FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	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

The issue before the Commission is whether Americans for Job Security ("AJS" or the "Respondent"), a business league organization established in 1997 under 26 U.S.C. § 501(c)(6), violated the Federal Election Campaign Act of 1971, as amended (the "Act" or "FECA"), by failing to register and report as a "political committee."[1] The Commission considered these same allegations only five years ago.[2] As before,[3] we believe AJS — an organization that has spent less than ten percent of its funds on express advocacy during its entire existence — is an issue-advocacy organization that cannot be regulated as a political committee. We therefore voted against finding reason to believe AJS violated the Act.

"The agency's controlling statute and court decisions stretching back nearly 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."[4] Such organizations cannot be classified as political committees, even if they engage in some express electoral advocacy, so long as their major purpose for existing is not to advocate for or against the nomination or election of federal candidates.[5] 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.[6]

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1 *See generally* MUR 6538 (AJS), Complaint.

2 MURs 5694 & 5910 (AJS).

3 *See generally id.*, Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn.

4 MUR 6396 (Crossroads GPS), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen, at 1.

5 *Id.*

6 *See id.* at 1, 6–9 (analyzing Crossroads GPS's major purpose).

In this matter, AJS's major purpose is and always has been to advocate on issues — that is, for policies AJS believes will "enhanc[e] the climate for American businesses" through "pro-growth, pro-jobs economic messages."[7] The overwhelming majority of its spending since inception has related to pure issue advocacy in furtherance of this economic policy agenda. In fact, AJS was active for over thirteen years before finally spending funds on express advocacy in 2010. When compared with its aggregate spending activity from 1997 to 2012 (over $50 million), the meager amount AJS spent on its express advocacy in 2010 (less than $5 million) is grossly insufficient to justify regulating the organization as a political committee.

We are not alone in reaching this conclusion. Just last October, California's Fair Political Practices Commission concluded that AJS could not be regulated as a political committee under California law because the organization's donors gave to AJS specifically to fund issue rather than express advocacy.[8]

Disregarding key facts and clear legal boundaries, the Commission's Office of General Counsel ("OGC") recommended we find reason to believe AJS violated the Act by not registering as a political committee in 2010. In so doing, OGC proposed an analysis of AJS's major purpose that would have correspondingly expanded the universe of communications to be considered, while simultaneously contracting the period for evaluating the organization's spending to such an extent that it would ignore all of AJS's spending on issue advocacy from 1997 to 2010. We rejected a similarly tortured effort to subject a different issue group to the burdens of political-committee regulation late last year,[9] and since then the U.S. Court of Appeals for the Seventh Circuit has endorsed our basic position.[10] Absent a monumental shift in AJS's future spending, we believe AJS should not have to devote time or financial resources to rebuffing baseless allegations involving political-committee status.

I. PROCEDURAL BACKGROUND

A. THE COMPLAINT

The Complaint in this matter was filed on March 8, 2012 and alleges that AJS violated the Act by failing to register and report as a political committee. It asserts that AJS became a political committee in 2010, allegedly a year in which it "made expenditures aggregating in excess of $1,000," and "[a]s demonstrated by its extensive spending on federal campaign

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7 MUR 6538 (AJS), Response at 3.

8 *See* Stipulation for Entry of Judgment 9 (Oct. 24, 2013), *available at* https://oag.ca.gov/system/files/attachments/press_releases/Signed%20Final%20Stipulation.pdf.

9 *See generally* MUR 6396 (Crossroads GPS), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen.

10 *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 834 (7th Cir. 2014).

activity, [its] major purpose . . . was the nomination or election of federal candidates."[11] The Complaint concludes that "[b]y failing to register as a political committee [in 2010], AJS violated 2 U.S.C. § 433(a) and 11 C.F.R. § 102.1(d)," and that "[b]y failing to file [periodic] reports, AJS violated 2 U.S.C. § 434(a)(4) and 11 C.F.R. § 104.1(a)."[12]

B. THE RESPONSE

AJS responded on May 4, 2012, denying the Complaint's allegations and contending it "is not a political committee."[13] AJS does not challenge the Complaint's allegation that it made expenditures aggregating in excess of $1,000 during 2010. Rather, AJS denies it had the requisite major purpose, stating "there is no factual or legal basis for asserting that AJS's major purpose is federal campaign activity as alleged in the Complaint."[14]

C. COMMISSION ACTION

On June 24, 2014, the Commission considered and voted on this matter.[15] The Complaint failed to convince the required four Commissioners that there is reason to believe AJS violated the Act and the matter was dismissed.[16] As the controlling decision makers,[17] we are issuing this Statement of Reasons to set forth the Commission's rationale for not finding reason to believe and dismissing the matter.[18]

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11 MUR 6538 (AJS), Complaint ¶¶ 35, 39.

12 *Id.* ¶¶ 42, 45.

13 MUR 6538 (AJS), Response at 1.

14 *Id.* at 2.

15 MUR 6538 (AJS), Certification (June 24, 2014).

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

17 *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 § 437g(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*, 831 F.2d 1131, 1133 (D.C. Cir. 1987))).

18 *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.*, 831 F.2d at 1134–35)).

II. FACTUAL BACKGROUND

AJS was established in 1997 as an incorporated non-profit entity organized under section 501(c)(6) of the Internal Revenue Code[19] and continues to maintain its tax-exempt status in good standing.[20] The organization's mission is to "enhanc[e] the climate for American businesses" by promoting "pro-growth, pro-jobs economic messages."[21] Its articles of incorporation provide that AJS aims to accomplish this by uniting "'in a common organization businesses, business leaders, entrepreneurs, and associations of businesses'" and "'promot[ing] the common business interests of its members . . . by helping the American public to better understand public policy issues of interests to businesses.'"[22]

Since its inception, AJS has regularly relied on broadcast and print advertising and mass mail to "educat[e] the public on [economic] policy positions and encourage[e] the public to urge legislators — or other government officials or public figures — to support policies consistent with AJS's pro-job, pro-growth agenda."[23] In 2004 and 2005, for instance, AJS ran a series of print and radio advertisements in various jurisdictions to promote public support for a repeal of the estate or "Death" tax by encouraging listeners to contact their Senators to ask them to vote to repeal the tax.[24] Similarly, in early 2006, AJS aired television communications in several states advocating against legislation to establish the asbestos trust fund.[25] These latter communications criticized Republican Senators who supported the legislation and praised Democratic Senators

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19 MUR 6538 (AJS), Response at 2–3, 11. Section 501(c)(6) provides tax-exempt status to "[b]usiness leagues . . . not organized for profit." To qualify for exemption under the provision, an organization must be "an association of persons having some common business interest, the purpose of which is to promote such common interest." 26 C.F.R. § 1.501(c)(6)-1.

