BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
George Soros	)	MUR 5642
	)	
	)	

BRIEF OF MR. GEORGE SOROS

I. INTRODUCTION

In the fall of 2004, George Soros, a noted author and commentator on financial, social and geopolitical world affairs, undertook a multi-city speaking tour to discuss his latest book, *The Bubble of American Supremacy*, and the major thesis of the book—a criticism of the Bush administration's conduct of foreign policy and the War on Terror. At the same time, Mr. Soros mailed book brochures that provided a synopsis of the views expressed in the book, including his view that the country should set off in a new foreign policy direction by not re-electing President Bush. The book brochure, which was mailed to certain magazine subscribers, invited people to purchase the book from their local bookstore, online booksellers or at Mr. Soros's own website. Because the book brochure and his website included a small number of statements by Mr. Soros expressing his view that, as part of setting a new course for the nation on the international stage, President Bush should not be re-elected, Mr. Soros undertook to file Form 5 independent expenditure disclosure forms, even though such disclosure was arguably not required. Mr. Soros disclosed the costs of the website and that he had sent a mass-mailing. He described the brochure's actual production costs (professional layout fee and printing cost) and the actual distribution costs (postage and mailing house fee) of the book brochure.

The General Counsel seeks a finding of probable cause, alleging that Mr. Soros's disclosures improperly failed to include the cost of obtaining a magazine subscriber list. The General Counsel's position should not be adopted by the Commission.

This matter arose from a complaint filed with the Federal Election Commission ("Commission") by the National Legal and Policy Center on January 26, 2005. The complaint alleged that Mr. George Soros and two unrelated entities, Fenton Communications and the World Affairs Council of Philadelphia, violated the Federal Election Campaign Act ("FECA" or "Act"). The Complaint made a series of allegations focused on what was described as "a largely off-the-books independent expenditure campaign speaking and media tour . . . ." Compl. at 2. The complaint rested on the mistaken notion that FECA applies the same disclosure requirements to individuals as it does to candidates, political parties and political committees. Accordingly, the Commission declined to pursue virtually all of the allegations made in the Complaint. The Commission did however determine that one tangential aspect of the Complaint deserved to be pursued. In its Complaint, the National Legal and Policy Center speculated that since no rental or purchase price for a mailing list had been disclosed it was likely that Mr. Soros had been given a list of voters to whom he would send his book brochure by a political party or ideological group, a speculation that the Complaint posited as evidence of coordination between Mr. Soros and an unidentified political candidate or committee. *Id.* at 17.

In the course of responding to the sweeping, legally incorrect allegations in the Complaint, counsel for Mr. Soros indicated that no candidate or political committee had provided the names and addresses of those to whom the book brochure was mailed. The response indicated that the disclosed costs of the production and distribution of the book brochure had not included the cost of obtaining the names and addresses of the magazine subscribers to whom it had been mailed. The response also noted that the Commission's sole discussion on the subject, an Advisory Opinion, had concluded that the cost of a mailing list was neither treated as nor reportable as part of an "independent expenditure" mass-mailing. Given that the Commission's

sole guidance on the question had concluded that the costs of a mailing list did not constitute a reportable element of an independent expenditure it would seem reasonable that Mr. Soros's independent expenditure filings would not have included such costs.

The Commission chose not to move forward on the broad claims asserted in the Complaint. And one might have anticipated that would have ended the matter. But instead, on May 23, 2006, the Commission informed Mr. Soros that it had reason to believe that he violated 2 U.S.C. § 434(c) and 11 C.F.R. § 109.10, in failing to disclose the cost of the mailing list at the time he disclosed the cost of the production and distribution of the book brochure, and it opened an investigation. Shortly thereafter, counsel for Mr. Soros contacted the Commission and offered to provide it with whatever assistance it needed. Mr. Soros answered all of the Commission's subsequent inquiries fully and truthfully. In a letter to the Commission, counsel to Mr. Soros explained:

> Mr. Soros made every reasonable effort to report expenses related to his reportable communication expenses as an independent expenditure in a fulsome and timely manner. While we remained convinced that the reports met all applicable legal requirements, we are happy to amend the report to add this additional information . . . .

