

FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL'S REPORT

MUR: 7860

DATE COMPLAINT FILED: Nov. 20, 2020

DATE OF NOTIFICATIONS: Nov. 30, 2020

DATE OF LAST RESPONSE: Jan. 26, 2021

DATE ACTIVATED: April 29, 2021

SOL EXPIRATION: Oct. 1, 2018 – Oct. 1, 2021

ELECTION CYCLE: 2014, 2016, 2018

COMPLAINANTS:

Marc Kruman

Citizens for Responsibility and Ethics in
Washington**RESPONDENTS:**

Jobs and Progress Fund, Inc.

Vaughn Church

Thomas Norris

Mark Miller

**RELEVANT STATUTES
AND REGULATIONS:**

52 U.S.C. § 30102

52 U.S.C. § 30103

52 U.S.C. § 30104

11 C.F.R. § 100.5

11 C.F.R. § 100.22

INTERNAL REPORTS CHECKED: Disclosure Reports**FEDERAL AGENCIES CHECKED:** None**I. INTRODUCTION**

The Complaint alleges that Jobs and Progress Fund, Inc. (“JPF”), a 501(c)(4) organization, became a political committee “no later than 2018” and consequently violated the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations by failing to register as a political committee and file appropriate reports. The Complaint also alleges that JPF’s present and former officers, Vaughn Church, Thomas Norris, and Mark Miller, violated the Act in their individual capacities by failing to register JPF as a political committee

1 and report as a political committee.¹ The Complaint, analyzing JPF's Internal Revenue Service
 2 ("IRS") Form 990 filings,² contends that JPF either became a political committee in its 2013
 3 fiscal year (October 1, 2013-September 30, 2014) or in its 2017 fiscal year (October 1, 2017-
 4 September 30, 2018) because in those two years, more than 50% of its funds were spent making
 5 contributions to federal independent expenditure-only political committees ("IEOPCs").³
 6 Respondents contend that the facts alleged in the Complaint are legally insufficient to meet the
 7 political committee statutory threshold and alternatively contend that the matter should be
 8 dismissed as time barred.

9 For the reasons set forth below, we recommend that the Commission exercise its
 10 prosecutorial discretion and dismiss the allegations that JPF violated 52 U.S.C. §§ 30102, 30103,
 11 and 30104 by failing to register and report as a political committee.⁴ Although the record
 12 indicates that JPF may have become a political committee between 2013 and 2014, this activity
 13 occurred more than five years ago, limiting the Commission's remedies, and the factual record is
 14 less developed concerning its activity in subsequent years. Finally, because the Complaint does
 15 not appear to allege any cognizable violations against the individual respondents, we recommend
 16 that the Commission find no reason to believe that Church, Norris, and Miller violated the Act's
 17 registration and reporting provisions.

¹ Compl. ¶¶ 11-13 (Nov. 20, 2020). The Complaint notes that Vaughn Church is JPF's sole director and was listed as such beginning in FY 2017. *Id.* ¶ 11. Thomas Norris was reported as JPF's Chairman and President for the fiscal reporting period that covered Oct. 1, 2012 - Sept. 30, 2014 and is the treasurer for several Super PACs to which JPF made contributions. *Id.* ¶ 12. Mark Miller was JPF's treasurer for the fiscal year covering Oct. 1, 2013 - Sept. 30, 2014. *Id.* ¶ 13.

² All references to "fiscal year" in this report refer to JPF's fiscal year, used in its tax filings, which runs from October 1 to September 30.

³ Compl. ¶¶ 2-3.

⁴ *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

II. FACTUAL BACKGROUND

JPF was initially incorporated in Ohio in 2011 as Ohio First for a Better Government, Inc., but changed its name to JPF in 2012.⁵ JPF is recognized by the IRS as a 501(c)(4) tax exempt organization.⁶ According to its IRS filings, JPF's stated purpose is "to promote the common good and general welfare through education and legislative participation on public policy matters that significantly impact the economy, job growth and retention, and employment, and that are designed to promote fiscal responsibility."⁷

During its 2012 fiscal year, Mark Miller served as JPF's President, and during its 2013 fiscal year, served as its treasurer.⁸ Thomas Norris served as JPF's chairman during its 2012 fiscal year and JPF's Director and President during its 2013 fiscal year.⁹ In fiscal year 2017, Vaughn Church was listed as JPF's sole officer, and served as its director.¹⁰

⁵ Ohio Secretary of State, Business Details and Filing Search, <https://businesssearch.ohiosos.gov/> (search for "Jobs and Progress Fund") (last visited July 7, 2021).

⁶ IRS Tax Exempt Organization Search, <https://apps.irs.gov/app/eos/allSearch> (search for "Jobs and Progress Fund") (last visited Jul. 7, 2021) [hereinafter JPF IRS Data].

⁷ Form 990-EZ, 2015 Tax Return of Jobs and Progress Fund, Inc. (Aug. 14, 2017) [hereinafter JPF 2015 Tax Return].

⁸ Compl. at 4 (citing Form 990, 2012 Tax Return of Jobs and Progress Fund (Mar. 11, 2014), https://projects.propublica.org/nonprofits/display_990/275401086/2014_03_EO%2F27-5401086_990O_201309 (last visited Jul. 8, 2021) [hereinafter JPF 2012 Tax Return]; Form 990, 2013 Tax Return of Jobs and Progress Fund (Aug. 15, 2015) https://projects.propublica.org/nonprofits/display_990/275401086/2015_10_EO%2F27-5401086_990O_201409 (last visited July 8, 2021) [hereinafter JPF 2013 Tax Return]). Miller also served as JPF's director during its 2014 and 2015 fiscal years. *See* Form 990-EZ, 2014 Tax Return of Jobs and Progress Fund (Sept. 19, 2016); https://projects.propublica.org/nonprofits/display_990/275401086/2016_09_EO%2F27-5401086_990EO_201509 (last visited Aug. 23, 2021); Form 990-EZ, 2015 Tax Return of Jobs and Progress Fund (Aug. 21, 2017), https://apps.irs.gov/pub/epostcard/cor/275401086_201609_990EO_2017082814680091.pdf. In Fiscal Year 2016, JPF had limited activity and filed a Form 990-N (an "e-postcard") with the IRS listing Miller as a principal officer. *See* JPF IRS Data.

⁹ *See* JPF 2012 Tax Return; JPF 2013 Tax Return.

¹⁰ Form 990, 2017 Tax Return of Jobs and Progress Fund (Aug. 15, 2019) [hereinafter JPF 2017 Tax Return].

During its 2013 fiscal year, JPF reported in its tax return spending a total of \$3,217, 826, \$1,815,000 of which it identified to the IRS as “political expenditures.”¹¹ These political expenditures consisted of making contributions to two IEOPCs: Citizens for a Working America PAC (\$1,735,000) and Hometown Freedom Action Network (\$80,000).¹² JPF did not report making any independent expenditures. Between its 2014 and 2016 fiscal years, JPF did not make any political expenditures and had limited activity.¹³

During its 2017 fiscal year, JPF reported to the IRS that it had spent a total of \$297,403, of which \$175,000 was for identified as “political expenditures.” In addition to the political activity acknowledged on the tax return, according to FEC disclosure reports, JPF also contributed \$18,500 to Make Cincinnati Better, a federally registered IEOPC.¹⁴

Although JPF's IRS filing for its 2018 fiscal year is not publicly available, based on its Response, it appears to have had limited activity during that fiscal year.¹⁵ JPF continued to make contributions to IEOPCs in 2020, spending a total of \$266,000 according to disclosure reports filed by the recipient committees.¹⁶ The vast majority of these contributions, \$260,000, were made to Fighting for Kansas PAC, which also reported making independent expenditures during

¹¹ JPF 2013 Tax Return at Schedule C, Part I-A, line 2, Part IV.

¹² *Id.* Citizens for a Working America PAC's FEC disclosure reports indicate that JPF contributed an additional \$10,000, which was not reflected on JPF's 2013 Tax Return. *See* Compl. ¶ 25; *see also* *FEC Individual Contributions: Filtered Results*, FEC.GOV, https://www.fec.gov/data/receipts/individual-contributions/?contributor_name=Jobs+and+Progress+Fund (last visited July 20, 2021) [hereinafter JPF Contribution History] (reflecting results for contributions from “Jobs and Progress Fund”). As such, the Complaint contends that this contribution should also be included in analyses of JPF's activity. Compl. ¶ 25.

