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Larry Norton, Esq.
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

RE: MUR 5403 Respondent The Media Fund

Dear Mr. Norton:

On behalf of The Media Fund, ("TMF") this letter is submitted in response to a complaint filed with the Federal Election Commission by Democracy 21, Campaign Legal Center, and Center for Responsive Politics.

Certain reform groups are now engaged in a bit of revisionist history as they attempt to argue that the Bipartisan Campaign Reform Act (BCRA) and the Supreme Court's decision upholding it in *McConnell v. FEC* 124 S.Ct. 619 (2003) somehow changed the definition of "political committee" that has firmly been in place for almost thirty years after *Buckley v. Valeo* 424 U.S. 1 (1976).

For the reasons set forth below, the Commission should find no reason to believe that TMF violated the Federal Election Campaign Act of 1971, as amended, ("FECA") or the Commission's regulations.

1. TMF is not a political committee.

TMF is a §527 political organization registered with the Internal Revenue Service. TMF has not made any contributions nor has it made any expenditures as those terms are defined in FECA and interpreted by the Supreme Court. In *Buckley*, the Court narrowly construed the definition of "expenditure" to reach "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 79-80. TMF has not used any funds for communications that expressly advocate the election or defeat of a clearly identified candidate and it does not intend to do so.

In 2000, Congress passed legislation addressing 527s and required them to register with the IRS and file reports disclosing their donors and disbursements. H.R. 4762, 106th Cong. (2000) (enacted). Congress did not require 527s to register as political committees with the FEC and did not change the FECA definition of political committee when it passed this legislation. TMF has filed disclosure reports with the IRS and will continue to do so, as required by law.

In 2002, BCRA was passed as a statute of limited scope intended by Congress to address two primary issues of concern related to soft money. First, it prohibits federal candidates and national party committees from raising and spending non-federal funds. Second, it prohibits the use of corporate and labor funds to pay for electioneering communications during a limited period of time shortly before a federal primary or general election. As applied to groups like TMF, BCRA prohibits the use of corporate and labor union treasury funds to pay for non-express advocacy electioneering communications 30 days before a primary election and 60 days before a general election. If these groups run electioneering communications, they must use only individual funds and must file disclosure reports related to the electioneering communications with the FEC. In the event that TMF makes electioneering communications, it will comply with BCRA, will use only funds held in a segregated account from individuals to pay for these ads, and it will file electioneering communication reports with the FEC.

In December 2003, the Supreme Court in *McConnell* did not reinterpret the definitions of "political committee" or "expenditure," contrary to the assertion of complainants. While the Court seems to suggest that it may be constitutional for Congress to re-write the definitions of "political committee" or "expenditure" in the future to cover more than express advocacy, the Court took the opportunity to specifically re-affirm that under current law, 527 groups "remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications)." 124 S.Ct. at 686 (emphasis added).

Finally, in 2004, just this week, the FEC acknowledged that "BCRA did not amend the definition of expenditure" and, therefore, did not change the definition of "political committee." *Draft Notice of Proposed Rulemaking, Political Committee Status*, (March 1, 2004), p.4. The purpose of this proposed rulemaking "explores whether and how the Commission should amend its regulations defining whether an entity is a nonconnected political committee and what constitutes an 'expenditure'." *Draft NPRM, p. 5.*

Congress and the Supreme Court have spoken on this issue. 527 organizations that do not make expenditures are not required to register as political committees with the FEC. They are required to use only unlimited individual contributions for electioneering communications and to file certain disclosure reports. They remain free to use soft money for non-express advocacy broadcast ads 61 days in advance of a general election. The so-called reform groups should not now be permitted to change the words of Congress or the Supreme Court through the back-channel of an FEC enforcement case.

Notwithstanding this clear history, the complainants base their theory on a misapplication of *Buckley* in asserting that there is a "major purpose" test for determining whether an organization is a political committee. In the 30 years that have passed since *Buckley*, Congress did not amend FECA to change the statutory definition of political committee and the

Commission did not amend its regulations to add a "major purpose" test. In a lengthy discussion in the NPRM, the Commission acknowledges that its regulations do not include *Buckley's* major purpose test and invites a discussion of whether and how such a test could be implemented. *Draft NPRM,* pp. 33 – 57.

The FEC should not pursue this matter against TMF in an enforcement process when the proposed violation is based on a new found theory for a test that is not found in the statute or the Commission's regulations. Because TMF has and will continue to act in compliance with well-established law, the Commission should find that there is no reason-to-believe that TMF violated FECA or the Commission's regulations.

We believe that only Congress has the power to change the definitions of "expenditure" or "political committee" that would result in a sweeping change in our nation's campaign finance laws. New law should not be made in secret through the FEC's enforcement process, as the complainants propose.

2. This complaint provides no factual basis for finding reason to believe.

Finally, in addition to an incorrect legal theory, this complaint is devoid of any facts that would give rise to a violation of FECA. The complainants new found theory that a 527 organization that has not made any expenditures is a political committee that must register with the FEC has no basis under current law. We respectfully request that the Commission close this matter as it pertains to TMF.

Sincerely,

Lyn Utrecht
James Lamb
Counsel, The Media Fund