

SENSITIVE

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

FIRST GENERAL COUNSEL'S REPORT

**MUR: 6396
DATE COMPLAINT FILED: 10/14/2010
DATE OF NOTIFICATION: 10/21/2010
DATE OF LAST RESPONSE: 10/10/2011¹
DATE ACTIVATED: 2/7/2011**

EXPIRATION OF SOL: 9/1/2014

COMPLAINANTS:

**Public Citizen
ProtectOurElections.org
ProsperityAgenda.us
AmericanCrossroadsWatch.org
Kevin Zeese
Craig Holman
Missouri Democratic Party²**

RESPONDENT:

Crossroads Grassroots Policy Strategies

**RELEVANT STATUTES
AND REGULATIONS:**

**2 U.S.C. § 431(4)
2 U.S.C. § 432
2 U.S.C. § 433
2 U.S.C. § 434
26 U.S.C. § 501(c)
11 C.F.R. § 100.22**

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

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¹ Crossroads GPS filed an initial response to the complaint on December 22, 2010 ("Response"). On September 9, 2011, Crossroads GPS submitted a supplemental response describing its activity from December 2010 through August 2011 ("Supplemental Response"). On October 10, 2011, Crossroads GPS submitted an additional response to several news articles discussing its activities ("Second Supplemental Response").

² In MUR 6368, the Missouri Democratic Party alleged that Crossroads GPS became a political committee in 2010 when it aired the "Lawsuit" advertisement discussed in this report. Because the allegation in MUR 6368 regarding Crossroads GPS's political committee status overlaps with the allegations contained in MUR 6396, we recommended in MUR 6368 that the Commission sever that allegation and treat it as part of MUR 6396. We therefore treat the Missouri Democratic Party as a Complainant in this matter.

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1 **I. INTRODUCTION**

2
3 In 2010, Crossroads Grassroots Policy Strategies ("Crossroads GPS") spent millions of
4 dollars on federal campaign activity. This matter involves allegations that Crossroads GPS
5 violated the Federal Election Campaign Act of 1971, as amended, (the "Act") by failing to
6 organize, register, and report as a political committee in 2010. *See* Compl. at 1-2.

7 Crossroads GPS acknowledges making and reporting approximately \$15.4 million in
8 independent expenditures during 2010. *Resp.* at 7. As a consequence, Crossroads GPS concedes
9 that it exceeded the Act's \$1,000 threshold for expenditures or contributions triggering political
10 committee status. 2 U.S.C. § 431(4). Crossroads GPS argues, however, that it is not a political
11 committee under the Act because it lacks the requisite major purpose: the nomination or election
12 of a federal candidate. *Resp.* at 1. Crossroads GPS's argument rests on the assertion that, in
13 2010, it spent greater sums on activity not considered express advocacy than it did on
14 independent expenditures. *Id.* In our view, the argument is wide of the mark.

15 As discussed below, the available information regarding Crossroads GPS's overall conduct
16 in 2010 supports a finding that there is reason to believe that Crossroads GPS had as its major
17 purpose the nomination or election of federal candidates. Accordingly, we recommend that the
18 Commission find reason to believe that Crossroads GPS violated 2 U.S.C. §§ 432, 433, and 434
19 by failing to organize, register, and report as a political committee, and authorize an
20 investigation.

21

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1 **II. FACTUAL AND LEGAL ANALYSIS**

2 **A. Facts**

3 1. Crossroads GPS

4 Crossroads GPS is a non-profit corporation that was founded on June 1, 2010. Resp. at 7.

5 It applied for 501(c)(4) status as a social welfare organization in September 2010; the Internal
6 Revenue Service ("IRS") has yet to act on its application. Second Supp. Resp. at 3.³ Crossroads
7 GPS's current officers and directors are Steven Law (President), Steven Duffield (Vice President
8 for Policy), Sally Vastola (Secretary and Board Member), Bobby Burchfield (Board Member),
9 and Rob Collins (Board Member). See <http://www.crossroadsgps.org/leadership-team>.

10 Crossroads GPS's Articles of Incorporation state that it "is established primarily to
11 further the common good and general welfare of the citizens of the United States of America."

12 Resp. at 15. Crossroads GPS's 2010 Tax Return describes its mission as:

13 Engaging in public communications and direct contact with interested
14 constituencies to advocate policy outcomes on pending legislative and
15 regulatory issues such as: health care reform, taxes, spending and deficits,
16 Congressional reform and energy and environment. The purpose of these
17 issue advocacy and grassroots lobbying activities is to promote policies
18 that strengthen the nation's economy, reduce regulation of private sector
19 activity, and restore government to a sound financial footing.

20
21 See 2010 Tax Return at 1, 43.

22 According to its Articles of Incorporation, to further its stated mission Crossroads GPS
23 "engag[es] in research, education, and communication efforts regarding policy issues of national

³ Several letters challenging the classification of Crossroads GPS as a 501(c)(4) corporation have been filed with the IRS over the past two years. See, e.g., Letter from Gerald Herbert, Executive Director, Campaign Legal Center, and Fred Wertheimer, President, Democracy 21 to Hon. Douglas H. Shulman, Commissioner, IRS, and Lois Lerner, Director of Exempt Organizations Division, IRS (Sept. 27, 2012), available at http://www.democracy21.org/vertical/sites/%7B3D66FAFE-2697-446F-BB39-85FBBBA57812%7D/uploads/IRS_LETTER_CROSSROADS_GPS_Sept_27.pdf.

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1 importance that will impact America's economy and national security in the years ahead." Resp.
2 at 15. On its website, Crossroads GPS states that it is "a policy and grassroots advocacy
3 organization that is committed to educating, equipping and mobilizing millions of American
4 citizens to take action on the critical economic and legislative issues that will shape our nation's
5 future in the years ahead." See <http://www.crossroadsgps.org/about>. In its Response, Crossroads
6 GPS proffers that its "primary mission in 2010 and beyond is to advance the '7 in '11' National
7 Action Plan," which "lists seven key priorities for legislative action this fall or in a 'lame-duck'
8 session of Congress or in 2011." Resp. at 16 (quoting "7 in '11" Plan).

9 Crossroads GPS has a close relationship with what it refers to as a "sister organization,"
10 American Crossroads, a Section 527 political organization that registered with the Commission
11 as an independent expenditure-only political committee on August 10, 2010.⁴ Both Crossroads
12 GPS and American Crossroads operate from the same address and share in common at least four
13 corporate officers and employees: (1) Law, who is President of both organizations; (2) Margee
14 Clancy, who is listed as Treasurer for both organizations in their tax filings in 2010 and 2011;
15 (3) Jonathan Collegio, who is the Communications Director for both organizations; and (4) Carl
16 Forti, who is the Political Director for American Crossroads and the Advocacy Director for
17 Crossroads GPS.⁵ Collegio — a spokesman on behalf of both organizations — has emphasized
18 that, despite sharing some employees, the two organizations are distinct entities with separate
19 boards and legal structures.⁶ Yet, Collegio also has reportedly stated that the two groups raise

⁴ See *Crossroads GPS and American Crossroads Pledge \$120 million for 2012 Election* (Mar. 1, 2011), <http://www.crossroadsgps.org/2011/03/crossroads-gps-and-american-crossroads-pledge-120-million-for-2012-effort>.

