

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2  
3 In the Matter of )  
4 ) MUR 6538R  
5 Americans for Job Security )  
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10 **SECOND GENERAL COUNSEL'S REPORT**

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12 **I. ACTIONS RECOMMENDED**

13 We recommend that the Commission: (1) enter into pre-probable cause conciliation with  
14 Americans for Job Security; (2) approve the attached conciliation agreement; and (3) approve the  
15 appropriate letter.

16 **II. INTRODUCTION**

17 The Commission found reason to believe that Americans for Job Security ("AJS")  
18 violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to organize, register, and report with  
19 the Commission as a political committee in 2010 and commenced an investigation to gather  
20 further information about AJS's activities in 2010.<sup>1</sup> This report details the results of that  
21 investigation and makes recommendations to the Commission regarding the disposition of this  
22 matter.

23 The completed investigation reveals that the vast majority of AJS's 2010 discretionary  
24 spending, more than \$9.4 million out of a total program budget of \$11.3 million, pertained to  
25 federal elections and thus confirms that AJS was required to register and report as a political  
26 committee, specifically by September 2010 at the latest. Because AJS has never registered and  
27 reported with the Commission, and has a continuing obligation to report its activities from the

<sup>1</sup> Certification, MUR 6538R (AJS) (Oct. 18, 2016) (finding reason to believe AJS violated 52 U.S.C. §§ 30102, 30103, and 30104); Certification, MUR 6538R (AJS) (Apr. 26, 2017).

1 time it becomes a political committee until it is terminated, we recommend that the Commission  
2 enter into pre-probable cause conciliation with AJS to resolve its violations and require AJS to  
3 file disclosure reports reflecting its federal activity.

4 **III. PROCEDURAL HISTORY**

5 The Complaint in MUR 6538 was filed on March 8, 2012, and alleged that AJS violated  
6 the Federal Election Campaign Act of 1971, as amended, (the "Act") by failing to organize,  
7 register, and report as a political committee after spending more than \$9 million on independent  
8 expenditures and electioneering communications during 2010.<sup>2</sup> AJS filed its response on May 4,  
9 2012, arguing that it could not be a political committee because its major purpose was not the  
10 election or defeat of federal candidates.<sup>3</sup> Among other things, AJS noted that it had been in  
11 existence since 1997, but made no independent expenditures until 2010.<sup>4</sup> While AJS did not  
12 dispute making the independent expenditures alleged in the Complaint, it argued that it spent  
13 much more money on activity that was not express advocacy.<sup>5</sup> The First General Counsel's  
14 Report in MUR 6538, circulated to the Commission on May 2, 2013, recommended finding  
15 reason to believe AJS violated the Act because the majority of the group's spending in 2010 was  
16 "federal campaign activity"—even if much of it was not express advocacy.<sup>6</sup>

17 On June 24, 2014, the Commission voted on the General Counsel's recommendations;  
18 three Commissioners voted to approve, and three voted against the recommendations. All six

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<sup>2</sup> See Compl. at 3, 10-12, MUR 6538 (Mar. 8, 2012); see also First Gen. Counsel's Report at 12, 15, 21-22, MUR 6538.

<sup>3</sup> Resp. at 1, 2, 5, 1, MUR 6538 (May 4, 2012).

<sup>4</sup> *Id.* at 1, 12.

<sup>5</sup> *Id.* at 5, 11-12.

<sup>6</sup> See First Gen. Counsel's Report at 15-21.

1 Commissioners subsequently voted to close the file.<sup>7</sup> The controlling Commissioners, *i.e.*, those  
2 voting against the recommendations, issued a Statement of Reasons explaining that over the  
3 course of its history, AJS had spent less than 10% of its funds on express advocacy and therefore  
4 “is an issue-advocacy organization that cannot be regulated as a political committee.”<sup>8</sup>

5 After the Commission closed MUR 6538, the Complainant, Citizens for Responsibility  
6 and Ethics in Washington (“CREW”), sued the Commission in federal district court, arguing that  
7 the Commission’s dismissal was contrary to law.<sup>9</sup> On September 19, 2016, following cross  
8 motions for summary judgment, the court held the Commission’s dismissal was indeed “contrary  
9 to law” and remanded the case.<sup>10</sup> The court disagreed with the controlling Commissioners on  
10 two major points: (1) the court held that it was legal error to exclude all non-express advocacy  
11 from the Commission’s calculation of federal election spending;<sup>11</sup> and (2) the court also held  
12 that, at least as applied to AJS, it was impermissible for the Commission to use a “lifetime-only  
13 rule,” because it would ignore facts indicating an organization’s major purpose had changed.<sup>12</sup>

14 On remand, the Commission found reason to believe that AJS violated 52 U.S.C.  
15 §§ 30102, 30103, and 30104<sup>13</sup> and on April 26, 2017, the Commission voted to approve a  
16 Factual and Legal Analysis supporting the findings.<sup>14</sup> The Factual and Legal Analysis explained

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<sup>7</sup> Certification, MUR 6538 (June 24, 2014).

<sup>8</sup> Statement of Reasons, Comm’rs. Goodman, Hunter, & Petersen at 1, MUR 6538.

<sup>9</sup> *See CREW v. FEC*, 209 F. Supp. 3d 77, 83-85 (D.D.C. 2016); *see generally* 52 U.S.C. § 30109(a)(8)(A).

<sup>10</sup> *See Crew*, 209 F. Supp. 3d at 81.

<sup>11</sup> *Id.* at 93.

<sup>12</sup> *Id.* at 94.

<sup>13</sup> Certification, MUR 6538R (Oct. 18, 2016).

<sup>14</sup> Certification, MUR 6538R (Apr. 26, 2017).

