the sole indicator that an organization’s
18 major purpose is federal campaign activity and to limit “political committee” status to

¹² Crossroads GPS’s use of two different totals when explaining the amount it spent on express advocacy (i.e. \$15,455,039.50 and \$15,749,171) raises questions about the accuracy of the assertions in Crossroads GPS’s response with regard to the amount of activity that was and was not express advocacy. Because Crossroads GPS is a 501(c)(4) organization, its tax documents (such as its Form 1024 and Forms 990) are not readily available to corroborate the groups spending, in particular its overall spending and the amount spent on its various other activities such as grassroots lobbying, issue advocacy, and education.

¹³ In addition to featuring candidates for the U.S. Senate, it appears that these advertisements may also have been produced and aired as a means to “shape citizen attitudes with hard-hitting issue advocacy and usable message tools for Republicans and their supportive activist communities.” See Concept Paper, *supra*. See also Kenneth P. Vogel, *Rove-linked group uses secret donors to fund attacks*, POLITICO (June 20, 2010).

1 only those groups whose major purpose is *expressly advocating* the nomination or
2 election of a candidate. Not only is Crossroads GPS's position at odds with *Buckley* and
3 *MCFL*, *see* discussion *supra* at Part II.B.2.a., the Commission has never adopted that
4 position. In 2001 and 2004, major purpose standards based (1) only on "independent
5 expenditures" and/or (2) on requiring a mathematical majority (over 50%) of campaign
6 activity to be "independent expenditures" were proposed, but were not adopted. *See*
7 Definition of Political Committee: Advance Notice of Proposed Rulemaking, 66 Fed.
8 Reg. 13681, 13682 (March 7, 2001); Political Committee Status: Notice of Proposed
9 Rulemaking, 69 Fed. Reg. 11736, 11746 (March 11, 2004); Final Rules on Political
10 Committee Status, Definition of Contribution, and Allocation for Separate Segregated
11 Funds and Nonconnected Committees, 69 Fed. Reg. 68056, 68064-65 (November 23,
12 2004). The Commission has, however, adopted the broader terms used by the *Buckley*
13 and *MCFL* Courts. *See* Supplemental E&J, 72 Fed. Reg. at 5597 (limiting "political
14 committee" status to those organizations whose "major purpose is Federal campaign
15 activity (*i.e.*, the nomination or election of a Federal candidate)"); *see also Real Truth*
16 *About Obama v. FEC*, No. 3:08-CV-483 at 21-22 (E.D. Va. June 16, 2011) ("The FEC
17 considers whether the group spends money extensively on campaign activities such as
18 canvassing or phone banks, or on express advocacy communications" and "the FEC is
19 entitled to consider the full range of an organization's activities in deciding whether it is a
20 political committee").

21 Moreover, in evaluating "major purpose" in prior matters, the Commission also
22 routinely has considered non-express advocacy communications directed to a particular
23 candidate's electorate that could be shown to be related to an organization's support or

1 opposition to a particular candidate. *See* Supplemental E&J, 72 Fed. Reg. at 5602,
2 5605(citing Factual and Legal Analyses in MURs 5511 and 5525 (Swiftboat Vets); MUR
3 5753 (League of Conservation Voters); and MUR 5754 (MoveOn.org Voter Fund)); *see*
4 *also Federal Election Commission v. Citizens Club for Growth, Inc.*, Consent Judgment:
5 Stipulation for Entry of Consent Judgment ¶22 (Sept. 6, 2007) (wherein Commission
6 entered a stipulation, approved as part of a consent judgment, treating organization as a
7 political committee because “the vast majority of [the group’s disbursements] were made
8 in connection with federal elections, including, but not limited to, funding for candidate
9 research, polling, and advertisements and other public communications referencing a
10 clearly identified federal candidate”).

11 During 2010, Crossroads GPS made extensive disbursements for federal
12 campaign activity. As a starting point, Crossroads GPS spent \$15,445,039.50 on
13 independent expenditures reported to the Commission, and \$15,749,171.00 on express
14 advocacy in 2010. *See* Response at 7 and 13. Crossroads GPS spent an additional \$5.4
15 million for September-November electioneering communications as well as June-August
16 pre-electioneering period communications that supported or attacked many of the same
17 federal candidates being supported or opposed by its independent expenditures.
18 Additionally, Crossroads GPS and American Crossroads’ joint statement that the two
19 groups planned to spend as much as \$10 million on get-out-the-vote activity in 2010
20 suggests that Crossroads GPS’s share of the spending may have been between \$4.6 and
21 \$5.2 million.¹⁴ Michael Crowley, *The New GOP Money Stampede*, TIME (Sept. 16,
22 2010). This was far more than just “occasional” federal campaign activity.

¹⁴ An examination of American Crossroads’ reports filed with the Commission indicate that American Crossroads’ share of the \$10 million was between \$4,194,345 and \$5,406,203.

1 Crossroads GPS asserts that “[a] simple comparison of the amount spent . . . on
2 express advocacy communications (\$15,445,039.50) versus the amount spent on other,
3 non-express advocacy activities (approximately \$23.7 million) in its first 6 months of
4 existence, demonstrates quite clearly that the “major purpose” of Crossroads GPS is *not*
5 Federal campaign activity.” (Emphasis in original.) Response at 21. However,
6 Crossroads GPS’s own reported statements to its donors conflict with the information it
7 provided in its response: “American Crossroads and Crossroads GPS disclosed in an
8 annual report sent to donors . . . that they spent 96% of the money raised on campaigns.”
9 *See* 2012 Election Spending Race Heats Up, *supra*. This claim contradicts Crossroads
10 GPS’s attempt to limit its federal campaign activity to the \$15,455,039.50 in independent
11 expenditures.

12 Second, Crossroads GPS has asserted that the \$15,445,039.50 that purportedly
13 consisted of all of its independent expenditures for 2010 did not trigger major purpose
14 because it does not constitute a mathematical majority of its spending for that calendar
15 year. Response at 7. Crossroads GPS argues that the Commission should find major
16 purpose only where its primary activity is a “majority” of such spending, and the
17 response cites to *New Mexico Youth Organized v. Herrera*, 611 F.3d at 678, for the
18 proposition that major purpose may be determined by a “comparison of the
19 organization’s electioneering spending with overall spending to determine whether the
20 preponderance of expenditures is for express advocacy or contributions to candidates.”
21 However, in *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 1009-11 (9th
22 Cir. 2010), the U.S. Court of Appeals for the Ninth Circuit has concluded that the major
23 purpose test only requires that the group’s spending on “political advocacy” to be a

1 plurality to be considered an organization's major purpose.¹⁵ *See Real Truth About*
2 *Obama v. FEC*, No. 3:08-CV-483 at 22-23 (E.D. Va. June 16, 2011) (concluding that
3 *MCFL* did *not* hold that an organization's expenditures and the central purpose revealed
4 in its organic documents "are the exclusive indicia of an organization's status as a
5 political committee").

6 Based on the information in Crossroads GPS's response and publicly available
7 sources, Crossroads GPS's spending on federal campaign activity appears to have been
8 its major purpose under either the "majority" or "plurality" standards. Crossroads GPS's
9 spending on independent expenditures, electioneering communications, and other public
10 communications that appear to support or oppose a federal candidate totaled
11 approximately \$21,453,954.48 in spending on federal campaign activity and represented
12 54.8% of Crossroads GPS's total spending for 2010. Such spending would appear to be
13 so "extensive" that it would satisfy the major purpose test that the Commission set forth
14 in the 2007 Supplemental E&J when it explained it would examine a group's
15 proportionate amount of spending on election-related activity. 72 Fed. Reg. at 5605.
16 Moreover, the inclusion of at least \$4.6 million that may have been spent on partisan get-
17 out-the-vote activities would increase Crossroads GPS's known spending on federal
18 campaign activity to approximately \$26 million, or 66.6% of the group's activity for
19 2010.

20 Crossroads GPS has not indicated to what extent its non-express advocacy budget
21 was allocated among grassroots lobbying, issue advocacy, and education, but considering
22 that the remaining \$23.7 million spent by Crossroads GPS would necessarily have to be

¹⁵ The U.S. Supreme Court recently declined to review the Ninth Circuit's decision. *See Human Life of Washington, Inc. v. Brumsickle*, 131 S.Ct. 1477 (2011).

1 split among these activities, the nearly \$16 million spent on express advocacy may
2 constitute a clear plurality of the group's spending. Despite Crossroads GPS's own
3 response suggesting that its electoral spending is at least a plurality of its 2010 spending,
4 its statement to its donors "that [Crossroads GPS and American Crossroads] spent 96% of
5 the money raised on campaigns" suggests that well over a majority of Crossroads GPS's
6 2010 spending was for federal campaign activity. This statement to its donors, as well as
7 the statement in its "Concept Paper" that it aimed to create "usable message tools for
8 Republicans," suggests that at least some of the activities that Crossroads GPS labels as
9 grassroots lobbying, issue advocacy, and education may actually be campaign related. It
10 appears, therefore, that Crossroads GPS's spending has been so extensive that its major
11 purpose can be considered federal campaign activity under either the "plurality" or
12 "majority" standards.

13 Finally, Crossroads GPS argues that "[g]iven the rough equivalence of the IRS
14 'primary purpose' test and the FEC's 'major purpose' test, a Section 501(c)(4)
15 organization that is in compliance with IRS standards *should* [not] be found to satisfy the
16 FEC's 'political committee' test." Response at 2. Crossroads GPS further argues that the
17 FEC should apply the major purpose test to activity that occurred during the group's
18 fiscal tax year, which runs from June 1, 2010 to May 31, 2011. Crossroads GPS's
19 arguments that standards relied on for tax purposes should be used in determining
20 political committee status has already been rejected by the Commission, which concluded
21 that "the use of the Internal Revenue Code classification to interpret and implement
22 FECA is inappropriate." *See* 72 Fed. Reg. at 5599; *see also Shays v. FEC*, 337
23 F.Supp.2d 28, 126 (D.D.C. 2004) ("*Shays I*") ("It is the FEC, not the IRS, that is charged

1 with enforcing FECA.”). Likewise, the Commission should not import the use of a fiscal
2 tax year into its determination of political committee status. Furthermore, using a fiscal
3 tax year would run counter to the principle that using the Internal Revenue Code to
4 interpret FECA is “inappropriate.” Finally, allowing organizations to use their own fiscal
5 tax year would allow them to manipulate the timeline for activity that can be considered
6 by the Commission. Rather, once an organization has surpassed the statutory threshold
7 for political committee status within a calendar year, *see* 2 U.S.C. § 431(4)(A), evaluation
8 of its major purpose under the Act may be considered. *See* MUR 6317 (Utah Defenders
9 of Constitutional Integrity) (Commission found reason to believe where new organization
10 spent in excess of \$1,000 on single independent expenditure).

11 3. Conclusion

12 Crossroads GPS satisfied the statutory threshold for political committee status by
13 spending nearly \$16 million on advertisements that expressly advocate for or against
14 federal candidates during the 2010 election cycle. In addition, Crossroads GPS’s public
15 statements focusing on electing Republican candidates to Congress or defeating
16 Democratic congressional candidates demonstrate that the group’s major purpose is
17 federal campaign activity. Moreover, Crossroads GPS’s spending on advertisements
18 featuring federal candidates and express advocacy phone calls not only supports the
19 group’s statements that it intended to affect federal elections, but also provides an
20 independent basis for meeting the major purpose test: its spending was “so extensive”
21 that its major purpose should be regarded as federal campaign activity. Therefore,
22 Crossroads GPS appears to be a political committee under the Act that should have
23 registered, organized, and reported pursuant to 2 U.S.C. §§ 432, 433, and 434.

