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October 28, 2004

VIA FACSIMILE (202-219-3923) AND CERTIFIED MAIL

Federal Election Commission
999 E Street NW
Washington, DC 20463
ATTN: Office of General Counsel

Re: MUR 5546

Dear Federal Election Commission:

On behalf of President George W. Bush and Vice President Richard B. Cheney in their capacities as candidates for federal office, David Herndon and Bush-Cheney '04, Inc., this letter responds to the allegations contained in the complaint filed with the Federal Election Commission (the "Commission") by Steven C. Russo.

Mr. Russo's complaint alleges that Bush-Cheney 2004 and several other individuals and organizations violated the Federal Election Campaign Act of 1971, as amended (2 U.S.C. § 431 *et seq.*) ("the Act"). Specifically, the complaint alleges that individuals and organizations named therein illegally coordinated with one another to promote the candidacy of President Bush.

Considering that no entity by the name of Bush-Cheney 2004 appears to exist, Bush-Cheney '04, Inc. ("Bush Campaign") presumes that Mr. Russo mistakenly filed his complaint against a non-existent entity and actually intended to file against the Bush Campaign. Assuming that the foregoing presumption is correct, the Bush Campaign, on behalf of itself and President George W. Bush and Vice President Richard B. Cheney in their capacities as candidates for federal office, as well as David Herndon (the "Parties"), responds as follows:

Response to Allegations Against President George W. Bush, Vice President Richard B. Cheney, David Herndon and Bush-Cheney '04, Inc.

The complaint filed by Mr. Russo is so vague and unsubstantiated in its allegations that it should be dismissed on its face. The complainant asserts his misguided theory of "coordination" and fails to present any specific evidence of coordinated expenditures or coordinated communications between the Bush Campaign and either Progress for America Voter Fund ("PVAVF") or the Leadership Forum as defined in Commission Regulations at 11 C.F.R. § 109.20 and 109.21 (2004). Mr. Russo fails to

offer any concrete facts in support of this alleged coordination, apart from his citation of entirely legal and appropriate conduct. The Parties flatly deny any coordination as defined in the Act and in Commission Regulations with both PVAVF and the Leadership Forum and all of the associated allegations, and request that the Commission accordingly dismiss the complaint in its entirety.

Mr. Russo's failure to allege any specific coordinated expenditures makes it difficult to even respond to his vague complaint. The complainant offers no evidence to demonstrate that any expenditures by PVAVF or the Leadership Forum were "made in cooperation, consultation, or concert with, or at the request or suggestion of a candidate [or] a candidate's authorized committee...." *See* 11 C.F.R. §109.20.

First, Mr. Russo's allegation that PVAVF and the Leadership Forum were created in response to President Bush's "plea for help" and therefore are coordinating with his campaign is preposterous. As evidence of this coordination the complainant points to a quotation from a joint press release issued by the Republican National Committee ("RNC") and the Bush Campaign commenting on the Commission's May 13, 2004 decision to exclude "527 Organizations" from the definition of Federal Political Committees. In this regard, the press release cited by Mr. Russo [*See* Attachment A, *Joint Statement by Bush-Cheney Campaign Chairman Marc Racicot and RNC Chairman Ed Gillespie on Today's FEC Ruling on 527 Groups*, May 13, 2004] states that the Commission gave the "go-ahead" to conservative "527" groups because the "commission...made clear that these '527' groups will not be affected by the federal campaign finance rules, at least in 2004."

The press release the complainant cites, however, is a criticism of the FEC's failure to regulate "527" organizations as political committees, not an invitation for those "527" groups to engage in expenditures or public communications. The press release never even mentions, much less encourages, any specific expenditures. Instead, it merely expresses the frustration and dismay with which the Bush Campaign and RNC viewed the Commission's failure to act. Indeed, the release simply re-emphasizes the net affect that the Commission's failure to regulate "527" organizations as political committees will have on the 2004 election cycle. This sentiment can not be overlooked when reading the press release in its entirety. Specifically, the press release states "Today's decision to delay addressing the fundamental questions regarding the regulations of '527's' is irresponsible." In addition, the press release closely mirrors Commissioner Toner's prediction that "The election of 2004 is going to be the Wild West" considering that the Commission's failure to regulate will cause a "...dramatic escalation of soft-money spending by organizations." While the press release speaks generally about the Commission's actions and provides some examples of "527" organizations, the allegation that the Bush Campaign somehow directed its comments to PFAVF and Leadership Forum is unfounded. The mere characterization of an action taken by the Commission in a press release clearly does not constitute a "request or suggestion" to produce a communication or make an expenditure, as required by 2 U.S.C. §441a(a)(7)(B)(i). *See also* 11 C.F.R. § 109.21.

