No. 08-2257

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

HOLLY LYNN KOERBER and
COMMITTEE FOR TRUTH IN POLITICS, INC., Plaintiffs-Appellants,
v.
FEDERAL ELECTION COMMISSION, Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of North Carolina

BRIEF OF APPELLEE FEDERAL ELECTION COMMISSION

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action pursuant to 28 U.S.C. §1331. This Court has jurisdiction pursuant to 28 U.S.C. §1292(a)(1) over the interlocutory appeal of the district court's denial of appellants' preliminary injunction motion. The district court denied this motion by order dated October 29, 2008 (J.A. 27-44). A notice of appeal was filed on October 31, 2008. (J.A. 45-46.)

COUNTERSTATEMENT OF ISSUES PRESENTED

Whether the district court abused its discretion in declining to preliminarily enjoin the Federal Election Commission (Commission) from (1) enforcing the electioneering communication reporting requirements, 2 U.S.C. §434(f)(2), and disclaimer requirements, 2 U.S.C. §441d, as to appellant Committee for Truth in Politics (CTP); and (2) pursuing the Commission's approach to political committee status.

STATUTES AND REGULATIONS

An addendum contains relevant statutory and regulatory provisions.

COUNTERSTATEMENT OF THE CASE

This case presents an as-applied challenge to two campaign finance disclosure provisions and a facial and as-applied challenge to the analysis the Commission uses to determine whether an organization is a "political committee."

At the height of the nationwide 2008 general election campaign, appellants CTP and Holly Lynn Koerber requested that the district court preliminarily enjoin the Commission from enforcing these provisions. The district court denied appellants' preliminary injunction motion, holding that they were unlikely to prevail on the merits of their challenges and that the harm an injunction would likely cause to the public and the Commission outweighed appellants' unsupported assertions of injury to themselves. Appellants timely appealed.

COUNTERSTATEMENT OF FACTS

This case involves no limits on speech. CTP did in fact broadcast a television ad in October 2008 that criticized then-Senator Obama for, *inter alia*, voting four times "against protecting infants that survived late term abortions" (J.A. 13-14 ¶¶31-32). CTP also intended to broadcast another ad that criticized Obama for being the "only member" of the Illinois Senate who "voted to allow early release for convicted sexual abusers" (J.A. 14-15 ¶33). The parties agree that, under the Federal Election Campaign Act of 1971, as amended (FECA or Act), 2 U.S.C. §§431-55, CTP can pay for these ads with its corporate funds without restriction. CTP challenges only FECA's *disclosure* requirements for these ads, and the analysis the Commission uses to determine whether CTP is a "political committee" under the Act. Even if CTP were a political committee, however, nothing in the Act would restrict its speech.

I. STATUTORY AND REGULATORY BACKGROUND

A. Electioneering Communications

Under FECA, "contribution" is defined to include giving anything of value "for the purpose of influencing any election for Federal office." 2 U.S.C. §431(8)(A)(i). Similarly, "expenditure" is defined to include spending "for the purpose of influencing any election for Federal office." 2 U.S.C. §431(9)(A)(i). The Act generally prohibits corporations and labor unions from making any contribution or expenditure from their treasury funds, 2 U.S.C. §441b(a), but they may establish "separate segregated fund[s]," commonly known as PACs, to make such disbursements. *See* 2 U.S.C. §§431(4)(B), 441b(b)(2)(C).

For a century, federal law has required disclosure related to election campaigns. Tillman Act, Ch. 420, 34 Stat. 864 (1907). Congress significantly increased the scope of the disclosure requirements in 1974, and the Supreme Court upheld the amended provisions, explaining that disclosure serves the important government interests of (1) providing the electorate with information on campaign financing "to aid the voters in evaluating those who seek federal office," (2) "deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity," and (3) "gathering the data necessary to detect violations of the contribution

limitations" that were simultaneously enacted. *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976).

Because the phrase "'for the purpose of … influencing'" an election in the statutory definition of "expenditure" raised "serious problems of vagueness" for entities whose major purpose was not campaign activity, the Supreme Court construed the disclosure provisions for those entities "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate," *i.e.*, "spending that is unambiguously related to the campaign of a particular federal candidate." *Id.* at 76, 79-80.

Congress later determined that the "express advocacy" standard was easy to evade and that entities had been funding broadcast ads designed to influence federal elections "while concealing their identities from the public" and "hiding behind dubious and misleading names." *McConnell v. FEC*, 540 U.S. 93, 196-97 (2003). In 2002, Congress amended FECA to prohibit corporations and labor unions from using general treasury funds to finance electioneering communications, which the statute defined as a "broadcast, cable, or satellite communication" that (a) refers to a clearly identified federal candidate, and (b) is made within sixty days before a general election or thirty days before a primary

election in which that candidate is running. *See* 2 U.S.C. §§434(f)(3)(A)(i), 441b(a),(b)(2).[1]

Electioneering communications (ECs) are subject to reporting requirements, 2 U.S.C. §434(f)(2); 11 C.F.R. §104.20, and disclaimer requirements, 2 U.S.C. §441d; 11 C.F.R. §110.11 (referred to herein collectively as the "disclosure requirements"). Every person who spends in excess of $10,000 on ECs in any calendar year must report information, including the identity of the person making the disbursement; the amount and recipient of each disbursement over $200; and the names and addresses of contributors who give $1,000 or more in the calendar year to the person making the disbursement. 2 U.S.C. §434(f)(2). The relevant disclaimer provision requires each communication to "clearly state the name and [contact information of the payor] and state that the communication is not authorized by any candidate or candidate's committee." 2 U.S.C. §441d(a)(3).

Immediately after BCRA was enacted, parties challenged the constitutionality of the same EC disclosure provisions that are at issue in this case, as well as BCRA's restrictions on corporate financing of ECs. The Supreme Court rejected these challenges in *McConnell*, 540 U.S. at 196-99, 203-09, 230-31. The Court upheld the reporting requirements because they did not suppress speech, *id*.

[1] The 2002 amendments to FECA are called the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81.

at 197-99, 201, and because "important state interests" "amply support[]" the requirements. *Id*. at 196. The Court noted that although plaintiffs did not provide sufficient "specific evidence" of harm, if other organizations could show a "reasonable probability" that compelled disclosure would subject their funders to "threats, harassment, or reprisals," the burdens of disclosure might outweigh the government interests. *Id*. at 197-99 (citation and quotation marks omitted). Eight justices also upheld the disclaimer requirements, explaining that they bore "a sufficient relationship to the important governmental interest of 'shed[ding] the light of publicity' on campaign financing." *Id*. at 231 (quoting *Buckley*, 424 U.S. at 81).

Four years later, in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 127 S. Ct. 2652 (2007) (*WRTL*), the controlling opinion held that a corporation may use its general treasury funds to finance an EC unless the communication is the "functional equivalent of express advocacy," which the Court defined as a communication that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 2667. This holding created two categories of communications that meet the statutory definition of an EC: (1) ECs that are the functional equivalent of express advocacy, which are subject to the corporate funding restriction; and (2) ECs that are susceptible of an interpretation other than as an appeal to vote for or against a specific candidate

(hereinafter "*WRTL* ads"), which may be financed with the general treasury funds of corporations or unions. The plaintiff in *WRTL* did not challenge BCRA's *disclosure* provisions, and the Court did not address them. To implement the *WRTL* decision, the Commission promulgated a regulatory exemption from the corporation and labor organization funding prohibitions. 11 C.F.R. §114.15(b). The Commission determined that it did not have authority to alter the disclosure rules because they were not challenged or discussed in any of *WRTL*'s four opinions. *See Electioneering Communications*, 72 Fed. Reg. 72899, 72901 (Dec. 26, 2007).

In 2008, a three-judge panel unanimously rejected a preliminary injunction request in a challenge to the same EC disclosure provisions at issue here. *Citizens United v. FEC,* 530 F. Supp. 2d 274, 281-82 (D.D.C. 2008). The Supreme Court declined to review the denial of the preliminary injunction. *Citizens United v. FEC*, 128 S. Ct. 1732 (2008). The three-judge panel also unanimously rejected the plaintiff's claims on summary judgment, *Citizens United v. FEC*, Civ. No. 07-2240, 2008 WL 2788753 (D.D.C. Jul. 18, 2008). That plaintiff appealed directly to the Supreme Court and the Court noted probable jurisdiction. *Citizens United v. FEC*, 129 S. Ct. 594 (2008). The Court heard oral argument on March 24, 2009, and will likely issue an opinion this term.

B. *MCFL* Corporations

Although corporations generally cannot finance express advocacy or electioneering communications that are the functional equivalent of express advocacy from their general treasury funds, a small number of corporations are entitled to do so. In *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 264 (1986) (*MCFL*), the Supreme Court exempted corporations that (1) are formed for the express purpose of promoting political ideas, not to engage in business activities; (2) have no shareholders or other persons so as to have a claim on the corporations' assets or earnings; and (3) were not established by a corporation or a labor union, and have a policy not to accept contributions from such entities. *See also McConnell*, 540 U.S. at 209-11 (construing BCRA to allow *MCFL* corporations to use corporate funds to finance ECs); 11 C.F.R. §114.10.

C. Political Committee Status

FECA provides that any "committee, club, association, or other group of persons" that receives over $1,000 in contributions or makes over $1,000 in expenditures in a calendar year is a "political committee." 2 U.S.C. §431(4)(A). Political committees must register with the Commission and file periodic reports for disclosure to the public of all their receipts and disbursements, with exceptions for most transactions below a $200 threshold. *See* 2 U.S.C. §§433, 434. No

person may contribute more than $5,000 per calendar year to any one political committee (other than political party committees). 2 U.S.C. §441a(a)(1)(C).

In *Buckley*, the Supreme Court held that defining political committee status "only in terms of amount of annual 'contributions' and 'expenditures'" might result in overbroad application of FECA's political committee requirements by reaching "groups engaged purely in issue discussion." 424 U.S. at 79. The Court therefore concluded that the Act's political committee provisions "need 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." *Id*. Thus, a non-candidate-controlled entity must register as a political committee 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.

In September 2008, a court in the Eastern District of Virginia denied a preliminary injunction request in a challenge to, *inter alia*, the Commission's approach to political committee status. *Real Truth About Obama, Inc. v. FEC*, No. 08-483, 2008 WL 4416282 (E.D. Va. Sept. 24, 2008) (*RTAO*). That denial is currently on appeal before this Court, and oral argument is scheduled for May 13, 2009.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Federal Election Commission

The Commission is the independent agency of the United States government with exclusive jurisdiction to administer, interpret, and civilly enforce FECA. The Commission is empowered to "formulate policy" with respect to the Act, 2 U.S.C. §437c(b)(1); "to make, amend, and repeal such rules … as are necessary to carry out the provisions of [the] Act," 2 U.S.C. §437d(a)(8); to issue advisory opinions construing the Act, 2 U.S.C. §§437d(a)(7), 437f; and to civilly enforce the Act, 2 U.S.C. §437g.

B. Appellants' Activities

CTP is a nonprofit "ideological" corporation. (J.A. 8 ¶6.) CTP incorporated in North Carolina on September 26, 2008, one week prior to filing this lawsuit. (FEC Opp. to Prelim. Inj. Exh. 1 (Docket No. 21).) CTP alleges that it is a corporation whose characteristics entitle it to use its general corporate funds to make unlimited independent expenditures and electioneering communications under *MCFL*, 479 U.S. at 264. (J.A. 12 ¶¶26-27.) On October 2, 2008, CTP's ad *Basic Rights* was broadcast in Pennsylvania, North Carolina, and Wisconsin. (J.A. 13 ¶31.) CTP also alleges that it intended to broadcast *Basic Rights* and another ad, *Tragic, but True*, before the general election in November. (J.A. 13 ¶31.) The ads criticize then-Senator Obama for voting against protection for infants that

survive late term abortions (*Basic Rights*) and voting for the early release of convicted child predators and other sex offenders (*Tragic, but True*). The ads invite viewers to "Call Senator Obama" and tell him to change his position or support certain legislation. The ads CTP aired would meet the definition of ECs in 2 U.S.C. §434(f)(3)(A). CTP admits that it violated the law by failing to file the required disclosure report after reaching the $10,000 reporting threshold for ECs. (J.A. 16 ¶40.)

Press reports based on media analysis data suggest that CTP spent a total of $1,144,593 to broadcast its two ads in Ohio, Pennsylvania, Wisconsin, West Virginia, and North Carolina prior to the 2008 election. *See* FEC Exhibit (bound hereto behind addendum).[2]

Appellant Holly Lynn Koerber is a resident of North Carolina whose sole claim here is that she would like to continue to hear CTP's speech. (J.A. 8 ¶7.)

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[2] Because CTP did not comply with the Act's disclosure requirements, information regarding CTP's actual spending was not available to the Commission during briefing before the district court. Through statistics complied by the Campaign Media Analysis Group, which tracks political advertising expenditures, and made publicly available by *The New York Times*, the Commission subsequently learned about CTP's actual spending during the EC period. This Court may take judicial notice of information available on the internet and statistical data. *See, e.g.*, *Richlin Sec. Serv. Co. v. Chertoff*, 128 S. Ct. 2007, 2011 (2008) (noting in EAJA determination appeal that judicial notice had been taken of paralegal salaries in local area as reflected on internet); *United States. v. Gregory*, 871 F.2d 1239, 1245 (4th Cir. 1989) (taking judicial notice of statistical data to prove a Title VII violation); *accord* Fed. R. Evid. 201, 803(6).

C. Procedural History

On October 3, 2008, CTP and Koerber filed their complaint and a motion for a preliminary injunction alleging that the EC disclosure provision was unconstitutional as applied to CTP and that the Commission's political committee status enforcement policy was unconstitutional on its face and as applied to CTP. The district court denied their motion on October 29, 2008 (J.A. 44).

The district court held that plaintiffs had failed to meet any of the requirements for preliminary injunctive relief. Assessing plaintiffs' likelihood of success on the merits, the district court held that plaintiffs were not likely to prevail on their claim that the disclosure provisions are unconstitutional as applied to CTP. (J.A. 37.) The court found that the appropriate standard of review for these provisions is not "strict scrutiny, but … the lesser standard of intermediate scrutiny applied in *Buckley* and *McConnell*." (J.A. 33-34.) The court found that plaintiffs had not addressed whether there is a "'relevant correlation'" or "'substantial relation' between the governmental interest and the information required to be disclosed," "but instead argue[d] that CTP's advertisements are not 'unambiguously campaign related,'" and the Court held that this argument had been "made and rejected by the Supreme Court in *McConnell*." (J.A. 34.) The court found that "[p]laintiffs ha[d] presented no reason to warrant a departure from the reasoning and outcome in *McConnell*." (J.A. 36.) Moreover, the court rejected

plaintiffs' reliance on *WRTL*: "The *WRTL II* decision makes no mention of the disclosure requirements upheld in *McConnell* and at issue before this court nor any other provision, the constitutionality of which is determined by the 'relevant correlation' or 'substantial relation' test." (*Id*.) The court also found that "[t]here is no indication that revelation of the sponsors' identities may result in harassment, threats or reprisals." (J.A. 37.)

Moreover, the court found that, although plaintiffs' claim as to the Commission's analysis regarding political committee status was justiciable, plaintiffs had failed to demonstrate a likelihood of success on the merits of the claim. The court noted that the Commission's methodology is "flexible" and recognizes that "an organization's 'major purpose' is inherently comparative and necessarily requires an understanding of an organization's overall activities, as opposed to its stated purpose." (J.A. 41.) The court held that in light of the discretion to which the Commission is entitled, the agency does not have a "'statutory duty to promulgate regulations that, either by default rule or by specification, address every conceivable question.'" (J.A. 41-42 (quoting *Shays v. FEC*, 528 F.3d 914, 931 (D.C. Cir. 2008)).)

Finally, the district court determined that the remaining preliminary injunction factors "weigh in favor of the FEC and against the issuance of a preliminary injunction." (J.A. 42.) The court held that the balance of harms and

the public interest weighed in favor of denying injunctive relief in "light of the government's strong interests in providing the electorate with information to assist the voters in making informed election decisions, in deterring actual and perceived corruption and in enforcing the federal campaign finance laws." (J.A. 43.)

Plaintiffs filed their notice of appeal on October 31, 2008. (J.A. 45.)

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion in denying CTP's extraordinary request that the Commission be preliminarily enjoined from enforcing important disclosure provisions that inform the public and pursuing its approach to "political committee" status under FECA. CTP and Koerber did not demonstrate irreparable harm. The challenged provisions do not limit CTP's speech, and CTP did in fact broadcast advertisements criticizing then-Senator Obama — without a preliminary injunction. Moreover, CTP made no showing of harm, let alone irreparable harm, from FECA's disclosure requirements applicable to "electioneering communications" or political committees. The Supreme Court has found serious harm from disclosure only in cases involving organizations whose members faced harassment, threats, or reprisals, but CTP alleged no such facts. CTP also failed to show irreparable harm from its alleged fears about a potential Commission enforcement action.

Appellants are unlikely to succeed on the merits. The Supreme Court has upheld the challenged disclosure provisions on their face, and the Court has repeatedly upheld disclosure requirements even when striking down substantive restrictions on the funds to be disclosed. The information to be disclosed serves important interests by informing the public and assisting the Commission's enforcement of the law.

The Commission's analysis of political committee status is not final agency action subject to APA review, and it is not clear that appellants have presented an Article III case or controversy. In any event, the Commission's analysis constitutionally implements the Supreme Court's requirement that only organizations whose "major purpose" is federal campaign activity be regulated as political committees. That test is inherently comparative and requires an understanding of an organization's overall activities.

The balance of harms weighs strongly in the Commission's favor. Enjoining enforcement of disclosure provisions, already upheld by the Supreme Court, in the pre-election season would greatly harm the public by denying it information Congress deems important. Conversely, CTP's speech was not in fact chilled, and it failed to demonstrate any risk of reprisal from the applicable disclosure provisions.

ARGUMENT

I. STANDARD OF REVIEW

This Court "review[s] the grant or denial of a preliminary injunction for abuse of discretion, recognizing that preliminary injunctions are extraordinary remedies involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances." *MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001) (quotation marks omitted); *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 524 (4th Cir. 2003) (quoting *MicroStrategy*); *see also Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006) (per curiam) (vacating circuit court's reversal of denial of pre-election preliminary injunction on grounds that "[i]t was … necessary, as a procedural matter, for the Court of Appeals to give deference to the discretion of the District Court. We find no indication that it did so, and we conclude this was error.").

The purpose of a preliminary injunction "is merely to preserve the relative positions of the parties until a trial on the merits can be held," *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981), and "to maintain the *status quo ante litem*," *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189, 195, 197 (4th Cir. 1977). In this case, the *status quo* before litigation was that Congress had enacted the relevant statutory provisions, and the Supreme Court facially upheld those provisions. Thus, the *status quo* was not a blank slate

without any regulation, as CTP contends (Br. 12-13), but a state in which the public was entitled to receive information Congress deems important to the public interest. *See Nat'l Ass'n of Mfrs. v. Taylor*, 549 F. Supp. 2d 68, 72 (D.D.C. 2008), *appeal pending*, No. 08-5085 (D.C. Cir.) (*NAM*), (denying injunction against lobbying disclosure requirements, explaining that "an injunction 'grants judicial intervention … [and] alter[s] the legal status quo'") (quoting *Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301, 1302 (1993) (Rehnquist, C.J., in chambers) (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers))).[3]

The Court assesses the grant or denial of a preliminary injunction under four factors: "(1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied; (2) the likelihood of harm to the defendant if the requested relief is granted; (3) the likelihood that the plaintiff will succeed on the merits; and (4) the public interest." *U.S. Dep't of Labor v. Wolf Run Mining Co., Inc.*, 452 F.3d 275, 280 (4th Cir. 2006) (citing *Blackwelder*, 550 F.2d at 193-94); *see also United States v. M/V Sanctuary*, 540 F.3d 295, 302 (4th Cir. 2008). Plaintiffs bear the burden of proving that each factor supports the granting of such relief. *See Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991).

