UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Representative Christopher Shays and Representative Martin Meehan, Plaintiffs, v. Federal Election Commission, Defendant.	)))))))))	Civil Action No. 04-1597 (EGS)

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR FURTHER RELIEF AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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The Commission's opposition fails to refute Plaintiffs' Motion for Further Relief and fails to provide a basis for granting summary judgment for Defendant. This memorandum briefly exposes the flaws in the Commission's position and shows why Plaintiffs are entitled to the further relief requested.

1. The Commission's Flawed Reliance on Two Rule Changes in 2004.

The Commission places much emphasis on the two regulations it passed as part of the 2004 Final Rules. (FEC Br. at 14-16.) However, as Plaintiffs have explained, these collateral regulatory changes have demonstrably had little impact on soft-money spending. (*See* Pl. Br. at 21-22.) After the Commission adopted those rules in 2004 (and at the same time decided *not* to issue any rule focusing on 527 status), soft money spending by 527 groups continued unabated in 2004 and resumed in 2006. During the 2006 campaign cycle, with no presidential election, section 527 groups spent over $200 million. (Pl. Br. at at 8.); *see also* CFI study at 1 (noting that 527's "played a significant role" in the 2006 congressional elections). There is no indication that 2008 will be different.

A recent Campaign Finance Institute ("CFI") study that the Commission misleadingly cites in support of its proposition that the 2004 regulations have had "a significant impact on recent section 527 organization activities" (FEC Br. at 16 n.5) actually finds the opposite. *See* Stephen R. Weissman and Kara D. Ryan, *Soft Money in the 2006 Election and the Outlook for 2008* at 3-4 (CFI 2007) ("CFI study") (attached to FEC Br. as Ex. 8). It generally concludes that "[o]ne restraining influence on certain 527s will be recent FEC regulations, investigations and civil settlements. Yet, while these actions have limited or threatened to limit some types of 527 activities, *they have not curbed 527 groups in general*." *Id.* at 3 (emphasis added).

As to the regulation regarding solicitation of contributions, 11 C.F.R. 100.57(b), the CFI study notes that the regulation could impact a subset of 527 groups that focus on broad direct mail solicitations, but:

> is *much less relevant to a majority of 527 groups*. The ruling has *no impact on organizations that finance their own 527s with their treasuries (notably labor unions which donated over $40 million to 527s in 2006). Also unaffected are groups that depend on a small coterie of wealthy individual and organizational financiers* and do not need to explain to numerous donors in letters, emails and phone calls how their money will help specific candidates [listing seven such 527 groups]. Nor is it excluded that a 527 group appealing to a relatively broad, issue-oriented group of donors could frame its solicitations in ways that avoid references to supporting or opposing 'clearly identified candidates.'

(*Id.* at 4 (emphasis added).) As explained in Plaintiffs' Memorandum, 527 groups can easily draft around this rule. (Pl. Br. at 22.)

The CFI study also notes that the allocation regulation adopted by the Commission in the 2004 rulemaking, 11 C.F.R. § 106.6, is easily circumvented as well: "To avoid this new restriction, a group would simply have to decide not to share expenses between its PAC and 527. This is in fact common among PACs with related 527s already." (*Id.* at 4.) The allocation rule is particularly irrelevant to the problem at hand since, as the Commission admits, that rule

addresses only the non-Federal funds that "a registered political committee may use to engage in certain activity." (FEC Br. at 16.) Thus, this regulation fails entirely to address the central question: when a 527 group must register as a political committee in the first place.

2. The Commission's Flawed Reliance on a Handful of Settlements.

The Commission has not shown that the belated settlement of a few -- but by no means all -- of the cases involving 527 groups active in the 2004 elections will deter 527 groups in 2008, or beyond. (To this date, the Commission has still not resolved complaints *pending since January, 2004* against two of the largest 527 groups in the 2004 election, America Coming Together and The Media Fund, nor any of the complaints arising from the 2006 election). The evidence is to the contrary. The CFI study discussed above found:

> [T]here is a strong possibility that 527 activity will increase substantially over '06 levels . . . . One likely development is the resumption of substantial federal 527 spending by certain labor unions . . . that chose to focus on state and local elections in '06 but were quite active federally in '04.

