

BEFORE THE
FEDERAL ELECTION COMMISSION

Democracy 21
1875 I Street, NW, Suite 500
Washington, DC 20006
202-429-2008

Campaign Legal Center
1640 Rhode Island Ave. NW, Suite 650
Washington, DC 20036
202-736-2200

v.

MUR No. _____

Economic Freedom Fund
455 Capital Mall, Suite 801
Sacramento, California 95814

Majority Action
2207 Valley Circle
Alexandria, Virginia 22302

COMPLAINT

1. In March, 2002, Congress enacted the Bipartisan Campaign Reform Act of 2002 (BCRA) in order to stop the raising and spending of soft money to influence federal elections. The soft money provisions of BCRA were upheld by the Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003).

2. Since the enactment of BCRA, a number of political and party operatives have been engaged in illegal schemes to use soft money to influence federal elections, through the use of so-called “section 527 groups” — entities registered as “political organizations” under section 527 of the Internal Revenue Code, 26 U.S.C. § 527. These illegal schemes took place in the

2004 federal elections and, in the absence of any effective enforcement of the law by the Commission, are again taking place in the 2006 federal elections.

3. The Supreme Court in *McConnell* took specific note of “the hard lesson of circumvention” that is taught “by the entire history of campaign finance regulation.” 540 U.S. at 165. The deployment of “section 527 groups” as a new vehicle for using soft money to pay for partisan activities to influence federal elections is simply the latest chapter in the long history of efforts to evade and violate the federal campaign finance laws.

4. The Economic Freedom Fund and Majority Action are each registered with the IRS as a section 527 group and are each *not* registered with the Commission as a political committee. However, both groups are, in fact, federal political committees. Each group is an entity which, as a 527 group, has a “major purpose” to influence candidate elections, and more specifically, federal candidate elections, and which has spent significant amounts of funds to influence the 2006 congressional elections. These “political committees” are therefore required to register with the Commission under the federal campaign finance laws, and are subject to the federal contribution limits, source prohibitions and reporting requirements on the funds they receive. As a political committee, each of these groups may not receive more than \$5,000 per year from an individual donor, and may not receive any union or corporate treasury funds whatsoever. 2 U.S.C. § § 441a(a)(1)(C), 441b(a). These limits and prohibitions apply to all “political committees,” including those that engage in independent spending. 11 C.F.R. § 110.1(n). Furthermore, as political committees, each of these groups is required to file periodic reports with the Commission, disclosing all receipts and disbursements. 2 U.S.C. § 434.

5. The Supreme Court in *McConnell* took specific – and repeated – note of the central role of the Federal Election Commission in improperly creating the soft money loophole

that was used by federal candidates and political parties to circumvent the federal campaign finance laws. The massive flow of soft money through the political parties into federal elections was made possible by the Commission's allocation rules, which the Court described as "FEC regulations [that] permitted more than Congress, in enacting FECA, had ever intended." 540 U.S. at 142 n.44. Indeed, the Court noted that the existing Federal Election Campaign Act (FECA), which had been upheld in *Buckley*, "was *subverted* by the creation of the FEC's allocation regime" which allowed the parties "to use vast amounts of soft money in their efforts to elect federal candidates." *Id.* (emphasis added). The Court flatly stated that the Commission's rules "invited widespread circumvention" of the law. *Id.* at 145.

6. It is critically important that the Commission not repeat this history here. The Commission must ensure that it does not once again subvert and invite "widespread circumvention" of the law by licensing the spending of massive amounts of soft money to influence federal elections, this time through section 527 groups whose major, indeed overriding, purpose is to influence federal elections.

