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OFFICE OF GENERAL COUNSEL

Via Electronic Mail and Hand Delivery

Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Re: Comments and Request to Testify Concerning Notice of Proposed Rulemaking on Political Committee Status

Dear Ms. Dinh:

The 415 undersigned civil rights, environmental, civil liberties, women's rights, public health, social welfare, religious, consumer, senior and social service organizations submit these comments in response to the Notice of Proposed Rulemaking on Political Committee Status issued by the Federal Election Commission on March 11, 2004 (hereinafter "NPRM").[1] In addition to these comments, the following organizations request an opportunity to testify as representative panels at the hearings scheduled on April 14-15, 2004:

Nan Aron, Alliance for Justice
Wade Henderson, Leadership Conference on Civil Rights
Elliot Mincberg, People For the American Way Foundation

Greg Moore, NAACP National Voter Fund
Carl Pope, Sierra Club
Michael Trister, Lichtman, Trister & Ross, PLLC (on behalf of the undersigned commenters)

The organizations signing this letter are organized as nonprofit corporations under state law and are exempt from federal income taxation under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code ("IRC"). Several organizations operate as qualified nonprofit corporations under 11 C.F.R. §114.10. A number of the signatories have established separate segregated funds that are registered with the Commission as political committees; many also maintain nonfederal political organizations established under IRC §527(e)(3) that are not registered with the Commission. Some of the groups represented in these comments supported the passage of the Bipartisan Campaign Reform Act ("BCRA") and other campaign finance reform legislation. Our shared interest is that we regularly seek to educate the public and to

advocate positions on legislative and policy issues, including the positions taken by federal officeholders with respect to these issues. In addition, many of us carry out extensive voter participation activities aimed at encouraging under-represented communities to participate in the democratic process by registering and voting. All of the undersigned groups firmly oppose the rules proposed in the NPRM.

This is no ordinary rulemaking. If adopted in anything like the form in which they have been proposed, the proposals in the NPRM would cause countless nonprofit organizations to drastically curtail their current programs or significantly alter the way in which they raise funds and conduct their activities. The proposed rules would seriously impair vigorous free speech and advocacy, as well as voter participation now and in the future. They would double, triple, or even quadruple the number of citizen organizations whose activities are subject to pervasive regulation by the Commission. Most importantly, the NPRM is an ill-conceived attempt to fit a square peg (nonprofit organizations) into a round hole (the rules applicable to political party committees) that not only vastly exceeds the FEC's authority but also would usurp Congress' proper role in this area. The Commission should **withdraw** the NPRM.

I

The NPRM Would Have A Devastating Impact on the Issue Advocacy, Voter Participation and Membership Activities of Nonprofit Organizations.

The draconian proposals in the NPRM will have a devastating effect on three critical and constitutionally protected areas of nonprofit activity: issue advocacy, voter participation, and internal membership communications.

1. The NPRM Will Seriously Impede the Ability of Nonprofit Organizations to Engage in Issue Advocacy.

Nearly 40 years ago, the Supreme Court spoke of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[2] Thus, "[s]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."[3] The proposals in the NPRM ignore these well-established principles by restricting the ability of nonprofit organizations to mention the names of federal officeholders while speaking out on public issues, a practice long approved by the Internal Revenue Service ("Service")[4] and now ingrained in the fabric of political discourse in this country. Several specific proposals in the NPRM suffer from this as well as other related defects.

(A) The NPRM would expand the regulatory definition of "expenditure" to include any public communication that refers to a clearly identified candidate for federal office, and promotes or supports, or attacks or opposes any candidate for federal office, or promotes or opposes any political party.[5] Because nonprofit and other corporations are prohibited by existing Federal Election Campaign Act ("FECA") rules from making "expenditures," the result could be to exclude nonprofits from significant public debate and advocacy. For example, under the

proposed rules, nonprofits would be virtually prohibited from criticizing or praising President Bush until after the November election

Insofar as this provision would expand the FECA's prohibition on corporate expenditures to include communications that do not expressly advocate the election or defeat of a clearly identified candidate, it is completely unauthorized by the statute, which for twenty plus years has been limited to communications that in express terms advocate the election or defeat of a clearly identified federal candidate.[6] Moreover, contrary to the suggestion in the NPRM, nothing in *McConnell v. FEC*, 124 S. Ct. 619 (2003), requires or even permits the Commission to prohibit corporate communications merely because they support, promote, attack or oppose a candidate or political party.[7]

Apart from the facial invalidity of this proposal, it raises other critical problems. For example, the NPRM makes no effort to define the "promote, support, attack or oppose" standard,[8] a failure which will make it impossible for the regulated community and the agency itself to understand the kinds of communications that are prohibited and could have a significant chilling effect and other constitutional problems as applied in this context.[9] In BCRA, Congress permitted the Commission to promulgate exceptions to the definition of "electioneering communication," so long as such exceptions did not allow corporations to promote, support, attack or oppose a candidate.[10] The Commission recognized the unlimited scope of this standard, however, when it rejected numerous such exceptions proposed because they would have protected *some* communications that fell within this broad standard.[11] As the Commission stated, "[a]lthough some communications that are devoted exclusively to pending public policy issues before Congress or the Executive Branch may not be intended to influence a Federal election, the Commission believes that such communications could be reasonably perceived to promote, support, attack, or oppose a candidate in some manner."[12]

In issuing regulations on coordinated communications as directed in BCRA, the Commission similarly considered a "promote, support, attack or oppose" content standard, but rejected it "[a]fter considering the concerns raised by the commenters about overbreadth, vagueness, underinclusiveness, and potential circumvention of the restrictions in the Act and the Commission's regulations ...."[13] Since the Commission's stated goal in defining the content standards for coordinated communications was "to limit the new rules to communications whose subject matter is reasonably related to an election,"[14] it is difficult to explain how its earlier determination that the "promote, support, attack, or oppose" standard was unworkable should not apply with equal force here.

(B) Even if the Commission were to drop the "promote, support, attack or oppose" standard from an expanded definition of "expenditures," the definition of "political committee" proposed in the NPRM would also have a devastating impact on issue advocacy conducted by nonprofit organizations. By importing the definition of "federal election activity" from BCRA's provisions regulating political party committees, the NPRM incorporates the "promote, support, attack or oppose" standard for determining whether a nonprofit organization is a federal political committee.[15] While not as far-reaching as the blanket prohibition on corporate expenditures that promote, support, attack or oppose a federal candidate, the definition of political committee could force many nonprofits either to raise and spend funds in accordance with the source and

amount limitations of the FECA, which would be next to impossible,[16] or to forego or significantly curtail the kinds of issue advocacy that would cause them to be treated as political committees.

Furthermore, the other elements of the expanded definition of political committee are so expansive that a huge number of IRC §501(c) organizations are likely to be so categorized and thus brought within the FECA's rules. For example, an IRC §501(c)(3) or (c)(4) organization which takes out a single full-page ad in the *New York Times* urging President Bush to withdraw American troops from Iraq would, at current rates, likely qualify as a political committee under the proposed $50,000 threshold.[17] So would an organization which runs a single set of television ads urging Senator Kerry to vote in favor of tax cut legislation pending before the Senate if the ads referred to the Senator's votes on earlier tax cuts. And so would a good-government organization which spends more than $50,000 to research and publish a report listing the Members of Congress who accept campaign contributions from corporations, unions or other disfavored sources. In each such instance, it would be of no consequence under the NPRM's proposed rule that the organization in question had never endorsed any candidate for federal office and never maintained a federal political committee to make contributions or expenditures in support of candidates.

(C) By treating all IRC §527 organizations as "political committees" regardless of the nature of their activities, the NPRM would present nonprofits with a classic catch-22 dilemma in which they would be required to create a separate segregated fund ("SSF") in order to protect their federal tax exemption[18] or to avoid paying federal income tax on their permissible campaign related activities,[19] only to have the SSF treated by the Commission as a federal political committee because of its tax status alone.[20] These non-federal SSFs currently may receive and spend soft money contributions, including transfers from their connected IRC §501(c) organizations, as long as they do not make contributions or independent expenditures as defined under the FECA. Under the NPRM, however, such connected 527 entities would be prohibited from accepting soft money from any source, including their own sponsoring organizations, and would be required to register and report to the FEC. The result would be to seriously impede the sponsoring 501(c)(4) organization.

