

Comments to  
AOR 2004-5

February 12, 2004

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General Counsel  
Federal Election Commission  
999 E Street NW  
Washington, DC 20463

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Re: Comments on Draft Advisory Opinion 2004-05

Dear Mr. Norton:

The following comments are submitted on behalf of Democracy 21, the Campaign Legal Center, and the Center for Responsive Politics in regard to AOR 2004-05, a request filed by "America Coming Together," (ACT), an unincorporated entity operating under section 527 of the Internal Revenue Code that proposes to engage in various federal campaign activities in the 2004 election.

The procedural posture of this AOR is significant. It follows a request submitted by Americans for a Better Country (ABC), a similarly situated section 527 organization that also seeks guidance on the funding of its proposed political activities in the 2004 election. See AOR 2003-37 (submitted November 18, 2003).

This request also follows a complaint filed by these commenters against ACT and two other section 527 organizations. See *Democracy 21 et al v. ACT et al.* (FEC) (filed January 15, 2003). For reasons stated in that complaint, the circumstances of ACT's formation, operation, fundraising and activities make clear that ACT has an overriding purpose to influence the 2004 federal elections. In these circumstances, and for the reasons set forth in the complaint and further discussed below, ACT should not be permitted to spend nonfederal funds for any portion of the partisan generic voter mobilization activities and public communications about federal candidates it is undertaking, or planning to undertake.

All of these matters pending before the Commission, including the general counsel's release two weeks ago of his draft advisory opinion in the ABC matter, have prompted an ongoing public discussion of the law that applies to section 527 groups operating in federal elections, when a group becomes a federal "political committee," and whether and how such groups can allocate their spending between federal and nonfederal accounts.

They have also prompted a public discussion about whether the draft ABC advisory opinion, and any ACT advisory opinion, will affect section 501(c) groups.

For the reasons stated below, we believe it is important that, in addressing the ABC draft opinion's requirement that hard money be spent on public communications by section 527 groups that "promote, support, attack or oppose" federal candidates, the Commission make clear that, under existing law and Supreme Court precedents, this standard does not, and cannot, apply to public communications by properly constituted section 501(c) groups.

The decisions made by the Commission in this advisory opinion request, as well as in the ABC advisory opinion request, will have a profound impact on whether federal campaign finance laws are properly implemented in the 2004 elections, and on whether widespread circumvention of the new campaign finance law is licensed by the Commission.

We want to state again, as we did in our comments on AOR 2003-37, that the Commission must be extremely careful to avoid licensing any activities by ACT, or any similarly situated section 527 organization, that would permit circumvention of the campaign finance laws, or undermine the steps taken by Congress in both FECA and BCRA to prevent the flow of soft money in federal campaigns.

We also again urge the Commission to take to heart the Supreme Court's recent warnings about the history of circumvention in the area of campaign finance regulation, the Commission's past role in facilitating that circumvention, and the need for (and constitutionality of) prophylactic measures against evasion of the laws intended to protect the integrity of the political process. *McConnell v. FEC*, 540 U.S. \_\_\_, 157 L.Ed. 2d 491 (2003).

The Court noted that the soft money ban in the Bipartisan Campaign Reform Act of 2002 (BCRA) "simply effects a return to the scheme that was approved in *Buckley and that was subverted by the creation of the FEC's allocation regime*, which permitted the political parties to fund federal electioneering efforts with a combination of hard and soft money....Under that allocation regime, national parties were able to use vast amounts of soft money in their efforts to elect federal candidates." 157 L.Ed. 2d at 548 (emphasis added).

It was, as the Supreme Court recounted, this same advisory opinion process that was used by the political parties to establish the soft money system in the late 1970's. *Id.* at 535 n.7 citing Advisory Ops. 1978-10, 1979-17. The Commission should be especially alert, now, to preventing another use of the advisory opinion process to open a new means of circumventing the campaign finance law by channeling soft money into federal elections through section 527 political organizations instead of through political parties.

**1. The campaign finance laws apply different standards to section 527 groups than to other groups, such as those organized under section 501(c) of the tax code.** We first want to address an issue that has generated much public comment, largely prompted by the general counsel's draft opinion in AOR 2003-37. The issue raised in that draft opinion is also raised in this advisory opinion request. The ACT request makes clear that it will engage

in public communications, such as direct mail<sup>1</sup> and “public commentary”<sup>2</sup> that refer to federal candidates, so the same question about whether its public communications constitute “expenditures” is raised by the ACT request as it is by the ABC request.

Concern has been expressed by many non-profit organizations that the Commission may adopt a test that will treat public communications by section 501(c) groups that “promote, support, attack or oppose” a federal candidate as an “expenditure” under federal campaign finance law. Since incorporated nonprofit groups organized under section 501(c) of the tax code are prohibited from making “expenditures,” any such interpretation by the Commission would have a broad impact on the ability of these nonprofit groups to discuss, criticize or praise federal candidates and officeholders.

Contrary to the stated concern, the draft advisory opinion issued by the general counsel in AO 2003-37 explicitly applies to political committees. It does not, nor could not under existing law, apply the “promote, support, attack or oppose” standard for public communications to section 501(c) groups.

To clarify this, the Commission should state explicitly in any opinions it issues in response to the ACT and ABC requests that apply a “promote, support, attack or oppose” test to spending by political committees, that such a test does not apply to properly constituted section 501(c) nonprofit organizations.

The concern by the nonprofit organizations has arisen in the context of an advisory opinion request filed by ABC, a section 527 organization that acknowledged it is a political committee with both a federal and non-federal account.

The proposed answer drafted by the general counsel is directed to the activities of this political committee, and its reasoning would apply as well to ACT and to other section 527 organizations.

The Supreme Court, however, has sharply and explicitly distinguished the activities of such political committees from other kinds of groups – *e.g.*, for-profit corporations, non-profit corporations, unincorporated associations and labor unions.

As a matter of campaign finance law and Supreme Court precedents, the rules that apply to political committees are different from the rules that apply, or can apply, to these other kinds of groups. The Court’s recent ruling in *McConnell v. FEC* affirmed this important distinction, first formulated by the Court more than 25 years ago in *Buckley v. Valeo*.

Our principal analysis here can be summarized as follows:

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<sup>1</sup> ACT request letter of January 13, 2004 at 1.

<sup>2</sup> ACT supplemental request letter of January 28, 2004 at 3.

Under existing tax laws, a section 527 organization is by definition a group that operates primarily for the purpose of influencing the election of candidates for public office.

Under existing tax laws, nonprofit section 501(c) groups *cannot* have a primary purpose to influence elections – or they would not be eligible for their tax status.

As a matter of campaign finance law and constitutional precedents, the rules that apply to section 527 groups are different from the rules that apply, or can apply to section 501(c) organizations.

In *Buckley*, the Court established the “express advocacy” test to help nonprofit groups, corporations, labor unions, and individuals identify when their communications crossed the line and became “electioneering” messages subject to federal campaign finance laws (*i.e.*, communications that require the use of federal funds – hard money). The “express advocacy” standard established by *Buckley* said that communications are covered by the federal campaign finance laws only if they contain express words of advocacy, such as “vote for, elect, support, cast your ballot for” and similar terms.

The Court explicitly established the “express advocacy” standard, however, *only* for individuals and non-political groups who did not have as their major purpose the election of candidates. In other words, the Court established the standard for those who were not in the business of trying to elect and defeat candidates. The Court did so to provide these individuals and groups with a clear standard that would tell them when their communications would be considered electioneering activities covered by campaign finance laws, and when they would be treated as issue discussion not covered by the laws.

The Supreme Court also made clear in *Buckley* that candidates and political groups whose major purpose was to elect candidates had no need for this kind of bright-line test. The Court reaffirmed this distinction in *McConnell*.

The major purpose of Section 527 groups, by definition, is to influence the election of candidates. Therefore, under *Buckley*, as reaffirmed in the *McConnell* case, the “express advocacy” test is not applicable to them in determining whether their public communications are covered by federal campaign finance laws. The test suggested in Draft Advisory Opinion 2003-37 – whether a communication “promotes, supports, attacks or opposes” a candidate – is appropriate for section 527 groups to determine if their communications are for the purpose of influencing a federal election.

