FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matters of	)	
	)	
Americans for Job Security; and	)	MUR 6538 & MUR 6589
	)	
American Action Network	)	
	)	

STATEMENT OF REASONS
OF VICE CHAIR ANN M. RAVEL, COMMISSIONER STEVEN T. WALTHER, AND COMMISSIONER ELLEN L. WEINTRAUB

"Dark money" groups[1] are spending vast amounts of money on American elections. Millions of dollars are flowing into our political system – over $310 million in the 2012 federal elections[2] – often to fund aggressively negative ads,[3] without any way for the public to know where the money is coming from. This is not what Congress intended the campaign finance system to do, not what the Supreme Court has insisted should be done, and not how it has long been done at the Federal Election Commission. Disclosure laws provide voters with the information necessary to evaluate the source of political messages. Unfortunately, the Commission has reached an impasse that has prevented us from enforcing the Commission's

[1] The term "dark money" generally refers to federal election spending by 501(c) groups that do not disclose their donors, in part because they claim they are not "political committees." *See, e.g.*, Lee Drutman, *No, Less Disclosure Will Not Reduce Dark Money*, SUNLIGHT FOUND. BLOG (Jul. 17, 2014, 11:49 AM), http://sunlightfoundation.com/blog/2014/07/17/no-less-disclosure-will-not-reduce-dark-money; *see also* Joshua Fechter & David Saleh Rauf, *'Dark Money' Group Riles Up Attorney General Candidates*, HOUS. CHRON., May 24, 2014, at B2; Theodoric Meyer, *IRS Delays New Rules for Dark Money Groups*, PROPUBLICA (May 23, 2014, 12:05 PM), http://www.propublica.org/article/irs-pushes-back-new-rules-for-dark-money-groups; Fredreka Schouten, *'Dark Money' Surges Ahead of Midterms: Certain Groups Spending Tops $23M This Week*, USA TODAY, May 14, 2014, at 3A; Kellan Howell, *Hollywood Increases Political Influence by Funding 'Dark Money' Groups*, WASH. TIMES, Feb. 27, 2014, *available at* http://www.washingtontimes.com/news/2014/feb/27/hollywood-funds-dark-money-groups-to-increase-poli/.

[2] Robert Maguire, *How 2014 is Shaping Up to be the Darkest Money Election to Date*, OPENSECRETS BLOG (Apr. 30, 2014), https://www.opensecrets.org/news/2014/04/how-2014-is-shaping-up-to-be-the-darkest-money-election-to-date/.

[3] Erika Franklin Fowler & Travis N. Ridout, *Negative Angry, and Ubiquitous: Political Advertising in 2012*, THE FORUM, Dec. 2012, at 59, *available at* http://www.degruyter.com/view/j/for.2012.10.issue-4/forum-2013-0004/forum-2013-0004.xml ("Fully 85% of ads sponsored by non-party organizations were purely negative, and another 10% were contrasting, leaving only 5% positive.").

own written policy[4] – a policy that should shine a much-needed light on the sources of dark money.

The Commission recently encountered yet another roadblock when it deadlocked, 3-3, on whether to investigate two organizations that were alleged to have violated the Federal Election Campaign Act by failing to register with the Commission as political committees and report their donors and spending.[5] Both groups, Americans for Job Security ("AJS") and the American Action Network ("AAN"), were heavily involved in political campaigns, spending more than $9.5 million and $17 million, respectively, on advertisements supporting or opposing federal candidates in close proximity to the 2010 elections, without disclosing their donors.[6] At a minimum, the Commission should have investigated these organizations in order to vindicate the public's interest in knowing the source of political spending.[7]

The test for political committee status has two parts. An organization satisfies the first part by receiving contributions or making expenditures in excess of $1,000 during a calendar year.[8] The second part is satisfied if the "major purpose" of the organization is "the nomination or election of a candidate."[9] This "major purpose" requirement was adopted by the Supreme Court, in *Buckley v. Valeo*, in order to address concerns that the test might otherwise reach

[4] *See* Political Committee Status, 72 Fed. Reg. 5595, 5596-97 (Feb. 7, 2007) (Supplemental Explanation and Justification) ("2007 E&J"), *available at* http://sers.fec.gov/fosers/showpdf.htm?docid=34789 (requiring certain organizations to register as political committees and report their activity).

