IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Representative Christopher Shays
1126 Longworth House Office Building
Washington, DC 20515

Representative Martin Meehan
2447 Rayburn House Office Building
Washington, D.C. 20515

Plaintiffs

v. Civil Action No. 04-1597 (EGS)

United States Federal Election Commission

Defendant

FIRST AMENDED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Christopher Shays and Martin Meehan, for their Complaint, state as follows:

1. This action challenges the failure of the Federal Election Commission ("FEC" or "Commission") to promulgate legally sufficient regulations to define the term "political committee," 2 U.S.C. § 431(4), as that term is used in the Federal Election Campaign Act (FECA), Pub. L. No. 93-443, 88 Stat. 1263, and particularly as that term applies to groups organized under section 527 of the tax law, 26 U.S.C. § 527.

2. Since the beginning of the last century, Congress has enacted, and the Supreme Court has upheld, laws to regulate the source and amount of contributions spent to influence federal elections. Since the enactment of the FECA in 1974, it has been established that

corporations and labor unions cannot spend their treasury funds in connection with federal elections, and that individuals cannot contribute more than $5,000 per year to "political committees," or groups whose major purpose is to influence federal elections and that raise or spend $1,000 or more to do so.

3. By the mid-1990's, there was pervasive evasion and circumvention of these laws, as political party committees became vehicles for raising and spending hundreds of millions of dollars of "soft money" – funds that do not comply with the contribution limits and source prohibitions of the law – to influence federal campaigns. In 2002, Congress enacted the Bipartisan Campaign Reform Act, Pub. L. No. 107-155, 116 Stat. 81 (BCRA), in order to close this avenue for the improper spending of soft money to influence federal elections. In *McConnell v. FEC,* 124 S. Ct. 619 (2003), the Supreme Court upheld this effort to repair FECA, and in so doing, faulted the FEC for its flawed administration of the FECA, and for promulgating "FEC regulations [that] permitted more than Congress, in enacting FECA, had ever intended." *Id.* at 660, n. 44. The FEC's regulations, the Court said, "subverted" the law, *id.* at 660, and "invited widespread circumvention" of the law. *Id.* at 661.

4. The Court also noted that "the entire history of campaign finance regulation" teaches "the hard lesson of circumvention." *Id.* at 673. And in fact, as soon as the Congress closed down the flow of soft money through political party committees, party and political operatives began to establish new illegal schemes to accomplish the same goal of using soft money to influence federal elections.

5. The 2004 presidential election was marked by the escalating use of so-called "section 527 groups" as the new vehicle for the improper spending of tens of millions of dollars of soft money for the purpose of influencing federal elections. These are groups

organized as "political organizations" under section 527 of the Internal Revenue Code but typically *not* registered with the FEC as "political committees." A number of highly publicized section 527 groups – both pro-Democratic and pro-Republican – operated in the 2004 election wholly outside the federal campaign finance laws. Groups such as The Media Fund, the Swift Boat Veterans for Truth and Progress for America Voter Fund sponsored multi-million dollar ad campaigns promoting or attacking President Bush or Senator Kerry in targeted swing states crucial to the presidential election. They spent corporate, union and individual funds plainly not in compliance with FECA; in some cases, these groups raised contributions of $5 million or more from a single donor for the purpose of influencing the presidential election.

6. Any group with a "major purpose" to influence federal elections, and that raises $1,000 in "contributions" or spends $1,000 in "expenditures" for that purpose, must register with the FEC as a "political committee" and comply with the contribution limits, source prohibitions and reporting requirements that apply to such political committees. Political committees cannot accept corporate or union funds at all, 2 U.S.C. § 441b(a), and cannot accept contributions from individuals in amounts greater than $5,000 per donor per year. *Id.* § 441a(a)(1)(C).

