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January 12, 2007

VIA HAND-DELIVERY

Ms. Lynn Tran
General Counsel's Office
Federal Election Commission
999 E Street, N.W.
Washington, DC 20436

Re: MUR 5440 – The Media Fund

Dear Ms. Tran:

Enclosed are three copies of the Response of The Media Fund to the General Counsel's Brief in MUR 5440.

Please contact me at (202) 778-4007 if you have any questions.

Sincerely,

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Patricia Fiori
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Washington, DC 20036

Counsel for The Media Fund

SUMMARY OF THE MEDIA FUND RESPONSE
January 12, 2007

- TMF was not a federal political committee in 2004 and therefore was not required to register and report. It did not receive contributions as defined under the Act.
- TMF's solicitations did not cause the funds received by the organization to be converted to contributions, and neither did its participation in a joint fundraising committee.
- It is legally impermissible for the Commission to apply retroactively its regulation at 100.57, which was adopted after the TMF communications were made.
- TMF communications did not contain language referring to voting, an election, or a candidacy and therefore did not constitute express advocacy.
- In attempting to find express advocacy, OGC relies on an invalid regulation 100.22(b), which allows reference to external events to determine whether a communication expressly advocates the election or defeat of a clearly identified candidate.
- OGC also relies on case law that is no longer viable, the *Furgatch* decision, which has been invalidated in six U.S. Circuits.
- The Buckley standard on express advocacy remains in effect for ads that are not electioneering communications under BCRA.
- The current controlling law in the D.C. Circuit (found in the *WRTL* decision) bars the Commission from going beyond the "four corners of a communication" to determine whether express advocacy exists.
- Under past Commission precedent, TMF ads do not constitute express advocacy.
- In past enforcement actions, the Commission did not find express advocacy where a communication did not refer to voting, election or candidates.
- In a very recent MUR, the Commission did not find express advocacy in communications that were almost identical to the TMF communications.
- TMF is not a political committee and OGC's use of the major purpose test is erroneous.
- OGC's brief should be withdrawn because it contains insufficient analysis of case law and TMF should be given an opportunity to respond to any further analysis of case law by that Office.

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
The Media Fund,	)	
	)	**MUR 5440**
Respondent	)	
	)	

RESPONSE TO THE BRIEF OF THE GENERAL COUNSEL IN MUR 5440 ON BEHALF OF THE MEDIA FUND

I. INTRODUCTION.

This response is submitted on behalf of The Media Fund ("TMF") to the brief of the Office of General Counsel ("OGC") recommending that the Commission find probable cause to believe that TMF violated various provisions of the Federal Election Campaign Act of 1974 as amended (the "Act" or "FECA"). The Office of General Counsel argues that TMF raised "contributions" in excess of $1,000, made "expenditures" in excess of $1,000, had a major purpose to influence a federal election, and therefore was a political committee under FECA. The legal arguments set forth in the General Counsel's Brief in support of these conclusions are simply wrong. We urge the Commission to look carefully at the scant legal support provided by OGC and conclude that there is no probable cause to believe that TMF received contributions, made expenditures or was a federal political committee.

What the General Counsel is asking the Commission to do is retroactively change the law applicable to nonfederal political organizations registered with the Internal Revenue Service pursuant to Section 527 of the Internal Revenue Code that were active in the 2004 election cycle. It is the law that was in effect in 2004 that must be applied in this matter. Under that law, as the Supreme Court said in the *McConnell* decision, nonfederal 527s "remain free to raise soft money to fund voter registration, GOTV activities, mailings and broadcast advertising..." *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003), at 187-188. Rather than requiring such 527s to become federal political committees, Congress created special reporting requirements for broadcast communications it denoted as "electioneering communications" regarding clearly identified federal candidates. These communications could not contain words of express advocacy, could not be financed with corporate or labor funds, and if run within 30 days of a primary or 60 days of a general election, had to be reported to the FEC. TMF complied fully with these requirements.

OGC puts forth a very simplistic argument to support its probable cause recommendation. The first argument advanced by OGC – that TMF raised "contributions" because its solicitations referenced federal candidates – has as its legal support a case from 1995 interpreting a disclaimer provision that is no longer in the statute and that does not say what OGC asserts that it says. *Fed. Election Comm'n v. Survival Education Fund, Inc.*, 65 F.3d 285 (2d Cir. 1995). In fact, under *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), and as

confirmed in *SEF*, the only funds that are "earmarked for political purposes" are those that will be "converted to expenditures subject to regulation," that is, express advocacy expenditures. *SEF* at 27. Despite OGC's claim that it is applying *SEF*, what OGC is really doing is retroactively applying the new solicitation rule. This is contrary to the Commission's explicit public statement in the Explanation & Justification of section 100.57 that this regulation a new rule that applies to communications *following the effective date of the rules*, which was January 1, 2005, well after the activity that is the subject of this matter. *See Explanation and Justification, Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees*, 69 Fed. Reg. 68057 (Nov. 23, 2004). Prior to the effective date of these regulations, it was simply not the law that the message in a solicitation determined whether the funds donated were "contributions."

The second argument advanced by OGC – that TMF made "expenditures" – is based on a definition of express advocacy that is not the law and, at best expands a definition at Section 100.22(b) that is constitutionally suspect. While the Office of General Counsel never actually explains its definition of "express advocacy," based on those communications that they identify as express advocacy, OGC is apparently claiming that an ad mentioning a federal candidate with a negative or positive reference to that candidate or a discussion of that candidate's qualifications or fitness is express advocacy, even if (as was the case in TMF ads) there was no mention of candidacy, elections or voting and no exhortation to the viewer to take electoral action. This definition of express advocacy is directly contrary to the representations made by the Commission in its brief to the Supreme Court in *McConnell*, in which the Commission said to the Court that under BCRA interest groups could continue to run issue ads outside the 30 and 60 days windows and 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."* *See* Brief of Fed. Election Comm'n, *McConnell v. FEC*, (Case cite), n. 40 (2003).[1]

Even the sponsors of the legislation told the Court that the electioneering communication provisions were not overbroad because they are *"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). Contrary to these representations to the Court, the Office of General Counsel is essentially asking the Commission to write the electioneering communication provisions out of the law, since under the standard they have now concocted – a standard which is different than the Commission applied in past express advocacy cases – virtually all electioneering communications would be "express advocacy" and would trigger political committee status.

This is not the law, and that was confirmed by the sponsors of McCain-Feingold. Regarding issue advertising, Senator McCain explained that under McCain-Feingold, groups advertising more than 60 days before a general election (30 days before a primary) will remain unregulated: "With respect to ads run by non-candidates and outside groups, however, the [Supreme] Court indicated that to avoid vagueness, *federal election law*

[1] During the 30 and 60 day pre-election periods ads may still be run with individual money.

contribution limits and disclosure requirements should apply only if the ads contain 'express advocacy.'' 148 Cong. Rec. S2141 (2002). However, even if 100.22(b) is valid and means what the General Counsel's office says, the six ads (three broadcast ads and three mailers) do not contain express advocacy under any definition that has ever been applied by a Court or by the Commission.

The third argument advanced by OGC – that TMF is a political committee because its major purpose was to influence a federal election – is contrary to Supreme Court precedent, congressional action and the Commission's own action in declining to redefine "political committee." Under *Buckley*, an entity's "major purpose" is examined only after it has been determined that contributions were received or expenditures made. *Buckley,* 424 U.S. at 79. *Buckley* held that contributions were those that were given to a candidate or used to make expenditures. Expenditures are those that contain express advocacy. When Congress passed the legislation in 2000 requiring 527s that were not federal political committees to register and file reports with the IRS, it did so specifically in recognition that entities like TMF were permissible under the law and were in fact not regulated by FECA. This view was confirmed by various FEC Commissioners in public statements made during the 2004 cycle.

When the erroneous legal arguments are peeled away, it is clear that the Office of General Counsel has vastly overreached in an attempt to change the rules that were applicable to 527s making electioneering communications during the 2004 election cycle. The Commission must reject the analysis in this brief and find no probable cause that TMF violated any provision of the law.

II. FACTUAL BACKGROUND.

TMF is an unincorporated association registered with the Internal Revenue Service pursuant to section 527 of the Internal Revenue Code as a political organization. TMF was set up as a 527 expressly to engage in lawful activity that falls short of making it a federal political committee. The IRS defines a 527 political organization as an association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting donations or making disbursements, or both, for the exempt function purpose of influencing or attempting to influence the selection, nomination, election or appointment of an individual to a federal, state, or local public office or office in a political organization. *See* 26 U.S.C. Section 527. Since its inception, TMF has filed timely disclosure reports of receipts and disbursements with the IRS. Furthermore, TMF accurately followed the statutory guidelines applicable to electioneering communications by filing timely reports for all such communications. TMF also did not use any corporate or labor union funds for these communications.

On Form 8871, TMF states its purpose is "to communicate with the public on issues that relate to the election of candidates for federal, state or local office or the legislative process in a manner that does not expressly advocate the election or defeat of a particular candidate." As a 527, TMF lawfully engaged in issue advocacy relating to the 2004 election cycle. TMF's communications centered on pertinent social and public policy issues, such as the economy, unemployment, poverty, education, health care, prescription drugs, government special interests

and fuel prices. None of TMF's television, radio or print communications expressly advocated the election or defeat of a clearly identified candidate.

Of the many TMF advertisements, the General Counsel's brief addresses only six communications.[2] Only three of these advertisements were electioneering communications; all three electioneering communications were developed and distributed with individual funds and properly reported to the Commission.[3]

III. TMF WAS NOT REQUIRED TO REGISTER AND REPORT AS A FEDERAL POLITICAL COMMITTEE.

A. TMF Did Not Receive "Contributions" As Defined Under the Act, and None of TMF's Solicitations or Any Other Activities Caused the Non-Federal Funds Raised To Be Converted Into Federal Contributions.

The Office of General Counsel first argues – with insufficient legal and factual support – that the funds received by TMF during 2004 constituted contributions, as defined by the Act, and therefore required TMF to register as a political committee because it received contributions in excess of $1,000. This argument is deeply flawed and appears to be a transparent attempt to retroactively apply new Commission regulation 100.57 to activity which occurred – in its entirety – prior to the effective date of that new provision. Nothing in the Act or Commission regulations at the time of the fundraising in question made it a violation of the Act to solicit and accept funds in the manner in which TMF did, and nothing in the Act or Commission regulations operated to "convert" those funds from nonfederal donations into federally regulated contributions. Similarly, no case law – OGC's erroneous reliance on one singular and inapposite court case notwithstanding – and no opinion or precedent of the Commission operated to convert funds legally raised as nonfederal donations into federal contributions. In fact, prior to the passage of BCRA, the Commission historically recognized the legality of the very type of non-federal fundraising at issue here.

1. OGC's Brief is nothing more than a thinly veiled and legally impermissible retroactive application of 100.57, contrary to the commission's express direction to the regulated community.

The OGC Brief states that ". . . *all funds* received in response to [TMF's] solicitations constituted contributions." *See* OGC Probable Cause Brief at 14 (emphasis added). This conclusion is apparently based on OGC's assertion that ". . . TMF's numerous fundraising presentations, letters and e-mails used language clearly indicating that the funds received would be targeted to the election or defeat of a clearly identified candidate—here, John Kerry or George Bush, respectively." *See* OGC Probable Cause Brief at 7. However, assuming, *arguendo*, that

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[2] TMF fully complied with the electioneering communication provisions by using only funds donated by individuals. However, these individual donors, whose funds were used to make the electioneering communications, could themselves have made unlimited independent expenditures that contained express advocacy.

[3] The name of the ad "Just Getting By" was changed to "First Priority" just before shipping. Thus, the ad disclosed on the electioneering communication reports as "Just Getting By" is the same ad that the Commission has called "First Priority." See Attachment A.

this statement is factually correct, no provision of the Act or the Commission's regulations in effect during 2004 trigger political committee status for TMF on the basis of its solicitations. Only under the recent addition to the definition of "contribution" at 11 C.F.R. §100.57, and its retroactive application, could this statement come close to being accurate.