As an “independent expenditure only political committee,” Crossroads GPS would have to organize, register, and report with the Commission, but would not be subject to the Act’s source and amount limitations. *See SpeechNow*, 599 F.3d at 689; Advisory Opinions 2010-09 (Club for Growth) and 2010-11 (Commonsense Ten). As such, a determination that Crossroads GPS is a political committee implicates “disclosure requirements [that] may burden the ability to speak, but . . . ‘impose no ceiling on campaign-related activities’ and ‘do not prevent anyone from speaking.’” *Citizens United*, 130 S.Ct. at 914 (quoting *Buckley*, 424 U.S. at 64, and *McConnell*, 540 U.S. at 201).

Accordingly, we recommend that the Commission find reason to believe that Crossroads GPS violated 2 U.S.C. §§ 432, 433, and 434.

III. FACTUAL AND LEGAL ANALYSIS FOR MUR 6368

A. Factual Summary

On August 21, 2010, Crossroads GPS began airing an advertisement that criticized Roy Blunt’s opponent in the 2010 race for a U.S. Senate seat in Missouri, Robin Carnahan, for supporting health care reform (“the Carnahan Ad”). Complaint at 3. The Carnahan Ad, which references the results of a recent statewide referendum on certain health care reform measures, includes the following voiceover text:

The message is clear. 71% of Missouri voters don’t want government-mandated health care. We want to make our own health care decisions. But Robin Carnahan disagrees. While 71% of us voted no, Carnahan sided with lobbyists, big unions and Washington insiders to force Obamacare on us. Missouri’s Lieutenant Governor is suing the federal government so we can keep our health care. Tell Carnahan to get in touch with Missourians and to support the health care challenge.

1 See <http://www.youtube.com/watch?v=4lr9xEr9zgU>. The visual portion of the
2 advertisement contains a disclaimer stating the ad was paid for by Crossroads GPS. *Id.*
3 Crossroads GPS filed electioneering communication reports for television advertisements
4 referencing Robin Carnahan during this same time period. The complaint alleges that
5 Crossroads GPS coordinated the Carnahan Ad with the Blunt campaign, and thus
6 Crossroads GPS made, and the Committee accepted, a prohibited corporate in-kind
7 contribution. See Complaint at 4-5.

8 According to the complaint, Karl Rove actively campaigned for Blunt in Missouri
9 during the 2010 election cycle, including recording a message included in a web video
10 that was uploaded to the Internet on June 29, 2010. Complaint at 2-3. The video contains
11 a disclaimer that it was paid for and authorized by Friends of Roy Blunt, and in it Rove
12 notes Blunt's opposition to health care reform and contrasts it with Carnahan's support of
13 health care reform. *Id.* at 2. The complaint alleges that Rove and Blunt, on account of
14 their "close relationship," likely would have had "additional discussions of the [Blunt]
15 campaign's plans, projects, activities, and needs," and surmises that "given Rove's
16 intimate and well-publicized role in the organization, it is unlikely that the Crossroads
17 GPS created and aired the [Carnahan] ad without Rove's involvement." *Id.* at 3-4. The
18 complaint contends that Crossroads GPS coordinated the Carnahan Ad with Blunt and the
19 Committee and that the "close ties" between Karl Rove (who it alleges is associated with
20 American Crossroads, Crossroads GPS, and Blunt) satisfies the "conduct" prong of the
21 coordination analysis. Complaint at 1-2. Accordingly, the complaint contends that
22 Crossroads GPS would have made a contribution in excess of \$1,000 and, thus, would
23 have been required to register as a political committee. *Id.* at 5.

1 Crossroads GPS, and Blunt and the Committee submitted responses denying any
2 coordination with respect to the Carnahan Ad. Crossroads GPS, in its response, asserts
3 that Steven Law, its President, and Carl Forti, its Advocacy Director, made the decision
4 to create and distribute the Carnahan Ad, and that Karl Rove, who holds no formal
5 position with Crossroads GPS, played no part in the process. Crossroads GPS Response
6 at 2-3; *see also* Law Affidavit at ¶ 4 and Forti Affidavit at ¶ 5. Further, Crossroads GPS
7 states that the Carnahan Ad was produced by “‘firewalled’ vendors.” *Id.*

8 Crossroads GPS additionally argues that the web video endorsement by Rove
9 does not, on its face, indicate what “inside information” might have been relayed to Rove
10 during its taping that was subsequently used by Crossroads GPS in creating the Carnahan
11 Ad.¹⁶ *Id.* at 4. Indeed, Respondents assert that the Carnahan Ad concerned a ubiquitous
12 political issue, and that Crossroads GPS would not have needed to coordinate with Blunt
13 or his Committee in order to understand the issue’s relevance to the Blunt-Carnahan race.
14 Blunt/Committee Response at 2; Crossroads GPS Response at 4. Finally, Crossroads
15 GPS contends that the complaint presents no actual evidence of coordination, but only
16 mere speculation, and that the complaint should be dismissed on that basis. Crossroads
17 GPS Response at 1-2. Blunt and the Committee likewise maintains that the “conduct”
18 prong is not satisfied by Crossroads GPS’s alleged connection with Rove, nor by any
19 other claim in the complaint. Blunt/Committee Response at 1-2.

20
21
22

¹⁶ See <http://www.youtube.com/watch?v=tkIJ-r9Gi1.U>.

B. Legal Analysis

1. Coordination

The Federal Election Campaign Act of 1971, as amended (“the Act”), prohibits corporations from making contributions from their general treasury funds in connection with any election of any candidate for federal office. 2 U.S.C. § 441b(a). Further, no candidate or political committee may knowingly accept a corporate contribution. *Id.*

Under the Act, an expenditure made by any person “in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents” constitutes an in-kind contribution. 2 U.S.C.

§ 441a(a)(7)(B)(i). A communication is coordinated with a candidate, a candidate’s authorized committee, or agent of the candidate or committee when the communication satisfies the three-pronged test set forth in 11 C.F.R. § 109.21(a): (1) the communication is paid for by a person other than that candidate or authorized committee; (2) the communication satisfies at least one of the content standards set forth in 11 C.F.R. § 109.21(c); and (3) the communication satisfies at least one of the conduct standards set forth in 11 C.F.R. § 109.21(d). The Commission’s regulations at 11 C.F.R. § 109.21 provide that coordinated communications constitute in-kind contributions from the party paying for such communications to the candidate, the candidate’s authorized committee, or the political party committee which coordinates the communication. As an in-kind contribution, the costs of coordinated communications must not exceed a political committee’s applicable contribution limits. *See* 2 U.S.C. § 441a.

a. Payment

In this matter, the first prong of the coordinated communication test is satisfied because Crossroads GPS is a third-party payor. *See* 11 C.F.R. § 109.21(a)(1). Crossroads GPS has admitted in its response that it has paid for the Carnahan Ad and has filed an FEC Form 9 disclosing its payment for the advertisement as an electioneering communication. *See* Crossroads GPS, FEC Form 9 (Sept. 3, 2010).

b. Content

The second prong of this test, the content standard, is also satisfied. The content prong is satisfied if a communication meets at least one of the following content standards: (1) a communication that is an electioneering communication under 11 C.F.R. § 100.29; (2) a public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate or the candidate's authorized committee; (3) a public communication that expressly advocates the election or defeat of a clearly identified candidate for Federal office; or (4) a public communication, in relevant part, that refers to a clearly identified House or Senate candidate, and is publicly distributed or disseminated in the clearly identified candidate's jurisdiction 90 days or fewer before the candidate's primary or general election.¹⁷ *See* 11 C.F.R. § 109.21(c).

The Carnahan Ad satisfies the content standard because the Carnahan Ad is an electioneering communication, *see* 11 C.F.R. § 109.21(c)(1)(A), and it is a public communication that refers to a clearly identified candidate for federal office (Robin

¹⁷ A "public communication" is defined as a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank, or any other form of general public political advertising. 11 C.F.R. § 100.26.

Carnahan), and was broadcast in the clearly identified candidate's jurisdiction within 90 days of the November 2, 2010 general election. *See* 11 C.F.R. § 109.21(c)(4)(i).

c. Conduct

The conduct prong is satisfied where any of the following types of conduct occurs: (1) the communication was created, produced, or distributed at the request or suggestion of a candidate or his campaign; (2) the candidate or his campaign was materially involved in decisions regarding the communication; (3) the communication was created, produced, or distributed after substantial discussions with the campaign or its agents; (4) the parties contracted with or employed a common vendor that used or conveyed material information about the campaign's plans, projects, activities or needs, or used material information gained from past work with the candidate to create, produce, or distribute the communication; (5) the payor employed a former employee or independent contractor of the candidate who used or conveyed material information about the campaign's plans, projects, activities or needs, or used material information gained from past work with the candidate to create, produce, or distribute the communication; or (6) the payor republished campaign material. *See* 11 C.F.R. § 109.21(d).

The complaint contends that the "conduct" prong is satisfied, essentially, because Blunt has "close ties" to Rove, and Rove has connections to Crossroads GPS. However, the complaint is based on speculative inferences drawn on nothing more than Rove's relationship with both Blunt and Crossroads GPS. *See* Complaint at 3-4. It presents no facts supporting the allegation that the Carnahan Ad was created, produced, or distributed at the request or suggestion of Blunt or the Committee, or that Blunt, the Committee, or

1 Rove were materially involved with any aspect of the Carnahan Ad, that Blunt had any
2 substantial discussions with Crossroads GPS or Rove about the Carnahan Ad, that a
3 former employee or independent contractor of the Blunt campaign was involved with the
4 Carnahan Ad, or that the Blunt campaign and Crossroads GPS shared a common vendor.
5 Further, as noted above, both Crossroads GPS's and the Blunt/Committee's responses
6 explicitly deny that there was any such interaction. The Crossroads GPS response, which
7 is supported by affidavits from Messrs. Corti and Law, also indicates that Mr. Rove, the
8 individual with past ties to Blunt, played no role in creating or placing the advertisement.
9 See Crossroads GPS Response at 3-4 and attached affidavits. We have no information to
10 the contrary. As such, there is no basis on which to conclude that the Carnahan Ad
11 satisfied the "conduct" prong.

12 Accordingly, we recommend that the Commission find no reason to believe that
13 Crossroads Grassroots Policy Strategies, Senator Roy Blunt and Friends of Roy Blunt
14 and Gordon Elliott, in his official capacity as Treasurer, violated 2 U.S.C. § 441b(a) by
15 making or accepting a prohibited corporate in-kind contribution in the form of a
16 coordinated expenditure.¹⁸

17 **IV. PROPOSED DISCOVERY**

18 We seek information: (1) to establish the extent, nature, and cost of Crossroads
19 GPS's fundraising activities and disbursements for election-related advertisements and
20 other public communications; and (2) to identify potential witnesses who may have
21 relevant knowledge of these facts. We also request that the Commission authorize the

¹⁸ Based on this recommendation, there does not appear to be any additional "contributions" or "expenditures" that would need to be examined under a political committee status analysis that was not addressed above. See Part II, *supra*.

