

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REP. CHRISTOPHER SHAYS, *et al.*,)
)
Plaintiffs,)
)
v.)
) Civil Action No. 04-1597 (EGS)
)
FEDERAL ELECTION COMMISSION,)
)
Defendant.)
_____)
) **Consolidated Cases**
)
BUSH-CHENEY '04, INC.,)
)
Plaintiff,)
)
v.)
) Civil Action No. 04-1612 (EGS)
)
FEDERAL ELECTION COMMISSION,)
)
Defendant.)
_____)

**MEMORANDUM OF U.S. SENATORS JOHN MCCAIN AND
RUSSELL D. FEINGOLD AS AMICI CURIAE SUPPORTING PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT AND OPPOSING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

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MOTION FOR SUMMARY JUDGMENT AND OPPOSING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

U.S. Senators John McCain and Russell D. Feingold, *amici curiae* herein,¹
respectfully submit this Memorandum supporting plaintiffs' motion for summary
judgment and in opposition to defendant's motion for summary judgment.

INTRODUCTION

This action challenges the failure of the Federal Election Commission ("FEC" or
"Commission") to promulgate legally sufficient regulations to define the term "political
committee," 2 U.S.C. § 431(4), as that term is used in the Federal Election Campaign

¹ This Court granted the motion of *amici* to participate in these consolidated cases by minute order of
December 14, 2004.

Act, (“FECA”), and particularly as that term applies to groups organized under section 527 of the tax law, 26 U.S.C. § 527.

The Bipartisan Campaign Reform Act of 2002 (hereafter “BCRA”), enacted after a seven-year legislative battle, put an end to the corrupting practice of wealthy interests contributing unlimited soft money (*i.e.*, funds not raised in compliance with FECA’s amount limitations and source prohibitions) to the political parties. In 2003 and 2004, we saw the escalating role of so-called “section 527 groups” – groups organized as “political organizations” under section 527 of the Internal Revenue Code but typically *not* registered with the FEC as “political committees” – as the new vehicle for the improper spending of tens of millions of dollars of soft money for the purpose of influencing federal elections. The FEC considered regulating these groups as political committees, but failed to do so. Political operatives, often ex-national party officials or persons with close ties to the national parties, were emboldened by the FEC’s refusal to regulate 527s as “political committees.” They formed 527 groups, whose major purpose was to influence the 2004 presidential election, and which were not subjected to the same rules and campaign finance laws as other political committees.

As a result of the FEC’s failure to exercise its existing authority and close the new soft money loophole which 527s were starting to open, a number of highly publicized section 527 groups – both pro-Democratic and pro-Republican – operated in the 2004 election cycle wholly outside the federal campaign finance laws. Groups such as the Media Fund, Progress for America Voting Fund (“PFA” or “PFA-VF”), and Swift Boat Veterans for Truth (“SBVT”), sponsored multi-million dollar media buys promoting or attacking President Bush or Senator Kerry in targeted swing states crucial to the presidential election. They used corporate, union and individual funds plainly not in

compliance with FECA; in some cases, contributions of \$5 million or more from a single donor were reported.

This did not have to be. The FEC first considered the issue of regulating 527s in the 2004 election cycle when the issue came before it in November 2003 in a request for an advisory opinion from Americans for a Better Country (“ABC”).² A majority of the Commissioners either voted in favor of addressing the 527 issue in a formal rulemaking proceeding or spoke in favor of doing so, rather than proceeding on a case-by-case basis. But when the Commission announced a formal rulemaking in early 2004, it concluded the rulemaking process without taking any action. This left the 527s free to spend unlimited amounts of soft money to influence the 2004 Presidential election, which is exactly what they did.

