FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
Americans for Job Security, Inc.;	)	MURs 5694 and 5910
Michael Dubke, President (MUR 5694 only);	)	
Fred Maas, Secretary and	)	
Treasurer (MUR 5694 only)	)	

STATEMENT OF REASONS OF VICE CHAIRMAN MATTHEW S. PETERSEN AND COMMISSIONERS CAROLINE C. HUNTER AND DONALD F. McGAHN

In these matters, a U.S. Senate campaign filed a complaint with the Commission against Americans for Job Security ("AJS" or "Respondent"), a public policy group organized under section 501(c)(6) of the Internal Revenue Code, based on its sponsorship of television issue ads that referenced public officials during the 2006 election cycle. A third party (Public Citizen) later attempted to bolster the complaint against AJS with additional allegations that the group had committed numerous violations of the Federal Election Campaign Act of 1971, as amended (the "Act"), with respect to other similar ads aired during the 2000 elections up through the 2006 cycle.

Specifically, these matters arose from complaints filed by Senator Bob Casey's 2006 campaign and Public Citizen, alleging that AJS violated the Act by: (1) failing to register and report as a political committee under 2 U.S.C. §§ 433, 434; (2) accepting prohibited and excessive contributions under 2 U.S.C. § 441a(f); (3) failing to include proper disclaimers on its advertisements under 2 U.S.C. § 441d; and (4) making prohibited expenditures on communications containing express advocacy under 2 U.S.C. § 441b. The first complaint, filed by Senator Casey's campaign, raised the specter of a criminal violation of Federal campaign finance law.[1]

After a review of the complaints and AJS's various responses, we voted to reject the allegations contained in the complaints and the recommendation of the Office of

[1] We note that the complaint filed by Public Citizen takes issue with virtually every public communication that AJS has made since 1998. In addition to the obvious problems with such an approach (including but not limited to the fact that the complaint concerns activity clearly time barred by the statute of limitations and the allegations are not made with sufficient specificity), the complaint contains numerous obvious factual errors and falsehoods. Given that such complaints are filed under oath, we expect better.

General Counsel ("OGC") to find reason to believe that a violation of the Act occurred.[2] Contrary to the views of the Complainants and OGC, the Respondent did not receive contributions or make expenditures in excess of $1,000 and did not have as its major purpose the nomination or election of Federal candidates. At its core, this matter concerns a well-established 501(c) that conducted issue advocacy beyond the reach of the Commission's regulations and jurisdiction. As Public Citizen itself commented to the Commission in 2004, "a legitimate 501(c) organization should not have to fear that it will become a political committee simply by engaging in political issue-related criticisms of public officials."[3]

These allegations turn on whether the ads in question contained "express advocacy" as defined in 11 C.F.R. § 100.22. Even assuming *arguendo* that the plain language of section 100.22 is constitutional and enforceable, the ads do not come within the regulatory reach of either section 100.22(a) or (b). Thus, we need not address section 100.22(b)'s checkered history in the federal courts to reach our conclusion. Nonetheless, because both Complainants and OGC failed to acknowledge (until raised by us) that history – let alone explain how section 100.22(b) can be applied in the Fourth Circuit, when (i) the Fourth Circuit has already found that section unconstitutional,[4] and (ii) Commission has stated publicly that it would not enforce section 100.22(b) in that Circuit, among other jurisdictions[5] – we intend to address section 100.22(b) broadly in a separate statement.

I. FACTUAL BACKGROUND

AJS is an incorporated non-profit entity organized pursuant to section 501(c)(6) of the Internal Revenue Code. As stated in its Articles of Incorporation, AJS has as its mission, among other things, to promote "a strong job-creating economy," "[t]o promote the common business interests of its members and contributors," and "[t]o encourage communication, discussion, and concerted action by and among its members in furtherance of their common business interests to encourage a strong job creating economy."

In furtherance of these goals, AJS has, since its inception, utilized broadcast and print advertising and mass mail to inform the public about issues and legislation

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[2] Chairman Walther and Commissioners Bauerly and Weintraub voted affirmatively to adopt the Counsel's recommendation. The undersigned objected. MURs 5694 & 5910, Certification dated February 25, 2009.

[3] Political Committee Status, 69 Fed. Reg. 11,736, 11,748 (Notice of Proposed Rulemaking, Mar. 11, 2004), Comments of Public Citizen at 10, available at: http://www.fec.gov/pdf/nprm/political_comm_status/public_citizen_holman.pdf.

[4] *Virginia Society for Human Life, Inc. v. FEC* ("*VSHL*"), 263 F.3d 379 (4th Cir. 2001); *FEC v. Christian Action Network, Inc.* ("*CAN II*"), 110 F.3d 1049 (4th Cir. 1997). The Fourth Circuit imposed fees and costs on the Commission for its enforcement efforts.

[5] *VSHL*, 263 F.3d at 382 and 388 (noting that the Commission voted 6-0 "in a closed meeting" that it would not seek to enforce 11 C.F.R. § 100.22(b) in the First and Fourth Circuits pursuant to *Maine Right to Life Comm., Inc. v. FEC* ("*MRLC*"), 914 F. Supp. 8 (D. Maine), *aff'd per curiam*, 98 F.3d 1 (1st Cir.1996), *cert. denied*, 522 U.S. 810 (1997) and *CAN II*).

important to the association and to urge the public to contact their legislators to support legislation favorable to American businesses.

The complaints in this matter found fault with several such communications made by AJS between the 2000 and 2006 election cycles. The initial complaint focused on advertisements that aired in Pennsylvania in 2005. The first ad ("Record" / "Moms") stated:

> Most Saturdays they get together in the park, 8 a.m. sharp. Pennsylvania families relax a little more these days because Rick Santorum is getting things done everyday. Over $300 billion in tax relief; eliminating the marriage penalty, increasing the per child tax credit --all done. And now Rick Santorum is fighting to eliminate unfair taxes on family businesses. Call and say thanks because Rick Santorum is the one getting it done. (Text on screen: "Senator Rick Santorum; (717) 231-7540; Paid For By Americans for Job Security.")[6]

In the news article cited by the complainant, AJS's president is reported to have said that "Record" was a kickoff to a national campaign to promote tax cuts and other issues the group backs, that there would be a heated political and policy debate during the Pennsylvania race, and is quoted as saying that "we want to be part of that debate."[7]

The second ad mentioned in the first complaint ("Grandkids") stated:

> (On screen: images of grandfather and grandson in a park.) These days, Edgar's afternoons are reserved for grandkids. Like thousands of Pennsylvania seniors, he's enjoying retirement. (Text on screen" "Rick Santorum.") Santorum sponsored legislation guaranteeing Americans 55 and older the Social Security they deserve. (Text on screen: "Rick Santorum sponsored Social Security Guarantee Act of 2005 s.1750.") Fighting to make sure Congress can't touch it in the future. Because seniors worked so hard to pay into it, Santorum's ensuring it's there when we need it. (Text on screen: "Rick Santorum ensuring Social Security is there when we need it.") Call and say thanks. Rick Santorum's the one getting it done. (Text on screen: "Senator Rick Santorum; (412) 562-0533; Getting It Done; Paid For By Americans for Job Security.")[8]

The second complaint took issue with virtually everything AJS has done "at least since 1998." OGC recommended that the Commission not pursue much of this activity,[9]

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[6] MUR 5694, Complaint at 2 (citing Kimberly Hefling, *Group's Ad Touts Santorum's Record on Tax Relief*, The Associated Press, Nov. 21, 2005).