1 that at least certain electioneering communications AJS funded in 2010 appeared to indicate a  
2 major purpose to elect or defeat a federal candidate.<sup>15</sup> Furthermore, the Commission noted that  
3 “[a]bsent detailed information about AJS’s spending and activities in subsequent years, the  
4 record evidence of AJS’s spending in 2010 provides reason to believe that AJS’s major purpose  
5 had become the nomination or election of federal candidates.”<sup>16</sup> This Office then commenced its  
6 investigation to learn more about AJS’s spending in 2010 and subsequent years.

#### 7 IV. INVESTIGATION

8 The investigation in this matter included document subpoenas and interrogatories to AJS,  
9 bank subpoenas to AJS’s two banks of record, and a deposition of Stephen DeMaura, AJS’s  
10 former treasurer and sole employee.<sup>17</sup> We also obtained AJS’s emails from the California Fair  
11 Political Practices Commission (“CFPPC”), which had previously received a large volume of  
12 emails from AJS as part of that agency’s investigation into AJS’s activity in 2012, and obtained  
13 partial records of political advertising created and disseminated for AJS from four of its vendors,  
14 including Crossroads Media, which was responsible for placing all of AJS’s electioneering  
15 communications in 2010, and Spectrum Marketing, which gave us copies of several mailers  
16 pertaining to federal elections that AJS had not previously reported to the Commission. As

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<sup>15</sup> See Factual & Legal Analysis at 12-15, MUR 6538R (Americans for Job Security) (“Factual and Legal Analysis”).

<sup>16</sup> *Id.* at 14-15.

<sup>17</sup> This Office attempted to contact AJS numerous times prior to service of the subpoena. On June 6, 2017, we sent a notification letter with the Commission’s Factual and Legal Analysis to AJS’s last-known counsel. On June 21, 2017, counsel contacted this Office to express doubt that they had a current engagement to represent AJS. Five days later, the law firm sent a letter to the Commission confirming that they were no longer counsel to AJS, and noting that AJS was defunct. We attempted to reach AJS’s former treasurer throughout July 2017, and on August 1, 2017, sent the notification letter and the Commission’s Factual and Legal Analysis to AJS’s last-known business address. That package was returned to the Commission when the recipient refused to accept it.

1 described in detail below, the information obtained through these sources provided a detailed  
2 picture of AJS's history and activities during the time periods relevant to this matter.

3           Founded in 1997 by David Carney, AJS was a tax-exempt entity organized under section  
4 501(c)(6) of the Internal Revenue Code.<sup>18</sup> Its articles of incorporation state that it was formed  
5 for the purpose of "unit[ing] in a common organization businesses, business leaders,  
6 entrepreneurs, and associations of businesses" "to promote the common business interests of its  
7 members and contributors and the members of its trade association" by "helping . . . the  
8 American public to better understand public policy issues of interest to business and to  
9 encourage a strong job creating economy promoting a pro-growth agenda."<sup>19</sup> Prior to 2008,  
10 Michael Dubke served as president of AJS.<sup>20</sup> Stephen DeMaura, a former executive director of  
11 the New Hampshire Republican Party, became president of AJS in 2008 and was its only  
12 employee until the organization went defunct around 2016 or 2017.<sup>21</sup>

13           AJS claimed to be a "membership-based" organization, although it appears to have been  
14 funded through simple ad hoc donations. According to DeMaura, AJS "members" could decide  
15 to join AJS with no board approval and set their own dues.<sup>22</sup> The only criteria to be an AJS  
16 member was to be "aligned with our mission" and "willing to support it."<sup>23</sup> AJS's bank records

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<sup>18</sup> See AJS Resp., Subpoena Req. No. 1 at 1-8, Articles of Incorporation of AJS, Dep't of Consumer & Regulatory Affairs, Business Regulation Admin. (Nov. 3, 1997).

<sup>19</sup> See *id.*

<sup>20</sup> See Deposition of Stephen DeMaura at 23:17-18 (June 14, 2017) ("DeMaura Dep.").

<sup>21</sup> *Id.* at 17:20-21, 26:2-27:4, 239:22-240:5 Bank records show that AJS continued to make relatively small withdrawals until 2017, but it appears the organization had ceased all activity substantially before that time.

<sup>22</sup> *Id.* at 36:9-22.

<sup>23</sup> *Id.* at 36:7-8.

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1 show a huge variety in the donation amount from any given member, and the organization raised  
2 substantially different amounts of money in election versus non-election years.<sup>24</sup>

3 Given that DeMaura was its sole employee, AJS relied heavily on political consultants to  
4 carry out its work. DeMaura testified that he frequently consulted with Carney, who became the  
5 owner of a political consulting firm called Norway Hill Associates, and Dubke, who owned  
6 political consulting firms the November Company and Black Rock Group.<sup>25</sup> DeMaura testified  
7 that AJS had them on retainer,<sup>26</sup> and bank records confirm that in 2010, AJS made twelve  
8 monthly payments of \$12,500 to Norway Hill and twelve monthly payments of \$13,250 to the  
9 November Company (a total of \$309,000 for the year).<sup>27</sup> Further, AJS was located at the same  
10 address as Black Rock Group, as well as Crossroads Media,<sup>28</sup> which ran all of AJS's 2010  
11 electioneering communications, totaling nearly \$4.6 million.

12 DeMaura maintained that AJS always remained an "issue advocacy" organization. His  
13 assertion is supported by information in the record until 2008. Up to this point, it appears that  
14 AJS appears primarily focused on raising public awareness about issues important to the  
15 organization.<sup>29</sup> For instance, in 2004 and 2005, AJS produced print advertisements and  
16 broadcasts about the so-called "death tax," and encouraged constituents to contact their

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<sup>24</sup> See *infra* n.53 and accompanying table.