The application of section 100.57 would be directly contrary to the Commission's own express statements and directions to the regulated community. The Commission has been clear: section 100.57 is a "new rule" that explains when funds received in response to certain communications must be treated as contributions. *See Explanation and Justification, Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees*, 69 Fed. Reg. 68056 (Nov. 23, 2004). ("*E & J*") Throughout the *E & J*, there are repeated references to the fact that this particular section of the regulations is new.[4] This so-called new rule was published in the Federal Register on November 23, 2004 and became effective on January 1, 2005, after the dates of the activity at issue in this MUR.

Importantly, the Commission expressly states that a communication must occur following the effective date of the new rule, in order for receipts received in response thereto to be considered contributions. *See id.* at 68057. This alone is dispositive of the issue: all of TMF's receipts occurred prior to the effective date (January 1, 2005), and, therefore, are not contributions.

Finally, the Commission has also been clear as to the need for and reasoning behind this new rule: "[t]he draft final rules are intended to give clear guidance to persons engaged in political activity so that they will know with a high degree of certainty whether their activities are subject to Commission regulation." *See* Memorandum to the Federal Election Commission for the Meeting of August 19, 2004, "Draft Final Rules for Political Committee Status" (Agenda Document No. 04-75) at 2. If there had been clear guidance prior to the promulgation of this new rule, there would have been neither a need for the rule, nor for the Commission to justify the rule by desiring to give clear guidance.

Accordingly, there is simply no legal avenue whereby the Commission may apply section 100.57 – or the theory behind it – to the content of TMF's solicitations. To do so is contrary to the Commission's stated intent, as clearly expressed in the *E & J*. *See E & J* at 68057. Section 100.57 did not exist at the time of the solicitations, and cannot be used to find a retroactive violation of the Act.[5] TMF complied with the law as it existed at that time.

2. The General Counsel relies exclusively on one court case, *FEC v. Survival Education Fund, Inc.*, and its reliance on that case is deeply flawed.

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[4] By expressly calling this a new rule, the Commission implies that such a rule did not previously exist; otherwise, it would not be new. If OGC's position is – however inexplicable – that this "new" rule codified a previously existing precedent, then OGC has the burden of providing that precedent. Instead, its Brief is completely silent on the subject, leading to the only reasonable conclusion: there is no such precedent, and "new" means "new."

[5] *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988) ("A statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms").

Apart from the disguised application of 100.57, the sole stated legal precedent in support of its allegation that TMF raised "contributions" is a 1995 case from the Second Circuit interpreting the disclaimer requirements of Section 441a(d), as they were in 1995. *See FEC v. Survival Education Fund, Inc.*, 65 F.3d 285 (2d Cir. 1995).[6] This case does not stand for the precedent argued by OGC, is not the law in this Circuit and, indeed, reviewed a section of the Act that no longer even exists.

First, this 1995 Second Circuit case interpreted only the disclaimer requirements then in effect. Since the time of that opinion, the disclaimer regulations have been changed and no longer even contain the language that the court was interpreting in *SEF*.[7] That alone makes this case inapposite, and at best, OGC's Brief is citing dicta taken out of context.[8]

Second, OGC argues that this case stands for the proposition that funds raised may be "contributions" even if they are not used to make "contributions" or "expenditures," as defined and understood through a long series of court cases and legislative history. This is a gross misrepresentation of the court's opinion in *SEF*. In fact, the court said:

> We think the hazards of uncertainty feared by defendants can be avoided. The only contributions "earmarked for political purposes" with which the Buckley Court appears to have been concerned are those that will be converted to expenditures subject to regulation under FECA.

See SEF at 27. This opinion, in fact, supports the reading of *Buckley* more fully discussed in Section 3 below, that funds donated are "contributions" only if they are used by the recipient to make "contributions" to candidates or to make "expenditures." Expenditures are those that contain express advocacy.

Importantly, the court in *SEF* affirms a very narrow construction of "political committee" under *Buckley*, contrary to OGC's overly broad swath, and explicitly recognizes that issue advocacy groups may both applaud and criticize federal candidates and raise funds – that are not contributions – to do so, even in an election year. *See id.* at 295. Thus, if anything, *SEF* stands for the very proposition that TMF – not OGC – is contending: that not all fundraising activity that mentions federal candidates converts the funds raised into federal contributions. *SEF* has, in fact, never been cited by another court as supportive of OGC's proposition, but rather has been cited as supportive of TMF's position, requiring a narrow reading of *Buckley*. *See, e.g., Right to*

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[6] As explained below, in addition to the fact that OGC cites no provision of the Act or Commission regulations to support its erroneous assertion, there is neither a single Advisory Opinion nor enforcement matter cited.

[7] Factually, the opinion analyzes only one direct mail communication. The court notes that the old disclaimer requirement it is interpreting only applies to communications by broadcast, newspaper, magazine, outdoor advertisement or general public political advertising, none of which were used by TMF to solicit funds. *See SEF* at 38. All of the solicitations cited by OGC in its brief were in person, by phone or email. None were through any form of general public communication.

[8] The fact that OGC relies on one sentence from one ten-year-old court case as its entire legal position is insufficient, as a matter of law, for the Commission to move forward to probable case.

Life v. FEC, 6 F.Supp. 2d 248, 250 (S.D.N.Y. 1998); *Vermont Right to Life v. Sorrell*, 19 F.Supp. 2d 204, 213 (D.Vt. 1998).

Indeed, this TMF matter is more akin to *FEC v. GOPAC*, 917 F. Supp. 851 (D.D.C. 1996), rather than *SEF*. In *GOPAC*, Commission attempted to radically expand the Act's scope and coverage through the analysis of GOPAC's direct mail fundraising solicitations, but the District Court soundly rejected the Commission's position and endorsed the narrower *Buckley* standard. *See GOPAC* at 855, 859 (GOPAC direct mail fundraising efforts were insufficient, alone, to conclude that GOPAC should register as a federal political committee; thus rejecting the Commission's "broader – and troubling – interpretation of the Act").

Finally, since this decision was rendered, Congress has passed two very specific laws regarding reporting requirements for 527 organizations and the BCRA electioneering communication provisions, and the Commission declined to change its regulations regarding political committees. It is the 527 law and the electioneering communication provisions that are applicable to TMF as outlined more fully below. OGC's attempt to resurrect a ten year old opinion from a different Circuit, interpreting a different provision of the law that is no longer even in the statute, and argue that it supports an interpretation of the law that is totally inconsistent with applicable recent court decisions and subsequent legislative activity is a complete distortion of the applicable law.

Accordingly, OGC's argument that donations made to TMF were contributions – thus turning TMF into a political committee – based on the *SEF* opinion must be rejected.

3. Prior to the enactment of 100.57, the content of a solicitation did not determine whether money raised was subject to federal rules or was "converted" to contributions.

As indicated above, Commission regulation 100.57 is a new rule enacted subsequent to the TMF solicitations at issue here. OGC's Brief cites no provision of the Act or Commission regulations that would have restricted the content of a nonfederal entity's solicitation. OGC points to neither a single Advisory Opinion nor enforcement matter to stand for this proposition. It is simply erroneous to claim that this was the law prior to January 1, 2005.[9]

The settled law during 2004, even as recognized by the Commission, was *Buckley*. Under *Buckley,* donations are only contributions if they are made in order for the recipient to further make express advocacy expenditures or contributions to candidates. In *Buckley*, 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. Nothing in *Buckley* stands for the proposition asserted by OGC: that the content of solicitations is determinative of whether federal or nonfederal money is being raised. Nothing in *Buckley* stands for the proposition that funds are automatically converted to "contributions" based on the wording of a solicitation.

[9] Even *SEF*, the ten-year-old court case cited by OGC, indicates that solicitations that applaud or criticize federal candidates do no convert the money raised into federal contributions. *See SEF* at 29.

Most importantly, nothing in *SEF* changed the *Buckley* decision, regardless of OGC's partial and piecemeal use of that case. In fact, the *SEF* court was careful to indicate that it was following the *Buckley* limitations: "[t]he only contributions "earmarked for political purposes" with which the Buckley Court appears to have been concerned are those that will be converted to expenditures subject to regulation under FECA." *See SEF* at 27.

Before the BCRA ban on political party soft money, FEC followed *Buckley* and did not take the position that money is hard money because of the content of the solicitation. Federal candidates frequently in the past raised soft money, and the donations received were not considered federal contributions.[10] The Commission is well aware that candidates – from both parties – were explicit that the soft money contributions that they raised were of assistance to their own campaigns. Yet, as indicated, OGC cites not one instance prior to the passage of BCRA where the Commission found that soft money proceeds received in response to a candidate solicitation were converted to hard money. In fact, the definitive statement on this issue was made in 1997 by then Attorney General Janet Reno in reviewing soft money donations raised by Vice President Al Gore. In deciding against appointing an independent counsel to investigate possible violations of 18 U.S.C. § 607, Attorney General Reno stated that section 607, "specifically applies only to *contributions* as technically defined by the Federal Election Campaign Act (FECA) – funds commonly referred to as 'hard money." *See S. Comm. on Gov't Affairs, Investigation of Illegal or Improper Activities in Connection with 1996 Fed. Election Campaigns*, S. Rep. No. 105-167, Vol. 1, at 503 (1998). This decision was made on the grounds that Vice President Gore was soliciting funds for the Democratic National Committee's nonfederal account, or funds considered "soft money."

Clearly, if the Commission had truly believed that the law was different at the time, there would be numerous MURs involving the solicitation of soft money by candidates. Accordingly, and as indicated earlier, there is simply no Commission rule or precedent that existed during the time in question that would convert money raised into federal contributions based on the content of the solicitations. Under the controlling ruling of *Buckley*, TMF's solicitations were legal and raised exclusively nonfederal funds.

4. OGC's assertion that TMF's participation in a joint fundraising committee converts all funds received into federal contributions has no legal basis.

Nothing about TMF's participation in joint fundraising activities alters the conclusions stated above. OGC's position that joint fundraising proceeds, raised by a registered joint

[10] In one of the most well documented examples of this, during a March 3, 1997 press conference held by Vice President Al Gore, it was clear that he made several telephone solicitations for the Democratic National Committee ("DNC") from the White House in which he stated he asked donors, "to help raise *campaign funds*," "to ask people to make lawful contributions *to the campaign*," "to support *our campaign*," "to help[] to raise funds *for the campaign*," and "to help raise money *for the campaign*." *Emphasis added. S. Comm. on Gov't Affairs, Investigation of Illegal or Improper Activities in Connection with 1996 Fed. Election Campaigns*, S. Rep. No. 105-167, Vol. 1, at 502 (1998). The Commission reviewed this activity in the audit of the Clinton/Gore '96 campaign and in a subsequent MUR, and never suggested that the soft money donations to the DNC made as a result of these and similar solicitations were hard money contributions to the DNC.

fundraising committee and including one federal and one nonfederal participant, were all federal contributions is not only wrong, it is nonsensical.[11] OGC makes only one statement in support of this conclusion:

> "[I]f a joint fundraising committee receives funds from a prohibited source, then those funds must go to a participant that can lawfully accept such contributions, regardless of the allocation formula under the joint fundraising agreement."

See OGC Probable Cause Brief at Footnote 11 (quoting 11 C.F.R. § 102.17(c)(4)(ii)). While true, this statement is far more supportive of TMF's legal position than OGC's. Prior to the effective date of 100.57 in January 2005, a joint fundraising committee was permitted to raise prohibited sums when one of the participants was a nonfederal entity. Nowhere in the joint fundraising regulation is there a restriction on the content of a joint fundraising solicitation, and, in fact, it was clearly permissible for the joint fundraising committee to refer to a federal candidate in raising prohibited or other sums that would be allocated solely to the nonfederal participant.[12]

The FEC joint fundraising regulations in effect in 2004 provided explicitly that "[p]olitical committees may engage in joint fundraising with other political committees or with unregistered committees or organizations." 11 C.F.R. § 102.17(a)(1)(i). Further, "[i]f any participants can lawfully accept contributions from sources prohibited under the Act, any such contributions that are received are not required to be distributed according to the allocation formula." *See §* 102.17(c)(6). With the exception of excessive or prohibited contributions, all proceeds were required to be distributed pursuant to a joint fundraising agreement that set forth how the proceeds would be divided. Nothing in these regulations states that the joint fundraising entity's solicitations had anything to do whatsoever with the allocation specified in the joint fundraising regulations. In fact, a distribution contrary to the joint fundraising agreement would have been in violation of the regulations. The most common joint fundraising agreements were drafted so that all federal participants would receive the maximum they were able legally to accept and that anything in excess of that would go to the nonfederal participants. There is no instance in which the Commission even inquired into the content of solicitations in any case involving joint fundraising.