[7] *Id.*

[8] MUR 5694, Complaint at 3; MUR 5910, Response at 42.

[9] For purposes of this Statement of Reasons, we rely upon that determination. In addition, we note that counsel for Respondent submitted a voluminous and comprehensive response (including, for example, legislation pending at the time a communication was distributed) to each and every ad challenged by Public Citizen in its complaint, and we also rely and hereby incorporate by reference that analysis as additional

as it did not come within the reach of the Act, but did single out a few advertisements that it felt constituted express advocacy and, therefore, warranted further scrutiny. The first ad was run in North Carolina in 2004, and stated:

> What will it take to get North Carolina moving? Experience. Leadership. Richard Burr. In Congress, Burr fought to keep jobs here, while attracting new businesses. He blocked unfair trade practices seven times, voting against giving China special trade status. A small businessman for 17 years, Burr has the leadership required to protect jobs of our working families. Call Richard Burr. Tell him thanks for being a conservative, common sense voice for North Carolina.[10]

AJS also sponsored a television ad in Alaska in 2004, which stated:

> (On screen: Cindy Norquest; Anchorage). CINDY NORQUEST: When Tony Knowles was governor, I had a great many friends that chose to leave Alaska. (On screen: Under Tony Knowles, Alaska had the lowest economic growth of any state). They didn't actually choose –they had to leave Alaska, because there weren't opportunities here. (On screen: Roy Eckert; Ketchikan). ROY ECKERT: You can't just drive to the next town to find work. (On screen: 2001 study showed a sharp increase in young Alaskans leaving to find work.) You'd have to literally leave your home; there's nowhere else to go. (On screen: Neil MacKinnon; Juneau). NEIL MACKINNON: Probably Alaska's greatest export is our children searching for jobs. (On screen: Paul Axelson; Ketchikan). PAUL AXELSON: You know, if you don't have a living-wage job, then you have no option but to leave the community. (On screen: Alaska had the highest unemployment rate in the country under Tony Knowles). CINDY NORQUEST: Tony Knowles may think flipping burgers is a good job, but it's not the future I want for my daughters. (On screen: Ask Tony Knowles his plans to bring our children back to Alaska; Paid for by Americans for Job Security.)[11]

In total, we reviewed approximately fifty AJS communications disseminated during the 2004 and 2006 election cycles. OGC concluded that the majority of them did not contain express advocacy. The ads distributed by AJS during the 2004 cycle typically referred to actions or positions taken by federal candidates regarding particular issues or legislation, and urged the viewer/recipient to contact the candidate regarding that issue or piece of legislation. For example, a direct mail piece disseminated by AJS, which OGC concluded did not contain express advocacy, contained the following text:

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support of our conclusion that (i) the ads in question do not contain express advocacy; and (ii) AJS is not a political committee.

[10] MUR 5910 Complaint, Attach. at 48; MUR 5910 Response at 34.

[11] MUR 5910 Complaint, Attach. at 42; MUR 5910 Response at 28.

> John Kerry voted against a comprehensive prescription drug benefit making prescription drugs more affordable and accessible to seniors. But it gets worse. Kerry wants to repeal the prescription drug benefits seniors now receive. Kerry's prescription for failure: Fewer choices. More government. More paperwork. Higher costs. Call Senator Kerry at (202) 224-2742 and let him know that American Seniors deserve better.[12]

Some of the other ads produced by AJS did not even identify a federal candidate,[13] or mentioned a federal officeholder who had already announced his intention to retire and not seek election to any other federal office.[14] For example, in 2004, after Senator Don Nickles had announced his retirement from the U.S. Senate, AJS produced a series of print ads critical of Nickles' stand on the "death tax," and encouraged the public to contact Senator Nickles and urge him to solidify his legacy on the issue.[15] And in 2005, AJS produced a series of broadcast and print ads criticizing members of the Senate leadership, including then-Senator Santorum, for failing to bring to the floor for a vote legislation that would repeal the estate tax to the Senate floor for a vote, despite their public promises to repeal the estate tax.[16]

In 2006, AJS sponsored ads conveying its position on issues of interest to the small business community. These ads ("the Casey ads") referenced then-Pennsylvania State Treasurer Bob Casey, and used his candidacy as a vehicle to discuss these issues. For example:

- "The Little Guy": "The recent tax cuts have given me the help I need to raise salaries and hire additional folks. Bob Casey wants to take those tax cuts away. That'll hurt. If Casey raises taxes on small businesses, it'll hurt the little guy like me, and the people I employ, making it harder for me to hire more help, and pay my guys more. It makes no sense. Bob Casey needs to do better for small businesses in Pennsylvania. We need a strong economy, not higher taxes." (On screen text: Call Bob Casey (717) 787-2465. Tell him higher taxes kill jobs.).

- "Honest Day's Work" or "Dedication": "Doing a good job requires dedication. Yet, as treasurer, Bob Casey has skipped work more than 43 percent of the time. In fact, just three months after being sworn in as treasurer, Bob Casey was already skipping work to look for another job. If you missed that much work, would you keep your job? Call Bob Casey and tell him we expect an honest day's work for a honest day's pay." (On screen text: Call Bob Casey (717) 787-2465. Honest Day's Work. Honest Day's Pay.).

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[12] MUR 5910 Complaint, Attach. at 45; MUR 5910 Response at 30. *See also* MUR 5910 Complaint, Attach. at 44, 46-47 (transcripts of similar communications by AJS).
[13] MUR 5910 Response at 37-38 (Communications #26-27).
[14] *See* MUR 5694, Response at Attach. 5.
[15] MUR 5910 Response at 7.
[16] *Id.*

- "Serious Times": "These are serious times that call for serious leaders. Yet, as treasurer, Bob Casey has skipped work more than 43 percent of the time. In fact, just three months after being sworn in as treasurer, Bob Casey was already skipping work to look for another job. With a record like that can we really count on Bob Casey to be there for us when it matters the most? Call Bob Casey. Tell him we need serious leaders in these serious times." (Text on screen: Call Bob Casey (717) 787-2465).

