FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

In the Matter of	)	
The November Fund and	)	
Bill Sittman in his official capacity as treasurer;	)	MUR 5541
U.S. Chamber of Commerce and	)	
Tom Donahue in his official capacity as treasurer	)	

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STATEMENT OF REASONS OF
Vice Chairman MATTHEW S. PETERSEN and COMMISSIONERS CAROLINE C. HUNTER and DONALD F. MCGAHN

The central issue in this matter is whether The November Fund is a "political committee" under the Federal Election Campaign Act of 1971, as amended, ("the Act"), due to certain activity it undertook during 2004. The November Fund is an independent group that had registered with the Internal Revenue Service as a so-called 527 group. After reviewing the exhaustive record (assembled after a lengthy investigation), we, in the words of Chief Justice Roberts, said "enough is enough,"[1] and voted to take no further action and close the file in this matter.[2]

Contrary to any overly simplistic allegation that we have chosen to "not enforce the law," we were unable to divine a coherent and sound legal theory upon which to impose the limitations of "political committee" status upon The November Fund, and thus declare a violation of "the law" by the respondents because, *inter alia*:

- The factual record does not support the imposition of "political committee" status on The November Fund. First, The November Fund's August 16, 2004 request to the U.S. Chamber of Commerce for funds did not even reference a Federal election, let alone a Federal candidate. Second, The November Fund's public communications did not contain express advocacy or its functional equivalent and were not "expenditures." In fact, almost two-thirds of its funds were spent on overhead and on advertising that did not reference a Federal candidate; the remaining funds were spent on what all concede was independent issue advocacy.

- This matter is distinguishable from past actions against 527 groups under the Commission's so-called "case-by-case" approach.[3] It should come as no surprise that in

[1] *FEC v. Wisconsin Right to Life* ("*WRTL*"), 127 S. Ct. 2652, 2672 (2007) (opinion of Roberts, C. J.).
[2] *See* MUR 5541, Certification dated October 22, 2008.
[3] *See Shays v. FEC*, 511 F. Supp.2d 19, 29 (D.D.C. 2007) (in an action brought to compel Commission to issue regulations concerning the applicability of campaign finance laws to so-called "527 groups," the court held that,

adopting such an approach, the Commission would eventually confront a set of facts that did not support the imposition of political committee status. After all, the Commission long ago rejected the notion that all 527s are, as a matter of law, political committees. Moreover, the treatment of the respondents in this matter is inconsistent with how the Commission treats other similarly situated respondents. For example, this is the only matter where the Commission found reason to believe that a donor to a so-called 527 group violated the Act.

- There was no prior notice to respondents that their conduct could result in the imposition of "political committee" status; one court case that concerned disclaimers cannot serve as the basis to impose "political committee" status on these respondents.

- This case concerns constitutionally-protected political speech. The theories advanced in support of enforcement failed to fully incorporate important principles in recent judicial decisions that should assist the Commission in its thinking on this issue, including the Government's losses before the U.S. Supreme Court in *FEC v. Wisconsin Right to Life*[4] and *FEC v. Davis*,[5] and the Fourth Circuit's persuasive decision in *North Carolina Right To Life, Inc. v. Leake*.[6]

- Ultimately, the theory presented in support of further enforcement rested on circular logic: The November Fund is a "political committee" because it received "contributions," and the money received constituted "contributions" because it went to a "political committee."

We declined the invitation to engage in after-the-fact freelancing by creating a legal theory that would ensnare The November Fund. We do not view *Buckley* and its progeny as inconveniences to be overcome, nor do we view the First Amendment as a "loophole" to be sewn shut by stricter regulation of our participatory democracy. Instead, the analysis in this, and any other matter in this area, both begins and ends with the First Amendment,[7] which is the written embodiment of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[8]

Moreover, using enforcement as a vehicle for establishing new legal precedent while aware that the novel underlying theory is highly questionable creates unnecessary constitutional doubt regarding the Commission's posture. Enforcement strategies of this type are inappropriate in any context because they can quickly devolve into intimidation tactics – or at least appear as

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"[p]utting aside the FEC's unpersuasive arguments," the revised explanation for the Commission's "case-by-case" approach in lieu of rulemaking was sufficient under the Administrative Procedure Act).

[4] 127 S. Ct. 2652. Simply because *WRTL* can be seen as a corporate-source case, as opposed to one addressing the spending of individuals' funds, does not mean it is inapposite to the political committee status analysis or the definition of express advocacy.

[5] 128 S.Ct. 2759 (2008).

[6] 525 F.3d 274 (4th Cir. 2008) ("*NCRTL II*").

[7] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech*, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I (emphasis added).

[8] *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

such. But they are particularly problematic in matters involving persons and entities who are attempting to exercise their constitutional right to free speech – especially when such efforts involve criticizing or educating the public as to the policies of the Government and its current or former officials, and those who seek to serve in the Government.[9] As the Supreme Court has made clear, campaign finance regulation must "avoid problems of vagueness and overbreadth."[10] To continue to use the power of the Government to pursue The November Fund and others in this matter violates that directive.

I. BACKGROUND

This matter arose from a complaint filed by Citizens for Responsibility and Ethics in Washington ("CREW") alleging (1) The November Fund and its treasurer violated the Act by failing to register and report as a "political committee"; (2) the U.S. Chamber of Commerce ("the Chamber") and its president violated the Act by making corporate expenditures to influence a federal election; (3) The November Fund violated the Act by paying for electioneering communications with funds from sources prohibited under the Act; and (4) The November Fund violated the Act by making coordinated expenditures that resulted in in-kind contributions to, and that were improperly accepted by, the Bush-Cheney '04 campaign and its campaign manager.

The November Fund is an unincorporated association that is exempt from taxation as a political organization under section 527 of the Internal Revenue Code. As stated on its website, "The November Fund is dedicated to telling America the truth about trial lawyers, their efforts to stop legal reform, and the impact of the trial-lawyer lobby in Washington, D.C." According to the Form 8871 it filed with the Internal Revenue Service, The November Fund's purpose was "[t]o engage in political activities that educate the general public regarding the public policy positions of candidates for federal, state, and local office and mobilize voters in compliance with federal and state laws."

The complaint in this matter was filed shortly after The November Fund was established. Long on rhetoric but short on facts, the allegations were at best speculative, hypothesizing about what The November Fund "plan[ned]" to do. In fact, the complaint did not even allege that The November Fund engaged in communications that contained express advocacy – which, as discussed below, is the touchstone of the appropriate analysis when ascertaining whether or not an entity such as The November Fund is a "political committee" under the Act. Instead, taking matters into its own hands, the complainant leap-frogged over any mention of express advocacy, and claimed that The November Fund is a "political committee" because it "has as a 'major purpose' the intent to influence a federal election and it ha[d] received contributions or made expenditures of over $1,000 in a calendar year."

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[9] The "opportunity for free political discussion" is vital to assuring "that government may be responsive to the will of the people and that changes may be obtained by lawful means." *Stromberg v. California*, 283 U.S. 359, 369 (1931).

[10] *McConnell v. FEC*, 124 S. Ct. 619, 688 (2003). As the Sixth Circuit has since explained, *McConnell* "left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and overbreadth." *Anderson v. Spear*, 356 F.3d 651, 664-65 (6th Cir. 2004).