Thus, for example, joint fundraising activity between a federal candidate committee and a nonfederal committee would have only been permitted to raise federal contributions under OGC's new interpretation. This is contrary to the allocation formula and regulations because

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[11] Victory Campaign 2004 ("VC 2004") is a joint fundraising committee registered with the FEC and is acting in full compliance with the Commission's joint fundraising regulations. America Coming Together ("ACT"), a Federal political committee with federal and nonfederal accounts, and TMF, a 527 political organization registered with the Internal Revenue Service that is not a Federal political committee, are the two participants in the joint fundraising effort. The Commission's regulations specifically provide that political committees, such as ACT, "may engage in joint fundraising ... with unregistered committees or organizations," such as TMF. 11 C.F.R. §102.17(a)(1)(i). VC 2004 has no other purpose other than to serve as a joint fundraising committee for ACT and TMF.

[12] If this were not the case, there would be numerous MURs involving joint fundraisers that solicited and received prohibited and excessive funds and mentioned federal candidates in doing so. OGC does not cite to even one such case. The legal support for their position is simply non-existent.

clearly the federal participant would have been mentioned and the allocable share of his or her receipts would have benefited his or her campaign. This result would have turned the nonfederal participant automatically into a federal political committee. While that may be OGC's desired result, it is simply not the law, and certainly was not the law during the time period in question here.

Even under new regulations, joint fundraising is allowed between federal and nonfederal entities. If all the money raised is converted to hard money, the permission to have joint fundraising is rendered null and void. OGC is either unwittingly or intentionally writing the joint fundraising regulation out of the law. Because the joint fundraising regulations are assumed to have their plain meaning and effect, it is clear that the content of joint fundraising solicitations must be treated similarly to any other solicitations. Consequently, OGC's lack of legal support for its position – given the clear precedent of *Buckley* – compels the conclusion that the joint fundraising solicitations were legal and did nothing to convert funds received into 100% federal funds.

5. Conclusion

Accordingly, then, there is no legal support for the proposition advanced by OGC: that the content of solicitations made, in their entirety prior to the effective date of section 100.57, can convert nonfederal funds into federal contributions and can determine whether a nonfederal entity must register with the Commission as a political committee. In fact, under the law in effect in 2004, including the statute, regulations, opinions, enforcement matters, and relevant court cases, just the contrary was clear. The language of a solicitation was irrelevant to the registration and reporting requirements of the Act. As a result, none of TMF's solicitations – or funds received – triggered registration with the Commission as a federal political committee, and the Commission should decline to find probable against TMF on this basis.

B. None of the TMF Communications Contained Express Ddvocacy.

1. TMF's communications do not contain express advocacy.

At issue are six TMF communications – three mailers, two TV ads and one radio ad. Copies are at Attachments B – G. None contained express advocacy under 100.22(a) or 100.22(b). Moreover they are clearly distinguishable from the ads in which the Commission has previously found express advocacy.[13]

a. Education mailer – Attachment B

This mailer addressed the issue of making college affordable for everyone. It specifically laid out particular plans proposed by John Kerry, including tuition tax credits and funding for Pell grants and other financial aid. The OGC brief highlights three sentences in the mailer: "We need a President who encourages pursuit of the American Dream instead of dashing these hopes." "John Kerry Will Make College Affordable for Every American." "John Kerry –

[13] The law applicable to determination of whether these communications contained express advocacy is set out in III (B)(2)-(4) below.

Making the American Dream a Reality." OGC argues that this is express advocacy under 100.22(a) because it refers to a need for a particular type of President. In support of this assertion, the brief alleges that this language is similar to "Vote Pro-Choice." It is not similar at all. The example cited by OGC uses the word "Vote." It exhorts the reader to go to the polls and vote for specifically identified candidates. In the TMF Education Mailer there is no reference to John Kerry's candidacy, no reference to an election, no exhortation to the reader to **do** anything, much less vote. Under the applicable legal precedent there is no express advocacy under 100.22(a) unless the communication urges the reader to take an action that is explicitly to elect, vote, or defeat a candidate,[14] and this mailer does not contain express advocacy.

The TMF Education Mailer is not express advocacy under Section 100.22(b) either. The only support proffered for this argument is the comparison to an ad referring to Tom Kean in MUR 5024R. When this matter was first considered the Commission failed to reach agreement and voted 3 – 3 as to whether this ad was express advocacy. On remand, the case was settled. The OGC brief does not accurately describe the language in that matter that was found to be express advocacy. The General Counsel's comparison to the Kean mailer is grossly misleading because it does not quote several other pertinent lines in the mailer upon which the Commissioners were focused: "And until he decided to *run for Congress* ..." (emphasis added). And: "Tom Kean Moved to New Jersey to *Run for Congress*." (emphasis added). And: "Never," coupled with a picture of a "Tom Kean for Congress" sticker. It is these lines in combination with "New Jersey Needs New Jersey Leaders" that were relied on by the Commissioners initially voting to treat this communication as express advocacy. As we summarize later in this response, this is consistent with the Commission's prior determinations in MURs on express advocacy. In each instance in which the Commission has found express advocacy, including this Kean mailer, there was reference to a person's candidacy, the election, or voting. None of these is present in the TMF education mailer. Even if 100.22(b) was valid, the mailer does not meet its standard in the absence of a reference to a person's candidacy, voting or an election.

b. Health care mailer – Attachment C

This mailer describes the Kerry Edwards health care plan in some detail. The OGC brief cites to two excerpts: "George W. Bush and Dick Cheney have no plan to lower health care costs." And: "For Florida's Families. The Choice is Clear." This is not express advocacy under 100.22(a). There is no reference to the election, to a candidacy, to voting and the reader is not exhorted to take any action by doing anything. "The choice is clear" in the context of the extensive discussion of the Kerry-Edwards health plan is that the Kerry Edwards health plan is the plan that is right for Florida families. This mailer was a substantive and substantiated discussion of the health care issue to provide voters with information on this issue. While OGC cites the Kean matter and argues that this is similar to that ad, the most similar ad is the Sierra Club pamphlet "The Dirt" in which the Sierra Club portrayed John Kerry's and George Bush's

[14] In one of the most recently closed matters related to express advocacy, MUR 5643, the Sierra Club settled a case in which the Commission found that one mailer contained express advocacy. This mailer used the word "Vote," thus exhorting the readers to go to the polls and vote for the favored candidates. This mailer is also distinguishable from the TMF mailer for the reasons set forth above.

environmental records, and the Commission in finding no express advocacy under 100.22(a) or 100.22(b).

As set forth above regarding the education mailer, the General Counsel's comparison of the health care mailer to the Kean mailer is grossly misleading because their brief does not quote several other pertinent lines in the mailer upon which the Commissioners were focused: "And until he decided to *run for Congress* ..." And: "Tom Kean Moved to New Jersey to *Run for Congress*." And: "Never," coupled with a picture of a Tom Kean for Congress sticker. It is these lines in combination with "New Jersey Needs New Jersey Leaders" that were relied on by the Commissioners initially voting to treat this communication as express advocacy. The TMF health care mailer does not make any reference to a person's candidacy (as in the Kean mailer). Nor does it reference the election, or voting. In the absence of such language that is an unmistakable and unambiguous electoral message, there is no express advocacy under 100.22(b).

c. Military service mailer – Attachment D

The third mailer discusses John Kerry's military service and gives his position on 3 issues of importance to veterans – mandatory health care for veterans, the penalizing of disabled veterans who receive both pensions and disability pay, and reservists' access to health care. OGC argues that this mailer contains express advocacy under 100.22(b). There is no reference to an election, to candidacy or to voting. There is no exhortation to the reader to take any action. This mailer simply provides information. Without citation to any legal authority in support or comparison to any other matter, the OGC brief simply asserts that because this mailer discusses the candidate's character and fitness for the office of President, it can have no other meaning than to encourage his election. The General Counsel's office gives no explanation of why a discussion of a candidate's history without any reference to his candidacy, election, voting and without a direction to the reader to take any action is express advocacy, nor does the brief cite any authority for that assertion. There is no case in which a court found express advocacy under 100.22(b) when there was no exhortation to a voter to do anything, and the communication simply made positive or negative comments about an individual. Under 100.22(b), even if it was a valid regulation, the message must be unmistakable and unambiguously an electoral message. There is simply no language in this ad that would meet that standard.

d. "Stand Up" African American TV ad – Attachment E

The OGC brief argues that this ad contains express advocacy under 100.22(b) citing to *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). While we do not believe *Furgatch* is good law or valid precedent, even under *Furgatch*, this ad is not express advocacy. In support, the brief argues that "You better wake up before you get taken out" is the same as "Don't let him do it" referring to then President Carter. On its face, the language is not at all similar. This ad was targeted to the African American community and has an anti-Iraq war message. It is indisputable that African Americans are disproportionately affected by the war. The tag line, in context, is a reference to opposition to the war. It does not reference the election, candidacy or voting. It does not give the viewer any direction as to any action to take. It is simply asking them to take notice of war and its disproportionate impact on African Americans. What to do about the war is left solely to the viewer to determine. That cannot be construed as an electoral message that is

"unmistakable, unambiguous, and suggestive of only one meaning" under 100.22(b). And, reasonable minds could clearly "differ as to whether it encourages actions to elect or defeat one or more clearly identified candidates or encourages some other action" – in this case opposition to the war in Iraq. As described above, the General Counsel's assertion that comments regarding a candidate's character or fitness are express advocacy is without legal support and is certainly not consistent either with the words of 100.22(b) or the *Furgatch* standard.

Moreover, while *Furgatch* is cited as support for this conclusion, the General Counsel does not explain how this ad meets the *Furgatch* standard which is: 1) the speech must be express, even if not explicit; 2) the speech must present a clear plea for action in order to constitute advocacy; and 3) it must be clear what action is advocated by the speech. Other than telling the viewer to "wake up" which is not a clear call for any electoral action whatsoever – unlike the Carter ad which refers to "him" – the ad makes no reference to the election, candidacy or voting and does not constitute express advocacy even if *Furgatch* was the applicable legal standard.

e. "First Priority" African American TV ad (also referenced as "Just Getting By") – Attachment F

OGC argues that this ad also contains express advocacy under 100.22(b), citing to *Furgatch*. For the same reasons as noted above, the line "You better wake up before you get taken out" is not express advocacy. It does not reference the election, candidacy or voting. It discusses issues of concern to African Americans including affirmative action, jobs, minimum wage and health care, all of which were pending before Congress and in many states during the '04 cycle. It does not give the viewer any direction as to what action to take. It is simply asking the viewer to take note of the state of the black community. What to do about that (other than wake up and notice) is left solely to the viewer to determine. As with "Stand Up," "First Priority" is ambiguous at best and reasonable minds could clearly differ as to what action it encourages. Similarly, this ad does not meet the standard articulated in *Furgatch*. There is no clear call for any action, much less a clear action, and there is no specific plea to do anything. This ad is not express advocacy under either 100.22(b) or *Furgatch*.

f. "Good" radio ad – Attachment G

OGC argues that this radio ad contains express advocacy under 100.22(b), citing to the line "Wouldn't it be good to have someone on our side?" The assertion in the Brief that the only way the listener can act on this is to vote for Kerry is simply untrue. The ad specifically warns that privatizing social security is one of the administration's next big priorities. It also discusses tax cuts that were passed by Congress and pending issues before Congress such as Medicare reform. These are all issues that were pending before Congress during the 2004 cycle and as is the case with the television ads, there is no reference to an election, voting or candidacy. It does not give the viewer any direction as to any action to take. Regarding this ad, the OGC Brief does not even cite *Furgatch*, but relies solely on 100.22(b). Despite the General Counsel's assertion, this ad does not have an unmistakable and unambiguous message to vote for or against anyone. Thus, this ad is not express advocacy, even if 100.22(b) was a valid regulation.