II. DISCUSSION

"Political committee" is defined by the Act as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year."[17] The Supreme Court, to avoid vagueness problems with the statutory language, construed "expenditure" to "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."[18] Similarly, the Court narrowed the definition of contribution to encompass only (1) donations to candidates, political parties, or campaign committees; (2) expenditures made in coordination with a candidate or campaign committee; and (3) donations given to other persons or organizations but "earmarked for political purposes."[19]

Thus, the definition of "political committee" is narrow. The Supreme Court has construed the term to "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."[20] In other words, the Act does not reach those "engaged purely in issue discussion," but instead can only reach "that spending that is unambiguously related to the campaign of a particular federal candidate" – specifically, "communications that expressly advocate the election or defeat of a clearly identified candidate."[21] The purpose of this narrowing construction is to restrict the number of groups that must "submit to an elaborate panoply of FEC regulations requiring the filings of dozens of forms, the disclosing of various activities, and the limiting of the group's freedom of political action to make expenditures or contributions."[22]

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[17] 2 U.S.C. § 431(4)(A).
[18] *Buckley v. Valeo*, 424 U.S. 1, 80 (1976).
[19] *Id.* at 24, n.24, 78.
[20] *Id.* at 79-80.
[21] *Id.*
[22] *FEC v. GOPAC, Inc.*, 917 F. Supp.2d 851, 858 (D.D.C. 1996) (*quoting FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 392 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981)). We have been struck by the number of committees, including separate segregated funds of corporations, that seek to terminate after encountering the regulatory burdens associated with "political committee" status that the court in *GOPAC* noted. *See, e.g.*, ADR 047 (American Animal Husbandry Coalition PAC); ADR 145 (Americans for Sound Energy Policy); ADR 288 (Progressive Majority); ADR 418 (Miller Alfano Raspanti PAC); ADR 469 (Pro-Life Campaign Committee).

A. AJS Did Not Make Contributions or Expenditures in Excess of $1,000

The Commission, in the wake of the Supreme Court's decision in *FEC v. Massachusetts Citizens for Life, Inc. ("MCFL")*,[23] and the Ninth Circuit's decision in *FEC v. Furgatch*,[24] attempted to define the contours of what constitutes "express advocacy" and promulgated 11 C.F.R. § 100.22.[25] The regulation, which for the purposes of reaching our decision in this matter we assume *arguendo* to be constitutional and enforceable,[26] provides that:

> Expressly advocating means any communication that:
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> (a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush" or "Mondale!"; or
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> (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because
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> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
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> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.[27]

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[23] 479 U.S. 238 (1986).

[24] 807 F. 2d 857 (9th Cir.), *cert. denied* 484 U.S. 850 (1987).

[25] *See* Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35292 (July 6, 1995) ("Express Advocacy E&J").

[26] As will be discussed more fully in a forthcoming separate statement, this is not an easy assumption, given that portions of section 100.22—namely, subsection (b)—have been held unconstitutional by every Federal court that has considered the regulation on its merits. *See, e.g., VSHL*, 263 F.3d at 392; *MRLC*, 914 F. Supp. at 12; *Right to Life of Dutchess Co., Inc. v. FEC*, 6 F. Supp.2d 248 (S.D.N.Y. 1998) (finding "that 11 C.F.R. § 100.22(b)'s definition of 'express advocacy' is not authorized by FECA, 2 U.S.C. § 441b, as that statute has been interpreted by the United State Supreme Court in *MCFL* and *Buckley v. Valeo*."). States with statutes modeled after section 100.22(b) have fared no better. *See, e.g., Ctr. for Individual Freedom, Inc. v. Ireland*, 2008 WL 4642268 (S.D.W.Va.), *amended by* 2009 WL 2009 WL 749868 (S.D.W.Va); *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 969-70 (8th Cir. 1999).

[27] 11 C.F.R. 100.22.

First, there does not appear to be any disagreement as to the application of section 100.22(a) to the ads in question. The complainants do not claim that any AJS communications contained so-called "magic words" of express advocacy, or otherwise came within the reach of section 100.22(a).[28] Nor has OGC made such a recommendation. Our own review of the various ads and materials leads us to the same conclusion. Therefore, the ads in question do not come within the reach of section 100.22(a).

The complainants do allege, however, that certain AJS communications come within the reach of section 100.22(b), and OGC reached a similar conclusion. We disagree. The plain language of section 100.22(b) limits its reach to speech that "could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)" because the "electoral portion" is "unmistakable, unambiguous, and suggestive of only one meaning."[29] Notwithstanding any suggestion to the contrary, the standard for "express advocacy" is not whether a communication might somehow be read as campaign-related, or whether such a reading is a reasonable, or perhaps even the most reasonable, interpretation. Instead, as long as "reasonable minds" can plausibly interpret an ad in some way other than as encouraging actions to elect or defeat a clearly identified federal candidate, the ad does not contain "express advocacy" as defined by section 100.22(b).[30] This is so even in cases where a communication "discusses or comments on a candidate's character, qualifications, or accomplishments."[31] After all, as the Express Advocacy E&J made clear, "the revised rules in section 100.22(b) do not affect pure issue advocacy, such as attempts to create support for specific legislation, or purely educational messages."[32] Thus, section 100.22(b), even though somewhat broader than section 100.22(a), still sets a very high bar.

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[28] Although not relevant in this matter, we note that there appears to be some confusion about the meaning of the third part of section 100.22(a), regarding the use of slogans. To be clear, mere use of some sort of slogan or other similar language is not enough to come within its regulatory reach. Instead, the regulation contemplates that the slogans or other similar language be the same as (or at least resemble) a slogan that is being used by the campaign of the referenced Federal candidate. *See, e.g.*, MUR 5024, Statement of Reasons of Chairman Bradley Smith and Commissioners David Mason and Michael Toner at 5 (concluding that a slogan on a brochure, "New Jersey Needs New Jersey Leaders," did not constitute a campaign slogan because there was no information that the slogan was employed or adopted by any of the candidates in the relevant election, and no basis to conclude that the slogan was identified with any campaign).

[29] 11 C.F.R. 100.22(b).

[30] Any suggestion that section 100.22(b)'s "reasonable person" test can turn on the understanding of the audience has been decisively rejected. *VSHL*, 263 F.3d. at 392 (quoting *Buckley*, 424 U.S. at 43). *See also FEC v. Wisconsin Right to Life* ("*WRTL*"), 127 S. Ct. 2652, 2666 (2007) (regarding the functional equivalent of express advocacy). Moreover, reading this test this way would turn the inquiry into an issue of fact, not a question of law.