S. Ross letter to FEC, July 24, 2006, Exh. 1 at 3.

the General Counsel initiated probable cause proceedings by recommending to the Commission that it conclude that a violation occurred. In

its brief to the Commission, the General Counsel asserts one principal argument: that the expenses associated with the rental of a mailing list used to distribute a brochure advertising Mr. Soros's book, *The Bubble of American Supremacy*, are reportable independent expenditures under 2 U.S.C. § 434(c) and 11 C.F.R. § 110.16.

II. SUMMARY OF FACTS

George Soros is Chairman of Soros Fund Management LLC. He was born in Budapest in 1930. He survived the Nazi occupation and fled communist Hungary in 1947 for England, where he graduated from the London School of Economics. After settling in the United States and successfully managing an international investment fund, he established a network of philanthropic organizations in more than fifty countries. Mr. Soros's foundation network spends about $450 million annually.

Over a twenty-three year period, Mr. Soros has authored approximately thirteen books discussing wide-ranging topics of international economic and foreign policy, which have been translated into dozens of languages and have been widely purchased throughout the nation and worldwide. Mr. Soros has regularly authored approximately seventy-eight newspaper and magazine articles on politics, society, and economics, and is a regular contributor to *The New York Times*, *The Wall Street Journal*, *The Financial Times*, *The Atlantic Monthly*, *Newsweek*, *The London Times*, *Le Figaro*, *The Moscow Times*, and *Foreign Affairs*. *See* Exh. 2. He also regularly speaks on the same issues.

In December 2003, Mr. Soros published a book entitled *The Bubble of American Supremacy*. The purpose of the book was to inform the public of his personal viewpoint that the decline of American leadership in the world community was a direct result of the war in Iraq. The overwhelming majority of the book discussed Mr. Soros's criticisms of the Bush

Administration's handling of the war in Iraq. The book urges, in part, what Mr. Soros believes to be part of the solution to reasserting American global leadership: a change in the direction and leadership of American foreign policy. However, the defeat of George Bush in the 2004 election is by no means the primary purpose of the book, nor has domestic electoral politics been the central rationale of his writing and speaking activities. Rather, Mr. Soros sought to inform the public of his world viewpoint.

He leased a mailing list of approximately two million magazine subscribers from ClientLogic, and paid EU Services, Inc., a direct mail production company, to print, mark postage, and handle the mailing of a book brochure to each of the magazine subscribers. Karol Keane was paid for her services in designing the brochure, and Ann Wixon was paid to manage the mailing production. In his disclosure forms submitted to the FEC, Mr. Soros disclosed the payments made to EU Services, Karol Keane, and Ann Wixon, but did not disclose the payments made to ClientLogic.

The unambiguous, primary purpose of the book brochure was to market Mr. Soros's book and disseminate his personal views on American foreign policy. The General Counsel's characterization that the "packet clearly stated numerous times that President Bush should not be re-elected" is an over-exaggeration when examined in context. G.C. Br. 2:3-4. Of the approximately one hundred eighty six full sentences contained in the brochure, only four sentences, or approximately 1%, specifically state Mr. Soros's view that the nation should not re-elect President Bush. Moreover, Mr. Soros's call to action in the brochure was not to go out and cast a vote against President Bush, but rather to read his book. On the inside front cover, Mr. Soros's personal message to the reader ends with "I hope you will read this pamphlet and my book, *The Bubble of American Supremacy: The Costs of Bush's War in Iraq*. For the text,

comments, discussion and further information, please visit www.GeorgeSoros.com." Similarly, Mr. Soros concluded his message in the middle of the brochure by stating: "There is a lot more to be said on the subject and I have said it in my book, *The Bubble of American Supremacy*, now available in paperback. I hope you will read it. You can download the chapter on the Iraqi quagmire free from www.GeorgeSoros.com." Finally, three of the four most visible pages, the outside and inside front and back covers, contained a picture of Mr. Soros's book. The last page of the brochure, which contains four book reviews from prestigious publications and authors, also reveals that the primary purpose of the publication was to engage in a discussion of the role of America in the world. Tellingly, none of these reviews describe the book in relation to the candidacy of George Bush for the 2004 election. Rather, they review the central message of his book: the perceived decline of American credibility as a result of the Iraq War.

III. ANALYSIS

A. Mr. Soros Acted In Good Faith Reliance on Federal Election Commission Advisory Opinion 1979-80, Which Concluded that Mailing List Rental Expenses Are Not Independent Expenditures.

1. The Commission should reject the General Counsel's recommendation that mailing list expenses are independent expenditures because it is contrary to both the plain language of 2 U.S.C. § 437f(c) and the materially indistinguishable holding of Advisory Opinion 1979-80 ("AO 1979-80").

