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February 3, 2005

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

Re: MUR 5626

Dear Mr. Norton:

This letter is submitted on behalf of Respondents the New Democrat Network ("NDN") and its related entities in response to a complaint filed with the Commission on December 10, 2004, by the Campaign Legal Center ("Complainants").

In that complaint, the Complainants attempt to revise the legislative history of the Bipartisan Campaign Reform Act of 2002 (BCRA), continually misstate case law, and, in some cases, beseech the Commission to ignore or defy court decisions binding upon both the Commission and the signatories to the complaint.

In addition to presenting faulty legal arguments in support of their complaint, the Complainants fail to allege facts sufficient to constitute a violation of the Federal Election Campaign Act of 1971, as amended ("FECA" or the "Act"), or the Commission's regulations.

For the reasons set forth below, the Commission should find no reason to believe that Respondents violated or are about to violate the Act or the Commission's regulations.

INTRODUCTION

NDN is (and was at all times relevant to the complaint) a *bona fide* membership organization as defined at 11 C.F.R. 114.1(e)(1). NDN PAC is a separate segregated fund of which NDN is the connected organization. NDN PAC is registered with and reports to the Commission pursuant to the provisions of FECA.

NDN paid for certain issue ads that appeared on television during 2003 and 2004. Those ads are the subject of the complaint filed in this matter. Complainants allege that those ads

should have been paid for with funds subject to FECA. However, as explained below, NDN is not a political committee and those ads were not expenditures. Other than through its separate segregated fund, NDN does not receive or make federal contributions. Thus, Respondents are in full compliance with FECA, Commission regulations and other applicable law.

I. NDN Is Not A Political Committee.

NDN is not a political committee required to register with the FEC. NDN does not meet the definition of "political committee" set forth at 2 U.S.C. § 431(4) as construed by the courts in a series of decisions which have left the term largely undisturbed since the U.S. Supreme Court's 1976 decision in *Buckley v. Valeo.*[1]

a. Definition of "Political Committee"

As the law currently stands, there is a two-pronged test for determining whether an entity is a "political committee" under the Act. "[A]n organization is a "political committee" under the Act if it received and/or expended $1,000 or more and had as its major purpose the election of a particular candidate or candidates for federal office." FEC v. GOPAC, 917 F.Supp. 851, 862 (D.D.C. 1996).[2] The first prong is the statutory test: whether the entity receives "contributions" or makes "expenditures" as those terms are defined in the Act. See 2 U.S.C. 431(4). In *Buckley*, the Supreme Court construed "contributions" as those funds used to make direct contributions to candidates, to make express advocacy communications, or to make expenditures coordinated with candidates. See Buckley, 424 U.S. at 77-78, 80. Similarly, the Court narrowly construed the definition of "expenditure" to reach "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." Buckley, 424 U.S. at 79-80.

Thus, under FECA, organizations, like NDN, operating independently of any Federal candidate or political party that do not make $1,000 in contributions to Federal candidates and do not expend at least $1,000 for communications that expressly advocate the election or defeat of a clearly identified Federal candidate are not Federal political committees.

Even those entities that do receive $1,000 in "contributions" or make $1,000 in "expenditures" may not be political committees. Under the second prong of the test, if the entity has received contributions or made expenditures, an inquiry is made into the entity's purpose. In order to fall within the definition of "political committee" as construed by the Federal courts, an entity must, in addition to meeting the $1,000 contribution or expenditure threshold, have as its major purpose "the nomination or election of a particular candidate or candidates for federal office."[3] GOPAC, 917 F.Supp. at 859. This second prong of the political committee test is

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[1] 424 U.S. 1 (1976).

[2] In *Buckley*, the Supreme established the two-prong test to address its concerns that the statute could be interpreted to reach groups that make contributions and/or expenditure but engage "purely in issue discussion." Buckley, 424 U.S. 79. The second prong was added to avoid vagueness concerns. Organizations that receive contributions and/or make expenditures must also be "under the control of a candidate" or "the major purpose" of the organization must be the nomination or election of a candidate. Id.