<sup>25</sup> See DeMaura Dep. at 22:11-23:22, 95:13-18.

<sup>26</sup> See *id.* at 31:9.

<sup>27</sup> The same remained true the next year, except that the monthly \$13,250 payments were directed to Black Rock rather than the November Company.

<sup>28</sup> *Id.* at 179:11-20.

<sup>29</sup> See AJS Resp. at 3-4.

1 legislators in support of repealing this tax.<sup>30</sup> In 2006, AJS produced and disseminated television  
2 communications in several states seeking to generate opposition to legislation establishing an  
3 asbestos trust fund, which was then under consideration by the U.S. Senate.<sup>31</sup>

4 Beginning in 2008, however, AJS took advantage of changes in campaign finance law  
5 and began spending funds on communications focusing on federal candidates.<sup>32</sup> First, AJS aired  
6 its first electioneering communications a year after the Supreme Court invalidated the corporate  
7 and union ban on electioneering communications in *FEC v. Wisconsin Right to Life, Inc.*, 551  
8 U.S. 449 (2007).<sup>33</sup> Second, AJS aired its first independent expenditures shortly after the  
9 Supreme Court's 2010 decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), which  
10 invalidated the ban on corporate and union funding of communications that contain express  
11 advocacy.<sup>34</sup>

12 DeMaura acknowledged that the changing legal regime impacted AJS, saying that prior  
13 to 2008 running issue advocacy was "all that was allowed."<sup>35</sup> He also claimed, however, that the  
14 electioneering communications and independent expenditures AJS ran did not seem very  
15 different from the issue ads AJS had previously run, but that AJS's lawyers advised him to file  
16 independent expenditure reports to avoid problems with the Commission.<sup>36</sup> When asked later

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<sup>30</sup> See *id.*

<sup>31</sup> *Id.* at 4.

<sup>32</sup> See Factual & Legal Analysis at 3.

<sup>33</sup> See *id.*

<sup>34</sup> See *id.*

<sup>35</sup> DeMaura Dep. at 49:6-11.

<sup>36</sup> *Id.* at 55:3-56:4.

1 whether AJS funded independent expenditures in 2010 to influence the outcomes of elections in  
2 districts where AJS ran ads, DeMaura responded, "yes."<sup>37</sup>

3 DeMaura also acknowledged that during the 2010 election cycle AJS targeted vulnerable  
4 Democrats.<sup>38</sup> DeMaura stated that in election years "all that politicians care about is what's  
5 happening in districts of vulnerable members."<sup>39</sup> According to DeMaura, targeting these districts  
6 was important to get candidates' attention and shift the policy debate in Congress to one  
7 favorable to AJS.<sup>40</sup> AJS targeted both Senate and House races in 2010—when asked whether  
8 AJS was hoping to send a message to Washington, DC with the outcomes of some of these  
9 primary elections, DeMaura answered yes.<sup>41</sup>

10 For example, in 2010, Bill Halter, who was then the Lieutenant Governor of Arkansas,  
11 challenged incumbent Senator Blanche Lincoln for the Democratic nomination in Arkansas's  
12 U.S. Senate race.<sup>42</sup> AJS spent nearly \$1.4 million in electioneering communications criticizing  
13 Halter for previously moving jobs overseas in the ads "Thank You" and "Outsource."<sup>43</sup>  
14 DeMaura testified that the purpose of the ads was "not about changing Bill Halter's opinion" in  
15 that "[h]e was primarying Blanche Lincoln from the left;" rather, these ads were intended to send

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<sup>37</sup> See *id.* at 59:15-17.

<sup>38</sup> See *id.* at 223:17-224:2.

<sup>39</sup> *Id.* at 44:8-9.

<sup>40</sup> See *id.* at 63:20-67:6.

<sup>41</sup> *Id.* at 87:3-7.

<sup>42</sup> See *id.* at 69:16-21, 81:18-19.

<sup>43</sup> See AJS 2009-2010 Electioneering Communications, available at <https://www.fec.gov/data/committee/C30001135/?cycle=2010&tab=spending>; Factual & Legal Analysis at 16 & n.66, 17 & n.67.



1 a message to the Democratic caucus that a pro-business Democrat could win the primary.<sup>44</sup>  
2 When asked whether the only way such a message would actually be sent to the Democratic  
3 caucus was for Bill Halter to lose in the primary, DeMaura said, "I would say that's 90 percent  
4 true."<sup>45</sup>

5 Additionally, in Colorado's 2010 U.S. Senate race, AJS spent over \$1.5 million on ads  
6 that identified Ken Buck, Jane Norton, and Michael Bennett in the weeks before the primary  
7 elections.<sup>46</sup> Buck and Norton, who were not federal officeholders, were candidates for the  
8 Republican nomination, and the winner of the Republican Primary would face incumbent  
9 Bennett in the general election.<sup>47</sup> AJS spent \$822,730.90 on the ads "Talk is Cheap" and  
10 "Brink," both of which criticized Norton on government spending and high taxes, and \$287,900  
11 in criticizing Bennett with "Talk is Cheap."<sup>48</sup> AJS spent \$441,496.70 on the ad "Back to Work,"  
12 which favorably contrasted Buck for supporting lower taxes and smaller government.<sup>49</sup> Notably,  
13 neither Buck nor Norton could have impacted any legislation because they were not  
14 officeholders. DeMaura acknowledged the ads that identified Norton and Bennett were

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<sup>44</sup> DeMaura Dep. at 81:17-84:4.

<sup>45</sup> *Id.* at 82:4-10.