[5] *See* Certification in MUR 6538 (Americans for Job Security), dated June 24, 2014; Certification in MUR 6589 (American Action Network), dated June 24, 2014. In both matters, we voted to find reason to believe that the groups violated the Act. *Id.* Chairman Goodman and Commissioners Hunter and Petersen dissented. *Id.*

[6] First General Counsel's Report in MUR 6538 (Americans for Job Security), dated May 2, 2013, at 21 ("AJS FGCR") ("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."); First General Counsel's Report in MUR 6589 (American Action Network), dated Jan. 17, 2013, at 25 ("AAN FGCR") ("American Action Network appears to have spent at least $17,013,017 during 2010 on the type of communications that the Commission considered to be federal campaign activity.").

[7] OGC recommended that the Commission find reason to believe that AJS and AAN violated 2 U.S.C. §§ 432, 433, and 434 and authorize an investigation to establish the extent, nature, and cost of AJS's and AAN's federal campaign activity. *See* AJS FGCR; AAN FGCR. "Reason to believe" is a threshold determination that by itself does not establish that the law has been violated, "but instead simply means that the Commission believes a violation *may* have occurred." *See* Guidebook for Complainants and Respondents on the FEC Enforcement Process, May 2012, *available at* http://www.fec.gov/em/respondent_guide.pdf (emphasis added). In fact, a "reason to believe" determination indicates only that the Commission has found sufficient legal justification to open an investigation to determine whether there is probable cause to believe that a violation of the Act has occurred. A "reason to believe" finding is appropriate when a complaint "credibly alleges that a significant violation *may* have occurred, but further investigation is required to determine whether a violation in fact occurred and, if so, its exact scope." *See* Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 F.R. 12545 (March 16, 2007), *available at* http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-6.pdf (emphasis added).

[8] 2 U.S.C. § 431(4)(A). The calendar year framework is unambiguous in the statute.

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

"groups engaged purely in issue discussion."[10] Since *Buckley*, the Commission has made determinations on a case-by-case basis as to whether an organization has the requisite major purpose.[11] In doing so, the Commission has examined an organization's public statements as well as its "full range of campaign activities."[12] In 2007, the Commission published a detailed Supplemental Explanation and Justification providing its reasons for adhering to the existing practice and providing "guidance to all organizations regarding the receipt of contributions, making of expenditures, and political committee status."[13] In doing so, it listed a number of factors that may properly be considered in determining political committee status that were not limited to express advocacy. This "2007 E&J" includes a list of examples of activity from prior matters that the Commission considers to be "campaign activities," and therefore indicative of major purpose, including: "direct mail attacking *or* expressly advocating the defeat of a Presidential candidate," "television advertising opposing a Federal candidate," spending on "candidate research" and "polling," and "other spending . . . for public communications mentioning Federal candidates."[14] Clearly, for the purpose of determining political committee status, this list encompasses activity that extends well beyond express advocacy.

Since 2007, courts in three different circuits have been asked to rule upon the constitutionality of the policy embodied in the 2007 E&J. All three found it to be constitutional.[15] Yet our colleagues have increasingly contended that any communications not containing express advocacy must not be considered in a major purpose analysis, effectively eviscerating the Commission's policy as set forth in the 2007 E&J. This 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)."[16]

In the case of AJS and AAN, spending on advertisements that supported or opposed federal candidates – the types of activity identified in the 2007 E&J – made up a *majority* of each organization's total spending in the 2010 calendar year.[17] For example, AJS, an entity organized under section 501(c)(6) of the tax code, reported spending over $4.9 million on communications

[10] *Id.*

[11] *See* 2007 E&J at 5596-97.