[3] The Complainants wrongly assert that the statutory test is the second (rather than the first) prong of the analysis used for determining whether an entity is a political committee, thereby engaging in the misapplication of even the

another limitation the Supreme Court has placed upon FECA's statutory definition of "political committee." The *Buckley* Court concluded that to include within the purview of the Act every entity that receives contributions or makes expenditures would sweep too broadly. Only those entities "under the control of a candidate or the major purpose of which is the nomination or election of a candidate" were included within the Court's narrowing interpretation of "political committee." See Buckley, 424 U.S. at 79. In the *GOPAC* decision, which the Complainants (who are not a federal appellate court) opine was wrongly decided,[4] the District Court interpreted the *Buckley* Court's use of the phrase "a candidate" to mean not just any candidate, but rather "a particular candidate or candidates for federal office."[5] In opting not to appeal the *GOPAC* decision—a move that seems to have been overlooked by the Complainants—the Commission signaled to the regulated community that it agrees with, or will at least abide by, the *GOPAC* court's decision.

i. Neither BCRA nor *McConnell* Altered the Definition of "Political Committee."

Respondents are fully aware that the Complainants desperately wish that BCRA or the *McConnell* decision altered the definition of political committee or prohibited the use of soft money by independent groups like NDN. Neither did. The basic definitions provided by Congress in the 1974 FECA amendments have remained unchanged in the statute for thirty years,[6] and the purpose of BCRA was *not*, as the Complainants allege, "to stop the raising and spending of soft money,"[7] but rather to address the corruption of federal officeholders (or the appearance thereof) resulting from large soft money contributions to the national parties and the use of labor and corporate funds to pay for issue advertising in the 30 or 60 days prior to a primary and general election.

1. BCRA Is A Statute of Limited Purpose and Scope.

BCRA did not address FECA's statutory definitions of "political committee," "contribution" or "expenditure." Instead, it was passed to address two primary issues of concern related to soft money. First, to eliminate even the appearance of corruption, it prohibits federal candidates and officeholders 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" on to FECA's prohibition on corporate and labor

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most basic principles of judicial interpretation and statutory construction. The Court's initiation of a "major purpose" test is a partial remedy to the vagueness problems presented by the face of the statute, not *vice versa*.

[4] See CLC Complaint at para. 21.

[5] The Complainants note that *McConnell* "restated the 'major purpose' test for political committee status as iterated in *Buckley*." Complaint at para. 19. While it is true that the *McConnell* Court made reference to *Buckley*'s "major purpose test, the Complainants fail to point out that the Court did not invalidate, or even give unfavorable treatment to, the *GOPAC* Court's interpretation of *Buckley*'s "major purpose" standard.

[6] In 1997, Senators McCain and Feingold proposed legislation that "addressed electioneering issue advocacy by redefining 'expenditures'." Brief for Defendants at 50, McConnell, 251 F.Supp. 2d 176 (citing 143 Cong. Rec. S10101, 10108). This proposal was never adopted.

[7] See Complaint at para. 1.

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).

a. BCRA's Framers Embraced the Express Advocacy Standard.

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.

2. *McConnell* Did Not Re-interpret FECA's Statutory Definitions of Political Committee or Expenditure.

In December 2003, the Supreme Court in *McConnell* upheld the constitutionality of BCRA, but did not reinterpret the definitions of "political committee" or "expenditure."[8] While

[8] 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

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 fact remains that Congress did not amend or revise those definitions during its drafting of BCRA. For this reason, the Court could not have reinterpreted them, as the issue was not properly before the Court. Thus, the *McConnell* Court – like Congress – did not change the definitions of expenditure or political committee.

b. NDN Does Not Fall Within the Definition of "Political Committee."

NDN does not receive contributions or make expenditures, and is, therefore, not a political committee. Even if it had received contributions or made expenditures, it would not fall within the definition of political committee because it does not have as its major purpose "the nomination or election of a particular candidate or candidates for federal office."[9] GOPAC, 917 F.Supp. at 859.

i. NDN Does Not Receive Contributions or Make Expenditures.

