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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 5427 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 Thomas J. Josefiak on behalf of Bush-Cheney '04, Inc.("Bush/Cheney").

Mr. Josefiak misstates the law and relies on an advisory opinion that does not apply to TMF to support his otherwise baseless complaint. 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 is not a political committee required to register with the FEC. The statutory test for whether an entity is a Federal "political committee" is whether it receives "contributions" or makes "expenditures" as those terms are defined in FECA. In *Buckley v. Valeo,* 424 U.S. 1 (1976), the Supreme 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. Similarly, the Court construed "contributions" as those donations that would be used to make contributions to candidates, to make express advocacy communications, or to make expenditures coordinated with candidates. *Buckley*, 424 U.S. at 77-78, 80.

These terms were not redefined by Congress in the Bipartisan Campaign Reform Act of 2002 (BCRA) and the Supreme Court did not reinterpret them in *McConnell v. FEC,* 124 S.Ct. 619 (2003).

Thus, under FECA, 527 organizations such as The Media Fund, operating independently of any Federal candidate or political party that do not make contributions to Federal candidates and do not use any funds for communications that expressly advocate the election or defeat of a clearly identified Federal candidate are not Federal political committees. This has been the law for thirty years and it remains so, today. There is no basis for the FEC to change these rules in its enforcement process.

Recent Congressional action and the *McConnell* decision illustrate that there has not been fundamental change in the definition of "political committee" in FECA.

a. Congress Did Not Change the Definition of Political Committee

Congress has not changed the fundamental legal definitions of "expenditure" and "political committee" since the inception of FECA and the Supreme Court's review of its constitutionality in *Buckley.* The basic definitions provided by Congress in the 1974 FECA amendments have remained unchanged in the statute for thirty years covering seven presidential elections. A review of the history of amendments to FECA confirms this.

(1). 1997 – 1999 History of Legislative Proposals

In 1997, Senators McCain and Feingold first introduced legislation to block the use of corporate and union general treasury funds for "unregulated electioneering disguised as 'issue ads.' *See* 143 Cong. Rec. S159 (Jan. 21, 1999); 143 Cong. Rec. S10106-12 (Sep. 29, 1997)." Brief for Defendants at 50, *McConnell v. FEC*, 251 F.Supp. 2d 176 (D.D.C. 2003). This early version of the McCain-Feingold bill "addressed electioneering issue advocacy by redefining 'expenditures' subject to FECA's strictures to include public communications at any time of year, and in any medium, whether broadcast, print, direct mail, or otherwise, that a reasonable person would understand as advocating the election or defeat of a candidate for federal office." *See* 143 Cong. Rec. S10107, 10108. Brief for Defendants at 50, *McConnell*, 251 F.Supp. 2d 176.

BCRA's sponsors abandoned their effort to redefine "expenditure" and instead proposed the "narrow[er]" regulation of "electioneering communications," "in contrast to the earlier provisions of the ... bill." Brief for Defendants at 50, *McConnell*, 251 F.Supp. 2d 176 *quoting* 144 Cong. Rec. H3801, H3802 (June 28, 2001). The Commission explained in its brief to the District Court:

> In part to respond to concerns raised by the bill's opponents about its constitutionality, Senators Snowe and Jeffords proposed an amendment to McCain-Feingold to draw a bright line between genuine issue advocacy and a narrowly defined category of television and radio advertisements, broadcast in proximity to federal elections, 'that constitute the most blatant form of [unregulated] electioneering.' 144 Cong. Rec. S906, S912 (Feb. 12, 1998). Senator Snowe explained that this approach had been developed in consultation with constitutional experts, to come up with 'clear and narrowing wording' which, in contrast to the earlier

provisions of the McCain-Feingold bill, supra, strictly limited the reach of the legislation to TV and radio advertisements that mention a candidate within 60 days of a general election, or 30 days of a primary, so as specifically to avoid the pitfalls of vagueness identified in *Buckley*. Snowe-Jeffords was adopted as an amendment to both the Shays-Meehan and McCain-Feingold bill, 144 Cong. Rec. H3801, H3802 (June 28, 2001). Brief for Defendants at 50, *McConnell v. FEC*, 251 F.Supp. 2d 176.

As the sponsors explained, "Congress self-consciously evaluated ways to limit the reach of the law without sacrificing its purpose, so as to leave unregulated as many avenues of speech as possible." Opposition Brief for Defendants at I-84, *McConnell v. FEC,* 251 F. Supp. 2d 176 (D.D.C. 2003).

