FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

By First Class U.S. Mail
Stephen DeMaura, President and Treasurer
Americans for Job Security
107 South West St.
PMB 551
Alexandria, VA 22314

AUG 01 2017

RE: MUR 6538R
Americans for Job Security

Dear Mr. DeMaura:

On June 6, 2017, the Commission notified Counsel of Record for MUR 6538R that the Commission had found reason to believe Americans for Job Security and you in your official capacity as president and treasurer ("AJS") violated 52 U.S.C. §§ 30102, 30103, and 30104, provisions of the Federal Election Campaign Act of 1971, as amended (the "Act"). On June 15, 2017, the Commission also mailed to Counsel the Concurring Statement of Reasons of Commissioner Lee E. Goodman. On June 26, 2017, after receiving these materials, Counsel informed the Commission that it no longer represents AJS.

As AJS no longer has representation in this matter, we are forwarding the materials originally enclosed in the June 6 and June 15, 2017 packages directly to AJS. Those materials include the June 6, 2017 notification letter, the Commission's Factual and Legal Analysis, a designation of counsel form, the Commission's procedures for handling possible violations of the Act, the June 15, 2017 notification letter, and the Concurring Statement of Reasons of Commissioner Lee E. Goodman.

If you have any questions, please contact me at (202) 694-1638 or sreulbach@fec.gov. Please note that Peter Reynolds, the staff attorney identified in the June notification letters, is no longer assigned to this matter.

Sincerely,

Shanna M. Reulbach

Shanna M. Reulbach
Attorney

16044357292

Enclosures
June 6, 2017 Notification Letter
Factual and Legal Analysis

June 15, 2017 Notification Letter
Concurring Statement of Reasons of Commissioner Lee E. Goodman

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

By Electronic and First Class U.S. Mail
Megan Newton, Esq.
Jones Day
51 Louisiana Avenue, NW
Washington, DC 20001-2113
msowardsnewton@jonesday.com

JUN - 6 2017

RE: MUR 6538R
Americans for Job Security

Dear Ms. Newton:

On October 12, 2016, the Federal Election Commission notified you of the opening of this matter involving allegations that Americans for Job Security violated the Federal Election Campaign Act of 1971, as amended.

On October 18, 2016, the Federal Election Commission found 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 Act"). The Factual and Legal Analysis, which more fully explains the Commission's findings, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of your receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. *See* 18 U.S.C. § 1519.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. *See* 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter.

Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

If you intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

This matter will remain confidential in accordance with 52 U.S.C. §§ 30109(a)(4)(B) and 30109(a)(12)(A) unless you notify the Commission in writing that you wish the investigation to be made public. Please be advised that, although the Commission cannot disclose information regarding an investigation to the public, it may share information on a confidential basis with other law enforcement agencies.[1]

For your information, we have enclosed a brief description of the Commission's procedures for handling possible violations of the Act. If you have any questions, please contact Peter Reynolds, the staff attorney assigned to this matter, at (202) 694-1343 or preynolds@fec.gov.

On behalf of the Commission,

Steven T. Walther
Chairman

Enclosures
Factual and Legal Analysis
Procedures
Designation of Counsel Form

[1] The Commission has the statutory authority to refer knowing and willful violations of the Act to the Department of Justice for potential criminal prosecution, 52 U.S.C. § 30109(a)(5)(C), and to report information regarding violations of law not within its jurisdiction to appropriate law enforcement authorities. *Id.* § 30107(a)(9).

FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

MUR: 6538R

RESPONDENT: Americans for Job Security and Stephen DeMaura in his official capacity as treasurer

I. INTRODUCTION

This matter was generated by a complaint filed by Citizens for Responsibility and Ethics in Washington and Melanie Sloan.[1] The complaint alleges that Americans for Job Security ("AJS") violated the Federal Election Campaign Act of 1971, as amended, (the "Act") by failing to organize, register, and report as a political committee.