2. OGC's brief misstates the law.

In addition to their erroneous analysis of the facts and content of TMF's communications, OGC also misstates and misapplies the law applicable to those mailers and ads. As fully explained below, OGC has incorrectly applied a questionable regulation and discredited court case (section 100.22(b) and *Furgatch*) and has misapplied the correct legal standard (section 100.22(a) and *Buckley*).

In its Brief, OGC argues that TMF communications included express advocacy as defined in the Commission regulations at 11 C.F.R. §100.22, whether distributed as mailers, or broadcast as television and radio ads. Subsection (a) of that regulation bases a determination of express advocacy on a combination of explicit words and a clearly identified candidate. This *Buckley* "magic words" standard lists several specific phrases, such as "vote for" or "support," which constitute express advocacy and, in addition, provides that other words could constitute express advocacy if those words in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates. Subsection (b) of the regulation goes beyond the words of a communication to rely on external events surrounding an ad, what meaning is "suggested" by the ad and whether "reasonable minds could not differ" as to whether the ad encourages voters to elect or defeat a clearly identified candidate. Subsection (b) ostensibly is based on the Court of Appeals holding in *Federal Election Commission v. Furgatch*, 807 F2d 857 (9th Cir. 1987). As demonstrated below, the validity of both subsection (b) and *Furgatch* are in question.

In recommending that the Commission find probable cause in this MUR, OGC is expanding express advocacy to encompass communications that the Commission has in the past treated as issue advocacy. In so doing, OGC is urging the Commission to redefine and broaden express advocacy in the context of a MUR, without going through the regulatory process. As discussed below, numerous judicial rulings have concluded that the Commission lacks the authority to redefine express advocacy. By attempting to do so in the context of this MUR, OGC is compounding its error by urging the Commission to take unauthorized action in an unauthorized manner.

a. Commission regulations at 11 C.F.R. §100.22(b) are invalid.

OGC's Brief relies heavily on the second prong of the definition of express advocacy at section 100.22(b).[15] That reliance is disingenuous, given the number of cases that have either invalidated this provision or found it to be legally suspect, including *Maine Right to Life v. Federal Election Commission*, ("*MRTL*"), 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 522 U.S. 810 (1997); *Right to Life of Dutchess County, Inc. v. Federal Election Commission*, 6 F.Supp. 2d 248 (S.D.N.Y. 1998); *Robin Clifton and Maine Right to Life Committee, Inc. v. Federal Election Commission*, 114 F.3d 1309 (1st Cir. 1997), *cert. denied*, 522 U.S. 1108 (1998) and several other cases. (*See* discussion below at 16.)

[15] Of the six identified communications, they argue that only two are express advocacy under 100.22(a).

It is astonishing that in its Brief, OGC neither distinguishes nor explains these cases,[16] however, the Commission, in the past, took administrative notice of at least several, when "on September 19, 1999...the FEC voted 6-0 to adopt a policy that 11 C.F.R. § 100.22(b) would not be enforced in the First or Fourth Circuits because the regulation 'has been found invalid' by the First Circuit and 'has in effect been found invalid' by the Fourth Circuit." *Virginia Society for Human Life, Inc. v. FEC,* 263 F.3d 379, 382 (4th Cir. 2001). Thus, by the Commission's own action, the regulated community has been put on notice as to, at best, confusion and partial unenforceability over the applicability of this section. OGC's reliance upon it is significantly misplaced.

It is surmised, though unclear, that possibly OGC is using MUR 5024R (Kean) as legal support for their reliance on section 100.22(b), since they expressly cite to the facts of that matter and assert that they "closely resemble" those of TMF.[17] However, there is no citation to the legal analysis of that MUR, an analysis that is significantly flawed and cannot be used here to resurrect 100.22(b).

The legal analysis of the Kean MUR is inherently contradictory. *See* General Counsel's Report #2 at 5-9. On the one hand, OGC asserts that *McConnell* overturns the court cases invalidating 100.22(b), thus resurrecting it, and on the other OGC claims *McConnell* is silent on 100.22(b). The simple fact of the matter is that section 100.22(b) was not at issue in *McConnell*; provisions of BCRA were. Using the *McConnell* opinion to resurrect 100.22(b) violates every precept of legal interpretation. OGC states in MUR 5024R that "the Supreme Court essentially overruled past decisions invalidating section 100.22(b) on constitutional grounds . . . *McConnell* offers no new grounds upon which to conclude that section 100.22(b) is unconstitutional." *See id.* at 7. Yet one paragraph later OGC states "*McConnell* did not involve a challenge to the express advocacy test or its application, did not purport to determine the precise contours of express advocacy, and **did not address the validity of section 100.22(a) or (b). In fact, the Court never cited section 100.22 in *McConnell*.**" (emphasis added) *Id.*

Logically – if logic can be applied to OGC's contradictory statement – it follows then that if the Court never cited section 100.22(b) and the validity of that section was not at issue, then the Court in *McConnell* did not – through any reasonable reading or interpretation – overrule past cases that were not even at issue. Clearly, those cases still stand and are still good law, notwithstanding OGC's weak and convoluted attempt to circumvent them. Consequently, as stated above, section 100.22(b)'s validity is still in doubt.

More troubling, however, is the fact that TMF has had to guess as to OGC's legal theory in applying section 100.22(b). None of this discussion appears in the Brief in this matter. Neither the cases invalidating 100.22(b), nor its attempted resurrection through MUR 5024R and *McConnell* are discussed. The Commission is required to give the regulated community, in general, and this Respondent, in particular, something more than a guessing game as to the applicability of this regulation. A single General Counsel's Report – in an unrelated and

[16] *See* Section III. (B)(2)(e) below on the sufficiency of OGC's analysis of the relevant case law.

[17] See discussion distinguishing the facts of MUR 5024R above.

distinguishable MUR – cannot serve to provide adequate notice, particularly when the analysis therein is so fundamentally flawed.

Consequently, it can be fairly concluded that neither the Commission nor the Supreme Court has take any action to indicate that section 100.22(b) is valid constitutionally or good law. It is not, and the Commission should be precluded from enforcing it until such time as it reconciles the disingenuous statements of OGC with the actual court cases and provides sufficient and proper notice to the entire regulated community.

b. OGC improperly applies holding in *Furgatch*, which is no longer viable case law and was rejected by Congress in enacting BCRA.

Furgatch is no longer good case law because it has been repeatedly rejected by several courts. Moreover, the legislative history directly pertinent to BCRA electioneering communications provisions explicitly stated the *Furgatch* standard is not incorporated into the law. In addition to its attempt to apply the unenforceable 100.22(b) provision, OGC's brief also disingenuously cites to and applies the judicial version of that test. As stated above, Judge Kollar-Kotelly at the District Court level in *McConnell* agreed with the results in the cases invalidating 100.22(b), because the Commission redefined a statutory test in its express advocacy regulations, which only Congress or the Supreme Court could redefine.[18] Judge Kollar-Kotelly, noting that only one court concluded that the Commission could constitutionally regulate beyond the *Buckley* express advocacy standard, termed *Furgatch*, "a case that has largely been discredited." *See McConnell v. FEC*, Civ. No. 02-582, Kollar-Kotelly, J., memorandum op. at 377 (D.C. Cir. filed May 1, 2003).

Inexplicably, OGC fails to mention that a number of cases have rejected the expanded view of express advocacy adopted in *Furgatch*. In fact, there are at least seven U.S. Court of Appeals cases that have found *Furgatch* to be unconstitutionally vague. *See, e.g., North Carolina Right to Life v. Leake,* 344 F. 3d 418 (4th Cir. 2003); *Chamber of Commerce of the United States v. Moore,* 288 F.3d 187, 194 (5th Cir. 2002); *Virginia Society for Human Life, Inc. v. FEC,* 263 F.3d 379, 391 (4th Cir. 2001) ("*VSHL II*"); *Citizens for Responsible Government's State Political Action Comm. v. Davidson,* 236 F.3d 1174, 1187 (10th Cir. 2000); *Vermont Right to Life Comm., Inc. v. Sorrell,* 221 F.3d 376, 386-87 (2d Cir. 2000); *Iowa Right to Life Comm., Inc. v. Williams,* 187 F.3d 963, 969-70 (8th Cir. 1999); *Faucher v. FEC,* 928 F.2d 468, 471 (1st Cir. 1991). *See* also, *Governor Gray Davis Committee v. American Taxpayers Alliance*, 102 Cal. App. 4th 449 (2002) (rejecting *Furgatch* test in part on vagueness grounds). Given the fact that the Supreme Court decision in *McConnell* essentially adopted the reasoning of Judge Kollar-Kotelly, *Furgatch* is no longer viable case law. OGC's reliance upon it is significantly misplaced.[19]

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[18] The opinion cites several cases in which the Courts struck down 11 C.F.R. Sec. 100.22(b), *e.g., Virginia Society for Human Life*, 263 F.3d 385; *Maine Right to Life v. FEC*, 98 F.3d 1; *Right to Life of Dutchess County*, 6 F.Supp 2d 248; *Clifton v. FEC*, 114 F.3d 1309; and *Faucher v. FEC*, 928 F.2d 468.

[19] Even, *assuming arguendo*, that *Furgatch* was good law and applicable here, OGC has completely misapplied it. TMF's communications do not contain express advocacy under *Furgatch*. The only issue before that Court was whether the FECA required that the expenditure be reported and required a "paid for by" disclaimer. In that context, the court held that the express advocacy standard has three components: 1) the speech must be express, even if not

Moreover, the legislative history of the BCRA electioneering communications provisions makes it very clear that Congress specifically rejected the Furgatch standard. Senator Snowe, who played a significant role in legislative process that led to the adoption of the electioneering communication provisions, emphasized that Congress was not adopting the *Furgatch* standard because it is too ambiguous and vague. She stated "We are concerned about being substantially too broad and too overreaching. The concern that I have is it may have a chilling effect....That is why we...did not include the *Furgatch* [standard] for that reason because it invited ambiguity and vagueness as to whether or not these ads would be ultimately aired...." 147 Cong. Rec. 82711 (March 22, 2001).

In the wake of overwhelming judicial precedent and clear legislative history, it is incomprehensible that OGC would attempt to resuscitate *Furgatch* and apply it in this MUR. This error is compounded by OGC's total failure to mention those precedents and the legislative history.

c. The applicable law is found in *Buckley* and *MCFL*.

The applicable law is found in *Buckley* and *MCFL*. The holdings in *Buckley* and *MCFL* were left intact by the *McConnell* decision which only validated Congress' enactment of electioneering communications restrictions that apply to a narrow class of pre election advertising. Any attempt by the FEC to apply FECA provisions beyond the electioneering communication restrictions must still meet the standards imposed in *Buckley* and *MCFL*. *McConnell* thus concluded that only Congress, or the Supreme Court, has the authority to adopt statutory provisions that go beyond express advocacy.[20] Congress did that when it enacted the electioneering communication provisions, with which TMF complied. Any attempt by the Commission to apply an express advocacy standard to TMF communications must comply with the bright line, magic words test of *Buckley* and *MCFL*. Nothing in *McConnell* changed this conclusion, and, if anything, that decision strengthened it.

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explicit; 2) the speech must present a clear plea for action in order to constitute advocacy; and 3) it must be clear what action is advocated by the speech. If reasonable minds could differ whether speech encourages voting for or against a candidate or encourages reader to take other action, then it is not express advocacy. The Court concluded that the language of the ad left no doubt that it asked public to vote against President Carter because the ad contained "simple and direct" words of "command." *See id.* at 864. (*See also FEC v. Christian Action Network*, 110 F3d 1049 (4th Cir. 1997), (the premise of *Furgatch* was that explicit words of advocacy were required to support Commission jurisdiction over expenditures for communications.)