(CFI study at 3.) Likewise, when Benjamin Ginsberg, national counsel to Governor Romney's presidential campaign, was recently asked whether he expected "organizations like the Swift Boat Veterans or 527s to play as big of a role in this [2008] election," he responded: "Oh yeah, absolutely. . . . They are already lining up to play major, major roles." *Working Lunch: Mitt's the Man for Patton's Ginsberg*, LEGAL TIMES, April 16, 2007 (Ex. 54)[1]; (*See also* Pl. Br. at 16 n.19 (citing various reports of 527 groups gearing up for the 2008 election).) Given that Ginsburg also was the counsel for Progress for America Voter Fund, whose enforcement action from the 2004 campaign the FEC now touts as providing effective deterrence (FEC Br. at 17-18,

[1] Exhibit attached to the Declaration of Adam Raviv, submitted herewith.

19 n.8), it is notable that he foresees 527 groups as playing a "major, major" role in the 2008 campaign.

Even apart from deterrence, stipulated settlement agreements resolving complaints against specific 527 groups do not provide the effective guidance of a formal regulation. (*See* Pl. Br. at 18-21.) Conciliation agreements, read either individually or collectively, do not present a coherent agency statement of the law on political committee status, because they are the product of negotiations that may be affected by a variety of factors other than the Commission's view of the law. Further, although *some* of the conciliation agreements with 527 groups may hinge *in part* on those groups' 527 status, and the Commission states that it "regards section 527 tax status as a relevant factor, but not a determinative one," (FEC Br. at 33), it has offered no generally applicable explanation or guidance as to when and how 527 status affects political committee status.

The Commission also fails to resolve the patent inconsistency between its contentions that, on the one hand, it can provide general guidance to 527 groups through the cases it settles, and, on the other hand, that a general rule is improper, because every case is uniquely fact-specific. *See* 72 Fed. Reg. at 5601 ("E&J II") ("Applying the major purpose doctrine . . . requires the flexibility of a case-by-case analysis of an organization's conduct that is incompatible with a one-size-fits-all rule."). If the determination of the political committee status of a 527 group is so fact-dependent, then case-specific settlement agreements and advisory opinions should be of marginal utility in providing generalized guidance.

3. <u>The Commission's Flawed Reliance on the Need for Fact-Intensive Review.</u>

The FEC also argues that a fact-intensive, case-by-case analysis is a necessary predicate for the FEC to make "an overall assessment of an organization's activities and spending" by

weighing such factors as the "organization's public and private statements and the extent of its spending on federal campaign activity." (FEC Br. at 22.) What the FEC ignores, however, is that a 527 group's self-identification as a "political organization" "organized and operated primarily for the purpose" of accepting contributions or making expenditures for electoral activity, 26 U.S.C. § 527(e)(1), is *precisely* such a "public statement." While it may be true that when a group makes no such statement about its purposes, the FEC might indeed need to "make an overall assessment of an organization's activities and spending," it is equally true that when a group *does* make such a statement, the FEC can and should consider it to be significant -- and say so in a guidance-giving rule. FEC Agenda Doc. 04-75 (A.R. 354) (Ex. 11) at 20 ("[A]n organization's decision to avail itself of 527 status is *inherently indicative* of its choice principally to engage in electoral activity.") (emphasis added).

The Commission's repeated decisions to rely on rules in many other areas belie its argument that a 527 rule would be ineffectual. For years, the FEC enforced a standard, similar to the FEC's "major purpose" test, regarding what "expenditures" and activities constitute "coordination." *See* Former 11 C.F.R. 100.23 (2000) (defining "coordinated general public political communications"). In 2002, the FEC enacted detailed regulations that very specifically defined both the "content" and "conduct" elements of "coordination." *See* 11 C.F.R. § 109.21(c) (content standards); § 109.21(d) (conduct standards). While these regulations do not pretermit the need for enforcement actions, the Commission evidently concluded that more specific regulations would clarify the coordination standard and diminish the need for, or facilitate,

enforcement.[2] The benefit of a rule does not disappear simply because the FEC may also have to enforce the rule in fact-specific situations. Without these regulations, however, the community would have to wait for enforcement to obtain general guidance.

4. <u>The Commission's Flawed Reliance on a Misinterpretation of the FECA.</u>

E&J II extensively discusses and quite plainly relies on the FEC's interpretation of the FECA regarding "political committee" status (s*ee generally* E&J II at 5598, part D "Applying the Major Purpose Doctrine, a Judicial Construct Established Thirty Years Ago, Requires a Case-by-Case Analysis of an Organization's Conduct"). We have shown that interpretation to be plainly erroneous. (Pl. Br. at 28-34.) In response, the FEC first lamely defends its interpretation, and in the next breath argues that, even if it has misinterpreted Supreme Court precedent, this Court cannot reject E&J II because the FEC's interpretation of the FECA was not a necessary part of its decision to eschew a rule. (FEC Br. at 40-42.)