The Commission, based upon the recommendation of the Office of General Counsel ("OGC"), voted on March 8, 2005 (1) to find no reason to believe that The November Fund and its treasurer made or failed to report electioneering communications; and (2) to find no reason to believe that The November Fund made or failed to report excessive contributions in the form of coordinated expenditures to Bush-Cheney '04 (and likewise, that Bush-Cheney '04 accepted and failed to report excessive and prohibited in-kind contributions from The November Fund). Incongruously, the Commission, also based upon the recommendation of OGC, voted[11] (1) to find reason to believe that The November Fund and its treasurer failed to register and report as a political committee with the Commission by knowingly accepting contributions in excess of $5,000 and by knowingly accepting corporate contributions; and (2) to find reason to believe that the U.S. Chamber of Commerce and its treasurer made impermissible corporate contributions to a political committee to influence an election.[12] The Commission also authorized a sweeping investigation which included the use of compulsory process.[13] Yet even after an extensive and intrusive investigation,[14] there are insufficient facts to establish that The November Fund ought to have registered as a political committee, and thus be subject to the Act's contribution limits and source prohibitions. Accordingly, on October 21, 2008, we voted to take no further action in this matter and to close the file.

II. DISCUSSION

A. Entities Engaged Purely in Issue Advocacy are not Political Committees

"Political committee" is defined by the Act as "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."[15] The Supreme Court, to avoid vagueness problems with the statutory language, construed "expenditure" to "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."[16] Similarly, the Court narrowed the definition of "contribution" to encompass only (1) donations to candidates, political parties, or campaign

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[11] The vote to proceed was 4-2. MUR 5541, Certification dated Mar. 9, 2005.

[12] The "analysis" that supported this finding was a mere two sentences: "It appears that the $3 million the Chamber provided to The November Fund may constitute a prohibited corporate contribution and expenditures made for the purpose of influencing a federal election. Accordingly, the Commission finds reason to believe the Chamber and Tom Donahue violated the Act by making prohibited corporate contributions." MUR 5541, Factual & Legal Analysis (Chamber of Commerce) at 7. Compare this with the thirty-nine page factual and legal analysis that supported the reason to believe finding in MUR 5365 (Club for Growth).

[13] The only vote on the public record regarding compulsory process appears to be open-ended, with no specificity. *See* MUR 5541, Certification dated Mar. 9, 2005 (authorizing the use of compulsory process "as necessary"). There were no subsequent votes in this matter regarding discovery.

[14] This case illustrates precisely what Chief Justice Roberts instructs should be avoided. According to the Chief Justice, a proper standard for determining whether speech may be regulated "must *entail minimal if any discovery*, to allow parties to *resolve disputes* quickly without chilling speech through the threat of burdensome litigation." *WRTL*, 127 S. Ct. at 2666 (emphasis added).

[15] 2 U.S.C. § 431(4)(A).

[16] *Buckley v. Valeo*, 424 U.S. 1, 80 (1976).

committees; (2) expenditures made in coordination with a candidate or campaign committee; and (3) donations given to other persons or organizations but "earmarked for political purposes."[17]

Thus, the definition of "political committee" is narrow. The Supreme Court has construed the term 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."[18] In other words, the Act does not reach those "engaged purely in issue discussion," but instead can only reach "that spending that is unambiguously related to the campaign of a particular federal candidate" – specifically, "communications that expressly advocate the election or defeat of a clearly identified candidate."[19]

In *Buckley* and recently in *WRTL*, the Court broadly defined what constitutes First Amendment protected issue discussion, emphasizing that regulation of protected speech may occur only if it falls within a very narrow exception to the constitutional guarantee of free speech – express advocacy, or in certain circumstances, its functional equivalent.[20] Thus, by narrowing the scope of speech that may be regulated consistent with the First Amendment, the Court necessarily narrowed the scope of which entities may be regulated under the Act. This is because an organization that chooses to become a political committee must "submit to an elaborate panoply of FEC regulations requiring the filings of dozens of forms, the disclosing of various activities, and the limiting of the group's freedom of political action to make expenditures or contributions."[21] Such burdens on speech can be justified only under narrow circumstances.

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[17] *Id.* at 24, n. 24, 78. In order to avoid the "hazards of uncertainty" regarding the meaning of "earmarked for political purposes," the United States Court of Appeals for the Second Circuit interpreted the phrase to include only donations "that *will be converted* to expenditures subject to regulation under FECA." *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995) (emphasis added).

[18] *Buckley*, 424 U.S. at 79-80.

[19] *Id.*

[20] *Id.*; *WRTL* at 2672; *see also Davis v. FEC*, 128 S.Ct. 2759 (2008). This reading of *WRTL* is further supported by the Court in *Davis* which, relying on the logic of *Buckley* and *WRTL*, not only rejected the contribution penalties of the "Millionaire's Amendment" but eliminated the disclosure requirements as well.

[21] *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 858 (D.D.C. 1996) (quoting *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 392 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981)). Whether contribution limits can be imposed on an independent "political committee" has been questioned. *See NCRTL II*, 525 F.3d 274; *California Medical Association v. FEC*, 453 U.S. 182, 203 (1981) (Blackmun, J., concurring) (upholding political committee contribution limits, but noting a different result if contribution limits were applied to an independent speech group, because such contributions pose no threat of real or potential corruption); *see also SpeechNow.Org v. FEC*, 567 F. Supp.2d 70 (D.D.C. 2008), *Emily's List v. FEC*, 569 F. Supp.2d 18 (D.D.C. 2008) (both challenging "contribution" limits and other restrictions as applied to independent speech group); AO 2007-32 (SpeechNow.org), Dissenting Opinion of Chairman David M. Mason (opining that contribution limits to do not apply to independent speech groups); *see also* MUR 5156, Statement of Reasons of Commissioner Darryl R. Wold (joined in relevant part by Commissioners David M. Mason and Bradley A. Smith) (discussing similar issue); Richard A. Hasen, *Level Playing Field – The Law May Allow Ads Attacking the Democratic Presidential Nominee to Go Unanswered*, Slate (Jan. 28, 2004), *available at* http://slate.msn.com/id/2094599/ ("But as long as it is impermissible (under *Buckley*) to limit what individuals such as [George] Soros can independently spend on an election, there is little justification for limiting the amount they can contribute to other groups for the same spending if those groups are unaffiliated with, and do not contribute to, candidates or parties."). Merely because the Court in *McConnell* permitted Congress to impose more onerous restrictions on party committees does not then mean that similar restrictions may be applied to independent speech groups.

It is beyond dispute that none of the funds raised by The November Fund – in excess of $3 million – were spent on public communications that expressly advocated the election or defeat of a Federal candidate.[22] About one-third of its funds were spent on communications that, consistent with The November Fund's stated purpose, educated the general public regarding the public policy positions of John Edwards, and discussed issues related to trial lawyers.[23] Close to $2 million was spent on overhead and on television and radio advertisements that did not even reference a Federal candidate, let alone contain express advocacy or its functional equivalent. The absence of public communications constituting "expenditures" in this matter distinguishes it, in one respect, from other noteworthy past Commission matters where the Commission pursued enforcement on the basis that at least some of the respondent's public communications contained express advocacy.[24] Thus, the independent speech activities undertaken by The November Fund fell well beyond the reach of government regulation.