⁵ See <http://www.americancrossroads.org/leadership-team>; 2010 Tax Return; 2011 Tax Return.

⁶ See Bill Estep, *Conservative Group Fires First Shot in the U.S. Senate Race Ad War*, LEXINGTON HERALD-LEADER (Aug. 26, 2010) (modified June 11, 2011).

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1 funds jointly and that “the fact that we’re raising it for two groups instead of one is a distinction
2 without a difference.”⁷

3 According to Law’s public statements, the reason for creating two organizations “was
4 that there are a number of things that are priorities for us that seemed to fit more into a 501(c)(4)
5 than a 527, such as doing very legislatively focused issue advocacy activity” and “building out a
6 very substantial grassroots activist network.”⁸ Law has also publicly acknowledged, however,
7 that contributor confidentiality provided by section 501(c)(4)⁹ is a valuable tool in fundraising.¹⁰

8 **2. Crossroads GPS’s 2010 and 2011 Activities**
9

10 According to its publicly-available tax returns, from the founding of Crossroads GPS on
11 June 1, 2010, through the end of 2011, it raised \$76,806,799 and spent \$64,720,514.¹¹ Focusing
12 on 2010, Crossroads GPS states that it raised approximately \$43.6 million and spent
13 approximately \$39.1 million on “communications with the public, pre-production activities in
14 support of these communications, and grants to other non-profit organizations engaged in social
15 welfare activities.” Resp. at 7.¹² Of the approximately \$ 39.1 million spent, Crossroads GPS

⁷ See Kenneth P. Vogel, *Rove-linked Group Uses Secret Donors to Fund Attacks*, POLITICO (July 20, 2010).

⁸ Kenneth P. Vogel, *Crossroads Hauls in \$8.5M in June*, POLITICO (June 30, 2010).

⁹ IRS rules relating to charitable organizations do not require 501(c)(4) and other charitable organizations to disclose publicly the identities and addresses of their contributors. See IRS, *Public Disclosure and Availability of Exempt Organizations Returns and Applications: Contributors’ Identities Not Subject to Disclosure*, available at <http://www.irs.gov/Charities-&-Non-Profits/Public-Disclosure-and-Availability-of-Exempt-Organizations>Returns-and-Applications:-Contributors'-Identities-Not-Subject-to-Disclosure> (last updated Aug. 2, 2012).

¹⁰ *Id.* Crossroads GPS argues that Law’s statement regarding donor disclosure “is irrelevant to the legal analysis of ‘political committee’ status.” Second Supp. Resp. at 3.

¹¹ 2010 Tax Return at 1; 2011 Tax Return at 1. Crossroads GPS’s 2010 Tax Return covers the tax year beginning on June 1, 2010, and ending on May 31, 2011. Crossroads GPS’s 2011 Tax Return covers the tax year beginning on June 1, 2011, and ending on December 31, 2011.

¹² Crossroads GPS’s initial response to the complaint was filed on December 23, 2010. These figures reflect totals through December 15, 2010.

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1 reported spending approximately \$15.4 million in independent expenditures in 2010:
2 \$13,259,915.13 for communications expressly advocating the election or defeat of a candidate in
3 seven elections for the U.S. Senate, and \$2,185,124.37 for communications expressly advocating
4 the election or defeat of candidates in eight elections for the U.S. House of Representatives. *Id.*
5 Crossroads GPS maintains that nearly all of its remaining spending in 2010, approximately \$23.7
6 million, was for activities furthering its stated exempt purpose, such as issue advocacy,
7 grassroots lobbying, and educational activities. *Id.* Thus, Crossroads GPS maintains that 59
8 percent of its 2010 spending was to further its exempt purpose, 39 percent was for independent
9 expenditures, and two percent was for overhead and administrative expenses. *Id.* at 7-8.

10 Crossroads GPS claims that the following 2010 activities furthered its exempt purpose:

- 11 • \$4.3 million for seven television advertisements airing more than 60 days prior to
12 the 2010 general election: "Worried"; "Calendar"; "Debt Clock"; "Lawsuit";
13 "Wrong Way"; "Thanks Harry"; and "Hurting."¹³
14
- 15 • \$1,104,783.48 for four electioneering communications: "Debt Clock Long";
16 "Health/Bad Sign"; "Health/Baby"; and "Jobs/Thanks a Lot."¹⁴
17
- 18 • "Hundreds of thousands of dollars" on the radio advertisement "Deal," urging
19 listeners to contact specified Members of Congress to vote to extend tax cuts and
20 in support of spending cuts.
21
- 22 • An unknown amount on print advertisement supporting S.3773, the Tax Hike
23 Prevention Act.
24
- 25 • An unknown amount on "numerous issue advocacy mailings and phone calls."¹⁵

¹³ Resp. at 8. Federal candidates were identified in each advertisement: "Worried" – Barbara Boxer (CA); "Calendar" and "Debt Clock" – Michael Bennett (CO); "Lawsuit" – Robin Carnahan (MO); "Wrong Way" – Jack Conway (KY); "Thanks, Harry" – Harry Reid (NV); and "Hurting" – Joe Sestak (PA).

¹⁴ Resp. at 9. Federal candidates were identified in each of these communications: "Debt Clock Long" – Michael Bennett (CO); "Health/Bad Sign" – Jack Conway (KY); "Health/Baby" – Robin Carnahan (MO); and "Jobs/Thanks a Lot" – Harry Reid (NV). Crossroads GPS notes that some of the electioneering communications were identical to advertisements aired before the electioneering communications window, such as "Debt Clock" and "Debt Clock Long." *Id.*

¹⁵ Scripts of these communications were not provided with the Response. Crossroads GPS states that it spent \$4,500 on express advocacy phone calls that were reported to the Commission, bringing the total spent on

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- 1
- 2 • Grants to section 501(c)(4) organizations for activities consistent with each
- 3 organization's exempt purpose.¹⁶
- 4
- 5 • An unknown amount on conducting and publicizing a nationwide public opinion
- 6 study on extending Bush-era tax rates.¹⁷
- 7
- 8 • An unknown amount on building and maintaining the Crossroads GPS website.
- 9
- 10 • An unknown amount on developing and publicizing its "7 in '11" National Action
- 11 Plan, which listed the group's priorities for legislative action in late 2010 and
- 12 2011.
- 13
- 14 • An unknown amount on "extensive research to create lists of citizens who are
- 15 concerned about issues."¹⁸
- 16

17 *Id.* at 8-13.

18

19 In its Supplemental Response, Crossroads GPS states that, from December 2010 through

20 August 2011, it did not "engage[] in any express advocacy," but rather "devoted substantial

21 resources to a variety of issue advocacy, watchdog and accountability projects." *Supp. Resp.*

22 at 1. Its principal project during that time was the "Jobs, Economy, and Debt Initiative," a series

23 of advertisements criticizing President Obama and several members of Congress and the Senate,

24 on which Crossroads GPS spent approximately \$20 million. *Id.* at 4-6.

independent expenditures in 2010 from \$15,445,039.50 to \$15,749,171. *See Resp.* at 13. We were unable to account for the varying figures, but the discrepancy is not material.