NDN does not receive contributions or make expenditures. As stated above, "contributions" are those funds used to make direct contributions to candidates, to make communications that expressly advocate the election or defeat of a federal candidate, or to make expenditures coordinated with candidates. See Buckley, 424 U.S. at 77-78, 80. Similarly, the Court narrowly construed the definition of "expenditure" to reach "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." Buckley, 424 U.S. at 79-80. NDN does not make direct contributions to federal candidates, they do not make expenditures coordinated with federal candidates, and they do not fund communications that expressly advocate the election or defeat of a clearly identified candidate.

1. NDN's Communications Do Not Expressly Advocate the Election or Defeat of Federal Candidates.

The Complainants wrongly allege that NDN funded express advocacy communications. See Complaint at para. 31. The Complainants, incredibly, base this allegation on, and only on, 11 C.F.R. § 100.22(b), which has been declared unconstitutional by every federal court that has

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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.

[9] The Complainants wrongly assert that the statutory test is the second (rather than the first) prong of the analysis used for determining whether an entity is a political committee, thereby engaging in the misapplication of even the most basic principles of judicial interpretation and statutory construction. The Court's initiation of a "major purpose" test is a partial remedy to the vagueness problems presented by the face of the statute, not *vice versa*.

ever addressed it.[10] See, e.g., Va. Soc'y for Human Life, Inc., v. FEC, 263 F.3d. 379 (4th Cir. 2001); Maine Right to Life Comm. v. FEC, 98 F. 3d 1 (1st Cir. 1996); Right to Life of Dutchess Cty., Inc. v. FEC, 6 F.Supp. 2d 248 (S.D.N.Y. 1998). Judge Kollar-Kotelly noted in the District Court's *McConnell* decision that, "[i]n fact, only one decision concluded that the FEC could make such a regulation, FEC v. Furgatch, 807 F.2d 857 (9th Cir. 1987), a case that has been largely discredited." McConnell v. FEC, 251 F.Supp. 2d 176, 601 (D.D.C. 2003). Section 100.22(b) is not good law, and the Complainants' reliance upon it is misplaced.

If, however, the General Counsel's Office should choose to throw caution—and nearly a decade of legal precedent—to the wind by attempting to resurrect § 100.22(b), an examination of the three communications cited by the Complainants as express advocacy shows that, even using the unconstitutional standard of § 100.22(b), those ads do not expressly advocate the election or defeat of a federal candidate.

a. "Faces"

The television ad "Faces" makes no reference to any clearly-identified federal candidate.[11] The ad makes no reference to any campaign, to any election, the date of an election or to voting. There is no exhortation to support or oppose a candidate. "Faces" is not an "electoral" ad and contains no "electoral portion," thus, § 100.22(b) would not apply. But, even using the invalid § 100.22(b) standard, the ad does not contain express advocacy.

The focus of the ad is health insurance legislation proposed by Democrats that would benefit Latinos and is generally supportive of that plan. The ad asks the viewer to call their congressmen and ask them to support the plan.

First, if there is an "electoral portion" of "Faces" is not "unmistakable, unambiguous, and suggestive of only one meaning." 11 C.F.R. § 100.22(b)(1). There is no "electoral portion" of the ad at all. There is no reference to a clearly-identified federal candidate, no exhortation to support or oppose a candidate in any election. Taken on its face, the ad is a call to support a particular health care plan and an encouragement to viewers—who may or may not be eligible to vote—to communicate this support to their Congressman. It could be interpreted to mean that Republicans should be encouraged to support the plan. It could mean that people should not be uninsured. It is simply not "suggestive of only one meaning."

Second, taken as a whole, especially in light of the fact that it mentions no candidate, a reasonable person would certainly view it as a communication that encourages passage of a particular piece of health care legislation, not as an "electoral" ad. Respondents think it unreasonable to conclude that an ad that does not mention a federal candidate encourages action

[10] This regulation defines "expressly advocating" to mean any communication "when taken as whole with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because – (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action." 11 C.F.R. 100.22(b).