[20] In the *McConnell* case, at the District Court level, Judge Kollar-Kotelly reviewed the cases that held 11 C.F.R. §100.22(b) unconstitutional, endorsing the results in those cases because the FEC has no authority to redefine a statutory test that only Congress or Supreme Court could redefine. The express advocacy regulations that OGC is currently relying upon were found to be "plagued with vague terms" that place the speaker at the "mercy of the subjective intent of the listener." *McConnell v. FEC*, Civ. No. 02-582, Kollar-Kotelly, J., memorandum op. at 377 (D.C. Cir. filed May 1, 2003).

Despite OGC's efforts, the law here is settled. Thus, the *McConnell* Court continued to equate "express advocacy" and "magic words", effectively disregarding section 100.22(b).[21] In stark contrast, the express advocacy regulation OGC relies upon in this MUR—section 100.22(b)—is vague and does not survive constitutional scrutiny under the Supreme Court's reasoning in *McConnell*. OGC in this MUR seeks to take expenditures for communications that comply with statutory provisions and transform them into illegal expenditures based on a completely subjective standard enunciated in section 100.22(b).

d. Controlling law in D.C. Circuit (*WRTL v. FEC*) bars the Commission from going beyond four corners of TMF ads to find express advocacy.

In a recent ruling, a three Judge U.S. District Court for the District of Columbia has held in *Wisconsin Right to Life, Inc. v. Fed. Election Comm'n*, Civ. No. 04-1260, 2006 U.S. Dist. LEXIS 92289, at *1 (D.C. Cir. Dec. 21, 2006), that BCRA restrictions on the use of corporate funds to finance electioneering communications as applied to Wisconsin Right to Life is unconstitutional. While TMF, which used only donations from individuals to finance its communications, complied with BCRA electioneering communications restrictions, the ruling placed significant restrictions on what the Commission may consider in determining whether a communication contains express advocacy. In determining whether WRTL ads constitute express advocacy, the court concluded that consideration must be limited to "... language within the four corners of the ...ads.... " *WRTL*, 2006 U.S. Dist. LEXIS 92289, at *30.

The court sharply criticized the Commission's contention that the determination of whether an ad is sham issue ad is not limited to facial evaluation of words and images in the communication, but a "contextual analysis of the 'intent' behind the ad's creation and the 'effect' that the ad is intended and likely to have on the voting public." *Id.* at *24. The Court agreed with WRTL that determining intent and effect of ad on public is too "conjectural" and "impractical." *Id.* The Court cited the *Buckley* Court's recognition that a test distinguishing issue ad and candidate discussion should not be based on audience determination of "speaker's subjective intent." *Id.* at *27.

Thus, the controlling law in the D.C. Circuit would clearly require the Commission to base its analysis of an ad solely on the word and images of the ad, without regard to the context of the ad, timing or external events surrounding the ad, or whether reasonable minds could not differ regarding the actions encouraged by the ad. Clearly, the Commission should not adopt the approach advocated by the General Counsel's Office. Furthermore, the Commission should direct OGC to issue an additional analysis which takes into account the holding in the *WRTL* case and Respondents should be given an opportunity to respond to this analysis.

[21] There are apparently at least 13 instances in which the majority in *McConnell* equated the term "express advocacy" with the magic words test. *See* 540 U.S. at 126 (2 references), 127 (2 references), 190 (2 references), 192, 193 (2 references); 193-194, 216-217, 217, 219. The dissenting opinions in *McConnell* similarly used "express advocacy" to mean communications that contain magic words. *See* 540 U.S. at 281 and 322.

e. The OGC Brief should be withdrawn because it contains insufficient analysis of relevant case law.

Given the discussion above, it is clear, that the General Counsel's brief lacks a sufficient analysis of relevant case law, especially regarding judicial rulings relevant to the Commission's express advocacy regulations. Most of the cases cited in the General Counsel's Probable Cause Brief (six of eight) date to the 1990's or earlier, while the Brief is silent on numerous cases directly on point, including those invalidating the very regulation upon which the General Counsel bases this MUR. Nor does OGC discuss the U.S. District Court opinion in the *McConnell* case, or for that matter the Supreme Court opinion in that case. These glaring omissions constitute a disservice to the Commission and the Respondents in this MUR.[22]

As stated above, the District Court opinion in *McConnell* explicitly analyzed several cases invalidating section 100.22(b), endorsed the result of those cases, and cast doubt on the validity of the *Furgatch* decision, the centerpiece of OGC's legal argument in the instant MUR. Moreover, there are six United States Court of Appeals decisions (listed above) that rejected the expanded definition of express advocacy in *Furgatch*. OGC does not even mention this precedent, which is contrary to its position in this MUR, much less explain how it can possibly be distinguished. Without an adequate explanation of the General Counsel's legal position, respondents are at a severe disadvantage in fashioning a response.[23]

3. OGC's Brief disregards past Commission precedent.

In addition to applying an invalid legal standard to TMF's communications, OGC's Brief also fails to fully analyze or apply the Commission's own precedent to the communications as issue. A full review of these precedents, as set forth below, demonstrates that TMF's communications are akin to those in which the Commission failed to find express advocacy.

a. Past Commission precedent did not find express advocacy without reference to a candidate, election or voting.

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[22] OGC's Brief does discuss a curious selection of court opinions. For instance, OGC relies on a footnote in a District Court opinion in *Richey v. Tyson*, 120 F.Supp. 2d 1298, 1310, n.11 (S.D. Ala. 2002) to support its statement that campaign activity can satisfy the major purpose test. Inasmuch as this case dealt with a state law that was held unconstitutional as applied to the plaintiff, Christian Coalition of Alabama, it does not appear to be on point. Similarly, OGC relies on *FEC v. Christian Coalition*, 965 F.Supp. 66 (D.D.C. 1997), 52 F.Supp 2d 45 (D.D.C. 1999), which found that a reference in a speech to "knocking off" a Congressman was not express advocacy and a letter on "the 1994 elections for Congress" stating "If Christian voters...are going to make our voices heard in the elections this November...we must stand together..." was not express advocacy. (The court did find express advocacy in a mailer that contained explicit references to a "primary election," "November," and termed Congressman Gingrich a "100 percenter.") The TMF communications which OGC argues contain express advocacy language, under the standard applied in Christian Coalition would clearly not constitute express advocacy. OGC also relies on *FEC v. GOPAC, Inc.*, 917 F.Supp. 851 (D.D.C. 1996), which invalidated the Commission's attempt to treat an organization that engaged generally in any partisan politics or electoral activity as a political committee within the scope of the FECA.

[23] Even if OGC now decides to address these matters in writing for the Commission, it would be prejudicial and unfair to do so without giving TMF an opportunity to respond.

The Commission has repeatedly considered the question of whether a communication qualifies as issue advertising in its enforcement matters and advisory opinions. In all of its many enforcement matters and advisory opinions, the Commission applied the following standard for determining whether a communication constituted issue advocacy: unless an ad contained a specific reference to an individual's status as a *candidate*, to an *election*, or to *voting*, the ad was determined to be outside the scope of the FECA limitations:

- MUR 2116 – The Commission failed to find express advocacy in a communication stating that Congressman St. Germain amassed a personal fortune by using his position in Congress to aid wealthy investors and asking him to disclose his financial records and tax returns.

- MUR 2231 – The Commission determined there was no express advocacy in a communication rating Senators and Representatives from Nevada on their voting records and criticizing Senator Harry Reid for consistently voting against President Reagan and his tax policies.

- MUR 2370 – The Commission failed to find express advocacy in a billboard criticizing then Senate candidate Jay Rockefeller's, citing to WV's 16% unemployment rate and the biggest tax increase in state history as "Just part of Jay's record..."

- MUR 4215 – The Commission determined there was no express advocacy in ads terming Republican Contract with America "an echo of the failed past," criticizing Republican policies and asking "why should we go back now?" while depicting Speaker Gingrich.

- MUR 4246 – The Commission failed to find express advocacy in ads stating that "Republicans...just don't get it" while depicting prominent Republicans, including Senators Dole and Congressman Kemp, making statement that "... there is no health care crisis."

- MUR 4250 – The Commission failed to find express advocacy in ads identifying Senator Wellstone as an "ultra-liberal" who voted for welfare and against workfare and urging viewers to call him to tell him to support certain legislation.

- MUR 4472 – The Commission failed to find express advocacy in ads linking Tim Hutchinson to "the Gingrich agenda" of Medicare cuts, higher taxes for families, etc.

- MUR 4483 – The Commission failed to find express advocacy in ads stating Senator Hagel ran deceptive negative ads, lied about his record, but that "...he thinks he can just walk in and run for Senator from Nebraska..."

- MUR 4509 – The Commission failed to find express advocacy in ads accusing Republicans of running negative ads that termed Senator Wellstone "soft on crime" and asking viewers to call the Republicans to demand a stop to attacks.

- MUR 4982 – The Commission failed to find express advocacy in ads which featured Senator John McCain and then-Governor Bush, compared their records in favor of Governor Bush and concluded, "Governor Bush. Leading. . . so each day dawns brighter."

- MUR 5154 – The Commission failed to find express advocacy in ads featuring Senator Chuck Robb and candidate George Allen. The ad urged "Before You Vote on November 7 Know Their Record on the Environment" and included a series of checkmarks when the candidates supported Sierra Club's positions and a series of thumbs-down when they did not.

- MUR 5158 – The Commission determined there was no express advocacy in ads which featured then-Governor Bush, referenced "Election Day," and asked readers, "Should the next ***president*** be a candidate of the gun lobby? Should he be someone of whom the NRA has said that if he is elected, they'll be working right out of the ***Oval Office***? That's Governor Bush's record." *Emphasis added.*

- MUR 5089 – The Commission failed to find express advocacy in ads which referred to Loretta Sanchez, urging readers to remember Sanchez's conduct when she asked voters to vote for her in November.

OGC has made no attempt to distinguish any of these MURs. The Commission should require a thorough analysis of past precedent. Upon review, it will become clear that TMF's activities are consistent with the MURs cited herein.

b. Under a recent determination, the Commission still required explicit reference to voting or candidacy in order to find express advocacy.

In a recent MUR, the Commission, following OGC's recommendation, determined that three Sierra Club pamphlets did not constitute express advocacy.[24] OGC concluded that neither of the pamphlets at issue contained express advocacy language – the phrases used were not comparable to those in section 100.22(a), "nor do they "in effect" contain an explicit directive to take electoral action...." MUR 5634 First General Counsel's Report, August 10, 2005 at 5. OGC emphasizes that neither pamphlet "...makes any reference to an election," but instead urge readers to email Senator Kerry or President Bush. *Id.* at 5.

[24] As to a fourth Sierra Club pamphlet, the Commission found express advocacy. In that one, unlike any TMF communication, the word "vote" appeared, thus urging the reader to vote for the preferred candidate. The pamphlet compared the records of Senator Kerry and President Bush regarding specific environmental issues, as well as the positions of Senator Martinez and his opponent. Senator Kerry's record received more favorable reviews than President Bush's did, and Betty Castor was viewed more positively than Senator Martinez. Thus, unlike the TMF communications, the pamphlet contained explicit references to voting. It urged readers to "Find out more about the candidates before you vote," and urged them to "Let your vote be your voice." In contrast to this pamphlet, none of the TMF communications at issue in this MUR contain specific language referring to voting, elections, campaigns or candidates. OGC's recommendation in this MUR is therefore completely inconsistent with the treatment accorded the Sierra Club pamphlets.

OGC also concluded that neither of the "pamphlets contained express advocacy language under section 100.22(b) because "neither contains an 'explicit electoral portion,'" and "reasonable minds could differ whether the action urged" was advocacy concerning either candidate or merely "encouraged readers to lobby the two in their incumbent positions...." *Id.* at 6.

With regard to the third pamphlet, OGC, noting its mention of campaign contributors, states that "it leaves no doubt that the Sierra Club views Senator Kerry's environmental stance more favorably than President Bush's record." *Id.* at 7. Nevertheless, OGC finds that it did not contain express advocacy language under either sections 100.22(a) or (b). OGC analysis is that "[o]ne can reasonably view the directives ...as encouraging readers to obtain more information about the candidates...before deciding for whom to vote." *Id.* at 8.

