December 17, 2003

Lawrence Norton, Esq.
General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Comment on AOR 2003-37

Re: AOR 2003-37 (Americans for a Better Country)

Dear Mr. Norton:

The following comments are submitted on behalf of the Campaign Legal Center and Democracy 21 in regard to AOR 2003-37, a request filed by "Americans for a Better Country" (ABC), an unincorporated entity operating under section 527 of the Internal Revenue Code that proposes to engage in various federal campaign activities in the 2004 election.

We note at the outset that it is important for the Commission to recognize that this AOR, submitted by a Republican political organization, sets forth proposed activities that appear nearly identical to the widely publicized proposed activities of America Coming Together (ACT), a similarly organized Democratic political group.

We make this point as a matter of context: the opinion issued by the Commission in this matter could have immediate and obvious application not just to ABC, but also to ACT and other similarly situated section 527 organizations. For this reason, the Commission has a responsibility to be extremely careful in this AOR to avoid licensing any activities that would undermine the new campaign finance law and open the door to its wholesale evasion. An advisory opinion in this matter can be expected to have broad application to the activities of multiple section 527 organizations on both sides of the political spectrum.

We also urge the Commission to take to heart the Supreme Court's recent findings about the past role played by the Commission in facilitating and tolerating widespread circumvention of the nation's campaign finance laws and the need for (and constitutionality of) prophylactic measures to guard against evasion of the laws intended to protect the integrity of the political process. *McConnell v. FEC*, 540 U.S. ___ (2003) (slip op. December 10, 2003).

In its opinion, for example, the Supreme Court noted that the soft money ban in the Bipartisan Campaign Reform Act of 2002 (BCRA) "simply effects a return to the scheme that was approved in *Buckley* and that was subverted by the creation of the FEC's allocation regime, which permitted the political parties to fund federal electioneering efforts with a combination of hard and soft money....Under that allocation regime, national parties were able to use vast amounts of soft money in their efforts to elect federal candidates." *Id.* (slip op. at 32) (emphasis added).

As the Supreme Court recounted, it was the FEC's advisory opinion process -- now being used by ABC -- that was used by the political parties to open the door to soft money being raised and spent to influence federal elections in the late 1970's. Slip op. at 12, n.7, *citing* Advisory Ops. 1978-10, 1979-17. In light of past history, the Commission has a special responsibility to prevent the advisory opinion process from being used again to open a new means for funneling soft money into federal elections, such as by funneling proscribed corporate or union treasury funds into federal elections through section 527 organizations instead of through political parties.

In our comments, we present a framework for analysis of the activities of ABC (and ACT) which we believe should be controlling in determining the answers to the specific questions posed by ABC.

1. The Commission should conclude in this advisory opinion that corporations and labor unions are prohibited from making donations to section 527 organizations like ABC (and ACT) to be used for funding partisan voter drive activities aimed at the general public, and that groups like ABC (and ACT) are prohibited from receiving and using corporate and labor union donations for such purposes.

Section 441b of the FECA prohibits "any corporation" or "any labor organization" from making a "contribution or expenditure in connection with any election" for federal office. 2 U.S.C. § 441b(a). It defines "contribution or expenditure" to include:

> any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value...to any candidate, campaign committee, or political party or organization, in connection with any [federal] election....
>
> 2 U.S.C. § 441b(b)(2)
> (emphasis added)

The law makes clear that corporations and labor unions cannot use their treasury funds to conduct partisan voter mobilization efforts aimed at the general public. 11 C.F.R. § 114.4(d). The statute exempts from the definition of "expenditure" only

nonpartisan registration and get-out-the-vote campaigns by a corporation or labor union aimed at the general public. 2 U.S.C. § 431(9)(B)(ii).[1]

Partisan voter mobilization activities are clearly "in connection with" a federal election. As the Supreme Court noted in *McConnell*, "voter registration, voter identification, GOTV and generic campaign activity all confer substantial benefits on federal candidates," slip. op. at 60. Nor does the "express advocacy" test limit the application of the "in connection with" standard of section 441b when applied to voter mobilization activities by section 527 political organizations, whose principal purpose, as defined by section 527, is to influence candidate elections.[2]

Thus, under federal law, corporations and labor unions are prohibited from spending their treasury funds for partisan voter mobilization activities aimed at the general public. And this prohibition expressly applies as well to any "indirect payment" of such funds for the same activity – such as a donation of corporate or union funds to a section 527 organization to fund partisan voter drive activity aimed at the public. *See* pages 5 and 6 herein.