7. The Commission has the authority to take enforcement action based on a complaint where it finds reason to believe that a person "has committed, or is about to commit," a violation of the law. 2 U.S.C. §§ 437g(a)(2), 437g(a)(4)(A)(i), 437g(a)(6)(A); *see also* 11 C.F.R. § 111.4(a) ("Any person who believes that a violation...has occurred *or is about to occur* may file a complaint....") (emphasis added). Based on published reports, the named respondents here have committed violations of the law by raising and spending significant amounts of soft money — including large individual contributions — to influence the 2006 congressional elections. The respondents are doing so without registering as federal political committees and without complying with the rules applicable to such political committees. The Commission has

a responsibility and obligation to act expeditiously to prevent the violations of the law that are occurring and that are threatened by the widely publicized activities of these section 527 groups.

Economic Freedom Fund

8. Economic Freedom Fund (EFF) was established on August 1, 2006 as a “political organization” under section 527 of the Internal Revenue Code, 26 U.S.C. § 527.¹

9. EFF has made clear that its major purpose is to influence key races in the 2006 congressional elections and to defeat Democratic House members who are running for reelection.

10. The Form 8871 filed with the IRS lists Charles H. Bell, Jr. as the group’s treasurer and custodian of records. According to an article dated September 5, 2006 in *Roll Call*, Charles Bell is “the general counsel to the California Republican Party.”²

11. According to electioneering communication reports filed with the FEC, as of October 9, 2006, the EFF has raised at least \$5,050,225. Of this, \$5 million was donated by a single donor, Bob Perry.³

12. In 2004, Bob Perry made large contributions to 527 groups whose purpose was to defeat Democratic Presidential nominee John Kerry and to re-elect President Bush. According to an article dated September 15, 2006 that appeared in the *Charleston Gazette*, “In 2004, Perry gave \$4.45 million to Swift Boat Veterans and POWs for Truth to run television ads attacking

¹ A copy of its Form 8871, Notice of Section 527 Status, filed with the IRS, is attached as Exhibit A.

² L. Whittington, “New 527 Group Debuts Ad Attacking Mollohan,” *Roll Call* (September 5, 2006) (Exhibit B).

³ Copies of the FEC Form 9, 24 Hour Notices of Disbursements / Obligations for Electioneering Communications, filed with the FEC are attached as Exhibit C.

Kerry. Perry gave another \$3 million to Progress for America Voter Fund, another 527 group created in 2004 that raised \$38 million for President Bush's re-election campaign."⁴

13. According to electioneering communication reports filed with the FEC, as of October 9, 2006, EFF has made disbursements through October 9, 2006 of at least \$2,120,893.⁵

14. According to EFF's Web site, the group has funded eight direct mailings and four television ads explicitly referring to Representative Allan Mollohan (D-WV), who is running for re-election. The direct mailings and television ads attack Mollohan's congressional voting record and refer to published reports that he is under a federal investigation. The mailings charge, among other things, that "Allan Mollohan's vote is bad medicine for West Virginia seniors" and that "Allan Mollohan has betrayed West Virginia families."⁶

15. According to an *Associated Press* (AP) article dated September 14, 2006, "[t]he fund's West Virginia ads address recent allegations regarding Mollohan's ethics, citing news reports that he is the subject of a federal investigation into whether he steered government money to nonprofit groups that donated to his campaigns."⁷ The article also states, "One of the direct mailings paid for by the group accuses Mollohan of voting 'against additional protection for children from sexual predators,' which Mollohan's campaign denies."

⁴ P. Nyden, "Swift Boat Figure Attacks Mollohan," *The Charleston Gazette* (September 15, 2006) (Exhibit D).

⁵ See Exhibit C.

⁶ The direct mailings involving Representative Mollohan are attached as Exhibit E. For clips of the TV ads. See <http://www.economicfreedomfund.com/viewads.html>. (Last Accessed: 09/28/06)

⁷ B. Evans, "Former Swift Boat attack-ad backer takes on House Democrats," *Associated Press* (September 14, 2006) (Exhibit F).

