"Svoboda, Brian-WDC" <BSvoboda@perkinscoie.com> on 04/05/2004 03:34:08 PM

To: "'pcstestify@fec.gov'" <pcstestify@fec.gov>
cc: "Corley, Judy-WDC" <JCorley@perkinscoie.com>, "'legold@legoldlaw.com'" <legold@legoldlaw.com>, "Bauer, Bob-WDC" <RBauer@perkinscoie.com>, "Reese, Ezra-WDC" <EReese@perkinscoie.com>, "Gordon, Rebecca-WDC" <RGordon@perkinscoie.com>

Subject: NPRM Comments

Attached please find comments submitted on behalf of America Coming Together on the Commission's Notice of Proposed Rulemaking on Political Committee Status. If there are problems with the transmission of these comments, please contact Brian G. Svoboda at (202) 434-1654. Thank you for your attention.

---

Please open the attached document.
This document was sent to you using an HP Digital Sender.

| | |
|---|---|
| Sent by: | <BSvoboda@perkinscoie.com> |
| Number of pages: | 38 |
| Document type: | B/W Document |
| Attachment File Format: | Adobe PDF |

To view this document you need to use the Adobe Acrobat Reader.
For free copy of the Acrobat reader please visit:

http://www.adobe.com

For more information on the HP Digital Sender please visit:

http://www.digitalsender.hp.com

 . NPRM_Com.pdf

Perkins Coie

607 Fourteenth Street N.W.
Washington, D.C. 20005-2011
PHONE: 202.628.6600
FAX: 202.434.1690
www.perkinscoie.com

April 5, 2004

**VIA ELECTRONIC MAIL, FACSIMILE AND MESSENGER**

Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

**RE: Political Committee Status Notice of Proposed Rulemaking**

Dear Ms. Dinh:

The undersigned respectfully submit these comments regarding the Notice of Proposed Rulemaking ("NPRM") on political committee status, 67 Fed. Reg. 11,736 (Mar. 11, 2004), to be considered by the Federal Election Commission. We submit these comments on behalf of America Coming Together ("ACT"), an unincorporated political entity consisting of a federal account registered with and reporting to the Federal Election Commission (FEC) under sections 433 and 434 of the Federal Election Campaign Act (FECA), and a non-federal account registered with the Internal Revenue Service under section 527 of the Internal Revenue Code. We respectfully request the opportunity for ACT representatives to testify on its behalf at the Commission's hearings in this matter.

The Commission's proposed rulemaking represents an effort to rewrite, hurriedly and yet radically, the rules by which various groups and organizations have been operating for years. The agency is embarking on this venture in the middle of an election year. In this rushed environment, the Commission's proposed rules are inevitably an amalgamation of conflicting theories and approaches.

The proposed rules are not grounded in any evidence of corruption as found by Congress, the Supreme Court, or the Commission itself. They are severely overinclusive, limiting vast swaths of protected First Amendment activity. The Commission has done no factfinding to determine what problem areas should be targeted or how best to address them. Many of the proposed rules also present intractable practical difficulties for the regulated community and for the Commission.

The Commission should set aside the present rulemaking and start at the beginning with an attempt to define the problem – if any –for which a solution might be devised. The Commission has issued rules—for the most part, highly elaborate ones—without focusing on the collection of information that would illuminate the issues it might seek to address. The question for the Commission is not whether it could, on a frantic pace, craft some rules, but whether any of the rules under consideration are needed, even in theory, to resolve concrete and demonstrable problems for the enforcement of the law.

## I. Fundamental Problems with the Rulemaking

### A. Misreading of *McConnell*

The NPRM begins by citing the recent Supreme Court decision in *McConnell v. FEC*, 124 S. Ct. 619 (2003), as evidence that "regulation of certain activities that affect Federal elections is a valid measure to prevent circumvention." 69 Fed. Reg. at 11,736. The NPRM points to *McConnell*'s upholding of the Federal election activity and electioneering communications provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA") as evidence that the Court's decision in some way compels, or even sanctions, the Commission's undertaking.

This is a misreading of *McConnell*. The proposed rules treat as their founding charter, in regulating nonparty organizations, a decision concerned with Congress' regulation of political parties and a limited form of direct spending by corporations and unions. The premise of BCRA's new restrictions on political parties was that they – unlike other entities – were vehicles for contributors to secure influence over officeholders and candidates. *See McConnell*, 124 S. Ct. at 661.

Neither the provisions of BCRA nor the Court's affirmance of them lends support to the increased regulation of nonconnected committees and other entities outside the political party structure.[1] Under BCRA, as the *McConnell* Court noted, "Interest

---

[1] Indeed, as discussed more fully below, the Republican National Committee emphatically argued to the Court that BCRA "singles political parties out" because:

> In contrast, corporations, unions, trade associations, and other interest groups not only avoid the collateral restrictions, but are largely unrestricted

groups, however, remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications)." *Id.* at 686. In so stating, the Court was referring to the very types of activities–"Federal election activities"— that a number of the proposed rules would treat as the predicate for the regulation of those very groups. So rather than follow *McConnell*, the proposed rules would disregard what that case has to say about the state of the law after BCRA.

The *McConnell* Court recognized the Congress' care in identifying the precise targets of its regulatory effort. It specifically praised "Congress' careful legislative adjustment of the federal election laws, in a cautious advance, step by step." *Id.* at 645 (internal quotations omitted). The Commission, before the Court, agreed with that characterization, describing BCRA as "a refinement of pre-existing campaign-finance rules," rather than a "repudiation of the prior legal regime," because BCRA merely extended the reach of federal election law from express advocacy to "electioneering communications" paid for with corporate or labor union general treasury funds. Brief for Appellees at 27, *McConnell v. FEC*, 124 S. Ct. 619 (2003) (No. 02-1674). BCRA's sponsors made the same argument, noting that Congress "made another 'cautious advance' in the long history of 'careful legislative adjustment of the federal electoral laws' to reflect ongoing experience . . . . It drew new lines that respond directly to the demonstrated problem, in a way that honors First Amendment values of clarity and objectivity, and does not 'unnecessarily circumscribe protected expression'." Brief for Defendants at 43, *McConnell v. FEC*, 124 S. Ct. 619 (2003) (No. 02-1674).

The cautious advance of BCRA highlighted by the *McConnell* Court is a far cry from the Commission's present headlong rush into new regulations. The Commission is not engaged in a cautious appraisal of the facts supporting new rules, or of the impact of those rules on the political process, but instead in the establishment of new rules on a

---

> in raising and spending unlimited, unregulated and undisclosed money from any source to pay for such activities as: voter registration; GOTV; phone banks, mail and leafleting *at any time*; any broadcast advertising except for 'electioneering communications'; and communications in any form on any subject – including endorsements of federal candidates – to their officers, shareholders, and members.

Brief of the Political Parties at 92, *McConnell*, 124 S. Ct. 619 (2003) (No. 02-1674).

foundation of pure theorizing. Nothing could be farther from *McConnell* jurisprudence.

**B. The Absence of a Factual Record**

The Commission does not have the facts before it to properly contend with the issues it confronts. Under the arbitrary and capricious standard, *see* 5 U.S.C. § 706(2)(A), upon review a court considers whether the agency "considered the relevant factors and explained the facts and policy concerns on which it relied, and whether those facts have some basis in the record." *National Treasury Employees Union v. Horner*, 854 F.2d 490, 498 (D.C. Cir. 1988). When considering all relevant factors, the agency is required to engage in factfinding, and may not merely defer to its "expert judgment." *Id.* at 499; *see also Getty v. Federal Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986) ("Stating that a factor was considered is not a substitute for considering it."). "[T]here must always be some evidence in the record to support an agency's decision; otherwise, the agency's action by definition is arbitrary and capricious." *Milk Indus. Found. v. Glickman*, 967 F. Supp. 564, 571 (D.D.C. 1997).

The Commission has not made any findings, or even any inquiries, as to the following factual issues: the scope of political spending by the organizations at issue; how the various organizations are structured and organized; the number and size of organizations that would fall under the Commission's jurisdiction under the various proposed definitions of "political committee"; and the practical difficulties to the organizations that would fall under the Commission's jurisdiction.

Contrast this lack of evidence to the "voluminous record" before Congress and the Supreme Court in *McConnell*. *See* 124 S. Ct. at 654. It is striking that the Commission would cite *McConnell* while ignoring this aspect of the jurisprudential framework within which the Court operated. The Court stressed that its decision rested on a finding that in crafting BCRA, Congress proceeded with care in the light of extensive factual findings about the groups subject to new regulation of their political activity. Its decision makes abundant references to the record: to "the evidence in the record," *McConnell*, 124 S. Ct. at 662; the "record in the present case," *id.* at 664; and overall, "[t]he evidence connect[ing] soft money to manipulations of the legislative calendar," *id.* The Commission in developing the present rules has wholly overlooked this critical step.

While the Commission may receive relevant information in the form of comments, factual data is unlikely to be thorough or representative. The Commission may not merely rely on its expertise to navigate these issues; it must stop and collect the relevant data before proceeding.

**C. First Amendment Concerns**

The evidence compiled by Congress focused on the corruption, and appearance of corruption, presented by contributions to federal officeholders and candidates and political parties. The legislative history from the sponsors and primary supporters of BCRA reflects serious doubt that the same potential for corruption exists with regard to independent groups.