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[22] Fortunately, this case does not turn on the issue of whether The November Fund's public communications contained express advocacy or its functional equivalent; otherwise the Commission would have been forced to confront what has become an increasingly murky issue post-*WRTL*. Although we think the legal standard set forth by Chief Justice Roberts in *WRTL* is clear, *see* AO 2008-15 (National Right to Life Committee), Amendment to OGC Draft (Chairman McGahn), Agenda Document 08-32-A, it appears that not all share our view. *See generally* Votes and Open Meeting discussion regarding AO 2008-15 (Oct. 23, 2008) (where the Commission was unable to approve an advisory opinion as to whether certain ads were prohibited electioneering communications). Justice Scalia had already forewarned of this potential murkiness, and what Justice Alito anticipated could happen – that the standard set forth in the Chief Justice's opinion may not prove to be sufficiently clear and thus could, without the reversal of the holding in *McConnell*, impermissibly chill political speech – apparently has happened. *WRTL*, 127 S. Ct. at 2675 (Scalia, J., concurring, advising that all ambiguity should be removed by a direct reversal of *McConnell*); *WRTL* 127 S. Ct. at 2674 (Alito, J., concurring (noting that he joins the opinion of the Court "because § 203 is unconstitutional as applied to the advertisements before us, it is unnecessary to go further.... If it turns out that the implementation of the as-applied standard set out in the principal opinion impermissibly chills speech [citing opinion of Scalia J., cite omitted], we will presumably be asked in a future case to reconsider the holding in *McConnell* [cite omitted]."). Indeed, the Chief Justice recognized the issue when he said "[w]e have no occasion to revisit that [*McConnell*] determination today. But when it comes to defining what speech qualifies as the functional equivalent of express advocacy subject to such a ban – the issue we *do* have to decide – we give the benefit of the doubt to speech, not censorship." *Id.* (emphasis in original).

[23] A substantial portion of these remaining funds were spent on Internet communications that were not subject to Commission regulations. *See* 11 CFR 100.26 ("The term public communication shall not include communications over the Internet.") and 100.29(c)(1) ("Electioneering communication does not include ... communications over the internet ....") (2004). *See also McConnell v. FEC*, 251 F. Supp.2d 176 (D.D.C. 2003), 572-647 (Kollar-Kotelly, J.) (finding that "broadcast advertising is the most effective form of communicating an electioneering message" and therefore poses the most acute risk of corruption; other forms of communication, such as the Internet, are not "nearly as effective as broadcast advertising" and therefore are not "as problematic.").

[24] *See* MURs 5365 (Club for Growth), 5440 (The Media Fund), 5487 (Progress for America Voter Fund), 5511 & 5525 (Swift Boat Veterans and POWs for Truth), and 5754 (MoveOn PAC). The precedential effect of these matters is less than clear, because all these matters settled, and the conciliation agreements made clear that settlement occurred to resolve the matter expeditiously and to avoid the cost of litigation. Other less high-profile MURs also settled after extensive discovery. *See* MURs 5542 (Texans for Truth) and 5568 (Empower Illinois). At least one of these MURs (MUR 5365 (Club for Growth)) and one other matter commonly cited as a so-called 527 MUR (MUR 5403 (America Coming Together)) can be further distinguished, as those matters concerned groups that had already established a Federal account (unlike The November Fund), thus raising the issue of whether certain spending should have been from the Federal account or non-Federal account, and whether the proper overhead allocation between such accounts was used. Certainly, merely because some portion of an entity's activities come within an agency's jurisdiction does not mean that the agency is free to regulate all of its activities, *i.e.*, those that do not influence Federal elections. MURs 5754 (MoveOn PAC), 5542 (Texans for Truth) and 5568 (Empower Illinois) can also be further distinguished, as the alleged "solicitations" did reference a Federal candidate or election and

B. Donations Which Are Not Spent on Federal Elections Cannot Convert an Entity Into a Political Committee

Even though none of The November Fund's public communications contained express advocacy or its functional equivalent, a novel legal theory was nonetheless pursued: that The November Fund was a "political committee" solely because it received more than $1,000 in response to a supposed "solicitation" indicating that the money would be used to criticize a candidate or otherwise potentially influence federal election.

Imposing political committee status on The November Fund based upon this theory is improper for several reasons. First, as a factual matter, The November Fund's request for funds to the Chamber did not even reference a Federal election, let alone a Federal candidate. The request for funds, dated August 16, 2004, stated:

> I am writing on behalf of The November Fund, which has been co-founded by Craig Fuller, Bill Brock and myself. As you know, reform of our legal system, particularly with respect to medical malpractice lawsuit abuse, is a pressing national need. That is why we have established The November Fund in order to disseminate public information on this and related issues.
>
> The Fund is registered with the IRS as a 527 organization. It is an issue advocacy organization. It will not make contributions to candidates for political office and will not make any expenditures as defined under the Federal Election Campaign Act. For those reasons, it is not a political committee that must register with the Federal Election Commission. As a result, The November Fund legally may accept donations in any amount from individuals or organizations including corporations. We cannot accept gifts from foreign nationals. All donations over $200 will be disclosed on reports filed with the IRS. Donations are not tax deductible.
>
> We ask the U.S. Chamber to consider making a generous donation of $500,000 to the Fund. Your money will help us in telling the American people "The Truth About Trial Lawyers," which is the theme of our media effort.
>
> If you would like to discuss our effort please contact me. Otherwise, please delivery [*sic*] by courier any donation made payable to "The November Fund" to Dirk Smith, 201 N. Union Street, Suite 530, Alexandria, VA 22314.

On its face, The November Fund informed the Chamber in no uncertain terms that the funds would be used in connection with issue advocacy related to legal reform, trial lawyers and the like. This could not have been any clearer. Thus, even under the novel legal theory pursued in this matter, the supposed "solicitation" itself did not in any way claim that funds would be used to advocate a candidate's election or defeat at the polls.

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were widely disseminated to the public, all of which was known to the Commission prior to its reason to believe finding and authorization of an investigation.

In order to reach the conclusion that "solicitations" did somehow advocate election or defeat of a Federal candidate requires reference to other materials such as websites, press releases, statements in newspaper articles and internal documents. And even then, such materials at best merely give some indicia of subjective intent, and do not change the clear language of the actual request for funds. In addition to the obvious constitutional infirmities, bootstrapping this material in such a way to establish a "solicitation" is a far cry from satisfying the standard employed by the Commission in other related matters (assuming *arguendo* that this was the proper standard): the request leaves "no doubt that the funds contributed would be used to advocate [a candidate's election or] defeat at polls."[25] The Commission has never before engaged in bootstrapping to this extent to claim that there was a "solicitation,"[26] and we declined to do so here.

Second, even if we were inclined to permit such bootstrapping, the novel legal theory is based upon a misreading of a Second Circuit case, *FEC v. Survival Education Fund*.[27] In that case, the Commission sued a nonprofit corporation, claiming that certain spending by the defendant was illegal. The defendant ultimately convinced the court that its spending was legal, because it was a qualified nonprofit "MCFL" organization[28] that was permitted to make independent expenditures.[29]

The Second Circuit held that a written solicitation indicating that money received in response to the solicitation will be spent to defeat a Federal candidate must carry disclaimers informing the public of whether the organization is coordinating with a candidate or its agents.[30] Funds given to the organization resulting from the solicitation (which, according to the court, left "no doubt that the funds contributed would be used to advocate Reagan's defeat at the polls"[31])

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[25] See MURs 5365, 5440, 5487, 5511, 5525, 5754, 5542 & 5568, Conciliation Agreements at 2, ¶ 2 (citing to *Survival Education Fund* for the proposition that "where a statement in a solicitation 'leaves no doubt that the funds contributed would be used to advocate [a candidate's election or] defeat at the polls, not simply to criticize his policies during the election year,' proceeds from that solicitation are contributions).