(2). 2000 Legislation Regarding 527 Political Organizations

In 2000, Congress considered the growing number of political organizations that were not subject to the reporting requirements of FECA and passed legislation addressing 527s that are not Federal political committees. This law requires them to register with the IRS and file disclosure reports with the IRS listing their donors and disbursements -- precisely because they are not required to register at the FEC or report to the FEC. H.R. 4762, 106th Cong. (2000) (enacted).

The 527 disclosure law did not change the definition of "expenditure" or require these organizations to register as political committees with the FEC even though at the time this legislation was debated and enacted it was understood by Congress that 527 organizations that were engaging in non-express advocacy communications impacting Federal elections and were spending millions of dollars to do so. In his testimony before the House Ways and Means Committee on June 20, 2000, Senator McCain identified the lack-of disclosure as the problem that Congress needed to narrowly address. Quoting from a newspaper article Senator McCain stated that special interests "can donate unlimited sums to entities known as 'section 527 committees,' beyond the reach of the campaign-reporting laws designed to curb such abuses." *Disclosure of Political Activities of Tax Exempt Organizations*: *Hearing on H.R.4717 Before the Subcommittee on Oversight of the House Committee on Ways and Means*, 106th Cong. (June 20, 2000) (statement of Sen. John McCain).

The Committee and Dissenting Views presented in the House Report shared the same reasons for changing the law to only require disclosure. Neither suggested that the solution to the problem was for 501(c) or 527 organizations engaged in the exempt purpose of "influencing or attempting to influence" a federal election to register as a political committee with the FEC or file disclosure reports with the FEC. The Committee was clear about its goal: "[T]he bill does not regulate political activities, but instead merely requires the disclosure of such activities..." H.R. Rep. No. 106-702, at 15 (2000).

Pro-reform Members argued for an even narrower disclosure bill than H.R. 4717 that did not cover 501(c) organizations -- one that was more likely to pass in 2000. H.R. 4672 was a

solution adopted by the House and Senate and approved by the President that only required 527 organizations to register and file periodic disclosure reports with the IRS – not the FEC. In the summer of 2000, Congress did not limit in any way a 527's ability to continue to legally engage in non-express advocacy communications for the exempt function of "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office." Congress did not require any additional 527s to register as political committees with the FEC and it did not change the FECA definition of political committee when it passed this legislation.

(3). 2002 BCRA History

In 2002, BCRA was passed 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. In BCRA, rather than amend the general definition of "expenditure," Congress tacked the new term "electioneering communications" to FECA's prohibition on corporate and labor union contributions. 2 U.S.C. § 441b(b)(2). The FEC explained to the Supreme Court that BCRA was "a refinement of pre-existing campaign-finance rules" rather than a "repudiation of the prior legal regime" because BCRA merely extended the reach of Federal election law from express advocacy to "electioneering communications" paid for with corporate or labor union general treasury funds within a short time period before Federal elections. Brief for Appellees at 27, *McConnell v. FEC*, 124 S. Ct. 619 (2003).

BCRA's Congressional sponsors supported the limited purpose of BCRA in their arguments to the Supreme Court in *McConnell*, contending that "[Congress] made another 'cautious advance' in the long history of 'careful legislative adjustment of the federal electoral laws' to reflect ongoing experience ... It drew new lines that respond directly to the demonstrated problem, in a way that honors First Amendment values of clarity and objectivity, and does not 'unnecessarily circumscribe protected expression.'" Brief for Defendants at 43, *McConnell v. FEC*, 124 S.Ct. 619 (2003). They argued that the express advocacy meaning developed over the years by the Court provided a guide for Congress into which they said the electioneering communication restriction was narrowly applied: "It was, after all, principally a concern for clarity that first led this Court to adopt the 'express advocacy' test as a gloss on FECA's language." Brief for Intervenor-Defendants at 59, *McConnell v. FEC,* 251 F. Supp. 2d 176 (D.D.C. 2003) (Civ. No. 02-582) (citing *Buckley*, 424 U.S. at 40-44, 79-80).

The Congressional sponsors explained that BCRA was crafted by using the express advocacy analysis developed by the Court as a roadmap with two principle concerns: (1) eliminating vagueness and (2) assuring that restrictions were not overbroad since they were "directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate.'" Brief for Intervenor-Defendants at 62, *McConnell*, 251 F.Supp. 2d 176, (quoting *Buckley*, 424 U.S. at 80). "Those are precisely the precepts to which Congress adhered to in framing (the electioneering communication provisions)." Brief for Intervenor-Defendants at 62, *McConnell*, 251 F.Supp. 2d 176.