It is clear, based on the assertions in the advisory opinion request, that ABC intends to engage in partisan voter mobilization activities aimed at the general public. The AOR states:

> Aimed at the general public, ABC will conduct an independent massive get-out-the-vote operation with non-federal "soft" dollars that it wishes to aid President Bush's re-election, the defeat of the eventual Democratic Presidential nominee, and the election of Republican candidates to the United States Senate and House....
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> ABC plans to concentrate its activities in 17 or 18 states which are likely to be battleground states in the 2004 presidential election as well as a

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[1] The statutory definition of "expenditure" includes any "payment" made "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A). The statute then expressly excludes from this definition "*non partisan* activity designed to encourage individuals to vote or to register to vote." *Id.* at § 431(9)(B)(ii)(emphasis added). This means that *partisan* voter drive activity is included within the definition of "expenditure" and thus is "in connection with" an election for purposes of section 441b.

[2] As the Supreme Court held in *Buckley*, the "express advocacy" test does not apply to organizations "that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U.S. 1, 79 (1976). This position was affirmed in *McConnell*, slip op. at 61-62, and includes all section 527 organizations which, by definition, have a principal purpose to influence candidate elections. 26 U.S.C 527(e).

number of states and congressional districts to be determined as they become battlegrounds for control of the U.S. Senate and House.

ABC AOR at 5

This clearly partisan purpose of ABC reflects the similar publicly stated partisan goals of ACT, which has announced it will undertake a substantial effort in 17 key states to defeat President George W. Bush. ACT officials have made clear that the basic purpose of ACT is to turn out voters to defeat President Bush.

For example, in announcing its formation, ACT President Ellen Malcolm stated: "President Bush is taking this country in the wrong direction. ACT's creation is further evidence that mainstream America is coming together in response to President Bush's extremism..." ACT Board Member Andy Stern, President of the Service Employees International, said: "ACT is launching the largest field operation this country has ever seen. We will be going door-to-door to let people know what the Administration's record really is on the bread-and-butter issues that voters care about."[3]

The partisan nature of the ABC and ACT voter mobilization activities is further demonstrated by each organization's status as a Section 527 tax-exempt organization. Organizations exempt from taxation under Section 527 of the Internal Revenue Code are organized and operated primarily for the purpose of receiving contributions or making expenditures for an "exempt function." This 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, whether or not such individual or electors are selected, nominated, elected, or appointed." 26 U.S.C. §§ 527(e)(1)&(2).

To qualify as expenditures for an "exempt function" under Section 527, voter mobilization expenditures must be partisan in nature. *See* IRS Priv. Ltr. Rul. 1999-25-051 (Mar. 29, 1999) (holding that voter registration and voter turnout activities of a 527 organization were expenditures for an exempt function under 26 U.S.C. § 527(e), because they were partisan in nature). Indeed, in *McConnell v. FEC*, the Supreme Court indicated that Section 527 organizations "by definition engage in partisan political activity." Slip. Op. at 69.

ABC and ACT plan to raise and spend soft money for their voter mobilization activities. ABC proposes in its AOR to raise corporate treasury funds to spend on

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[3] Both quotes are from a press release issued by ACT on August 8, 2003 announcing its formation. The release may be found online at http://www.americacomingtogether.com/about/announcement_press_release.pdf

partisan voter drive activities aimed at the general public.[4] ACT has announced it will raise union treasury funds to undertake the same activities.[5]

The receipt and use of such funds by ABC and ACT for partisan mobilization activities aimed at the general public would constitute a prohibited "indirect" expenditure of labor and corporate treasury funds "in connection with a federal election," in violation of section 441b(b)(2). The FEC should also find that corporations and unions are prohibited by federal law from making such donations to ABC or ACT.

In *Federal Election Com'n v. California Democratic Party*, 1999 WL 33633264 (E.D.Cal. Oct 14, 1999), the court agreed with the FEC's legal argument that a similar scheme to do indirectly what could not be done directly was illegal. In that case, the Commission argued that the California Democratic state party (CDP) made an illegal donation of funds from its non-federal account to an outside group organized to oppose a ballot referendum. The referendum group used the soft money to conduct voter drive activities which, if conducted by the CDP itself, would have had to be funded with an allocated mixture of federal and non-federal funds.