1 use of compulsory process, including the issuance of appropriate interrogatories,
2 document subpoenas, and deposition subpoenas, as necessary.

3 **V. RECOMMENDATIONS**

4 **A. MUR 6396**

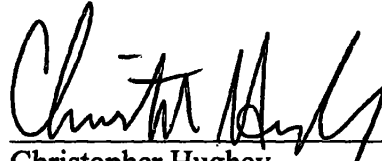
- 5 1. Find reason to believe that Crossroads Grassroots Political Strategies violated
6 2 U.S.C. §§ 432, 433, and 434.
7
8 2. Approve the attached Factual and Legal Analysis.
9
10 3. Authorize the use of compulsory process in this matter.
11
12 4. Approve the appropriate letter.
13

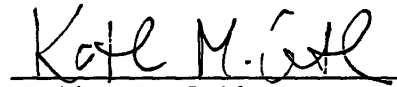
14 **B. MUR 6368**

- 15
16 1. Find no reason to believe that Crossroads Grassroots Policy Strategies
17 violated 2 U.S.C. § 441b(a).
18
19 2. Find no reason to believe that Senator Roy Blunt violated 2 U.S.C. § 441b(a).
20
21 3. Find no reason to believe that Friends of Roy Blunt and Gordon Elliott, in his
22 official capacity as Treasurer, violated 2 U.S.C. § 441b(a).
23
24 4. Approve the attached Factual and Legal Analyses.
25
26 5. Approve the appropriate letters.

6. Close the file.

6-21-2011
Date


Christopher Hughey
Acting General Counsel


Kathleen M. Guith
Acting Associate General Counsel
for Enforcement


Susan L. Lebeaux
Acting Deputy Associate General
Counsel for Enforcement


Mark D. Shonkwiler
Assistant General Counsel


William A. Powers
Attorney

Attachments:

- 1 – Factual and Legal Analysis – MUR 6396 – Crossroads Grassroots Political Strategies
- 2 – Factual and Legal Analysis – MUR 6368 – Crossroads Grassroots Political Strategies
- 3 – Factual and Legal Analysis – MUR 6368 – Senator Roy Blunt and Friends of Roy
Blunt and Gordon Elliott, in his official capacity as Treasurer

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3
4 RESPONDENT: Crossroads Grassroots Political Strategies MUR: 6396

5 **I. INTRODUCTION**

6 This matter was generated by a complaint filed with the Federal Election
7 Commission by Public Citizen, ProtectOurElections.org, ProsperityAgenda.us,
8 AmericanCrossroadsWatch.org, Kevin Zeese, and Craig Holman. See 2 U.S.C.
9 § 437g(a)(1).

10 **II. FACTUAL AND LEGAL ANALYSIS FOR MUR 6396**

11 **A. Facts**

12 **1. Background**

13 Crossroads GPS was founded on June 1, 2010 and is, or has applied to be, a
14 nonprofit corporation organized under section 501(c)(4) of the Internal Revenue Code.
15 See Response at 7; see also Kenneth P. Vogel, *Crossroads hauls in \$8.5M in June*,
16 POLITICO (June 30, 2010); Commonwealth of Virginia, State Corporation Commission
17 Corporate Data Inquiry, <https://cisiweb.scc.virginia.gov> (listing Crossroads GPS as
18 having filed incorporation documents on June 2, 2010).¹ As such, Crossroads GPS lists
19 the sources of its funding, including donors, and categorizes its spending in its filings
20 with the IRS, but the identification of the donors is not made public. See Internal
21 Revenue Service, *Exempt Organizations – Contributors’ Identities Not Subject to*
22 *Disclosure*, available at <http://www.irs.gov/charities/article/0,,id=135015,00.html>. As

¹ Although it has been reported that Crossroads GPS filed its application for 501(c)(4) status in September of 2010, it does not appear that the Internal Revenue Service has acted on that application yet. T.W. Farnam and Dan Eggen, *Lax Internal Revenue Service rules help groups shield campaign donor identities*, WASHINGTON POST (Mar. 20, 2011).

discussed below, during 2010, Crossroads GPS raised and spent approximately \$39.1 million, of which over \$15 million was reported to the Commission as independent expenditures. Response at 7.

American Crossroads, an independent expenditure only political committee registered with the Commission, and Crossroads GPS refer to each other as a “sister organization.” Crossroads GPS, *Crossroads GPS and American Crossroads Pledge \$120 million for 2012 Election*, available at <http://www.crossroadsgps.org/news/crossroads-gps-and-american-crossroads-pledge-120-million-2012-effort> (last visited May 16, 2011) (“Crossroads GPS 2012 Press Release”); American Crossroads, *American Crossroads and Crossroads GPS Pledge \$120 million for 2012 Election*, available at <http://www.americancrossroads.org/news/american-crossroads-and-crossroads-gps-pledge-120-million-2012-election> (last visited May 16, 2011) (“American Crossroads 2012 Press Release”). As an independent expenditure only political committee, American Crossroads receives unlimited contributions from individuals, corporations, labor organizations, and political committees. See American Crossroads, Statement of Organization (Aug. 9, 2010).² During 2010, American Crossroads reported raising and spending approximately \$25.8 million.

Both Crossroads GPS and American Crossroads operate from the same address of 1401 New York Avenue, NW, Suite 1200, Washington, DC 20005, and share a number of corporate officers and employees, including: (1) Steven Law, who is President of both organizations; (2) Mike Duncan, who has been referenced in news articles as Chairman

² Before filing as a political committee with the Commission, American Crossroads registered and reported as a 527 nonprofit organization with the Internal Revenue Service. See American Crossroads, Notice of Section 527 Status (IRS Form 8871) (Mar. 29, 2010).

1 of both organizations; (3) Jonathan Collegio, who is the Spokesman for both
2 organizations; (4) Carl Forti, who is the “Political Director” for American Crossroads and
3 the “Advocacy Director” for Crossroads GPS; and (5) Margee Clancy, who is listed as
4 Treasurer and Custodian of Records for both organizations.³ *See* Steve Peoples, *GOP*
5 *sees flaws in Tea Party candidates*, ROLL CALL (Nov. 3, 2010); *see also* Peter Overby, *Is*
6 *Michael Steele Ready to Move On?*, NATIONAL PUBLIC RADIO (Dec. 13, 2010); Kenneth
7 P. Vogel and Ben Smith, *RNC weighs outsourcing list*, POLITICO (May 17, 2011).

8 The acknowledged relationship between American Crossroads, a registered
9 independent expenditure only committee, and Crossroads GPS, an unregistered
10 organization, is germane to the issue of whether Crossroads GPS has a “major purpose”
11 of campaign activity because many of the groups’ public statements were made with
12 reference to both Crossroads GPS and American Crossroads’ activities without
13 distinguishing between the two, and were made by the individuals associated with both
14 groups. While Crossroads GPS has requested recognition by the IRS as a social welfare
15 organization engaged in research, education, and communication efforts regarding policy
16 issues, the leaders of both groups frequently describe its goals in political terms that are
17 jointly achieved with American Crossroads. In numerous statements on its website and
18 to the press, Crossroads GPS and American Crossroads have indicated that both groups
19 were jointly focused on affecting the results of the 2010 midterm elections. For example,
20 in July 2010, Crossroads GPS stated its prospective intentions for the remainder of 2010:
21 “A spokesman . . . said American Crossroads GPS, combined with its parent group
22 [American Crossroads], intended to raise a combined total of ‘approximately \$50 million’

³ Additionally, American Crossroads and Crossroads GPS have been described as groups
“conceived by” Karl Rove and Ed Gillespie. Kenneth P. Vogel, *Rove-linked group uses secret donors to*
fund attacks, POLITICO (July 20, 2010).

1 to attack Democrats and boost Republicans headed into the 2010 midterm elections.”

2 Kenneth P. Vogel, *Rove-linked group uses secret donors to fund attacks*, POLITICO (July
3 20, 2010).

4 Crossroads GPS and American Crossroads also reportedly engaged in “a monster
5 \$10 million national get-out-the-vote campaign that will include 40 million pieces of
6 political mail and 20 million phone calls to voters in key states.” Michael Crowley, *The*
7 *New GOP Money Stampede*, TIME (Sept. 16, 2010). The press reported that “Crossroads
8 GPS sank \$17 million into ads and turnout communications in a plan to obliterate the
9 Democrats’ Senate and House majorities.” Jeanne Cummings, *GOP groups coordinated*
10 *spending*, POLITICO (Nov. 3, 2010). Reportedly, the inclusion of get-out-the-vote
11 activities was part of the Crossroads groups’ “more ambitious goal: To bring together the
12 disparate new and old GOP political players so they could coordinate their efforts and
13 maximize the damage on the political battlefield.” *Id.* As for 2012, American
14 Crossroads and Crossroads GPS President Steven Law reportedly stated, “‘We’re
15 definitely building a foundation, . . . We hope to be an important player in 2012.’”
16 Michael Crowley, *The New GOP Money Stampede*, TIME (Sept. 16, 2010).

17 2. 2010 Spending

18 According to Crossroads GPS, from June 1, 2010 until December 15, 2010, the
19 organization raised approximately \$43.6 million and spent approximately \$39.1 million.⁴
20 Response at 7. Crossroads GPS acknowledges that it spent approximately 39% of its
21 total funds, or \$15.4 million, on federal independent expenditures. Response at 8. This
22 admitted electoral spending includes \$13,259,915.13 of independent expenditures made

⁴ The Response was filed on December 23, 2010, which presumably would explain why Crossroads GPS did not determine its spending for the entire calendar year of 2010.

1 in support of or opposition to a candidate in seven elections for the United States Senate⁵
2 and \$2,185,124.37 of independent expenditures made in support of or opposition to
3 candidates in eight elections for the United States House of Representatives.⁶

4 Crossroads GPS maintains that it spent its remaining \$23.7 million in 2010 on
5 exempt social welfare activities such as issue advocacy, grassroots lobbying and
6 educational activities relating to seven priorities for legislative action in the fall of 2010
7 or 2011. Response at 7. In describing what it characterizes as nonelectoral spending,
8 Crossroads GPS details spending more than \$5.4 million for advertisements that attacked
9 or promoted specific federal candidates prior to the 2010 elections. These
10 communications, which did not include express advocacy, included \$1,104,783.48 for
11 electioneering communications that attacked or promoted four federal candidates within
12 60 days of the 2010 elections⁷ and approximately \$4.3 million on advertisements that
13 attacked or promoted specific federal candidates that were run during the summer of
14 2010, prior to beginning of the 60 day period in which electioneering communications
15 must be reported. Response at 8-9.⁸ In addition, Crossroads GPS released a “Concept

⁵ These included independent expenditures attacking or supporting Alexander Ginnoulas (IL), Charlie Crist (FL), Marco Rubio (FL), Harry Reid (NV), Sharron Angle (NV), Jack Conway (KY), Joe Sestak (PA), Patty Murray (WA), and Robin Carnahan (MO).

⁶ Each of these independent expenditures was in opposition to candidates for the House of Representatives, including Russ Carnahan (MO-3), Lincoln Davis (TN-4), Joseph Donnelly (IN-2), Joe Boccieri (OH-16), Jim Oberstar (MN-8), Jim Costa (CA-20), Earl Pomeroy (ND), and Ciro Rodriguez (TX-23).