The Commission originally considered the complaint in MUR 6538 (Americans for Job Security), but there was an insufficient number of votes to find reason to believe that AJS violated 52 U.S.C. §§ 30102 ("Organization of political committees"), 30103 ("Registration of political committees"), and 30104 ("Reporting requirements").[2] Accordingly, the Commission closed its file in MUR 6538. The Commission's decision was challenged in *CREW v. FEC, et al.*, No. 1:14-cv-01419. On September 19, 2016, the U.S. District Court for the District of Columbia held that the dismissal was contrary to law, and remanded the case to the Commission for proceedings consistent with that Opinion.[3] Pursuant to the court's remand, this matter was reopened and numbered MUR 6538R.

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1 *See* 52 U.S.C. § 30109(a)(1).

2 *See* Certification, MUR 6538 (Americans for Job Security) (June 27, 2014), *available at* http://eqs.fec.gov/eqsdocsMUR/14044361730.pdf.

3 *CREW v. FEC*, 2016 WL 5107018 (D.D.C. September 19, 2016) ("*CREW v. FEC*").

As discussed below, consistent with the Court's instructions, the Commission finds 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.

II. FACTUAL AND LEGAL ANALYSIS

A. Facts

1. AJS

Americans for Job Security, a tax-exempt entity organized under section 501(c)(6) of the Internal Revenue Code, was founded in 1997.[4] Stephen DeMaura is the President and Treasurer.[5] AJS describes itself as an "independent, bi-partisan, pro-business issue advocacy organization" whose chief goal is "educating the public on issues of importance to businesses and encouraging a strong job-creating economy that promotes a pro-growth agenda."[6] Its articles of incorporation state that it is incorporated for the purpose of uniting "in a common organization businesses, business leaders, entrepreneurs, and associations of businesses" and to "promote the common business interests of its members . . . by helping the American public to better understand public policy issues of interest to business."[7] According to its tax return, "the organization promotes governmental policy that reflects economic issues of the workplace" by "educating the public through television, radio, and newspaper and direct mail advertising . . . ."[8]

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[4] Compl. at 3; Resp. at 2-3. The administrative complaint, responses, vote certifications and other documents related to MUR 6538 are publicly available at http://eqs.fec.gov/eqs/searcheqs;jsessionid=DB4F18785BEEF61E76AF65FCD107CE2C?SUBMIT=continue.

[5] Compl. at 3.

[6] Resp. at 3; *see* https://web.archive.org/web/20091113131843/http://www.savejobs.org/aboutajs.php. The organization's website appears to no longer be active.

[7] Resp. at 11.

[8] Form 990, Return of Organization Exempt from Income Tax (2009) at 2, *available at* http://eqs.fec.gov/eqsdocsMUR/14044360317.pdf.

2. AJS's Activities

AJS states that it received approximately $54 million in membership dues and assessments and spent approximately $51 million on its activities and communications between its establishment in 1997 and 2012.[9] AJS cites several examples of its "economic issue advocacy communications and activities" from 2004 through 2006, including communications about the "death tax" and the establishment of an asbestos trust fund.[10] After the Supreme Court lifted the prohibition on certain corporate "electioneering communications"[11] in *FEC v. Wisconsin Right to Life, Inc.* ("*WRTL II*"),[12] AJS began making electioneering communications. In 2008, the first election following the Court's decision, AJS reported spending $10,322,302 on forty-three electioneering communications. In 2010, the Supreme Court in *Citizens United v. FEC*[13] struck down the Act's prohibition on corporate independent expenditures and the remaining prohibition on corporate and union funding of electioneering communications. Following *Citizens United v. FEC*, AJS reported making independent expenditures totaling $4,908,847[14] and electioneering communications totaling $4,556,518[15] in the months leading up to the 2010 election. According

9 Resp., Attach. 1. ¶ 3.

10 *Id.* at 3-4. AJS's activities between 2000 and 2006 were the subject of MURs 5910 and 5694. The Commission failed to find that there was reason to believe that AJS was a political committee or that its advertisements contained express advocacy, on a 3-3 vote.