20 MUR 6538 (AJS), Response at 11.

21 *Id.* at 3. AJS describes its economic-policy message as "a simple one: free markets and pro-paycheck public policy are fundamental to building a strong economy and creating more and better paying jobs." *Id.* & Attachment 2.

22 MUR 6538 (AJS), Response at 11 (omission in original) (quoting AJS articles of incorporation). For example, AJS's website identifies various policy "Issues" it is "actively working to affect," including: "Reducing Taxes"; "Tort Reform"; "Free Markets & Free Trade"; "Transportation"; "Education Reform"; "Health Care Reform & Modernization"; and "Energy." *Id.*, Attachment 2.

23 MUR 6538 (AJS), Response at 2.

24 In 2004, AJS published a series of print advertisements critical of Republican Senator Don Nickles's stance on tax issues and failure to do more to repeal the death tax and that also encouraged the public to contact Senator Nickles to urge him to "kill the Death Tax." *Id.* at 3. In 2005, moreover, AJS continued "its campaign to raise awareness about the death tax" through print advocacy and broadcast communications critical of Senate leadership for members' positions on the tax and for failing to bring legislation to the floor that would eliminate it. *Id.* AJS also aired radio advertisements in certain states represented by Democratic Senators that noted the importance of the Senator's vote to the passage of legislation to repeal the estate tax and encouraging the public to contact their Senator in order to ask the Senator to support such legislation. *Id.*

25 *Id.* at 3–4.

who opposed the legislation for fighting for the interests of small businesses and job creation.[26] All of these ads sought to raise public support for AJS's economic-policy positions and none featured any language expressly advocating the election or defeat of a federal candidate, nor were they run within thirty days of a primary election or sixty days of a general election.

From 1997 to May 2012 (the last month of spending data available in the Commission's administrative record), AJS spent over $50 million on its activities and communications.[27] Most of that spending related to advocating its positions on various economic issues. In fact, AJS did not make any expenditures on speech expressly advocating the election or defeat of a federal candidate until 2010. As of May 2012, AJS had spent in aggregate just under $5 million on independent expenditure advertising — all of which occurred in 2010.

Furthermore, AJS, despite regularly engaging in issue advocacy for over a decade, did not make any "electioneering communications" until 2008.[28] The Complaint nonetheless relies on a handful of electioneering communications AJS made in 2010 as support for its assertion that AJS is a political committee.[29] Each of the identified electioneering communications reflect genuine issue advocacy by AJS in support of its economic agenda.[30] All were focused on and discussed economic policy issues and public officials' or figures' positions on those policy issues and called on the public to take action to contact those public leaders to communicate their views on the issues.[31] None of the communications contained express advocacy or explicitly referred to any individual as a candidate for federal office or even mentioned an election; nor did any urge the public to campaign for or contribute to any federal candidate.[32]

Thus, influencing the policy discussion on salient economic issues has taken up the majority of AJS's history.

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[26] MUR 6538 (AJS), Response at 2.

[27] *Id.* at 5.

[28] *Id.* An "electioneering communication" is defined as "any broadcast, cable, or satellite communication" which (a) refers to a clearly identified candidate for Federal office, (b) is publicly distributed within sixty days before a general election or 30 days before a primary election, and (c) is targeted to the relevant electorate. 2 U.S.C. § 434(f)(3); 11 C.F.R. § 100.29. The term "electioneering communication" does not include a communication that constitutes an expenditure or an independent expenditure. 2 U.S.C. § 434(f)(3)(B)(ii). A communication is "targeted to the relevant electorate" when it can be received by 50,000 or more persons within the congressional district that the candidate seeks to represent. 11 C.F.R. § 100.29(b)(5)(i).

[29] *See infra* Appendix A (providing list of and transcripts from AJS's 2010 electioneering communications); *see also* MUR 6538 (AJS), Complaint ¶¶ 22–33 (allegations relating to AJS's 2010 electioneering communications).

[30] *See generally infra* Appendix A.

[31] *See generally id.* Among the economic issues discussed in the communications were (i) tax policies; (ii) employment; (iii) the off-shoring or outsourcing of jobs; (iv) government spending and debt; and (v) congressional earmarks.

[32] *See generally id.*

III. LEGAL BACKGROUND

To appreciate what is at stake in this matter and why groups tailor their activity to avoid triggering burdensome regulation, it is important to understand the responsibilities and burdens that accompany political-committee status. Such an understanding also explains the courts' decisions narrowing the scope and application of the Act.

The Supreme Court 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. . . .
>
> 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 over 12 different categories; the names of all authorized or affiliated committees to whom expenditures aggregating over $200 have been made; persons to whom loan repayments 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.[33]

Moreover, all political committees — including so-called "super PACs" that operate independently of a candidate — remain subject to certain prohibitions even in the post-*Citizens United* world.[34]

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[33] *Citizens United v. FEC*, 558 U.S. 310, 337–38 (2010) (quoting *McConnell v. FEC*, 540 U.S. 93, 331–32 (2003)).

[34] *See* 2 U.S.C. § 441e(a)(1) (making it unlawful for a foreign national to directly or indirectly make "a contribution or donation of money or other thing of value . . . in connection with a Federal, State, or local election"); *see also* 11 C.F.R. § 115.2 (prohibiting contributions by Federal contractors).