[3] In this sense, CTP's preliminary injunction request could be viewed as a "mandatory" one, as it would alter the legal *status quo*. As CTP notes (Br. 12 n.9), the burden of proof for a mandatory injunction is significantly higher than the already-demanding burden required to justify a "prohibitory" injunction.

In general, in applying the factors, "the court must first determine whether the plaintiff has made a strong showing of irreparable harm if the injunction is denied; if such a showing is made, the court must then balance the likelihood of harm to the plaintiff against the likelihood of harm to the defendant." *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 271 (4th Cir. 2002) (citations omitted).[4]

In evaluating the preliminary injunction factors, this Circuit has held that when a claim of irreparable harm "is inseparably linked to [a] claim of a violation of … First Amendment rights," the determination of irreparable harm requires analysis of plaintiff's likelihood of success on the merits. *Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 254-55 (4th Cir. 2003). Because CTP's claim of irreparable harm is so weak, and *not* inseparably linked to its alleged violation of First Amendment rights, we address the irreparable harm factor first.

II. APPELLANTS CANNOT DEMONSTRATE IRREPARABLE HARM

Appellants' failure to demonstrate irreparable harm is dispositive because "[t]he basis of injunctive relief in the federal courts has always been irreparable harm." *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (citation omitted). The provisions appellants challenge do not limit their speech or spending on speech.

[4] CTP erroneously argues (Br. 13-14) that the government bears the burden of proof at the preliminary injunction stage. In *Blackwelder*, this Circuit framed the key issues in terms of *petitioner's* burden, asking: "(1) Has the petitioner made a strong showing that it is likely to prevail upon the merits? (2) Has the petitioner shown that without such relief it will suffer irreparable injury?" 550 F.2d at 193 (citation omitted).

When it sought a preliminary injunction, CTP *was speaking* — and Koerber *was listening* — without any court intervention or action by the Commission. Thus, appellants' request (Br. 11) that the Court "clarify" new standards for preliminary injunctions because their "freedom of speech" (Br. 12) is at issue is both illogical and unnecessary. This case simply involves no limit on CTP's freedom to speak; rather, the challenged provisions further First Amendment values by providing *more* information to the public.

A. CTP's Speech Is Not Restricted

CTP did not allege that its speech has been or would be restricted. To the contrary, when it sought a preliminary injunction, CTP alleged that it "is broadcasting" one of its ads and "intends" to broadcast another. (J.A. 13 ¶31.) Publicly available information indicates that CTP spent $1,145,000 running its two ads prior to the 2008 election. *See supra* p.11; FEC Exhibit. Holly Lynn Koerber also cannot demonstrate any harm, let alone irreparable harm, since she was able to hear CTP's ads when they were broadcast, and the ads remain available for the public to view at any time on the internet, through YouTube. *See id.*[5]

There are three independent legal reasons why CTP's speech is not restricted. First, the Commission agrees that CTP's ads are neither express

[5] Plaintiff Koerber states only a derivative and hypothetical fear that, as a listener, she may not continue to hear speech she has already heard *if* CTP is "silenced" (Br. 2), a claim that CTP itself does not even make.

advocacy nor "the functional equivalent of express advocacy," *WRTL*, 127 S. Ct. at 2667, so CTP can use its corporate funds to pay for them. In particular, CTP's ads fall within the safe harbor of the Commission's regulation implementing *WRTL*, 11 C.F.R. §114.15(b). (*See* J.A. 17 ¶45 (appellants' allegation that CTP's ads fall within 11 C.F.R. §114.15).) The ads do not mention then-Senator Obama's candidacy or political party, they focus on a public policy issue, and their call to action concerns legislation. The ads can reasonably be interpreted as something other than an appeal to vote against Senator Obama. Thus, under *WRTL* and the Commission's regulation implementing that decision, CTP can pay for these independent ads without restriction.

Second, CTP claims status as an *MCFL* corporation (J.A. 12 ¶¶26-27), which, if correct, would permit CTP to use its corporate funds to finance even ads that contain express advocacy or the functional equivalent of express advocacy. *See supra* p.8.

Third, even if CTP were deemed to be a political committee, that status would not require CTP to abide by any spending limits or restrictions. Political committees may finance unlimited independent campaign advocacy, including express advocacy and electioneering communications. *See FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480 (1985); 11 C.F.R. §114.12 (treating an incorporated political committee as a political committee rather than a

corporation). Moreover, as we demonstrate *infra* pp. 49-50, CTP has supplied no evidence to support its fear (*see* J.A. 16-17 ¶42) that it might be considered a political committee.

B. CTP Alleges No Irreparable Harm From Disclosure Or Potential Status As A Political Committee

CTP makes no showing that it would suffer any harm — let alone irreparable harm — by abiding by FECA's disclosure requirements.[6] The Supreme Court has found that serious harm from disclosure has been demonstrated only in cases involving organizations whose members faced danger or reprisals. In *NAACP v. Alabama*, 357 U.S. 449, 462 (1958), the association "made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." Similarly, in *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982), the Court invalidated disclosure requirements as applied to the Socialist Workers' Party based on "substantial evidence of past and present hostility from private persons and Government officials," *id*. at 102, including

[6] The EC disclosure provision is carefully tailored and requires only disclosure of ECs that are in excess of $10,000 in a calendar year and donors who give more than $1,000 in a calendar year. 2 U.S.C. §§ 434(f)(1)-(2). CTP has not alleged how many, if any, of its donors gave in excess of $1,000.

record proof of "threatening phone calls and hate mail, the burning of … literature, the destruction of … members' property," and of "members [who] were fired because of their party membership." *Id*. at 99; *see Buckley*, 424 U.S. at 69 (noting that NAACP members faced "'economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility'"); *McConnell*, 540 U.S. at 198-99 (noting that *Socialist Workers* had found "reasonable probability" of "threats, harassment, and reprisals"); *see also NAM*, 549 F. Supp. 2d at 75-76 (trade association suffers no irreparable harm in disclosing membership list under lobbying disclosure provisions).

Here, CTP has not alleged any such harm, as the lower court correctly found: "There is no indication that revelation of the sponsors' identities may result in harassment, threats or reprisals." (J.A. 37). Appellants in *Buckley*, who were *denied* an exemption from the disclosure requirements, showed more harm than CTP has here. "At best, [*Buckley* appellants] offer[ed] the testimony … that one or two persons refused to make contributions because of the possibility of disclosure." 424 U.S. at 71-72. But CTP has not provided any evidence that its members have been subjected to reprisals or reasonably fear that they will be.

Moreover, any alleged administrative burden imposed by the disclosure requirements could not constitute irreparable harm. "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the

absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297-98 (D.C. Cir. 2006).

For the same reasons, CTP has made no showing that it would suffer irreparable harm if it were to comply with the disclosure rules applicable to political committees. Moreover, CTP has not shown that its fundraising would be irreparably harmed if it abided by the $5,000 limit per contributor on contributions to political committees. Indeed, it has alleged nothing specific about its actual or potential donors, or whether it expects to receive more than $5,000 from any one person.

Thus, CTP makes only a conclusory assertion of harm, but a mere allegation of harm under the First Amendment does not demonstrate irreparable harm sufficient to justify the extraordinary remedy of a preliminary injunction. *See Smith v. Frye*, 488 F.3d 263, 271 (4th Cir.), *cert. denied,* 128 S. Ct. 653 (2007) (holding that harm allegation does not "necessarily, by itself, state a First Amendment claim under *Elrod* [*v. Burns*, 427 U.S. 347 (1976) (plurality)]"); *see also Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of*

Columbia, 919 F.2d 148, 149-50 (D.C. Cir. 1990) (holding *Elrod* applicable only when "First Amendment rights were totally denied").[7]

C. CTP Cannot Demonstrate Irreparable Harm Based On Its Alleged Fears Of A Commission Enforcement Action

CTP provides neither evidence of an imminent investigation that would cause it irreparable harm, nor legal support for the proposition that any such investigation or potential penalties could occur so imminently or without due process as to require a preliminary injunction.

Congress established the Commission's balanced enforcement mechanisms decades ago, providing specific "procedures purposely designed to ensure fairness not only to complainants but also to respondents." *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996). The Commission investigates potential violations of the Act only if at least four of its members have voted to find "reason to believe" that the law has been violated. 2 U.S.C. §437g(a)(2). CTP does not allege that a complaint has been filed against it or that the Commission has notified it that it has found "reason

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[7] CTP relies (Br. 47, 55-56) on *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507 (4th Cir. 2002), to argue that this Court can find an "automatic" irreparable injury if it finds a likelihood of success on the merits for CTP. However, *Bason* involved a facial challenge to an overbroad regulation that prohibited "a great deal of expression" protected by the First Amendment. *Id*. at 516. Because the current case is primarily an as-applied challenge to a narrowly tailored disclosure statute that has been upheld facially by the Supreme Court, the *Bason* analysis of the *Blackwelder* factors is not analogous. Moreover, because CTP's speech is not limited and it has alleged no irreparable harm from disclosure, its alleged harms are not inseparably linked to its First Amendment claims.

to believe." Even if those events had occurred, penalties could not be imposed imminently against CTP because the Commission has no authority to impose penalties unilaterally; the Commission's authority is limited to encouraging voluntary compliance with the law and negotiating a voluntary penalty, if appropriate. 2 U.S.C. §437g(a)(4),(5). Only if those efforts are unsuccessful, and after at least four Commissioners vote to find "probable cause" that a violation occurred, can the Commission vote to authorize the filing of a *de novo* action in federal court to seek *judicial* imposition of a civil penalty. 2 U.S.C. §437g(a)(6). Moreover, CTP would have multiple opportunities to present its defenses before such penalties could be imposed — before both the Commission and the courts — and it does not need a preliminary injunction to preserve its ability to present those defenses, if and when any enforcement action might occur. *See, e.g.*, 2 U.S.C. §437g(a)(1),(3).

CTP's arguments prove too much: If every *potential* investigation could be enjoined because it *might* create an undue burden, the Commission's enforcement powers would be a nullity. *See FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (expense and annoyance of agency proceedings do not constitute irreparable injury, but are part of social burden of living under government). If and when an FEC investigation begins, and if and when CTP believes the investigation is unduly burdensome, it can seek a remedy from the courts, which are well-

equipped to resolve specific subpoena and discovery disputes. CTP is essentially asking this Court to assume that a series of hypothetical events will take place, including future courts' inability to protect appellants from an improper investigation. That kind of speculation falls far short of meeting CTP's burden to show imminent, irreparable harm.

Appellants rely (Br. 47-55) on several irrelevant cases and FEC investigations. First, appellants rely (Br. 49) on *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710-11 (4th Cir. 1999) (*NCRL*), to argue that the "threat of prosecution is inherent in the statute." In *NCRL*, however, the relevant issue was standing, not the showing of irreparable harm necessary to obtain a preliminary injunction. This Court found a plaintiff has "*standing* to mount a pre-enforcement challenge if the statute 'facially restrict[s] expressive activity by the class to which the plaintiff belongs.'" *Id*. at 710 (citation omitted) (emphasis added). Moreover, in contrast to the statute in *NCRL*, the EC disclosure provisions and political committee enforcement analysis challenged here do not restrict speech, and the disclosure provisions have been upheld facially by the Supreme Court. *See infra* pp. 29-32.

Second, appellants' reliance (Br. 48 n.31) on *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981), is misplaced, because that case did not involve an attempt to enjoin an investigation that had not yet

begun. Rather, the case arose when the Commission brought suit in federal court after the defendant had refused to comply with the Commission's administrative subpoena. At that appropriate juncture, the court ruled that the Commission lacked authority over "draft candidate" groups. The court did not rule that the subpoena itself was overbroad or asked for inappropriate materials. Indeed, the court affirmed that "[i]f jurisdiction for a full investigation appears to exist, a broader subpoena seeking evidence of a violation may then be enforceable." 655 F.2d at 397.

Third, CTP's assertions (Br. 31-33) about the relevance of the investigation and discovery in *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999), ignore the vast differences in complexity and scale between *Christian Coalition* and the present case. That case involved a series of allegations of coordination between The Christian Coalition and a national political committee in the distribution of voter guides in seven states in the 1990 election, as well as alleged coordination with federal candidates in five different races (one presidential, two senatorial, and two congressional) in the 1990, 1992, and 1994 election cycles. Investigating those allegations involved an extraordinary number of factual scenarios and inherently fact-intensive coordination determinations. Here, in contrast, CTP's alleged activity apparently consists of broadcasting some ads and failing to disclose its disbursements and its donors who gave more than $1,000.

See 11 C.F.R. §§104.20(c); 114.15(f). Moreover, the volume of discovery in *Christian Coalition* was increased because the defendant failed to produce timely information, at times not until after relevant witnesses had already been deposed once. "The Coalition's repeated inability to comply with reasonable discovery requests led Magistrate Judge Alan Kay, who oversaw discovery, to impose sanctions." *Christian Coalition*, 52 F.Supp.2d at 51.[8]

In sum, CTP's alleged harms are too remote, insubstantial, and speculative to warrant a preliminary injunction, and it has failed to make even a rudimentary showing of irreparable harm, let alone the "clear" and "strong" showing required in this Circuit. *See Scotts*, 315 F.3d at 271; *Dan River, Inc. v. Icahn*, 701 F.2d 278, 284 (4th Cir. 1983).

[8] Appellants also rely (Br. 50) on *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003). The issue in that case, however, was whether the Commission could publicly disclose certain documents after the conclusion of its investigation, not the appropriate scope of the underlying investigation. Appellants also wrongly suggest (Br. 16) that the Commission engaged in what they call "scorched-earth litigation tactics," in *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997). The decision did not suggest that the Commission did anything inappropriate during discovery or the administrative investigation; rather, the Court stated, "The question for us is only whether the FEC was 'substantially jusitifed'" in its interpretation of the scope of regulable activity under the "express advocacy" standard. *Id.* at 1061.

III. APPELLANTS ARE NOT LIKELY TO SUCCEED ON THE MERITS

A. Appellants Are Not Likely To Succeed On The Merits Of Their Challenge To The Disclosure Requirements For Electioneering Communications

Appellants bring a broad constitutional challenge to the statutory EC disclosure requirements as applied to all *WRTL* ads, *i.e.*, ECs that can be financed with corporate funds. This challenge is not likely to succeed.

1. The Supreme Court Has Upheld The EC Disclosure Requirements On Their Face

In *McConnell*, the Supreme Court upheld the disclosure provisions at issue here on their face. 540 U.S. at 196-99, 203-09, 230-31. The Court held that the electioneering communication reporting requirements are consistent with the First Amendment because they do not suppress speech, *see id.* at 197-99, 201 ("[FECA's] disclosure requirements are constitutional because they 'd[o] not prevent anyone from speaking.'") (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 241 (D.D.C. 2003)), and because the "important state interests" in "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions … amply support[ ] application of [the] disclosure requirements to the entire range of electioneering communications," 540 U.S. at 196 (internal quotation marks omitted); *see also id*. at 321 (Kennedy, J., concurring, joined by Rehnquist, C.J., and Scalia, J.) (finding reporting

requirements constitutional because they "substantially relate" to the informational interest cited by the majority opinion). The Court explained that disclosure furthers the "First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." *Id.* at 197 (quoting *McConnell*, 251 F. Supp. 2d at 237).

Consistent with *Buckley* and earlier cases, *McConnell* acknowledged that there may be limited instances in which the First Amendment burdens of disclosure might outweigh these government interests as to particular organizations: when an organization could present "specific evidence" showing a "reasonable probability" that compelled disclosure of its funders would subject them to "threats, harassment, or reprisals." *McConnell*, 540 U.S. at 197-99. Regarding the disclaimer requirements, Chief Justice Rehnquist, writing for eight Justices, upheld the provisions as bearing "a sufficient relationship to the important governmental interest of 'shed[ding] the light of publicity' on campaign financing." *Id*. at 231 (quoting *Buckley*, 424 U.S. at 81). Indeed, as appellants' counsel himself noted in rulemaking comments on behalf of other parties:

> There was broad support on the [*McConnell*] Court for requiring *disclosure* of electioneering communication expenditures, while support for the electioneering communication ban was narrow. *Cf.* [124 S. Ct.] at 689-94 (majority) *with id*. at 762-69 (Kennedy, J., joined by Rehnquist, C.J., and Scalia J.). Although there is little explanation of the point by Justices who objected to the ban but not the disclosure, their support doubtless rested on the facts that disclosure is a significantly lighter burden than a ban, that no disclosure is required

> until $10,000 has been expended, and that only donors of $1,000 or more need to be disclosed (as compared to the $200 level for independent expenditures). *Id.* at 690.... And the Court left open the possibility of as-applied challenges to the donor disclosure requirement for organizations that can demonstrate a "reasonable probability" of "economic reprisals or physical threats" as a result of compelled disclosure. *Id*. at 692.[9]

Nothing in *WRTL* casts doubt on the Supreme Court's prior holdings regarding the requisite showing for an as-applied challenge to disclosure requirements. The subject of *WRTL* was not disclosure but a ban on corporate-treasury financing for certain advertisements, and the Court applied strict scrutiny. The Court did not suggest that the relevant advertisements are constitutionally exempt from *all* regulation. Indeed, the *WRTL* plaintiff explicitly disavowed any challenge to the disclosure provisions at the outset of the litigation. Verified Compl. for Declaratory and Injunctive Relief ¶36, *Wis. Right to Life, Inc. v. FEC*, Civ. No. 04-1260 (D.D.C. July 28, 2004) ("WRTL does not challenge the reporting and disclaimer requirements for electioneering communications, only the prohibition on using its corporate funds for its grass-roots lobbying advertisements.").[10] It defies logic and the law to interpret the decision in *WRTL*

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[9] Comments on FEC Notice of Proposed Rulemaking 2004-6 (Political Committee Status), available at http://www.fec.gov/pdf/nprm/political_comm_status/comm3/52.pdf.

[10] WRTL also informed the Supreme Court that "[b]ecause WRTL does not challenge the disclaimer and disclosure requirements, there will be no ads done under misleading names. *There will continue to be full disclosure of all electioneering communications, both as to disclaimers and public reports. The*

as striking down an act of Congress and significantly limiting *McConnell's* holdings on disclosure — *sub silentio*.[11] Therefore, the lower court correctly rejected appellants' argument that *WRTL* had overturned *McConnell*. (J.A. 36.)

Indeed, a unanimous three-judge district court has recently rejected appellants' misinterpretation of *WRTL*. In *Citizens United*, the court denied the plaintiff's request to enjoin enforcement of the EC disclosure provisions and rejected the argument that *WRTL* exempts all *WRTL* ads from disclosure, stating: "We do not believe *WRTL* went so far. The only issue in the case was whether speech that did not constitute the functional equivalent of express advocacy could be banned during the relevant pre-election period." 530 F. Supp. 2d at 281.[12] Even the decision in *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008) (*Leake II*), upon which appellants rely, noted that "no circuit court should engage

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whole system will be transparent. With all this information, it will then be up to the people to decide how to respond to the call for grassroots lobbying on a particular governmental issue." Br. for Appellee at 49, *WRTL*, S. Ct. Nos. 06-969, 06-970 (emphasis added).

[11] *See, e.g., Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 449 n.4 (2004) (Court is unlikely to overrule its own recent decisions *sub silentio*); *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (courts should not conclude that "more recent [Supreme Court] cases have, by implication, overruled an earlier precedent").