This doubt does not appear to be the preserve of critics of the legislation. Sponsors of the legislation acknowledged that the grounds for regulating political parties did not support comparable regulation of interest groups. "Will contributors of these large sums want to buy access to the Sierra Club or the National Rifle Association? Dubious. Will they be able to buy access to us through these unlimited contributions to third parties? No." 148 Cong. Rec. S2116 (Mar. 20, 2002) (statement of Sen. Levin). They understood that to the extent that soft money activity by these groups implicated core concerns of BCRA, those concerns would be addressed by limitations on fundraising for these groups, not on spending by them. "[T]his bill would prohibit members from directing money to these [independent] groups to affect elections, so that would cut out an entire avenue of solicitation for funds, not to mention any real or perceived 'quid pro quo'." 148 Cong. Rec. S2136 (Mar. 20, 2002) (statement of Sen. Snowe).

Contribution limits impinge on both free speech and associational rights, with the latter playing a more powerful role. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 388 (2000) (noting that contribution limits "bore more heavily on the associational right than on freedom to speak"). The only constitutionally sufficient justifications the Supreme Court has found to limit these constitutional rights are "limit[ing] the actuality and appearance of corruption resulting from large individual financial contributions," *Buckley v. Valeo*, 424 U.S. 1, 26 (1976), *cited in McConnell v. FEC*, 124 S. Ct. 619, 647 (2003), and limiting the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form," *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659-60 (1990), *cited in McConnell*, 124 S. Ct. at 695-96. Without evidence addressing the threat of

corruption or the appearance of corruption, neither Congress nor the Commission may restrict the free speech and associational rights of organizations.

### D. Timing

#### 1. Disruption to the Regulated Community

The Commission asks whether the effective date for any final rules should be delayed until after the next general election. *See* 69 Fed. Reg. at 11,737. There is simply no basis for the Commission to act now, under pressure and without adequate time for factual development and reflection on the facts found. It would be disastrous for organizations to suddenly find themselves within the jurisdiction of the Commission mere months before the general election. Setting aside the time it will take to digest and adapt to any new regulations promulgated by the Commission, organizations will already have planned their activities, hired staff, opened offices, and entered into contracts.

The legislative history of BCRA supports the contention that any new regulations should be effective only after the next election. "We reluctantly determined that it would simply not be practical to apply new rules in the middle of the election cycle. To change the rules in the middle of the campaign would have created uncertainty and potential unfairness . . . ." 148 Cong. Rec. S2141 (Mar. 20, 2002) (statement of Sen. McCain); "So I was asked and others, does it make sense to have this bill take effect now, and the answer was it really does not." 148 Cong. Rec. H454 (Feb. 13, 2002) (statement of Rep. Shays).

In the course of other rulemaking initiatives, the Commission has readily recognized the problems with the issuance of regulations mid-stream.

> The Commission is mindful of the potentially disruptive effect of modifying existing regulations . . . in such close proximity to the 2004 conventions. . . . The Commission also concludes that the proposed changes would not add sufficient clarity or precision to justify the possible confusion and disruption they may engender at a time when preparations for the 2004 conventions are well advanced, and further concludes that none of the proposed changes are required by BCRA.

*See* Final Rule: Public Financing of Presidential Candidates and Nominating Conventions, 68 Fed. Reg. 47,386, 47,398 (Aug. 8, 2003). The rules considered in the NPRM should be delayed for similar reasons. Creating new rules for organizations so close to a highly contested election would make it impossible to adapt in time to operate, indeed to speak, effectively this election cycle.

There exists no countervailing reason to rush to judgment on these issues. As noted, the rulemaking is not compelled by BCRA, much less by *McConnell*. In fact, BCRA compelled two specific rulemaking phases, on two identified timetables, and nowhere did Congress direct the Commission to formulate rules addressed to the issues raised in this proceeding. In recent days, in fact, a number of the organizations most active in support of BCRA have publicly stated that the new rules may be justified as needed for the enforcement of the law in place for 30 years prior to BCRA. *See* Letter from Democracy 21, Campaign Legal Center, & Center for Responsive Politics, to The Honorable John Larson (Mar. 29, 2004). Even assuming such a need—which we do not—this claim undermines the very predicate of a rulemaking launched with misguided urgency on an election year timetable. The Commission in this view has not acted to promulgated rules of this nature for 30 years; and indeed placed in "abeyance" the last attempt to do so in its 2001 rulemaking initiative. *See* Advanced Notice of Proposed Rulemaking: Definition of Political Committee, 66 Fed. Reg. 13,681 (Mar. 7, 2001). It is not reasonable, nor likely to lead to a sustainable result, for the Commission to suddenly rush to judgment when such a rush is neither mandated nor appropriate.

If the Commission does not take the practical considerations of the effective date into account, its decision would surely be the definition of arbitrary and capricious agency action. *See* 5 U.S.C. § 706(2)(A). The agency must take the impact on the regulated community into account. *See Horner*, 854 F.2d at 499. This is particularly true when long-standing rules are being altered. *DSE, Inc. v. U.S.*, 169 F.3d 21, 31 (D.C. Cir.1999) ("It is a settled tenet of administrative law that an agency cannot depart from a long-standing policy without providing sufficient explanation of its rationale for altering course."). By regulating a class of organizations for the first time only months before a presidential election, the Commission would be ignoring the ramifications of its decisions. Principles of sound administration require that the Commission stay its hand until after the general election.

### 2. Soundness of Decision-Making

The Commission should also not merely defer the effective date of regulations that were considered too briefly and approved too quickly. At issue are very complicated questions that intersect with constitutionally protected rights of speech and association; the constantly changing field of political activity; and the practical considerations surrounding the implementation of a new series of regulations. The regulations must also accord with both older and recent legislation; a series of Supreme Court decisions; and the other recent regulations in this area. The result of undue haste would be a set of regulations that was both over- and underinclusive and that would prove to be impractical and unwieldy to implement. Instead, the Commission should take care first and foremost to evaluate the feasibility and need of regulation in the light of a careful development of a relevant factual record.

The Commission has attempted to answer some of these questions before. *See* Proposed Rules; Definition of Political Committee, 66 Fed. Reg. 13,681 (2001). Then, with the benefit of an unrestricted time schedule – over three years from the next presidential election – and with few other pressing issues under consideration, the Commission wholly failed to come to an agreement over a fair treatment of the major purpose requirement. The Commission stands no chance of increased success this time, with a far broader range of issues under consideration, in the midst of a highly competitive election year, and when the Commission has been deluged with difficult and time-consuming Advisory Opinion requests.

## II. Political Committee Status

In the following sections, we discuss the specific proposed regulations and describe particular theoretical, practical and constitutional infirmities. This discussion should not be taken as an argument that the proposed rules may be corrected, or should be promulgated in a modified form to remedy the problems noted below. The proposed rules cannot and should not be used even as a starting point or foundation. The purpose of the discussion is to underscore the unsound nature of this entire enterprise and the troubles that arise when the Commission works too quickly in so complicated an arena.

By redefining the core statutory terms "expenditure" and "political committee," the proposed rules would contradict three statutes enacted by Congress since 2000; ignore the exhaustively considered legislative compromises those statutes reflect in

addressing current political phenomena; misread and misapply the Supreme Court's decision in *McConnell*; and conflict with the Commission's own regulatory and litigation positions since BCRA was enacted.

As the Commission itself pointed out just days ago, BCRA was "an arduously negotiated compromise that took years in the making." Federal Election Commission's Response in Support of Its Motion and Opposition to Plaintiffs' Motion for Summary Judgment at (March 31, 2004) *Shays v. FEC*, No. 02-CV-1984 (D.D.C). Certainly, at no time was it ever suggested by anyone that the enactment and upholding of BCRA by the courts would give the Commission license to appropriate statutory language and concepts in BCRA in order to infuse unexpected new and expanded meanings to FECA terms that Congress left unamended, with dramatic and adverse consequences to entities that Congress declined to so disturb. But the Commission now confronts the regulated community – literally thousands of private political and civic organizations and millions of their adherents, members and donors – with an extraordinarily far-reaching proposal that is fundamentally flawed in every significant respect.

### A. Constitutional Issues

#### 1. Promote, Support, Attack, or Oppose

##### a) Vagueness

Laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The Supreme Court found that the words "promote," "support," "attack," and "oppose," *see* 2 U.S.C. § 431(20)(A)(iii), were not unconstitutionally vague, but only as applied to political parties, "since actions taken by political parties are presumed to be in connection with election campaigns." *McConnell*, 124 S. Ct. at 675 n.64.

The NPRM includes proposals to incorporate the definition of "Federal election activity," or to use the terms "promote," "support," "attack," and "oppose," in the definition of "political committee." This use of these terms, while constitutionally valid in those circumstances where they are applied to political parties and candidates, would be unconstitutionally vague as applied to other organizations. In the context of political parties, it may be clear what will be considered promoting or opposing candidates, because political parties exist in large measure, if not predominantly, to

promote or oppose candidates. Outside of this narrow realm, it is considerably less clear how these terms would apply to other entities. The *McConnell* Court's approval of these terms as applied to political parties does not give the Commission license to apply this language to all organizations and people who communicate publicly on public policy issues.