Characterizing the onerous requirements that attach to political-committee status as "just disclosure" does not alleviate the attendant burden. Not all disclosure regimes are created equal. The responsibilities that come with one-time, event-specific disclosure[35] are a far cry from the ongoing, all-encompassing reporting and regulatory burdens faced by political committees under the Act.[36] Indeed, it is a "mistake" to interpret the Supreme Court's recent endorsement of event-driven disclosure as "giving the government a green light to impose political-committee status on every person or group that makes a communication about a political issue that also refers to a candidate."[37]

In short, the regulatory obligations, prohibitions, and First Amendment impingements associated with political-committee status are weighty and extensive. As shown below, this is why courts have narrowed the reach of the Act's "political committee" definition to ensure that issue advocacy groups 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 defines the term "political committee" to mean "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."[38]

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."[39] 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

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35 *See, e.g.*, 2 U.S.C. §§ 434(c), 434(f) & 434(g).

36 *See Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 824 (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.

37 *Barland*, 751 F.3d at 836–37.

38 2 U.S.C. § 431(4)(A); 11 C.F.R. § 100.5.

39 *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 (1976).

committees.[40] 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.[41] This was particularly true for "nonpartisan issue groups which in a sense seek to 'influence' an election, *but only by influencing the public to demand of candidates that they take certain stands on the issues.*"[42]

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.[43] 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."[44] In fact, Congress elected not to regulate directly as political committees many "liberal, labor, environmental, business and conservative organizations,"[45] 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."[46] Instead, Congress subjected these organizations to separate disclosure requirements under an independent provision of the Act, 2 U.S.C. § 437a (1974).[47] The D.C. Circuit, however, declared this statute unconstitutional in *Buckley v. Valeo*, in a ruling that was not appealed to the Supreme Court[48] and "apparently

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[40] *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).

[41] *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").

[42] *Buckley*, 519 F.2d at 863 n.112 (emphasis added).

[43] *Nat'l Comm. for Impeachment*, 469 F.2d at 1142.

[44] *Id.* at 1141–42.

[45] 120 Cong. Rec. H10333 (daily ed., Oct. 10, 1974).

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

[47] 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).

[48] *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

accept[ed]" by lawmakers.[49] 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 believe that 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 resentments 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.
>
> ** [To readers:] Let them hear from you. They deserve your support in their resistance to the Nixon administration's bill.[50]

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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").

[49] *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*).

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

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."[51]

Thus, from the outset, courts recognized that although "[p]ublic discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct,"[52] such discussions do not convert an 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."[53]

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.[54] 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."[55] 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."[56]

Buckley fashioned these limitations to prevent the Act from "encompassing both issue discussion and advocacy of a political result"; thus, the major purpose limitation ensures that issue-advocacy organizations are not swept into the Act's burdensome regulatory scheme.[57] 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.

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

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

53 *Id.* at 873.

54 424 U.S. at 79.

55 *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.

56 *Id.* at 79.

57 *Id.*

The Court reaffirmed this distinction in *FEC v. Massachusetts Citizens for Life*,[58] noting that all "organizations whose major purpose is not campaign advocacy, but who occasionally make independent expenditures on behalf of candidates, are subject only to these [independent expenditure-specific reporting] regulations."[59] Then, with respect to the nonprofit corporation at issue, the Court held that its "central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates,"[60] elaborating that if a group's "independent spending become[s] so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee."[61]

C. Lower Court Clarifications of the "Major Purpose" Test

Since *Buckley*, lower courts have further clarified the contours of the major purpose test. For instance, in May of this year, the Seventh Circuit in *Wisconsin Right to Life, Inc. v. Barland*,[62] summed up the Supreme Court's precedent as requiring the major purpose of "express election advocacy" before Wisconsin could impose state-level political-committee burdens.[63] According to the Seventh Circuit, "[t]o avoid overbreadth concerns in this sensitive area, *Buckley* held that independent groups not engaged in express election advocacy as their major purpose cannot be subjected to the complex and extensive regulatory requirements that accompany the PAC designation."[64] Because of similarities between the Act's political-committee disclosure provisions and the regulation at issue, the court held that the major-purpose construction limiting the Act similarly limited the state's regulation. Therefore, the rule at issue was only "a reasonably tailored disclosure rule for independent organizations engaged in express election advocacy as their major purpose."[65]

Other courts have applied the major purpose doctrine in a similar manner. In *New Mexico Youth Organized v. Herrera*,[66] the Tenth Circuit identified two methods for determining

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58 479 U.S. 238 (1986) ("*MCFL*").

59 *Id.* at 252–53.

60 *Id.* at 252 n.6. The phrase "engages 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.

61 *Id.* at 262 (citing *Buckley*, 424 U.S. at 79); *see also N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 287–88 (4th Cir. 2008) ("*NCRTL*") (explaining that *Buckley*'s major purpose test requires that the nomination or election of a candidate must be *the* (i.e., sole and exclusive) major purpose of an organization, not merely *a* (i.e., one of several) major purpose).

62 751 F.3d 804 (7th Cir. 2014).

63 *Id.* at 838, 839.

64 *Id.* at 839.

65 *Id.* at 842.

66 611 F.3d 669 (10th Cir. 2010) ("*NMYO*").

a group's major purpose: "an examination of the organization's central organizational purpose," or a "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."[67] Relying on both *MCFL* and *Colorado Right to Life Committee, Inc. v. Coffman*,[68] the *NMYO* court held that not only was there no preponderance of spending on express advocacy, there was no indication of any spending on express advocacy at all.[69]

The Fourth Circuit also has expounded upon how to assess a group's central organizational purpose in *NCRTL*.[70] The Fourth Circuit explained that "if an organization explicitly states, in its bylaws or elsewhere, that influencing elections is its primary objective, or if the organization spends the majority of its money on supporting or opposing candidates, that organization is under 'fair warning' that it may fall within the ambit of *Buckley*'s test."[71]

At the district court level, the court in *FEC v. GOPAC, Inc.*[72] rejected the use of a fundraising letter lacking express advocacy as evidence that the group's major purpose was the election or defeat of a candidate, finding that "[a]lthough [a Federal candidate] is mentioned by name, the letter does not advocate his election or defeat nor was it directed at [that candidate's] constituents. . . . Instead, the letter attacks generally the Democratic Congress, of which [the candidate] was a prominent member, and the franking privilege . . . and requests contributions."[73] And in *FEC v. Malenick*,[74] the court relied on only express advocacy communications, rather than communications that merely mentioned a candidate, in concluding that the major purpose test was met.[75] In both *Malenick* and *GOPAC* the courts examined the public and non-public statements, as well as the spending and contributions, by particular groups to determine if the major purpose of each organization was the nomination or election of a federal candidate.