7. In March, 2001, the Commission began a rulemaking to revise its regulatory definition of the statutory term "political committee," but abandoned that effort without result seven months later. In March, 2004, in the wake of press reports indicating that multiple section 527 groups were intending to raise and spend tens of millions of dollars of soft money to influence the 2004 federal elections without registering as political committees, the Commission once again commenced a rulemaking to amend its definition of

"political committee," and specifically to address the circumstances in which section 527 groups must register as political committees. In its Notice of Proposed Rulemaking, the Commission acknowledged that this rulemaking was necessary in order "to revisit the issue of whether the current definition of 'political committee' adequately encompasses all organizations that should be considered political committees subject to the limitations, prohibitions and reporting requirements of FECA." "Political Committee Status," 69 Fed. Reg. 11736 (March 11, 2004).

8. In May, 2004, the Commission approved the recommendation of its general counsel to defer the rulemaking for 90 days. The general counsel told the Commission at that time that the NPRM "was prompted" by the Supreme Court's decision in *McConnell,* and by the question of whether "law and common sense dictate" that groups devoted to influencing federal elections "be considered political committees." (FEC Agenda Document 04-48 at 3, 4). Although the counsel recommended that the Commission "continue its work on this rulemaking" in order to study the matter further, he also said "[i]t is just as important not to drop the issue as it is to get it right." *Id.* at 11.

9. In August, 2004, the Commission decided to "drop the issue." It concluded the rulemaking without issuing a new rule that addresses the political committee issue, just as it had done in 2001. Although the Commission promulgated two rules on collateral matters, it failed entirely to issue any rule at the heart of the rulemaking: the definition of a political committee and the requirement for when section 527 groups must register as political committees. In November, 2004, the Commission published in the *Federal Register* the two collateral rules it had earlier adopted, along with the Commission's "Explanation and Justification" for them, as well as a brief explanation for why the Commission "decided not

to adopt any of the foregoing proposals to revise the definition of 'political committee.'" *See* "Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees," 69 Fed.Reg. 68056 (Nov. 23, 2004).

10. At the same time, the Commission has also failed to address the section 527 issue in enforcement actions. A number of complaints have been filed with the Commission against section 527 groups, at least as early as January, 2004, urging the Commission to take action to require these section 527 groups to register as federal political committees and to comply with federal campaign finance laws. The Commission has not taken any publicly disclosed action on any of these complaints, and it has taken no other publicly disclosed steps to require these section 527 groups to comply with federal law.

11. The Commission's failure to issue any new rule on the definition of political committee leaves in place a legally inadequate rule that fails to properly implement the law, and under which multiple section 527 groups spent tens of millions of dollars of soft money plainly for the purpose, and with the effect, of influencing the 2004 presidential and congressional elections. The Commission's failure to issue new rules to end these abuses is undermining the FECA by permitting massive evasion, circumvention, subversion and violation of its provisions. The Commission's failure to act in the face of a compelling public need to do so is unlawful under the Administrative Procedure Act. 5 U.S.C. §§ 551 *et seq.*

Jurisdiction and Venue

12. This action arises under the Federal Election Campaign Act (FECA), 2 U.S.C. § 431 *et seq.*, as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155; the Administrative Procedure Act (APA), 5 U.S.C. § § 551-706; and the

Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq*. This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

13. Venue is proper in the District of Columbia under 28 U.S.C. § 1391(e) because the defendant is a United States agency and because a substantial part of the events or omissions giving rise to the claim occurred in this District.

Parties

14. Plaintiff Christopher Shays is a Member of the United States House of Representatives from the 4th Congressional District of the State of Connecticut. Representative Shays was elected in 1987 and re-elected in 1988, and every two years thereafter. He next faces re-election in November 2006. Representative Shays was a principal House sponsor of the Bipartisan Campaign Reform Act. He participated in this rulemaking by filing timely comments with the Commission.

15. Plaintiff Martin Meehan is a Member of the House of Representatives from the 5th Congressional District of the Commonwealth of Massachusetts. Representative Meehan was elected in 1992 and has been re-elected every two years thereafter. He next faces re-election in November 2006. Representative Meehan was also a principal House sponsor of the Bipartisan Campaign Reform Act. He participated in this rulemaking by filing timely comments with the Commission.