11 An "electioneering communication" is "any broadcast, cable, or satellite communication which — (I) refers to a clearly identified candidate for federal office; (II) is made within [30 or 60 days of certain elections]; and (III) in the case of a communication which refers to a candidate for an office other than President and Vice President, is targeted to the relevant electorate." 52 U.S.C. § 30104(f)(3)(A).

12 551 U.S. 449 (2007).

13 130 S. Ct. 876 (2010).

14 AJS October 2010 Quarterly Report at 1 (amended Jan. 13, 2017), *available at* http://docquery.fec.gov/pdf/551/201701139041387551/201701139041387551.pdf; 2010 Year End Report at 1, *available at* http://docquery.fec.gov/pdf/422/11930290422/11930290422.pdf.

15 *See infra* notes 65-74.

to its tax return, AJS received $12,411,684 and spent $12,417,809 between November 1, 2009, and October 31, 2010.[16]

AJS describes its issue advocacy campaigns as "particularly active during campaign season" because "campaign season is when the majority of Americans are debating and focused on public policy."[17] AJS lists several "issues of the day" that it attempts to influence: reducing taxes; tort reform; free markets and free trade; transportation; education reform; health care reform and modernization; and energy.[18]

B. Analysis

1. The Test for Political Committee Status

The Act and Commission regulations define a "political committee" as "any committee, club, association or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year."[19] In *Buckley v. Valeo*,[20] the Supreme Court held that defining political committee status "only in terms of the annual amount of 'contributions' and 'expenditures'" might be overbroad, reaching "groups engaged purely in issue discussion."[21] 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*

16 Form 990, Return of Organization Exempt from Income Tax (2009) at 1.

17 https://web.archive.org/web/20091113131843/http://www.savejobs.org/aboutajs.php ("In addition, since the media and public officials only focus on media markets where there are hotly contested political campaigns, we select the media markets we advertise in accordingly.").

18 https://web.archive.org/web/20091114124504/http://www.savejobs.org/issues.php.

19 52 U.S.C. § 30101(4)(A); 11 C.F.R. § 100.5.

20 424 U.S. 1 (1976).

21 *Id.* at 79.

nomination or election of a candidate."[22] Accordingly, under the statute as thus construed, an organization that is not controlled by a candidate must register as a political committee only if (1) it crosses the $1,000 threshold and (2) it has as its "major purpose" the nomination or election of federal candidates.

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

Although *Buckley* established the major purpose test, it provided no guidance as to the proper approach to determine an organization's major purpose.[23] In *Massachusetts Citizens for Life v. FEC* ("*MCFL*"),[24] the Supreme Court identified an organization's independent spending as a relevant factor in determining an organization's major purpose.[25]

Following *Buckley*, the Commission adopted a policy of determining on a case-by-case basis whether an organization is a political committee, including whether its major purpose is the nomination or election of federal candidates.[26] The Commission has since periodically considered proposed rulemakings to craft a bright-line rule regarding the major purpose test; however, the Commission consistently has declined to do so.[27]

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22 *Id.* (emphasis added).

23 *See, e.g.*, *Real Truth About Abortion, Inc. v. FEC* (formerly *Real Truth About Obama 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*").

24 479 U.S. 241, 249, 263 (1986) ("*MCFL*").

25 *Id.* at 249, 262.

26 Political Committee Status, 72 Fed. Reg. 5,596 (Feb. 7, 2007) (Supplemental Explanation and Justification) ("Supplemental E&J").

27 *See, e.g.*, Independent Expenditures; Corporate and Labor Organization Expenditures, 57 Fed. Reg. 33,548, 33,558-59 (July 29, 1992) (Notice of Proposed Rulemaking); Definition of Political Committee, 66 Fed. Reg. 13,681, 13,685-86 (Mar. 7, 2001) (Advance Notice of Proposed Rulemaking); *see also* Summary of Comments and Possible Options on the Advance Notice of Proposed Rulemaking on the Definition of "Political Committee," Certification (Sept. 27, 2001) (voting 6-0 to hold proposed rulemaking in abeyance).