In its argument to the Court, the FEC, too, was explicit that BCRA left unregulated all public communications other than express advocacy and "electioneering communications." "[B]ecause of the exceptional clarity of the lines drawn by BCRA's primary definition, any entity truly interested in airing electioneering communications may easily avoid the source limitation on such communications by simply ... running the advertisement outside the 30- or 60-day window..." Brief for Appellees at 92, *McConnell,* 124 S.Ct. 619. The FEC explained that interest groups could continue to "run print advertisements, send direct mail, or use phone banks to target a particular candidate in the days before an election in his district without even having to take the minimal step of using a separate segregated fund." Brief for Appellees at 95 n. 40, *McConnell,* 124 S.Ct. 619. BCRA's sponsors agreed: "[T]he electioneering communications definition only applies to TV and radio broadcasts, leaving similar communications in alternative media unregulated. Newspaper and magazine advertising, mass mailings, internet mail, public speeches, billboards, yard signs, phone banks, and door-to-door campaigns all fall outside its narrow scope..." Brief for Intervenor-Defendants at 158, *McConnell,* 251 F.Supp. 2d 176.

When Congress revises a statute, its decision to leave certain sections unamended constitutes at least acceptance, if not explicit endorsement, of the preexisting construction and application of the unamended terms. *Cottage Sav. Ass'n v. Comm'r,* 499 U.S. 554, 562 (1991). The administrative agency that interprets and enforces the law has no authority to effectuate "amendments" that Congress considered but abandoned. Post-*McConnell,* only Congress may seek to expand government regulation beyond express advocacy and "electioneering communications," and in order to do so it would have to craft the statute in a manner that demonstrates that the additional restriction is not unconstitutionally vague and is narrowly tailored to serve the requisite governmental interest, as McConnell so found regarding "electioneering communications." *See Anderson v. Separ,* No. 02-5529, slip op. at 22 (6th Cir. Jan 16, 2004).

Thus, existing law remains unchanged in this area, as it has for thirty years. The Commission has no reason or Congressional authority to unsettle this area of the law in an enforcement action.

b. No Judicial Precedent from Buckley v. Valeo through McConnell v. FEC Changed the Definition of Political Committee

The FEC acknowledges in a recent Notice of Proposed Rulemaking (NPRM) that since *Buckley,* neither Congress nor the FEC has amended the FECA to change the definition of "political committee." NPRM, 69 Fed. Reg. 11736-37.

In *Buckley*, the Court was concerned that the term "political committee...could be interpreted to reach groups engaged purely in issue discussion," noting that lower courts had interpreted the term "more narrowly" to include only those groups whose major purpose is the nomination or election of Federal candidates. *Buckley*, 424 U.S. at 79-80. In addition, the Court construed the definition of "expenditure" to reach "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." Similarly, the Court construed "contributions" as only those donations that would be used to make contributions to

candidates, to make express advocacy communications, or to make expenditures coordinated with candidates. *Buckley*, 424 U.S. at 77-78, 80.

The Supreme Court construed the "political committee" reporting requirements to apply only to those groups controlled by Federal candidates or to those groups that receive "contributions" or make "expenditures" in excess of $1,000 and whose major purpose is the nomination or election of a federal candidate. *Buckley,* 424 U.S. at 663. Thus, the major purpose test in *Buckley* was a limitation on the number of groups that might otherwise qualify as political committees because they received "contributions" or made "expenditures" in excess of $1,000.

In *FEC v. GOPAC,* 917 F. Supp. 851 (D.D.C. 1996), the District Court specifically rejected the Commission's attempt to treat GOPAC as a Federal political committee. GOPAC's avowed purpose was to support Republican candidates for State legislatures, so that ultimately Republicans could "capture the U.S. House of Representatives." *GOPAC,* 917 F. Supp. at 854. The District Court rejected the FEC's position and concluded that under *Buckley*, an organization is a "political committee" only "if it receives contributions and/or makes expenditures of $1,000 or more **and** its major purpose is the nomination or election of a particular candidate or candidates for federal office." *GOPAC,* 917 F. Supp. at 859 (emphasis added). The FEC declined to appeal this decision. This interpretation was reaffirmed, post-*McConnell*, in *FEC v. Malenick*, Civ. No. 02-1237, slip. op. at 8, (D.D.C. Mar. 30, 2004) (order granting summary judgment).

