

**BEFORE THE
FEDERAL ELECTION COMMISSION**

Guy Cecil
Executive Director
Democratic Senatorial Campaign Committee
120 Maryland Avenue, NE
Washington, DC 20002,

v.

60 Plus Association
515 King Street
Suite 315
Alexandria, VA 22314,

Americans for Prosperity
2111 Wilson Blvd.
Suite 350
Arlington, VA 22201,

Crossroads Grassroots Policy Strategies
1401 New York Ave. NW
Suite 1200
Washington, DC 20005,

COMPLAINT

The Democratic Senatorial Campaign Committee ("DSCC" or "Complainant"), by and through its executive director, Guy Cecil, files this complaint under 2 U.S.C. § 437g(a)(1) against 60 Plus Association, Crossroads Grassroots Policy Strategies, and Americans for Prosperity ("Respondents"), for violations of the Federal Election Campaign Act.

Complainant is a Democratic political committee established and maintained by a national political party under 11 C.F.R. § 110.2(c)(2)(iii). Comprised of sitting Democratic Members of the United States Senate, its primary function is to aid the election of Democratic Senate candidates and otherwise support the goals of the Democratic Party. It opposes and competes with Respondents' electoral objectives, making contributions and expenditures in support of the same candidates they oppose. It also refers to and relies upon the information that Respondents and other, similar groups file with the Commission, in order to effectively combat their activities and elect its own preferred candidates.

A. FACTS

The American campaign finance system is awash in secret money, to a degree unseen since Watergate.¹ As *The Washington Post* reported recently: "Nearly all of the independent advertising being aired for the 2012 general-election campaign has come from interest groups that do not disclose their donors, suggesting that much of the political spending over the next six months will come from sources invisible to the public."²

Respondents 60 Plus Association ("60 Plus"), Crossroads Grassroots Policy Strategies ("Crossroads") and Americans for Prosperity ("AFP") are in the vanguard of using secret money to subvert the democratic process:

60-Plus, by its own admission, has made independent expenditures in vast excess of the \$1,000 threshold for political committee registration. Reports on file with the Commission demonstrate that 60-Plus made no fewer than \$1,060,923.38 in independent expenditures during the 2010 election cycle.³ Yet it is not registered as a political committee with the FEC. The group purports also to sponsor issue advertisements, to promote the social welfare. But a recent advertisement in Ohio shows how thin this claim is. To attack Senator Sherrod Brown, who seeks re-election, it made a series of false assertions about the Affordable Care Act that were rated "Pants on Fire" by PolitiFact Ohio, and then concluded with a reference to his election.⁴

Crossroads, also by its own admission, has made independent expenditures in vast excess of the \$1,000 threshold. Reports on file with the Commission show that the group made at least \$14,028,775.48 in independent expenditures during the 2010 election cycle.⁵ Yet it is not registered with the Commission, either. Like 60 Plus, Crossroads claims to leaven its express advocacy with issue advertisements. But Crossroads' definition of "issue advocacy" appears to involve "lobbying" Senate candidates to abandon positions they never took, even attacking candidates who actually share the position that it purports to espouse. For example, a Crossroads ad in Montana attacked Senator Jon Tester for supposedly voting "against preventing Obama's EPA from being able to regulate Montana farmers' dust." But, as FactCheck.org reported: "the Senate never voted on such a measure. And Tester is on record as being opposed to increased regulations on farm dust."⁶

AFP purports to shun express advocacy altogether. But its recent communications undercut that claim.⁷ An ad sponsored by AFP in Virginia attacks Senate candidate Tim Kaine – who left

¹ See, e.g., Dan Eggen, *Post-Watergate campaign finance limits undercut by changes*, WASH. POST, June 16, 2012, available at, http://www.washingtonpost.com/politics/post-watergate-campaign-finance-limits-undercut-by-changes/2012/06/16/gJQAinRrhV_print.html (Exhibit 1).

² Dan Eggen, *Most independent ads for 2012 election are from groups that don't disclose donors*, WASH. POST, Apr. 24, 2012, available at, http://www.washingtonpost.com/politics/most-independent-ads-for-2012-election-are-from-groups-that-dont-disclose-donors/2012/04/24/gIQACKkpfT_print.html (Exhibit 2).

³ 60-Plus Association, FEC Form 5 (Nov. 15, 2011) (amendment) (Exhibit 3).