[11] The version of "Faces" referenced by Complainant appeared only on the internet and was viewed only by visitors to NDN's website.

to elect or defeat some unnamed candidate, but are willing to concede that reasonable minds may differ on this. See 11 C.F.R. 100.22(b)(2). For these reasons, "Faces" does not expressly advocate.

b. "Two Jobs"

The television ad "Two Jobs" makes no reference to any clearly-identified federal candidate.[12] The ad makes no reference to any campaign, to any election, the date of an election or to voting. There is no exhortation to support or oppose a candidate. "Two Jobs" is not an "electoral" ad and contains no "electoral portion," thus, § 100.22(b) would not apply. But, even using the invalid § 100.22(b) standard, the ad does not contain express advocacy.

In Two Jobs, a Latino discusses his long day spent working two jobs. The ad discusses a Democratic plan to raise minimum wage and points out that the Republicans oppose the plan. The ad asks the viewer to call her Congressman and ask him to support the Democratic plan.

Again, "Two Jobs" has no "electoral portion." If there is an electoral portion, it is not "unmistakable, unambiguous and suggestive of only one meaning." 11 C.F.R. 100.22(b)(1). It makes not reference to a federal candidate. Taken on its face, it is a basic statement regarding a proposal to raise the minimum wage, and an encouragement to the viewer—who may or may not be eligible to vote—to urge their Member of Congress to support the proposal. It could easily be interpreted as a communication favoring a raise in minimum wage without regard to any effect the proposal may have on any election. It could be interpreted to mean that Republicans should be encouraged to support the plan. Or it could mean that people should not have to work two jobs to support a family and this should be brought to the attention of the viewer's Congressman.

Taken as a whole, and considering that no candidate is referenced, a reasonable person would conclude that "Two Jobs" calls for the viewing public to support an increase in the minimum wage. Again, Respondents think it unreasonable to conclude that an ad that does not mention a federal candidate encourages action to elect or defeat some unnamed candidate, but are willing to concede that reasonable minds may differ on this. See 11 C.F.R. 100.22(b)(2). For these reasons, "Two Jobs" does not expressly advocate.

c. "Broken Promises"

Like "Faces" and "Two Jobs", "Broken Promises" is another issued ad regarding a matter of important public policy—education. This ad last aired in July 2004—four months prior to the presidential election. The ad refers to President Bush and discusses the failure of his administration to fund the "No Child Left Behind" program. The ad never makes reference to any campaign, an election, the date of an election or to voting. There is no exhortation to support or oppose President Bush. "Broken Promises" is not an "electoral" ad and contains no "electoral portion," thus, § 100.22(b) would not apply. But, even using the invalid § 100.22(b) standard, the ad does not contain express advocacy.

[12] The version of "Two Jobs" referenced by Complainants appeared only on the internet and was viewed only by visitors to NDN's website.

Like the other ads cited by the Complainants, "Broken Promises" has no "electoral portion." If there is an electoral portion, it is not "unmistakable, unambiguous and suggestive of only one meaning." 11 C.F.R. 100.22(b)(1). Taken on its face, it is a basic statement of the failure of the "No Child Left Behind" program. It could easily be interpreted as a plea for more funding for schools. It could be interpreted to mean that President Bush should follow through on his pledge to better fund public education. Or it could mean that the viewer should write to President Bush and tell him to fund public schools to the degree to which he said he would. Even the "evidence" provided by the Complainants regarding "Broken Promises" fails to support their assertion that NDN engaged in express advocacy under the invalid § 100.22(b) standard. See Complaint at para. 12. Complainants demonstrate that a Los Angeles *Times* reporter interpreted "Broken Promises" not to be an attack on President Bush, but rather, an attack on his record on education. See id. This is issue advocacy at its most basic.