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67 *Id.* at 678.

68 498 F.3d 1137 (10th Cir. 2007).

69 *NMYO*, 611 F.3d at 678; *see also Free Speech v. FEC*, 720 F.3d 788, 797 (10th Cir. 2013), *cert. denied* – S. Ct. --, No. 13-772 (May 19, 2014) ("The determination of whether the election or defeat of federal candidates for office is *the* major purpose of an organization, not simply *a* major purpose, is inherently a comparative task, and in most instances it will require weighing the importance of some of a group's activities against others." (quoting *Real Truth About Abortion v. FEC*, 681 F.3d 544, 556 (4th Cir. 2012))).

70 525 F.3d at 289.

71 *Id.*

72 917 F. Supp. 851 (D.D.C. 1996).

73 *Id.* at 863–64.

74 310 F. Supp. 2d 230 (D.D.C. 2005).

75 *Id.* at 234–36 (noting the sixty fax alerts that the group sent in which it "advocated for the election of specific federal candidates").

D. THE STANDARD FOR IDENTIFYING GENUINE ISSUE SPEECH

The courts have appropriately rejected attempts to count issue speech — even that which references federal candidates — as evidence that a group has met *Buckley*'s major purpose test. A contrary conclusion would undermine the objective of the major purpose limitation: to ensure that issue-advocacy organizations are not regulated as political committees. In *Buckley*, the Supreme Court observed:

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest.[76]

The Supreme Court in *FEC v. Wisconsin Right to Life, Inc.*[77] provided explicit guidance regarding how to distinguish electoral advocacy from issue speech. "Issue advocacy conveys information and educates. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose — uninvited by the ad — to factor it into their voting decisions."[78] The Court concluded that "[d]iscussion of issues cannot be suppressed simply because the issues may also be pertinent in an election."[79]

In holding that the ads at issue in *WRTL II* were genuine issue ads, the Court noted that they "focus[ed] on a legislative issue, [took] a position on the issue, exhort[ed] the public to adopt that position, and urge[d] the public to contact public officials with respect to the matter,"[80] and rejected the notion that any of the following characteristics would render a communication electoral advocacy:

- If it contains an appeal to contact a candidate;
- If it mentions a candidate in relation to an issue;
- If it is disseminated in close proximity to elections, rather than near actual legislative votes on issues;

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76 424 U.S. at 42.

77 551 U.S. 449 (2007) ('*WRTL II*').

78 *Id.* at 470.

79 *Id.* at 474.

80 *Id.* at 470.

- If it is aired when the Congress is not in session;
- If it cross-references a website that contains express advocacy;
- If the group running the communication had in the past expressly advocated the election or defeat of the candidate referenced in the advertisement; or
- If it merely mentions — or even promotes or criticizes — a federal candidate.[81]

The Seventh Circuit reinforced the importance of broad protections for issue-related speech in *Barland* — a case involving state regulations that were "specifically designed to bring issue advocacy within the scope of the state's PAC regulatory system."[82] Applying *Buckley*, the *Barland* court found the regulation at issue to be "fatally vague and overbroad"[83] and "a serious chill on debate about political issues,"[84] noting that the "pervasive" regulatory burdens of political-committee status are not "relevantly correlated and reasonably tailored to the public's informational interest for "issue-advocacy groups that only occasionally engage in express advocacy."[85]

E. THE COMMISSION'S APPLICATION OF THE "MAJOR PURPOSE" TEST

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,"[86] and in particular, whether the regulatory definition of political committee "should be amended by incorporating the major purpose requirement."[87] The Commission sought comment on four tests for determining whether an entity had the requisite major purpose.[88] These proposed tests would have examined — to varying degrees — an organization's avowed purpose, its spending, and its tax status.[89]

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81 *Id.* at 470–73.

82 751 F.3d at 834.

83 *Id.* at 835.

84 *Id.* at 837.

85 *Id.* at 841.

86 *Notice of Proposed Rulemaking on Political Committee Status*, 69 Fed. Reg. 11736, 11736 (Mar. 11, 2004).

87 *Id.* at 11743.

88 *Id.* at 11745.

89 *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. 68056, 68064–65 (Nov. 23,

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.[90] 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.[91] In response, the Commission issued a Supplemental Explanation and Justification in 2007.[92] This Supplemental E&J did not issue or explain a new rule. Rather, it elaborated on the Commission's ongoing case-by-case approach to the major purpose test, 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."[93] To that end, the Commission indicated that determining a group's major purpose requires "flexibility" and a "fact-intensive" consideration of a number of indicators unique to each organization.[94]

This central premise of the 2007 Supplemental E&J has been upheld by several courts.[95] The Fourth Circuit in *Real Truth About Abortion v. FEC*,[96] 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."[97] This flexible, comparative approach remains at the core of the Commission's major purpose analysis today.

While the basic approach to political-committee status outlined in the 2007 Supplemental E&J remains valid, some portions of the guidance contained therein have been superseded by subsequent case law and Commission interpretations. Among these portions is the reference to certain older administrative matters that were cited as relevant examples. Though the 2007

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).

90 2004 E&J, 69 Fed. Reg. at 68065.

91 *Shays v. FEC*, 424 F. Supp. 2d 100, 115–16 (D.D.C. 2006).

92 *Supplemental Explanation and Justification, Political Committee Status*, 72 Fed. Reg. 5596 (Feb. 7, 2007) ("2007 Supplemental E&J").

93 *Id.* at 5601.

94 *Id.* at 5601–05.

95 *See, e.g.*, *Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013), *cert. denied* 134 S. Ct.2288, No. 13-772 (2014); *Real Truth About Abortion v. FEC*, 681 F.3d 544 (4th Cir. 2012) ("*RTAA*"); *Shays v. FEC*, 511 F. Supp. 2d 19 (2007) ("*Shays II*").