⁷ These advertisements featured candidates for the U.S. Senate, including Michael Bennett (CO), Robin Carnahan (MO), Jack Conway (KY), and Harry Reid (NV).

⁸ These advertisements featured candidates for U.S. Senate, including Barbara Boxer (CA), Michael Bennett (CO), Robin Carnahan (MO), Jack Conway (KY), Harry Reid (NV), and Patty Murray (WA). Each of these advertisements’ scripts is available in the Appendix of Crossroads GPS’s response and can also be viewed on Crossroads GPS’s YouTube channel at <http://www.youtube.com/user/CrossroadsGPSchannel>.

1 Paper” to donors describing its activity as focused on achieving, among other things,
2 “shap[ing] citizen attitudes with hard-hitting issue advocacy and usable message tools for
3 Republicans and their supportive activist communities.” *See* American Crossroads GPS,
4 “Concept Paper” available at [http://www.politico.com/static/PPM169](http://www.politico.com/static/PPM169_crossroadsgpsconceptpaper.html)
5 [crossroadsgpsconceptpaper.html](http://www.politico.com/static/PPM169_crossroadsgpsconceptpaper.html) (last visited May 16, 2011) (“Concept Paper”).
6 Crossroads GPS also spent an unknown and unitemized amount of money on various
7 post-election activities in November and December 2010. Response at 12.

8 In response to the complaint’s allegation that it had a major purpose consistent
9 with that of a federal political committee, Crossroads GPS states that Internal Revenue
10 Service (IRS) standards permit a Section 501(c)(4) organization to engage in some
11 “political activity” so long as the organization’s “primary purpose” is not direct or
12 indirect participation or intervention in political campaigns on behalf of or in opposition
13 to any candidate for public office. Response at 2 (citing IRS regulations). Crossroads
14 GPS asserts that “[g]iven the rough equivalence of the IRS ‘primary purpose’ test and the
15 FEC’s ‘major purpose’ test, a Section 501(c)(4) organization that is in compliance with
16 IRS standards *should* be found to satisfy the FEC’s ‘political committee’ test.”
17 (Emphasis in original.) *Id.* Crossroads GPS also asserts that its current fiscal year runs
18 from June 1, 2010 through May 31, 2011, and that the Commission should wait until it
19 has completed its first full year of advocacy activity before acting on any complaint. *Id.*

20 B. Legal Analysis

21 Under the Act, groups that trigger political committee status are required to
22 comply with certain organizational requirements, register with the Commission, and
23 publicly disclose all of their receipts and disbursements. 2 U.S.C. §§ 432, 433, and 434.

1 The Act defines a “political committee” as any committee, association, or other group of
2 persons that receives “contributions” or makes “expenditures” which aggregate in excess
3 of \$1,000 during a calendar year. 2 U.S.C. § 431(4)(A).⁹ An organization that has made
4 expenditures in excess of \$1,000, however, will not be considered a “political committee”
5 unless, in addition, its “major purpose is Federal campaign activity (*i.e.*, the nomination
6 or election of a Federal candidate).” Political Committee Status: Supplemental
7 Explanation and Justification, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007) (“Supplemental
8 E&J”). *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for*
9 *Life, Inc.*, 479 U.S. 238, 262 (1986) (“*MCFL*”).

10 Political committees that only engage in independent expenditures are not subject
11 to the contribution limits of 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3). *See*
12 *SpeechNow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010) (“*SpeechNow*”); *see also*
13 *EMILY’s List v. FEC*, 581 F.3d 1, 10 (D.C. Cir. 2009) (“... individual citizens may
14 spend money without limit (apart from the limit on their own contributions to candidates
15 or parties) in support of the election of particular candidates”). The Commission has
16 concluded that it necessarily followed from the decisions in *Citizens United v. Federal*
17 *Election Commission*, 558 U.S. ___, 130 S.Ct. 876, 916 (2010) (“*Citizens United*”),
18 *SpeechNow*, and *EMILY’s List*, that corporations, labor organizations and political
19 committees also may make unlimited contributions to independent expenditure only
20 political committees. *See* Advisory Opinions 2010-09 (Club for Growth) and 2010-11
21 (Commonsense Ten). Nonetheless, these political committees, often referred to as

⁹ The term “expenditure” is defined to include “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.” 2 U.S.C. § 431(9)(A)(i). The term “contribution” is defined by 2 U.S.C. § 431(8)(A)(i).

1 independent expenditure only political committees, are still subject to the “reporting
2 requirements of 2 U.S.C. §§ 432, 433, and 434(a) and the organizational requirements of
3 2 U.S.C. §§ 431(4) and 431(8).” *See SpeechNow*, 599 F.3d at 689; *see also MCFL*, 479
4 at 266 (O’Connor, J., concurring) (stating that significant burden on MCFL came from
5 contribution restrictions, not disclosure).

6 **1. Crossroads GPS Has Made More than \$1,000 in Expenditures**

7
8 In determining whether an organization makes an expenditure, the Commission
9 “analyzes whether expenditures for any of an organization’s communications made
10 independently of a candidate constitute express advocacy either under 11 C.F.R.
11 § 100.22(a), or the broader definition at 11 C.F.R. § 100.22(b).” 72 Fed. Reg. at 5606.
12 Following the Supreme Court’s decision in *Citizens United v. FEC*, 130 S.Ct. at 916,
13 corporations, including Crossroads GPS, are no longer prohibited from making
14 independent expenditures.

15 As noted above, depending on different figures used in its Response, Crossroads
16 GPS spent either \$15,455,039.50 or \$15,749,171.00 on reported federal independent
17 expenditures in 2010. Response at 7 and 13. Thus, Crossroads GPS exceeded the \$1,000
18 statutory threshold for political committee status. 2 U.S.C. § 431(4)(A). Therefore, the
19 only remaining issue with regard to whether Crossroads GPS is a political committee is
20 whether or not it has the requisite “major purpose” required under *Buckley* and *MCFL*.

21 **2. Crossroads GPS Appears to Have Federal Campaign Activity as**
22 **its Major Purpose**

23
24 **i. The Major Purpose Test**

25 The U.S. Supreme Court first articulated the “major purpose” test in *Buckley*
26 when it construed the Act’s reporting requirements. 424 U.S. at 78-81. After expressing

1 concern that the phrase “for the purpose of . . . influencing” an election could be vague as
2 applied to certain individuals or groups (besides candidates and political committees) that
3 must report their “expenditures,” the Court concluded that the definition of “political
4 committee” could raise similar vagueness problems to the extent it could be construed to
5 “reach groups engaged *purely* in issue discussion.” *Id.* at 79 (emphasis added). The
6 Court, however, addressed these vagueness concerns using two distinct narrowing
7 constructions: one for the definition of “expenditure” for reporting by certain individuals
8 and another through its interpretation of the term “political committee.” The Court first
9 discussed the definition of a “political committee” and adapted the lower courts’
10 narrowing construction of that term:¹⁰ “[t]o fulfill the purposes of the Act,” political
11 committees “need only encompass organizations that are under the control of a candidate
12 or the major purpose of which is the nomination or election of a candidate.” *Id.* By
13 limiting “political committees” to groups whose “major purpose” was the nomination or
14 election of a candidate, the Court was satisfied that the definition of “political committee”
15 was not vague because “[e]xpenditures . . . of ‘political committees’ so construed can be
16 assumed to fall within the core area sought to be addressed by Congress. They are, by
17 definition, campaign related.” *Id.* As discussed below, this construction is in stark
18 contrast to what the Court did to narrow the definition of “expenditures” made by
19 individual persons or groups that lacked the requisite major purpose to “communications
20 that expressly advocate[d] the election or defeat” of a federal candidate. *Id.* at 80.

¹⁰ See *United States v. Nat’l Comm. For Impeachment*, 469 F.2d 1135, 1141 (2d Cir. 1972) (construing “the Act to apply only to committees soliciting contributions or making expenditures the major purpose of which is the nomination or election of candidates”) (“under this interpretation, enforcement of the Act may be made somewhat more burdensome, as the supervisory officials will be forced to glean the principal or major purpose of the organizations they seek to have comply with the Act”); see also *American Civil Liberties Union v. Jennings*, 366 F.Supp. 1041, 1057 (D.D.C. 1973), citing *Nat’l Comm. For Impeachment*, 469 F.2d at 1141.

1 The Court did not apply the “express advocacy” narrowing construction to the
2 term “political committee” — nor to the expenditures made by such groups — because
3 political committees act within the “core area sought to be addressed by Congress” by
4 virtue of their “major purpose.” *See id.* at 78-80. For example, an organization may
5 satisfy the “major purpose” test, and therefore act within that “core area,” based on the
6 organization’s stated purpose. *See FEC v. Malenick*, 310 F. Supp. 2d 230, 234-35
7 (D.D.C. 2004); *see also infra* Part II.B.2.c. So long as the “major purpose” test is met,
8 the *Buckley* court’s vagueness concerns about the definition of “political committee” are
9 satisfied, and in turn, the test eliminates vagueness concerns that might otherwise arise
10 from requiring political committees to report all of their “expenditures” — even those
11 that do not include express advocacy. Thus, the “express advocacy” narrowing
12 construction cannot be considered part of *Buckley*’s narrowing of the definition of
13 “political committee” through the “major purpose” test.

14 Far from relying on “express advocacy” as part of the narrowing construction
15 established through the “major purpose” test, the Court indicated that the activities
16 relevant to determining major purpose went beyond express advocacy communications.¹¹
17 *See Buckley*, 424 U.S. at 78-80. Indeed, the Court explicitly avoided equating express
18 advocacy with broader types of activity that (if undertaken by a political committee or

¹¹ Other courts have rejected using “express advocacy” as a narrowing construction for “major purpose.” *See, e.g., Real Truth About Obama v. FEC*, No. 3:08-CV-483 at 22 (E.D. Va. June 16, 2011) (rejecting the argument that a multi-factored approach fails to provide fair notice, and stating that “the FEC is entitled to consider the full range of an organization’s activities in deciding whether it is a political committee”). The *Real Truth About Obama* court’s rejection of such a narrowing of “major purpose” is consistent with the decision in *North Carolina Right to Life v. Leake*, 525 F.3d 274, 289 (4th Cir. 2008) (major purpose test is to be implemented by examining, *inter alia*, “if the organization spends the majority of its money on supporting or opposing candidates”). *But cf. New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 678 (10th Cir. 2010) (“comparison of the organization’s electioneering spending with overall spending to determine whether the preponderance of expenditures is for express advocacy or contributions to candidates” was relevant in evaluating state statute in which the definition of political committee was limited to groups organized “primarily” for political purposes).

1 candidate, and not an individual) could be required to be reported under the Act. For
2 example, the Court contrasted the potential for the individual disclosure requirements to
3 encompass “both issue discussion and advocacy of a political result.” *Id.* at 77.
4 Significantly, the former would have fallen outside of the definition of “expenditure” as
5 narrowed by *Buckley*, while the latter would not. Likewise, the Court emphasized that
6 the narrower “express advocacy” standard was necessary in the context of the Act’s
7 individual reporting requirements, but that it did not encompass “all partisan discussion,”
8 a broader category of speech reported by political committees and candidates. *Id.* at 80.
9 In sum, by relying on the express advocacy construction only for groups and individuals
10 other than political committees (or candidates), and by doing so in the immediate
11 paragraph following its discussion of the “major purpose” test, the Court clearly
12 eschewed reliance on an organization’s express advocacy communications as the
13 touchstone for whether it has met the “major purpose” standard.