The sentiment exhibited in the press release is visible in countless other statements made and actions taken by the Parties. President Bush has said time and time

again that he favors banning all "527" organizations. In fact, in an effort to demonstrate his opposition to these groups, the President instructed the Bush Campaign to file suit against the Commission to force it to fulfill its congressionally mandated duty to promulgate clarifying regulations for "527" organizations in hopes of stopping the flow of unregulated "soft money" into the political process. Pursuant to President Bush's instruction, the Bush Campaign filed a suit in the District court for the District of Columbia on September 17, 2004. [*See* Attachment B, *Bush-Cheney, '04 Inc. v. FEC*, Case No. 04-1612 (filed D.D.C. Sept. 17, 2004).]

Equally spurious is the complainant's allegation that "there appears to be little if any separation of personnel between the Republican Party and the Campaign on the one hand, and these groups on the other." Mr. Russo implies that there must be coordination between the Bush Campaign and these groups. As "evidence" for this allegation, Mr. Russo simply points to the fact that some individuals who are associated with the Bush campaign as fundraisers or volunteers are also associated with PVAVF or the Leadership Forum. Specifically, Mr. Russo alleges that Congressman Dennis Hastert, Senator Rick Santorum, James Francis Jr., Carl Lidner, Rick Caruso, Jerry Perenchio and Paul Singer facilitated illegal coordination between the Bush Campaign. Mr. Francis, Mr. Lidner, Mr. Caruso, Mr. Perenchio and Mr. Singer were contributors to and volunteer fundraisers for the Bush Campaign, and as such do not have access to any campaign strategy, "...plans, projects, activities, or needs" that isn't otherwise publicly available. *See* 11 C.F.R. §109.21(d)(3). Congressman Hastert and Senator Santorum serve the Bush Campaign in honorary voluntary capacities, but neither has access to any campaign strategies or plans that are not otherwise publicly available. The mere fact that PFAVF and the Leadership Forum may be supported by individuals clearly acting in their individual capacity who are also supporting the Bush Campaign does not trigger the "coordination" found at 2 U.S.C. §441a(a)(7)(B)(i) and 11 C.F.R. §109.20 and (21). Likewise, if in fact the individuals raised funds for those "527" groups, which is alleged, they did so in their individual capacity and not in cooperation with, consultation or concert with, or at the request or suggestion of the Parties. *See* 11 C.F.R. §109.20. In addition, since the Parties themselves did not raise funds for PFAVF or the Leadership Forum the complainant's allegation of a 2 U.S.C. §441i(e)(1)(A) violation by the Parties for "soft money" fundraising is without merit.

Mr. Russo alleges that PFAVF's advertisements are "coordinated" with the Bush Campaign because of presentations made by Ken Mehlman and Karl Rove to PFA. The complainant contends that the presentations satisfy the conduct prong of the "coordination" test applicable to public communications and, as a result, all PFAVF advertisements constitute "coordinated" public communications. The only evidence Mr. Russo offers in support of his allegation are the Mehlman and Rove presentations to PFA. Specifically, the complainant argues that those presentations are adequate to satisfy the Commission's "substantial discussions" and "material involvement" tests, even though PFAVF had not even been created at the time of the presentations, and even though Mr. Russo offers no evidence of any link between the content of those presentations and any public communication made by PFAVF. In the Commission's explanation and justification accompanying its regulations at C.F.R. §109.21, the Commission explains that, "the plain meaning of 'material'...provides sufficient guidance for an inherently fact-based determination." *See* 68 FR 421, 434 (January 3, 2003). In this regard, "a

candidate, or political party committee is considered 'materially involved' in the decision enumerated in paragraph [C.F.R. §109.21](d)(2) after sharing information about plans, projects activities, or needs with the person making the communication, but only if this information is found to be material to any of the above-enumerated decisions related to the communication." *Id.*

Mr. Mehlman and Mr. Rove addressed PFA in the same manner as they had addressed many general public audiences. To be clear, these presentations never discussed and in no way offered insight into the "...plans, projects, activities, or needs..." of the campaign that were not otherwise publicly available and there is no evidence presented that their comments were in any way "...'material' to the creation, production, or distribution of [a] communication." *See* 11 C.F.R. §109.21(d)(3). The complainant also cites the "material involvement" test of the conduct standard as additional evidence of "coordination." However, the complainant does not provide any evidence that any information about content, intended audience, means or mode, specific media outlet, timing or frequency, or size or prominence of any public communication was discussed during these presentations. *See* 11 C.F.R. §109.21(d)(2)(i) – (vi). Again, the presentations to PFA occurred prior to the formation of PVAVF, and neither Mr. Mehlman nor Mr. Rove, nor any other authorized agent of the Bush Campaign, has ever briefed PVAVF.

