FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
American Leadership Project;	)	MURs 5977 and 6005
Roger V. Salazar, *et. al.*	)	

STATEMENT OF REASONS OF VICE CHAIRMAN MATTHEW S. PETERSEN AND COMMISSIONERS CAROLINE C. HUNTER AND DONALD F. McGAHN

In these matters, the Obama for America campaign and several of its individual supporters filed complaints with the Commission against the American Leadership Project ("ALP"), an issue advocacy group, and its organizers and donors for sponsoring several television ads during the 2008 Democratic presidential primary. In Complainants' view, these ads were excessively partial toward then-Senator Hillary Clinton, and, therefore, proved that ALP's "major purpose" was to elect Clinton over then-Senator Barack Obama, and that ALP received "contributions" exceeding $1,000. Accordingly, per the complaints, ALP was required to register as a "political committee" and subject itself to, *inter alia*, the contribution limits, prohibitions and reporting requirements of the Federal Election Campaign Act of 1971, as amended ("the Act").[1]

We disagreed, and on February 25, 2009, voted to reject recommendations by the Office of General Counsel ("OGC") to find reason to believe that ALP had violated the Act, as alleged by Complainants, and supported closing the file.[2]

I. BACKGROUND

The American Leadership Project is an entity organized under section 527 of the Internal Revenue Code ("IRC"). In 2008, ALP ran several television ads in Oregon, Pennsylvania, Texas, Ohio, and Indiana, among other states, shortly before the Democratic presidential primaries in those states. ALP filed disclosure reports with the Internal Revenue Service ("IRS") indicating that it received itemized donations of more than $3.4 million between February and June 2008, much of it from labor unions. ALP also filed "electioneering communication" reports with the Commission, showing that it spent more

[1] *See generally* MUR 5977, Complaint, and MUR 6005, Complaint.
[2] Certification, dated Feb. 25, 2009.

than $4.2 million on broadcast ads referring to then-Senators Clinton and Obama during the 2008 presidential primaries.

The Complainants in these matters refer to advertisements sponsored by ALP. ALP's television and radio advertisements were posted on its website:

- "Middle": Gas and food prices are squeezing Oregon families from both ends. Hillary Clinton has the right plan to help. Her plan focuses on clean energy, creating more good paying jobs right here. No wonder the Salem Statesman Journal wrote that Hillary Clinton gets the concerns of the middle class. Call Hillary Clinton and tell her to keep fighting for clean energy and good jobs. Paid for by American Leadership Project, which is responsible for its content. Not authorized by any candidate or candidate's committee.

- "Squeezed" (South Dakota/Montana): Gas and food prices are squeezing South Dakota/Montana families from both ends. Hillary Clinton has the right plan to help. One. Promote clean energy to create more good paying jobs in South Dakota/Montana. Two. Cut taxes for the middle class. Three. Eliminate the special tax breaks for the big oil companies. Call Hillary Clinton and tell her to keep fighting for the middle class. Paid for by American Leadership Project, which is responsible for its content. Not authorized by any candidate or candidate's committee.

- "Jobs": Our economy is in trouble. Rising prices. Unemployment. Foreclosures. So, what's Barack Obama's plan? The Associated Press reported that Obama's proposals to clean up financial markets had no specifics. And, the Washington Post wrote that what Obama would actually do remains a mystery in too many areas. Call Barack Obama and tell him to give Hoosiers a real plan to fix our economy. Paid for by American Leadership Project, which is responsible for its content. Not authorized by any candidate or candidate's committee.

- "Every/Difference": Health care plans. The difference? Hillary Clinton's health care plan would help every American get affordable, quality health care. Barack Obama's plan would leave as many as 15 million Americans uncovered. So you would either be one of the millions without coverage or you would keep paying more to provide emergency health care for the millions of uninsured. Call Barack Obama and tell him to support health care for all Americans. Paid for by American Leadership Project, which is responsible for its content. Not authorized by any candidate or candidate's committee.

- "Count On": If speeches could solve problems, there would be no health care crisis. But it takes more. Hillary Clinton took on the hard work to provide health care coverage for children. As Senator, she expanded care for the National Guard. While lots of people talk about universal health care, experts say her plan gets it done. Tell Hillary to keep working for health care we can all count on. Paid for by American Leadership Project, which is responsible for its content. Not authorized by any candidate or candidate's committee.

- "Blueprint": If speeches could create jobs, we wouldn't be facing a recession. But it takes more. As Senator, Hillary Clinton passed legislation to bring investment and jobs to struggling communities and worked to end tax breaks for corporations sending jobs overseas. Her economic blueprint is endorsed by Governor Strickland. Tell Hillary to keep working on these solutions for the middle class. Paid for by American Leadership Project, which is responsible for its content. Not authorized by any candidate or candidate's committee.

- "More Money More Problems": Gas prices across Colorado exceeded the [sic] 4 dollar per gallon... Exxon Mobil reported the biggest quarterly profit ever by a corporation... Demonstrators in Denver today rallied against big oil profits... With Colorado's working families struggling to make ends meet, big oil companies are enjoying record profits. The John McCain solution? More money for big oil. More problems for us. McCain wants to drill along our coastline which experts say won't produce oil until 2018. But he has repeatedly opposed incentives for provable renewable energies like wind and solar power. McCain voted against requiring big oil to invest their windfall profits in clean energy and new jobs. But he supports a 4 billion dollar tax break for America's 5 richest oil companies. That's not a path to energy independence. Call John McCain at 202-224-2235 and tell him Coloradans need real solutions to our energy crisis. Visit Leadership-project[dot]org. Paid for by American Leadership Project, which is responsible for its content. Not authorized by any candidate or candidate's committee.

II. DISCUSSION

A. ALP's Activities Did Not Trigger "Political Committee" Status

Complainants' central accusation is that ALP was required to register as a "political committee," and thus be subjected to the various limitations, prohibitions and reporting requirements imposed by the Act. "Political committee" is defined by the Act as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year."[3] "Contribution" is defined by the Act to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office."[4] "Expenditure" is defined by the Act to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office."[5]

The Supreme Court, to avoid vagueness problems with the statutory language, construed "expenditure" to "reach only funds used for communications that expressly

[3] 2 U.S.C. § 431(4)(A).
[4] *Id.* § 431(8)(A)(i).
[5] *Id.* § 431(9)(A)(i).

advocate the election or defeat of a clearly identified candidate."[6] Similarly, the Court narrowed the definition of contribution to encompass only (1) donations to candidates, political parties, or campaign committees; (2) expenditures made in coordination with a candidate or campaign committee; and (3) donations given to other persons or organizations but "earmarked for political purposes."[7]

Thus, the definition of "political committee" is narrow. The Supreme Court has construed the term to "only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate."[8] In other words, the Act does not reach those "engaged purely in issue discussion," but instead can only reach "that spending that is unambiguously related to the campaign of a particular federal candidate" – specifically, "communications that expressly advocate the election or defeat of a clearly identified candidate."[9] The purpose of this narrowing construction is to restrict the number of groups that must "submit to an elaborate panoply of FEC regulations requiring the filings of dozens of forms, the disclosing of various activities, and the limiting of the group's freedom of political action to make expenditures or contributions."[10]