Since the “express advocacy” test was established to govern groups like 501(c) groups, the “promotes, supports, attacks or opposes” test for section 527 groups that is set forth in the draft Advisory Opinion does not and cannot apply to 501(c) groups under current law and Supreme Court precedents.

The only communications by 501(c) groups that are required to be financed with hard money contributions legal under federal campaign finance laws are communications that contain “express advocacy,” and broadcast ads about federal candidates that are run close to a federal election.

Section 501(c) groups can use their treasury funds to pay for communications criticizing or praising federal officeholders and candidates. These groups are free to spend their treasury funds on public communications about federal officeholders and candidates, subject to two caveats:

- Treasury funds cannot be used to finance communications about federal candidates that contain language “expressly advocating” the election or defeat of a federal candidate;
- Under BCRA, treasury funds cannot be used to pay for “electioneering communications,” *i.e.*, broadcast ads about federal candidates run close to an election.

Communications by section 501(c) groups in these two categories – and only in these two categories – must be funded by contributions that comply with federal campaign finance laws.<sup>3</sup>

The basis for this analysis is set forth below:

1. The *Buckley* distinction. The background for treating political organizations and other entities, including section 501(c) groups, differently under federal campaign finance laws was set forth in *Buckley v. Valeo*, 424 U.S. 1 (1976). There, the Court in two contexts faced the question of whether campaign finance laws were unconstitutionally “vague” because they allegedly failed to clearly separate campaign communications from issue discussion. In both cases, the Court established the “express advocacy” standard, but did so only for groups that did not have as their “major purpose” influencing the election of candidates.

The first context concerned a provision that limited the amount of money that persons could spend on “expenditures relative to a clearly identified candidate” *Id.* at 41. “The use of so indefinite a phrase as ‘relative to’ a candidate fails to clearly mark the boundary between permissible and impermissible speech,” the Court said. *Id.* at 42. The Court further noted that “the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application.” *Id.*

For this reason, the Court limited the scope of this statutory provision “to communications that include explicit words of advocacy of election or defeat of a candidate.”

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<sup>3</sup> Any communication by any group, including a section 501(c) group, that is “coordinated” with a candidate or party, within the meaning of the campaign finance laws, is subject to being treated as an “expenditure,” regardless of whether it contains “express advocacy” or is an “electioneering communication.” 2 U.S.C. § 441a(a)(7).

*Id.* at 43. The law would apply “only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.” The Court further explained this test to encompass only “express words of advocacy” such as “vote for, elect, support, cast your ballot for” and similar terms. *Id.* at 44 n.52.<sup>4</sup>

The Court in *Buckley* returned to this problem in another provision of the law that required disclosure of “contributions” or “expenditures” over \$100 made by any person, other than a candidate or “political committee.” *Id.* at 77. Candidates and political committees were under a separate disclosure requirement for their spending. The terms “contribution” and “expenditure” were defined in the statute as the use of money “for the purpose of influencing” the election of candidates for federal office. *Id.*

These definitions in the disclosure law raised concerns for the Court about possible vagueness, because they might not provide “adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal...” *Id.* The Court said that the statutory definition of “contribution” in the law was sufficiently clear for this purpose, but that the definition of “expenditure” caused “line drawing problems of the sort we faced” with the spending limit discussed earlier. *Id.* at 78:

[The term “expenditure”] shares the same potential for encompassing both issue discussion and advocacy of a political result. The general requirement that “political committees” and candidates disclose their expenditures could raise similar vagueness problems, for “political committee” is defined only in terms of amounts of annual “contributions” and “expenditures,” and could be interpreted to reach groups engaged purely in issue discussion.

*Id.* at 79 (emphasis added)

The Court resolved the problem by dividing it in two. First, it narrowed the definition of “political committee”:

To fulfill the purposes of the Act, [political committees] 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. Expenditures of candidates and of ‘political committees’ so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

*Id.* (emphasis added).

Then the Court addressed the question of whether – for organizations under the control of a candidate or “the major purpose of which is the nomination or election of a candidate” – the statutory requirement that they disclose their “expenditures” was sufficiently clear to meet

<sup>4</sup> Having construed the limit on expenditures narrowly in order to avoid constitutional problems of vagueness, the Court then struck it down as an infringement on the First Amendment. *Id.* at 44-5.

constitutional concerns. The Court held that because such groups “are, by definition, campaign related,” the definition of “expenditure” to include any spending “for the purpose of influencing” federal elections did not cause a problem of vagueness. *Id.*

Second, the Court addressed the same question for all other spenders:

But when the maker of the expenditure is not within these categories – when it is an individual other than a candidate or a group other than a “political committee” – the relation of the information sought to the purposes of the Act may be too remote. To insure that the reach of [the disclosure provision] is not impermissibly broad, we construe “expenditure” for purposes of that section in the same way we construed the terms of [the spending limit] – to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.

*Id.* at 80 (emphasis added)

Thus, the Court in *Buckley* made a crucial distinction: when the spender is an organization with a “major purpose” to influence candidate elections, the statutory definition of “expenditure” as spending “for the purpose of influencing” a federal election is sufficiently clear to be constitutional, because such organizations “are, by definition, campaign related” and their spending “can be assumed” to fall within the area properly regulated by Congress. Therefore, the “express advocacy” standard does not apply as a limit on the definition of an “expenditure.”

On the other hand, when the spender is any other kind of organization – any organization which does not have a “major purpose” to influence elections – then a narrowed construction of “expenditure” is required in order to avoid constitutional problems of vagueness. The Court in *Buckley* used the “express advocacy” test for this purpose to narrow and clarify what “expenditure” means. For these groups, including section 501(c) groups, communications without “express advocacy” were not treated as “expenditures.”

2. The ban on corporate “expenditures.” In *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), the Court imported this same analysis to construe another provision of the campaign finance laws – the prohibition on spending by any corporation or labor union for any “expenditure.” 2 U.S.C. § 441b. Again, the Court said that the statutory term “expenditure” was potentially vague, and the Court therefore held “that an expenditure must constitute ‘express advocacy’ in order to be subject to the prohibition of § 441b.” *Id.* at 249.

The Court’s discussion in *MCFL* is consistent with the distinctions it drew in *Buckley*. The issue in *MCFL* was how the prohibition on “expenditures” would be applied to a non-profit corporation organized under section 501(c)(4) of the tax law. The Court specifically noted that “it is undisputed on this record that MCFL” is not an entity “the major purpose of which is the nomination or election of a candidate.” *Id.* at 625, n. 6. It said that “its central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates.” *Id.*

As such, the Court applied the same narrowing construction to the term “expenditure” that it used in *Buckley*, so that the statutory prohibition on “expenditures” by a corporation would cover only “express advocacy.”

The Court exempted MCFL from the prohibition on making “expenditures” because it found MCFL was a purely ideological corporation that engaged in no business activities and took no union or corporate funds. MCFL and other similar ideological nonprofit groups are “more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status.” *Id.* at 631.

But the Court again drew the same distinction as in *Buckley* between those organizations like MCFL that do not have a “major purpose” to influence federal elections – and those that do, and as such are “political committees.” The Court noted that:

...should MCFL’s independent spending become so extensive that the organization’s major purpose may be regarded as campaign activity, the corporation would be classified as a political committee. As such, it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns.

*Id.* at 262 (emphasis added).

Thus, as a result of *Buckley* and *MCFL*, the Court established that, for entities which do not have a “major purpose” to influence candidate elections, the term “expenditure” in the campaign finance laws must be construed to extend only to “express advocacy” in order to avoid problems of constitutionally impermissible vagueness.

By contrast, for those organizations that do have a “major purpose” to influence candidate elections, there is no constitutional requirement that the statutory definition of “expenditure” – any spending “for the purpose of influencing” a federal election – be narrowed by a bright line construction such as “express advocacy.”