16. According to EFF's Web site, the group has funded six direct mailings and four TV ads explicitly referring to Representative Jim Marshall (D-GA), who is running for re-election. The direct mailings and TV ads criticize Marshall's voting record on various issues.⁸

17. According to an article dated September 23, 2006 in the *Atlanta Constitution Journal*, "In one spot, Marshall is accused of talking like a conservative in Georgia and voting as a liberal in Washington. In another, his votes are compared to those of Sens. Ted Kennedy and Hillary Clinton and Rep. Cynthia McKinney, and his vote for Nancy Pelosi to be speaker of the House is highlighted."⁹

18. According to EFF's Web site, the group has funded six direct mailings and three television ads explicitly referring to Representative John Barrow (D-GA). One of the direct mailings states, "John Barrow's liberal votes do not represent Georgia values."¹⁰ The mailing also refers to Barrow as "Georgia's LEAST Effective Member of Congress."

19. According to the *Atlanta Constitution Journal* article, "In the TV spot in his race, Barrow is depicted as voting to benefit trial lawyers and against small businesses."¹¹

20. According to EFF's Web site, the group has funded seven direct mailings and three television ads explicitly referring to Representative Leonard Boswell (D-IA). The mailings

⁸ The direct mailings involving Representative Marshall are attached as Exhibit G. For clips of the TV ads, see <http://www.economicfreedomfund.com/viewads.html>. (Last Accessed: 09/28/06).

⁹ B. Dart, "Swift Boat ad bankroller targets 2 Ga. Democrats," *Atlanta Constitution Journal* (September 23, 2006) (Exhibit H).

¹⁰ The direct mailing involving Representative Barrow is attached as Exhibit I. For clips of the TV ads, see <http://www.economicfreedomfund.com/viewads.html> (Last Accessed: 09/28/06).

¹¹ See Exhibit H.

and ads attack Boswell's vote record on taxes, labeling Boswell "The Tax Man." One of the TV ad states "Leonard Boswell must believe he is better able to spend your money than you are."¹²

21. According to EFF's Web site the group has also funded a TV ad explicitly referring to Representative Darlene Hooley (D-OR). The ad states, "In Congress, Darlene Hooley voted repeatedly to raid the Social Security surplus and spend money on wasteful pork barrel projects, like that bridge to nowhere in Alaska. Even worse Hooley actually co-sponsored legislation which allows illegal aliens to be eligible for Social Security."¹³

22. In addition to direct mailings and TV ads, EFF has funded automated calls made to citizens in the State of Indiana. The phone calls attacked Democratic candidate Baron Hill in the 9th District congressional race.

23. After receiving citizen complaints regarding the calls, the state's Attorney General, Steve Carter, filed a lawsuit against EFF.¹⁴ Carter said EFF representatives agreed to stop the calls when his office contacted them. "They implicitly acknowledged they were making the calls," Carter, a Republican, said during a news conference to announce the lawsuit.¹⁵

24. Following the lawsuit by the Attorney General, the company employed by EFF to do the automated calls — called FreeEats.com, Inc. — filed a lawsuit against the State of Indiana and Indiana's Attorney General. In its court filings, FreeEats.com explicitly stated that phone calls made on behalf of EFF were political calls, whose purpose is to influence the November

¹² The direct mailings involving Representative Boswell are attached as Exhibit J. For a clip of the TV ad, see <http://www.economicfreedomfund.com/viewads.html>. (Last Accessed: 09/28/06).

¹³ For a clip of the TV ad, see <http://www.economicfreedomfund.com/viewads.html> (Last Accessed: 10/10/06)

¹⁴ "Indiana sues California group over automated calls," *Associated Press* (September 18, 2006) (Exhibit K).

¹⁵ *Id.*

2006 congressional elections. According to the complaint filed by FreeEats.com, “[t]he company has been active in many political campaigns and initiatives, on behalf of candidates or of groups that support candidates, *including the making of interstate calls into Indiana in support of congressional candidates in that state for the election year 2006.*”¹⁶ FreeEats.com states in the complaint that the State of Indiana filed a lawsuit “against the Economic Freedom Fund *related to calls made by plaintiff on the Economic Freedom Fund’s behalf for interstate calls that are entirely political in nature.*”¹⁷

Majority Action

25. Majority Action was established on July 12, 2005 as a “political organization” under section 527 of the Internal Revenue Code, 26 U.S.C. § 527.¹⁸

26. Majority Action has made clear that its major purpose is to influence the 2006 congressional elections and support Democratic candidates.

