FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
New Models	)	MUR 6872
	)	

STATEMENT OF REASONS OF VICE CHAIR CAROLINE C. HUNTER AND COMMISSIONER LEE E. GOODMAN

In this matter the Commission was called upon to determine whether New Models, a social welfare organization incorporated under section 501(c)(4) of the Internal Revenue Code ("IRC"), failed to register and report as a "political committee" under the Federal Election Campaign Act of 1971, as amended (the "Act").

This agency's controlling statute and court decisions stretching back over forty years properly tailor the applicability of campaign finance laws to protect non-profit issue advocacy groups from burdensome political committee registration and reporting requirements.[1] Organizations such as New Models do not become political committees under the Act merely as a result of making incidental or occasional campaign contributions. Rather, such organizations may be regulated as political committees only if their "major purpose" is the nomination or election of federal candidates.[2] Determining an organization's major purpose requires a comprehensive, case-specific inquiry that focuses on the organization's public statements, organizational documents, and overall spending history.[3] The Commission has settled on a "case-by-case analysis of an organization's conduct" in applying the major purpose doctrine.[4]

Publicly available tax returns indicate that for over 15 years, from 2000 to 2015, New Models engaged almost exclusively in policy research, polling and public policy discussion. That was consistent with New Models's social welfare mission and maintenance of its tax-

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[1] *Accord* Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 1, MUR 6538 (Americans for Job Security, *et al.*); Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 1, MUR 6396 (Crossroads GPS).

[2] *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

[3] Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 1, MUR 6538 (Americans for Job Security, *et al.*).

[4] *Supplemental Explanation and Justification, Political Committee Status*, 72 Fed. Reg. 5,596, 5,601 (Feb. 7, 2007) ("2007 Supplemental E&J"). *See also Real Truth About Abortion v. FEC*, 681 F.3d 544, 556-57 (4th Cir. 2012), *cert. denied*, 81 U.S.L.W. 3127 (U.S. Jan. 7, 2013) (No. 12-311) ("*RTAA*").

exempt status. Over that time period, New Models received no contributions under the Act and made no disbursements to fund "expenditures" expressly advocating the election or defeat of federal candidates. The main allegation that New Models nonetheless was, or became, a political committee was based on the fact that it contributed $3 million—all publicly disclosed—to three political committees that made independent expenditures in 2012. Based on that financial activity in one year, the allegation was that New Models was a federal political committee required to register with the Commission, submit to extensive regulatory requirements, and file ongoing financial disclosure reports.

Applying our case-by-case analysis and agency expertise to the facts in the record, and consistent with numerous court decisions applying the major purpose test, we concluded that New Models's major purpose was not the nomination or election of federal candidates over the course of its existence, that New Models's major purpose did not change to become the nomination or election of federal candidates based upon its contributions to political committees in one calendar year, and that New Models was not a political committee. Accordingly, we voted against finding reason to believe that New Models violated the Act.

I. PROCEDURAL BACKGROUND

A. THE COMPLAINT

The Complaint in this matter was filed by Citizens for Responsibility and Ethics in Washington ("CREW") on September 18, 2014. The Complaint alleges New Models was a political committee in 2012 because it made $3,090,000 in contributions to three independent expenditure-only committees: Now or Never PAC, Government Integrity Fund Action Network ("GIFAN"), and Citizens for a Working America PAC ("CWA PAC").[5] In support of the allegation, CREW cites New Models's 2012 tax return in which New Models disclosed grants of $2,171,000 to Now or Never PAC and $627,000 to GIFAN, in addition to reports filed with the Commission by Now or Never PAC and GIFAN disclosing New Models as the source of the PACs' contributions received for those respective amounts.[6] CREW also includes an April Quarterly Report from CWA PAC disclosing New Models as the source of $292,000.[7] These amounts, when added together, constituted 68.5% of New Models's total disbursements for its 2012 fiscal year and 51.6% for fiscal years 2011 and 2012 (the 2012 election cycle).[8] As a result, CREW argues that New Models was required to register and report as a "political committee" under the Act.

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5 *See* Complaint at 5-7, MUR 6872 (New Models).

6 *Id.* at Exs. A, B & C.

7 *Id.* at Ex. D.

8 *See id.* at Ex. E. (including the cover page of New Models's 2011 Form 990).

B. THE RESPONSE

New Models responded on November 17, 2014, claiming it was a social welfare policy-oriented organization established in 2000 and was never a political committee. New Models does not dispute that it contributed funds to Now or Never PAC, GIFAN, and CWA PAC. Rather, New Models denies it had the requisite major purpose, stating that it "did not [in 2012], and never has had, the major purpose of nominating or electing federal candidates" and that such a determination should not be based on its federal contributions in a single calendar year.[9]

The Response included an affidavit signed by New Models President and Chief Operating Officer Tim Crawford representing that New Models never advocated the election or defeat of a candidate for federal office through public statements, advertisements, or its website; New Models never made an independent expenditure or electioneering communication, never stated its purpose was the election or defeat of candidates, and that New Models's solicitation materials never expressed an intent to elect or defeat candidates.[10]

C. OFFICE OF GENERAL COUNSEL RECOMMENDATION

The Commission's Office of General Counsel ("OGC") recommended the Commission find reason to believe New Models violated the Act by not registering as a political committee in 2012, the year in which it contributed $3,090,000 to three separate independent expenditure-only committees, representing approximately 68.5% of its 2012 spending.[11] OGC proposed an analysis of New Models's spending which focused principally on one calendar year, thereby concentrating on New Models's contributions to political committees in 2012 while ignoring New Models's extensive policy research and discussion activities over the course of its existence from 2000 to 2015.[12]

D. COMMISSION ACTION

On November 14, 2017, the Commission considered and voted on this matter.[13] The available information failed to convince the required four Commissioners there was reason to

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9 Response at 2.

10 Resp., Affidavit of Tim Crawford ¶¶ 4-10.

11 *See* First Gen. Counsel's Rpt. at 5-6, MUR 6872 (New Models). Independent expenditure-only committees are non-connected committees registered with the Commission which "may solicit and accept unlimited contributions from individuals, political committees, corporations, and labor organizations," for the purpose of making independent expenditures. *See* Advisory Opinion 2010-11 at 3 (Commonsense Ten).

12 *See* First Gen. Counsel's Rpt., MUR 6872 (New Models).

13 MUR 6872 (New Models), Certification (Nov. 14, 2017).

believe New Models violated the Act and the matter was dismissed.[14] As the controlling group of Commissioners,[15] we are issuing this Statement of Reasons to set forth the Commission's rationale for not finding reason to believe and dismissing the matter.[16]

II. FACTUAL BACKGROUND

New Models appears to have incorporated in Washington, DC on August 17, 2000, as a non-profit entity under section 501(c)(4) of the IRC.[17] For more than a decade, New Models' primary purpose consisted of studying and advocating policy issues of national importance.[18] Its mission in 2012, according to its annual return filed with the IRS, was to:

> "research[] national issues and support[] efforts to highlight or advocate for those issues. New Models polls to determine what issues the state, local and national public care about and what messages they may be hearing about those issues. New Models polls and focus groups to find out what philosophy can best handle the issues of the day. Ne [sic] models participates in issue advocacy when appropriate."[19]

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[14] *See* 2 U.S.C. § 437g(a)(2) (four-vote requirement).

[15] *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("[W]hen the Commission deadlocks 3-3 and so dismisses a complaint, that dismissal, like any other, is judicially reviewable under [52 U.S.C. § 30109(a)(8)] . . . [T]o make judicial review a meaningful exercise, the three Commissioners who voted to dismiss must provide a statement of their reasons for so voting." (citing *Democratic Cong. Campaign Comm. v. FEC*, 931 F.2d 1131, 1133 (D.C. Cir. 1987))).

[16] *See id.* ("Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did." (citing *Democratic Cong. Campaign Comm.*, 931 F.2d at 1134-35)).

[17] *See* 26 U.S.C. § 501(c)(4)(A) (providing an exemption from taxation for "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare"). The Response's identification of New Models as a Virginia Corporation appears to be mistaken. *See* Resp., Affidavit of Tim Crawford ¶2. While New Models was licensed to do business in Virginia, the Virginia State Corporation Commission's online database identifies New Models as a foreign corporation (*i.e.*, not a Virginia corporation) formed in DC. *See* Commonwealth of Virginia, State Corporation Commission Business Entity Search, https://sccefile.scc.virginia.gov/Find/Business (search in search bar for "New Models"); DC Department of Consumer and Regulatory Affairs, https://corponline.dcra.dc.gov/Home.aspx (search in search bar for "New Models").

[18] *See* New Models, 2004 Return of Organization Exempt from Income Tax ("Form 990"); New Models, 2005 Form 990; New Models, 2006 Form 990; New Models, 2007 Form 990; New Models, 2008 Form 990; New Models, 2009 Form 990; New Models, 2010 Form 990; New Models, 2011 Form 990; New Models, 2012 Form 990; New Models, 2013 Form 990; New Models, 2014 Form 990; and New Models, 2015 Form 990 (collectively "Form 990s").

[19] 2012 Form 990, Part III 1.

The evidence indicates that New Models pursued this mission consistently throughout its lifetime, including before and after 2012.[20] New Models conducted polls, maintained a website that published information about public policy, sponsored and made available polling results and research papers, and made grants to other organizations.[21] From 2002 through 2015, New Models spent approximately $17.2 million. A chart of New Models's revenue and expenses is below.