¹⁶ The 2010 Tax Return, which covers activity from June 1, 2010, through May 31, 2011, states that Crossroads GPS gave grants totaling \$15,860,000. 2010 Tax Return at 2. It is unclear how much of this was spent during calendar year 2010 and how much was spent during 2011. Crossroads GPS states that "grants are accompanied by a letter of transmittal stating that the funds are to be used only for exempt purposes, and not for political expenditures, consistent with the organization's tax-exempt mission." 2010 Tax Return at 40.

¹⁷ The group spent a total of \$1,410,141 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 most inclined to take action on through grassroots participation." *See* 2010 Tax Return at 2; 2011 Tax Return at 2. This activity may have been part of this category of expenses.

¹⁸ *Resp.* at 12-13.

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1 Crossroads GPS argues that all of this activity shows that it does not have as its major
2 purpose the nomination or election of federal candidates, and therefore it is not a political
3 committee under the Act and Commission regulations.

4 **B. Analysis**

5 1. The Test for Political Committee Status

6 The Act and Commission regulations define a “political committee” as “any committee,
7 club, association or other group of persons which receives contributions aggregating in excess of
8 \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000
9 during a calendar year.” 2 U.S.C. § 431(4)(A); 11 C.F.R. § 100.5. In *Buckley v. Valeo*, 424 U.S.
10 1 (1976), the Supreme Court held that defining political committee status “only in terms of the
11 annual amount of ‘contributions’ and ‘expenditures’” might be overbroad, reaching “groups
12 engaged purely in issue discussion.” *Id.* at 79. To cure that infirmity, the Court concluded that
13 the term “political committee” “need only encompass organizations that are under the control of
14 a candidate or the *major purpose of which is the nomination or election of a candidate.*” *Id.*
15 (emphasis added). Accordingly, under the statute as thus construed, an organization that is not
16 controlled by a candidate must register as a political committee only if (1) it crosses the \$1,000
17 threshold and (2) it has as its “major purpose” the nomination or election of federal candidates.

18 a. The Commission’s Case-By-Case Approach to Major Purpose

19 Although *Buckley* established the major purpose test, it provided no guidance as to the
20 proper approach to determine an organization’s major purpose. *See, e.g., Real Truth About*
21 *Abortion, Inc. v. FEC*, 681 F.3d 544, 556 (4th Cir. 2012), *petition for cert. filed*, 81 U.S.L.W.
22 3127 (U.S. Sept. 10, 2012) (No. 12-311) (“RTAA”). The Supreme Court’s discussion of major
23 purpose in a subsequent opinion, *Massachusetts Citizens for Life v. FEC*, 479 U.S. 238 (1986)

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1 ("MCFL"), was similarly sparse. *See id.* at 262. In that case, the Court identified an
2 organization's independent spending as a relevant factor in determining an organization's major
3 purpose, but examined the entire record as part of its analysis and did not chart the outer bounds
4 of the test. 479 U.S. at 238. Following *Buckley* and *MCFL*, lower courts have refined the major
5 purpose test — but only to a limited extent.¹⁹ In large measure, the contours of political
6 committee status — and the major purpose test — have been left to the Commission.²⁰

7 Following *Buckley*, the Commission adopted a policy of determining on a case-by-case
8 basis whether an organization is a political committee, including whether its major purpose is the
9 nomination or election of federal candidates. Political Committee Status, 72 Fed. Reg. 5596
10 (Feb. 7, 2007) (Supplemental Explanation and Justification). The Commission has periodically
11 considered proposed rulemakings that would have determined major purpose by reference to a
12 bright-line rule — such as proportional (*i.e.*, 50%) or aggregate threshold amounts spent by an
13 organization on federal campaign activity. But the Commission consistently has declined to
14 adopt such bright-line rules. *See* Independent Expenditures; Corporate and Labor Organization
15 Expenditures: 57 Fed. Reg. 33,548, 33,558-59 (July 29, 1992) (Notice of Proposed
16 Rulemaking); Definition of Political Committee: 66 Fed. Reg. 13,681, 13,685-86 (Mar. 7, 2001)
17 (Advance Notice of Proposed Rulemaking). *See also*, Summary of Comments and Possible

¹⁹ *See FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 396 (D.C. Cir. 1981) (stating that political committee "contribution limitations did not apply to . . . groups whose activities did not support an existing 'candidate'" and finding Commission's subpoena was overly intrusive where directed toward "draft" group lacking a "candidate" to support); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 861-62 (D.D.C. 1996) (holding that a group's support of a "farm team" of future potential federal candidates at the state and local level did not make it a political committee under the Act); *see also Unity08 v. FEC*, 596 F.3d 861, 869 (D.C. Cir. 2010) (concluding that an organization "is not subject to regulation as a political committee unless and until it selects a 'clearly identified' candidate").

²⁰ Like other administrative agencies, the Commission has the inherent authority to interpret its statute through a case-by-case approach. *See SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947) ("[T]he choice made between proceeding by general rule or by individual . . . litigation is one that lies primarily in the informed discretion of the administrative agency.")

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1 Options on the Advance Notice of Proposed Rulemaking on the Definition of "Political
2 Committee," Certification (Sept. 27, 2001) (voting 6-0 to hold proposed rulemaking in
3 abeyance).

4 In 2004, for example, the Commission issued a notice of proposed rulemaking asking
5 whether the agency should adopt a regulatory definition of "political committee." See Political
6 Committee Status: 69 Fed. Reg. 11,736, 11,745-49 (Mar. 11, 2004) (Notice of Proposed
7 Rulemaking). The Commission declined to adopt a bright-line rule, noting that it had been
8 applying the major purpose test "for many years without additional regulatory definitions," and
9 concluded that "it will continue to do so in the future." See Final Rules on Political Committee
10 Status, Definition of Contribution, and Allocation for Separate Segregated Funds and
11 Nonconnected Committees, 69 Fed. Reg. 68056, 68064-65 (Nov. 23, 2004).

12 b. Challenges to the Commission's Major Purpose Test and the
13 Supplemental E&J
14

15 When the Commission's 2004 decision not to adopt a regulatory definition was
16 challenged in litigation, the court rejected plaintiffs' request that the Commission initiate a new
17 rulemaking. *Shays v. FEC*, 424 F. Supp. 2d 100, 117 (D.D.C. 2006) ("*Shays I*"). The district
18 court found, however, that the Commission had "failed to present a reasoned explanation for its
19 decision" to engage in case-by-case decision-making, rather than rulemaking, and remanded the
20 case to the Commission to explain its decision. *Id.* at 116-17.

