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

FIRST GENERAL COUNSEL'S REPORT

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ELECTION CYCLE: 2010
EXPIRATION OF SOL: 9/9/2015

COMPLAINANTS:
Citizens for Responsibility and Ethics in Washington
Melanie Sloan

RESPONDENT:
Americans for Job Security and Stephen DeMaura, individually and in his capacity as president and treasurer of Americans for Job Security

RELEVANT STATUTES AND REGULATIONS:
2 U.S.C. § 431(4)
2 U.S.C. § 432
2 U.S.C. § 433
2 U.S.C. § 434
26 U.S.C. § 501(c)
11 C.F.R. § 100.22

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None
TABLE OF CONTENTS

I. INTRODUCTION .................................................................3

II. FACTUAL AND LEGAL ANALYSIS ..........................................3
   A. Facts ..................................................................................3
      1. AJS ................................................................................3
      2. AJS’s Activities .................................................................4
   B. Analysis ..............................................................................5
      1. The Test for Political Committee Status ................................5
         a. The Commission’s Case-By-Case Approach to Major Purpose ....6
         b. Challenges to the Commission’s Major Purpose Test and the
            Supplemental E&J ............................................................8
         c. Organizational and Reporting Requirements for Political Committees ..10
      2. Application of the Test for Political Committee Status to AJS ..........12
         a. Statutory Threshold .......................................................12
         b. Major Purpose ...............................................................12
   C. Conclusion .........................................................................22

III. PROPOSED DISCOVERY ....................................................23

IV. RECOMMENDATIONS ........................................................24
I. INTRODUCTION

This matter involves allegations that Americans for Job Security ("AJS") violated the Federal Election Campaign Act of 1971, as amended, ("the Act") by failing to organize, register, and report as a political committee after spending over nine million dollars on independent expenditures and electioneering communications during 2010. See Compl. at 3, 12.¹

AJS acknowledges exceeding the Act’s $1,000 threshold for expenditures or contributions triggering political committee status. 2 U.S.C. § 431(4); Resp. at 5. AJS argues, however, that it is not a political committee because it lacks the requisite major purpose: the nomination or election of a federal candidate. Id. at 1, 2, 5, 11. AJS’s argument rests on the assertion that it spent greater sums on activity not considered express advocacy than it did on independent expenditures. Id. at 5, 11-12. In our view, the argument is wide of the mark.

As discussed below, AJS’s overall conduct supports a finding that there is reason to believe that AJS had as its major purpose the nomination or election of federal candidates during 2010. Accordingly, we recommend that the Commission find reason to believe that AJS violated 2 U.S.C. §§ 432, 433, and 434, by failing to organize, register, and report as a political committee, and authorize an investigation.

II. FACTUAL AND LEGAL ANALYSIS

A. Facts

1. AJS

Americans for Job Security, a tax-exempt entity organized under section 501(c)(6) of the Internal Revenue Code, was founded in 1997. Compl. at 3; Resp. at 2-3. Stephen DeMaura is the President and Treasurer. Compl. at 3. AJS describes itself as an “independent, bi-partisan,

¹ The Complaint also names Stephen DeMaura, individually, as a respondent but does not include any allegations that he violated the Act. Compl. at 10-12. DeMaura did not file a separate response.
1. A pro-business issue advocacy organization" whose chief goal is "educating the public on issues of
importance to businesses and encouraging a strong job-creating economy that promotes a pro-
growth agenda." Resp. at 3; see http://www.savejobs.org/aboutajs.php. Its articles of
incorporation state that it is incorporated for the purpose of uniting "in a common organization
businesses, business leaders, entrepreneurs, and associations of businesses" and to "promote the
common business interests of its members . . . by helping the American public to better
understand public policy issues of interest to business." Resp. at 11. According to its tax return,
"the organization promotes governmental policy that reflects economic issues of the workplace"
bym"educating the public through television, radio, and newspaper and direct mail

2. AJS's Activities

AJS states that since its establishment in 1997, it has received approximately $54 million
in membership dues and assessments and has spent approximately $51 million on its activities
and communications. Resp., Attach. 1. ¶ 3. AJS states that it did not air any electioneering
communications until 2008 or independent expenditures until 2010. Id. at 5. AJS cites several
examples of its "economic issue advocacy communications and activities" from 2004 through
2006, including communications about the "death tax" and the establishment of an asbestos trust
fund.2 Id. at 3-4.