FIGURE 1: New Models's Revenue and Spending 2002-2015

Year	Total Revenue	Total Expenses[22]	Super PAC Contributions	Super PAC Contributions As % of Total Expenses - Calendar Year	Super PAC Contributions As % of Total Expenses - Lifetime
2000					
2001					
2002	$89,700.00	$89,700.00	$ 0	0.0%	
2003	$332,500.00	$332,500.00	$ 0	0.0%	0.0%
2004	$768,886.91	$754,805.21	$ 0	0.0%	0.0%
2005	$581,136.39	$564,908.00	$ 0	0.0%	0.0%
2006	$830,000.00	$702,025.00	$ 0	0.0%	0.0%
2007	$656,516.54	$745,323.00	$ 0	0.0%	0.0%
2008	$647,045.73	$599,638.68	$ 0	0.0%	0.0%
2009	$2,049,110.10	$2,088,372.59	$ 0	0.0%	0.0%
2010	$2,511,000.00	$2,326,991.10	$ 265,000[23]	11.4%	3.2 %

[20] *See* 2004, 2005, 2006, & 2007 Form 990s ¶77; 2008, 2009, 2010, 2011, 2012, 2013, 2014 & 2015 Form 990s.

[21] *See* Form 990s, Part III 4a-c (describing 501(c)(4) program services engaged in during the reporting year). *See also* Wayback Machine, Internet Archive (search for "http://newmodelsusa.org) (revealing published research and polling reports from 2003 to early 2016 that was available on New Models's "http://newmodelsusa.org" website).

[22] This amount is derived from the New Models' reported "total expenses" on its annual returns, excluding 2001, 2002, and 2003 which do not appear to be available online. *See* Form 990s. Fundraising amounts for 2002 and 2003 are listed in New Models's response and we use those figures as a proxy for expenses for those years. *See* Resp., Aff. of Tim Crawford Attachment 1.

[23] OGC references, but does not include this $265,000 contribution in its analysis because it was not within the 2012 calendar year. *See* First Gen. Counsel's Rpt. at 4 n.8. We include it because the timeframe for our analysis is not and has never been limited to a single calendar year. New Models was CWA PAC's sole contributor in 2010. That same year CWA PAC reported making a $254,779 independent expenditure communication in opposition to South Carolina Congressman John Spratt. *See* October 2010 Quarterly Report of CWA PAC at 6-7; Post General 2010 Report of CWA PAC at 6. New Models, however, reported to the IRS that it did not engage in direct or indirect political campaign activities during 2010. *See* 2010 Form 990 Part IV, Question 3. Furthermore, New Models disclosed a grant of $692,500 to Citizens for a Working America, a 501(c)(4) corporation, to fund a "legal battle in Ohio on the casino petition drive" and that the grantee "also did issue advocacy on the spending and taxation issue in South Carolina." *See id.* at Part III, 4c. The Complaint did not address the 2010 contribution and

2011	$1,388,291.50	$1,480,065.53	$ 0	0.0%	2.7%
2012	$4,523,850.00	$4,506,176.20	$3,095,000[24]	68.7%[25]	23.7%
2013	$922,500.00	$1,025,833.22	$ 0	0.0%	22.1%
2014	$885,000.00	$954,604.34	$ 0	0.0%	20.8%
2015	$1,035,000.00	$ 1,057,073.40	$ 0	0.0%	19.5%
Total	**$ 17,220,537.17**	**$17,228,016.27**	**$3,360,000**		**19.5%**

As shown in Figure 1, over 80% of New Models's lifetime spending was devoted to purposes other than the nomination or election of federal candidates. New Models never made (and legally could not make) contributions to independent expenditure-only committees until it contributed $265,000 to CWA PAC in 2010, the first year its First Amendment right to do so was recognized.[26] This contribution was reported publicly by CWA PAC.[27]

Contributions to Now or Never PAC, GIFAN, and CWA PAC in 2012 represent the only other contributions to independent expenditure-only committees made by New Models over its lifetime.[28] These contributions also were disclosed publicly.[29] Thus, contributions made by New Models to independent expenditure-only committees from 2002 to 2015 total $3,360,000, or

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New Models has not been afforded the notice or opportunity to explain, nor have we had the opportunity to view the content of the communications. The inclusion of $265,000 in our analysis of New Models' total campaign spending, however, does not change our determination that New Models is not a political committee under the Act. Therefore it is unnecessary to speculate whether the TV ad made by CWA PAC subsequent to New Models's contribution contained express advocacy, was misreported, or whether the discrepancy in filings was a result of an administrative or accounting error.

[24] The Complaint did not address New Models's reported $5,000 contribution to OPSEC PAC. As we did for the 2010 CWA PAC contribution, we include it because it does not alter our conclusion as to New Models's status.

[25] The $3,095,000 constituted 51.7% of total expenses for 2011 and 2012. *See discussion*, infra at n.96.

[26] *See Citizens United v. FEC*, 558 U.S. 310 (2010); *SpeechNOW v. FEC*, 559 F.3d 686 (D.C. Cir. 2010).

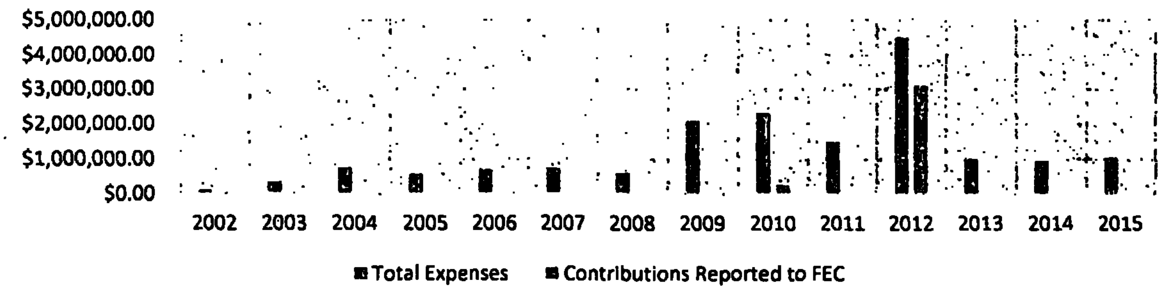
[27] *See* October 2010 Quarterly Report of CWA PAC at 6-7; Post Gen. 2010 Report of CWA PAC at 6.

[28] *See* Compl. at 3-5. We note that OGC appears willing to include an additional $37,500 based on a grant by New Models to an organization named Freedom PAC that was disclosed on the 2012 Form 990. *See* First Gen. Counsel's Rpt. at 2, 5, MUR 6872 (New Models); 2012 Form 990 Schedule C. We reject including this amount in an analysis of New Models' major purpose in this matter because the committee which received the $37,500 grant is not a political committee registered with the Commission. Instead, it is a committee registered with the Missouri Ethics Commission. *Compare* Missouri Ethics Commission: Electronic Reports, 8 Day Before General Election Report, *available at* http://www.mec.mo.gov/MEC/Campaign_Finance/CF11_CommInfo.aspx (listing the same address and amount as information listed on 2012 Form 990), *with* First Gen. Counsel's Rpt. at 2 n.6 (citing Freedom PAC, Statement of Organization (Mar. 30, 2012), http://docquery.fec.gov/pdf/316/12030762316/12030762316.pdf (listing different information)).

[29] *See* 2012 30-Day Post-General Election Report of Now or Never PAC at 8-9; 2012 12-Day Pre-Election Report of GIFAN at 6; April 2012 Quarterly Report of CWA PAC at 6.

approximately 19.5% of the organization's spending during that period (and this figure overstates the statistic because New Models was established in 2000 and operated for a year and a half before our record of spending begins in 2002).[30] Significantly, New Models has never made any independent expenditures nor has it ever funded any electioneering communications.[31] In 2015 New Models ceased operations.[32] The graph at Figure 2 depicts New Models's contributions relative to its total expenses.[33]

Figure 2: New Models' Spending 2002-2015



III. LEGAL BACKGROUND

The Supreme Court consistently has recognized 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 . . .

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30 The 19.5% figure overstates New Model's lifetime political spending given the omission of 2000 and 2001 fundraising and spending information in New Models' response and the absence of publicly available IRS Form 990s for those years.

31 *See* Resp., Affidavit of Tim Crawford ¶¶5-6. Commission records also reveal no independent expenditures or electioneering communications by New Models.

32 *See* New Models, 2015 Form 990 Part IV, Question 31 (representing that the organization liquidated, terminated, dissolved, or otherwise ceased operations).

33 The data used in Figure 2 comes directly from FEC reports filed by CWA PAC, GIFAN, and Now or Never PAC and New Models's Form 990s, except for 2002 and 2003 expenses, where fundraising amounts given in New Models' response are used as a proxy. *See* Resp., Affidavit of Tim Crawford Attachment 1 (listing fundraising amounts from 2002-2014).

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 by 12 different categories; the names of all authorized or affiliated committees to whom expenditures aggregating over $200 have been made; persons to whom loan payments 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.[34]

Thus, characterizing the onerous requirements that attach to political-committee status as "just disclosure" understates the significant burdens on First Amendment associational rights. Balancing those rights, the Act requires non-political committees that make independent expenditures that exceed certain amounts to report each of those expenditures on forms tailored to disclosing one-time events. Congress determined that such event-specific disclosures provide the public adequate disclosure of the financing of federal elections.

By comparison, the Act imposes more comprehensive, perpetual organizational and disclosure obligations to report all financial activity on "political committees." The Act requires political committees that receive contributions to disclose each contributor over $200. The Supreme Court has limited the definition of "political committee" to include only those organizations that have the major purpose of nominating and electing federal candidates.

It is a matter of First Amendment significance that the burdens attendant to one-time, event-specific disclosure[35] differ dramatically from the ongoing, all-encompassing reporting and regulatory burdens faced by political committees under the Act.[36] Political committee status and its attendant disclosure requirements impose significant burdens on the exercise of constitutionally protected political activities. The Supreme Court has found that "compelled

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34 *Citizens United v. FEC*, 558 U.S. at 338 (quoting *McConnell v. FEC*, 540 U.S. 93, 331-32 (2003)).

35 *See, e.g.*, 52 U.S.C. §§ 30104(c), (f) & 30104(g).