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

97 *Id.* (emphasis in the original). The *RTAA* court also noted that the inquiry to assess an organization's major purpose "would not necessarily be an intrusive one" as "[m]uch of the information the Commission would consider would already be available in that organization's government filings or public statements." *Id.* at 558.

Supplemental E&J does not articulate a rule defining the major purpose test, it points to the public files of closed enforcement cases as historical "guidance as to how the Commission has applied the statutory definition of 'political committee' together with the major purpose doctrine."[98] Yet the value of a number of the Commission's past political committee enforcement matters cited in the 2007 Supplemental E&J has been diminished by intervening decisions both by courts and by the Commission.

For example, the 2007 Supplemental E&J was issued prior to the Court's decision in *WRTL II*,[99] which clarified the distinction between issue and electoral advocacy.[100] And recently, the Seventh Circuit in *Barland* reinforced *WRTL II*'s holding that genuine issue advertisements cannot be regulated as electoral advocacy.[101] Wisconsin's rule defining political committees was narrower in some respects than the federal definition of "electioneering communication." It applied only to communications made within thirty days of a primary election or sixty days of a general election that name or depict a federal candidate and "refers to the candidate's 'personal qualities, character, or fitness' or 'supports or condemns' the candidate's record or 'position or stance on issues.'"[102] Nevertheless, *Barland* rejected this approach, holding that Wisconsin's provision improperly captured genuine issue advertisements and "under *Buckley* and *Wisconsin Right to Life II* must be narrowly construed to apply only to independent spending for express advocacy and its functional equivalent."[103] Thus, reliance on the advertisements cited in the 2007 Supplemental E&J is undermined to the extent that those advertisements constitute issue advocacy, as later clarified by the Court in *WRTL II* and the Seventh Circuit in *Barland*.[104]

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,[105] many of the enforcement matters contained therein have been undermined by

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98 2007 Supplemental E&J, 72 Fed. Reg. at 5604.

99 The 2007 Supplemental E&J was issued on February 7, 2007. *See* 72 Fed. Reg. 5595. *WRTL II* was decided on June 25, 2007. 551 U.S. 449 (2007).

100 *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.").

101 *Barland*, 751 F.3d at 834–35.

102 *Id.* at 834 (quoting GAB § 1.28(3)(b)).

103 *Id.* at 835. None of AJS's advertisements are the "functional equivalent" of express advocacy. Moreover, after *WRTL II*, almost all electioneering communications are genuine issue ads.

104 *Free Speech* and *RTAA* are fully consistent with this limitation. *Free Speech* and *RTAA* upheld the case-by-case approach outlined in the 2007 Supplemental E&J. *Barland* and other cases such as *NMYO* clarified the application of the major purpose test within the case-by-case approach upheld in *Free Speech* and *RTAA*.

105 2007 Supplemental E&J, 72 Fed. Reg. at 5601.

subsequent judicial decisions, a development the Commission has adapted to over time through its case-by-case approach.

* * * *

In sum:

- The Act's definition of political committee only reaches those groups that have as their only major purpose the nomination or election of a federal candidate; a group that has as its major purpose the discussion of issues, including political issues, may not be regulated as a political committee under the Act.
- Genuine issue speech does not lose its character merely by mentioning – or even promoting or criticizing – a federal candidate.
- 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.

With these principles in mind, we turn to AJS.

IV. ANALYSIS OF AJS'S MAJOR PURPOSE

As explained above, since its adoption, the Act's definition of "political committee" has been the subject of 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. AJS's major purpose is not the nomination or election of a federal candidate under the second prong.

A. AJS Met the Statutory Threshold for Political-Committee Status

Based on its filings with the Commission, AJS plainly crossed the statutory threshold for political-committee status by making over $1,000 in independent expenditures in 2010.[106] In fact, AJS does not even challenge this in its response. Accordingly, the question of whether AJS is a political committee under the Act turns on if AJS's major purpose is the nomination or election of a federal candidate.

106 MUR 6538 (AJS), First General Counsel's Report at 12.

B. AJS DOES NOT HAVE THE REQUISITE MAJOR PURPOSE FOR POLITICAL-COMMITTEE STATUS

Although not the only factors that may be considered, the following two factors are most relevant in this case: (1) assessing AJS's central organizational purpose by examining its public and non-public statements; and (2) analyzing AJS's spending on campaign activities with its spending on activities unrelated to the election or defeat of a federal candidate, including the group's genuine issue speech.[107]

1. AJS's Central Organizational Purpose Is Not the Nomination or Election of a Federal Candidate

Neither the Complaint nor OGC even suggest that AJS is a political committee based on its stated organizational purpose. To the contrary, AJS's organizational documents, including its website, mission statement, and status as a 501(c) organization, counsel against its being a political committee.

AJS's articles of incorporation provide that it is organized "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.'"[108] AJS's "core mission," moreover, "remains the promotion of pro-growth, pro-jobs economic messages."[109] Indeed, its website declares that "[f]rom the beginning [AJS's] message has been a simple one: free markets and pro-paycheck public policy are fundamental to building a strong economy and creating more and better paying jobs."[110] The website even contains an "Issues" page that outlines "a small sampling of the [policy] issues of the day" that AJS "is actively working to affect."[111]

In addition, AJS's registration as a 501(c)(6) organization, when viewed in combination with its consistent organizational statements indicative of an issue-advocacy focus, further evidences that the organization is not a political committee. Although an organization's tax status is not dispositive of the question, it is certainly a relevant consideration. Indeed, Senator John McCain, one of the principal Senate sponsors of the Bipartisan Campaign Reform Act ("BCRA"), stated that "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

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107 We note that neither OGC nor Complainants argued that any factor other than statements or spending support their conclusions that AJS has as its major purpose the nomination or election of a federal candidate.

108 MUR 6538 (AJS), Response at 11 (quoting AJS's articles of incorporation).

109 *Id.* at 3 (citing AJS's website).