[31] Express Advocacy E&J, 60 Fed. Reg. at 35,296 ("Communications discussing or commenting on a candidate's character, qualifications, or accomplishments are considered express advocacy under new section 100.22(b) *if, in context, they have no other reasonable meaning* than to encourage actions to elect or defeat the candidate in question.") (emphasis added).

[32] *Id.* at 35,295.

For example, the advertisements that AJS sponsored in Pennsylvania that referenced Senator Santorum did not contain an "unmistakable" or "unambiguous" message urging viewers to vote one way or another. Instead, the Pennsylvania ads were part of a larger advocacy campaign to draw attention to the need for tax relief and retirement security, and were run almost a year prior to the general election and almost six months prior to the primary election. The first ad, entitled "Moms," concerned tax relief legislation and included several different video clips depicting families while a voiceover noted Senator Santorum's efforts to pass tax relief legislation. The ad included several textual graphics noting Senator Santorum's record on tax relief and referring to the "Jobs and Growth Tax Relief Reconciliation Act of 2003" and the "Jobs and Growth Tax Relief Act of 2005," as sponsored by Senator Santorum. The ad concluded with a message encouraging viewers to call Senator Santorum's district office and thank him for his efforts.[33] The ad also included the AJS logo as well as a notice that AJS paid for the advertisement.

The second Pennsylvania ad, entitled "Grandkids," addressed pending social security guarantee legislation sponsored by Senator Santorum. While a voiceover referred to Senator Santorum's efforts to pass social security reform legislation, viewers saw clips of a grandfather in the park with his grandson and a textual graphic noting that Senator Santorum sponsored S. 1750, the "Social Security Guarantee Act of 2005." The ad concluded with a message encouraging viewers to call Senator Santorum's government district office and thank him for sponsoring the legislation. The ad included the AJS logo and a notice that it was paid for by AJS.

A reasonable person could interpret these ads as something other than as an appeal to vote for or against a federal candidate. Neither ad exhorts the public to campaign for or contribute to any federal candidate.[34] Nor do they explicitly refer to any individual as a candidate or reference an election.[35] In short, neither ad contains any sort of discernable electoral portion. Both ads discuss public policy issues and a public official's position on those issues, and ask the public to contact the official to communicate their views. In other words, the ads lack express advocacy.

With respect to "Moms," Respondent correctly notes that the ad discusses the issue of social security. On September 22, 2005, Senator Santorum introduced S. 1750, a bill purported to guarantee social security benefits to beneficiaries born before 1950. The ad specifically requests that the viewer contact Senator Santorum to discuss these issues. Moreover, the communication may be interpreted as a request to contact Senator Santorum to inquire about his positions on these issues. It does not refer to Senator Santorum as a candidate, reference an election, or exhort the public to campaign for or contribute to a federal candidate. In fact, it urges the viewer to call Senator Santorum at

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[33] As the Ninth Circuit noted in *Furgatch*, when a communication contains such an explicit call to take some type of non-electoral action, the Commission cannot supply a meaning to the words that is incompatible with the clear import of the words. *Furgatch*, 807 F.2d at 863-64.

[34] *See* 72 Fed. Reg. 5604 ("Express advocacy also includes exhortations 'to campaign for, or contribute to, a clearly identified candidate.'").

[35] Of course, even if there were such references, that alone is has not been enough to convert a message into express advocacy. *See* MUR 5634 (Sierra Club, Inc.), General Counsel's Report # 2 at 16.

his official office. And even assuming arguendo that timing is relevant, the ad was broadcast about a year before the general election, further evidence that the ad is not unambiguously campaign-related.

With respect to "Grandkids," Respondent correctly notes that the ad discusses the issue of tax policy. President Bush's 2003 tax relief package was an issue considered and debated by the 109th Congress. Senator Santorum voted for the original 2003 bill, and was a co-sponsor of S. 7, a bill introduced in the 109th Congress, to make the tax reductions permanent. The ad specifically requests that the viewer contact Senator Santorum to discuss these issues. The ad may also be interpreted as a request to contact Senator Santorum to inquire about his positions on these issues. It does not refer to Senator Santorum as a candidate, reference an election, or exhort the public to campaign for or contribute to a federal candidate. In fact, it urges the viewer to call Senator Santorum at his official office. As with the first ad, the ad was broadcast about a year before the general election, making it all the more difficult to see how the ad is unambiguously campaign-related.

That these ads can be read as an effort by AJS to engage in protected issue discussion, and thus something other than as an appeal to vote, is bolstered by additional AJS ads aired in 2006, subsequent to the filing of the first complaint, but challenged by the second. None of these additional ads, including the Casey ads,[36] contained express advocacy. Rather, the Casey ads can be seen as using Casey as the proverbial poster child for focusing the public's attention on certain issues about which a group consisting of employers naturally would be concerned. Thus, his candidacy is tangential to the central message of the ads, and is merely a vehicle for the group to effectively communicate its message regarding issues.

The two Casey ads that OGC believed warranted further review were called "Serious Times" and "Dedication." With respect to "Serious Times," Respondent correctly asserts that the issues discussed in this advertisement pertain to employment and government ethics issues. The ad specifically requests that the viewer contact then-State Treasurer Casey to discuss these issues; thus, the ad can be read as a request to contact Casey to inquire about his positions on these issues. The ad does not reference an election, or exhort the public to campaign for or contribute to a federal candidate, but instead states that he skipped work more than 43 percent of the time. Whether or not Respondent's claims are true or not – that the wasting of taxpayer funds to subsidize an individual who is pursuing activities unrelated to his current job is a serious issue for the business community, and that it was waste that then-State Treasurer Casey was in a position to affect – is not relevant. But what does matter is that this is a reasonable non-campaign related reading of the ad.

"Dedication" aired two weeks after the 2006 primary election, and about five months before the general election. As Respondent correctly notes, the issues discussed in this ad pertain to employment and government ethics issues. In addition to the

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[36] The Casey ads included "The Little Guy," "Honest Day's Work/Dedication," and Serious Times," described *supra*, section II.A. *See also* MUR 5910, Response at 39-42.

arguments of Respondent, this ad conveys a very simple message: that then-State Treasurer Casey ought to spend his time doing his then-current job as opposed to spending time doing other things, and that viewers ought to call Casey and tell him as much.

Another ad OGC believed warranted further review aired in Alaska in July of 2004 and referenced Alaska's former Governor, Tony Knowles. The issues discussed in this ad pertain to business and employment issues. The Respondent notes that, at the time the ad was aired, Alaska was facing an unemployment crisis. The lack of jobs was causing young adults to leave the state in search of employment opportunities elsewhere. This in turn negatively impacted the small business community in the state. The communication specifically requests that the viewer contact Governor Knowles to discuss these issues. It can also be interpreted as a request to contact Governor Knowles to inquire about his positions on these issues. It does not refer to Governor Knowles as a candidate, reference an election, or exhort the public to campaign for or contribute to a federal candidate. The ad aired about four months prior to the general election.

