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Lawrence Norton, Esq.
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
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Re: AOR 2006-32 (PFAVF/PFA)
Response to Comments from Campaign Legal Center and Democracy 21

Dear Mr. Norton:

On behalf of Progress for America Voter Fund ("PFAVF") and Progress for America ("PFA"), this will respond to Comments on AOR 2006-32 filed October 10, 2006 by the Campaign Legal Center and Democracy 21 (collectively, the "Commenters"). While PFA and PFAVF dispute the Commenters' inaccurate assessment of the substantive law governing "political committee" status under 2 U.S.C. § 431(4), it is the conclusory assertion that "it would be improper and inappropriate for the Commission to answer this AOR" which this letter addresses.

The Commenters' objection that AOR 2006-32 "raises numerous issues identical to those raised in MUR 5487" (initiated by these same Commenters' July 21, 2004 complaint), ignores the fundamental distinction between past speech and activity that is the subject of pending Commission MURs and the proposed future speech that is the subject of the AOR. The fact that issues raised in PFA's and PFAVF's planned future communications are similar to those raised in the past is neither surprising nor controversial, as those communications were successful both in raising awareness in the issues debate and in raising the funds needed to communicate on issues of public importance. The groups' desire to use messages that have proven effective does not destroy the prospective nature of the specific communications set forth in AOR 2006-32.

Under the Commenters' flawed logic, unsubstantiated allegations in a complaint such as theirs would be sufficient not only to cloud a respondent's specific past speech giving rise to that complaint, but indeed to chill all of that organization's future speech for the duration of the matter under review, regardless of its ultimate disposition, by depriving any respondent in a

pending MUR recourse to the advisory opinion process for guidance on its proposed future speech. Beyond the obvious restraints on core political speech, such an exclusionary policy would be rife for abuse by turning Commission complaints into offensive weapons to silence opposing political speech for years with nothing more than a bare request for an investigation. Interpreting FECA to confer such power of private censorship violates the most basic tenets of the First Amendment's protections. *See Buckley v. Valeo*, 424 U.S. 1, 41 n. 48, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam) (citations omitted) (arbitrary and discriminatory application of vague campaign finance laws inhibits protected expression).

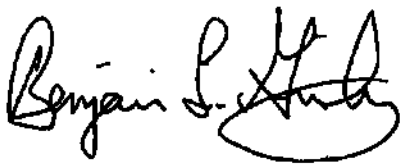
The importance of the advisory opinion process has been heightened in recent years by the Commission's decisions not to provide guidance to the regulated community through rulemaking. In March 2001, the Commission proposed a rulemaking that would have amended the definition of "political committee," using four alternative criteria for determining a group's "major purpose." Definition of Political Committee, 66 Fed. Reg. 13681, 13685-86 (March 7, 2001). The Commission adopted none of those alternatives and voted instead to hold this rulemaking in abeyance, where it remains. In August 2004, the Commission considered two new draft Final Rules on political committee status, both of which were intended, in part, to "establish practical bright lines to ensure that organizations can predict with a high level of certainty how the Commission will view their various activities ..." FEC Agenda Document 04-75 at 3; *see also* Political Committee Status; Proposed Rule, 69 Fed.Reg. 11,736-60 (March 11, 2004). Instead, the Commission's ultimate failure to adopt either Rule again left those organizations with no guidance whatsoever, and its proffered justification that the Rules "would have entailed a degree of regulation that Congress did not elect to undertake itself" is belied by the Commission's confused record of attempting to achieve that same degree of regulation through inconsistent and piecemeal "case-by-case" enforcement actions such as MUR 5487. As the Commenters know well, they filed their complaint in 2004 and now, more than two years later, the MUR is still open and there has been no Commission guidance, case-by-case or otherwise. *See Shays v. Federal Election Commission*, 424 F.Supp.2d 100 (D.D.C. 2006).

Where such a regime of regulatory vagueness persists today, organizations whose past speech has rendered them, fairly or unfairly, the subject of an enforcement matter are <u>most</u> urgently in need of the advisory opinion process to ensure that future communications do not engender similar complaints. Basic due process rights require that the recurring "issues" the Commenters identify as prohibiting a response to the AOR, *i.e.* "whether PFAVF is a political committee, how to apply the 'major purpose' test to PFAVF's activities, and what standard is to be used in applying the definition of 'expenditure' to PFAVF's spending," be fairly noticed in <u>advance</u> of speech rather than *post hoc* through arbitrary retroactive enforcement. *See*

Shays, 424 F.Supp.2d at 115 (admonishing Commission that "due process concerns might impair its ability to bring enforcement actions against 527 groups in the absence of a regulation providing clear guidance as to when those groups must register as a political committee."). In the absence of clear and generally applicable rules, PFA and PFAVF are at the very least entitled to an advisory opinion clarifying the legality of a planned communication in advance of its dissemination, and an unresolved enforcement action for past activity is certainly no substitute for that prospective guidance. *Id.* at 116 (holding that individual enforcement actions, even if successful, provide no guidance and have "no bearing" on political committee status beyond the particular facts, activities, and statements resolved in each unique action.); *see also* Fed. Elec. Comm'n Annual Report 2004 at 42 (preliminary reason to believe findings are not conclusive as to the alleged violations).

Frankly, we are puzzled by the Commenters' objection, which seems so hypocritical. Having filed a civil action in the U.S. District Court for the District of Columbia to compel the Commission to promulgate rules providing articulated standards governing a Section 527 organization's registration as a "political committee," *see Shays*, *supra*, they now seek to deprive PFA and PFAVF of their right to obtain such clarity through the advisory opinion process simply because these same Commenters previously have accused PFAVF of violating the very standards they assert the Commission has failed to articulate. Indeed, these Commenters, as counsel for the plaintiffs, specifically complained to the *Shays* Court that the Commission "expressly eschewed addressing the 527 issue step-by-step through advisory opinions, despite the opportunity to do so." *See* Plaintiffs' Summary Judgment Motion at 30. That is precisely what PFAVF and PFA seek here. Thus, this inconsistency in complaining that the Commission has failed to utilize its advisory opinion process for 527s while simultaneously requesting that the Commission exclude PFAVF from that process further exposes the diaphanous sophistry of their self-serving comments. Accordingly, the October 10, 2006 comments should be disregarded in the Commission's consideration of, and response to, AOR 2006-32.

Sincerely,



Benjamin L. Ginsberg

cc: Commission Secretary