FEDERAL ELECTION COMMISSION
Washington, DC 20463

By Electronic and First Class U.S. Mail
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JUN 15 2017

RE: MUR 6538R
Americans for Job Security

Dear Ms. Newton:

On June 6, 2017, the Federal Election Commission notified you of its findings in MUR 6538R that there is reason to believe your client violated 52 U.S.C. §§ 30102, 30103, and 30104, provisions of the Federal Election Campaign Act of 1971, as amended. The Factual and Legal Analysis explaining the Commission's findings was provided to you at that time.

Attached is a separate Concurring Statement of Reasons of Commissioner Lee E. Goodman regarding this matter. If you have any questions, please contact Peter Reynolds, the attorney assigned to this matter, at (202) 694-1343 or preynolds@fec.gov.

Sincerely,

Kathleen M. Guith

Kathleen M. Guith
Associate General Counsel for Enforcement

Enclosure
Concurring Statement of Reasons of Commissioner Lee E. Goodman

FEDERAL ELECTION COMMISSION

CONCURRING STATEMENT OF REASONS OF COMMISSIONER LEE E. GOODMAN

RESPONDENTS: Americans for Job Security MUR: 6538R

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

INTRODUCTION

I voted with my colleagues to find reason to believe Americans for Job Security ("AJS") violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by failing to register, organize, and report as a political committee because I believed the remand instructions in *Citizens for Responsibility and Ethics in Washington v. FEC*[1] compelled that finding. My reasons for finding reason to believe are nuanced and more qualified than the Factual and Legal Analysis approved by my colleagues on April 26, 2017. Because Respondents have a right under 52 U.S.C. § 30109(a)(2) and 11 C.F.R. § 111.9 to the facts and inferences supporting the finding that there is reason to believe they violated the Act, I write separately here to explain the basis of my vote in favor of that finding.[2]

AJS sponsored ads featuring express advocacy and issue advocacy in the months before the 2010 election, including nine ads that qualified as electioneering communications.[3] In compliance with the Act and the Commission's regulations, AJS included disclaimers in these nine ads that identified AJS as the sponsor of the ads, and AJS also filed reports with the

[1] 209 F. Supp. 3d 77 (D.D.C. 2017) ("*CREW v. FEC*").

[2] Except as otherwise indicated, I agree with the factual summary and procedural history recited in the Factual and Legal Analysis approved by my colleagues.

[3] These nine ads are regulated as "electioneering communications" because the content of the ads included the names of individuals who were Congressional or Senate candidates and were broadcast shortly before elections in which those candidates participated and in media markets including the relevant electorate. *See* 52 U.S.C. § 30104(f)(3)(A); 11 C.F.R. § 100.29(a), (c).

Commission disclosing the costs of the ads.[4] The principal issue when this matter was first before the Commission was whether to count AJS's disbursements for these nine ads as evidence AJS's major purpose is the nomination or election of candidates, and thus that it should have registered with the Commission as a political committee. Political committee status would also have triggered organizational requirements and on-going disclosure of all of its financial activities. Consequently, if AJS became a political committee, it would have been retroactively subject to punishment for not having registered with the Commission or having reported its finances.

When this matter was first decided, the Commission's controlling conclusion was that these ads contained ambiguous political messages and therefore—as a matter of the Commission's implementation of the relevant case law through the Commission's case-by-case method of political committee status analysis, or in an exercise of its prosecutorial discretion in light of the constitutional doubts raised here—their costs should not be counted as evidence AJS's major purpose was the nomination or election of candidates. Thus the Commission did not find reason to believe AJS failed to register as a political committee and closed the matter.[5]

The complainant, Citizens for Responsibility and Ethics in Washington ("CREW"), sued the Commission pursuant to 52 U.S.C. § 30109(a)(8).[6] CREW argued that the Commission was required by law to count AJS's payments for *all* electioneering communications as indicative of

[4] Commission regulations required AJS to include disclaimers in its electioneering communications and file reports with the Commission, which it did. 11 C.F.R. §§ 110.11(a)-(c), 114.10 (required disclaimers); 11 C.F.R. §§ 104.5(j), 104.20, 114.10 (required reporting).

[5] Certification, MUR 6538 (Americans for Job Security) (June 24, 2014); Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 19-24 and n.142, MUR 6538 (Americans for Job Security).

[6] *CREW v. FEC* at 81, 84.

the major purpose of nominating or electing federal candidates.[7] The District Court rejected CREW's claim that the Commission must count *all* of AJS's electioneering communications.[8] But the District Court also found that the Commission's decision to count *none* of AJS's electioneering communications was contrary to law.[9]

The District Court ruled that the Commission made a mistake of law by limiting its analysis of AJS's major purpose solely to ads containing express advocacy and its functional equivalent.[10] The District Court did not, however, identify any precise source of law—a Supreme Court or other court decision, statute, or Commission regulation—that affirmatively compels the Commission to count spending on non-express advocacy communications toward a major purpose determination. Nor did the District Court, in finding fault with the Commission's constitutional analysis, distinguish between the Commission's case-by-case discretion to count only express advocacy versus a constitutional requirement to do so.[11] The District Court also observed that "many" or "most" electioneering communications evidence the major purpose of

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7 *Id.* at 93; Pl.'s Mot. Summ. J. at 30, *CREW v. FEC* (arguing "electioneering communications are as relevant to determining a group's major purpose as its express advocacy. After all, both communications serve a political purpose, and just as the public interest in transparency of express advocacy merits disclosure by groups primarily engaged in express advocacy, the public interest in transparency of electioneering communications similarly supports disclosure by groups primarily involved in electioneering communications.")

8 *CREW v. FEC* at 93..

9 *Id.* at 92-93.

10 *Id.*; *id.* at nn.4, 10; *see also* District Court's Mem. Op. and Order, *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, No. 14-0419 (D.D.C. Apr. 6, 2017), ECF No. 74 at 2, 6 (reiterating that the District Court "declared 'contrary to law' the Commissioners' decision to exclude from the category of spending showing a campaign-related major purpose all spending on communications that did not meet the technical definition of 'express advocacy.'").