The court held that by funneling the money through the referendum group, the state party evaded the allocation rules that applied to such party expenditures and "financed a partisan voter registration drive with non-federal account funds." The court found that the state party "contributed non-federal funds to [the referendum group]'s voter registration drive and that this contravened the allocation rules." Thus, "the FEC has shown that the CDP violated the FECA and the allocation rules by funding a generic voter drive that targeted Democrats."

So too here, corporate and union donors to ABC and ACT would be doing indirectly what they may not do directly: using their treasury funds to finance partisan voter drives aimed at the general public. It would contravene section 441b for unions and corporations to donate their treasury funds to an outside section 527 group which then uses those soft money funds to engage in partisan mobilization activities aimed at the general public.

It is no answer to this position, furthermore, that section 527 organizations can accept and use corporate or labor union funds for this purpose under an "allocation" formula approach.

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[4] *See* ABC AOR at 1 (ABC...maintains...several non-federal accounts in which it segregates large individual contributions from contributions from corporations, unions and trade associations.").

[5] *See* ACT press release, *supra* n.3. According to press reports, ACT has raised or received pledges of $8 million from labor unions to date. *See* T. Edsall, "Liberals Form Fund to Defeat President; Aim is to Spend $75 Million for 2004," *The Washington Post* (Aug. 8, 2003).

The Supreme Court in *McConnell* explicitly and repeatedly described allocation as an approach that "subverted" the federal campaign finance laws. Slip op. at 32.

The Court noted that the Commission had permitted allocation by the political parties for voter mobilization activities "although a literal reading of FECA's definition of 'contribution' would have required such activities to be funded with hard money...." Slip op. at 12. Indeed, the Court noted that the allocation regulations "permitted more than Congress, in enacting FECA, had ever intended." *Id.* at 32, n.44. The same reasoning would apply to section 527 organizations such as ABC and ACT whose basic purpose is to conduct partisan voter mobilization activities to influence federal elections.

There is no legitimate justification for applying allocation rules to section 527 groups, like ABC and ACT, which have made clear that their basic purpose is to influence the 2004 federal elections.

In short, corporations and labor unions are not permitted to spend their treasury funds on partisan voter mobilization activities aimed at the general public. Nor are they permitted to evade that prohibition by donating those funds to an outside group which will use those funds to engage in the same activity. And section 527 groups are not permitted to receive and use corporate or labor union donations to fund partisan voter mobilization efforts aimed at the public.

2. The Commission must ensure that the statutory provisions dealing with "coordination" and "solicitation" are effectively administered and enforced to prevent widespread circumvention of the law.

The proper administration and effective enforcement of the statutory provisions on "coordination" are essential to preventing section 527 groups and the political parties and their candidates from making a mockery of the new law.

Advisory Opinion Request 2003-37 raises the issue of "coordination" -- under which "expenditures" made "in cooperation, consultation, or concert with, or at the request or suggestion of," a federal candidate or political party are treated as in-kind campaign contributions subject to the source prohibitions, amount limitations and reporting requirements of the Act. 2 U.S.C. § 441a(a)(7)(B).

The coordination provisions in the statute embody a longstanding and essential campaign finance law concept that serves to guard against corruption and the appearance of corruption. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the U.S. Supreme Court equated "prearranged or coordinated expenditures" with "disguised contributions." *Id.* at 47.

Thus, the Court held that the limits on campaign contributions properly applied to such expenditures, served to prevent "attempts to circumvent the Act." *See id.* Indeed, allowing groups to coordinate their campaign spending with candidates and parties would fundamentally undermine the limits on the size of campaign contributions, prohibitions on the sources of such contributions and campaign finance disclosure requirements.