27. According to a press release issued by the group, “Majority Action is an independent organization focused on exposing the record of the current Republican Congress and on promoting a progressive Democratic agenda in the U.S. House of Representatives.”¹⁹ The press release notes that “Majority Action is led by veteran Democratic campaign operatives and has a leadership board that consists of prominent political figures, including several former

¹⁶ FreeEats.com, Inc. v. State of Indiana, 1:06-cv-1403-LJM-WTL, Complaint For Declaratory and Injunctive Relief at 4, (U.S. Dist. Ct. S.D. Ind. September 21, 2006) (Exhibit L) (emphasis added).

¹⁷ Exhibit L at 10 (emphasis added).

¹⁸ A copy of its Form 8871, Notice of Section 527 Status, filed with the IRS, is attached as Exhibit M.

¹⁹ The press release is attached as Exhibit N.

Members of Congress, two former Democratic National Committee Chairmen and two former DCCC Chairmen.”

28. According to Majority Action’s Web site, “In 2006, Majority Action’s objective will be to shine the spotlight on 10-15 key Republican members of Congress, through aggressive advocacy campaigns aimed at educating and informing the public about these members’ voting records, issue positions and ethical behavior.”²⁰

29. According to an article dated June 5, 2006 in *Roll Call*, Majority Action was formed by “Democratic operatives and party leaders.”²¹ The *Roll Call* article states that the Majority Action staff includes “Donnie Fowler, son of former DNC Chairman Don Fowler and an innovator in party efforts to use technology to make electoral gains, and Amanda Crumley, who has worked on three presidential campaigns and served as communications director to Iowa Gov. Tom Vilsack (D), a possible 2008 presidential candidate.”²²

30. According to the *Roll Call* article, “The group’s leadership board includes two former DCCC chairmen, former Reps. Tony Coelho (D-Calif.) and Martin Frost (D-Texas); ex-Reps. Buddy Darden (D-Ga.), Tom Downey (D-N.Y.), Cleo Fields (D-La.), Liz Patterson (D-S.C.) and Lynn Schenk (D-Calif.); the elder Fowler and fellow former DNC Chairman Joe Andrew; and Harold Ickes, the consigliere to Sen. Hillary Rodham Clinton (D-N.Y.).”²³

²⁰ See http://www.majorityaction.net/about_us (Last Accessed: 09/28/06).

²¹ J.Kurtz, “Democrats Form New 527 to Win Back House,” *Roll Call* (June 5, 2006) (Exhibit O).

²² *Id.*

²³ *Id.*

31. The *Roll Call* article states that Majority Action “intends to target ‘eight to 12 to 15’ vulnerable House Republicans this fall, primarily through TV and radio ads,” according to its executive director.²⁴

32. An article in the *Washington Post* dated September 7, 2006 states that “the goal of Majority Action, according to co-chairman Joe Andrew, is to level the financial playing field in Republican-held seats where a potential national wave could wipe out a number of incumbents.”²⁵ Joe Andrew is a former national Chairman of the Democratic National Committee.

33. According to the *Post* article, “Majority Action’s founders have insisted the organization will succeed where other outside groups — which can accept contributions of unlimited size — targeting House and Senate races have failed because of the high-profile figures aligned with the effort and the amount of attention being paid to the fight for control of this cycle.”²⁶

34. The *Post* article also stated, “Andrew said Majority Action has a ‘seven-figure’ budget—between \$8 million and \$10 million, an informed source said—and was spending in the ‘six figures’ in individual House districts.”²⁷

35. According to Forms 8872 filed with the IRS and electioneering communication reports filed with the FEC, as of October 6, 2006, the group has raised at least \$1,382,250 and has made disbursements of at least \$384,816. Contributions to the group range from \$10,000 to

²⁴ *Id.*

²⁵ C. Cilizza, “New Group is Racing to Slow Down GOP,” *The Washington Post* (September 7, 2006) (Exhibit P).