An independent expenditure is defined as "an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate." 11 C.F.R. § 110.16; 2 U.S.C. § 431(17). In AO 1979-80, the Commission concluded that mailing list rental expenses are not independent expenditures. The Commission addressed whether an entity that rents and uses a mailing list from a commercial list broker is making an independent expenditure where the list is used to mail communications advocating the defeat of a candidate. The Commission concluded that such mailing list expenses are not independent expenditures

because the entity "is neither making any communication by renting the lists nor is it making an independent expenditure through the broker." *Id.*

Under 2 U.S.C. § 437f(c), a person may establish good faith reliance on an Advisory Opinion if the "*specific transaction* or *activity* . . . is indistinguishable in all material respects from the *transaction* or *activity* with respect to which such advisory opinion is rendered." (emphasis added). The proper focus is thus not on *who* is conducting the activity, but rather *whether* the activity or transaction itself is materially indistinguishable from that in the Advisory Opinion. *See* BLACK'S LAW DICTIONARY 728 (3d pocket ed. 2006) (defining "transaction" as the "*act* or an *instance* of conducting business") (emphasis added). In this regard, it is indisputable that the entity involved in AO 1979-80 and Mr. Soros conducted exactly the same transaction and activity: the renting of mail lists. The General Counsel's substantially broader interpretation of § 437f(c), that the "facts underlying this matter are materially distinguishable from the factual scenario presented in the AO," is thus contrary to its statutory command. G.C. Br. 4:13-14.

The General Counsel purports to distinguish AO 1979-80 not on the basis of whether the activity itself is distinguishable but on whether the entity conducting it is distinguishable. Specifically, the General Counsel argues that the activity in AO 1979-80 was conducted by a political committee whereas the activity here is conducted by an individual. G.C. Br. 4:15. The General Counsel also attaches significance to the fact that, unlike committees, individuals do not have operating expenses. *Id.* 4:16-17. However, these arguments draw a distinction without a difference. AO 1979-80 properly characterized the committee's list expenses as operating

expenses, which affected *how* the committee recorded and reported the expenses.[1] While there are certainly different types of reporting requirements for individuals and committees, these differences have no legal effect on the only question presented by this complaint: *whether* the specific transaction or activity, i.e. the rental of a mailing list, is an independent expenditure. There are any number of expenses, such as the rental of an office, which may require reporting as an operating expense if expended by a political committee which are not reportable by an individual who makes and reports the costs directly attributable to an independent expenditure. In any event, the Commission has expressly rejected any adverse inference that may be drawn from this distinction. Under 11 C.F.R. § 100.16, an "independent expenditure" is one that is made by a "person." And under 11 C.F.R. § 100.10, a "person" for purposes of independent expenditures is defined to include both individuals and committees.

Moreover, the General Counsel mistakenly asserts that the 2003 Explanation and Justification ("E & J") of the regulations contained at 11 C.F.R. § 104.4(f) "effectively supercede[s]" the Commission's analysis about mailing lists in AO 1979-80. G.C. Br. 5:1-2. Although the E & J mentions in passing the "production and distribution costs" associated with an independent expenditure, it altogether omits a discussion of the *nature* or *type* of costs that constitute an independent expenditure, which is precisely the issue addressed by AO 1979-80. *See* Explanation and Justification, Bipartisan Campaign Reform Act of 2002 Reporting, 68 Fed. Reg. 404, 407 (Jan. 3, 2003). On the one hand, the General Counsel argues that AO 1979-80 does not apply to Mr. Soros because he is not a political committee, while on the other hand it argues that the 2003 political committee regulations apply to him. *Compare* G.C. 4:15 *with id.* 5:

[1] The independent expenditure reporting requirements provide the public with expenditure-specific disclosure, which is unique in both timing and content and differs from the

1-12. The General Counsel cannot have its cake and eat it too. And, in fact, this distinction argues against the General Counsel's position. While the source of the independent expenditure is not germane to the application of AO 1979-80, which properly focuses on the specific type of transaction, the source *is* germane to the application of the 2003 regulations, which pertain to the aggregation of operating expenses by political committees when payments for independent expenditures are made across multiple reporting periods. And the Commission's explanation in AO 1979-80 that mailing list expenses are not independent expenditures demonstrates why they are not production and distribution costs. Costs typically associated with the production and distribution of an advocacy piece, such as the design of a brochure and its printing and mailing costs, may be reportable. However, any costs associated with determining *what* an individual wants to say and to *whom* he wants to speak are not reportable.

