BEFORE THE
FEDERAL ELECTION COMMISSION

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v. MUR No. _____

Swift Boat Veterans for Truth
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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 relevant provisions of BCRA were upheld by the Supreme Court in *McConnell v. FEC,* 540 U.S. 39, 124 S.Ct. 619 (2003).

2. Since the enactment of the BCRA, a number of political and party operatives have been engaged in illegal new schemes to use soft money to influence the 2004 presidential and congressional elections. These schemes, for the most part, involve 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 – as vehicles to raise and spend soft money to influence the 2004 federal elections.

3. These schemes to inject soft money into the 2004 federal elections are illegal. 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." 124 S.Ct. at 673. The deployment of "section 527 groups" as the new vehicle for using soft money to conduct 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. Swift Boat Veterans for Truth (SBVT) is registered with the IRS as a section 527 group but is not registered with the Commission as a political committee. However, SBVT is, in fact, a federal political committee. SBVT is an entity which, as a 527 group, has a "major purpose," indeed an overriding purpose, to influence candidate elections, and more specifically, federal candidate elections, and which has spent, or is planning to spend, significant amounts of funds to influence the 2004 presidential election. This "political committee" is therefore required to register with the Commission under the federal campaign finance laws, and is subject to the federal contribution limits and source prohibitions on the funds it receives. As a political committee, SBVT 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).

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 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." 124 S.Ct. at 660, 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.* at 660 (emphasis added). The Court flatly stated that the Commission's rules "invited widespread circumvention" of the law. *Id.* at 661.

6. It is critically important that the Commission not repeat this history here. The Commission must ensure that it does not once again invite "widespread circumvention" of the law by licensing the injection of massive amounts of soft money into federal campaigns, 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 SBVT has either committed or is "about to commit" violations of the law by raising and spending significant amounts of soft money – including large individual contributions – to influence the 2004 presidential elections. The respondent is doing so without registering as a federal political committee and without complying with the rules applicable to such political

committees. It is critical that the Commission act effectively and expeditiously to prevent the violations of the law threatened by the widely publicized activities of this section 527 group.

Swift Boat Veterans for Truth

8. Swift Boat Veterans for Truth (SBVT) was established on April 23, 2004 as a "political organization" under section 527 of the Internal Revenue Code, 26 U.S.C. § 527.[1] Although it describes itself as a "Special Purpose Political Action Committee," SBVT has not registered as a "political committee" with the FEC.

9. SBVT has made clear that its major, indeed overriding, purpose is to influence the 2004 presidential election and defeat the Democratic nominee for President, Senator John Kerry.

10. A press release announcing the formation of SBVT said the organization "has been formed in order to bring the truth about Kerry to the American people." The organization states that it "intends to discuss Kerry's war crimes charges, Kerry's record and to request that Kerry authorize the Department of Defense to release the originals and the complete files relating to his military service and medical military records."[2]

11. SBVT has begun airing a 60-second television ad in three presidential "battleground" states, Ohio, West Virginia and Wisconsin, "as part of a multimedia effort to discredit Kerry's wartime record, a cornerstone of the Democratic campaign."[3] According to a report in *The New York Times,* the ad "attacks Senator John Kerry, accusing him of lying about his war record, including the circumstances surrounding his medals, and betraying his

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

[2] This press release is attached as Exhibit B.

[3] M. LaGanga, "Veterans Attack Kerry on Medals, War Record," *The Los Angeles Times* (August 5, 2004) (Exhibit C).

comrades by later opposing the war."[4] The ad attacks Senator Kerry, and quotes Vietnam veterans who say, *e.g.,* "John Kerry is no war hero," and "John Kerry cannot be trusted." A copy of the entire text of the ad is attached as Exhibit E.

12. According to the Form 8872 filed with the IRS by SBVT, the group raised $158,750 in the quarter ending June 30, 2004.[5] Of this, $100,000 was contributed by a single donor, Bob Perry, who *The New York Times* identifies as "a Houston developer and major contributor to Republican campaigns."[6] A report in *The Los Angeles Times* states that Perry "has helped bankroll the widespread success of Republican candidates [in Texas], has long-standing ties to many close associates of President Bush and has contributed to Bush's last four campaigns."[7] According to *The New York Times,* a spokesman for SBVT said the group intends to spend $500,000 to run the advertisement attacking Senator Kerry's war record.

13. A member of SBVT, Andy Horne, appeared on CNN on August 6, 2004 and was asked by news anchor Heidi Collins about the purpose of SBVT:

> Collins: Sir, is [the ad] not produced and made to influence the presidential election this November?
>
> Horne: Yes, of course.
>
> Collins: Is it not a campaign ad, then?
>
> Horne: Well, I'm not going to quibble with you on that.[8]

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[4] J. Wilgoren, "Vietnam Veterans Buy Ads to Attack Kerry," *The New York Times* (Aug. 5, 2004)(Exhibit D).

[5] A copy of the Form 8872 second quarter 2004 disclosure filed with the IRS is attached as Exhibits F.

[6] Wilgoren, *supra.*

[7] S. Gold, "Top Texas Donor's Influence Far More Visible Than He Is," *The Los Angeles Times* (August, 8, 2004) (Exhibit G).