[12] The same argument was also made and rejected in *Ohio Right to Life Soc., Inc. v. Ohio Elections Comm'n (ORTL)*, Civ. No. 08-492, 2008 WL 4186312, at *7 (S.D. Ohio Sept. 5, 2008) ("The *WRTL* Court made clear that the Court was only considering the constitutionality of the BCRA's federal electioneering [communication] funding prohibition ... [T]he *WRTL* Court did not even mention disclosure requirements, much less consider their constitutionality.").

in cloudy crystal ball-gazing" about the "effect *WRTL* may or may not have had upon *McConnell*," *id.* at 285. Although *Leake II* struck down a state law provision defining certain kinds of campaign communications, this Court distinguished that statute from BCRA's definition of electioneering communication: "[N]othing in BCRA even approached the First Amendment infirmities present here: that is to say the complete lack of notice as to what speech is regulable, and the unguided discretion given to the State to decide when it will move against political speech and when it will not." *Id.* As explained *supra* pp. 4-6, the definition of electioneering communication is a bright-line test that presents no comparable problems of vagueness. *See McConnell*, 540 U.S. at 194 ("[BCRA's] definition of 'electioneering communication' raises none of the vagueness concerns that drove our analysis in *Buckley*.").

2. Disclosure Requirements Are Subject To Intermediate Scrutiny

Even without *McConnell's* facial upholding of the disclosure requirements, appellants would still be unlikely to prevail on the merits of their claims under the appropriate level of scrutiny. First Amendment challenges to disclosure statutes are analyzed under an "exacting scrutiny" standard, which requires that the compelled disclosure bear a "substantial relation" to an important government interest. *Buckley*, 424 U.S. at 64, 66, 75; *see also McConnell*, 540 U.S. at 196,

231; *Davis v. FEC*, 128 S. Ct. at 2775 ("[T]here must be 'a relevant correlation' or 'substantial relationship' between governmental interest and the information required to be disclosed, and the government interest 'must survive exacting scrutiny.'"); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 202 (1999) ("In [*Buckley v. Valeo*], we stated that 'exacting scrutiny' is necessary when compelled disclosure of campaign-related payments is at issue [and] upheld, as substantially related to important governmental interests, the recordkeeping, reporting, and disclosure provisions of [FECA] ....").[13] The Court in *Buckley* expressly distinguished the strict scrutiny applicable to statutes (such as expenditure limits) that impose "limitations on core First Amendment rights of political expression," 424 U.S. at 44-45, from the lesser scrutiny applicable to encroachments on the "privacy of association" by disclosure requirements, *id.* at 64. *McConnell* confirmed that it is "simply untrue in the campaign finance context that all burdens on speech necessitate strict scrutiny review." 540 U.S. at 140 n.42 (internal quotation marks omitted).

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[13] *See Alaska Right To Life Comm. v. Miles*, 441 F.3d 773, 788 (9th Cir. 2006) (finding *McConnell* did not apply strict scrutiny and upholding disclosure requirements as supported by "important state interests"); *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 663 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 938 (2007); *Jones v. Unknown Agents of FEC*, 613 F.2d 864, 875 (D.C. Cir. 1979) (citing *Buckley*); *Jackson v. Leake*, 476 F. Supp. 2d 515, 525 (E.D.N.C. 2006) (citing *Buckley* and *McConnell*); *ORTL*, 2008 WL 4186312, at *8 ("With respect to campaign finance disclosure provisions, the Supreme Court has consistently applied an intermediate level of scrutiny.").

Twenty-five years ago, this Court held that the Supreme Court's decisions in *Buckley*, *NAACP*, and other cases made clear that disclosure laws must have a "'relevant correlation' or 'substantial relation' between the governmental interest and the information sought through disclosure." *Master Printers of Am. v. Donovan*, 751 F.2d 700, 704 (4th Cir. 1984) (quoting *Buckley*, 424 U.S. at 64). Recently, this Court rejected the argument that the scrutiny applicable to such disclosure requirements is equivalent to strict scrutiny, explaining that "having a substantial relation to an important state interest is all that is required by *Buckley* and *McConnell*…." *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 440 (4th Cir. 2008) (*Leake I*) (footnote omitted). There, in upholding the constitutionality of state judicial election disclosure laws, the Court confirmed its application of the *Buckley* and *McConnell* test for disclosure laws.

> Reporting and disclosure requirements in the campaign finance realm "must survive exacting scrutiny." *Buckley*, 424 U.S. at 64. The plaintiffs argue that "exacting scrutiny" in this context is equivalent to strict scrutiny (requiring narrow tailoring to a compelling state interest), but this argument is inconsistent with *Buckley* and subsequent cases.

Leake I, 524 F.3d at 439.[14] Thus, as the district court below correctly held, "the

[14] Appellants' reliance on *Leake II* is misplaced. There, this Court considered limits on independent expenditures and contributions for political committees, not reporting requirements standing alone. In contrast, *Leake I* specifically and thoroughly examined disclosure requirements for campaign spending.

provisions involved here have only a marginal impact on the ability of contributors to engage in effective political speech. As such, they are not subject to strict scrutiny, but to the lesser standard of intermediate scrutiny applied in *Buckley* and *McConnell*." (J.A. 33-34.)

3. Disclosure Requirements Have Been Upheld As To Spending On "Issue" Speech That Cannot Constitutionally Be Limited

Although the government need not demonstrate that a disclosure provision is the least restrictive means of furthering a government interest, the Supreme Court has found it significant in the electoral context that such provisions are considerably less restrictive than contribution or expenditure restrictions. *See Buckley*, 424 U.S. at 81-82 ("[T]he disclosure requirement is … [a] minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view.").

Thus, the Court has often upheld disclosure requirements *even when striking down substantive restrictions on the funds to be disclosed*. *See, e.g.*, *MCFL*, 479 U.S. at 262 (striking down independent expenditure restrictions on certain non-profit organizations in part because "reporting obligations provide precisely the information necessary to monitor MCFL's independent spending activity"); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 298 (1981) (striking down contribution limits governing ballot initiative groups because "there is no

risk that the Berkeley voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since contributors must make their identities known under … the ordinance, which requires publication of lists of contributors in advance of the voting"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 & n.32 (1978) (striking down prohibition on corporate expenditures to support or oppose ballot initiatives but noting that "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected"). The three-judge court in *Citizens United* recently emphasized that "the Supreme Court has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment." 530 F. Supp. 2d at 281 (citing *MCFL*, *Citizens Against Rent Control*, and *Bellotti*; footnote omitted).

Despite this precedent, appellants argue that the First Amendment requires that "the government always has the *threshold burden* of proving that the unambiguously-campaign-related principle is met (as implemented by the appropriate test) before meeting the burden imposed by the required level of scrutiny." (Br. 13 (emphasis in original).) Appellants, however, have created a novel threshold burden that lacks precedential foundation. Contrary to appellants' assertions, *Buckley* did not enshrine the phrase "unambiguously campaign related"

as a stand-alone constitutional test that all disclosure statutes must pass. Instead, this phrase was merely part of the Court's explanation that its statutory construction of "expenditure" in one part of the Act's disclosure provisions would resolve "serious problems of vagueness," *Buckley*, 424 U.S. at 76 — a problem that the Court has explicitly noted does *not* arise in the definition of "electioneering communication." *McConnell*, 540 U.S. at 194.

As the lower court correctly stated (J.A. 34) when it rejected CTP's "unambiguously campaign related" assertion, "[t]his argument is, for all intents and purposes, the same argument made and rejected by the Supreme Court in *McConnell*." The Court in *McConnell* specifically refuted the argument that "Congress cannot constitutionally require disclosure of … 'electioneering communications' without making an exception for those 'communications' that do not meet *Buckley's* definition of express advocacy." *McConnell*, 540 U.S. at 190. The Court explained that this argument "misapprehends" the Court's "prior decisions, for the express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law." *Id.* The same misapprehension is fatal to appellants' "unambiguously campaign related" theory, because it ignores the fact that the Court's use of that phrase in *Buckley* was part of the same statutory construction — not a first principle of constitutional law — needed to address the vagueness in the phrase "for the purpose of … influencing"

the nomination or election of candidates. *Buckley*, 424 U.S. at 77; *see generally id.* at 76-82.[15]

Finally, appellants' interpretation of *Buckley* is further belied by the decisions since *Buckley* that have repeatedly employed intermediate scrutiny — with no application of any "unambiguously campaign related" requirement — in assessing disclosure statutes governing "issue" speech. *See Buckley v. Am. Constitutional Law Found.*, 525 U.S. at 204 (applying exacting scrutiny and upholding requirement to disclose donations made to organizations to pay ballot-initiative petition circulators); *Citizens Against Rent Control*, 454 U.S. at 298-99 (ballot initiatives); *Bellotti*, 435 U.S. at 791-92 n.32 (same). This is particularly noteworthy because in the context of ballot-issue campaigns, unrestricted campaign spending creates little risk of *quid pro quo* corruption because the elections do not involve candidates who may become beholden to their financial supporters. *See Bellotti*, 435 U.S. at 790 (distinguishing referendum from candidate campaign).

4. The Disclosure Provisions Serve Important Government Interests By Providing Information To The Public

This Court and the Supreme Court have found that disclosure requirements as to campaign contributions, express advocacy communications, electioneering

[15] Again, appellants' reliance on *Leake II* is misplaced because that opinion focused on limits on independent expenditures and contributions for political committees, not reporting requirements standing alone.

communications, and lobbying and other issue-oriented political communications serve important public interests. *See, e.g.*, *Buckley*, 424 U.S. at 66-68, 81-82; *McConnell*, 540 U.S. at 196; *United States v. Harriss*, 347 U.S. 612, 625 (1954) (upholding lobbying disclosure); *Leake I*, 524 F.3d at 440 (upholding disclosure requirements for a state public financing system, even as to non-participating candidates, due to the "important state interests," including "providing the electorate with information") (quoting *McConnell*, 540 U.S. at 196).

In upholding the disclosure requirements at issue here against a facial challenge, the Supreme Court relied upon the important interest in securing the public's access to information about the choice of their elected leaders. "[I]ndividual citizens seeking to make informed choices in the political marketplace" have "First Amendment interests" in learning how electoral advocacy is funded. *McConnell*, 540 U.S. at 197 (citation omitted); *accord Buckley*, 424 U.S. at 82 (disclosure "further[s] First Amendment values by opening the basic processes of our federal election system to public view" (footnote omitted)).

Similarly, more than fifty years ago, the Supreme Court upheld mandatory disclosure of lobbying expenditures to further the government interest in informing the public of who is attempting to sway the resolution of public issues and how they are attempting to do so:

> Congress has not sought to prohibit [lobbying]. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much.

Harriss, 347 U.S. at 625. In the decades since *Harriss*, courts have almost unanimously upheld lobbying disclosure. *See, e.g.*, *Fla. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 460 (11th Cir. 1996) (upholding requirement that lobbyists disclose the name of each client who provided money for each of the lobbyist's expenditures); *Minn. State Ethical Practices Bd. v. NRA*, 761 F.2d 509, 512 (8th Cir. 1985) ("[U]nder *Buckley*, the state of Minnesota's interest in disclosure outweighs any infringement of … first amendment rights."); *NAM*, 549 F. Supp. 2d at 73-75.[16] Lobbying, like issue advocacy, is not directed at candidate campaigns. It is issue-oriented political activity protected by the First Amendment, and it therefore shares most of the key characteristics of the advertising at issue in *WRTL*. *See WRTL*, 127 S. Ct. at 2667 ("The ads focus on a

[16] Likewise, this Court has upheld required disclosure of the identity of an individual hired by an employer to persuade employees on union-related matters. *Master Printers*, 751 F.2d at 713. The Labor-Management Reporting and Disclosure Act (LMRDA) required disclosure of the individual's name, address, all receipts and disbursements, a detailed statement of the terms and conditions of their employment agreement, and annual reports of all receipts and disbursements. *Id*. at 702 n.1. "Just as the Federal Election Campaign Act reviewed in *Buckley* and the Lobbying Act upheld in *Harriss* provided such needed sunlight in two areas prone to corrupt activity, so the disclosure provisions of the LMRDA expose 'persuader activity' to the effective 'disinfectant' of public scrutiny." *Id*. at 713 (citations omitted).

legislative issue [and] take a position on the issue.... The ads do not mention an election, candidacy, political party, or challenger....”). This overwhelming precedent belies appellants’ contention (Br. 37) that the public’s informational interest attaches only to campaign speech, and not “independent, issue-advocacy.”

In any event, just because an ad is a *WRTL* ad does not mean it is not election-related. The controlling opinion in *WRTL* held that a corporation may use its general treasury funds to finance an EC unless the communication “is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *Id.* at 2667. That opinion recognized, however, that some electioneering communications can reasonably be construed as *either* electoral appeals *or* as issue advocacy, and that regarding the *financing* restrictions, “the tie goes to the speaker.” *Id*. at 2669. The necessary consequence of that holding is that some ECs may be constitutionally exempt from BCRA’s corporate-financing prohibitions, even though some reasonable observers will construe the advertisements as electoral advocacy.

CTP’s ads in this case are good examples: Although *Basic Rights* and *Tragic but True* (J.A. 13-14 ¶¶32-33) do not expressly mention the presidential election or advocate an electoral outcome, they were highly critical of Senator Obama and broadcast outside his home state of Illinois in the final weeks of the campaign. The ads are closer to the “Jane Doe” example identified in *McConnell*

— which "condemned Jane Doe's record on a particular issue" — than the *WRTL* ads, which did not expressly identify the senators' positions on the filibuster issue. *See WRTL*, 127 S. Ct. at 2667 n.6 (citing *McConnell*; citation and quotation marks omitted). Voters who perceive a connection between ads like these and an upcoming election retain a significant interest in identifying the advertisements' sponsor and underwriters, to assess the ads' credibility, and the candidate's reaction. The reporting provisions at issue further that interest. The disclaimer provisions also ensure that communications having potential electoral significance are not *mis*attributed to the identified candidate or his or her opponent. *Cf. Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 565 (2005) (discussing, in dicta, potential as-applied challenge to misattributed advertising); *id*. at 568 (Thomas J., concurring).

5. Disclosure Requirements Support The Important Government Interest In Law Enforcement

Disclosure statutes serve an important government interest in enabling enforcement of substantive funding regulations. In the electoral context, *Buckley* upheld FECA's disclosure requirements as advancing the government's interest in "gathering the data necessary to detect violations of the contribution limitations." 424 U.S. at 68. *McConnell* similarly held that mandatory disclosure was constitutional in light of the interest in "gathering the data necessary to enforce more substantive electioneering restrictions." 540 U.S. at 196.

The enforcement interest is not limited to spending by candidates or political committees. *MCFL* held that the defendant corporation must be allowed to finance independent expenditures with its corporate treasury funds because it presented no "threat at all" of corruption due to its particular lack of business activity and funding. 479 U.S. at 263. Nevertheless, the Court held that MCFL would have to report its independent expenditures so that the public would have information, the Commission could monitor its independent spending, and the Commission could review whether the corporation's major purpose has become campaign activity:

> Even if [the contribution limit] is inapplicable, an independent expenditure of as little as $250 by MCFL will trigger the disclosure provisions [which require MCFL] to identify all contributors who annually provide … funds intended to influence elections, [] to specify all recipients of independent spending …, and [] to identify all persons making contributions … who request that the money be used for independent expenditures. *These reporting obligations provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of contributions*....
>
> Furthermore, should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee. As such, it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns. In sum, there is no need for the sake of disclosure to treat MCFL any differently than other organizations that only occasionally engage in independent spending on behalf of candidates.

Id. at 262 (internal citation omitted and emphasis added). Thus, FECA's disclosure provisions remain applicable to *MCFL* corporations so that the

government can determine if and when they cross the line from exempt to regulable activity.

Analogously, even though the prohibition on corporate spending cannot constitutionally be applied when a corporation runs a *WRTL* ad, the EC disclosure provisions remain applicable to such ads because the government has an important enforcement interest in determining which ECs are exempt under *WRTL*. The Ninth Circuit recognized such an interest in *Alaska Right to Life* when the court analyzed a state disclosure statute similar to FECA's disclosure provisions regarding ECs. *See* 441 F.3d at 788-93. The court held that the corporation could constitutionally be compelled to make disclosures regarding advertising that met the statutory definition of an EC but that consisted only of issue advocacy — *i.e.*, a subset of what would now be known as *WRTL* ads. *Id*. at 791-93. This analysis applies with equal force to BCRA's EC disclosure provisions: Without disclosure, the Commission and potential administrative complainants among the public would have difficulty knowing when ECs are being broadcast, and whether communications purporting to meet *WRTL*'s criteria actually do so.[17]

[17] Appellants suggest (Br. 37-38) that the enforcement interest does not apply because it is linked to the anti-corruption interest, but they fail to explain why there is no enforcement interest in determining which specific activities are regulable. Appellants also rely (Br. 38) on *Davis*, but in that case the government's interest in disclosure was the administration of certain contribution limits that the Court struck down *in their entirety*. *See* 128 S. Ct. at 2775. That situation is not present in the context of BCRA's electioneering communication funding restrictions,

6. Appellants Demonstrate No Constitutional Burden Arising From The Disclosure Provisions

CTP cannot prevail in its as-applied challenge to the EC disclosure provisions because it presents no evidence about who its donors are or how they or the organization would suffer "threats, harassment, and reprisals" if CTP were to comply with the requirements. *McConnell*, 540 U.S. at 198-99 (citing *Buckley*, *Socialist Workers*, *and NAACP*); *see also Buckley*, 424 U.S. at 69-74, 82 n.109 (citing *NAACP*).[18] *Buckley* and *McConnell*, while recognizing harassment as a *potential* burden, specifically found no evidence of *actual* harassment in the FECA/BCRA context and held that such evidence would be required to mount a reprisal-based, as-applied First Amendment challenge to the Act's disclosure provisions. *Buckley*, 424 U.S. at 69 ("No record of harassment on a similar scale was found in this case."); *McConnell*, 540 U.S. at 199 (upholding lower court finding that "concerns" of plaintiffs regarding harassment were unsupported due to

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which *McConnell* facially upheld and which the FEC remains charged with enforcing.

[18] If a donor faced a real threat of reprisal, the corporation could request that the Commission exempt disclosure of that donor from the relevant disclosure requirements on constitutional grounds, as the Socialist Workers Party has done repeatedly and successfully. *See* FEC Advisory Opinions 1990-13 (granting party exemption from disclosure requirements due to substantiated threat of reprisals), 1996-46 (same), 2003-02 (same), 2009-01 (same); *see also* 72 Fed. Reg. 72901 ("Organizations with significant and serious threats of reprisal or harassment may seek as-applied exemptions to the disclosure requirements under *Socialist Workers* through advisory opinions and court filings."). All FEC advisory opinions are available at http://saos.nictusa.com/saos/searchao.

"lack of specific evidence"); *see also Citizens United*, 530 F. Supp. 2d at 281 (rejecting plaintiff's claim of reprisals, characterizing it is a "bald assertion" for which plaintiff "presented no specific evidentiary support"); *Alaska Right To Life*, 441 F.3d at 793-94 (rejecting harassment-based, as-applied challenge to disclosure requirements).

Appellants cite *ORTL* and *Center for Individual Freedom, Inc. v. Ireland*, Nos. 08-190 & 08-1133, 2009 WL 749868 (S.D. W. Va. Feb. 12, 2009) (*CFIF*), as examples of district courts issuing preliminary injunctions "in this context." (Br. 11 n.8.)[19] However, the court did not issue an injunction as to the EC disclosure requirements in *ORTL*, finding that ORTL "has not even attempted to establish a record that would permit this Court to conclude that its contributors face a real threat of retaliation if their names were disclosed." 2008 WL 4186312, at *9. Likewise, the court in *CFIF* found that CFIF had "not demonstrated that its members will be subject to threats, harassment, or reprisals even remotely approaching the severity of the situations in *NAACP* and *Brown*," even though the state attorney general had publicly threatened legal action against CFIF. 2009 WL 749868, at *25.