[26] In fact, the Commission has already rejected such bootstrapping in a 5-0 vote in the remarkably similar context of whether a webpage that references a Federal candidate constitutes a "solicitation." *See* MUR 5711 (Senators Barbara Boxer and Dianne Feinstein, Representative Nancy Pelosi, and Phil Angelides), Statement of Reasons of Chairman Robert D. Lenhard, Vice David M. Mason, and Commissioners Hans A. von Spakovsky and Steven T. Walther at 6 ("The mere presence of a solicitation on a secondary webpage does not transform other connected . . . webpages into solicitations. . . . The simple display of [Federal candidates and/or officeholders'] names or likenesses on the homepage of a . . . website that includes one "contribute" link does not constitute a solicitation . . . ."). *See* note 22, *supra*.

[27] 65 F.3d 285.

[28] Although corporations and labor organizations are generally prohibited under the Act from making contributions or expenditures in connection with federal elections, a limited exception allows certain Qualified Nonprofit Corporations (QNCs) to make independent expenditures and electioneering communications. To qualify as a QNC: (a) the corporation must be a social welfare organization organized under section 501(c)(4) of the IRC, but not established by a corporation or labor organization, nor accept contributions from such; (b) the corporation's only purpose must be issue advocacy, election influencing activity or research, training or educational activities; (c) the corporation cannot engage in business activities; and (d) the corporations' shareholders may not have an equitable interest in the corporation. *See FEC v. Massachusetts Citizens for Life (MCFL)*, 479 U.S. 238 (1986).

[29] *Survival Education Fund, Inc.*, 65 F.3d at 293.

[30] *Id.* at 295.

[31] *Id.*

were not considered contributions subject to a limit.[32] Critically, the court did not impose political committee status on the defendant.[33]

Nor could it. The court was careful not to proceed in the absence of a nexus to candidates, and limited its holding by noting that "[s]ection 441d(a)(3)...does not require direct disclosure of what an individual or group contributes or spends . . . but only disclosure of who paid for the particular communication at issue and that it was not authorized by a candidate or his agents."[34] The Second Circuit said in no less than three places that its holding is tied to interests in preventing corruption of candidates.[35] Thus, the court allowed for the imposition of a disclaimer requirement that indicated whether a communication was at the behest of a candidate because it determined that doing so furthered the interest of preventing real or perceived corruption.[36]

In other words, *Survival Education Fund* cannot be read in a vacuum to define what can be regulated under the label of "contribution" – it must be read through the lens of *Buckley*. To read it otherwise obliterates the critical distinction drawn by the *Buckley* Court between contributions that can be limited and expenditures and other spending that cannot. The *Buckley* Court defined the nature of a contribution: "A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support."[37] On the other hand, limits on expenditures and other spending "preclud[e] most associations from effectively amplifying the voice of their adherents."[38] Whether something is to be labeled a "contribution" was also addressed in *Buckley*:

> While contributions may result in political expression if spent by a candidate or an association to present views to voters, the transformation of contributions into political debate involves speech by someone other than the contributor.[39]

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[32] Such restrictions are the very essence of political committee reporting – disclosure that the *Survival Education Fund* court made clear it was *not* mandating. In fact, in its reply brief in that case, the Commission asserted that "[w]hether or not SEF . . . later actually used the contributions they received for the purpose stated in the solicitation obviously cannot affect whether the letter itself solicited a contribution," Reply Brief of the Federal Election Commission at 18 (Sept. 1, 1994), *Survival Education Fund*, 65 F.3d 285, a proposition expressly rejected by the Second Circuit. After all, that court made clear that its decision was limited only to solicitations of funds that actually "will be *converted* to expenditures subject to regulation" under the Act. To read the case otherwise allows the Government to attempt to glean subjective intent – precisely what was rejected in *Buckley*.

[33] This is made all the more clear by the briefs filed by the Commission in that case, none of which assert that political committee status was even an issue. Brief of the Federal Election Commission, *Survival Education Fund*, 65 F.3d 285 (May 27,1994); Reply Brief of the Federal Election Commission, *id.* (Sep. 1, 1994) (neither raises the issue of political committee status, either explicitly or implicitly).

[34] *Survival Education Fund*, 65 F.3d at 296 (internal citations omitted).

[35] *Id.* at 295-97.

[36] Of course, the Supreme Court has already struck efforts to limit the expenditure of personal funds. *See Davis*, 128 S. Ct. at 2773 ("The burden imposed . . . on the expenditure of personal funds is not justified by any governmental interest in eliminating corruption or the perception of corruption.").

[37] *Buckley*, 424 U.S. at 21.

[38] *Id.* at 22.

[39] *Id.* at 21.

Here, assuming that its press releases, websites and other materials can be bootstrapped onto The November Fund's August 16, 2004 request for funds, it follows that the funds given to The November Fund did include, in the words of the *Buckley* Court, an "underlying basis for support." Those who wanted further enforcement action in this matter concede as much (as evidenced by their reliance on press releases, web sites and other materials that at best show subjective intent). Hence, as a factual matter, the donations here went well beyond an "undifferentiated, symbolic act of contributing,"[40] and there was no need for a "transformation" of a contribution into the speech of another (as the donors knew the message to be delivered at the time of the donation).

When viewed through the lens of *Buckley*, the activity here is consistent with activity the Court views as beyond the reach of government regulation, as opposed to something that is not (*e.g.*, a contribution). To impose a limit here – accomplished by simply applying the "contribution" label[41] to something that is in actual fact what the *Buckley* Court made clear is beyond the reach of government-imposed limits, would impermissibly "preclude[e] [respondents] from effectively amplifying the voice of their adherents."[42] In other words, it would be nothing more than a back-door way to limit expenditures and core political speech.[43] Thus, even assuming *arguendo* that The November Fund's "solicitations"[44] indicated that the funds received would be used to influence the election of a federal candidate, *Survival Education Fund* does not warrant the imposition of political committee status upon The November Fund. On the contrary, it mandates the opposite result.

The court in *Survival Education Fund* made clear that issue-advocacy groups "may take positions favorable or unfavorable to different candidates, and may solicit contributions to promulgate their views to the public, even for the purpose of applauding or criticizing candidates during an election campaign," without such groups becoming "political committees" under the Act.[45] Here, the investigation uncovered no evidence that funds raised by The November Fund were used in a manner inconsistent with this protection (indeed, the Commission essentially

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[40] *Id.*

[41] Even if something is properly labeled a "contribution," the Supreme Court has already expressed doubt that in matters where the "governmental interest in eliminating corruption or the perception of corruption" is absent, it could be limited. *Davis*, 128 S. Ct. at 2772 ("Even if [it] were characterized as a limit on contributions rather than expenditures, it is doubtful whether it would survive. A contribution limit involving 'significant interference' with associational rights must be closely drawn to serve a sufficiently important interest.") (internal quotations omitted).