Lastly, Mr. Russo alleges that the Bush Campaign's relationship with Feather, Larson & Synhorst ("FLS") establishes a scenario in which "it is scarcely conceivable that the PFAVF's activities could not be coordinated with those of the [Bush Campaign]." In this regard, the Bush Campaign is well aware of the intricacies of the campaign finance laws pertaining to this election. For this reason, our contract with FLS states "[FLS] agrees to comply with all local state and federal regulations relating to their activities..." The Bush Campaign discussed the relevant campaign finance laws including the relevant factors of the Bipartisan Campaign Finance Reform Act ("BCRA") related to "coordination," including common vendors and overlapping personnel with FLS representatives and relies on FLS's representations that it is in compliance with the Act and Commission Regulations.

Conclusion

The Parties have acted conscientiously in implementing a thorough and guarded set of procedures to prevent illegal coordination. The Bush Campaign has taken every precaution to assure that its actions remain above reproach. The Bush Campaign has given detailed instructions to its employees, volunteers, agents and vendors about preventing illegal coordination and other impermissible activity. There is no basis to believe that a violation of the Act has occurred and no basis for these unfounded accusations to advance.

For the foregoing reasons, Bush-Cheney '04, Inc. respectfully requests that the Commission dismiss Mr. Russo's complaint with regard to the Parties.

Respectfully submitted,

Thomas Josefiak
General Counsel

ATTACHMENT A

Thursday, May 13, 2004

Joint Statement by Bush-Cheney Campaign Chairman Marc Racicot and RNC Chairman Ed Gillespie on Today's FEC Ruling on 527 Groups

"The FEC's decision today to do nothing to stop the massive spending of soft money "527" committees to influence the 2004 elections is unfortunate, but provides clarity.

"It has always been clear to us that the Bipartisan Campaign Reform Act ("BCRA") and its subsequent affirmation by the Supreme Court would limit the role of political parties in the political process and allow special interest "527" groups to proliferate. We had always assumed however, that the provisions of the Federal Election Campaign Act that have existed since the 1970's and were not changed by BCRA would require the 527s to follow the basic tenets underlying federal campaign finance law.

"We erroneously thought "527" groups would be regulated by their status and their activities. We expected that when one of these "527" groups raised and spent more than $1,000 for the specific purpose of defeating or electing federal candidates such as President Bush or John Kerry, that particular "527"" group would fall under the Federal Election Commission's umbrella as a federal political committee. In other words, the "527" would have to spend and raise federally regulated money, "hard dollars." No corporate money could be raised nor spent and individual contributions would be limited to $5,000 per year.

"Today's decision to delay addressing fundamental questions regarding the regulation of "527's"" is irresponsible. It also sets the stage for a total meltdown of federal campaign finance regulation in 2004 - the first election after BCRA supposedly banned soft money from influencing federal candidates and elections.

"The Commission by its own action, or more precisely inaction, today has given the "green light" to all non-federal "527's" to forge full steam ahead in their efforts to affect the outcome of this year's Federal elections and, in particular, the presidential race.

"Conservative groups now have the go-ahead they were waiting for as the commission has now made clear that these "527"groups will not be affected by the federal campaign finance rules, at least in 2004.

"As FEC Commissioner Michael Toner said, "Delaying a decision is making a decision- namely, that we are not going to issue any regulations for the 2004 elections. We are going to see a new 'soft money' arms race for the 2004 election." (Delay Urged for FEC Action on Pro-Democratic Groups, Washington Post, 5/12/04)

"Look at the blatant anti-President Bush and pro-Kerry activity by MoveOn.org, The Media Fund, ACT and others. Add in their uninhibited coordination with agents of the Kerry campaign and the Democratic Party at the national and state levels.

Remember that all of this information was known to the FEC during its "527" rulemaking deliberations.

"By today's action, the FEC has sanctioned the activities of these groups. Its decision sends a very clear signal to the political community -- let the "527" battle begin.

"The 2004 elections will now be a free-for-all. Thanks to the deliberate inaction by the Federal Election Commission, the battle of the 527's is likely to escalate to a full scale, two-sided war.

"Groups like the Leadership Forum, Progress for America, The Republican Governor's Association, GOPAC and others now know that they can legally engage in the same way Democrat leaning groups like ACT, the Media Fund, MoveOn and Moving America Forward have been engaging.