The NPRM suggests that, with certain exceptions, all IRC §527 organizations should be treated as political committees because under the tax code such organizations must be organized for the primary purpose of accepting contributions or making expenditures for an "exempt function," which in turn is defined in part as the "function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual" to federal, office.[21] However, this argument ignores the fact that the IRS broadly construes the term "exempt function" activities in IRC §527(e) to include campaign-related activities that have never been regarded as triggering political committee status under the FECA, including activities in connection with ballot measures and grassroots lobbying, as long as the activities "are related to and support the process of" influencing the selection and nomination of a candidate to public office.[22] Indeed, under the facts and circumstances test followed by the IRS in making determinations under IRC §527, this may mean nothing more than that the organization has certified that its purpose in undertaking certain activities is to influence elections.[23]

In addition to the broad meaning of "exempt function" as construed by the IRS, the IRS' definitions of political campaign activity do not as a general rule provide appropriate standards for enforcement of federal election law. The language of the tax code dealing with political campaign activity is much broader than the language of the FECA.[24] Moreover, because the tax law provisions dealing with political campaign activity merely determine the conditions under which organizations may receive the benefits of particular tax exemptions, Congress has greater leeway in defining these activities than in defining the political activities *prohibited* under the FECA.[25] Because an organization which violates the tax rules on political campaign activity is not subject to civil or criminal penalties, the IRS has taken the position that its policies in this area are not subject to constitutional limits of vagueness and overbreadth.[26] The Commission should not rely on standards developed by the IRS to define "political committees" regulated by federal election law.

Finally, the suggestion in the NPRM that IRC §501(c) organizations could be exempted from the proposed definition of political committee,[27] would provide little relief to many such organizations as long as the Commission adopts a *per se* rule for IRC §527 organizations. As explained above, and as illustrated by the structures of many of the signatories to this letter, nonprofit organizations frequently maintain connected non-federal SSFs under IRC §527(f)(3) in order to protect their tax-exempt status and to avoid paying tax on their campaign-related activities -- a practice that has become more common throughout the nonprofit community as a result of the broad definition of "exempt function" developed by the IRS. IRC §§501(c)(4), (c)(5) and (c)(6) organizations also establish non-federal SSFs in order to take advantage of the favorable gift tax treatment of IRS §527 organizations, which allows them to raise large contributions from individual donors.[28] Non-federal IRC §527 organizations are already subject to more stringent reporting requirements than IRC §501(c) organizations, and, to the extent that the Commission were to conclude that it is unnecessary or inappropriate to regulate IRC §501(c) organizations as "political committees," there is no legitimate reason to regulate the SSFs that are established, financed and controlled by such IRC §501(c)s.[29]

2. The NPRM Will Restrict the Ability of Nonprofit Organizations to Conduct Nonpartisan Voter Participation Activities.

Since before the civil rights movement of the 1950's and 60's, nonprofit organizations have undertaken extensive activities to encourage citizens to participate in the democratic process by registering to vote and voting. In 1969, Congress took note of these activities and approved them.[30] In the past, the Commission has also recognized the benefits of voter participation activities by expressly approving nonprofit corporations to engage in them. Indeed under an earlier version of its regulation, the Commission determined that for-profit corporations and unions could only support voter participation activities if they were conducted jointly with nonprofit organizations.[31] The proposals in the NPRM would significantly curtail, if not eliminate, these invaluable voter participation activities.

(A) The NPRM includes an amended definition of nonpartisan voter registration and get-out-the-vote activity which would bar almost all forms of voter participation activity now undertaken by nonprofit organizations. In contrast to the current regulation, under which voters

may be encouraged to register or to vote using any message that does not expressly advocate the election or defeat of a federal candidate,[32] the proposed amendment would prohibit any voter participation activities in which the message "promotes, supports, attacks, or opposes a Federal or non-Federal candidate or that promotes or opposes a political party."[33] Since, in this instance, the regulation does not even require a reference to a clearly identified candidate, virtually any message that urges citizens to vote out of concern for a particular issue could violate the FECA's ban on corporate expenditures if the message might be construed as promoting or opposing a federal candidate in some fashion.

In addition, whereas under the current regulations, corporations and unions have been prohibited from determining the party or candidate preferences of *individuals* before encouraging them to register to vote or to vote,[34] the NPRM proposes to add a new section prohibiting groups from using any information "concerning likely party or candidate preference" to determine who it will encourage to register or vote.[35] Under this proposal, a nonprofit organization may no longer be able to target its voter participation activities on particular communities or demographic groups, including African-Americans or Hispanics, even though such groups have historically been excluded from participating in the democratic process, if data showed that such groups were "likely"[36] to prefer the candidates of one party or another. They similarly may not be able to target their voter participation activities by gender, even though women have been under-represented in the democratic process and may be more likely to support issues of concern to some organizations, if data showed that one gender is more "likely" to prefer, for example, a female candidate, a younger candidate, or a married candidate.

Finally, under this proposal, groups that are concerned with particular issues, such as protecting the environment, reforming our tax laws, or eliminating poverty, may not be able to target voters who have indicated support for these issues, if data shows that individuals who favor, or disfavor, such issues are more likely to prefer candidates of one party or the other or one candidate over another. In each of these instances, under the NPRM, as long as data is available showing "likely" voting preferences by particular groups, an organization could not safely undertake a voter participation program aimed at such groups without risking a full FEC investigation into whether it was aware of such information and took it into account in making decisions about its program, an investigation which would involve the most sensitive details of the organization's decision-making process and in which the organization would always be faced with proving a negative. Few nonprofit organizations will be willing or able to take this risk.[37]

(B) As in the case of issue advocacy, even if the Commission were to drop the new definition of nonpartisan voter registration and get-out-the-vote from the definition of prohibited "expenditures," the NPRM's proposed definition of "political committee" would nevertheless make it virtually impossible for nonprofits to engage in voter participation activities, no matter how nonpartisan they may be. Under the Commission's existing regulations, any "voter registration activity" conducted in the period beginning 120 days before a regularly scheduled primary or general election and ending on the date of the election falls within the definition of "federal election activity."[38] In addition, "voter identification," "generic campaign activity," and "get-out-the-vote activity," in connection with any election in which one or more candidates for federal office appears on the ballot fall within the definition of "federal election activity" if such activities are conducted at any time after January 1 of an even-numbered year or after the date of

the earliest filing deadline for access to the primary election as determined by state law.[39] These definitions apply whether or not the voter participation activities are conducted in a strictly nonpartisan manner. While these rules were adopted by Congress only for state and local political committees, the NPRM would apply them to independent, non-party groups by incorporating them into the definition of federal "political committee."[40] The result would be to require that virtually all voter participation activities, whether undertaken by IRC §501(c) organizations or IRC §527 organizations, be financed entirely with hard money.

Since many nonprofits rely on grants from private foundations and large donations from individuals to support their voter participation activities, such a rule would virtually put them out of business. For example, even a foundation-funded nonpartisan voter registration drive conducted by the League of Women Voters beginning on July 4, 2004, less than 120 days before the election, would be illegal under the proposed rules.

3. The NPRM Will Restrict the Ability of Nonprofit Organizations to Communicate With Their Members on Legislative and Political Subjects.

In *United States v. C.I.O.*, 335 U.S.106, 121 (1948), the Supreme Court ruled that, under the First Amendment, labor unions may not be limited in their communications with members on matters of legislation and politics. When Congress enacted the FECA, it responded to these constitutional concerns by expressly allowing unions and other membership organizations to communicate with their members and their families "on any subject," notwithstanding the statute's general prohibition on corporate and union contributions and expenditures.[41] The ability of nonprofit corporations or labor organizations to communicate with their members under the FECA may not be unduly restricted because of the First Amendment values at stake.[42] The NPRM, however, burdens membership communications by nonprofit organizations in several important ways.

(A) The NPRM eviscerates the benefits of the FECA's membership exception by treating as a federal political committee any nonprofit organization whose membership communications and voter participation activities reach prescribed thresholds. This is because three of the proposed alternative definitions of "political committee" rely in part on the FEC's definition of "federal election activity," which contains no exception for membership communications.[43] Not only is this limitation very clearly unconstitutional, it is another example of the way in which the NPRM's wholesale incorporation of rules enacted by Congress to regulate political party committees makes no sense in the context of independent, non-party organizations.

(B) The NPRM also limits the ability of nonprofit organizations to urge their members to support or oppose specific candidates when these messages are joined with a solicitation for funds. Prop. Reg. §100.57 provides that any gift made in response to a communication that includes material expressly advocating a clearly identified federal candidate "is a contribution to the person making the communication." Since the proposed regulation contains no membership exception, if a nonprofit organization were to urge its members to contribute to a candidate endorsed by the organization, which the FECA permits it to do, all contributions made to the

endorsed candidate would be treated as "contributions" to the organization and cause it to become a "political committee" in its own right. Similarly, if a nonprofit organization were to urge its members to contribute to the organization's own federally registered separate segregated fund in order to support or defeat specific candidates, which it is also permitted to do, the organization itself could become a "political committee" for federal election law purposes. Since nonprofit organizations cannot operate as political committees for both fiscal and administrative reasons, they will have no choice but to limit their membership communications to avoid political committee status.

