FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
New Models	)	MUR 6872

STATEMENT OF REASONS OF COMMISSIONER ELLEN L. WEINTRAUB

I did not expect to be celebrating Groundhog Day between Hanukah and Christmas this week. But here I am, once again, faced with pages upon pages of analysis from my Republican colleagues on why, once again, they couldn't *possibly* find that a group that gave the majority of its money in a calendar year to a super PAC could *under any circumstances* be considered a political committee that year.

Their argument, in a nutshell, is that one can determine the political-committee status of an organization only by looking at the group's spending over its entire lifetime. But over the course of 32 pages and 139 footnotes,[1] my colleagues fail to mention that this exact argument was evaluated – and resoundingly rejected – by a court *just last year,* in remarkably similar circumstances, in the *CREW v. FEC* matter regarding the American Action Network.[2]

My colleagues *do* cite the case, pulling out the parenthetical that it's "reasonable for the Commission to consider organization's 'full spending history.'"[3] But for some reason they fail to note that the opinion's next paragraph starts with the word "However," and it all goes downhill from there.

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1 Statement of Vice Chair Caroline C. Hunter and Commissioner Lee E. Goodman, dated Dec. 20, 2017.

2 209 F.Supp.3d 77 (2016).

3 Statement of Vice Chair Caroline C. Hunter and Commissioner Lee E. Goodman, dated Dec. 20, 2017, at n.132.

Way downhill. Let's recap: Judge Christopher R. Cooper of the U.S. District Court for the District of Columbia called the Republicans' reasoning on this point "arbitrary" [4] and "contrary to law" [5] and awarded summary judgment to CREW.[6]

It is difficult to make the case against my Republican colleagues' political-committee analysis more clearly than Judge Cooper did last year, so I'll let him take it from here:

> *Given the FEC's embrace of a totality-of-the-circumstances approach to divining an organization's "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.*
>
> *However, the Commissioners have gone further than merely eschewing the calendar-year approach as a "rigid, one-size-fits-all rule" at odds with the FEC's chosen case-by-case method... Rather, they have replaced that rule with a different — but equally inflexible — metric. Looking* ***only*** *at relative spending over an organization's lifetime runs the risk of ignoring the not unlikely possibility, contemplated by the Supreme Court, that an organization's major purpose can* ***change****. See MCFL, 479 U.S. at 262, 107 S.Ct. 616 (recognizing that a group's "spending [may]* ***become*** *so extensive that the organization's major purpose may be regarded as campaign activity [such that] the corporation would be classified as a political committee." (emphasis added))...*
>
> *The Commissioners' refusal to give any weight whatsoever to an organization's relative spending in the most recent calendar year — particularly in the case of a fifteen-year-old organization like AJS — indicates an arbitrary "fail[ure] to consider an important aspect of the [relevant] problem."... The seriousness of that failure would only increase with the lifespan of the challenged organization: A half-century-old organization with a substantial spending history could commence spending handsomely on election-related ads and continue such expenditures for decades before its new "major purpose" would be detected by the controlling Commissioners' lifetime-only approach. Surely, that cannot be what Congress contemplated in defining "political committee" in terms of calendar-year spending under FECA, see 52 U.S.C. § 30101(4) (defining political committee as an entity with more than $1,000 in contributions or expenditures* ***in a calendar year****), nor can it be what the Supreme Court intended with its "major purpose" narrowing instruction, see MCFL, 479 U.S. at 262, 107 S.Ct. 616.*
>
> *The Court therefore concludes that the Commissioners' lifetime-only rule — at least as applied to AJS — is "contrary to law," 52 U.S.C. § 30109(a)(8)(C), in that it tends to ignore crucial facts indicating whether an organization's major*

[4] 209 F.Supp.3d 77 at 94.

[5] *Id.*

[6] *Id.* at 95.

purpose has changed, and is inconsistent with the FEC's stated fact-intensive approach to the "major purpose" inquiry.[7]

The 2016 *CREW v. FEC* decision was an embarrassing legal smackdown for my Republican colleagues. It takes some real chutzpah for them to now cite that very decision to try to make the exact legal point upon which they had been smacked down.

It is disappointing to see that my Republican colleagues failed to learn anything from the experience and that they are willing to make the exact same legal mistake again, likely with the exact same legal consequences when the 2018 version of *CREW v. FEC* undoubtedly hits the courts. It's *déjà vu* all over again, and it makes for an unhappy Groundhog Day.

12-21-17
Date

Ellen L. Weintraub
Commissioner

7 *Id.* at 94-95.