"Now that the Commission has spoken, or not spoken, it is all but certain that those groups that would like to see the President re-elected and the U.S. House and Senate remain in Republican control will begin raising and spending money in the same manner as those groups that would like to see the President defeated and the U.S. House and Senate in Democratic control have already been doing. Thanks to the Federal Election Commission, the "527" battle will now rage unabated through Election Day."

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Paid for by BUSH-CHENEY '04, Inc.

ATTACHMENT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Bush-Cheney '04, Inc.
PO Box 10648
Arlington, VA 22210

Plaintiff

v.

Federal Election Commission
999 E Street, NW
Washington, DC 20463

Defendant

CASE NUMBER 1:04CV01612
JUDGE: Emmet G. Sullivan
DECK TYPE: Administrative Agency Review
DATE STAMP: 09/17/2004

27044152801

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

Plaintiff Bush-Cheney '04, Inc., for its Complaint, states as follows:

1. This action challenges the failure of the Federal Election Commission ("FEC") to promulgate regulations to implement the phrase "for the purpose of influencing a federal election" in the definition of the term "expenditure," 2 U.S.C. § 431(9)(A)(i), and "contribution," 2 U.S.C. § 431(8)(A)(i), as those terms are used in the Federal Election Campaign Act, 2 U.S.C. §§ 431 *et seq.*, ("FECA"). This phrase is critically important because it is used to determine which organizations organized under section 527 of the tax law, 26 U.S.C. § 527, are "political committees," 2 U.S.C. § 431(4), under the FECA.

2. On March 27, 2002, President George W. Bush signed into law the Bipartisan Campaign Reform Act of 2002 ("BCRA"), a landmark statute that sought to "plug the soft-money loophole" through which wealthy individuals, labor unions, and corporations had

contributed vast sums of money to political parties in circumvention of campaign finance limits. *McConnell v. FEC*, 124 S. Ct. 619, 654 (2003). The large corporate, union, and individual contributions that these groups had received are commonly referred to as "soft money."

3. Prior to *McConnell*, the lower courts had interpreted the phrase "for the purpose of influencing a federal election" to refer to communications that involved only "express advocacy" defined by the "magic words" test of *Buckley v. Valeo*, 424 U.S. 1 (1976). The lower courts, legal scholars, practitioners, and many members of the FEC itself had previously understood the *Buckley* "magic words" test to be a constitutional limitation. Lower courts had therefore limited the reach of FECA to avoid violating their understanding of the First Amendment's limitations. But the *McConnell* Court ruled that "the unmistakable lesson from the record in this [BCRA] litigation, as all three judges on the District Court agreed, is that *Buckley*'s magic-words requirement is functionally meaningless." *McConnell*, 124 S. Ct. at 689.

4. After the Supreme Court upheld the soft-money ban, individuals and groups, most in opposition to President Bush, turned to a new strategy that they believed might allow them to continue to spend soft money in an effort to influence federal elections while avoiding words of express advocacy, a test the Supreme Court itself has now rejected.

5. Rather than giving soft money directly to the national political parties, Democratic activists organized their own shadow political parties, staffed by former party operatives, and dedicated to spending money raised to oppose the re-election of President Bush and to benefit their party's presidential nominee, John Kerry.

6. During the course of the current federal election cycle, numerous organizations, all of which are organized as "political organizations" under the Internal Revenue Code, 26 U.S.C. § 527, have raised and spent large sums of money from sources and in amounts not permissible under the FECA. As Senator John McCain, one of BCRA's sponsors explained, "[u]se of soft money by 527 groups whose major purpose is to affect federal elections is not legal."[1] The FEC likewise concluded, in an advisory opinion, that a political committee already registered with the FEC that seeks to spend its money to influence a federal election must raise that money in compliance with the "hard money" restrictions of the campaign finance laws. *See* FEC Advisory Opinion 2003-37.

7. To date, however, the FEC has refused to issue regulations that interpret the FECA in light of the Supreme Court's *McConnell* decision. In light of the Supreme Court's recent decision in *McConnell,* the FEC's failure to issue any new rule on the definition of the phrase "for the purpose of influencing a federal election" improperly and inadequately implements the law. This regulatory inaction appears to allow multiple section 527 groups, which are currently raising and spending enormous amounts of money, to operate outside of the prohibitions and limitations of the FECA despite the declared purpose and intent of the organizations and for the purpose of influencing the 2004 presidential election.

