

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

American Action Network

MUR 6589R

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STATEMENT OF REASONS
OF COMMISSIONERS ANN M. RAVEL AND ELLEN L. WEINTRAUB

Remanding this matter to the Commission, Judge Christopher R. Cooper wrote that it “blinks reality” to conclude that advertisements produced by American Action Network (“AAN”) were not designed to influence an election.¹ Yet given a chance to revisit this question, our colleagues have blinked reality once again.

AAN is a 501(c)(4) “social welfare” organization that spent roughly \$27.1 million between 2009 and 2011, including more than \$4 million on independent expenditures and \$13.7 million on electioneering communications.² On this point, we have made our views clear.³ Despite its extensive election-related spending, AAN has never registered with the Commission as a political committee, thereby shrouding from public view its donors and the full scope of its spending. A 2012 complaint filed with the Commission alleged that AAN’s failure to register and report violated the Federal Election Campaign Act (the “Act”),⁴ but in 2014, Chairman Petersen and Commissioners Hunter and Goodman refused to authorize an investigation into the allegations.⁵ At the time, they justified this on the basis that only a small portion — \$4 million — of AAN’s lifetime spending was used for express advocacy, so the organization did not have as a “major purpose” the nomination or election of federal candidates and consequently did not qualify as a federal political committee.⁶

¹ *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, No. 1:14-cv-01419 (CRC), 2016 WL 5107018 at *11 (D.D.C. Sept. 19, 2016) (“*CREW v. FEC*”).

² See First General Counsel’s Report, MUR 6589 at 25 (Jan. 17, 2013) (“FGCR”).

³ Statement of Reasons of Vice Chair Ann M. Ravel and Commissioners Steven T. Walther and Ellen L. Weintraub, MUR 6589 (AAN) (July 30, 2014).

⁴ As we have previously described at length, *see id.*, the Act requires an entity to register with the Commission as a political committee when it satisfies two criteria: (1) it receives contributions or makes expenditures in excess of \$1,000 in a calendar year, 52 U.S.C. § 30101(4)(A); and (2) it has as a major purpose “the nomination or election of a candidate,” *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

⁵ Certification, MUR 6589 (AAN) (June 24, 2014).

⁶ Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen, MUR 6589 (AAN) (July 30, 2014).

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This conclusion was challenged in the U.S. District Court for the District of Columbia, where on September 19, 2016, Judge Cooper sharply rebuked our colleagues' analysis and justifications. Noting courts' repeated vindication of the importance of campaign finance disclosure, the judge declared that the controlling group of Commissioners' exclusion of all non-express advocacy communications from their assessment of AAN's major purpose was "contrary to law" and premised on "an erroneous understanding" of the First Amendment.⁷ The court found that "legislative history, past FEC precedent, and court precedent certainly supported the conclusion that *many* or even *most* electioneering communications indicate a campaign-related purpose,"⁸ and directed the Commission to reevaluate AAN's major purpose in light of its finding that "well over half of [AAN's] spending during the period was election-related."⁹ The court further determined that the Commissioners' refusal to give any weight to an organization's spending in the most recent calendar year ignored "critical facts" regarding its major purpose.¹⁰ The court directed the Commission to conform with its declaration within 30 days.¹¹

Despite the court's order, the Commission deadlocked in another 3-3 vote when reevaluating the matter.¹² Flouting the court's opinion, Chairman Petersen and Commissioners Hunter and Goodman again refused to authorize an investigation into the allegations against AAN.¹³ In a new Statement of Reasons, our colleagues feigned compliance with the Court's order by evaluating AAN's advertising on a case-by-case basis.¹⁴ From a close review of their analysis, however, it is clear that they have ignored the court's ruling and the plain language of the ads that objectively criticized candidates in the weeks preceding the 2010 elections. This approach is divorced from Supreme Court precedent and from reality.

Our colleagues have concluded that, at most, only five of AAN's twenty electioneering communications showed indications of electoral activity,¹⁵ failing even to re-categorize an advertisement that the court specifically highlighted in its opinion.¹⁶ In so doing, our colleagues have again ignored the plain language of the communications that objectively criticized candidates in the weeks preceding the 2010 elections, not to mention a federal court's clear order to do otherwise.

⁷ *CREW v. FEC*, 2016 WL 5107018 at *11.

⁸ *Id.* at *11 (emphasis in original).

⁹ *Id.* at *3.

¹⁰ *Id.* at *12.

¹¹ *Id.* at *27.

¹² Certification, MUR 6589R (AAN) (Oct. 18, 2016).

¹³ *Id.*

¹⁴ Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman, MUR 6589R (AAN) (Oct. 19, 2016).

¹⁵ *Id.* at 6-17.

¹⁶ *CREW v. FEC*, 2016 WL 5107018 at *1.