21 Responding to the remand, the Commission issued a Supplemental Explanation and
22 Justification for its final rules on political committee status to further explain its case-by-case
23 approach and provide the public with additional guidance as to its process for determining
24 political committee status. Political Committee Status, 72 Fed. Reg. 5595 (Feb. 7, 2007)
25 ("Supplemental E&J"). The Supplemental E&J explained that "the major purpose doctrine

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1 requires fact-intensive analysis of a group's campaign activities compared to its activities
2 unrelated to campaigns." *Id.* at 5601-02. The Commission concluded that the determination of
3 an organization's major purpose "requires the flexibility of a case-by-case analysis of an
4 organization's conduct that is incompatible with a one-size fits-all rule," and that "any list of
5 factors developed by the Commission would not likely be exhaustive in any event, as evidenced
6 by the multitude of fact patterns at issue in the Commission's enforcement actions considering
7 the political committee status of various entities." *Id.*

8 To determine an entity's "major purpose," the Commission explained that it considers a
9 group's "overall conduct," including public statements about its mission, organizational
10 documents, government filings (*e.g.*, IRS notices), the proportion of spending related to "federal
11 campaign activity," and the extent to which fundraising solicitations indicate funds raised will be
12 used to support or oppose specific candidates. *Id.* at 5597, 5605. Among other things, the
13 Commission informed the public that it compares how much of an organization's spending is for
14 "federal campaign activity" relative to "activities that [a]re not campaign related." *Id.* at 5601,
15 5605 (emphasis added).

16 To provide the public with additional guidance, the Supplemental E&J referenced
17 enforcement actions on the public record, as well as advisory opinions and filings in civil
18 enforcement cases following the 2004 rulemaking. *Id.* at 5604-05. The Commission noted that
19 the settlements in several MURs involving section 527 organizations "provide considerable
20 guidance to all organizations" regarding the application of the major purpose test and "reduce
21 any claim of uncertainty because concrete factual examples of the Committee's political
22 committee analysis are now part of the public record." *Id.* at 5595, 5604.

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1 After the Commission issued the Supplemental E&J, the *Shays I* plaintiffs again
2 challenged, under the Administrative Procedure Act, 5 U.S.C. §§ 551-59, the Commission's
3 case-by-case approach to political committee status. The court rejected the challenge, upholding
4 the Commission's case-by-case approach as an appropriate exercise of the agency's discretion.
5 *Shays v. FEC*, 511 F. Supp. 2d 19, 24 (D.D.C. 2007) ("*Shays II*"). The court recognized that "an
6 organization . . . may engage in many non-electoral activities so that determining its major
7 purpose requires a very close examination of various activities and statements." *Id.* at 31.

8 Recently, the Fourth Circuit rejected a constitutional challenge to the Commission's case-
9 by-case determination of major purpose. The court upheld the Commission's approach, finding
10 that *Buckley* "did not mandate a particular methodology for determining an organization's major
11 purpose," and so the Commission was free to make that determination "either through
12 categorical rules or through individualized adjudications." *RTAA*, 681 F.3d at 556. The court
13 concluded that the Commission's case-by-case approach was "sensible, . . . consistent with
14 Supreme Court precedent and does not unlawfully deter protected speech." *Id.* at 558.²¹ The
15 Fourth Circuit concluded that the Supplemental E&J provides "ample guidance as to the criteria
16 the Commission might consider" in determining an organization's political committee status and

²¹ The *RTAA* court rejected an argument — similar to the one made by Crossroads GPS here — that the major purpose test must be confined to "(1) examining an organization's expenditures to see if campaign-related speech amounts to 50% of all expenditures; or (2) reviewing 'the organization's central purpose revealed by its organic documents.'" *RTAA*, 681 F.3d at 555. The Fourth Circuit recognized that determining an organization's major purpose "is inherently a comparative task, and in most instances it will require weighing some of the group's activities against others." *Id.* at 556; see also *Kaerber v. FEC*, 483 F. Supp. 2d 740 (E.D.N.C. 2008) (denying preliminary relief in challenge to Commission's approach to determining political committee status, and noting that "an organization's 'major purpose' is inherently comparative and necessarily requires an understanding of an organization's overall activities, as opposed to its stated purpose"); *FEC v. Malenick*, 310 F. Supp. 2d 230, 234-37 (D.D.C. 2004) (considering organization's statements in brochures and "fax alerts" sent to potential and actual contributors, as well as its spending influencing federal elections); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996) ("The organization's purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates."); *id.* at 864, 866 (applying a fact-intensive inquiry, including review of organizations' meetings attended by national leaders and organization's "Political Strategy Campaign Plan and Budget," and concluding that organization did not have as its major purpose the election of federal candidates).

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1 therefore is not unconstitutionally vague. *Id.* See also *Free Speech v. FEC*, No. 12-CV-127-
2 SWS at 22 (D. Wy. Oct. 3, 2012) (citing *RTAA* and finding Commission's method of
3 determining political committee status to be constitutional), *appeal docketed*, No. 12-8078 (10th
4 Cir. Oct. 19, 2012).²²

5 c. Organizational and Reporting Requirements for Political
6 Committees

7
8 Political committees — commonly known as “PACs” — must comply with certain
9 organizational and reporting requirements set forth in the Act. PACs must register with the
10 Commission, file periodic reports for disclosure to the public, appoint a treasurer who maintains
11 its records, and identify themselves through “disclaimers” on all of their political advertising, on
12 their websites, and in mass e-mails. See 2 U.S.C. §§ 432-34; 11 C.F.R. §110.11(a)(1).²³ The
13 Act's reporting requirements “are minimal” and the organizational requirements are not “much
14 of an additional burden.” *SpeechNow.org v. FEC*, F.3d 686, 696 (D.C. Cir. 2010)
15 (“*SpeechNow*”). These requirements, which promote disclosure, do not, of course, prohibit
16 speech. *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d at 552 n.3.

17 In the wake of the Supreme Court's decision in *Citizens United v. FEC*, 130 S. Ct. 876
18 (2010), which struck down the Act's prohibitions on corporate independent expenditures and

²² The Supreme Court's decision in *FCC v. Fox Television Stations, Inc.* 132 S. Ct. 2307 (2012) is not to the contrary. See *id.* at 2317 (“[A] regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved”). In that case, the FCC's indecency standard was held to be vague for lack of notice when it applied a new stricter standard, *ex post facto*, to the Fox defendants, and when it relied on a single “isolated and ambiguous statement” from a 50-year old administrative decision to support its finding of indecency against the ABC defendants. *Id.* at 13-17. Here, in sharp contrast, the Supplemental E&J — which was issued several years before Crossroads GPS was formed — provides extensive guidance as the Commission's approach to major purpose, and has withstood both APA and constitutional challenges. See also *Center for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. Sept. 10, 2012) (“*Madigan*”) (rejecting vagueness challenge to the definition of “political committee” in the Illinois campaign finance statute).

²³ An organization must register as a political committee when it crosses the \$1,000 threshold and determines, based on the guidance in the Supplemental E&J, that it has the requisite major purpose.

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1 electioneering communications, the D.C. Circuit held in *SpeechNow* that political committees
2 that engage only in independent expenditures are not subject to contribution limits. *See* 599 F.3d
3 at 696. These political committees, often referred to as independent expenditure-only political
4 committees or Super PACs, continue to be subject, however, to the “minimal” “reporting
5 requirements of 2 U.S.C. §§ 432, 433, and 434(a), and the organizational requirements of
6 2 U.S.C. §§ 431(4) and 431(8).” *Id.* at 689.