Because political committees have a “primary objective to influence political campaigns,” and “are therefore, by definition, campaign related,” their spending can be presumed to constitute campaign spending, subject to campaign finance laws and not limited by the “express advocacy” standard.

This has been the Supreme Court’s framework for application of the campaign finance laws since *Buckley*.

3. *BCRA and McConnell*. The enactment of the Bipartisan Campaign Reform Act (BCRA) in 2002 did not change this underlying principle. Nor did Congress alter the statutory definition of “expenditure.” Rather, Congress created a new category of speech –

called “electioneering communications”<sup>5</sup> – and imposed regulations on such spending that are similar to the regulations imposed on express advocacy “expenditures.” And as with express advocacy “expenditures,” the rules on “electioneering communications” apply to all spenders, including those that do not have a “major purpose” to influence elections.

The Supreme Court in *McConnell* upheld the definition of “electioneering communication” because it found it to be, like the express advocacy test, “neither vague nor overbroad.” 124 S.Ct. at 688. And the Court found that its analysis in *Buckley* and *MCFL* “in no way drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech” as limited to express advocacy. *Id.*

The Court in *McConnell* also reiterated the distinction it drew in *Buckley* between organizations with a “major purpose” to influence candidate elections, and other entities, for purposes of whether campaign finance regulations meet the constitutional requirement to be clear and non-vague. In reviewing a separate BCRA requirement that state parties use hard money to pay for a public communication that “promotes or supports” or “attacks or opposes” a federal candidate, 2 U.S.C. §§ 431(20)(A)(iii); 441i(b)(1), the Court rejected a challenge that the definition was unconstitutionally vague because, it said, the words “clearly set forth the confines within which potential party speakers must act in order to avoid triggering the statutory provision.” *Id.* at 675, n. 64.

The Court said that this is “particularly the case here, since actions taken by political parties are presumed to be in connection with election campaigns.” *Id.* The Court then cited and quoted its discussion in *Buckley* by “noting that a general requirement that political committees disclose their expenditures raised no vagueness problems because 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’ and thus a political committee’s expenditures ‘are, by definition, campaign related.’” *Id.*

4. The applicable principles. From all this, a set of clear principles has emerged to govern when communications are “expenditures” required to be funded with contributions subject to the limitations, prohibitions and reporting requirements of the campaign finance laws.

First, the Court has developed and adhered to an important distinction between those groups which have a “major purpose” to influence political campaigns, and those groups which do not. The activities of the former are “presumed to be in connection with campaigns” and their spending is “by definition, campaign related.” They do not get the benefit of the “express advocacy” test as a limiting construction on “expenditures.”

Second, because of this distinction, campaign finance regulations that apply to the activities of those groups which do not have a “major purpose” to influence political

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<sup>5</sup> 2 U.S.C. § 434(f)(3). These are broadcast ads that refer to a clearly identified federal candidate, are targeted to the electorate of the candidate, and are aired within 30 days of a primary or 60 days of a general election.

campaigns must meet a constitutional concern with vagueness. For such groups, including section 501(c) nonprofit groups, under current laws and Supreme Court precedents, the “express advocacy” standard and the “electioneering communications” test established in BCRA govern as to whether their communications are covered by federal campaign finance laws. The concern for vagueness does not apply to those entities which do have a major purpose to influence candidate elections, including “political committees” and section 527 organizations.

And third, to accommodate this distinction, the definition of “expenditure” has always had two different meanings, depending on the type of entity it is applied to:

For groups with a “major purpose” to influence campaigns, including “political committees” and section 527 organizations, the statutory definition of “expenditures” – spending “for the purpose of influencing” a federal election – applies.

For all other groups, the definition of “expenditure” is applied with a narrowing construction under *Buckley* and *MCFL* – the term covers only “express advocacy.” As noted above, with the enactment of BCRA, such groups are also subject to similar regulation for their “electioneering communications.”

5. The application of tax law. These election law distinctions reflect similar categories created by tax law. Nonprofit corporations organized under section 501(c) of the tax code, including 501(c)(4) advocacy groups, section 501(c)(5) labor organizations, and section 501(c)(6) trade association, all may engage in political campaign activity, but not to the extent that it becomes their “primary” purpose.<sup>6</sup>

By contrast, section 527 of the tax code governs “political organizations,” which are defined as an entity “organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.” 26 U.S.C. § 527(e)(1) (emphasis added). “Exempt function,” in turn, is defined as “influencing or attempting to influence the selection, nomination, election or appointment” of any individual to public office. *Id.* at (e)(2).

These categories of tax law reflect the categories of election law discussed above. Section 501(c) groups cannot – by definition – “primarily engage” in campaign activity, therefore such activity cannot be their “major purpose.” Any section 501(c) group operating in conformance with its tax status accordingly does not qualify as a “political committee,” and is therefore (for election law purposes) subject only to the bright line regulations of their

<sup>6</sup> See, e.g., Treas. Reg. § 1.501(c)(4)-(1)(a)(2)(i) (providing that a section 501(c)(4) organization must be “primarily engaged in promoting” general welfare, and *id.* at § 1.501(c)(4)-(1)(a)(2)(ii) (providing that the promotion of social welfare does not include “direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office.”). By contrast, Section 501(c)(3) charities may not “participate in, or intervene in” political campaigns at all. 26 U.S.C. § 501(c)(3).

political spending that are applicable to such groups – their “expenditures” (defined to include only express advocacy), and their “electioneering communications.”<sup>7</sup>

On the other hand, any entity organized under section 527 of the tax code is operated “primarily for the purpose” of influencing candidate elections. Such groups thus have a “major purpose” to engage in electioneering. This means that, under the reasoning of *Buckley*, such groups are “by definition, campaign related,” and therefore subject to regulation of their “expenditures,” defined as spending “for the purpose of influencing” federal elections, without the need for any limiting construction such as express advocacy.<sup>8</sup>

6. The draft advisory opinion. The advisory opinion in AOR 2003-37 was requested by ABC, which (like ACT) is a “political organization” under section 527 of the tax code. It is thus a group that is “primarily for the purpose” of influencing candidate elections. It described its purpose as “to aid President Bush’s reelection, the defeat of the eventual Democratic Presidential nominee, and the election of Republican candidates to the United States Senate and House....”<sup>9</sup>

ABC has registered a federal “political committee” and also maintains one or more non-federal accounts (soft money). Its questions to the Commission concerned whether it must spend hard money, or can spend soft money, or an allocated mixture of both, for various political activities.

The general counsel’s draft followed the Supreme Court analysis set forth above, and concluded that because ABC is a political committee, any spending “for the purpose of influencing” a federal election is an “expenditure” that must be funded with hard money.

In applying the test of spending “for the purpose of influencing” an election, the general counsel said that any spending that “promotes, supports, attacks or opposes” a candidate will meet this test:

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This principle would not apply, of course, to any section 501(c) group that is not operating in conformance with its tax status, and which instead is engaged primarily in electioneering activity.

The AOR letter by ACT claims that our analysis “blur[s] the real distinctions between non-federal “527’s,” on the one hand, and federal political committees on the other.” ACT Request Letter of January 13, 2004 at 6. We agree that a section 527 “political organizations” could be primarily engaged in non-federal activity. Our point here, however, is a different one: that in either case, the section 527 group is an entity that is, by definition, “organized and operated primarily” for the purpose of influencing candidate elections, and therefore is not within the class of spenders to which the *Buckley* “express advocacy” test applies.

Further, section 527 organizations are partisan by nature, whether they focus on federal or non-federal electoral activity – although ACT does not appear to contend that its voter mobilization activity aimed at the general public will be non-partisan. Nor would such a claim be plausible. See discussion *infra* at 12-17.

<sup>9</sup> ABC Request letter at 5.

[T]he promote, support, attack or oppose standard is equally appropriate as the benchmark for determining whether communications made by political committees must be paid for with Federal funds. By their very nature, all political committees, not just party committees, are focused on the influencing of Federal elections.

Draft AO 2003-37 at 3.