**b) Overbreadth**

The use of these terms outside of the political party context would also be vastly overbroad. The Supreme Court found that the regulation of Federal election activity is "narrowly focused on regulating contributions that pose the greatest risk of this kind of corruption . . . . Further, these regulations all are reasonably tailored, with various temporal and substantive limitations designed to focus the regulations on the important anti-corruption interests to be served." *McConnell*, 124 S. Ct. at 674. The restrictions were closely drawn, because any time a political party is promoting or opposing a federal candidate, it does so for the purpose of influencing the election of that candidate; electing candidates is, after all, a core purpose of political parties.

The same is simply not true of other entities. An outside organization may have myriad reasons for promoting, supporting, attacking, or opposing a federal candidate; those reasons may or may not include a purpose of influencing an election. The sponsors of BCRA were aware of the dangers of overregulation of political speech. "Congress self-consciously evaluated ways to limit the reach of the law without sacrificing its purpose, so as to leave unregulated as many avenues of speech as possible." Opposition Brief for Defendants at I-84, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (Civ. No. 02-582). Using BCRA's language to regulate entities other than political parties would not be reasonably tailored. The proposed rules are lacking in any attempt to achieve the tailoring necessary to protect constitutional interests.

**2. "Avowed" Purpose**

The NPRM's proposal to consider "organizational documents, solicitations, advertising, other similar written materials, public pronouncements, or any other communication" of the organization to determine whether its "major purpose is to nominate, elect, defeat, promote, support, attack or oppose" clearly identified federal candidates is also unconstitutionally vague. The approach of the Commission here is keyed specifically to speech, and requires evaluation of speech, and for that reason it

requires a care and precision that is wholly lacking. There are no notions in the proposed regulation as to what factors the Commission would consider, or how it would treat conflicting evidence. The agency will undoubtedly be embroiled in the evaluation of the regulatory significance of political speech, while the organizations and their adherents engaged in this speech will have no basis for judging which of their pronouncements pass over into highly regulated territory. Some organizations may adjust to the uncertainty by limiting their speech, while others—unprepared to undertake that evaluation on their own—will feel compelled to review their proposed public commentary with the Commission through the submission of Advisory Opinion requests. The ensuring state of affairs would be constitutionally intolerable. "Given the vague contours of the coverage of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional protection." *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

**B. Redefining Expenditures**

Essential to each of the alternative proposals in the NPRM to redefine what is a "political committee" subject to the Act is the Commission's question as to "whether and how it should amend its regulations defining...what constitutes an 'expenditure' under 11 CFR 100.5(a) and 11 CFR Part 100, subparts D and E." 69 Fed. Reg. at 11,736. Tracing aspects of the Supreme Court's *McConnell* decision, the NPRM asks whether that decision "requires or permits" the Commission to change that definition (and, relatedly, that of the term "contribution") in order to encompass two new statutory terms introduced by BCRA: "Federal election activity," 2 U.S.C § 431(20), and "electioneering communication," 2 U.S.C § 434(f)(3)(A)(i). See 69 Fed. Reg. at 11,738. The answer to these threshold questions can only be "no."

Section 431(9) of the Act defines "expenditure" as "any purchase, payment, distribution, loan, advance, deposit, or gift of money, or anything of value, made by any person for the purpose of influencing any election for federal office." *Id.*; *see also* 11 C.F.R. Part 100, Subpart D. As the *McConnell* Court related in detail, over the years the Court had construed this term to be confined to communications that "in express terms advocate the election or defeat of a clearly identified federal candidate," so as to avoid unconstitutional vagueness and overbreadth. 124 S. Ct. at 647, 687-88 (quoting *Buckley v. Valeo*, 424 U.S. 1, 42-44 (1976)). The *McConnell* Court characterized its opinion in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 248 (1986), as both reaffirming this construction of "expenditure" and applying

the same construction to the prohibition of union and corporate "expenditures ... in connection with any [federal] election" in 2 U.S.C. § 441b. *See* 124 S. Ct. at 688 n.76.

While the *McConnell* Court concluded that "the express advocacy limitation, in both the expenditure and disclosure contexts, was the product of statutory interpretation rather than a constitutional command," *id.* at 688, it made absolutely clear that FECA did indeed contain that "limitation," for it explicitly found that Congress, in enacting BCRA, modified this limitation only insofar as it added "electioneering communications" to the scope of proscribed union and corporate treasury spending:

> 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 [§ 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 amended FECA §[441b(b)(2)].*

*Id.* at 694. (emphasis added)[2].

Otherwise, BCRA did *not* amend § 431(9), as the NPRM explicitly acknowledges. See 69 Fed. Reg. at 11,736. Indeed, BCRA specified that "electioneering communications" are not "expenditures" under the Act. *See* 2 U.S.C. §§ 434(f)(1-2) (treating electioneering communications as "disbursements"), 441b(b) (treating

---

[2]The Court rejected the constitutional challenge to the regulation of "electioneering communications" on the grounds that (1) "the Government has a compelling interest in regulating advertisements that expressly advocate the election or defeat of a candidate for federal office," *McConnell*, 124 S. Ct. at 696; (2) "electioneering communications" is neither a vague term nor encompasses an overbroad realm of expression, *id.* at 675, 697; and (3) "electioneering communications" comprise "the functional equivalent of express advocacy," *id.* at 696. If FECA were to be amended further by Congress to compel the use of hard money for additional forms of communication, that amendment would have to satisfy the second and third steps of this analysis. See *Anderson v. Spear*, 356 F 3d 651, 664-65 (6th Cir. 2004). The parties in the *McConnell* litigation developed and contended over a vast record with respect to "electioneering communications" that, the Court concluded, "amply justifies Congress' line drawing." See 124 S. Ct. at 697. Such a record simply does not exist with respect to any other type of communication by any entity.

spending for electioneering communications as a proscribed union and corporate action distinct from the § 431 definitions of "expenditure" and "contribution"). Congress in BCRA simply identified "electioneering communications" as a new class of regulated independent expression by corporations and unions and – uniquely in FECA – by other persons using funds donated by unions or corporations. *See* 2 U.S.C § 441b(c)(1). Congress explicitly acknowledged that incorporated non-federal § 527 organizations and incorporated § 501(c)(4) organizations fell within the "electioneering communications" proscription, *see* 2 U.S.C. §§ 441b(c)(2) and 441b(c)(6), leaving unaffected their other communications and activities.[3]

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. *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 132 (2003); *Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 562 (1991); *Asarco, Inc. v. Kadish*, 490 U.S. 605, 632 (1988). And, an administrative agency that interprets and enforces a statute has no authority to extend its reach, *see generally FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 161 (2000) or to effectuate "amendments" that Congress might have adopted but did not. *MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218, 233-34 (1994); *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 97 (1983).

Furthermore, even if the Commission could redefine "expenditure" on its own, it could not do so one way for a non-federal § 527 group and another way for other organizations. FECA is structured so that the § 431 definitions apply throughout the statute. When definitions vary by the nature of the entity, as in § 441b(b)(2)'s additional formulation of "contribution or expenditure" applicable to unions and corporations, FECA so states.

---

[3] The proposed enlargement of the term "expenditure" also plainly contradicts BCRA because it would implement a version of the so-called "back-up definition" of "electioneering communications" that Congress adopted for the sole eventuality that a final judicial determination invalidated the primary definition, see 2 U.S.C §434(f)(3)(A)(ii) -- which *McConnell*, of course, upheld. That backup definition includes broadcasts containing the "promotes or supports ... or attacks or opposes" formulation regardless of when and where they aired. Redefining "expenditure" to include that formulation would impose the same sort of hard-money requirement on unions and corporations that Congress in BCRA only held in reserve.

Since *Buckley*, as confirmed by *MCFL* and now *McConnell*, the scope of "expenditure" with respect to communications by *all* groups other than political committees has been express advocacy. Thus, unions, corporations and incorporated § 501(c) and non-federal § 527 organizations have been compelled to undertake such communications only through connected federal political committees, if at all; and, they have been able to use non-federal funds for all other public communications referring to federal candidates – in the case of corporations and non-federal § 527 organizations, with their regular treasuries, and in the case of unions and other § 501(c) organizations, with either their regular treasuries or their non-federal § 527 separate segregated funds.[4]

Moreover during 2002, the Commission promulgated detailed rules to implement BCRA, and otherwise to modify existing rules in light of its enactment. Those rules preclude the readings offered by the NPRM. The "expenditures" prohibited by corporations and unions, for example, are specified, 11 C.F.R. § 114.2(b)(2), and they do not include "public communications" referring to federal candidates that "promote, support, attack or oppose" that candidate let alone voter registration, GOTV activities or voter identification activities. Nowhere in the many Commission rulemakings conducted pursuant to BCRA during 2002 did there appear even a proposal to expand the term "expenditure" as the NPRM proposes to do.[5]

---

[4] Indeed, most recently, the IRS issued Rev. Rul. 2004-06 to describe various communications fact patterns in order to guide that choice for §§ 501(c)(4), (5) and (6) organizations; but under the NPRM, the non-federal § 527 separate segregated fund could not fund any such communication that could be said to "promote, support, attack or oppose" a federal candidate contrary to that revenue ruling, and the § 501(c) organization could only make the expenditure through a federal political committee. Even if this were properly subject to Commission regulation, the Commission must at least to "consult and work together [with the IRS] to promulgate rules [and] regulations...that are mutually consistent." *See* 2 U.S.C. § 438(f). The Commission apparently has undertaken no effort to comply with this statutory directive.