II

The Expansive Proposals In the NPRM Far Exceed the FEC's Regulatory Authority or Capability and Usurp Congress' Proper Role.

Under the FECA, the Commission has been delegated authority only to "prescribe rules, regulations, and forms *to carry out the provisions of this Act* . . . ."[44] This provision not only grants authority to the Commission, it also serves as a limitation on the scope of that authority, for any regulation that is not authorized by the Act itself is beyond the power delegated to the agency by Congress. As shown above, the NPRM's proposal to abandon the express advocacy definition of "expenditure" and replace it with the "promote, support, attack or oppose" standard is not authorized by the FECA as authoritatively and consistently construed by the Supreme Court. The other proposals in the NPRM are similarly beyond the Commission's authority or capability. Congress has spoken to the core issues raised in the NPRM and has stopped well short of enacting the kinds of broad rules under consideration. Furthermore, even if the agency were acting on a blank legislative slate, which it is not, it does not have the administrative tools and has allowed itself insufficient time to examine properly the complex issues underlying the NPRM. Finally, in a government characterized by the constitutional separation of powers, Congress and not the Commission is the proper institution to balance the competing political interests at stake in the NPRM.

1. Congress Has Addressed the Core Issues Raised in the NPRM and It Stopped Far Short of the Radical Proposals Now Being Considered.

As the Supreme Court recognized in *McConnell*, under the BCRA, "[i]nterest groups ... remain free to raise soft money to fund voter registration, GOTV activities, mailings and broadcast advertising (other than electioneering communications)."[45] Congress' decision to stop short of applying its soft money regulations to independent interest groups forecloses the far-ranging proposals in the NPRM.[46]

Questions about the application of federal election law to independent nonprofit interest groups are not new and have been addressed on numerous occasions by both the courts and Congress. In *FEC v. Nat'l Right To Work Comm.*, 459 U.S. 197, 201 (1982), for example, the Supreme Court noted that in enacting the FECA §441b, Congress had allowed "some participation" by nonprofits in the federal electoral process by allowing them to establish and pay for separate segregated funds which may be used for political purposes. And, in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 93 (1986), the Court found that certain nonprofit

"political associations" do not pose the same danger of corruption as business corporations, and it held, therefore, that even when incorporated, such groups constitutionally may not be barred from using their treasury funds to expressly advocate the election or defeat of federal candidates.[47] Finally, in its recent decision in *McConnell*, in considering the application of BCRA's ban on electioneering communications to nonprofit corporations, the Court found that the nonprofit exception adopted in *MCFL* was part of the background on which Congress enacted BCRA and that it was presumed to have incorporated the special treatment of such entities into the specific provisions which it adopted.[48]

Protection of *MCFL* entities is not the only way in which BCRA addresses nonprofit interest groups. The Thompson Committee investigation that provided the empirical basis for the BCRA reforms had touched on the activities of certain nonprofit organizations during the 1996 federal elections,[49] and Congress responded to the Committee's findings in a number of limited ways. In a section entitled "Tax-Exempt Organizations," for example, BCRA provides that no political party committee and no agent acting on behalf of a political party committee may "solicit any funds for, or make or direct any donations to," an organization established under any provision of section 501(c) of the Internal Revenue Code that makes expenditures or disbursements in connection with an election for federal office, or to any non-party political organization established under IRC §527 organization other than a registered political committee.[50] Similarly, although BCRA generally prohibits federal candidates and officeholders from soliciting or spending soft money for any purpose,[51] the statute expressly permits candidates and officeholders to make general solicitations of soft money without limitation for any IRC §501(c) organization other than one whose principal purpose is to conduct certain federal election activities, and even to make limited specific solicitations of soft money to support such election activities by these organizations.[52]

Nonprofit organizations were also addressed in BCRA's provisions dealing with electioneering communications. While the Snowe-Jeffords amendment initially excepted both IRC §501(c)(4) and §527 entities from the ban on corporate and union electioneering communications,[53] the Wellstone amendment eliminated this exception, but only with respect to certain "targeted communications."[54] And, the Commission itself has recognized that the purposes of these provisions are not served "by discouraging charitable organizations from participating in what the public considers highly desirable and beneficial activity, simply to foreclose a theoretical threat from organizations that has not been manifested....".[55]

Two conclusions relevant to the pending NPRM are evident from these provisions. First, in enacting BCRA, Congress was concerned with the activities of nonprofit entities primarily as they related to the larger issue of soft money contributions to federal candidates and political party committees. Congress evidently did not believe that the election-related activities of IRC §501(c) and 527 organizations presented the same risk of soft money abuse as had been documented for political parties, and it stopped short of prohibiting nonprofit entities from engaging in such activities. Indeed, Congress recognized that nonprofit interest groups would continue to engage in campaign-related activities and it expressly permitted candidates and officeholders to assist such groups in raising funds to support these activities, albeit subject to new limitations.

Second, the debate over the Snowe-Jeffords and Wellstone amendments makes clear that Congress understood the role of nonprofit entities in sponsoring issue advertisements and, while it prohibited many of them from disseminating the narrowly defined category of broadcast communications, it again stopped far short of prohibiting nonprofit organizations from engaging in a much wider range of public communications. The distinction between political parties and interest groups was fully aired. Indeed, it was the continuing ability of independent interest groups "to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications),"[56] on which the political party plaintiffs in *McConnell* based their equal protection challenge to the statute.[57] While the Supreme Court acknowledged "this disparate treatment,"[58] it nevertheless rejected the equal protection argument because Congress "is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation."[59]

In addition to its treatment of nonprofit organizations generally in BCRA, Congress has twice enacted legislation specifically addressing the issue of IRC §527 organizations, on both occasions stopping far short of the radical measures proposed in the NPRM. During the 2000 election cycle, the media reported extensively on the existence of so-called "stealth PACs" which were not registered with the Commission as political committees but which reportedly were spending large sums to influence the outcome of the upcoming federal elections.[60] Congress responded to these reports by amending the tax code to require any organization established under IRC §527 that does not file reports with the Commission to register with and report their contributions and expenditures to the Internal Revenue Service.[61] In October 2002, only six months after passage of BCRA, Congress again amended IRC §527 in order to clarify that the registration and reporting requirements imposed in 2000 were not applicable to entities that conduct state and local political activity and report to state agencies.[62] Congress thus clearly stopped short of treating all 527 organizations as hard-money entities,[63] and instead adopted enhanced disclosure provisions to ensure that the public had access to extensive information about these groups.[64]

In sum, the Commission is not considering the current NPRM on a blank slate. Both in BCRA and in specific legislation addressing IRC §527 organizations, Congress has recently considered the extent to which it is willing to limit the campaign-related activities of independent nonprofit interest groups and in each instance it has stopped far short of the radical proposals in the NPRM. The Commission cannot ignore these judgments and proceed on a course that Congress itself has refused to take.

2. The Commission Lacks the Administrative Tools To Examine the Issues Raised in the NPRM and, in Any Event, There Is Insufficient Time To Carry Out this Examination Under the Current Expedited Schedule.

Even if Congress had not spoken to the issues raised in the NPRM and stopped far short of the far-ranging provisions now before the Commission, the Commission lacks the administrative tools to examine these proposals properly. As the Supreme Court described in *McConnell*, Congress adopted the BCRA reforms only after receiving a six-volume report summarizing the results of a year-long investigation into campaign practices in the 1996 federal

elections.[65] As described in the Thompson Committee's 9575-page report, the committee's hearings occupied 32 days over a period of three and one-half months and included testimony from 72 witnesses.[66] The Committee also subpoenaed and received thousands of pages of documents from 31 different organizations and conducted interviews with numerous other individuals.[67] In contrast, the Commission has no power to hold evidentiary hearings, compel the production of documents and witnesses, or take the other steps necessary to consider adequately the factual issues raised in the NPRM. In addition, the few reports filed with the Commission and the IRS since BCRA took effect at best provide only a partial glimpse at the activities which the NPRM addresses; and the Commission itself has virtually no enforcement experience in this area.[68]

The lack of adequate administrative tools has been compounded by the Commission's decision to complete its work on the NPRM on an expedited schedule that will leave it only a few weeks to consider the voluminous comments likely to be submitted by the public. There is insufficient time for the Commission to conduct even a truncated investigation into the need for the reforms it is now considering under this schedule, and there is no need for it to rush to do so. Congress has not mandated that the Commission reconsider its policy on political committees,[69] let alone that it do so by a date certain. Furthermore, even under the Commission's expedited schedule, any new regulations the Commission may decide to issue will not take effect until the middle of the current federal election season, forcing the Commission either to choose between delaying the effective date of its regulations or changing the rules in the middle of the campaign.[70]

The inability of the Commission to compile a full empirical record regarding the issues in the NPRM has critical legal consequences. Most importantly, because the proposed regulations impact directly on freedom of speech and freedom of association, the Commission must be able to demonstrate that its rules are required by a compelling governmental interest and are narrowly tailored to serve those interests.[71] As the Supreme Court noted in *McConnell*, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty or the plausibility of the justification raised."[72] Here, the notion that independent groups with no connection to federal candidates or political parties are subject to the same risk of corruption as party committees is not only novel and implausible, but, as discussed above, it also disregards Congress' own recent legislative judgments on the same subject. The Commission cannot attempt to meet this constitutional burden with little more than "mere conjecture,"[73] which is all it can possibly offer on the record before it.