In 2004, for example, the Commission issued a notice of proposed rulemaking asking whether the agency should adopt a regulatory definition of "political committee."[28] The Commission declined to adopt a bright-line rule, noting that it had been applying the major purpose test "for many years without additional regulatory definitions," and concluded that "it will continue to do so in the future."[29]

b. Challenges to the Commission's Major Purpose Test and the Supplemental E&J

When the Commission's decision in the 2004 rulemaking not to adopt a regulatory definition was challenged in litigation, the district court in *Shays v. FEC* rejected plaintiffs' request that the Commission initiate a new rulemaking.[30] The court found, however, that the Commission had "failed to present a reasoned explanation for its decision" to engage in case-by-case decision-making, rather than rulemaking, and remanded the case to the Commission to explain its decision.[31]

Responding to the remand, the Commission issued a Supplemental E&J to further elaborate on its 2004 decision to apply a case-by-case approach and to provide the public with additional guidance as to its process for determining political committee status.[32] The Supplemental E&J explained that "the major purpose doctrine requires fact-intensive analysis of

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[28] *See* Political Committee Status, 69 Fed. Reg. 11,736, 11,745-49 (Mar. 11, 2004) (Notice of Proposed Rulemaking).

[29] *See* Final Rules on Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056, 68,064-65 (Nov. 23, 2004).

[30] *Shays v. FEC*, 424 F. Supp. 2d 100, 117 (D.D.C. 2006) ("*Shays I*").

[31] *Id.* at 116-17.

[32] Supplemental E&J, 72 Fed. Reg. 5595.

a group's campaign activities compared to its activities unrelated to campaigns."[33] The Commission stated that the determination of an organization's major purpose "requires the flexibility of a case-by-case analysis of an organization's conduct that is incompatible with a one-size fits-all rule," and that "any list of factors developed by the Commission would not likely be exhaustive in any event, as evidenced by the multitude of fact patterns at issue in the Commission's enforcement actions considering the political committee status of various entities."

To determine an entity's "major purpose," the Commission explained that it considers a group's "overall conduct," including public statements about its mission, organizational documents, government filings (*e.g.*, IRS notices), the proportion of spending related to "Federal campaign activity (*i.e.*, the nomination or election of a Federal candidate)," and the extent to which fundraising solicitations indicate funds raised will be used to support or oppose specific candidates.[34] The Commission stated in the Supplemental E&J that it compares how much of an organization's spending is for "*federal campaign activity*" relative to "activities that [a]re not campaign related."[35]

After the Commission issued the Supplemental E&J, the *Shays I* plaintiffs again challenged, under the Administrative Procedure Act,[36] the Commission's case-by-case approach to political committee status. In *Shays II*, the district court rejected the challenge, upholding the

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33 *Id.* at 5601-02.

34 *Id.* at 5597, 5605.

35 *Id.* at 5601, 5605 (emphasis added).

Commission's case-by-case approach as an appropriate exercise of the agency's discretion.[37] The court recognized that "an organization . . . may engage in many non-electoral activities so that determining its major purpose requires a very close examination of various activities and statements."[38]

In 2012, in *Real Truth About Abortion, Inc. v. FEC*, the Fourth Circuit rejected a constitutional challenge to the Commission's case-by-case determination of major purpose.[39] The court upheld the Commission's approach, holding that *Buckley* "did not mandate a particular methodology for determining an organization's major purpose," and therefore the Commission was free to make that determination "either through categorical rules or through individualized adjudications."[40] The court concluded that the Commission's case-by-case approach was "sensible, . . . consistent with Supreme Court precedent and does not unlawfully deter protected speech."[41] The Fourth Circuit concluded that the Supplemental E&J provides "ample guidance as to the criteria the Commission might consider" in determining an organization's political committee status and therefore is not unconstitutionally vague.[42]

The Commission's application of the major purpose test was recently considered in *CREW v. FEC*, following the Commission's dismissal of allegations in MUR 6538 that two organizations, including AJS, were required to register and report as political committees. The

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37 *Shays v.* FEC, 511 F. Supp. 2d 19, 24 (D.D.C. 2007) ("*Shays II*").

38 *Id.* at 31.