[5] Indeed, BCRA specifically applies the "promote, support, attack and oppose" formulation to unions and corporations only as a limitation on the Commission's power to promulgate regulatory exceptions to the scope of "electioneering communications." See 2 U.S.C. § 434(f)(3)(B)(iv). The Commission has no authority instead to use that formulation to *enlarge* the proscription against union- and corporate-financed "electioneering communications."

The NPRM also strays from BCRA's essential goal of severing the financial links between officeholders, candidates and parties, on the one hand, and tax-exempt groups on the other. BCRA did *not* prohibit tax-exempt groups *themselves* from either engaging in Federal election activity or – independently from officeholders, candidates and parties – raising non-federal funds in order to do so. See *McConnell*, 124 S. Ct. at 678-80, 682-83. Congress introduced the concept of "Federal election activity" in crafting BCRA's requirement that state and local political party committees pay for certain activities with contributions raised in compliance with the Act's limits and source restrictions. "Federal election activity" is *not* a general classification of activities undertaken by all possible actors. *See* 69 Fed. Reg. at 11,739; *see also* 2 U.S.C. § 441i(b); 11 C.F.R. § 300.30(a). BCRA required state and local party committees – and *only* those committees – to spend federally permissible funds for any "public communication that refers to a clearly identified candidate for Federal office . . . and that 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)." See 2 U.S.C. § 431(20)(A)(iii); *see also* 2 U.S.C. § 441i(b)(1).

Congress in BCRA accepted that tax-exempt § 501(a) and non-federal § 527 organizations could continue to engage in what BCRA newly defined as "Federal election activity" under 2 U.S.C. § 431(20). Eschewing limitations on those groups' ability to engage in that activity, Congress instead restricted fundraising for them by federal candidates and officeholders precisely because they *do* engage in that activity.[6] See 2 U.S.C §§ 441i(e)(1)&(4). Indeed, BCRA's new requirement that federal candidates and officeholders limit their solicitations to $20,000 from individuals to be donated to a group engaged in Federal election activity makes no sense if Federal election activity itself is an "expenditure," or if an organization that spends $10,000 (proposed Alternative B-1) or $50,000 (proposed Alternative B-2) on such expenditures is a political committee that can receive no more than $5,000 from an individual. Nor does the exemption in § 441i(e)(1) for § 501(c) organizations "whose principal purpose is to conduct" Federal election activities make any sense if there

---

[6] BCRA imposed similar restrictions on state and local party fundraising for § 501(a) organizations that engage in Federal election activity, and completely barred them from raising non-federal funds for most non-federal § 527 organizations. *See* 2 U.S.C. § 441i(d)(2); 11 C.F.R. § 300-37(a)(3)(iv); *see also McConnell*, 124 S. Ct. at 680 n. 69.

could be no such § 501(c) organizations, because having such a principal purpose made one a political committee.

In upholding these fundraising restrictions, the *McConnell* Court explicitly and extensively discussed facts in the record reflecting that § 501(c) *and non-federal § 527 organizations* engage in "Federal election activity" with non-federal funds, such as "sophisticated and effective electioneering activities for the purpose of influencing federal elections, including waging broadcast campaigns promoting or attacking particular candidates and conducting large-scale voter registration and GOTV drives." 124 S. Ct. at 678-69 and n. 68.[7] The Court did so after analyzing and upholding BCRA's restrictions *not* on these groups, but on national, state and local party committees, to prevent *them* from "mobilizing their formidable fundraising apparatuses, including the peddling of access to federal officeholders, into the service of like-minded tax-exempt organizations that conduct activities benefiting their candidates." *Id.* at 678, discussing BCRA §323(d) codified at 2 U.S.C § 441i(d). The Court could not have been clearer that independent organizations themselves would operate under rules very different from those applied to party committees. For this reason, while describing non-federal §527 organizations as inherently "partisan," the Court explicitly distinguished them from "federal" political committees. *See id.* at 678-79.

Moreover, extending the definition of "expenditure" to encompass "Federal election activity" contradicts the Commission's own stated understanding of BCRA at the time it promulgated the rules implementing the statute. Discussing its rule at 11 C.F.R. § 300.36(a)(2), which addresses reporting of disbursements for "Federal election activity" by non-federally-registered state, district, and local party committees, the Commission specifically noted that "a payment . . . for the costs of Federal election activity does not constitute an expenditure for purposes of determining whether or not a State, district, or local political party committee . . . becomes a political committee . . . *unless the payment otherwise qualifies as an expenditure.*" Explanation and

---

[7] Indeed, in rejecting plaintiffs' under-inclusiveness argument – that the proscription of "electioneering communications" did not apply to "print media or the Internet" – the Court noted that the definition leaves all "advertising 61 days in advance of an election entirely unregulated." *Id.* at 697. *See also* 124 S. Ct. at 702 ("[E]xpress advocacy represents only a tiny fraction of the political communications made for the purpose of electing or defeating candidates during a campaign.").

Justification for Final Rule, Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,104 (July 29, 2002) (emphasis added).[8]

As to certain types of Federal election activity – voter registration, voter identification GOTV, and generic party promotional communications – it would be anomalous and inconsistent with BCRA to require independent organizations to finance them with hard money while permitting state and local party committees to finance them with soft money–including, of course, soft money donated by those very same independent groups–under the Levin Amendment, 2 U.S.C § 441i(b)(2)(B)(iii).

Nor does the Commission's suggestion to mitigate the effects of its overreaching by "narrowing" its approach in Alternative 1-B to require the regulated activity to have a "partisan political purpose" to cure the problem. Tax-exempt organizations, of course, are not political parties, and the Commission may not, in the face of clear congressional intent to the contrary, treat the two types of entities as if they are the same. As Judge Kollar-Kotelly noted in *McConnell*, equal protection principles require similarly-situated entities to be treated alike, but do not require different entities to be treated similarly. *McConnell v. FEC*, 251 F. Supp. 2d 176, 709 (D.D.C. 2003) (Kollar-Kotelly, J.); *see also Plyler v. Doe*, 457 U.S. 202, 216 (1982). Indeed, Judge Kollar-Kotelly supported upholding Title I of BCRA precisely because of the uniqueness of political parties and the differences between party committees and other interest groups in the political process. *See McConnell*, 251 F. Supp. 2d at 709-10 ("The record in this case establishes the unique situation of political parties in the political process. . . . It is therefore the case that BCRA treats political parties differently than special interest organizations."). The Supreme Court drew heavily on Judge Kollar-Kotelly's reasoning, and the facts on which she relied, as factual support

---

[8] Moreover, if the term "expenditure" included all Federal election activity, then BCRA's specific requirements that state and local party committees finance certain Federal election activity with hard money, 2 U.S.C § 441i(b)(1), would be superfluous.

Notably, the Commission originally proposed to treat any party spending for Federal election activity as a statutory "expenditure," and the RNC strongly opposed that proposal because it would convert "thousands of local and district committees" into federal political committees, and "[t]here is nothing in the statutory language, or legislative history, of the BCRA to require such a regulation." Comments of Republican National Committee at 17-18 (May 29, 2002).

for its conclusions, *see McConnell*, 124 S. Ct. at 661, 663-64, 667, while the proposed rules would ignore these critical distinctions.

Significantly, *McConnell* plaintiff Republican National Committee and other political parties challenged this and Title I's other "unique speech disabilities" for political parties on equal protection grounds *precisely because* BCRA imposed *no* comparable limitations on "corporations, unions, trade associations, and other interest groups." Brief of the Political Parties at 91-98, *McConnell v. FEC*, 124 S. Ct. 619 (2003).[9]

The *McConnell* Court fully agreed with the RNC's description of BCRA's disparate treatment of parties and other groups, confirming that, under BCRA "[i]nterest groups ... remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications)." 124 S. Ct. at 686. But the Court found no constitutional violation because "Congress is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation," including that

---

[9]The RNC emphatically argued to the Court that BCRA "singles political parties out" because, "[i]n contrast, corporations, unions, trade associations, and other interest groups not only avoid the collateral restrictions, but are largely unrestricted in raising and spending unlimited, unregulated and undisclosed money from any source to pay for such activities as: voter registration; GOTV; phone banks, mail, and leafleting *at any time*; any broadcast advertising except for 'electioneering communications;' and communications in any form on any subject – including endorsements of federal candidates – to their officers, shareholders, and members." Brief of the Political Parties at 92, *McConnell*, 124 S. Ct. (emphasis in original).

The RNC specifically alerted the Court to efforts already underway by such groups to undertake voter outreach that BCRA did not restrict, emphasizing that "BCRA will merely shift nonfederal funds away from political parties to interest groups," *id.* at 25, quoting a Washington Post article describing "myriad so-called 527s – the tax code designation for organizations that are springing up now that campaign reform has banned the two parties from collecting soft money to fund voter registration and mobilization campaigns." *Id.* at 26 n. 14.