As explained in Plaintiffs' Opening Brief, the FEC was wrong in its interpretation of the FECA, and it did rely on that misconstruction in deciding not to issue a 527 rule. (Pl. Br. at 34-35.) The Commission's lengthy discussion of this topic was not mere idle rumination. The FEC's conclusion that a 527 rule would be inefficacious turns on its interpretation of the law as requiring an analytical framework that necessarily first looks to whether a group has received "contributions" or made "express advocacy" expenditures, before even considering the group's major purpose. (E&J II at 5597 ("organizations could easily qualify for 527 status without ever making expenditures for express advocacy. However, as discussed above, that activity is outside

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[2] For a trivial but illustrative example, the FEC's (rather lengthy) regulations defining the term "file" or "filed," 11 C.F.R. § 100.19, provide clarity and improve compliance without requiring enforcement in the first instance to define the scope of this term.

of the Commission's regulatory scope under *Buckley's* express advocacy limitation for expenditures on communications made independently of a candidate.").)

This misconstruction of FECA eviscerates the major purpose standard articulated in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *McConnell v. FEC*, 540 U.S. 93 (2003), which does not require the more stringent "express advocacy" test of "expenditures" to be applied to spending by those groups that have a "major purpose" to influence campaigns. (Pl. Br. at 28-30.) The test for "expenditures" by such major purpose groups is the statutory standard of whether their spending "is for the purpose of influencing" a federal election.[3] The fundamental flaw in the Commission's position is that it provides an easy pathway for evasion: a 527 group could spend all of the soft money it wants on ads attacking or promoting federal candidates -- and even proclaim its major purpose to do so -- so long as it simply eschews express advocacy, and it would *never* become a political committee. Under the FEC's reasoning in E&J II, a group's major purpose is irrelevant if it avoids express advocacy. That is not what the Court meant in *Buckley* when it formulated both the express advocacy and major purpose standards, and that is not consistent with the Court's discussion of those standards in *McConnell*. Therefore, the FEC's decision not to issue a 527 rule is contrary to law. *See* 5 U.S.C. § 706(2)(A); *NLRB v. Bell Aerospace Co*., 416 U.S. 267, 294 (1974) (holding that an agency's decision to choose either rule-making or case-by-case adjudication is subject to reversal where the agency committed an "abuse of discretion or a violation of [law].").

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[3] The FEC is wrong in contending that Plaintiffs write the statutory $1,000 expenditure test "out of the statute." (FEC Br. at 41.) To the contrary, a major purpose group, such as a 527 organization, would still have to spend $1,000 to influence federal elections in order to meet the test for political committee status. If its spending were directed, for instance, to non-federal elections, it would not be a FECA political committee.

5. <u>The Commission's Flawed Reliance on the Law-of-the-Case Doctrine.</u>

The FEC also invokes the "law-of-the-case doctrine," apparently to suggest that this Court previously determined that it would *never* be appropriate to order the FEC to issue a 527 rule. (FEC Br. at 12-14.) The law-of-the-case doctrine has no application here. It provides that "the *same* issue presented a second time in the *same* case in the *same* court should lead to the *same* result." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (emphasis in original). It does not bar judicial consideration of issues that were not finally decided. *Quern v. Jordan*, 440 U.S. 332, 348 n.18 (1979) ("The doctrine of law of the case comes into play only with respect to issues previously determined."); *United States ex rel. Dep't of Labor v. Insurance Co. of No. Am.*, 131 F.3d 1037, 1041 (D.C. Cir. 1997) ("the scope of the 'law of the case' doctrine is limited to issues that were decided either explicitly or by necessary implication-the mere fact that an issue could have been decided is not sufficient to foreclose the issue on remand." (quotations omitted)).

Contrary to the FEC's assertions, the Court's March 29, 2006 Opinion addressed only the specific issues presented to the Court -- whether the FEC's decision in E&J I not to issue a rule directed to 527 groups was arbitrary and capricious and contrary to law. The Court held that the FEC had violated the APA and, for a remedy, directed the FEC either to issue a new explanation that answered the Court's questions and satisfied the APA or "to promulgate a rule if necessary." *Robinson-Smith v. Government Employees Ins. Co.*, 424 F. Supp. 2d, 117, 117 (D.D.C. 2006) (finding the circumstances presented were not sufficiently compelling at that stage to require the FEC to promulgate a rule). The Court quite obviously left itself free to consider the FEC's response and to take further judicial action as it deemed appropriate. The Court did not hold that it would never be appropriate to direct the Commission to promulgate a 527 regulation.