7 Notably, the Supreme Court has stressed that such requirements serve the vital role of
8 disclosure in political discourse. *See Citizens United*, 130 S. Ct. at 916 (recognizing that
9 increased “transparency” resulting from FECA disclosure requirements “enables the electorate to
10 make informed decisions and give proper weight to different speakers and messages”); *Doe v.*
11 *Reed*, 561 U.S. ___, 130 S. Ct. 2811, 2820 (2010) (holding that public disclosure of state
12 referendum petitions serves important government interest of “promot[ing] transparency and
13 accountability in the electoral process,” and “preserving the integrity of the electoral process”);
14 *Madigan*, 697 F.3d at ___ (upholding Illinois’s campaign finance disclosure provisions against
15 constitutional facial challenge, finding a substantial relation to “Illinois’s interest in informing its
16 electorate about who is speaking before an election”); *see also Doe*, 130 S. Ct. at 2837 (Scalia,
17 J., concurring) (“Requiring people to stand up in public for their political acts fosters civic
18 courage, without which democracy is doomed.”).²⁴

²⁴ *But cf. Minn. Citizens for Life, Inc. v. Swanson*, 692 F.3d 864, 876 (8th Cir. 2012) (striking down certain registration and disclosure provisions of Minnesota’s campaign finance law, finding that those obligations as applied to associations that do not meet Buckley’s “major purpose test” are unduly burdensome and do not match any “sufficiently important disclosure interest”).

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1 2. Application of the Test for Political Committee Status to Crossroads GPS

2 a. Statutory Threshold

3
4 To assess whether an organization has made an "expenditure," the Commission "analyzes
5 whether expenditures for any of an organization's communications made independently of a
6 candidate constitute express advocacy either under 11 C.F.R. § 100.22(a), or the broader
7 definition at 11 C.F.R. § 100.22(b)." Supplemental E&J at 5606. According to the Response,
8 Crossroads GPS spent either \$15,455,039.50 or \$15,749,171.00 on reported independent
9 expenditures in 2010. Resp. at 7, 13. Thus, Crossroads GPS far exceeded the \$1,000 statutory
10 threshold for political committee status.

11 b. Major Purpose

12
13 Crossroads GPS states in its Response, on its website, and in its tax returns that its major
14 purpose is not federal campaign activity but rather advocacy of issues and education of the
15 public. Resp. at 1. The Commission noted in the Supplemental E&J that it may consider such
16 statements in its analysis of an organization's major purpose, Supplemental E&J at 5606, but that
17 such statements are not necessarily dispositive. *See Real Truth About Obama v. FEC*, No. 3:08-
18 cv-00483, 2008 WL 4416282, at *14 (E.D. Va. Sept. 24, 2008) ("A declaration by the
19 organization that they are *not* [organized] for an electioneering purpose is not
20 dispositive.")(emphasis in original, alteration added), *aff'd*, 575 F.3d 342 (4th Cir. 2009),
21 *vacated on other grounds*, 130 S. Ct. 2371 (2010), *remanded and decided*, 796 F. Supp. 2d 736,
22 *affirmed sub nom. Real Truth About Abortion v. FEC*, 681 F.3d 544 (4th Cir. 2012), *petition for*
23 *cert. filed*, 81 U.S.L.W. 3127 (U.S. Sept. 10, 2012) (No. 12-311). Under the Commission's case-
24 by-case approach, the Commission considers the organization's "overall conduct," including its
25 disbursements, activities, and statements. Supplemental E&J at 5597. In this case, Crossroads

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1 GPS's proportion of spending related to federal campaign activity is alone sufficient to establish
2 that its major purpose in 2010 was the nomination or election of federal candidates.

3 Crossroads GPS reported spending at least \$15,445,039.50 on independent expenditures
4 in 2010. In addition, the available information indicates that Crossroads GPS spent
5 approximately \$5.4 million in 2010 on communications that do not contain express advocacy but
6 criticize or oppose a clearly identified federal candidate. Resp. at 8-9. In past enforcement
7 actions, the Commission has determined that funds spent on communications that support or
8 oppose a clearly identified federal candidate, but do not contain express advocacy, should be
9 considered in determining whether that group has federal campaign activity as its major
10 purpose.²⁵

11 For example, the Commission has relied, in part, on the following advertisements in
12 determining that an entity was a political committee:

- 13 • **"Child's Pay"**: The advertisement contains "images of children performing
14 labor-intensive jobs: washing dishes in a restaurant kitchen, vacuuming a hotel
15 hallway, working on an assembly line in a factory, collecting garbage, working at
16 an auto repair shop, and checking groceries," and concludes with the question:
17 "Guess who's going to pay off President Bush's \$1 trillion deficit?"²⁶
18

²⁵ See Conciliation Agreement ¶ IV.11, MUR 5754 (MoveOn.org Voter Fund) (relying on funds used for advertisements that "opposed" or "criticized" George W. Bush to establish political committee status); Factual and Legal Analysis at 2, MUR 5753 (League of Conservation Voters 527) (finding major purpose satisfied where funds spent on door-to-door and phone bank express advocacy campaign, and also on advertisements "supporting or opposing clearly identified federal candidates, some of which contained express advocacy"); Conciliation Agreement ¶ IV.14, MUR 5487 (Progress for America Voter Fund) (concluding that PFA VF had met the major purpose test after spending 60 percent of its funds on communications that "praised George W. Bush's leadership as President and/or criticized Senator Kerry's ability to provide similar leadership"); see also *FEC v. Citizens Club for Growth, Inc.*, Stipulation for Entry of Consent Judgment ¶ 22 (Sept. 6, 2007) (entering stipulation of Commission, approved as part of a consent judgment, where organization was treated 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").

²⁶ Factual and Legal Analysis at 3-4, 12-13, MUR 5754 (MoveOn.Org Voter Fund). The full communication can be viewed at <http://www.youtube.com/watch?v=A9WKimKIyUQ>.

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- **"70 Billion More"**: The advertisement shows images of a young boy sitting at a school desk and a young girl with a thermometer in her mouth. The voice-over states: "We could build thousands of new schools, or hire a million new teachers. We could make sure every child has insurance. Instead, George Bush has spent \$150 billion in Iraq and has a secret plan to ask for \$70 billion more. But after four years it's now clear: George Bush has no plan for taking care of America. Face it. George Bush is not on our side."²⁷
- **"Jobs"**: "Is George Bush listening to us? Since taking office, he's let oil and energy companies call the shots. Special exemptions from the Clean Water and Clean Air Acts. Halliburton collecting billions in no-bid contracts. Here in Wisconsin, 52,500 manufacturing jobs lost. America is going in the wrong direction. And George Bush just listens to the special interests."²⁸
- **"Yucca You Decide"**: "Yucca Mountain. While everyone plays politics, who's looking out for Nevada? Eighty-five percent of the nuclear waste could come through Las Vegas. Past businesses. Through communities. By our schools. Accidents happen, and if so, how could Las Vegas, a city and economy built on tourism, recover? Who would come visit us then? The question: did George W. Bush really try and stop Yucca Mountain? Or was he just playing politics?"²⁹
- **"Finish It"**: [On screen: Images of Mohammed Atta, Osama bin Laden, Khalid Sheik Mohammed, Nick Berg's killers, and victims of terrorist attacks.] "These people want to kill us. They killed hundreds of innocent children in Russia. Two hundred innocent commuters in Spain. And 3,000 innocent Americans. John Kerry has a 30-year record of supporting cuts in defense and intelligence and endlessly changed positions on Iraq. Would you trust Kerry against these fanatic killers? President Bush didn't start this war, but he will finish it."³⁰
- **"Ashley's Story"**: This advertisement recounts the story of Ashley Faulkner, whose mother was killed in the September 11, 2001, terrorist attacks, and the interaction she had with President George W. Bush during a visit to Ohio. It closes with Ashley Faulkner's father stating: "What I saw was what I want to see

²⁷ *Id.* at 4, 12-13, MUR 5754 (MoveOn.Org Voter Fund). The full communication can be viewed at <http://archive.org/details/movnf70billionmore>.