39 *RTAA*, 681 F.3d 544.

40 *Id.* at 556.

41 *Id.* at 558.

42 *Id.*; *see also Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013) (quoting *RTAA* and upholding Commission's case-by-case method of determining political committee status), *cert. denied*, 572 U.S. __ (2014).

Court held that the dismissal was contrary to law, finding that the controlling Commissioners' 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. The Court instructed the Commission, when examining the organization's major purpose, to look beyond express advocacy and consider whether the other communications at issue indicate a "campaign-related purpose."[43] The Court also held that the Commission's analysis of the relevant time period for evaluating a group's spending must retain the flexibility to account for changes in an organization's major purpose over time.[44]

c. Organizational and Reporting Requirements for Political Committees

Political committees — commonly known as "PACs" — must comply with certain organizational and reporting requirements set forth in the Act. PACs must register with the Commission, file periodic reports for disclosure to the public, appoint a treasurer who maintains its records, and identify themselves through "disclaimers" on all of their political advertising, on their websites, and in mass e-mails.[45]

In the wake of the Supreme Court's decision in *Citizens United v. FEC*,[46] which struck down the Act's prohibitions on corporate independent expenditures and electioneering communications, the D.C. Circuit held in *SpeechNow.org v. FEC* that political committees that

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43 *CREW v. FEC* at 11.

44 *Id.* at 25 (citing *MCFL*, 479 U.S. at 262 ("recognizing that a group's 'spending [may] *become* so extensive that the organization's major purpose may be regarded as campaign activity [such that] the corporation would be classified as a political committee.' (emphasis added)").

45 *See* 52 U.S.C. §§ 30102-30104; 11 C.F.R. §110.11(a)(1).

46 130 S. Ct. 876 (2010).

engage only in independent expenditures are not subject to contribution limits.[47] These political committees, often referred to as independent expenditure-only political committees or Super PACs, continue to be subject, however, to the reporting requirements of 2 U.S.C. §§ 432, 433, and 434(a) [now 52 U.S.C. §§ 30102, 30103, and 30104(a)], and the organizational requirements of 2 U.S.C. §§ 431(4) and 431(8) [now 52 U.S.C. §§ 30101(4) and 30101(8)]. The district court in *CREW v. FEC* concluded that "the majority of circuits have concluded that . . . disclosure requirements [related to registration and reporting] are not unduly burdensome."[48]

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

a. Statutory Threshold

To assess whether an organization has made an "expenditure," the Commission analyzes whether spending on any of an organization's communications made independently of a candidate constitute express advocacy under 11 C.F.R. § 100.22.[49] In 2010, AJS made more than $4.9 million in independent expenditures.[50] Thus, AJS far exceeded the $1,000 statutory threshold for political committee status.[51]

b. Major Purpose

AJS states in its response to the complaint in MUR 6538, on its website, and in its tax returns that its major purpose is not to engage in federal campaign activity but rather to advocate

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47 599 F.3d 686, 696 (D.C. Cir. 2010).

48 *See CREW v. FEC* at 10 (quoting *Yamada v. Snipes*, 786 F.3d 1182, 1195 (9th Cir.), *cert. denied sub nom., Yamada v. Shoda*, 136 S. Ct. 569 (2015)).

49 *See* Supplemental E&J at 5606.

50 *See supra* at 3.

51 *See* 52 U.S.C. § 30101 (4)(A); 11 C.F.R. § 100.5.

issues and educate the public.[52] The Commission noted in the Supplemental E&J that it may consider such statements made by an organization in its analysis of an organization's major purpose,[53] but that such statements are not necessarily dispositive.[54] Under the Commission's case-by-case approach, the Commission considers the organization's "overall conduct," including its disbursements, activities, and statements.[55] In this case, AJS's proportion of spending related to federal campaign activity compared to its total spending is alone sufficient to indicate that its major purpose had become the nomination or election of federal candidates.