[42] *Buckley*, 424 U.S. at 22.

[43] The Court in *Buckley* made clear that it is the nature of the speech, and the not the label, that matters. *Id.* at 21-22. Simply because one puts salt in the pepper shaker does not make it pepper – it is still salt.

[44] Whether or not the materials relied upon by Office of General Counsel constitute "solicitations" is subject to dispute for yet another reason, due to the Commission's finding of reason to believe that the Chamber violated the Act on what appears to be some sort of alter-ego theory. *See* Factual & Legal Analysis (Chamber) at 7 (concluding that the funds provided by the Chamber also constituted "expenditures," thus rendering The November Fund as a mere pass-through). Such a theory only further eliminates the distinction between "contribution" and "expenditure," as it is a legally and analytically absurd proposition to say that an organization can solicit contributions from itself. If The November Fund truly was an alter-ego of the Chamber, then the materials could not constitute solicitations and thus, the funds could not possibly be deemed contributions. Which means the only remaining ground for pursuing The November Fund and the Chamber was for making illegal corporate expenditures. But since The November Fund (and the Chamber) made no expenditures, this ground is foreclosed as well.

[45] 65 F.3d at 295.

conceded as much at the beginning of this investigation). Instead, the evidence shows that the funds were used for overhead costs, television ads that did not reference a Federal candidate, and issue advocacy related to trial lawyers and commenting on a candidate's positions as related to tort reform.[46]

Furthermore, although *Survival Education Fund* was decided in 1995, the "discovery" that it was a case that somehow mandates the imposition of political committee status simply based upon a solicitation (instead of a case about disclaimers) did not occur until nearly a decade later and after The November Fund had engaged in the activity that was at issue in this matter. In fact, although the Commission's enforcement matters over the years have grappled with the issue of political committee status, until recently the Commission's enforcement posture has never so much as hinted that a solicitation without more could convert an entity into a political committee. MUR 4624 (The Coalition, *et al.*) is but one example.[47] In that case, a group called The Coalition (which ironically, like the November Fund, was funded in large part by the Chamber) ran a number of television advertisements during the 1996 election cycle (after the decision in *Survival Education Fund*), none of which contained express advocacy. Nonetheless, the Commission launched a massive investigation with dozens of subpoenas compelling testimony and the production of documents, all in an effort to prove that the advertisements were "coordinated" with political campaigns. Despite the size of the investigation, and the expansive and innovative legal theories presented by the OGC, there was no reference to or suggestion of any theory like the one recently concocted from a misreading of *Survival Education Fund*.[48]

This raises the critical question of notice. Even assuming *arguendo* that there were some constitutionally permissible grounds to regulate The November Fund, there was no notice to them or anyone else that the Commission would ever take such an approach. After all, this matter arose from the 2004 election cycle, at a time when the "political committee" status of so-called section 527 organizations was at best still being debated, and confusion was widespread throughout the so-called "regulated community" about the state of the law.[49]

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[46] *See Buckley*, 424 U.S. at 42 ("The distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest.").

[47] This matter is also one of several examples of new Commissioners putting an end to lengthy and burdensome investigations and review. *See* MUR 4291 (American Federation of Labor and Congress of Industrial Organizations); Statement of Reasons of Vice Chairman Darryl R. Wold, and Commissioners Lee Ann Elliott, David M. Mason, and Karl J. Sandstrom on the Audits of "Dole for President Committee, Inc." (Primary), "Clinton/Gore '96 Primary Committee, Inc.," "Dole/Kemp '96, Inc." (General), "Dole/Kemp '96 Compliance Committee, Inc." (General), and "Clinton/Gore '96 General Election Legal and Compliance Fund" (June 24, 1999).

[48] Although the matter was closed without any finding of wrongdoing by the Coalition, Commissioner Sandstrom did, in a dissenting Statement of Reasons, state that the Coalition's major purpose was such that it warranted regulation, but did not reach that conclusion by way of or with any reference to *Survival Education Fund*. MUR 4624, Statement of Reasons of Commissioner Karl J. Sandstrom.

[49] *See* 2 U.S.C. § 438(d); 11 C.F.R. 112.4(e) ("Any rule of law which is not stated in the Act . . . or in a regulation duly prescribed by the Commission, may be initially proposed only as a rule or regulation pursuant to procedures in 2 U.S.C. § 438(d) . . . .").

In fact, the Commission already implicitly confirmed this. The Commission promulgated a rule published after the 2004 general election (which became effective in January 2005) concerning solicitations and political committee status.[50] That it was deemed necessary to establish a new rule – effective after The November Fund acted – is an acknowledgement that the state of the law was not sufficiently clear, and demonstrates that the "regulated community" lacked adequate notice.[51] In the words of the Fourth Circuit in a similar case, to impose a penalty on The November Fund in this case "is essentially handing out speeding tickets without telling anyone the speed limit."[52]

C. Political Committee Status: Major Purpose Test

The "major purpose" test is a judicial construct that spares some organizations from political committee registration and reporting, even though they have raised or spent more than $1,000 on express advocacy;[53] it is not the first prong of a two-prong test for political committee

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[50] Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Non-Connected Committees, 69 Fed. Reg. 68,056 (Nov. 23, 2004) (to be codified at 11 CFR 100.57) (emphasis added).

[51] Assuming *arguendo* The November Fund's conduct would cause it to become a political committee under this new rule (which, of course, cannot be applied retroactively, *see Bowen v. Georgetown University Hospital*, 488, U.S. 204, 208 (1988) ("A statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."), or in a matter inconsistent with the teachings of *Buckley*), any suggestion that the Notice of Proposed Rulemaking (NPRM) on Political Committee Status (published on March 11, 2004), or the subsequent hearing on the NPRM (held on April 14-15, 2004), provided adequate notice cannot withstand scrutiny. To begin with, an NPRM frequently contains numerous competing, and often inconsistent, proposals for rules changes. Thus, to require a group to comply with an NPRM's proposals would leave the group in the troublesome predicament of trying to decipher what exactly it was supposed to do. Moreover, this particular rulemaking was discretionary; thus, there was no certainty that the rulemaking would even result in substantive changes to the Commission's regulations, making it unreasonable to expect groups to comply with standards that might never be promulgated. But, most importantly, requiring a person to comply with a standard that has not yet been properly enacted violates notions of fundamental fairness, due process, and the rule of law. Even if one tries to apply the standard in 11 CFR 100.57, there was no indication the Commission would use the rule to pursue enforcement against donors (here, the Chamber) for making purported "contributions" in excess of FECA limits in cases such as this. Yet, the Commission found reason to believe the Chamber made prohibited contributions in this case when, in fact, both of the Commission's Explanations and Justifications for the rule have focused exclusively on its application to the political committee status of the group issuing the solicitations or receiving such funds: "The rule's focus on the planned use of funds leaves *the group issuing the communication* with complete control over whether its communications will trigger new section 100.57." 69 Fed. Reg. at 68,057 (emphasis added). *See also* Political Committee Status, 72 Fed. Reg. 5595, 5606 (Supplemental E&J, Feb. 7, 2007) ("By adopting a new regulation *by which an organization may be required to register as a political committee based on its solicitations, and by tightening the rules governing how registered political committees fund solicitations, voter drives and campaign advertisements*, the 2004 Final Rules bolstered FECA against circumvention not just by one kind of organization, but by groups of all kinds.") (emphasis added). The patent unfairness and overbreadth are best illustrated by example: If an individual who is concerned about the environment, and has a pattern of giving to the League of Conservation Voters, were to make donations to that group exceeding the FECA contribution limits, would she suddenly become an outlaw simply because the group issues one solicitation critical of a federal candidate's public policy positions or advocating for that candidate's defeat? We think not.