In addition to these constitutional concerns, the Commission must also create an adequate empirical record to meet its obligation under the Regulatory Flexibility Act,[74] to demonstrate that the proposals in the NPRM will not have an unnecessary impact on small entities, including small nonprofit organizations. The NPRM does not include an initial regulatory flexibility analysis because the Commission concluded that the rules will not have a significant economic impact on a substantial number of small entities.[75] This conclusion was based, however, on the specific finding that "all but a few of the 527 organizations that may be affected by the proposed rules have less than $6 million in average annual receipts and therefore qualify as small entities under the North American Industry Classification System."[76] The NPRM did not, however, indicate the empirical basis for this finding, which so far as can be determined has no basis

whatsoever in the public record. Moreover, in assessing the impact on small entities, the NPRM only considered the impact on non-federal 527 organizations which would be reclassified as federal political committees under the NPRM, without taking into account the hundreds, if not thousands, of other nonprofit organizations that also would be classified as political committees under the proposed definition. In addition, in assessing the impact of the NPRM, the Commission erroneously stated that organizations will not be economically impacted by the new rules because, while the rules "limit the types of funds that may be used to pay for certain activities," organizations can still spend unlimited amounts on those activities that do not fall within the expanded definition of "expenditure." This conclusion ignores the fact that most nonprofits will not be able to raise hard money at all and they are prohibited from engaging in many of the other activities that do fall within the definition of expenditures. Unless the Commission demonstrates a good faith effort to consider these issues on the record, the entire NPRM will be subject to challenge by the numerous small nonprofit organizations that will be affected by its proposals.

Finally, although the issues raised in the NPRM have received some limited attention in the media, these reports, which consist largely of a few, oft-repeated anecdotes about a tiny number of so-called 527 entities, are insufficient to satisfy any of these legal requirements. At least one of the groups mentioned in the media already appears to be covered by the rules announced very recently in AO 2003-37.[77] And the limited information about the other groups mentioned in these new stories hardly amounts to an empirical record on which to base important policy decisions. As Thomas E. Mann and Norman Ornstein recently wrote, "[m]ost of the reports about shadow political party organizations reeling in large soft money donations from corporations, unions and wealthy individuals – money that previously went to the parties – *are based more on hype than fact.*"[78] This observation has special force because Mann and Ornstein are well-recognized social scientists who have studied the impact of campaign finance regulations for many years and who helped develop the factual record supporting BCRA before Congress and in the courts.

In sum, it will be impossible for the Commission to conclude on the basis of the record to be compiled in this truncated rulemaking that BCRA's provisions are being routinely circumvented by the activities of independent interest groups, let alone that the drastic remedies proposed in the NPRM are necessary or practical. The editorial writers at the *Washington Post* were clearly correct when they recently wrote, "[b]efore [Congress] -- or the FEC – take another [step], it would be wise to wait and see how the new system operates in practice."[79]

3. Congress And Not the Commission Is the Appropriate Institution To Resolve the Delicate Political Issues at the Core of the NPRM.

Even if Congress had not already spoken to the issues raised by the NPRM, and even if the Commission were able to compile an adequate empirical record to evaluate those proposals in the limited time available, and even if the new rules would not risk serious disruption in the middle of an election year, the Commission is not the proper institution within our government to resolve the issues at stake. The proposals in the NPRM pose, at their core, fundamental policy questions concerning the appropriate role of independent interest groups in our political system.

Just as the role of corporations, unions and political action committees was central to the original legislative debates over the FECA, and the relative role of political party committees was central to Congress' consideration of BCRA, determining the appropriate role of independent, non-party groups in our political system requires a delicate balancing of deeply felt and competing interests which is beyond the mandate or competence of this Commission.[80]

These observations have even greater power here because the NPRM involves the regulation of protected forms of speech and association. Since any rule adopted by the Commission regulating the campaign-related activities of nonprofit organizations will necessarily burden First Amendment rights, it is critical that the rule be based on choices made by Congress and not by the Commission acting without any legislative guidance. As Professor Kenneth Culp Davis, one of the country's most respected students of the administrative process, has written, "[g]overnmental action at the borderland of constitutionality can reasonably be held unconstitutional if the basic determination is made by anyone but Congress."[81] In our constitutional system of shared governmental powers, it is Congress and not the Commission which should decide whether there is a compelling governmental interest in limiting fundamental constitutional rights and, if so, how such limits should be tailored to serve only those and no other ends.[82]

Conclusion

The proposals in the NPRM conflict with existing law and go far beyond Congress' legislative determinations on three recent occasions. They would improperly and drastically impede the ability of nonprofit organizations to undertake vital issue advocacy, member communications and nonpartisan voter participation activities. Furthermore, the Commission does not have the administrative tools and has left itself insufficient time to conduct the full empirical inquiry required by the First Amendment and other legal requirements. Finally, the NPRM raises important policy issues regarding the role of independent interest groups in our political system which should be resolved only by Congress. For these reasons, the Commission should withdraw the NPRM without further action.

Respectfully submitted,

Alliance for Justice
Leadership Conference on Civil Rights
League of Conservation Voters
NAACP National Voter Fund
NARAL Pro-Choice America
Planned Parenthood Federation of America
People For the American Way Foundation
Sierra Club

See below for additional signatories.

20/20 Vision
A Territory Resource Foundation
Access4All
Adelante Mujeres
Affordable Housing Coalition of San Diego
Affordable Housing Consultant to the NLIHC
Agenda for Children: A Voice for Louisiana's Children
AIDS Action
AIDS Action Committee
AIDS Housing Association of Tacoma/Three Cedars
AIDS Legal Council of Chicago
AIDS Project Los Angeles
AIDS Research Alliance
AIDS Services of Dallas
AIDS Taskforce of Greater Cleveland
Alamo Area Mutual Housing Association, Inc.
Alliance for Retired Americans
Alliance of Cleveland HUD Tenants
American Association of People with Disabilities (AAPD)
American Association of University Professors
American Association of University Women
American Civil Liberties Union
American Council of the Blind
American Friends Service Committee
American Jewish World Service
American Lands Alliance
American Library Association
American Rivers
Americans for Democratic Action
Anchorage Neighborhood Health Center
Animal Protection of New Mexico Animal Protection Voters
Animal Protective Association of Missouri
Ann Arbor Area Committee for Peace
Arab Community Center for Economic and Social Services
Arizonans for Gun Safety
Asian & Pacific Islander American Health Forum
Asian American Legal Defense & Education Fund
Association for Documentary Editing
Bailey House
Beldon Fund
Birmingham Public Library
Bradford Environmental Research
Brady Campaign to Prevent Gun Violence
Brain Injury Association of America
Brattleboro Area Affordable Housing Corporation
Bread and Roses Community Fund
Bronx AIDS Services
Campaign for Community Change