In their recent comments to the Commission on AOR 2003-37, however, the RNC, without explaining whether or how its portrayal of BCRA to the Court was changed by *McConnell* or some other intervening legal event, urged that "it will be important that the same standard for what constitutes 'Federal election activity' under the BCRA be applied across the board, whether to political parties or Section 527 organizations." RNC Comments at 1 (January 13, 2004).

"[i]nterest groups do not select slates of candidates for elections. Interest groups do not determine who will serve on legislative committees, elect congressional leadership or organize legislative concerns. Political parties have influence and power in the legislature that vastly exceeds that of any interest group." *Id.*

Nonetheless, the NPRM reasons that communications that "promote, support, attack or oppose" federal candidates are "expenditures" payable only with federally regulated funds because, like party committees, non-federal § 527 and § 501(c) groups "are focused on the influencing of Federal elections" and their communications "have no less a 'dramatic effect' on Federal elections." 69 Fed. Reg. at 11,737. That premise is incorrect as a matter of fact – as discussed above, a political party committee, as the *McConnell* Court emphasized, is different from other entities. But even if the premise were accepted, the decision to regulate independent groups' "Federal election activities" is not one for the Commission to make. Congress made its choices, and as the Court made clear, it chose not to disturb the rules in place for § 527 and other groups that avoid express advocacy and coordination with federal candidates. "When Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Barnhart v. Sigmon Coal Co*, 534 U.S. 438, 452 (2002) (internal quotation marks omitted); *U.S. Telecomm. Ass'n v. FCC*, 227 F.3d 450, 458 (D.C. Cir. 2000). Only an amendment to FECA could appropriate the statutory language restricting how state and local parties can finance certain communications, graft it on the preexisting FECA statutory term "expenditure," and enforce the resulting prohibition on non-party entities.

A similar flaw plagues the Commission's suggestion that it "harmonize" its approach to political committees with the Internal Revenue Service's approach to § 527 political organizations. *See* 69 Fed. Reg. at 11,740. 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.

Moreover, Congress explicitly recognized the differences between tax-exempt political organizations described in § 527 and "political committees" as defined in the Act when it promulgated, as part of the Internal Revenue Code, different reporting requirements for the two types of entities. Section 527 political organizations that are

not federally registered political committees must file a number of reports and forms that federal political committees need not file. Specifically, federal political committees are not required to file Form 8871 to attain tax-exempt status under the Internal Revenue Code; most other § 527 political organizations are generally required to do so. *See* IRC § 527(i). Nor are political committees required to file the periodic Form 8872 reports or the Form 990 annual information returns that most other Section 527 organizations must file. *See* IRC §§ 527(j), 6033(g).

Congress's very imposition of those IRS reporting and disclosure requirements in 2000 conclusively demonstrates its intent with respect to the regulation of § 527 organizations. Against a widely publicized backdrop of news reports concerning non-federal § 527 groups, Congress required these organizations (at least those with receipts over $25,000) to register and report their activities to the IRS. *See* Pub. L. 106-230 (2000), *codified at* 26 U.S.C. §527(i)-(j). Congress was well aware that § 527 organizations that were not political committees could affect Federal as well as other elections. See 46 Cong. Rec. H5282-01 (June 27, 2000) and 146 Cong. Rec. H5295-01 (June 27, 2000) (House debate); 146 Cong. Rec. S5994-03 (June 28, 2000) and 146 Cong. Rec. S6041-03 (June 29, 2000) (Senate debate). Congress could have amended FECA to make them political committees but chose not to do so.[10] Rather, Congress only subjected them to new and extensive reporting and disclosure requirements:

> [T]hese 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 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.

Report on H.R. 4717, House Ways and Means Committee, 106th Cong., 2d Sess. 18 (2002). In the words of Senator Lieberman, a principal author of the legislation, "nor

---

[10] See comments of Senator McCain: "Would I have liked to do more? Absolutely." 146 Cong. Rec. S5994-03, S5997.

does [the bill] force any group that does not currently have to comply with FECA or disclose information about itself to do either of those things." 146 Cong. Rec. S5994-03, S5996 (June 27, 2000). *See also* 146 Cong. Rec. H5285 ("[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.") (Statement of Rep. Archer).

In 2002, Congress amended the Section 527 reporting provisions but declined to take any other action to include them within the scope of FECA as political committees. See Pub. L. 107-276 (2002). And, of course, as discussed above, when Congress enacted BCRA, it expressly contemplated the continuing existence of § 527 organizations routinely operating other than as political committees under FECA, and it left them free to engage in public advocacy and voter mobilization activities.

The Campaign Legal Center recognized the limited scope of congressional regulation of 527 groups last year in order to convince the Eleventh Circuit to reject a constitutional challenge to the newly enacted §527(j) reporting and disclosing provisions:

> BCRA will clearly deliver greater transparency in the conduct of elections and thus enhance the integrity of our political system. However, its enactment does not obviate the need or justification for IRC § 527(j). Indeed, BCRA's requirements relating to the financing of "electioneering communications" do not cover all forms of electioneering activity. For instance, they will not apply to spending on non-express advocacy electioneering telemarketing and direct mail communications, newspaper advertisements or Internet communications. Likewise, they will not apply to independent spending on non-express advocacy electioneering television or radio advertisements that are aired more than 60 days before a general election or 30 days before a primary (i.e., during the majority of an election cycle). *Thus, even with the enactment of BCRA, IRC § 527 organizations will be able to conduct considerable amounts of Federal campaign finance activity outside the scope of FECA.* As such, IRC §527(j) continues to be a critical mechanism for campaign finance disclosure.

Brief Amicus Curiae of the Campaign Legal Center in Support of Appellants and Urging Reversal at 26-27 (Feb. 27, 2003) (emphasis added) (footnotes omitted), *Mobile Republican Assembly v. United States*, 353 F.3d 1357 (11th Cir. 2003).

In this respect, it is very much to the point that the *McConnell* majority opinion concluded with its observation that BCRA was unlikely to be "the last congressional statement on the matter" and "[w]hat problems will arise, and how Congress will respond, are concerns for another day." 124 S. Ct. at 632. At oral argument, the BCRA sponsors' counsel responded to a question posing the prospect that more money would be contributed to "independent, sometimes highly ideological groups" in place of now-banned soft money donations to the political parties, that if that occurred and "it turns out to be a phenomenon that creates corruption as this Court [has] defined it ... Congress can take care of the problem." Transcript at 88-89, *McConnell v. FEC*, 124 S. Ct. 619 (2003) (No. 02-1674) (Sept. 8, 2003).

We hasten to assert that independent groups' political activity and advocacy are not "problems" but essential aspects of a vigorous democracy; the point here is that only Congress might have authority, subject to constitutional review, to restrict those endeavors further. So, while addressing "circumvention" of FECA may be a legitimate governmental goal in enacting legislation, as *McConnell* states, only Congress can determine what behavior constitutes "circumvention" and attempt to proscribe it; the Commission only has authority to deal with conduct that Congress has already subjected to its regulatory jurisdiction. *McConnell*, of course, could not and did not confer further authority on the Commission.

This analysis is further confirmed by the explicit positions asserted throughout the *McConnell* litigation by the Commission and by BCRA's principal sponsors as they outlined BCRA's legislative history to the courts and stressed its limited reach as to non-party, non-candidate entities. As the Commission explained to the district court, Senators McCain and Feingold first introduced legislation to block the use of corporate and union general treasury funds for "unregulated electioneering disguised as 'issue ads.' *See* 143 Cong. Rec. S159 (Jan. 21, 1999); 143 Cong. Rec. S10106-12 (Sep. 29, 1997)." Brief for Defendants at 50, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (Civ. No. 02-582). Notably, as the Commission related, this early version of the McCain-Feingold bill "addressed electioneering issue advocacy by redefining 'expenditures' subject to FECA's strictures to include public communications at any time of year, and in any medium, whether broadcast, print,

direct mail, or otherwise, that a reasonable person would understand as advocating the election or defeat of a candidate for federal office. *See* 143 Cong. Rec. S10107, 10108." *Id.* at 50.

Redefining "expenditure" is, of course, precisely the course proposed now in the NPRM. But BCRA's sponsors *abandoned* that approach after their initial legislative proposals, and instead proposed the distinctly "narrow[er]" regulation of "electioneering communications," "in contrast to the earlier provisions of the...bill." *Id.* (quoting 144 Cong. Rec. H3801, H3802 (June 28, 2001)). As the sponsors explained to the district court, "Congress self-consciously evaluated ways to limit the reach of the law without sacrificing its purpose, so as to leave unregulated as many avenues of speech as possible." Opposition Brief for Defendants at I-84, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (Civ. No. 02-582).

The Commission also repeatedly confirmed that FECA otherwise did not limit advertisements that did not contain words of express advocacy. "[C]orporations and labor unions can spend unlimited general treasury funds on electoral advocacy outside FECA's regulatory framework, and now do so routinely, through the simple expedient of avoiding express advocacy." Brief for Defendants at 147, *McConnell*, 251 F. Supp. 2d. "Because [election-proximate] advertisements do not include words of express advocacy, the corporate or union disbursements used to finance them have entirely escaped regulation under FECA." Brief for Appellees at 15, *McConnell v. FEC*, 124 S. Ct. 619 (2003) (No. 02-1674).