16. Plaintiffs are United States citizens, elected Members of Congress, candidates for re-election to Congress, voters, recipients of campaign contributions, fundraisers, and members of national and state political parties. Each plaintiff faces personal, particularized, and concrete injury in the event that the FEC's failure to issue regulations defining "political committee" status is allowed to stand, and thereby to undermine the letter and spirit of the

campaign finance laws by allowing unregulated groups, such as section 527 groups, to spend soft money to influence federal elections without complying with the registration requirements, contribution limits, source prohibitions and reporting obligations of the FECA.

17. In particular, as federal officeholders and as actual and potential future candidates for federal office, plaintiffs and their campaign opponents are and will be regulated by the FECA. Plaintiffs are among those whom the FECA seeks to insulate from the actual or apparent corrupting influence of special interest soft money. If the Commission's failure to issue regulations defining "political committee" status is allowed to stand and to undermine the FECA, the plaintiffs will be forced to discharge their public responsibilities, raise money, and campaign in a system that Congress has determined is, and appears to be, corrupted by the influence of spending by unregulated groups, including section 527 groups, that operate in federal elections outside the registration requirements, contribution limits, source prohibitions and reporting obligations of the FECA. Further, by thwarting and undermining the FECA, the challenged rules will also adversely affect the public's perception of plaintiffs and their fellow office-holders as candidates, public officials and party members.

18. In their capacities as elected federal officeholders, present and future candidates for federal office, and voters, plaintiffs also have "informational standing" to challenge the Commission's failure to issue regulations defining "political committee" status. As a result of that failure, plaintiffs are not receiving the full, accurate, and timely disclosures required under FECA. The reporting requirements under section 527 of the Internal Revenue Code are an inadequate substitute for the disclosures required by FECA, because section 527 disclosure may be avoided altogether if the recipient 527 organization chooses to pay income

tax on challenged donations rather than reveal the sources of those donations. Further, section 527 groups, unlike political committees, are not required to disclose the ultimate source of funds donated to it by a group, but rather only the name of the group. In addition, section 527, unlike the FECA requirements applicable to political committees, does not require the reporting of the aggregate amount of unitemized contributions received by a 527 group, so there is no basis to determine the total aggregate amount raised by such a group. Thus, to the extent that a 527 group is wrongly treating contributions required to be reported under FECA instead as donations to a section 527 account, plaintiffs and others have no assurance that all contributions required to be disclosed under FECA are properly or fully being disclosed, or that the total amount of contributions to such a group is being disclosed. The Commission's failure to require section 527 groups that should register as political committees to do so, and to disclose information as required by FECA, thereby interferes with plaintiffs' ability to plan their own campaign strategies and activities, differentiate themselves from their opponents, and make informed choices as officeholders, candidates, and voters.

19. Defendant United States Federal Election Commission is a federal agency created pursuant to FECA, 2 U.S.C. § 437c. The FECA requires the FEC to promulgate regulations to implement the statute.

The FEC's Failure to Promulgate Regulations on Political Committee Status

20. Section 431(4) of Title 2 defines the term "political committee" to mean "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." 2 U.S.C. § 431(4); *see also* 11 C.F.R. § 100.5(a).

21. Any entity which meets the definition of a "political committee" must file a "statement of organization" with the Federal Election Commission, 2 U.S.C. § 433, and periodic disclosure reports of its receipts and disbursements. *Id.* § 434. In addition, a "political committee" is subject to contribution limits, *id.* § 441a(a)(1)- (2), and source prohibitions, *id.* § 441b(a), on the contributions it may receive and make. *Id.* § 441a(f). These rules apply even if the political committee is engaged only in independent spending. 11 C.F.R. § 110.1(n).

22. In *Buckley v. Valeo,* 424 U.S. 1, 79 (1976), the Supreme Court construed the statutory term "political committee" to "only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate" (emphasis added).