¹³ Compl. ¶ 26; JPF, Church, Norris, & Miller Joint Resp. at 6 (Jan. 26, 2021) (“Resp.”).

¹⁴ Compl. ¶ 15; Make Cincinnati Better, 2017 Year-End Report at 6 (Jan. 25, 2018).

¹⁵ *See* Resp. at 6 (reporting \$264,030 of expenses and no political expenses). The Response does not address fiscal year 2019, which would have covered JPF's activity until September 30, 2020.

¹⁶ JPF Contribution History.

the relevant time period.¹⁷ JPF's tax returns for the relevant time period for these expenditures are not yet available, so it is not known what percentage of JPF's overall spending went toward these contributions. JPF filed dissolution papers with the Ohio Secretary of State on or about February 26, 2021, and its dissolution appears to have been approved by the Ohio Secretary of State and became effective March 4, 2021.¹⁸ In that filing, JPF included several board documents, which stated that JPF was seeking to terminate and wind-down its affairs and had amended its articles of incorporation to terminate.¹⁹

The Complaint alleges that "despite its heavy political spending, JPF never registered as a political committee with the FEC and failed and continues to fail to file reports disclosing its contributors."²⁰ The Complaint notes JPF's contributions to various IEPOCs and contends that the recipient organization's reporting of JPF's "gifts, deposits, or distributions" as contributions, as that term is defined under the Act, serves as support for the conclusion that JPF's payments were intended to influence elections.²¹ The Complaint also contends that the recipient IEOPCs made independent expenditures in connection with federal elections during the relevant time periods.²² According to the Complaint, between October 1, 2013, and September 30, 2014, JPF's political spending represented 56.7% of its total aggregate spending,²³ and between October 1, 2017 and September 30, 2018, JPF's political spending represented 65% of its total

¹⁷ See Fighting for Kansas PAC, 2020 October Quarterly Report (Oct. 15, 2020) (reporting all contributions as being from JPF and reporting independent expenditures that were made in connection with Congressional elections in Kansas).

¹⁸ Ohio Sec'y of State, Dissolution of Jobs and Progress Fund (Mar. 11, 2021), <https://bizimage.ohiosos.gov/api/image/pdf/202106301942>.

¹⁹ *Id.* at 12-13.

²⁰ Compl. ¶ 3.

²¹ *Id.* ¶¶ 16, 24, 33.

²² *Id.* ¶¶ 18, 25.

²³ *Id.* ¶ 25.

1 spending.²⁴ Based on these conclusions, the Complaint further alleges that Church, Norris, and
2 Miller should be held liable in their official and personal capacities for JPF's purported failure to
3 register and report as a political committee and contends that their violations were knowing and
4 willful.²⁵

5 In a joint response, Respondents deny the allegations, and contend that because JPF's
6 activity consisted solely of "making contributions to several other organizations, some of which
7 were registered federal political committees, some of which, in turn did federal independent
8 expenditures," the available information is insufficient as a matter of law for a finding that JPF
9 was itself a political committee.²⁶ Respondents do not dispute that during the 2013 fiscal year,
10 JPF's political expenses constituted 56% of its overall spending.²⁷ Respondents do, however,
11 dispute the Complaint's characterization of 65% of its 2017 fiscal year spending as federal
12 election-related political expenditures. In support of this, Respondents note that during the
13 reporting period where JPF made contributions to Kansas First, Kansas First only reported
14 making expenditures that related to state-level races.²⁸ As a result, Respondents contend that
15 only 25 percent of its overall spending in that year consisted of "federal campaign activity
16 spending".²⁹

²⁴ *Id.* ¶ 21.

²⁵ *Id.* ¶¶ 51-76.

²⁶ Resp. at 2 (citing Statement of Reasons, Comm'rs Hunter & Goodman, MUR 6872 (New Models)). The Response states that "a single transaction cannot be deemed both an expenditure and a contribution by the same entity." *Id.*

²⁷ *Id.* at 6.

²⁸ *Id.* at 7. Disclosure reports from Kansas First confirm that it did not make federal IEs during the period where JPF was making contributions. See Kansas First, 2018 April Quarterly Report at 8 (Apr. 12, 2018).

²⁹ Resp. at 7.

JPF's Self-Reported Receipts and Expenditures³⁰

Tax Year (Oct. 1 to Sept. 30)	Gross Receipts	Total Expenses	Political Expenses (as reported on Sch C)	Federal Election Expenses	State Election Expenses	Federal as % of Total
2012	\$912,780	\$630,113	\$0	\$0	\$0	0%
2013	\$3,329,318	\$3,217,826	\$1,815,000	\$1,815,000	\$0	56%
2014	\$4,922	\$299,081	\$0	\$0	\$0	0%
2015	\$0	\$0	\$0	\$0	\$0	0%
2016	\$0	\$0	\$0	\$0	\$0	0%
2017	\$452,300	\$297,403	\$175,000	\$75,000	\$100,000	25%
2018	\$200,000	\$264,030	\$0	\$0	\$0	0%
TOTAL	\$4,799,320	\$4,708,453	\$1,990,000	\$1,890,000	\$100,000	40%

Respondents further contend that much of the activity identified in the Complaint occurred more than five years ago and claim that as a result, “these claims are unactionable.”³¹ Finally, Respondents argue that any claims as to Church, Norris, and Miller, in their individual capacities should be dismissed because the Complaint does not contain any factual allegations that any of the individual respondents acted knowingly and willfully.³²

III. LEGAL ANALYSIS

A. Determining Political Committee Status

Under the Act and Commission regulations, as construed by controlling Supreme Court precedent, an organization that is not controlled by a candidate must register as a political committee only if it both (1) receives contributions or makes expenditures aggregating in excess

³⁰ Reproduced from Resp. at 6 [hereinafter “JPF Spending Chart”].

³¹ Resp. at 8-11.

³² *Id.* at 12.

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of \$1,000 during a calendar year and (2) has as its “major purpose” the nomination or election of federal candidates.³³

In 2007, following litigation resulting from the Commission’s decision not to pursue a rulemaking on the subject of political committee status, the Commission issued a Supplemental Explanation and Justification (“Supplemental E&J”) to provide the public with additional guidance as to its process for determining political committee status.³⁴ As explained in the Supplemental E&J, to determine an entity’s “major purpose,” the Commission 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.³⁵ 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.”³⁶

In 2016, the United States District Court for the District of Columbia in *Citizens for Responsibility and Ethics in Washington v. FEC* instructed the Commission, when examining an organization’s major purpose, to look beyond express advocacy and consider whether other

³³ 52 U.S.C. § 30101(4)(A) (defining “political committee” based on the \$1,000 thresholds); 11 C.F.R. § 100.5 (same); *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (holding that the term “political committee” “need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate”).

³⁴ Political Committee Status, 72 Fed. Reg. 5,595 (Feb. 7, 2007) (Supplemental Explanation and Justification (“Supplemental E&J”). The Supplemental E&J was issued following a court challenge to the Commission’s decision to engage in case-by-case decision-making rather than formal rulemaking. *See Shays v. FEC*, 424 F. Supp. 2d 100, 117 (D.D.C. 2006).

³⁵ Supplemental E&J at 5,597, 5,605 (Feb. 7, 2007).

³⁶ *Id.* at 5,601, 5,605.

communications at issue indicate a “campaign-related purpose.”³⁷ 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.³⁸

B. The Available Information Indicates that JPF Became a Political Committee in 2013-2014 but Has Had Limited Political Activity in Subsequent Years

1. JPF Exceeded the Statutory Threshold for Political Committee Status

As a threshold matter, for an organization to be required to register as a political committee, it must receive contributions or make expenditures aggregating in excess of \$1,000 during a calendar year.³⁹ Under the Act, a “contribution” includes “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office,”⁴⁰ and an “expenditure” includes “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election to Federal office.”⁴¹ The Commission has

³⁷ 209 F. Supp. 3d 77, 92-93 (D.D.C. 2016) (“*CREW I*”). The same District Court later held that electioneering communications “*presumptively* have an election-related purpose,” but the analysis by that Court in *CREW I* and its subsequent decision refers generally to all speech that is campaign-related but does not contain express advocacy. *Citizens for Responsibility & Ethics in Wash. v. FEC*, 299 F. Supp. 3d 83, 93 (D.D.C. 2018) (“*CREW II*”). The court refrained from establishing its own bright-line rule regarding which communications inherently have a campaign-related purpose, but stated that the First Amendment does not require “the agency to exclude from its consideration all non-express advocacy in the context of disclosure.” *CREW I*, 209 F. Supp. 3d at 93.