[52] *NCRTL II*, 525 F.3d at 290 (internal quotations omitted). We also note that the Commission matters that concerned conduct during the 2004 cycle were not made public until after the 2006 election – exposing a significant weakness in the Commission's "case-by-case" approach.

[53] *See MCFL*, 479 U.S. at 262; *Buckley*, 424 U.S. at 78-79; *GOPAC*, 917 F. Supp. at 859. *See also* 69 Fed. Reg. 68,056 at 68,058.

status. Nevertheless, the Commission appears to have decided to investigate The November Fund's "major purpose" prior to ascertaining whether the group had engaged in any activity within the reach of the Act. This approach, which mirrors the one advanced by the complainant, inverts the proper analysis, and takes a doctrine that was supposed to protect organizations from the burdens of political committee registration and reporting, and twists it into the principal, albeit subjective,[54] basis for deciding that they are, in fact, political committees. Worse, this inverted sequence was the basis for launching a sweeping, time-consuming and costly investigation that would not have been undertaken had the Commission applied its current analysis for determining political committee status.[55]

The complainant, in its erroneous application of the "major purpose" test, also mistakenly equates "political committee" status under the Act with "political organization" status under section 527 of the Internal Revenue Code ("IRC"). The Commission has already rejected this approach.[56] For example, in 2001, the Commission noted that the IRC "definition is on its face substantially broader than the FECA definition of 'political committee.'"[57] The Commission also noted that the IRS had already found that "activities such as circulating voting records, voter guides and 'issue advocacy' communications – those that do not expressly advocate the election or defeat of a clearly identified candidate – fall within the 'exempt function' category under IRC section 527(E)(2)."[58] And in 2004, when the Commission proposed to rewrite the definition of "political committee," it considered two alternatives by which all or nearly all "527 organizations would be considered to have the nomination or election of candidates as a major purpose . . . ."[59] Both these proposals were rejected.[60]

Moreover, the legal argument advanced in the complaint is at odds with Congressional intent. On three occasions, knowing that so-called 527 groups ("527s") like The November Fund would sponsor communications criticizing federal candidates, Congress passed legislation

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[54] *See* BNA Money & Politics Report, "Smith, Weintraub, Mason Present Plan for Limited Rules on Nonparty Groups" (Aug. 20, 2004) ("[Commissioners] Smith and Weintraub both indicated that they viewed the attempt to regulate groups by assessing their major purpose as too complex and subjective.").

[55] Apparently, before we joined the Commission, but after it had already investigated The November Fund, the Commission reversed itself and began to employ an analysis more consistent with the Court's teachings in *Buckley* and *WRTL*: that discovery only occurs after there is evidence that a group engaged in activity within the reach of Federal regulation.

[56] The Fourth Circuit has rejected the concept as well. *See North Carolina Right to Life, Inc. v. Leake*, 344 F.3d 418, 430 (4th Cir. 2003) ("*NCRTL I*"), *vacated and remanded (for further consideration in light of McConnell v. FEC, 540 U.S. 93 (2003))*, 541 U.S. 1007 (2004) (rejecting such presumptions: "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.").

[57] Definition of Political Committee, 66 Fed. Reg. 13,681 (Advanced Notice of Proposed Rulemaking, Mar. 7, 2001). *See also* 72 Fed. Reg. at 5597, 5598 ("In fact, neither FECA, as amended, nor any judicial decision interpreting it, has substituted tax status for the conduct-based determination required for political committee status.").

[58] 66 Fed. Reg. at 13,687.

[59] Political Committee Status, 69 Fed. Reg. 11,736, 11,748 (Notice of Proposed Rulemaking, Mar. 11, 2004).

[60] Despite this public rejection, the Commission nonetheless stated in this case: "As a factual matter, therefore, an organization that avails itself of 527 status has effectively declared that its primary purpose is influencing elections of one kind or another." MUR 5541, Factual & Legal Analysis (The November Fund) at 9.

declining to make such groups political committees.[61] Instead, Congress chose to regulate these groups more narrowly: first by imposing limited reporting requirements in 2000, and then by amending those requirements in 2002. In fact, the 2002 Bipartisan Campaign Finance Act ("BCRA") continued down the path of a narrower regulatory framework, creating a special category called "electioneering communications." The Commission put it succinctly: imposing political committee status automatically on section 527 organizations would entail "a degree of regulation that Congress did not elect to undertake itself when it increased the reporting obligations of 527 groups in 2000, and again in 2002 when it substantially transformed campaign finance laws through BCRA."[62]

Turning to the application of the "major purpose" test to this matter: even if The November Fund had engaged in express advocacy, it still would not be a political committee because its "major purpose" was not the nomination or election of a Federal candidate. Some have asserted that an organization's major purpose may be established through "public statements of purpose."[63] The November Fund's public statements demonstrate that its major purpose was to promote awareness about the issue of legal reform and the influence of trial lawyers in national politics. To achieve this purpose, The November Fund established a website, and disseminated information to educate the public and policymakers. As set forth on its website, in its own words, "The November Fund is dedicated to telling America the truth about trial lawyers, their efforts to stop legal reform, and the impact of the trial lawyer lobby in Washington D.C."

Moreover, The November Fund disseminated information about trial lawyers and what it calls "the medical malpractice crisis in this country" through its website. Its largest financial supporter, the Chamber, has run similar ads and financially supported groups who sponsor similar ads for at least the past decade – it is beyond question that legal reform is one of its perennial issues.[64] The November Fund's director stated that the group was founded to

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[61] 69 Fed. Reg. 68,056 at 68,064 ("Congress appeared to be fully aware that some groups were operating outside [the Act]'s registration and reporting requirements as well as its limitations and prohibitions... [and] consciously did not require 527 organizations to register with the Commission as political committees."). *See also* 72 Fed. Reg. at 5599 ("While Congress has repeatedly enacted legislation governing 527 organizations, it has specifically rejected every effort... to classify organizations as political committees based on section 527 status."). *See also Cottage Savings Ass'n v. Commission*, 499 U.S. 554, 562 (1991) (when Congress revises a statute, its decision to leave certain sections unchanged indicates acceptance of the preexisting construction and application of the unchanged terms).

[62] 69 Fed. Reg. at 68,065. *See also* Brief *Amicus Curiae* of the Campaign Legal Center in Support of Appellants and Urging Reversal at 27 (Feb. 27, 2003), *Mobile Republicans Assembly v. United States*, 353 F.3d 1357 (11th Cir. 2003) (urging rejection of a constitutional challenge to the then-newly enacted section 527(j) reporting and disclosure provisions because, *inter alia*, "even with the enactment of BCRA, IRC § 527 organizations will be able to conduct considerable amounts of Federal campaign activity outside the scope of FECA.")