23. The Commission has never issued a regulation implementing the "major purpose" standard for the definition of "political committee" as set forth by the Supreme Court. Its basic regulation defining "political committee," 11 C.F.R. § 100.5(a), simply repeats without elaboration the statutory definition as "any committee, club, association or other group of persons which receives contributions aggregating in excess of $1,000 or which makes expenditures aggregating in excess of $1,000 during a calendar year...." The existing regulation contains no reference at all to the "major purpose" requirement imposed by *Buckley,* or any definition of what that requirement means.

24. In 2001, the Commission began a rulemaking to define the term "political committee." The Commission issued an Advance Notice of Proposed Rulemaking seeking

comment on several proposed alternative definitions for the term, including "comment on the scope and meaning of the 'major purpose' test..." *See* "Definition of Political Committee," 66 Fed. Reg. 13681, 13682 (Mar. 7, 2001). It noted that "concern remains that Commission action is needed to clarify when an organization becomes a political committee under FECA." *Id.* at 13687. The Commission specifically noted that "the number of 527 organizations is thought to have increased substantially, with a concomitant increase in their spending on federal elections," and that it was accordingly "seeking comment as to how this rulemaking should address 527 organizations . . . ." *Id.* These are groups registered with the Internal Revenue Service as "political organizations" under section 527 of the tax code, 26 U.S.C. § 527, but not registered with the FEC as "political committees" under FECA. But after initiating this rulemaking, the Commission did nothing. It subsequently suspended the rulemaking in September, 2001, when it decided to hold the matter "in abeyance pending changes in legislation, future judicial decisions, or other action." *See* 69 Fed. Reg. 11736, 11737 n.3.

25. In 2002, Congress enacted BCRA to address the rapidly growing problem of soft money spent by political party committees to influence federal elections, a circumvention of law that had escalated to more than a half-billion dollars in non-federal funds spent by the two parties in the 2000 election cycle. As the Supreme Court in *McConnell* recognized, the party soft money problem had been created by the FEC through its legally flawed regulations that, under the guise of authorizing "allocation" between "federal" and "nonfederal" accounts, had allowed the parties openly to spend nonfederal funds for obviously federal electoral purposes. BCRA effectively overrode these regulations and ended this practice.

26. Almost immediately upon the passage of BCRA in 2002, political and party operatives in both parties began forming so-called "section 527 groups" in an attempt to shift the flow of soft money into federal elections through an alternative conduit. At an early point in the current election cycle, a number of these section 527 groups began to raise and spend tens of millions of dollars of soft money on broadcast ads and other activities that promote or attack federal candidates, particularly the presidential candidates. Some of these groups were pro-Democratic, such as The Media Fund, and ran soft money-funded broadcast ads attacking President George Bush's candidacy. Other groups were pro-Republican, such as Progress for America Voter Fund and Swift Boat Veterans for Truth, and ran soft money-funded broadcast ads attacking Senator John Kerry's candidacy.

27. There is no reasonable doubt that these section 527 groups had a major – indeed, overriding – purpose to influence the 2004 presidential election, and that they openly spent soft money to do so. One group, The Media Fund, was headed by Harold Ickes, a member of the executive committee of the Democratic National Committee and a former White House deputy chief of staff to President Clinton. According to one report about this group's formation, "The Media Fund is looking to run television and radio ads to help the Democratic [presidential] candidate stay competitive from late March until the party convention in July." E.N. Carney *et al*, "New Rules of the Game," *The National Journal* (Dec. 20, 2003) at 3803, 3805. Another report noted that The Media Fund "will buy TV and radio commercials to promote the policies of whoever gets the Democratic nod for President." J. Birnbaum, "The New Soft Money," *Fortune* (Nov. 10, 2003). One donor, George Soros, pledged a $10 million contribution to The Media Fund and a related group, America Coming Together. G. Soros, "Why I Gave," *The Washington Post* (Dec. 5, 2003). According to *The Washington*

Post, Soros gave a total of "at least $27 million to 527 committees" in the 2004 election. T. Edsall, "Fundraising Records Broken By Both Major Political Parties," *The Washington Post* (Dec. 3, 2004).