<sup>46</sup> See AJS's 2009-2010 Electioneering Communications, *available at* <https://www.fec.gov/data/committee/C30001135/?cycle=2010&tab=spending>; Factual & Legal Analysis at 17 & nn. 68-69, 18 & n.71.

<sup>47</sup> See DeMaura Deposition at 87:8-88:8.

<sup>48</sup> See AJS's 2009-2010 Electioneering Communications, *available at* <https://www.fec.gov/data/committee/C30001135/?cycle=2010&tab=spending>; Factual & Legal Analysis at 17 & n.69, 18 & n.71.

<sup>49</sup> Factual & Legal Analysis at 17 & n.68.

1 "critical,"<sup>50</sup> that Norton's philosophy "was much more aligned with . . . Bennett,"<sup>51</sup> and that  
2 Buck "would have taken things in a far more preferential way than Jane Norton would have."<sup>52</sup>

3 AJS's finances confirm that from at least 2008—when AJS was first legally permitted to  
4 run electioneering communications—until it went essentially defunct sometime after 2014, AJS  
5 tended to raise and spend the overwhelming majority of its funds in election years. The charts  
6 below detail the organization's surge in both fundraising and spending in the period leading up to  
7 an election.

8 **Fundraising and Spending by Fiscal Year**

<b>Fiscal Year</b>	<b>Dates</b>	<b>Funds Raised</b>	<b>Funds Spent</b>	<b>Election Year<sup>53</sup></b>
2007	11/1/2007-10/31/2008	\$12,273,165	\$12,343,781	Y (2008)
2008	11/1/2008-10/31/2009	\$3,625,918	\$3,490,547	N
2009	11/1/2009-10/31/2010	\$12,411,684	\$12,417,809	Y (2010)
2010	11/1/2010-10/31/2011	\$2,508,025	\$2,481,855	N
2011	11/1/2011-10/31/2012	\$51,030,033	\$48,420,068	Y (2012)
2012	11/1/2012-10/31/2013	\$817,975	\$2,889,901	N

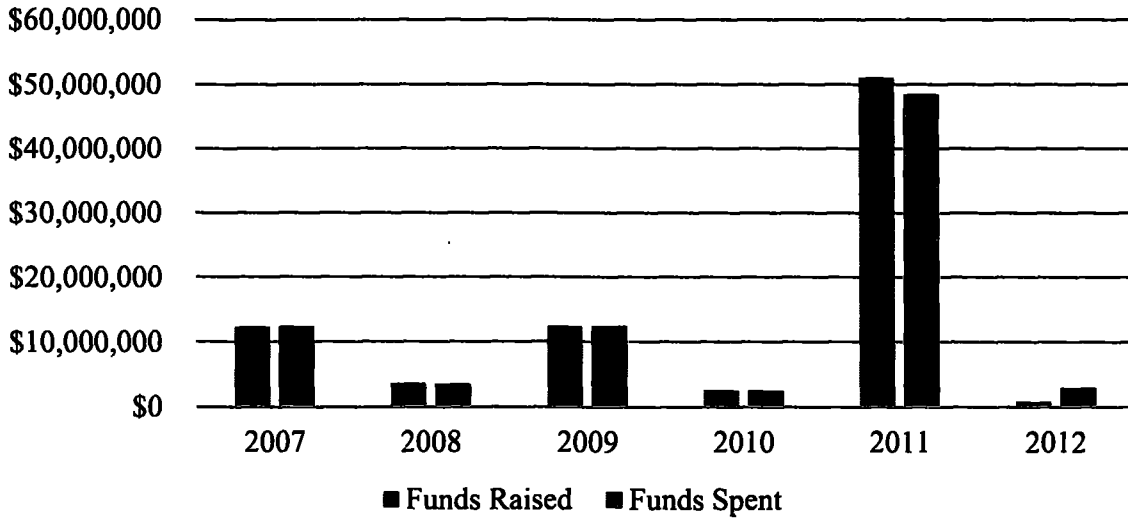
<sup>50</sup> DeMaura Dep. at 89:21-90:1.

<sup>51</sup> *Id.* at 90:5-7.

<sup>52</sup> *Id.* at 88:10-15.

<sup>53</sup> Because federal general elections are held in early November, at the very beginning of the fiscal year, we considered an "election year" to be the fiscal year immediately preceding such an election because that is when we would expect to see the vast majority of fundraising and spending.

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As noted above, DeMaura repeatedly testified that the organization's focus on elections was intentional. When asked whether it was necessary to mention federal candidates in what were purportedly issue ads, DeMaura replied "it doesn't get anybody's attention unless you're doing that . . . . These trade associations run what I would call worthless[,] hundreds of millions of dollars of worthless TV ads . . . nobody pays attention to it. Because you have to get people to pay attention. That was kind of the whole point of the AJS stuff is you have to call out federal candidates."<sup>54</sup>

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Promotional materials for AJS also echo this sentiment. For example, an AJS pamphlet sent to prospective donors notes that AJS is active in campaign season because "[q]uite frankly, campaign season is when the majority of Americans are debating and focused on public policy. 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."<sup>55</sup>

<sup>54</sup> DeMaura Dep. at 64:4-18.

<sup>55</sup> See AJS Resp., Subpoena Req. No. 7 at 2, *AJS Background Information*.