Thus, a reasonable person could interpret the ad as an appeal for viewers to query the Senate candidate about his jobs plan (which is exactly what the ad's plain language stated), and otherwise influence the issue debate related to jobs. Coming from a group eponymous with that issue, and whose mission statement suggests as much, such an interpretation is not in any way unreasonable. And the mere fact that Mr. Knowles was not an officeholder at the time the ad ran does not change the result. As a former high-profile public official, Mr. Knowles's stance on job-related issues, coupled with his candidacy, provided a vehicle for AJS to express its own views on an issue of public importance. The advertisement, then, is the sort of discussion of a candidate's position of issues that Supreme Court spoke of in *Buckley*. Moreover, as a high-profile public figure running for office and thus one who still commanded the proverbial bully pulpit and, if victorious, would have the ability to vote on bills before Congress related to jobs, it is reasonable that AJS would also try and influence Mr. Knowles own views on those issues.[37]

Another ad singled out by OGC for further review was aired in North Carolina and referenced Congressman Richard Burr. Setting aside the more obvious problems with attempting to launch an enforcement action regarding this ad premised upon section 100.22(b) (the ad aired in the Fourth Circuit, which is significant because that Circuit has already declared section 100.22(b) unconstitutional and the Commission has previously stated publicly that it would not enforce that section in the Circuit), the ad does not come within the reach of section 100.22(b) on its face.[38]

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[37] *See FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 498 (1985) (*"NCPAC"*) ("The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the few essential features of democracy is the presentation to the electorate of varying points of view.").

[38] *See* n. 3 and 4, *supra*. The significance of the Fourth Circuit decision and the Commission's non-enforcement policy will be addressed more fully in a forthcoming supplemental statement.

First, the ad does not contain any terms that expressly advocate the election or defeat of any clearly identified candidate. The issues discussed in the ad pertain to business, foreign trade, and employment issues. Respondent has provided a coherent and persuasive explanation for why the ad does not constitute express advocacy, with which we agree:

> The issues of trade, unfair trade practices by the Chinese, and Most Favored Nation status for the Chinese were, and are, topics of legislation and debate in the Congress. North Carolina's manufacturing and textile base have been decimated by unfair trade practices by our trading partners. These practices have resulted in the loss of jobs across the nation, including North Carolina. Especially hard hit are small business owners. The communication specifically requests that the viewer contact then-Congressman Burr to discuss these issues. Then-Congressman Burr was in a position to affect the issues discussed in the advertisement. Moreover the communication may be interpreted as [a] request to contact then-Congressman Burr to inquire about his positions on these issues. Importantly, the communication does not refer to then-Congressman Burr as a candidate, reference an election, or exhort the public to campaign for or contribute to a federal candidate. In addition, the Complaint alleges that the communication aired June 10, 2004, approximately five months before the federal general election.[39]

Thus, a reasonable person can interpret the North Carolina ad as supporting Congressman Burr's stances on economic issues combined with a request that North Carolinians call the Congressman and thank him. This is consistent with what the Second Circuit has previously held to constitute protected issue discussion, and not express advocacy: "If your Representative consistently votes for measures that increase taxes, let him know how you feel. And thank him when he votes for lower taxes and less government."[40] Like in that case, the ad here contains "no reference anywhere ... to the congressman's party, to whether he is running for re-election, to the existence of an election or the act of voting in any election; nor is there anything approaching an unambiguous statement in favor of or against the election of [the congressman]."[41]

Moreover, as Respondent makes clear, the ad lacks any sort of electoral portion. Instead, the action advocated is to call the Congressman and thank him for his work on the issue (notably, according to the Second Circuit, a "thank you" does not convert an issue ad into express advocacy[42]). And even if the ad could be read as somehow referring to character, qualifications, and accomplishments, the result does not change, as there still exists another interpretation that a reasonable person can make. As the Ninth Circuit in *Furgatch* made clear, to constitute express advocacy, a message requires more than just "informative content" – it must contain a clear call to electoral action. Thus,

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[39] MUR 5910, Response at 34.
[40] *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2d Cir. 1980).
[41] *Id.*
[42] *Id.*

Respondent's conclusion is correct: "the communication does not contain an electoral portion that is unmistakable, unambiguous and suggestive of only one meaning,"[43] and does not constitute express advocacy as defined by section 100.22(b).

These conclusions are consistent with other recent Commission actions and OGC recommendations. For example, in MUR 5634 (Sierra Club, Inc.), OGC and the Commission asked whether "reasonable minds could differ as to the action [a communication] urges."[44] Even where an ad referenced an individual as a candidate, invited the recipients to become better informed about the candidates, and presented one candidate more favorably than another, the Commission determined that the particular Sierra Club ad in question did not in and of itself constitute express advocacy. Thus, the Commission has already determined that outside independent groups are permitted to discuss in their communications the public policy positions of government officials and public figures, indicate a preference for one candidate over another in the context of contrast communications, refer to individuals as candidates, identify the election year, and even urge the public to become better informed about the candidates without satisfying the definition of express advocacy found at section 100.22(b). Such prior Commission action provides further support for the conclusion that the ads sponsored by AJS do not come within the reach of section 100.22(b), even when read broadly.

More recently, in MUR 5854 (Lantern Project), OGC recommended, and the Commission voted 4-1 to approve, finding that numerous ads run by Lantern Project did not contain express advocacy under 11 C.F.R. § 100.22(b). Those ads are materially indistinguishable from the ads sponsored by AJS, as all the ads reference persons who were federal candidates, and can be read as discussing or otherwise critiquing those candidates' policy positions, yet stop short of any sort of electoral advocacy:

- One Lantern Project ad attacked Senator Santorum's legislative record for "voting against raising the minimum wage. But Santorum voted to allow his own pay to be raised by $8,000. What is he thinking?"

- In another ad, the group alleged that "Rick Santorum's committees accepted more money from lobbyists last year than any other member of Congress. No wonder Santorum voted to give billions in special tax breaks to oil companies. What was he thinking?"

- Yet another Lantern Project ad intoned, "From privatizing Social Security to cutting student loans for the middle class, when Rick Santorum has to choose between siding with George Bush or middle class Pennsylvanians, Santorum supports Bush. What is he thinking?"