The major purpose test was established by the U.S. Supreme Court in *Buckley v. Valeo*. Seeking to provide clear guidance on when groups must register, the Commission codified its interpretation of this standard in the 2007 Supplemental Explanation and Justification on Political Committee Status.¹⁷ The Explanation and Justification specified that the standard requires a comprehensive analysis of an organization's "full range of campaign activities" as well as those activities that are not campaign related.¹⁸ Among the conduct identified as indicative of major purpose was "sufficiently extensive spending on Federal campaign activity."¹⁹

As Judge Cooper reaffirmed, the major purpose inquiry is not limited to express advocacy and its functional equivalent and likely includes "*many* or even *most* electioneering communications."²⁰ Indeed, the Commission has previously agreed that any advertisements that support or oppose a clearly identified federal candidate should be considered in determining whether that group has a major purpose of nominating or electing federal candidates.²¹

Despite the court's clear direction, our colleagues concluded here that at least three quarters of AAN's electioneering communications had a "legislative focus" and did not indicate a major purpose to nominate or elect federal candidates.²² In reaching this conclusion, the Commissioners ignored the plain language of AAN's ads that openly and obviously opposes clearly identified federal candidates. For example, one of AAN's advertisements was explicitly entitled "Quit Critz"²³ and criticized Rep. Mark Critz's record in Congress and support of Democratic leadership:

He was our district economic development director when we lost jobs and unemployment skyrocketed. Mark Critz. He supports the Obama-Pelosi agenda that's left us fourteen trillion in debt. Mark Critz. And instead of extending tax cuts for Pennsylvania families and businesses, he voted with Nancy Pelosi to quit working and leave town. Mark Critz. Tell Congressman Critz that Pennsylvania families need tax relief this November, not more government. [Ends with superscript over photo: "Tell Congressman Critz vote to cut taxes this November. Yes on H.R. 4746 (202) 224-3121."]

¹⁷ Political Committee Status, 72 Fed. Reg. 5595, 5596-97 (Feb. 7, 2007) (Supplemental Explanation and Justification) ("2007 E&J").

¹⁸ *Id.* at 5605.

¹⁹ *Id.* at 5601.

²⁰ *CREW v. FEC*, 2016 WL 5107018 at *11.

²¹ *See* FGCR at n. 10 & accompanying text.

²² *See supra* n. 14, at 10.

²³ We note that "Quit Critz" — an apparent directive to either Critz himself to quit his job or the general public to end their support of Critz — might itself have been the functional equivalent of express advocacy had it been included in the ad itself. As it is, the title of the communication was apparently not communicated to its audience. But it should serve as valuable context for any honest attempt to analyze the ad's true purpose.

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In "Read This," an advertisement highlighted by Judge Cooper, AAN decried candidates' congressional records in particularly hyperbolic terms:

[On-screen text:] Congress doesn't want you to read this. Just like [Charlie Wilson/Jim Himes/Chris Murphy]. [Charlie Wilson/Jim Himes/Chris Murphy] & Nancy Pelosi rammed through government healthcare. Without Congress reading all the details. \$500 billion in Medicare cuts. Free healthcare for illegal immigrants. Even Viagra for convicted sex offenders. So tell [Charlie Wilson/Jim Himes/Chris Murphy] to read this: In November, fix the healthcare mess Congress made.

These two advertisements, along with the other eighteen run by AAN, clearly criticize and oppose named federal candidates. Their focus is not, as our colleagues suggest, on "issues important to the group,"²⁴ but on the named candidate's *record* on those issues and asserted failures as a public official. This emphasis on *individual conduct*, rather than issues or policies themselves, belies any suggestion that AAN sought only to engage in legislative advocacy. Instead, the advertisements demonstrate the purpose of the ads: to influence the 2010 election.

Seeking a way around this conclusion, our colleagues cherry-picked language from the ads that was helpful to their desired outcome and manufactured context not previously indicated in the record. Notably, although the Commissioners explicitly stated that they would "avoid speculating about the subjective motivations of the speaker,"²⁵ they did exactly that, by reading into almost all of the advertisements an intent to influence a hypothetical lame-duck session of Congress following the 2010 elections. For example, "Promise" stated:

Spending in Washington is out of control . . . Representative Hodes promised he'd fight wasteful spending. Hodes hasn't kept that promise. He voted for Pelosi's stimulus bill. . . . For the auto bailout. . . . For massive government-run health care. Trillions in new spending. As New Hampshire families struggle . . . Hodes continues the wasteful spending spree with our tax dollars.

The ad ends with:

Tell Congressman Hodes to stop voting for reckless spending.

Despite the fact that the vast majority of the advertisement is dedicated to criticizing a candidate's voting record, our colleagues argue that the last sentence is a "call to action" intended to influence the outcome on possible budget bills in a potential lame-duck session of Congress. Of course, the ad does not even mention the possibility of a post-election Congressional session, nor any legislative initiative. The context our colleagues project upon this ad is created from whole cloth. It is far outweighed by the clear advocacy against Rep. Hodes.

²⁴ See *supra* n. 14, at 6.