11 The Court rejected the Commission's invocation of prosecutorial discretion, responding that the Commission's discretion was nevertheless subject to judicial review. *See CREW v. FEC* at n.7.

the nomination or election of candidates and, specifically, AJS's electioneering communications were "election-focused" and "in some way tied to elections."[12]

The District Court's instruction for the Commission to reconsider the evidence without "exclud[ing] from its [major purpose] consideration all non-express advocacy" and the Court's rejection of CREW's argument that all electioneering communications must be counted in the major purpose test were necessarily understood to require the Commission to re-analyze the text of each electioneering communication to determine whether it "indicates a campaign-related purpose" such that its costs should count toward a determination that AJS's major purpose became the nomination or election of candidates.[13]

The District Court's remand instructions thus required the Commission to undertake novel textual analyses of ambiguous political messages, with practical challenges, often in tension with the holdings of other federal courts. Additionally, a separate holding and instruction to consider whether AJS's major purpose changed over time begged for additional details about AJS's spending since 2010.

This Concurring Statement of Reasons explains my resolution of these challenging issues and why, in compliance with the District Court's instructions, I voted to find there is reason to believe that Americans for Job Security violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to organize, register, and report as a political committee.

[12] *See id.* at 93 ("Indeed, it blinks reality to conclude that many of the ads considered by the Commissioners in this case were not designed to influence the election or defeat of a particular candidate in an ongoing race"); *see also id.* ("many or even most electioneering communications indicate a campaign-related purpose"); *id.* at 82-83 (stating that in 2008, AJS shifted to an "election-focused approach" and that in 2010, "over three-fourths of its spending was in some way tied to elections," a figure that included AJS's spending on its electioneering communications).

[13] Factual and Legal Analysis at 12, MUR 6538R (Americans for Job Security).

ANALYSIS

I. Legal Background

CREW alleges that AJS became a "political committee" within the meaning of the Act in 2010 but failed to register with the Commission.[14] Among other requirements, political committees must register with the Commission, fulfill an ongoing obligation to file periodic public reports disclosing their contributors, finances, and recipients of their disbursements (including detailing expenditures in twelve categories), preserve records, appoint a treasurer to examine contributions and be responsible for fulfilling the Act's requirements, and include certain disclaimers on all of their political advertising, websites, and mass e-mails.[15]

A. The Significance of "Political Committee" Status and Regulation

When this matter was originally resolved by the Commission, I considered the Supreme Court's recognition in Citizens United that political committees "are burdensome alternatives" that are "expensive to administer and subject to extensive regulations."[16] In *Wisconsin Right to Life, Inc. v. Barland*, a constitutional challenge to state regulatory burdens on state political committees similar to those imposed by the Act, the Seventh Circuit similarly held that "[p]olitical-committee status carries a complex, comprehensive, and intrusive set of restrictions and regulatory burdens."[17] Non-compliance with the requirements of the Act may also lead to fines, investigations, administrative enforcement proceedings, monetary penalties, injunctions,

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[14] Compl. at ¶¶ 35-42.

[15] *See Citizens United v. FEC*, 558 U.S. 310, 337-38 (2010); *McConnell v. FEC*, 540 U.S. 93, 331-32 (2003); 52 U.S.C. §§ 30102-30104; 11 C.F.R. § 110.11(a)(1).

[16] Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 6, MUR 6538 (Americans for Job Security) (citing *Citizens United*, 558 U.S. at 337).

[17] *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 811 (7th Cir. 2014).

personal liability for those involved, and in some cases, criminal prosecution. The costs of routine compliance, and responding to complaints and Commission investigations before any final determinations of a violation have been made, can be substantial.

Furthermore, mandatory ongoing disclosure of the names, addresses, occupations, and employers of all donors contributing over $200—required of political committees but not of non-political committees filing ad-specific disclosure reports[18]—chills donors from using their contributions to speak and associate with one another through the recipient organization. Political committee status and its attendant disclosure requirements thus impose significant burdens on the exercise of constitutionally protected political activities. The Supreme Court has found that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment"[19] and "the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for 'financial transactions can reveal much about a person's activities, associations, and beliefs.'"[20]

As explained in the original Statement of Reasons, *Buckley* and *Barland* limited the definition of "political committee" to avoid constitutional overregulation of issue-oriented organizations and the Commission respected those concerns by implementing the major purpose

[18] However, a corporation's ad-specific electioneering communication disclosure reports must identify donors who contributed $1,000 or more earmarked for the disclosed ad. *See* 11 C.F.R. § 104.20(c)(9); *Van Hollen v. FEC*, 811 F.3d 486 (2016).

[19] *Davis v. FEC*, 554 U.S. 724, 744 (2008) (quoting *Buckley*, 424 U.S. at 64).

[20] *Buckley*, 424 U.S. at 66 (quoting *Cal. Bankers Ass'n v. Shulz*, 416 U.S. 21, 78-94 (1974) (Powell, J., concurring)).

test with respect to AJS with First Amendment sensitivity.[21] Whether or not the First Amendment compels the careful approach the Commission adopted in the first resolution, we thought this approach was a prudent and practical exercise of the Commission's discretion in implementing its case-by-case analysis of political committee determinations. It also maintained clear and practical standards for individuals and groups to understand when considering the potential consequences of engaging in regulated political speech.

In rejecting our approach, the District Court observed that all disclosure regimes, whether ad-specific disclosures or political committee registration and comprehensive financial reporting, are subject to an exacting scrutiny standard of judicial review and concluded the burden imposed by political committee registration and reporting is not significantly more onerous or intrusive than ad-specific disclosures.[22] The District Court dismissed the Seventh Circuit's analysis in *Barland*, on which the Commission relied for guidance, as "an outlier" that was "out of step with the legal consensus" and which "rested on a flawed premise."[23] The District Court cited decisions of other courts, including the D.C. Circuit in *SpeechNow.org v. FEC*, 599 F.3d 686, 696-97 (D.C. Cir. 2010) (*en banc*), which concluded that political committee status does not impose "much of an additional burden" on entities that already comply with ad-specific

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[21] Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 14-17, 19-24, MUR 6538 (Americans for Job Security); *see also Buckley*, 424 U.S. at 44 n.52, 79-80; *Barland*, 751 F.3d at 838-39, 842; *Van Hollen v. FEC*, 811 F.3d 486, 499, 501 (D.C. Cir. 2016)(observing the Commission's "unique prerogative to safeguard the First Amendment when implementing its congressional directives" and authorizing the agency to "tailor[] its disclosure requirements to satisfy constitutional interests in privacy").

[22] *CREW v. FEC* at 90-93 ("'[T]he majority of circuits have concluded that . . . disclosure requirements [related to registration and reporting] are not unduly burdensome.'" (quoting *Yamada v. Snipes*, 786 F.3d 1182, 1195 (9th Cir.), *cert denied sub nom. Yamada v. Shoda* __ U.S. __, 136 S. Ct. 569 (2015))).