California Coalition for Rural Housing
California Housing Partnership Corporation
California Women Lawyers
Canaries Foundation, Inc.
Canoochee Riverkeeper
Casa Esperanza Homeless Center
Cascade AIDS Project
Center for American Progress
Center for Civil Justice
Center for Community Solutions
Center for Democracy and Technology
Center for Impact Research
Central City Concern
Citizen Action of New York
Citizen Action/Illinois
Citizens Action Coalition of Indiana
CitizensTrade Campaign
Clean Air Trust and Clean Air Trust Education Fund
Clean Water Action
Coalition for the Homeless (NY)
Coalition of Religious Communities (Utah)
Coalition on Homelessness & Housing in Ohio
Coalition to Stop Gun Violence
CODEPINK:Women for Peace
Columbus AIDS Task Force
Committee for New Priorities, a committee of Chicago Jobs With Justice
Community Action Commission
Community Coordinated Child Care (4-C)
Community Economics, Inc.
Community Enterprises Corporation
Community Food Security Coalition
Community HIV/AIDS Mobilization Project (CHAMP)
Community Recovery Services
Community Shares of Greater Milwaukee
Community Toolbox for Children's Environmental Health
Concerned Friends of Ferry County
Connect for Kids
Connecticut Housing Coalition
Consumer Federation of California
Council for a Livable World
CT Against Gun Violence, CT Against Gun Violence Education Fund
Defenders of Wildlife
Direct CareGiver Association
Disability Rights Center, Disability Rights Education and Defense Fund, Inc.
Eckerd Youth Alternatives
Economic Policy Institute
Eden Housing, Inc.
Education Law Center

Elders in Action
Episcopal Migration Ministries
Equal Justice Foundation
Equality State Policy Center
Every Child Matters
Executive Alliance
Exponents
Fair Housing Resource Center, Inc.
Families USA
Family AIDS Coalition
Family Planning Association of Maine
Family Planning Health Services, Inc.
Family Pride Coalition
Federally Employed Women
Feminist Majority
Florida Coalition for the Homeless
Food Research & Action Center
Foundation Communities
Freedom Fund of Planned Parenthood of Greater Iowa
Friday Night Dean Club
Friends Committee on National Legislation
Gastineau Human Services Corporation
Gay and Lesbian Community Center of Southern Nevada
Gay, Lesbian & Straight Education Network (GLSEN)
Georgia Rural Urban Summit
Global Exchange
Goddard Riverside Community Center
Grantmakers Without Borders
Grassroots Fundraising Journal
Greater Upstate Law Project
Hadassah, the Women's Zionist Organization of America
Harm Reduction Coalition
Heartland Alliance for Human Needs & Human Rights
Hepatitis Education Project
HIV Community Coalition
HOME Line
Hoosiers Concerned About Gun Violence
Housing & Community Development Network of NJ
Housing Association of Delaware Valley
Housing Initiatives, Inc.
Housing Opportunities Made Equal, Inc.
Housing Preservation Project
Housing Rights Committee of San Francisco
Housing Works, Inc.
Howard Brown Health Center
Human Services Network
I Am Your Child Foundation
Idaho Community Action Network

Illinois Planned Parenthood Council
Immigrant Hope Network
Immigrant Legal Resource Center
Inglewood Neighborhood Housing Services
Institute for Agriculture and Trade Policy
Interfaith Housing Center of the Northern Suburbs
Interhemispheric Resource Center (IRC)
Intermountain Fair Housing Council
Iowa Citizen Action Network
Iowa Head Start Association
Iowa Planned Parenthood Affiliate League
JEHT Foundation
Jewish Alliance for Law & Action
Jewish Community Housing for the Elderly
Just Harvest
Kansas City Anti-Violence Project
King County Coalition Against Domestic Violence
Kirkpatrick Family Foundation
Labor Council for Latin American Advancement
Lambda Legal Defense and Education Fund
League of United Latin American Citizens (LULAC)
Legal Community Against Violence
Lesbian, Gay, Bisexual & Transgender Community Center - New York
Lesbian/Gay Rights Lobby of Texas
Lifelong AIDS Alliance
Living Earth: Gatherings for Deep Change
LLEGÓ, The National Latina/o Lesbian, Gay, Bisexual, and Transgender Organization
Loaves & Fishes
Lorain County Coalition of Citizens with Disabilities
Low Income Housing Institute
Lower Cape Cod CDC
Lutheran Advocacy Ministry in Pennsylvania
Lutheran Network for Justice Advocacy
Lutheran Social Services of Illinois
Magdalena Area Arts Council
Magnolia Charitable Trust
Maine Center for Economic Policy
Mental Health Association of Oregon
Merck Family Fund
Mercy Housing, Inc
Mercy Services Corporation
Metropolitan Interfaith Council on Affordable Housing
Mexican American Legal Defense Fund
Michigan Partnership to Prevent Gun Violence
Midwest States Center
Mimbres Region Arts Council
Minnesota Housing Partnership / HousingMinnesota
Minnesota Religious Coalition for Reproductive Choice

Missouri Religious Coalition for Reproductive Choice
Montana Fair Housing, Inc.
Montana People's Action
Montpelier Housing Task Force
Mow & Sow
NAACP
NARAL Pro-Choice New Jersey
NARAL Pro-Choice New York
National Alliance of HUD Tenants
National Association of Criminal Defense Lawyers
National Association of Social Workers, South Dakota Chapter
National Association of Social Workers, California Chapter
National Association of Social Workers, Missouri Chapter
National Association of Social Workers, Washington State Chapter
National Coalition for the Homeless
National Community Capital Association
National Congress for Community Economic Development
National Council for Community Behavioral Healthcare
National Council of Churches in the USA
National Council of Jewish Women
National Fair Housing Alliance
National Gay and Lesbian Task Force
National Head Start Association
National Health Law Program, Inc.
National Housing Trust
National Immigration Project of the National Lawyers Guild
National Law Center on Homelessness & Poverty
National Low Income Housing Coalition
National Parent Teacher Association
National Priorities Project
National Resources Defense Council Action Fund
National Urban League Institute for Opportunity and Equality
National Women's Political Caucus of Pennsylvania
National Youth Advocacy Coalition
Nazareth Housing Services
NC Justice Center's Health Access Coalition
Nehemiah Corporation
Nevada Conservation League
New Jersey Citizen Action
New Mexico Coalition to End Homelessness
New Mexico Wilderness Alliance
New York City Coalition to End Lead Poisoning Inc. (NYCCELP)
New York City Employment & Training Coalition
New York City Gay & Lesbian Anti-Violence Project
New York State Child Care Coordinating Council
New Yorkers Against Gun Violence Education Fund
North Carolina Community Action Association
North Carolinians Against Gun Violence Education Fund

North Dakota Fair Housing Council
Northeast Missouri Client Council for Human Needs, Inc.
Northeast Ohio Coalition for the Homeless
Northern Adirondack Planned Parenthood
Northwest Federation of Community Organizations
Northwoods Wilderness Recovery
November Coalition
NOW Legal Defense and Education Fund
NY Metro Religious Coalition for Reproductive Choice
Ohio Coalition Against Gun Violence
Ohio Empowerment Coalition
Oil & Gas Accountability Project
Older Women's League (OWL)
Orange County Healthy Start Coalition
Oregon Action
Oregon Center for Public Policy
Oregon Food Bank
"Oregon PeaceWorks, Inc. & Oregon PeaceWorks
Foundation"
Oregon Toxics Alliance
Organization of Chinese Americans
"Parents, Families and Friends of Lesbians and
Gays (PFLAG)"
Park Foundation
Peace Action and Peace Action Education Fund
Phinney Neighborhood Association
Physicians for Social Responsibility (PSR)
Planned Parenthood Advocates of Wisconsin
Planned Parenthood Affiliates of California, California Planned Parenthood Education Fund
Planned Parenthood Affiliates of Michigan
Planned Parenthood Affiliates of Washington
Planned Parenthood Blue Ridge Action Fund
Planned Parenthood Chicago Action
Planned Parenthood Health Services of Southwestern Oregon
Planned Parenthood Heart of Illinois
Planned Parenthood Los Angeles, Planned Parenthood Los Angeles County Advocacy Project
Planned Parenthood Mar Monte
Planned Parenthood of Central PA
Planned Parenthood of Central PA Advocates
"Planned Parenthood of Connecticut and
Planned Parenthood of Connecticut Public Policy Fund "
Planned Parenthood of Delaware
Planned Parenthood of East Central Illinois
Planned Parenthood of Greater Iowa
Planned Parenthood of Greater Northern New Jersey
"Planned Parenthood of Houston and Southeast Texas, Inc.
Planned Parenthood of Houston and Southeast Texas Action Fund, Inc."
Planned Parenthood of Metropolitan New Jersey