³⁸ *CREW I*, 209 F. Supp. 3d at 94. In its subsequent Factual and Legal Analysis, the Commission accepted the court’s remand of the enforcement matter, found that the organization’s campaign-related spending exceeded 50% of its overall spending approximately one year before the 2010 election, and found reason to believe that the organization violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to organize, register, and report as a political committee. Factual and Legal Analysis (“F&LA”) at 14-15, MUR 6538R (Americans for Job Security); *see* Conciliation Agreement, MUR 6538R.

³⁹ 52 U.S.C. § 30101(4)(A) (defining “political committee” based on the \$1,000 thresholds); 11 C.F.R. § 100.5 (same).

⁴⁰ 52 U.S.C. § 30101(8)(A).

⁴¹ 52 U.S.C. § 30101(9)(A).

also previously concluded that organizations could trigger the \$1,000 expenditure threshold by making contributions to a political committee.⁴²

In this matter, JPF contends that because it did not make independent expenditures of its own, but instead made contributions to other entities that in turn engaged in express advocacy, it cannot be said to have made expenditures.⁴³ JPF does not disclose who its contributors are in its IRS filings, and there does not appear to be any publicly available information concerning whether it solicited funds for the purpose of influencing federal elections. However, JPF admits in its Response that during its 2013 fiscal year, it incurred \$1,815,000 of federal election related-expenses.⁴⁴ In particular, these contributions from JPF to IEOPCs can be linked to independent expenditures. Moreover, the recipient committees “deposited” these funds into their accounts and reported the deposits on FEC disclosure reports as “contributions” (made for the purpose of influencing an election).⁴⁵ As such, it is OGC’s position that these deposits used for independent expenditures satisfy the statutory threshold for making more than \$1,000 in expenditures.

⁴² See *Akins v. FEC*, 101 F.3d 731, 742 (D.C. Cir. 1996), *vacated by* 524 U.S. 11, 118 S. Ct. 1777, 141 L. Ed. 2d 10 (1998) (finding that \$1,000 in “campaign contributions” would have qualified AIPAC as a political committee if it had also satisfied the major purpose test). See also Advisory Op. 1996-18 (Int’l Ass’n of Fire Fighters) (finding that a conduit organization that accepted funds from individual donors and then exercised control over the funds by contributing the funds to political committees would itself become a political committee because “making contributions” would trigger political committee status (*e.g.* the contributions would be expenditures). *But see* Statement of Reasons, Comm’rs Hunter & Goodman at 18-20, MUR 6872 (analyzing New Models’ contributions as “general expressions of support” for other political committees and not classifying such a payment as being an expenditure). In rejecting OGC’s position that contributions to other political committees should be categorized as expenditures, these Commissioners acknowledged that while precedent existed to support OGC’s position, “the better course is to maintain the distinction between contributions and expenditures.” *Id.* at n. 93.

⁴³ Resp. at 2.

⁴⁴ JPF Spending Chart. The plain definition of both contribution and expenditure would encompass gifts and payments intended to influence elections. 52 U.S.C. §§ 30101(8)(A), 30101(9)(A).

⁴⁵ See Compl. ¶¶ 24-25.

2. JPF's Spending Indicates that Its Major Purpose in 2013-2014 May Have Been the Nomination or Election of Federal Candidates

As to the second element of political committee status, JPF states in its Response and in its tax returns that its major purpose is not federal campaign activity, but rather “to promote the common good and general welfare through education and legislative participation on public policy matters that significantly impact the economy, job growth and retention, and employment, and that are designed to promote fiscal responsibility.”⁴⁶ The Commission has noted in a Supplemental E&J that it may consider such statements made by an organization in its analysis of an organization's major purpose,⁴⁷ but that such statements are not necessarily dispositive.⁴⁸

As noted above, JPF acknowledges that during its 2013 fiscal year, 56% of its spending involved making contributions to IEOPCs. While the Commission has never set a threshold on the proportion of spending on federal campaign activity required to satisfy the major purpose analysis, it has previously found reason to believe in matters where the organization's proportion

⁴⁶ See JPF 2015 Tax Return.

⁴⁷ Supplemental E&J at 5,606. The Commission also has noted that in its consideration of an organization's “overall conduct,” it will look at that organization's public statements, including its own materials, statements to donors, or statements made on its website, “giving due weight to the form and nature of the statement, as well as the speaker's position within the organization.” *Id.* at 5,601.

⁴⁸ 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, *aff'd 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).

was comparable or less than the apparent minimum 56% proportion present here.⁴⁹ As explained below, this significant tranche of activity supports a finding that JPF's major purpose was political activity.

Although it appears that JPF's major purpose in 2013-2014 involved engaging in political activity, JPF has also had long periods of subsequent inactivity, punctuated by smaller bouts of political spending, and during those subsequent years, it is not clear whether JPF's major purpose continued to be political activity. It was not until its 2017 fiscal year that JPF began to make political contributions again, contributing \$75,000 to American Jobs and Growth PAC.⁵⁰ The same day, American Jobs and Growth PAC made seven disbursements, totaling \$66,500 on cable television and radio advertising placements in connection with a congressional election in Florida's 6th District.⁵¹

Similarly, JPF provided \$18,500 to Make Cincinnati Better on November 1, 2017,⁵² and \$100,000 to Kansas First,⁵³ both of which are registered with the Commission. However, it appears that these IEOPCs ultimately used JPF's contributions for non-federal elections,⁵⁴ and it

⁴⁹ See, e.g.,

F&LA at 15, MUR 6538R (Americans for Job Security, *et al.*) ("More than half of [AJS's total spending] was for independent expenditures . . . and the electioneering communications analyzed above 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.") (emphases in original);

⁵⁰ American Jobs and Growth PAC, 2018 October Quarterly Report at 6 (Oct. 14, 2018) (disclosing a contribution from JPF of \$75,000 on August 13, 2018). Respondent Thomas Norris is listed on the disclosure report as the treasurer for American Jobs and Growth PAC.

⁵¹ *Id.* at 9-13.

⁵² Make Cincinnati Better, 2017 Year-End Report at 6 (Jan. 25, 2018).

⁵³ Kansas First, 2018 April Quarterly Report at 6 (Apr. 12, 2018).

⁵⁴ *Id.* at 8; see also Make Cincinnati Better, 2017 Year-End Report at 7.

1 is possible, as Respondents contend, that only 25% of JPF's expenditures during fiscal year 2017
 2 were federal election-related.⁵⁵ While ordinarily a contribution to an IEOPC would indicate
 3 intent to support the election or nomination of federal candidates, the specific IEOPCs at issue
 4 here do not appear to have undertaken any activity in connection with federal elections. Kansas
 5 First did not undertake activity in connection with federal elections during the relevant reporting
 6 period and does not appear to have ever made an independent expenditure in connection with a
 7 federal election.⁵⁶ The other IEOPC in question, Make Cincinnati Better, only filed a single
 8 report with the Commission and that report only disclosed involvement in a city-level election.⁵⁷
 9 As such, it appears possible that JPF may not have intended to influence federal elections with its
 10 contributions to Kansas First or Make Cincinnati Better.

11 In 2020, JPF continued its involvement in federal elections, contributing a total of
 12 \$266,000 to IEOPCs registered with the Commission, according to disclosure reports filed by
 13 those committees.⁵⁸ The vast majority of these contributions, \$260,000, were made to Fighting
 14 for Kansas PAC, which reported making independent expenditures during the relevant time
 15 period.⁵⁹ JPF's total spending in 2020 is not publicly available so it is not known whether this
 16 represented a majority of JPF's activity or was only a small portion of JPF's overall activity. As

⁵⁵ See Resp. at 4.

⁵⁶ See Kansas First, 2018 April Quarterly Report at 8; *see generally* Kansas First Regularly filed reports for the 2018 Election Cycle, <https://www.fec.gov/data/committee/C00659250/?tab=filings&cycle=2018#reports> (last accessed Aug. 25, 2021). After the 2018 election cycle, Kansas First engaged in no activity and carried a \$0.05 account balance with according to its filings with the Commission until it sought to terminate in 2021. *See* Kansas First, 2021 Termination Approval (Aug. 3, 2021).