Mr. Soros has thus established a good faith reliance on AO 1979-80 and cannot be punished by the General Counsel's overly broad and legally misguided interpretation of 2 U.S.C. § 437f(c). *See* 2 U.S.C. § 438(e).

2. If the Commission Concludes that Mailing List Expenses Are Independent Expenditures, Any Express Advocacy In Mr. Soros's Book Solicitation Is Legally De Minimis.

Assuming that the Commission concludes that a violation has occurred, it should conclude that any violation is de minimis. *See FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 192-93 (D.C. Cir. 2001) (concluding that it would be unconstitutional to apply FECA where an entity had received de minimis corporate contributions in a given year). In AO 1984-23, the Commission examined a regulation generally prohibiting corporations from distributing electoral communications to individuals outside of the corporation. The Commission created an

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requirement of a registered political committee to report general operating expenses.

exception, however, if the communications were made to a de minimis number of individuals. In the Advisory Opinion, the Commission concluded that distribution to approximately 1% of individuals unrelated to the corporation was de minimis as a matter of law, but that distribution to approximately 14% of individuals was not de minimis. *See also* AO 1999-6 (concluding that 1% was de minimis); 19 U.S.C. § 1673b(b)(3) (defining de minimis to be 2% for anti-dumping purposes).

Here, approximately 1% of the sentences contained in Mr. Soros's book brochure could arguably be characterized as express advocacy. Of the approximately one hundred eighty six full sentences contained in the brochure, only four sentences, or approximately 1%, state Mr. Soros's opinion that President Bush should not be reelected. Therefore, the Commission should decline to exercise its discretion to further prosecute this action and conclude that the purported express advocacy was de minimis.

B. The General Counsel's Position Violates the Equal Protection of the Laws Because It Treats Expenditures Related to the Sale of Books Differently Than Expenditures Related to the Sale of Magazines, Newspapers, Broadcasts or Other Periodical Publications.

Requiring the disclosure of mailing list expenses associated with the distribution of a book but not a magazine, newspaper, broadcast or other periodical is a violation of the Equal Protection Clause of the Fourteenth Amendment, as incorporated against the Federal Government by the Fifth Amendment's Due Process Clause. *See Johnson v. Robison*, 415 U.S. 361, 364 n.4 (1974). "Because the right to engage in political expression is fundamental to our constitutional system, statutory classifications impinging upon that right must be narrowly tailored to serve a compelling governmental interest." *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 669 (1990); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

By enforcing this action against Mr. Soros, the Commission would treat expenditures related to the sale of books differently than expenditures related to the sale of magazines, newspapers, broadcasts or other periodical publications. Congress exempted from the definition of "expenditure" costs associated with "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee or candidate." 2 U.S.C. § 431(9)(B)(i). This exemption, commonly known as the "media exemption," recognizes "the unfettered right of the newspapers, television networks, *and other media* to cover and comment on political campaigns." H.R. Rep. No. 93-1239, 93d Congress, 2d Session at 4 (1974) (emphasis added). The same House Report concluded that "[i]t is not the intent of the Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press and of association." *Id.*; *see also FEC v. Multimedia Television, Inc.*, 1995 U.S. Dist. LEXIS 22404 (D. Kan. Aug. 15, 1995), at *8 ("Legislative history shows that the congressional intent behind the press exemption was to preserve the media's traditional public commentary.").

The media exemption, as applied to expenditures, is implemented in 11 C.F.R. § 100.132, which specifically excludes from the definition of independent expenditure the costs incurred to produce a news story, commentary or editorial by any broadcasting station, website, newspaper, magazine or other periodical publication. Notably, the Commission does not exclude from the definition of independent expenditure the costs associated with the production of books.

In *Austin*, the U.S. Supreme Court examined the constitutionality of a nearly identical media exemption under Michigan law. The provision was challenged on Equal Protection grounds by a non-media corporation, which argued that there was no basis for exempting media-

based corporations and not all corporations. *Austin*, 494 U.S. at 667. The Supreme Court rejected the challenge, recognizing "the unique societal role that the press plays in 'informing and educating the public, offering criticism, and providing a forum for discussion and debate.'" *Id.* (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978)). As opposed to an average corporation, the media uses "resources [that] are devoted to the collection of information and its dissemination to the public." *Austin*, 494 U.S. at 667. Thus, the Court rejected the challenge because the non-media based corporation did not share any of these qualities with the press, and the State had a compelling interest in protecting the free exchange of ideas.