The TMF mailers and ads at issue are directly comparable to the above three pamphlets – they discuss issues, provide information on Senator Kerry's work on certain legislative issues, and present President Bush's position, but lack any exhortation to vote for a candidate or even a point of view. These communications are clearly within the standard set by OGC for the three Sierra Club pamphlets that were not pursued as violations. All TMF communications at issue provided information to the readers or viewers – a purpose OGC says is not express advocacy in the Sierra Club MUR. In the absence of an intervening rulemaking and a new regulation, the Commission cannot treat TMF ads differently.

4. Conclusion.

Accordingly, then, there is no legal support for the proposition advanced by OGC: that the content of the communications made by TMF contained express advocacy. Of the six communications at issue – three mailers, two TV ads and one radio ad – none contained express advocacy under either section 100.22(a) or (b), and they are all clearly distinguishable from ads in which the Commission has previously found express advocacy. In addition, OGC's reliance on 100.22(b) – in either its regulatory or judicial form – is misplaced, as that regulation has clearly been discredited. In fact, under the law in effect in 2004, including the Commission's own admission and all relevant court cases, it is clear that OGC's statement of the law in this Brief is fundamentally flawed. As a result, none of TMF's communications triggered registration with the Commission as a federal political committee, and the Commission should decline to find probable against TMF on this basis.

C. TMF is Not a Political Committee and OGC's Use of the Major Purpose Test is Erroneous.

TMF is a political organization registered with the Internal Revenue Service under §527. It 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). Congress enacted BCRA to carefully draw a second bright line for non-party, non-candidate organizations – targeted broadcast ads that run within 30 days of a primary election or 60 days of a primary election that refer to a clearly identified candidate for federal office may not be paid for by or with funds from a national bank, corporation, or labor organization. 2 U.S.C. §§434(f)(3); 441b(b)(2). Congress further required that the names and addresses of contributors who contributed $1,000 or more to the account used to pay for electioneering communications are disclosed within 24 hours. 2 U.S.C. § 434(f). In *McConnell,* the Supreme Court held that this new bright line was constitutional, even if the ads did not contain express advocacy, because the electioneering communication "components are both easily understood and objectively determinable." Thus, the constitutional objection that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy" does not apply to electioneering communications. *McConnell* at 689. BCRA did not amend FECA to require organizations that run electioneering communications to register as political committees nor did the *McConnell* Court impose such a requirement.

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.[25] 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.

1. 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.

a. 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

[25] Contrary to complainants' claims and regardless of the express or implied purpose of an organization, registration is not automatically triggered. Only after the contribution or express advocacy thresholds are met is registration triggered. Further, participation in joint fundraising, as more fully explained later, does not alter this conclusion.

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).

b. 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.

c. 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.

2. 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.[26] 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 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.

This view of the law is supported unequivocally by statements of Commissioners, Sponsors of the law and Members of Congress made during the passage of BCRA. See Attachment H.

D. OGC's Shifting Legal Analysis Has Failed to Demonstrate a Violation in this Matter.

OGC has clearly shifted what it asserts as the applicable legal standard in this matter. In the Factual and Legal Analysis for the Reason to Believe Findings (October 20, 2004), OGC argued, "Although TMF claims that its advertisements help define issues for local, state, and federal elections, all of the advertisements of which the Commission is aware clearly identify George Bush, John Kerry, or both, and either ***attack*** (or ***oppose***) George Bush, or ***promote*** John Kerry while ***attacking*** George Bush" (*emphasis added*). [*FLA at 2*] This OGC argument signified an attempt to use the "promote, support, attack or oppose" standard ("PSAO") when analyzing TMF advertisements. This PSAO theory was dropped in the OGC Brief and instead OGC is now basing its argument on a reformulated use of 100.22(b) and *Furgatch* which amounts to the resurrection of an unconstitutional provision that has not been applied in many years and a different standard than the FEC has ever applied to communications. Perhaps OGC

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[26] 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.

has altered the legal basis for its recommendation because at least one Commissioner has indicated that the PSAO standard applies only to political party committees and, in a more limited sense, candidates[27] and that there is no consensus view on the Commission as to the specific definition of PSAO.[28] Both arguments fail to prove that TMF's advertisements triggered political committee status.

E. Conclusion

Accordingly, OGC's application of the "major purpose" test is misplaced and misapplied. In fact, under the law in effect in 2004, including the statute, regulations, opinions, enforcement matters, and relevant court cases, it is clear that this test has never been adopted as determinative of when a nonfederal committee is required to register with the Commission as a federal political committee. Until such time as the law is appropriately changed to reflect the "major purpose" test, none of TMF's activities triggered registration with the Commission as a federal political committee, and the Commission should decline to find probable against TMF on this basis.

Based on the foregoing, TMF did not exceed the $1,000 threshold for political committee status, as set forth in the Act, and did not receive in excess of $1,000 in federal contributions or make in excess of $1,000 in express advocacy expenditures. Consequently, TMF had no duty to register as a federal political committee with the Commission, and no excessive or prohibited contributions were received. To the contrary, all funds received were legal nonfederal contributions made under the law applicable in 2004.

Thus, the Commission should find no probable cause to believe that The Media Fund violated any provision of the Act or Commission regulations and should close this matter as expeditiously as possible.

Respectfully submitted,

Lyn Utrecht

Eric Kleinfeld

[27] "The Supreme Court has ruled that the term makes sense to political party committees and the Commission has used it in crafting an exemption to another provision of the law allowing candidate endorsements, but that provision by its terms applies to candidates." Ellen L. Weintraub, Comm'r, Fed. Election Comm'n, Remarks during FEC Open Meeting (Aug. 29, 2006) (as transcribed).

[28] "Its not clear to me sitting here today that there's a consensus view on the Commission as to the precise meaning of the term 'promote, support, attack or oppose' and if there is such a consensus its not clear to me we've made it clear to the public." Ellen L. Weintraub, Comm'r, Fed. Election Comm'n, Remarks during FEC Open Meeting (Aug. 29, 2006) (as transcribed).

Patricia Fiori

Karen Zeglis

Ryan, Phillips, Utrecht & MacKinnon
1133 Connecticut Avenue, NW
Suite 300
Washington, DC 20036

Counsel for The Media Fund

ATTACHMENT A

From: Redmond Walsh [rwalsh@mediafund04.org] **Sent:** Wed 10/6/2004 4:38 PM

To: Jamal Simmons; Ann Walker Marchant; Brooks Meek; Melissa Brown

Cc: James Lamb; Sarah Leonard; Mo Elleithee; Cleve Mesidor; Erik Smith; Simone Hardeman; Eric Norrby; Cornell @ Brilliant; Patrick Gaspard; Tom Faulkner; Malika Reed

Subject: Two AA TV scripts for spots that air beginning today -- NOTE NEW NAME

Attachments: First Prioirty Final script previosuly known as Just Getting By, but with updated pics).doc(28KB) Stand Up1 - Final.doc(22KB)

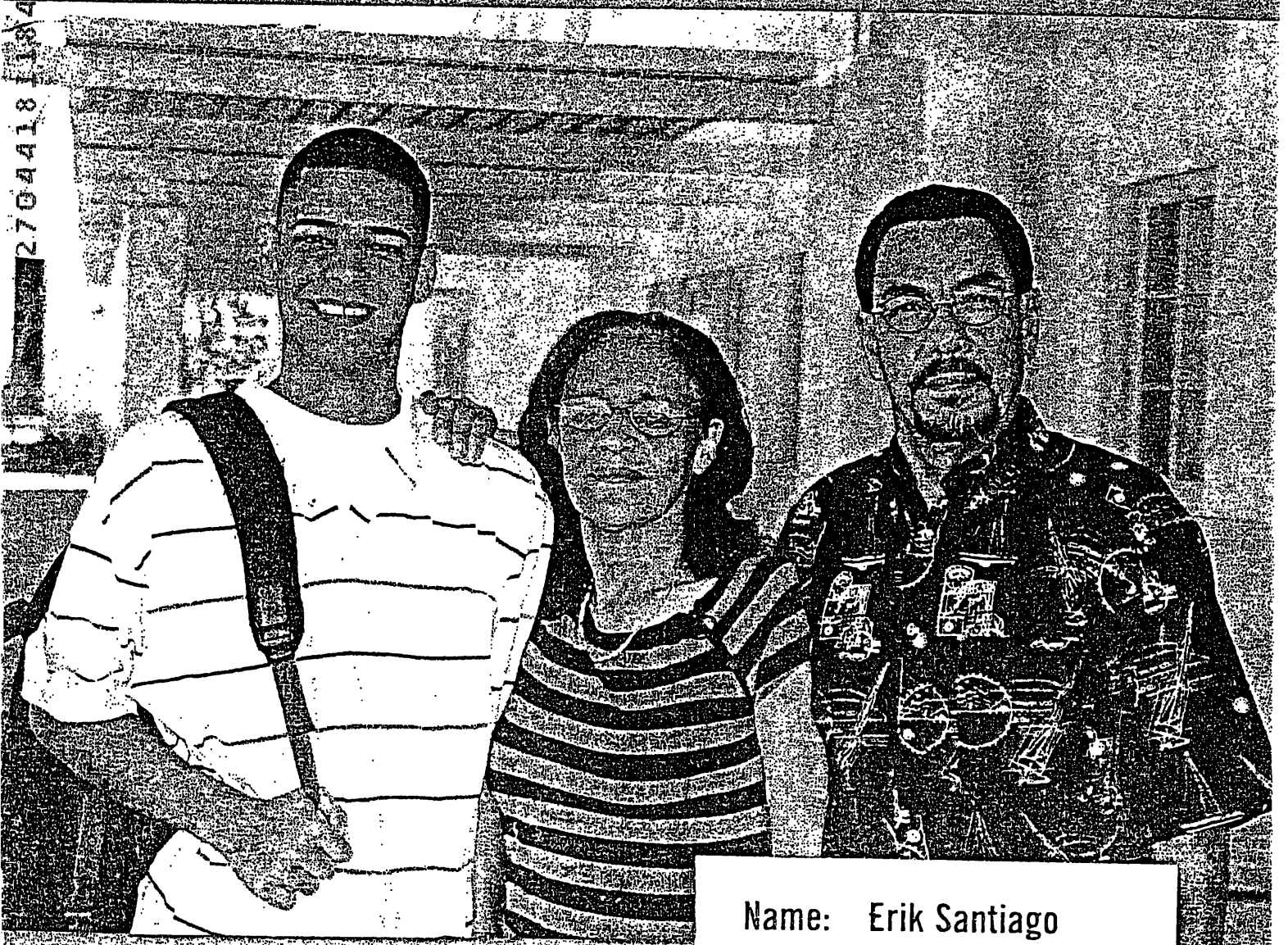
<<First Prioirty Final script previosuly known as Just Getting By, but with updated pics).doc>> (I <<Stand Up1 - Final.doc>> MPORTANT NOTE: NEW NAME FOR ONE OF SPOTS AIRING ON AA BUY)

Here are the two final AA Phase 2 TV scripts for spots that began airing today. We decided to fix a small problem in spot shipped yesterday titled Just Getting By. It is now called First Prioirty and reshipped today. Therefore, you will notice that spot/script has a new name, "First Priority".

The Media Fund	MFAD2001 "First Priority" (This is an updated version of earlier ad "Just Getting By")
Date: October 5, 2004 - Final	TYPE: TV :30
Copy	Visual
VO: Young adult male: "It will be virtually impossible to continue 'just getting by'."	Picture of Kerry on the stand
VO: Young Adult male: For the past four years, Bush's people got paid, but most of us are catching hell ... John Kerry will raise the minimum wage.	Super: "Kerry will give 7 million Americans a raise." (Source: Washington Post 6/19/04)
VO: Young Adult male: "John Kerry's first priority is to those struggling to make it in America by creating good paying jobs with healthcare."	Super: "John Kerry has a plan to create 10 million jobs." (Source: Boston Globe 6/24/04)
VO: Young adult male: "You need to understand that the clock is being turned back and no one seems to be paying attention."	Super: "Affirmative Action continues to be challenged by the Bush administration." (Source: CNN 1/16/03) Super: "The black community is in a state of emergency."
VO: Young adult male: "You better wake up... before you get taken out."	Super: "Go to breakbushoff.com."
Narrator: The Media Fund is responsible for the content of this advertising.	PAID FOR BY THE MEDIA FUND, BREAKBUSHOFF.COM, NOT AUTHORIZED BY ANY CANDIDATE OR CANDIDATE'S COMMITTEE. THE MEDIA FUND IS RESPONSIBLE FOR THE CONTENT OF THIS ADVERTISMENT.