In *Buckley*, the Supreme Court stated that, for campaign spending to be considered "independent" of candidates instead of coordinated, it must be "made *totally independently* of the candidate and his campaign." *Id.* at 47 (emphasis added). To the extent there was any doubt that the Supreme Court employed a broad and "functional" approach to the sort of conduct that could constitutionally and statutorily be considered coordination, the recent *McConnell* decision firmly dispels such doubt. Dismissing the notion that the First Amendment required the presence of an "agreement" to sustain a finding of coordination, the Court in *McConnell* stated:

> Thus, the rationale for affording special protection to ***wholly independent*** expenditures to has nothing to do with the absence of an agreement and everything to do with the functional consequences of different types of expenditures. Independent expenditures "are poor sources of leverage for a spender because they might be duplicative or counterproductive from a candidate's point of view. *Colorado II*, 533 U.S., at 446. ***By contrast, expenditures made after a 'wink or nod' often will be "as useful to the candidate as cash."*** *Id.*, at 442, 446. For that reason, Congress has always treated expenditures made "at the request or suggestion of" a candidate as coordinated.
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> *McConnell*, slip. op. at 116
> (emphasis added)

The FEC's current coordination regulations fail to comply with or carry out the statute's coordination provisions or the Supreme Court's broad, functional view of those provisions. The Supreme Court, for example, views an expenditure following a "wink or nod" as coordinated; by contrast, the Commission's regulations erect safe-harbors for far more blatant and extensive planning and consultation concerning campaign activity between candidates or parties and outside spenders such as section 527 organizations.

As a result the Commission's coordination regulations are currently being challenged in separate litigation pending before the U.S. District Court for the District of Columbia as "arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law." *See* Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief at 43-44, *Shays v. FEC*, No. 02-CV-1984 (D.D.C. amended cmplt. filed Jan. 21, 2003).

Given the potential for coordinated activities between 527 groups and parties and candidates to severely undermine the new law, the FEC has the responsibility to effectively implement the text and intent of the coordination provisions as recognized by the Supreme Court.

We urge the Commission in this advisory opinion to fully and effectively implement the statute and the broad and functional understanding of coordination set forth by the Supreme Court. This is essential to prevent quick efforts to evade and

undermine the new law. The AOR should not provide any form of license for "wink and nod" arrangements and other forms of improper coordination between 527 groups and parties and candidates.

The Supreme Court in a 7-2 vote (including the votes of Chief Justice Rehnquist and Justice Kennedy) in the *McConnell* case also upheld 2 U.S.C. § 441i(e), which prohibits federal officeholders and candidates, and any entity directly or established, financed, maintained or controlled by one or more candidates or individuals holding federal office from soliciting, receiving, directing, spending, transferring, spending or disbursing soft money in connection with elections. *See McConnell*, slip. op. at 73-76; slip op. at 31-32 (Kennedy, J., dissenting in part and concurring in part).

Section 441i(e)'s ban on soft money activity by federal officeholders and candidates is a fundamental component of the Bipartisan Campaign Reform Act of 2002. As recognized by the majority opinion written by Justices Stevens and O'Connor:

> Large soft-money donations at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder. Though the candidate may not ultimately control how the funds are spent, the value of the donation to the candidate or officeholder is evident from the fact of the solicitation itself. Without some restrictions on solicitations, federal candidates and officeholders could easily avoid FECA's contribution limits by soliciting funds from large donors and restricted sources to like-minded organizations engaging in federal election activities."
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> *McConnell*, slip. op. at 75

The solicitation of soft money by federal officeholders and candidates was a principal campaign finance abuse and at the core of the soft money problem prior to the enactment of BCRA. The Court elsewhere observed:

> Not only were such soft-money contributions often designed to gain access to federal candidates, but they were in many cases solicited by the candidates themselves. Candidates often directed potential donors to party committees and tax-exempt organizations that could legal accept soft money.
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> *Id.* at 14.

It is essential that the Commission's application of 2 U.S.C. § 441i(e) to Advisory Opinion Request 2003-37 honor the text and intent of the law as reinforced by the Supreme Court to ensure that federal candidates and officeholders are completely "out of the soft money fundraising business." *See* 148 Cong. Rec. S2116 (daily ed. Mar. 20, 2002) (statement of Sen. Levin).

As indicated above, the Supreme Court viewed this provision as an effective response to the prospect that federal officeholders and candidates would seek to evade FECA's contribution limits by "soliciting funds from large donors and restricted sources to like-minded organizations engaging in federal election activities." *McConnell*, slip. op. at 75. The Commission should give this provision the meaningful effect contemplated by the Court.

We appreciate the opportunity to submit these comments.

Sincerely,

Trevor Potter
President and General Counsel
Campaign Legal Center

Fred Wertheimer
President
Democracy 21