²⁶ *Id.*

²⁷ *Id.*

\$500,000. According to Form 8872 reports filed with the IRS and Form 9 reports filed with the FEC, the group has received contributions of \$500,000 from Adam Rove, \$170,000 from George Soros, \$100,000 from John Hunting, \$100,000 from Linda Pritzger, \$50,000 from the American Federation of Teachers and \$150,000 from SEIU entities.²⁸

36. According to Majority Action's Web site, the group has funded two television ads and one radio ad explicitly referring to Representative James Walsh (R-NY), who is running for re-election.²⁹

37. A press release by Majority Action stated that the radio ad "criticiz[ed] Congressman James Walsh (NY-25) for his record of supporting \$23,000 in Congressional pay raises while voting multiple times against increasing the minimum wage and making false claims during a radio call-in show."³⁰

38. According to other press releases by Majority Action, one television ad "criticiz[ed] Rep. James Walsh (NY-25) for his open-ended support for President Bush's war in Iraq" and the other "criticiz[ed] Congressman James Walsh (NY-25) for taking campaign contributions from big oil and voting to give them tax breaks as well as his vote to raise his own pay while voting repeatedly against raising the minimum wage."³¹

39. Majority Action has also funded two more television ads; one explicitly referring to Representative Deborah Pryce (R-OH) and one explicitly referring to Representative Dave Reichert (R-WA), both of whom are running for re-election.

²⁸ Forms 8872 filed with the IRS and electioneering communication reports filed with the FEC are attached as Exhibit Q.

²⁹ See <http://www.majorityaction.net> (Last Accessed: 09/28/06).

³⁰ The press release is attached as Exhibit R.

³¹ The press releases are attached as Exhibit S.

40. According to a Majority Action press release, the ad involving Representative Pryce, “criticiz[ed] Deborah Pryce (OH-15) for her record on congressional travel and votes to weaken ethics rules in the House.”³²

41. The ad involving Representative Reichert, a Majority Action press release stated, “criticiz[ed] Congressman Dave Reichert (WA-8) for his open-ended support for President Bush’s war in Iraq and failure to implement recommendations of the 9-11 Commission”³³

42. According to Majority Action’s Web site, the group has also funded radio and Internet ads explicitly referring to House Speaker Dennis Hastert (R-IL) and Representatives Thomas Reynolds (R-NY) and Deborah Pryce (R-OH).

43. According to a press release by Majority Action, the group’s ad “turned a bright spotlight on three Republican Members of Congress who turned a blind eye to Rep. Foley’s inappropriate relationships with boys who were House Pages.”³⁴

44. The press release stated, “Majority Action wants the public to know that Rep. Hastert, Rep. Reynolds and Rep. Pryce failed to use their top leadership posts in the House to immediately protect children. Even worse, they took money from Foley.”³⁵

45. According to Majority Action’s Web site the group has also funded ads explicitly referring to Representatives James Walsh (R-NY), Chris Chocola (R-IN), Thelma Drake (R-VA) and Don Sherwood (R-PA).

³² See Exhibit S.

³³ *Id.*

³⁴ The press release is attached as Exhibit T.