28. A pro-Republican group, Progress for America Voter Fund was reported to be "an effort to compete with Democratic groups for large sums of unregulated presidential campaign funds…" T. Edsall, "GOP Creating Own '527' Groups," *The Washington Post* (May 25, 2004). The same article notes that PFA-VF officials "are actively considering major purchases of television ads in roughly 18 key battleground states that praise Bush administration policies." *Id.* A press release announcing the formation of the group said that it was intended "to promote President Bush's record on key issues and expose the real John Kerry's ultra-liberal agenda, as well as the record of other liberal candidates." According to recent press reports, PFA-VF received contributions from two individuals, Alex Spanos and Dawn Arnall, each in the amount of $5 million. G. Justice, "GOP Group Says It's Ready to Wage Ad War," *The New York Times* (Aug. 24, 2004).

29. Another pro-Republican section 527 group, Swift Boat Veterans for Truth, sponsored television ads in three presidential "battleground" states, Ohio, West Virginia and Wisconsin, "as part of a multimedia effort to discredit Kerry's wartime record, a cornerstone of the Democratic campaign." M. LaGanga, "Veterans Attack Kerry on Medals, War Record," *The Los Angeles Times* (Aug. 5, 2004). A member of the Swift Boat group, Andy Horne, appeared on CNN on August 6, 2004 and was asked by news anchor Heidi Collins about the purpose of SBVT:

> Collins: Sir, is [the ad] not produced and made to influence the presidential election this November?
>
> Horne: Yes, of course.

Collins: Is it not a campaign ad, then?

Horne: Well, I'm not going to quibble with you on that.

See transcript at http://www.cnn.com/TRANSCRIPTS/0408/06/pzn.00.html. According to a report in *The New York Times*, the ad "attacks Senator John Kerry, accusing him of lying about his war record, including the circumstances surrounding his medals, and betraying his comrades by later opposing the war." J. Wilgoren, "Vietnam Veterans Buy Ads to Attack Kerry," *The New York Times* (Aug. 5, 2004). This group received a $1,000,000 contribution from a single individual, Bob Perry. T. Edsall, "After Late Start, Republican Groups Jump into the Lead," *The Washington Post* (Oct. 17, 2004). According to *The Wall Street Journal,* Perry "led Republican donors by giving $8 million to pro-Bush 527 groups, such as Swift Boat Veterans and POWs for Truth." J. Cummings, "Those 527 Fund-Raisers Prove Resilient," *The Wall Street Journal* (Dec. 6, 2004). Other reported donors to SBVT include Harold C. Simmons, who gave $3 million, and T. Boone Pickens, who gave $1.5 million. T. Edsall, *The Washington Post* (Oct. 17, 2004), *supra.*

30. These groups, although registered with the IRS as "political organizations" under section 527 of the tax law, are *not* registered with the Commission as "political committees" under the campaign finance law. They thus raised and spent funds that did not comply with the contribution limits, source prohibitions and reporting requirements of FECA. And although they report their financial activity to the IRS under section 527(j), they do not file the more detailed campaign finance disclosure reports that political committees are required to file with the Commission. Indeed, because a section 527 group can opt to pay tax on any of its receipts for which it chooses to avoid disclosure to the IRS, the reporting required of

section 527 groups is essentially just a voluntary act, not the mandatory requirement imposed on political committees under the campaign finance law.

31. Section 527 of the tax code provides tax exempt treatment for "exempt function" income received by any "political organization." The statute defines "political organization" as 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) (emphasis added). An "exempt function" is defined to mean 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) (emphasis added). In *McConnell,* the Supreme Court observed that "Section 527 'political organizations' are, unlike § 501(c) groups, organized for the express purpose of engaging in partisan political activity." 124 S. Ct. at 678 n.67. The Court noted that 527 groups "by definition engage in partisan political activity." *Id.* at 679.

32. As "political organizations" that are "organized and operated primarily" to influence elections, that have demonstrated a "major purpose" to influence *federal* elections, and that are spending millions of dollars to do so, a number of section 527 groups, including those referenced above, are required by law to register as federal "political committees" and to comply with the campaign finance laws that apply to such committees. Because these and other section 527 groups have chosen not to register with the Commission as "political committees," they are operating outside the legal requirements imposed by FECA.