[12] *Id.*

[13] *Id.* at 5596.

[14] *Id.* at 5605 (emphasis added).

[15] *Free Speech v. FEC*, 720 F.3d 788, 798 (10th Cir. 2013), *cert. denied*, 134 S.Ct. 2288 (May 19, 2014); *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d. 544, 556 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 841 (2013); *Shays v. FEC*, 511 F. Supp. 2d 19, 29-31 (D.D.C. 2007); *see also Koerber v. FEC*, 583 F.Supp.2d 740, 746-48 (E.D.N.C. 2008) (denying a motion for a preliminary injunction against the enforcement of the 2007 E&J because the constitutional challenge was unlikely to succeed on the merits).

[16] AJS FGCR at 19; AAN FGCR at 21.

[17] As OGC notes in its reports, major purpose determinations do not require that such spending exceed a 50 percent threshold of the organization's total spending. *See* AJS FGCR at 22, n.30; AAN FGCR at 25, n.42. However, such spending "is alone sufficient to support a finding of major purpose." *Id.*

that expressly advocated for or against a federal candidate ("independent expenditures" [18]) in 2010.[19] In the same year, AJS also reported spending over $4.5 million on communications that mentioned a federal candidate in close proximity to an election ("electioneering communications"[20]). Each of these advertisements supported or opposed a federal candidate.[21] Even if one assumes that every other dollar spent by AJS was unrelated to federal candidates – the assumption most favorable to AJS – at least 76.5 percent (over $9.5 million) of AJS's total spending in calendar year 2010 supported federal campaign activity.[22]

AAN's spending on political advertising was even higher. Formed in 2009 as a 501(c)(4) social welfare organization, AAN's largest spending category was electioneering communications, totaling almost $13.8 million in calendar year 2010.[23] OGC's analysis of these communications concluded that at least $12.9 million was spent on communications close to an election that supported or opposed a candidate.[24] Additionally, AAN spent a little over $4 million on independent expenditures.[25] Combining these figures, AAN spent a minimum of $17 million on federal campaign activity in 2010.[26] Even if one assumes that every other dollar spent by AAN was unrelated to federal candidates and was spent in calendar year 2010 – the assumptions most favorable to AAN – at least 62.6 percent (over $17 million) of AAN's total spending in that year supported federal campaign activity.[27]

As these facts demonstrate, both AJS and AAN are political committees under the plain language of the 2007 E&J. Without question, the undisputed facts concerning these groups' spending were more than sufficient for the Commission to find reason to believe that the law

[18] *See* 2 U.S.C. § 431(17); 11 C.F.R. § 100.16.

[19] AJS FGCR at 4-5.

[20] The term "electioneering communications" is limited to communications made via broadcast, cable, or satellite and targeted to the relevant electorate. *See* 2 U.S.C. § 434(f)(3); 11 C.F.R. § 100.29. Such communications must refer to a clearly identified candidate and be made with 60 days of a general election or 30 days of a primary. *Id.*

[21] AJS FGCR at 5, 15-20.

[22] *Id.* at 21-22. AJS spent a total of slightly over $12.4 million between November 1, 2009 and October 31, 2010. *Id.* at 4, 22. As noted in the FGCR, AJS's tax returns did not allow OGC to pinpoint in which calendar year AJS's unreported spending occurred; accordingly, OGC assumed that all of AJS's additional spending "was both unrelated to federal campaigns and occurred in calendar year 2010 – the assumption most favorable to AJS." *Id.* at 22.

[23] AAN FGCR at 4.

[24] This represents all but two of AAN's communications, which OGC was unable to locate. *Id.* at 1, 5 n.17.

[25] *Id.* at 4.