Taken as a whole, and considering it last aired approximately four months prior to the presidential election, a reasonable person would conclude that "Broken Promises" calls for the viewing public to support an increase in funding for public schools. It would be unreasonable to conclude that the ad encourages action to elect or defeat a candidate, but Respondents are willing to concede that reasonable minds may differ on this. See 11 C.F.R. 100.22(b)(2). For these reasons, "Broken Promises" does not expressly advocate.

These are the only ads reference by the Complainants in their complaint against Respondents. For the reasons stated above, none of these three ads expressly advocate the election or defeat of a clearly identified federal candidate. Indeed, no ads paid for in whole or in part by NDN contain express advocacy on behalf of (or against) any federal candidate under the invalid standard of § 100.22(b) or any other standard.

Because NDN does not expressly advocate the election or defeat of federal candidates, it does not make contributions or expenditures. Thus, the first prong of the definition of political committee has not been met and NDN is not required to register or file reports with the Commission.

ii. The Nomination or Election of a Particular Candidate or Candidates for Federal Office is Not NDN's Major Purpose.

If, for some reason, the Commission determines that prong one has been satisfied, NDN is still not a political committee because its major purpose is not the nomination or election of a particular candidate or candidates for federal office. See GOPAC, 917 F.Supp. at 859.

NDN is a membership organization that promotes the NDN Agenda, advocates that agenda to the public and attempts to persuade local, state and federal officials to support it. The NDN Agenda "strongly affirms the common purpose of progressive politics, and brings along Democrats, Independents, and disaffected Republicans in a sustaining majority coalition committed to ensuring that the world we are leaving for our children is a better one than has been left for us" and focuses on ways to expand prosperity and opportunity, assert responsible global leadership, protect the homeland, strengthen families and communities, modernize our health

care system, and leave behind an even more beautiful America.[13] NDN's purpose is to advocate for a better agenda for the nation and promote strategies to modernize progressive politics and build a durable Democratic majority.

As part of its advocacy for the NDN Agenda, NDN supports candidates at the local and state levels who promote the NDN Agenda, while NDN's separate segregated fund, NDN PAC supports federal candidates who promote the NDN Agenda. Supporting candidates for elected office at all levels of government is one method NDN uses to help build support for the NDN Agenda and build a durable Democratic majority from the grassroots up.

NDN may occasionally support candidates for state and local office, and NDN may occasionally issue endorsements of candidates for federal office to its members, but these are not goals in and of themselves. Rather, they are but two of many means employed to help NDN build a durable Democratic majority and achieve broad acceptance of its Agenda by promoting its vision and policies to the public and elected officials.

The Complainants argue that NDN has paid for broadcast ads "expressly referring to, and attacking or opposing, President Bush. Thus, the New Democrat Network has a 'major purpose' to support or oppose particular federal candidates...." Complaint at para. 26. A single ad may reference President Bush, but it does not attack or oppose him.[14] It expresses disapproval of his administration's policy positions. And, even if the ad did "attack or oppose" President Bush, which it does not, that is not the same as having a major purpose of the nomination or election of a particular candidate or candidates to a particular federal office.

The Complainants say that "[t]he New Democrat Network has spent significant amounts" on three broadcast ads "expressly referring" to President Bush. In reality, only one of approximately 25 television ads aired by NDN during the 2003 – 2004 election cycle referred to President Bush. None of these ads referred to President Bush's opponents. No ads referring to President Bush ran within 60 days of the presidential election. More of these approximately 25 ads made reference to non-federal candidates than made reference to President Bush. The overwhelming majority of these ads made reference to no candidate at all. In light of all these facts, the fact that only one television ad even mentioned President Bush, and it was broadcast months before the presidential election, cannot—by any stretch of the imagination—mean that NDN's major purpose is the nomination or election of a particular candidate for a particular federal office.[15]

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[13] <http://www.newdem.org/agenda/>, visited February 1, 2005.