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1 In sum, our investigation confirmed that AJS spent the vast majority of its funds in 2010  
2 on federal campaign activity. According to its IRS filings, AJS raised and spent roughly \$12.4  
3 million in the time period between November 1, 2009 and October 31, 2010 (immediately  
4 preceding the 2010 general election).<sup>56</sup> Within that \$12.4 million, AJS reported spending  
5 roughly \$4.9 million on independent expenditures and \$4.5 million on electioneering  
6 communications related to the 2010 election.<sup>57</sup> In addition, AJS apparently spent nearly \$1.1  
7 million that year on various administrative costs, including employee compensation,  
8 management and legal fees, travel, and insurance.<sup>58</sup> AJS calculated that it spent only  
9 \$11,330,889 on actual program expenses.<sup>59</sup> Thus, AJS's spending on electioneering  
10 communications and independent expenditures accounted for over 83% of its non-administrative  
11 spending in that year (\$9,465,365/\$11,330,889).

12 AJS spent less than \$1.9 million on 2010 program expenses that it did not report to the  
13 Commission. Evidence obtained in our investigation suggests that at least a substantial portion  
14 of those funds—and possibly nearly all of them—were spent on unreported advocacy related to

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<sup>56</sup> See AJS, Form 990 at 1 (FY 2009); see also Factual & Legal Analysis at 3-4.

<sup>57</sup> See Factual & Legal Analysis at 3, 11.

<sup>58</sup> See AJS, Form 990 (FY 2009) at 10.

<sup>59</sup> *Id.* at 2.

1 federal elections.<sup>60</sup> Because AJS did not register as a political committee in 2010, it only  
2 reported communications that fell strictly within the Commission's definition of "independent  
3 expenditure" and "electioneering communication." However, Crossroads Media provided  
4 records of AJS spending on advertisements that mentioned federal candidates,<sup>61</sup> but for which  
5 there does not appear to be any corresponding independent expenditure or electioneering  
6 communication report in the Commission database. Likewise, Spectrum Marketing turned over  
7 invoices for over \$178,000 for mailers praising 2010 Colorado Senate candidate Ken Buck, as  
8 well as over \$61,000 for mailers criticizing Buck's primary opponent Jane Norton—  
9 communications that did not meet the definition of either an independent expenditure or an  
10 electioneering communication.<sup>62</sup> These mailers, however, contained handwritten notations  
11 stating that the mailers were targeted to "select, registered CO voters."<sup>63</sup> At his deposition,  
12 DeMaura testified that he thought AJS had indeed run some advertisements mentioning federal

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<sup>60</sup> Unfortunately, we were not able to obtain sufficient evidence to match AJS's spending and expenditures exactly. DeMaura told us that by 2018, he had lost access to the accounting software he used to control AJS's finances. Most of AJS's vendors were likewise unable to produce comprehensive records of invoices dating back to 2010-2012. Furthermore, many invoices we received did not match up with AJS bank records. For example, AJS reported paying Crossroads Media \$980,256.00 for an ad that aired on October 20, 2010. Meanwhile, AJS bank records show a payment to Crossroads of \$884,405 to Crossroads Media on October 19, 2010, while Crossroads Media gave us records of a payment from AJS for \$962,256 for an ad that began airing October 20, 2010. Similarly, AJS reported a number of ads in July that account for roughly \$1.2 million in spending. AJS bank records show a number of payments to Crossroads in July that add up to roughly \$1.2 million, but neither the dates nor the exact amounts match perfectly.

<sup>61</sup> See Letter from Patricia Heck, President, Crossroads Media Production, to Jin Lee, Attorney, FEC (Apr. 25, 2018) (enclosing spreadsheet listing communications).

<sup>62</sup> See Letter from Chuck McGee, Vice President, Political & Corporate Communications, Spectrum Marketing Companies, to Shanna Reulbach, Attorney, FEC (May 7, 2018) (enclosing invoices and print samples).

<sup>63</sup> See *id.*, Enclosure of Mailers.

1 candidates in the 2010 cycle that AJS was not required to report.<sup>64</sup> Furthermore, DeMaura could  
2 not recall *any* significant media spending in 2010 that did not mention federal candidates.<sup>65</sup>

3 By 2012, however, AJS's political strategy changed once again. While AJS spent funds  
4 on communications referencing federal candidates — including \$15 million on independent  
5 expenditures opposing the re-election of President Barack Obama and at least another \$27,000  
6 on unreported mailers attacking Obama's economic policies, the proportion of AJS's spending  
7 on federal elections declined to less than a third of the group's overall expenses that year.<sup>66</sup>  
8 Further, AJS reported no electioneering communications in 2012.

9 Instead, in 2012, AJS raised and spent the majority of its funds on *state* rather than  
10 federal activity. In particular, DeMaura testified that in 2012, he shifted his focus to two ballot  
11 initiatives in California.<sup>67</sup> When asked why AJS spent no funds on electioneering  
12 communications during that time, DeMaura stated that in addition to focusing on the California  
13 projects, he wanted to do "less FEC type work, . . . I wanted to not do things that required as  
14 much reporting, . . . I just felt like I spent all my time on compliance and litigation and I was like,  
15 if I'm spending all my time doing this than [*sic*] we can't be effective."<sup>68</sup> He added that by 2012  
16 he was "sick of filing a thousand reports and dealing with all the hassle and rigmarole."<sup>69</sup>  
17 DeMaura's frustration with compliance costs coincided with two significant compliance events:

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<sup>64</sup> See DeMaura Dep. at 91:17-92:10.

<sup>65</sup> See *id.* at 109:19-110:2.

<sup>66</sup> This shift appears to have been sudden. In AJS's internal planning documents, the organization discusses "gearing up for November election" and "Teams highly focused on Presidential race." See AJS Resp., Subpoena Req. No. 7 at 79, *Cut. Limit. Prosper, A Local Approach to a National Problem*.

<sup>67</sup> DeMaura Dep. at 123:17-21, 140:1-6.

<sup>68</sup> *Id.* at 124:7-19.

<sup>69</sup> *Id.* at 125:3-4.