33. Beginning in January, 2004, a number of administrative complaints have been filed with the Commission, seeking action by the Commission to enforce the law that requires certain section 527 groups, including all of those identified above, to register as political committees. To date, the Commission has taken no publicly disclosed action on those complaints, nor has it undertaken any publicly disclosed action on its own initiative to enforce the law against these section 527 groups. Additionally, the Commission has not addressed this question in the context of any advisory opinion, despite the opportunity to do so. *See* Adv. Op. 2003-37 (Feb. 19, 2004). When it had an opportunity to do so in early 2004, Vice Chair Ellen Weintraub said that she wanted to address this issue by rulemaking instead of by advisory opinion, and that the Commission "would be leaving 'the status quo' in place until it could 'get to the rulemaking.'" A. Keller, "FEC Restricts Certain 527s' Ability to Spend Soft Money," *Roll Call* (Feb. 18, 2004).

34. In March, 2004, the Commission "got to the rulemaking" and announced that it was undertaking a rulemaking proceeding in which it would address the definition of "political committee," including the meaning of the "major purpose" test and how a group's decision to register with the IRS under section 527 would affect that group's obligation to register with the Commission as a political committee.

35. On March 11, 2004, the Commission published a Notice of Proposed Rulemaking that set forth a proposal for defining the term "political committee." *See* "Political Committee Status," 69 Fed.Reg. 11736 (March 11, 2004). The NPRM stated that the Commission "is undertaking this rulemaking to revisit the issue of whether the current definition of 'political committee' adequately encompasses all organizations that should be considered political committees subject to the limitations, prohibitions and reporting

requirements of FECA." 69 Fed. Reg. 11736. The NPRM included specific proposals to address when section 527 groups meet the "major purpose" test and trigger the requirement to register as political committees. *See id.* 11756-57 (11 C.F.R. 100.5 (proposed) (Alternatives 2A and 2B)).

36. The Commission received a large volume of comment on the NPRM, much of it generated by proposed regulatory language in the NPRM that would have potentially required non-profit groups organized under 26 U.S.C. § 501(c)(4) to register as political committees under certain circumstances, an issue distinct from the requirement for section 527 groups to do so. Representatives Shays and Meehan, along with Senators John McCain and Russell Feingold, the four principal sponsors of BCRA, participated in the rulemaking by filing joint comments, stating that "the Commission's responsibility to clarify and properly enforce the federal election laws with respect to 527 organizations is clear . . . .To do nothing would be to bless a loophole that will have grave consequences for the efficacy of both BCRA and FECA and again leave the public with the impression that the election laws can be treated with disdain without any consequence." Letter of April 9, 2004 from Senator John McCain *et al* re: Notice 2004-6 at 3-4. On April 14 and 15, 2004, the Commission held two days of public hearings on the matter, and heard testimony from more than two dozen witnesses.

37. On May 11, 2004, the general counsel of the Commission submitted a report recommending that the Commission continue to work on the rulemaking for an additional period not to exceed 90 days, to further study the matter. (FEC Agenda Document No. 04-48). The general counsel said the rulemaking had been "prompted" by the Supreme Court's decision in *McConnell,* which had held "incorrect" the view of at least some Commissioners

that only communications containing words of "express advocacy" could be considered "expenditures" that triggered "political committee" status for a group. *Id.* at 3. The rulemaking had been proposed on an expedited schedule, the general counsel noted, to respond "to concerns about the activities of some organizations that, according to press reports, are raising and spending (or planning to raise and spend) millions of dollars in corporate and union funds and unlimited donations from individuals for the purpose of influencing the 2004 Presidential election." *Id.* at 4-5. Nonetheless, the counsel recommended the Commission defer action to allow time for further study, although he warned that "[i]t is just as important not to drop the issue as it is to get it right." *Id.* at 11.