²⁸ Factual and Legal Analysis at 5, 18, MUR 5753 (League of Conservation Voters 527). The full communication can be viewed at http://archive.org/details/lcv_jobs_102604.

²⁹ *Id.* at 5, 18, MUR 5753 (League of Conservation Voters 527). The full communication can be viewed at http://archive.org/details/lcv_yucca_decide.

³⁰ Conciliation Agreement ¶ IV.14, MUR 5487 (Progress for America Voter Fund). The full communication can be viewed at <http://www.livingroomcandidate.org/commercials/2004/finish-it>.

1 in the heart and in the soul of the man who sits in the highest elected office in our
2 country.”³¹

3
4 The Commission found that each of these advertisements — though not express advocacy
5 — indicated that the respondents had as their major purpose the nomination or election of federal
6 candidates. These ads evidenced that the organization’s major purpose was federal campaign
7 activity because they “support,” “oppose,” “praise,” or “criticize” the federal candidates.

8 Supplemental E&J at 5601.

9 Likewise, the following advertisements on which Crossroads spent some \$5.4 million in
10 2010 (Resp. at 8-9), though not express advocacy, oppose or criticize federal candidates and
11 therefore provide evidence that Crossroads GPS had as its major purpose the nomination or
12 election of federal candidates.

13 i. “Worried”

14 California seniors are worried. Barbara Boxer voted to cut spending on
15 Medicare benefits by \$500 billion. Cuts so costly to hospitals and nursing
16 homes that they could stop taking Medicare altogether. Boxer’s cuts
17 would sharply reduce benefits for some and could jeopardize access to
18 care for millions of others. And millions of Americans won’t be able to
19 keep the plan or doctor they already have. Check the facts and take action.
20 Call Boxer. Stop the Medicare cuts.³²

21
22 ii. “Calendar”

23 Michael Bennet’s spending spree. Since his appointment, Bennet has
24 voted to spend \$2.5 billion every single day. Spending billions of your tax
25 dollars on everything, from the failed stimulus, billions in government
26 pork, even cash for clunkers. And to pay for some of it? Bennet voted
27 twice in 35 days to increase the national debt. Bennet’s way: spend more,
28 borrow more, and then raise our taxes. Michael Bennet’s spending spree.
29 Call Senator Bennet. Stop the spending.³³

³¹ *Id.* The full communication can be viewed at
<http://www.livingroomcandidate.org/commercials/2014/ashleys-story>.

³² See <http://www.youtube.com/watch?v=wQd74O3PEM8&feature=plcp>.

³³ See <http://www.youtube.com/watch?v=f85DHhYcqU4&feature=plcp>.

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iii. *"Debt Clock"/ "Debt Clock Long"*³⁴

Coloradans are in debt to Washington—deeply in debt. Big spenders like Michael Bennet are spending an average \$2.5 billion per day. Wasting billions on pork and the failed stimulus program. The result: over 100,000 Colorado jobs lost. Bankruptcies at a five-year high. And our national debt is hitting numbers that could break this country. Now Bennet has admitted, "in my view, we have nothing to show for it." Ya think? Call. Tell Bennet to stop the spending spree.³⁵

iv. *"Lawsuit"*

The message is clear: seventy-one percent of Missouri voters don't want government-mandated health care. We want to make our own health care decisions. But Robin Carnahan disagrees. While seventy-one percent 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 support the health care challenge.³⁶

v. *"Wrong Way"*

"Obamacare" is taking health care in the wrong direction, and Jack Conway has gone the wrong way, too. Conway endorsed "Obamacare," with its higher taxes and Medicare cuts, and Conway refused to join thirteen other attorneys general and defend Kentucky from Obama's health care mandate. "Obamacare" and Jack Conway are taking Kentucky's health care down the wrong road. Tell Jack Conway: turn around, stop defending "Obamacare," and protect Kentucky from the federal insurance mandate.³⁷

vi. *"Thanks Harry"*

"Obamacare" is bad for health care in America. And worse for Nevada. Because when Senator Harry Reid needed votes to push "Obamacare," he cut sweet deals across the country to help Nebraska, to help Louisiana, to

³⁴ The text of "Debt Clock Long" is substantially the same as "Debt Clock." See *infra* n.32.

³⁵ See <http://www.youtube.com/watch?v=7UzT0QTcZKw&feature=plcp> and <http://www.youtube.com/watch?v=7OjW3Negpm0&feature=plcp>.

³⁶ See <http://www.youtube.com/watch?v=4lr9xEr9zgU&feature=plcp>.

³⁷ See <http://www.youtube.com/watch?v=fEKxPGcEDVM&feature=plcp>.

1 even help Florida. What has Nevada gotten from Senator Reid? Record
2 foreclosures and the highest unemployment rate in the nation. And Reid's
3 still pushing for more government control of your health care. Really,
4 Harry, how about some help for Nevada?³⁸

5
6 vii. *"Hurting"*

7 We're hurting. But what are they doing in Washington? Congressman
8 Joe Sestak voted for Obama's big government health care scheme, billions
9 in job-killing taxes, and higher insurance premiums for hard-hit families.
10 Even worse, Sestak voted to gut Medicare—a \$500 billion cut. Reduced
11 benefits for 850,000 Pennsylvania seniors. Higher taxes and premiums.
12 Fewer jobs. Medicare cuts. The Sestak/Cibatta plan costs us too much.
13 Tell Congressman Sestak: stop the Medicare cuts.³⁹

14
15 viii. *"Bad Sign"*

16 "Obamacare" is the wrong way for Kentucky. And Jack Conway is going
17 the wrong way, too. "Obamacare" means \$525 billion in job-killing taxes.
18 It means higher insurance premiums. \$500 billion cut from Medicare.
19 Reduced benefits for 113,000 Kentucky seniors. And intrusive big
20 government mandates. It's the wrong way, Conway.⁴⁰

21
22 ix. *"Baby"*

23 She begins her life in the care of others, but what kind of care will be there
24 in her future? Missourians want to make their own health care decisions,
25 but Robin Carnahan disagrees. She supports the "Obamacare" law that
26 could raise our health insurance premiums and cuts billions from
27 Medicare. Now our lieutenant governor is suing so her health care will be
28 there. Tell Carnahan: start fighting for Missouri. Fight against
29 "Obamacare."⁴¹