⁴ See <http://www.politifact.com/ohio/statements/2011/nov/25/60-plus-association/60-plus-association-spokesman-pat-boone-says-ipab/> (Exhibit 4).

⁵ Crossroads Grassroots Policy Strategies, FEC Form 5 (Jan. 31, 2011) (Exhibit 5).

⁶ <http://www.factcheck.org/2011/11/the-fall-tv-seasons-senate-air-wars/> (Exhibit 6).

⁷ This complaint describes AFP activities that postdate the conduct in MUR 6311, which the Commission dismissed in April 2011.

public office more than three years ago – over actions he took as governor in the previous decade. After assailing Kaine's past service for 27 seconds, the ad ends with a three-second tag that can only be taken to refer to his fitness for future office: "Tell Tim Kaine: We Can't Afford More Debt & Higher Taxes."⁸ AFP announced it would follow up the ad by "sponsoring a bus tour with Virginia Attorney General Ken Cuccinelli and other conservatives to campaign against Kaine."⁹ Earlier, AFP ran ads "pummeling" Bob Kerrey in Nebraska over his qualifications when he returned home to run for Senate: "Tell Bob Kerrey his liberal agenda isn't welcome in our Nebraska home."¹⁰ (Like Kaine, Kerrey is a former officeholder and holds no elective office; he left the Senate in 2001.) And AFP admitted that it was reviewing its transactions with a charity that, in turn, appeared to have paid expenses on behalf of Herman Cain's presidential campaign.¹¹

Each group shields its donors from disclosure by disavowing political committee status under FECA, and claiming exemption from tax under section 501(c)(4) of the Internal Revenue Code. None has a legitimate claim. On June 27, *The Wall Street Journal* reported: "The Internal Revenue Service is taking initial steps to examine whether Crossroads GPS, a pro-Republican group affiliated with Karl Rove, and similar political entities are violating their tax-exempt status by spending too much on partisan activities."¹² Crossroads' application for (c)(4) exemption remains pending, and the IRS's recent disposition of similar claims by other groups raises the likelihood that it will be denied on the grounds of its massive political activity.¹³ Outrageously, 60 Plus and AFP each told the Internal Revenue Service on its 2010 Form 990 that it engaged in *no* direct or indirect activities on behalf of or in opposition to candidates *at all* during the bulk of the 2010 cycle.¹⁴ These claims are risible on their face, given what is known publicly about these groups' activities.

Yet however spurious these groups' claims to 501(c)(4) status may be, they are irrelevant to whether they must report as political committees. The Commission – not the IRS – decides whether, having made contributions or expenditures in excess of the \$1,000 threshold, a group's major purpose is to influence the election of candidates, which would make it a political

⁸ See http://www.youtube.com/watch?feature=player_embedded&v=PP48GNZj5iQ.

⁹ <http://firstread.msnbc.msn.com/news/2012/06/25/12397621-more-2012-americans-for-prosperity-hits-kaine> (Exhibit 7).

¹⁰ <http://www.politico.com/blogs/burns-haberman/2012/04/afps-new-kerrey-hit-not-in-my-house-119938.html> (Exhibit 8).

¹¹ Peter H. Stone, *Koch-related group is reviewing financial transactions with Cain aide's charity*, iWatch News, Nov. 3, 2011, available at, <http://www.iwatchnews.org/2011/11/03/7279/koch-related-group-reviewing-financial-transactions-cain-aides-charity> (Exhibit 9). See also Michael Isikoff, *Koch-backed group confirms financial ties to Cain campaign manager*, MSNBC First Read (Nov. 4, 2011), available at, <http://firstread.msnbc.msn.com/news/2011/11/04/8634375-koch-backed-group-confirms-financial-ties-to-cain-campaign-manager> (Exhibit 10).

¹² Brody Mullins and Jacob Gershman, *IRS Probes Nonprofit Political Groups*, WALL ST. J., June 27, 2012 (Exhibit 11).

¹³ See http://taxprof.typepad.com/taxprof_blog/2012/06/irs-denies-.html (Exhibit 12).