The facts of this case demonstrate that the function served by Mr. Soros, as an author of a book, is much more analogous, if not identical, to the function of newspapers, magazines and periodicals than it is to a typical corporation. The authorial role served by Mr. Soros involves exactly the same qualities and characteristics as those media protected in *Austin*: the collection and dissemination of information and viewpoint to the public. His book and advertisement are aimed directly at informing the public about a particular political viewpoint that is a quintessential example of the exchange of ideas in the global marketplace.

The General Counsel cannot demonstrate a unique reason supporting the exclusion of books from the publication exemption. Notably, the Court in *Austin* made no distinction between publications (like Mr. Soros's) and periodicals, magazines, or newspapers. This is noteworthy, because, unlike 11 C.F.R. § 100.132, the Michigan statute under review *specifically included publications* in its list of exempt media. *See Austin*, 494 U.S. at 667. Yet the Court treated each of these media, including publications, as directly covered under the media exemption because each shared the same fundamental characteristics described above. The Commission has also treated books, newspapers, and magazines as one and the same in its other regulations, *see* 11

C.F.R. § 104.15 (stating that the use of information from public reports by "newspapers, magazines, books or other similar communications" is permissible under certain circumstances), yet it inexplicably does not do so here.

To demonstrate the absurdity of the proposed application of § 434(c) to Mr. Soros, had he instead published a magazine discussing American foreign policy, and subsequently distributed the exact same solicitation brochure to the same individuals on the rented mailing list, he would have been exempted under 11 C.F.R. § 100.132 and would not be required to report his expenses. Yet because he published the same thoughts and ideas in a book, the General Counsel believes he is required to report his expenses and is subject to civil penalty. The Constitution cannot support such a distinction.

C. Should the Commission Conclude that Mailing List Costs Are Independent Expenditures, the Press Exemption Applies to Mr. Soros's Book Solicitation, Which Attempts to Publicize His Book and Generate Readership and Sales.

Under federal law, the press exemption applies if an expenditure constitutes a business activity of an entity and serves a normal business purpose of either soliciting subscriptions, *see FEC v. Phillips Publishing, Inc.*, 517 F. Supp. 1308, 1313 (D.D.C. 1981), or publicizing the entity's regular publications, *see Reader's Digest Ass'n, Inc. v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981). In *Phillips Publishing*, the court concluded that the press exemption applied where the respondent publisher distributed a solicitation letter to boost sales and subscriptions to its newsletter. Although the publication contained language expressly advocating the defeat of a political candidate in a federal election, the court concluded that the "purpose of the solicitation letter was to publicize [the publication] and obtain new subscribers, both of which are normal, legitimate press functions." *Phillips Publishing*, 517 F. Supp. at 1313. Moreover, in *Reader's Digest*, the court concluded that the press exemption applied where the publication distributed

copies of a video tape to television networks that contained a reenactment of a car accident of a political candidate. The publication simultaneously distributed an article discussing the accident. The Commission argued that *Reader's Digest* had violated the Act by making illegal corporate expenditures to influence the election, however, the court concluded that the distribution of the video tape fell within the press exemption. It stated that the publication acted in its publishing function when disseminating the video tape because its purpose "was to publicize the issue of the magazine containing the [accident] article." *Reader's Digest*, 509 F. Supp. at 1215. Moreover, the Commission has extended the exemption to those situations where a publication is available to the general public and is equivalent to a newspaper, magazine or other publication. *See* AO 2005-16, at 5. Indeed, as explained above, the Commission already treats books the same as magazines and newspapers. *See* 11 C.F.R. § 104.15.

Here, Mr. Soros performed an equivalent function as those performed by the publishers and distributors in *Phillips Publishing* and *Reader's Digest*: to facilitate the expression of his viewpoint in the media through solicitation or publicity. First, Mr. Soros's solicitation specifically encouraged recipients to go online or to a bookstore and purchase his book. As explained above, the book was featured prominently, and in some cases exclusively, on the front and back inside and outside covers. Second, the solicitation sought to heighten the publicity and attention surrounding the book with the expectation of generating readership and purchases. Both of these functions were the customary practices of publications such as magazines, newspapers, and other publications. These attempts to attract business or publicize a media publication satisfy the press exemption.