⁵⁷ Make Cincinnati Better, 2017 Year-End Report at 7 (Jan. 25, 2018). The 2017 Year-End Report was the only report that Make Cincinnati Better ever filed with the Commission, and that report only disclosed support for a Cincinnati City Council candidate. It received multiple Requests for Additional Information concerning its failure to file subsequent reports and was administratively terminated in 2019. *See* Make Cincinnati Better, 2019 Administrative Termination (Nov. 15, 2019).

⁵⁸ JPF Contribution History.

⁵⁹ *See* Fighting for Kansas PAC, 2020 October Quarterly Report at 8-11 (Oct. 15, 2020).

1 such, while it appears that throughout its organizational life, JPF continued to fund IEOPCs and
 2 support their efforts to influence federal elections, that degree of involvement may have
 3 diminished over time.

4 The court decisions and Commission precedent discussed above make clear that a
 5 committee's major purpose can shift over time.⁶⁰ Indeed, the Commission has regularly
 6 examined organizations that started out with a non-electoral purpose, but whose activity shifted
 7 over time, and has explained that "the Commission's analysis of the relevant time period for
 8 evaluating a group's spending must be flexible to account for changes in an organization's major
 9 purpose over time."⁶¹ As OGC has noted in other matters, the Commission has not, however,
 10 opined that an organization can qualify as a political committee and then, by virtue of its future
 11 conduct, "un-ring the bell," shedding its political committee status, and reverting back to its
 12 original purpose. Indeed, the Act is clear that political committees have an ongoing obligation

⁶⁰ See *CREW I*, 209 F. Supp. 3d at 94 ("The Commissioners' refusal to give any weight whatsoever to an organizations' [sic] relative spending in the most recent calendar year — particularly in the case of a fifteen-year-old organization like AJS — indicates an arbitrary 'fail[ure] to consider an important aspect of the [relevant] problem.'" (quoting *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 664, 658 (2007)); see also *FEC v. Malenick*, 310 F. Supp. 2d 230, 237 (D.D.C. 2004) ("Accordingly, because Triad and then Triad Inc.'s major purpose was the nomination or election of specific candidates *in 1996*, and because Triad received contributions aggregating more than \$1,000 *in 1996*, I find that Triad and Triad, Inc. operated as a 'political committee' *in 1996*." (emphases added); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 853 (D.D.C. 1996) (discussing major purpose only in 1989 and 1990 with respect to group formed in 1979); see also MUR 5492 (Freedom, Inc.) (analyzing admitted major purpose in 2004 of group formed in 1962); MURs 5577, 5620 (National Association of Realtors — 527 Fund) (analyzing 2004 spending of NAR-527 Fund registered with IRS in 2000); MUR 5755 (New Democrat Network) (analyzing 1996 group New Democrat Network's 2004 spending); MUR 5753 (League of Conservation Voters) (analyzing LCV's 2004 spending when one of LCV's funds had registered with the IRS as early as 2000); MURs 5694, 5910 (Americans for Job Security) (analyzing activity for group founded in 1997 from 2000 through 2006 in determining group's major purpose in 2006); MUR 5487 (Progress for America VF) (analyzing group's major purpose based on 2004 disbursements where group had raised \$4.6 million and spent \$11.2 million through 2006).

⁶¹ See, e.g., F&LA at 14-15, MUR 6538R (Americans for Job Security) (examining whether respondent's major purpose may have changed over time); cf. *CREW I*, 209 F. Supp. 3d at 94 (noting "that an organization's major purpose can *change*") (citing *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 262 (1986)) (emphasis in original).

1 to report and comply with the Act until notified of their termination, and allowing a committee to
2 “self-terminate” by never registering and eventually shifting away from political activity would
3 run counter to the Act. As such, JPF’s decline in political activity does not obviate the fact that it
4 became a political committee with ongoing reporting obligations during its 2013 fiscal year.

5 **C. We Recommend that the Commission Dismiss the Allegations as to JPF as a**
6 **Matter of Prosecutorial Discretion**

7 Although the available information could support a finding that JPF became a political
8 committee in 2013-2014, several prudential considerations lead us to recommend that the
9 Commission dismiss this matter. As described above, the age of the predicate activity, which
10 establishes that JPF was a political committee in 2013-2014, limits the enforcement remedies
11 available to the Commission. Further, the apparent decline of JPF’s political activity in the
12 intervening years, as well as JPF’s subsequent corporate dissolution, present investigatory
13 challenges. As a result, we recommend that the Commission exercise its prosecutorial discretion
14 and dismiss the allegations.

15 First, a potential investigation into JPF’s major purpose in 2013, would, by its nature, be
16 fact intensive, require substantial Commission resources, and likely face obstacles both in terms
17 of acquiring relevant documents and obtaining accurate statements from the individuals
18 involved. JPF has been dissolved as a corporate entity,⁶³ and while such a dissolution would not
19 preclude enforcement action, it would present additional difficulties in terms of locating
20 individuals and documents, and it is possible that documents are no longer available. Although
21 there is a potential benefit in seeking to promote the Commission’s interest in public disclosure,
22 under these circumstances, given these difficulties and in light of the Commission’s current

⁶³ See *supra* n. 18 and accompanying text (discussing JPF’s dissolution).

caseload related to more recent activity, we do not believe that pursuing JPF would be an efficient use of the Commission's limited resources.

Second, JPF raises the issue of the statute of limitations and claims that because the underlying activity that gave rise to the allegation that JPF may be a political committee occurred more than five years ago, the action is time-barred and equitable remedies are not available due to a lack of significant risk of future harm.⁶⁴ The vast majority of the underlying conduct in this matter occurred in 2013-2014, and although additional activity did occur within the statute of limitations, that activity only represents a small portion of JPF's overall political activity.

The statute of limitations does not bar the Commission from finding reason to believe based on JPF's 2013-2014 activity and seeking injunctive relief, including compelling JPF to register as a political committee and file reports for all of its receipts and disbursements since its 2013 fiscal year.⁶⁵ Indeed, the Commission approved precisely that type of injunctive relief in MUR 6538R (Americans for Job Security), which resulted in the disclosure of the respondent's contributions and expenditures during the relevant time period, even though much of the activity fell outside the five-year statute of limitations.⁶⁶ Consistent with that matter, the Commission has the authority to seek equitable relief from JPF. However, given the age of the predicate activity and the fact that JPF has ceased to exist, pursuing an investigation and injunctive relief in this case may not be a prudent use of the Commission's limited resources.

⁶⁴ Resp. at 9-10.

⁶⁵ See *FEC v. Christian Coal.*, 965 F. Supp. 66, 71 (D.D.C. 1997) (holding that injunctive relief is not a penalty); *FEC v. Nat'l Republican Senatorial Comm.*, 877 F. Supp. 15, 20-21 (D.D.C. 1995) (same).

⁶⁶ See Conciliation Agreement at 5-6, MUR 6538R (Americans for Job Security); *cf. CREW v. American Action Network*, No. 18-cv-945 (CRC), 2019 WL 4750248, at *14 (D.D.C. Sept. 30, 2019) (finding that a court may order defendant to disclose activity post-dating the alleged conduct in the administrative complaint when fashioning an equitable remedy). But see Certification ¶ 1 (Mar. 1, 2021), MUR 7181 (Independent Women's Voice) (reflecting 3-3 Commission split on finding reason to believe predicated on conduct that occurred more than five years ago where OGC recommended seeking equitable relief).

1 In conclusion, although the available information is sufficient to support a
2 recommendation that the Commission find reason to believe that JPF violated 52 U.S.C.
3 §§ 30102, 30103, 30104 by failing to register and report as a political committee, given the
4 passage of time since JPF may have become a political committee, and the Commission's limited
5 resources, we recommend that the Commission exercise its prosecutorial discretion and dismiss
6 the allegations that JPF failed to register and report as a political committee.⁶⁷ Additionally,
7 because these registration and reporting obligations apply only to committees and treasurers, we
8 recommend that the Commission find no reason to believe that Church, Norris, and Miller
9 violated 52 U.S.C. §§ 30102, 30103, 30104.