According to its tax return, AJS received $12,411,684 and spent $12,417,809 between
November 1, 2009, and October 31, 2010. Form 990, Return of Organization Exempt from
Income Tax (2009) at 1. During calendar year 2010, AJS made $4,908,847.27 in independent

2 AJS's activities between 2000 and 2006 were the subject of MURs 5910 and 5694. The Commission split
3-3 on the question of whether AJS was a political committee, as well as on whether the advertisements discussed in
the General Counsel's Report were express advocacy.
expenditures. October 2010 Quarterly Report at 1, available at
http://query.nictusa.com/pdf/560/10991369560/10991369560.pdf#navpanes=0; 2010 Year End
Report at 1, available at
http://query.nictusa.com/pdf/422/11930290422/11930290422.pdf#navpanes=0. AJS also
reported spending $4,598,518 during 2010 on electioneering communications. See infra notes
16-25.

The organization describes its issue advocacy campaigns as “particularly active during
campaign season” because “campaign season is when the majority of Americans are debating
and focused on public policy.” http://www.savejobs.org/aboutajs.php ("In addition, since the
media and public officials only focus on media markets where there are hotly contested political
campaigns, we select the media markets we advertise in accordingly."). AJS lists several “issues
of the day” that it attempts to influence: reducing taxes; tort reform; free markets and free trade;
transportation; education reform; health care reform and modernization; and energy.

B. Analysis

1. The Test for Political Committee Status

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
1 (1976), the Supreme Court held that defining political committee status “only in terms of the
annual amount of ‘contributions’ and ‘expenditures’” might be overbroad, reaching “groups
engaged purely in issue discussion.” Id. at 79. To cure that infirmity, the Court concluded 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." Id.
(emphasis added). Accordingly, under the statute as thus construed, an organization that is not
controlled by a candidate must register as a political committee only if (1) it crosses the $1,000
threshold and (2) it has as its "major purpose" the nomination or election of federal candidates.

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

Although Buckley established the major purpose test, it provided no guidance as to the
proper approach to determine an organization's major purpose. See, e.g., Real Truth About
Abortion, Inc. v. FEC, 681 F.3d 544, 556 (4th Cir. 2012), cert. denied, 81 U.S.L.W. 3127 (U.S.
Jan. 7, 2013) (No. 12-311) ("RTAA"). The Supreme Court's discussion of major purpose in a
subsequent opinion, Massachusetts Citizens for Life v. FEC, 479 U.S. 238 (1986) ("MCFL"),
was similarly sparse. See id. at 262. In that case, the Court identified an organization's
independent spending as a relevant factor in determining an organization's major purpose, but
examined the entire record as part of its analysis and did not chart the outer bounds of the test.
479 U.S. at 238. Following Buckley and MCFL, lower courts have refined the major purpose test
but only to a limited extent.3 In large measure, the contours of political committee status — and
the major purpose test — have been left to the Commission.4

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

4 Like other administrative agencies, the Commission has the inherent authority to interpret its statute
between proceeding by general rule or by individual . . . litigation is one that lies primarily in the informed
discretion of the administrative agency.").
Following *Buckley*, the Commission adopted a policy of determining on a case-by-case basis whether an organization is a political committee, including whether its major purpose is the nomination or election of federal candidates. Political Committee Status, 72 Fed. Reg. 5,596 (Feb. 7, 2007) (Supplemental Explanation and Justification). 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).

In 2004, for example, the Commission issued a notice of proposed rulemaking asking whether the agency should adopt a regulatory definition of “political committee.” See Political Committee Status, 69 Fed. Reg. 11,736, 11,745-49 (Mar. 11, 2004) (Notice of Proposed Rulemaking). The Commission declined to adopt a bright-line rule, noting that it had been applying the major purpose test “for many years without additional regulatory definitions,” and concluded that “it will continue to do so in the future.” See 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).
b. Challenges to the Commission’s Major Purpose Test and the Supplemental E&J

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

Responding to the remand, the Commission issued a Supplemental Explanation and Justification for its final rules on political committee status to further explain its case-by-case approach and provide the public with additional guidance as to its process for determining political committee status. Political Committee Status, 72 Fed. Reg. 5595 (Feb. 7, 2007) (“Supplemental E&J”). The Supplemental E&J explained that “the major purpose doctrine requires fact-intensive analysis of a group’s campaign activities compared to its activities unrelated to campaigns.” *Id.* at 5601-02. The Commission concluded that the determination of an organization’s major purpose “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 actions considering the political committee status of various entities.” *Id.*

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

To provide the public with additional guidance, the Supplemental E&J referenced
effort actions on the public record, as well as advisory opinions and filings in civil
enforcement actions on the public record, as well as advisory opinions and filings in civil
enforcement cases following the 2004 rulemaking. *Id.* at 5,604-05. The Commission noted that
the settlements in several MURs involving section 527 organizations “provide considerable
guidance to all organizations” regarding the application of the major purpose test and “reduce
any claim of uncertainty because concrete factual examples of the Committee’s political
community analysis are now part of the public record.” *Id.* at 5,595, 5,604.