The Commission now claims in its motion for summary judgment that the issue of regulating 527s is best dealt with by the Commission on a case-by-case basis, rather than in a formal rulemaking - the exact opposite of what Commissioners said in 2003-04 when the issue first arose during the last election cycle. *See* Defendant’s Memorandum in Support of Motion for Summary Judgment at 24-27. We detail this contradictory position below because it shows precisely the kind of “shell game” that has characterized the FEC’s actions and inactions over the years. Indeed, the Commission’s willingness to look the other way has been so pervasive that the United States Supreme Court concluded that the Commission’s actions over the years “subverted” campaign finance laws enacted by Congress and “invited widespread circumvention” of the law. *McConnell v. FEC*, 540 U.S. 93, 142-45 (2003).

² The FEC’s advisory opinion in AO 2003-37 can be viewed here: <http://ao.nictusa.com/ao/no/030037.html>

ARGUMENT

I. The FEC Has A History of Creating Soft Money Loopholes

A. The Background of the Original Soft Money Loophole

Soft money was not created by Congress. Rather, it was a loophole opened in the law by the Federal Election Commission in 1978, through administrative interpretations that allowed first state parties, and then national parties, to raise and spend funds not subject to federal contribution limits and source prohibitions for voter activities -- such as voter registration and get-out-the-vote drives -- that clearly affected federal elections. The soft money system changed character and scale in 1988 when it became an integrated part of that year's presidential campaign.

The soft money system changed yet again in the 1996 election, this time even more catastrophically, when it mutated from paying for just the "ground" war of grassroots voter activities to also paying for the "air" war of multimillion dollar television campaigns that promoted the presidential candidates. An unprecedented quarter of a billion dollars of soft money was raised by the national parties, much of it by the presidential candidates themselves. Firmly engrained in the campaign finance system by 2000, the soft money system dwarfed other components of candidate and party spending in the 2000 election, totaling nearly \$500 million.

B. Congress Enacted BCRA in 2002 To Close The Soft Money Loophole

In March, 2002, Congress enacted the Bipartisan Campaign Reform Act of 2002 (BCRA) "to eliminate the corrupt influence that corporations, labor unions and wealthy individuals had on our government through their large soft-money contributions."³ To plug the soft money loophole, BCRA prohibited federal candidates, officeholders, and

³ John McCain, *Paying for Campaigns: McCain Eyes Next Target*, USA Today, Nov. 4, 2004, at A27.

political party committees from soliciting, receiving, or directing soft money. *See* 2 U.S.C. § 441i.

The Supreme Court upheld BCRA and confirmed that BCRA’s soft money prohibitions were justified. *McConnell*, 540 U.S. at 133-89. The Court stated, “[T]here is substantial evidence . . . that large soft-money contributions . . . give rise to corruption and the appearance of corruption.” *Id.* at 154. The enactment of BCRA was a necessary congressional response to this evisceration of the federal election laws, not just as a step to address the corruption and appearance of corruption caused by soft money, but also as an anti-circumvention measure intended to repair and restore laws that the Supreme Court noted are “critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.” *Buckley v. Valeo*, 424 U.S. 1, 27 (1976), quoting *Civil Service Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 565 (1973).

In reviewing the FEC’s role in this area, the Supreme Court found that the “FEC regulations permitted more than Congress, in enacting FECA, had ever intended.” *McConnell*, *supra*, 540 U.S. at 142, n.44. The Supreme Court in *McConnell* took specific – and repeated – note of the central role of the FEC in improperly creating the soft money loophole that had been used to circumvent federal campaign finance laws. The Court noted that the existing 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 142. The Court flatly stated that the Commission’s rules had “invited widespread circumvention” of the law. *Id.* at 145. The FEC’s failure to regulate the 527s has once again created a soft money loophole, this time for 527 organizations.

C. The 2004 Election Cycle

With BCRA's soft money ban in place, and the 2004 elections approaching, a number of political party operatives sought new ways to continue using the vast amounts of soft money that they had exploited for decades so effectively. The new schemes involved the creation of 527s, which injected huge amounts of soft money into the 2004 federal elections.⁴ According to a study by the Campaign Finance Institute, section 527 groups raised \$405 million in 2004, up dramatically from the \$151 million they collected in 2002. As explained below, these schemes were illegal. Unfortunately, the defendant FEC, the only agency with enforcement authority of our nation's campaign finance laws, did virtually nothing about it.