³⁵ *Id.*

46. According to a Majority Action press release, the ads “turn a powerful spotlight on four Republican Members of Congress who voted against federal funding for stem cell research.”³⁶

47. The press release stated, “This ad, in very powerful terms, lays out what is at stake in the stem cell debate. Majority Action wants the public to know that these four Members of Congress do not believe that doctors and scientists should be able to carry out critical research and do not support critical federal funding of stem cell research.”³⁷

**Violation of Law
(Political Committee Status)³⁸**

48. EFF and Majority Action are each “political committees” under the federal campaign finance law. Each is an entity which (1) has a “major purpose” to influence candidate elections, and in particular, federal candidate elections, and (2) has received contributions or made expenditures of more than \$1,000 in a calendar year. Because each respondent meets both parts of this test, it is a federal “political committee,” and is accordingly subject to the contribution limits, source prohibitions and reporting requirements that apply to all federal political committees. Because each respondent has not complied with these rules applicable to federal political committees, each has been, and continues to be, in violation of the law.

49. Section 431(4) of Title 2 defines the term “political committee” to mean “any committee, club, association or other group of persons which receives contributions aggregating

³⁶ The press release is attached as Exhibit U.

³⁷ *Id.*

³⁸ This count sets forth a violation that is substantively identical as a matter of law to allegations made in four complaints previously filed by the same complainants against the Media Fund (complaint filed January 15, 2004) against Progress for America-Voter Fund (complaint filed July 21, 2004), against Swift Boat Veterans for Truth (complaint filed August 10, 2004), and against Texans for Truth (complaint filed September 24, 2004), four similarly situated section 527 groups.

in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year.” 2 U.S.C. § 431(4); *see also* 11 C.F.R. § 100.5(a). A “contribution,” in turn, is defined as “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office....” 2 U.S.C. § 431(8)(A). Similarly, an “expenditure” is defined 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....” 2 U.S.C. § 431(9)(A).

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

51. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court construed the term “political committee” to “only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.” 424 U.S. at 79 (emphasis added). Again, in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), the Court invoked the “major purpose” test and noted that if a group’s independent spending activities “become so extensive that the organization’s major purpose may be regarded as campaign activity, the corporation would be classified as a political committee.” 479 U.S. at 262 (emphasis added). In that instance, the Court continued, it would become subject to the “obligations and restrictions applicable to those groups whose primary objective is to influence

political campaigns.” *Id.* (emphasis added). The Court in *McConnell* restated the “major purpose” test for political committee status as iterated in *Buckley*. 540 U.S. at 170 n.64.

52. In *FEC v. GOPAC*, 917 F.Supp. 851 (D.D.C. 1996), a single federal district court further narrowed the “major purpose” test to encompass not just the nomination or election of any candidate, but only “the nomination or election of a particular candidate or candidates for federal office.” 917 F.Supp. at 859. Thus, the court said that “an organization is a ‘political committee’ under the Act if it received and/or expended \$1,000 or more and had as its major purpose the election of a particular candidate or candidates for federal office.” *Id.* at 862. The court further said that an organization’s purpose “may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates.” *Id.*

53. For the reasons set forth above, there is a two prong test for “political committee” status under the federal campaign finance laws: (1) whether an entity or other group of persons has a “major purpose” of influencing the “nomination or election of a candidate,” as stated by *Buckley*, or of influencing the “election of a particular candidate or candidates for federal office,” as stated by *GOPAC*, and if so, (2) whether the entity or other group of persons receives “contributions” or makes “expenditures” of at least \$1,000 or more in a calendar year.

54. Prong 1: The “major purpose” test. EFF and Majority Action each have a “major purpose” of influencing the election of a candidate, under *Buckley*, or of a “particular candidate or candidates for federal office,” under *GOPAC*. Each respondent thus meets the first prong of the test for “political committee” status, under either *Buckley* or *GOPAC*.

55. First, each respondent is organized under section 527 of the Internal Revenue Code, 26 U.S.C. § 527, and is thus by definition a “political organization” that is operated

“primarily” for the purpose of influencing candidate elections. Section 527 of the IRC provides tax exempt treatment for “exempt function” income received by any “political organization.” The statute defines “political organization” to mean a “party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.” 26 U.S.C. § 527(e)(1) (emphasis added). An “exempt function” is defined to mean the “function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors....” 26 U.S.C. § 527(e)(2) (emphasis added). The Supreme Court said in *McConnell*, “Section 527 ‘political organizations’ are, unlike § 501(c) groups, organized for the express purpose of engaging in partisan political activity.” 540 U.S. at 174 n.67. The Court noted that 527 groups “by definition engage in partisan political activity.” *Id.* at 177. A “political organization” as defined in section 527 must register as such with the Secretary of the Treasury, and must file periodic disclosure reports with the Secretary as required by section 527(j). Each respondent has registered as a “political organization” under section 527.