The discussion by the general counsel is limited to communications by a political committee. As discussed above, the Supreme Court has never held that only the “express advocacy” communications of a political committee are subject to the campaign finance laws. The general counsel’s analysis is consistent with the distinctions drawn by the Supreme Court.

Thus, we read the draft advisory opinion as not covering or applying to section 501(c) nonprofit corporations, to for-profit corporations, to labor unions, to unincorporated associations, or to other groups that do not have a “major purpose” to influence elections. In order to prevent any confusion about this (which the comments of other groups suggest may exist), the Commission should explicitly state that the advisory opinion applies only to groups whose primary purpose is to influence elections, and does not extend to other groups for whom “express advocacy” remains the operative standard in determining whether public communications are “expenditures.”

Requiring political committees to spend hard money for communications which promote or attack federal candidates – i.e., which are “for the purpose of influencing” a federal election – is clearly permitted. This is all the general counsel has proposed. The draft in no way suggests that the same test can, or should, be applied to section 501(c) groups. Those groups benefit from the “express advocacy” standard of “expenditure” imposed by the Court in *Buckley* and *MCFL*.

**2. ACT is a political committee with an overriding purpose to influence federal elections and accordingly, it should not be permitted to use soft money for its generic partisan voter drive activities through allocation of its spending.** ACT has established a federal political committee account, but also has established one or more “nonfederal” accounts. ACT proposes to engage in generic partisan voter mobilization activities, and to allocate its spending for such activities between its federal and “nonfederal” accounts, pursuant to the allocation rules in Part 106 of the Commission’s regulations.

The Commission should not permit this allocation. As we demonstrate in the complaint we filed, which is pending at the Commission, ACT has made clear that its overriding purpose is to defeat President George W. Bush in the 2004 presidential election.

Where a political committee as a whole clearly has an overriding purpose of influencing federal elections, the Commission should conclude that the committee should be required to spend federal funds for its activities, without any allocation of “nonfederal” funds.

Thus where, among other things, a political committee's major donors have given funds for the stated purpose of defeating a presidential candidate, where the committee's announced intentions are to target its activities only to those states it identifies as presidential battleground states, and where the only candidates named in its fundraising appeals are federal candidates, such as is the case with ACT, allocation should not be permitted.

The Commission should discount pretextual statements by ACT of a purportedly nonfederal purpose, where such statements seek simply to provide a rationale for the spending of soft money under a theory of allocation. In short, the Commission should not buy into a theory developed for the purpose of justifying the use of soft money when the intent, objectives, and operations of a committee are plainly focused on federal elections as an overriding matter.

That is the case here, as we set forth in our pending complaint.<sup>10</sup> In a press release issued by ACT on August 8, 2003 announcing its formation,<sup>11</sup> ACT president Ellen Malcolm states, "President Bush is taking this country in the wrong direction. ACT's creation is further evidence that mainstream America is coming together in response to President Bush's extremism..."<sup>12</sup> According to a report in *The Washington Post* about the formation of ACT,

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<sup>10</sup> ACT makes the argument that the Commission should ignore what it says, and pay attention only to what it does. ACT request letter at 8. By this argument – which it calls the "means-ends distinction," ACT claims that the Commission should give no credit whatsoever to the clear and compelling evidence that demonstrates that the overriding purpose of the organization is to influence federal elections, including statements made by ACT's founders and donors about what ACT is doing, in determining whether allocation should be allowed.

ACT grounds its suggestion on *FEC v. GOPAC*, 917 F.Supp. 851 (D.D.C. 1996). But that case actually stands for the opposite proposition. The court said that in analyzing the "major purpose" test for "political committee" status, "[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." 917 F.Supp. at 859 (emphasis added). The court assessed a wide range of evidence about GOPAC's purpose, including GOPAC mailings, *id.* at 854, its fundraising solicitations, *id.*, and internal GOPAC memoranda and correspondence, *id.* at 856.

Further, the district court found that "although GOPAC's *ultimate* major purpose was to influence the election of Republican candidates for the House of Representatives, GOPAC's immediate major purpose in 1989 and 1990 was to elect state and local candidates..." *Id.* at 858 (emphasis in original). On this basis, notwithstanding its "ultimate" goal, the court found that GOPAC was not a "political committee." *Id.* at 866. This is completely different than the case here, where ACT's founders and donors are clearly stating that their short-term, middle-term, long-term and "ultimate" goals are all directed to defeating President Bush.

<sup>11</sup> The press release can be viewed at the ACT website, at: [http://www.americacomingtogether.com/about/announcement\\_press\\_release.pdf](http://www.americacomingtogether.com/about/announcement_press_release.pdf).

<sup>12</sup> While this release also refers to electing "progressives officials at every level," statements by ACT's organizers and donors make clear that the overriding purpose of ACT is to defeat President Bush.

Malcolm said that ACT will conduct “a massive get-out-the-vote operation that we think will defeat George W. Bush in 2004.”<sup>13</sup> A story in *The Washington Post* said that ACT (and other similarly situated section 527 organizations) “are explicitly opposed to President Bush.”<sup>14</sup>

This overriding purpose to defeat President Bush is certainly confirmed by ACT’s direct mail fundraising solicitation materials. For one such solicitation, signed by ACT president Malcolm,<sup>15</sup> the outside of a large envelope in which the solicitation was mailed states:

**17 States;**

**25,000 Organizers;**

**200,000 Volunteers,**

**10 Million Doors Knocked On**

**...and a one-way ticket back to Crawford, Texas**

Exh. A (envelope)

This is clearly a reference to ACT’s overriding goal of defeating President Bush. The solicitation letter itself is focused on the presidential election:

[I]f we can count on your personal support and active participation, 2004 will be a year of America Coming Together and George W. Bush going home.

*Id.* at 1.

In communities all across America, people are hurting because Bush’s mindless devotion to tax cuts for the wealthy is making a shambles of our economy. Bush has turned record budget surpluses into record deficits in no time flat.

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<sup>13</sup> T. Edsall, “Liberals Form Fund to Defeat President; Aim is to Spend \$75 Million for 2004,” *The Washington Post* (Aug. 8, 2003).

<sup>14</sup> T. Edsall, “Democratic ‘Shadow’ Groups Face Scrutiny,” *The Washington Post* (Dec. 14, 2003).

<sup>15</sup> A copy of the ACT solicitation is attached as Exhibit A. As noted above, *see* n.10, this is precisely the kind of material that the court in *GOPAC* looked to in assessing the “major purpose” of a political organization.

He has worked to undermine a woman's right to choose. His reckless disregard for the environment has eroded decades of progress. He's set timber companies loose on our national forests – and he's set John Ashcroft loose on our civil liberties.

But, wishing won't make Bush, Cheney, Ashcroft, DeLay and their extremist agenda go away. People-to-people organizing will – and organizing is what ACT is all about.

*Id.* at 1-2

ACT's enclosed "Bold Action Plan" confirms its focus is on influencing the 2004 presidential campaign. Indeed, the action plan is premised on all of ACT's efforts taking place only in the seventeen "battleground" states that, in ACT's assessment, will determine the presidential election:

As the 2004 elections approach, Democrats have a firm grasp on 168 electoral votes. They're in states that the Democratic candidate is almost guaranteed to win. President Bush, on the other hand, seems an almost certain winner in states that add up to 180 votes.

That leaves seventeen states with 180 electoral votes as the competitive battleground in this election....

Our America Coming Together Action Plan will focus all of our attention in these key states – the ones that will decide in which direction America goes after the 2004 election.

Exh. A (Action Plan at 2)  
(emphasis added)<sup>16</sup>

The focus on the presidential election in its solicitation letter is fully consistent with other public information about ACT. According to its press release, ACT is launching "the largest field operation this country has ever seen." A press report quotes Steve Rosenthal, one of ACT's founders and its chief executive officer, as stating that ACT will hire "hundreds of organizers, state political directors and others..."<sup>17</sup> Another press report states

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<sup>16</sup> To be sure, ACT carefully notes that these same 17 presidential battleground states will also "be the home of dozens of key...state and local races as well." Exh. A (Action Plan at 2). The fact that ACT has no apparent interest in "key" state or local races outside of the 17 presidential battleground states confirms that its real focus here is on the presidential race, and its rote recitation of a catechism that includes "state and local" elections is no more than a pretext crafted to fit a desired application of the campaign finance laws.