After the Commission issued the Supplemental E&J, the *Shays I* plaintiffs again
challenged, under the Administrative Procedure Act, 5 U.S.C. §§ 551-59, the Commission’s
case-by-case approach to political committee status. The court rejected the challenge, upholding
the Commission’s case-by-case approach as an appropriate exercise of the agency’s discretion.
organization . . . may engage in many non-electoral activities so that determining its major
purpose requires a very close examination of various activities and statements.” *Id.* at 31.

Recently, the Fourth Circuit rejected a constitutional challenge to the Commission’s case-
by-case determination of major purpose. The court upheld the Commission’s approach, finding
that *Buckley* “did not mandate a particular methodology for determining an organization’s major
purpose,” and so the Commission was free to make that determination “either through
categorical rules or through individualized adjudications.” *RTAA*, 681 F.3d at 556. The court
1 concluded that the Commission’s case-by-case approach was “sensible, . . . consistent with
2 Supreme Court precedent and does not unlawfully deter protected speech.” Id. at 558. The
3 Fourth Circuit concluded that the Supplemental E&J provides “ample guidance as to the criteria
4 the Commission might consider” in determining an organization’s political committee status and
5 therefore is not unconstitutionally vague. Id.; see Transcript of Telephonic Oral Ruling, Free
7 Commission’s method of determining political committee status to be constitutional), appeal
9 c. Organizational and Reporting Requirements for Political
10 Committees
11
12 Political committees — commonly known as “PACs” — must comply with certain
13 organizational and reporting requirements set forth in the Act. PACs must register with the
14
5 The RTAA court rejected an argument — similar to the one made by AJS here — that the major purpose
6 test must be confined to “(1) examining an organization’s expenditures to see if campaign-related speech amounts to
7 50% of all expenditures; or (2) reviewing ‘the organization’s central purpose revealed by its organic documents.’”
8 RTAA, 681 F.3d at 555. The Fourth Circuit recognized that determining an organization’s major purpose “is
9 inherently a comparative task, and in most instances it will require weighing some of the group’s activities against
10 others.” Id. at 556; see also Koerber v. FEC, 483 F. Supp. 2d 740 (E.D.N.C. 2008) (denying preliminary relief in
11 challenge to Commission’s approach to determining political committee status, and noting that “an organization’s
12 major purpose” is inherently comparative and necessarily requires an understanding of an organization’s overall
13 activities, as opposed to its stated purpose); FEC v. Mollenick, 310 F. Supp. 2d 230, 234-37 (D.D.C. 2004)
14 (considering organization’s statements in brochures and “fax alerts” sent to potential and actual contributors, as well
16 organization’s purpose may be evidenced by its public statements of its purpose or by other means, such as its
17 expenditures in cash or in kind to or for the benefit of a particular candidate or candidates.”); id. at 864, 866
18 (applying a fact-intensive inquiry, including review of organizations’ meetings attended by national leaders and
19 organization’s “Political Strategy Campaign Plan and Budget,” and concluding that organization did not have as its
20 major purpose the election of federal candidates).

6 The Supreme Court’s decision in FCC v. Fox Television Stations, Inc. is not to the contrary. See 132 S. Ct.
7 2307, 2317 (2012) (“[A] regulation is not vague because it may at times be difficult to prove an incurringating fact
8 but rather because it is unclear as to what fact must be proved”). In that case, the FCC’s indecency standard was
9 held to be vague for lack of notice when it applied a new stricter standard, ex post facto, to the Fox defendants, and
10 when it relied on a single “isolated and ambiguous statement” from a 50-year old administrative decision to support
11 its finding of indecency against the ABC defendants. Id. at 2319. Here, in sharp contrast, the Supplemental E&J —
12 which was issued several years before the conduct at issue — provides extensive guidance on the Commission’s
13 approach to major purpose and has withstood both APA and constitutional challenges. See also Center for
14 Individual Freedom v. Madigan, 697 F.3d 464 (7th Cir. 2012) (“Madigan”) (rejecting vagueness challenge to the
15 definition of “political committee” in the Illinois campaign finance statute).
Commission, file periodic reports for disclosure to the public, appoint a treasurer who maintains
its records, and identify themselves through “disclaimers” on all of their political advertising, on
their websites, and in mass e-mails. See 2 U.S.C. §§ 432-34; 11 C.F.R. §110.11(a)(1). The
Act’s reporting requirements “are minimal” and the organizational requirements are not “much
of an additional burden.” SpeechNow.org v. FEC, F.3d 686, 696 (D.C. Cir. 2010)
(“SpeechNow”). These requirements, which promote disclosure, do not, of course, prohibit
speech. RTAA, 681 F.3d at 552 n.3.