36 *See Wisconsin Right to Life v. Barland*, 751 F.3d 804, 811 (7th Cir. 2014) (noting that "[a] one-time, event-driven disclosure rule is far less burdensome than the comprehensive registration and reporting system imposed on political committees"); *cf. Citizens United*, 558 U.S. at 366-71.

disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment"[37] and "the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for 'financial transactions can reveal much about a person's activities, associations, and beliefs.'"[38] Mandatory ongoing disclosure of the names, addresses, occupations, and employers of *all* donors contributing over $200—required of political committees but not of non-political committees filing independent expenditure reports[39]—chills donors from using their contributions to associate with one another through the recipient organization. We are cautious to avoid compounding this chilling effect by imposing political committee status on issue groups that may occasionally make contributions to independent expenditure-only committees, but which make no such communications themselves.

In sum, regulatory obligations, prohibitions, and First Amendment impingements associated with political-committee status are weighty and extensive. As we have stated before, this is why courts have narrowed the reach of the Act's "political committee" definition to ensure that groups engaged in discussion of issues are not chilled from engaging in First Amendment-protected speech and association.

A. PRE-*BUCKLEY* JUDICIAL TREATMENT OF THE ACT'S DEFINITION OF "POLITICAL COMMITTEE"

The Act and Commission regulations define a "political committee" as "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."[40]

Soon after FECA's enactment, during the period between 1972 and 1976, several courts considered vagueness and overbreadth challenges to the Act's political committee definition. From the outset, the judiciary warned that absent imposition of a limiting construction on this definition, "[t]he dampening effect on first amendment rights . . . would be intolerable."[41]

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37 *Davis v. FEC*, 554 U.S. 724, 744 (2008) (quoting *Buckley*, 424 U.S. at 64).

38 *Buckley*, 424 U.S. at 66 (quoting *Cal. Bankers Ass'n v. Shulz*, 416 U.S. 21, 78-94 (1974) (Powell, J., concurring)).

39 However, an organization's independent expenditure reports requires the identification of every person who made a contribution in excess of $200 specifically *for the purpose of* furthering the reported independent expenditure. *See* 11 C.F.R. § 109.10(e)(1)(vi); FEC Form 5 Instructions, available at http://www.fec.gov/pdf/forms/fecfrm5i.pdf.

40 52 U.S.C. § 30101(4); 11 C.F.R. § 100.5.

41 *United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1142 (2d Cir. 1972). This opinion was adopted by the D.C. Circuit in *Buckley v. Valeo*, 519 F.2d 821, 863 n.112 (D.C. Cir. 1975) (per curiam), *aff'd in part*, 424 U.S. 1 (1976), and cited by the Supreme Court in its opinion in *Buckley v. Valeo*, 424 U.S. 1, 79 n.106

Particularly troubling, courts admonished, was the prospect that "organizations which express views on topical issues involving . . . positions adopted by office-seekers" would have "their associational rights . . . encroached upon" by the disclosure burdens applicable to political committees."[42] It was "abhorrent" to think that "every position on any issue, major or minor, taken by anyone would be a campaign issue and any comment upon it in, say, . . . an advertisement would" subject an organization to political committee disclosure burdens.[43]

There was not a "shred of evidence in the legislative history of the Act that would tend to indicate that Congress meant to go so far" as to require issue groups to register as political committees.[44] A thorough review of the legislative history showed that, with respect to the political committee definition, "[c]ongressional concern was with political campaign financing, not with the funding of movements dealing with national policy."[45] In fact, Congress elected not to regulate directly as political committees many "liberal labor, environmental, business and conservative organizations,"[46] including those who "frequently and necessarily refer to, praise, criticize, set forth, describe or rate the conduct or actions of clearly identified public officials who may also happen to be candidates for federal office."[47] Instead, Congress subjected these organizations to separate disclosure requirements under an independent provision of the Act, 2 U.S.C. § 437a (1974).[48] The D.C. Circuit, however, declared this statute unconstitutional in

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(1976).

42 *ACLU v. Jennings*, 366 F. Supp. 1041, 1055, 1057 (D.D.C. 1973), *vacated as moot sub nom., Staats v. ACLU*, 422 U.S. 1030 (1975); *see also id.* at 1056 (recognizing that "controversial organizations" like the ACLU must be excluded from coverage as a political committee).

43 *Nat'l Comm. for Impeachment*, 469 F.2d at 1142 (footnote omitted); *see also id.* at 1139, 1142 (applying "fundamental principles of freedom of expression" in explaining that "every little Audubon Society chapter [should not] be a 'political committee,' [simply because] 'environment' is an issue in one campaign after another").

44 *Nat'l Comm. for Impeachment*, 469 F.2d at 1142.

45 *Id.* at 1441-42.

46 120 CONG. REC. H10333 (daily ed., Oct. 10, 1974).

47 *Buckley*, 519 F.2d at 871 (internal quotation marks omitted).

48 Congress "made it abundantly clear that it intended section 437a to reach beyond the other disclosure provisions of the Act." *Id* at 876. The statute provided that "[a]ny person (other than an individual) who expends any funds or commits any act directed to the public for the purpose of influencing the outcome of an election, or who publishes or broadcasts to the public any material referring to a candidate (by name, description, or other reference) advocating the election or defeat of such candidate, setting forth the candidate's position on any public issue, his voting record, or other official acts (in the case of a candidate who holds or has held Federal office), or otherwise designed to influence individuals to cast their votes for or against such candidate or to withhold their votes from such candidate shall file reports with the Commission as if such person were a political committee. The reports filed by such person shall set forth the source of the funds used in carrying out any activity described in the preceding sentence in the same detail as if the funds were contributions . . . ." 2 U.S.C. § 437a (1974).

Buckley v. Valeo, in a ruling that was not appealed to the Supreme Court[49] and "apparently accept[ed]" by lawmakers.[50] Thus, Congress and the courts made clear that the political committee disclosure burdens did not apply to issue-advocacy organizations.

As a result, even racially-tinged, character-assaulting advertisements like the following—published *less than two weeks* before the 1972 presidential election — did not and could not trigger political-committee status:

> AN OPEN LETTER TO PRESIDENT RICHARD M. NIXON IN OPPOSITION TO HIS STAND ON SCHOOL SEGREGATION
>
> Dear Mr. President:
>
> We write because we believethat you are taking steps to create an American apartheid. That, we know, is a nasty charge. Yet that is the direction the House of Representatives took us on August 17, 1972. On that date, the House voted 282-102 to prohibit federal courts from taking effective action to end school segregation. . . .
>
> We believe instead that the ultimate source of pressure behind this shameful bill has been you, Mr. President.
>
> During the last six months, you have encouraged the resentment and fears of whites, and made open enemies of blacks. You have made scapegoats of the federal courts, and attacked the rule of law itself. You have cut the middle ground out from under the feet of reasonable men. We find it hard to imagine a more cynical use of presidential power.
>
> In the House of Representatives only 102 members stood fast against you** Now the issue is before the Senate. We urge you to back off from the path to apartheid, and withdraw your support for this bill.

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[49] *See Buckley*, 424 U.S. at 10 & n.7. In so holding, the D.C. Circuit rejected congressional concerns that the law was necessary to demand disclosure from organizations that "use their resources for political purposes, [but which] conceal the interests they represent solely because [of] the technical definitions of political committee, contribution, and expenditure." H.R. REP. NO. 93-1438, 93d Cong., 2d Sess. 83 (1974); *see also id.* (explaining that the provision would "require any organization which expends any funds or commits any act directed to the public for the purpose of influencing the outcome of an election").

[50] *See Buckley*, 519 F.2d at 863 n.112 (observing that, while making other changes to the political committee definition, Congress did not materially alter the provision in response to the narrowing constructions imposed by *Jennings* and *National Committee for Impeachment*).

> **[To readers:] Let them hear from you. They deserve your support in their resistance to the Nixon administration's bill.[51]

Other, similar advertisements likewise did not count toward political-committee status, including one that was "derogatory to the President's stand on the Vietnam war," even though "the President is a candidate for re-election . . . and the war is a campaign issue."[52]

Thus, from the outset, courts recognized that although "[p]ublic discussion of public issues which are also campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct,"[53] such discussions do not convert the organization into a political committee. To the contrary, courts have emphasized how "the interest of a group engaging in nonpartisan discussion ascends to a high plane, while the governmental interest in disclosure correspondingly diminishes."[54]

B. *BUCKLEY'S* "MAJOR PURPOSE" TEST

In response to both vagueness and overbreadth concerns, the Supreme Court in *Buckley v. Valeo* limited the scope of the Act's definition of "political committee" in two important ways.[55] First, the Court circumscribed the Act's $1,000 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."[56] Second, to address 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."[57]

Buckley fashioned these limitations to prevent the Act from "encompassing both issue discussion and advocacy of a political result"; thus, the major purpose limitation protects important First Amendment rights, particularly the right of associational privacy, by ensuring

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51 *Jennings*, 366 F. Supp. at 1058 App'x; *see also Buckley*, 519 F.2d at 873-74 (referencing this discussion).

52 *Nat'l Comm. for Impeachment*, 469 F.2d at 1138.

53 *Buckley*, 519 F.2d at 875.

54 *Id.* at 873.

55 424 U.S. at 79.

56 *Id.* at 80 (footnote omitted). According to the Court, "[t]his 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.

57 *Id.* at 79.

issue-advocacy organizations are not swept into the Act's burdensome regulatory scheme.[58] Regulation of electoral groups, the Court held, was constitutionally acceptable; regulation of issue groups was not. Therefore, the major purpose test serves to distinguish between the two and protect the latter.