30
31 x. *"Thanks a Lot"*

32 With spending already out of control, Harry Reid spearheaded the
33 stimulus spending bill. Harry's stimulus sent nearly \$2 million to
34 California to collect ants in Africa, \$25 million for new chairlifts and

38 See <http://www.youtube.com/watch?v=NmGfdA2-wB0&feature=plcp>.

39 See <http://www.youtube.com/watch?v=NCBIbj9nOMs&feature=plcp>.

40 See <http://www.youtube.com/watch?v=m5BvNfRi8dg&feature=plcp>.

41 See <http://www.youtube.com/watch?v=gWwnTGkwGwI&feature=plcp>.

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1 snowmaking in Vermont, almost \$300,000 to Texas to study weather on
2 Venus. Meanwhile, back in Nevada, we still have the highest
3 unemployment and record foreclosures. Really, Harry, how about some
4 help for Nevada?⁴²
5

6 Crossroads GPS argues in its Response that none of the above communications can be
7 classified as express advocacy under either 11 C.F.R. §§ 100.22(a) or 100.22(b) and that each of
8 the four electioneering communications qualifies as an "issue ad" under *Wisconsin Right to Life,*
9 *Inc. v. FEC*, 551 U.S. 449 (2007) (distinguishing "issue ads" from those that are the "functional
10 equivalent of express advocacy."). As discussed above, however, that argument fails to come to
11 terms with the Commission's longstanding view — upheld by the courts — that the required
12 major purpose test is not limited solely to express advocacy (or the functional equivalent of
13 express advocacy). Each of the Crossroads GPS ads features a clearly identified federal
14 candidate, criticizes or opposes a candidate, and was run in the candidate's respective state
15 shortly before the 2010 elections. The fact that the ads do not contain express advocacy, or the
16 functional equivalent, does not shield such ads from consideration under the major purpose
17 test.⁴³

18 Nor does *Buckley* support an argument that determining an organization's major purpose
19 is limited to consideration of its express advocacy. The Court first established the major purpose
20 test in the context of its discussion of Section 434(e) — a provision that required the disclosure
21 of expenditures by persons *other* than political committees. In order to cure vagueness concerns
22 in that section, the Court construed "expenditure" to reach only express advocacy. *Id.* at 79-80.

⁴² See http://www.youtube.com/watch?v=3F1IX0_trLk&feature=plcp.

⁴³ Similarly, the fact that each of the ads contains a tag line requesting that the viewer call the candidate and tell the candidate to take certain action (*i.e.*, "Tell Carnahan: start fighting for Missouri. Fight against 'Obamacare'") does not immunize the communications from being considered federal campaign activity when determining major purpose.

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1 By contrast, limiting which expenditures *political committees* would have to disclose, the Court
2 held that the term “political committee” — as defined in Section 431(d) — “need only
3 encompass organizations that are under the control of a candidate or the major purpose of which
4 is the nomination or election of a candidate.” *Id.* at 79. Thus, the two limitations were imposed
5 on two different terms in two different sections of the Act: (1) “express advocacy” as a
6 limitation on “expenditures” made by persons other than political committees pursuant to Section
7 434(e); and (2) “major purpose” as a limitation on the definition of “political committee”
8 pursuant to Section 431(d). The opinion could have articulated a test that linked the limitations
9 — requiring, for example, that to be considered a political committee an organization’s “major
10 purposed must be to *expressly advocate* the nomination or election of a candidate.” But the
11 Court did not take that tack. Indeed, the Court noted that even “*partisan committees*,” which
12 include “groups within the control of the candidate or *primarily organized for political*
13 *activities*” would fall outside the definition of “political committee” *only* if they fail to meet the
14 statutory spending threshold. *Id.* at 80 (emphasis added).

15 Similarly, in *MCFL*, the Court’s opinion nowhere suggests that express advocacy
16 communications are the only kind of “campaign activity” that can satisfy the major purpose test.
17 See *MCFL*, 479 U.S. at 252-53, 262 (political committee requirements inapplicable to
18 “organizations whose major purpose is not *campaign advocacy*,” but “political committee” does
19 include organizations with a major purpose of “*campaign activity*”) (emphasis added). And
20 many lower federal courts have likewise decided that a determination of major purpose is not
21 restricted to consideration of a group’s express advocacy as compared to its other activities.⁴⁴

⁴⁴ See *North Carolina Right to Life v. Leake*, 525 F.3d 274, 289 (4th Cir. 2008) (major purpose test may be implemented by examining, *inter alia*, “if the organization spends the majority of its money on *supporting or opposing candidates*”) (emphasis added); *Akins v. FEC*, 101 F.3d 731, 742 (D.C. Cir. 1997) (“an organization devoted almost entirely to *campaign spending* could not plead that the administrative burdens associated with such

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1 Crossroads GPS also argues in its Response that, “[g]iven the rough equivalence of the
2 IRS ‘primary purpose’ test and the FEC’s ‘major purpose’ test, a Section 501(c)(4) organization
3 that is in compliance with IRS standards *should* [not] be found to satisfy the FEC’s ‘political
4 committee’ test.” Resp. at 2. The Commission has determined previously, however, that
5 “neither FECA, as amended, nor any judicial decision interpreting it, has substituted tax status
6 for the conduct-based determination required for political committee status.” Supplemental E&J
7 at 5999. Rather, when interpreting and applying the Act, the Commission has concluded that “a
8 detailed examination of each organization’s contributions, expenditures, and major purpose” is
9 the proper approach, as described in detail above. *Id.* Moreover, the argument is at best
10 premature, since the IRS has not yet determined whether to grant Crossroads GPS’s application
11 for 501(c)(4) status, which is now being challenged. *See supra* n.3.

12 Crossroads GPS further argues that the FEC should apply the major purpose test to
13 activity that occurred during the group’s fiscal tax year, which ran from June 1, 2010, to May 31,
14 2011. A calendar year, however, not a self-selected fiscal year, provides the firmest statutory

spending were unconstitutional as applied to it”); *vacated on other grounds*, 524 U.S. 11 (1998) (emphasis added); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 393 (D.C. Cir. 1981) (recognizing “the grave constitutional difficulties inherent in construing the term ‘political committee’ to include groups whose activities are not . . . directly related to *promoting* or *defeating* a clearly identified ‘candidate’ for federal office”) (emphasis added); *RTAA*, 796 F. Supp. 2d 736, 751 (E.D. Va. 2011) (Recognizing that “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”), *affirmed* by 681 F.3d 544 (4th Cir. June 12, 2012); *Free Speech v. FEC*, No. 12-CV-127-SWS at 22 (D. Wy. Oct. 3, 2012) (quoting *RTAA* and upholding Commission’s case-by-case method of determining political committee status), *appeal docketed*, No. 12-8078 (10th Cir. Oct. 19, 2012). *But see* *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 678 (10th Cir. 2010) (interpreting *Buckley*’s major purpose test as establishing that regulation as a political committee is only constitutionally permissible (1) when an organization’s central purpose is “campaign or election related”; or (2) when a “preponderance of [the organization’s] expenditures is for express advocacy or contributions to candidates.”); Statement of Reasons, Comm’rs. Petersen and Hunter at 6, MUR 5842 (Economic Freedom Fund) (interpreting the Court’s major purpose requirement to mean that “the Act does not reach these ‘engaged purely in issue discussion,’ but instead can only reach . . . ‘communications that expressly advocate the election or defeat of a clearly identified candidate’”) (citing *Buckley*, 424 U.S. at 79-80); *see also* *Cola. Right to Life Comm., Inc. v. Coffinan*, 498 F.3d 1137, 1154 (10th Cir. 2007) (holding a Colorado statute unconstitutional as applied because it “would, as a matter of common sense, operate to encompass a variety of entities based on an expenditure that is insubstantial in relation to their overall budgets”).