8. Members of the FEC recognized the problem and acknowledged that there is not likely to be any action to reign in tens of millions of dollars spent in violation of the FECA this election cycle. Indeed, after the FEC failed to pass a regulation in May of 2004 that would be effective for this election cycle, FEC Commissioner Michael Toner stated, "The election of 2004 is going to be the Wild West. . . . We are going to see a dramatic escalation

[1] Statement of Senator McCain, U.S. Senate Committee on Rules and Administration, Mar. 10, 2004.

of soft-money spending by organizations on both sides of the aisle."[2] Commissioner Toner's comment foresaw exactly what has happened in the months since the FEC failed to act.

9. The FEC's failure to issue new rules to clearly implement the law in order to end the ongoing evasion, circumvention, and subversion of the FECA by these section 527 organizations is unlawful.

10. The United States Court of Appeals for the District of Columbia Circuit has held that agencies have a general obligation to engage in "reasonably prompt decisionmaking." *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980). "Excessive delay saps the public confidence in an agency's ability to discharge its responsibilities and creates uncertainty for the parties, who must incorporate the potential effects of agency decisionmaking into future plans." *PEPCO v. ICC*, 702 F.2d 1026, 1034 (D.C. Cir. 1983).

11. Particularly in the election context, this Court has recognized that the need for prompt agency action is particularly acute in the context of the FEC's supervision of the electoral process:

> These concerns are obviously strong in an election context, where it is crucial that "public confidence" and trust in the integrity of the process be maintained, and where continuing uncertainty over the legality or illegality of a particular campaign practice can be highly disruptive of candidates' abilities to "plan" and conduct their electoral efforts.

Rose v. FEC, 608 F.Supp. 1, 10 (D.D.C. 1984). The fact of a pending election weighs strongly in favor of the need for prompt agency action. *Id.* at 8.

12. Courts have repeatedly addressed the same soft money claims at issue here. Years before the Supreme Court's decision in *McConnell*, this Court said of the soft money

[2] Thomas Edsall, "In Boost for Democrats, FEC Rejects Proposed Limits on Small Donors," Washington Post, May 14, 2004.

issue: "Although lives do not hang in the balance, the climate of concern surrounding soft money threatens the very corruption and appearance of corruption by which the integrity of our system of representative democracy is undermined, and which the FECA was intended to remedy. Soft money does not present discrete and isolated FECA violations, but allegedly comprises system-wide abuse." *Common Cause v. FEC,* 692 F. Supp. 1397 (D. D.C., 1988)

13. The FEC's failure to act in this matter, especially in the face of a compelling public need, is unlawful under the Administrative Procedure Act. 5 U.S.C. §§ 551 *et seq.*

Jurisdiction and Venue

14. This action arises under the Federal Election Campaign Act, 2 U.S.C. § 431 *et seq.*, as amended by the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155; the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-706; and the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.* This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

15. Venue is proper in the District of Columbia under 28 U.S.C. § 1391(e) because the Defendant is a United States agency and because a substantial part of the events or omissions giving rise to the claim occurred in this District.

Parties

16. The Plaintiff, Bush-Cheney '04, Inc., ("BC '04") is a Virginia corporation, with its principal headquarters in Virginia. It is the federally registered political committee that is the principal campaign committee for President Bush and Vice-President Cheney as they seek re-election in November 2004.

17. The failure of the FEC to issue rulings to implement the law has materially and adversely affected BC '04 as it attempts to convey to the American people the message and vision of President Bush and Vice President Cheney.

18. As the principal campaign committee of federal candidates for President and Vice President, BC '04 is subject to the source and amount limitations of the FECA. In financing expensive broadcast advertising and get out the vote efforts, BC '04 is not permitted to raise and spend corporate funds or multi-million dollar individual contributions.

19. Because the FEC has failed to take action that only it has the statutory power to undertake, section 527 political organizations that refuse to comply with the FECA have caused BC '04 particularized and concrete injury, and will continue to cause such injury.

20. As the principal campaign committee of the Republican Party's candidates for President and Vice-President of the United States, Plaintiff is and will be regulated by the FECA. Plaintiff is among those which the FECA is designed to regulate to ensure that those organizations engaging in activity for the purpose of influencing a federal election all follow the same rules.

21. If the FEC continues to fail to promulgate regulations to implement the phrase "for the purpose of influencing a federal election," the Plaintiff is and will continue to be forced to engage in an election system that is awash in a flood of illegal money that Congress intended to ban from influencing federal elections.

22. Plaintiff does, and will continue to suffer from a lack of information that the Supreme Court made clear Plaintiff and the public are entitled to under the FECA unless the FEC acts to implement existing law.