[23] *Id.* at 90-92.

disclosures.[24] The District Court concluded that "[i]n the wake of Citizens United, federal appellate courts have resoundingly concluded that WRTL II's constitutional division between express advocacy and issue speech is simply inapposite in the disclosure context."[25] Due to the common standard of review under which other courts had upheld the constitutionality of various disclosure regimes, the District Court concluded that the Commission's decision to count only express advocacy and its functional equivalent as evidence that AJS's major purpose is the nomination or election of candidates was "contrary to law."[26]

B. The Test for Political Committee Status

The Act and Commission regulations define a "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of

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[24] *Id.* at 92. There is an important difference between the burden analysis in this case compared to *SpeechNow.org*. SpeechNow represented that it intended to engage "exclusively" in express advocacy and affirmatively sought to become a political committee. The Court of Appeals found the reporting requirements were not unduly burdensome for SpeechNow "[b]ecause SpeechNow intends only to make independent expenditures" and "given the relative simplicity with which SpeechNow intends to operate." 599 F.3d at 697. Because SpeechNow.org only made independent expenditures, that is, communications containing express advocacy of the election or defeat of candidates, there was never a question whether the content of those communications evinced a major purpose of nominating or electing candidates, or whether its amount of spending on them was sufficient to trigger political committee status. Here, by contrast, AJS's activities were not limited to making independent expenditures, the amount it spent on them was insufficient, by itself, to establish that AJS's major purpose is the nomination or election of candidates, and imposing the burdens of political committee regulation primarily based upon issue-oriented electioneering communications presents a different question.

[25] *CREW v. FEC* at 90. The conclusion that disclosure requirements can reach a limited realm of issue advocacy is clear from Supreme Court decisions, including *Citizens United*. The issue here, however, is not whether issue speech is subject to disclosure. Indeed, AJS's electioneering communications were subject to the Act's disclosure requirements Congress specifically adapted to electioneering communications and AJS duly disclosed them. Rather, the issue is whether political committee status with all of its attendant burdens can be imposed based on the government's subtle parsing of political speech that is not clearly and unambiguously election-related. Aside from the Constitutional concerns over vagueness, overbreadth, and fair notice, or conflicting conclusions by different courts, this analysis explains the practical difficulty the Commission faced in its implementation of the District Court's mandate.

[26] The District Court principally relied on a body of cases addressing the constitutionality of one-time, event-specific disclosures whereas the Commission's original decision focused on other court decisions finding that political committee registration and on-going, perpetual disclosure of all donors and financial activity significantly burdens and chills First Amendment activity. *Compare* CREW v. FEC at 91-92, *with* Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 6-10, MUR 6538 (Americans for Job Security).

$1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year."[27] In *Buckley v. Valeo*,[28] the Supreme Court held that defining political committee status "only in terms of amount of annual 'contributions' and 'expenditures'" might be overbroad, reaching "groups engaged purely in issue discussion."[29] To cure that infirmity, the Court concluded that the term "political committee" "need only encompass organizations that are under the control of a candidate or the *major purpose of which is the nomination or election of a candidate*."[30] With this limitation, it held the expenditures of political committees "can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related."[31] Under the Act as thus construed, an organization that is not controlled by a candidate must register as a political committee only if (1) it crosses the $1,000 threshold for contributions or expenditures and (2) its "major purpose" is the nomination or election of federal candidates.

Although *Buckley* established the major purpose test, it "did not mandate a particular methodology for determining an organization's major purpose," delegating such determinations and methodology to the Commission "either through categorical rules or through individualized adjudications."[32] Indeed, the District Court acknowledged that "*how Buckley* (and the test it created) should be implemented," including "choices regarding the timeframe and spending

[27] 52 U.S.C. § 30101(4)(A); 11 C.F.R. § 100.5.

[28] 424 U.S. 1 (1976).

[29] *Id.* at 79.

[30] *Id.* (emphasis added).

[31] *Id.*

[32] *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 556 (4th Cir. 2012), *cert. denied*, 81 U.S.L.W. 3127 (U.S. Jan. 7, 2013) (No. 12-311) ("*RTAA*").

amounts relevant" to a major purpose determination are within the Commission's discretion and "warrant the Court's deference."[33]

After *Buckley*, in *FEC v. Massachusetts Citizens for Life* ("*MCFL*"), the Supreme Court stated that the extent of an organization's "independent spending"—which the Supreme Court's logic in *Buckley* and *MCFL* strongly suggests is limited to spending on communications containing express advocacy—could cause the organization's major purpose to become the nomination or election of candidates and, thus, the organization would become a political committee.[34]

[33] *CREW v. FEC*, 209 F. Supp. 3d at 87-88.

[34] 479 U.S. 238, 248, 262 (1986). In *Buckley*, the Supreme Court upheld the disclosure requirements for organizations making independent expenditures by limiting the Act's definition of an "expenditure" to express advocacy. *Id.* at 248; *Buckley*, 424 U.S. at 80. The Court's rationale for this limitation was that it is necessary to avoid unconstitutional overbreadth because "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *MCFL* at 249; *Buckley* at 42. The practical difficultly in distinguishing between "discussion of issues and candidates" and "advocacy of election or defeat of candidates" is not ameliorated by the purpose of the applicable regulation. Whether the regulation requires filing a one-time disclosure regarding a single communication, prohibits the communication, or requires registration and comprehensive ongoing financial reporting by the sponsor of the communication, fine distinctions between ambiguous texts is just as difficult. For this reason, in *MCFL* the Supreme Court limited the prohibition against corporate independent expenditures again to express advocacy. *MCFL* at 249. Accordingly, when the Court stated in *MCFL* that "should MCFL's *independent spending* become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee," *id.* at 262 (italics added), there is little doubt that the "independent spending" to which the Court referred was express advocacy. Any remaining doubt is resolved by the Court's numerous references in the decision to a group's independent expenditures (construed as express advocacy communications) as the group's "independent spending." *See id.* at 261-63. It is unlikely the Court used the term "independent spending" throughout the same decision to refer to two entirely different kinds of political speech without indicating it was doing so. Indeed, it would strain logic, if not qualify as absurd, for the Supreme Court to have limited disclosure requirements for independent expenditures to communications containing express advocacy while imposing political committee registration, organization, and reporting requirements on committees because they sponsored non-express advocacy communications.

The enduring significance of the Supreme Court's jurisprudence arising from the practical difficulty identified in *MCFL* is confirmed by its holding in *Citizens United*. In that case, the Court rejected an argument that the FEC must further parse the content or meaning of electioneering communications (which lack express advocacy) to determine whether the Act's disclosure provisions applied. This understanding of *MCFL* is consistent with the holdings of the Seventh Circuit in *Barland*, the Tenth Circuit in *Herrera*, and the District of Columbia District Court panel in *Independence Institute v. FEC*, addressed *infra*.