[8] *See* transcript at http://www.cnn.com/TRANSCRIPTS/0408/06/pzn.00.html (Exhibit H)

In addition, in an article in the *Fort Wayne Journal Gazette* dated August 5, 2004, one of the founders of SBVT, Rear Admiral Roy Hoffman, "said he began organizing the anti-Kerry group in March, when it became clear Kerry would be the Democratic presidential nominee."[9]

Violation of Law
(Political Committee Status)[10]

14. SBVT is a "political committee" under the federal campaign finance law. It 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 SBVT 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 it has not complied with these rules applicable to federal political committees, it has been, and continues to be, in violation of the law.

15. Section 431(4) of Title 2 defines the term "political committee" to mean "any committee, club, association or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4); *see also* 11 C.F.R. § 100.5(a). 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

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[9] Scripts Howard News Service, "Some vets challenge Kerry's medals," *Fort Wayne Journal Gazette* (August 5, 2004). (Exhibit I)

[10] This count sets forth a violation that is substantively identical as a matter of law to allegations made in two complaints previously filed by the same complainants against the Media Fund (complaint filed January 15, 2004) and against Progress for America-Voter Fund (complaint filed July 21, 2004), two similarly situated section 527 groups.

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).

16. 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).

17. 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*. 124 S.Ct. at 675, n.64.

18. 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.*

19. It is the view of complainants that the district court in *GOPAC* misinterpreted the law and incorrectly narrowed the test for a "political committee" as set forth by the Supreme Court in *Buckley,* and that the Commission should have appealed the district court decision in *GOPAC.* Nonetheless, even under the approach adopted in *GOPAC,* the respondent here is a "political committee" and is required to file as such under federal law.

20. 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.

21. Prong 1: The "major purpose" test. SBVT has a "major purpose" of influencing the election of a candidate, under *Buckley,* or of a "particular candidate or

candidates for federal office," under *GOPAC*. SBVT thus meets the first prong of the test for "political committee" status, under either *Buckley* or *GOPAC*.

22. First, SBVT 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." 124 S.Ct. at 678, n.67. The Court noted that 527 groups "by definition engage in partisan political activity." *Id.* at 679. 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). SBVT has registered as a "political organization" under section 527.

23. 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 frequently 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 SBVT -- is by definition an entity "the major purpose of which is the nomination or election of a candidate…"[11] Under the "major purpose" standard set forth in *Buckley*, this is sufficient to meet the first prong of the "political committee" test.

24. But even if that standard is further narrowed by *GOPAC,* the respondent here, SBVT, has a "major purpose" of influencing the nomination or election of a "particular candidate or candidates for federal office…" 917 F.Supp. at 859. SBVT has made clear that it intends to spend significant amounts on broadcast ads that will expressly refer to, and attack or oppose, Senator Kerry. Thus, SBVT has a "major purpose" to support or oppose particular federal candidates, thus meeting even the most rigorous definition under *GOPAC* of the first prong of the test for "political committee."

25. 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).

26. This second prong test of 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 SBVT. 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

[11] 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 SBVT.

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 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.* 124 S.Ct. at 675, n.64. Thus, the "express advocacy" test, which the Supreme Court deemed to be "functionally meaningless," 124 S.Ct. at 703, is not relevant to the question of whether a section 527 organization is spending money to influence the election of federal candidates.

27. SBVT 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 made for broadcast advertisements that attack or oppose Senator Kerry. These disbursements have been "for the purpose of influencing" federal elections, and thus constitute "expenditures" under the law.

28. 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 SBVT to attack or oppose Senator Kerry, are "expenditures." They are being made "for the purpose of influencing" the 2004 presidential elections.

29. Alternatively, even if the Commission incorrectly decides that the "express advocacy" test does apply to section 527 groups, the ads run by SBVT meet that test as well. The Commission's existing 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 SBVT, when taken as a whole, can only be interpreted by a reasonable person as opposing the election of Senator Kerry for President, and thus meet the Commission's existing regulatory definition of "express advocacy." Thus, the ads by SBVT contain "express advocacy" and therefore constitute "expenditures."

30. SBVT 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 which does not comply with federal contribution limits, source prohibitions and reporting requirements.

31. In sum, SBVT 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 SBVT is a "political committee" under the Act. SBVT has not filed a statement of

organization as a political committee, as required by 2 U.S.C. § 432, and has not complied or does not intend to comply with reporting requirements of 2 U.S.C. § 434, and has not complied with, and does not intend to comply with, the contribution limits and source prohibitions of 2 U.S.C. §§ 441a and 441b. The Commission should accordingly find SBVT in violation of all of these provisions of law.

Disclosure

32. 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 SBVT, as required by FECA. Because it is a political committee, the funds received by SBVT 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 SBVT 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 SBVT 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 SBVT is being disclosed.

Prayer for Relief

33. Wherefore, the Commission should conduct an immediate investigation under 2 U.S.C. §437g, should determine that SBVT has violated or is about to violate 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 SBVT 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.

Respectfully submitted,

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Counsel for Democracy 21

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 August, 2004

_____
Notary Public

For Complainant Campaign Legal Center

_____
J. Gerald Hebert

Sworn to and subscribed before me this ___ day of August, 2004

_____
Notary Public

For Complainant Center for Responsive Politics

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Steven Weiss

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