1. <u>There is No Reason To Believe that ALP Received More Than $1,000 in Contributions</u>

Complainants allege that ALP is a political committee because it received more than $1,000 in contributions. OGC agrees, but, in less than certain terms, asserts that because there is information "suggesting" that ALP received more than $1,000 in contributions, ALP "may" be a political committee,[11] and on that basis concludes there is a "reason to investigate" whether ALP is actually a political committee.[12] OGC's theory

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[6] *Buckley v. Valeo*, 424 U.S. 1, 80 (1976).
[7] *Id.* at 24, n.24, 78.
[8] *Id.* at 79-80.
[9] *Id.*
[10] *FEC v. GOPAC, Inc.*, 917 F. Supp.2d 851, 858 (D.D.C. 1996) (*quoting FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 392 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981)). We have been struck by the number of committees, including separate segregated funds of corporations, that seek to terminate after encountering the regulatory burdens associated with "political committee" status the court noted in *GOPAC*. *See, e.g.*, ADR 047 (American Animal Husbandry Coalition PAC); ADR 145 (Americans for Sound Energy Policy); ADR 288 (Progressive Majority); ADR 418 (Miller Alfano Raspanti PAC); ADR 469 (Pro-Life Campaign Committee).
[11] MURs 5977 and 6005 (American Leadership Project *et. al*), First General Counsel's Report at 9.
[12] *Id.* at 7. However, OGC overlays the wrong standard to its speculative theory – it is not enough for the Commission to believe that there is a reason to investigate whether a violation occurred. In fact, despite several Commission legislative recommendations, Congress has refused to lower the standard to "reason to investigate." *See* Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545 (Mar. 16, 2007) (noting past legislative recommendations to "clarify" that reason to believe means reason to investigate). "The Commission may find 'reason to believe' only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the FECA." *See* MUR 4960 (Hillary Rodham Clinton For U.S. Senate Exploratory Committee, Inc.). Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas at 1. Only once this threshold is met is there a "reason to investigate." In sum, the standard for finding reason to believe – which is necessary for the Commission to conduct any type of investigation or

relies on 11 C.F.R. 100.57(a), a regulation promulgated by the Commission in 2004.[13] That section states:

> A gift, subscription, loan, advance, or deposit of money or anything of value made by any person in response to any communication is a contribution to the person making the communication if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate.[14]

Thus, under its plain language, section 100.57(a) treats funds received in response to a public communication as "contributions" only if the communication "indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate."[15] Although not cited by Complainants, the Commission's 2004 E&J proffered in support of this regulation cautions that its application "turns on the plain meaning of the words used in the communication and does not encompass implied meanings or understandings."[16] It does not depend on "reference to external events, such as the timing or targeting of a solicitation."[17] The 2004 E&J also provides examples, and makes clear that language that is merely favorable to a candidate, such as "the President wants to cut taxes again . . . we will fight for the President's tax cuts," is insufficient to convert funds generated by that solicitation into "contributions." Rather, to constitute "contributions," the solicitation must state clearly that funds would be used in furtherance of "four more years" for the president, "Electing Joe Smith," helping the Congressman "to stay in Washington," or making sure that voters "remember in November."[18]

Complainants do not point to any fundraising materials of ALP or statements by its representatives suggesting that funds will be used to support or oppose a clearly identified federal candidate. Instead, Complainants assert that ALP received "contributions" because "ALP's organizers are closely tied to the Clintons and many of its donors have already contributed the maximum possible donation to [then-Senator] Clinton's presidential campaign."[19] But whether or not certain donors are "closely tied" to a campaign has nothing to do with whether ALP's solicitations stated that funds would be used to support or oppose a candidate.[20] After all, even assuming *arguendo* that there is some convergence

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take any discovery – is higher than the Federal Rules of Civil Procedure standard regarding sufficiency of a complaint, which allows discovery on virtually every complaint that identifies any potential legal or equitable claim. *See* MUR 4545 (Clinton-Gore '96 Primary Committee, Inc.), First General Counsel's Report at 17 ("While the available evidence is inadequate to determine whether the costs [associated with President Clinton's train trip to the Democratic National Convention in August 1996] were properly paid, the complainant's allegations are not sufficient to support a finding of reason to believe . . . .").

[13] In addition to issuing the final rule, 69 Fed. Reg. 68,056 (Nov. 23, 2004) (hereinafter, "2004 E&J"), the Commission subsequently issued a Supplemental Explanation and Justification, 72 Fed. Reg. 5595 (Feb. 7, 2007) (hereinafter, "2007 Supplemental E&J").

[14] 11 C.F.R. 100.57(a).

[15] *Id.* (emphasis added).

[16] 69 Fed. Reg. at 68,057.

[17] *Id.*

[18] *Id.*

[19] MUR 6005, Complaint at 3 (citing "public statements and news reports" (internal citations omitted)).

[20] Statements in a complaint which are not based upon personal knowledge should be accompanied by an identification of the source of information which gives rise to the complainant's belief in the truth of such

of donors between ALP and a campaign, that is not sufficient as a matter of law to establish any formal relationship between the two or that ALP received "contributions," and certainly is inadequate to convert ALP into a political committee.[21]

Complainants also claim that ALP somehow became a political committee because it placed on its website its television advertisements, and on that same page asked for funds. Next to the ads, ALP included a message to viewers: "To keep our TV ads on the air, please click here to make a secure online contribution."[22] Based upon this allegation, OGC developed a novel theory: ALP's website contained a solicitation for "contributions" under 11 C.F.R. 100.57(a) because the television ad placed on the site "was clearly candidate-centered" and "indicated to potential donors that their funds would be used to support Hillary Clinton's candidacy for President."[23]

We disagree. First, neither the regulation's plain text nor the Commission's two E&Js for the rule make any reference to a "candidate-centered" standard.[24] Thus, we do not understand OGC's invocation of this non-existent standard, and decline to apply it here. Instead, the language of the regulation requires more than a mere reference to a Federal candidate (which is how we view a "candidate centered" standard); instead, the regulation requires that it be clear that the funds "will be used to support or oppose the election" of a candidate. The ads in question contain no reference to the election, then-Senator Clinton's candidacy, or suggest any sort of electoral action in support of or opposition to then-Senator Clinton's candidacy. Instead, the ads are garden-variety issue

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statements, and should be accompanied by any documentation supporting the facts alleged. 11 C.F.R. 111.4(d). Notably, in this matter, one Complainant offers second-hand information from blogs and news articles to support the allegations regarding the relationship between ALP's donors and the Clinton campaign. MUR 6005, Complaint at 3 (citing Jake Tapper, *New Pro-Clinton 527 to Ding Obama in Ohio*, ABC News, Feb. 20, 2008, *available at* http://blogs.abcnews.com/politicalpunch/2008/02/new-pro-clinton.html) ("ABC News has learned [about ALP]...;" and reporting that, "Marc Ambinder of The Atlantic... first reported [about ALP and its purported connection to the Clinton campaign]...."). Although not mentioned in the complaint, the same blog posting goes on to report that, "[a] Clinton spokesman said he knew nothing about the 527." Remarkably, OGC goes even further in its report, citing to a news article not cited by either Complainant, reporting that "one anonymous 'major Clinton donor' admitted... that the effort [to raise money in support of Senator Clinton] was an 'open secret' among donors," as support for its theory. MURs 5799 and 6005, First General Counsel's Report at 5 (citing Marc Ambinder: A Reported Blog on Politics, Atlantic.com, *Pro-Clinton 527 Prepares For Ohio, PA and Texas*, http://marcambinder.theatlantic.com/archives/2008/02/proclinton_527_prepares_for_oh.php (Feb. 20, 2008, 08:20 EST)) (brackets in original). While we draw no conclusions about the reliability of information posted on this blog or reported in any news source, adherence to the Commission's regulations regarding sources of information contained in complaints cautions against accepting as true the statements of anonymous sources (especially since the Commission's regulations expressly prohibit consideration of anonymous complaints, 2 U.S.C. § 437g(a)). Nevertheless, even if the insinuations about the relationship between ALP's donors and the Clinton campaign are true, the subjective intent of donors cannot convert a group into a "political committee."