110 *Id.*

111 *Id.*, Attachment 2.

political committees, as long as they comply with their tax law requirements."[112] Reform groups like Public Citizen, moreover, have noted that "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."[113] AJS has been organized as a 501(c)(6) for seventeen years — it was even audited by the IRS in 2004 only to have no further action taken to challenge it tax-exempt status.[114] And "AJS continues to maintain its tax exempt status as a nonprofit trade association in good standing."[115]

The official documents of AJS, including its articles of incorporation, its purpose statement, and its website, all indicate that AJS's central organizational purpose is to promote economic issues, not the nomination or election of a federal candidate.

2. *AJS's Spending Activity Demonstrates that it is Focused on the Discussion of Issues, Not the Nomination or Election of a Federal Candidate*

The Complaint claims that, "[a]s demonstrated by its extensive spending on federal campaign activity, AJS's major purpose in 2010 was the nomination or election of federal candidates."[116] But this assertion relies on an erroneously broad test to assess AJS's spending activity.

To determine if "independent spending" has "become so extensive" as to subject an organization to regulation as a political committee, the Commission must compare the group's overall spending on express advocacy against its overall spending on activities unrelated to campaigns, including issue advocacy.[117] That is, as a general rule, the Commission assesses an

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112 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 tax exempt treatment to "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes").

113 Comment of Public Citizen on Reg. 2003-07 (Political Committee Status) at 10 (Apr. 5, 2004). Public Citizen further noted that "[e]ntities that do not have as their major purpose the election or defeat of federal candidates, such as 501(c) advocacy groups, but which may well be substantially engaged in political activity, should remain subject to regulation for only the narrow class of activities — express advocacy and electioneering communications — explicitly established by current federal election law, as amended by [McCain-Feingold]." *Id.* at 2.

114 MUR 6538 (AJS), Response at 11.

115 *Id.*

116 MUR 6538 (AJS), Complaint ¶ 39.

117 *See Buckley*, 424 U.S. at 79 ("To fulfill the purposes of the Act they [the words '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. Expenditures of candidates and of 'political committees' so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign

organization's major purpose by reference to its entire history.[118] The record of AJS's spending before the Commission clearly demonstrates that although advocating for the nomination, election, or defeat of candidates may have been *a* purpose of the organization in 2010, it has not been *the* major purpose of the organization over its lifetime.

AJS was founded in 1997.[119] The record shows that from its inception to May 2012 (the last month of spending data available in the Commission's administrative record), AJS spent over $50 million on activities and communications.[120] From its founding, and consistent with its organizational mission, AJS has sought to engage the public on economic issues by means of broadcast and print advertising, as well as mass mailings.[121] Through those communications AJS has routinely "urged the public to contact their legislators and other public leaders to support legislation favorable to American businesses."[122]

AJS did not engage in *any* amount of express advocacy until 2010,[123] when it spent $4,908,847 on independent expenditures.[124] AJS did not spend any money on independent expenditures in 2011 or prior to May 2012. And all of the electioneering communications identified in the Complaint are genuine issue advertisements;[125] they contain no references to elections, candidacies, or political parties, while "focus[ing] on a legislative issue, tak[ing] a position on the issue, exhort[ing] the public to adopt that position, and urg[ing] the public to contact public officials with respect to the matter."[126]

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related."); *see also id.* at 80 (noting that by construing "expenditure" "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate" ensures that the term only captures "spending that is unambiguously related to the campaign of a particular federal candidate").

118 *See* MUR 6396 (Crossroads GPS), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 24 n.101 ("Often one can assess an organization's true major purpose only by reference to its entire history."); *see also* MUR 6081 (American Issues Project), Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen (looking at four years of an organization's history).

119 MUR 6538 (AJS), Response at 1.

120 *Id.* at 5.

121 *Id.* at 3.

122 *Id.*; *see also supra* Part II.

123 MUR 6538 (AJS), Response at 5. Moreover, AJS had existed and pursued its economic issue advocacy for more than ten years before making its first electioneering communication. *Id.*

124 *See* Campaign Finance Disclosure Portal, *available at* http://www.fec.gov/pindex.shtml. Commission records also show that AJS did not engage in any express advocacy during 2011.

125 *See supra* Part II; *see also infra* Appendix A (transcripts of advertisements).

126 *WRTL II*, 551 U.S. at 470.

Thus, the record before the Commission shows that during the course of its history dating back to 1997, AJS spent over $50 million to "promot[e] its public policy agenda through issue advocacy activities and communications,"[127] but only $4.9 million — or a mere 9.8 percent [128]— of that spending was on express advocacy. In no fair or reasonable way can this relatively insignificant level of spending on express advocacy, in comparison with the remainder of the organization's activities, be deemed "so extensive that the organization's major purpose may be regarded as campaign activity."[129]

Because AJS's central organizational purpose is not the nomination or election of federal candidates and its independent spending to support the nomination or election of a federal candidate is not so extensive that its major purpose may be regarded as campaign activity, AJS's major purpose is not the nomination or election of a federal candidate. Accordingly, AJS is not a political committee. It is, in fact, an issue-advocacy group that occasionally speaks out on federal elections — precisely the type of organization the major purpose test is intended to spare from the "burdensome alternative[]" of political-committee status.[130]

V. THE FIRST GENERAL COUNSEL'S REPORT

Based on the above facts, OGC nevertheless recommended that the Commission find reason to believe that "AJS had as its major purpose the nomination or election of federal candidates during 2010" and, accordingly, violated the Act "by failing to organize, register, and report as a political committee."[131] OGC largely based its recommendation on two flawed

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127 MUR 6538 (AJS), Response at 5.

128 Respondents calculate the amount as 9.5%, which appears to be based on the affidavit of treasurer Stephen Demaura. *Id.* The difference is negligible and does not affect our analysis.

129 *MCFL*, 479 U.S. at 262 (citing *Buckley*, 424 U.S. at 79).

130 *See Citizens United*, 558 U.S. at 337 (describing generally the burdens associated with political-committee status); *see also supra* Part III (discussing burdens on political committees under the Act).