[63] *See FEC v. Malenick*, 310 F. Supp.2d 230, 234-36 (D.D.C. 2004) (*citing GOPAC*, 917 F. Supp. at 859) (*discussing FEC v. Machinists Non-Partisan League*, 655 F.2d 380, 392 (D.C. Cir. 1981)). *But see WRTL*, 127 S. Ct. 2652; *NCRTL II*, 525 F.3d 274 (cautioning against looking to subjective or contextual factors), which cast serious doubt on the validity of examining anything other than the amount of express advocacy in the major purpose test analysis.

[64] It is well-known that the Chamber has consistently run ads related to trial lawyers and legal reform around the time of a number of elections, such as those run during the 2000 judicial elections in Mississippi and Ohio, the 2004 attorney general election in Washington, and just last year in Michigan. Even a cursory review of their website reveals an on-going effort on their part to educate the public and influence public policy with respect to these issues.

"emphasize the need for litigation reform and educate the public about the positions of officeholders on that subject. The November Fund's materials state that its "plans" are "to put a national spotlight on the critical issue of lawsuit abuse, and alert Americans to the devastating influence that unscrupulous trial lawyers would have in a possible Kerry/Edwards administration."[65] To regulate a group with this stated purpose runs counter to the Court's proscription in *Buckley* and recently upheld in *WRTL* – specifically, that an organization may not be treated as a political committee simply because it engages in issue discussion and advocacy that references candidates.[66]

Theoretically, an organization can satisfy the "major purpose" test through independent spending that is "so extensive" that the organization's major purpose may be regarded as campaign activity.[67] With respect to this test, neither Congress, nor the Commission, nor the courts have established any guidance on what constitutes sufficiently extensive spending.[68] Under the facts in this case, we cannot conclude that The November Fund satisfied the "major purpose" test through sufficiently extensive spending on campaign activity. In addition to its own public statements of purpose, The November Fund's public communications did not include express advocacy, and of the $3,124,718 spent by The November Fund, almost two-thirds was spent on administrative costs and television and radio ads that did not even identify a federal candidate.[69]

For example, they set forth a ten-part "A Growth and Prosperity Agenda," with one part being "Ending Lawsuit Abuse and Ensuring Litigation Fairness." *See* http://www.uschamber.org/legalreform.htm. The Chamber also operates the "Institute for Legal Reform," that has a "critical mission of making America's legal system simpler, fairer and faster for everyone." *Id.* They have a link to a web page entitled "Jackpot Justice," with the banner "Trial lawyers have turned our courts into a game of chance." *Id.* The Chamber also publishes articles in its "uschamber.com magazine," one of which is entitled "Trial Lawyers Take Aim," discussing the legislative agenda of trial lawyers. *See* http://www.uschamber.org/content/0812_2.htm. The website also contains a "policy/advocacy" section which, not surprisingly, focuses in part on trial lawyers. *See* http:/www.uschamber.org/content/policy.htm ("Report: Lawsuit Abuse Still Widespread" (Dec. 19, 2008); "New Stories Show Impact of Lawsuit Abuse" (Dec. 9, 2008)).

[65] As the Fourth Circuit held, a constitutionally acceptable standard for political committee-type regulation should look to "an entity's stated purpose, which is typically reflected in its articles of incorporation, and the extent of an entity's activities and funding devoted to pure issue advocacy versus electoral advocacy." *NCRTL I*, 344 F.3d at 430.

[66] *WRTL*, 127 S. Ct. at 2659; *Buckley*, 424 U.S. at 79.

[67] *MCFL*, 479 U.S. at 262.

[68] *But see Akins v. FEC*, 101 F.3d 731, 740-42 (D.C. Cir. 1996), *vacated on other grounds*, 524 U.S. 11 (1998) (holding that the major purpose test applied only to independent expenditures, not direct contributions).

[69] Other considerations – such as its name, "The November Fund;" the timing when it was formed; that some of its public communications criticized a Federal candidate; that it did not conduct advertising after the election; and the like, used to bolster the argument that it "must" or "can only" have a major purpose of affecting the November election – are all by their very nature subjective and rely not on content but context, and thus are inconsistent with the teachings of *Buckley*. *See* Kirk Jowers, *Issue Advocacy: If It Cannot Be Regulated When It Is Least Valuable, It Cannot Be Regulated When It Is Most Valuable*, Cath. U. L. Rev. (Fall 2000) (discussing the use of timing and proximity to an election as improper considerations in the regulation of speech). Moreover, basing a major purpose determination on such criteria is tantamount to a presumption of the sort expressly rejected by the Fourth Circuit in *NCRTL II*. Finally, the potential for discriminatory enforcement of such a scheme is obvious – one could easily focus on factors that could justify enforcement against one's opponents while exempting friendly ads from sanction.

The Commission's unsuccessful attempt to impose political committee status on a group in *FEC v. GOPAC* is instructive.[70] In *GOPAC*, the organization adopted a formal "mission statement" which reiterated its ultimate objective "to create and disseminate the doctrine which defines a caring, humanitarian, reform Republican Party in such a way as to elect candidates, capture the U.S. House of Representatives and become a governing majority at every level of government."[71] As part of its mission, the committee's communications focused on the issues of the franking privilege and gerrymandering, prominently targeting then-Speaker of the House Jim Wright.[72] Even though the Court found that GOPAC's "ultimate major purpose" was to influence the election of Republican candidates for the House of Representatives, the court held that GOPAC was not a political committee.[73] The court reasoned that, as a means to promote the election of Republican candidates, GOPAC engaged in genuine issue advocacy which mentioned the name of a federal candidate (who was inextricably linked to its issues), which could not be regulated, and thus GOPAC was not a political committee.[74]

As *GOPAC* illustrates, simply running issue advertisements that mention the name of a candidate who may be emblematic of a particular issue does not make the election or defeat of that candidate the organization's major purpose – it supports the opposite conclusion.[75] As the Supreme Court stated in *Buckley*:

> The distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest.[76]

In other words, in any campaign, candidates become clearly identified with certain issues, whether they want to or not. Does that mean that citizens who pool their resources together are then limited in expressing their views on those issues, even if such discussion could subjectively "influence" the election? *Buckley* made it abundantly clear that the answer is a resounding no. In this matter, as a high-profile and remarkably successful trial lawyer and former U.S. Senator, John Edwards' candidacy created a vehicle for discussing a perennial issue, not *vice versa*.[77]

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[70] 917 F. Supp. 851.
[71] *Id.* at 854-55.
[72] *Id.*
[73] *Cf. Malenick*, 310 F. Supp.2d at 235 (entity held to be a political committee where it sent out hundreds of public communications expressly advocating the election of clearly identified federal candidates, and received and forwarded to the intended recipient approximately 230 individual checks (totaling approximately $185,000) made payable to the federal candidate or campaign committees so identified in the communications).
[74] The Commission has already read *GOPAC* as confining the major purpose test to Federal campaign activities. *See* MUR 5365 (Club for Growth), Factual & Legal Analysis at 21 (characterizing *GOPAC* as "confining the major purpose test to federal campaign activity").
[75] *GOPAC*, 917 F. Supp. at 854-55. Remarkably, the court noted that the Commission conceded, just as it must in the current matter, that there was no evidence of direct GOPAC support for federal candidates.
[76] *Buckley*, 424 U.S. at 42.
[77] *See* Brief of *Amici Curiae* of the Alliance for Justice, American Association Of University Women, Planned Parenthood Action Fund, Inc., National Abortion And Reproductive Rights Action League, People for the American Way Action Fund and Citizen Action at 11 (Oct. 3, 1994), *Survival Education Fund*, 65 F.3d 285 ("To hold that any reference to an election turns issue advocacy into express electoral advocacy – or, conversely, that no issue

Therefore, we conclude that The November Fund did not have the major purpose of electing or nominating a Federal candidate, and thus is not a political committee. Accordingly, the Commission should not infringe upon its First Amendment right to engage in protected political speech.[78]

D. Constitutional Doubt About the Commission's Enforcement Posture in this Matter

This matter arose during the 2004 election cycle when the political committee status of 527 organizations was being hotly argued, resulting in considerable uncertainty within the regulated community about the applicable law. Advocates of further action against The November Fund acknowledged this, and also conceded that there was considerable litigation risk, a risk that was particularly enhanced in this matter, where the political committee status threshold was supposedly reached solely as a result of donations received in response to alleged "solicitations," and not as a result of The November Fund making "expenditures."