[21] *See FEC v. GOPAC, Inc.*, 917 F. Supp. at 865 (rejecting argument that GOPAC was a political committee because of overlap between donors to it and the Newt Gingrich campaign committee).

[22] MUR 5977 and 6005, First General Counsel's Report at 10.

[23] *Id.*

[24] *See generally* 11 C.F.R. 100.57; 2007 Supplemental E&J; 2004 E&J.

ads[25] that urge the viewer to contact a named public official regarding a public policy position of that official.[26]

Specifically, the ads focused on economic and healthcare issues, and highlighted then-Senator Clinton's record and positions on these issues and compared them with then-Senator Obama's. For example, one ad stated that "Hillary Clinton's health care plan would help every American get affordable, quality health care. Barack Obama's plan would leave as many as 15 million Americans uncovered." The ad concluded with an appeal for viewers to "Call Barack Obama and tell him to support health care for all Americans." Other ads concluded by asking viewers to "Tell Hillary to keep working for health care we can all count on," "Call Hillary Clinton and tell her to keep fighting for the middle class," or "Call Barack Obama and tell him to give Hoosiers a real plan to fix our economy."

The ads in question are remarkably similar, and in several instances are materially indistinguishable from, the examples provided in the 2004 E&J that make clear that language that is merely favorable to a candidate is not enough. Instead, the 2004 E&J makes it clear that, in order to constitute "contributions," the solicitation must state clearly that funds would be used in furtherance of "four more years" in the case of a sitting president, "electing Joe Smith," helping a Congressman "to stay in Washington," or

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[25] As Respondent correctly notes, the Complainants make only passing reference to ALP's communications and do not seriously contend, much less attempt to demonstrate, that those communications were express advocacy.

[26] None of ALP's communications contained express advocacy as defined by the Commission's regulations. *See* 11 C.F.R. 100.22. Even the ad which OGC characterizes as "a close call." MURs 5977 and 6005, First General Counsel's Report at 12, n. 10 ("we believe we have all or nearly all of ALP's communications and the one that comes closest to express advocacy [under 11 C.F.R. 100.22] is arguably a close call."), does not contain express advocacy. The script of this ad, called "Every/Difference," reads:

> Health care plans. The difference? Hillary Clinton's health care plan would help every American get affordable, quality health care. Barack Obama's plan would leave as many as 15 million Americans uncovered. So you would either be one of the millions without coverage or you would keep paying more to provide emergency health care for the millions of uninsured. Call Barack Obama and tell him to support health care for all Americans.

MURs 5977 and 6005, First General Counsel's Report, Attach. 1 at 2. Clearly, the ad does not include any of the phrases set forth in section 100.22(a), or include any other slogans which "in context" have no other reasonable meaning than to urge the election or defeat of a clearly identified candidate. This advertisement does not urge the election of Hillary Clinton; because it can be reasonably understood as asking the viewer to contact Senator Obama to urge him to support the viewer's preferred health care plan. In addition, the ad has no electoral portion, let alone one that is "unmistakable, unambiguous, and suggestive of only one meaning." 11 C.F.R. 100.22(b). The ad obviously discusses a public policy issue (healthcare) and sets forth the positions of two Senators on that issue at a time when the Senate was considering that same issue, and asks the public to contact one of those officeholders to communicate their views on the issue discussed. Additionally, "Every/Difference" does not exhort the public to campaign for or contribute to any federal candidate. *See* 72 Fed. Reg. 5604 ("Express advocacy also includes exhortations 'to campaign for, or contribute to, a clearly identified candidate.'"). Thus, the "Every/Difference" ad can reasonably be read as an effort to engage in protected issue discussion, and therefore as something other than encouraging the election or defeat of a candidate. So, if this is, in OGC's view, the "closest" to express advocacy of any of ALP's ads, and it does not contain express advocacy under OGC's application of 100.22, then none of ALP's ads contained express advocacy, and therefore there is no evidence that ALP made "expenditures" under the Act.

making sure that voters "remember in November."[27] ALP's advertisements contain none of this type of language.[28] Therefore, none of the ads contains the sort of content that would convert any funds received by ALP *via* its website into "contributions" under section 100.57(a).[29]

2. Major Purpose Test

The "major purpose" test is a judicial construct that spares some organizations from political committee registration and reporting, even though they have raised or spent more than $1,000 on express advocacy;[30] it is not the first prong of a two-prong test for political committee status. Instead, it is a judicial doctrine designed to protect organizations from the burdens of political committee registration, reporting and limitations,[31] the reach of which is limited to "only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate."[32] Thus, an

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[27] 69 Fed. Reg. at 68,057.

[28] We also note that whether or not these ads were run in proximity to an election is irrelevant under section 100.57, as the 2004 E&J makes it clear that the application of the regulation does not "depend on reference to external events such as the timing . . . of a solicitation." 69 Fed. Reg. at 68,057.

[29] Section 100.57(a) purports to be based on one circuit court case, *FEC v. Survival Education Fund*, 65 F. 3d 285 (2nd Cir. 1995) ("*SEF*"); *see also* 2007 Supplemental E&J at 5602 (explaining that 11 C.F.R. 100.57 "codifies the *SEF* analysis"). Specifically, the question in that case was whether or not a disclaimer had to be included on a request for funds that made clear that funds given were going to be used to defeat a Federal candidate. *SEF* never addressed whether the organization's solicitations converted its donations into "contributions," or whether, on that basis alone, that could convert the organization into a "political committee" subject to the limitations, prohibitions, and reporting obligations imposed by the Act. Critically, the court never addressed the group's political committee status, because that was never at issue in the case. *SEF* addressed whether donations were required to include certain disclaimers under the requirements of 2 U.S.C. § 441d(a)(3) at the time. *Id.* Unlike the current language of 2 U.S.C. § 441d(a)(3), which applies explicitly and *only* to a "political committee," the language of 2 U.S.C. § 441d(a)(3) in 1984, which was the operative law at the time of the activities in question in *SEF*, applied broadly to "*any person*." *See* 2 U.S.C. § 434d(a)(3) (1984) (emphasis added); *cf.* 2 U.S.C. § 434d(a)(3) (2008); *see also SEF* at 292 (characterizing the Commission's litigation position as requiring that "'*any person*' who makes an expenditure to finance a 'direct mailing' that either 'expressly advocat[es] the election or defeat of a clearly identified candidate' or 'solicits any contribution' must include a specified notice in the communication") (emphasis added). Even at the time *SEF* was decided, the statute applied broadly to "any person," instead of only to a "political committee." *See* 2 U.S.C. § 434d(a)(3) (1994). Thus, it is impossible to read *SEF* as holding implicitly that the organization was a "political committee," because the statutory provision at issue in *SEF* at that time never purported to determine "political committee" status. *See also* MUR 5541 (November Fund), Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn. Accordingly, even assuming *arguendo* that ALP received "contributions" for the purposes of section 100.57, that provision alone does not automatically convert ALP into a "political committee" because the group still must have as its "major purpose" the nomination or election of a Federal candidate, as discussed in the next section.