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1 footing for the Commission's major purpose determination — and is consistent with FECA's
2 plain language. The Act defines "political committee" in terms of expenditures made or
3 contributions received "*during a calendar year.*" 2 U.S.C. § 431(4) (emphasis added). A
4 calendar year test is therefore consistent with the Act's plain language.

5 Moreover, using a calendar year as the statutory basis for defining "political committee"
6 as required by the Act but not as the basis for examining major purpose, as Crossroads GPS
7 suggests, could lead to absurd results. For example, two groups with identical spending patterns
8 could be evaluated differently if one group ended its fiscal tax year on May 31 and the other's
9 fiscal tax year ended on December 31. The possibility of such an incongruous result is
10 underscored by the ability of a nonprofit organization to change its tax filing period with the IRS
11 — Crossroads in fact did so in 2011. Crossroads GPS's fiscal tax year now coincides with the
12 calendar year.

13 Finally, examining a group's spending with reference to a calendar year, rather than a
14 fiscal year, is consistent with the Commission's actions in the enforcement matters cited as
15 guidance in the 2007 Supplemental E&J. In two matters cited by the 2007 Supplemental E&J —
16 and in one concluded shortly thereafter — the Commission focused on the group's activity
17 during the 2004 calendar year for that election to determine major purpose, and only used the
18 groups' later activity to assess their ongoing reporting obligations as political committees.⁴⁵ The

⁴⁵ For example, in MUR 5487 (Progress for America Voter Fund), the Commission's major purpose analysis of the group's spending was based on the funds raised and spent "before the 2004 General Election." See Conciliation Agreement ¶¶ 33-36, MUR 5487 (Progress for America Voter Fund). The Commission limited its analysis to activity during 2004 even though Progress for America Voter Fund had raised approximately \$4.6 million and spent approximately \$11.2 million since the 2004 presidential election. See *id.* ¶ 18. The Commission has also noted when groups cease to function after an election cycle. See Conciliation Agreement ¶ 16, MUR 5754 (MoveOn.org Voter Fund); Conciliation Agreement ¶ 36, MURs 5511, 5525 (Swift Boat Veterans and POWs for Truth).

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1 Commission, however, has not routinely examined a group's post-election activity unless such
2 activity implicated its ongoing obligations under the Act.⁴⁶

3 Thus, whether Crossroads GPS had the requisite major purpose should be determined by
4 reference to its activities during the 2010 calendar year. But even if the Commission were to
5 consider Crossroads GPS's 2011 activity, the inclusion of that activity in the major purpose
6 analysis would not alter our recommendation. Crossroads GPS's 2011 spending further
7 demonstrates that its major purpose is federal campaign activity (*i.e.*, the nomination or election
8 of a federal candidate), as the bulk of the organization's spending was for the type of
9 advertisements that the Commission has considered indicative of major purpose in past
10 enforcement matters.

11 * * * *

12 In short, taking into account all of its spending in 2010, Crossroads GPS appears to have
13 spent approximately \$20.8 million on the type of communications that the Commission considers
14 to be federal campaign activity — approximately \$15.4 million on express advocacy
15 communications and \$5.4 million on non-express advocacy communications that criticize or
16 oppose a clearly identified federal candidate.⁴⁷ This total of \$20.8 million represents
17 approximately 53 percent of the \$39.1 million Crossroads GPS reported spending during 2010.

⁴⁶ Not surprisingly, many political committee enforcement matters involve groups that only spend funds during the calendar year of an election, and that spending thus necessarily forms the sole basis for major purpose analysis.

⁴⁷ The Commission does not have sufficient information to determine whether some of the other categories of 2010 spending, such as the grants Crossroads GPS issues, would also qualify as federal campaign activity.

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1 Therefore, Crossroads GPS's spending by itself shows that the group's major purpose during
2 2010 was federal campaign activity (i.e., the nomination or election of a federal candidate).⁴⁸

3 C. Conclusion
4

5 Crossroads GPS made over \$1,000 in expenditures during 2010, and its spending during
6 that calendar year indicates that it had as its major purpose federal campaign activity (i.e., the
7 nomination or election of federal candidates). Accordingly, we recommend that the Commission
8 find reason to believe that Crossroads GPS violated 2 U.S.C. §§ 432, 433, and 434, by failing to
9 organize, register, and report as a political committee, and that the Commission authorize an
10 investigation. Although we believe there is sufficient information at this stage to recommend
11 pre-probable cause conciliation based solely on Crossroads GPS's spending for advertisements,
12 as detailed herein, an investigation of Crossroads GPS's additional 2010 activity, including
13 examination of its fundraising solicitations and advocacy mailings, may furnish evidence of
14 additional spending on federal campaign activity that will enhance the public record and
15 establish definitively the date by which Crossroads GPS should have registered as a political
16 committee.

⁴⁸ In reaching this conclusion, we do not intend to express the view that a finding of major purpose requires clearance of a 50 percent threshold, but only that the spending on federal campaign activity in this case is alone sufficient to support a finding of major purpose.

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1 **III. PROPOSED DISCOVERY**

2 We plan to seek information (1) to establish the extent, nature, and cost of Crossroads
3 GPS's federal campaign activity and (2) to identify potential witnesses who may have relevant
4 knowledge of these facts. We also request that the Commission authorize the use of compulsory
5 process, including the issuance of appropriate interrogatories, document subpoenas, and
6 deposition subpoenas, as necessary. The information sought through any discovery would be
7 focused on ascertaining the scope of Crossroads GPS's reporting obligations, and would be
8 consistent with the type of information that the Commission seeks in its analysis of a group's
9 requirements as a political committee.

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1 **IV. RECOMMENDATIONS**

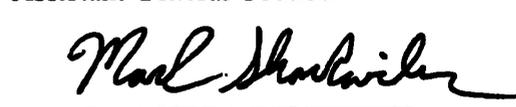
- 2 1. Find reason to believe that Crossroads Grassroots Policy Strategies
3 violated 2 U.S.C. §§ 432, 433, and 434.
4
5 2. Approve the attached Factual and Legal Analysis.
6
7 3. Authorize the use of compulsory process in this matter.
8
9 4. Approve the appropriate letters.

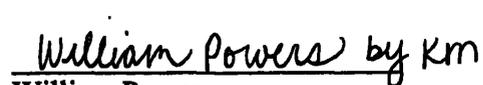
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13 Date

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15 Anthony Herman
16 General Counsel

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18 Daniel A. Petalas
19 Associate General Counsel for Enforcement

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21 Susan Lebeaux
22 Assistant General Counsel

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27 William Powers
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30 Kasey Morgenheim
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33 Peter Reynolds
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