OGC recommended, and the Commission voted to approve, finding that these ads contained no express advocacy because "one can reasonably view each communication as criticizing Santorum's legislative or issues agenda," even though the ads "arguably

[43] MUR 5910, Response at 34.
[44] MUR 5634 (Sierra Club, Inc.), General Counsel's Report #2, at 17.

attack Santorum's 'character, fitness and qualifications.'"[45] We do not see a reasoned distinction between the references to character and other personal qualifications found in the Lantern Project ads (which OGC concluded did not contain express advocacy) and the references to character and other personal qualifications at issue in the AJS ads (which OGC claims did contain express advocacy).[46]

In MUR 6073 (Patriot Majority), OGC recommended, and the Commission recently voted to approve, finding that 23 different ads run by Patriot Majority during the 2008 election cycle did not fall under 11 C.F.R. § 100.22(b). Again, the ads at issue (of which a representative sample follows) were materially indistinguishable from AJS's:

- One Patriot Majority ad attacked Congressman Steve Chabot's policy positions on gas prices: "Gas prices are hurting Ohio, but our Congressman -- Steve Chabot is part of the problem in Washington . . . Tell Steve Chabot to stop siding with big oil. ..and big oilmen."

- Another Patriot Majority ad featured Iraqi veterans who criticized Congressman Lincoln Diaz-Balart for voting "against healthcare for our troops... brain injuries... against burn care" and criticized him for voting "for five pay raises ... pay raises... for himself."

- Yet another one of the group's ad criticized Congressman Tim Walberg for voting "against continuing Head Start" and asked viewers to "Tell Tim Walberg to stop voting against Michigan's future."

The Commission voted to approve OGC's recommendation that these ads did not contain express advocacy because "[v]iewing the advertisements as a whole, one can reasonably conclude that they are being asked to contact the federal candidate and urge them to take a specific position on an issue or legislation."[47] Like the AJS ads at issue in this matter, Patriot Majority's ads, while critical of federal candidates, were also issue-focused, and there is no principled reason for finding express advocacy in one case but not the other.

In short, the AJS ads at issue, on their face, plainly contain messages regarding public policy issues—messages that can be understood without resort to intellectual somersaults or logical contortions. They become suspect only when one ascribes ulterior motives to their sponsors. But as the Supreme Court has admonished, "an intent-based test would chill core political speech by opening the door to a trial on every ad . . . on the

[45] MUR 5854, Factual and Legal Analysis.

[46] *See* MUR 5564 (Alaska Democratic Party). Statement of Reasons of Commissioners David Mason and Hans von Spakovsky at 2-3 & 10 (when the Commission fails to proceed against a respondent on a certain legal theory, it should not proceed against subsequent respondents in the future on that legal theory absent promulgation of a new regulation). *See also, CBS v. FCC*, 533 F.3d 167 (3rd Cir. 2008) (an agency cannot, in an enforcement action, take a substantial deviation from prior enforcement policies without sufficient notice of change in policy).

[47] MUR 6073, Factual and Legal Analysis at 10.

theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue."[48]

As the Commission recognized in MURs 5854 (Lantern Project) and 6073 (Patriot Majority), the fact that the AJS ads happened to reference candidates for federal office does not in any way diminish the issues they highlighted. The Supreme Court has "long recognized that the distinction between campaign advocacy and issue advocacy may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions."[49] Similarly, the fact that these ads happened to air in states with hotly contested elections, as was the case in MUR 5854, does not change our analysis, and in fact reinforces it. In the same way that some businesses have used closely watched races to highlight their own products,[50] advocacy groups legitimately piggyback on the heightened media focus and public attention in battleground elections to highlight their own issues.[51]

Since none of the communications sponsored by AJS contained express advocacy, it did not make any "expenditures" under 2 U.S.C. § 441b(a)[52] and, thus, did not fail to report any "independent expenditures" under 2 U.S.C. § 434(c). That AJS did not make expenditures or contributions[53] in excess of $1,000 supports our conclusion that AJS is not a "political committee" under the Act.

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[48] *WRTL*, 127 S. Ct. at 2664.

[49] *Id.* at 2659 (*quoting Buckley*, 424 U.S. at 42).

[50] During the 2008 Democratic presidential primary, the ice cream franchise Ben & Jerry's distributed a "Cherries for Change" flavor of ice cream. "Change" was a theme commonly associated with Senator Obama's presidential campaign. *See* Rachel Dry, *Ben & Jerry & Obama*, The Wash. Post, *at* http://blog.washingtonpost.com/44/2008/02/19/ben_jerry_obama_1.html.

[51] *See NCPAC*, 470 U.S. at 498.

[52] With respect to corporate speech, "expenditure" has been construed by the Court to require express advocacy. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); *MCFL*, 479 U.S. 238. *Cf.* AO 2009-02 (The True Patriot Network, LLC) (a single natural person member limited liability company that has not elected to be treated as a corporation for federal income tax purposes is subject to the contribution limits of its sole member, an individual, and subject to the disclosure requirements that apply to individuals). Thus, assuming *arguendo* that AJS is a "corporation" of the sort contemplated by *Austin* and not *MCFL*, it did not make "expenditures."

[53] Nor is there any evidence alleged to support any accusation that AJS accepted "contributions" in excess of $1,000. First, the failure to allege some sort of factual support is alone enough to decline to find reason to believe. *See* 11 C.F.R. 111.4(d); MUR 4960 (Hillary Rodham Clinton For U.S. Senate Exploratory Committee, Inc.). Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas at 1 ("The Commission may find 'reason to believe' only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the FECA."). Second, our own review of the record confirms that there is no support for a finding that AJS accepted "contributions," regardless of whether one looks to the definition of that term found at section 100.57 or not.

B. AJS is not a "political committee"

As stated above,[54] the Act defines a "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year."[55] An organization that triggers neither the Act's contribution nor expenditure thresholds cannot be, as a matter of law, "a political committee."[56] Thus, we conclude AJS was not a political committee without having to engage in an analysis of the so-called "major purpose" test.[57] However, the Commission has not always adhered to this approach in enforcement matters.[58] And Complainant spends much of its energy arguing over the "major purpose" of AJS. We will address, therefore, the issue of AJS's "major purpose," even though without an expenditure or contribution, the application of the "major purpose" test is unnecessary.

Contrary to how the complainants may wish to have it applied, the "major purpose" test is not the first prong of a two-prong test for political committee status. Instead, it is a judicial construct designed to protect some organizations from the burdens of political committee registration, reporting and limitations,[59] even though they have raised or spent more than $1,000 on express advocacy. Thus, the reach of the "major purpose" test is limited to "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."[60]

Though an organization could theoretically satisfy "the major purpose" test[61] through independent spending that is "so extensive" that the organization's major

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[54] *See supra* text accompanying note 17.

[55] 2 U.S.C. § 431(4)(A).

[56] *See. e.g.*, Political Committee Status. 69 Fed. Reg. 68,056, 68,064-65 (Nov. 23. 2004) (declining to incorporate the "major purpose" test into the definition of "political committee").