The FEC's failure to take enforcement action against 527 groups that were violating the law in 2003-04 was especially troubling because it came in the wake of landmark legislation designed to eliminate the corrupting influences of soft money in our political system. The deployment of "section 527 groups" as the new vehicle for using soft money to conduct political activities to influence federal elections is simply the latest chapter in a long history of efforts to evade and violate the federal campaign finance laws. Sadly, it is another chapter in the FEC's failure to enforce the campaign finance laws as well.

⁴ Frances R. Hill, *Probing the Limits of Section 527 to Design a New Campaign Finance Vehicle*, 86 Tax Notes 387 (Jan. 17, 2000) (discussing the development of 527s as a vehicle to avoid campaign finance laws).

II. The FEC's Failure To Regulate 527s in 2004

A. The FEC's Failure To Regulate 527 Organizations As Political Committees Undermined BCRA's Purpose, And Led To The Creation Of A New Soft Money Loophole In Circumvention Of FECA And BCRA

The Internal Revenue Code defines a “political organization” as an entity “organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for . . . influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State or local public office.” 26 U.S.C. §527(e). The statutory language of FECA, as interpreted by the Supreme Court in *Buckley*, is remarkably similar. A “political committee” is a group which receives contributions or which makes expenditures aggregating in excess of \$1,000 during a calendar year and has a major purpose of influencing a federal election. *See* 2 U.S.C. § 431(4), and *Buckley, supra* at 79. *See also* 2 U.S.C. §§ 431(8)(A)(i) and (9)(A)(i)(defining the terms “contribution” and “expenditure” to mean funds received or spent “for the purpose of influencing” a federal election).

FECA requires political committees to comply with contribution limits, source prohibitions, and certain reporting requirements. For example, political committees cannot accept contributions from individuals in amounts greater than \$5,000 per donor per year. 2 U.S.C. § 441a(a)(1)(C).⁵ Despite the clear connection between section 527 political organizations and FECA political committees, the FEC has failed to adopt rules that would require 527 organizations to register as political committees. This failure by the FEC permitted 527s to raise and spend massive amounts of soft money in 2004

⁵ The \$5,000 contribution limit referenced here applies to a “political committee” that is neither a candidate committee nor a party committee. Some political committees (*e.g.*, a political committee authorized by a candidate) may only accept \$2,000 contributions, and political committees established by state or national parties may accept greater amounts.

wholly outside FECA's limitations and use those illegal funds to influence federal elections.

B. The FEC's Position On Regulating 527s Is Contradictory

The FEC argues in its summary judgment papers that the Commission should deal with the issue of regulating the 527s on a case-by-case basis, rather than by conducting a rulemaking on the issue. See defendant's Memorandum at 1. The Commission's proposed case-by-case approach marks an about-face from the position taken by the Commission on the matter less than two years ago – when the Commission determined in the context of a case-by-case request for advice that a rulemaking was warranted.⁶

On November 18, 2003, a 527 organization known as Americans for a Better Country ("ABC") sought an advisory opinion from the FEC regarding the application of the FECA to the raising and spending of federal and non-federal funds for a wide range of campaign activities. While the Commission ultimately did issue a narrow advisory opinion to ABC, several commissioners said during the course of considering that matter that the issue of regulating 527s would best be addressed in a formal rulemaking rather than dealing with them on a case-by-case basis.⁷

For example, at the FEC's February 18, 2004 hearing on Draft Advisory Opinion 2003-37, Commissioner Weintraub said of the advisory opinion request:

I think that it asks us to delve into issues that would be more appropriate for the rulemaking, and as far as I'm concerned anything we decide today is up for grabs. **When we get to the rulemaking** we could supersede what we do today, we could build on it, we could go in an entirely different direction altogether.