Consequently, if the Commission concludes that the brochure itself was not subject to required reporting, then obviously no question is presented as to the rental of the mailing list.

D. Should the Commission Conclude the Press Exemption Does Not Apply, the Constitutional Right to Freedom of Expression Precludes the Commission from Requiring Mr. Soros to Disclose Advertising Expenditures Relating to the Publication of His Book.

Requiring the disclosure of mailing list expenses associated with the distribution of a book is an unconstitutionally overbroad application of 2 U.S.C. § 434(c) in violation of the First Amendment right to freedom of speech. "[I]ndependent campaign expenditures constitute political expression at the core of our electoral process and of the First Amendment freedoms." *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 662-63 (1990). Because campaign finance disclosure requirements infringe on core political speech, their application is reviewed under exacting, or strict, scrutiny. *See Buckley v. Valeo*, 424 U.S. 1, 64, 75 (1976). Under such circumstances, a law is upheld "only if it is narrowly tailored to serve an overriding state interest." *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995).

First, as applied to Mr. Soros, § 434(c) is not narrowly tailored because it requires him to report the cost of producing and distributing an overwhelming amount of political expression that is unrelated to the express advocacy of an electoral campaign. As applied, the General Counsel's interpretation would require the disclosure of *all* production and distribution expenses associated with the sale of an entire book even if it only once advocates the election or defeat of a candidate. The most cursory of reviews reveals that the overwhelming purpose and message of Mr. Soros's book and book solicitation is to engage in political expression about the state of American leadership in the world as a result of the Iraq War. For example, less than 1% of all sentences contained in the brochure state Mr. Soros's personal opinion on the election. Moreover, three of the four most important pages of the brochure, the front and back outside and

inside covers, contain a picture of *The Bubble of American Supremacy*. The call to action in the brochure is not to get out and vote but to purchase the book.[2]

To require Mr. Soros to disclose the costs associated with the production of speech that, at best, incidentally advocates the defeat of a candidate, is a broad sweeping and constitutionally untenable application of § 434(c). The regulation encompasses substantially more communication than is permissible for the FEC to regulate.

When determining whether the application of a campaign finance disclosure requirement is narrowly tailored, the U.S. Supreme Court has also attached meaningful importance to "the possibility of consequent chill and harassment." *Buckley*, 424 U.S. at 82, n.109. While the existence of chill is not necessary to establish a First Amendment violation, "[t]he fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 254 (1986). For example, in the context of corporate disclosure requirements, the Court has recognized that the imposition of additional administrative burdens is unconstitutional when "persons might well be turned away by the prospect of complying with all the requirements imposed by the Act." *Id.* at 255.

Here, the General Counsel's application, if applied to others, would have the unfortunate and unintended consequence of chilling the expression of political viewpoint in books. There are

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[2] The mere abstract advocacy of personal views regarding a candidate or election is not the same as actively advocating that others act to cast a ballot for or against a particular candidate. "American constitutional law recognizes a fundamental distinction between belief and activity." *Allende v. Shultz*, 845 F.2d 1111, 1117 n.11 (1st Cir. 1998); *see also Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969) (distinguishing between mere advocacy and incitement to action); *Reynolds v. United States*, 98 U.S. 145, 166 (1878) ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may

potentially hundreds, if not thousands, of books produced every year that advocate, in some small part, the election or defeat of a candidate. It is fair to assume that campaign finance disclosure requirements, which with the vast majority of authors are probably unfamiliar, create a strong disincentive to authorship. This is particularly true given the Commission's exemption of costs incurred to produce a news story, commentary or editorial by any broadcasting station, website, newspaper, magazine or other periodical publication. *See* 11 CFR § 100.132. Enforcing the regulation against books but not against other similar conventional media will discourage the distribution of viewpoints through books. For other individuals who continue to express their viewpoints through books, it is easy to envision such authors finding themselves in need of counsel to guide them through the unfamiliar filing and disclosure process. Rather than choosing to expend the funds to comply with the new interpretation, such individuals would most likely choose the easier path and eliminate altogether the few references they have made to candidate advocacy, thus chilling political expression. Moreover, the General Counsel's overbroad application would unconstitutionally require authors who anonymously publish books that incidentally contain express advocacy to reveal their identities on disclosure forms. *See McIntyre*, 514 U.S. at 343 & n.6.