[30] *See FEC v. Mass. Citizens for Life*, 479 U.S. 238, 262 (1986) ("*MCFL*"); *Buckley*, 424 U.S. at 78-79; *GOPAC*, 917 F. Supp. at 859. *See also* 69 Fed. Reg. 68,056 at 68,058.

[31] In *Buckley* and *WRTL*, the Court broadly defined what constitutes First Amendment protected issue discussion, emphasizing that regulation of protected speech may occur only if it falls within a very narrow exception to the constitutional guarantee of free speech – express advocacy, or in certain circumstances, its functional equivalent. *Buckley*, 424 U.S. at 79-80; *WRTL*, 127 S. Ct. at 2672; *see also Davis v. FEC*, 128 S. Ct. 2759 (2008). Thus, by narrowing the scope of speech that may be regulated consistent with the First Amendment, the Court necessarily narrowed the scope of which entities may be regulated under the Act.

[32] *Buckley*, 424 U.S. at 79.

organization that triggers neither the Act's contribution nor expenditure thresholds cannot be, as a matter of law, "a political committee."[33] Accordingly, ALP was not a political committee, and the analysis properly ends without any analysis of the so-called "major purpose" test.[34]

However, because Complainant asserts that ALP's "major purpose" required it to register as a political committee (and because the Commission has not always faithfully adhered to this approach in enforcement matters[35]), we will address the central thrust of their argument: as a section 527 organization, ALP has already declared itself to have a major purpose of influencing elections. As we have already explained elsewhere,[36] "political organization" status under section 527 of the IRC does not equate to "political committee" status under the Act. Critically, the Commission has already rejected this approach.[37]

For example, in 2001, the Commission noted that the IRC "definition is on its face substantially broader than the FECA definition of 'political committee.'"[38] The Commission also noted that the IRS had already found that "activities such as circulating voting records, voter guides and 'issue advocacy' communications – those that do not expressly advocate the election or defeat of a clearly identified candidate – fall within the 'exempt function' category under IRC section 527(E)(2)."[39] And in 2004, when the Commission proposed to rewrite the definition of "political committee," it considered two alternatives by which all or nearly all "527 organizations would be considered to have the

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[33] *See, e.g.*, Political Committee Status, 69 Fed. Reg. 68,056, 68,064-65 (Nov. 23, 2004) (declining to incorporate the "major purpose" test into the definition of "political committee").

[34] *See also* Brief of Defendants-Appellees Federal Election Commission and United States Department of Justice at 5 (Oct. 28, 2008), *The Real Truth About Obama, Inc. (RTAO) v. FEC*, No. 08-1977 (4th Cir.) ("Under the statute as thus limited, a non-candidate-controlled entity must register as a political committee – thereby becoming subject to limits on the sources and amounts of its contributions received – only if the entity crosses the $1,000 threshold of contributions or expenditures and its 'major purpose' is the nomination or election of federal candidates.").

[35] *See* MURs 5487 (Progress for America Voter Fund), 5751 (The Leadership Forum), and 5541 (The November Fund) (The Commission concluded that evidence that these organizations triggered the statutory threshold of $1,000 in contributions or expenditures was not necessary before finding reason to believe, where available information suggested that the organization had the sole or primary objective of influencing federal elections and had raised and spent "substantial" funds in furtherance of that objective.).

[36] MUR 5541 (November Fund), Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn.

[37] The Fourth Circuit has rejected the concept as well. *See North Carolina Right to Life, Inc. v. Leake*, 344 F.3d 418, 430 (4th Cir. 2003) ("*NCRTL I*"), *vacated and remanded* (for further consideration in light of *McConnell v. FEC*, 540 U.S. 93 (2003)), 541 U.S. 1007 (2004), *remanded to* 482 F.Supp.2d 686 (E.D.N.C. Mar 29, 2007), *aff'd in part, rev'd in part by* 525 F.3d 274, 283 (4th Cir. 2008) (rejecting such presumptions: "Any attempt to define statutorily the major purpose test cannot define the test according to the effect some arbitrary level of spending has on a given election.").

[38] Definition of Political Committee (Advanced Notice of Proposed Rulemaking), 66 Fed. Reg. 13,681 (Mar. 7, 2001). *See also* 72 Fed. Reg. at 5597, 5598 ("In fact, neither FECA, as amended, nor any judicial decision interpreting it, has substituted tax status for the conduct-based determination required for political committee status.").

[39] 66 Fed. Reg. at 13,687.

nomination or election of candidates as a major purpose . . . ."[40] Both these proposals were rejected.[41]

Moreover, the legal argument advanced in the complaint is at odds with congressional intent. On three occasions, knowing that so-called 527 groups ("527s") like ALP would sponsor communications criticizing federal candidates, Congress passed legislation declining to make such groups political committees.[42] Instead, Congress chose to regulate these groups more narrowly, first by imposing limited reporting requirements in 2000, and then by amending those requirements in 2002. In fact, the 2002 Bipartisan Campaign Finance Act ("BCRA") continued down the path of a narrower regulatory framework, creating a special category called "electioneering communications."[43] The Commission put it succinctly: imposing political committee status automatically on section 527 organizations would entail "a degree of regulation that Congress did not elect to undertake itself when it increased the reporting obligations of 527 groups in 2000, and again in 2002 when it substantially transformed campaign finance laws through BCRA."[44]

Turning to the application of the "major purpose" test to this matter, even if ALP had received "contributions," it still would not be a political committee because its "major purpose" was not the nomination or election of a Federal candidate. Some have asserted that an organization's major purpose may be established through "public statements of purpose."[45] There are no public statements by ALP that demonstrate that its major purpose was federal elections. Instead, a review of its television ads and other statements indicate that its focus was on issue advocacy – after all, none of its public communications expressly advocated the election or defeat of a federal candidate. And ALP has articulated its major purpose: "to raise public awareness of vital public policy issues affecting

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[40] Political Committee Status, 69 Fed. Reg. 11,736, 11,748 (Notice of Proposed Rulemaking, Mar. 11, 2004).

[41] Despite this public rejection, the Commission nonetheless stated in a subsequent case: "As a factual matter, therefore, an organization that avails itself of 527 status has effectively declared that its primary purpose is influencing elections of one kind or another." MUR 5541, Factual & Legal Analysis (The November Fund) at 9.