In the wake of the Supreme Court’s decision in Citizens United v. FEC, 130 S. Ct. 876
(2010), which struck down the Act’s prohibitions on corporate independent expenditures and
electioneering communications, the D.C. Circuit held in SpeechNow that political committees
that engage only in independent expenditures are not subject to contribution limits. See 599 F.3d
at 696. These political committees, often referred to as independent expenditure-only political
committees or Super PACs, continue to be subject, however, to the “minimal” “reporting
requirements of 2 U.S.C. §§ 432, 433, and 434(a), and the organizational requirements of
2 U.S.C. §§ 431(4) and 431(8).” Id. at 689.

Notably, the Supreme Court has stressed that such requirements serve the vital role of
disclosure in political discourse. See Citizens United, 130 S. Ct. at 916 (recognizing that
increased “transparency” resulting from FECA disclosure requirements “enables the electorate to
make informed decisions and give proper weight to different speakers and messages”); Doe v.
Reed, 561 U.S. ___, 130 S. Ct. 2811, 2820 (2010) (holding that public disclosure of state
referendum petitions serves important government interest of “promot[ing] transparency and
accountability in the electoral process,” and “preserving the integrity of the electoral process”);

An organization must register as a political committee when it crosses the $1,000 threshold and determines,
based on the guidance in the Supplemental E&J, that it has the requisite major purpose.
Madigan, 697 F.3d at 490 (upholding Illinois’s campaign finance disclosure provisions against constitutional facial challenge, finding a substantial relation to “Illinois’s interest in informing its electorate about who is speaking before an election”); see also Doe, 130 S. Ct. at 2837 (Scalia, J., concurring) (“Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.”). 8

2. Application of the Test for Political Committee Status to AJS

a. Statutory Threshold

To assess whether an organization has made an “expenditure,” the Commission “analyzes whether expenditures for any of an organization’s communications made independently of a candidate constitute express advocacy either under 11 C.F.R. § 100.22(a), or the broader definition at 11 C.F.R. § 100.22(b).” Supplemental E&J at 5606. During calendar year 2010, AJS made more than $4.9 million in independent expenditures. See supra at 4-5. Thus, AJS far exceeded the $1,000 statutory threshold for political committee status. See 2 U.S.C. § 431(4)(A); 11 C.F.R. § 100.5.

b. Major Purpose

AJS states in its response, on its website, and in its tax returns that its major purpose is not engaging in federal campaign activity but rather advocating issues and educating the public. Resp. at 1, 11; http://www.savejobs.org/aboutajs.php; Form 990, Return of Organization Exempt from Income Tax (2009) at 1, 2. The Commission noted in the Supplemental E&J that it may consider such statements in its analysis of an organization’s major purpose, Supplemental E&J at 5606, but that such statements are not necessarily dispositive. See Real Truth About Obama v. 8

8 But cf. Minn. Citizens for Life, Inc. v. Swanson, 692 F.3d 864, 876 (8th Cir. 2012) (striking down certain registration and disclosure provisions of Minnesota’s campaign finance law, finding that those obligations as applied to associations that do not meet Buckley’s “major purpose test” are unduly burdensome and do not match any “sufficiently important disclosure interest”).
1. FEC, No. 3:08-cv-00483, 2008 WL 4416282, at *14 (E.D. Va. Sept. 24, 2008) ("A declaration by the organization that they are not [organized] for an electioneering purpose is not dispositive.") (emphasis in original, alteration added), aff'd, 575 F.3d 342 (4th Cir. 2009), vacated on other grounds, 130 S. Ct. 2371 (2010), remanded and decided, 796 F. Supp. 2d 736, affirmed sub nom. Real Truth About Abortion v. FEC, 681 F.3d 544 (4th Cir. 2012), cert. denied, 81 U.S.L.W. 3127 (U.S. Jan. 7, 2013) (No. 12-311). Under the Commission's case-by-case approach, the Commission considers the organization's "overall conduct," including its disbursements, activities, and statements. Supplemental E&J at 5597. In this case, AJS's proportion of spending related to federal campaign activity is alone sufficient to establish that its major purpose in 2010 was the nomination or election of federal candidates.