AJS reported spending approximately $4,908,847 on independent expenditures during the 2010 election cycle, spending which clearly indicates a purpose to elect or nominate federal candidates. As noted, AJS reported making electioneering communications totaling $4,556,518. In *CREW v. FEC*, the Court instructed the Commission to consider not only independent spending on express advocacy but also spending on electioneering communications that indicate a "campaign-related purpose" when determining whether an organization's major purpose is the nomination or election of federal candidates.[56] Thus, following the Court's instruction in *FEC v. CREW*, and pursuant to the Commission's case-by-case, fact intensive approach to evaluating political committee status and major purpose, the Commission has determined that AJS ran

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[52] Resp. at 1, 11; https://web.archive.org/web/20091113131843/http://www.savejobs.org/aboutajs.php ; Form 990, Return of Organization Exempt from Income Tax (2009) at 1, 2.

[53] Supplemental E&J at 5606.

[54] *See Real Truth About Obama v. FEC*, No. 3:08-cv-00483, 2008 WL 4416282, at *14 (E.D. Va. Sept. 24, 2008) ("A declaration by the organization that they are *not* incorporated for an electioneering purpose is not dispositive.") (emphasis in original), *aff'd*, 575 F.3d 342 (4th Cir. 2009), *vacated on other grounds*, 130 S. Ct. 2371 (2010), *remanded and decided*, 796 F. Supp. 2d 736, *affirmed sub nom. Real Truth About Abortion v. FEC*, 681 F.3d 544 (4th Cir. 2012), *cert. denied*, 81 U.S.L.W. 3127 (U.S. Jan. 7, 2013) (No. 12-311).

[55] Supplemental E&J at 5597.

[56] *CREW v. FEC* at 11.

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electioneering communications during the period leading up to the 2010 election that, though not necessarily express advocacy, support a conclusion that there is reason to believe that the group's major purpose is the nomination or election of federal candidates.[57]

Consider, for example, "Agree," "Back to Work," and "Pennsylvania Jobs":

Agree[58]

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

Back to Work[59]

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

Pennsylvania Jobs[60]

> Washington politicians are on a spending spree. Bigger government. Earmarks. Bailouts and debt have pushed our country to the brink. Pennsylvania needs relief. Barack Obama and Washington politicians don't get it. They want higher taxes and bigger government. Pat Toomey has a commonsense plan to get Pennsylvania back to work. Cut the red tape, so Pennsylvania small businesses are free to create jobs. Cut the spending. No more earmarks and no more

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[57] While the Commission analyzes several of AJS's ads, the scripts for all ads before the Commission, as well as the amounts that AJS spent on each ad, are included in an appendix.

[58] AJS spent $479,268 on this advertisement. http://docquery.fec.gov/cgi-bin/fecimg/?_10930863308+0.

[59] AJS spent $143,300, $171,700, and $126,496 on this advertisement. http://docquery.fec.gov/cgi-bin/fecimg/?_10930858544+0; http://docquery.fec.gov/cgi-bin/fecimg/?_10930863356+0; http://docquery.fec.gov/cgi-bin/fecimg/?_10930869654+0.

[60] The transcript for this advertisement is attached to the AJS Response as "Complaint Communication #33." AJS spent $72,100 on this advertisement. http://docquery.fec.gov/cgi-bin/fecimg/?_10991128553+0.

> bailouts. Toomey wants to end deficit spending — and return money to families and job creators. The Toomey plan: getting Pennsylvania working again. As a small businessman Toomey created jobs and knows what it takes to make a payroll. Pat Toomey: fiscal discipline, lower taxes, and common sense economic policies. Call Pat Toomey at 434-809-7994 and tell him you support his common sense plan to get Pennsylvania back to work.

None of these ads expressly refers to candidacies or elections. However, "Back to Work" refers to "political insiders" and "insiders in both parties," and "Pennsylvania Jobs" refers to "Washington politicians." Each ad favorably contrasts the identified candidate's background or positions against activity conducted in Washington. None 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. Statements in these ads encouraging the individuals to maintain their positions on the identified issues have no nexus with the legislative process. More to the point, Buck and Toomey were in no position to implement either of their plans unless they were elected, and Brown's position on federal health care policy would likely be of minimal significance to legislative activities in Washington unless Brown were first elected to the Senate. Therefore, "Agree," "Back to Work," and "Pennsylvania Jobs" are indicative of a major purpose to nominate or elect a federal candidate.