The Commission adopted a policy of determining on a case-by-case basis whether an organization is a political committee, including whether its major purpose is the nomination or election of federal candidates.[35] The Commission concluded that its fact-intensive determination of an organization's major purpose "requires the flexibility of a case-by-case analysis of an organization's conduct that is incompatible with a one-size-fits-all rule," and that "any list of factors developed by the Commission would not likely be exhaustive in any event, as evidenced by the multitude of fact patterns at issue in the Commission's enforcement matters considering the political committee status of various entities."[36]

II. The District Court's Review of the Commission's Action and the Remand Order

When this matter first came before the Commission, the Commission's controlling opinion was that it should not count AJS's electioneering communications (other than any that were the functional equivalent of express advocacy) as indicative of the major purpose of nominating or electing candidates. This conclusion was based upon the fact that electioneering communications, by definition, do not contain express advocacy and thus are not the type of "independent spending" the Supreme Court described in *MCFL*.[37] The Commission's controlling Statement of Reasons was grounded in the analyses of the Supreme Court in *Buckley* and *Wisconsin Right to Life II* and the Seventh Circuit in *Barland* to show that, in our view, only

[35] Political Committee Status, 72 Fed. Reg. 5,595 (Feb. 7, 2007) ("Supplemental E&J").

[36] *Id.* at 5,601-02. The Commission has periodically considered proposed rulemakings that would have determined major purpose by reference to a bright-line rule — such as proportional (*i.e.*, 50%) or aggregate threshold amounts spent by an organization on federal campaign activity. But the Commission consistently has declined to adopt such bright-line rules. *See* Independent Expenditures; Corporate and Labor Organization Expenditures, 57 Fed. Reg. 33,548, 33,558-59 (July 29, 1992) (Notice of Proposed Rulemaking); Definition of Political Committee, 66 Fed. Reg. 13,681, 13,685-86 (Mar. 7, 2001) (Advance Notice of Proposed Rulemaking); *see also* Summary of Comments and Possible Options on the Advance Notice of Proposed Rulemaking on the Definition of "Political Committee," Certification (Sept. 27, 2001) (voting 6-0 to hold proposed rulemaking in abeyance).

[37] *See supra* n.34.

ads containing express advocacy or its functional equivalent unambiguously evidence the requisite major purpose of nominating or electing candidates.[38]

The controlling Commissioners were mindful of the First Amendment sensitivity required for the regulation of political communications and the independent issue advocacy organizations that make them, as well as the practical difficulty of attempting to evaluate objectively the purpose of ads that do not contain express electoral advocacy or its functional equivalent. Accordingly, the Commission's controlling Statement of Reasons observed that "all of the electioneering communications identified in the Complaint . . . contain no references to elections, candidacies, or political parties, while 'focus[ing] on a legislative issue, tak[ing] a position on the issues, exhort[ing] the public to adopt that position, and urg[ing] the public to contact public officials with respect to the matter."[39]

Consequently, AJS's electioneering communications were not counted as evidence that AJS's major purpose was the nomination or election of candidates. This reflected the line the Commission drew to distinguish whether a communication clearly indicates an organizational purpose to influence the election of candidates. The controlling Commissioners did not try to parse further the ambiguous texts of AJS's electioneering communications to divine a "campaign-related purpose." This approach was adopted both as a matter of practicality and agency discretion in implementing the Commission's case-by-case analysis as well as First

[38] Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 16, 21-22, MUR 6538 (Americans for Job Security).

[39] *Id.* at 20 (quoting *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 470 (2007)).

Amendment sensitivity, based on what was believed to be a fair reading of *Buckley* as well as *Barland, Herrera, GOPAC* and other court decisions.[40]

Additionally, to assess AJS's fundamental organizational purpose, we considered its spending over its lifetime and concluded that its spending in one calendar year did not indicate the organization had the major purpose of nominating or electing candidates.[41]

The District Court held that the Commission's dismissal was contrary to law because our Statement of Reasons adopted erroneous standards for determining (1) which spending indicates the "major purpose" of nominating or electing a candidate, and (2) the relevant time period for evaluating a group's spending.[42]

A. The District Court's Rejection of the Line The Commission Drew To Distinguish Between Clearly Electoral Speech Versus Ambiguous Speech Established A New Regulatory Subcategory Of Political Speech

According to the District Court, certain electioneering communications evince the "campaign-related purpose" of influencing elections while some do not, so the law compels the Commission to distinguish between the two.[43] The District Court ruled that the controlling analysis was unlawful, holding the law requires the Commission to look beyond express advocacy and its functional equivalent to consider whether an electioneering communication

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[40] *See infra* nn. 54-56 and text accompanying.

[41] *See* Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 24-26, MUR 6538 (Americans for Job Security).

[42] *CREW v. FEC*, 209 F. Supp. 3d at 95.

[43] *Id.* at 93.

indicates a "campaign-related purpose" and thus whether the ad's sponsoring organization's major purpose is the nomination or election of candidates.[44]

This ruling effectively establishes a new category of regulated speech. Prior to the District Court's ruling, there were four regulatory classifications of political speech within the Commission's jurisdiction subject to varying requirements and restrictions: (1) express advocacy,[45] (2) electioneering communications that are the "functional equivalent" of express advocacy,[46] (3) all other electioneering communications, historically understood to be issue

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[44] *Id.* The District Court's decision did not clarify the precise source of the legal requirement to look beyond express advocacy.

[45] Express advocacy has been divided into two subcategories: (a) "magic words" express advocacy and (b) "functional equivalent" express advocacy. *See Buckley*, 424 U.S. at 44, n.52; 11 C.F.R. § 100.22(a) (express advocacy defined as any communication that "[u]sues phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee,"); *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987) ("We conclude that speech need not include any of the words listed in *Buckley* to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.") and 11 C.F.R. § 100.22(b) (express advocacy includes a communication that "could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action."). However, the continuing validity of the second subcategory of express advocacy under 11 C.F.R. § 100.22(b) has been questioned. *See* Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 3 n.14, MUR 6729 (Checks and Balances for Economic Growth); Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen at 9-14, MUR 6346 (Cornerstone Action) (*citing Maine Right to Life Committee v. FEC*, 98 F.3d 1 (1st Cir. 1996)).