1 first, the filing of the original Complaint in this matter on March 8, 2012; and second, the district  
2 court's decision in *Van Hollen v. FEC*, 851 F. Supp. 2d 69 (D.D.C. 2012), which temporarily  
3 required persons who fund electioneering communications to disclose their contributors.<sup>70</sup>  
4 Although AJS ran independent expenditures in 2012, it did not run any electioneering  
5 communications—DeMaura testified that this decision was based on the advice of his attorneys  
6 that it would be “safer from a legal compliance standpoint” to run independent expenditures.<sup>71</sup>

7 DeMaura testified that he first learned of the California project after being introduced by  
8 David Carney to Jeff Miller and Tony Russo, and he committed AJS to it in early 2012.<sup>72</sup> AJS  
9 then hired Miller of Capitol Consulting & Strategy and Russo of California Policy Advisors to  
10 help with the ballot measures. Collectively, they raised approximately \$29 million for that  
11 campaign,<sup>73</sup> with the intention of running a series of major media spots.<sup>74</sup> This fundraising for  
12 the California initiative vastly surpassed AJS fundraising for 2010, which was less than \$13  
13 million total.

14 Ultimately, however, AJS never ran the communications as planned. Instead, AJS  
15 donated over \$24.5 million in funds to the Center to Protect Patient Rights (“CPPR”) so that

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<sup>70</sup> This decision was later reversed by the D.C. Circuit. *See* 694 F.3d 108 (D.C. Cir. 2012) (per curiam). After reversal and remand to the District Court, the District Court invalidated the Commission regulation at 11 C.F.R. § 104.20(c)(9), which only required disclosure when the donations were made for the purpose of furthering the electioneering communications, and on appeal, the D.C. Circuit again reversed the District Court. 811 F.3d 486 (2016).

<sup>71</sup> DeMaura Dep. at 125:15-126:5.

<sup>72</sup> *Id.* at 141:7-142:5.

<sup>73</sup> *See* Letter from Anthony Russo, Russo McGarty + Associates, to Derek Ross and Shanna Reulbach, Attorneys, FEC (Apr. 20, 2018).

<sup>74</sup> *See* DeMaura Dep. at 141:14-22.

1 CPPR could run the ads.<sup>75</sup> DeMaura explained that AJS gave the funds to CPPR when he  
2 learned that California law would have forced AJS to register with the FPPC and disclose its  
3 donors if AJS itself spent the funds on the ballot initiatives.<sup>76</sup>

4 In fact, donor disclosure was a major factor in how and where AJS decided to conduct its  
5 activities. In promotional materials used to solicit donations, AJS informed potential donors that  
6 it did not disclose its membership.<sup>77</sup> When asked whether donor disclosure in general was a  
7 concern for AJS, DeMaura replied, “[a]bsolutely, yeah.”<sup>78</sup> And when asked whether donor  
8 disclosure could drive where AJS worked throughout the country, DeMaura again responded,  
9 “[a]bsolutely. Yeah, absolutely.”<sup>79</sup> Further, DeMaura admitted that AJS could run independent  
10 expenditures and electioneering communications nationally as long as they were not earmarked  
11 for a particular advertisement.<sup>80</sup>

12 After 2012, AJS was no longer reporting any federal activity and the organization  
13 gradually stopped raising or spending significant amounts of money. By 2017, AJS formally  
14 closed its bank account. AJS was stripped of its tax-exempt status on March 15, 2018, for failure  
15 to file the required Form 990s for three consecutive years.<sup>81</sup>

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<sup>75</sup> *Id.* at 213:2-9 (“Q: So with the \$24 million that you gave to CPPR, it was money that you had planned to spend, but you gave to CPPR because you didn’t want to go through— A: Correct. Q: –having to comply with the California election laws? A: Correct, yeah, absolutely.”); *see also* AJS Written Resp., Subpoena Req. No. 5.

<sup>76</sup> DeMaura Dep. at 148:13-152:14; *see id.* at 213:2-9.

<sup>77</sup> *See* AJS Resp., Subpoena Req. No. 7 at 2, *AJS Background Information*.

<sup>78</sup> DeMaura Dep. at 209:1-4.

<sup>79</sup> *Id.* at 210:14-18.

<sup>80</sup> *Id.* at 210:19-22 (“Q: But you could do IEs and ECs nationally as long as they weren’t sort of earmarked for those ads, right? A: Correct, yeah.”).

<sup>81</sup> *See id.* at 240:9-11; *see also* IRS, Tax-Exempt Organization Search: Americans for Job Security (last visited Nov. 27, 2018).



1   **V.    ANALYSIS**

2           The evidence obtained in the course of the investigation — including confirmation that  
3 the vast majority of AJS's 2010 spending was for election-related activity — supports the  
4 Commission's earlier conclusion that AJS violated 52 U.S.C. §§ 30102, 30103, and 30104 by  
5 failing to organize, register, and report with the Commission as a political committee in 2010.

6           Political committees must register with the Commission and periodically disclose their  
7 receipts and disbursements.<sup>82</sup> The Act and Commission regulations define a "political  
8 committee" as "any committee, club, association or other group of persons which receives  
9 contributions aggregating in excess of \$1,000 during a calendar year or which makes  
10 expenditures aggregating in excess of \$1,000 during a calendar year."<sup>83</sup> In *Buckley v. Valeo*, the  
11 Supreme Court held that defining political committee status "only in terms of [the] amount of  
12 annual 'contributions' and 'expenditures'" might be overbroad, reaching "groups engaged purely  
13 in issue discussion."<sup>84</sup> To cure that infirmity, the Court concluded that the term "political  
14 committee" "need only encompass organizations that are under the control of a candidate or the  
15 *major purpose of which is the nomination or election of a candidate*."<sup>85</sup> Accordingly, under the  
16 statute as thus construed, an organization that is not controlled by a candidate must register as a  
17 political committee only if (1) it crosses the \$1,000 threshold and (2) it has as its "major  
18 purpose" the nomination or election of federal candidates.