ATTACHMENT B

With tuition costs up 35%, Erik has to take a semester off to work and save money. His parents are forced to delay their retirement to help Erik afford a college education.



Name: Erik Santiago

Home: Kissimmee, FL

John Kerry Wants Every C
College Education And I

Hector and Carmen Santiago are very proud parents, thrilled with Erik's work ethic and his desire for a college degree.

But it's not easy to make his dream a reality these days.

They're delaying their own retirement and continuing to work – Hector as a postal worker and Carmen as a pre-school teacher – in order to provide Erik with the funds he needs for college.

Erik is doing his part, working hard, taking a semester off from community college and saving so he can afford tuition at Florida State, UCF or another state school next year.

We need a President who encourages pursuit of the American Dream instead of dashing these hopes.

SOURCES: Cleveland Plain Dealer, 10/17/04; Tampa Tribune, 8/31/04

ild To Be Able To Afford A
ve The American Dream

John Kerry Will Make College Affordable For Every American

John Kerry believes every American who works hard should be able to afford college.

* Kerry proposes a $4,000 tuition tax credit to help families like the Santiagos.

* Kerry will increase funding for Pell Grants and other financial aid that so many Floridians need to help them afford college.

John Kerry offers hope for Erik Santiago, his parents, and thousands of other Americans just like them who want a better life for their children than the ones they've lived.

That's the true essence of the American Dream.

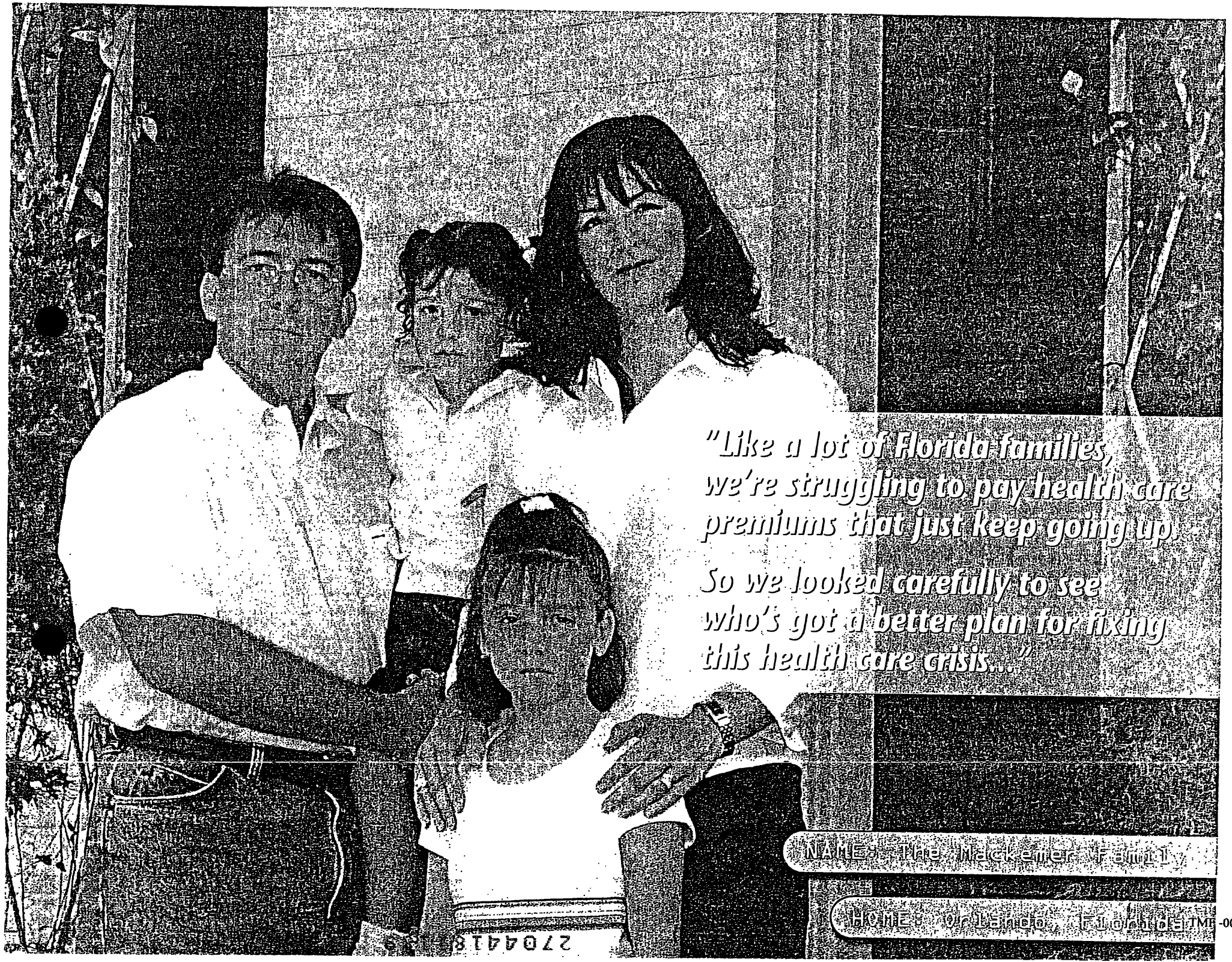
JOHN KERRY Making The American Dream A Reality

John Kerry will offer a College Opportunity Tax Credit of up to $4,000 per year in tuition costs so that every child like Erik Santiago who works hard can afford to go to college.

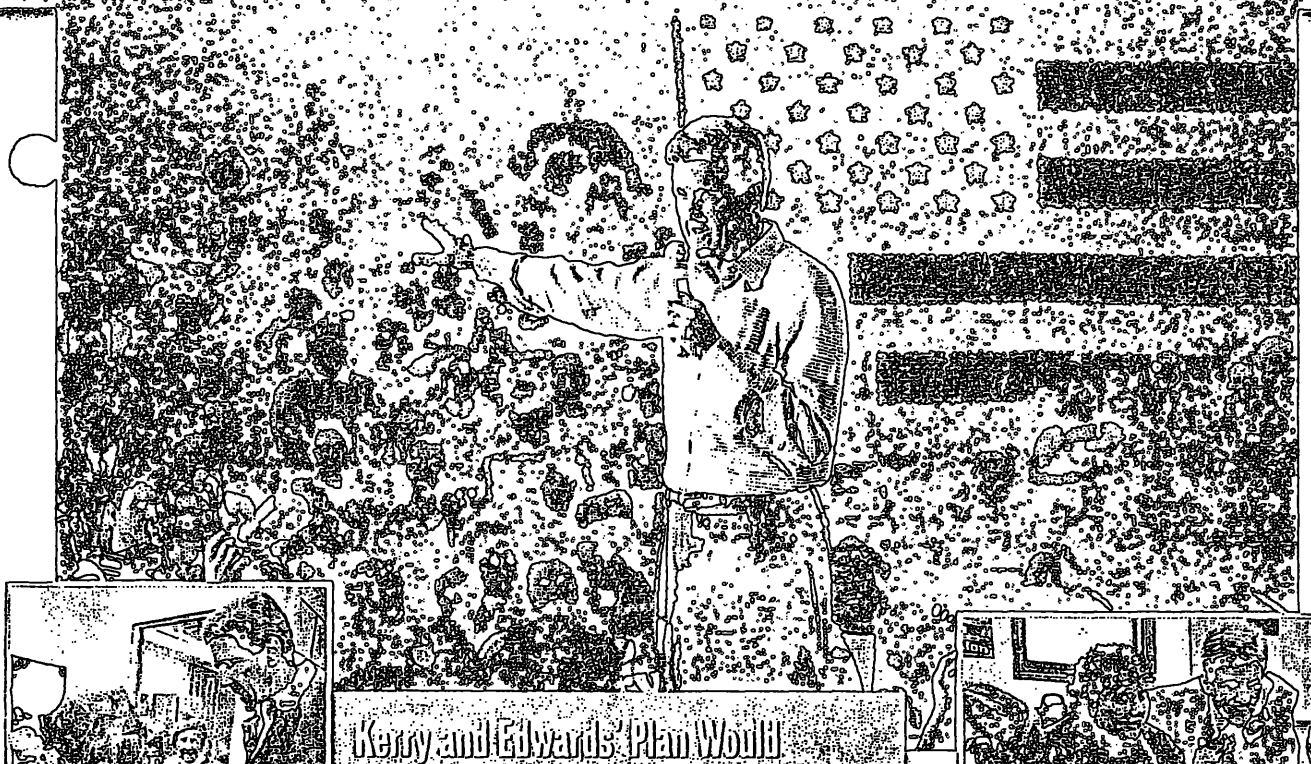
merica Coming Together
701 West Cherry Street
ampa, FL 33607

Presorted Standard
U.S. Postage
PAID
ACT

ATTACHMENT C



The Kerry and Edwards Health Care Plan Would Save Families Like The Mackemers Up To $1,000 A Year



The Mackemer family receives health insurance through Caprice's company. The Mackemers and the employer each pay $6,780 a year for the premium.

But health care premiums have gone up 59% since 2000.

The Kerry and Edwards Plan would put the highest-risk cases in a separate national insurance pool, shifting the cost of catastrophic cases away from small businesses, and require that the savings be passed on to employees like Caprice and her family.

Kerry and Edwards' Plan Would Reduce Health Care Premiums At Most Small Businesses By Up To $1,000

The Kerry and Edwards Plan will give a tax credit to small businesses for up to 50% or $3,000 for the cost of an employee's health insurance. Small businesses will be able to join larger health plans, spreading risk and reducing costs for everyone.

Kerry and Edwards' Plan Would Expand Health Care Coverage And Lower The Cost Of Medicine

Every American would be able to get the same coverage that members of Congress receive, and every child would get coverage through the existing Children's Health Insurance Program.

The Kerry and Edwards Plan would require the government to negotiate volume discounts with drug companies to lower the cost of prescription drugs. The plan would also allow the re-importation of less expensive prescription drugs from Canada, further reducing costs.

SOURCES: Associated Press, 8/20/04; Associated Press, 8/19/04; Kaiser Family Foundation's Employer Health Benefits 2004 Annual Survey; Families USA, September 2004; USA Today, 9/15/04; Akron Beacon Journal, 9/12/04.

GEORGE W. BUSH AND DICK CHENEY HAVE

NO PLAN

TO LOWER HEALTH CARE COSTS

TMF -000023

For Florida's Families, The Choice Is Clear

Florida families like the Mackeners have endured rising health care crisis since George W. Bush took office

Health care premiums up 59%

Prescription drug prices up 41%

3 million Floridians have no health insurance at all

Florida families need to reduce health care costs

Sources: [illegible]

America Coming Together
3701 West Cherry Street
Tampa, FL 33607

ATTACHMENT D

ATTACHMENT E

"Stand up" – *African American TV*

AUDIO- VOICE OVER	VISUAL - PICS	VISUAL - TEXT
static Only a man who stands up to his government can truly lead.	static Background (BG): eyes & nose of an African American man Pic of John Kerry superimposed (SI) on above BG - right side	Appears: Kerry has been taking a stand since 1972.
John Kerry fought and bled in the Vietnam War.	Pic of Vietnam soldiers (SI on left)	
He fought side by side with brothers who could not get out of the draft because they didn't have a rich father like George W. Bush.	Pic: soldier w/ gun (SI on right)	Appears: Kerry has a plan to get our troops home from Iraq. Source CNN 1/29/04
John Kerry understands war and who is disproportionately affected by it.	Pic: soldier in front of Arabic writing (SI on left) Above pic fades, pic: dead/wounded soldier laying on ground (SI on right)	Appears: The death toll for U.S. troops in Iraq passed 1,000. Source Associated Press 5/3/04
The way this war is going, our fourteen year olds will be fighting in Iraq in four years.	Pic: soldiers in tanks (SI left side)	Above fades; appears: The black community is in a state of emergency.
You better wake up before you get taken out. The media fund is responsible for the content of this advertisement.	Above pic and background fade into completely black screen	Appears: go to breakbushoff.com Paid for by The Media Fund, breakbushoff.com, not authorized by any candidate or candidate's committee. The Media Fund is responsible for the content of this advertisement.