<sup>17</sup> T. Edsall, Aug. 8, 2003, *supra*.

that ACT “already has get-out-the-vote specialists canvassing homes in Ohio to identify the most virulent opponents of” President Bush.<sup>18</sup>

George Soros, a key donor who pledged \$10 million in soft money to ACT as “seed money,” has made clear that this money is for the purpose of defeating President Bush. Mr. Soros, referring expressly to ACT, explained in an op-ed column in *The Washington Post* why he and others are, in his words, “contributing millions of dollars to grass-roots organizations engaged in the 2004 presidential election.”<sup>19</sup> He said that he and the other donors “are deeply concerned with the direction in which the Bush administration is taking the United States and the world.”<sup>20</sup>

Another article describes Soros meeting “with half a dozen top Democratic political strategists” in an effort “to try to figure out how he could help bring down [President] Bush....”<sup>21</sup> Following this meeting, “he agreed to lead several other major donors in what Democrats hope will be \$75 million in spending on a grass-roots get-out-the-vote effort in 17 battleground states. Called America Coming Together, it’s directed by top Democratic fundraisers Steve Rosenthal and Ellen Malcolm. That makes Soros a key player in the huge ‘soft money’ push that the Democrats...hope will be one of the keys to matching Bush’s formidable fundraising apparatus in the 2004 election.”<sup>22</sup>

According to a report in *The Washington Post*, Soros “has a new project: defeating President Bush. ‘It is the central focus of my life,’ Soros said, his blue eyes settled on an unseen target. The 2004 presidential race, he said in an interview, is ‘a matter of life and death.’”<sup>23</sup> The same report provides an additional explanation from Soros: “‘America, under Bush, is a danger to the world,’ Soros said. Then he smiled: ‘And I’m willing to put my money where my mouth is.’”<sup>24</sup> In an interview on public television, Soros also made clear his purpose in giving \$10 million to ACT:

**BRANCACCIO:** All this has led Soros to conclude the most important thing he can do is stop George Bush.

**SOROS:** I think he's a man of good intentions. I don't doubt it. But I think he's leading us in the wrong direction.

<sup>18</sup> J. Birnbaum, “The New Soft Money,” *Fortune* (Nov. 10, 2003).

<sup>19</sup> G. Soros, “Why I Gave,” *The Washington Post* (Dec. 5, 2003) (emphasis added).

<sup>20</sup> *Id.*

<sup>21</sup> M. Gimein, “George Soros Is Mad As Hell,” *Fortune* (Oct. 27, 2003).

<sup>22</sup> *Id.*

<sup>23</sup> L. Blumenfeld, “Soros’ Deep Pockets vs. Bush,” *The Washington Post* (Nov. 11, 2003).

<sup>24</sup> *Id.*

BRANCACCIO: So just last month, Soros put his money where his mouth is one more time. He gave \$10 million to America Coming Together, a liberal coalition pledged to defeat the President in 2004.

SOROS: By putting up \$10 million and getting other people engaged, there's enough there to get the show going. In other words, to get the organizing going. Half of it still needs funding.

BRANCACCIO: What is the show? It's a get out the vote effort.

SOROS: Get out the vote and get people engaged on issues. This is the same kind of grassroots organizing that we did or we helped in Slovakia when Mechar was defeated, in Croatia when Tudjman was defeated and in Yugoslavia when Milosevic was defeated.<sup>25</sup>

A report in *The Seattle Times* states that two other major donors to ACT from the Seattle area said that ACT "will present a cogent, focused message to help defeat [President] Bush no matter who the Democratic nominee is."<sup>26</sup>

The press release issued by ACT states that ACT's goal is to raise \$75 million to "create and coordinate massive registration and get-out-the-vote efforts." According to a story in *Roll Call*, ACT "is expected to be the primary conduit for huge soft-money donations from the labor movement..." in addition to the funds already pledged by SEIU.<sup>27</sup>

The evidence set forth above makes clear that the overriding purpose of ACT is to engage in partisan voter mobilization activities aimed at the general public, and public communications, for the purpose of defeating President Bush. The evidence also makes clear that the soft money being given to ACT and put into purportedly "nonfederal" accounts is being given and will be spent for the purpose of influencing the 2004 presidential election. Given these facts, ACT should not be permitted to allocate its spending between its federal and nonfederal accounts. Instead, these activities should be funded exclusively with federal funds.

**3. The Commission's current Part 106 allocation rules for non-connected political committees are wrong, can lead to absurd results and if left in place will once again invite widespread circumvention of the law.** ACT seeks permission to allocate its spending under the rules set forth in section 106.6 of the Commission's regulations. As we

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<sup>25</sup> "Transcript – David Brancaccio interviews George Soros," *NOW with Bill Moyers* (Sept. 12, 2003).

<sup>26</sup> D. Postman. "Democrats worried by emerging liberal force" *The Seattle Times* (Dec. 6, 2003).

<sup>27</sup> C. Cillizza, "Soros, Labor Pooling Efforts," *Roll Call* (Sept. 18, 2003).

state above, no allocation should be available for ACT, since the overriding purpose of the whole organization is to influence federal elections.

Even if ACT was not such an organization, the existing allocation regulations for non-connected political committees fail to protect against soft money being injected into federal campaigns to elect and defeat federal candidates.

Allocation rules like the rules in Part 106 invite widespread circumvention of the law, as the Supreme Court made clear in *McConnell*.

The Court found that the FECA “was subverted by the creation of the FEC’s allocation regime,” *id.*, which allowed the political parties “to use vast amounts of soft money in their efforts to elect federal candidates.” *Id.* at 548. The Court flatly stated that the Commission’s allocation rules “invited widespread circumvention” of the law. *Id.* at 550. The virtually unrestricted flow of soft money through the political parties into federal elections was made possible by the Commission’s allocation rules, which the Supreme Court described as “FEC regulations [that] permitted more than Congress, in enacting FECA, had ever intended.” *McConnell*, 157 L.Ed. 2d at 548, n. 44.<sup>28</sup>

There is no legitimate justification for applying allocation rules to a political committee, such as ACT, which has an overriding purpose of influencing federal elections. Such an approach would fundamentally undermine the contribution limitations and source prohibitions of federal campaign finance law and make a mockery of the Supreme Court’s stern critique of allocation in *McConnell*.<sup>29</sup>

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<sup>28</sup> The AOR contests our use of the Court’s critique of allocation by claiming that the Court “was focused on the background to the BCRA prohibitions and restrictions on *parties*.” Request letter of January 13, 2004 at 4. This is an artificially narrow reading of the Court opinion. To be sure, the Court was addressing the allocation issue in the context of allocation by the parties, but the criticisms made by the Court apply as well to allocation by non-connected committees. The Court’s underlying point was that allocation *as a regulatory device*, unless carefully and effectively circumscribed, authorizes the widespread use of soft money to influence federal elections. *See* 157 L.Ed. 2d at 548. This is as true for allocation by non-party committees as it is for party committees.

Further, ACT points to the distinction made by the Court (in dismissing plaintiffs’ Equal Protection claims) between parties and “interest groups.” Request letter at 5. But this cannot be read as distinguishing parties from non-connected political committees, such as ACT. The Court specifically referenced “special interest groups such as the National Rifle Association (NRA), American Civil Liberties (ACLU), and Sierra Club.” 157 L.Ed. 2d at 576. The Court was clearly distinguishing section 501(c) non-profit interest groups, not section 527 political organizations, from political parties.