⁶ The FEC actually commenced a rulemaking to revise its regulatory definition of "political committee" in March 2001, but abandoned that effort without result seven months later. See Definition of Political Committee Status, 66 Fed. Reg. 13681 (proposed March 7, 2001).

⁷ We have attached a transcript of the February 18, 2004 hearing to this Memorandum as Exhibit A.

I think that in the rulemaking context we will have the option of considering a wider range of options for how to deal with this difficult issue of where *McConnell* leaves us in terms of the definition of expenditures. I am personally very uncomfortable with the aspect of the counsel's draft that I think there is no way around it. It redefines expenditures at least for political committees.

And I think that would better be done in a rulemaking than in an advisory opinion. I think it is appropriate for us to do it in the rulemaking context.

Tr. at 21-2 (emphases added). Later in that hearing, Commissioner Weintraub, referencing the enactment of BCRA, said:

And now it appears that we may be changing that framework [of BCRA] and I would be a lot more comfortable doing that in a rulemaking context.

Tr. at 24. Commissioner Weintraub added later in the hearing that this matter “more appropriately belongs in the rule-making context.” Tr. at 79. The issue of defining “expenditure” one way for political committees and another way for other groups, Weintraub said, “may be where we end up, but I think we ought to do that with the rulemaking process and not through [an advisory opinion].” Tr. at 84.⁸

Commissioner Weintraub was not the only Commissioner at the February 18, 2004, hearing to make the point that the issue of regulating the 527s should be done in a formal rulemaking. FEC Commissioner Toner said:

We have a rulemaking schedule[d] in the next couple of months that will allow us to tackle all of these issues much more

⁸ Commissioner Weintraub later explained again why she believed the issue of regulating 527s should be dealt with during a formal rule making rather than on a case by case basis in connection with issuing advisory opinions:

[T]hese issues really are more appropriately dealt with in the rulemaking context and much as we appreciate our obligation to give guidance to the regulated community, I really think that we do a disservice to the regulated community when we give them advice with the knowledge that we're about to enter into a rulemaking that may make the whole thing irrelevant.

Tr. at 106.

comprehensively....And I no doubt believe that whatever action we might take today with respect to 527s could have a ripple effect in terms of what people do vis-a-vis 501(c) groups.

But I think that what our approach is going to be to 501(c)(3)s and (4)s can be squarely addressed in the rulemaking. I think it's important that we tackle that issue along with the 527 issue so that we deal [with] all these issues comprehensively, and whatever we decide, it's a comprehensive approach. I think that's very important that we speak with – comprehensively in terms of outside groups and what they can do.

Tr. at 34-35 (emphases added). Commissioner McDonald similarly opined that everyone would be “better served” by a formal rulemaking process rather than having the Commission deal with the 527 issue “piecemeal”:

[B]ut I would think as a general proposition when we're in the position of being – **having it announced we're going to have a rulemaking in a particular area, we might all be better served to try and encourage folks to wait until that process so that we don't get into kind of piecemeal activities,** which is what I'm actually very, very concerned about....I would like to deal with it in a comprehensive fashion.

Tr. at 110 (emphasis added).

At the conclusion of the February 18, 2004 hearing, half of the Commissioners (Weintraub, McDonald, & Smith) voted to decline to answer any portion of the advisory opinion on the ground that the decision to accept it “was improvidently granted, and [to] address all of these issues in the rulemaking context.” (Motion by Commissioner Weintraub). Tr. at 105. Thus, during the February 18 hearing, a majority of the Commissioners (Weintraub, McDonald, Toner, and Smith) either spoke in favor of dealing with the issue of regulating 527s in a rulemaking or actually voted in favor of doing so. Tr. at 113.