14 Ten years after *Buckley*, the Supreme Court addressed the concept of “major
15 purpose” in holding that section 441b, prohibiting corporate expenditures from general
16 treasury funds, was unconstitutional as applied to MCFL, a nonprofit, nonstock
17 corporation which engaged in no more than occasional electoral advocacy. *See MCFL*,
18 479 U.S. at 241-42, 262. The Commission argued that section 441b should apply to
19 MCFL because it was free to set up a separate segregated fund through which it could
20 conduct campaign activity. *Id.* at 242. In rejecting this argument, the Court pointed out
21 that if MCFL were not incorporated, it would be subject only to the independent
22 expenditure reporting requirements applicable to persons other than political committees,
23 as were “[a]ll unincorporated organizations whose major purpose is not campaign

1 advocacy, but who occasionally make independent expenditures on behalf of candidates.”
2 *Id.* at 252-253. In the Court’s view, if an organization like MCFL had to set up a separate
3 segregated fund, it would be subject to organizational and reporting obligations that
4 might cause a disincentive to engage in political speech. *Id.* at 253-255.

5 The Court concluded, however, that MCFL was not a political committee, but
6 rather that “[i]ts central organizational purpose is issue advocacy, although it occasionally
7 engages in activity on behalf of political candidates.” *Id.* at 252, n.6. Nonetheless, the
8 Court noted that MCFL would still be subject to independent expenditure reporting, so
9 the state’s interest in disclosure could be met by less restrictive means. *Id.* at 262. The
10 Court then added:

11 Furthermore, should MCFL’s independent spending become so
12 extensive that the organization’s major purpose may be regarded
13 as campaign activity, the corporation would be classified as a
14 political committee. *See Buckley*, 424 U.S., at 79, 96 S.Ct., at
15 663. As such, it would automatically be subject to the obligations
16 and restrictions applicable to those groups whose primary
17 objective is to influence political campaigns.

18
19 *Id.* Moreover, as in *Buckley*, the *MCFL* court suggested that activities considered as
20 indicators for the major purpose test go beyond “expenditures” containing express
21 advocacy. *See MCFL*, 479 U.S. at 252-253, 262 (political committee requirements
22 inapplicable to “organizations whose major purpose is not *campaign advocacy*,” but
23 “political committee” does include organizations with a major purpose of “*campaign*
24 *activity*”) (emphasis added); *see also Real Truth About Obama v. FEC*, No. 3:08-CV-483
25 at 22-23 (E.D. Va. June 16, 2011) (concluding that *MCFL* did *not* hold that an
26 organization’s expenditures and the central purpose revealed in its organic documents
27 “are the exclusive indicia of an organization’s status as a political committee”).

**ii. The Commission's Case-By-Case Approach to
Major Purpose**

In examining the “major purpose” of organizations, the Commission has adopted a “case-by-case” approach that requires a fact-intensive analysis of a group’s organizational documents and public statements, as well as the group’s spending. *See* Supplemental E&J, 72 Fed. Reg. at 5601. The Commission’s decision was the result of a nearly decade-long examination of the major purpose test through rulemakings, litigation, and enforcement actions. During this time, the Commission weighed the benefits of a case-by-case approach against the benefits of a bright-line rule, including rules that would have established major purpose through a proportional (such as 50%) or aggregate threshold (such as \$50,000) amount spent by an organization. *See* Definition of Political Committee: Advance Notice of Proposed Rulemaking, 66 Fed. Reg. 13681, 13682 (March 7, 2001); Political Committee Status: Notice of Proposed Rulemaking, 69 Fed. Reg. 11736, 11746 (March 11, 2004); *See* Final Rules on Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68056, 68064-65 (November 23, 2004) (explaining that the Commission would not promulgate a regulation codifying a “major purpose” test for the political committee definition, and noting that the Commission had determined the “major purpose” test on a case-by-case basis for many years and would continue to do so in the future).

In its 2007 Supplemental E&J, the Commission explained that its decision to make political committee status determinations through enforcement actions, rather than by regulation, was necessary because the major purpose doctrine “requires the flexibility of a case-by-case analysis of an organization’s conduct that is incompatible with a one-

1 size fits-all rule.” 72 Fed. Reg. at 5601. *See Shays v. FEC*, 511 F. Supp. 2d 19, 29
2 (D.D.C. 2007) (“*Shays II*”) (upholding the Commission’s Supplemental E&J as an
3 appropriate exercise of agency’s ability to engage in case-by-case determination of
4 political committee status, and noting that “*Buckley* established the major purpose test,
5 but did not describe its application in any fashion”). In applying the case-by-case
6 approach, the Commission has indicated that it will analyze two primary factors when
7 examining whether a group has the requisite major purpose to trigger political committee
8 status: (1) a group’s stated purpose, as revealed through its public statements and internal
9 documents and communications and (2) a group’s spending, particularly whether its
10 electoral spending has become “extensive.” *See* Supplemental E&J, 72 Fed. Reg. at
11 5601. As discussed below, a group can satisfy the major purpose test through either a
12 single factor or a combination of both factors. *Id.*

13 **iii. Stated Purpose**

14 The Commission has indicated that an organization’s “major purpose” may be
15 established through public statements of its purpose. *See* Supplemental E&J, 72 Fed.
16 Reg. at 560. Additionally, “[b]ecause such statements may not be inherently conclusive,
17 the Commission must evaluate the statements of the organization in a fact-intensive
18 inquiry giving due weight to the form and nature of the statements, as well as the
19 speaker’s position within the organization.” *Id.* Moreover, the Commission’s
20 examination of a group’s major purpose “may reach well beyond publicly available
21 advertisements . . . to examine statements by the organization that characterize its
22 activities and purposes.” *Id.* (citations omitted).

1 The courts have endorsed the evaluation of public and non-public statements and
2 an organization's spending and contributions to determine its major purpose. *See, e.g.,*
3 *FEC v. Malenick*, 310 F. Supp. 2d 230, 234-37 (D.D.C. 2004) (court considered
4 organization's statements in brochures, "fax alerts" sent to potential and actual
5 contributors, and letter from president to organization's primary contributor, as well as its
6 spending influencing federal elections); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859,
7 864, 866 (D.D.C. 1996) ("The organization's purpose may be evidenced by its public
8 statements of its purpose or by other means;" court considered organization's meetings
9 attended by national leaders and the organization's "Political Strategy Campaign Plan
10 and Budget"). Additionally, "[a] declaration by the organization that they are *not*
11 incorporated for an electioneering purpose is not dispositive." *The Real Truth About*
12 *Obama v. Federal Election Commission*, No. 3:08-cv-00483, 2008 WL 4416282, at 14
13 (E.D. Va. Sept. 24, 2008) (denying motion for preliminary injunction against FEC's
14 enforcement of political committee status) (emphasis in original), *aff'd*, 575 F.3d 342 (4th
15 Cir. 2009), *vacated*, 130 S. Ct. 2371 (2010), *remanded to and decided*, No. 3:08-cv-
16 00483, __ WL __ (E.D. Va. Jun. 16, 2011) (granting FEC's motion for summary
17 judgment).

18 Crossroads GPS's response indicates it has at least four objectives: (1) electoral
19 spending; (2) grassroots lobbying; (3) issue advocacy; and (4) education of the general
20 public. *See* Response at 7. Notwithstanding its stated social welfare purposes,
21 Crossroads GPS appears to have the major purpose of partisan campaign activity to
22 support or defeat specifically identified federal candidates. Crossroads GPS has made
23 public statements that demonstrate that the organization's goal is to influence federal

1 elections. Almost immediately after its formation, Crossroads GPS reportedly announced
2 its intent to raise approximately \$50 million “to attack Democrats and boost Republicans
3 headed into the 2010 midterm election.” *See* Kenneth P. Vogel, *Rove-linked group uses*
4 *secret donors to fund attacks*, POLITICO (July 20, 2010). In addition, Mike Duncan (who
5 has been referenced in news sources as the Chairman of both Crossroads GPS and
6 American Crossroads) reportedly stated that both organizations “plan[ned] to plow more
7 than \$49 million . . . into 11 Senate races in anticipation that the Republican Party is
8 within reach of a Senate majority,” and that the races were being targeted because they
9 could help switch the control of the majority in the Senate to the Republican Party.
10 Ralph Hallow, *Pro-GOP Nonprofits Kick in Millions: Cash to target 11 Senate races*,
11 WASHINGTON TIMES (Aug. 19, 2010).

12 In the weeks before the November 2010 election, Crossroads GPS reportedly also
13 sought to impact the outcome of House of Representative races by participating in a
14 “House Surge Strategy” with American Crossroads and other nonprofit organizations:
15 “American Crossroads and its related advocacy group, Crossroads GPS, the American
16 Action Network and the Commission on Hope, Growth and Opportunity — began a
17 ‘House surge strategy,’ pouring \$50 million into several dozen competitive House races.”
18 *See* Ashley Parker, *The Caucus: Big Spending by Republican-Friendly Group*, NEW
19 YORK TIMES (Oct. 13, 2010); *see also* Dan Eggen, *Conservative group, flush with funds,*
20 *turns to House*, WASHINGTON POST (Oct. 14, 2010). “The blitz will mainly focus on races
21 where Democrats have a financial advantage. Crossroads is contributing \$10 million to
22 the joint effort, including \$2 million behind an initial set of ads that will go up Friday in
23 eight House races. The group said it anticipates that its investment would cover at least

1 15 races.” *Id.* Crossroads GPS President Steven Law further explained the goal of the
2 “House Surge Strategy,” reportedly saying that the effort was “aimed at putting
3 Republicans over the top by evening out the financial disparities and dramatically
4 expanding the field of battle.” Brody Mullins and Danny Yadron, *GOP Groups Launch*
5 *Massive Ad Blitz*, WALL STREET JOURNAL (Oct. 13, 2010).

6 In addition to its statements regarding its general intended level of spending for
7 2010, Crossroads GPS reportedly also stated its reasons for running advertisements in
8 specific races. “Carl Forti, who helped orchestrate spending decisions for American
9 Crossroads and Crossroads GPS . . . said the goal all along was to expand the political
10 map, putting Democrats on the defensive. Even if Democratic candidates ultimately won
11 some of those races, he said, the spending by Republican-leaning groups was still useful.
12 ‘All of those things impact the whole playing field,’ Mr. Forti said. ‘It’s not just wins
13 and losses.’” Michael Luo and Griff Palmer, *Outside Groups on the Right Flexed*
14 *Muscles*, NEW YORK TIMES (Nov. 4, 2010). Despite spending about \$4 million on the
15 2010 Nevada Senate race, in which the Democratic candidate still won, “Mr. Forti said
16 the Crossroads groups’ investment was hardly wasted, because it diverted Democratic
17 attention and resources from other races. ‘In Nevada, we made a difference,’ he said.
18 ‘We didn’t win, no. But we definitely made a difference.’” *Id.* Further, Mr. Forti
19 explained why American Crossroads and Crossroads GPS placed so much focus on the
20 Nevada race: “We were the only group that advertised all summer. . . . We’ve been on
21 [television] since the week after the primary, driving Harry [Reid]’s negatives and trying
22 to keep that race competitive, trying to keep [Sharron Angle] in it.” See Steve Peoples,
23 *GOP sees flaws in Tea Party candidates*, ROLL CALL (Nov. 3, 2010). In describing the

1 advertisement run in late August in Kentucky featuring the Democratic candidate for the
2 U.S. Senate, Jack Conway, Crossroads GPS spokesman Jonathan Collegio explained that
3 the reason for the advertisement was “Kentucky is a key state for control of the Senate.”
4 Bill Estep, *Conservative group fires first shot in U.S. Senate race ad war*, LEXINGTON
5 HERALD-LEADER (Aug. 26, 2010). The press reported that in February 2011, “American
6 Crossroads and Crossroads GPS disclosed in an annual report sent to donors . . . that they
7 spent 96% of the money raised on campaigns.” Brody Mullins, *2012 Election Spending*
8 *Race Heats Up: Independent Conservative Groups Set Goal of \$120 million*, WALL
9 STREET JOURNAL (Mar. 1, 2011) (“2012 Spending Race Heats Up”).