23. If the Commission's failure to issue regulations regarding "political committee" status is allowed to stand and to undermine the FECA, the plaintiffs will be forced to discharge their public responsibilities, in a system that Congress has determined is, and appears to be, harmed by the influence of spending by unregulated groups, including section

527 groups, that operate in federal elections outside the registration requirements, contribution limits, source prohibitions and reporting obligations of the FECA. Further, by thwarting and undermining the FECA, the failure to promulgate regulations will also adversely affect the public's perception of plaintiffs and their fellow office-holders as candidates, public officials and party members.

24. The Defendant, FEC, is an agency of the United States created pursuant to the FECA, 2 U.S.C. § 437c, with its headquarters in Washington, D.C., whose purpose is to enforce the federal election laws, including the requirement that expenditures for the purpose of influencing a federal election be paid for with funds subject to the prohibitions, limitations and reporting requirements of the FECA.

25. The FEC is charged with the affirmative duty to promulgate rules necessary to carry out the FECA. 2 U.S.C. § 437d(a)(8).

FEC's Failure to Apply the Definition of Political Committee

26. Under the law, any entity that receives "contributions" (as defined in the FECA) or makes "expenditures" (as defined in the FECA) of more than $1,000 in a calendar year meets the definition of a "political committee" and must file a "statement of organization" and periodic disclosure reports of its receipts and disbursements with the FEC. 2 U.S.C. §§ 433-34.

27. In addition, a "political committee" is subject to contribution limits, *id.* §§ 441a(a)(1), 441a(a)(2), and source prohibitions, *id.* § 441b(a), on the contributions it may receive and make. *Id.* § 441a(f). These rules apply even if the political committee is engaged only in independent spending. 11 C.F.R. § 110.1(n).

28. An "expenditure" under the FECA "includes payments," 11 CFR § 100.110(a), "made by any person for the purpose of influencing any election for federal office." 11 CFR § 100.111(a). *Buckley* held that these expenditures were defined as "communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." 424 U.S. at 44. The *Buckley* Court limited express advocacy to "magic words" such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject." *Id.* at 44 n.52.

29. The *McConnell* Court recently expanded the types of communications that are regulated by the FECA by holding that advertisements that "promote, support, attack or oppose" a clearly identified federal candidate "undoubtedly have a dramatic effect on federal elections" and such communications can be regulated without violating the First Amendment. *McConnell*, 124 S. Ct. at 675.

30. At issue in this complaint is the application of the statutory phrase "for the purpose of influencing any election for federal office." 2 U.S.C. § 431. The FEC has historically sought to expand this statutory language beyond the "magic words" established in *Buckley*. *See, e.g., FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2d. Cir. 1986) ("The FEC would apparently have us read 'expressly advocating the election or defeat' to mean for the purpose, express or implied, of encouraging election or defeat."); and *FEC v. Furgatch*, 807 F.2d 857, 861 (9th Cir. 1987) ("The FEC further argues that the [communication at issue] is, in the words of the Supreme Court . . . unambiguously related to the campaign of a particular federal candidate. Nothing more, it contends, is required to place this advertisement under coverage of the Act.") (internal quotations and citations omitted).

31. Prior to *McConnell*, the lower courts had rejected the FEC's arguments and interpreted this phrase to mean communications that involved only "express advocacy" using *Buckley's* "magic words." The lower courts had nearly universally understood this to be a constitutional limitation. *See, e.g., Clifton v. FEC*, 114 F.3d 1309, 1312 (1st Cir. 1997); *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 387 (2d. Cir. 2000); *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1064 (4th Cir. 1997); *Chamber of Commerce v. Moore*, 288 F.3d 187, 193 (5th Cir. 2000); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 968-70 (8th Cir. 1999); *Citizens for Responsible Gov't. State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1187 (10th Cir. 2000); *cf. FEC v. Furgatch*, 807 F.2d 857, 862-863 (9th Cir. 1987).

32. But the *McConnell* Court ruled that, "the unmistakable lesson from the record in this [BCRA] litigation, as all three judges on the District Court agreed, is that *Buckley*'s magic-words requirement is functionally meaningless." *McConnell*, 124 S. Ct. at 689.

33. Given this analysis by the majority, dissenting Justice Thomas noted, the holding in *McConnell* that the "express advocacy test" was no longer a constitutionally mandated limit meant that *McConnell* effectively overruled lower court decisions applying and upholding *Buckley*'s "express advocacy" standard. *Id.* (Thomas, J., dissenting).

34. At the same time that the Supreme Court eschewed the express advocacy standard, it affirmed, in the context of "federal election activity," that the test of "promote, oppose, attack, and support clearly set forth the confines[,] provides explicit standards for those who apply them and gives the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Id.* n.64 (internal quotations omitted). By adopting this standard, the *McConnell* Court expanded the reach of the FECA beyond "express advocacy"

and returned the state of regulations to the statutorily imposed standard "for the purpose of influencing and election for federal office." 2 U.S.C. § 431(9)(A)(i).