131 MUR 6538 (AJS), First General Counsel's Report at 3. While the Commission has erroneously strayed into the vague notion of generalized "campaign activity," rather than *Buckley*'s more limited 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 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.*, MUR 6396 (Crossroads GPS), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen; MUR 6081 (American Issues Project), Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen; MUR 5541 (The November Fund), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn; 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

premises: first, that any communication that supports or opposes a clearly identified federal candidate but does not contain express advocacy is indicative of major purpose; and second, that an organization's spending is evaluated through the limited lens of a single calendar year.

A. THE RELEVANT SPENDING MAY NOT ENCOMPASS GENUINE ISSUE ADVERTISEMENTS

The legal theory proposed in the First General Counsel's Report ostensibly relies on the 2007 Supplemental E&J,[132] which explained the Commission's decision *not* to adopt a bright-line rule for applying the major purpose analysis. In particular, OGC cites to a series of decade-old enforcement matters (and the communications at issue therein) to arrive at its recommendation that for purposes of determining political-committee status "communications that support or oppose a clearly identified federal candidate, but do not contain express advocacy" are indicative of a major purpose of nominating or electing a federal candidate.[133] Relying on vague, ambiguous terms, it appears that the relevant criteria for OGC's determination are: (1) a reference to clearly identified federal candidate; (2) criticism of or opposition to that candidate; and (3) the timing of the communication being shortly before the election.[134]

OGC's analysis fails to distinguish between advertisements that support or oppose the election of a candidate and those that reference a candidate in the course of supporting or opposing an issue with which that candidate is involved. Nor does OGC acknowledge that such a distinction exists, despite judicial precedent that stands precisely for that proposition.[135] Indeed, the illustrative value of the Commission's past political committee enforcement matters cited in the 2007 Supplemental E&J has, in large part, been diminished by intervening decisions both by courts and by the Commission. Under *WRTL II*, many of the advertisements and communications at issue in those cases were genuine issue speech and, therefore, may not serve as the trigger to political-committee status.

Indeed, as noted above, the Seventh Circuit in *Barland* reviewed a provision that required groups to register and report as political committees if they spent a small amount on certain communications prior to an election. This provision is remarkably similar to the standard advocated by OGC to determine which of AJS's admittedly non-express advocacy communications nevertheless "supported or opposed" a federal candidate.

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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.").

132 2007 Supplemental E&J, 72 Fed. Reg. at 5601.

133 MUR 6538 (AJS), First General Counsel's Report at 13.

134 *Id.* at 19.

135 *See, e.g., WRTL II*, 551 U.S. at 470–73.

	PROVISION REVIEWED IN *BARLAND*[136]	OGC STANDARD[137]
Candidate Reference	"[A] clearly identified candidate"	"[A] clearly identified federal candidate"
Content	"[R]efers to the candidate's personal qualities, character, or fitness or supports or condemns the candidate's record or position or stance on issues"	"[C]riticizes or opposes a candidate"
Timing	"[W]ithin 30 days of a primary, or 60 days of a general election"	"[R]un in the candidate's respective state shortly before a primary or election"

In particular, OGC looks to whether an advertisement has "a clearly identified federal candidate," "criticizes or opposes a candidate," or is "run in the candidate's respective state shortly before a primary or election."[138] The *Barland* court held that a law requiring registration and reporting based on advertisements that had "a clearly identified candidate," "refers to the candidate's personal qualities, character, or fitness or supports or condemns the candidate's record or position or stance on issues," and is aired "within 30 days of a primary, or 60 days of a general election"[139] on the grounds that such provision "is fatally vague and overbroad"[140] and "is a serious chill on debate about political issues."[141] Considering the similarities between the Wisconsin's standard and OGC's proposed standard in this matter, the Seventh Circuit's holding is a rejection of the approach recommended by OGC.[142]

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136 *Barland*, 751 F.3d at 834.

137 MUR 6538 (AJS), First General Counsel's Report at 13.

138 *Id.* at 19.

139 *Barland*, 751 F.3d at 834.

140 *Id.* at 835.

141 *Id.* at 837.

142 At minimum, this explicit rejection casts grave constitutional doubt on OGC's expansive approach. As the Court has recently stated, "by analogy to the rule of statutory interpretation that avoids questionable constitutionality — validly conferred discretionary executive authority is properly exercised . . . to avoid serious constitutional doubt." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2259 (2013); *see also Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Contr. Trades Council*, 485 U.S. 568, 575 (1988) (although a regulatory agency's interpretation of its own statute is generally accorded deference, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress" (citing *NLRB v. Catholic Bishops of Chi.*, 440 U.S. 490, 500 (1979))); *Dep't. of Commerce v. U.S. House of Reps.*, 525 U.S. 316, 346 (2000) (Scalia, J., concurring in part) ("[I]t is our practice to construe the text [of a statute] in such fashion as to avoid serious constitutional doubt.").

Similarly, *GOPAC* rejected "the Commission's plea for a broadening of the *Buckley* concept,"[143] reasoning that "the terms 'partisan electoral politics' and 'electioneering' raise virtually the same vagueness concerns as the language 'influencing any election for Federal office,' the raw application of which the *Buckley* Court determined would impermissibly impinge on First Amendment values."[144]

In short, the approach adopted by OGC in this matter cannot be squared with these court holdings.

B. It is Inappropriate and Arbitrary to Focus AJS's Major Purpose Analysis on A Single Calendar Year

Furthermore, OGC once again advanced a calendar-year approach — focusing only on AJS's activity during calendar-year 2010 — to apply the major purpose analysis. Such an approach has never been formally adopted by the Commission,[145] and we have previously explained why such an approach is myopic, distortive, and legally erroneous.[146] AJS's case is a perfect example why.

Moreover, the constitutional doubts raised here militate in favor of cautious exercise of our prosecutorial discretion. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.").

[143] *GOPAC*, 917 F. Supp. at 861.

[144] *Id.* Similarly, in *Malenick* the court held that the major purpose test was met, only relied on express advocacy communications, rather than communications that merely mentioned a candidate. 310 F. Supp. 2d at 235 (noting the sixty fax alerts that the group sent in which it "advocated for the election of specific federal candidates").