Another ad, "Talk is Cheap,"[61] offers criticism rather than praise of a subject candidate:

> Liberal politicians will say anything, but talk is cheap. Take Jane Norton. [Norton clip] "The federal government is overspending, it's overtaxing, it's overregulating...." Wait, what's the real Norton record? Norton pushed the largest tax hike in Colorado history. As a regulator, she managed a multimillion dollar surge in government spending. Yep, talk is cheap, but Jane Norton's real record has cost us plenty. Tell Jane Norton: no more high taxes and spending.

"Talk is Cheap" does not expressly mention candidacies or elections, though it identifies Norton as a "[l]iberal politician[]" and includes an image of Senator Michael Bennet, whom Norton

[61] AJS spent $585,800 on this advertisement. http://docquery.fec.gov/cgi-bin/fecimg/?_10931075321+0.

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would have faced in the general election had she won the primary. The ad criticizes Norton for decisions (presumably) made during her term as Colorado's Lieutenant Governor, by stating that her decisions have "cost [Coloradoans] plenty." The ad also suggests that Norton's record is inconsistent with her public statements on those same issues. Norton, however, was not an officeholder at the state or federal level when the ad ran and in no position to affect the federal political activities, issues, or programs mentioned in the ads. Thus, the call to action — to "[t]ell Jane Norton: no more high taxes and spending" — has no nexus with the legislative process. Therefore, "Talk is Cheap" is indicative of a major purpose to nominate or elect a federal candidate.

Turning to the relevant time period for evaluating AJS' spending, AJS argues that its independent expenditures represent "a very minor portion" of its overall activities since its founding in 1997.[62] In *CREW v. FEC*, the Court ruled that the Commission's analysis of the relevant time period for evaluating a group's spending must be flexible to account for changes in an organization's major purpose over time.[63]

AJS spent no money on electioneering communications prior to the Supreme Court's decision in *WRTL II*, then shifted its activities towards electioneering communications leading up to the 2008 election. After the Supreme Court struck the prohibition on corporate independent expenditures in *Citizens United v. FEC*, AJS allocated more of its resources to campaign-related spending. Consistent with the Court's instructions, the Commission must consider AJS's election-related spending in 2010 as evidence that the organization's major purpose might have changed. Absent detailed information about AJS's spending and activities in subsequent years,

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62 Resp. at 2, 5.

63 *Id.* at 11-12.

the record evidence of AJS's spending in 2010 provides reason to believe that AJS's major purpose had become the nomination or election of federal candidates.

In sum, for roughly a year before the 2010 election, AJS spent a total of $12,417,809. More than half of this amount was for independent expenditures ($4,908,847) and the electioneering communications analyzed above ($1,578,664). The Commission has never set a threshold on the proportion of spending on major purpose activities required for political committee status and declines to do so now. Without determining whether it is *necessary* to cross a 50 percent threshold to determine an organization's major purpose, it is *sufficient* in this case, based on the available information, to find reason to believe that AJS's major purpose had become the nomination or election of federal candidates.[64]

C. Conclusion

Because AJS made over $1,000 in expenditures during calendar year 2010, and the available information indicates that its major purpose had become the nomination or election of federal candidates, the Commission finds 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.

[64] Since (as shown above) AJS spent a sufficient proportion of its funds on both express advocacy communications and electioneering communications indicating a "campaign-related purpose" to justify a reason-to-believe finding, it is not necessary to analyze each ad.

Appendix

i. Agree[65]

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

ii. Thank You[66]

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

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

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

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

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

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

[65] AJS spent $479,268 on this advertisement. http://docquery.fec.gov/cgi-bin/fecimg/?_10930863308+0.