Thereafter, in March, 2004, the Commission announced that it was undertaking a rulemaking proceeding in which it would address the definition of “political committee,” including the meaning of the “major purpose” test and how a group's decision to register

with the IRS under section 527 would affect that group's obligation to register with the Commission as a political committee. In May, however, the Commission voted to delay consideration of the issue until late summer. A few months later, in August 2004, the Commission, contrary to the advice of its general counsel, concluded the rulemaking without adopting any new rule to define "political committee" or "major purpose," and thus failed to decide when a section 527 group must register as a political committee. The defendant FEC had the opportunity to take the very action it claimed, just a few months earlier, was the better way to proceed: exercise its existing authority and issue a rule that would have governed 527s in the 2004 election cycle in a formal rulemaking proceeding. But the Commission failed to do so. That inexcusable failure by the Commission left the 527s, whose major purpose was to influence the 2004 Presidential election, free to spend unlimited amounts of soft money in the 2004 election cycle, and that is exactly what they did.

We recap this history because it puts in proper context the FEC's current arguments in its summary judgment papers that it is better to deal with the issue of regulating the 527s on a case-by-case basis rather than by proceeding to a rulemaking on this issue. As stated above, this is the exact opposite of the positions taken by a majority of Commissioners when the matter was before them as they considered ABC's request for an advisory opinion in late 2003 and early 2004 (see page 8-10, *supra*). As it has done so often in the past, the FEC is speaking out of both sides of its mouth on an issue. Just as it shirked its duty to the American people when it created the soft money loophole in the 25 years prior to BCRA, it has once again failed to fulfill its statutory duty to enforce the campaign finance laws. This time, its failure to adopt rules governing 527s

allowed those groups to spend unlimited amounts of soft money to influence the results of the 2004 elections. The American people deserve better.

C. The FEC Has Also Failed To Address The 527 Issue in 2004 or 2005 On A Case-By-Case Basis

In addition to its failure to regulate 527 organizations as political committees, the FEC has also failed to address the 527 issue in enforcement actions. During the 2004 election cycle, as early as January 2004, numerous complaints against 527 organizations were filed with the FEC.⁹ These complaints urged the FEC to require individually named 527 organizations to register as political committees and to comply with federal campaign finance laws. The FEC failed to take any publicly disclosed action on any of these complaints, thus leaving the 527 organizations free to engage in federal election activity influencing the federal election through the use of millions of dollars of soft money.

The FEC's failure to issue any new rule on the definition of political committee permitted 527 organizations to operate beyond the reach of campaign finance laws. Thus, 527s did not have to abide by the same rules and limitations that applied to other political committees. The FEC's failure to issue new rules or enforce FECA against individual 527 organizations will continue to undermine federal campaign finance laws by permitting massive evasion, circumvention, subversion, and violation of the laws in future election cycles.

⁹ For example, several campaign finance reform groups, the Campaign Legal Center, Democracy 21, and the Center for Responsive Politics filed administrative complaints with the FEC in 2004 against Swift Boat Veterans for Truth, Progress for America Voter Fund, among others. These complaints may be found at <http://www.campaignlegalcenter.org/attachments/1212.pdf> and <http://www.campaignlegalcenter.org/attachments/1232.pdf>.

Officeholders,¹⁰ academics,¹¹ campaign finance watchdog groups,¹² and the institutional press¹³ have all decried the FEC's repeated failures to enforce the campaign finance laws. Since its creation in 1974, Commissioners have helped to create and approve loopholes in FECA, and then looked the other way while creative party lawyers exploited those loopholes with impunity.¹⁴ The FEC's complicit role in the creation of the 527 soft money loophole, therefore, comes as no surprise. *The New York Times* summarized the situation quite well: "[T]he Federal Election Commission exercised vigilance over last year's record campaign spending with all the industry of a croupier making sure the players have chips at the ready. . . . A majority of party appointees to the F.E.C. gummed over the law strategically, once again performing as laissez-faire enablers of shady campaigners."¹⁵

III. 527 Organizations Circumvented Federal Campaign Finance Laws By Influencing The 2004 Federal Election Through Expenditure Of Millions Of Dollars In Unregulated Soft Money

Due to the FEC's failure to regulate 527 organizations as political committees, 527s played an unprecedented role in the 2004 federal election. National party operatives and others closely affiliated with the parties and candidates formed 527s to accept massive soft money contributions. These soft money contributions totaled in the hundreds of millions of dollars and were used to pay for stinging ad campaigns and partisan voter mobilization efforts that were formerly undertaken by the national parties.