The Commission further explained that FECA did not limit interest groups that used corporate and union funds for non-express advocacy ads. "While the air wars between business and labor constituted the largest and most direct influx of corporate and union money into the 2000 elections, corporate money also helped fund ads run by various interest groups, who, by virtue of avoiding express advocacy, could solicit corporate contributions to pay for their electioneering activities." Brief for Defendants at 46, *McConnell*, 251 F. Supp. 2d. The Commission concluded that "by 2000, corporations, unions, and interest groups fully recognized that, through the trivial effort of avoiding express advocacy, they could make unrestricted and undisclosed expenditures to influence the outcome of federal elections while avoiding the reach of federal election law." *Id.* at 48.

Before the Supreme Court, the Commission characterized BCRA as "a refinement of pre-existing campaign-finance rules" rather than a "repudiation of the prior legal

regime," because BCRA merely extended the reach of federal election law from express advocacy to "electioneering communications" paid for with corporate or labor union general treasury funds. Brief for Appellees at 27, *McConnell v. FEC*, 124 S. Ct. 619 (2003) (No. 02-1674). BCRA's sponsors made the same argument to the Court, contending that "[Congress] made another 'cautious advance' in the long history of 'careful legislative adjustment of the federal electoral laws' to reflect ongoing experience.... It drew new lines that respond directly to the demonstrated problem, in a way that honors First Amendment values of clarity and objectivity, and does not 'unnecessarily circumscribe protected expression.'" Brief for Defendants at 43, *McConnell v. FEC*, 124 S. Ct. 619 (2003) (No. 02-1674).

The Commission was explicit that BCRA left unregulated all public communications other than express advocacy and "electioneering communications" with enumerated examples.

> [B]ecause of the exceptional clarity of the lines drawn by BCRA's primary definition, any entity truly not interested in airing electioneering communications may easily avoid the source limitation on such communications by simply not referring to a candidate for federal office, running the advertisement outside the 30- or 60-day window, or running the advertisement outside the candidate's district.

Brief for Appellees at 92, *McConnell v. FEC*, 124 S. Ct. 619 (2003) (No. 02-1674). And the Commission asserted, interest groups could still "run print advertisements, send direct mail, or use phone banks to target a particular candidate in the days before an election in his district without even having to take the minimal step of using a separate segregated fund." *Id.* at 95 n.40. BCRA's sponsors agreed:

> [T]he electioneering communications definition only applies to TV and radio broadcasts, leaving similar communications in alternative media unregulated. Newspaper and magazine advertising, mass mailings, internet mail, public speeches billboards, yard signs, phone banks, and door-to-door campaign all fall outside its narrow scope, as do internal communications between a corporation or union and its stockholders or members.

Brief for Intervenor-Defendants at 158, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (Civ. No. 02-582). As already discussed, the Commission's and BCRA sponsors' arguments prevailed, and the Court upheld BCRA by specifically acknowledging the limited reach its proponents had stressed.

### C. "Major purpose" test

#### 1. Adopting "a" major purpose as the standard

The Commission seeks comment as to whether, in adopting its "major purpose" test at proposed 11 C.F.R. § 100.5, it should use the term "a major purpose," rather than "the major purpose," the term used by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 79 (1976), and *MCFL*.

Adopting the "a major purpose" standard has three principal flaws. First, although the Commission suggests that the standard derives from Supreme Court precedent, it has no actual basis in case law. Rather, in light of vagueness difficulties, Supreme Court precedent mandates the adoption of a standard that looks to the single, primary purpose of the organization before it may be regulated as a "political committee."

The *Buckley* Court, recognizing the vagueness problems inherent in defining "political committee" with too broad a scope, noted with approval lower court precedent narrowing the definition to encompass only two types of organizations that are clearly "campaign related." These types of organizations are: 1) those under the control of a candidate; and 2) those for whom *"the major purpose"* is the nomination or election of a candidate. *Buckley*, 424 U.S. at 79 (emphasis added). This discussion indicates the Court's recognition that a standard that does not require a political committee's "major purpose" to be its one primary purpose, above all others, would be overbroad, casting a wide enough net to catch organizations that are *not* campaign-related. This interpretation was so well-understood that the Court restated it, without real discussion, in *MCFL*. 479 U.S. at 262. Adopting the "a major purpose" standard—and creating the possibility that an organization with many purposes might nonetheless become a "political committee"— invites the very same vagueness problems that the Supreme Court understood the "major purpose" standard to mitigate in the first place.

Second, as the Commission points out and as noted above, adopting the "a major purpose" standard could impute political committee status to organizations for whom influencing elections is a subordinate or corollary purpose, or simply an unintended consequence of their activities. Organizations, such as true "issues" groups formed to inform the public with respect to particular social issues, or "think tank" types of organizations that participate in research and discussions about particular subject matter (such as foreign policy, "women's issues," or child care), could be swept into the definition and forced to register with and report to the Commission. The *Buckley* Court noted this very concern – the inevitable impact on true "issues" groups – in its discussion in *Buckley* of the "the major purpose" standard. 424 U.S. at 79.

Third, the implementation of a "purpose"-based test is, in itself, problematic. Determining an entity's purpose is inherently inexact and often subjective, and invites unfair and uneven treatment. Such a determination requires investigation into any of a host of factors, and as one may glean different answers as to the purposes of an organization depending on the factors investigated and the timing of the inquiry, the choice of factors may determine the outcome as to any particular organization. This type of scheme may invite the type of vagueness concerns voiced by the *Buckley* Court along with equal protection problems, fairness concerns, and other practical difficulties.

**2. Specific proposed tests**

**a) Public statements test**

Regardless of the formulation of the standard the Commission ultimately adopts, each of the Commission's proposed tests to execute the "major purpose" standard is fraught with problems, both legal and practical. The first of these, at proposed § 100.5(a)(2)(i), suggests an examination of a number of public statements and other criteria, including "organizational documents, solicitations, [and] advertising," coupled with a requirement that the organization make more than $10,000 in total disbursements for any of a number of activities during the current year or any of the previous four calendar years. *See* 69 Fed. Reg. at 11,756.

As noted above, a standard requiring the examination of public statements and other criteria is inherently overbroad and creates insurmountable practical and fairness problems. Every organization makes a variety of public statements at different times to serve different purposes. For fundraising or personnel-recruitment purposes, a true

"issues" group might overstate or "play up" its involvement with or opposition to a particular candidate or group of candidates in order to effect the broadest appeal. Yet the proposed rule would consider these statements as evidence that the organization was formed to influence elections. Similarly, a "think tank" organization, formed to debate and discuss a particular issue, could find itself accidentally within the scope of Commission regulation simply for advertising, during a Presidential election year, its hosting of a public discussion addressing the impact of public opinion of that issue on the upcoming election.

In light of the primary importance placed on protections traditionally guaranteed to political speech, the Commission must consider carefully whether using such speech as the fulcrum of its inquiry is truly necessary and, if so, whether doing so is consistent with constitutional jurisprudence. Yet the Commission here has made no such inquiry, and has clearly taken no such care. The test it has proposed merely exacerbates the inherent constitutional problems by requiring a vast, diffuse, unfocused, and invasive inquiry.

To avoid vagueness problems and the potential for "cherry-picking" of statements to reach a particular outcome, the Commission would have to augment this proposed rule by establishing a standard for determining which types of statements would be given the most weight, and would have to establish the relevant time periods as well. However, in light of the quantity and variety of organizations potentially swept in to this standard, attempting to set a one-size-fits-all determination would be inherently unfair.

The second prong of this test, the $10,000 disbursement provision, is beset with difficulties as well. Most importantly, especially when one considers the number of activities that must be examined and the four-year "look back" provision, the $10,000 threshold is sufficiently low as to place all organizations, including "issues" groups, § 501(c) organizations and other tax-exempts, at risk of unknowingly incurring Commission registration and reporting requirements. Three consequences will follow from this: a) some organizations will opt to hire legal counsel and other help to monitor their activities, and will reshuffle their spending priorities drastically as a result; b) some other organizations with limited resources will proceed with expert guidance on their own best judgment and at some considerable risk; and c) still other organizations will similarly decide they cannot afford the expense of complying with the rule, and will instead sharply curtail their speech to ensure they are not falling

within the Commission's standards. All of these outcomes are, in their own way, costly, but most unsettling is the likelihood that the real impact of the Commission's rule will be, as a result of its vagueness and complexity, to drain resources from true issues organizations or, worse, act as a prior restraint on their speech.

The incorporation of a four-calendar-year "look back" provision exemplifies the Commission's seemingly arbitrary selection of provisions and criteria in drafting these proposed rules. The Commission offers no justification for its arbitrary selection of the four-year period. Nowhere in BCRA or in the Act has Congress proposed or authorized the implementation of such a concept, and the Commission has made no effort to explain to the regulatory community why such a provision would be justified, or even relevant. In conducting a rulemaking, it is a basic responsibility of an agency, under the Administrative Procedure Act, to "explain[] its method of reasoning from factual predicates and expected effects of the rule to each of the statutory goals or purposes the agency is required to further or to consider. . . .". I Richard J. Pierce, Jr., Administrative Law Treatise § 7.4 (4th ed. 2002) (citing, *inter alia*, *American Gas Assn. v. FERC*, 888 F.2d 136 (D.C. Cir. 1989)).