Planned Parenthood of Nassau, County and Planned Parenthood of Nassau County Action Fund
Planned Parenthood of New Mexico
Planned Parenthood of New York City
Planned Parenthood of North Central Ohio
Planned Parenthood of Santa Barbara, Ventura & San Luis Obispo Counties, Inc.
"Planned Parenthood of South Central New York, Inc. &
Planned Parenthood Action Fund of Broome and Chenango Counties, Inc. "
Planned Parenthood of Southern Arizona, Planned Parenthood of Southern Arizona Action Fund
Planned Parenthood of the Inland Northwest, Idaho Planned Parenthood Action League
Planned Parenthood of the Mid Hudson Valley
"Planned Parenthood of the St. Louis Region &
Planned Parenthood of the St. Louis Region Advocates, Inc. "
Planned Parenthood of the Susquehanna Valley & Planned Parenthood of the Susquehanna Valley Action Fund
Planned Parenthood of the Texas Capital Region
Planned Parenthood/Chicago Area
Planned Parenthood: Shasta-Diablo & Planned Parenthood: Shasta-Diablo Action Fund
Plymouth Housing Group
Population Action International
Presbyterian Church (USA)
Progressive Leadership Alliance of Nevada
Progressive Majority
ProTex: Network for a Progressive Texas
Public Policy and Education Fund of New York
Rabbinical Assembly
Regional Center for Independent Living
Religious Coalition for Reproductive Choice & Religious Coalition for Reproductive Choice Educational Fund
Rhode Island Housing Tenants Association
Richmond Neighborhood Housing Services
Riverkeeper
Rockland Coalition for Democracy and Freedom
Rockland Immigration Coalition
Rose Foundation for Communities and the Environment
RPJ Housing
Rural California Housing Corporation
Rural Opportunities
Rural Organizing Project
San Diego Housing Federation
San Francisco AIDS Foundation
Sargent Shriver National Center on Poverty Law
Scenic America
Scott County Housing Council
Seattle Alliance for Good Jobs & Housing for Everyone
Seattle Human Services Coalition
Seattle Indian Health Board
SmokeFree Wisconsin, Inc.
Social Justice Education.Org, Inc.

Southwest Environmental Center
Southwest Youth and Family Services
SPIN Project
Spokane AIDS Network
St. Jude's Ranch for Children
St. Louis Area Jobs with Justice
Staten Island AIDS Task Force
Statewide Poverty Action Network
Supportive Housing Network of New York
Temple Kol Tikvah
Texas Association of Planned Parenthood Affiliates (TAPPA)
Texas Freedom Network & Texas Freedom Network Education Fund
The Advocacy for the Poor
The Arc of the U.S. and United Cerebral Palsy
The Arlington Community Temporary Shelter
The Bauman Foundation
The Coalition for the Homeless, Inc.
The Colorado Religious Coalition for Reproductive Choice
The Four Corners Institute
The General Board of Church and Society of The United Methodist Church
The Gruber Family Foundation
The Home Connection
The Interfaith Alliance of Rochester
The John Merck Fund
The McKay Foundation
The Neighborhood Partnership Fund
The Oceanview Foundation
The Pegasus Foundation
The Salem/Keizer Coalition for Equality
The Sexuality Information and Education Council of the United States (SIECUS)
The Shared Earth Foundation
The Virginia League for Planned Parenthood
The Wilderness Society
The Wisconsin Council on Children and Families
The Wisconsin Partnership for Housing Development, Inc.
Tides Foundation, Tides Center, & Groundspring.org
Tillamook Rainforest Coalition
Transition House
Triangle Foundation
Tri-Rivers Planned Parenthood, Inc.
Triumph Treatment Services
TuscoBus, Inc.
Union of Concerned Scientists
Unitarian Universalist Association of Congregations
Unitarian Universalist Service Committee
Unitarian Universalist Veatch Program at Shelter Rock
United Church of Christ, Justice and Witness Ministries
United Food Commercial Workers

United for Justice with Peace
Universal Health Care Action Network (UHCAN)
Upper Hudson Planned Parenthood of Albany, New York
USAction
Utah Progressive Network
Vervane Foundation
Violence Policy Center
Wallace Global Fund
Washington Citizen Action
Washington State Coalition for the Homeless
Waterkeeper Alliance
Welfare Rights Organizing Coalition
Western States Center
Westgate Housing Incorporated
Whidbey Environmental Action
Whole Systems Foundation
Wilburforce Foundation
Wild Salmon Center
Will-Grundy Center for Independent Living
Wisconsin Citizen Action
Wisconsin Family Planning and Reproductive Health Association
Wisconsin Mfd. Home Owners Association, Inc.
Women & Social Work, Inc.
Women Employed
Women Organizing Resources, Knowledge and Services (W.O.R.K.S.)
Women Work! The National Network for Women's Employment
"Women's International League
for Peace and Freedom"
Women's International League for Peace and Freedom (Boston Branch.)
Women's League for International Peace and Freedom
WomenVote PA
YouthLink

ENDNOTES

[1] 69 Fed. Reg. 11736.

[2] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

[3] *Connick v. Myers*, 461 U.S. 138, 145 (1983) (interior quotation marks omitted). *See also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

[4] For example, both IRC §501(c)(4) and IRC §501(c)(3) organizations are permitted to make expenditures for lobbying communications that also frequently refer to federal officeholders by name and which may be found to "promote, support, attack or oppose" those officeholders who are federal candidates. The Service has also long recognized that IRC §501(c)(4) organizations may engage in political campaign activities so long as they do not constitute the organization's primary activity. *See* Rev. Rul. 81-95, 1981-1 C.B. 332. Under the NPRM many such organizations would be forced to forego such activities or become political committees under the FECA, thereby restricting the sources and amounts of funds that they could receive. Even IRC §501(c)(3) organizations are permitted to engage in a wide-range of voter education activities, including publishing voting records and voter guides which, while nonpartisan under the facts and circumstances test applied by the IRS, could be found to "promote, support, attack or oppose" candidates under the proposals in the NPRM.

[5] *See* Prop. Reg. §100.116.

[6] *See FEC v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"). The NPRM asks whether the proposed definition should incorporate the criteria described by the Internal Revenue Service in Rev. Rul. 2004-06 for determining when public communications by IRC §501(c) organizations constitute taxable exempt function expenditures under IRC §527(f). *See* 69 Fed. Reg. at 11742-43. The short answer to this question is that, insofar as they reach communications that do not expressly advocate the election or defeat of clearly identified candidates or constitute electioneering communications, the IRS criteria are no more permissible under FECA than the "promote, support, attack or oppose" standard proposed in the NPRM. Furthermore, as we discuss *infra*, standards developed by the IRS with respect to federal tax exemptions are generally not appropriate in the election context because of their breadth and vagueness. The "facts and circumstances" test outlined in Rev. Rul 2004-06 and other similar IRS pronouncements do not provide clear standards to guide nonprofit organizations in their campaign-related activities and should not be incorporated into the Commission's definition of expenditures.

[7] While the Supreme Court in *McConnell* held that the express advocacy limitation "was the product of statutory interpretation rather than a constitutional command," 124 S. Ct. at 688, it made clear that this was, and after BCRA still is, the meaning of the statutory term: "Since our decision in *Buckley*, Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates has been firmly embedded in our law... Section 203 of BCRA amends [FECA] to extend this rule, which previously applied only to express advocacy, to all "electioneering communications" covered by the definition of that term in amended FECA...." *Id.* at 694. Although much more can be said on this point, we leave it to others to elaborate on the clear meaning of *McConnell* in this regard.

[8] Although the "promote, support, attack, or oppose" standard is unduly overbroad and vague with respect to communications regarding candidates, it is virtually unintelligible with respect to political parties because it does not even require a reference to a "clearly identified" party. *See* Prop. Reg. §100.116(b). Thus, a nonprofit corporation's issue communication that does not mention a party by name

but critically addresses an issue with which a party has become identified (such as a pro-Choice or a pro-Life message) could be found to violate FECA.

[9] In *McConnell,* the Supreme Court concluded that the "promote, support, attack, or oppose" standard was not unconstitutionally vague in the context of state and local political parties. *See* 124 S.Ct. at 675, n. 64. In reaching this conclusion, however, the Court specifically noted that "actions taken by political parties are presumed to be in connection with election campaigns," *id.,* which cannot be said of nonprofit interest groups. Thus, while clarifying regulations may not have been required in applying the "promote, support, attack or oppose" standard to political parties, they are essential in helping nonprofit groups to distinguish between prohibited election-influencing communications and constitutionally-protected issue communications.

[10] *See* 2 U.S.C. §434(f)(3)(B)(iv).

[11] *See* Final Rule, "Electioneering Communications," 67 Fed. Reg. 65190, 65200-03 (Oct. 23, 2002).

[12] *Id.* at 65202.

[13] Final Rule, "Coordinated and Independent Expenditures," 68 Fed. Reg. 421, 428 (Jan. 3, 2003).

[14] *Id.* at 427.

[15] *See* Prop. Reg. §§105.5(a)(2)(i)(C), (a)(2)(ii)(C), (a)(2)(iii)(C) (incorporating 11 C.F.R. §100.24(b)(3)).