C. *MASSACHUSETTS CITIZENS FOR LIFE AND "INDEPENDENT SPENDING"*

A decade after *Buckley*, in *FEC v. Massachusetts Citizens for Life* ("*MCFL*"), the Supreme Court reaffirmed the distinction between electoral groups and issue groups while acknowledging that the extent of an organization's "independent spending" —which the Supreme Court's logic in *Buckley* and *MCFL* strongly suggests is limited to spending on communications containing express advocacy—could cause an organization's major purpose to become the nomination or election of candidates and, thus, the organization would be classified as a political committee.[59] Then, with respect to the nonprofit organization MCFL, the Court

[58] *Id.* at 66, 79.

[59] 479 U.S. 238, 248, 262 (1986) ("*MCFL*"). In *Buckley*, the Supreme Court upheld the disclosure requirements for organizations making independent expenditures by limiting the Act's definition of an "expenditure" to express advocacy. *Id.* at 248; *Buckley*, 424 U.S. at 80. The Court reasoned this limitation is necessary to avoid unconstitutional overbreadth because "the distinction between discussion of issues and candidates and the advocacy of election or defeat of candidates may often dissolve in practical application." *MCFL*, at 249; *Buckley* at 42. The practical difficultly in distinguishing between "discussion of issues and candidates" and "advocacy of election or defeat of candidates" is not ameliorated by the purpose of the applicable regulation. Whether the regulation requires filing a one-time disclosure regarding a single communication, prohibits the communication, or requires registration and comprehensive ongoing financial reporting by the sponsor of the communication, fine distinctions between ambiguous texts are just as difficult. For this reason, in *MCFL* the Supreme Court again limited the prohibition against corporate independent expenditures to express advocacy. *MCFL* at 249. Accordingly, when the Court stated in *MCFL* that "should MCFL's *independent spending* become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee," *id.* at 262 (italics added), there is little doubt that the "independent spending" to which the Court referred was express advocacy. Any remaining doubt is resolved by the Court's numerous references in the decision to a group's independent expenditures (construed as express advocacy communications) as the group's "independent spending." *See id.* at 261-63. It is unlikely the Court used the term "independent spending" throughout the same decision to refer to two entirely different kinds of political speech without indicating it was doing so. Indeed, it would strain logic, if not qualify as absurd, for the Supreme Court to have limited disclosure requirements for independent expenditures to communications containing express advocacy while imposing political committee registration, organization, and reporting requirements on committees because they sponsored non-express advocacy communications.

The enduring significance of the Supreme Court's jurisprudence arising from the practical difficulty identified in *MCFL* is confirmed by its holding in *Citizens United*. In that case, the Court rejected an argument that the FEC must further parse the content or meaning of electioneering communications (which lack express advocacy) to determine whether the Act's disclosure provisions applied. This understanding of *MCFL* is consistent with the holdings of the Seventh Circuit in *Wisconsin Right to Life v. Barland*, 751 F.3d 804 (7th Cir. 2014), the Tenth Circuit in *New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010) ("*Herrera*")., and the District of Columbia District Court panel in *Independence Institute v. FEC*, 216 F. Supp. 3d 176 (D.D.C. 2016).

held that its "central organizational purpose is issue advocacy, although it occasionally engage[d] in activities on behalf of political candidates."[60]

D. LOWER COURT CLARIFICATIONS OF THE "MAJOR PURPOSE" TEST

Since *Buckley* and *MCFL*, various courts of appeals have further explored the major purpose limitation. In *New Mexico Youth Organized v. Herrera*, the Tenth Circuit stated:

> There are two methods to determine an organization's 'major purpose': (1) examination 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.[61]

And the Fourth Circuit in *North Carolina Right to Life, Inc. v. Leake* explained:

> [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 letter of *Buckley's* "unambiguously campaign

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60 *MCFL*, 479 U.S. at 252 n.6. The phrase "engage[d] in activities on behalf of political candidates" seems to have been used interchangeably with the term "independent expenditures." *Compare id.* at 252-53, *with id.* at 252 n.6. Independent expenditures are reported to the Commission on Form 5 and are subject to three separate reporting requirements. First, a report is required when independent expenditures aggregate in excess of $250 in any quarterly reporting period. In addition to the quarterly report, a 48-hour report is required when independent expenditures aggregate $10,000 or more any time during the calendar year up to and including the twentieth day before an election. Each time subsequent independent expenditures relating to the same election aggregate $10,000 or more, a new 48-hour report is required to be filed. Each 48-hour report is due within forty-eight hours of when the communication is publicly distributed or otherwise publicly disseminated. Finally, a 24-hour report is required when independent expenditures aggregate $1,000 or more, less than twenty days but more than twenty-four hours before an election. Each time subsequent independent expenditures relating to the same election aggregate $1,000 or more, a new 24- hour report is required to be filed. Each 24-hour report is due within twenty-four hours of when the communication is publicly distributed or otherwise publicly disseminated. For purposes of determining whether 24- and 48-hour reports are required to be filed, aggregation is based on all independent expenditures during a calendar year that are made with respect to the same election for a Federal office. 11 C.F.R. § 109.10 (b), (c) & (d).

61 611 F.3d at 678.

related" test, but it would also subject a large quantity of ordinary political speech to regulation.[62]

The Fourth Circuit in *Real Truth About Abortion v. FEC* cited to a narrow understanding of the major purpose test, noting that "[t]he expenditure or contribution threshold means that some groups whose 'major purpose' was *indisputably the nomination or election of federal candidates* would not be designated PACs."[63]

The nature and scope of the major purpose test as applied to the Act was further examined in *FEC v. Malenick*,[64] and *FEC v. GOPAC, Inc.*[65] In those cases, federal district courts examined the public and non-public statements, as well as the electoral spending, of particular groups to determine if the major purpose of each organization was the nomination or election of a federal candidate.

E. COMMISSION RULEMAKING & APPLICATION OF THE "MAJOR PURPOSE" TEST

Although *Buckley* established the major purpose test, it "did not mandate a particular methodology for determining an organization's major purpose," delegating such determinations and methodology to the Commission "either through categorical rules or through individualized adjudications."[66] The Commission opted for the latter. Since *Buckley*, the Commission has determined the major purpose of an organization on a case-by-case basis, rejecting on multiple occasions the invitation to adopt a bright line rule governing the analysis. In 2004, the Commission published a Notice of Proposed Rulemaking to "explore[] whether and how [it] should amend its regulations defining whether an entity is a . . . political committee,"[67] and in particular, whether the regulatory definition of political committee "should be amended by incorporating the major purpose requirement."[68] The Commission sought comment on four tests for determining whether an entity had the requisite major purpose.[69] These proposed tests would

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62 525 F.3d 274, 287-88 (4th Cir. 2008) ("*NCRTL*") (emphasis in original).

63 681 F.3d 544, 558 (4th Cir. 2012), *cert. denied*, 81 U.S.L.W. 3127 (U.S. Jan. 7, 2013) (No. 12-311) ("*RTAA*").

64 310 F. Supp. 2d 230, 234-36 (D.D.C. 2005).

65 917 F. Supp. 851, 859 (D.D.C. 1996).

66 *RTAA*, 681 F.3d at 556.

67 *Notice of Proposed Rulemaking on Political Committee Status*, 69 Fed. Reg. 11,736, 11,736 (Mar. 11, 2004).

68 *Id.* at 11,743.

69 *Id.* at 11,745.

have examined — to varying degrees — an organization's avowed purpose, its spending, and its tax status.[70]

The Commission concluded that "incorporating a 'major purpose' test into the definition of 'political committee' [was] inadvisable" and declined to adopt any of the proposed standards.[71] This decision was challenged in federal district court. The court found that the Commission's decision was not arbitrary and capricious but did order the Commission to provide a more detailed explanation of that decision.[72] In response, the Commission issued a Supplemental Explanation and Justification in 2007.[73] This Supplemental E&J did not issue or explain a new rule. Rather, it elaborated on the Commission's case-by-case approach, explaining that "[a]pplying the major purpose doctrine . . . requires the flexibility of a case-by-case analysis of an organization's conduct that is incompatible with a one-size-fits-all rule," and that "any list of factors developed by the Commission would not likely be exhaustive in any event, as evidenced by the multitude of fact patterns at issue in the Commission's enforcement matters considering the political committee status of various entities."[74]

The U.S. District Court for the District of Columbia upheld the Commission's case-by-case approach as further explained in the Supplemental E&J.[75] More recently, the Fourth and Tenth Circuits upheld the constitutionality of the Commission's case-by-case approach.[76] The

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70 *See id.* at 11745-49; *see also Final Rules on Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees*, 69 Fed. Reg. 68,056, 68,064-65 (Nov. 23, 2004) ("2004 E&J") (explaining that the Commission considered — and rejected — two additional tests (for a total of six) prior to adopting the E&J).

71 2004 E&J, 69 Fed. Reg. at 68,065.

72 424 F. Supp. 2d 100, 115-16 (D.D.C. 2006).

73 2007 Supplemental E&J, 72 Fed. Reg. 5,596.

74 *Id.* at 5,601-02. The Commission has periodically considered proposed rulemakings that would have determined major purpose by reference to a bright-line rule — such as proportional (*i.e.*, 50%) or aggregate threshold amounts spent by an organization on federal campaign activity. But the Commission consistently has declined to adopt such bright-line rules. *See* Independent Expenditures; Corporate and Labor Organization Expenditures, 57 Fed. Reg. 33,548, 33,558-59 (July 29, 1992) (Notice of Proposed Rulemaking); Definition of Political Committee, 66 Fed. Reg. 13,681, 13,685-86 (Mar. 7, 2001) (Advance Notice of Proposed Rulemaking); *see also* Summary of Comments and Possible Options on the Advance Notice of Proposed Rulemaking on the Definition of "Political Committee," Certification (Sept. 27, 2001) (voting 6-0 to hold proposed rulemaking in abeyance).

75 *Shays v. FEC*, 511 F. Supp. 2d 19, 29-31 (D.D.C. 2007) (holding that the Commission's choice to regulate "political organizations" as defined by 26 U.S.C. § 527 on a case-by-case basis was neither arbitrary nor capricious and was "exactly the type of question generally left to the expertise of [the] agency").