38. At a meeting of the Commission on May 13, 2004, the Commission rejected a rule proposed by Commissioners Scott Thomas and Michael Toner that would have, *inter alia,* set forth clear and specific standards – effective for the 2004 elections – for when section 527 groups are required to register as political committees. (FEC Agenda Document 04-44). Instead, the Commission accepted the general counsel's recommendation to continue the rulemaking for a period not to exceed 90 days.

39. On August 12, 2004, the general counsel submitted a report recommending that the Commission adopt final rules that would, *inter alia,* set forth a new regulatory definition of "major purpose" as part of the definition of "political committee," and that included specific standards for when section 527 groups are required to register as political committees. (FEC Agenda Document 04-75). As the general counsel found, "an organization's decision to avail itself of 527 status is inherently indicative of its choice to engage principally in electoral activity." *Id.* at 14. Commissioners Thomas and Toner also re-introduced their earlier and alternative proposal on the same subject, directed specifically

at section 527 groups. (FEC Agenda Document 04-75-A). At a meeting of the Commission on August 19, 2004, the Commission rejected both the general counsel's proposed regulation on "major purpose" and section 527 groups, and the alternative Thomas-Toner proposal. Instead, Chair Bradley Smith, Vice Chair Ellen Weintraub and Commissioner David Mason severed and proposed for adoption the only two provisions of the general counsel's recommendation that did *not* address the "major purpose" issue or the section 527 issue. (FEC Agenda Document 04-75-B). Those provisions addressed (i) the rules by which an entity which is already a political committee can "allocate" certain portions of its spending between a federal account and a non-federal account, and (ii) the standard for determining when funds received by a group are considered to be "contributions," based on a solicitation that refers to the use of the solicited funds in connection with a federal election. The Commission, by a vote of 4-2, with Commissioners Thomas and McDonald dissenting, adopted those two proposals and then terminated the rulemaking proceeding. In November, 2004, the Commission published these two collateral rules, along with an "Explanation and Justification" for them, as well as a brief explanation for why the Commission "decided not to adopt any of the foregoing proposals to revise the definition of 'political committee.'" *See* "Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees," 69 Fed.Reg. 68056, 68065 (Nov. 23, 2004).

40. The Commission, contrary to the advice of its general counsel, thus concluded the rulemaking without adopting any new rule to define "political committee" or "major purpose," or when a section 527 group must register as a political committee. According to a published report, Commissioners Smith and Weintraub both indicated that they viewed the

attempt to regulate groups by assessing their major purpose as "too complex and subjective." K. Doyle, "FEC Votes 4-2 to Adopt Limited New Rule Requiring 'Hard Money' for Some 527 Groups," *BNA Money & Politics Report* (Aug. 20, 2004). In so doing, these Commissioners took the position, in essence, that they disagreed with, and therefore would not implement, a rule of campaign finance law that was established by the Supreme Court in *Buckley* and reaffirmed in *McConnell.*

41. The FEC's failure to adopt any new regulation setting forth clear standards for when section 527 groups are required to register as political committees was viewed, and will continue to be viewed, by section 527 groups as a license to continue spending unlimited amounts of soft money to influence federal elections, despite the fact that such spending is illegal. This failure undermines the FECA and is contrary to law.

42. "[T]he entire history of campaign finance regulation" teaches "the hard lesson of circumvention...." *McConnell,* 124 S. Ct. at 673. The Commission's failure to properly interpret, administer and enforce the campaign finance law was repeatedly noted by both the Supreme Court and members of the three-judge district court in *McConnell*. The massive flow of soft money through the political parties into federal elections was made possible by the Commission's legally flawed allocation rules, which the Supreme Court described as "FEC regulations [that] permitted more than Congress, in enacting FECA, had ever intended." 124 S.Ct. at 660 n.44. Indeed, the Court noted that the existing FECA, which had been upheld in *Buckley,* "was *subverted* by the creation of the FEC's allocation regime" which allowed the parties "to use vast amounts of soft money in their efforts to elect federal candidates." *Id.* at 660 (emphasis added). The Court flatly stated that the Commission's rules "invited widespread circumvention" of the law, *id.* at 661, and noted that BCRA was