Moreover, if implemented in this election cycle or the next, the provision presents obvious notice problems for organizations subject to the rule. Vagueness problems are inherent as well, as the rule does not specify whether or at what point in time an organization would have to register as a political committee if it, for example, met the $10,000 threshold in one year but not in the next two. The rule could have a punitive effect on organizations that, whether knowingly or not, meet the threshold in one year but not in any subsequent years, forcing them to register as a political committee for activity performed in a previous year even if they do not participate at all in election-related activity in the current year.

Finally, the Commission proposes to use the terms "federal election activities" and "electioneering communications" in contexts clearly outside of those in which Congress intended these terms to apply. As noted above, "federal election activities" is a term in BCRA that applies specifically to activities by political party committees; by the Commission's own statement, carrying out these activities does not form an independent basis upon which to base "political committee" status.

Similarly, Congress crafted the "electioneering communications" provisions to implement 2 U.S.C. § 441b's prohibition on certain broadcast advertising by non-charitable corporate entities. This provision was not intended to apply to, or to limit,

other kinds of speech by tax-exempts or other kinds of groups. Rep. Christopher Shays, one of the principal drafters of BCRA, explained this during deliberations on the bill in 2002:

> What our law seeks to do is enforce the 1907 law banning corporate treasury money, the 1947 law that bans union dues money, and enforces the 1974 campaign finance reform law. That is what our bill seeks to do. It allows people to speak out using the hard money 60 days before an election, and, frankly, they can use all that other money 60 days before an election.

149 Cong. Rec. H439 (Feb. 13, 2002) (Statement of Rep. Shays).

The "electioneering communication" provision was thus not intended to limit the ability of citizens acting individually or collectively to communicate to the general public on issues. The Commission itself has recognized the "substantial chilling effect" that such a rule would have on the activities of tax-exempt organizations. Defs. Summ. J. Mot. at 70, *Shays v. FEC*, (D.D.C. 2004) (No. 02-CV-1984). The Commission should not misuse these terms, as it attempts to do here, to apply to organizations and activities outside the scope of what Congress intended, for to do so would chill previously protected speech and constitute a clear abuse of agency discretion.

**b) The fifty-percent threshold test**

The Commission's second proposed test, the "fifty-percent threshold" test, presents similar difficulties. This rule would examine each organization's annual disbursements during any of the previous four calendar years, requiring it to register as a political committee if more than fifty percent of these expenditures were made for contributions, expenditures, payments for federal election activities, or payments for electioneering communications. *See* 69 Fed. Reg. at 11,756. The four-year "look back" provision faces the same notice and vagueness problems discussed above. Also as discussed above, this rule uses the terms "federal election activities" and "electioneering communications" in ways Congress did not intend.

The fifty-percent threshold provision is impermissibly unfair and unworkable with respect to smaller organizations. This rule will sweep all organizations meeting the criteria into the purview of Commission regulations without regard to their actual

impact on elections. Small organizations such as local or school clubs with very small annual budgets may find themselves suddenly, and unexpectedly, subject to the Act because they decide to mobilize a $500 voter drive in a Presidential election year.

In addition to these concerns, the fifty-percent threshold provision will likely chill the speech of many organizations that would spend their funds cautiously in order to ensure they will not cross the fifty-percent threshold. As the rule's criteria force organizations to monitor their spending on the enumerated activities relative to all of their spending (which is a function, in large part, of their fundraising success in a given year—an inherently unpredictable number), many organizations will be forced to limit their political activity, participation in issues discussions, and participation in the other enumerated activities to well under fifty-percent of their projected spending in order to be sure that a weak fundraising year does not cause them to cross the threshold. An organization that is not sure that it will have a strong financial year may simply opt to curtail its activities in order to ensure it will not, at the end of the year, exceed this "fifty percent" threshold.

**c) The $50,000 threshold test**

The third proposed test, the "$50,000 threshold" test, examines an organization's total spending during the current year and the four previous calendar years on contributions, expenditures, federal election activities, and electioneering communications. *See* 69 Fed. Reg. at 11,756-57. If this spending exceeds $50,000, the organization qualifies as a "political committee." *Id.* This test presents all of the vagueness, notice, and abuse of discretion problems discussed above. In addition, a $50,000 threshold is far too low in light of the number and type of activities at issue here. Nowhere is the arbitrary nature of the Commission's proposal clearer than here. The Commission has clearly chosen the $50,000 threshold arbitrarily: the electronic filing threshold, which the Commission points to as the other provision in the regulations that employs a $50,000 threshold, *see* 69 Fed. Reg. at 11,747-48—has no relevance whatsoever to political committee status and its attendant responsibilities. *See, e.g., N.C. Right To Life v. Leake*, 344 F.3d 418, 430 (2003) ("Any attempt to define statutorily the major purpose test cannot define the test according to the effect some arbitrary level of spending has on a given election"). The Commission offers no reason why a $50,000 threshold is needed, useful, or even relevant. As noted above, conducting a rulemaking in this matter is a clear shirking of agency responsibility under the Administrative Procedure Act.

### D. Conversion Requirements

#### 1. Constitutional Infirmity: Freezing Contributions

The proposed regulations governing the conversion of an organization to a political committee requires that a committee cease all contributions, expenditures, independent expenditures and allocable expenditures until the committee has raised or converted sufficient federal funds. This is an unwarranted restriction on speech and association rights. *See Nixon*, 528 U.S. at 388. While the Commission may be able to prevent the committee from making allocated expenditures, it may not constitutionally prevent a committee from making contributions from funds that meet all of the obligations of federal election law, or of making independent expenditures using federal funds. Otherwise, the Commission would be restricting not only the rights of the committee itself, but of the contributors to the committee as well.

#### 2. Practical Considerations

##### a) The "Look back" to January 1 of the preceding year

Section 102.50 would define "Covered period" as beginning on January 1 of the calendar year immediately preceding the year in which the organization qualifies as a political committee. This timeline has the potential of creating a massive liability for an organization, especially one that meets the "avowed purpose" test or the $50,000 disbursement test. Organizations that decide to increase their federal activities and become political committees will be saddled with at least a year, and perhaps as many as two years, of debt stemming from administrative expenses, generic campaign activity, and other expenses that would otherwise be entirely nonfederal. The result is a tax on organizations that decide to switch purpose, or even on those that merely alter their ratio of federal-to-nonfederal activities.

##### b) The "Debt" concept & freezing expenditures

Section 102.53 would treat the amount of expenditures and allocable expenditures and disbursements made during the covered period as debt owed by its federal account to its non-federal account. The committee could not make any contributions, expenditures, independent expenditures or allocable expenditures until the debt is

satisfied. The committee may convert federally permissible funds to federal funds, or raise new federal funds and transfer them into a non-federal account.

There are at least two severe problems with this system. The first is that if a committee is prevented from making any expenditures or allocable expenditures, it will be unable to spend any money to raise federal funds. It would be unable to spend federal funds until its debt was paid, but it would be unable to raise funds to pay that debt. In the meantime, if the committee could not make any allocable expenditures, it would also be forbidden to pay its administrative expenses, including paying for rent and salaries.

Second, this system has the potential to permit a loophole in state campaign finance law for state committees that become political committees. Many states have far lower contribution limits than under federal law. If a state committee became a political committee, it could raise funds under the more permissive federal contribution limits and transfer those funds into its state account. Moreover, it could continue to pay for many activities on an allocated basis, using in part the more permissive federal funds. This problem would be exacerbated under the proposed regulations because they provide for a transfer of funds from the federal to the non-federal account, and because there is a minimum federal percentage for administrative expenses. Thus, a state committee could avow that it is a political committee, and disburse $10,000 on Federal election activity, and pay for a percentage of its administrative expenses and generic campaign activity with federal instead of state funds.

**c) Restrictions on the use of "surplus" converted funds**

Section 102.55 would permit a political committee to transfer excess converted funds to the federal account, but only up to the amount of cash on hand as of the date the organization became a political committee. There is no justification for this restriction on the transfer of federal funds to the federal account. There is no possible danger of circumvention, because the federally permissible funds must meet all requirements of federal election law. Moreover, such a restriction impermissibly punishes contributors who consent to have their contributions converted, because their contributions will count against their aggregate limits, but the converted contributions will not be able to be used to support federal candidates.

### d) Donor notification and approval requirements for the conversion of funds

Section 102.54 describes the procedure by which committees may convert federally permissible funds to federal funds. The requirements are far more onerous than necessary. First, and most importantly, the 60-day window from the time an organization becomes a political committee is far too short, because an organization may not be aware that it has become a political committee until much later in time. This is particularly true if the "avowed purpose" test is adopted; but even if the trigger is a disbursement amount, or a primary purpose test, it may take time to realize that the organization has crossed that threshold. Organizations do not typically track their spending on a day-by-day basis. It is only when the organization calculates its disbursements that it will be aware that it has crossed the disbursement threshold. By that time, the 60-day window may have already closed. These problems exemplify the unworkability of this prong of the rule.