[46] *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 469-70 (2007) ("a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."). The Supreme Court has applied the functional equivalent of express advocacy standard to both permit the regulation of communications as express advocacy as well as to permit the regulation of communications as electioneering communications—which cannot contain express advocacy. *See RTAA*, 681 F. 3d at 550-52 (summarizing the Supreme Court's use of the functional equivalent of express advocacy standards in *Wisconsin Right to Life* and *Citizens United*). The Fourth Circuit in *RTAA* concluded, "[a]lthough it is true that the language of § 100.22(b) does not exactly mirror the functional equivalent definition in *Wisconsin Right to Life*—e.g., § 100.22(b) uses the word 'suggestive' while *Wisconsin Right to Life* used the word 'susceptible'—the differences between the two tests are not meaningful. Indeed, the test in § 100.22(b) is likely narrower than the one articulated in *Wisconsin Right to Life*, since it requires a communication to have an 'electoral portion' that is 'unmistakable' and 'unambiguous.' 11 C.F.R. § 100.22(b)(1)." *Id.* at 552; *see also Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013) (concluding that the two standards are closely correlated and noting the characterization in *RTAA* that 100.22(b) is likely narrower). Accordingly, any distinctions are so subtle and difficult to discern or

advocacy, and (4) an ill-defined category of communications subject to very limited regulation known as "PASO," speech that promotes, attacks, supports or opposes a candidate.[47] Political speech in each of these categories has been subject to varying burdens and restrictions tailored to the purpose for which each is regulated.[48] When this matter first came before the Commission, the controlling Commissioners concluded that the costs of an organization's ads containing the first two categories of speech would indicate that organization's major purpose may be the nomination or election of candidates.

The District Court effectively subdivided electioneering communications further, which established a fifth category of political speech: electioneering communications that indicate an "election-related purpose." The District Court did not instruct the Commission how to differentiate between the sub-categories of electioneering communications or prescribe criteria for distinguishing between them.

The District Court's establishment of this fifth regulatory category, however, is in tension with a more recent decision by a three-judge District Court panel in the District of Columbia in *Independence Institute v. FEC*, which the Supreme Court summarily affirmed.[49] In that case, the plaintiff challenged the application of the ad-specific reporting requirements to an electioneering

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articulate that, in application and as a practical matter, the Commission typically treats them as one category of speech (subject to frequent disagreement among Commissioners as to classifying them as express advocacy or electioneering communications).

[47] 11 C.F.R. § 100.24(b)(3) (defining a type of regulated "federal election activity" to include a "public communication" that PASO's a federal candidate); *see also Wisconsin Right to Life II*, 551 U.S. at 493 (Scalia, Kennedy, & Thomas, J.J., concurring) (describing the PASO standard as "inherently vague").

[48] For example, Congress enacted ad-specific disclosure for electioneering communications and the Commission fashioned a reporting regime for these unique political messages. The U.S. Court of Appeals for the District of Columbia upheld the Commission's special reporting requirements for electioneering communications because it found they were appropriately tailored. *Van Hollen v. FEC*, 811 F.3d 486 (2016).

[49] *Independence Institute v. FEC*, No. 16–743, 2017 WL 737809 (S. Ct. Feb. 27, 2017).

communication it intended to broadcast, arguing the ad constituted "genuine issue advocacy."[50] In rejecting the challenge, the three-judge court again endorsed the Act's ad-specific reporting regime for electioneering communications. It also affirmed that electioneering communications are a different category of regulated speech—regardless of whether they may have the purpose or effect of influencing elections—from communications that expressly advocate for the nomination or election of candidates and for which Congress created a different regulatory regime. As for the plaintiff's unsuccessful contention that the FEC must distinguish those electioneering communications that in fact electioneer from those that are "'genuine' issue advocacy," *Independence Institute* observed that distinguishing between electioneering communications is an "entirely unworkable" regulatory task.[51] *Independence Institute* observed that there is no "administrable rule or definition that would distinguish which types of advocacy specifically referencing electoral candidates would fall on which side of the constitutional disclosure line, or how the Commission could neutrally police it."[52] The Court continued, "it would blink reality to try and divorce speech about legislative candidates from speech about the legislative issues for which they will be responsible."[53] The district court panel thus upheld ad-specific disclosure as the appropriate mechanism for all electioneering communications.

In *Independence Institute*, the proposed purpose of making such distinctions was to determine whether the Independence Institute was required to file ad-specific electioneering communication disclosure reports. In this matter, making such distinctions would be used to

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50 *Independence Institute v. FEC*, No. 14-1500, 2016 WL 6560396, at *1 (D.D.C. Nov. 3, 2016).

51 *Id.* at *9.

52 *Id.*

53 *Id.*

determine whether AJS, in addition to filing its ad-specific electioneering communication disclosure reports, was also required to register with the Commission as a political committee and bear the attendant regulatory burdens of that status. Despite the different regulatory implications at issue in each case, the proposed task of differentiating ambiguous electioneering communications is equally difficult here as the court concluded it was in *Independence Institute*.

Other court decisions have avoided the analytical and practical difficulties observed in *Independence Institute* by excluding non-express advocacy communications from major purpose determinations altogether. The Seventh Circuit in *Barland*[54] and the Tenth Circuit in *New Mexico Youth Organized v. Herrera*[55] both concluded that *Buckley*'s major purpose test must focus on express advocacy or its functional equivalent. And as noted in the controlling Statement of Reasons found to be in error here, two other district courts in the District of Columbia—in cases involving the Act—previously disregarded communications lacking express advocacy when determining whether the major purpose of a group was the nomination or election of candidates.[56]

Accordingly, the Circuit Courts of Appeals decisions in *Barland* and *Herrera*, prior decisions of district courts in the District of Columbia, and the recent district court panel decision in *Independence Institute* are harmonious insofar as they urge an appropriately First Amendment-sensitive and practical implementation of the Act and the Supreme Court's major purpose test. Taken together, they strongly advise against attempting to differentiate ambiguous

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[54] *Barland*, 751 F.3d at 810-11, 834, 842.

[55] 611 F.3d 669, 676-78 (10th Cir. 2010).

[56] *See* Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 11-12, MUR 6538 (Americans for Job Security) (citing *FEC v. GOPAC*, 917 F. Supp. 851 (D.D.C. 1996) and *FEC v. Malenick*, 310 F. Supp. 2d 230 (D.D.C. 2005)).

electioneering communications—which do not include express advocacy or its functional equivalent—to potentially count some as evidence that an organization's major purpose is the nomination or election of candidates.