AJS reported spending approximately $4,908,847.27 on independent expenditures in 2010. See supra at 4-5. In addition, AJS spent $4,598,520 during 2010 on electioneering communications, all of which appear to be communications that criticize or oppose a clearly identified Federal candidate but do not contain express advocacy. In past enforcement actions, the Commission has determined that funds spent on communications that support or oppose a clearly identified federal candidate but do not contain express advocacy should be considered in determining whether that group has federal campaign activity as its major purpose.\(^9\)

\(^9\) See Conciliation Agreement ¶ IV.11, MUR 5754 (MoveOn.org Voter Fund) (relying on funds used for advertisements that "opposed" or "criticized" George W. Bush to establish political committee status); Factual and Legal Analysis at 2, MUR 5753 (League of Conservation Voters 527) (finding major purpose satisfied where funds spent on door-to-door and phone bank express advocacy campaign, and also on advertisements "supporting or opposing clearly identified federal candidates, some of which contained express advocacy"); Conciliation Agreement ¶ IV.14, MUR 5487 (Progress for America Voter Fund) (concluding that PFA VF had met the major purpose test after spending 60% of its funds on communications that "praised George W. Bush's leadership as President and/or criticized Senator Kerry's ability to provide similar leadership"); see also Stipulation for Entry of Consent Judgment ¶ 22, FEC v. Citizens Club for Growth, Inc., Civ. No. 1:05-01851 (Sept. 6, 2007) (entering stipulation of Commission, approved as part of a consent judgment, where organization was treated as a political committee because "the vast majority of [the group's disbursements] were made in connection with federal elections, including, but not limited to, funding for candidate research, polling, and advertisements and other public communications referencing a clearly identified federal candidate").
For example, the Commission has relied, in part, on the following advertisements in determining that an entity was a political committee:

- **"Child's Pay":** The advertisement contains "images of children performing labor-intensive jobs: washing dishes in a restaurant kitchen, vacuuming a hotel hallway, working on an assembly line in a factory, collecting garbage, working at an auto repair shop, and checking groceries," and concludes with the question: "Guess who's going to pay off President Bush's $1 trillion deficit?"\(^{10}\)

- **"70 Billion More":** The advertisement shows images of a young boy sitting at a school desk and a young girl with a thermometer in her mouth. The voice-over states: "We could build thousands of new schools, or hire a million new teachers. We could make sure every child has insurance. Instead, George Bush has spent $150 billion in Iraq and has a secret plan to ask for $70 billion more. But after four years it's now clear: George Bush has no plan for taking care of America. Face it. George Bush is not on our side."\(^{11}\)

- **"Jobs":** "Is George Bush listening to us? Since taking office, he's let oil and energy companies call the shots. Special exemptions from the Clean Water and Clean Air Acts. Halliburton collecting billions in no-bid contracts. Here in Wisconsin, 52,500 manufacturing jobs lost. America is going in the wrong direction. And George Bush just listens to the special interests."\(^{12}\)

- **"Yucca You Decide":** "Yucca Mountain. While everyone plays politics, who's looking out for Nevada? Eighty-five percent of the nuclear waste could come through Las Vegas. Past businesses. Through communities. By our schools. Accidents happen, and if so, how could Las Vegas, a city and economy built on tourism, recover? Who would come visit us then? The question: did George W. Bush really try and stop Yucca Mountain? Or was he just playing politics?"\(^{13}\)

- **"Finish It":** [On screen: Images of Mohammed Atta, Osama bin Laden, Khalid Sheik Mohammed, Nick Berg's killers, and victims of terrorist attacks.] "These people want to kill us. They killed hundreds of innocent children in Russia. Two hundred innocent commuters in Spain. And 3,000 innocent Americans. John Kerry has a 30-year record of supporting cuts in defense and intelligence and

\(^{10}\) Factual and Legal Analysis at 3-4, 12-13, MUR 5754 (MoveOn.Org Voter Fund). The full communication can be viewed at http://www.youtube.com/watch?v=A9WKimKJyUQ.

\(^{11}\) Id. at 4, 12-13. The full communication can be viewed at http://archive.org/details/movf70billionmore.

\(^{12}\) Factual and Legal Analysis at 5, 18, MUR 5753 (League of Conservation Voters 527). The full communication can be viewed at http://archive.org/details/lcv_jobs_102604.

\(^{13}\) Id. at 5, 18. The full communication can be viewed at http://archive.org/details/lcv_yucca_decide.
endlessly changed positions on Iraq. Would you trust Kerry against these fanatic killers? President Bush didn’t start this war, but he will finish it.\textsuperscript{14}

- "Ashley’s Story": This advertisement recounts the story of Ashley Faulkner, whose mother was killed in the September 11, 2001, terrorist attacks, and the interaction she had with President George W. Bush during a visit to Ohio. It closes with Ashley Faulkner’s father stating: “What I saw was what I want to see in the heart and in the soul of the man who sits in the highest elected office in our country.”\textsuperscript{15}

The Commission found that each of these advertisements — though not express advocacy — demonstrated that the respondents had as their major purpose the nomination or election of federal candidates. These ads evidenced that the organization’s major purpose was federal campaign activity because they "support," "oppose," "praise," or "criticize" the federal candidates. See supra n.9-15.