35. The FEC's failure to adopt any new regulation or to take any other action setting forth clear standards for when Section 527 groups are required to register as political committees appears to allow Section 527 groups to continue spending unlimited amounts of unregulated soft money to influence federal elections, both in 2004 and in the future. This failure undermines the FECA and is contrary to law.

Failure of the FEC to Act on its own Advisory Opinion

36. The FEC affirmed in February of this year that the FECA requires any communication by a federal political committee registered under the FECA that "promotes, supports, attacks or opposes" a federal candidate to be paid for under the "hard dollar" rules of the Act. Advisory Opinion 2003-37 ("AO 2003-37"). The FEC, citing *McConnell*, held that communications referring to a clearly identified federal candidate that promote, support, attack or oppose that candidate are for "the purpose of influencing a federal election" within the meaning of the FECA. *Id.* (*citing McConnell*, 124 S. Ct. at 675 n.64). The FEC explained that "communications that promote, support, attack or oppose a clearly identified Federal candidate" have a "dramatic effect" on federal elections. *Id.* at 3.

37. In AO 2003-37, the FEC told Americans for a Better Country ("ABC"), a political committee, that it could not use donations from individuals in excess of the FECA's limits or from sources prohibited by the FECA for communications that "promote, support, attack or oppose" a candidate for federal office. *Id.* at 9-10.[3]

[3] The full text of the question and the FEC's answer follows:

3. *You indicate that ABC may fund a communication that states: "President George W. Bush, Senator X and Representative Y have led the fight in Congress for a stronger defense and stronger economy.*

38. In AO 2003-37, the FEC also advised ABC that a political committee could not solicit non-federal funds in fundraising communications that conveyed ABC's support or opposition to a specific federal candidate. *Id.* at 19-20. The FEC determined that 2 U.S.C. § 431(8) means that federal political committees can only raise funds using such solicitations if the funds are subject to the prohibitions and limitations of the FECA.

39. In addition, the FEC found that communications for political committees' voter identification, voter registration, or get-out-the-vote purposes that are not coordinated with a candidate and that do not refer to any federal candidate still must use federal funds in proportion to the number of federal and non-federal candidates on the piece or on the handout because the activities are for the purpose of influencing a federal election. *See* 11 C.F.R. § 106.1.

40. The FEC determined that soliciting soft money "by using the names of specific Federal candidates in a manner that will convey [its] plan to use those funds to support or oppose specific federal candidates." constitutes an illegal contribution subject to the FECA's

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Call them and tell them to keep fighting for you." May ABC pay for this communication containing no express advocacy solely with donations from individuals that exceed the Act's limitations?

No. If the communication meets the criteria of an electioneering communication, it must be treated as an expenditure when made by a political committee. ...

Even if it does not have all the characteristics of an electioneering communication, it still must be treated as an expenditure and paid for entirely from ABC's Federal account for the following reasons. The communication you intend to produce would promote or support candidates for Federal office by proclaiming that those candidates have "led the fight in Congress for a stronger defense and stronger economy." As explained above in the introduction to the legal analysis, a payment for a communication that promotes, supports, attacks, or opposes a clearly identified Federal candidate is "for the purpose of influencing a Federal election" when made by a political committee and is therefore an "expenditure" within the meaning of 2 U.S.C. § 431(9) that must be paid for entirely with Federal funds. Moreover, there is no basis under 11 CFR § 106.1 for allocating the costs of this communication between ABC's Federal and non-Federal accounts, because the communication refers only to Federal candidates. Nor is allocation between ABC's Federal and non-Federal accounts permissible under 11 CFR § 106.6. Those allocation provisions explicitly do not cover candidate-specific communications. See 11 CFR § 106.6(b)(2)(i) and (iii). Consequently, because the payments for the communications you propose to run will be expenditures regulated under the Act, ABC must pay for these ads entirely with funds that comply with the Act's various limitations, including individual contribution limitations.

contribution and source limitations. AO 2003-37, at 19-20. Such solicitations, the FEC determined, violate federal law. 2 U.S.C. § 431(8).

41. However, the FEC declined at that time to make a determination about what threshold an organization that was not already a federally registered political committee must cross before it is required to register with the FEC and comply with the prohibitions and limitations of the FECA.