[14] The Complainants claim that ads paid for by independent issue organizations that "promote, support, attack or oppose" federal candidates are "for the purpose of influencing a federal election." The "promote, support, attack or oppose" concept first introduced into FECA in BCRA applies only to state and local political parties. See 2 U.S.C. 441i(b). NDN is not a state or local political party. Furthermore, the phrase "for the purpose of influencing a federal election," as it applies to independent political organizations has consistently been interpreted by the courts to mean express advocacy. See Buckley, 424 U.S. 1, 76 – 80.

[15] As further "evidence" that NDN has as a major purpose the nomination or election of a particular candidate for a particular federal office, the Complainants point to a statement by Joe Garcia, a senior advisor to NDN, in which he said, "I think this is probably the most important election of my general, and I have to get involved." Complaint at para. 14. Apparently, the Complainants overlooked the fact that the election referenced by Mr. Garcia included hundreds of races at the local, state and federal level.

The purpose of NDN is not the election or nomination of candidates to federal office, and certainly not "the nomination or election of a particular candidate or candidates for federal office." FEC v. GOPAC, 917 F.Supp. 851, 859.

Because the nomination or election of a particular candidate or candidates for federal office is not NDN's major purpose, NDN is not a political committee.

c. NDN is not Subject to FECA's Registration and Reporting Requirements.

Political committees are required to register and file disclosure reports with the Commission. See 2 U.S.C. § 433 – 434. Because NDN is not a political committee, it is not required to register or file disclosure reports with the Commission pursuant to FECA.[16]

II. NDN May Lawfully Raise and Spend Soft Money.

Because NDN is not a political committee, it is not required to abide by FECA's contribution limits for political committees set forth at 2 U.S.C. § 441a. Because it is not governed by these limits, NDN may raise and spend unlimited amounts from such sources as individuals, corporations and labor organizations.

a. All 527 Political Organizations Do Not "By Definition" Have the Major Purpose of Nominating or Electing A Federal Candidate.

Complainants assert that "any group that chooses to register as a 'section 527 group'...is by definition an entity 'the major purpose of which is the nomination or election of a candidate....'" Complaint at para. 25. Complainants here cite *Buckley*. In doing so, Complainants are asserting that every 527 political organization has a major purpose to nominate or elect federal candidates. Complainants are simply wrong.

Section 527 of the Internal Revenue Code describes the exempt function of a political organization as:

> "the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to and Federal, State or Local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed."

26 U.S.C. § 527(e)(2). Section 527 encompasses groups organized to attempt to indirectly influence the appointment of cabinet officers, the election of a mayor, the selection of officers for state or local political parties, the nomination of federal, state and local judges. It can even encompass a group organized to elect a person as Chair of a 527 political organization that is

[16] If NDN funds "electioneering communications," they would be required to file electioneering communication reports with the Commission pursuant to 2 U.S.C. 434 (f).

itself organized to influence the election of a county commissioner. Thus, by definition, not every 527 organization has as its major purpose the nomination or election of a federal candidate.

Indeed, in her testimony before the House Administration Committee, Commissioner Weintraub explained that the scope of § 527 is very broad. She used comments submitted to the Commission by John Pomeranz to illustrate the point that the IRS has "long construed section 527 so broadly that he described it as the regulatory equivalent of a 'kitchen junk drawer.'" Testimony of Ellen L. Weintraub before the Committee on House Administration (May 20, 2004) at 1.

She noted further that "IRS rulings have included within section 527's scope organizations engaged in activities far from the traditional domain of campaign finance regulation" including: organizations that seek candidate commitments to the organization's code of fair campaign practices; organizations that promote state ballot measures likely to bring out voters that would support a federal candidate; and organizations that publish ratings of candidates based on nonpartisan criteria. See id at 2.

Complainants assertion that all 527 political organization have a major purpose of nominating or electing federal candidates is legally and factually incorrect.

b. BCRA Did Not Prohibit Non-Political Committee Political Organizations From Raising or Spending Soft Money to Fund Issue Advocacy.

As explained above, BCRA was a statute of limited purpose and scope. It 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.[17] It does not, and was not intended to, prohibit independent political organizations like NDN from raising and spending soft money.

i. BCRA's Framers Endorsed the Continued Use of Soft Money by 527 Organizations.