Likewise, the following electioneering communications on which AJS spent approximately $4,598,518, though not express advocacy, support or oppose federal candidates and therefore provide evidence that AJS had as its major purpose the nomination or election of federal candidates:

i. Agree\textsuperscript{16}

Behind closed doors, Washington decides the future of our health care. With no transparency or accountability, they’re slashing Medicare and raising taxes, and only listening to the special interests. One Massachusetts leader says, “Slow down. Get health care right.” Scott Brown says, “Protect Medicare. Don’t raise taxes. Listen to the people, not the lobbyists.” Call Scott Brown and tell him you agree. Washington should listen to us on health care for a change.

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

\textsuperscript{15} Id. The full communication can be viewed at http://www.livingroomcandidate.org/commercials/2004/ashleys-story.

ii. Thank You\(^7\)

[Traditional Indian music is playing. There is a person of apparent southeast Asian descent, dressed in traditional garb and standing in front of stock footage of an Indian market.]
Person: "Thank you, Bill Halter. Thank you!"

[Screen shows an image of Bill Halter and the text: "Bill Halter off-shored American jobs to Bangalore, India while our economy struggled."]
Narrator: "While millionaire Bill Halter was a highly-paid director of a U.S. company, they exported American jobs to Bangalore, India."

[Person #2, also of apparent southeast Asian descent, appears in front of stock footage of an Indian family.]
Person #2: "Bangalore needs many, many jobs. Thank you, Bill Halter."

[Screen shows an image of Bill Halter and the text: "Support job creation here. Don't send jobs overseas.""]
Narrator: "With almost 65,000 Arkansans out of work, we need jobs, too."

[Person #3, also of apparent southeast Asian descent, appears in front of stock footage of a street in India.]
Person #3: "Thank you. Thank you, Bill Halter."

[Screen shows an image of Bill Halter and the text: "While American families struggle, Bangalore says, 'Thanks Bill Halter.'"
Narrator: "Bangalore says, 'Thanks, Bill Halter.' Arkansas, tell Bill Halter, 'Thanks for nothing.'"

iii. Outsource\(^8\)

Arkansas families are struggling. Thousands out of work. Politicians? They say one thing and do another. Bill Halter says he has never outsourced American jobs. [Picture of Halter and text: "Not a single one of those companies has moved jobs overseas."] But the facts say when he was a highly-paid corporate director, his company outsourced jobs to India. Those jobs could have boosted a community here in Arkansas, but all they boosted was Bill Halter's company's bottom line. Call Bill Halter. Tell him to support job creation here in America.

\(^7\) AJS spent $913,096 on this advertisement.

\(^8\) AJS spent $490,000 on this advertisement.
iv. Back to Work

Washington is a cesspool filled with political insiders who think more government is the solution. Not Ken Buck. Ken Buck stands up to the insiders in both parties. Ken Buck’s conservative plan to get Colorado back to work: No to bailouts. No to debt. No to big government spending. Yes to low taxes for job creation that helps families. Call Ken Buck. Tell him to keep fighting for smaller government and policies that support taxpayers.

v. Brink

Our country is at the brink. Colorado families and workers need relief. Yet Jane Norton supported the largest tax hike in Colorado history, costing us billions. And Jane Norton’s record on government spending? The state bureaucracy she managed grew by $43 million in just three years. Record taxes and reckless spending has cost Colorado jobs. Call Jane Norton. Tell her no more tax hikes and big government spending.

vi. Earmarks

Reckless spending, earmarks, debt, bankrupting our country. Politicians and insiders are at the trough. Take Billy Long, who says he’s against earmarks. But while on the airport board of directors, he voted to use more than $3 million in Congressional earmarks for a brand new bus terminal — a terminal that now sits empty. The Billy Long bus terminal to nowhere. Call Billy Long and tell him you’re sick of earmarks and bus terminals to nowhere.

vii. Talk is Cheap

Liberal politicians will say anything, but talk is cheap. Take Jane Norton. [Norton clip] “The federal government is overspending, it’s overtaxing, it’s overregulating....” Wait, what’s the real Norton record? Norton pushed the

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19 AJS spent $143,300, $171,700, and $126,496 on this advertisement.