[26] *Id.*

[27] *Id.* at 25. AAN spent a total of just over $27 million between July 23, 2009 and June 30, 2011. *Id.* at 4. As noted in the FGCR, AAN's tax returns did not allow OGC to pinpoint in which calendar year AAN's unreported spending occurred; accordingly, OGC assumed that all of AAN's additional spending "was both unrelated to federal campaigns and occurred in 2010 – the assumption most favorable to AAN." *Id.* at 25.

may have been violated, and to authorize an investigation. That was the question before the Commission.[28]

Each time the 2007 E&J has been challenged in federal court, it has been held constitutional.[29] Nonetheless, those who have opposed disclosure ignore the only directly relevant precedents and insist that the test in the 2007 E&J must be substantially narrowed to address their own concerns. In making these arguments, they have handpicked only the decisions of courts that have limited or overturned *state* campaign finance laws, decisions which have no direct bearing on *federal* campaign finance law.[30] Most recently, the anti-disclosure camp has pivoted to the decision in *Wisconsin Right to Life v. Barland*, which struck down Wisconsin's registration and disclosure requirements.[31] Yet they make no mention of the numerous cases in which state disclosure laws have been upheld.[32] The Commission is obliged to follow the analytic approach enunciated in the 2007 E&J, adopted by a majority vote, and consistently upheld by the courts.[33] For half of the Commission to do otherwise is unreasonable.

What seems to have been overlooked in the ongoing stalemate over the Commission's policy is that the entire purpose of the political committee status test boils down to a single, compelling policy interest: *disclosure*.[34] Disclosure of donors and political spending is crucial.

---

[28] *See* note 7.

[29] *See* note 15.

[30] For example, our colleagues have recently relied heavily on cases interpreting the New Mexico Campaign Reporting Act and North Carolina campaign finance laws. *See* Statement of Chairman Goodman and Commissioners Hunter and Petersen in MUR 6396 (Crossroads GPS), dated Jan. 8, 2014, at 7-8 (*citing New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010); *North Carolina Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2010)). In both of the circuit courts where these cases were decided, subsequent caselaw upheld the Commission's 2007 E&J. *Free Speech v. FEC*, 720 F.3d at 798; *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d. at 556.

[31] 751 F.3d 804 (7th Cir. May 14, 2014).

[32] *See, e.g., Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010) (upholding political committee requirements of Washington State's Public Disclosure Law); *Worley v. Florida Secretary of State*, 717 F.3d 1238 (11th Cir. 2013) (upholding political committee requirements of the Florida Campaign Financing Statutes); *Yamada v. Weaver*, 872 F.Supp.2d 1023, 1042-53 (D. Haw. 2012) (upholding political committee requirements of Hawaii's campaign finance laws). In fact, now that disclosure is the only consequence of political committee status, several courts reviewing analogous state political committee statutes have found that it is unnecessary to apply the major purpose test. *See, e.g. Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 59 (1st Cir. 2011), *cert. denied*, 132 S.Ct. 1635 (2012) (upholding political committee requirements of the Maine Clean Election Act); *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 490 (7th Cir. 2012) (upholding political committee requirements of the Illinois Election Code); *Vermont Right to Life Comm.* v. *Sorrell*, No. 12-2904-cv, 2014 WL 2958565, at *13-14 (2nd Cir. July 2, 2014) (upholding political committee requirements of Vermont's campaign finance laws, noting that the lack of explicit reference to an "express advocacy" test in the laws – which included the terms "supporting or opposing one or more candidates" and "influencing an election" in the definition of "political committee" – did not make the laws unconstitutional). For now, however, as stated in the 2007 E&J, the major purpose test continues to be required in interpreting the relevant provisions of the Act.

[33] *See* note 15.

[34] *See* Statement of Reasons of Vice Chair Ravel, Commissioner Walther, and Commissioner Weintraub in MUR 6396 (Crossroads Grassroots Political Strategies), dated Jan. 10, 2014, at 1-2, 5.