76 *RTAA*, 681 F.3d at 556. The court observed that the Commission's approach was "sensible . . . [and] consistent with Supreme Court precedent". *Id.* at 558. *See also Free Speech v. FEC*, Case No. 12-CV-127-S, 2013 WL 12142583, at *7 (D. Wyoming Mar. 19, 2013) ("*Free Speech*") ("[A]gree[ing] with the assessment of the

Fourth Circuit in *Real Truth About Abortion v. FEC*,[77] for example, concluded that "[t]he determination of whether the election or defeat of federal candidates for office is *the* major purpose of an organization . . . is inherently a comparative task, and in most instances it will require weighing the importance of some of a group's activities against others."[78]

While the fundamental approach to determining political-committee status set forth in the 2007 Supplemental E&J — *i.e.*, a flexible, fact-intensive analysis of relevant factors — remains sound,[79] many of the enforcement matters contained therein have been undermined by subsequent judicial decisions. For example, the 2007 Supplemental E&J was issued prior to the Court's decision in *FEC v. Wisconsin Right to Life, Inc.*,[80] which clarified the distinction between issue and electoral advocacy.[81] And recently, the Seventh Circuit in *Wisconsin Right to Life v. Barland* reinforced *WRTL II's* holding that genuine issue advertisements cannot be regulated – through disclosure rules – as electoral advocacy.[82] The Commission has adapted to such developments in the law through its case-by-case approach.

* * * *

In sum:

- Under the Act, an organization must (1) receive "contributions" or make "expenditures" expressly advocating the election or defeat of a federal candidate aggregating at least $1,000 in a calendar year and (2) have as its "major purpose" the nomination or election of federal candidates.

- The major purpose of an organization must be nominating or electing federal candidates; a group that has as its major purpose the discussion of public policy, or political issues, may not be regulated as a political committee under the Act.

Fourth Circuit in *RTAA*") (adopted in full as the opinion for the U.S. Court of Appeals for the Tenth Circuit in *Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013). *cert. denied* 134 S. Ct. 2288, No. 13-772 (2014)).

77 *RTAA*, 681 F.3d at 556.

78 *Id.* (emphasis in original). The *RTAA* court also noted that the inquiry to assess an organization's major purpose "would not necessarily be an intrusive one" since "[m]uch of the information the Commission would consider would already be available in that organization's government filings or public statements." *Id.*

79 2007 Supplemental E&J, 72 Fed. Reg. at 5,601.

80 The 2007 Supplemental E&J was issued on February 7, 2007. *See* 72 Fed. Reg. 5595. *WRTL II* was decided on June 25, 2007. 511 U.S. 449 (2007) ("*WRTL II*").

81 *See WRTL II*, 551 U.S. at 478-79 ("Issue ads like WRTL's are by no means equivalent to contributions and the *quid-pro-quo* corruption interest cannot justify regulating them. To equate WRTL's ads with contributions is to ignore their value as political speech.").

82 *Barland*, 751 F.3d at 834-35.

- The Commission will apply the major purpose doctrine on a case-by-case basis, taking into consideration the unique facts and circumstances involved with a particular group.[83]

With these principles in mind, we turn to New Models.

IV. ANALYSIS OF NEW MODELS' MAJOR PURPOSE

As explained above, since its adoption, the Act's definition of "political committee" has been subject to judicial scrutiny. The Supreme Court held in *Buckley* that the definition as adopted by Congress impermissibly swept within its ambit groups engaged primarily in issue discussion. For this reason, the Court narrowly construed the definition of political committee to reach only groups that (1) meet the statutory definition and (2) have as their major purpose the nomination or election of a federal candidate. Congress also required a threshold predicate to distinguish between ordinary contributors and political committees – that as a threshold matter an organization receives contributions or makes expenditures. Upon thorough consideration of various facts indicative of political committee status: organizational documents, public statements of purpose, tax status, and independent spending, we do not have reason to believe that New Models met the threshold of receiving $1,000 in contributions or making $1,000 in expenditures under the first prong, or that New Models had the major purpose of nominating or electing federal candidates under the second prong.

A. NEW MODELS HAS NOT MET THE STATUTORY THRESHOLD FOR POLITICAL COMMITTEE STATUS

New Models made several contributions to political committees, but did not ***receive contributions*** as defined by the Act. There is also no evidence that New Models ***made expenditures*** as defined by the Act. Therefore, New Models did not meet the statutory threshold for becoming a political committee.

The Act defines the term "contribution" to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any

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[83] While the Commission does look at the facts and circumstances to determine the organization's true purpose—such as its organizational documents, public statements of purpose, tax status, and the amount spent on express advocacy over the course of the organization's history—the Commission cannot (and should not) consider the facts and circumstances of speech itself. *See* 2007 Supplemental E&J, 72 Fed. Reg. 5,595, 5,598 (Feb. 7, 2007) (citing Rev. Rul. 2004-06, 2004-1 C.B. and noting the IRS's facts and circumstances test, if applied to the Act, "clearly would violate the Supreme Court's Constitutional parameters established in *Buckley*, and reiterated in *MCFL* and *McConnell*, that campaign finance rules must avoid vagueness"); *see also Citizens United*, 558 U.S. at 337; *WRTL II*, 551 U.S. at 473-74 (contextual factors of the sort invoked by [the Commission] should seldom play a significant role . . . . the need to consider such background should not become an excuse for discovery or a broader inquiry").

election for Federal office."[84] It defines "expenditure" 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."[85] With regard to both of these definitions, the Supreme Court clarified and, especially for non-candidates and non-political parties, limited the scope of what counts as "made . . . for the purpose of influencing any election for Federal office."[86]

In *Buckley*, the Court upheld regulations on contributions, noting that "[a] contribution to [a Federal candidate] serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support."[87] Even so, the Act limits contributions or requires their disclosure only when they are sufficiently "connected to a candidate or his campaign."[88] Specifically, *Buckley* narrowed the definition of contribution to encompass only (1) donations to candidates, political parties, or campaign committees; (2) expenditures made in coordination with a candidate or campaign committee; and (3) donations given to other persons or organizations but "earmarked for political purposes."[89] New Models was not a candidate, party, or campaign committee and, as explained below, did not make any expenditures – coordinated or otherwise. Therefore, none of its funding seems earmarked for a political purpose and would not be counted as a "contribution" for purposes of the Act.

The Court circumscribed the definition of "expenditure" even more than it did the term "contribution." The Court held that the term "expenditure" is construed "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified federal candidate."[90] This is to limit regulation – including disclosure requirements – to "spending that is unambiguously related to the campaign of a particular federal candidate."[91]

There is no claim that New Models made any independent expenditures of its own expressly advocating the election or defeat of a clearly identified candidate. New Models's spending on political activities consisted only of making contributions to several organizations,

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84 52 U.S.C. § 30101(8)(A)(i).

85 52 U.S.C. § 30101 (9)(A)(i).

86 *See, e.g.*, *Buckley*, 424 U.S. at 78-80.

87 *Id.* at 424 U.S. at 21.

88 *Id.* at 78.

89 *Id.* at 23, n.24, 78. The United States Court of Appeals for the Second Circuit interpreted the phrase "earmarked for political purposes" to include only donations "that will be converted to expenditures subject to regulation under [the Act]." *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995).

90 *Id.* at 79-80.

91 *Id.* at 80.

most of which were registered as political committees with the Commission. Those committees made expenditures independent of candidates and political parties.[92] The contributions to these political committees would be "generalized expressions of support" for those committees, but not necessarily any particular candidate. They would not be "expenditures made" under the Act. To find otherwise requires ignoring how the Act differentiates between "contributions" and "expenditures" throughout its provisions.[93] Moreover, the Act defines the term "contribution" and never includes that term in a definition or modification of the term "expenditure."[94] Thus, under the plain language of the Act, New Models did not receive contributions or make expenditures of more than $1,000. As a result, they were not required to register and report as a political committee with the Commission.

The threshold inquiry is not a trivial technicality. It indicates a fundamental distinction between a political committee, on the one hand, versus a contributor to political committees, on the other. New Models was a contributor, not a political committee.

B. THERE IS NO REASON TO BELIEVE NEW MODELS HAS THE MAJOR PURPOSE FOR POLITICAL COMMITTEE STATUS

Whether or not New Models met the threshold inquiry, it nonetheless did not have the requisite major purpose to be a political committee.[95] The Complaint bases its allegation upon a

[92] Indeed, New Model's contributions to these political committees are only permissible because, as the Court of Appeals for the District of Columbia held, "the government has no anti-corruption interest in limiting contributions to an independent expenditure group." *SpeechNow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010). Thus, "limits on [such] contributions . . . cannot stand." *Id.* at 696. This follows from the Supreme Court's holding that spending for communications made independent of a candidate "do not give rise to corruption or appearance of corruption." *Citizens United*, 558 U.S. 310, 357. As "general expressions[s] of support" for the independent expenditure committees, New Models' contributions here bear even less risk of corruption than the committees' expenditures do. [To paraphrase *Buckley*, these contributions "do not communicate the underlying basis for the support" of these independent groups, much less a clearly identified federal candidate.] This is another reason contributions to such groups should not count as "expenditures made" toward the statutory trigger of § 30101(4)(A).

[93] OGC argued that contributions to a political committee should qualify as expenditures for purposes of the statutory threshold. We think the better course is to maintain the distinction between contributions and expenditures that exists throughout the Act, Commission regulations, and case law. Seemingly contrary precedents can be distinguished by candidate involvement. Political committees are the *only* organizations that can contribute to federal candidates. 52 U.S.C. § 30116(a); *cf.* 11 C.F.R. §110.1(e) (permitting contributions by partnerships, provided they are attributed to individual partners). This lends weight to the argument that giving money to candidates may trigger political committee status. Whatever the merits of this argument when candidates are involved, however, they lose all force in context of contributions to independent expenditure groups, which have no potential for corruption or the appearance of corruption.