10 **IV. RECOMMENDATIONS**

- 11 1. Dismiss, as a matter of prosecutorial discretion, the allegations that Jobs and
12 Progress Fund, Inc. violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to
13 register and report as a political committee;
14
- 15 2. Find no reason to believe that Vaughn Church, Thomas Norris, and Mark Miller
16 violated 52 U.S.C. §§ 30102, 30103, and 30104 in their individual or official
17 capacities;
18
- 19 3. Approve the attached Factual and Legal Analysis;
20
- 21 4. Approve the appropriate letters; and
22

⁶⁷ *Heckler*, 470 U.S. at 831-32.

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1 5. Close the file.
2
3

Lisa J. Stevenson
Acting General Counsel

6 Charles Kitcher
7 Associate General Counsel for Enforcement
8
9

10 August 27, 2021

11 Date

Peter G. Blumberg

Peter G. Blumberg
Acting Deputy Associate General Counsel
for Enforcement

Adrienne C. Baranowicz

Adrienne C. Baranowicz
Attorney

FACTUAL AND LEGAL ANALYSIS

I. INTRODUCTION

The Complaint alleges that Jobs and Progress Fund, Inc. (“JPF”), a 501(c)(4) organization, became a political committee “no later than 2018” and consequently violated the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations by failing to register as a political committee and file appropriate reports. The Complaint also alleges that JPF’s present and former officers, Vaughn Church, Thomas Norris, and Mark Miller, violated the Act in their individual capacities by failing to register JPF as a political committee and report as a political committee.¹ The Complaint, analyzing JPF’s Internal Revenue Service (“IRS”) Form 990 filings,² contends that JPF either became a political committee in its 2013 fiscal year (October 1, 2013-September 30, 2014) or in its 2017 fiscal year (October 1, 2017-September 30, 2018) because in those two years, more than 50% of its funds were spent making contributions to federal independent expenditure-only political committees (“IEOPCs”).³ Respondents contend that the facts alleged in the Complaint are legally insufficient to meet the

1 Compl. ¶¶ 11-13 (Nov. 20, 2020). The Complaint notes that Vaughn Church is JPF's sole director and was listed as such beginning in FY 2017. *Id.* ¶ 11. Thomas Norris was reported as JPF's Chairman and President for the fiscal reporting period that covered Oct. 1, 2012 - Sept. 30, 2014 and is the treasurer for several Super PACs to which JPF made contributions. *Id.* ¶ 12. Mark Miller was JPF's treasurer for the fiscal year covering Oct. 1, 2013 - Sept. 30, 2014. *Id.* ¶ 13.

² All references to “fiscal year” in this report refer to JPF’s fiscal year, used in its tax filings, which runs from October 1 to September 30.

3 Compl. ¶¶ 2-3.

1 political committee statutory threshold and alternatively contend that the matter should be
2 dismissed as time barred.

3 For the reasons set forth below, the Commission exercises its prosecutorial discretion and
4 dismisses the allegations that JPF violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to
5 register and report as a political committee.⁴ Although the record indicates that JPF may have
6 become a political committee between 2013 and 2014, this activity occurred more than five years
7 ago, limiting the Commission’s remedies, and the factual record is less developed concerning its
8 activity in subsequent years. Finally, because the Complaint does not appear to allege any
9 cognizable violations against the individual respondents, the Commission finds no reason to
10 believe that Church, Norris, and Miller violated the Act’s registration and reporting provisions.

11 **II. FACTUAL BACKGROUND**

12 JPF was initially incorporated in Ohio in 2011 as Ohio First for a Better Government,
13 Inc., but changed its name to JPF in 2012.⁵ JPF is recognized by the IRS as a 501(c)(4) tax
14 exempt organization.⁶ According to its IRS filings, JPF’s stated purpose is “to promote the
15 common good and general welfare through education and legislative participation on public
16 policy matters that significantly impact the economy, job growth and retention, and employment,
17 and that are designed to promote fiscal responsibility.”⁷

⁴ *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

⁵ Ohio Secretary of State, Business Details and Filing Search, <https://businesssearch.ohiosos.gov/> (search for “Jobs and Progress Fund”) (last visited July 7, 2021).

⁶ IRS Tax Exempt Organization Search, <https://apps.irs.gov/app/eos/allSearch> (search for “Jobs and Progress Fund”) (last visited Jul. 7, 2021) [hereinafter JPF IRS Data].

⁷ Form 990-EZ, 2015 Tax Return of Jobs and Progress Fund, Inc. (Aug. 14, 2017) [hereinafter JPF 2015 Tax Return].

During its 2012 fiscal year, Mark Miller served as JPF's President, and during its 2013 fiscal year, served as its treasurer.⁸ Thomas Norris served as JPF's chairman during its 2012 fiscal year and JPF's Director and President during its 2013 fiscal year.⁹ In fiscal year 2017, Vaughn Church was listed as JPF's sole officer, and served as its director.¹⁰

During its 2013 fiscal year, JPF reported in its tax return spending a total of \$3,217, 826, \$1,815,000 of which it identified to the IRS as "political expenditures."¹¹ These political expenditures consisted of making contributions to two IEOPCs: Citizens for a Working America PAC (\$1,735,000) and Hometown Freedom Action Network (\$80,000).¹² JPF did not report making any independent expenditures. Between its 2014 and 2016 fiscal years, JPF did not make any political expenditures and had limited activity.¹³

During its 2017 fiscal year, JPF reported to the IRS that it had spent a total of \$297,403, of which \$175,000 was for identified as "political expenditures." In addition to the political

⁸ Compl. at 4 (citing Form 990, 2012 Tax Return of Jobs and Progress Fund (Mar. 11, 2014), https://projects.propublica.org/nonprofits/display_990/275401086/2014_03_EO%2F27-5401086_990O_201309 (last visited Jul. 8, 2021) [hereinafter JPF 2012 Tax Return]; Form 990, 2013 Tax Return of Jobs and Progress Fund (Aug. 15, 2015) https://projects.propublica.org/nonprofits/display_990/275401086/2015_10_EO%2F27-5401086_990O_201409 (last visited July 8, 2021) [hereinafter JPF 2013 Tax Return]). Miller also served as JPF's director during its 2014 and 2015 fiscal years. See Form 990-EZ, 2014 Tax Return of Jobs and Progress Fund (Sept. 19, 2016); https://projects.propublica.org/nonprofits/display_990/275401086/2016_09_EO%2F27-5401086_990EO_201509 (last visited Aug. 23, 2021); Form 990-EZ, 2015 Tax Return of Jobs and Progress Fund (Aug. 21, 2017), https://apps.irs.gov/pub/epostcard/cor/275401086_201609_990EO_2017082814680091.pdf. In Fiscal Year 2016, JPF had limited activity and filed a Form 990-N (an "e-postcard") with the IRS listing Miller as a principal officer. See JPF IRS Data.

⁹ See JPF 2012 Tax Return; JPF 2013 Tax Return.

¹⁰ Form 990, 2017 Tax Return of Jobs and Progress Fund (Aug. 15, 2019) [hereinafter JPF 2017 Tax Return].

¹¹ JPF 2013 Tax Return at Schedule C, Part I-A, line 2, Part IV.

¹² *Id.* Citizens for a Working America PAC's FEC disclosure reports indicate that JPF contributed an additional \$10,000, which was not reflected on JPF's 2013 Tax Return. See Compl. ¶ 25; see also *FEC Individual Contributions: Filtered Results*, FEC.GOV, https://www.fec.gov/data/receipts/individual-contributions/?contributor_name=Jobs+and+Progress+Fund (last visited July 20, 2021) [hereinafter JPF Contribution History] (reflecting results for contributions from "Jobs and Progress Fund"). As such, the Complaint contends that this contribution should also be included in analyses of JPF's activity. Compl. ¶ 25.

¹³ Compl. ¶ 26; JPF, Church, Norris, & Miller Joint Resp. at 6 (Jan. 26, 2021) ("Resp.").