In addition to showing no threat of reprisals, CTP has widely broadcast its ads, so its speech has not been chilled. *See supra* pp. 10-11. Moreover,

[19] The *CFIF* opinion appellants cite, 2008 WL 4642268 (S.D. W. Va. Oct. 17, 2008), has been superseded by 2009 WL 749868.

McConnell and numerous other cases have held that financial reporting relating to speech is, as a matter of law, too removed in time and space from the speech act to constitute a constitutional infringement on the speech itself. *See McConnell*, 540 U.S. at 197-99, 201; *see also Buckley v. Am. Constitutional Law Found.*, 525 U.S. at 198 (rejecting challenge to requirement that petition circulators file affidavits); *cf. Harriss*, 347 U.S. at 626 (rejecting First Amendment challenge to federal lobbyist disclosure statute because "hazard" of speech being silenced by financial disclosure was "too remote").

As to the disclaimer requirements, the Commission is aware of no authority — and CTP cites none — stating that a requirement to use a portion of a television commercial to convey important information relevant to that commercial creates a cognizable chill on the advertiser's ability to advertise. The only concern CTP has stated regarding the disclaimers is that it "would prefer to use a shorter identification of itself so as not to consume so much valuable advertising time." (J.A. 15-16 ¶36.) However, federal and state governments often permissibly require extensive oral and written information to be included in various communications, such as advertising for attorneys, pharmaceuticals, and securities. For example, the Second Circuit has rejected a First Amendment challenge to a state labeling law on similar grounds. *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 116 (2d Cir. 2001) (noting "the potentially wide-ranging implications" of

plaintiff's First Amendment claim and refusing to call into question the constitutionality of such a variety of long-established requirements). In each of these areas, the advertiser undoubtedly would prefer to use its time and space for content other than a disclaimer, but the disclaimer requirements do not prevent plaintiff from advertising. They only require plaintiff, like all advertisers subject to regulation, to devote a few seconds of advertising time to inform the public, which is not a burden of constitutional dimension.

B. Appellants Are Not Likely To Succeed On The Merits Of Their Challenge To The Analysis The Commission Uses To Determine Political Committee Status

As a threshold issue, it is unclear whether CTP has presented an Article III case or controversy regarding the Commission's political committee analysis because CTP's fears that it would be deemed a political committee under 2 U.S.C. §431(4) are speculative. CTP does not allege it has received more than $1,000 in "contributions"; nor does it allege that it has made more than $1,000 in "expenditures," but only disbursements for permissible corporate ECs. CTP also alleges that it does not meet the Supreme Court's "major purpose" test. (J.A. 12-13 ¶¶28-30.) Thus, CTP's challenge appears to present only an abstract inquiry that is not ripe or otherwise fit for judicial resolution. "'Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the

proper exercise of the judicial function.'" *Renne v. Geary*, 501 U.S. 312, 323 (1991) (quoting *Longshoremen's Union v. Boyd*, 347 U.S. 222, 224 (1954)).

1. The Commission's Enforcement Analysis Is Not Reviewable Under The Administrative Procedure Act

CTP challenges the Commission's explanation of how it determines whether the "major purpose" test for political committee status has been met, as explained in an Explanation and Justification (E&J) published in the Federal Register. *See Political Committee Status,* 72 Fed. Reg. 5595 (Feb. 7, 2007); *supra* pp. 8-9. Because this explanation binds no one and its discussion of the Commission's political committee analysis does not constitute final agency action, this claim is not reviewable under the APA. Courts may only hear APA suits based on "[a]gency action made reviewable by statute and *final agency action* for which there is no other adequate remedy in a court." 5 U.S.C. §704 (emphasis added). "Final" agency action ends the agency's decision-making process and determines the rights and obligations of parties. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852 (4th Cir. 2002) (publication of report not final agency action); *Invention Submission Corp. v. Rogan*, 357 F.3d 452, 459 (4th Cir. 2004) (APA "does not provide judicial review for everything done by an administrative agency") (citation omitted); *see also Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538-39 (D.C. Cir. 1986) (enforcement policy and guidelines "used by inspectors as guidance in

making individual enforcement decisions" not final agency action). *But see RTAO*, 2008 WL 4416282, at *9 (FEC's political committee explanation is reviewable).

After a rulemaking concerning political committee status, the Commission published its E&J to explain why it did not promulgate a revised regulatory definition of "political committee" or single out 26 U.S.C. §527 political organizations for increased regulation. 72 Fed. Reg. 5595. As part of that E&J, the Commission "discusse[d] several recently resolved administrative matters that provide considerable guidance to all organizations regarding … political committee status." *Id*. Its decision to continue analyzing political committee status on a case-by-case basis rather than promulgating a rule of general application was challenged and upheld in *Shays v. FEC* (*Shays II*), 511 F. Supp. 2d 19 (D.D.C. 2007). The E&J's primary purpose was to explain why a broad regulation was *not* created; it neither describes itself as a "policy statement," nor purports to establish a binding norm or decide anyone's legal status. CTP cites nothing to the contrary. The E&J did not create a new regulation or change past policy but simply explained how the Commission's particular case-by-case enforcement actions provide "guidance" to organizations about political committee status and the major purpose test. 72 Fed. Reg. at 5604. This guidance is not

"final" agency action subject to APA review.[20]

2. The Commission's Political Committee Analysis Is Lawful

a. Standard Of Review

Appellants' facial challenge to the Commission's enforcement analysis includes claims of overbreadth and vagueness. The Supreme Court has used various formulations in determining facial overbreadth. *Compare, e.g., United States v. Salerno*, 481 U.S. 739, 745 (1987) (plaintiff must "establish that no set of circumstances exists under which the Act would be valid") *with New York v. Ferber*, 458 U.S. 747, 769-771 (1982) (plaintiff can succeed if it establishes that a "substantial number" of the challenged law's applications are unconstitutional) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Thus, at a minimum, CTP carries the "heavy burden of proving" that the challenged methodology's "application to protected speech is substantial, 'not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications.'" *McConnell*, 540 U.S. at 207 (citation omitted). CTP also argues that the enforcement analysis is unconstitutionally vague on its face, that is, that it fails to give "the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that

[20] In passing, CTP also criticizes (Br. 41 n.28) Commission regulations that are relevant to the Commission's analysis of political committee status, but these regulations were not considered below and are not properly before this Court.

he may act accordingly" and permits "arbitrary and discriminatory enforcement." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

b. The Commission's Political Committee Analysis Is Neither Vague Nor Overbroad

The Commission's approach to political committee status is constitutional. As explained *supra* pp. 8-9, in *Buckley* the Court established the "major purpose" test and limited the definition of "political committee" to organizations controlled by a candidate or whose major purpose is the nomination or election of a candidate. *Buckley*, 424 U.S. at 79. "Expenditures of candidates and of 'political committees' so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." *Id.*; *see also MCFL*, 479 U.S. at 252 n.6 (plaintiff not a political committee because "[i]ts central organizational purpose is issue advocacy"); *McConnell*, 540 U.S. at 170 n.64.

CTP's claim focuses on the Commission's implementation of the major purpose test, but the Commission's approach is not unconstitutionally vague or overbroad. The assessment of an organization's "major" purpose is inherently comparative and necessarily requires an understanding of an organization's overall activities. In enforcement decisions, the Commission considers a variety of factors — most of which courts have endorsed or CTP does not challenge — to determine

whether an organization's major purpose is the election or defeat of a candidate.[21] Those factors include an organization's public statements, representations made in government filings, statements made to potential donors, internal governing documents, and the proportionate amount of spending on election-related activity. *See* 72 Fed. Reg. at 5605. Although CTP concedes (Br. 41) that an organization's "organic" documents are relevant to determine major purpose, documents like articles of incorporation paint only an abstract and incomplete picture of an organization's actual activities and disbursements. Moreover, if CTP were correct (*id.*) that the only purpose of examining such documents is "to determine if there was an express intention to operate as a political committee, *e.g.*, by being designated as a 'separate segregated fund,'" that inquiry would be meaningless: *Every* entity designated as a separate segregated fund is, by definition, a political committee under 2 U.S.C. §431(4)(B), so the major purpose test is redundant for such entities.

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[21] The Commission generally considers the major purpose test after first determining that an organization has either spent more than $1,000 in expenditures or raised more than $1,000 in contributions. *See* 72 Fed. Reg. at 5603-04. The only court to address this approach has criticized the Commission for determining whether communicative expenditures contain express advocacy before evaluating the major purpose of an organization; the court believed that the express advocacy analysis is unnecessary for groups whose major purpose is known to be campaign related. *Shays II*, 511 F. Supp. 2d at 26-27. Although the Commission disagrees with that court's criticism, it recognizes that its own interpretation may tend to limit the number of organizations that qualify as political committees. CTP ignores this conservative aspect of the Commission's approach.

Courts have endorsed evaluation of public statements and an organization's spending or contributions to determine its major purpose. *See, e.g., FEC v. Malenick*, 310 F. Supp. 2d 230, 234-37 (D.D.C. 2004) (considering organization's statements in brochures and "fax alerts" sent to potential and actual contributors, as well as its spending influencing federal elections); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996) ("The 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."). Courts also consider non-public statements. *Malenick*, 310 F. Supp. 2d at 235 (letter from president to organization's primary contributor); *GOPAC*, 917 F. Supp. at 864, 866 (description of organization's meetings attended by national leaders; reference to organization's "Political Strategy Campaign Plan and Budget").

In numerous administrative enforcement proceedings and advisory opinions, the Commission has examined these factors and others to determine whether organizations satisfy the major purpose test. *See* 72 Fed. Reg. at 5605-06. The Commission has also declined to find reason to believe organizations should have registered as political committees in a number of recent matters.[22] CTP does not allege that any of these analyses came to the wrong conclusion. Instead, CTP

[22] *See, e.g.*, MURs 5779/5805 (City of Santa Clarita); 5820/5843 (ACORN); and 5928 (Kos Media LLC). Documents relating to closed MURs are available at http://eqs.nictusa.com/eqs/searcheqs.

relies upon unsubstantiated and irrelevant allegations. For instance, CTP argues (Br. 40) that political committee status must be based upon "*the* major purpose" of an entity, not *a* major purpose, but fails to provide any evidence that the Commission has made any political committee determinations in a manner contrary to this principle. *See* 72 Fed. Reg. at 5601 (political committee status requires having "the major purpose of engaging in Federal campaign activity").[23] The Commission's approach is thus consistent with this Court's statement in *Leake II*, 525 F.3d at 289: "While '*the* major purpose' of an organization may be open to interpretation, it provides potentially regulated entities with sufficient direction to determine if they will be designated as a political committee."

Finally, CTP argues (Br. 42-43 n.29) that the Commission has improperly reformulated the major purpose test to focus on "Federal campaign activity." *Buckley*, however, uses the term "campaign related" to summarize legitimately regulable activity by political committees and to distinguish such organizations from groups "engaged purely in issue discussion." 424 U.S. at 79. The Commission's use of the phrase "federal campaign activity" when examining a group's major purpose is thus reasonable and also takes into account that not all

[23] Another district court in this Circuit recently rejected essentially the same argument that CTP makes here, and this Court denied an injunction pending appeal. *RTAO*, 2008 WL 4416282, at *14 ("Because the FEC rule appears to consider the same factors as have been supported and encouraged by the courts in determining a 'major purpose,' Plaintiff fails to demonstrate a likelihood of success on the merits ....").

"campaign related" spending involves communications; it may also involve expenditures for activity such as gaining ballot access rather than payments for disseminating advocacy messages. Moreover, as the court in *RTAO* recognized, the use of the word "federal" simply clarifies that to satisfy the major purpose test an organization's campaign activity must involve federal candidates, not state or local ones. *See* 72 Fed. Reg. at 5601; *RTAO*, 2008 WL 4416282, at *14. Like the rest of the Commission's interpretation, this part is reasonable and constitutional.

IV. THE PUBLIC INTEREST AND THE BALANCE OF HARMS WEIGH AGAINST THE ISSUANCE OF A PRELIMINARY INJUNCTION

Enjoining the Commission from enforcing its regulations would substantially injure the Commission and harm the public, whose interests are essentially the same as those of the Commission. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers … injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). A "presumption of constitutionality … attaches to every Act of Congress," and that presumption is "an equity to be considered in favor of [the government] in balancing hardships." *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers). "[A] court sitting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation.'" *United States v.*

Oakland Cannabis Buyer's Co-op., 532 U.S. 483, 497 (2001) (quoting *Va. Ry. Co. v. Ry. Employees*, 300 U.S. 515, 551 (1937)). As Chief Justice Rehnquist stated in the similar context of a request for injunction pending appeal, "barring the enforcement of an Act of Congress would be an extraordinary remedy, particularly when this Court recently held [that Act] facially constitutional." *WRTL v. FEC*, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers) (citing *McConnell*, 540 U.S. at 189-210, and denying request regarding BCRA's EC financing restrictions).

The "harm to [the Commission] and considerations of public policy, in this case, are intertwined," *RTAO*, 2008 WL 4416282, at *16, and the imminent harm to the public if the Commission is not permitted to enforce the statute far outweighs CTP's speculative allegations. Moreover, the public also has a powerful interest in knowing that the laws written by its elected officials are being followed and enforced. In particular, as explained *supra* pp. 19-24, appellants' challenges do not involve restrictions on speech, but disclosure of information to the public; and appellants have demonstrated no risk to themselves of serious reprisals or harassment, nor any imminent investigation by the Commission.

In the key weeks leading up to the national election, a temporary lifting of the challenged provisions would have undermined the public's confidence in the federal campaign finance system. The statute and enforcement analysis at issue

implement longstanding limits on corporate influence in federal elections and ensure that political committees, whose major purpose is campaign activity, abide by certain contribution limits and disclose their receipts and disbursements to the public. CTP alleges that it is reasonable to expect suits challenging regulations in an election period (Br. 7), but this does not mean it is reasonable to change the rules less than one month before a national election. As a district court in this Circuit found, changing the rules weeks prior to an election does not benefit the public interest but rather supports denial of a preliminary injunction. *Jackson*, 476 F. Supp. 2d at 530; *see also RTAO*, 2008 WL 4416282, at *16 (if court were to enter injunction, "the next two months of election law and enforcement would likely become a 'wild west' of electioneering communication and contributions without the challenged regulations in place").

V. CONCLUSION

CTP argues that a preliminary injunction is necessary because the public has an interest in receiving its speech. However, the public has already received CTP's speech, *without* a preliminary injunction. Its speech has not been chilled, it faces no risk of irreparable harm, and it is unlikely to succeed on the merits. Thus, the district court did not abuse its discretion when it held that appellants had failed to meet their heavy burden of justifying the extraordinary remedy of a preliminary injunction.

ORAL ARGUMENT

The Commission requests oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,955 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman font.

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I hereby certify that on April 17, 2009, I will electronically file the foregoing using the Court's CM/ECF system, which will then send a notification of such filing to the following:

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ADDENDUM

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TITLE 2. THE CONGRESS
Chapter 14—Federal Election Campaigns
Subchapter 1—Disclosure of Federal Campaign Funds

§ 431. Definitions

When used in this Act:

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(4) The term "political committee" means—
(A) 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; or
(B) any separate segregated fund established under the provisions of section 441b(b) of this title; or
(C) any local committee of a political party which receives contributions aggregating in excess of $5,000 during a calendar year, or makes payments exempted from the definition of contribution or expenditure as defined in paragraphs (8) and (9) of this section aggregating in excess of $5,000 during a calendar year, or makes contributions aggregating in excess of $1,000 during a calendar year or makes expenditures aggregating in excess of $1,000 during a calendar year.

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§ 434. Reporting Requirements

(f)[1] *Disclosure of electioneering communications.*
(1) *Statement required*. Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement containing the information described in paragraph (2).
(2) *Contents of statement*. Each statement required to be filed under this subsection shall be made under penalty of perjury and shall contain the following information:
(A) The identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement.
(B) The principal place of business of the person making the disbursement, if not an individual.
(C) The amount of each disbursement of more than $200 during the period covered by the statement and the identification of the person to whom the disbursement was made.
(D) The elections to which the electioneering communications pertain and the names (if known) of the candidates identified or to be identified.
(E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(20))) directly to this account for electioneering communications, the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. Nothing in this subparagraph is to be construed as a prohibition on the use of funds in such a segregated account for a purpose other than electioneering communications.

[1] Section 212(a) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, amended section 434 by striking the undesignated matter after subsection (c)(2) and adding new subsection (g). This amendment is effective as of November 6, 2002.

(F) If the disbursements were paid out of funds not described in subparagraph (E), the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.
(3) *Electioneering communication*. For purposes of this subsection—
(A) *In general*.
(i) The term 'electioneering communication' means any broadcast, cable, or satellite communication which—
(I) refers to a clearly identified candidate for Federal office;
(II) is made within—
(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.
(ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term 'electioneering communication' means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate. Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations.

(B) *Exceptions*. The term 'electioneering communication' does not include—
(i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;
(ii) a communication which constitutes an expenditure or an independent expenditure under this Act;
(iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or
(iv) any other communication exempted under such regulations as the Commission may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 301(20)(A)(iii) (2 U.S.C. § 431(20)(A)(iii)).
(C) *Targeting to relevant electorate*. For purposes of this paragraph, a communication which refers to a clearly identified candidate for Federal office is 'targeted to the relevant electorate' if the communication can be received by 50,000 or more persons—
(i) in the district the candidate seeks to represent, in the case of a candidate for Representative in, or Delegate or Resident Commissioner to, the Congress; or
(ii) in the State the candidate seeks to represent, in the case of a candidate for Senator.
(4) *Disclosure date*. For purposes of this subsection, the term 'disclosure date' means—
(A) the first date during any calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000; and
(B) any other date during such calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000 since the most recent disclosure date for such calendar year.

(5) *Contracts to disburse*. For purposes of this subsection, a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement.
(6) *Coordination with other requirements*. Any requirement to report under this subsection shall be in addition to any other reporting requirement under this Act.
(7) *Coordination with Internal Revenue Code*. Nothing in this subsection may be construed to establish, modify, or otherwise affect the definition of political activities or electioneering activities (including the definition of participating in, intervening in, or influencing or attempting to influence a political campaign on behalf of or in opposition to any candidate for public office) for purposes of the Internal Revenue Code of 1986.

(g) [1] *Time for reporting certain expenditures*.
(1) *Expenditures aggregating $1,000*.
(A) *Initial report*. A person (including a political committee) that makes or contracts to make independent expenditures aggregating $1,000 or more after the 20th day, but more than 24 hours, before the date of an election shall file a report describing the expenditures within 24 hours.
(B) *Additional reports*. After a person files a report under subparagraph (A), the person shall file an additional report within 24 hours after each time the person makes or contracts to make independent expenditures aggregating an additional $1,000 with respect to the same election as that to which the initial report relates.
(2) *Expenditures aggregating $10,000*.
(A) *Initial report*. A person (including a political committee) that makes or contracts to make independent expenditures aggregating $10,000 or more at any time up to and including the 20th day before the date of an election shall file a report describing the expenditures within 48 hours.
(B) *Additional reports*. After a person files a report under subparagraph (A), the person shall file an additional report within 48 hours after each time the person makes or contracts to make independent expenditures aggregating an additional $10,000 with respect to the same election as that to which the initial report relates.
(3) *Place of filing; Contents*. A report under this subsection—
(A) shall be filed with the Commission; and
(B) shall contain the information required by subsection (b)(6)(B)(iii), including the name of each candidate whom an expenditure is intended to support or oppose.
(4) *Time of filing for expenditures aggregating $1,000*. Notwithstanding subsection (a)(5), the time at which the statement under paragraph (1) is received by the Commission or any other recipient to whom the notification is required to be sent shall be considered the time of filing of the statement with the recipient.

***

[1] Section 212(a) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, amended section 434 by striking the undesignated matter after subsection (c)(2) and adding new subsection (g). This amendment is effective as of November 6, 2002.