That the Chamber is the only donor to a 527 organization that the Commission has found reason to believe violated the law in connection with its donations further added to the litigation risk.[79] Nevertheless, enforcement was pursued so as to supposedly put the public on notice in the future that the Commission would pursue donors to 527 organizations under certain circumstances, and that their activities in connection with, and donations to, 527 organizations could result in enforcement action. Clearly, those who favored this approach knew that their legal theory was highly questionable, but rather than announce this intention through proper means, they sought to use enforcement as an opportunity to obtain some sort of legal precedent which was apparently unattainable through more traditional and appropriate channels. The obvious effect of this approach is to effectively preclude it from being tested in court – unless a particular citizen or group chooses to engage in a very high-risk strategy of becoming an after-the-fact test case.[80]

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advocacy can mention a national election of which everyone is already aware – would turn the FEC into the national proofreader for all political speech in election years."); *see also* Cmt. of The Anti-Defamation League of B'nai B'rith, Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures (Notice of Proposed Rulemaking), 57 Fed. Reg. 33548 (Jul. 29, 1992) at 7 ("even within a few days of an election, an issue advocacy group must be free to condemn the position or actions of a Member of Congress, up for re-election, regardless of whether that condemnation is coupled with a specific call to lobby that Member or take other 'issue oriented' action.").

[78] *WRTL* makes the point as well. Under the theory used to pursue The November Fund, a hypothetical group whose communications precisely mirrored those made by The November Fund but whose private communications with potential donors about the group's purpose avoided any mention of federal candidates or elections would not have been subjected to an enforcement action, which demonstrates the inherent problem with the prior approach in this matter. In *WRTL*, Chief Justice Roberts roundly criticized this type of approach, stating that it would be a "bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to criminal penalties for another." 127 S. Ct. at 2666. Furthermore, under the theory used in this matter, any organization that dared criticize a federal candidate, even if it scrupulously avoided engaging in express advocacy, would be vulnerable to an intrusive and time and resource-consuming investigation into (1) the private communications the organization's officials may have made about its purpose or (2) what the organization's donors might have been thinking when they gave their money. The chilling effect this approach would have upon political speech is painfully obvious, and we do not see how it passes muster under the First Amendment.

[79] *See* note 43, *supra*.

[80] Simply because one court has upheld the Commission's "case-by-case" approach in an action to compel the promulgation of regulations because the Commission was able to, after a few tries, justify its decision for purposes

Self-serving efforts to unilaterally expand the Commission's jurisdiction and reach so as to generate issues that will create new test cases is not something that an agency is generally required to do nor is it appropriate unless required.[81] This is particularly so given the large number of cases challenging broad areas of the Commission's jurisdiction and regulations which are already in litigation. *See Cao v. FEC*, 08-4887 (E.D. La.); *Citizens United v. FEC*, 07-2240 (D.D.C.); *Emily's List v. FEC*, 05-0049 (D.D.C.); *Koerber v. FEC*, 08-39 (E.D.N.C.), 08-2257 (4th Cir.); *Real Truth About Obama, Inc. v. FEC*, 08-483 (E.D. Va.), 08-1977 (4th Cir.); *RNC v. FEC*, 08-1953 (D.D.C.); *SpeechNow.org v. FEC*, 08-248 (D.D.C.), 08-5223 (D.C. Cir.); *Unity08 v. FEC*, 07-0053 (D.D.C.).[82] A more measured approach (*i.e.*, to avoid raising constitutional doubt) is particularly appropriate, when as here, improper enforcement means denying persons their constitutional right to free speech, and chilling the exercise of same.[83]

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III. CONCLUSION

As Justice Brandeis stated in his famous concurrence in *Whitney v. California*:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. But they knew that order cannot be secured

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of the Administrative Procedures Act, does not mean it is not vulnerable to attacks under the First Amendment or Due Process Clause.

[81] *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("Although [a regulatory agency's interpretations of its own statute] are normally entitled to deference, where, as here, an otherwise acceptable construction would raise serious constitutional problems . . . courts [must] construe the statute to avoid such problems unless such construction is plainly contrary to Congress' intent." (*citing NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) ("In a number of cases the Court has heeded the essence of Mr. Chief Justice Marshall's admonition in *Murray v. The Charming Betsy*, 2 L.Ed. 208 (1804), by holding that an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."))). *See also Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 346 (2000) (Scalia, J., concurring, in part) (noting that "[where statutory intent is unclear], it is our practice to construe the text in such fashion as to avoid serious constitutional doubt").

[82] We hope that, to the extent judicially practicable, these cases reach an expedited conclusion, as none involve "the open-ended rough-and-tumble of factors" that Chief Justice Roberts warned against, and require only minimal, if any, discovery. *See WRTL*, 127 S. Ct. at 2666. We are all aware that political actors must shape their strategies around the rules, and how they allocate resources is determined at least in part by regulatory limitations and prohibitions. Their rapid resolution will clarify the law in this area for all to see, and if they are not resolved quickly, there will, as this case illustrates, be an inevitable degradation of the right of free speech.

[83] Given the constitutional doubt of the theory under which the Respondents were alleged to have violated the Act (*see* note n. 80, *supra*), that it would represent a departure from other Commission enforcement actions, and the lack of notice to the Respondents of the theory, the Commission would be justified in dismissing this Complaint based upon prosecutorial discretion as outlined in *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("...[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion... [and] the presumption of reviewability of agency action does not apply to an agency's decision not to undertake certain enforcement actions.").

> merely through fear of punishment for its infraction . . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

275 U.S. 357, 375-76 (1927) (citations omitted).

Ultimately, this matter is about political speech. The Commission should not have initiated an investigation in this matter. As soon as the Commission determined, as it did in its initial review of the complaint, that The November Fund did not engage in express advocacy, or any coordination, this matter should immediately have been closed. Instead, The November Fund and the Chamber were subjected to an unwarranted multi-year investigation that was both burdensome and intrusive. Such enforcement activity can, and does, chill the free speech of citizens exercising their First Amendment rights. Thus, we voted both to take no further action in this matter and to close the file.

MATTHEW S. PETERSEN
Vice Chairman

1/22/2009
Date

CAROLINE C. HUNTER
Commissioner

1/22/2009
Date

DONALD F. MCGAHN II
Commissioner

1/22/09
Date