[94] *See e.g.*, 52 U.S.C. § 30118. Contributions ***or*** expenditures by national banks, corporations, or labor organizations (modifying definitions of the terms "contribution" or "expenditure" for purposes of this subsection (emphasis added)).

[95] Our conclusion that the available evidence does not support finding reason to believe that New Models is not a political committee is based upon two independent grounds. First, New Models did not cross the statutory

comparison of New Models's 2012 campaign spending with its 2012 spending on activities unrelated to the election or defeat of federal candidates, a comparison showing 68.5% of New Models's total disbursements in 2012 went towards contributions to independent expenditure-only committees.[96] We do not believe contributions in one year establish this organization's major purpose. Instead, we compare New Models's isolated contributions with other activities both in 2012 and during its lifetime. Our analysis also considers the First Amendment implications of overreaching to regulate a policy organization as a political committee—and subjecting it to the burdens attendant to such classification—based solely on a handful of contributions in a brief snapshot in time.[97]

1. *New Models' Central Organizational Purpose Focused on Public Policy and Issues, not Federal Candidates*

A finding of reason to believe requires significant evidence a violation of the Act occurred. Here, the Complaint does not allege or provide evidence indicating New Models organized for purposes other than the promotion of social welfare consistent with 26 U.S.C. § 501(c)(4) and Department of the Treasury regulations. Discussion of organizational purpose is likewise absent from OGC's analysis.

Although an organization's tax status is not dispositive of the question, it is certainly a relevant consideration. As Senator McCain, a principal Senate sponsor of BCRA, has stated, "under existing tax laws, Section 501(c) groups . . . cannot have a major purpose to influence federal elections, and therefore are not required to register as federal political committees, as

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threshold of $1,000 in contributions received or expenditures made. Second, New Models's major purpose is not nominating or electing federal candidates. Each ground is independently sufficient to substantiate our conclusion..

96 Compl. at 4-5, 7. Similarly, OGC—while noting that the "Commission considers a group's overall conduct, including its disbursements, activities, and statements" when determining major purpose—devotes its analysis almost exclusively to New Models' spending in calendar year 2012, ignoring other conduct over 15 years. First Gen. Counsel's Rpt. at 5, MUR 6872. OGC also supports its recommendation by reference to New Models's 2011-2012 *election cycle* spending. *Id.* at 6. That argument fails for the same reason as an analysis based solely on one calendar year. New Models made no contributions or expenditures in 2011, indicating it was not a political committee in 2011. Counting its 2012 contributions as a percentage of its 2011 and 2012 spending still uses a single year of activity to define the organization. Even counting the 2012 spending over that two-year period represents a departure, or temporary anomaly, from the organization's usual issue-related spending over the course of multiple years and election cycles and that snapshot does not, based upon our expertise in judging organizations, and considering all other facts and circumstances, represent the organization's major purpose. And arguing that New Models's major purpose "changed" in 2012 is a different rhetorical way to justify a focus on one year. We have consistently rejected OGC's myopic focus on one year of spending, no matter how OGC rhetorically describes one year of spending. The fundamental flaw in OGC's one-year approach – which is a recent creation by OGC – is that it ignores an organization's history and other activities. Here, New Models's history, before and after 2012, evidences a classic issue organization.

97 *See* Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 1, MUR 6538 (Americans for Job Security, *et al.*); Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 1, MUR 6396 (Crossroads GPS).

long as they comply with their tax law requirements."[98] 501(c)(4) groups, specifically, are permitted to engage in a substantial amount of political campaign activity without losing their exempt status.[99]

The Complaint does not allege that New Models's organizational documents reveal its purpose to be the nomination or election of federal candidates.[100] Without allegations or evidence to the contrary we may assume such documents were properly drafted in order to incorporate and operate as a non-profit organization and obtain and maintain 501(c)(4) status with the IRS.[101] Thus, we weigh this factor in favor of New Models absent evidence that its articles of incorporation or bylaws manifest an organizational purpose other than engaging in legitimate 501(c)(4) social welfare activities, or evidence that its 501(c)(4) status has been violated or revoked. Accordingly, we find that New Models's organizational documents weigh against finding reason to believe that its major purpose was the nomination or election of federal candidates.

2. *New Models' Public Statements Do Not Indicate That Its Major Purpose Was the Nomination or Election of Federal Candidates*

Some courts have asserted that an organization's major purpose may be established through "public statements of purpose."[102] In *Malenick*, the court reviewed the organization's

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98 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 an exemption from taxation for "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare"). *See also* Comment of Public Citizen on Reg. 2003-07 (Political Committee Status) at 10 (Apr. 5, 2004) ("[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").

99 *See* Rev. Rul. 81-85, 1981-1 C.B. 332 ("[T]he regulations do not impose a complete ban on [political campaign activities] for section 501(c)(4) organizations. Thus, an organization may carry on lawful political activities and remain exempt under section 501(c)(4) as long as it is primarily engaged in activities that promote social welfare."). Whether an organization is in fact "primarily" engaged in promoting social welfare under the IRC and Treasury Department regulations is a different (and broader) "facts and circumstances test," than the "major purpose" test articulated in *Buckley*. *See* 2007 Supplemental E&J at 5,598.

100 *See* Statement of Reasons of Commissioners Darryl R. Wold, David M. Mason, and Scott E. Thomas at 2, MUR 4850 (Deloitte & Touche, LLP, *et al.*) ("The burden of proof does not shift to a respondent merely because a complaint is filed.").

101 *See* Treas. Reg. § 1.501(c)(4)–1(a)(2)(ii) ("The promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office."); Rev. Rul. 81-85, 1981-1 C.B. 332 ("In order to qualify for exemption under section 501(c)(4) of the [Internal Revenue] Code, an organization must be primarily engaged in activities that promote social welfare within the meaning of section 1.501(c)(4)-1."). *See also* D.C. CODE § 29-402.02 (requiring articles of incorporation to set forth that the corporation is incorporated as a nonprofit.).

102 *FEC v. Malenick*, 310 F. Supp. 2d 230, 234-36 (D.D.C. 2004) (citing *GOPAC*, 917 F. Supp. at 859) (discussing *FEC v. Machinists Non-Partisan League*, 655 F.2d 380, 392 (D.C. Cir. 1981)). *But see FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL II*"); *North Carolina Right to Life v. Leake* ("*NCRTL II*"), 525

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.[103] In *GOPAC*, the court predominantly focused on letters GOPAC sent to citizens as well as discussions 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.[104]

Under *GOPAC*, official statements from a group, such as a group's organizing documents and official statement of purpose, or other materials issued under the group's name, including fundraising documents or press releases, are the primary public statements by which an entity's central organizational purpose is determined. According to the 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."[105] Thus, under the Supplemental E&J and federal court decisions, these statements must be given significant weight and a stray quote or a paraphrase, in the face of all the other evidence, will not transform a group into a political committee.

Here New Models denies that the organization has the requisite major purpose for political committee status.[106] New Models claims it never made an independent expenditure,[107] nor publicly advocated the election or defeat of a federal candidate.[108] Its fundraising materials do not state that the organization's goal is to elect federal candidates nor do they suggest to prospective donors that funds will be used to elect or defeat federal candidates; and New Models has never stated that its purpose was the election or defeat of a federal candidate.[109]

The Complaint does not identify a single statement in over 15 years where a representative of New Models indicated the major purpose of the organization was to nominate

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F.3d 274 (cautioning against looking to subjective or contextual factors), which cast serious doubt on the validity of examining anything other than the amount of express advocacy in the major purpose test analysis.

103 310 F. Supp. 2d at 235.

104 917 F. Supp. at 862-65.

105 72 Fed. Reg. at 5,601.

106 Resp. at 3-4; Resp., Aff. of Tim Crawford at ¶ 3.

107 Resp., Aff. of Tim Crawford at ¶ 5. A review of Commission filings reveals no independent expenditure reports ever filed by New Models. Federal Election Commission, Independent Expenditures, https://www.fec.gov/data/independent-expenditures/?data_type=processed&is_notice=false&max_date=08%2F29%2F2017

108 *Id.* at 4, 7.

109 *Id.* at 9-10.

or elect federal candidates.[110] Public statements available in our record indicate that New Models's major purpose was to conduct and sponsor research on public policy. As set forth on its website, "New Models provides public opinion research on key issues facing the American people." The website even maintains an "[a]rchives" page allowing the public to view the research New Models engaged in or commissioned since 2003.[111] No online report that we reviewed contains language advocating the election or defeat of a candidate.[112] Therefore, New Models's public statements weigh against finding reason to believe New Models was a political committee and we place much weight on this factor in our analysis.

3. *New Models' Independent Spending Demonstrates Its Major Purpose Was Not the Nomination or Election of a Federal Candidate*

In applying the Commission's case-by-case approach, we place significant weight upon an organization's history of activities and spending. This approach gives the most complete picture of an organization's major purpose.[113] One federal court recently ruled that this approach

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110 OGC's Report does not identify a single statement evincing a purpose to nominate or elect federal candidates. OGC's analysis states that "the available information does not include examples of New Model's public statements or non-contribution activities." First Gen. Counsel's Rpt., at 5, MUR 6872. This statement is inaccurate. New Models' 2012 Form 990 was attached to the Complaint and describes New Models' "program service accomplishments." *See* Compl. Ex. A, 2012 Form 990 Part III (listing program service activities including focus groups, national issues polling and branding). "A program service is an activity of an organization that accomplishes its exempt purpose." 2016 Instructions for Form 990 Return of Organization Exempt from Income Tax at 10, https://www.irs.gov/pub/irs-pdf/i990.pdf. Because "[t]he promotion of social welfare does not include direct or indirect participation or intervention in political campaigns . . ." program service activities are by definition "non-contribution activities." 26 C.F.R. 1.501(c)(4)–1(a)(2)(ii). New Models' program service accomplishments are apparent throughout its lifetime. *See* Form 990s. Part III; NEW MODELS, http://newmodelsusa.org/. Because newmodelsusa.org website is no longer functioning we utilized an internet archive to review New Models's reports. *See* Wayback Machine, Internet Archive (search for "http://newmodelsusa.org") (revealing published monthly research results from 2003 to early 2016). Additionally, New Models' website is listed on the front page of the 2012 Form 990 and 2011 Form 990, both of which were attached to the Complaint. *See* Compl. at Exs. A, E. A check of that website would easily have given OGC examples of New Models' public statements in addition to the polling research it funded for over a decade.