¹⁴ See 60 Plus Association, IRS Form 990, at 3 (Apr. 28, 2011) (Exhibit 13); Americans for Prosperity, IRS Form 990, at 3 (Exhibit 14). See also Evan Lehmann, *As Anti-Climate Group's Activities Rise, So Do Questions About Its Secret Finances*, N.Y. TIMES, Oct. 12, 2011 available at, <http://www.nytimes.com/cwire/2011/10/12/12climatewire-as-anti-climate-groups-activities-rise-so-do-14988.html?pagewanted=all> (Exhibit 15). See also <http://lawprofessors.typepad.com/nonprofit/2011/10/americans-for-prosperity-reported-no-political-campaign-activities-for-2007-2010.html> (Exhibit 16).

committee under Commission policy that the United States Court of Appeals for the Fourth Circuit upheld even this month.¹⁵

A Commission review will readily reveal that these "Stealth PACs," whose activities dwarf those of nearly all conventional PACs, have long been required to register, report and disclose their donors. Their time in the shadows is over.

B. LEGAL ARGUMENT: RESPONDENTS ARE "POLITICAL COMMITTEES" WHO HAVE FAILED TO REGISTER AND DISCLOSE WITH THE FEC

To determine whether these groups are political committees, and therefore subject to the Act's registration and disclosure provisions – the Commission applies a two-part test. It looks to whether the organization has received or spent more than \$1,000 in a calendar year for the purposes of influencing a federal election.¹⁶ It then looks to determine whether the organization's "major purpose is Federal campaign activity."¹⁷ In determining an organization's major purpose, the FEC considers the group's organizational documents, regulatory filings, public statements about its mission, fundraising appeals, political activities, and the amount it spends on non-campaign activities to determine whether the group has the major purpose of nominating or electing federal candidates.¹⁸ Whether a group's "campaign-related speech amounts to 50% of all expenditures" is not dispositive; the Commission may use "a more comprehensive methodology" to determine major purpose.¹⁹

All three organizations meet both prongs of this test. By their own admission, Crossroads and 60 Plus have spent millions on independent expenditures, triggering the first prong of the test for political committee status. The text of AFP's advertisements, and circumstantial evidence about its other activities, show that it, too, has far surpassed the \$1,000 threshold.

Nor can there be any doubt that these groups' major purpose is to influence elections. As the Commission has noted: "The Supreme Court has made it clear that an organization can satisfy the major purpose doctrine through sufficiently extensive spending on Federal campaign activity."²⁰ The many millions of dollars of spending by 60 Plus and Crossroads on undisputed express advocacy advertisements, and by AFP on sham issue advertising, easily meet this criterion.

"An analysis of public statements can also be instructive in determining an organization's purpose."²¹ 60 Plus, Crossroads and AFP have made no bones about their intent to affect the outcomes of elections. At a Tea Party rally just this month, the president of 60 Plus bragged about his organization's key role in creating a Republican House majority, and warned that it would bring the same result in the 2012 cycle:

¹⁵ *Real Truth About Abortion, Inc. v. Fed. Election Comm'n*, No. 11-1760, 2012 WL 2108217 (4th Cir. June 12, 2012).

¹⁶ 2 U.S.C. § 431(8).

¹⁷ 72 Fed. Reg. 5,595, 5,597 (Feb. 7, 2007).

¹⁸ *Id.* at 5,605.

¹⁹ *Real Truth About Abortion, Inc.*, No. 11-1760, 2012 WL 2108217, at *__.

²⁰ 72 Fed. Reg. at 5,601.

²¹ *Id.*

And you know something folks, back then when I was goin' around - and you folks were too - talkin' about that bad medicine foisted upon us called Obamacare, I predicted there'd be a senior citizen tsunami headed toward Capitol Hill. And Howard Kaloogian was right when he said, 'Yep. It's coming.' And it did. It washed out over 60-some Democrats who stood behind that bill. We kept warnin' 'em 'You better update your resumes, because you're gonna be lookin' for a new line of work in November.' And we were right. And now I'm predicting in 2012 a lot of Senators had better, had better on the Senate side, because the Republicans and conservatives took over the House in 2010. They're this close to takin' over the Senate in 2012. So that same senior citizen tsunami is still offshore, It's gonna come ashore again. And there are number of Senators - one I gotta mention out in Montana, Senator Tester the other day said, 'No, I wasn't the 60th vote. I wasn't the one.' He said, 'I was only the 55th or 56th vote.' Gimme a break. How dumb can you be? You obviously voted for this piece of - this mess - and we're gonna repeal it. But the fact is, I think that tsunami will come ashore again, and they're gonna pay the price. Also it may also send back one individual toward Chicago. Who would that be? I think he's headed that way too.²²