<sup>29</sup> ACT points out that Congress itself in BCRA applied a system of allocation to state parties, for the spending of Levin funds. Request letter at 5; *see* 2 U.S.C. § 441i(b)(2). Congress did so out of a recognition that state parties are quintessentially involved in non-federal elections, and concluded it was appropriate to allow them to spend Levin funds, on an allocated basis, under carefully constrained conditions that would prevent the creation of a new loophole for the flow of soft money in federal elections. A non-connected political committee such as ACT, however, is in a

ACT seeks the ability to allocate spending for generic partisan voter mobilization activity aimed at the general public.<sup>30</sup>

According to 11 C.F.R. § 106.6(c)(1), the allocation ratio for generic voter drive activity by a non-connected organization is based on the ratio of the committee's expenditures on behalf of specific federal candidates to its total disbursements for specific federal and non-federal candidates (not including overhead or other generic costs) during the two-year federal election cycle.<sup>31</sup>

This allocation approach can readily and easily be manipulated in order to work absurd results that will, for instance, allow funding of generic partisan voter mobilization activity to influence federal elections with *entirely* soft money.

Under the existing regulations, if a non-connected political committee makes a single small disbursement on behalf of a specific nonfederal candidate, but does not undertake *any* expenditures on behalf of specific federal candidates, this allocation formula would permit the committee to pay for unlimited generic partisan voter drive activity *entirely* with soft money, since it will have no expenditures "on behalf of specific federal candidates." This is true even if the explicit purpose of the committee and its donors is to elect or defeat federal candidates.

That a political organization whose overriding purpose is to influence federal elections could use exclusively, or primarily, soft money to finance voter mobilization drives urging voters to "Get out and vote Democratic on Election Day" is an absurd result. The activities of a group whose overriding purpose as a whole is to influence federal elections *should* be funded entirely with federal funds. In *McConnell*, the Supreme Court emphasized that generic campaign activity confers "substantial benefits on federal candidates." 157 L.Ed. 2d at 564. But the Part 106 regulations potentially allow them instead to be funded

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fundamentally different position than a state party. Further, the multiple constraints that Congress established around the Levin allocation system, including most significantly the contribution limits imposed on the Levin funds, 2 U.S.C. § 441i(b)(2)(A)(iii) (limit of \$10,000 per donor), prevent the kinds of abuses that were present under the broader pre-BCRA allocation regime established by the Commission, and that are still present to perhaps an even greater extent under the section 106.6 allocation rules for non-connected committees.

<sup>30</sup> Under 11 C.F.R. § 106.6(b)(2)(iii), "[g]eneric voter drives" include "voter identification, voter registration, and get-out-the-vote drives, or any other activities that urge the general public to register, vote, or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate."

<sup>31</sup> ACT cites AO 2003-01 (March 7, 2003) for the proposition that BCRA "did not generally affect or alter the effectiveness" of the Commission's pre-existing Part 106 allocation rules for non-connected committees. *See* Request letter at 2, 4. That advisory opinion was issued nine months prior to the Supreme Court's decision in *McConnell*, in which the Court made clear that allocation formulae like those in Part 106 are invitations to widespread circumvention of the law. The advisory opinion should, at a minimum, be reconsidered in light of *McConnell*. In any event, no allocation formula is appropriate for ACT as an organization whose overriding purpose as a whole is to influence federal elections.

entirely or primarily with non-federal funds, thereby turning the intent of the law upside-down.

If the Commission allows non-connected committees to allocate partisan generic voter drive activities to influence federal elections under the fundamentally flawed section 106.6 formulae, it will be licensing an egregious variant of the allocation fiction that was at the heart of the soft money system, and was fully discredited by the Supreme Court in *McConnell*. It will be re-creating the soft money system in federal elections.

As we stated above, no allocation should be available for ACT, since the overriding purpose of the whole organization is to influence federal elections.

Moreover, it is essential in the forthcoming rulemaking on the definition of “political committee” that the Commission address the interrelated issue of allocation for non-connected committees. The Commission must determine in the first instance whether and to what extent such allocation is permissible.

The Commission must ensure that its rules prevent groups whose overriding purpose as a whole is to influence federal elections from making any use of allocation.

To the extent any allocation is allowed, the Commission also must ensure that any allocation rules have tight restrictions that effectively prevent the injection of soft money into federal elections and the kind of easy “gaming” of the allocation ratio that is permitted by the existing section 106.6 formulae.

**4. The Commission should prohibit ACT from using corporate or labor union funds for partisan voter mobilization activities aimed at the general public, because the “direct or indirect” use of such funds is prohibited by 2 U.S.C. § 441b.** Section 441b of the FECA prohibits “any corporation” or “any labor organization” from making a “contribution or expenditure in connection with any election” for federal office. 2 U.S.C. § 441b(a). It defines “contribution or expenditure” to include:

any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value...to any candidate, campaign committee, or political party or organization, in connection with any [federal] election....

2 U.S.C. § 441b(b)(2)  
(emphasis added)

The law makes clear that corporations and labor unions cannot use their treasury funds to conduct partisan voter mobilization efforts aimed at the general public. 11 C.F.R. § 114.4(d). The statute exempts from the definition of “expenditure” only nonpartisan

registration and get-out-the-vote campaigns by a corporation or labor union aimed at the general public. 2 U.S.C. § 431(9)(B)(ii).<sup>32</sup>

Partisan voter mobilization activities are clearly “in connection with” a federal election. As the Court noted in *McConnell*, “voter registration, voter identification, GOTV and generic campaign activity all confer substantial benefits on federal candidates,” 157 L.Ed. 2d at 564. Nor does the “express advocacy” test limit the application of the “in connection with” standard of section 441b when applied to voter mobilization activities by section 527 political organizations, whose principal purpose, as defined by section 527, is to influence candidate elections.<sup>33</sup>

Thus, under federal law, corporations and labor unions are prohibited from spending their treasury funds for partisan voter mobilization activities aimed at the general public. And this prohibition expressly applies as well to any “indirect payment” of such funds for the same activity – such as a donation of corporate or union funds to a section 527 organization to fund partisan voter drive activity aimed at the public.<sup>34</sup>

It is clear, based on the assertions in the advisory opinion request, that ACT intends that its voter mobilization activities will be aimed at the general public, will be in connection with a federal election, and will be explicitly partisan in nature.<sup>35</sup>

ACT’s partisan nature is further demonstrated by its status as a Section 527 tax-exempt organization. To qualify as an “exempt function” under Section 527, voter mobilization expenditures must be partisan in nature. *See* IRS Priv. Ltr. Rul. 1999-25-051 (Mar. 29, 1999) (holding that voter registration and voter turnout activities of a 527 organization were expenditures for an exempt function under 26 U.S.C. § 527(e), because they were partisan in nature). Indeed, in *McConnell*, the Court noted that section 527

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<sup>32</sup> The statutory definition of “expenditure” includes any “payment” made “for the purpose of influencing any election for Federal office.” 2 U.S.C. § 431(9)(A). The statute then expressly excludes from this definition “*non partisan* activity designed to encourage individuals to vote or to register to vote.” *Id.* at § 431(9)(B)(ii)(emphasis added). This means that *partisan* voter drive activity is included within the definition of “expenditure” and thus is “in connection with” an election for purposes of section 441b.

<sup>33</sup> *See* discussion *supra* at pp 9-11.

<sup>34</sup> ACT’s response to this point is to simply read the prohibition on the “indirect” spending of union or corporate funds out of the statute. ACT states that “in only two aspects of the law” is there a prohibition on third-party use of corporate or labor funds. ACT request letter at 5. Yet it does not dispute that section 441b(b)(2) bars the “direct or indirect” use of corporate and union funds in connection with federal elections, nor supply any alternative interpretation of this statutory prohibition, other than to suggest that the Commission ignore it.

<sup>35</sup> *See, e.g.*, ACT supplemental request letter of January 28, 2004 at 2 *quoting* proposed canvassing script (“I am here on behalf of America Coming Together, or ACT, which is dedicated to bringing out a large Democratic vote this year in the November elections.”).

organizations are “organized for the express purpose of engaging in partisan political activity.” 157 L.Ed. 2d at 567 n.67. The Court said they “by definition engage in partisan political activity.” *Id.* at 569.