20 AJS spent $318,874 and $175,956 on this advertisement.

21 AJS spent $45,100 on this advertisement.

22 AJS spent $42,000 and $585,800 on this advertisement.
largest tax hike in Colorado history. As a regulator, she managed a multimillion
dollar surge in government spending. Yep, talk is cheap, but Jane Norton’s real
record has cost us plenty. Tell Jane Norton: no more high taxes and spending.

viii. Pennsylvania Jobs

Bailouts and debt have pushed our country to the brink. Pennsylvania needs
relief. Barack Obama and Washington politicians don’t get it. They want higher
taxes and bigger government. Pat Toomey has a commonsense plan to get
Pennsylvania back to work. Cut the red tape, so Pennsylvania small businesses
are free to create jobs. Cut the spending. No more earmarks and no more
bailouts. Toomey wants to end deficit spending — and return money to families
and job creators. The Toomey plan: getting Pennsylvania working again. As a
small businessman Toomey created jobs and knows what it takes to make a
payroll. Pat Toomey: fiscal discipline, lower taxes, and common sense economic
policies. Call Pat Toomey at 434-809-7994 and tell him you support his common
sense plan to get Pennsylvania back to work.

ix. Instrumental

The economy’s in a tailspin. Unemployment on the rise. And they just continue
the spending, taxing, and bailouts. Harry Teague was instrumental in passing a
job-killing cap-and-trade bill. Teague’s tax would mean higher electric rates for
families, higher gas prices, and cost us up to 12,000 jobs in New Mexico. Tell
Harry Teague to stop his reckless spending, bailouts, and job-killing taxes.

x. Ants

Have you heard about how Joe Manchin supported the Obama stimulus, then
wasted money on turtle tunnels, ant research and cocaine for monkeys? But that’s
not their only waste. Their stimulus wasted money on studying the atmosphere of
Neptune, hunting for dinosaur eggs in China, and even the International
Accordion Festival. We asked for jobs. What we got was waste. Really. Tell
Obama and Manchin not to stimulate us anymore.

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23 The transcript for this advertisement is attached to the AJS Response as “Complaint Communication #33.”
AJ S spent $72,100 on this advertisement: http://images.nictusa.com/pdf/553/10991128553/10991128553.pdf.

24 AJ S spent $54,572 on this advertisement.

25 AJ S spent $980,256 on this advertisement.
AJS argues in its response that none of the above communications can be classified as express advocacy under either 11 C.F.R. §§ 100.22(a) or 100.22(b), or as the functional equivalent of express advocacy under Wisconsin Right to Life, Inc. v. FEC, 551 U.S. 449 (2007), and therefore none of them constitutes federal campaign activity. Resp. at 2. As discussed above, however, that argument fails to come to terms with the Commission’s longstanding view — upheld by the courts — that the required major purpose test is not limited solely to express advocacy (or the functional equivalent of express advocacy). Each of the AJS ads features a clearly identified federal candidate, supports or opposes a candidate, and was run in the candidate’s respective state shortly before a primary or election. The fact that the ads do not contain express advocacy, or the functional equivalent, does not shield such ads from consideration under the major purpose test.26

Nor does Buckley support an argument that determining an organization’s major purpose is limited to consideration of its express advocacy. The Court first established the major purpose test in the context of its discussion of Section 434(e) — a provision that required the disclosure of expenditures by persons other than political committees. In order to cure vagueness concerns in that section, the Court construed “expenditure” to reach only express advocacy. Id. at 79-80. By contrast, limiting which expenditures political committees would have to disclose, the Court held that the term “political committee” — as defined in Section 431(d) — “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.” Id. at 79. Thus, the two limitations were imposed on two different terms in two different sections of the Act: (1) “express advocacy” as a

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26 Similarly, the fact that some of the ads contain a tag line requesting that the viewer call the candidate and tell the candidate to take certain action (e.g., “Tell Harry Teague to stop his reckless spending, bailouts, and job-killing taxes.”) does not immunize the communications from being considered federal campaign activity when determining major purpose.
limitation on “expenditures” made by persons other than political committees pursuant to Section
434(e); and (2) “major purpose” as a limitation on the definition of “political committee”
pursuant to Section 431(d). The opinion could have articulated a test that linked the limitations — requiring, for example, that to be considered a political committee an organization’s “major purpose must be to expressly advocate the nomination or election of a candidate.” But the Court did not take that tack. Indeed, the Court noted that even “partisan committees,” which include “groups within the control of the candidate or primarily organized for political activities” would fall outside the definition of “political committee” only if they fail to meet the statutory spending threshold. Id. at 80 (emphasis added).