This is not just our opinion. According to eight Justices of the Supreme Court, disclosure "enables the electorate to make informed decisions and give proper weight to different speakers and messages."[35] The only consequence of political committee status after *Citizens United* and *SpeechNow* is that political committees must follow organizational and reporting requirements that allow the public to evaluate the source of political messages. The Supreme Court has *repeatedly* upheld such requirements, finding them to be "the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist."[36] The Supreme Court's support for campaign finance disclosure has not wavered:

- "[T]he important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements – providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions – apply in full to [the disclosure requirements of the Bipartisan Campaign Reform Act]."[37]

- "The 1st Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way."[38]

- "With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."[39]

- "With modern technology, disclosure now offers a particularly effective means of arming the voting public with information."[40]

- "[D]isclosure of contributions minimizes the potential for abuse of the campaign finance system."[41]

- "Public disclosure...promotes transparency and accountability in the electoral process to an extent other measures cannot."[42]

In fact, in the 38 years since *Buckley*, the Supreme Court has only *once* struck down a requirement having solely to do with public disclosure of political activity. That 1995 case,

[35] *Citizens United v. FEC*, 558 U.S. 310, 371 (2010).

[36] *Buckley*, 424 U.S. at 68.

[37] *McConnell v. FEC*, 540 U.S. 93, 195 (2003).

[38] *Citizens United*, 558 U.S. at 370.

[39] *Id.*

[40] *McCutcheon v. FEC*, 134 S. Ct. 1434, 1460 (2014).

[41] *Id.* at 1459.

[42] *Doe v. Reed*, 561 U.S. 186, 199 (2010).

McIntyre v. Ohio Elections Commission, concerned an individual, Margaret McIntyre, who personally prepared and hand-distributed leaflets at a public meeting urging attendees to vote against a local tax levy.[43] She was fined $100 for failing to include her name and address on the leaflets – and the Supreme Court thought that this was a bridge too far, even for a mere disclosure requirement. Nonetheless, Justice Scalia wrote a forceful dissent favoring disclosure. He noted that that anonymous speech "facilitates wrong by eliminating accountability, which ordinarily is the very purpose of the anonymity."[44] Furthermore, Justice Scalia argued that publicity is the "principal impediment" to "mudslinging," "innuendo," "demeaning characterization" of candidates, and "dirty tricks."[45] Disclosing the identity of the speaker, in contrast, "promot[es] a civil and dignified level of debate."[46]

The respondents in these matters are no Margaret McIntyres.[47] AJS and AAN are sophisticated organizations, which spent many millions of dollars on federal campaign activity. The requirements for disclosure are not too onerous for these groups.

Dark money is an increasing problem. The FEC's mission is to ensure that voters receive the information they need – the information that the Supreme Court has said they are entitled to – in order to make informed decisions. The Commission's established approach to evaluating political committee status prevents groups like these from operating under a veil of anonymity. Our democracy is stronger and public debate is enriched when that veil is lifted.

7/30/14
Date

Ann M. Ravel
Ann M. Ravel
Vice Chair

7/30/14
Date

Steven T. Walther
Steven T. Walther
Commissioner

7/30/14
Date

Ellen L. Weintraub
Ellen L. Weintraub
Commissioner

[43] 514 U.S. 334 (1995). McIntyre acted on her own, "[e]xcept for the help provided by her son and a friend, who placed some of the leaflets on car windshields in the school parking lot." *Id.* at 337.

[44] 514 U.S. at 385 (Scalia, J., dissenting).

[45] *Id.* at 382-83.

[46] *Id.* at 382.

[47] It should also be noted that *McIntyre* went out of its way to distinguish the Ohio statute at issue in that case from the Federal Election Campaign Act. *Id.* at 356 ("Not only is the Ohio statute's infringement on speech more intrusive than the *Buckley* disclosure requirement, but it rests on different and less powerful state interests.").