§ 441d. Publication and distribution of statements and solicitations; charge for newspaper or magazine space[1]

(a) Whenever a political committee makes a disbursement for the purpose of financing any communication through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising, or whenever any person makes a disbursement for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising or makes a disbursement for an electioneering communication (as defined in section 304(f)(3)) (2 U.S.C. § 434(f)(3)), such communication—
(1) if paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee, or
(2) if paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee;
(3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name and permanent street address, telephone number or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.
(b) No person who sells space in a newspaper or magazine to a candidate or to the agent of a candidate, for use in connection with such candidate's campaign, may charge any amount for such space which exceeds the amount charged for comparable use of such space for other purposes.
(c) *Specification*. Any printed communication described in subsection (a) shall—
(1) be of sufficient type size to be clearly readable by the recipient of the communication;
(2) be contained in a printed box set apart from the other contents of the communication; and
(3) be printed with a reasonable degree of color contrast between the background and the printed statement.
(d) *Additional requirements.*
(1) *Communications by candidates or authorized persons.*
(A) *By radio*. Any communication described in paragraph (1) or (2) of subsection (a) which is transmitted through radio shall include, in addition to the requirements of that paragraph, an audio statement by the candidate that identifies the candidate and states that the candidate has approved the communication.
(B) By television. Any communication described in paragraph (1) or (2) of subsection (a) which is transmitted through television shall include, in addition to the requirements of that paragraph, a statement that identifies the candidate and states that the candidate has approved the communication. Such statement—
(i) shall be conveyed by—
(I) an unobscured, full-screen view of the candidate making the statement, or
(II) the candidate in voice-over, accompanied by a clearly identifiable photographic or similar image of the candidate; and

[1] Section 311 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, amended section 441d to revise the language of subsection (a) and insert subsections (c) and (d). This amendment is effective as of November 6, 2002. It does not apply with respect to runoff elections or recounts of contested elections resulting from elections held prior to November 6, 2002. See section 402(a)(4) of BCRA, cited at Note, 2 U.S.C. § 431.

(ii) shall also appear in writing at the end of the communication in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least 4 seconds.

(2) *Communications by others*. Any communication described in paragraph (3) of subsection (a) which is transmitted through radio or television shall include, in addition to the requirements of that paragraph, in a clearly spoken manner, the following audio statement: '_____ is responsible for the content of this advertising.' (with the blank to be filled in with the name of the political committee or other person paying for the communication and the name of any connected organization of the payor). If transmitted through television, the statement shall be conveyed by an unobscured, full-screen view of a representative of the political committee or other person making the statement, or by a representative of such political committee or other person in voice-over, and shall also appear in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least 4 seconds.

11 C.F.R. § 114.15 Permissible use of corporate and labor organization funds for certain electioneering communications.

(a) *Permissible electioneering communications.* Corporations and labor organizations may make an electioneering communication, as defined in 11 CFR 100.29, to those outside the restricted class unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.
(b) *Safe harbor.* An electioneering communication is permissible under paragraph (a) of this section if it:
(1) Does not mention any election, candidacy, political party, opposing candidate, or voting by the general public;
(2) Does not take a position on any candidate's or officeholder's character, qualifications, or fitness for office; and
(3) Either:
(i) Focuses on a legislative, executive or judicial matter or issue; and (A) Urges a candidate to take a particular position or action with respect to the matter or issue, or (B) Urges the public to adopt a particular position and to contact the candidate with respect to the matter or issue; or
(ii) Proposes a commercial transaction, such as purchase of a book, video, or other product or service, or such as attendance (for a fee) at a film exhibition or other event.
(c) *Rules of interpretation.* If an electioneering communication does not qualify for the safe harbor in paragraph (b) of this section, the Commission will consider whether the communication includes any indicia of express advocacy and whether the communication has an interpretation other than as an appeal to vote for or against a clearly identified Federal candidate in order to determine whether, on balance, the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.
(1) A communication includes indicia of express advocacy if it: (i) Mentions any election, candidacy, political party, opposing candidate, or voting by the general public; or (ii) Takes a position on any candidate's or officeholder's character, qualifications, or fitness for office.
(2) Content that would support a determination that a communication has an interpretation other than as an appeal to vote for or against a clearly identified Federal candidate includes content that:
(i) Focuses on a public policy issue and either urges a candidate to take a position on the issue or urges the public to contact the candidate about the issue; or
(ii) Proposes a commercial transaction, such as purchase of a book, video or other product or service, or such as attendance (for a fee) at a film exhibition or other event; or (iii) Includes a call to action or other appeal that interpreted in conjunction with the rest of the communication urges an action other than voting for or against or contributing to a clearly identified Federal candidate or political
party.
(3) In interpreting a communication under paragraph (a) of this section, any doubt will be resolved in favor of permitting the communication.
(d) *Information permissibly considered.* In evaluating an electioneering communication under this section, the Commission may consider only the communication itself and basic background information that may be necessary to put the communication in context and which can be established with minimal, if any, discovery. Such information may include, for example, whether a named individual is a candidate for office or whether a communication describes a public policy issue.
(e) *Examples of communications.* A list of examples derived from prior Commission or judicial actions of communications that have been determined to be permissible and of communications that have been determined not to be permissible under paragraph (a) of this

section is available on the Commission's Web site, *http://www.fec.gov*.

(f) *Reporting requirement.* Corporations and labor organizations that make electioneering communications under paragraph (a) of this section aggregating in excess of $10,000 in a calendar year shall file statements as required by 11 CFR 104.20.

[72 FR 72914, Dec. 26, 2007]

Rules and Regulations

Federal Register
Vol. 72, No. 25
Wednesday, February 7, 2007

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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NUCLEAR REGULATORY COMMISSION

10 CFR Part 72

RIN 3150–AH93

List of Approved Spent Fuel Storage Casks: NUHOMS HD® Addition; Correction

AGENCY: Nuclear Regulatory Commission.

ACTION: Correcting amendment.

SUMMARY: This document corrects a final rule appearing in the **Federal Register** on December 11, 2006 (71 FR 71463) to add the NUHOMS® HD cask system to the list of approved spent fuel storage casks. This action is necessary to correct an erroneous date.

DATES: *Effective Date:* January 10, 2007.

FOR FURTHER INFORMATION CONTACT: Jayne McCausland, telephone 301–415–6219, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION: On December 11, 2006 (71 FR 71463), Certificate of Compliance 1030 was added to the list of approved spent fuel storage casks. The December 11, 2006, document contained an incorrect Certificate Expiration Date. This document corrects that date.

List of Subjects in 10 CFR Part 72

Administrative practice and procedure, Criminal penalties, Manpower training programs, Nuclear materials, Occupational safety and health, Penalties, Radiation protection, Reporting and recordkeeping requirements, Security measures, Spent fuel, Whistleblowing.

■ Accordingly, 10 CFR part 72 is corrected by making the following correcting amendment.

PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL, HIGH-LEVEL RADIOACTIVE WASTE AND REACTOR-RELATED GREATER THAN CLASS C WASTE

■ 1. The authority citation for 10 CFR part 72 continues to read as follows:

Authority: Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2282); sec. 274, Pub. L. 86–373, 73 Stat. 688, as amended (42 U.S.C. 2021); sec. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); Pub. L. 95–601, sec. 10, 92 Stat. 2951, as amended by Pub. L. 102–486, sec. 7902, 106 Stat. 3123 (42 U.S.C. 5851); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332); secs. 131, 132, 133, 135, 137, 141, Pub. L. 97–425, 96 Stat. 2229, 2230, 2232, 2241, sec. 148, Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10151, 10152, 10153, 10155, 10157, 10161, 10168); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); sec. 651(e), Pub. L. 109–58, 119 Stat. 806–810 (42 U.S.C. 2014, 2021, 2021b, 2111).

Section 72.44(g) also issued under secs. 142(b) and 148(c), (d), Pub. L. 100–203, 101 Stat. 1330–232, 1330–236 (42 U.S.C. 10162(b), 10168(c), (d)). Section 72.46 also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97–425, 96 Stat. 2230 (42 U.S.C. 10154). Section 72.96(d) also issued under sec. 145(g), Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10165(g)). Subpart J also issued under secs. 2(2), 2(15), 2(19), 117(a), 141(h), Pub. L. 97–425, 96 Stat. 2202, 2203, 2204, 2222, 2224 (42 U.S.C. 10101, 10137(a), 10161(h)). Subparts K and L are also issued under sec. 133, 98 Stat. 2230 (42 U.S.C. 10153) and sec. 218(a), 96 Stat. 2252 (42 U.S.C. 10198).

■ 2. In § 72.214, Certificate of Compliance 1030 is corrected by revising the Certificate Expiration date to read as follows:

§ 72.214 List of approved spent fuel storage casks.

* * * * *

Certificate Number: 1030.

* * * * *

Certificate Expiration date: January 10, 2027.

* * * * *

Dated at Rockville, Maryland, this 1st day of February 2007.

For the Nuclear Regulatory Commission.

Michael T. Lesar,

Federal Register Liaison Officer.

[FR Doc. E7–2035 Filed 2–6–07; 8:45 am]

BILLING CODE 7590–01–P

FEDERAL ELECTION COMMISSION

11 CFR Part 100

[Notice 2007–3]

Political Committee Status

AGENCY: Federal Election Commission.

ACTION: Supplemental Explanation and Justification.

SUMMARY: In November 2004, the Federal Election Commission (''FEC'') adopted new regulations codifying when an organization's solicitations generate ''contributions'' under the Federal Election Campaign Act (''FECA'' or ''the Act''), and consequently, require that organization, regardless of tax status, to register as a political committee with the FEC. Additionally, the Commission substantially revised its allocation regulations to require the costs of voter drives, certain campaign advertisements, and a political committee's general administrative costs be paid for in whole or in substantial part with funds subject to FECA's limits, prohibitions, and reporting requirements. Pursuant to *Shays* v. *FEC*, 424 F. Supp. 2d 100 (D.D.C. 2006) (*''Shays II''*), the Commission is publishing a supplemental Explanation and Justification to provide a more detailed explanation of (a) The basis for the measures it adopted and (b) the reasons it declined to revise the regulatory definition of ''political committee'' to single out organizations exempt from Federal taxation under section 527 of the Internal Revenue Code (''527 organizations'') for increased regulation. This document also discusses several recently resolved administrative matters that provide considerable guidance to all organizations regarding the receipt of contributions, making of expenditures, and political committee status.

EFFECTIVE DATE: February 7, 2007.

FOR FURTHER INFORMATION CONTACT: Mr. J. Duane Pugh Jr., Acting Assistant General Counsel, or Ms. Margaret G. Perl, Attorney, 999 E Street, NW.,

Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION:

Explanation and Justification

On November 23, 2004, following an extensive rulemaking process, the Commission adopted new regulations to ensure that organizations that participate in Federal elections conduct their activities in compliance with Federal law. This rulemaking generated an extraordinary amount of public engagement on the issue of when organizations should have to register with and report their activities to the FEC. The Commission received and considered over 100,000 written comments, including comments from approximately 150 Members of Congress, many political party organizations, hundreds of non-profit organizations, as well as academics, trade associations, and labor organizations. Additionally, the Commission heard testimony from 31 witnesses during two days of public hearings on April 14 and 15, 2004.[1]

At the end of this process, the Commission amended its regulations in two significant ways. First, the Commission adopted a regulation codifying when an organization's solicitations generate ''contributions'' under FECA, and consequently, may require an organization to register as a political committee with the FEC. Second, the Commission substantially revised its allocation regulations to require that voter drives and campaign ads that target Federal elections, as well as a substantial portion of a political committee's administrative costs, be paid for with funds subject to Federal limits, prohibitions, and reporting requirements. *See Final Rules on Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees,* 69 FR 68056, 68056–63 (Nov. 23, 2004) (*''2004 Final Rules''*); *see also* 11 CFR 100.57 and 106.6. The *2004 Final Rules* also explained the Commission's decision not to re-define the terms ''political committee'' in 11 CFR 100.5 and ''expenditure'' in 11 CFR 100.110 through 100.154, including the Commission's decision not to establish a separate political committee definition singling out 527 organizations.[2] *See 2004 Final Rules*, 69 FR at 68063–65. The 2004 Final Rules took effect January 1, 2005. *Id.* at 68056.

In 2004, an action was brought before the U.S. District Court of the District of Columbia challenging the Commission's decision not to revise the regulatory definition of ''political committee.'' *See Shays II*, 424 F. Supp. 2d at 114–17.[3] Plaintiffs sought a court order directing the Commission to promulgate a rule specifically addressing the political committee status of all 527 organizations. *Id.* at 116. The district court rejected the plaintiffs' request to order the Commission to commence a new rulemaking, concluding that nothing in FECA, Congress's most-recent amendments in the Bipartisan Campaign Reform Act of 2002 (''BCRA''),[4] or the Supreme Court's decision in *McConnell* v. *FEC*, 540 U.S. 93 (2003), required the Commission to adopt such rules. *Shays II*, 424 F. Supp. 2d at 108. Case law, the *Shays II* court explained, demonstrates ''that a statutory mandate is a crucial component to a finding that an agency's reliance on adjudication [is] arbitrary and capricious.'' *Id.* at 114. The district court found, however, that the Commission ''failed to present a reasoned explanation for its decision'' not to regulate 527 organizations specifically by virtue of their status under the Internal Revenue Code, and remanded the case to the Commission ''to explain its decision or institute a new rulemaking.'' *Id.* at 116–17.

The Commission did not appeal the district court's ruling. Instead, the Commission is issuing this supplemental Explanation and Justification to explain its decision not to use tax law classifications as a substitute for making determinations of political committee status under FECA, as construed by the courts. By adopting a new regulation under which any organization may be required to register as a political committee and by tightening the rules governing how political committees fund activity for the purpose of influencing Federal elections, the Commission has acted to prevent circumvention not by just 527 organizations, but by groups of all kinds. As further explained, the Commission's decision not to single out 527 organizations is entirely consistent with the statutory scheme, Supreme Court precedent, and Congressional action regarding 527 organizations. Political committee status, whether articulated in FECA, Supreme Court interpretations of FECA, or the Commission's regulations, must be applied and enforced by the Commission through a case-by-case analysis of a specific organization's conduct. Existing regulations, bolstered by the adoption of the *2004 Final Rules,* leave the Commission with a very effective mechanism for addressing claims that organizations of any tax status should be registered as political committees under FECA. The Commission's recent enforcement experience confirms this conclusion.

Parts A and D of this document explain the framework for establishing political committee status under FECA, as interpreted by the Supreme Court. Parts B and C explain why reliance on a group's tax exempt status under section 527 of the Internal Revenue Code cannot substitute for an analysis of the group's conduct. Part E discusses the new and amended rules the Commission adopted in 2004, which codified an additional trigger for political committee status and increased the Federal funding requirements to participate in certain election-related activities. Finally, Part F describes the significance of several recently resolved enforcement matters that illustrate the sufficiency of the legal basis for the Commission's political committee status determinations.

A. FECA Provides a Specific, Conduct-Based Framework for Establishing Political Committee Status

Since its enactment in 1971, FECA has placed strict limits and source prohibitions on the contributions received by organizations that are defined as political committees. Under the Act, an organization's conduct has always been the basis for determining whether it is required to register and abide by the Act's requirements as a political committee. Likewise, since its enactment in 1971, the determination of political committee status has taken place on a case-by-case basis. FECA defines a ''political committee'' as ''any committee, club, association, or other group of persons which receives

[1] The comments and transcripts of the public hearing are available at *http://www.fec.gov/law/RulemakingArchive.shmtl* under ''Political Committee Status (2004)''.

[2] Under the Internal Revenue Code, a 527 organization is ''a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.'' 26 U.S.C. 527(e)(1). The ''exempt function'' of 527 organizations is the ''function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization,'' or the election or selection of presidential or vice presidential electors. 26 U.S.C. 527(e)(2). Virtually all political committees that register with the Commission under FECA are also tax exempt under section 527 of the Internal Revenue Code, including political party committees, authorized campaign committees of candidates, separate segregated funds, and nonconnected committees. *See* 11 CFR 1005.

[3] Documents related to this litigation are available at *http://www.fec.gov/law/litigation_CAA_Alpha.shtml#shays_04*.

[4] Pub. L. 107–155, 116 Stat. 81 (Mar. 7, 2002).

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.'' *See* 2 U.S.C. 431(4)(A). FECA further defines the terms ''contribution'' and ''expenditure,'' limiting these terms to those receipts and disbursements made ''for the purpose of influencing any election for Federal office.'' 2 U.S.C. 431(8) and (9). Commission regulations first promulgated in 1975 essentially repeat FECA's definition of ''political committee.'' 11 CFR 100.5(a).[5]

Congress has not materially amended the definition of ''political committee'' since the enactment of section 431(4)(A) in 1971, nor has Congress at any time since required the Commission to adopt or amend its regulations in this area. Indeed, in 2002, when Congress made sweeping changes in campaign finance law pursuant to BCRA, it left the definition of ''political committee'' undisturbed and political committee status to be determined on a case-by-case basis.

To address constitutional concerns raised when FECA was adopted, the Supreme Court added two additional requirements that affect the statutory definition of political committee. First, the Supreme Court held, when applied to communications made independently of a candidate or a candidate's committee, the term ''expenditure'' includes only ''expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.'' *Buckley* v. *Valeo*, 424 U.S. 1, 44, 80 (1976).[6] Second, the Supreme Court mandated that an additional hurdle was necessary to avoid Constitutional vagueness concerns; only organizations whose ''major purpose'' is the nomination or election of a Federal candidate can be considered ''political committees'' under the Act. *Id.* at 79. The court deemed this necessary to avoid the regulation of activity ''encompassing both issue discussion and advocacy of a political result.'' *See, e.g.*, *Buckley*, 424 U.S. at 79; *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) (*''MCFL''*).

Neither BCRA, *McConnell*, nor any other legislative, regulatory, or judicial action has eliminated (1) The Supreme Court's express advocacy requirement for expenditures on communications made independently of a candidate or (2) the Court's major purpose test. In its 2003 *McConnell* decision, the Supreme Court implicitly endorsed the major purpose framework to uphold BCRA's regulation of political party activity against vagueness concerns. *See McConnell*, 540 U.S. at 170 n.64 (''This is particularly the case here, since actions taken by political parties are presumed to be in connection with election campaigns. *See Buckley*, 424 U.S. at 79, 96 S. Ct. 612 (noting that a general requirement that political committees disclose their expenditures raised no vagueness problems because the term 'political committee' 'need 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 * * *')'').

McConnell also addressed the *Buckley* expenditure framework, finding, ''the express advocacy limitation, in both the expenditure and disclosure contexts, was the product of statutory interpretation rather than a constitutional command.'' *McConnell*, 540 U.S. at 191–92. However, the Court made it clear that FECA continued to contain the express advocacy limitation as to expenditures on communications made independently of a candidate, because Congress, in enacting BCRA, modified the limitation only insofar as it applied to ''electioneering communications.'' The Court found:

> Since our decision in *Buckley*, Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates has been firmly embedded in our law * * * Section 203 of BCRA amends [2 U.S.C. 441b(b)(2)] to extend this rule, which previously applied only to express advocacy, to all 'electioneering communications' covered by the definition of that term in [2 U.S.C. 434(f)(3)].

McConnell, 540 U.S. at 203–04.

Congress did not amend the definition of expenditure in BCRA, and in fact, specified that ''electioneering communications'' are not expenditures under the Act. 2 U.S.C. 434(f)(1) and (2) (treating electioneering communications as ''disbursements''). Accordingly, while BCRA, as interpreted by *McConnell*, did not extend *Buckley's* express advocacy limitation to the regulation of ''electioneering communications,'' it also did not alter that limitation as to expenditures on communications made independently of a candidate. Absent future Congressional action altering the definition of ''expenditure,'' the Supreme Court's limitation of expenditures, on communications made independently of a candidate, to ''express advocacy'' continues to apply.