Second, the government cannot demonstrate that the application of § 434(c) is narrowly tailored to serve a *compelling* governmental interest. While the government traditionally and generally has a strong interest in providing the electorate with information regarding public elections and in preventing any corrupting effects of large expenditures, *see Buckley*, 424 U.S. at 66-68, the government's interest is at its zenith in cases where the overwhelming or entire

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with practices."). Here, Mr. Soros's discussions of President Bush refer to his personal beliefs and do not ask voters to actively cast their vote against President Bush.

content of speech advocates the election or defeat of a candidate and is at its nadir where speech incidentally does so. This is so because the *ability* to corrupt candidates and inform the public is substantially lessened when the impact of any candidate related advocacy is minimal or altogether drowned-out by pure political speech. *See FEC v. Cal. Democratic Party*, 2004 WL 865833 (E.D. Cal. Feb. 13, 2004) (radio advertisements); *FEC v. Freedom's Heritage Forum*, 2000 WL 33975409 (W.D. Ky. Apr. 28, 2000) (flyers).

Here, as explained above, the overwhelming majority of expression contained in Mr. Soros's book and brochure does not advocate the election or defeat of a candidate. Consequently, the government's interest in preventing corruption and educating the public about the 2004 election is at its lowest. When balanced against the clear infringement on Mr. Soros's right to freely express his viewpoint, and combined with the likely potential to chill additional political speech, the government's interests do not constitutionally support the application of § 434(c) to Mr. Soros.

E. The Commission Should Conclude That Probable Cause Does Not Exist To Establish That A Reporting Violation Has Occurred.

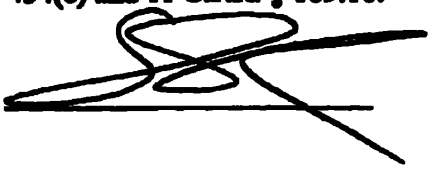
The Commission should reject the General Counsel's recommendation and refuse to exercise its discretion to find probable cause that a violation has occurred. At all stages of these proceedings, Mr. Soros has cooperated fully with the Commission, and at all times during the disclosure process he has acted in nothing less than good faith. Mr. Soros has even disclosed to the Commission more than what was required by the independent expenditure laws. Although the Commission has since promulgated regulations that bring Internet communications within the scope of independent expenditure regulations (*see* Explanation and Justification, Internet Communications, 71 Fed. Reg. 18589-614 (Apr. 12, 2006)), at the time of Mr. Soros's communications, Internet communications were explicitly exempted from reporting and

disclosure requirements. Though not required by statute or regulation to do so, Mr. Soros nevertheless disclosed in his Form 5 Reports over $300,000 of costs associated with website design and Internet advertising. Additionally, the entire cost of the production and distribution of the brochure is reported rather than allocating a portion to book sales and a portion to the dissemination of Mr. Soros's opinion on the election.[3] Moreover, Mr. Soros has repeatedly offered to amend his disclosure statements to accommodate the General Counsel's viewpoint. Permitting Mr. Soros to amend his statements would facilitate one of the Commission's primary responsibilities: "to encourage voluntary compliance." 2 U.S.C. § 437d(a)(9). As the Commission is undoubtedly aware, under 2 U.S.C. § 438(e), anyone who relies on the rules and regulations of the Commission, and acts in good faith, shall not be subject to sanction.

IV. CONCLUSION

For the foregoing reasons, the Commission should conclude that there is not probable cause to establish that Mr. Soros violated 2 U.S.C. § 434(c) and 11 C.F.R. § 109.10.

DATE: May 31, 2007



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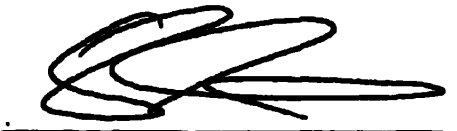
[3] One alternative would be to allow Mr. Soros to amend his reports to reduce the amount reported for the mailing to reflect only that portion attributable to the election-specific portion of the brochure, but to add a portion of the mailing list rental cost.

CERTIFICATE OF SERVICE

On this date a mail courier delivered 10 copies of this Brief to the Office of the Secretary of the Commission and 3 copies to the Office of the General Counsel of the Commission at the following address:

Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

I declare that the statements above are true to the best of my information, knowledge and belief.



Christopher R. Pudelski

Dated: May 31, 2007