10 Finally, Crossroads GPS’s stated intent to influence elections is not limited to the
11 2010 election cycle. As the presidential election cycle of 2012 began, Crossroads GPS
12 and American Crossroads have set a combined goal of “raising \$120 million in the effort
13 to defeat President Barack Obama, win a GOP majority in the Senate and protect the
14 party’s grip on the House in the 2012 election.” See 2012 Spending Race Heats Up,
15 *supra*. See also American Crossroads and Crossroads GPS 2012 Press Releases, *supra*
16 Part II.A. In addition, they announced that the two Crossroads groups “will focus on
17 television advertising and other election activities, which could complement the
18 Republican National Committee’s focus on rallying Republican voters and funding state
19 parties.” 2012 Spending Race Heats Up, *supra*. See also, Dan Eggen, *Political groups,*
20 *now free of limits, spending heavily ahead of 2012*, WASHINGTON POST (May 21, 2011)
21 (“‘The Crossroads groups have stated that we’ll be involved heavily in 2012, both in
22 congressional races and the presidential side as well,’ Collegio said.”)

1 electioneering communication period that appear to support or oppose a federal
2 candidate,¹³ and at least \$4.6 million worth of partisan get-out-the-vote activity.

3 Although we do not know the full extent of Crossroads GPS's spending because it is a
4 501(c)(4) organization, a fact-intensive analysis of the group's known spending
5 establishes that Crossroads GPS has federal campaign activity as its major purpose.

6 To rebut the claim that its major purpose is federal campaign activity, Crossroads
7 GPS attempts to establish express advocacy as the sole indicator that an organization's
8 major purpose is federal campaign activity and to limit "political committee" status to
9 only those groups whose major purpose is *expressly advocating* the nomination or
10 election of a candidate. Not only is Crossroads GPS's position at odds with *Buckley* and
11 *MCFL*, see discussion *supra* at Part II.B.2.a., the Commission has never adopted that
12 position. In 2001 and 2004, major purpose standards based (1) only on "independent
13 expenditures" and/or (2) on requiring a mathematical majority (over 50%) of campaign
14 activity to be "independent expenditures" were proposed, but were not adopted. See
15 Definition of Political Committee: Advance Notice of Proposed Rulemaking, 66 Fed.
16 Reg. 13681, 13682 (March 7, 2001); Political Committee Status: Notice of Proposed
17 Rulemaking, 69 Fed. Reg. 11736, 11746 (March 11, 2004); Final Rules on Political
18 Committee Status, Definition of Contribution, and Allocation for Separate Segregated
19 Funds and Nonconnected Committees, 69 Fed. Reg. 68056, 68064-65 (November 23,
20 2004). The Commission has, however, adopted the broader terms used by the *Buckley*
21 and *MCFL* Courts. See Supplemental E&J, 72 Fed. Reg. at 5597 (limiting "political

¹³ In addition to featuring candidates for the U.S. Senate, it appears that these advertisements may also have been produced and aired as a means to "shape citizen attitudes with hard-hitting issue advocacy and usable message tools for Republicans and their supportive activist communities." See Concept Paper, *supra*. See also Kenneth P. Vogel, *Rove-linked group uses secret donors to fund attacks*, POLITICO (June 20, 2010).

committee” status to those organizations whose “major purpose is Federal campaign activity (*i.e.*, the nomination or election of a Federal candidate)”; *see also Real Truth About Obama v. FEC*, No. 3:08-CV-483 at 21-22 (E.D. Va. June 16, 2011) (“The FEC considers whether the group spends money extensively on campaign activities such as canvassing or phone banks, or on express advocacy communications” and “the FEC is entitled to consider the full range of an organization’s activities in deciding whether it is a political committee”).

Moreover, in evaluating “major purpose” in prior matters, the Commission also routinely has considered non-express advocacy communications directed to a particular candidate’s electorate that could be shown to be related to an organization’s support or opposition to a particular candidate. *See* Supplemental E&J, 72 Fed. Reg. at 5602, 5605(citing Factual and Legal Analyses in MURs 5511 and 5525 (Swiftboat Vets); MUR 5753 (League of Conservation Voters); and MUR 5754 (MoveOn.org Voter Fund)); *see also Federal Election Commission v. Citizens Club for Growth, Inc.*, Consent Judgment: Stipulation for Entry of Consent Judgment ¶22 (Sept. 6, 2007) (wherein Commission entered a stipulation, approved as part of a consent judgment, treating organization as a political committee because “the vast majority of [the group’s disbursements] were made in connection with federal elections, including, but not limited to, funding for candidate research, polling, and advertisements and other public communications referencing a clearly identified federal candidate”).

During 2010, Crossroads GPS made extensive disbursements for federal campaign activity. As a starting point, Crossroads GPS spent \$15,445,039.50 on independent expenditures reported to the Commission, and \$15,749,171.00 on express

1 advocacy in 2010. *See* Response at 7 and 13. Crossroads GPS spent an additional \$5.4
2 million for September-November electioneering communications as well as June-August
3 pre-electioneering period communications that supported or attacked many of the same
4 federal candidates being supported or opposed by its independent expenditures.
5 Additionally, Crossroads GPS and American Crossroads' joint statement that the two
6 groups planned to spend as much as \$10 million on get-out-the-vote activity in 2010
7 suggests that Crossroads GPS's share of the spending may have been between \$4.6 and
8 \$5.2 million.¹⁴ Michael Crowley, *The New GOP Money Stampede*, TIME (Sept. 16,
9 2010). This was far more than just "occasional" federal campaign activity.

10 Crossroads GPS asserts that "[a] simple comparison of the amount spent . . . on
11 express advocacy communications (\$15,445,039.50) versus the amount spent on other,
12 non-express advocacy activities (approximately \$23.7 million) in its first 6 months of
13 existence, demonstrates quite clearly that the "major purpose" of Crossroads GPS is *not*
14 Federal campaign activity." (Emphasis in original.) Response at 21. However,
15 Crossroads GPS's own reported statements to its donors conflict with the information it
16 provided in its response: "American Crossroads and Crossroads GPS disclosed in an
17 annual report sent to donors . . . that they spent 96% of the money raised on campaigns."
18 *See* 2012 Election Spending Race Heats Up, *supra*. This claim contradicts Crossroads
19 GPS's attempt to limit its federal campaign activity to the \$15,455,039.50 in independent
20 expenditures.

21 Second, Crossroads GPS has asserted that the \$15,445,039.50 that purportedly
22 consisted of all of its independent expenditures for 2010 did not trigger major purpose

¹⁴ An examination of American Crossroads' reports filed with the Commission indicate that American Crossroads' share of the \$10 million was between \$4,194,345 and \$5,406,203.

1 because it does not constitute a mathematical majority of its spending for that calendar
2 year. Response at 7. Crossroads GPS argues that the Commission should find major
3 purpose only where its primary activity is a “majority” of such spending, and the
4 response cites to *New Mexico Youth Organized v. Herrera*, 611 F.3d at 678, for the
5 proposition that major purpose may be determined by a “comparison of the
6 organization’s electioneering spending with overall spending to determine whether the
7 preponderance of expenditures is for express advocacy or contributions to candidates.”
8 However, in *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 1009-11 (9th
9 Cir. 2010), the U.S. Court of Appeals for the Ninth Circuit has concluded that the major
10 purpose test only requires that the group’s spending on “political advocacy” to be a
11 plurality to be considered an organization’s major purpose.¹⁵ See *Real Truth About*
12 *Obama v. FEC*, No. 3:08-CV-483 at 22-23 (E.D. Va. June 16, 2011) (concluding that
13 *MCFL* did *not* hold that an organization’s expenditures and the central purpose revealed
14 in its organic documents “are the exclusive indicia of an organization’s status as a
15 political committee”).

16 Based on the information in Crossroads GPS’s response and publicly available
17 sources, Crossroads GPS’s spending on federal campaign activity appears to have been
18 its major purpose under either the “majority” or “plurality” standards. Crossroads GPS’s
19 spending on independent expenditures, electioneering communications, and other public
20 communications that appear to support or oppose a federal candidate totaled
21 approximately \$21,453,954.48 in spending on federal campaign activity and represented
22 54.8% of Crossroads GPS’s total spending for 2010. Such spending would appear to be

¹⁵ The U.S. Supreme Court recently declined to review the Ninth Circuit’s decision. See *Human Life of Washington, Inc. v. Brumsickle*, 131 S.Ct. 1477 (2011).

1 so “extensive” that it would satisfy the major purpose test that the Commission set forth
2 in the 2007 Supplemental E&J when it explained it would examine a group’s
3 proportionate amount of spending on election-related activity. 72 Fed. Reg. at 5605.
4 Moreover, the inclusion of at least \$4.6 million that may have been spent on partisan get-
5 out-the-vote activities would increase Crossroads GPS’s known spending on federal
6 campaign activity to approximately \$26 million, or 66.6% of the group’s activity for
7 2010.

8 Crossroads GPS has not indicated to what extent its non-express advocacy budget
9 was allocated among grassroots lobbying, issue advocacy, and education, but considering
10 that the remaining \$23.7 million spent by Crossroads GPS would necessarily have to be
11 split among these activities, the nearly \$16 million spent on express advocacy may
12 constitute a clear plurality of the group’s spending. Despite Crossroads GPS’s own
13 response suggesting that its electoral spending is at least a plurality of its 2010 spending,
14 its statement to its donors “that [Crossroads GPS and American Crossroads] spent 96% of
15 the money raised on campaigns” suggests that well over a majority of Crossroads GPS’s
16 2010 spending was for federal campaign activity. This statement to its donors, as well as
17 the statement in its “Concept Paper” that it aimed to create “usable message tools for
18 Republicans,” suggests that at least some of the activities that Crossroads GPS labels as
19 grassroots lobbying, issue advocacy, and education may actually be campaign related. It
20 appears, therefore, that Crossroads GPS’s spending has been so extensive that its major
21 purpose can be considered federal campaign activity under either the “plurality” or
22 “majority” standards.