²⁵ *Id.*

What's more, while placing AAN's ads in the context of a possible lame-duck session of Congress, our colleagues ignore entirely other contextual details that clearly point to an electoral purpose behind the communications. Notably, all of the twenty electioneering communications (by definition) aired in the sixty days preceding the November 2, 2010 general election. For example, in "Leadership," AAN communicated:

[Announcer:] Herseth Sandlin on health care: [Herseth Sandlin:] "I stood up to my party leadership and voted no." [Announcer:] The truth is Herseth Sandlin supports keeping Obamacare, a trillion dollar health care debacle, billions in new job-killing taxes. It cuts five hundred billion from Medicare for seniors then spends our money on health care for illegal immigrants. Tell Congresswoman Herseth Sandlin to vote for repeal in November.

"[T]he use of 'November' in ads such as "Quit Critz," "Read This," and "Leadership," our colleagues explain, "is *best understood* as a reference to the time period in which the lame-duck session would commence."²⁶

This is farcical. Not one voter in a thousand would have been aware that Congress might possibly be going into a lame-duck session in November after the election. Not one in a *million* would have thought that the use of "November" in that context would be *best understood* to refer to a lame-duck congressional session instead of Election Day. Any reference to "November" in a politically themed advertisement aired in the weeks before a federal election is most likely to be understood as a reference to those elections and *not* some unmentioned congressional session. But even if it were not, the advertisement, as those above, primarily serves to castigate a candidate in the run-up to an election, with the plain purpose of influencing that election.

In addition to their selective application of context, our colleagues place inordinate weight on the "call to action" contained in some ads in order to obfuscate the fact that the bulk of the communication serves to criticize the candidate's voting record. For example, "Naked," on which AAN spent more than \$2 million, stated:

[Announcer:] How can you tell the taxpayers in Congressman Gerry Connolly's district? We're not so tough to spot. Connolly stripped us with a wasteful stimulus, spent the shirts off our backs. [On-screen text:] \$14 Trillion Debt. [Announcer:] Connolly is taking money from our pockets to put in Washington's pockets. [Actor:] Now I don't have any pockets. [Announcer:] Now, Congress wants to strip us bare with more spending. Call Congressman Connolly. Tell him: vote to cut spending this November. [Superimposed text:] Call Congressman Connolly. Vote to cut spending this November. Yes to H.R. 5545 (202) 224-3121.

Our colleagues whistle past the vitriolic criticism of the candidate, and focus only on the call to action (a silent call that appears only in superimposed text), using it to inoculate what is otherwise, by its plain language, an advertisement that opposes a candidate for federal office.

²⁶ *Id.* at 9 (emphasis added).

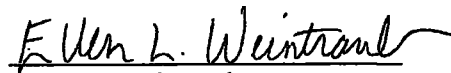
Our colleagues argue that references to candidates do not, by themselves, make communications campaign-related.²⁷ Here, however, the advertisements — all twenty — do not contain mere references to candidates, but *clear opposition to candidates*. There can therefore be no doubt that these ads constitute federal campaign activity and should be counted toward AAN's campaign-related spending in our major purpose analysis. By this calculus, AAN spent more than \$17.7 million on federal campaign activity between 2009 and 2011,²⁸ approximately 62.2% of its total spending during the same period, even assuming all other spending was unrelated to federal campaigns.²⁹ By any metric, this number is indicative of "sufficiently extensive spending on Federal campaign activity" and demonstrates that AAN had a major purpose of influencing federal elections.

In 2014, AAN functioned as a political committee. It owed the American people full disclosure of its election-related activities. Our colleagues were given a fair opportunity by the court to recognize this obvious reality. Judge Cooper's decision "identif[ie]d the legal error in the Commissioners' statements"—the erroneous understanding of the First Amendment,³⁰ and required the Commission to reconsider its action in "light of the correction."³¹ Given this opportunity, our colleagues again have turned a blind eye to the law and to reality.

Date: December 5, 2016


Ann M. Ravel
Commissioner

Date: December 5, 2016


Ellen L. Weintraub
Commissioner

²⁷ See *supra* n. 14, at 6. Cf. *CREW v. FEC*, 2016 WL 5107018 at *11 ("citations to legislative history, past FEC precedent, and court precedent certainly support the conclusion that *many* or even *most* electioneering communications indicate a campaign-related purpose").

²⁸ We note as well that our colleagues have disregarded the court's instruction that the Commission give weight to an organization's relative spending in the most recent calendar year. See *CREW v. FEC*, 2016 WL 5107018 at *12. The court emphasized that Congress explicitly chose "calendar year" as its metric for the monetary threshold established in the definition of "political committee" and concluded that an analysis of spending over the lifetime of an organization "tends to ignore crucial facts indicating whether an organization's major purpose has changed and is inconsistent with the FEC's stated fact-intensive approach to the 'major purpose' inquiry." *Id.* Nevertheless, our colleagues continue to analyze AAN's spending over the course of its lifetime. Although AAN formed in 2009, and although we lack a precise breakdown of AAN's spending in 2009, 2010, and 2011, respectively, it is important to recognize the court's opinion that an organization's most recent calendar year spending is most indicative of its major purpose. The available record provides ample reason to believe AAN violated the Act by failing to register and report as a political committee. An investigation will provide us with a more precise understanding of AAN's most recent calendar year spending.

²⁹ FGCR at 25.

³⁰ *CREW v. FEC*, 2016 WL 5107018 at *11.

³¹ *Id.*