## III. Allocation

If the Commission were to take its own statements in Advisory Opinion 2003-37 at face value, it would conclude here that no changes to its allocation rules are necessary. In that opinion, it stated that the requestor's proposed activities "are covered by the existing allocation regulations in 11 C.F.R. Part 106." Advisory Opinion 2003-37, at 2. It claimed that its advice was the logical result of applying those rules. *See e.g., id.* at 9 (holding that a communication that refers only to federal candidates may not be allocated because the rules "explicitly do not cover candidate-specific communications").

However, in Advisory Opinion 2003-37, the Commission did not simply apply old rules, but rather fashioned new requirements that no one in the regulated community would have known to apply:

(1) That a communication may never be paid on an allocated basis when it promotes, supports, attacks or opposes a Federal candidate, and refers solely to that candidate. *But see* Advisory Opinion 1995-25 (allowing a Republican committee to allocate the costs of "legislative advocacy" ads, where one such advertisement referred to President Clinton six times). *See also, e.g.,* Advisory Opinion 1985-14 (permitting treatment of advertisements that "criticize a congressman's record" as "operating expenses").

(2) That the costs of a communication that promotes, supports, attacks or opposes a Federal candidate must be counted toward the numerator of the administrative/generic allocation ratio, even when they do not result in a contribution or independent expenditure. *But see Revised Supplement on Allocation,* FEC Record, Dec. 1992, at 12 (requiring committees to count only "direct candidate support" in calculating the ratio). *See also, e.g.,* Advisory Opinion 1982-5 (defining "direct support" to mean "only ... contributions ... and coordinated party expenditures").

(3) That a PAC must pay for a fundraising solicitation that refers to a federal candidate entirely with federal funds, because the funds are being raised to influence a federal election. *But see* 11 C.F.R. § 102.5(a)(2) (disallowing deposit of funds into a federal account unless, *inter alia*, the solicitation "expressly states" that the funds will be used in connection with a federal election). *See also* 11 C.F.R. § 102.5(a)(3) (2002) (allowing a party committee, even under pre-BCRA rules, to rebut a presumption that nonfederal funds were given to influence a federal election when the "funds were solicited with express notice that they would not be used for federal election purposes").

While the Commission claims that its proposed allocation rules would simply "clarify," "reflect" and "expressly state" its conclusions in Advisory Opinion 2003-37, they would actually write the authority for those conclusions into law after the fact. 69 Fed. Reg. at 11,753, 11,755. The NPRM thus demonstrates that Advisory Opinion 2003-37 was issued arbitrarily, capriciously and contrary to law. The Commission should supersede that opinion, at least insofar as its reasoning may be applied to anyone other than the putative requestor.

The roots of these proposed rules in the illogic of Advisory Opinion 2003-37 are reason enough to reject them. There are several other reasons, however, to leave the current rules – as properly interpreted – alone.

First, to include what the Commission calls "PASO" expenditures in the numerator of the administrative/generic ratio would be burdensome, unenforceable and arbitrary. Non-connected PACs now have no reason to track those sorts of expenditures, being wholly removed from 11 C.F.R. Part 300's restrictions on the financing of Federal election activity. To develop systems to track those expenses now, in the middle of an election year, would be disruptive in the extreme.

Even if PACs were to deploy such systems, current reporting procedures provide no way short of an audit to determine if the ratios were being correctly calculated. Under current allocation rules, where contributions and independent expenditures are the only variables driving the splits, one could look at a PAC's FEC report to make a rough assessment of compliance. There would be no such transparency in the Commission's proposed rules. To create it, the Commission would have to revise its forms in the closing months of a presidential election cycle, placing heavy burdens on committees and their vendors.

The proposed "PASO" rule is also arbitrary, insofar as it creates an asymmetry between the treatment of a committee's federal and nonfederal spending. "[A]mounts spent on public communications that promote, support, attack, support [sic] or oppose a clearly identified Federal candidate" would count toward the numerator of the split. 69 Fed. Reg. at 11,755. However, identical spending with respect to nonfederal candidates would not clearly count toward the denominator. This is an odd approach for an agency that has long styled its allocation rules as reflecting a committee's proportionate effect on federal and nonfederal elections.

To adopt a minimum federal percentage for non-connected PACs would also be arbitrary and unsupported by law. First, the Commission has already rejected this approach after fact-finding far more extensive than any undertaken here. It expressly decided to exempt non-connected PACs from the minimum allocation ratios that applied to political parties. *See* Methods of Allocation Between Federal and Non-Federal Accounts, 55 Fed. Reg. 26,058, 26,062, 26,066 (1990). The Commission now abruptly proposes to return to this approach, apparently because it thought it convenient to imitate the approach taken with state parties in the Levin Amendment context. *See* 69 Fed. Reg. at 11,754. It offers no new facts to suggest why a distinction between parties and PACs was appropriate in 1990, but inappropriate now. This is another instance in which the Commission has collapsed the fundamental distinction between parties and other groups that is central to BCRA and the Court's review in *McConnell.*

There are several other problems with adopting a minimum allocation percentage for non-connected committees. First, the proposed rule would not reflect the relative extent of a PAC's Federal activity as well as the current rule does. For example, a PAC might be principally focused on state elections and give only incidentally to federal candidates, thus warranting a split weighted more heavily toward the

nonfederal end. Second, the proposed rule presents PACs with a false choice. They may either adopt an impenetrably complicated method of state-by-state allocation, or "choose to simplify [their] ... allocation" by opting for a less efficient method that wastes federal money. *See* 69 Fed. Reg. at 11,754.

The most extreme version of this approach can be found in the Commission's query as to whether a PAC should "be required to pay for all of its disbursements out of Federal funds and therefore be prohibited from allocating any of its disbursements" if its "major purpose" – whatever that means – "is to influence Federal elections...". *Id.* at 11,753. Yet this query has been asked and answered before. A federal district court squarely rejected the notion, propounded by Common Cause, that the statutory language of the Act compels a non-allocation regime:

> This reading of the [1999 FECA] amendments goes too far. It is clear from the statute as a whole that the FECA regulates federal elections only. This limit on the FECA's reach underlies the entire act. Congress would have had to have spoken much more clearly in the amendments at issue to contradict this.

*Common Cause v. FEC*, 692 F. Supp. 1391, 1395 (D.D.C. 1987). Made with regard to political parties after the Federal Election Campaign Act Amendments of 1979, it is no less true of non-connected PACs after BCRA, which left their activities almost entirely untouched. Indeed, the Supreme Court in *McConnell* affirmed that allocation remained appropriate under the statute, notwithstanding the specific restrictions placed on party committees:

> As a practical matter, *BCRA merely codifies the principles of the FEC allocation scheme* while at the same time justifiably adjusting the formulas applicable to these activities in order to restore the efficacy of the FECA's longtime statutory restrictions – approved by the Court and eroded by the FEC's allocation regime – on contributions to state and local party committees for the purpose of influencing federal elections.

124 S. Ct. at 673-74 (emphasis added). *See also* Federal Election Commission's Response in Support of Its Motion and in Opposition to Plaintiff's Motion for Summ. Judgment, *Shays v. FEC*, at 16-18 (D.D.C. 2004) (No. 02-CV-1984).

## IV. Comments of Others

Finally, we must address some of the comments made with specific regard to ACT by Democracy 21, the Campaign Legal Center and the Center for Responsive Politics. These commenters assert that this rulemaking is necessary to address activities being conducted by ACT and other organizations in so-called "evasion," "circumvention" and "obvious" violation of the law.

Of course, the commenters have filed complaints making similar and unsupportable claims of this kind. Yet it is plainly a misuse of the rulemaking process – one designed to formulate rules of general applicability – to rush into effect rules that are intended to function in place of the enforcement process in addressing specific allegations against specific organizations.

In the first place, the premise is completely mistaken: it is not correct, much less "obvious," that any of the named organizations have violated the law. Certainly the Commission has made no such finding. Thus there is little merit in seeking a rule on the basis of claimed ongoing "violations" that are simply asserted, and no more.

The law as it now stands refutes the suggestion of ongoing violations. Congress, as noted elsewhere in the comments, was well aware of the issues raised by the commenters – and did not choose to do what they insist that the FEC now proceed to do in Congress' place. Congress considered the allocation rules, for example, at length: it eliminated the allocation for national parties, and adopted a new allocation scheme for state and local parties spending Levin funds for Federal election activities. The FEC, moreover, in revising its regulations under the command of Congress in BCRA, retained in place the allocation procedures for nonparty committees. Even in the recent ABC opinion, the FEC did not eliminate, even if it revised, the allocation process for nonparty committees. Clearly there can be no "violation of law" in these circumstances.

Second, it is simply not a responsible use of the rulemaking process to expedite rules in the middle of an election cycle that will affect a broad range of organizations, well beyond those targeted by these "reform groups." This is a rulemaking, not an enforcement process, and its use to redress what the groups claim to be "violations" constitutes an abuse of the rulemaking process and a complete disregard of the requirements, including safeguards, of the enforcement process. The course urged by

these groups would make bad law on mistaken premises for a whole community of organizations entitled to a rational and well-considered rulemaking procedure.

Very truly yours,

Judith L. Corley
Perkins Coie LLP
607 14th Street, NW
Suite 800
Washington, DC 20005
(202) 434-1622
Counsel to America Coming Together

Laurence E. Gold
888 16th Street, NW
Fourth Floor
Washington, DC 20006
(202) 974-8306
Counsel to America Coming Together