Therefore, determining political committee status under FECA, as modified by the Supreme Court, requires an analysis of both an organization's specific conduct—whether it received $1,000 in contributions or made $1,000 in expenditures—as well as its overall conduct—whether its major purpose is Federal campaign activity (*i.e.*, the nomination or election of a Federal candidate). Neither FECA, its subsequent amendments, nor any judicial decision interpreting either, has substituted tax status as an acceptable proxy for this conduct-based determination.

The Commission has promulgated regulations defining in detail what constitutes a ''contribution'' and an ''expenditure.'' *See* 11 CFR 100.51 to 100.94 and 100.110 to 100.155. Many administrative actions, including the recently resolved actions against several 527 organizations that are described in Part F below, include substantial investigations and case-by-case analyses and determinations of whether a group's fundraising generated ''contributions'' and whether payments for its communications made independently of a candidate constituted ''expenditures,'' as alternative prerequisites to a determination that a group is a political committee, prior to any consideration of the group's major purpose. Additional regulations defining ''contribution'' and ''expenditure'' would not obviate the need for a case-by-case investigation and determination in a Commission enforcement proceeding. Neither would a regulation defining ''major purpose'' that singled out 527 organizations, as the *Shays II* plaintiffs seek, obviate the need for case-by-case investigations and determinations in the Commission's enforcement process regarding the organization's major purpose.

B. Section 527 Tax Status Does Not Determine Whether an Organization Is a Political Committee Under FECA

527 organizations are so named for section 527 of the Internal Revenue Code, a section that exempts certain activities from taxation. An organization's election of section 527

[5] *See* H.R. Doc. No. 97–293, at 7–8 and 29–30 (1975) addressing 11 CFR 100.14 (1976), which was recodified as 11 CFR 100.5 in 1980. *See* 45 FR 15080 (Mar. 7, 1980).

[6] The Supreme Court applies a different analysis to coordinated expenditures. *See Buckley,* 424 U.S. at 46–47 (''They argue that expenditures controlled by or coordinated with the candidate and his campaign might well have virtually the same value to the candidate as a contribution and would pose similar dangers of abuse. yet such controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act.''). *Cf.* AO 2006–20 Unity '08 (finding monies spent on ballot access through petition drives by an organization supporting only two candidates, both yet to be selected, one for the office of President of the United States and one for the office of Vice President, are expenditures).

tax status is not sufficient evidence in itself that the organization satisfies FECA and the Supreme Court's contribution, expenditure, and major purpose requirements. As stated by a commenter, ''All that 527 status means is that the organization is exempt from federal income tax to the extent it spends political income on political activities * * * All federal political committees registered with the FEC are 527 organizations. So are the Republican National Committee and the Democratic National Committee. So are John Kerry for President, Inc. and Bush-Cheney '04, Inc. So is every candidate's campaign committee right down to school board and dogcatcher.'' Thus, virtually all political committees are 527 organizations. It does not necessarily follow that all 527 organizations are or should be registered as political committees.

The IRS's requirements for an organization to be entitled to the tax exemption under section 527 are based on a different and broader set of criteria than the Commission's determination of political committee status. *See* note 2 above. Section 527 exempts political organizations from tax on ''exempt function'' income, where the Internal Revenue Code would impose tax on such activity when conducted by other non-profit organizations, such as groups organized under section 501(c)(4) (social welfare organizations), 501(c)(5) (labor organizations), and 501(c)(6) (business leagues). *See* 26 U.S.C. 527(c)(1) and (f)(1). Accordingly, the definition of ''exempt function'' is central to the reach of section 527. ''Exempt function'' is defined as the ''function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors.'' 26 U.S.C. 527(e)(2).

By definition, 527 organizations may engage in a host of State, local, and non-electoral activity well outside the Commission's jurisdiction. As noted by several commenters, the broad range of groups availing themselves of the 527 exemption include, but are not limited to the following: All Federal, State, and local candidate campaign committees and party entities; Federal, State, and local political action committees; caucuses and associations of State or local public officials; newsletter funds operated by Federal, State, and local public officials; funds set up to pay ordinary business expenses of a public officeholder; political party officer committees; and groups seeking to influence the appointment of judicial and executive branch officials. A forthcoming tax law article states:

> Once section 527 is placed in proper context, it becomes clear that the tax law is not a very good mechanism for differentiating between election-focused and ideological groups. Because of its unique policies and idiosyncrasies, the tax law has an exceptionally broad definition of ''political organization,'' one that has the potential to capture ideological as well as partisan organizations. Furthermore, section 527 should not be understood to convey any real tax benefits to organizations that self-identify. Accordingly, the reformers' mission to use section 527 as a campaign finance instrument is misguided.

Gregg D. Polsky, *A Tax Lawyer's Perspective on Section 527 Organizations*, 28 Cardozo L. Rev. (forthcoming Feb. 2007).

The IRS has specifically determined that exempt function activity can include disbursements for Federal electoral activity that does not constitute express advocacy. IRS Revenue Ruling 2004–6 states (at 4): ''[w]hen an advocacy communication explicitly advocates the election or defeat of an individual to public office, the expenditure clearly is for an exempt function under [section] 527(e)(2). However, when an advocacy communication relating to a public policy issue does not explicitly advocate the election or defeat of a candidate, all the facts and circumstances need to be considered to determine whether the expenditure is for an exempt function under [section] 527(e)(2).'' Rev. Rul. 04–6, 2004–1 C.B. 328. Accordingly, the IRS structure presumes section 527 organizations will engage in non-express advocacy activities. Indeed, organizations could easily qualify for 527 status without ever making expenditures for express advocacy. However, as discussed above, that activity is outside of the Commission's regulatory scope under *Buckley's* express advocacy limitation for expenditures on communications made independently of a candidate. *See Buckley*, 424 U.S. at 44; *see also* 2 U.S.C. 431(8) and (9) (defining contribution and expenditure as ''for the purpose of influencing any election for Federal office'').

The IRS ''facts and circumstances'' test, if applied to FECA, clearly would violate the Supreme Court's Constitutional parameters, established in *Buckley*, and reiterated in *MCFL* and *McConnell*, that campaign finance rules must avoid vagueness. See *Buckley*, 424 U.S. at 40–41; MCFL, 479 U.S. at 248–49; *McConnell*, 540 U.S. at 103. Because the tax code definitions arise in the context of a grant of exemption, which is viewed as a form of subsidy to the organization, a lower level of scrutiny is applied than when the government regulates or prohibits outright certain types of speech. *See, e.g., Regan* v. *Taxation With Representation*, 461 U.S. 540, 549–50 (1983) (upholding limitation on lobbying by 501(c)(3) organizations); *Christian Echoes Nat'l Ministry, Inc.* v. *United States*, 470 F.2d 849, 857 (10th Cir. 1972) (upholding 501(c)(3) ban on campaign intervention). As one commenter noted:

> The Internal Revenue Code (IRC) and its accompanying regulations offer several different tests for what constitutes political activity for tax-exempt organizations (including 527 organizations), but all of these tests boil down to a vague ''facts and circumstances'' standard. While constitutionally adequate * * * for the enforcement of tax laws, the inherent uncertainty created by such a contextual, subjective standard renders it wholly inadequate to the task of providing a predictable standard for those required to comply with [F]ederal election law * * * FECA regulates core political speech and imposes criminal penalties for violations. Thus, FECA is especially intolerant of vague standards. As the court explained in *Buckley*: ''Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for 'no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.' When First Amendment rights are involved, an even 'greater degree of specificity' is required.''

As stated by a commenter, ''While IRC political *organizations* and FECA political *committees* seem to have some similarities, [section] 527 'exempt function' activity is much broader than the activity that defines FECA political committees. Consequently, IRS regulations provide no guidance for FEC rulemaking.'' 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.

As discussed further below in Part F, the Commission's enforcement experience illustrates the inadequacy of tax classification as a measure of political committee status. The Commission recently completed six matters, including five organizations that were alleged to have failed to register as political committees.[7] The

[7] *See* Press Release, Federal Election Commission, FEC Collects $630,000 in Civil Penalties from Three 527 Organizations (Dec. 13, 2006), available at *http://www.fec.gov/press/press2006/20061213murs.html*; Press Release, Federal Election Commission, Freedom Inc. Pays $45,000 Penalty for Failing to Register as Political Committee (Dec. 20, 2006), available at *http://www.fec.gov/press/*

Commission reached conciliation agreements with five of these organizations—four 527 organizations and one 501(c)(4) organization—in which the organizations did not contest the Commission's determination that they had violated FECA by failing to register as political committees. *See* Matters Under Review (''MURs'') 5511 and 5525 (Swiftboat Veterans and POWs for Truth (''Swiftboat Vets'')); 5753 (League of Conservation Voters 527 and 527 II (''League of Conservation Voters'')); 5754 (MoveOn.org Voter Fund); 5492 (Freedom, Inc.). In the sixth matter, the Commission determined that a 527 organization was not a political committee under the statutory requirements, and dismissed the matter. *See* MUR 5751 (The Leadership Forum). The Commission has demonstrated through the finding of political committee status for a 501(c)(4) organization and the dismissal of a complaint against a 527 organization, that tax status did not establish whether an organization was required to register with the FEC. Rather, the Commission's findings were based on a detailed examination of each organization's contributions, expenditures, and major purpose, as required by FECA and the Supreme Court.

Courts have cautioned the Commission against assuming ''the compatibility of the IRS's enforcement * * * and FECA's requirements.'' *See Shays* v. *FEC*, 337 F. Supp. 2d 28, 128 (D.D.C. 2004) (*''Shays I''*). The Commission is instead obligated to perform a detailed review of differences in tax and campaign finance law provisions rather than adopting the former as a proxy for the latter. *Id.* The U.S. District Court recently reminded the Commission: ''It is the FEC, not the IRS, that is charged with enforcing FECA.'' *Shays I*, 337 F. Supp. 2d at 126. The detailed comparison of the Internal Revenue Code and FECA provisions required by *Shays I* demonstrates that the ''exempt function'' standard of section 527 is not co-extensive with the ''expenditure'' and ''contribution'' definitions that trigger political committee status. Therefore, the use of the Internal Revenue Code classification to interpret and implement FECA is inappropriate.

press2006/20061220mur.html; Press Release, Federal Election Commission, FEC Completes Action on Two Enforcement Cases (Dec. 22, 2006), available at *http://www.fec.gov/press/press2006/20061222mur.html.*

C. Congress Has Consistently Affirmed the Existing Statutory Framework and Specifically Refused To Require All 527 Organizations To Register as Political Committees

While Congress has repeatedly enacted legislation governing 527 organizations, it has specifically rejected every effort, including those by some of the *Shays II* plaintiffs,[8] to classify organizations as political committees based on section 527 status. In refusing to enact such legislation, Congress fully recognized that some 527 organizations not registered with the Commission were, and would continue to be, involved with Federal elections. Nevertheless, in each instance in which Congress regulated 527 organizations, whether through amendments to the Internal Revenue Code or FECA, it (a) Chose not to address the political committee status of these organizations, (b) left the reporting obligations in the hands of the IRS, and (c) did not direct the Commission to adopt revised regulations.

1. Congress Amended the Internal Revenue Code To Create a Reporting Scheme for 527 Organizations That are Not Political Committees Under FECA

In 2000, Congress passed a bill requiring section 527 organizations that are not required to register as political committees under FECA to register and report their financial activity with the IRS. *See* 26 U.S.C. 527(i)(6), (j)(5)(A); Public Law 106–230 (2000). Congress ordered the IRS to disclose this information publicly on a searchable database within 48 hours of receipt, requirements matching the FEC's disclosure obligations. *See* 26 U.S.C. 527(k); 2 U.S.C. 434(a)(11)(B) and 438a.[9] At the same time, Congress considered, but rejected, alternative bills that would have explicitly required the Commission to regulate all 527 organizations. *See, e.g.*, H.R. 3688, 106th Cong. (2000); S. 2582, 106th Cong. (2000); *see also* H.R. Rep. No. 106–702 (2000). The alternative House bill was co-sponsored by two of the *Shays II* plaintiffs. Additionally, Congress took no other action to otherwise alter the statutory framework for determining political committee status.

In 2002, Congress modified the section 527 reporting requirements to exempt organizations that were exclusively involved in State and local elections from having to report with the IRS. *See* 26 U.S.C. 527(i)(5)(C), (j)(5)(C); Income Tax Notification and Return Requirements—Political Committees Act, Public Law 107–276, 116 Stat. 1929 (2002). Those 527 organizations that were involved in Federal elections, but that did not qualify as ''political committees'' under FECA, continued to have to report their activities to the IRS. *See* Public Law 107–276. This legislation was passed only a few months after BCRA, which, as discussed below, did not change the requirements for political committee status of 527 organizations. As stated by a commenter, ''Congress explicitly recognized the differences in intent and scope between the Internal Revenue Code and the Federal Election Campaign Act when it drafted two separate statutes to address the respective subjects; if Congress had intended the two bodies of law to be congruous, Congress would have passed congruous provisions at the outset.'' If, as some commenters suggested, all 527 organizations not exclusively involved in State and local elections are required by FECA to register as political committees, then the 2002 amendments to 26 U.S.C. 527 would have meant that no 527 organizations would continue to report to the IRS. Such an interpretation of the two statutes would effectively nullify the statutory requirement to report to the IRS.

These two provisions were passed, as noted by a commenter, ''[a]gainst a widely publicized backdrop of news reports concerning non-federal [section] 527 groups,'' yet, ''Congress required these organizations * * * to register and report with the IRS * * * Congress was well aware that [section] 527 organizations that were not political committees could affect Federal as well as other elections.'' The legislative history of the 2000 amendment confirms the commenter's assessment:

> These enhanced disclosure and reporting rules are intended to make no changes to the present-law substantive rules regarding the extent to which tax-exempt organizations are permitted to engage in political activities. Thus, the Committee bill is not intended to alter the involvement of such organizations in the political process, but rather it is intended to shed sunlight on these activities so that the general public can be informed as to the types and extent of activities in which such organizations engage.

H.R. Rep. No. 106–702, at 14 (2000). Senator Lieberman, a principal author of the legislation, stated, ''nor does [the bill] force any group that does not currently have to comply with FECA or disclose information about itself to do

[8] In *Shays II*, the case filed by Representatives Shays and Meehan was consolidated with a similar case filed by Bush-Cheney '04 challenging the Commission's 2004 rulemaking. *See Shays II*, 424 F. Supp. 2d at 104–05.

[9] *See* IRS Political Organization Disclosure database, *available at http://forms.irs.gov/politicalOrgsSearch/search/basicSearch.jsp.*

either of those things.'' *See* Statement of Sen. Lieberman, 146 Cong. Rec. S5996 (June 28, 2000). Representative Archer stated, ''[T]his bill does nothing but require disclosure. It does not change anything as to how much money can be given or how it can be used, any of those other substantive things in the law.'' *See* Statement of Rep. Archer, 146 Cong. Rec. H5285 (June 27, 2000).

A rule hinging on section 527 tax status could frustrate this separate reporting scheme created by Congress in the 2000 and 2002 amendments to section 527. It could also have the effect of reducing disclosure. If a rule singled out 527 organizations, those entities could then either shift the same election-related conduct to a related section 501(c)(4) organization that shares common management, or perhaps even reorganize as a section 501(c)(4) organization in order to avoid a rule that singled out 527 organizations.[10] Several commenters predicted that 527 organizations would do so. Because section 501(c)(4) of the Internal Revenue Code requires almost no disclosure of receipts and disbursements, migration of political conduct to section 501(c)(4) groups would reduce the amount of information disclosed to the public.[11]

2. BCRA Amended FECA and Addressed Federal Activity of 527 Organizations Without Requiring Political Committee Registration

In BCRA, Congress directly addressed the Federal activity of unregistered 527 organizations, but again, declined to take any other action to regulate 527 organizations as political committees or otherwise alter the existing political committee framework. BCRA prohibits national, State and local political parties from soliciting for, or donating to ''an organization described in section 527 of [the Internal Revenue] Code (*other than a political committee*, a State, district, or local committee of a political party, or the authorized campaign committee of a candidate for State or local office).'' *See* 2 U.S.C. 441i(d)(2) (emphasis added). This provision explicitly confirms Congress's intent to retain separate regimes for those 527 organizations that must register with the Commission as political committees and those 527 organizations that are not required to register as political committees. Furthermore, if Congress had believed that all 527 organizations (other than those operating at the State level) were political committees, this BCRA prohibition would be superfluous.

BCRA also included a limited exception from the prohibition on corporations making electioneering communications for 527 organizations (and 501(c)(4) organizations), as long as they were funded exclusively from individual contributions. *See* 2 U.S.C. 441b(c)(2). This exception was altered by the Wellstone amendment to BCRA, codified at 2 U.S.C. 441b(c)(6), which strictly limited the scope of the exception. Although the exception was amended, this provision illustrates Congress's knowledge that 527 organizations were raising funds outside FECA's individual contribution limits and source prohibitions to produce communications that referenced Federal candidates. And BCRA makes two explicit determinations: electioneering communications are not themselves ''expenditures'' (even when conducted by 527 organizations) and such communications may not be paid for with corporate or labor union funds during specific pre-election periods. Had Congress determined that such communications constituted expenditures that required registration as a political committee, the reporting requirements and funding restrictions for the electioneering communications provisions would have been duplicative and meaningless. Yet, Congress chose to leave in place its decisions in 2000 and 2002 that some 527 organizations should report their activities to the IRS, rather than register with the FEC.

BCRA's legislative history further confirms Congress's recognition that 527 organizations (as well as 501(c)(4) organizations) could engage in some Federal campaign activity and yet not have to register as political committees. In defending BCRA's approach to 527 organizations, Senator Snowe stated:

> [S]ome 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.''

See Statement of Sen. Snowe, 148 Cong. Rec. S2136 (Mar. 20, 2002). Senator Wellstone noted that 527 and 501(c)(4) groups ''already play a major role in our elections'' and acknowledged that soft money would shift from political parties to these organizations. *See* Statement of Sen. Wellstone, 147 Cong. Rec. S2846–47 (Mar. 26, 2001). Senator Breaux stated that 501(c)(4) and 527 organizations would continue to be able to raise unrestricted money to be used in Federal elections. *See* Statement of Sen. Breaux, 147 Cong. Rec. S2885–86 (Mar. 26, 2001). Senator McConnell, who led the opposition to the passage of BCRA, was clear on this point as well: ''this bill will greatly weaken the parties and shift those resources to outside groups that will continue to engage in issue advocacy, as they have a constitutional right to do, with unlimited and undisclosed soft money.'' *See* Statement of Sen. McConnell, 148 Cong. Rec. S2160 (Mar. 20, 2002). As stated in a comment from a Governor who is also a former Member of Congress:

> That perceived evil, the direct personal involvement of [F]ederal and party officials in the raising of ''soft money'' funds, is not present with respect to donations made to non-profit organizations—whether organized under section 527 or under section 501(c) of the Internal Revenue Code—acting *independently* from any [F]ederal officeholder, candidate or political party. Congress did not choose, in BCRA, to impose limits on those desiring to provide financial support to such non-profit organizations. Congress was well aware of the existence and activities of non-political committee 527 organizations and yet the BCRA did not elect to address such organizations other than to impose a prohibition on [F]ederal officeholders actively participating in the solicitation of funds for such groups.

Based on this history of Congressional action regarding section 527 and the enactment of BCRA, the Commission concludes that changing the regulatory definition of ''political committee'' to rely explicitly upon section 527 tax status would not be consistent with the Commission's statutory authority. The Commission reaches this conclusion regarding the scope of its regulatory authority because Congress previously considered and rejected bills that would have changed the political committee status of 527 organizations. *See FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (''[A] specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended.''

[10] As commenters noted, a 501(c)(4) organization may engage in the same political campaign activities as a 527 organization, as long as these activiteis do not constitute the 501(c)(4) organization's ''primary purpose'' as determined by the IRS.