[42] 69 Fed. Reg. 68,056 at 68,064 ("Congress appeared to be fully aware that some groups were operating outside [the Act]'s registration and reporting requirements as well as its limitations and prohibitions... [and] consciously did not require 527 organizations to register with the Commission as political committees."). *See also* 72 Fed. Reg. at 5599 ("While Congress has repeatedly enacted legislation governing 527 organizations, it has specifically rejected every effort... to classify organizations as political committees based on section 527 status."). *See also Cottage Savings Ass'n v. Commission*, 499 U.S. 554, 562 (1991) (when Congress revises a statute, its decision to leave certain sections unchanged indicates acceptance of the preexisting construction and application of the unchanged terms).

[43] Bipartisan Campaign Finance Reform Act of 2002, Pub. L. No. 107-155, § 201(a).

[44] 69 Fed. Reg. at 68,065. *See also* Brief *Amicus Curiae* of the Campaign Legal Center in Support of Appellants and Urging Reversal at 27 (Feb. 27, 2003), *Mobile Republicans Assembly v. United States*, 353 F.3d 1357 (11th Cir. 2003) (urging rejection of a constitutional challenge to the then-newly enacted section 527(j) reporting and disclosure provisions because, *inter alia*, "even with the enactment of BCRA, IRC § 527 organizations will be able to conduct considerable amounts of Federal campaign activity outside the scope of FECA.").

[45] *See FEC v. Malenick*, 310 F. Supp.2d 230, 234-36 (D.D.C. 2004), *rev'd in part on reconsideration by* 2005 WL 588222 (D.D.C. 2005) (*citing GOPAC*, 917 F. Supp. at 859) (*discussing FEC v. Machinists Non-Partisan League*, 655 F.2d 380, 392 (D.C. Cir. 1981)). *But see WRTL*, 127 S. Ct. 2652; *NCRTL II*, 525 F.3d 274 (cautioning against looking to subjective or contextual factors).

America's middle class – the economy and jobs, tax fairness, health care reform, public education, trade policy, and the mortgage crisis, among others – against the high-visibility backdrop of closely-contested primary elections."[46]

That ALP characterized its activities as being "against the high-visibility backdrop of closely-contested primary elections" does not change its major purpose. On the contrary, to regulate a group with a major purpose such as that of ALP runs counter to the Court's proscription in *Buckley* – specifically, that an organization may not be treated as a political committee simply because it engages in issue discussion and advocacy that references candidates.[47] This is precisely what the Supreme Court in *Buckley* anticipated when it said:

> The distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest.[48]

Theoretically, some have suggested that an organization can also satisfy "the major purpose" test[49] through independent spending that is "so extensive" that the organization's major purpose may be regarded as campaign activity.[50] With respect to this test, neither Congress, nor the Commission, nor the courts have established any guidance on what constitutes sufficiently extensive spending.[51] However, past Commission efforts to impose "political committee" status on independent groups that have not engaged in express advocacy has not been particularly successful, as demonstrated by *FEC v. GOPAC, Inc.*

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[46] MUR 6005 (American Leadership Project *et. al*), Response of American Leadership Project *et al.* at 5.
[47] *Buckley*, 424 U.S. at 79.
[48] *Buckley*, 424 U.S. at 42.
[49] We note that the appropriate test looks to "the" major purpose, and not simply whether influencing elections is one of several subjective goals. First, this comports with the directives of *Buckley*, which specifically refers to "the" major purpose. *See Leake*, 525 F.3d at 287-88 ("Thus, the Court in Buckley must have been using '*the* major purpose' test to identify organizations that had the election or opposition of a candidate as their only or primary goal – this ensured that the burdens facing a political committee largely fell on election-related speech, rather than on protected political speech. If organizations were regulable merely for having the support or opposition of a candidate as '*a* major purpose,' political committee burdens could fall on organizations primarily engaged in speech on political issues unrelated to a particular candidate. This would not only contravene both the spirit and the letter of *Buckley's* 'unambiguously campaign related' test, but it would also subject a large quantity of ordinary political speech to regulation.") (emphasis in original) (internal citations omitted). Cases post-*Buckley* confirm this. *See MCFL*, 479 U.S. at 262 (referring to "*the* organization's major purpose") (emphasis added); *see also California Pro-Life Council v. Getman*, 328 F.3d 1088, 1104 n.21 (9th Cir. 2003); *Machinists Non-Partisan Political League*, 655 F.2d at 391-92; *Richey v. Tyson*, 69 F. Supp. 2d 1298, 1311 (S.D. Ala. 2000); *Volle v. Webster*, 69 F. Supp. 2d 171, 174-76 (D. Me. 1999); *New York Civil Liberties Union, Inc. v. Acitio*, 459 F. Supp. 75, 84 n.5, 89 (S.D.N.Y. 1978).
[50] *MCFL*, 479 U.S. at 262.
[51] This lack of guidance makes it difficult even for us as after-the-fact decision makers to decide in close cases whether or not a group has spent enough to be able to regard as its major purpose activity that could subject it to regulation. Fortunately, we do not view the current matter as a close case.

In *FEC v. GOPAC, Inc.*, the court explained that "[t]he organization's purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates."[52] GOPAC adopted a formal "mission statement" which reiterated its ultimate objective "to create and disseminate the doctrine which defines a caring, humanitarian, reform Republican Party in such a way as to elect candidates, capture the U.S. House of Representatives and become a governing majority at every level of government."[53] As part of its mission, the committee's communications focused on the issues of the franking privilege and gerrymandering, prominently targeting then-Speaker of the House Jim Wright.[54] Even though the Court found that GOPAC's "ultimate major purpose" was to influence the election of Republican candidates for the House of Representatives, the court held the GOPAC was not a political committee.[55] The court reasoned that, as a means to promote the election of Republican candidates, GOPAC engaged in genuine issue advocacy which nonetheless mentioned the name of a federal candidate (who was inextricably linked to the issues), and that such spending could not be regulated. Thus, the court reasoned, GOPAC was not a "political committee."[56]

As *GOPAC* illustrates, simply running issue advertisements that mention the name of a candidate who may be emblematic of a particular issue does not make the election or defeat of that candidate the organization's major purpose – it supports the opposite conclusion.[57] In other words, in any campaign, candidates become clearly identified with certain issues, whether they want to or not. Does that mean that citizens who pool their resources together are then limited in expressing their views on those issues, even if such discussion could subjectively "influence" the election? *Buckley*, as rearticulated by *WRTL*, made it abundantly clear that the answer is a resounding no. In this matter, as high-profile Senators who had already become associated with certain positions on a variety of issues (in particular, then-Senator Clinton and her history with respect to health care legislation), their candidacies created a vehicle for discussing issues, not *vice versa*.[58]