The District Court concluded that the court decisions discussed above were incorrect or of limited guidance.[57] It therefore instructed the Commission to broaden the scope of the speech it counts to include electioneering communications that, although lacking express advocacy or its functional equivalent, nonetheless "indicate a campaign-related purpose." Accordingly, under the law of the case, the Commission is required to distinguish among such electioneering communications, applying its experience, expertise and discretion, and to count those that "indicate a campaign-related purpose."

B. The District Court Mandated That The Commission Consider AJS's Spending in 2010 As Part Of A Major Purpose "Change" Analysis

The Commission's historical case-by-case analyses of organizations' major purpose have avoided setting a definitive time frame for judging each organization's activities. The Commission has resolved major purpose analyses by reference to varying years of activity, including two-year and four-year periods.[58]

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[57] I have previously summarized the District Court's reasons for distinguishing *Barland*. *See supra* notes 22-26 and text accompanying. In a footnote, the District Court also distinguished *GOPAC* and *Malenick* on the grounds that they either pre-dated *Citizens United* or, in the case of *Herrera*, did not adequately consider it. *CREW v. FEC* at n.8. According to the District Court, the Supreme Court in *Citizens United*, as well as other courts, have held that disclosure requirements were subject to intermediate scrutiny review and have rejected facial challenges to disclosure regimes. *Id.* As noted above, the District Court's conclusion that disclosure laws have been reviewed and upheld under the exacting scrutiny standard does not preclude or otherwise conflict with the conclusion that the major purpose test must be limited to consideration of express advocacy communications. *See supra* note 26. The court decisions cited by the District Court do not hold that the Commission *must* consider non-express advocacy in determining the major purpose of an organization.

[58] *See generally GOPAC*, 917 F. Supp. at 862-66 (reviewing, among other things, GOPAC's 1989-1990 Political Strategy Campaign Plan and Budget); *Malenick*, 310 F. Supp. 2d at 233 (citing Pl.'s Mem., Ex. 1 (Stipulation of Fact signed and submitted Malenick and Triad Inc., to the FEC on January 28, 2000, listing numerous 1995 and 1996 Triad materials) and Ex. 47 ("Letter from Malenick to Cone, dated Mar. 30, 1993") 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

AJS is an organization founded in 1997. It had thirteen years of activity to its credit before it funded express advocacy and electioneering communications in 2010. AJS argues—and indeed the record establishes—that its independent expenditures in 2010 represent "a very minor portion" of its overall activities since 1997.[59]

When the Commission first considered AJS, the controlling Commissioners noted their longstanding position that a single calendar year evaluation of major purpose would be "myopic, distortive, and legally erroneous."[60] Specifically, "[t]rying 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 . . . . [to] sav[e] 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."[61] Because "AJS engaged in issue advocacy for nearly thirteen years before making its first independent expenditure in 2010

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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 over a five-year period from 2002 through 2006, in concluding that the Respondent had not crossed the statutory threshold for political-committee status); MUR 5753 (League of Conservation Voters 327, 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 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) and 5753 (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).

[59] Resp. at 2, 5.

[60] Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 24, n.146, MUR 6538 (Americans for Job Security). The Commission's Office of General Counsel had recommended that the Commission determine AJS's major organizational purpose by reference solely to its activities in calendar year 2010. First General Counsel's Report at 21, MUR 6538. That recommendation did not garner four Commissioners (for the reasons set forth in the Statement of Reasons), and the District Court here did not rule that approach is required by law.

[61] *Id.* at 25.

[,] [f]ocusing exclusively on AJS's spending in 2010, the first year it engaged in *any* express advocacy . . . 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."[62]

The District Court ruled that "[g]iven the FEC's embrace of a totality-of-the-circumstances approach to divining an organization's 'major purpose,' it is not *per se* unreasonable that the Commissioners would consider a particular organization's full spending history as relevant to its analysis."[63] Thus, according to the court, the Commission is not limited to considering a group's spending in a single calendar year when conducting a "major purpose" inquiry. The District Court ruled, however, that a "lifetime-only rule" is contrary to law ("at least as applied to AJS") because "an organization's major purpose can *change*."[64] Therefore, under the court's holding, the Commission may, when examining major purpose, consider a group's full spending history provided it also considers whether the group's major purpose has changed as evidenced by its more recent independent spending.

Significantly, the District Court did not rule that the law compels the Commission to determine AJS's major purpose solely by reference to any single calendar year. The District Court simply instructed the Commission to consider whether AJS's spending in 2010 evidenced a fundamental change in AJS's historical organizational purpose over time. My understanding of the District Court's opinion is that a single year is relevant *but is not dispositive of* an organization's major purpose under *Buckley*. I did not understand the District Court to impose

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62 *Id.* at 25-26.

63 *CREW v. FEC* at 94.

64 *Id.* (italics in original).

an inflexible single-calendar-year test, but rather to require the Commission to consider changes in the recent spending of an ongoing organization of long standing.

III. Implementation of the District Court's Remand Order

The Commission has faithfully complied with the District Court's remand order, as the District Court recently concluded with respect to American Action Network, the respondent in another matter dismissed after undertaking the same analysis compelled by the District Court's order and applied to AJS in this matter.[65] In compliance with the District Court's order, the Commission counted the costs of AJS's express advocacy communications as well as certain electioneering communications, the combined costs of which exceeded 50% of AJS's total expenditures in 2010, and concluded that there is reason to believe AJS's organizational purpose had changed by the end of 2010. Nonetheless, the analytical and practical complexities inherent in the Commission's analysis have divided federal courts, as well as Commissioners, and should not be obscured.

A. Analyzing AJS's Electioneering Communications

Compliance with the District Court's Order imposed precisely the analytical and practical challenges identified in *Independence Institute*. The only content required for an ad to be regulated as an "electioneering communication" like those at issue here is that it refer to a person who is a federal candidate. The Act's definition of an electioneering communication does not consider the ad's objective content, subjective intent with respect to elections, effect on elections, or potential subjective interpretations of the ad's content. Because electioneering

[65] Court's Mem. Op. and Order, *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, No. 14-0419 (D.D.C. Apr. 6, 2017), ECF No. 74 ("the Court directed the FEC to reconsider its decision 'without exclude[ing] from its [major purpose] consideration all non-express advocacy. The FEC did just that." (internal citation omitted)).

communications by definition do not contain express advocacy, they are inherently ambiguous messages and fall within *Buckley's* description of "issue discussion."[66]

By contrast, the electoral messages in ads containing "express advocacy" and its functional equivalent are wholly unambiguous. Commission regulations define "express advocacy" as messages that contain certain "magic words" of express advocacy, like "vote for the President"[67] as well as communications which "could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action."[68]

The AJS electioneering communications at issue in this matter did not and could not—as a matter of law—contain "unmistakable" and "unambiguous" electoral portions that are "suggestive of only one meaning," that is, the "advocacy of the election or defeat of . . . candidates," such that reasonable minds could not disagree that the ads "encourage[d] actions to elect or defeat" the identified candidates as opposed to "some other kind of action."[69] If they

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[66] *Buckley* at 42-43, 79 (recognizing the distinction "between discussion of issues and candidates and advocacy of election or defeat of candidates" and narrowing the Act's definition of "expenditure" to only those communications advocating the election or defeat of a candidate).