necessary "in order to restore the efficacy of FECA's longstanding statutory restrictions" on soft money, which had been "approved by the Court and eroded by the FEC's allocation regime." *Id.* at 674. *See also* 251 F. Supp. 2d 176, 195-201 (D.D.C. 2003) (per curiam); *id.* at 651-53, 655 (Kollar-Kotelly, J.) (noting that the FEC's inadequate allocation regulations had left the Nation's campaign finance system in "utter disarray," "an elaborate fiction," and "so riddled with loopholes as to be rendered ineffective").

43. By failing to issue the necessary rules to address the problem of section 527 groups avoiding the requirement to register as political committees, the Commission has once again "subverted" the law. The Commission should be required to issue rules to ensure that section 527 "political organizations" are complying with the law and are not improperly spending tens of millions of dollars of soft money to influence federal elections. If the Commission fails to issue new rules to stop this illegal behavior, it will – once again – in the words of the Supreme Court, have "invited widespread circumvention" of the law.

Legal Basis for Challenging the FEC's Failure to Act

44. This Court should not afford deference to the FEC in reviewing its failure to issue new regulations governing activity by section 527 groups and when such groups are required to register as political committees. This is not a case where an agency, after deliberation, concluded that issuing a rule would be pointless, unnecessary or counter-productive, and then articulated a rationale for that conclusion. To the contrary, while the Commission has indeed failed to complete the rulemakings it has initiated by promulgating a rule with respect to the "major purpose" test, it has never reached the conclusion, reasoned or otherwise, that the best way to carry out its statutory mandate is to eschew any rulemaking on

this topic. Thus, there is no reasoned decision-making to which a reviewing court owes deference.

45. The FEC's failure to act is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law. As such, it is invalid pursuant to 5 U.S.C. § 706(2)(A).

46. The FEC's failure to issue regulations to require section 527 groups to register as political committees when their major purpose is to influence federal elections and they raise or spend $1,000 or more to do so, is contrary to FECA as construed by the Supreme Court in *Buckley* and *McConnell*. The Commission's failure to act constitutes agency action unlawfully withheld or unreasonably delayed. As such, it is invalid pursuant to 5 U.S.C. § 706(1).

47. The FEC acknowledged in initiating a rulemaking that it was necessary "to revisit the issue of whether the current definition of 'political committee' adequately encompasses all organizations that should be considered political committees subject to the limitations, prohibitions and reporting requirements of FECA." 69 Fed. Reg. 11736. The FEC failed to articulate, nor is there, a rational basis for its decision not to adopt regulations to require section 527 groups to register as political committees when their major purpose is to influence federal elections and they raise or spend $1,000 or more to do so. Moreover, the FEC failed to offer any rational or sufficient explanation for its rejection of alternative approaches to the regulation, including those proposed by Commissioners Thomas and Toner, by the Commission's own general counsel and by members of the public who commented on the proposed regulations. For these and other reasons, the FEC's failure to issue the regulations described above is invalid pursuant to 5 U.S.C § 706(2)(D).

Requested Relief

48. Plaintiffs request the following relief:

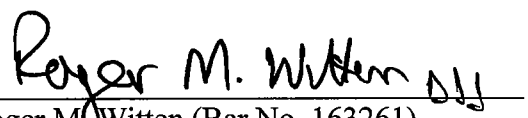
A. That the Court declare the Commission's failure to issue necessary and appropriate regulations to define the term "political committee," and particularly to define when section 527 groups must register as such, is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law;

B. That the Court issue an order requiring the Commission to commence proceedings to promulgate, on an expedited basis, necessary and appropriate regulations to define the term "political committee" and to define when a section 527 group must register as a "political committee";

C. That the Court retain jurisdiction over this matter to ensure the Commission's timely and legal compliance with the Court's decision; and

D. That the Court grant such other and further relief as it deems proper.

Respectfully submitted,



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