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[52] *GOPAC*, 917 F. Supp. at 859 (citing *MCFL*, 479 U.S. at 262).
[53] *Id.* at 854-55.
[54] *Id.*
[55] *Cf. Malenick*, 310 F. Supp. 2d at 230, *rev'd on other grounds*, 2005 WL 588222 (D.D.C. 2005) (entity held to be a political committee where it sent out hundreds of public communications expressly advocating the election of clearly identified federal candidates, and received and forwarded to the intended recipient approximately 230 individual checks (totaling approximately $185,000) made payable to the federal candidate or campaign committees so identified in the communications).
[56] *GOPAC*, 917 F. Supp. at 854-55.
[57] *Id.* Remarkably, the court noted that the Commission conceded, just as it must in the current matter, that there was no evidence of direct GOPAC support for federal candidates.
[58] *See* Brief of *Amici Curiae* of the Alliance for Justice, American Association Of University Women, Planned Parenthood Action Fund, Inc., National Abortion And Reproductive Rights Action League, People for the American Way Action Fund and Citizen Action at 11 (Oct. 3, 1994), *Survival Education Fund*, 65 F.3d 285 (2d Cir. 1995) ("To hold that any reference to an election turns issue advocacy into express electoral advocacy – or, conversely, that no issue advocacy can mention a national election of which everyone is already aware – would turn the FEC into the national proofreader for all political speech in election years."); *see also* Cmt. of Anti-Defamation League of B'nai B'rith, Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures (Notice of Proposed Rulemaking), 57 Fed. Reg. 33,548 (Jul. 29, 1992) at 7 ("even within a few days of an election, an issue advocacy group must be free to condemn the position or actions of a Member of Congress, up for re-election, regardless of whether

Therefore, assuming *arguendo* that ALP received contributions or made expenditures in excess of $1,000 during a calendar year, we would conclude that ALP did not have the major purpose of electing or nominating a Federal candidate, and thus is not a political committee.

B. When Funds Received in Response to a Solicitation May Be Considered a Contribution Under the Act is Determined by the Nature of the Speech (11 C.F.R. 100.57)

Because this matter can be resolved by way of a straightforward application of the plain language of section 100.57, it is not necessary to reach other potential issues presented by that provision, both on its face and as applied to ALP. However, that both OGC and several of our colleagues believed that ALP may have run afoul of section 100.57 (and that in turn can be the basis for the imposition of political committee status), a more detailed discussion of the implications of such a reading of that section is in order.[59]

1. An Expansive Reading of 11 C.F.R. 100.57 Could Chill Political Speech

First, we can envision situations in which an expansive application of section 100.57(a) might result in a content-based restriction on speech, or otherwise chill political speech. Some within the Commission have argued that section 100.57(a) is not such a restriction, because those asking for money retain complete control over what they wish to say when raising funds. Thus, the argument goes, a group like ALP is not prohibited from saying that it intends to use the funds raised to support or oppose a Federal candidate.[60] What this argument fails to acknowledge is the inevitable hedging and trimming of content that will occur by groups that wish to critique the actions of public officials and discuss other public issues, and seek to raise funds by invoking the names of public officials, yet not be subject the various limitations, prohibitions and reporting obligations of the Act.[61]

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that condemnation is coupled with a specific call to lobby that Member or take other 'issue oriented' action.").

[59] Although not at issue in this matter, the remainder of section 100.57 might go too far. After all, it cannot be disputed that it restricts vast amounts of state and local election activity, and we have been hard-pressed to locate in the section's administrative record why this regulation was needed to address corruption or the appearance thereof. Certainly, that is the only permissible rationale; equally certain is that the Commission cannot, on its own, do whatever it wants in the name of anti-circumvention. And the regulation does not merely clarify old regulations: the regulation vastly expands the range of fundraising and spending regulated by the Commission. Moreover, it is not readily apparent why the Commission imposed an across-the-board 50% minimum ratio. A more narrow approach to preventing so-called circumvention would have been to base the various spending ratios on the ballot composition, *e.g.*, if a locality has 10 candidates on the ballot, two of which are Federal, then the more tailored rule would only 20% of spending come from federally permissible funds. As promulgated, however, section 100.57 requires at least 50% of spending to come from federally-permissible funds.

[60] Of course, when it chooses to do so, any funds received will be deemed "contributions."

[61] *See Buckley* at 43 (citing *Thomas v. Collins*, 323 U.S. 516, 535 (1945) (That discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application "offers no security for free discussion," and "blankets with uncertainty whatever may be said," which "compels the speaker to hedge and trim.")).

Moreover, this argument is similar to the one presented before the Supreme Court in *FEC v. Davis*, where the Government contended that the so-called Millionaire's Amendment did not abridge Jack Davis' First Amendment rights because he could still spend whatever he wanted on his own election,[62] while minimizing the chilling effect the law had on those rights, a point noted by the Court.[63] Similarly, in *WRTL*, the Government argued that the electioneering communication ban was not really a ban on speech, as it left WRTL free to say whatever it wanted, but only regulated the sort of funds used to fund their message.[64] The Court unequivocally rejected this argument.[65]

2. A Broad Interpretation of 11 C.F.R. 100.57 Would Be Over-Inclusive

Second, as demonstrated by how the regulation is being read by OGC and some of our colleagues, it appears that any reference to a Federal candidate in connection with asking for funds puts a group at risk of inadvertently accepting a "contribution," and thus triggering myriad regulatory and reporting obligations.[66] Although the regulation talks in terms of "support or oppose," in reality it seems that for some within the Commission, this is being conflated with a standard that merely requires little more than a reference to a Federal candidate. And even if that were not the case, the use of a "support or oppose" standard has not, to our knowledge, ever been upheld by a federal appellate court in the

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[62] *See* Brief of Appellee Federal Election Commission at 13, *Davis v. FEC*, No. 07-320 (S. Ct. Mar. 2008) ("We struggle to see how [appellant] can credibly argue that his speech has been 'chilled' in light of the fact that he has chosen to pay for his campaign and has spent, after all, a considerable amount of his own money...." (*citing* Brief of Defendant Federal Election Commission in Support of Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment at 20, *Davis v. FEC*, No. 1:06CV01185 (D.D.C.) (Sept. 8, 2006))).

[63] The Millionaire's Amendment deterred self-funding candidates by tripling the ordinary individual contribution limits for opponents of self-funding House candidates; for self-funding Senate candidates, their opponents' limit was increased by as much six times. Moreover, the coordinated party expenditure thresholds were eliminated for opponents. *See* Federal Election Commission, *Millionaire's Amendment Brochure, at* http://www.fec.gov/pages/brochures/millionaire.shtml#Increased_Limits. Even though the Supreme Court struck down the Millionaire's Amendment as unconstitutional, the Commission has thus far left all closed matters involving its application on the Commission's website without notice of that holding, which rendered this law void.

[64] Reply Brief of Appellant Federal Election Commission at 5, *FEC v. Wisconsin Right to Life, Inc.*, Nos. 06-969 and 06-970 (S. Ct.) (Apr. 2007) ("Appelle's characterization of BCRA § 203 as a '*prohibition*' on speech is, to use the Court's words in *McConnell*, 'simply wrong.'" (emphasis in original) (*citing* Brief of Appellant Federal Election Commission at 5, *FEC v. Wisconsin Right to Life, Inc.*, Nos. 06-969 and 06-970 (S. Ct.) (Feb. 2007) ("A corporation or union remains free, moreover, to establish a separate segregated fund and to pay for electioneering communications in unlimited amounts from that fund."))).