1 activity acknowledged on the tax return, according to FEC disclosure reports, JPF also
2 contributed \$18,500 to Make Cincinnati Better, a federally registered IEOPC.¹⁴

3 Although JPF's IRS filing for its 2018 fiscal year is not publicly available, based on its
4 Response, it appears to have had limited activity during that fiscal year.¹⁵ JPF continued to make
5 contributions to IEOPCs in 2020, spending a total of \$266,000 according to disclosure reports
6 filed by the recipient committees.¹⁶ The vast majority of these contributions, \$260,000, were
7 made to Fighting for Kansas PAC, which also reported making independent expenditures during
8 the relevant time period.¹⁷ JPF's tax returns for the relevant time period for these expenditures
9 are not yet available, so it is not known what percentage of JPF's overall spending went toward
10 these contributions. JPF filed dissolution papers with the Ohio Secretary of State on or about
11 February 26, 2021, and its dissolution appears to have been approved by the Ohio Secretary of
12 State and became effective March 4, 2021.¹⁸ In that filing, JPF included several board
13 documents, which stated that JPF was seeking to terminate and wind-down its affairs and had
14 amended its articles of incorporation to terminate.¹⁹

15 The Complaint alleges that "despite its heavy political spending, JPF never registered as a
16 political committee with the FEC and failed and continues to fail to file reports disclosing its

¹⁴ Compl. ¶ 15; Make Cincinnati Better, 2017 Year-End Report at 6 (Jan. 25, 2018).

¹⁵ See Resp. at 6 (reporting \$264,030 of expenses and no political expenses). The Response does not address fiscal year 2019, which would have covered JPF's activity until September 30, 2020.

¹⁶ JPF Contribution History.

¹⁷ See Fighting for Kansas PAC, 2020 October Quarterly Report (Oct. 15, 2020) (reporting all contributions as being from JPF and reporting independent expenditures that were made in connection with Congressional elections in Kansas).

¹⁸ Ohio Sec'y of State, Dissolution of Jobs and Progress Fund (Mar. 11, 2021), <https://bizimage.ohiosos.gov/api/image/pdf/202106301942>.

¹⁹ *Id.* at 12-13.

1 contributors.”²⁰ The Complaint notes JPF’s contributions to various IEPOCs and contends that
 2 the recipient organization’s reporting of JPF’s “gifts, deposits, or distributions” as contributions,
 3 as that term is defined under the Act, serves as support for the conclusion that JPF’s payments
 4 were intended to influence elections.²¹ The Complaint also contends that the recipient IEOPCs
 5 made independent expenditures in connection with federal elections during the relevant time
 6 periods.²² According to the Complaint, between October 1, 2013, and September 30, 2014,
 7 JPF’s political spending represented 56.7% of its total aggregate spending,²³ and between
 8 October 1, 2017 and September 30, 2018, JPF’s political spending represented 65% of its total
 9 spending.²⁴ Based on these conclusions, the Complaint further alleges that Church, Norris, and
 10 Miller should be held liable in their official and personal capacities for JPF’s purported failure to
 11 register and report as a political committee and contends that their violations were knowing and
 12 willful.²⁵

13 In a joint response, Respondents deny the allegations, and contend that because JPF’s
 14 activity consisted solely of “making contributions to several other organizations, some of which
 15 were registered federal political committees, some of which, in turn did federal independent
 16 expenditures,” the available information is insufficient as a matter of law for a finding that JPF
 17 was itself a political committee.²⁶ Respondents do not dispute that during the 2013 fiscal year,

²⁰ Compl. ¶ 3.

²¹ *Id.* ¶¶ 16, 24, 33.

²² *Id.* ¶¶ 18, 25.

²³ *Id.* ¶ 25.

²⁴ *Id.* ¶ 21.

²⁵ *Id.* ¶¶ 51-76.

²⁶ Resp. at 2 (citing Statement of Reasons, Comm’rs Hunter & Goodman, MUR 6872 (New Models)). The Response states that “a single transaction cannot be deemed both an expenditure and a contribution by the same entity.” *Id.*

JPF’s political expenses constituted 56% of its overall spending.²⁷ Respondents do, however, dispute the Complaint’s characterization of 65% of its 2017 fiscal year spending as federal election-related political expenditures. In support of this, Respondents note that during the reporting period where JPF made contributions to Kansas First, Kansas First only reported making expenditures that related to state-level races.²⁸ As a result, Respondents contend that only 25 percent of its overall spending in that year consisted of “federal campaign activity spending”.²⁹

JPF’s Self-Reported Receipts and Expenditures³⁰

Tax Year (Oct. 1 to Sept. 30)	Gross Receipts	Total Expenses	Political Expenses (as reported on Sch C)	Federal Election Expenses	State Election Expenses	Federal as % of Total
2012	\$912,780	\$630,113	\$0	\$0	\$0	0%
2013	\$3,329,318	\$3,217,826	\$1,815,000	\$1,815,000	\$0	56%
2014	\$4,922	\$299,081	\$0	\$0	\$0	0%
2015	\$0	\$0	\$0	\$0	\$0	0%
2016	\$0	\$0	\$0	\$0	\$0	0%
2017	\$452,300	\$297,403	\$175,000	\$75,000	\$100,000	25%
2018	\$200,000	\$264,030	\$0	\$0	\$0	0%
TOTAL	\$4,799,320	\$4,708,453	\$1,990,000	\$1,890,000	\$100,000	40%

Respondents further contend that much of the activity identified in the Complaint occurred more than five years ago and claim that as a result, “these claims are unactionable.”³¹ Finally, Respondents argue that any claims as to Church, Norris, and Miller, in their individual

²⁷ *Id.* at 6.

²⁸ *Id.* at 7. Disclosure reports from Kansas First confirm that it did not make federal IEs during the period where JPF was making contributions. *See* Kansas First, 2018 April Quarterly Report at 8 (Apr. 12, 2018).

²⁹ Resp. at 7.

³⁰ Reproduced from Resp. at 6 [hereinafter “JPF Spending Chart”].

³¹ Resp. at 8-11.

capacities should be dismissed because the Complaint does not contain any factual allegations that any of the individual respondents acted knowingly and willfully.³²

III. LEGAL ANALYSIS

A. Determining Political Committee Status

Under the Act and Commission regulations, as construed by controlling Supreme Court precedent, an organization that is not controlled by a candidate must register as a political committee only if it both (1) receives contributions or makes expenditures aggregating in excess of \$1,000 during a calendar year and (2) has as its “major purpose” the nomination or election of federal candidates.³³

In 2007, following litigation resulting from the Commission’s decision not to pursue a rulemaking on the subject of political committee status, the Commission issued a Supplemental Explanation and Justification (“Supplemental E&J”) to provide the public with additional guidance as to its process for determining political committee status.³⁴ As explained in the Supplemental E&J, to determine an entity’s “major purpose,” the Commission 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

³² *Id.* at 12.

³³ 52 U.S.C. § 30101(4)(A) (defining “political committee” based on the \$1,000 thresholds); 11 C.F.R. § 100.5 (same); *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (holding that the term “political committee” “need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate”).

³⁴ Political Committee Status, 72 Fed. Reg. 5,595 (Feb. 7, 2007) (Supplemental Explanation and Justification (“Supplemental E&J”). The Supplemental E&J was issued following a court challenge to the Commission’s decision to engage in case-by-case decision-making rather than formal rulemaking. *See Shays v. FEC*, 424 F. Supp. 2d 100, 117 (D.D.C. 2006).

1 candidates.³⁵ The Commission stated in the Supplemental E&J that it compares how much of an
 2 organization’s spending is for “federal campaign activity” relative to “activities that [a]re not
 3 campaign related.”³⁶

4 In 2016, the United States District Court for the District of Columbia in *Citizens for*
 5 *Responsibility and Ethics in Washington v. FEC* instructed the Commission, when examining an
 6 organization’s major purpose, to look beyond express advocacy and consider whether other
 7 communications at issue indicate a “campaign-related purpose.”³⁷ The Court also held that the
 8 Commission’s analysis of the relevant time period for evaluating a group’s spending must retain
 9 the flexibility to account for changes in an organization’s major purpose over time.³⁸

10 **B. The Available Information Indicates that JPF Became a Political Committee**
 11 **in 2013-2014 but Has Had Limited Political Activity in Subsequent Years**

12 1. JPF Exceeded the Statutory Threshold for Political Committee Status

13 As a threshold matter, for an organization to be required to register as a political
 14 committee, it must receive contributions or make expenditures aggregating in excess of \$1,000

³⁵ Supplemental E&J at 5,597, 5,605 (Feb. 7, 2007).

³⁶ *Id.* at 5,601, 5,605.