6. The Commission's Flawed Reliance on Deference Owed Administrative Agencies.

From the beginning of this litigation, Plaintiffs have acknowledged the general proposition that agencies have considerable discretion in deciding whether to enforce the laws through rulemaking or case-by-case adjudication. But such discretion is not boundless. As detailed in Plaintiffs' Summary Judgment memorandum (Pl. SJ Br. at 29-31), deference does not insulate the Commission's inaction here for several major reasons: (1) BCRA and *McConnell* were both in large part responses to the Commission's blatant failure to plug the "soft money" loophole; (2) there is an extensive rulemaking record on the 527 issue, *see Consumer Fed'n of Am. v. Consumer Prod. Safety Comm'n*, 990 F.2d 1298, 1305 (D.C. Cir. 1993); *Williams Natural Gas Co. v. FERC*, 872 F.2d 438, 443 (D.C. Cir. 1989); (3) the Commission has still failed to resolve complaints against the largest-spending 527 groups from the 2004 election, and has taken no action against *any* of the major 527 groups active in the 2006 elections, thus undermining its claims of effective case-by-case enforcement against the offending groups; and (4) deference to the FEC's priorities as to how to allocate its scarce resources is largely a non-issue, since the rulemaking process on the 527 question has already been substantially completed, *see Natural Res. Def. Council v. SEC*, 606 F.2d 1031, 1045-46 (D.C. Cir. 1979). These factors combined with the Commission's failure -- for the second time -- to offer a rational explanation for its decision squarely makes this one of the cases where, as the Supreme Court put it, "the [agency's] reliance on adjudication would amount to an abuse of discretion." *Bell Aerospace Co.*, 416 U.S. at 294.

7. The Commission's Flawed Reliance on Congressional Inaction.

The FEC also argues that its decision to proceed with case-by-case adjudication is consistent with congressional intent, as purportedly evidenced by congressional inaction on 527

legislation, and unrelated amendments to IRS disclosure law. But congressional silence on a 527 bill does not excuse the FEC's failure to issue a regulation, any more than it would excuse an FEC decision not to enforce the law on a case-by-case basis. *See Wright v. West*., 505 U.S. 277, 295 n.9 (1992) ("Our task, however, is not to construe bills that Congress has failed to enact, but to construe statutes that Congress has enacted."); *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 388 (2000) (noting that "the silence of Congress is ambiguous"). Flaunting the circularity of its reasoning, the Commission notes that in 2002, Congress amended the IRS disclosure rules for 527 groups, "but retained the requirement that section 527 organizations that are not political committees file disclosure reports with the IRS." (FEC Br. at 24.) That observation, of course, simply begs the question and says nothing about those 527 organizations that are -- or should be -- political committees under existing FECA provisions. The FEC concedes that 527 groups spending money to influence federal elections should be required under existing statutory law, at least on a case-by-case basis through enforcement actions, to register as political committees even though Congress has not enacted any specific statute to that effect. The only question, then, is whether the implementation of existing law would be more "effective," *Shays v. FEC*, 424 F. Supp. 2d 100, 116 (D.D.C. 2006), through a rule or on a case-by-case basis.

8. <u>The Commission's Flawed Reliance on Plaintiffs' References to the Thomas-Toner and General Counsel Proposals.</u>

Finally, the Commission's criticism of Plaintiffs for referencing two of the 527 rules that were proposed during the 2004 rulemaking (FEC Br. at 31-32) misses the point of that discussion. Plaintiffs are not asking the Court to order the Commission to promulgate rules with any specific content. Rather, Plaintiffs discussed the rules proposed by Commissioners Toner and Thomas and by the General Counsel in order to highlight the illogic of the Commission's

claim that any rule it passed would inevitably be overly broad, because both the Toner-Thomas and the General Counsel's rules directly addressed and resolved the very overbreadth issues that the Commission mentioned. (Pl. Br. at 22-23.) Plaintiffs cited these proposed rules to demonstrate that the Commission can, and could have, passed rules that address the supposedly intractable problems that the Commission has mistakenly referenced. The Commission, however, continues to insist on its overbreadth straw man, repeating here several times that Plaintiffs "would presume that all section 527 organizations are political committees." (FEC Br. at 34; *see also id*. at 25, 26.) Plaintiffs have never so contended, and both of the rules proposed to the Commission illustrate that this concern was never a real issue.

CONCLUSION

For these reasons, this Court should (a) grant Plaintiffs' Motion for Further Relief; and (b) deny the Commission's Motion for Summary Judgment.

Respectfully submitted,

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