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<sup>82</sup> 52 U.S.C. §§ 30102, 30103, 30104.

<sup>83</sup> 52 U.S.C. § 30101(4)(A); 11 C.F.R. § 100.5.

<sup>84</sup> 424 U.S. 1, 79 (1976).

<sup>85</sup> *Id.* (emphasis added).

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1           **A. Statutory Threshold**

2           It is undisputed that AJS met the statutory threshold in both 2010 and 2012. In 2010,  
3           AJS reported over \$4.9 million in independent expenditures, and in 2012, AJS reported over \$15  
4           million in independent expenditures. Because independent expenditures, by definition, expressly  
5           advocate for the election or defeat of a clearly identified federal candidate,<sup>86</sup> AJS met the  
6           statutory threshold for political committee status in both of these years.

7           **B. Major Purpose**

8           The record also demonstrates that AJS had as its major purpose the nomination or  
9           election of federal candidates by 2010.<sup>87</sup> Under the Commission's case-by-case approach to the  
10          major purpose inquiry, the Commission considers the organization's "overall conduct," including  
11          its disbursements, activities, and statements.<sup>88</sup> In assessing an organization's major purpose, the  
12          Commission has previously considered how much the organization spends for "federal campaign  
13          activity" against "activities that [a]re not campaign related."<sup>89</sup> As noted above, our investigation  
14          found virtually no non-federal spending in 2010 other than AJS's operational expenses.

15          The Commission previously found reason to believe AJS's major purpose had become  
16          the nomination or election of federal candidates by 2010 based on the fact that at least some of

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<sup>86</sup> See 52 U.S.C. § 30101(17). An independent expenditure is an expenditure that expressly advocates the election or defeat of a clearly identified federal candidate and that is not made in concert or cooperation with, or at the request or suggestion of, the candidate or his or her committee or agent, or a political party committee or its agent. *Id.*

<sup>87</sup> As the District Court noted in remanding this case to the Commission, the Supreme Court has allowed for the possibility that an organization's purpose can change over time such that it becomes a political committee. See *CREW v. FEC*, 209 F. Supp. 3d 77, 94 (D.D.C. 2016) (citing *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 262 (1986)).

<sup>88</sup> Political Committee Status, 72 Fed Reg. 5,595, 5,597 (Feb. 7, 2007) (Supplemental Explanation & Justification) ("Supplemental E&J").

<sup>89</sup> *Id.* at 5,597, 5,605.

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1 its electioneering communications for that year served no purpose other than to persuade voters  
2 to elect a particular candidate.<sup>90</sup> The Commission did not analyze any of AJS's other reported  
3 electioneering communications, but the investigation confirmed that these remaining ads were  
4 also indicative of federal campaign activity.

5 As reflected in his deposition testimony described above, DeMaura admitted that AJS's  
6 communications, including its electioneering communications, were designed to influence the  
7 elections and that the outcomes of elections mattered. With regard to the 2010 Colorado Senate  
8 primary, for example, DeMaura testified that Ken Buck was an example of a candidate who  
9 could shift the debate in Congress,<sup>91</sup> and that AJS preferred Ken Buck as a candidate over his  
10 opponent, Jane Norton.<sup>92</sup> The Commission previously found that AJS's electioneering  
11 communications "Back to Work" (supporting Buck) and "Talk is Cheap" (opposing Norton)  
12 were indicative of a major purpose to elect or nominate a federal candidate,<sup>93</sup> and we see no basis  
13 for excluding "Brink," which sharply criticized Norton's record as lieutenant governor at a time  
14 when she was running for U.S. Senate. In addition, AJS did not report well over \$200,000 in

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<sup>90</sup> See Factual & Legal Analysis at 12-15.

<sup>91</sup> DeMaura Dep. at 70:17-71:13 ("Ken Buck was running against a republican in a primary there . . . . So, each of those are examples of where you're trying to shift the discourse, right. . . . So, if a progressive democrat beats a probusiness democratic senator, I think it sends a message to democrats in the senate. That you have to move to the left and you can support probusiness issues so that's why we thought it was so important to engage there. And, you know, I'd [say] same on the Colorado thing that, you know, kind of moderate republican. If them overcoming a kind of amorphous glee conservative. Republican sends a message to congress, like hey, this is the direction we're heading. You should shift to the middle because that's what's winning. So that's kind of how -- we were concerned about, you know, that message being sent.").

<sup>92</sup> See *id.* at 88:10-15.

<sup>93</sup> Factual & Legal Analysis at 12-14.

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1 mailers that supported Buck or criticized Norton, and which were sent to “select, registered CO  
2 voters.”<sup>94</sup>

3 Likewise, DeMaura testified that AJS ran ads against Bill Halter (“Thank You” and  
4 “Outsource”) because he was challenging incumbent Senator Blanche Lincoln from the left.<sup>95</sup>  
5 According to DeMaura, AJS wanted to ensure Lincoln did not lose her primary because it would  
6 have caused the Democratic caucus to shift toward more liberal policies: if “Blanche Lincoln the  
7 most pro[-]business [D]emocrat were to lose because of her pro[-]business stance, they would all  
8 run to the left as fast as possible.”<sup>96</sup> Moreover, the ads criticized Halter for outsourcing jobs  
9 while in private practice, which does not appear to serve any purpose other than encouraging  
10 viewers to vote against him.<sup>97</sup>

11 AJS’s remaining electioneering communications, “Earmarks,” “Instrumental,” and  
12 “Ants,” targeted federal candidates for previous, rather than pending, legislative actions. In  
13 “Earmarks,” AJS criticized Billy Long, then a candidate for U.S. House of Representatives, for  
14 accepting earmarks while in a prior position. “Instrumental” criticized then-Congressman Harry  
15 Teague for supporting a cap-and-trade bill that had already passed.<sup>98</sup> Likewise, “Ants” criticized  
16 Senator Joe Manchin for supporting a stimulus package that had also already passed. In all

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<sup>94</sup> See *supra* notes 62-63.