[57] *See also The Real Truth About Obama, Inc. (RTAO) v. FEC*, 08-1977 (4th Cir.), Brief of Defendants-Appellees Federal Election Commission and United States Department of Justice, at 5 ("Under the statute as thus limited, a non-candidate-controlled entity must register as a political committee – thereby becoming subject to limits on the sources and amounts of its contributions received – only if the entity crosses the $1,000 threshold of contributions or expenditures and its "major purpose" is the nomination or election of federal candidates.").

[58] *See* MURs 5487 (Progress for America Voter Fund), 5751 (The Leadership Forum), and 5541 (The November Fund) (The Commission concluded that evidence that these organizations triggered the statutory threshold of $1,000 in contributions or expenditures was not necessary before finding reason to believe, where available information suggested that the organization had the sole or primary objective of influencing federal elections and had raised and spent "substantial" funds in furtherance of that objective.).

[59] In *Buckley* and *WRTL*, the Court broadly defined what constitutes First Amendment protected issue discussion, emphasizing that regulation of protected speech may occur only if it falls within a very narrow exception to the constitutional guarantee of free speech – express advocacy, or in certain circumstances, its functional equivalent. *Buckley*, 424 U.S. at 79-80; *WRTL* , 127 S. Ct. at 2672. Thus, by narrowing the scope of speech that may be regulated consistent with the First Amendment, the Court necessarily narrowed the scope of which entities may be regulated under the Act.

[60] *Buckley*, 424 U.S. at 79.

[61] We note that the appropriate test looks to "the" major purpose, and not simply whether influencing elections is one of several subjective goals. First, this comports with the directives of *Buckley*, which specifically refers to "the" major purpose. *See Leake*, 525, F.3d at 19 ("Thus, the Court in Buckley must have been using '*the* major purpose' test to identify organizations that had the election or opposition of a

purpose may be regarded as campaign activity,[62] neither Congress, nor the Commission, nor the courts have established any guidance on what constitutes sufficiently extensive spending.[63] However, past Commission efforts to impose "political committee" status on independent groups that have not engaged in express advocacy has not been particularly successful, as demonstrated by *FEC v. GOPAC, Inc.*

In *FEC v. GOPAC, Inc.*, the court explained that "[t]he organization's purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates."[64] GOPAC adopted a formal "mission statement" which reiterated its ultimate objective "to create and disseminate the doctrine which defines a caring, humanitarian, reform Republican Party in such a way as to elect candidates, capture the U.S. House of Representatives and become a governing majority at every level of government."[65] As part of its mission, the committee's communications focused on the issues of the franking privilege and gerrymandering, prominently targeting then-Speaker of the House Jim Wright.[66] Even though the Court found that GOPAC's "ultimate major purpose" was to influence the election of Republican candidates for the House of Representatives, the court held the GOPAC was not a political committee.[67] The court reasoned that, as a means to promote the election of Republican candidates, GOPAC engaged in genuine issue advocacy which nonetheless mentioned the name of a federal candidate (who was inextricably linked to the issues), and that such spending could not be regulated. Thus, the court reasoned, GOPAC was not a "political committee."

As *GOPAC* illustrates, simply because AJS sponsored issue advertisements that mentioned the name of a candidate who may be emblematic of a particular issue does not

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candidate as their only or primary goal – this ensured that the burdens facing a political committee largely fell on election-related speech, rather than on protected political speech. If organizations were regulable merely for having the support or opposition of a candidate as '*a* major purpose,' political committee burdens could fall on organizations primarily engaged in speech on political issues unrelated to a particular candidate. This would not only contravene both the spirit and the letter of *Buckley's* 'unambiguously campaign related' test, but it would also subject a large quantity of ordinary political speech to regulation.") (emphasis in original) (internal citations omitted). Cases post-*Buckley* confirm this. *See MCFL*, 479 U.S. at 262 (referring to "the organization's major purpose"); *see also California Pro-Life Council v. Getman*, 328 F.3d 1088, 1104 n.21 (9th Cir. 2003); *Machinists Non-Partisan Political League*, 655 F.2d at 391-92; *Richey v. Tyson*, 69 F. Supp. 2d 1298, 1311 (S.D. Ala. 2000); *Volle v. Webster*, 69 F. Supp. 2d 171, 174-76 (D. Me. 1999); *New York Civil Liberties Union, Inc. v. Acitio*, 459 F. Supp. 75, 84 n.5, 89 (S.D.N.Y. 1978).

[62] *See MCFL*, 479 U.S. at 262.

[63] Because of this lack of guidance, it is difficult even for us as after-the-fact decision makers to decide in close cases whether or not a group has as its major purpose activity that could subject it to regulation. Fortunately, we do not view the current matter as a close case.

[64] *GOPAC*, 917 F. Supp. at 859 (citing *MCFL*, 479 U.S. at 262).

[65] *Id.* at 854-55.

[66] *Id.*

[67] *Cf. FEC v. Malenick*, 310 F. Supp. 2d 230 (D.D.C. 2004) (entity held to be a political committee where it sent out hundreds of public communications expressly advocating the election of clearly identified federal candidates, and received and forwarded to the intended recipient approximately 230 individual checks (totaling approximately $185,000) made payable to the federal candidate or campaign committees so identified in the communications); *rev'd on other grounds on recons.*, 2005 WL 588222 (D.D.C. 2005).

make the election or defeat of that candidate the organization's major purpose. In fact, it supports the opposite conclusion. Again, as the Supreme Court stated in *Buckley*:

> The distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest.[68]

Thus, even assuming *arguendo* that Respondent's lack of "expenditures" or "contributions" is not somehow dispositive of the question of major purpose, simply because AJS sponsored communications that reference Federal candidates is not enough to convert it into a "political committee."

Likewise, the factual record demonstrates that campaign activity is not the major purpose of AJS. First, contrary to the Complainants' inference that AJS is really a 527 political organization, it is not. AJS is a 501(c)(6) nonprofit trade association that, according to its Articles of Incorporation, is organized for the purpose of uniting "in a common organization businesses, business leaders, entrepreneurs, and associations of businesses" and to "promote the common business interests of its members . . . by helping members of the American public to better understand public policy issues of interest to business." The IRS audited AJS in 2004, but elected to take no action challenging its status under section 501(c)(6).[69]

Our own review of the record confirms Respondent's contention that AJS does not contribute to candidates or their authorized committees. Instead, to the extent that its actions relate to candidates or legislators, the record demonstrates that their message is focused on educating the public on positions and encouraging the public to urge legislators to support policies consistent with AJS's pro-job, pro-growth agenda. As noted by Respondents, such educational efforts and other "grassroots lobbying" are standard fare for trade associations like AJS (after all, this is why the Internal Revenue Code treats such associations differently than section 527 political organizations; regardless, even the Internal Revenue Code allows section 501(c)(6) trade associations to engage in some amount of political activity without automatically triggering "political organization" status[70]). Complainant Public Citizen said as much in its own comments filed with the Commission in connection with the Commission's consideration of a political committee status rulemaking.[71]

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[68] *Buckley*, 424 U.S. at 42.