Similarly, in MCFL, the Court’s opinion nowhere suggests that express advocacy communications are the only kind of “campaign activity” that can satisfy the major purpose test. See MCFL, 479 U.S. at 252-53, 262 (political committee requirements inapplicable to “organizations whose major purpose is not campaign advocacy,” but “political committee” does include organizations with a major purpose of “campaign activity”) (emphasis added). And many lower federal courts have likewise decided that a determination of major purpose is not restricted to consideration of a group’s express advocacy as compared to its other activities. See North Carolina Right to Life v. Leake, 525 F.3d 274, 289 (4th Cir. 2008) (major purpose test may be implemented by examining, inter alia, “if the organization spends the majority of its money on supporting or opposing candidates”) (emphasis added); Akins v. FEC, 101 F.3d 731, 742 (D.C. Cir. 1997) (“an organization devoted almost entirely to campaign spending could not plead that the administrative burdens associated with such spending were unconstitutional as applied to it”) (emphasis added), vacated on other grounds, 524 U.S. 11 (1998); FEC v. Machinists Non-Partisan Political League, 655 F.2d 380, 393 (D.C. Cir. 1981) (recognizing “the grave constitutional difficulties inherent in construing the term ‘political committee’ to include groups whose activities are not . . . directly related to promoting or defeating a clearly identified ‘candidate’ for federal office”) (emphasis added); RTAA, 796 F. Supp. 2d 736, 751 (E.D. Va. 2011) (recognizing that “the FEC considers whether the group spends money extensively on campaign activities such as canvassing or phone banks, or on express advocacy communications” and “the FEC is entitled to consider the full range of an organization’s activities in deciding whether it is a political committee”), affirmed by 681 F.3d 544 (4th Cir. June 12, 2012); Transcript of Telephonic Oral Ruling, Free Speech v. FEC, No. 12-CV-127-SWS, at 21-22 (D. Wy. Oct. 3, 2012) (quoting RTAA and uphold Commission’s case-by-case method of determining political committee status), appeal docketed, No. 12-8078 (10th Cir. Oct. 19, 2012). But see New Mexico Youth Organized v. Herrera, 611 F.3d 669, 678 (10th Cir. 2010) (interpreting Buckley’s major purpose test as establishing that regulation as a political committee is only

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AJS argues that its 2010 independent expenditures represent "a very minor portion" of its overall activities since its founding in 1997. Resp. at 2, 5. A calendar year, however, and not a group's entire history, provides the firmest statutory footing for the Commission's major purpose determination—and is consistent with FECA's plain language. The Act defines "political committee" in terms of expenditures made or contributions received "during a calendar year."

2 U.S.C. § 431(4) (emphasis added). Moreover, in determining the major purpose of organizations with longer histories, the Commission typically only considers the group's election-year spending.\textsuperscript{28} Thus, whether AJS had the requisite major purpose should be determined by reference to its activities during the 2010 calendar year.

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AJS appears to have spent at least $9,507,365 during 2010 on the type of communications that the Commission has considered to be federal campaign activity—and therefore indicative of major purpose—in past enforcement decisions. AJS's tax return shows that it spent $12,417,809 between November 1, 2009, and October 31, 2010. See Form 990, Return of Organization Exempt from Income Tax (2009) at 1. The tax return does not allow us

\textsuperscript{28} See MUR 5492 (Freedom, Inc.) (analyzing group's admitted major purpose in 2004 even though group was formed in 1962); MURs 5577 and 5620 (National Association of Realtors - 527 Fund) (analyzing NAR-527 Fund's 2004 spending even though group had registered with IRS since 2000); MUR 5755 (New Democrat Network) (analyzing New Democrat Network's 2004 spending while group had existed since at least 1996); MUR 5753 (League of Conservation Voters) (analyzing LCV's 2004 spending even though one of LCV's funds had registered with the IRS as early as 2000). But see MURs 5694 and 5910 (Americans for Job Security) (analyzing activity from 2000 through 2006 in determining group's major purpose in 2006).
to pinpoint in which calendar year the remaining approximately $2.9 million in unreported spending occurred. But even if we assume that all of its unreported spending was both unrelated to federal campaigns and occurred in calendar year 2010 — the assumption most favorable to AJS based on the available information — the minimum amount spent on federal campaign activity ($9,507,365) is approximately 76.5% of AJS's total spending for calendar year 2010. As a result, AJS's spending shows that the group's major purpose during 2010 was federal campaign activity (i.e., the nomination or election of a federal candidate).

c. Conclusion

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

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29 Information about AJS's spending during November and December 2010 is not available.

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

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


2. Approve the attached Factual and Legal Analysis.

3. Authorize the use of compulsory process in this matter.

4. Approve the appropriate letter.

5/12/13

Anthony Herman
General Counsel

Daniel A. Petalas
Associate General Counsel for Enforcement

Peter Reynolds
Attorney