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. 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

[17] BCRA does prohibit NDN from using corporate or labor union funds to pay for electioneering communications. See 2 U.S.C. 434(f).

provision. Anyone not meeting any single one of those criteria will not be affected." 147 CONG. REC. S2455, 2456 (Mar. 19, 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).

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. 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).

Just yesterday, February 2, 2005, the framers of BCRA conceded that BCRA left 527 organizations free to raise and spend soft money. Senator John McCain introduced legislation that would limit the raising and spending of soft money by 527s. According to today's New York Times, "The campaign finance law championed by Mr. McCain in 2002 [BCRA] stopped political parties from collecting the unlimited soft money contributions that grew to dominate presidential races in the 1990's. But it did not restrict groups known as 527 committees from collecting six and seven-figure checks." Glen Justice, *McCain Calls for New Limits on Money to Political Groups*," N.Y. TIMES, Feb. 3, 2005. at A14.

Senator McCain's introduction of new legislation that would make the raising and spending of soft money by 527 organizations illegal is an acknowledgement that BCRA itself did not outlaw such activity.

ii. *McConnell* Reaffirmed the Right of Interest Groups to Engage in Issue Advocacy Using Soft Money.

When the *McConnell* plaintiffs complained to the Supreme Court that BCRA's ban on the raising and spending of soft money by political parties and candidates favored interest groups over political parties, the Court agreed, stating that:

> "BCRA imposes numerous restrictions on the fundraising abilities of political parties, of which the soft-money ban is only the most prominent. **Interest groups, however, remain free to raise soft money to fund voter registration, GOTV activities, mailings and broadcast advertising (other than electioneering communications).** We conclude that this disparate treatment does not offend the Constitution."

McConnell, 124 S.Ct. at 685-686 (emphasis added). The Court was fully aware that, even after BCRA's implementation, independent interest groups like NDN would continue to fund issue advocacy with soft money, and unreservedly affirmed their right to do so.[18] Had the Court believed that the raising and spending of soft money by these independent interest organizations to fund issue advocacy converted them to "political committees," it is unlikely the Court would have endorsed this right.

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[18] Common Cause and the Brennan Center, long-time proponents of campaign finance reform also acknowledged that "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).

iii. The FEC Acknowledged that BCRA Allows Independent Political Organizations to Engage in Issue Advocacy Using Soft Money.

In its argument to the *McConnell* Court, the FEC 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.

Because NDN is not a political committee subject to FECA's contribution limitations and because BCRA does not prohibit NDN from raising and spending soft money, NDN's use of soft money to pay for issue advocacy is perfectly legal and does not constitute a violation of FECA or the Commission's regulations.

III. NDN PAC is a Federal Committee and Fully Complies with FECA and the Commission's Regulations.

NDN PAC is the separate segregated fund of NDN. It is registered with the Commission as a political committee. It files disclosure reports are required by FECA. The Complainants do not allege otherwise.

For these reasons, NDN PAC is not in violation of FECA or the Commission's regulations.

IV. The Complaint Alleges No Factual Basis for the Commission to Determine There is Reason to Believe Respondents Violated FECA or Commission Regulations.

The bases of the Complaint in this matter are that: (1) 527 political organizations are, by definition, federal political committees that must register with the FEC; and (2) that NDN's ads contain express advocacy. Both of these bases are legally incorrect.

In addition to an incorrect legal theory, this complaint is devoid of any facts that would give rise to a violation of FECA. The Complainants' theory that independent political organizations that have not made expenditures or received any contributions for the purpose of making expenditures is a political committee that must register with the FEC has no basis under current law. The factual allegations made in support of this theory cannot constitute violations of a statute that does not apply to NDN.

Conclusion

For the reasons set forth above, we respectfully request that the Commission find that there is no reason to believe that Respondents have violated the Act or the Commission's regulations and to close this matter without further action.

Respectfully submitted,

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James Lamb
Jessica Robinson