[11] Only 501(c)(4) organizations with $25,000 or more in annual gross receipts must file annual tax returns with the IRS. *See* 26 U.S.C. 6012(a)(6); Judith Kindell & John Francis Reilly, *Election Year Issues:* IRS Exempt Organizations Continuing Professional Education Text at 444, 470–71 (2002), *available at http://www.irs.gov/charities/nonprofits/article/0,,id=155031,00.html* (last visited Jan. 31, 2007). The required annual return (Form 990) includes a line for total amount of ''direct and indirect political expenditures'' without requiring any further breakdown of the expenditure amount. *See* IRS Form 990 Line 81a. Individual donors need not be disclosed by 501(c)(4) organizations.

(*quoting United States* v. *Estate of Romani*, 523 U.S. 517, 530–31 (1998))).

Furthermore, when Congress revises a statute, its decision to leave certain sections unamended constitutes at least acceptance, if not explicit endorsement, of the preexisting construction and application of the unamended terms. *See Cook County, Illinois* v. *United States ex rel. Chandler*, 538 U.S. 119, 132 (2003); *Cottage Sav. Ass'n* v. *Comm'r*, 499 U.S. 554, 561–62 (1991); *Asarco Inc.* v. *Kadish*, 490 U.S. 605, 632 (1989).

During the 2004 rulemaking, the Commission received a comment signed by 138 Members of the House of Representatives, and a similar comment signed by 19 Senators. Both comments stated, ''the proposed rules before the Commission would expand the reach of BCRA's limitations to independent organizations in a manner wholly unsupported by BCRA or the record of our deliberations on the new law.'' The comment submitted by the House Members further stated:

> More generally, the rulemaking is concerned with new restrictions on ''527'' organizations, primarily through the adoption of new definitions of an ''expenditure.'' Congress, of course, did not amend in BCRA the definition of ''expenditure'' or, for that matter, the definition of ''political committee.'' Moreover, while BCRA reflects Congress' full awareness of the nature and activities of ''527s,'' it did not consider comprehensive restrictions on these organizations like those in the proposed rules. There has been absolutely no case made to Congress, or record established by the Commission, to support any notion that tax-exempt organizations and other independent groups threaten the legitimacy of our government when criticizing its policies. We believe instead that more, not less, political activity by ordinary citizens and the associations they form is needed in our country.[12]

In upholding BCRA, the Supreme Court was also well aware that BCRA's new provisions would not reach all interest group Federal political activity. The *McConnell* Court observed that, unlike political parties, ''[i]nterest groups, however, remain free to raise soft money to fund voter registration, [get-out-the-vote] activities, mailings, and broadcast advertising (other than electioneering communications).'' *McConnell*, 540 U.S. at 187–88.

Finally, at least two new bills requiring 527 organizations to register as political committees were recently considered in Congress. *See, e.g.*, H.R. 513, 109th Cong. (2006); S. 2828, 108th Cong. (2004). The introduction and consideration of these bills, including one supported by two of the *Shays II* plaintiffs, demonstrates Congress's and these plaintiffs' recognition that Congress has not acted in this area. As with all past Congressional attempts to regulate all 527s as political committees, Congress did not adopt these bills, or any other bills altering the political committee framework. While the Commission is authorized to regulate in order to give substance to otherwise ambiguous provisions, ''[a] regulation, however, may not serve to amend a statute, or to add to the statue something which is not there.'' *See Iglesias* v. *United States*, 848 F.2d 362, 366 (2d Cir. 1988) (citations omitted).

Thus, Congressional action regarding 527 organizations provides no basis for the Commission to revise FECA and the Supreme Court's requirements for political committee status by creating a separate political committee definition singling out 527 organizations. Rather, the Commission's decision to reject proposed rules based on section 527 tax status is consistent with all past Congressional action addressing 527 organizations.

D. Applying the Major Purpose Doctrine, a Judicial Construct Established Thirty Years Ago, Requires a Case-by-Case Analysis of an Organization's Conduct

The *Shays II* court expressed concern that, in the absence of a regulation regarding the major purpose doctrine, the Commission was not providing clear guidance to groups as to when they must register as a political committee. *See Shays II*, 424 F. Supp. 2d at 115. Applying the major purpose doctrine, however, requires the flexibility of a case-by-case analysis of an organization's conduct that is incompatible with a one-size-fits-all rule.

The Supreme Court has held that, to avoid the regulation of activity ''encompassing both issue discussion and advocacy of a political result'' only organizations whose major purpose is Federal campaign activity can be considered political committees under the Act. *See, e.g., Buckley*, 424 U.S. at 79; *MCFL*, 479 U.S. at 262. Thus, the major purpose test serves as an additional hurdle to establishing political committee status. Not only must the organization have raised or spent $1,000 in contributions or expenditures, but it must additionally have the major purpose of engaging in Federal campaign activity.

The Supreme Court has made it clear that an organization can satisfy the major purpose doctrine through sufficiently extensive spending on Federal campaign activity. *See MCFL*, 479 U.S. at 262 (explaining that a section 501(c)(4) organization could become a political committee required to register with the Commission if its ''independent spending become[s] so extensive that the organization's major purpose may be regarded as campaign activity'').

An analysis of public statements can also be instructive in determining an organization's purpose. *See, e.g., FEC* v. *Malenick*, 310 F. Supp. 2d 230, 234–36 (D.D.C. 2004) (court found organization evidenced its major purpose through its own materials which stated the organization's main goal of supporting the election of the Republican Party candidates for Federal office and through efforts to get prospective donors to consider supporting Federal candidates); *FEC* v. *GOPAC*, Inc., 917 F. Supp. 851, 859 (D.D.C. 1996) (''organization's [major] purpose may be evidenced by its public statements of its purpose or by other means''); Advisory Opinion 2006–20 (Unity 08) (organization evidenced its major purpose through organizational statements of purpose on Web site). Because such statements may not be inherently conclusive, the Commission must evaluate the statements of the organization in a fact-intensive inquiry giving due weight to the form and nature of the statements, as well as the speaker's position within the organization.

The Federal courts' interpretation of the constitutionally mandated major purpose doctrine requires the Commission to conduct investigations into the conduct of specific organizations that may reach well beyond publicly available advertisements. *See, e.g., Malenick*, 310 F. Supp. 2d at 234–36 (examining organizations' materials distributed to prospective donors). The Commission may need to examine statements by the organization that characterize its activities and purposes. The Commission may also need to evaluate the organization's spending on Federal campaign activity, as well as any other spending by the organization. In addition, the Commission may need to examine the organization's fundraising appeals.

Because *Buckley* and *MCFL* make clear that the major purpose doctrine requires a fact-intensive analysis of a group's campaign activities compared to its activities unrelated to campaigns, any rule must permit the Commission

[12] The Commission also received a comment signed by 14 members of the Congressional Hispanic Caucus who opposed the proposed changes to the regulations based on possible adverse effects on grassroots voter mobilization efforts. This comment is available at *http://www.fec.gov/pdf/nprm/political_comm_status/mailed/57.pdf.*

the flexibility to apply the doctrine to a particular organization's conduct. After considering these precedents and the rulemaking record, the Commission concluded that none of the competing proposed rules would have accorded the Commission the flexibility needed to apply the major purpose doctrine appropriately. Therefore, the Commission decided not to adopt any of the proposed amendments to section 100.5.[13]

However, even if the Commission were to adopt a regulation encapsulating the judicially created major purpose doctrine, that regulation could only serve to limit, rather than to define or expand, the number or type of organizations regarded as political committees. The major purpose doctrine did not supplant the statutory ''contribution'' and ''expenditure'' triggers for political committee status, rather it operates to limit the reach of the statute in certain circumstances.

Moreover, any perceived shortcomings with the enforcement process identified by the Shays II court would not be remedied by a change in the regulatory definition of ''political committee.'' [14] Any revised rule adopted by the Commission would still have to be interpreted and applied through the very same statutory enforcement procedures as currently exist. In fact, all of the rules proposed in 2004 would have required that factual determinations be made through the enforcement process. *See, e.g.*, proposed 11 CFR 100.5(a)(2)(iv), *Notice of Proposed Rulemaking on Political Committee Status*, 69 FR 11736, 11748, 11757 (Mar. 11, 2004) (exemptions limited to 527 organizations that are formed ''solely for the purpose of'' supporting a non-Federal candidate or influencing selection of individuals to non-elective office). Even if the Commission had simply adopted a rule in 2004 that listed the factors considered in determining an organization's major purpose, the rule would still have had to be enforced through investigations of the specific statements, solicitations, and other conduct by particular organizations. Furthermore, any list of factors developed by the Commission would not likely be exhaustive in any event, as evidenced by the multitude of fact patterns at issue in the Commission's enforcement matters considering the political committee status of various entities (''Political Committee Status Matters''). *See, e.g.*, MURs 5511 and 5525 (Swiftboat Vets); 5753 (League of Conservation Voters); 5754 (MoveOn.org Voter Fund); 5492 (Freedom, Inc.); 5751 (Leadership Forum).

E. The 2004 Final Rules Clarify and Strengthen the Political Committee Determination Consistent With the FECA and Supreme Court Framework

To best ensure that organizations that participate in Federal elections use funds compliant with the Act's restrictions, the Commission decided in the 2004 rulemaking to adopt two broad anti-circumvention measures. The first expands the regulatory definition of ''contribution'' to capture funds solicited for the specific purpose of supporting or opposing the election of a Federal candidate. *See* 11 CFR 100.57. An organization that receives more than $1,000 of such funds is required to register as a political committee. The second rule places limits on the non-Federal funds a registered political committee may use to engage in certain activity, such as voter drives and campaign advertisements, which has a clear Federal component. *See* 11 CFR 106.6. The combined effect of these two rules significantly curbs the raising and spending of non-Federal funds in connection with Federal elections, in a manner wholly consistent with the existing political committee framework. The effect of these changes on 527 organizations has already been remarked. *See* Paul Kane, *''Liberal 527s Find Shortfall,''* Roll Call (Sept. 25, 2006) (''a change in FEC regulations curtailed a huge chunk of 527 money because, after the 2004 elections, the commission issued a ruling that said all get-out-the-vote efforts in Congressional races had to be financed with at least 50 percent federal donations, those contributions that are limited to $5000 per year to political action committees'').

1. The Commission Adopted a New Regulation That Requires Organizations To Register as Political Committees Based on Their Solicitations

While Supreme Court precedent places strict parameters on the breadth of the definition of expenditure, Supreme Court precedent provides greater deference to contribution restrictions. *See FEC* v. *Beaumont,* 539 U.S. 146, 161 (U.S. 2003) (upholding the constitutionality of FECA's corporate contribution prohibition as applied to a non-profit advocacy corporation and noting: ''Going back to *Buckley,* restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression.'') (citations omitted). Other judicial precedent specifically permits a broader interpretation of when an organization has solicited contributions. In *FEC* v. *Survival Educ. Fund, Inc.,* 65 F.3d 285 (2d Cir. 1995) (*''SEF''*), the appellate court held that a mailer solicited ''contributions'' under FECA when it left '' no doubt that the funds contributed would be used to advocate President Reagan's defeat at the polls, not simply to criticize his policies during the election year.'' *Id.* at 295. The Commission's new rule at 11 CFR 100.57 codifies the *SEF* analysis. Section 100.57(a) states that if a solicitation ''indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate,'' then all money received in response to that solicitation must be treated as a ''contribution'' under FECA. *See 2004 Final Rules,* 69 FR at 68057–58.

When an organization receives $1,000 or more in contributions, including those that are defined under new section 100.57(a), the organization will meet the statutory definition of a ''political committee.'' An organization that triggers political committee status through the receipt of such contributions is required to register the committee with the Commission, report all receipts and disbursements, and abide by the contribution limitations and source prohibitions.

Thus, section 100.57 codifies a clear, practical, and effective means of determining whether an entity, regardless of tax status, is participating in activity designed to influence Federal elections, and, therefore, may be required to register as a political committee.

[13] Many prominent 527 organizations in 2004 were registered political committees with Federal and non-Federal accounts. A new rule addressing major purpose would not have required these organizations to change their structures. The more relevant questions for these organizations was whether particular expenses could lawfully be paid with non-Federal funds from a non-Federal account, which was sometimes a connected 527 organization not registered with the Commission, and whether non-Federal funds could be raised through solicitations that referred to clearly identified Federal candidates. New section 100.57 and revised section 106.6, as discussed below in Part E, address these questions.

[14] As described in Part F, below, the Commission has resolved several enforcement matters that involve 527 organizations alleged to have unlawfully failed to register as political committees. The Commission further notes that it has concluded action on the vast majority of the 2004-cycle cases on its docket and posted record enforcement figures in 2006. *See* Press Release, Federal Election Commission, FEC Posts Record Year, Collecting $6.2 Million in Civil Penalties, *available at http://www.fec.gov/press/press2006/20061228summary.htmlprocess.*

In addition, the new regulation contains a prophylactic measure at section 100.57(b) to prevent circumvention of the solicitation rule by registered political committees operating both Federal and non-Federal accounts under the Commission's allocation rules. Section 100.57(b) requires that at least 50%, and as much as 100%, of the funds received in response to a solicitation satisfying the requirements of section 100.57(a) be treated as FECA contributions, regardless of references to other intended uses for the funds received. *See* 11 CFR 100.57(b)(1) and (2); *2004 Final Rules,* 69 FR at 68058–59. Therefore, section 100.57(b) prevents a political committee from adding references to non-Federal candidates or political parties to its solicitation materials in order to claim that most or all of the funds received are for non-Federal purposes, and therefore, not ''contributions'' under FECA. The regulation has the additional advantage of prohibiting registered political committees from raising donations not subject to the limitations from individual contributors or from prohibited sources using solicitation materials that focus on influencing the election of Federal candidates.

Moreover, the costs of these solicitations must be paid for with a corresponding proportion of Federal funds. For example, if 100% of the funds received from a solicitation would be treated as contributions under section 100.57(b)(1), then 100% of the costs of that solicitation must be paid with Federal funds. *See* 11 CFR 100.57(b); 11 CFR 106.1(a)(1); 11 CFR 106.6(d)(1); 11 CFR 106.7(d)(4).

In sum, section 100.57 codifies a broad method of establishing political committee status with strong anti-circumvention protections, providing clear guidance to the regulated community that any organization, regardless of tax status, may be required to register as a political committee based on its solicitations.

2. The Commission Adopted Anti-Circumvention Measures Requiring That Campaign Ads and Voter Turn Out Efforts be Paid for With at Least 50% Federal Funds and as Much as 100% Federal Funds

The *2004 Final Rules* also include a comprehensive overhaul of the Commission's allocation regulations, which govern how corporate and labor organization PACs and nonconnected committees split the costs of Federal and non-Federal activities such as campaign ads and voter turnout efforts. *See* 11 CFR 106.6. Under Commission regulations, a registered political committee that participates in both Federal and non-Federal elections is permitted to maintain both Federal and non-Federal accounts, containing funds that comply, respectively, with Federal and State restrictions. *See* 11 CFR 102.5(a).

Because many activities that an organization may undertake will have both a Federal and non-Federal component (such as a voter drive where both the Federal candidate and the non-Federal candidate are appearing on the ballot), previous Commission regulations had permitted the committee to develop an allocation percentage based on a ratio of Federal expenditure to Federal and non-Federal disbursements. This allocation percentage would govern how payments for all activity of the organization would be split between the two accounts.

Several commenters claimed that some registered political committees were relying on these former allocation rules to pay for Federal campaign ads and voter turnout efforts that could influence the 2004 Federal elections almost entirely with non-Federal funds. BCRA's Congressional sponsors, including two of the *Shays II* plaintiffs, argued that the previous allocation requirements ''allow[ed] for absurd results'' and that ''[t]he Commission must revise its allocation rules to require a significant minimum hard money share for spending on voter mobilization in a federal election year.''

Several campaign finance reform groups, including counsel to two of the *Shays II* amici, urged the Commission to curb these perceived abuses. At the time, they stated it was ''essential for the Commission to take this action as part of the [2004] rulemaking process.''

The *2004 Final Rules* directly resolve these concerns by establishing strict new Federal funding requirements for registered political committees, as well as for entities that conduct activity through both registered Federal accounts and unregistered non-Federal accounts. The new rules require these groups to: (a) Use a minimum of 50% Federal funds to pay for get-out-the-vote drives that do not mention a specific candidate, as well as public communications that refer to a political party without referring to any specific candidates, and administrative costs; (b) use 100% Federal funds to pay for public communications or voter drives that refer to one or more Federal candidates, but no non-Federal candidates; and (c) for public communications or voter drives that refer to both Federal and non-Federal candidates, use a ratio of Federal and non-Federal funds based on the time and space devoted to each Federal candidate as compared to the total space devoted to all candidates. *See* 11 CFR 106.6(c); *2004 Final Rules,* 69 FR at 68061–63; 11 CFR 106.6(f). Notably, the Commission's new allocation and contribution regulations are the subject of pending litigation, where the Commission is charged not with being too lenient, but being too restrictive. *See EMILY's List* v. *FEC* (Civil No. 05–0049 (CKK)) (D.D.C. summary judgment briefing completed July 18, 2005).[15]

An additional change to the regulation will also significantly shift political committees towards a greater use of Federal funds. The new regulations require an organization to pay at least 50% of its administrative costs with funds from the Federal account. This regulatory adjustment will curtail longstanding complaints that the Commission's allocation regulations have permitted non-Federal funds to substantially subsidize the overhead and day-to-day operations of the organization's Federal activity.

The revisions to section 106.6 prevent registered political committees from fully funding campaign advertisements and voter drives primarily designed to benefit Federal candidates with non-Federal funds simply by making a passing reference to a non-Federal candidate.

F. Since the 2004 Rulemaking, the Commission's Enforcement Actions Demonstrate the Application and Sufficiency of the FECA Political Committee Framework, and Provide Considerable Guidance Addressing When Groups Must Register as Political Committees

The Commission has applied FECA's definition of ''political committee,'' together with the major purpose doctrine, in the recent resolution of a number of administrative enforcement Matters involving 527 organizations and other groups. *See* MURs 5511 and 5525 (Swiftboat Vets); 5753 (League of Conservation Voters); 5754 (MoveOn.org Voter Fund); 5751 (The Leadership Forum); 5492 (Freedom, Inc.).[16] In each of these Political Committee Status Matters, the Commission conducted a thorough investigation of all aspects of the organization's statements and activities to determine first if the organization exceeded the $1,000

[15] Material related to this litigation can be found at *http://www.fec.gov/law/litigation_related.shtml#emilyslist_dc.*

[16] Documents related to these and other Commission MURs cited in this Explanation and Justification are available at *http://eqs.nictusa.com/eqs/searcheqs.*

statutory and regulatory threshold for expenditures or contributions in 2 U.S.C. 431(4)(A) and 11 CFR 100.5(a), and then whether the organization's major purpose was Federal campaign activity. The settlements in the Political Committee Status Matters are significant because they are the first major cases after the Supreme Court's decision in *McConnell* to consider the reach of the definition of ''express advocacy'' when evaluating an organization's disbursements for communications made independently of a candidate to determine if the expenditure threshold has been met. They are also significant because they demonstrate that an organization may satisfy the political committee status threshold based on how the organization raises funds, and that the Commission examines fundraising appeals based on the plain meaning of the solicitation, not the presence or absence of specific words or phrases. Finally, the Political Committee Status Matters illustrate well the Commission's application of the major purpose doctrine to the conduct of particular organizations.