[65] *Buckley*, 424 U.S. at 18, n.18 ("Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.").

[66] That a particular group can seek an advisory opinion prior to acting makes section 100.57 no less a trap for the unwary. After all, the Commission routinely takes several months to issue a response to such requests, and even then, a requestor still may not receive a definitive answer. For example, in Advisory Opinion 2008-15 (National Right to Life Committee, Inc.), by votes of 3-3, the Commission failed to approve either of two drafts. AO 2008-15, Certification, dated Oct. 23, 2008. One month later (three months after the request was submitted to the Commission), by a vote of 4-2, the Commission approved an alternative third draft, which reached an answer on only one of the two questions presented in the request. AO 2008-15, Certification, dated Nov. 24, 2008.

context of an independent group that has not registered as a political committee.[67] On the contrary, they have either struck such standards altogether, or have limited their reach to express advocacy (or its functional equivalent) so as to avoid vagueness problems.[68]

For example, in *Center for Individual Freedom v. Carmouche*, the Fifth Circuit reviewed a Louisiana statute that imposed reporting and disclosure requirements on persons making payments "for the purpose of supporting, opposing, or otherwise influencing the nomination or election of a person."[69] The court found the language to be vague, and limited its application to "communications that expressly advocate the election or defeat of a clearly identified candidate."[70] Similarly, in *North Carolina Right to Life v. Leake*, the Fourth Circuit limited the reach of a campaign finance statute that defined "contributions" as funds expended "to support or oppose the nomination or election of one or more clearly identified candidates."[71] The phrase "to support or oppose" was further defined by statute to encompass not only "a set of carefully delineated election-related words or phrases," but also communications whose "essential nature . . . direct[s] voters to take some [electoral] action," to be determined by "contextual factors."[72] The Fourth Circuit held that such an "ad hoc, totality of the circumstances" standard for determining the "essential nature" of speech was unconstitutional because it "extend[ed] beyond both 'express advocacy' and its 'functional equivalent."[73]

In fact, the 2004 E&J reveals similar potential vagaries of section 100.57, as it makes clear that the application of the regulation is not "limited to solicitations that use specific words or phrases that are similar to a list of illustrative phrases." Although it purports to contain illustrative examples, the 2004 E&J does not explain what the "support or oppose" standard entails. But at the same time, the 2004 E&J supports reading section 100.57 much more narrowly than the way suggested by OGC, because the application of the regulation ought to "tur[n] on the plain meaning of the words used in the

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[67] Although the Supreme Court has upheld a "promote, attack, support, or oppose" standard against a facial challenge, it only did so in the context of political parties (and thus had already met the thresholds of becoming a political committee under the Act). *McConnell*, 540 U.S. 93. The Court stated that, in the context of a facial challenge, the "actions taken by political parties are presumed to be in connection with a federal election." *Id.* at 170, n. 64. Of course, merely because this was presumed does not make it so in all cases, and parties remain free in the wake of *McConnell* to rebut this presumption – after all, parties engage in several activities that are not in connection with federal elections, such as state and local elections (and related voter identification and voter mobilization efforts), funding of ballot initiatives, legislative advocacy, redistricting assistance and the like.

[68] *NCRTL II*, 525 F.3d at 283 (holding that regulations of political speech must be limited to addressing "communications that are unambiguously campaign related. The Supreme Court has identified two categories of communication as being unambiguously campaign related. First, 'express advocacy.' . . . Second, 'the functional equivalent of express advocacy.'"). *But see, Human Life of Washington, Inc. v. Brumsickle*, 2009 WL 62144 (W.D. Wash.), (denying plaintiff's Summary Judgment motion that it is not a political committee under state law) *on appeal* at No. 09-35128 (9th Cir.).

[69] 449 F.3d 655 (5th Cir. 2006).

[70] *Id.* at 664.

[71] *NCRTL II*, 525 F.3d 274.

[72] *Id.* at 280.

[73] *Id.* at 284. We envision situations where the phrase "indicates" as used in section 100.57(a) may also be vague, and cause independent groups to hedge and trim their speech.

communication and does not encompass implied meanings or understandings. It does not depend on reference to external events, such as the timing or targeting of a solicitation . . . ."[74]

3. Treating as "Contributions" Funds ALP Received Through Its Website Would Violate the Supreme Court's Mandate in Buckley and Its Progeny

Finally, to claim that funds received by ALP *via* its website constituted "contributions" would be nothing more than a back-door attempt to impose a spending limit of the sort already deemed unconstitutional by the Supreme Court. Although the Court has upheld the ability of the Government to limit "contributions," the Court in *Buckley* drew a critical distinction between what could be deemed a "contribution" that could be limited and expenditures and other spending that cannot.

The Court drew this distinction based upon the nature of the speech at issue (as opposed to merely the label applied to it), and explained that "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support."[75] In other words, a contribution is an "undifferentiated, symbolic act,"[76] which "may result in political expression if spent by a candidate or an association to present views to voters," but "the transformation of contributions into political debate involves *speech by someone other than the contributor*."[77] The Court contrasted this with expenditures and other spending, which unlike the symbolic speech of contributions, involved direct speech. To impose a limit on such spending would impermissibly "preclud[e] most associations from effectively amplifying the voice of their adherents."[78]

Here, as a factual matter, ALP donors were able to view the actual message that they were funding. Donors did not give to ALP generally, with the hopes that the funding would be transformed into speech that might reflect their views. Instead, they gave to support a specific ad that had already been produced and was in final form – in other words, donors knew with certainty the message that their money would fund. Thus, such donations were not simply an "undifferentiated, symbolic act," or "a general expression of support" for the views of others. Instead, because donors were able to view the ultimate message (in the form of the advertisement fully produced), and because they knew they were giving to keep that particular ad on the air, there was no "transformation of contributions into political debate . . . by someone other than the contributor." In other words, the donations constituted direct speech by the donors.[79] The Court in *Buckley* has

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[74] 69 Fed. Reg. at 68,057.
[75] *Buckley*, 424 U.S. at 21.
[76] *Id.*
[77] *Id.* (emphasis added).
[78] *Id.* at 22.
[79] The donations to ALP were materially indistinguishable from activities that the Commission recently approved in the VoterVoter.com advisory opinion. In AO 2008-10, the requestor proposed to create a website where political ads could be posted and purchased for airing on television. The ads would be created by the company running the website, as well as by other individuals and entities, and would constitute

already held that such spending cannot be limited.[80] Certainly, given that the Court has already spoken to this issue, the Commission cannot through regulation impose a limit merely by labeling such spending "contributions." To do so is to ignore the Supreme Court (which has already made it abundantly clear that it is the nature of the speech itself, and not merely the regulatory label applied to it, that controls), and impose an impermissible limit on spending. This we cannot do.