[69] MUR 5694, Response at 11.

[70] See Rev. Rul. 2004-06, 2004-4 I.R.B. 328 (section 501(c)(6) business leagues may engage in some political activities, provided those activities are not the groups' primary activities).

[71] *See* Political Committee Status, 69 Fed. Reg. 11,736, 11,748 (Notice of Proposed Rulemaking, Mar. 11, 2004), Comments of Public Citizen at 10 ("In particular, a legitimate 501(c) organization should not have to fear that it will become a political committee simply by engaging in political issue-related criticisms of public officials."), available at: http://www.fec.gov/pdf/nprm/political_comm_status/public_citizen_holman.pdf.

Contrary to the Complainants' assertions, AJS's primary activity is not to "support Republican candidates in close elections." Instead, the record demonstrates that AJS has not sought to elect or defeat any candidate for a federal election, nor was it created to achieve such a goal. To reiterate what we noted earlier,[72] in 2004 and 2005 AJS undertook a widespread campaign concerning legislation to repeal the estate tax. AJS distributed a series of print advertisements in Oklahoma, criticizing Senator Don Nickles – a Republican not running for reelection – for not doing more to repeal the estate tax. The materials included a message encouraging readers to contact Senator Nickles and urge him to "kill the Death Tax" before his previously announced, impending retirement from the Senate. AJS continued its campaign concerning legislation to repeal the estate tax in 2005 with a series of broadcast advertisements urging listeners to contact key Democrat Senators to ask their support of legislation to repeal the estate tax. Also that year, AJS produced a series of print advocacy pieces that criticized Senate leadership – namely Republican Majority Leader Bill Frist, Senator Jon Kyl, and even Senator Santorum – for failing to bring legislation to the floor for a vote, despite their public promise to repeal the estate tax.

Respondent correctly concludes that the 2004-05 death tax campaign rebuts Complainant's accusations that AJS is an electoral, rather than an issue-oriented, entity. The 2004 communications focused on a Senator who was retiring, and the 2005 communications similarly named one Senator who had already announced his intent not to seek re-election, and several others who were not in an election cycle at the time. Critically, one Complainant takes particular umbrage with AJS's supposed support of Senator Santorum's re-election, but fails to acknowledge other AJS communications that were critical of him.

Further support is found in other television advertisements sponsored by AJS in 2006 concerning the establishment of an asbestos trust fund. As presented by Respondent, the purpose of the advertisements was to generate opposition to the asbestos trust fund legislation that was being considered by the United State Senate. The communications criticized the policy positions of Democratic Senators opposing the legislation. Part of this effort involved communications that were distributed in numerous states criticizing the policy positions of several Republican Senators with respect to the asbestos trust fund.[73] Other communications praised the public policy positions of Democratic Senators Kent Conrad and Byron Dorgan for opposing the asbestos trust legislation and fighting for small business and the jobs they create.

This factual record convincingly establishes that AJS lacked a major purpose of the sort that would allow for it to be subjected to the various restrictions and regulations imposed upon a "political committee."

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[72] *See supra* text accompanying notes 12-16.

[73] The Senators included Senators Sessions (Alabama); Kyl (Arizona); Craig (Idaho); Crapo (Idaho); Bunning (Kentucky); McConnell (Kentucky); Lott (Mississippi); Burns (Montana); Gregg (New Hampshire); Sununu (New Hampshire); Coburn (Oklahoma); Thune (South Dakota); Bennett (Utah); Hatch (Utah); Enzi (Wyoming); and Thomas (Wyoming).

C. AJS did not violate any disclaimer provisions

Complainants also claim that Respondent failed to include required disclaimers. The Act imposes certain disclaimer requirements for political activity sponsored by "political committees."[74] Because AJS is not a political committee under the Act, those disclaimer requirements are inapplicable. The only other relevant disclaimer provisions are the requirements generally applicable to communications containing "express advocacy" or for "electioneering communications."[75] Therefore, because the ads in question did not contain "express advocacy," and no one has alleged that they constitute "electioneering communications" (obviously because they do not), AJS was not required to include any disclaimers mandated by the Act. Regardless, as Respondent has made clear, they nonetheless did include a disclaimer regarding who paid for the advertisements, even though they were not required under the Act to do so.

III. CONCLUSION

Contrary to the allegations made in the Complaints and the recommendations of OGC, there is no reason to believe that AJS violated the Act and/or Commission regulations.[76] AJS did not fail to register and report as a political committee under 2

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[74] 2 U.S.C. § 441d.

[75] *Id.*

[76] The Commission is not required to create legal and constitutional issues in its administration and enforcement of the law, indeed the prudent and preferred course is to avoid such issues. Where the Commission has two reasonable ways of interpreting the law, its regulations and enforcement practices, one of which avoids legal and constitutional doubt and another which creates serious legal and constitutional doubt, the Commission is well within its discretion to take the safer course. Expanding the Commission's jurisdiction and reach so as to generate issues that will create new test cases is not something that an agency is generally required to do nor is it appropriate unless required. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("Although [a regulatory agency's interpretations of its own statute] are normally entitled to deference, where, as here, an otherwise acceptable construction would raise serious constitutional problems . . . courts [must] construe the statute to avoid such problems unless such construction is plainly contrary to Congress' intent." (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) ("In a number of cases the Court has heeded the essence of Mr. Chief Justice Marshall's admonition in *Murray v. The Charming Betsy*, 2 L.Ed. 208 (1804), by holding that an Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available."))). *See also Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 346 (2000) (Scalia, J., concurring, in part) (noting that "[where statutory intent is unclear], it is our practice to construe the text in such fashion as to avoid serious constitutional doubt"). As a result given the numerous legal and constitutional concerns raised above we would clearly be within our discretion to dismiss this case and in light of those concerns we would exercise that discretion. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement. The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. The agency

U.S.C. §§ 433, 434; it did not accept prohibited and excessive contributions under 2 U.S.C. § 441a(f); it did not fail to include proper disclaimers on its advertisements under 2 U.S.C. § 441d; and it did not make prohibited expenditures on communications containing express advocacy under 2 U.S.C. § 441b.

MATTHEW S. PETERSEN
Vice Chairman

4/27/09
Date

CAROLINE C. HUNTER
Commissioner

4/27/09
Date

DONALD F. MCGAHN II
Commissioner

4/27/09
Date

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is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. Finally, we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict-a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'") (internal citations omitted)). *See also United States v. Batchelder*, 442 U.S. 114, 123-124 (1979); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *Confiscation Cases*, 7 Wall. 454 (1869).