³⁷ 209 F. Supp. 3d 77, 92-93 (D.D.C. 2016) (“*CREW I*”). The same District Court later held that electioneering communications “*presumptively* have an election-related purpose,” but the analysis by that Court in *CREW I* and its subsequent decision refers generally to all speech that is campaign-related but does not contain express advocacy. *Citizens for Responsibility & Ethics in Wash. v. FEC*, 299 F. Supp. 3d 83, 93 (D.D.C. 2018) (“*CREW II*”). The court refrained from establishing its own bright-line rule regarding which communications inherently have a campaign-related purpose, but stated that the First Amendment does not require “the agency to exclude from its consideration all non-express advocacy in the context of disclosure.” *CREW I*, 209 F. Supp. 3d at 93.

³⁸ *CREW I*, 209 F. Supp. 3d at 94. In its subsequent Factual and Legal Analysis, the Commission accepted the court’s remand of the enforcement matter, found that the organization’s campaign-related spending exceeded 50% of its overall spending approximately one year before the 2010 election, and found reason to believe that the organization violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to organize, register, and report as a political committee. Factual and Legal Analysis (“F&LA”) at 14-15, MUR 6538R (Americans for Job Security); *see* Conciliation Agreement, MUR 6538R.

during a calendar year.³⁹ Under the Act, a “contribution” includes “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office,”⁴⁰ and an “expenditure” includes “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election to Federal office.”⁴¹ The Commission has also previously concluded that organizations could trigger the \$1,000 expenditure threshold by making contributions to a political committee.⁴²

In this matter, JPF contends that because it did not make independent expenditures of its own, but instead made contributions to other entities that in turn engaged in express advocacy, it cannot be said to have made expenditures.⁴³ JPF does not disclose who its contributors are in its IRS filings, and there does not appear to be any publicly available information concerning whether it solicited funds for the purpose of influencing federal elections. However, JPF admits in its Response that during its 2013 fiscal year, it incurred \$1,815,000 of federal election related-expenses.⁴⁴ In particular, these contributions from JPF to IEOPCs can be linked to independent expenditures. Moreover, the recipient committees “deposited” these funds into their accounts

³⁹ 52 U.S.C. § 30101(4)(A) (defining “political committee” based on the \$1,000 thresholds); 11 C.F.R. § 100.5 (same).

⁴⁰ 52 U.S.C. § 30101(8)(A).

⁴¹ 52 U.S.C. § 30101(9)(A).

⁴² *See Akins v. FEC*, 101 F.3d 731, 742 (D.C. Cir. 1996), *vacated by* 524 U.S. 11, 118 S. Ct. 1777, 141 L. Ed. 2d 10 (1998) (finding that \$1,000 in “campaign contributions” would have qualified AIPAC as a political committee if it had also satisfied the major purpose test). *See also* Advisory Op. 1996-18 (Int’l Ass’n of Fire Fighters) (finding that a conduit organization that accepted funds from individual donors and then exercised control over the funds by contributing the funds to political committees would itself become a political committee because “making contributions” would trigger political committee status (*e.g.* the contributions would be expenditures)).

⁴³ Resp. at 2.

⁴⁴ JPF Spending Chart. The plain definition of both contribution and expenditure would encompass gifts and payments intended to influence elections. 52 U.S.C. §§ 30101(8)(A), 30101(9)(A).

and reported the deposits on FEC disclosure reports as “contributions” (made for the purpose of influencing an election).⁴⁵ As such, it is OGC’s position that these deposits used for independent expenditures satisfy the statutory threshold for making more than \$1,000 in expenditures.

2. JPF’s Spending Indicates that Its Major Purpose in 2013-2014 May Have Been the Nomination or Election of Federal Candidates

As to the second element of political committee status, JPF states in its Response and in its tax returns that its major purpose is not federal campaign activity, but rather “to promote the common good and general welfare through education and legislative participation on public policy matters that significantly impact the economy, job growth and retention, and employment, and that are designed to promote fiscal responsibility.”⁴⁶ The Commission has noted in a Supplemental E&J that it may consider such statements made by an organization in its analysis of an organization’s major purpose,⁴⁷ but that such statements are not necessarily dispositive.⁴⁸

As noted above, JPF acknowledges that during its 2013 fiscal year, 56% of its spending involved making contributions to IEOPCs. While the Commission has never set a threshold on the proportion of spending on federal campaign activity required to satisfy the major purpose analysis, it has previously found reason to believe in matters where the organization’s proportion

⁴⁵ See Compl. ¶¶ 24-25.

⁴⁶ See JPF 2015 Tax Return.

⁴⁷ Supplemental E&J at 5,606. The Commission also has noted that in its consideration of an organization’s “overall conduct,” it will look at that organization’s public statements, including its own materials, statements to donors, or statements made on its website, “giving due weight to the form and nature of the statement, as well as the speaker’s position within the organization.” *Id.* at 5,601.

⁴⁸ 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, *aff’d 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).

was comparable or less than the apparent minimum 56% proportion present here.⁴⁹ As explained below, this significant tranche of activity supports a finding that JPF's major purpose was political activity.

Although it appears that JPF's major purpose in 2013-2014 involved engaging in political activity, JPF has also had long periods of subsequent inactivity, punctuated by smaller bouts of political spending, and during those subsequent years, it is not clear whether JPF's major purpose continued to be political activity. It was not until its 2017 fiscal year that JPF began to make political contributions again, contributing \$75,000 to American Jobs and Growth PAC.⁵⁰ The same day, American Jobs and Growth PAC made seven disbursements, totaling \$66,500 on cable television and radio advertising placements in connection with a congressional election in Florida's 6th District.⁵¹

Similarly, JPF provided \$18,500 to Make Cincinnati Better on November 1, 2017,⁵² and \$100,000 to Kansas First,⁵³ both of which are registered with the Commission. However, it appears that these IEOPCs ultimately used JPF's contributions for non-federal elections,⁵⁴ and it is possible, as Respondents contend, that only 25% of JPF's expenditures during fiscal year 2017

⁴⁹ See, e.g., F&LA at 15, MUR 6538R (Americans for Job Security, *et al.*) ("More than half of [AJS's total spending] was for independent expenditures . . . and the electioneering communications analyzed above 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.") (emphases in original).

⁵⁰ American Jobs and Growth PAC, 2018 October Quarterly Report at 6 (Oct. 14, 2018) (disclosing a contribution from JPF of \$75,000 on August 13, 2018). Respondent Thomas Norris is listed on the disclosure report as the treasurer for American Jobs and Growth PAC.

⁵¹ *Id.* at 9-13.

⁵² Make Cincinnati Better, 2017 Year-End Report at 6 (Jan. 25, 2018).

⁵³ Kansas First, 2018 April Quarterly Report at 6 (Apr. 12, 2018).

⁵⁴ *Id.* at 8; see also Make Cincinnati Better, 2017 Year-End Report at 7.

were federal election-related.⁵⁵ While ordinarily a contribution to an IEOPC would indicate intent to support the election or nomination of federal candidates, the specific IEOPCs at issue here do not appear to have undertaken any activity in connection with federal elections. Kansas First did not undertake activity in connection with federal elections during the relevant reporting period and does not appear to have ever made an independent expenditure in connection with a federal election.⁵⁶ The other IEOPC in question, Make Cincinnati Better, only filed a single report with the Commission and that report only disclosed involvement in a city-level election.⁵⁷ As such, it appears possible that JPF may not have intended to influence federal elections with its contributions to Kansas First or Make Cincinnati Better.

In 2020, JPF continued its involvement in federal elections, contributing a total of \$266,000 to IEOPCs registered with the Commission, according to disclosure reports filed by those committees.⁵⁸ The vast majority of these contributions, \$260,000, were made to Fighting for Kansas PAC, which reported making independent expenditures during the relevant time period.⁵⁹ JPF's total spending in 2020 is not publicly available so it is not known whether this represented a majority of JPF's activity or was only a small portion of JPF's overall activity. As such, while it appears that throughout its organizational life, JPF continued to fund IEOPCs and

⁵⁵ See Resp. at 4.

⁵⁶ See Kansas First, 2018 April Quarterly Report at 8; *see generally* Kansas First Regularly filed reports for the 2018 Election Cycle, <https://www.fec.gov/data/committee/C00659250/?tab=filings&cycle=2018#reports> (last accessed Aug. 25, 2021). After the 2018 election cycle, Kansas First engaged in no activity and carried a \$0.05 account balance with according to its filings with the Commission until it sought to terminate in 2021. *See* Kansas First, 2021 Termination Approval (Aug. 3, 2021).