[67] 11 C.F.R. § 100.22(a).

[68] 11 C.F.R. § 100.22(b).

[69] In *McConnell v. FEC*, the Supreme Court held that the government's interest was sufficiently strong for the Bipartisan Campaign Reform Act of 2002 to survive strict scrutiny review to the extent it regulates express advocacy or its functional equivalent. *See McConnell*, 540 U.S. at 206; *WRTL II*, 551 U.S. at 465. In *WRTL II*, the Supreme Court concluded that "an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL II*, 551 U.S. at 469-70. Accordingly, any ads lacking the functional equivalent of express advocacy necessarily *are* susceptible of reasonable interpretations other than as appeals to vote for or against a candidate. The District Court's Order, by

did, they would not be electioneering communications, they would be independent expenditures subject to a different reporting regime.[70]

Therefore, faithful compliance with the District Court's remand order compels the Commission to venture into the interpretation of communications which, by law, have *ambiguous* and *mistakable* meanings over which reasonable persons can disagree. This creates three distinct challenges. First, the District Court provided no test for the Commission to determine what texts indicate the requisite campaign-related purpose. Second, the Supreme Court has warned that multi-factor political speech tests, such as the one the Commission has been required to develop in this case, are constitutionally suspect. Third, AJS was provided no notice of the test the Commission subsequently has applied to its political speech.

Although the District Court provided no guidance as to how the agency should differentiate among electioneering communications, its Order provided implicit clues—clues that as a Commissioner I heeded—that the District Court viewed AJS's electioneering communications as campaign-related, with the implication that the Commission should too. Four passages of the District Court's Order were particularly influential. The District Court declared that "[i]ndeed, it blinks reality to conclude that many of the ads considered by the Commissioners in this case were not *designed to influence* the election or defeat of a particular candidate in an ongoing race";[71] the District Court stated that "*many* or even *most* electioneering

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mandating that we must reconsider our decision to dismiss AJS's ads after our factual conclusion that they did not contain express advocacy or its functional equivalent, compels us to pick which of AJS's ambiguous ads should count towards a determination that its major purpose was the nomination or election of candidates.

[70] 52 U.S.C. § 30101(17) (defining an independent expenditure to be an expenditure that expressly advocates the election or defeat of a clearly identified candidate); 52 U.S.C. § 30104(c), (d), (g) (reporting of independent expenditures); 52 U.S.C. § 30104(f)(3)(B)(ii) (electioneering communications do not include independent expenditures).

[71] *CREW v. FEC* at 93 (emphasis added).

communications indicate a campaign-related purpose";[72] the District Court showcased one ad which it apparently deemed indicative of the requisite campaign-related purpose;[73] and the District Court described AJS's electioneering communications as "election-focused" or "in some way tied to elections."[74]

Implementing the District Court's directive was a difficult task. Because AJS's electioneering communications do not contain express advocacy or its functional equivalent, and therefore have ambiguous meanings and purposes, the logical method of separating qualifying ads from non-qualifying ads would be to apply some set of objective factors to try to avoid subjectivity or arbitrariness in Commission regulation. But this effort too runs the Commission into the Supreme Court's admonition in *Wisconsin Right to Life* that, to avoid chilling protected speech, tests for the regulation of political communications should not be based on "the open-ended rough-and-tumble of factors, which invites complex argument in a trial court and a virtually inevitable appeal."[75]

In an effort to implement the District Court's order in MUR 6589R (American Action Network), the controlling Commissioners undertook to judge AAN's electioneering communications without "speculating about the subjective motivations or a speaker,"[76] or

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[72] *Id.* (italics in original).

[73] *Id.* at 80.

[74] *Id.* at 82-83.

[75] *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 469 (2007) (internal citations omitted).

[76] The District Court's Order reference to ads "designed to influence" an election strongly suggested that the Commission count electioneering communications based upon an inference of AJS's intent or purpose in airing the ads. But a test based upon the subjective intent of the speaker is in tension with the Supreme Court's admonition that political speech regulation tests cannot turn on speaker intent (or the effect on the audience). *See WRTL II* at 467 (quoting *Buckley* at 43 and *Thomas v. Collins*, 323 U.S. 516, 535 (1945)) ("analyzing the question in terms 'of intent and of effect' would 'afford no security for free discussion"); *id.* at 467-68 ("The test should also reflec[t] our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-

presuming that mere references to candidates near in time to an election evince the purpose of influencing the election.[77] The Statement of Reasons acknowledged "the essential need for objectivity, clarity, and consistency" as well as "meaningful guidance to the regulated community" about the kind of speech that is regulated under the major purpose analysis.[78] Nevertheless, the Commission sharply disagreed over how to define or distinguish the requisite campaign-related purpose in AAN's electioneering communications. [79]

The controlling Commissioners concluded that the majority of AAN's electioneering communications did not indicate the requisite campaign-related purpose because, in summary, they did not discuss campaigns or elections and called upon viewers to contact named incumbent officeholders to urge them to take specific legislative actions.[80] Although certain ads criticized candidates' past legislative actions, "the express point of that criticism – as demonstrated by the

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open. A test turning on the intent of the speaker does not remotely fit the bill." (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (internal quotations and citations omitted)); *id.* at 468 ("Far from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech by opening the door to a trial on every ad . . . on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue. No reasonable speaker would choose to run an ad covered by BCRA if its only defense to a criminal prosecution would be that its motives were pure. An intent-based standard 'blankets with uncertainty whatever may be said.' and 'offers no security for free discussion.'" (quoting *Buckley* at 43)); *id.* ("A test focused on the speaker's intent could lead to the bizarre result that the identical ads aired at the same time could be protected speech for one speaker, while leading to criminal penalties for another."). Effect-based speech tests also "'puts the speaker . . . wholly at the mercy of the varied understanding of his hearers.'" *Id.* at 469 (quoting *Buckley* at 43). The Supreme Court held that it would instead apply a test that was "objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect." *Id.* Such a test "must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation." *Id.*

[77] Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman at 6, MUR 6589R (American Action Network).