111 *See* Wayback Machine, Internet Archive (search for "http://newmodelsusa.org").

112 *See id; see e.g.,* NEW MODELS, Messaging on Immigration Reform and the Fiscal Cliff (December 2012), https://web.archive.org/web/20160503062835/http://newmodelsusa.org/wp-content/uploads/2012/12/NewModelsDecember2012Report.pdf. Even if New Models had engaged in express advocacy on its own website, such internet communications are not expenditures under the Act and have no relevance to an analysis of political committee status. *See* 11 C.F.R. § 100.153 (exempting uncompensated internet activity from the definition of "expenditure").

113 *See* Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen, MUR 6538 (Americans for Job Security, *et al.*) (looking at organization's spending over its lifetime); Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 24 n.101, MUR 6396 ("Often one can assess an organization's true major purpose only by reference to its entire history."); *see also* Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners

is reasonable.[114] The Commission and courts have resolved major purpose analyses by examining each organization as a whole, considering varying years of activity ranging from two to ten years, and often the organization's entire history.

For example, in MUR 5365 (Club for Growth, Inc.) the Commission cited "CFG's activities, including its candidate research and advertising campaigns discussed above [from 2000 to 2004]."[115] In MUR 5751 (The Leadership Forum), OGC cited IRS reports showing receipts and disbursements over a five-year period, from 2002 through 2006, before concluding that the Respondent had not crossed the statutory threshold for political committee status.[116]

In MUR 2804, the Commission considered whether the American Israel Public Affairs Committee ("AIPAC") was a political committee. The Commission based its conclusion that AIPAC was not a political committee upon the General Counsel's analysis of a full decade, from 1983 to 1992, of varied political activities, which included some electoral expenditures.[117] After the Commission's conclusion was challenged in court and remanded, the Commission ratified that conclusion again in 2000.[118] The Commission's determination that AIPAC was not a

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Caroline C. Hunter and Matthew S. Petersen, MUR 6081 (American Issues Project, Inc.) (looking at four years of an organization's history).

[114] *CREW v. FEC*, 209 F. Supp. 3d. 77, 94 (D.D.C. 2017) ("Given the FEC's embrace of a totality-of-the-circumstances approach to divining an organizations 'major purpose,' it is not *per se* unreasonable that the Commissioners would consider a particular organization's full spending history as relevant to its analysis."). The district court in *CREW* went on to rule that the Commission should consider whether an organization's major purpose fundamentally *changed* over time, and to consider whether a spike in electoral spending in one year indicates such a fundamental change in the organization. *Id.* at 94. Having considered New Models's history, and the contributions it made in 2012 in the context of that history and the long-term mission, as well as its activities in the years immediately preceding and following 2012, the facts and circumstances do not provide reason to believe that New Models's major purpose changed from public policy discussion to nominating or electing federal candidates. This conclusion is depicted graphically in Figure 2 above.

[115] General Counsel's Brief at 24, MUR 5365 (Club For Growth, Inc.); *see id.* at 4 ("every CFG membership solicitation between 2000-2004 confirms [] the mission of the organization") & 12 ("charting CFG's "annual advertising disbursements compared to its total disbursements for each year since 2000."). *See also* Stipulation for Entry of Consent Judgment ¶ 22, *FEC v. Citizens Club for Growth, Inc.*, Civ. No. 1:05-01851 (Sept. 6, 2007) ("Defendant's disbursements also show that its major purpose is influencing federal elections. Between August 30, 2000 and December 31, 2004, Defendant made disbursements totaling approximately $15.1 million, the vast majority of which were made *in connection with* federal elections, including . . . public communications *referencing* a clearly identified candidate.") (emphasis added). The legal underpinnings of this MUR, including its consideration of spending on activity merely "in connection with" federal elections have been undermined by *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) and *Emily's List v. FEC*, 581 F.3d 1, 12-14 (D.C. Cir. 2009).

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

[117] *See* General Counsel's Brief (Jan. 30, 1992), MUR 2804 (American Israel Public Affairs Committee).

[118] *See* Vote Certification (Mar. 22, 2000), MUR 2804R, *approving recommendations in* General Counsel's Report (Mar. 8, 2000) at 19-22, MUR 2804R ("This was the conclusion reached in MUR 2804 with regard to AIPAC, with the result that the Commission found no probable cause to believe that the organization had violated 2

political committee also was the basis for the Commission's conclusion, resolving a related allegation, that AIPAC was a bona fide membership organization.[119] The Commission's two determinations – that AIPAC was not a political committee and was a membership organization – were conflated because classification as a membership organization turned on whether the organization was a political committee. When the issue was again reviewed by the U.S. District Court for the District of Columbia, the court affirmed the Commission's conclusion that AIPAC was not a political committee, even expanding the scope to AIPAC's "more than forty years" history:

> AIPAC was incorporated in 1963 as a non-profit organization with the "sole function," as a registered domestic lobby, to encourage close U.S.-Israel relations and to provide services to its own members. Based on a careful review of the administrative record and the parties' arguments, I find no evidence that AIPAC's focus on lobbying for more than forty years has been a sham perpetrated to circumvent the Act's contribution and expenditure limits.[120]

The Commission has analyzed other matters according to several years of activity. In MUR 3669, the Commission considered nearly the entire five-year lifetime of the Christian Coalition.[121]

Here, the Complaint alleges New Models was a political committee in 2012 because it made contributions in excess of $1,000 to independent expenditure-only political committees,

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U.S.C. §§ 433 and 434. . . . Therefore, the Commission's determination that there was no probable cause to believe AIPAC had violated 2 U.S.C. §§ 433 and 434 by failing to register and report as a political committee should remain undisturbed.").

[119] General Counsel's Report at 19-20 (Mar. 8, 2000), MUR 2804R.

[120] *Akins v. FEC*, 736 F. Supp. 2d 9, 20 (D.D.C. 2010).

[121] *See, e.g.*, Gen. Counsel's Brief at 13-169 (July 28, 1995), MUR 3669 (Christian Coalition) (considering activities over five years, 1990, 1991, 1992, 1993 and 1994). The Christian Coalition was created in 1989. *See FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 49 (D.D.C. 1999). So the Commission's consideration of activities over five years, 1990, 1991, 1992, 1993 and 1994, constituted practically the entire lifespan of the organization. *See* Statement of Reasons of Commissioner Scott E. Thomas, Vice Chairman John Warren McGarry, and Commissioner Danny Lee McDonald, MUR 3669 at 6-11 (Christian Coalition) (citing to OGC's 192-page brief and arguing the Christian Coalition's major purpose was "election-related activities" as shown by various activities and statements from 1990 to 1994). *See also* General Counsel's Report (Mar. 18, 1999) at 6, MUR 3669 (Christian Coalition) (expanding proposed investigation to "new areas of inquiry" including TV and newspaper ads from 1990, 1991, 1992, and 1993); First Gen. Counsel's Rpt. at 12, 18-30, MUR 3669 (Christian Coalition) (analyzing activities from 1990 through 1992 and determining that the organization's activities were "designed" to influence federal elections). The legal underpinnings of this MUR, including consideration of spending on "election-related" activities "designed" to influence federal elections have been undermined by *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007).

representing approximately 68.5% of its total spending during the 2012 calendar year.[122] We disagree. Based upon our review of New Models's spending, nominating or defeating a federal candidate may have been *a* purpose of the organization in 2012, but was not *the* major purpose of the organization.[123] New Models never received contributions or made independent expenditures. New Models's federal electoral activity was limited to making isolated contributions to three Super PACs. Over its lifetime, these contributions amounted to just 19.5% of the organization's total spending.[124] Even in 2012, New Models spent $1.5 million on its traditional policy mission. Thus, the contributions it made to other organizations in 2012 does not support a finding that its the major purpose was nominating or electing candidates to federal office.

Our conclusion is further supported by looking at New Models's activities in the wake of *Citizens United* and *Speech Now*. From 2010 through 2015, the amount allocated to independent expenditure-only committees totaled just 29.6% of New Models's overall spending. Furthermore, the three most recent calendar years show *zero* contributions to federal political committees.[125] Accordingly, we do not have reason to believe that New Models's major purpose is the nomination or election of federal candidates. Rather, we believe New Models is an issue discussion organization that made sporadic contributions to independent expenditure-only committees. In other words, New Models is precisely the type of group the *Buckley* court sought to exclude from the definition of political committee through the major purpose limitation.

Recently, in the last five years, OGC has conceived a new timeframe for determining an organization's major purpose by reference to a single calendar year. Although that argument has not persuaded the Commission, or any federal court, OGC nonetheless continues to advance it

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122 *See* Compl. at 6-7.

123 Nor does New Models's spending after 2012 indicate a shift in the organization's spending pattern. To the contrary, the 2012 contributions deviate from New Models' usual spending practices both before and after 2012. Furthermore, New Models affirmed under penalty of perjury that no significant changes to its governing documents—and by extension the exempt purposes under IRC section 501(c)(4) required to be denoted in those documents—took place in 2012 or in the years following. *See* New Models' 2011, 2012, 2013, 2014, 2015 Form 990s.