[145] MUR 6538 (AJS), First General Counsel's Report at 21 ("AJS argues that its 2010 independent expenditures represent 'a very minor portion' of its overall activities since its founding in 1997. A calendar year, however, and not a group's entire history, provides the firmest statutory footing for the Commission's major purpose determination.").

[146] *See* MUR 6396 (Crossroads GPS), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 20–23; MUR 6081 (American Issues Project), Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen at 14–25; *see generally GOPAC*, 917 F. Supp. at 862–66 (reviewing, among other things, GOPAC's *1989–1990* Political Strategy Campaign Plan and Budget) (emphasis added); *Malenick*, 310 F. Supp. 2d at 235 (citing Pl.'s Mem., Ex. 1 (Stipulation of Fact signed and submitted by Malenick and Triad Inc., to the FEC on January 28, 2000, "listing numerous 1995 and 1995 Triad materials announcing these goals") and Ex. 47 ("Letter from Malenick, to Cone, dated Mar. 30, 1995") 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); MUR 5751 (The Leadership Forum), General Counsel's Report #2 at 3 (OGC cited IRS reports showing receipts and disbursements from 2002–2006 before concluding that the Respondent had not crossed the statutory threshold for political-committee status); MUR 5753 (League of Conservation Voters 527, *et al.*), Factual and Legal Analysis at 11 & 18 (the Commission determined that Respondents "were required to register as political committees and commence filing disclosure reports with the Commission by no later than their initial receipt of contributions of more than $1,000 in July 2003," citing to Respondents' disbursements "during the *entire 2004 election cycle*" while evaluating their major purpose) (emphasis added); MUR 5754 (MoveOn.org Voter Fund), Factual and Legal

Trying to determine an organization's major purpose through a narrow snapshot of time — one calendar year in this case — flatly ignores the point of the major purpose test. The major purpose limitation acts as a constraint, saving the Act's definition of "political committee" by restricting it to groups with the clearest electoral focus — i.e., to those that have the nomination or election of a candidate for federal office as their major purpose.[147] Although the calendar-year approach superficially attempts to root itself in the FECA, it provides precisely the same rigid, "one-size-fits-all rule" roundly rejected by the Commission.[148]

Indeed, AJS's case exemplifies why an assessment of an organization's major purpose by reference to its activities in only a single calendar year is misguided and renders an artificial and distorted picture of the organization's activities that could wrongly subject an issue-advocacy group to the regulatory burdens attendant to political-committee status.[149] *Buckley*'s concept of an "organization" manifests its major purpose over its lifetime of existence and activities,[150] and in this case, AJS engaged in issue advocacy for nearly thirteen years before making its first independent expenditure in 2010. Focusing exclusively on AJS's spending in 2010, the first year it engaged in *any* express advocacy (although still likely insufficient to support political-

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Analysis at 12 &13 (the Commission looked to disbursements "[d]uring the *entire 2004 election cycle*" and cited to specific solicitations and disbursements made during calendar year 2003 in assessing the Respondent's major purpose) (emphasis added). Note, the legal underpinnings of MURs 5754 (MoveOn.org Voter Fund) and5753 (League of Conservation Voters 527, *et al.*) have been undermined for other reasons by *EMILY's List v. FEC*, 581 F.3d 1, 12–14 (D.C. Cir. 2009).

147 *See, e.g.*, 2007 Supplemental E&J, 72 Fed. Reg. at 5602 ("[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.").

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

149 The fact that the statutory definition of political committee relies on $1,000 of expenditures or contributions in a calendar year is not relevant to an assessment of the organization's longstanding major purpose for which it was created and as manifested throughout its existence. The Act imposes a bright line that, according to *Buckley*, was unconstitutionally over-inclusive, and thus the Court imposed an intention-based standard as a further filter. It is unclear why that arbitrary statutory time frame is appropriate when *RTAA* rejected the argument that "the major purpose test requires a bright-line, two-factor test." 681 F.3d at 557. It makes little sense that a case-by-case standard, which according to *Shays II*, "requires a very close examination of various activities and statements," would reject a broader examination. 511 F. Supp. 2d at 31.

150 "Often one can assess an organization's true major purpose only by reference to its entire history." MUR 6396 (Crossroads GPS), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 24 n.101; *see also* MUR 6081 (American Issues Project), Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen (looking at four years of an organization's history).

committee status[151]), creates a false reality of the organization's major purpose — which the record clearly shows has remained consistently focused on issue advocacy since AJS's inception.

VI. Conclusion

AJS is an "issue-advocacy group[] that only occasionally engage[d] in express advocacy."[152] It cannot (nor should it) be subject to the "pervasive" and burdensome" requirements of registering and reporting as a political committee. For that reason, and in exercise of our prosecutorial discretion,[153] we voted against finding reason to believe it violated the Act by failing to register and report as a political committee.

151 Indeed, in 2010, AJS spent a total of $12 million, of which only $4.9 million (or approximately 40%) applied to independent expenditures. Such spending does not clearly signify a *major* purpose of engaging in express advocacy. MUR 6538 (Americans for Job Security), Response at 12.

152 *Barland*, 751 F.3d at 841.

153 *See Heckler*, 470 U.S. at 831; *see also supra* note 142.

Lee E. Goodman

LEE E. GOODMAN
Chairman

7/30/14
Date

Caroline C. Hunter

CAROLINE C. HUNTER
Commissioner

7/30/14
Date

Matthew Petersen

MATTHEW S. PETERSEN
Commissioner

7/30/14
Date

Appendix A

1. "Agree"

> 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.

AJS spent $479,268 on this communication.

2. "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.

AJS spent $980,256 on this communication.

3. "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.

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

4. "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.

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

5. "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.

AJS spent $45,100 on this communication.

6. "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.

AJS spent $54,572 on this communication.

7. "Outsource"

> 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.

AJS spent $490,000 on this communication.

8. "Pennsylvania Jobs"

> Washington politicians are on a spending spree. Bigger government. Earmarks. 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.

AJS spent $72,100 on this communication.

9. "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 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.

AJS spent $42,000 and $585,800 on this communication.

10. "Thank You"

[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.'"

AJS spent $913,096 on this communication.