In its turn, Crossroads has taken pains to draw media attention to its central, coordinating role in 2012 election spending by Republican-leaning outside groups. As Crossroads' director of public relations told the media this month:

There's a lot of coordination among outside groups on the right, all of which is allowed ... Starting in 2010, Crossroads started bringing together a lot of the organizations that were going to be spending a lot of money in the issue and election debate. The goal there was to maximize the efficiency of what everyone was doing ... Crossroads encouraged a number of the groups to share polling information, research and also to share the scheduling of their media buy information.²³

And AFP has been no less audacious in describing its role in the 2012 presidential election. As its president told CBS News after the Wisconsin gubernatorial recall:

You have to have a ground game that matches the left door to door, neighborhood to neighborhood ... [AFP staff are] now going back to states like Florida and Ohio and Michigan and Colorado, and they're going to keep doing the same grass-roots work, educating folks candidly on President Obama's disastrous economic record and what folks can do about it.²⁴

These statements are just the tip of the iceberg. The major purpose doctrine can require the Commission to "reach well beyond publicly available advertisements" and "examine the organization's fundraising appeals."²⁵ And the groups' spurious claims to 501(c)(4) status are

²² Jim Martin, Speech at Tea Party Express Rally in Green Bay, WI (June 2, 2012), *available at*, http://www.youtube.com/watch?v=DUTv_P6UwSg&feature=plcp.

²³ Patricia Zengerle, *Outside campaign groups can coordinate - with each other*, Reuters (Jun. 25, 2012), *available at*, <http://blogs.reuters.com/talesfromthetrail/2012/06/25/outside-campaign-groups-can-coordinate-with-each-other/> (Exhibit 17).

²⁴ <http://www.youtube.com/watch?v=z-tK2fdygFQ&feature=relmfu>.

²⁵ 72 Fed. Reg. at 5,602.

not a defense.²⁶ Individual Commissioners have warned that a 501(c)(4) making independent expenditures runs the risk of triggering political committee status, unless it establishes a PAC to do so.²⁷ In the case of 60 Plus and AFP, their outrageous claim to have engaged in *no* political activity *at all* during the bulk of the 2010 cycle suggests a conscious attempt to hide their true purpose – to elect or defeat candidates.

C. REQUESTED ACTION

As we have shown, Respondents are raising and spending millions of dollars to accomplish their major purpose of influencing federal elections, while hiding their funding sources. By operating in secret, they have violated and continue to violate the Federal Election Campaign Act. Accordingly, Complainant Democratic Senatorial Campaign Committee respectfully requests that they be enjoined from further violations and fined the maximum amount permitted by law.

Sincerely,

Guy Cecil
Executive Director
Democratic Senatorial Campaign Committee

SUBSCRIBED AND SWORN to before me this ____ day of July, 2012.

Notary Public

My Commission Expires:

²⁶ See *id.* at 5,599 ("The Commission has demonstrated through the finding of political committee status for a 501(c)(4) organization and the dismissal of a complaint against a 527 organization, that tax status did not establish whether an organization was required to register with the FEC. Rather, the Commission's findings were based on a detailed examination of each organization's contributions, expenditures, and major purpose, as required by FECA and the Supreme Court.")

²⁷ See Discussion of Draft Advisory Opinion 2012-01 (Stop the Insanity), FEC Open Meeting, Mar. 1, 2012, available at, <http://www.fec.gov/audio/2012/2012030104.mp3> (remarks of Commissioner McGahn at 15:47) ("Let's say you do this out of the (c)(4) and set aside the tax issues. You only have a handful of employees, you're not that large. And you start doing independent expenditures. Is this really just about where the bank account is housed? I mean, couldn't your whole thing become a political committee at some point? Particularly the way the Commission sort of has a case-by-case – there's no way you're going to know, so to say there is no burden, that just doesn't make any sense and it is completely counter to what you've already said. I mean, I don't want you to admit you could be a political committee in the abstract because your instinct is to say no, but for the sake of argument, isn't that a very real potential? That at least the FEC could say you might have to endure an investigation and take it to court to prove you're not?").