Failure of the FEC to Act on Administrative Complaints

42. In March of 2004, BC '04 filed two administrative complaints with the FEC seeking action by the FEC to enforce the law that requires a section 527 group, whose purpose is to influence the November 2004 presidential election, to register as a political committee. To date, the FEC has taken no action on those complaints, nor has it undertaken any publicly disclosed action on its own initiative to enforce the law.

43. On September 1, 2004, BC '04 filed *Bush-Cheney '04, Inc. v. FEC*, 04-CV-1501 (D.D.C.), a lawsuit under 2 U.S.C. 437g(a)(8), because the FEC has failed to act on the administrative complaints within 120 days of the filing of those complaints as required by law. On September 15, 2004, Judge James Robertson of the United States District Court for the District of Columbia denied BC '04's Application for a Preliminary Injunction against the FEC. The underlying matter is still pending before the court, and the FEC will file its response on November 1, 2004.

Failure of the FEC to Act Through Rulemaking

44. In March of 2004, the FEC issued a Notice of Proposed Rulemaking in which it acknowledged that rulemaking was necessary "to revisit the issue of whether the current definition of 'political committee' adequately encompasses all organizations that should be

considered political committees subject to the limitations, prohibitions and reporting requirements of FECA." 69 Fed.Reg. 11736.

45. In May of 2004, the FEC approved the recommendation of its general counsel to defer the rulemaking for 90 days. The general counsel told the FEC at that time that the NPRM "was prompted" by the Supreme Court's decision in *McConnell,* which presented the question of whether "law and common sense dictate" that groups devoted to influencing federal elections "be considered political committees." FEC Agenda Document 04-48 at 3-4.

46. In August of 2004, the FEC concluded its rulemaking proceeding by promulgating rules on two collateral matters but refused to issue any rule addressing the central question that had prompted the rulemaking in the first place: the definition of a political committee and the requirement for Section 527 groups to register as political committees.

Legal Basis for Challenging the FEC's Failure to Act

47. It is well-settled that an agency is not precluded from announcing new principles in an adjudicative proceeding. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). Rather, the choice between rulemaking and adjudication lies in the first instance within the agency's discretion. *Id.*; *see also SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947); *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998). However, the FEC must choose one or the other or it violates Section 706(1) of the APA and the FECA.

48. After reviewing the record of the FEC's failure to act, and in light of the importance of the integrity of federal elections, this Court should not defer to the FEC. The FEC's failure to issue regulations governing activity by section 527 groups undertaken for

the purpose of influencing federal elections, and by extension determining when such groups are required to register as political committees, is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law. The FEC's failure to act is therefore contrary to 5 U.S.C. § 706(2)(A).

49. The FEC's failure to act by issuing regulations to enforce the Supreme Court's decision in *McConnell* constitutes agency action unlawfully withheld or unreasonably delayed. As such, it is contrary to 5 U.S.C. § 706(1).

50. The FEC has itself concluded that a rulemaking is necessary "to revisit the issue of whether the current definition of 'political committee' adequately encompasses all organizations that should be considered political committees subject to the limitations, prohibitions and reporting requirements of FECA." 69 Fed.Reg. 11736.

51. The FEC failed to articulate a rational basis for its decision not to adopt regulations to require section 527 groups to register as political committees when they raise or spend more than $1,000 for the purpose of influencing a federal election.

52. Moreover, the FEC has failed to provide any rational explanation for its rejection of alternative approaches to the regulation proposed in the NPRM, including recommendations by the FEC's own general counsel, several Commissioners, and members of the public who commented on the proposed regulations. For these and other reasons, the FEC's failure to issue the regulations described above is contrary to 5 U.S.C § 706(2)(D).

53. Apart from the provisions of 2 U.S.C. §437g(a)(8)(C), there is no private right of action available to Plaintiff to enforce the FECA against an alleged violator. *Perot v. FEC*, 97 F.3d 553, 558 n.2 (D.C. Cir. 1996). As such, Plaintiff has no alternatives to requesting relief from this court.

Requested Relief

54. Plaintiffs request the following relief:

A. That the Court declare the FEC's failure to issue appropriate regulations implementing the statutory phrase "for the purpose of influencing a federal election" constitutes agency action unlawfully withheld and an abuse of the FEC's discretion;

B. That the Court issue an order requiring the FEC to commence proceedings to promulgate, on an expedited basis, appropriate regulations implementing the statutory phrase "for the purpose of influencing a federal election," and by extension address which organizations are "political committees" under the FECA;

C. That the Court retain jurisdiction over this matter to ensure the FEC's timely and sufficient compliance with the Court's decision; and

D. That the Court grant such other and further relief as it deems proper.

Respectfully submitted,

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September 17, 2004