56. Thus, by definition, any entity that registers with the Secretary as a “political organization” under section 527 is “organized and operated primarily” for the purpose of “influencing or attempting to influence the selection, nomination, election or appointment of” an individual to public office. The Commission has cited the section 527 standard as identical to the “major purpose” prong of the test for “political committee” status. *See e.g.*, Advisory Opinions 1996-13, 1996-3, 1995-11. Accordingly, any group that chooses to register as a “section 527 group” – including each respondent here – is, by definition, an entity “the major

purpose of which is the nomination or election of a candidate...”³⁹ Under the “major purpose” standard set forth in *Buckley*, this is sufficient to meet the first prong of the “political committee” test.

57. Even if that standard is further narrowed by *GOPAC*, each respondent here has a “major purpose” of influencing the nomination or election of a “particular candidate or candidates for federal office....” 917 F. Supp. at 859. Each respondent is spending significant amounts on broadcast ads and mailings that expressly refer to, and attack or oppose, various candidates for Congress in the 2006 congressional elections. Thus, each respondent has a “major purpose” to support or oppose particular federal candidates, thus meeting even the most narrow definition under *GOPAC* of the first prong of the test for “political committee.”

58. Prong 2: “Expenditures” of \$1,000. The second prong of the definition of “political committee” is met if an entity which meets the “major purpose” test also receives “contributions” or makes “expenditures” aggregating in excess of \$1,000 in a calendar year. Both “contributions” and “expenditures” are defined to mean funds received or disbursements made “for the purpose of influencing” any federal election. 2 U.S.C. § 431(8), (9).

59. This second prong test – whether a group has made \$1,000 in “expenditures” – is not limited by the “express advocacy” standard when applied to a section 527 group, such as the respondents here. Rather, the test for “expenditure” in this case is the statutory standard of whether disbursements have been made “for the purpose of influencing” any federal election, regardless of whether the disbursements were for any “express advocacy” communication. The Supreme Court made clear in *Buckley* that the “express advocacy” standard does not apply to an entity, like a section 527 group, which has a major purpose to influence candidate elections and

³⁹ This would be true in all instances other than a 527 organization which is devoted to influencing the nomination or appointment of individuals to appointive office such as, *e.g.*, a judicial appointment, but this exception does not apply to the respondents here.

is thus not subject to concerns of vagueness in drawing a line between issue discussion and electioneering activities. Groups such as section 527 “political organizations” are formed for the principal purpose of influencing candidate elections and, as explained by the Court in *Buckley*, their expenditures “can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.” 424 U.S. at 79. The Court affirmed this position in *McConnell*. 540 U.S. at 170, n.64. Thus, the “express advocacy” test, which the Supreme Court in *McConnell* deemed to be “functionally meaningless,” 540 U.S. at 217, is not relevant to the question of whether a section 527 organization is making expenditures to influence the election of federal candidates.

60. Each respondent here has made “expenditures” in amounts far in excess of the \$1,000 threshold of the second prong of the test for “political committee” status. These expenditures have been and will be made for broadcast advertisements and mailings that attack or oppose congressional candidates in the 2006 mid-term elections. These disbursements have been “for the purpose of influencing” federal elections, and thus constitute “expenditures” under the law.