[16] Many IRC §501(c)(3) and IRC §501(c)(4) organizations could not exist without the large grants and contributions from foundations, corporations and individuals that are prohibited under FECA. Even organizations that operate federal political committees are able to raise relatively small amounts from their members for these purposes - amounts that would not support the extensive educational and advocacy programs we have conducted for many years.

[17] The NPRM's proposal to treat an organization as a political committee where it spends only $10,000 on federal election activities if the organization's written materials, public pronouncements, or any other communications demonstrate that its major purpose is to nominate, elect, defeat, promote, support, attack or oppose a clearly identified candidate or the candidates of a clearly identified political party, *see* Prop. Reg. §105.5(a)(2)(i), is even more problematic. What if the organization has issued contradictory pronouncements? What if the individual who made the pronouncements was acting outside of her or his authority? Or what if the pronouncements were hyperbole and did not reflect the organization's actual program in any way? ("We must elect [defeat] George W. Bush at all costs.") This standard is particularly troubling because it will allow an organization's political opponents, merely by filing a complaint with the Commission, to instigate a debilitating investigation into all of the organization's inner workings. Furthermore, because the rule relies on expenditures made at any time during the current or previous four years, once an organization qualifies under the test, it would be treated as a political committee for four subsequent years regardless of whether it has changed its purpose or its activities.

[18] An organization that is exempt under IRC §501(c)(4) may engage in political campaign activities, as defined by the IRS, as long as these activities do not constitute its primary purpose. *See* Rev. Rul. 81-95. The same rule applies to labor and other organizations exempt under IRC §501(c)(5) and business,

trade and professional associations exempt under IRC §501(c)(6). Because the IRS has never defined the contours of the primary purpose test, many nonprofit organizations risk the loss of their tax-exempt status if they unwittingly conduct too much political activity. Out of an abundance of caution, such organizations frequently establish nonfederal SSFs under IRC §527(f)(3) in order to preserve their tax-exempt status under IRC §501(c).

[19] An organization exempt from federal taxation under IRC §501(c) may be subject to income tax at ordinary corporate rates on its "exempt function" activities, *see* IRC §527(f)(1), unless it establishes a SSF to conduct those activities under IRC §527(f)(3).

[20] Although the NPRM states, *see* 69 Fed. Reg. at 11736, n. 2, that it is not intended to reach "separate segregated funds," it appears that the NPRM is using this term as it appears in FECA §441b(b)(2)(C) to apply only to federally registered political committees and not to a connected IRC §527 SSF which is not a federal political committee.

[21] *See* 69 Fed. Reg. at 11758.

[22] *See, e.g.*, Technical Advice Memorandum 9130008 (Apr. 16, 1991)("The fact that an activity may constitute grassroots lobbying (or direct lobbying) ... does not preclude a finding that it may constitute political campaign activity and, thus, exempt function activity for purposes of section 527 of the Code.").

[23] *See* Technical Advice Memorandum 9249002 (June 30, 1992); *see also* PLR 9808037 (Nov. 21, 1997); PLR 9725036 (June 20, 1997); PLR 9652026 (Oct. 1, 1996).

[24] *See* Judith E. Kindell and John Francis Reilly, "Election Year Issues," IRS Exempt Organizations Division, Continuing Professional Education Test for Fiscal 2002, 349.

[25] *See Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983). *See also The Association of the Bar of the City of New York v. Commissioner*, 858 F.2d 876 (2d Cir. 1988).

[26] *See Nat'l Fed'n of Republican Assemblies v. United States*, 218 F. Supp. 2d 1300 (S.D.Ala. 2002), *rev'd on other grounds*, 353 F.3d 1357 (11th Cir. 2003).

[27] *See* 69 Fed. Reg. at 11749.

[28] *See* IRC §2501(a)(5).

[29] This is not to suggest that it is either appropriate or necessary to regulate non-connected IRC §527 organizations as political committees. In contrast to the image of non-connected 527 organizations put forth by the media and some campaign reform groups, many such organizations engage in the same kinds of issue advocacy and nonpartisan voter participation activities as IRC §501(c) organizations, and these groups frequently work closely with IRC §501(c) organizations in carrying out these programs. Treating non-connected IRC §527 organizations as political committees will make it extremely risky for IRC §501(c) organizations to coordinate their own advocacy and voter participation programs with such entities, even though this is frequently the most efficient and effective means to serve their communities and achieve their goals. Many of the arguments against regulation of IRC §527 organizations as political committees set forth in these comments are equally applicable to both connected and non-connected entities.

30 *See* IRC §4945(f).

31 *See* 11 C.F.R. §114.4(c), (1)(A)(1995).

32 *See* 11 C.F.R. §114.4(d)(1).

33 Prop. Reg. §100.133(a).

34 *See* 11 C.F.R. § 114.4(d)(3).

35 Prop. Reg. §100.133(c).

36 One of the many problems with this proposal is that it fails to define the term "likely." Given that data showing voter preferences is now available over many years time, and is generally reported using sophisticated sampling and other statistical techniques, a voter participation group that relies on such data will have no idea whether a group or community is "likely" to prefer a candidate or political party to the degree and over the period of time required under the regulation. For example, numerous studies have expressed conflicting studies about the voting preferences over time of so-called "soccer moms," "under-20s," or "over-50s." At what point would an organization violate FECA if it took into account the candidate, party or issue preferences of these groups?

37 The NPRM states that the proposed changes to 11 C.F.R. §100.133 are intended to "achieve more harmony" between the Commission's position and the approach of the IRS to issues regarding nonpartisan voter participation activities. *See* 69 Fed. Reg. at 11740. As any tax practitioner will attest, since the IRS relies on the totality of the facts and circumstances presented in each case in determining whether campaign-related activities are nonpartisan, it is a serious error to attempt to discern the IRS' "approach" to an issue from a single, nonprecedential ruling. Thus the ruling cited in the NPRM, PLR 9925051 (March 29, 1999), relied on a variety of facts in reaching its conclusions about the organization's voter participation activities, including the fact that the organization had consciously designed its activities to fall within the definition of exempt function activities under IRC Section 527. The organization not only represented to the IRS that its overall purpose in carrying out all of its voter participation activities was to influence the outcome of the elections, but that its decisions as to timing, targeting and other key elements of the program were all designed with this purpose in mind. In other contexts, where the totality of the facts and circumstances have not been so obvious, the IRS has consistently ruled that nonprofit organizations may conduct voter participation activities targeted to specific populations as long as these programs are made available without regard to an individual voter's political preference. *See* Milton Cerny, "Campaigns, Candidates and Charities: Guideposts for All Charitable Institutions," *New York University's Nineteenth Conference on Tax Planning for 501(c)(3) Organizations,* §5.04[2] at 5-14 (1991)(stating that IRS has explicitly approved aiming voter registration or GOTV drives at sub-groups defined by generic criteria, like race, gender or language, economic circumstances, like poverty, unemployment, or education level, or other criteria such as "students," "business people," or "farmers.").

38 *See* 11 C.F.R. §100.24(b)(1).

39 *See* 11 C.F.R. §§100.24(a)(1)(i), 100.24(b)(2).

40 *See* Prop. Reg. §§100.5(a)(2)(i)(C), (a)(2)(ii)(C), (a)(2)(iii)(C)(incorporating 11 C.F.R. §100.24(b)(1) and (b)(2)).

[41] *See* 2 U.S.C. §441b(b)(2)(A).

[42] *See Chamber of Commerce of the United States v. FEC,* 69 F.3d 600 (D.C.Cir. 1995), *amended on denial of rehearing,* 76 F.3d 1234 (D.C.Cir. 1996); *see also Toledo Area AFL-CIO Council v. Pizza,* 154 F.3d 307 (6th Cir. 1998).

[43] *See* Prop. Reg. §§105.5(a)(2)(i)(C), (a)(2)(ii)(C), (a)(2)(iii)(C)(incorporating 11 C.F.R. §100.24(b)(1) through (b)(3)). Similarly, by defining a political committee's "major purpose" by reference to "the organizational documents , ... similar written materials, ... or any other communications" of the organization, *see* Prop. Reg. §100.5((a)(2)(i), the NPRM suggests that an organization can become a political committee based on its partisan membership communications, even though such communications are excluded from the definition of "expenditure."

[44] 2 U.S.C. §438(a)(8) (emphasis added).

[45] 124 S. Ct. at 686.