The receipt and use of union (or corporate) treasury funds by ACT for partisan mobilization activities aimed at the general public and in connection with a federal election would constitute a prohibited “indirect” expenditure of labor and corporate treasury funds “in connection with a federal election,” in violation of section 441b(b)(2). The FEC should also find that corporations and unions are prohibited by federal law from making such donations to ACT.

In *Federal Election Com'n v. California Democratic Party*, 1999 WL 33633264 (E.D.Cal. Oct 14, 1999), the court agreed with the FEC’s legal argument that a similar scheme to do indirectly what could not be done directly was illegal. In that case, the Commission argued that the California Democratic state party (CDP) made an illegal donation of funds from its non-federal account to an outside group organized to oppose a ballot referendum. The referendum group used the soft money to conduct voter drive activities which, if conducted by the CDP itself, would have had to be funded with an allocated mixture of federal and non-federal funds.

The court held that by funneling the money through the referendum group, the state party evaded the allocation rules that applied to such party expenditures and “financed a partisan voter registration drive with non-federal account funds.” The court found that the state party “contributed non-federal funds to [the referendum group]’s voter registration drive and that this contravened the allocation rules.” Thus, “the FEC has shown that the CDP violated the FECA and the allocation rules by funding a generic voter drive that targeted Democrats.”<sup>36</sup>

So too here, corporate and union donors to ACT would be doing indirectly what they are prohibited by statute from doing directly or indirectly: using their treasury funds to finance partisan voter drives aimed at the general public. It would contravene section 441b for unions and corporations to donate their treasury funds to an outside section 527 group which then uses those soft money funds to engage in partisan mobilization activities aimed at the general public.

<sup>36</sup> ACT argues that the *CDP* case is “inapposite” since it “involved a failure by a political party committee to allocate expenditures, rather than an attack on the scheme of allocation.” ACT request letter at 5. This misses the point. The *CDP* case stands for the proposition that the campaign finance laws cannot be evaded by doing indirectly what cannot be done directly. In that case, the rule being evaded was the party allocation rule, and the California Party attempted to avoid its allocation obligation by funneling funds instead through an outside group. The court found that to be impermissible. The same point applies here – the ban on corporations or unions spending treasury funds for partisan voter mobilization activities aimed at the general public cannot be evaded by funneling that money through a section 527 group which then spends the money for that same impermissible purpose. The statute itself forbids evasion of the law by any such “indirect” payment, and so does the reasoning of the *CDP* case.

For the reasons set forth above, it is no answer that section 527 organizations can accept and use corporate or labor union funds for this purpose under an "allocation" formula approach. The allocation approach has no place for a section 527 organization like ACT which has made clear its overriding purpose is to influence the 2004 federal elections.

In short, corporations and labor unions are not permitted to spend their treasury funds on partisan voter mobilization activities aimed at the general public and in connection with a federal election. Nor are they permitted to evade that prohibition by donating those funds to an outside group which will use those funds to engage in the same activity. Section 527 groups are not permitted to receive and use corporate or labor union donations to fund partisan voter mobilization efforts aimed at the public and in connection with a federal election. The Commission should make this explicitly clear in its advisory opinion.

We appreciate the opportunity to submit these comments.

Respectfully,

*/s/ Fred Wertheimer*

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Politics



**17 States**

**25,000 Organizers**

**200,000 Volunteers**

**10 Million Doors Knocked On**

**.. and a one-way ticket  
back to Crawford, Texas**



# America Coming Together Enrollment Form

## I Want to Provide Critically Needed Financial Support.

I'm excited that progressives are getting organized in an unprecedented way. And I want to help *America Coming Together* defeat George W. Bush and elect progressive candidates by organizing an unprecedented, door-to-door campaign. To help advance this essential organizing effort, I am enclosing a special donation of:

- \$25
- \$35
- \$50
- \$100
- \$500
- Other \$ \_\_\_\_\_

### I Also Want to Volunteer My Time and Energy.

As *America Coming Together* plans its activities in the months ahead, please contact me about volunteering.

- I'd be willing to contact my friends and neighbors about *America Coming Together*.
- As Election Day approaches, I'd like to be a part of the *America Coming Together* Get-Out-The-Vote operation.
- I'm willing to do anything you need done.

### I Want to Be an America Coming Together E-Activist

I know that events move quickly in a presidential election year and that *America Coming Together* must be prepared to take action at a moment's notice. Please keep me as up-to-date as possible with e-alerts.

My e-mail address is \_\_\_\_\_ @ \_\_\_\_\_

My phone contact information is \_\_\_\_\_

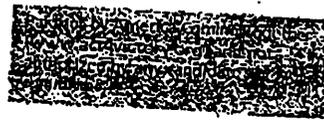
Home: (\_\_\_\_) \_\_\_\_\_ Work: (\_\_\_\_) \_\_\_\_\_

Please make any necessary corrections to your name and address. Make checks payable to ACT, and return in the enclosed envelope or send to 1120 Connecticut Ave., NW, Suite 1120, Washington, DC 20036. Thank you.

To make your gift by credit card, please see reverse side of this form

Contributions to ACT are not tax deductible for charitable purposes.

All contributions permissible under federal law (individual contributions of \$5,000 or less per calendar year) will be placed in ACT's federal account to be used in connection with federal elections.





*Ellen R. Malcolm*  
President

Dear Friend,

Are you ready to go for it, prepared to lay everything on the line to win in 2004?

I hope so. Because, if we can count on your personal support and active participation, 2004 will be a year of *America Coming Together* and George W. Bush going home.

To keep their grasp on the White House and win other critical key House, Senate and local races, the Bush campaign and the Republican National Committee are amassing a political fortune. By Election Day, they will have raised and spent over half a billion dollars to hold onto power.

**We can't match them dollar-for-dollar. But, we can — and must — match them door-for-door.**

America is divided almost evenly between those who support President Bush and those who believe he is taking America in the wrong direction. In the presidential contest and in other key federal, state and local races, the elections of 2004 will be won by whichever side does the best job identifying and mobilizing its supporters.

That's why some of the leading progressive organizers in America have come together to advance a bold, far-reaching Action Plan, an outline of which I have enclosed with this letter.

With help from committed activists like you, *America Coming Together (ACT)* will organize millions of face-to-face, door-to-door, neighbor-to-neighbor contacts that will shape the outcome of the 2004 elections — and shape the future of American politics.

And, when Election Day is over, we will have defeated George W. Bush and elected progressive candidates all across the nation. The extraordinary effort we're undertaking is in response to the extraordinary damage Bush and his allies do, on a daily basis, to values we believe in and to people we care about.

In communities all across America, people are hurting because Bush's mindless devotion

(read on, please)

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(2)

to tax cuts for the wealthy is making a shambles of our economy. Bush has turned record budget surpluses into record deficits in no time flat.

He has worked hard to undermine a woman's right to choose. His reckless disregard for the environment has eroded decades of progress. He's set timber companies loose on our national forests — and he's set John Ashcroft loose on our civil liberties.

But, wishing won't make Bush, Cheney, Ashcroft, DeLay and their extremist agenda go away. People-to-people organizing will — and organizing is what ACT is all about.

With your help, we're going to put people back into politics — big-time.

What's it going to take to defeat George W. Bush and elect strong progressive candidates across the country? It's going to take an ambitious, history-making voter contact plan — and it's going to take people like you getting involved.

Do you believe that there is no higher priority in 2004 than defeating George W. Bush and electing strong progressives to replace those politicians who have helped Bush advance his extreme agenda?

Are you willing to help *America Coming Together* finance and execute the most far-reaching and intensive face-to-face campaigning by progressives that America has ever seen?

Here's what *America Coming Together* is all about. It's about people like you and me making a personal commitment to defeating George W. Bush and electing strong progressive candidates.

It's time to put our money where our hearts are. Please join us.

Sincerely,



Ellen R. Malcolm  
President

P.S. As our Action Plan unfolds in the months ahead, we'll be counting on both your financial support and your personal participation. So, as you write your check, please take a moment to fill out the enclosed *America Coming Together* enrollment form.