1 Finally, Crossroads GPS argues that “[g]iven the rough equivalence of the IRS
2 ‘primary purpose’ test and the FEC’s ‘major purpose’ test, a Section 501(c)(4)
3 organization that is in compliance with IRS standards *should* [not] be found to satisfy the
4 FEC’s ‘political committee’ test.” Response at 2. Crossroads GPS further argues that the
5 FEC should apply the major purpose test to activity that occurred during the group’s
6 fiscal tax year, which runs from June 1, 2010 to May 31, 2011. Crossroads GPS’s
7 arguments that standards relied on for tax purposes should be used in determining
8 political committee status has already been rejected by the Commission, which concluded
9 that “the use of the Internal Revenue Code classification to interpret and implement
10 FECA is inappropriate.” *See* 72 Fed. Reg. at 5599; *see also Shays v. FEC*, 337
11 F.Supp.2d 28, 126 (D.D.C. 2004) (“*Shays I*”) (“It is the FEC, not the IRS, that is charged
12 with enforcing FECA.”). Likewise, the Commission should not import the use of a fiscal
13 tax year into its determination of political committee status. Furthermore, using a fiscal
14 tax year would run counter to the principle that using the Internal Revenue Code to
15 interpret FECA is “inappropriate.” Finally, allowing organizations to use their own fiscal
16 tax year would allow them to manipulate the timeline for activity that can be considered
17 by the Commission. Rather, once an organization has surpassed the statutory threshold
18 for political committee status within a calendar year, *see* 2 U.S.C. § 431(4)(A), evaluation
19 of its major purpose under the Act may be considered.

20 3. Conclusion

21 Crossroads GPS satisfied the statutory threshold for political committee status by
22 spending nearly \$16 million on advertisements that expressly advocate for or against
23 federal candidates during the 2010 election cycle. In addition, Crossroads GPS’s public

1 statements focusing on electing Republican candidates to Congress or defeating
2 Democratic congressional candidates demonstrate that the group's major purpose is
3 federal campaign activity. Moreover, Crossroads GPS's spending on advertisements
4 featuring federal candidates and express advocacy phone calls not only supports the
5 group's statements that it intended to affect federal elections, but also provides an
6 independent basis for meeting the major purpose test: its spending was "so extensive"
7 that its major purpose should be regarded as federal campaign activity. Therefore,
8 Crossroads GPS appears to be a political committee under the Act that should have
9 registered, organized, and reported pursuant to 2 U.S.C. §§ 432, 433, and 434.

10 As an "independent expenditure only political committee," Crossroads GPS
11 would have to organize, register, and report with the Commission, but would not be
12 subject to the Act's source and amount limitations. *See SpeechNow*, 599 F.3d at 689;
13 Advisory Opinions 2010-09 (Club for Growth) and 2010-11 (Commonsense Ten). As
14 such, a determination that Crossroads GPS is a political committee implicates
15 "disclosure requirements [that] may burden the ability to speak, but . . . 'impose no
16 ceiling on campaign-related activities' and 'do not prevent anyone from speaking.'"
17 *Citizens United*, 130 S.Ct. at 914 (quoting *Buckley*, 424 U.S. at 64, and *McConnell*, 540
18 U.S. at 201).

19 Accordingly, the Commission finds reason to believe that Crossroads GPS violated
20 2 U.S.C. §§ 432, 433, and 434.

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3
4 RESPONDENT: Crossroads Grassroots Political Strategies MUR: 6368

5 **I. INTRODUCTION**

6 This matter was generated by a complaint filed with the Federal Election
7 Commission by the Missouri Democratic Party. *See* 2 U.S.C. § 437g(a)(1).

8 **II. FACTUAL AND LEGAL ANALYSIS**

9 **A. Factual Summary**

10 On August 21, 2010, Crossroads Grassroots Political Strategies (“Crossroads
11 GPS”), a nonprofit corporation organized under section 501(c)(4), began airing an
12 advertisement that criticized Roy Blunt’s opponent in the 2010 race for a U.S. Senate seat
13 in Missouri, Robin Carnahan, for supporting health care reform (“the Carnahan Ad”).
14 Complaint at 3. The Carnahan Ad, which references the results of a recent statewide
15 referendum on certain health care reform measures, includes the following voiceover
16 text:

17 The message is clear. 71% of Missouri voters don’t want
18 government-mandated health care. We want to make our
19 own health care decisions. But Robin Carnahan disagrees.
20 While 71% of us voted no, Carnahan sided with lobbyists,
21 big unions and Washington insiders to force Obamacare on
22 us. Missouri’s Lieutenant Governor is suing the federal
23 government so we can keep our health care. Tell Carnahan
24 to get in touch with Missourians and to support the health
25 care challenge.
26

27 *See* <http://www.youtube.com/watch?v=4tr9xEr9zgU>. The visual portion of the
28 advertisement contains a disclaimer stating the ad was paid for by Crossroads GPS. *Id.*
29 Crossroads GPS filed electioneering communication reports for television advertisements

1 referencing Robin Carnahan during this same time period. The complaint alleges that
2 Crossroads GPS coordinated the Carnahan Ad with the Blunt campaign, and thus
3 Crossroads GPS made, and the Committee accepted, a prohibited corporate in-kind
4 contribution. *See* Complaint at 4-5.

5 According to the complaint, Karl Rove actively campaigned for Blunt in Missouri
6 during the 2010 election cycle, including recording a message included in a web video
7 that was uploaded to the Internet on June 29, 2010. Complaint at 2-3. The video contains
8 a disclaimer that it was paid for and authorized by Friends of Roy Blunt, and in it Rove
9 notes Blunt's opposition to health care reform and contrasts it with Carnahan's support of
10 health care reform. *Id.* at 2. The complaint alleges that Rove and Blunt, on account of
11 their "close relationship," likely would have had "additional discussions of the [Blunt]
12 campaign's plans, projects, activities, and needs," and surmises that "given Rove's
13 intimate and well-publicized role in the organization, it is unlikely that the Crossroads
14 GPS created and aired the [Carnahan] ad without Rove's involvement." *Id.* at 3-4. The
15 complaint contends that Crossroads GPS coordinated the Carnahan Ad with Blunt and the
16 Committee and that the "close ties" between Karl Rove (who it alleges is associated with
17 American Crossroads, Crossroads GPS, and Blunt) satisfies the "conduct" prong of the
18 coordination analysis. Complaint at 1-2. Accordingly, the complaint contends that
19 Crossroads GPS would have made a contribution in excess of \$1,000 and, thus, would
20 have been required to register as a political committee. *Id.* at 5.

21 Crossroads GPS submitted a response denying any coordination with respect to
22 the Carnahan Ad. Crossroads GPS, in its response, asserts that Steven Law, its President,
23 and Carl Forti, its Advocacy Director, made the decision to create and distribute the

1 Carnahan Ad, and that Karl Rove, who holds no formal position with Crossroads GPS,
2 played no part in the process. Crossroads GPS Response at 2-3; *see also* Law Affidavit
3 at ¶ 4 and Forti Affidavit at ¶ 5. Further, Crossroads GPS states that the Carnahan Ad
4 was produced by “‘firewalled’ vendors.” *Id.*

5 Crossroads GPS additionally argues that the web video endorsement by Rove
6 does not, on its face, indicate what “inside information” might have been relayed to Rove
7 during its taping that was subsequently used by Crossroads GPS in creating the Carnahan
8 Ad.¹ *Id.* at 4. Indeed, Crossroads GPS asserts that the Carnahan Ad concerned a
9 ubiquitous political issue, and that Crossroads GPS would not have needed to coordinate
10 with Blunt or his Committee in order to understand the issue’s relevance to the Blunt-
11 Carnahan race. Crossroads GPS Response at 4. Finally, Crossroads GPS contends that
12 the complaint presents no actual evidence of coordination, but only mere speculation, and
13 that the complaint should be dismissed on that basis. Crossroads GPS Response at 1-2.

14 **B. Legal Analysis**

15 **1. Coordination**

16 The Federal Election Campaign Act of 1971, as amended (“the Act”), prohibits
17 corporations from making contributions from their general treasury funds in connection
18 with any election of any candidate for federal office. 2 U.S.C. § 441b(a). Further, no
19 candidate or political committee may knowingly accept a corporate contribution. *Id.*

20 Under the Act, an expenditure made by any person “in cooperation, consultation,
21 or concert, with, or at the request or suggestion of, a candidate, his authorized political
22 committees or their agents” constitutes an in-kind contribution. 2 U.S.C.
23 § 441a(a)(7)(B)(i). A communication is coordinated with a candidate, a candidate’s

1 ¹ See <http://www.youtube.com/watch?v=tkIJ-r9Gi1.U>.

1 authorized committee, or agent of the candidate or committee when the communication
2 satisfies the three-pronged test set forth in 11 C.F.R. § 109.21(a): (1) the communication
3 is paid for by a person other than that candidate or authorized committee; (2) the
4 communication satisfies at least one of the content standards set forth in 11 C.F.R.
5 § 109.21(c); and (3) the communication satisfies at least one of the conduct standards set
6 forth in 11 C.F.R. § 109.21(d). The Commission's regulations at 11 C.F.R. § 109.21
7 provide that coordinated communications constitute in-kind contributions from the party
8 paying for such communications to the candidate, the candidate's authorized committee,
9 or the political party committee which coordinates the communication. As an in-kind
10 contribution, the costs of coordinated communications must not exceed a political
11 committee's applicable contribution limits. *See* 2 U.S.C. § 441a.

12 **a. Payment**

13 In this matter, the first prong of the coordinated communication test is satisfied
14 because Crossroads GPS is a third-party payor. *See* 11 C.F.R. § 109.21(a)(1).
15 Crossroads GPS has admitted in its response that it has paid for the Carnahan Ad and has
16 filed an FEC Form 9 disclosing its payment for the advertisement as an electioneering
17 communication. *See* Crossroads GPS, FEC Form 9 (Sept. 3, 2010).

18 **b. Content**

19 The second prong of this test, the content standard, is also satisfied. The content
20 prong is satisfied if a communication meets at least one of the following content
21 standards: (1) a communication that is an electioneering communication under 11 C.F.R.
22 § 100.29; (2) a public communication that disseminates, distributes, or republishes, in
23 whole or in part, campaign materials prepared by a candidate or the candidate's

1 authorized committee; (3) a public communication that expressly advocates the election
2 or defeat of a clearly identified candidate for Federal office; or (4) a public
3 communication, in relevant part, that refers to a clearly identified House or Senate
4 candidate, and is publicly distributed or disseminated in the clearly identified candidate's
5 jurisdiction 90 days or fewer before the candidate's primary election.² See 11 C.F.R.
6 § 109.21(c).

7 The Carnahan Ad satisfies the content standard because the Carnahan Ad is a an
8 electioneering communication, *see* 11 C.F.R. § 109.21(n), and it is a public
9 communication that refers to a clearly identified candidate for federal office (Robin
10 Carnahan), and was broadcast in the clearly identified candidate's jurisdiction within 90
11 days of the November 2, 2010 general election. See 11 C.F.R. § 109.21(c).

12 **c. Conduct**

13 The conduct prong is satisfied where any of the following types of conduct
14 occurs: (1) the communication was created, produced, or distributed at the request or
15 suggestion of a candidate or his campaign; (2) the candidate or his campaign was
16 materially involved in decisions regarding the communication; (3) the communication
17 was created, produced, or distributed after substantial discussions with the campaign or
18 its agents; (4) the parties contracted with or employed a common vendor that used or
19 conveyed material information about the campaign's plans, projects, activities or needs,
20 or used material information gained from past work with the candidate to create, produce,
21 or distribute the communication; (5) the payor employed a former employee or

² A "public communication" is defined as a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank, or any other form of general public political advertising. 11 C.F.R. § 100.26.