124 OGC stated in its First General Counsel's Report that "the available information does not provide an adequate basis" to assess New Models's representation that its contributions amount to "'less than 20%' of its overall spending since the group's inception." First Gen. Counsel's Rpt. at 5. Again, OGC's Report was inaccurate. New Models' annual returns are publicly available. *See* Foundation Center 990 Finder, http://990finder.foundationcenter.org/990results.aspx?990_type=A&fn=New+Models&st=&zp=&ei=&fy=&action=Find; ProPublica Nonprofit Explorer, https://projects.propublica.org/nonprofits/organizations/522267268; OpenSecrets Nonprofit Data Search, https://www.opensecrets.org/outside-spending/political-nonprofits/990_tax_forms?id=522267268

125 209 F. Supp. 3d 77, 94 (D.D.C. 2017) (stating that the Commission should have given additional weight to an organization's most recent calendar year).

here.[126] According to OGC's report, "whether the analytical time frame for major purpose is a calendar year, the group's fiscal year, or the relevant election cycle, New Models' spending on federal campaign activity[127] appears to constitute the majority of its overall spending."[128] Because the only year in which New Models made significant political contributions was 2012, OGC's analysis, whether phrased as calendar year, fiscal year, or election-cycle, turns on the contributions made in the single calendar year 2012.

However, determining an organization's major purpose by reference to its activity in a narrow snapshot of time—one calendar year or two—overlooks 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 that exist to elect or defeat federal candidates.[129] Other regulatory rules apply to groups that occasionally, or incidentally, act to nominate or elect candidates. While OGC attempts to root the single calendar year approach in the statute,[130] the major purpose test is not expressed in the statute. The major purpose test was

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126 *See* First Gen. Counsel's Rpt. at 5, 6872 (New Models).

127 While the Commission has erroneously strayed into the vague notion of generalized "campaign activity," rather than *Buckley's* strict concept of nomination or election of federal candidates, *see, e.g.*, MUR 5365 (Club for Growth), General Counsel's Report #2 at 3, 5 ("[T]he vast majority of CFG's disbursements are for federal campaign activity" and concluding that CFG "has the major purpose of federal campaign activity."), the Commission more recently has abided by *Buckley's* mandate: that major purpose encompasses only activity expressly directed at the nomination or election of federal candidates. *See, e.g.*, Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen, MUR 6396 (Crossroads GPS); Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen, MUR 6081 (American Issues Project); Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn, MUR 5541 (The November Fund); Federal Election Commission's Brief for the Respondents in Opposition at 4, *The Real Truth About Obama, Inc., v. FEC*, 130 S. Ct. 2371 (2010) (No. 09-724) ("*RTAO*") ("[A]n entity that is not controlled by a candidate need not register as a political committee unless its 'major purpose' is the nomination or election of federal candidates."); Brief of Appellees Federal Election Commission and United States Department of Justice at 5, *RTAO*, 575 F.3d 342 (4th Cir. 2009) (No. 08-1977) ("[A] non-candidate-controlled entity must register as a political committee — thereby becoming subject to limits on the sources and amounts of its contributions received — only if the entity crosses the $1,000 threshold of contributions or expenditures and its 'major purpose' is the nomination or election of federal candidates").

128 First Gen. Counsel's Rpt. at 6, 8, MUR 6872 (New Models). New Models's fiscal year *is* the calendar year. *See* Form 990s.

129 *See, e.g.*, 2007 Political Committee Status Supplemental E&J at 5,602 ("[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.").

130 OGC argues that "[a] calendar year provides the firmest statutory footing for the Commission's major purpose determination . . . ." First Gen. Counsel's Rpt.at 5 n.21, MUR 6872 (New Models). However, 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 and operates. The Act imposes a bright line that, according to *Buckley*, was unconstitutionally over-inclusive, and thus, the Court imposed the major purpose limitation as a further filter. It is

fashioned by the Supreme Court precisely to avoid a rigid, "one-size-fits-all rule" rule.[131] The Commission has chosen a more comprehensive set of factors in a case-by-case approach. Moreover, a rigid calendar year approach or election cycle approach conflicts with multiple decisions by the U.S. District Court for the District of Columbia upholding Commission consideration of an organization's multi-year spending history.[132] For these reasons, the Commission has never formally adopted such an approach[133] and has eschewed limiting its analysis to a single calendar year in prior enforcement matters – matters OGC chose not to cite.[134]

Assessing the major purpose limitation through the myopic and artificial window of an organization's political contributions in a single calendar year would inevitably subject many issue-based organizations to the burdens of political committee status.[135] 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. Like any snapshot analysis, limiting ourselves to short time periods in the life of an organization provides an incomplete and distorted picture of a group's actual major purpose.

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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.

131 According to *RTAA*, the Commission is not "foreclose[d] . . . from using a more comprehensive methodology." 681 F.3d at 557. But *RTAA* never approved of 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.

132 *See CREW v. FEC*, 209 F. Supp. 3d 77, 94 (D.D.C. 2017) (reasonable for the Commission to consider organization's "full spending history"); *Akins v. FEC*, 736 F. Supp. 2d 9, 20 (D.D.C. 2010) (considering organization's "focus on lobbying for more than forty years"). *See also FEC v. Malenick*, 310 F. Supp. 2d 230, 233 (D.D.C. 2004) (citing Pl.'s Mem., Ex. 1 (Stipulation of Fact signed and submitted Malenick and Triad Inc., to the FEC on January 28, 2000, listing numerous 1995 and 1996 Triad materials) and Ex. 47 ("Letter from Malenick to Cone, dated Mar. 30, 1993" 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); *FEC v. GOPAC*, 917 F. Supp. 851, 862-66 (D.D.C. 1996) (reviewing, among other things, GOPAC's 1989-1990 Political Strategy Campaign Plan and Budget).

133 2007 Supplemental E&J, 72 Fed. Reg. 5,595 (Feb. 7, 2007).

134 *See* MUR 5751 (The Leadership Forum); MUR 5365 (Club for Growth); MUR 3669 (Christian Coalition); MURs 2804 & 2804R (AIPAC).

135 A calendar-year approach also presents practical difficulties. If a group is a political committee, it must file a statement of organization within ten days of becoming a political committee. Since a group may not know its overall spending *a priori*, there is no way for a group to know when the ten-day period begins to run, or when the first filing is due.

For example, consider a group that exists for eight years, spending one million dollars per year. For four years, it spends 90% of its resources on issue advocacy and 10% on express advocacy. In year five, the organization's foremost issue becomes highly visible in a federal election. As a result, it devotes 90% of its resources that year to expressly advocate the election or defeat of clearly identified federal candidates and only 10% on issue advocacy. In years six, seven, and eight, it returns to spending 90% of its funds on issue advocacy and 10% 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% of its total resources, and 90% of its resources in seven of its eight years of existence, were spent on issue advocacy. Deeming 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 a calendar-year basis. Such an organization could devote 10% of its resources to express advocacy prior to the election, then spend the other 90% 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 on a distinct minority of its spending within the first twelve months of its operation. Despite the group's best efforts to minimize its 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 policies and other legislative *issues* would focus some of its time and spending 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."[136] Thus, linking issues to candidates and elections is quite common. But if a group resumes its issue advocacy after the election date, such spending is also evidence of its true purpose.[137] 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'etre*.

Also problematic, if the groups in the examples above were regulated 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

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[136] 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).

[137] Interestingly, in the past the Commission has relied, in part, on the fact that an organization ceased active operations after 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 5,605 (summarizing MUR 5511 (Swiftboat Vets) and MUR 5754 (MoveOn.org Voter Fund)). If the Commission may consider the lack of activity in the calendar year following an election as relevant for determining major purpose, then it certainly it can look at and evaluate actual activity undertaken in the next calendar year.

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."[138] Thus, in order to stop filing burdensome and invasive financial reports, a committee would have to surrender its political rights and agree to not make *any* independent expenditures, regardless of the organization's major purpose.

For all of these reasons, the Commission's analysis of an organization's major purpose has avoided setting a definitive time frame for judging each organization's activities. Here, applying our expertise in the context of the Commission's well-established case-by-case framework, we considered New Models's contributions in 2012 in the context of the organization's history, before and after its contributions in 2012, to conclude that New Models's overall spending history did not support finding reason to believe that it had the major purpose of nominating or election federal candidates to office. Nor do we conclude that New Models's contributions in 2012, by themselves, support finding reason to believe that New Models fundamentally changed its organizational purpose.

V. CONCLUSION

Based on our review of the evidence in the record, New Models is an organization that made permissible contributions to independent expenditure-only political committees. These occasions were irregular, occurring in 2010 and 2012 and totaled less than 20% of the organization's total lifetime expenses. As the 2007 Supplemental E&J made clear, however, to be considered a political committee under the Act, the nomination or election of a candidate must be the major purpose of the organization. Here, New Models's organizational purpose, tax exempt status, public statements, and overall spending evidence an issue discussion organization, not a political committee having the major purpose of nominating or electing candidates. As a result, it cannot (nor should it) be subject to the "pervasive" and "burdensome" requirements of registering and reporting as a political committee. For these reasons, and in exercise of our prosecutorial discretion,[139] we voted against finding reason to believe that New Models violated the Act by failing to register and report as a political committee and to dismiss the matter.

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[138] 11 C.F.R. § 102.3(a).

[139] *See Heckler v Chaney*, 470 U.S. 821 (1985). Given the age of the activity and the fact that the organization appears no longer active, proceeding further would not be an appropriate use of Commission resources. *See* 28 U.S.C. § 2462. *See also Nader v. FEC*, 823 F. Supp. 2d 53, 65-66 (D.D.C. 2011) (finding Commission decision to dismiss allegations that several groups were political committees was not contrary to law, and "represents a reasonable exercise of the agency's considerable prosecutorial discretion" given the "staleness of evidence and the defunctness of several of the groups").

Caroline C. Hunter
Vice Chair

Dec. 20, 2017
Date

Lee E. Goodman
Commissioner

Dec. 20, 2017
Date