Whether you're in one of our 17 target states or not, there is much you can do. So be sure to let us know how you'd like to be involved.



## **A Bold Action Plan Essential to Victory in 2004**

### **Introduction**

How do we give progressive candidates the winning edge in the race for the White House and other closely contested elections in 2004?

We organize like we've never organized before — and we work together.

Our America Coming Together Action Plan is based on proven techniques and directed by proven leaders. Our ambitious voter contact plan will be designed and executed by Steve Rosenthal, ACT's Chief Executive Officer. Before joining ACT, Steve served for eight years as the Political Director of the AFL-CIO, where he developed a ground-breaking voter contact program that increased voter turnout of union members by 4.8 million during a time when non-union turnout decreased by 15 million.

And ACT's President is Ellen R. Malcolm, who revolutionized American politics as founder and president of EMILY's List, the largest political action committee in America. EMILY's List elects pro-choice Democratic women to office and, since 1994, its WOMEN VOTE! program has helped mobilize women to vote, turning the advantage of the "gender gap" into votes for Democrats.

Here are some of the key details of our Action Plan.

### **Seventeen States**

As the 2004 elections approach, Democrats have a firm grasp on 168 electoral votes. They're in states that the Democratic candidate is almost guaranteed to win: President Bush, on the other hand, seems an almost certain winner in states that add up to 190 electoral votes.

(over, please)

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That leaves seventeen states with 180 electoral votes as the competitive battleground in this election. Those states will not only determine the outcome of the presidential election, they will be the home of dozens of key federal, state and local races as well.

Our America Coming Together Action Plan will focus all of our attention in these key states — the ones that will decide in which direction America goes after the 2004 elections.

There's no doubt that America Coming Together can make a decisive difference. Consider the facts:

- In Wisconsin (10 electoral votes), 2,598,607 people voted and Al Gore won by 5,396 votes.
- In Oregon (7 electoral votes), 2,598,601 ballots were cast, Gore won by just 6,765 votes. And, how close are things in Oregon today? In a recent poll, 41% say they will vote to re-elect Bush, 47% plan to vote for or consider someone else, and 13% are undecided.
- And, of course, in Florida, 5,963,110 votes were counted and Bush was declared the winner by a margin of only 537. And, today, a majority of Florida voters say they will vote for or consider a candidate other than Bush in 2004.

## **25,000 organizers**

At the heart of our America Coming Together Action Plan is an effort to build an infrastructure of deeply committed organizers. Each state will be led by a highly experienced state director.

We're already putting directors in place in nine states. Eight more will be added as soon as we have the financial support to know that we can carry out an effective effort in those states. That's why your immediate help is so vitally important.

Each state director will build a detailed plan and strategy to match the specific circumstances of his or her state. But, the centerpiece of each state plan is specific vote goals — city-by-city, county-by-county, precinct-by-precinct, voter-by-voter. We know how many votes we need to defeat President Bush and elect progressive candidates and we're organizing a massive, interconnected program of voter contact to go out and find those votes.

We'll begin with an early canvass, knocking on people's doors, getting the lay of the land. Then, come summer, we'll launch a massive door-to-door effort — contacting voters, identifying our supporters, and learning what issues matter most in their lives. We'll follow up with a stream of individual communications around the issues people have told us they are most concerned about.

The America Coming Together effort will combine all the spirit and energy of old-fashioned political organizing with all the technology and innovation of 21st century politics.

As our canvassers go door-to-door, they'll be equipped with hand-held computer devices, allowing them to keep a detailed record of every contact and to help shape the content of future communications with a voter based upon what that voter has told us he cares about the most.

Then, we'll work our hearts out right through the fall — staying in close contact with voters, making sure they have the information they need, registering voters, organizing absentee and early voting programs, and more.

Our plan will culminate in the most sophisticated and massive Get-Out-The-Vote operation America has ever seen. And, when we're done, American politics will never be the same.

## **200,000 Volunteers**

Our America Coming Together Action Plan will rely upon a core of full-time, experienced, paid organizers in each of our target states — a group that will expand in number as Election Day gets closer. But, the energy, spirit and enthusiasm of volunteers must and will play an essential role in our campaign.

As ACT canvassers go door-to-door, they will be constantly on the lookout for people willing to play an ongoing role in our campaign — people like you.

Our most committed volunteers will be asked to "take responsibility" for a group of voters in their neighborhood, staying in touch with them throughout the campaign, making sure they have all the information they need, and assuring that, come Election Day, they get out and vote for our candidates.

By the time, Election Day rolls around, ACT will have mobilized over 200,000 volunteers — people willing to commit their personal time and energy to the effort to end the Bush presidency and elect progressive candidates.

Our goal is to put every ounce of energy those volunteers commit to the most effective use. Our America Coming Together Action Plan is a bold, but well-considered, undertaking.

## **10 million doors knocked on.**

The America Coming Together Action Plan is based upon reaching out to millions of carefully targeted voters in the seventeen most competitive states. If we commit the time, energy, and financial resources to engaging people in an ongoing conversation

throughout 2004, we can build a broader community of support and an unstoppable margin of victory.

We've got to find those voters who will support our candidates and we've got to engage them face-to-face. We know that, in 2004, voters will experience an avalanche of radio and television ads. Those ads have their place and it's critical for progressive candidates to stay competitive in the tit-for-tat media wars.

But, you and I both know that these mass market, impersonal communications aren't enough to truly engage people. Continuing declines in voter participation are evidence enough of that.

Our 2004 America Coming Together strategy isn't about adding to the media clutter. It's about putting good old-fashioned community organizing back into the electoral process. Our ambitious, well-considered plan revolves around face-to-face, door-to-door, neighbor-to-neighbor campaigning.

It's not only the most edifying thing to do; it's the most effective thing to do.

Experience has shown that multiple personal contacts, beginning well before the election and running right up through Election Day, are the most powerful way to engage citizens in politics. And, that's just what our America Coming Together strategy is all about.

## **And a one-way ticket back to Crawford, Texas.**

The effort we're undertaking won't be inexpensive. Our America Coming Together Action Plan will cost \$94 million to carry out. We've already raised \$32 million and, to keep our efforts on track, we must raise the next \$5 million before the end of the year.

But, the rewards of victory will be well worth the time, effort, and money we invest. With your help, our America Coming Together Action Plan can help propel progressive candidates to victory in vitally important state, local and federal contests — and it can help buy George W. Bush a one-way ticket back to Crawford, Texas.

Let's get mad. Let's get organized. Let's win.

# What People Are Saying About America Coming Together



"I helped found EMILY's List because I knew that, if we wanted to elect more pro-choice Democratic women, we had to change politics and break through the barriers that were stopping women candidates from winning. It's time to change politics again — and that's what *America Coming Together* is all about."

Ellen R. Malcolm  
*America Coming Together*  
President



"I wholeheartedly support the *America Coming Together* Action Plan. It's about time we came together and organized the kind of extraordinary efforts it takes to win on Election Day. I urge you to support this important organization."

Former Texas Governor Ann Richards

"With the Bush Administration in power, and the way it has exploited the terrorist attacks of September 11, I feel very uncomfortable about the direction in which the U.S. is taking the world, and to me it is not business as usual. It is for this reason that I am supporting *America Coming Together*. ACT is an effective way to mobilize civil society, to convince people to go to the polls and vote."

George Soros

"I'm proud to be a part of *America Coming Together*. The only way to protect our environment is to defeat President Bush and elect strong environmental candidates nationwide. The *America Coming Together* Action Plan is essential to that task."

Carl Pope  
Sierra Club Executive Director and  
*America Coming Together* board member

"The record is clear. If we talk to voters one-on-one, at the door, in their neighborhoods, on the phone, in the mail and on the Internet about the issues they care about — and weave our communications into an ongoing dialogue, they will come out to vote and make a change. That's why I'm proud to be a part of *America Coming Together*."

Steve Rosenthal  
ACT CEO and former AFL-GO Political Director



[www.act4victory.org](http://www.act4victory.org)

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