After *Buckley*,[81] the Court has consistently made this point in other contexts. For example, in *California Medical Association, et. al v. FEC ("CalMed")*, a majority of the Court acknowledged the distinction between a political committee which could be subject to contribution limits, and a group of individuals who pooled their resources to express their views.[82] More recently, and subsequent to the promulgation of section 100.57, the Court in *FEC v. Davis* went even further. There, even if something is labeled a "contribution," the Court expressed doubt that in matters where the "governmental interest

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independent expenditures. (As such, the ads would contain express advocacy and would almost certainly support or oppose the election of clearly identified Federal candidates.) VoterVoter.com would act essentially as a media buyer for its website visitors who were willing to pay, whether in part or in full, for the costs of airing the ads. The Commission concluded that, "Where there is no communication or prearrangement between the creator and the purchaser of the ad . . . the purchaser may run an ad without the Corporation and the ad's creator and purchaser becoming a 'group' for purposes of the definition of "political committee.'" By excluding the requestor from being considered a "political committee," the Commission implicitly recognized that VoterVoter.com was facilitating its website visitors' ability to exercise their right to engage in unlimited direct speech and independent expenditures. ALP's website transactions were essentially the same as the VoterVoter.com website transactions. To wit, ALP created the ads to be aired on television, just as VoterVoter.com created many of its ads (indeed, the advisory opinion was not premised on the company creating only a portion of the ads; the reasoning would have been identical had the company created all of the ads). Like VoterVoter.com, ALP gave its website visitors the means to pay for those ads to be aired on television. Moreover, there is no evidence that ALP had any more communications or prearrangements with its website visitors prior to their seeing the website than did VoterVoter.com.

[80] In *Buckley*, the Court struck down limitations on individuals' independent expenditures because such expenditures, which are uncoordinated with any candidate or his campaign, have no tendency to corrupt or give the appearance of corruption (which, as the Court held in *Buckley*, and subsequently reaffirmed in *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, Cal. ("CARO")*, 454 U.S. 290 (1981), are the only legitimate and compelling government interests sufficient for restricting political speech by individuals).

[81] The Court in *Buckley* concluded that there was a constitutional difference between money spent to advertise one's views independently of the candidate's campaign (independent speech) and money contributed to the candidate to be spent on his campaign. *Buckley*, 424 U.S. at 47 ("Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and may indeed prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that the expenditures will be given as a *quid pro quo* for improper commitments from the candidate.").

[82] 453 U.S. 182, 197, n. 17 (1981) (Recognizing the critical differences between contributions to multicandidate political committees and expenditures made jointly by groups of individuals in order to express common political views."); *see also id.* at 203 (Blackmun, J., concurring) (upholding political committee contribution limits, but noting a different result if contribution limits were applied to an independent speech group, because multicandidate political committees are essentially conduits for contributions to candidates, whereas contributions to a committee that makes only independent expenditures "pose no such threat.").

in eliminating corruption or the perception of corruption" is absent, such a "contribution" could be limited.[83] In the words of the Court:

> Even if [it] were characterized as a limit on contributions rather than expenditures, it is doubtful whether it would survive. A contribution limit involving 'significant interference' with associational rights must be closely drawn to serve a sufficiently important interest.[84]

Here, it is hard to see such a sufficient interest, given that what is at issue is independent speech.[85]

Some at the Commission have suggested that even if a donor knew how a particular donation would be spent, the fact that the money passed through ALP (a separate entity) precludes it from being considered direct speech, and is sufficient under the teachings of *Buckley* to be limited as a "contribution." But the Court and the Commission have already rejected such an absolutist view. In *MCFL* , the Court held that MCFL (despite its corporate status) could make independent expenditures because the entity was funded solely by individuals. And just recently, in the context of an advisory opinion, the Commission rejected the notion of a mechanical adherence to the corporate form. In Advisory Opinion 2009-02, the Commission was asked whether an L.L.C. could make independent expenditures as defined by the Act. Ordinarily, if treated as a corporate entity, the L.L.C. would be banned from making such expenditures. The Commission determined, however, that because there was no material difference between expenditures made by the sole member of the L.L.C. and the L.L.C., the entity was not prohibited from making independent expenditures. Therefore, simply because donor funds were passed through ALP does not end the analysis – the nature of the speech still controls.

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[83] *Davis*, 128 S. Ct. at 2772.

[84] *Id.* at n. 7 (citing *McConnell*, 540 U.S. 93). Contribution limits directly affect the right of association by imposing a limit on groups while allowing individuals to spend as much as they desire on their speech. Moreover, a limit on a group's contributions necessarily operates to limit its expenditures. *CARO at* 299-300 (1981). *See also FEC v. National Conservative Political Action Committee* ("NCPAC"), 470 U.S. 480, 495 (1985) ("To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources.").

[85] The Court has previously held that contributions to committees formed to support or oppose ballot measures cannot be limited. *CARO*, at 296 ("There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them. To place a Spartan limit–or indeed any limit–on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association."); *C&C Plywood Corp. v. Hanson*, 583 F.2d 421 (1978) (recognizing that *Buckley* does not support limitations on contributions to committees formed to favor or oppose ballot measures). This same analysis applies to committees formed to engage in independent speech because, as the Court explained in *Buckley*, independent speech does not pose a sufficient threat of corruption or appearance thereof to justify First Amendment restrictions.

III. CONCLUSION

Contrary to the allegations made in the Complaints and the recommendations of OGC, and for the reasons stated above, there is no reason to believe that ALP violated the Act and/or Commission regulations.[86] ALP did not fail to register and report as a political committee under 2 U.S.C. §§ 433, 434. Nor did it accept prohibited or excessive contributions under 2 U.S.C. §§ 441a, 441b. Therefore, we rejected OGC's recommendations to find reason to believe in this matter and voted to close the file.[87]

[86] Likewise, there is no reason to believe that any of ALP's directors, officers, fundraisers, or donors violated the Act or Commission regulations.

[87] The Commission is not required to create legal and constitutional issues in its administration and enforcement of the law. Indeed the prudent and preferred course is to avoid such issues. Therefore, where the Commission has two reasonable ways of interpreting the law, its regulations and enforcement practices, one of which avoids legal and constitutional doubt and another which creates serious legal and constitutional doubt, the Commission is well within its discretion to take the safer course. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("Although [a regulatory agency's interpretations of its own statute] are normally entitled to deference, where, as here, an otherwise acceptable construction would raise serious constitutional problems . . . courts [must] construe the statute to avoid such problems unless such construction is plainly contrary to Congress' intent." (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) ("In a number of cases the Court has heeded the essence of Mr. Chief Justice Marshall's admonition in *Murray v. The Charming Betsy*, 2 L.Ed. 208 (1804), by holding that an Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available."))). *See also Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 346 (2000) (Scalia, J., concurring, in part) (noting that "[where statutory intent is unclear], it is our practice to construe the text in such fashion as to avoid serious constitutional doubt"). As a result, given the numerous legal and constitutional concerns raised above, we clearly would be within our discretion to dismiss this case and, in light of those concerns, we would exercise that discretion. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement. The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. Finally, we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict – a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'") (internal citations omitted)). *See also United States v. Batchelder*, 442 U.S. 114, 123-124 (1979); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *Confiscation Cases*, 7 Wall. 454 (1869).

MATTHEW S. PETERSEN
Vice Chairman

5/1/09
Date

CAROLINE C. HUNTER
Commissioner

5/1/09
Date

DONALD F. MCGAHN II
Commissioner

5-1-09
Date