1 independent contractor of the candidate who used or conveyed material information
2 about the campaign's plans, projects, activities or needs, or used material information
3 gained from past work with the candidate to create, produce, or distribute the
4 communication; or (6) the payor republished campaign material. *See* 11 C.F.R.
5 § 109.21(d).

6 The complaint contends that the "conduct" prong is satisfied, essentially, because
7 Blunt has "close ties" to Rove, and Rove has connections to Crossroads GPS. However,
8 the complaint is based on speculative inferences drawn on nothing more than Rove's
9 relationship with both Blunt and Crossroads GPS. *See* Complaint at 3-4. It presents no
10 facts supporting the allegation that the Carnahan Ad was created, produced, or distributed
11 at the request or suggestion of Blunt or the Committee, or that Blunt, the Committee, or
12 Rove were materially involved with any aspect of the Carnahan Ad, that Blunt had any
13 substantial discussions with Crossroads GPS or Rove about the Carnahan Ad, that a
14 former employee or independent contractor of the Blunt campaign was involved with the
15 Carnahan Ad, or that the Blunt campaign and Crossroads GPS shared a common vendor.
16 Further, as noted above, Crossroads GPS's response explicitly denies that there was any
17 such interaction. The Crossroads GPS response, which is supported by affidavits from
18 Messrs. Corti and Law, also indicates that Mr. Rove, the individual with past ties to
19 Blunt, played no role in creating or placing the advertisement. *See* Crossroads GPS
20 Response at 3-4 and attached affidavits. There is no information to the contrary. As
21 such, there is no basis on which to conclude that the Carnahan Ad satisfied the "conduct"
22 prong.

- 1 Accordingly, the Commission finds no reason to believe that Crossroads
- 2 Grassroots Policy Strategies violated 2 U.S.C. § 441b(a) by making a prohibited
- 3 corporate in-kind contribution in the form of a coordinated expenditure.

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3
4 **RESPONDENTS:** Senator Roy Blunt and MUR: 6368
5 Friends of Roy Blunt and Gordon Elliott,
6 in his official capacity as Treasurer
7

8 **I. INTRODUCTION**

9 This matter was generated by a complaint filed with the Federal Election
10 Commission by the Missouri Democratic Party. *See* 2 U.S.C. § 437g(a)(1).

11 **II. FACTUAL AND LEGAL ANALYSIS**

12 **A. Factual Summary**

13 On August 21, 2010, Crossroads GPS, a nonprofit corporation organized under
14 section 501(c)(4), began airing an advertisement that criticized Roy Blunt's opponent in
15 the 2010 race for a U.S. Senate seat in Missouri, Robin Carnahan, for supporting health
16 care reform ("the Carnahan Ad"). Complaint at 3. The Carnahan Ad, which references
17 the results of a recent statewide referendum on certain health care reform measures,
18 includes the following voiceover text:

19 The message is clear. 71% of Missouri voters don't want
20 government-mandated health care. We want to make our
21 own health care decisions. But Robin Carnahan disagrees.
22 While 71% of us voted no, Carnahan sided with lobbyists,
23 big unions and Washington insiders to force Obamacare on
24 us. Missouri's Lieutenant Governor is suing the federal
25 government so we can keep our health care. Tell Carnahan
26 to get in touch with Missourians and to support the health
27 care challenge.
28
29

30 *See* <http://www.youtube.com/watch?v=4lr9xEr9zgU>. The visual portion of the
31 advertisement contains a disclaimer stating the ad was paid for by Crossroads GPS. *Id.*

1 Crossroads GPS filed electioneering communication reports for television advertisements
2 referencing Robin Carnahan during this same time period. The complaint alleges that
3 Crossroads GPS coordinated the Carnahan Ad with the Blunt campaign, and thus
4 Crossroads GPS made, and the Committee accepted, a prohibited corporate in-kind
5 contribution. *See* Complaint at 4-5.

6 According to the complaint, Karl Rove actively campaigned for Blunt in Missouri
7 during the 2010 election cycle, including recording a message included in a web video
8 that was uploaded to the Internet on June 29, 2010. Complaint at 2-3. The video contains
9 a disclaimer that it was paid for and authorized by Friends of Roy Blunt, and in it Rove
10 notes Blunt's opposition to health care reform and contrasts it with Carnahan's support of
11 health care reform. *Id.* at 2. The complaint alleges that Rove and Blunt, on account of
12 their "close relationship," likely would have had "additional discussions of the [Blunt]
13 campaign's plans, projects, activities, and needs," and surmises that "given Rove's
14 intimate and well-publicized role in the organization, it is unlikely that the Crossroads
15 GPS created and aired the [Carnahan] ad without Rove's involvement." *Id.* at 3-4. The
16 complaint contends that Crossroads GPS coordinated the Carnahan Ad with Blunt and the
17 Committee and that the "close ties" between Karl Rove (who it alleges is associated with
18 American Crossroads, Crossroads GPS, and Blunt) satisfies the "conduct" prong of the
19 coordination analysis. Complaint at 1-2. Accordingly, the complaint contends that
20 Crossroads GPS would have made a contribution in excess of \$1,000 and, thus, would
21 have been required to register as a political committee. *Id.* at 5.

22 Senator Blunt and the Committee submitted a joint response denying any
23 coordination with respect to the Carnahan Ad. Respondents assert that the Carnahan Ad

1 concerned a ubiquitous political issue, and that Crossroads GPS would not have needed
2 to coordinate with Blunt or his Committee in order to understand the issue's relevance to
3 the Blunt-Carnahan race. Blunt/Committee Response at 2. Respondents further maintain
4 that the "conduct" prong is not satisfied by Crossroads GPS's alleged connection with
5 Rove, nor by any other claim in the complaint. Blunt/Committee Response at 1-2.

6 **B. Legal Analysis**

7 **1. Coordination**

8 The Federal Election Campaign Act of 1971, as amended ("the Act"), prohibits
9 corporations from making contributions from their general treasury funds in connection
10 with any election of any candidate for federal office. 2 U.S.C. § 441b(a). Further, no
11 candidate or political committee may knowingly accept a corporate contribution. *Id.*

12 Under the Act, an expenditure made by any person "in cooperation, consultation,
13 or concert, with, or at the request or suggestion of, a candidate, his authorized political
14 committees or their agents" constitutes an in-kind contribution. 2 U.S.C.

15 § 441a(a)(7)(B)(i). A communication is coordinated with a candidate, a candidate's
16 authorized committee, or agent of the candidate or committee when the communication
17 satisfies the three-pronged test set forth in 11 C.F.R. § 109.21(a): (1) the communication
18 is paid for by a person other than that candidate or authorized committee; (2) the
19 communication satisfies at least one of the content standards set forth in 11 C.F.R.

20 § 109.21(c); and (3) the communication satisfies at least one of the conduct standards set
21 forth in 11 C.F.R. § 109.21(d). The Commission's regulations at 11 C.F.R. § 109.21
22 provide that coordinated communications constitute in-kind contributions from the party
23 paying for such communications to the candidate, the candidate's authorized committee,

1 or the political party committee which coordinates the communication. As an in-kind
2 contribution, the costs of coordinated communications must not exceed a political
3 committee's applicable contribution limits. *See* 2 U.S.C. § 441a.

4 **a. Payment**

5 In this matter, the first prong of the coordinated communication test is satisfied because
6 Crossroads GPS is a third-party payor. *See* 11 C.F.R. § 109.21(a)(1). Crossroads GPS
7 has has filed an FEC Form 9 disclosing its payment for the advertisement as an
8 electioneering communication. *See* Crossroads GPS, FEC Form 9 (Sept. 3, 2010).

9 **b. Content**

10 The second prong of this test, the content standard, is also satisfied. The content
11 prong is satisfied if a communication meets at least one of the following content
12 standards: (1) a communication that is an electioneering communication under 11 C.F.R.
13 § 100.29; (2) a public communication that disseminates, distributes, or republishes, in
14 whole or in part, campaign materials prepared by a candidate or the candidate's
15 authorized committee; (3) a public communication that expressly advocates the election
16 or defeat of a clearly identified candidate for Federal office; or (4) a public
17 communication, in relevant part, that refers to a clearly identified House or Senate
18 candidate, and is publicly distributed or disseminated in the clearly identified candidate's
19 jurisdiction 90 days or fewer before the candidate's primary election.¹ *See* 11 C.F.R.
20 § 109.21(c).

¹ A "public communication" is defined as a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank, or any other form of general public political advertising. 11 C.F.R. § 100.26.

1 The Carnahan Ad satisfies the content standard because the Carnahan Ad is a an
2 electioneering communication, *see* 11 C.F.R. § 109.21(a), and it is a public
3 communication that refers to a clearly identified candidate for federal office (Robin
4 Carnahan), and was broadcast in the clearly identified candidate's jurisdiction within 90
5 days of the November 2, 2010 general election. *See* 11 C.F.R. § 109.21(c).

6 **c. Conduct**

7 The conduct prong is satisfied where any of the following types of conduct
8 occurs: (1) the communicatim was created, produced, or distributed at the request or
9 suggestion of a candidate or his campaign; (2) the candidate or his campaign was
10 materially involved in decisions regarding the communication; (3) the communication
11 was created, produced, or distributed after substantial discussions with the campaign or
12 its agents; (4) the parties contracted with or employed a common vendor that used or
13 conveyed material information about the campaign's plans, projects, activities or needs,
14 or used material information gained from past work with the candidate to create, produce,
15 or distribute the communication; (5) the payor employed a former employee or
16 independent contractor of the candidate who used or conveyed material information
17 about the campaign's plans, projects, activities or needs, or used material information
18 gained from past work with the candidate to create, produce, or distribnte the
19 communication; or (6) the payor republished campaign material. *See* 11 C.F.R.
20 § 109.21(d).

21 The complaint contends that the "conduct" prong is satisfied, essentially, because
22 Blunt has "close ties" to Rove, and Rove has connections to Crossroads GPS. However,
23 the complaint is based on speculative inferences drawn on nothing more than Rove's

1 relationship with both Blunt and Crossroads GPS. *See* Complaint at 3-4. It presents no
2 facts supporting the allegation that the Carnahan Ad was created, produced, or distributed
3 at the request or suggestion of Blunt or the Committee, or that Blunt, the Committee, or
4 Rove were materially involved with any aspect of the Carnahan Ad, that Blunt had any
5 substantial discussions with Crossroads GPS or Rove about the Carnahan Ad, that a
6 former employee or independent contractor of the Blunt campaign was involved with the
7 Carnahan Ad, or that the Blunt campaign and Crossroads GPS shared a common vendor.
8 Further, as noted above, the Blunt/Committee's response explicitly denies that there was
9 any such interaction: There is no information to the contrary. As such, there is no basis
10 on which to conclude that the Carnahan Ad satisfied the "conduct" prong.

11 Accordingly, the Commission finds no reason to believe that Senator Roy Blunt
12 and Friends of Roy Blunt and Gordon Elliott, in his official capacity as Treasurer,
13 violated 2 U.S.C. § 441b(a) by accepting a prohibited corporate in-kind contribution in
14 the form of a coordinated expenditure.