[66] AJS spent $913,096 on this advertisement. http://docquery.fec.gov/cgi-bin/fecimg/?_10030321386+0.

iii. Outsource[67]

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

iv. Back to Work[68]

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

v. Brink[69]

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

vi. Earmarks[70]

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

[67] AJS spent $490,000 on this advertisement. http://docquery.fec.gov/cgi-bin/fecimg/?_10930863250+0.

[68] AJS spent $143,300, $171,700, and $126,496 on this advertisement. http://docquery.fec.gov/cgi-bin/fecimg/?_10930858544+0; http://docquery.fec.gov/cgi-bin/fecimg/?_10930863356+0; http://docquery.fec.gov/cgi-bin/fecimg/?_10930869654+0.

[69] AJS spent $318,874 and $175,956 on this advertisement. http://docquery.fec.gov/cgi-bin/fecimg/?_10930941615+0; http://docquery.fec.gov/cgi-bin/fecimg/?_10991002213+0.

[70] AJS spent $45,100 on this advertisement. http://docquery.fec.gov/cgi-bin/fecimg/?_10931073407+0.

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empty. The Billy Long bus terminal to nowhere. Call Billy Long and tell him you're sick of earmarks and bus terminals to nowhere.

vii. Talk is Cheap[71]

Liberal politicians will say anything, but talk is cheap. Take Jane Norton. [Norton clip] "The federal government is overspending, it's overtaxing, it's overregulating...." Wait, what's the real Norton record? Norton pushed the largest tax hike in Colorado history. As a regulator, she managed a multimillion dollar surge in government spending. Yep, talk is cheap, but Jane Norton's real record has cost us plenty. Tell Jane Norton: no more high taxes and spending.

viii. Pennsylvania Jobs[72]

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

ix. Instrumental[73]

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

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71 "Talk is Cheap" is available at https://www.youtube.com/watch?v=BF-4Bz9wRwE. AJS spent $585,800 on this advertisement. http://docquery.fec.gov/cgi-bin/fecimg/?_10931075321+0.

72 The transcript for this advertisement is attached to the AJS Response as "Complaint Communication #33." AJS spent $72,100 on this advertisement. http://docquery.fec.gov/cgi-bin/fecimg/?_10991128553+0.

73 AJS spent $54,572 on this advertisement. http://docquery.fec.gov/cgi-bin/fecimg/?_10030421366+0.

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x. Ants[74]

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

[74] AJS spent $980,256 on this advertisement. http://docquery.fec.gov/cgi-bin/fecimg/?_10931695957+0.

FEDERAL ELECTION COMMISSION
Washington, DC 20463

By Electronic and First Class U.S. Mail
Megan Newton, Esq.
Jones Day
51 Louisiana Avenue, NW
Washington, DC 20001-2113
msowardsnewton@jonesday.com

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

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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

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[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.

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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.

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[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

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[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

[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.

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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 $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000
2 during a calendar year."[27] In *Buckley* v. *Valeo*,[28] the Supreme Court held that defining political
3 committee status "only in terms of amount of annual 'contributions' and 'expenditures'" might
4 be overbroad, reaching "groups engaged purely in issue discussion."[29] To cure that infirmity, the
5 Court concluded that the term "political committee" "need only encompass organizations that are
6 under the control of a candidate or the *major purpose of which is the nomination or election of a*
7 *candidate*."[30] With this limitation, it held the expenditures of political committees "can be
8 assumed to fall within the core area sought to be addressed by Congress. They are, by definition,
9 campaign related."[31] Under the Act as thus construed, an organization that is not controlled by a
10 candidate must register as a political committee only if (1) it crosses the $1,000 threshold for
11 contributions or expenditures and (2) its "major purpose" is the nomination or election of federal
12 candidates.
13 Although *Buckley* established the major purpose test, it "did not mandate a particular
14 methodology for determining an organization's major purpose," delegating such determinations
15 and methodology to the Commission "either through categorical rules or through individualized
16 adjudications."[32] Indeed, the District Court acknowledged that "*how Buckley* (and the test it
17 created) should be implemented," including "choices regarding the timeframe and spending

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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*").

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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]

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[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*.

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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

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[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.

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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

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[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

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[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).

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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.*

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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)).

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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.

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