In December 2003, the Supreme Court in *McConnell* upheld the constitutionality of BCRA, but did not reinterpret the definitions of "political committee" or "expenditure," contrary to the assertions made by some "born again" campaign finance reformers such as Bush/Cheney.[1] While the Court seems to suggest in *McConnell* that it may be constitutional for **Congress** to re-write the definitions of "political committee" or "expenditure" in the future to cover more than just express advocacy, the Court specifically re-affirmed that under current law, 527 groups "remain free to raise soft money to fund voter registration, GOTV activities, mailings, and

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[1] In laying out the history of the Courts' rulings interpreting these key statutory terms, the *McConnell* Court said: In *Buckley* we began by examining 11 U.S.C. § 608(e)(1) (1970 ed. Supp. IV), which restricted expenditures "'relative to a clearly identified candidate,'" and we found that the phrase "'relative to' was impermissibly vague." 424 U.S., at 40-42, 96 S.Ct. 612. We concluded that the vagueness deficiencies could "be avoided only by reading § 608(e)(1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate." *Id.* At 43, 96 S.Ct. 612. We provided examples of words of express advocacy, such as "'vote for,' 'elect,' 'support,' ... 'defeat,' [and] 'reject,'" *Id.* At 44 n. 52, 96 S.Ct. 612, and those examples eventually gave rise to what is now known as the "magic words" requirement.

We then considered FECA's disclosure provisions, including 2 U.S.C. §431([9]) (1979 ed. Supp. IV), which defined "'expenditur[e]' to include the use of money or other assets 'for the purpose of ... influencing' a federal election.'" *Buckley*, 424 U.S., at 77, 96 S.Ct. 612. Finding the 'ambiguity of this phrase" posed "constitutional problems," *ibid*, we noted our "obligation to construe the statute, if that can be done consistent with the legislature's purpose, to avoid the shoals of vagueness," *id.* At 77-78, 96 S.Ct. 612 (citations omitted). "To insure that the reach" of the disclosure requirement was "not impermissibly broad, we construe[d] 'expenditure' for the purpose of that section in the same way we construed the terms of § 608(e) – to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* At 80, 96 S.Ct. 612 (footnote omitted). *McConnell*, 124 S.Ct. at 688 (footnote omitted).

MCFL applied the same construction to the ban, at 2 U.S.C. § 441b, on any corporate or labor union "' expenditure in connection with any [federal] election.'" 479 U.S. at 249. See *McConnell,* 124 S.Ct. at 688 n. 76.

broadcast advertising (other than electioneering communications)." 124 S.Ct. at 686 (emphasis added). Thus, the *McConnell* Court – like Congress – did not change the definitions of expenditure or political committee.

2. AO 2003-37 does not Apply to The Media Fund

The Bush/Cheney complaint relies upon an advisory opinion issued to an apparently imaginary organization, Americans for a Better Country ("ABC"), to support its legal theory against TMF. Interestingly, between September 2, 2003 (the date ABC registered as a political committee with the FEC) through the April 15, 2004 quarterly report, ABC reported no activity. Zero contributions received. Zero expenditures made. Zero debt. Given the publicity and notoriety this organization has received, it seems very odd that it has not received at least one contribution (direct or in-kind), made at least one expenditure, or incurred some debt over the past seven months! They apparently did not even incur any costs or make any expenditures related to their request for an advisory opinion. How can this be?

Nevertheless, Bush/Cheney shamelessly references AO 2003-37 no less than eleven times in their complaint against TMF. One wonders if, perhaps, Bush/Cheney had something to do with ABC's request given that the only apparent use for this non-existent political committee is the advisory opinion it received that has subsequently been used by Bush/Cheney to waive around to the press and as support for their complaints against organizations that do not share their extremist views.[2]

Unfortunately for them, AO 2003-37 does not apply to TMF. The only relevant part of this advisory opinion in this matter is found in the first paragraph. "The fact that ABC is a political committee is particularly relevant. This opinion does not set forth general standards that might be applicable to other tax-exempt entities." AO 2003-37, at 1. TMF is not a political committee. Thus, AO 2003-37 does not apply in this matter.

The general standards set forth in AO 2003-37 do not apply to TMF. Specifically, the "promotes, supports, attacks or opposes" standard for communications does not apply to tax-exempt organizations like TMF. AO 2003-37, at 1, 9-10. The alleged prohibition against soliciting non-federal funds in fundraising communications that use "the names of specific Federal candidates in a manner that will convey [its] plan to use those funds to support or oppose specific federal candidates..." does not apply to tax-exempt organizations like TMF. AO 2003-37, at 1, 19-20.

The FEC should not pursue this matter against TMF in an enforcement process when the legal theory supporting the complaint, issued to an imaginary organization, specifically states that it does not apply to tax-exempt organizations like TMF. Because TMF has and will continue to act in compliance with well-established law regarding specifically defined terms, such as "political committee," "expenditure," and "contribution" the Commission should find that there is no reason-to-believe that TMF violated FECA or the Commission's regulations.

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[2] The Commission has frequently declined to answer requests for advisory opinions when the questions were largely speculative or theoretical. See 2 U.S.C. §437f.

3. 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 newly found theory that a 527 organization that has not made any expenditures or received any contributions for the purpose of making 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

Lyn Utrecht
James Lamb
Counsel, The Media Fund