⁵⁷ Make Cincinnati Better, 2017 Year-End Report at 7 (Jan. 25, 2018). The 2017 Year-End Report was the only report that Make Cincinnati Better ever filed with the Commission, and that report only disclosed support for a Cincinnati City Council candidate. It received multiple Requests for Additional Information concerning its failure to file subsequent reports and was administratively terminated in 2019. *See* Make Cincinnati Better, 2019 Administrative Termination (Nov. 15, 2019).

⁵⁸ JPF Contribution History.

⁵⁹ *See* Fighting for Kansas PAC, 2020 October Quarterly Report at 8-11 (Oct. 15, 2020).

1 support their efforts to influence federal elections, that degree of involvement may have
 2 diminished over time.

3 The court decisions and Commission precedent discussed above make clear that a
 4 committee’s major purpose can shift over time.⁶⁰ Indeed, the Commission has regularly
 5 examined organizations that started out with a non-electoral purpose, but whose activity shifted
 6 over time, and has explained that “the Commission’s analysis of the relevant time period for
 7 evaluating a group’s spending must be flexible to account for changes in an organization’s major
 8 purpose over time.”⁶¹ The Commission has not, however, opined that an organization can
 9 qualify as a political committee and then, by virtue of its future conduct, “un-ring the bell,”
 10 shedding its political committee status, and reverting back to its original purpose. Indeed, the
 11 Act is clear that political committees have an ongoing obligation to report and comply with the
 12 Act until notified of their termination, and allowing a committee to “self-terminate” by never
 13 registering and eventually shifting away from political activity would run counter to the Act. As

⁶⁰ See *CREW I*, 209 F. Supp. 3d at 94 (“The Commissioners’ refusal to give any weight whatsoever to an organizations’ [sic] relative spending in the most recent calendar year — particularly in the case of a fifteen-year-old organization like AJS — indicates an arbitrary ‘fail[ure] to consider an important aspect of the [relevant] problem.’” (quoting *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 664, 658 (2007)); see also *FEC v. Malenick*, 310 F. Supp. 2d 230, 237 (D.D.C. 2004) (“Accordingly, because Triad and then Triad Inc.’s major purpose was the nomination or election of specific candidates in 1996, and because Triad received contributions aggregating more than \$1,000 in 1996, I find that Triad and Triad, Inc. operated as a ‘political committee’ in 1996.”) (emphases added); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 853 (D.D.C. 1996) (discussing major purpose only in 1989 and 1990 with respect to group formed in 1979); see also MUR 5492 (Freedom, Inc.) (analyzing admitted major purpose in 2004 of group formed in 1962); MURs 5577, 5620 (National Association of Realtors — 527 Fund) (analyzing 2004 spending of NAR-527 Fund registered with IRS in 2000); MUR 5755 (New Democrat Network) (analyzing 1996 group New Democrat Network’s 2004 spending); MUR 5753 (League of Conservation Voters) (analyzing LCV’s 2004 spending when one of LCV’s funds had registered with the IRS as early as 2000); MURs 5694, 5910 (Americans for Job Security) (analyzing activity for group founded in 1997 from 2000 through 2006 in determining group’s major purpose in 2006); MUR 5487 (Progress for America VF) (analyzing group’s major purpose based on 2004 disbursements where group had raised \$4.6 million and spent \$11.2 million through 2006).

⁶¹ See, e.g., F&LA at 14-15, MUR 6538R (Americans for Job Security) (examining whether respondent’s major purpose may have changed over time); cf. *CREW I*, 209 F. Supp. 3d at 94 (noting “that an organization’s major purpose can *change*”) (citing *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 262 (1986)) (emphasis in original).

1 such, JPF's decline in political activity does not obviate the fact that it became a political
2 committee with ongoing reporting obligations during its 2013 fiscal year.

3 **C. The Commission Dismisses the Allegations as to JPF as a Matter of**
4 **Prosecutorial Discretion**

5 Although the available information could support a finding that JPF became a political
6 committee in 2013-2014, several prudential considerations lead us to dismiss this matter. As
7 described above, the age of the predicate activity, which establishes that JPF was a political
8 committee in 2013-2014, limits the enforcement remedies available to the Commission. Further,
9 the apparent decline of JPF's political activity in the intervening years, as well as JPF's
10 subsequent corporate dissolution, present investigatory challenges. As a result, the Commission
11 exercises its prosecutorial discretion and dismisses the allegations.

12 First, a potential investigation into JPF's major purpose in 2013, would, by its nature, be
13 fact intensive, require substantial Commission resources, and likely face obstacles both in terms
14 of acquiring relevant documents and obtaining accurate statements from the individuals
15 involved. JPF has been dissolved as a corporate entity,⁶² and while such a dissolution would not
16 preclude enforcement action, it would present additional difficulties in terms of locating
17 individuals and documents, and it is possible that documents are no longer available. Indeed, it
18 was not until November 2020, approximately seven years after the qualifying activity occurred,
19 that the Complaint was filed and JBF was notified of its legal obligation to preserve documents
20 relating to this matter. Although there is a potential benefit in seeking to promote the
21 Commission's interest in public disclosure, under these circumstances, given these difficulties

⁶² See *supra* n. 18 and accompanying text (discussing JPF's dissolution).

1 and in light of the Commission's current caseload related to more recent activity, pursuing JPF
2 would not be an efficient use of the Commission's limited resources.

3 Second, JPF raises the issue of the statute of limitations and claims that because the
4 underlying activity that gave rise to the allegation that JPF may be a political committee occurred
5 more than five years ago, the action is time-barred and equitable remedies are not available due
6 to a lack of significant risk of future harm.⁶³ The vast majority of the underlying conduct in this
7 matter occurred in 2013-2014, and although additional activity did occur within the statute of
8 limitations, that activity only represents a small portion of JPF's overall political activity.

9 The statute of limitations does not bar the Commission from finding reason to believe
10 based on JPF's 2013-2014 activity and seeking injunctive relief, including compelling JPF to
11 register as a political committee and file reports for all of its receipts and disbursements since its
12 2013 fiscal year.⁶⁴ Indeed, the Commission approved precisely that type of injunctive relief in
13 MUR 6538R (Americans for Job Security), which resulted in the disclosure of the respondent's
14 contributions and expenditures during the relevant time period, even though much of the activity
15 fell outside the five-year statute of limitations.⁶⁵ Consistent with that matter, the Commission
16 has the authority to seek equitable relief from JPF. However, given the age of the predicate
17 activity and the fact that JPF has ceased to exist, pursuing an investigation and injunctive relief
18 in this case would not be a prudent use of the Commission's limited resources.

⁶³ Resp. at 9-10.

⁶⁴ See *FEC v. Christian Coal.*, 965 F. Supp. 66, 71 (D.D.C. 1997) (holding that injunctive relief is not a penalty); *FEC v. Nat'l Republican Senatorial Comm.*, 877 F. Supp. 15, 20-21 (D.D.C. 1995) (same).

⁶⁵ See Conciliation Agreement at 5-6, MUR 6538R (Americans for Job Security); cf. *CREW v. American Action Network*, No. 18-cv-945 (CRC), 2019 WL 4750248, at *14 (D.D.C. Sept. 30, 2019) (finding that a court may order defendant to disclose activity post-dating the alleged conduct in the administrative complaint when fashioning an equitable remedy). But see Certification ¶ 1 (Mar. 1, 2021), MUR 7181 (Independent Women's Voice) (reflecting 3-3 Commission split on finding reason to believe predicated on conduct that occurred more than five years ago where OGC recommended seeking equitable relief).

1 In conclusion, although the available information is sufficient to support a reason to
2 believe finding that JPF violated 52 U.S.C. §§ 30102, 30103, 30104 by failing to register and
3 report as a political committee, given the passage of time since JPF may have become a political
4 committee, and the Commission's limited resources, the Commission exercises its prosecutorial
5 discretion and dismisses the allegations that JPF failed to register and report as a political
6 committee.⁶⁶ Additionally, because these registration and reporting obligations apply only to
7 committees and treasurers, the Commission finds no reason to believe that Church, Norris, and
8 Miller violated 52 U.S.C. §§ 30102, 30103, 30104.

⁶⁶ *Heckler*, 470 U.S. at 831-32.