As discussed in detail below, in these and other matters, the Commission provides guidance to organizations about both the expenditure and the contribution paths to political committee status under FECA, as well as the major purpose doctrine. Any organization can look to the public files for the Political Committee Status Matters and other closed enforcement matters, as well as advisory opinions and filings in civil enforcement cases, for guidance as to how the Commission has applied the statutory definition of ''political committee'' together with the major purpose doctrine. The public documents available regarding the 527 settlements in particular provide more than mere clarification of legal principle; they provide numerous examples of actual fundraising solicitations, advertisements, and other communications that will trigger political committee status. These documents should guide organizations in the future as they formulate plans and evaluate their own conduct so they may determine whether they must register and report with the Commission as political committees. To the extent uncertainty existed, these 527 settlements reduce any claim of uncertainty because concrete factual examples of the Commission's political committee status analysis are now part of the public record.

1. The Expenditure Path to Political Committee Status

In the Swiftboat Vets and League of Conservation Voters Matters, the Commission analyzed whether the organizations' advertising, voter drives and other communications ''expressly advocated'' the election or defeat of a clearly identified Federal candidate under the two definitions of that term in 11 CFR 100.22.[17] The Commission applied a test for express advocacy that is not only limited to the so-called ''magic words'' such as ''vote for'' or ''vote against,''[18] but also includes communications containing an ''electoral portion'' that is ''unmistakable, unambiguous, and suggestive of only one meaning'' and about which ''reasonable minds could not differ as to whether it encourages actions to elect or defeat'' a candidate when taken as a whole and with limited reference to external events, such as the proximity to the election.[19] The Commission was able to apply the alternative test set forth in 11 CFR 100.22(b) free of constitutional doubt based on *McConnell's* statement that a ''magic words'' test was not constitutionally required, as certain Federal courts had previously held. Express advocacy also includes exhortations ''to campaign for, or contribute to, a clearly identified candidate.'' *FEC* v. *Christian Coalition,* 52 F. Supp. 2d 45, 62 (D.D.C. 1999) (explaining why *Buckley,* 424 U.S. at 44 n.52, included the word ''support,'' in addition to ''vote for'' or ''elect,'' in its list of examples of express advocacy communication). Thus, if the organization spent more than $1,000 on a communication meeting either test for express advocacy, then the statutory threshold of expenditures was met.

The Commission determined that Swiftboat Vets met the threshold for ''expenditures'' because it spent over $1,000 for fundraising communications that ''expressly advocated'' the election or defeat of a clearly identified Federal candidate under 11 CFR 100.22(a). In addition, Swiftboat Vets spent over $1,000 for television advertisements, direct mailings and a newspaper advertisement that contained express advocacy under 11 CFR 100.22(b).[20]

The Commission also determined that two League of Conservation Voter 527 organizations met the expenditure threshold because they spent more than $1,000 on door-to-door canvassing and telephone banks where the scripts and talking points for canvassers and callers expressly advocated the defeat of a Federal candidate under 11 CFR 100.22(a). In addition, the League of Conservation Voters 527s spent more than $1,000 for a mailer expressly advocating a Federal candidate's election under both definitions in 11 CFR 100.22(a) and (b).[21]

2. The Contribution Path to Political Committee Status

With regard to the $1,000 threshold for ''contributions,'' the Commission examined fundraising appeals from each organization in the Swiftboat Vets, League of Conservation Voters and MoveOn.org Voter Fund matters and determined that if any of the solicitations clearly indicated that the funds received would be used to support or defeat a Federal candidate, then the funds received were given ''for the purpose of influencing'' a Federal election and therefore constituted ''contributions'' under FECA. *See SEF.* The Commission examined the entirety of the solicitations and did not limit its analysis to the presence or absence of any particular words or phrases. If any solicitations meeting the test set forth in *SEF* resulted in more than $1,000 received by the organization, then the statutory threshold for contributions was met.

Swiftboat Vets received more than $1,000 in response to several e-mail and Internet fundraising appeals and a direct mail solicitation clearly indicating that the funds received would be used to the defeat of a Federal candidate, which meant these funds were ''contributions'' under FECA.[22] Similarly, the League of

[17] In these Matters, the Commission used its enforcement process to develop the factual record of what advertisements the organizations ran, when and where they ran, and how much they cost, and to reach the legal conclusions of whether the regulatory standards were satisfied. Thus, even when the Commission codifies a legal standard in its regulations, the enforcement process is the vehicle for determining how that legal standard should be applied in a particular case.

[18] Under 11 CFR 100.22(a), a communication contains express advocacy when it uses phrases such as ''vote for the President,'' ''re-elect your Congressman,'' or ''Smith for Congress,'' or uses campaign slogans or words that in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, such as posters, bumper stickers, or advertisements that say, ''Nixon's the One,'' ''Carter '76,'' ''Reagan/Bush,'' or ''Mondale!''.

[19] 11 CFR 100.22(b). The Commission also recently resolved another administrative action based on a determination that a 501(c)(4) organization's communications satisfied the ''express advocacy'' definition in section 100.22(b). *See* MUR 5634 (Sierra Club, Inc.).

[20] *See* MUR 5511 Conciliation Agreement, at paragraphs 23–28.

[21] *See* MUR 5753 Conciliation Agreement, at 8–9.

[22] *See* MUR 5511 Conciliation Agreement, at paragraphs 18–21.

Conservation Voters 527s each received more than $1,000 in response to mailed solicitations, telephone calls, and personal meetings with contributors where the organizations clearly indicated that the funds received would be used to defeat a Federal candidate, which also meant these funds were ''contributions'' under FECA.[23] Finally, MoveOn.org Voter Fund received more than $1,000 in response to specific fundraising e-mail messages that clearly indicated the funds received would be used to defeat a Presidential candidate, which constituted ''contributions'' under FECA.[24]

3. Application of the Major Purpose Doctrine

After determining that each organization in the Swiftboat Vets, League of Conservation Voters, and MoveOn.org Voter Fund matters had met the threshold for contributions or expenditures in FECA and Commission regulations, the Commission then investigated whether each organization's major purpose was Federal campaign activity. The Commission examined each organization's fundraising solicitations, the sources of its contributions, and the amounts received. The Commission considered public statements as well as internal documents about an organization's mission. Each organization's full range of campaign activities was evaluated, including whether the organization engaged in any activities that were not campaign related.

Recently resolved matters reflect the comprehensive analysis required to determine an organization's major purpose. Swiftboat Vets' major purpose was campaign activity, as evidenced by: (1) Statements made to prospective donors detailing the organization's goals; (2) public statements on the organization's Web site; (3) statements in a letter from the organization's Chairman thanking a large contributor; (4) statements by a member of the organization's Steering Committee on a news program; and (5) statements in various fundraising solicitations. The organization's activities also evidenced its major purpose as over 91% of its reported disbursements were spent on advertisements directed to Presidential battleground States and direct mail attacking or expressly advocating the defeat of a Presidential candidate, and the organization has effectively ceased active operations after the November 2004 election.[25]

The League of Conservation Voters 527s' major purpose was campaign activity as demonstrated through: (1) Statements made in the organizations' solicitations; (2) statements in organizational planning documents, such as a ''National Electoral Strategic Plan 2004''; (3) public statements endorsing Federal candidates; and (4) statements in letters from the organizations' President describing the organizations' activities. The organizations' budget also evidenced its major purpose of campaign activity because 50–75% of the political budget for the organizations was intended for the Presidential election.[26]

MoveOn.org Voter Fund's major purpose was campaign activity as evidenced by statements regarding its objectives in e-mail solicitations. MoveOn.org Voter Fund's activities also demonstrated its major purpose of campaign activity. MoveOn.org Voter Fund spent over 68% of its total 2004 disbursements on television advertising opposing a Federal candidate in Presidential battleground states; the only other disbursements from MoveOn.org Voter Fund in 2004 were for fundraising, administrative expenses, and grants to other political organizations. MoveOn.org Voter Fund spent nothing on State or local elections. Lastly, MoveOn.org Voter Fund has effectively ceased active operations after the November 2004 election.[27]

527 organizations are not the only groups whose major purpose is Federal campaign activity. The Commission recently conciliated a MUR with a 501(c)(4) organization, Freedom Inc., which had failed to register and report as a political committee despite conducting Federal campaign activity during the 2004 election cycle. *See* MUR 5492. Freedom Inc. made more than $1,000 in expenditures for communications that expressly advocated a Federal candidate's election under section 100.22(a), and it conceded that its major purpose was campaign activity.

4. Other FEC Actions

In addition to the Political Committee Status Matters discussed above, the Commission filed suit against another 527 organization, the Club for Growth, Inc. (''CFG''), for failing to register and report as a political committee in violation of FECA. *See FEC* v. *Club for Growth, Inc.,* Civ. No. 05–1851 (RMU) (D.D.C. Compl. pending).[28] The Commission's complaint against CFG provides further guidance to organizations regarding the prerequisites of political committee status.

The complaint shows that CFG made expenditures for candidate research, polling, and advertising, including advertising that expressly advocates the election or defeat of clearly identified candidates. (Compl. at 10–11). Additionally, CFG made solicitations indicating that funds provided would be used to support or oppose specific candidates, which means the funds received were contributions under FECA. (*Id.,* at 8–9). Finally, the complaint reflects an extensive examination of the organization, resulting in a determination that the major purpose of the organization was to influence Federal elections (*id.,* at 12), including evidence such as: CFG's statement of purpose in the registration statement submitted to the Internal Revenue Service (*id.,* at 6); other public statements indicating CFG'S purpose is influencing Federal elections (*id.,* at 6–7); CFG's use of solicitations that make clear that contributions will be used to support or oppose the election of specific Federal candidates (*id.,* at 8–9); other spending by CFG for public communications mentioning Federal candidates (*id.,* at 10–11); and the absence of any spending by CFG on State or local races (*id.,* at 10).

Just as findings of violations inform organizations as to what kinds of activities will compel registration as a Federal political committee, a Commission finding that there has been no violation clarifies those activities that will not. For example, in MUR 5751 (the Leadership Forum), the Commission made a threshold finding that there was a basis for investigating (*i.e.*, the Commission found ''Reason to Believe'') whether the Leadership Forum had failed to register as a political committee based on its 2004 election activity. The subsequent investigation revealed that the Leadership Forum's only public communications reprinted governmental voter information, without any mention of Federal or non-Federal candidates or political parties. Following the investigation, the Commission closed the matter because it found no evidence that the Leadership

[23] *See* MUR 5753 Conciliation Agreement, at 5–7.

[24] *See* MUR 5754 Conciliation Agreement, at 5–8.

[25] *See* MUR 5511 Conciliation Agreement, at paragraphs 31–36.

[26] *See* MUR 5753 Conciliation Agreement, at 9–10.

[27] *See* MUR 5754 Conciliation Agreement, at 8, and Factual & Legal Analysis, at 11–13 (Aug. 9, 2006).

[28] Complaint available at *http://www.fec.gov/law/litigation/club_for_growth_complaint.pdf.*

Forum had crossed the $1,000 threshold through expenditures or contributions. Consequently, the Commission did not undertake a major purpose analysis for the Leadership Forum.

All of these cases taken together illustrate (1) The Commission's commitment to enforcing FECA's requirements for political committee status as well as (2) the need for an examination of an organization's activities under the major purpose doctrine, regardless of a particular organization's tax status.

5. The Advisory Opinion Process

Any entity that remains unclear about the application of FECA to its prospective activities may request an advisory opinion from the Commission. *See* 2 U.S.C. 437f; 11 CFR part 112. Through advisory opinions, the Commission can further explain the application of the law and provide guidance to an organization about how the Commission would apply the major purpose doctrine to its proposed activities, and whether the organization must register as a political committee.[29]

Under FECA, the Commission is required to provide an advisory opinion within 60 days of receiving a complete written request and, in some instances, within 20 days. *See* 2 U.S.C. 437f(a); 11 CFR 112.4(a) and (b). Moreover, the Commission's legal analysis and conclusions in an advisory opinion may be relied upon not only by the requestor, but also by any person whose activity ''is indistinguishable in all its material aspects'' from the activity in the advisory opinion. *See* 2 U.S.C. 437f(c); 11 CFR 112.5(a)(2). The Commission has considered the major purpose doctrine in prior advisory opinions when assessing whether an organization is a political committee.[30]

The advisory opinion process is an effective means by which the Commission clarifies the law because it allows an entity to ask the Commission for specific advice about the factual situation with which the entity is concerned, often in advance of the entity engaging in the contemplated activities.

[29] *See* McConnell, 540 U.S. at 170 n.64 (holding portions of BCRA were not unconstitutionally vague, in part because ''should plaintiffs feel that they need further guidance, they are able to seek advisory opinions for clarification * * * and thereby 'remove any doubt there may be as to the meaning of the law''' (internal citation omitted)).

[30] *See* Advisory Opinions 2006–20 (Unity 08); 2005–16 (Fired Up); 1996–13 (Townhouse Associates); 1996–3 (Breeden-Schmidt Foundation); 1995–11 (Hawthorn Group); 1994–25 (Libertarian National Committee) and 1988–22 (San Joaquin Valley Republican Associates).

Conclusion

By adopting a new regulation by which an organization may be required to register as a political committee based on its solicitations, and by tightening the rules governing how registered political committees fund solicitations, voter drives and campaign advertisements, the *2004 Final Rules* bolstered FECA against circumvention not just by one kind of organization, but by groups of all kinds. As discussed above, the Commission's decision not to establish a political committee definition singling out 527 organizations is informed by the statutory scheme, Supreme Court precedent, and Congressional action regarding 527 organizations. Accordingly, the Commission will continue to utilize the political committee framework provided by Congress in FECA, as modified by the Supreme Court.

Pursuant to FECA and Supreme Court precedent, the Commission will continue to determine political committee status based on whether an organization (1) Received contributions or made expenditures in excess of $1,000 during a calendar year, and (2) whether that organization's major purpose was campaign activity. *See* 2 U.S.C. 431(4)(A); *Buckley,* 424 U.S. at 79; *MCFL,* 479 U.S. at 262. When analyzing a group's contributions, the Commission will consider whether any of an organization's solicitations generated contributions because the solicitations indicated that any portion of the funds received would be used to support or oppose the election of a clearly identified Federal candidate. *See* 11 CFR 100.57. Additionally, the Commission will analyze whether expenditures for any of an organization's communications made independently of a candidate constituted express advocacy either under 11 CFR 100.22(a), or the broader definition at 11 CFR 100.22(b).

As evidenced by the Commission's recent enforcement actions, together with guidance provided through publicly available advisory opinions and filings in civil enforcement cases, this framework provides the Commission with a very effective mechanism for regulating organizations that should be registered as political committees under FECA, regardless of that organization's tax status. The Commission's new and amended rules, together with this Supplemental Explanation and Justification, as well as the Commission's recent enforcement actions, places the regulated community on notice of the state of the law regarding expenditures, the major purpose doctrine, and solicitations resulting in contributions. In addition, any group unclear about the application of FECA to its prospective activities may request an advisory opinion from the Commission. *See* 2 U.S.C. 437f; 11 CFR part 112.

Dated: February 1, 2007.

Robert D. Lenhard,

Chairman, Federal Election Commission.

[FR Doc. E7–1936 Filed 2–6–07; 8:45 am]

BILLING CODE 6715–01–P

FARM CREDIT ADMINISTRATION

12 CFR Parts 611, 612, 613, 614, and 615

RIN 3052–AC15

Organization; Standards of Conduct and Referral of Known or Suspected Criminal Violations; Eligibility and Scope of Financing; Loan Policies and Operations; Funding and Fiscal Affairs, Loan Policies and Operations, and Funding Operations; Regulatory Burden; Effective Date

AGENCY: Farm Credit Administration.

ACTION: Notice of effective date.

SUMMARY: The Farm Credit Administration (FCA) published a final rule under parts 611, 612, 613, 614, and 615 on November 8, 2006 (71 FR 65383). This final rule reduces regulatory burden on the Farm Credit System by repealing or revising regulations and correcting outdated and erroneous regulations. In accordance with 12 U.S.C. 2252, the effective date of the final rule is 30 days from the date of publication in the **Federal Register** during which either or both Houses of Congress are in session. Based on the records of the sessions of Congress, the effective date of the regulations is February 1, 2007.

EFFECTIVE DATES: The regulation amending 12 CFR parts 611, 612, 613, 614, and 615, published on November 8, 2006 (71 FR 65383) is effective February 1, 2007.

FOR FURTHER INFORMATION CONTACT: Jacqueline R. Melvin, Associate Policy Analyst, Office of Policy and Analysis, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4498, TTY (703) 883–4434; or Howard I. Rubin, Senior Counsel, Office of General Counsel, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4020, TTY (703) 883–4020.

(12 U.S.C. 2252(a)(9) and (10))

FEC EXHIBIT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HOLLY LYNN KOERBER and COMMITTEE FOR TRUTH IN POLITICS, INC.,	)	
Plaintiffs,	)	No. 2:08-cv-2257
v.	)	
	)	Declaration of Jayci A. Sadio
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

DECLARATION OF
JAYCI A. SADIO

Jayci A. Sadio hereby declares as follows:

1. My name is Jayci A. Sadio. I am a resident of Upper Marlboro, Maryland. I am over 21 years of age.

2. I am a Paralegal Specialist employed in the Office of General Counsel at the Federal Election Commission ("FEC" or "Commission"). Unless otherwise indicated, I make this declaration based on my personal knowledge. I make this declaration in support of the Commission's Brief in this litigation and, if called as a witness, I could and would testify competently to the matters set forth herein.

3. On October 21, 2008, I viewed a video of an ad posted on the YouTube web site located at http://www.youtube.com/watch?v=Ew1_fHptwr4&feature=related that the site indicates was originally posted on the site on October 12, 2008. The ad is titled *"CTP: Early Release"* and discusses then-Senator Barack Obama's voting record on bills relating to sexual predators. The script of *"CTP: Early Release"* is virtually identical to the script for the ad referred to as *"Tragic, But True"* in Plaintiffs' Amended Complaint in this litigation.

4. On October 21, 2008, I viewed a separate video of an ad posted on the YouTube web site located at http://www.youtube.com/watch?v=4BhAvcnlkKw that the site indicates was originally posted on the site on October 5, 2008. The ad is titled *"Committee For Truth In Politics: Basic Rights"* and discusses then-Senator Barack Obama's voting record on bills relating to late term abortions. The script of *"Committee For Truth In Politics: Basic Rights"* is virtually identical to the script for the ad referred to as *"Basic Rights"* in Plaintiffs' Amended Complaint in this litigation.

5. As of March 26, 2009, both ads were still available on YouTube.

6. On March 26, 2009, I visited the Election 2008 section of the New York Times website located at http://elections.nytimes.com/2008/president/advertising/advertisers/343-committee-for-truth-in-politics. This page contains an interactive map of the United States and shows in what states The Committee for Truth in Politics ("CTP") broadcast the two television ads above, based on data obtained from the Campaign Media Analysis Group. From this map, I created a chart listing the cities, states, and the amount of money spent on CTP advertising in each region, which is attached as Attachment 1.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in Washington, D.C. on the 17th day of April, 2009.

Jayci A. Sadio
Paralegal Specialist

Committee for Truth in Politics 2008 Advertising Expenditures

State	Amount of Advertising Expenditure
Wilmington, **NC**	**$7,579**
PA	
Wilkes Barre, PA	$64,700
Harrisburg, PA	$86,649
Johnstown, PA	$29,677
Pittsburgh, PA	$265,119
Erie, PA	$28,729
	$474,874
OH	
Cleveland, OH	$206,318
Zanesville, OH	$5,346
Columbus, OH	$131,973
Lima, OH	$22,021
Dayton, OH	$85,970
Cincinnati, OH	$42,267
Toledo, OH	$23,956
	$517,851
WV	
Wheeling, WV- Steubenville, WV	$9,102
Charleston, WV	$21,453
	$30,555
WI	
Milwaukee, WI	$43,078
Madison, WI	$34,023
Green Bay, WI	$23,576
Wausau, WI	$12,921
Lacrosse, WI	$136
	$113,734
TOTAL	**$1,144,593.00**

Attachment 1