61. Ads run by a section 527 “political organization” that promote, support, attack or oppose federal candidates are clearly for the purpose of influencing a federal election, even if such ads do not contain “express advocacy” or are not “electioneering communications,” as defined in 2 U.S.C. § 434(f)(3)(A)(i). Because the “express advocacy” test does not apply to section 527 groups, and thus does not limit the statutory definition of “expenditures” made by such groups, the funds spent by each respondent here to attack or oppose candidates for Congress in the 2006 election, are “expenditures.” They are being made “for the purpose of influencing” the 2006 congressional elections.

62. Alternatively, even if the Commission were to incorrectly decide that the “express advocacy” test does apply to section 527 groups, the ads run by the respondents here meet that test as well under the Commission’s existing regulations. The Commission regulations define “express advocacy” to include a communication that “when taken as a whole and with limited reference to external events...could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more candidates because the electoral portion of the communication is unmistakable, unambiguous and suggestive of only one meaning and reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidates or encourages some other kind of action.” 11 C.F.R. § 100.21(b). The ads run by the respondents, when taken as a whole, can only be interpreted by a reasonable person as opposing the election of particular candidates for Congress, and thus meet the Commission’s existing regulatory definition of “express advocacy.” Thus, the ads by the respondents here contain “express advocacy” and therefore constitute “expenditures.”

63. Each respondent to date has not registered with the Commission as a federal political committee. It is presumably intending to make all of its disbursements regarding federal candidates from an account that does not comply with federal contribution limits, source prohibitions and reporting requirements.

64. In sum, each respondent has a “major purpose” to support or oppose the election of one or more particular federal candidates, and it has spent far in excess of the statutory \$1,000 threshold amount on “expenditures” for this purpose. The Commission accordingly should find that each respondent is a “political committee” under the Act. None of the respondents has filed a statement of organization as a political committee, as required by 2 U.S.C. § 432, none has complied with reporting requirements of 2 U.S.C. § 434, and none has complied with the

contribution limits and source prohibitions of 2 U.S.C. §§ 441a and 441b. The Commission should accordingly find each respondent in violation of all of these provisions of law.

Disclosure

65. Because of the violations of law set forth above, the Commission and the public, including the complainants, are not receiving full and accurate public disclosure of the funds raised and spent by each respondent, as required by FECA. Because each respondent is a political committee, the funds received by each respondent are “contributions” subject to the mandatory federal reporting requirements of FECA and are required to be fully disclosed to the Commission and to the public, 2 U.S.C. § 434, including complainants. The donations received by each respondent, as a section 527 group which is not reporting to the Commission as a federal political committee, are subject only to reporting to the Internal Revenue Service under 26 U.S.C. § 527 and such disclosure may be avoided altogether if the recipient chooses to pay income tax on the donation. Further, section 527, unlike the FECA requirements applicable to political committees, does not require the reporting of the aggregate amount of unitemized contributions received by the group, so there is no basis to determine the total aggregate amount raised by such a section 527 group. Thus, to the extent that each respondent is wrongly treating contributions required to be reported under FECA instead as donations to a section 527 account, the public, including complainants, and the Commission have no assurance that all contributions required to be disclosed under FECA are properly being disclosed, or that the total amount of contributions to each respondent is being disclosed.

Prayer for Relief

66. Wherefore, the Commission should conduct an immediate investigation under 2 U.S.C. §437g, should determine that EFF and Majority Action have each violated 2 U.S.C. §§

432, 434, 441a and 441b(a), and 11 C.F.R. § 114.4, should impose appropriate sanctions for such violations, should enjoin the each respondent from all such violations in the future, and should impose such additional remedies as are necessary and appropriate to ensure compliance with FECA and BCRA.

October 12, 2006

Respectfully submitted,

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Verification

The complainants listed below hereby verify that the statements made in the attached Complaint are, upon their information and belief, true.

Sworn to pursuant to 18 U.S.C. § 1001.

For Complainant Democracy 21

Fred Wertheimer

Sworn to and subscribed before me this ____ day of October, 2006.

Notary Public

For Complainant Campaign Legal Center

J. Gerald Hebert

Sworn to and subscribed before me this ____ day of October, 2006.

Notary Public