ATTACHMENT F

"First Priority" – *African American TV*

AUDIO- VOICE OVER	VISUAL - PICS	VISUAL - TEXT
static It will be virtually impossible to continue just getting by.	static Background (BG): eyes & nose of an African American man Pic: woman on phone superimposed (SI) right side	
For the past four years Bush's people got paid, but most of us are catching hell.	Pic: locked fence in front of abandoned building (SI left side)	
John Kerry will raise the minimum wage.	Pic: John Kerry (SI right side)	Appears: Kerry will give 7 million Americans a raise. Source: Washington Post 6/13/04
John Kerry's first priority is to those struggling to make it in America by creating good paying jobs with healthcare.	Pic: Woman & child (SI left side)	Appears: John Kerry has a plan to create 10 million jobs. Source: Boston Globe 6/24/04
You need to understand that the clock is being turned back and no one seems to be paying attention.	Pic: Crowd (SI right side) Pic: back of crowd (SI left side)	Appears: Affirmative action continues to be challenged by the Bush Administration. Source: CNN 1/16/03
You better wake up before you get taken out.	Just BG	Appears: The black community is in a state of emergency
The media fund is responsible for the content of this advertisement.	BG: Black screen	Appears: go to breakbushoff.com Paid for by The Media Fund, breakbushoff.com, not authorized by any candidate or candidate's committee. The Media Fund is responsible for the content of this advertisement.

ATTACHMENT G

"Good" - Radio

Man: Wouldn't it be good to have someone on our side? George Bush has given his biggest tax cuts to millionaires, shifting the burden to the middle class. Bush has turned the budget surplus into the largest deficit in history, leaving trillions in debt for our children, while Dick Cheney's Halliburton gets billions in no-bid contracts. Bush and Republicans have taken 40 million dollars in campaign contributions from drug companies and now George Bush's so called Medicare reform guarantees the pharmaceutical industry 139 billion dollars in profit. And privatizing social security is Bush's next big priority; rewarding his friends on Wall Street and putting our retirement benefits at risk. John Kerry and John Edwards have a better idea, a plan that's fair for working families here in Hawaii and across America.

Woman: Paid for by the media fund and not authorized by any candidate or candidate's committee. The media fund is responsible for the content of this advertising. MakeAmericaworkforus.org

ATTACHMENT H

The FEC and Individual Commissioners, Congressional Sponsors, and Others Have Acknowledged that the Law Has Not Been Changed Regarding Issue Advocacy by Outside Groups Uncoordinated with Candidates and Parties.

Over the past few years, there has been agreement on one major point: BCRA would not limit groups that run non-express advocacy ads more than 60 days before a general election or 30 days before a primary election, acting independently of candidates and party committees.

Congress' BCRA solution was aimed at the problems of corruption or the appearance of corruption when Federal officeholders and candidates solicited non-Federal money and the use of corporate and labor union funds for non-express advocacy broadcast communications close to a Federal election. To solve these problems, Congress did not change the statutory definition of expenditure or require 527 political organizations running non-express advocacy ads to register as political committees with the FEC. The solutions were bright lines: a complete ban on non-Federal money solicitations by Federal officeholders, candidates and the national party committees; disclosure of the funds used to pay for the electioneering communications during the 60 day period before a Federal general election; and a prohibition against using corporate or labor funds to pay for such electioneering communications.

A review of the contemporaneous statements made by individual Members during the debates, and by others in public comments, demonstrates Congress' clear intent that, in a post-BCRA world, 527 political organizations would be able to run independent non-express advocacy communications without regulation by the FEC. Some of the highlights include:

> **Sen. Feingold**, introducing S. 26, the Bipartisan Campaign Reform Act of 1999: "Advocacy groups, on the other hand, are permitted to purchase what the bill calls ``electioneering communications,'' as long as they disclose their expenditures and the major donors to the effort and take steps to prevent the use of corporate and union treasury money for the ads." 145 Cong. Rec. S423 (Jan. 19, 1999) also quoted by the Federal Election Commission in its Brief for Appellees at 15a, *McConnell v. FEC,* 124 S.Ct. 619 (2003).
>
> **Sen. Snowe**, in support of the Snowe-Jeffords amendment: "Certainly, this provision is not vague. We draw a bright line. Anyone will know that running ads more than $10,000 in a given year, mentioning a Federal candidate 30 days before a primary, 60 days before a general election, and seen by that candidate's electorate, being aired in that candidate's district or State, will be covered by this provision. Anyone not meeting any single one of those criteria will not be affected." 147 CONG. REC. S2455, 2456 (Mar. 19, 2001).
>
> **Sen. Snowe**, explaining that Snowe-Jeffords specifically did not apply the *Furgatch* standard because it is too ambiguous and vague: "We are concerned about being substantially too broad and too overreaching. The concern that I have is it may have a chilling effect. The idea is that people are designing ads, and they need to know with some certainty without inviting the constitutional question

that we have been discussing today as to whether or not that language would affect them as whether or not they air those ads.

That is why we became cautious and prudent in the Senate language that we included and did not include the *Furgatch* for that reason because it invites ambiguity and vagueness as to whether or not these ads ultimately would be aired or whether somebody would be willing to air them because they are not sure how it would be viewed in terms of being unmistakable and unambiguous. That is the concern that I have." 147 CONG. REC. S2711 (March 22, 2001)

Sen. Jeffords, explaining that Congress did not intend to require groups that run electioneering communications to register as PACs:

"Now let me explain what the Snowe-Jeffords provision will not do:

The Snowe-Jeffords provision will not prohibit groups like the National Right to Life Committee or the Sierra Club from disseminating electioneering communications;

It will not prohibit such groups from accepting corporate or labor funds;

It will not require such groups to create a PAC or another separate entity;

It will not bar or require disclosure of communications by print media, direct mail, or other non-broadcast media;

It will not require the invasive disclosure of all donors; and

Finally, it will not affect the ability of any organization to urge grassroots contacts with lawmakers on upcoming votes." 147 CONG. REC. S2813 (Mar. 27, 2001) (emphasis added).

Sen. Thompson: "It is not enough just to get rid of soft money and leave the hard money unrealistically low limitations where they are. Everything will go to the independent groups. We see how powerful they are now, and they are getting more and more so. Under the First Amendment, they have the right to do that. It will be even more in the future when and if we do away with soft money." 147 CONG. REC. S3006 (Mar. 28, 2001).

Sen. Feinstein, in context of seeking to raise hard money contribution limits: "Meanwhile, one of the effects of McCain-Feingold is that as we ban soft money, which I am all for, the field is skewed because one has to say: Can you still give soft money? Some would say no. That is wrong. The answer is: Yes, you can still give soft money. But that soft money then goes toward the independent campaign; into so-called issue advocacy. . . . It is likely that spending on so-called issued advocacy, most of which is thinly disguised electioneering, probably is going to surpass all hard money spending, and very soon." 147 CONG. REC. S3012 (Mar. 28, 2001)

Sen. Snowe, in support of Snowe-Jeffords amendment: "That is why 70 constitutional scholars and experts signed a letter in support of these provisions, because they know they don't run afoul of constitutional limitations in the first amendment because it is very specifically drafted to address those issues. . . . We

are not saying they can't run ads. They can run ads all year long. They can do whatever they want in that sense. But what we are saying is, when they come into that narrow window, we have the right to know who are their major contributors who are financing those ads close to an election." 147 CONG. REC. S3042-43 (Mar. 28, 2001).

Sen. McCain, arguing against the Bingaman amendment because it was too vague and the Constitution requires bright lines:

"Frankly, after going around and around on this issue, identifying who paid for the ad, full disclosure and, frankly, not allowing corporations and unions to contribute to paying for these things in the last 60, 90 days (sic), which is part of our legislation, is about the only constitutional way that we thought we could address this issue." 147 CONG. REC. S3115, 3116 (Mar. 29, 2001).

Sen. Kohl, in support of McCain-Feingold bill: "This legislation does not ban issue advocacy or limit the right of groups to air their views. Rather, the disclosure provisions in the bill require that these groups step up and identify themselves when they run issue ads which are clearly targeted for or against candidates." 147 CONG. REC. S3236 (April 2, 2001).

Sen. Murray, in support of McCain-Feingold bill, but disappointed that the bill did not go further: "This bill also has the potential to give a disproportionately larger role in elections to third party organizations." 147 CONG. REC. S3236 (April 2, 2001)

Rep. Shays, explaining that there was no limit on the funds that may be used by advocacy groups more than 60 days before a general election: "We do not allow corporate treasury money and union dues money 60 days before an election; we allow individual contributions and PAC contributions to compete. Nobody is shutting up."

...

"[Shays-Meehan] allows people to speak out using the hard money 60 days before an election, and, frankly, they can use all that other money 60 days before an election." 148 Cong. Rec. H439 (Feb. 13, 2002)

Sen. Levin, explaining the narrow and limited reach of McCain Feingold: "The bill does not prohibit such ads from being aired by nonparty groups with unregulated money; it only requires disclosure of the sponsoring group's major contributions if the group spends over $10,000 on such ads. This is a very reasonable and modest limitation on political advocacy. It is very clear in order to withstand charges of ambiguity. 148 CONG. REC. S2116 (March 20, 2002)

Sen. Snowe, recognized that soft money would be channeled to independent groups, but was not concerned because there was no fear of real or perceived corruption: "Some of our opponents have said that we are simply opening the floodgates in allowing soft money to now be channeled through these independent

groups for electioneering purposes. To that, I would say that this bill would prohibit members from directing money to these groups to affect elections, so that would cut out an entire avenue of solicitation for funds, not to mention any real or perceived 'quid pro quo.'" 148 CONG. REC. S2136 (March 20, 2002).

Sen. McCain, explains that under McCain-Feingold, groups advertising more than 60 days before a general election (30 days before a primary) will remain unregulated: "With respect to ads run by non-candidates and outside groups, however, the [Supreme] Court indicated that to avoid vagueness, federal election law contribution limits and disclosure requirements should apply only if the ads contain 'express advocacy.''

...

"Of course, the bill's bright line test also gives clear guidance to corporations and unions regarding which advertisements would be subject to campaign law and which advertisements would remain unregulated." 148 CONG. REC. S2141 (March 20, 2002).

Common Cause and Brennan Center, "BCRA as enacted did not eliminate non-PAC 527 organizations and it did not restrict their ability to participate in the political process. The Supreme Court, in *McConnell*, also acknowledged the legitimacy of independent interest groups and that their right to function in our democracy was not abrogated by BCRA." Comments of the Brennan Center for Justice at NYU School of Law and Common Cause on FEC Draft Advisory Opinion 2003-37, at 6 (Feb. 17, 2004).

FEC Chairman Bradley A. Smith: "Indeed, the rise of 527s is exactly what Senator McConnell and other Republicans, during the legislative debates over McCain-Feingold, had said would happen – soft money would simply change its address. The Democrats prepared for this. It appears that perhaps some Republicans did not."

...

"The law clearly does not require everyone involved in partisan political activity to register as a "political committee" under the Act."

...

"Our obligation at the Federal Election Commission is to enforce the law. It is not to enforce the law as we wish Congress had written it, or as some members now wish that they had written it, or now claim to have written it, or as seems to serve the interests of a particular campaign." Bradley A. Smith, Chairman, Federal Election Commission, An Address to the Republican National Lawyers Association CLE Presentation, at 7, 14, and 16, (Mar. 19, 2004).

These statements are unequivocal evidence that Congress did not intend the regulatory extension as proposed in the NPRM.