[46] In *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), the Supreme Court considered the Food and Drug Administration's assertion of jurisdiction to regulate tobacco products as drugs after many years of inaction on this issue. Acknowledging "that tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States," 529 U.S. at 161, the Court nevertheless held that the agency's action was not "grounded in a valid grant of authority from Congress," *id.* , because it extended "'the scope of the statute beyond the point where Congress indicated it would stop.'" *Id.* (quoting *United States v. Article of Drug . . . Bacto-Unidisk,* 394 U.S. 784, 800 (1969), quoting *62 Cases of Jam v. United States,* 340 U.S. 593, 600 (1951)).

[47] *Cf. FEC v. Beaumont,* 539 U.S. 146 (2003).

[48] *See* 124 S. Ct. at 699.

[49] *See* U.S. Senate, Committee on Governmental Affairs, "Investigation of Illegal or Improper Activities in Connection With 1996 Federal Election Campaigns," S. Rept. No. 105-167, Vol. III, 105th Cong. 2d Sess., 3993.

[50] *See* 2 U.S.C. §323(d)(1)-(2).

[51] *See* 2 U.S.C. §323(e)(1).

[52] *See* 2 U.S.C. §323(e)(4)(A)-(B).

[53] *See* 2 U.S.C. §441b(c)(2).

[54] *See* 2 U.S.C. §441b(c)(6).

[55] Final Rule, "Electioneering Communications," 67 Fed. Reg. 65190, 65200 (Oct. 23, 2002) (explaining exemption in 11 C.F.R. §100.29(c)(6) for any electioneering communication paid for by an IRC §501(c)(3) organization).

[56] As discussed below, two years before Congress enacted BCRA, it amended the Internal Revenue Code to require registration and reporting by IRC §527 organizations. In a brief submitted to the United

States Court of Appeals for the Eleventh Circuit, an organization that had supported BCRA and assisted in its development noted that the new provisions were necessary because "even with the enactment of BCRA, IRC §527 organizations will be able to conduct considerable amounts of federal campaign finance activity outside the scope of FECA." *See* Brief *Amicus Curiae* of Campaign Legal Center, *Mobile Republican Assembly v. United States,* No. 02-16283, pg. 27.

[57] *See* 124 S.Ct. at 686.

[58] *Id.*

[59] *Id.* It is also important to note that, apart from the provisions it enacted, Congress did not even direct the Commission in BCRA to reconsider and review its current definition of "political committee" as it did with respect to the definition of "coordinated public communications." *See* Pub. L. 107-155, 116 Stat. 81 (2002), §214(c). If Congress was dissatisfied with the Commission's policies in this area, or if it only considered that the issue was of great importance, it surely would have directed the Commission to consider the issue along with the other issues in the post-BCRA rulemakings. It did not do so.

[60] *See, e.g.,* "McCain Camp Files FEC Complaint Charging Clean Air Ads Violate Law," *BNA Money & Politics Report* (March 7, 2000); Ruth Marcus, "Hidden Assets; Flood of Secret Money Erodes Election Limits, *Washington Post*, A1 (May 15, 2000).

[61] *See* Pub.L. 106-230, 114 Stat. 477 (2000) (codified as IRC §527(i) and (j)).

[62] *See* Pub.L. 107-276, 116 Stat.1929 (2002).

[63] Indeed the premise of the registration and reporting requirements imposed on these groups was that they were not political committees under federal election law; political committees under FECA were expressly exempted from the new requirements. *See* IRC §§527(i)(6), 527(j)(5)(A). Virtually every supporter of the 527 amendments enacted in 2000 explicitly recognized that the new registration and reporting requirements represented a limited approach to regulating soft money political organizations and that further restrictions on these entities' activities, if any, would require action *by Congress* as part of comprehensive campaign reform legislation then being blocked by a Senate filibuster. *See, e.g.,* 146 Cong. Rec. H5284 (daily ed. June 27, 2000) (Statement of Rep. Houghton) ("This is not the end. It is the first step and a big one; and we still need to move forward on better disclosure, but that will come."); *id.* at H5285. 146 Cong. Rec. S5994 (daily ed. June 28, 2000) (Statement of Sen. Feingold) ("Tomorrow will be a historic day. For the first time since 1979, the Congress is going to pass a campaign finance reform bill. The bill we are going to pass is by no means a solution to all the problems of our campaign finance system but it is a start -- and an important start -- because it will close the loophole that was opened at the intersection of the tax laws and election laws that allows unlimited amounts of completely secret contributions to flow into our campaign finance system and to influence our elections.") As discussed above, however, when Congress considered comprehensive reform legislation only two years later, the provisions it adopted with respect to tax-exempt organizations and IRC §527 groups were very narrow; and when Congress again considered IRC §527 organizations specifically following BCRA, it took no steps to extend these limited rules in the manner now proposed in the NPRM.

[64] Although some have argued that the NPRM's treatment of IRC §527 organizations is merely a restatement of existing law with respect to the definition of political committees, *see* Letter submitted by Democracy 21, Campaign Legal Center, and Center for Responsive Politics to the Commission Re: Rulemaking on Political Committees, 1 (March 16, 2004) ("At the outset, we want to state that the law as written already requires section 527 groups whose major purpose is to influence federal elections to

register as federal political committees and to comply with federal campaign finance laws."), this argument could only be correct if Congress engaged in a pointless exercise when it twice amended IRC §527 to require the same kind of registration and reporting that, in these commenters' view, were already required under existing law. In point of fact, the Congressional sponsors of the 527 amendments hailed them as the first major campaign finance reforms in more than two decades precisely because soft money IRC §527 organizations were not then subject to the restrictions of FECA.

[65] 124 S.Ct. at 652 (2003).

[66] *See* Committee on Governmental Affairs, U.S. Senate, "Investigation of Illegal or Improper Activities in Connection With 1996 Federal Election Campaigns," S. Rept. No. 105-167, Vol. I, 105th Cong. 2d Sess., 20.

[67] *See id.* at Vol. III, 3994.

[68] The most significant, if not the only, complaint raising the core issues presented in the NPRM is, presumably, not even at the investigation stage. *See* Compliant filed by Democracy 21, Campaign Legal Center and Center for Responsive Politics against America Coming Together, The Leadership Form, and The Media Fund (January 15. 2004).

[69] *See supra* note 17.

[70] We do not address in detail the questions raised in the NPRM concerning the possible effective date of new regulations because we believe that the proposals under consideration are so fundamentally flawed that they cannot provide the basis for regulation even if, as suggested, they were not to become effective until the next election cycle. It is evident, however, that applying another set of new rules in the middle of an election cycle would be unfair to organizations which have already spent considerable sums attempting to comply with the new BCRA rules, and would be disruptive in the extreme. Moreover, since it can be expected that any new regulations will raise present numerous unresolved questions requiring clarification through the advisory opinion process, any effort to apply the new rules to the current election cycle would result in confusion and uncertainty. Finally, to the extent that the proposed definitions of political committee rely on activities conducted during the current and the previous four years, making them effective without a lengthy phase-in period would pose serious issues of due process as well as fundamental fairness.

[71] *See, e.g., Republican Party of Minn. v. White,* 536 U.S. 765, 774-75 (2002); *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 657 (1990); *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 786 (1978).

[72] 124 S.Ct. at 661 (quoting *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 371, 391 (2000)).

[73] *Nixon,* 528 U.S. at 392.

[74] 5 U.S.C. §§601 *et seq.*

[75] *See* 69 Fed. Reg. at 11755-56.

[76] *Id.*

[77] *See* AOR 2004-04 submitted on behalf of America Coming Together.

[78] Thomas E. Mann and Norman Ornstein, "So Far So Good On Campaign Finance Reform," *Washington Post*, A19 (March 1, 2004) (emphasis added).

[79] "Soft Money and the FEC," *Washington Post*, A18 (Feb. 18, 2004).

[80] *See, e.g., Hampton v. Mow Sun Wong*, 426 U.S. 88, 116 (1976); *United States v. Robel*, 389 U.S. 258, 276 (1967) (Brennan, J. concurring) ("[F]ormulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree to the people.") In BCRA, Congress ultimately determined that state and local political parties be allowed to raise limited amounts of soft money to conduct federal election activities, rather than prohibiting soft money entirely for such purposes. Similarly, Congress permitted candidates and officeholders to raise limited amounts of soft money for IRC §501(c) organizations, rather than prohibiting them from having any role in raising money for these organizations. The Commission does not have authority to craft such compromises because it must act within the scope of the statute as written by Congress.

[81] 1 Davis, *Administrative Law Treatise*, §3.13 (2d ed. 1978).

[82] *See Kent v. Dulles*, 357 U.S. 116 (1958); Tribe, *American Constitutional Law*, § 5-17, 285 (1st ed. 1978) ("The open-ended discretion to choose ends is the essence of legislative power; it is this power which Congress possesses but its agents lack.").