<sup>95</sup> See DeMaura Dep. at 81:11-82:18.

<sup>96</sup> *Id.* at 71:18-21.

<sup>97</sup> DeMaura claimed in his deposition that the purpose of these ads was to highlight “the hypocrisy he held in some of his policies. He was talking about companies that ship jobs overseas at the time on the campaign trail. And so, I think, you know, this certainly highlighted . . . hey well wait a second, like that issue is not so simple.” *Id.* at 85:11-18. We do not believe this is a tenable interpretation of the ads, which nowhere mention Halter’s position on outsourcing. Instead, they merely criticize him for not creating jobs in Arkansas. In fact, “Outsource” concludes with the message “Call Bill Halter. Tell him to support job creation here in America.” This message directly contradicts DeMaura’s explanation that the issue of outsourcing jobs is “not so simple.” Factual & Legal Analysis at 17.

<sup>98</sup> *Id.* at 17-19.

1 cases, the ads were run immediately prior to a competitive election and could not reasonably be  
2 construed as asking the candidates to change their positions on issues long-since decided.  
3 Instead, these ads were intended to influence the outcome of the elections.

4 In *CREW v. FEC*, 299 F. Supp. 3d 83, 93 (D.D.C. 2018), the court held that “to the extent  
5 that the Commission considers an entity’s spending in assessing its major purpose, it must  
6 presumptively treat spending on electioneering ads as indicating a purpose of nominating or  
7 electing a candidate.” Assuming that this framework applies, there is no rationale for excluding  
8 any of AJS’s 2010 electioneering communications since none of them can overcome of having  
9 an election-related purpose. And setting aside the framework completely, we conclude, as  
10 summarized above, that all of AJS’s reported electioneering communications clearly support or  
11 oppose a particular federal candidate, and all appear intended to nominate, elect, or defeat that  
12 candidate.

13 Furthermore, although we lack concrete evidence about the small percentage of AJS  
14 spending that was not independent expenditures, electioneering communications, or  
15 administrative expenses, the available evidence—for example, over \$200,000 in unreported  
16 mailers supporting Ken Buck’s Senate candidacy—suggests it was neither the type nor  
17 magnitude of activity that would show AJS had any purpose other than the election or  
18 nomination of federal candidates.

19 DeMaura maintained in his deposition that AJS was always an issue advocacy group, but  
20 he was clear that, at least in 2010, AJS deliberately sought to focus its resources on federal  
21 elections—particularly competitive federal elections.<sup>99</sup> The reason, according to DeMaura, was

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<sup>99</sup> Promotional materials for AJS also state that the organization focuses its advertising on “hotly contested political campaigns.” See AJS Resp., Subpoena Req. No. 7 at 2, *AJS Background Information*.

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1 to get the attention of members of Congress. As DeMaura described it, “all that politicians care  
2 about is what’s happening in districts of vulnerable members.”<sup>100</sup> When pressed, DeMaura  
3 conceded that the outcome of these competitive elections tended to matter to AJS.<sup>101</sup> There is no  
4 basis in *Buckley* or the Act to distinguish between federal election advocacy that is intended to  
5 further certain issues and federal election advocacy in the abstract—both indicate a major  
6 purpose to nominate or elect a federal candidate. Once an organization satisfies the statutory  
7 threshold at 30101(4)(A) and it has as its major purpose the nomination or election of federal  
8 candidates, it becomes a political committee under the Act.

9 We conclude, however, that by 2012, although AJS was spending *more* money on federal  
10 elections (well over \$15 million on independent expenditures in that year—more than the  
11 organization’s entire 2010 budget), the *proportion* of spending on federal elections declined. In  
12 his deposition, DeMaura discussed a deliberate move away from activities that required  
13 Commission reporting, saying “after 2010, we wanted to do less of the FEC-centric work and  
14 more non-FEC work. And so we tried to make a shift in that direction.”<sup>102</sup> All evidence  
15 obtained in our investigation—including AJS bank records and documents obtained from the  
16 FPPC—confirm that AJS raised and spent the majority of its 2012 funds in connection with the  
17 California ballot initiatives. Nonetheless, once AJS became a political committee, it had an

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<sup>100</sup> *Id.* at 44:8-10.

<sup>101</sup> *See id.* at 65:18-67:2.

<sup>102</sup> *Id.* at 123:22-124:3.

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1 obligation to file a Statement of Organization and continue reporting as set forth in 52 U.S.C.

2 § 30104 until it terminated.<sup>103</sup>

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**VII. RECOMMENDATIONS**

1. Enter into pre-probable cause conciliation with Americans for Job Security;
2. Approve the attached Conciliation Agreement; and
3. Approve the appropriate letter.

Lisa J. Stevenson  
Acting General Counsel

Date: 2/15/19

Kathleen M. Guith  
Kathleen M. Guith  
Associate General Counsel

Jin Lee  
Jin Lee  
Acting Assistant General Counsel

Amanda Andrade by Jd  
Amanda Andrade  
Attorney

Jonathan A. Peterson  
Jonathan Peterson  
Attorney