[78] *Id.*

[79] Certification, MUR 6589 (American Action Network), Oct. 18, 2016. As further evidence of the difficulty inherent in the District Court's instructions, both AAN and CREW appealed the District Court's Order seeking widely divergent relief. The issue is indeed important and would benefit from appellate resolution.

[80] Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman at 9-10, MUR 6589R (American Action Network).

calls to action—is to marshal public sentiment to persuade the officeholders to alter their voting stances."[81] "In short, the above ads are more indicative of grassroots lobbying (*i.e.*, exhorting constituents to contact their representatives about specific policy proposals) than of election-influencing activity."[82]

Here, the task was not easier with respect to AJS's electioneering communications, although agreement was reached by a majority of Commissioners as to three of AJS's nine electioneering communications.[83] The Commission concluded that three ads indicated the requisite campaign-related purpose because "[n]one of the individuals identified in these ads was a federal officeholder when the ads ran and thus was in no position to affect the federal political activities, issues, or programs mentioned in the ads."[84] Furthermore, the issues discussed were not directly linked to the legislative process.[85]

Comparing the Commission's resolutions of the two MURs on remand, it would appear that the Commission has drawn a line between lobbying incumbents to take positions on legislation, which does not indicate a campaign-related purpose, versus lobbying non-incumbents to take positions on general policy topics, which does. Whether that line is deemed arbitrary or breaks down in application to future cases involving nuanced ads that seek to convince non-incumbents to take certain policy positions, without influencing their elections, remains to be

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[81] *Id.* at 10.

[82] *Id.*

[83] Certification, MUR 6538R (Americans for Job Security) (Apr. 29, 2017) (approving, by a vote of 4 to 1, a factual and legal analysis for their prior votes in favor of finding reason to believe AJS violated the Act).

[84] Factual and Legal Analysis at 13, MUR 6538R (Americans for Job Security).

[85] *Id.*

seen.[86] It suffices here to acknowledge that the distinctions drawn between AAN's electioneering communications in MUR 6589R and AJS's electioneering communications in MUR 6538R represent a good faith effort by a majority of Commissioners to comply with the difficult task put to the Commission.

Finally, neither a court nor the Commission has previously concluded that the differentiation between electioneering communications mandated by the District Court here is the *only* lawful method for implementing the Commission's case-by-case major purpose analysis. Accordingly, both the necessity of the test the Commission applies here, as well as the analytical method the Commission settled upon to distinguish between AJS's electioneering communications, were not known to AJS at the time of the activities under review. Had AJS known that the law required the Commission to differentiate electioneering communications for the major purpose test, and had AJS known of the particular test the Commission has now adopted, AJS probably would have chosen different words for some of its ads, or not broadcast them. That likelihood is especially troubling considering the heightened notice requirements for regulatory burdens on political speech and the chilling effect of the uncertain application of speech regulations.[87]

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[86] The result of this approach could be that a genuine issue advocacy organization sponsoring ads to influence the legislative policy positions of incumbent officeholder candidates would not be deemed to be political committees, but an organization running the same ads to influence the legislative policy positions of challenger candidates before they are elected would be deemed to be political committees. As a matter of implementation of the major purpose test, this result would be problematic because neither group would, in fact, have as its major purpose the nomination or election of candidates. The practical effect would be to chill speech addressing the policy positions of challengers while protecting identical speech addressing incumbents.

[87] *See Citizens United v. FEC*, 558 U.S. 310, 324 (2010) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)) ("The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'"); *id.* at 329 ("We decline to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned, especially if we are convinced that, in the end, this corporation has a constitutional right to speak

In sum, the Commission has complied with the District Court's remand instructions, engaging in an unprecedented exercise of differentiating electioneering communications to divine an organization's major purpose through an admittedly novel set of standards.

B. Analyzing Whether AJS's Major Purpose Changed Over Time

Turning to the relevant time period for evaluating AJS's spending, the record before the Commission indicates that AJS spent no money on election-related activities prior to 2008. After the Supreme Court's decision in *WRTL II*, AJS funded electioneering communications, but no express advocacy, leading up to the 2008 election. After the Supreme Court, in January 2010, struck the prohibition on corporate independent expenditures in *Citizens United*, AJS allocated more of its resources to express advocacy in addition to electioneering communications.

Consistent with the Court's instructions, the Commission has considered AJS's spending in 2010 for evidence that the organization's major purpose might have changed to become the nomination or election of candidates over time. Detailed information about AJS's spending and activities in subsequent years might have shown whether AJS's federal election spending was sustained as one might expect if its fundamental purpose changed to become the nomination or election of candidates. Or it could show that its federal election spending diminished in line with its activity in prior years, as one might expect if its 2010 spending was an anomalous spike that did not reflect a fundamental change in its purpose. In practical terms, the difference is whether, as a consequence of broadcasting its non-express advocacy ads, AJS was required to register

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on this subject."); *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) ("[L]aws . . . must give fair notice of conduct that is forbidden or required . . . [T]wo connected but discrete due process concerns [are]: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." (internal cites omitted)).

with the Commission, comply with various operational requirements, and disclose all of its financial activity rather than simply filing ad-specific disclosures, as it has done until now. Further, the regulatory consequence is whether AJS should now be investigated and punished for not doing so.

I was reluctant to make a decision about AJS's purpose based on just one year's activity, especially where the record evidence of AJS's spending effectively ends in 2010, after a relatively long period of minimal election spending and just as that spending became significant. Nevertheless, faced with the snapshot in time driven by the timing of the Complaint and the limited evidence in the record, I concluded that there is reason to believe that AJS's major purpose became the nomination or election of federal candidates. However, because 2010 spending is not dispositive of the issue, I would expect more details to be developed about AJS's political spending in subsequent years in order to determine if AJS's spending on campaign-related purposes was sustained.

CONCLUSION

Under the law of the case, based upon my understanding of the District Court's instructions, and the spending information in the record before the Commission, there is sufficient evidence to find there is reason to believe that AJS became a political committee. Obviously more evidence needs to be developed, particularly regarding AJS's spending in the years following 2010, in order to assess whether the spending in 2010 was a temporary spike or part of a sustained change in the organization's fundamental purpose. Accordingly, I voted to find there is reason to believe that AJS violated 52 U.S.C. §§ 30102, 30103, and 30104, by failing to organize, register, and report as a political committee, and to authorize an investigation.