¹⁰ John McCain, "Paying For Campaigns: McCain Eyes Next Target," *supra*.

¹¹ Richard Briffault, *The Future of Reform: Campaign Finance After the Bipartisan Campaign Reform Act of 2002*, 34 *Ariz. St. L.J.* 1179, 1205-08 (2002) (describing the FEC's failed attempts to implement BCRA properly).

¹² Project FEC, *No Bark, No Bite, No Point*, 5-33 (2002) available at <http://www.democracy21.org/vertical/Sites/{3D66FAFE-2697-446F-BB39-85FBBBA57812}/uploads/{B4BE5C24-65EA-4910-974C-759644EC0901}.pdf>

¹³ *Turning Out the Watchdogs*, N.Y. Times, Jan. 13, 2005, at A34; *Overhauling the FEC*, Wash. Post, July 11, 2003, at A20; *Captured Watchdog: Revamp FEC to Enforce Campaign Reforms*, San Diego Union-Trib., July 21, 2003, at B6.

¹⁴ *No Bark, No Bite, No Point*, *supra* at 5-33 (detailing the many failures of the FEC).

¹⁵ *Turning Out the Watchdogs*, *supra*.

Without question, 527 organizations had an influence on the 2004 federal elections using massive soft money contributions raised completely outside the limits of the federal campaign finance laws.

A. National Party Operatives And Those Closely Affiliated With Federal Candidates And Officeholders Created New 527 Organizations In The 2004 Election Cycle To Accept Soft Money Contributions That Had Been Banned By BCRA

In *McConnell*, the Supreme Court upheld BCRA's ban on federal political party committee solicitation, direction and receipt of soft money contributions. *McConnell*, 540 U.S. at 161. 133-89. The Court paid particular attention to the close relationship between the parties and candidates, noting that because of this close relationship, contributions to the party on behalf of the candidate create "a sense of obligation." *Id.* at 144-45. The Court also noted that federal officeholders and candidates are "well aware of the identities of the donors," even when the officeholder/candidate does not participate directly in the fundraising. *Id.* at 147. According to the Court, such "close ties" between the officeholders/candidates and the parties clearly give rise to at least the appearance of corruption. *Id.* at 152 (noting also that Justice Kennedy's "crabbed view of corruption" ignored "the realities of political fundraising").

Knowing that BCRA closed the original soft money loophole for parties and their federal candidates, party operatives and others closely affiliated with federal candidates¹⁶ formed section 527 political organizations to maintain the flow of soft money while ensuring that the message of those 527 organizations was controlled by individuals who had "a special relationship and unity of interest" with the federal candidates. *Id.* at 145.

¹⁶ Steve Weissman & Ruth Hassan, Campaign Finance Institute, *BCRA and the 527 Groups*, at 6-7 in *The Election After Reform: Money Politics, and the Bipartisan Campaign Reform Act* (Michael J. Malbin, ed., Forthcoming 2005), available at http://www.cfinst.org/studies/ElectionAfterReform/pdf/EAR_527chapter.pdf (describing the Democratic National Committee Chairman's role in developing 527 organizations).

Though 527 organizations are carefully crafted to appear “independent” of federal candidates, the leadership structure of a number of the 527 organizations is actually a thinly veiled shadow of the national political parties. Thus, in these 527 organizations, the soft money “recipient’s relationship to the candidate,” *id.* at 152, is nearly identical to the former relationship between the candidate and the party as the soft money conduit.

A closer look at the individuals behind three of the most influential 527 organizations, The Media Fund, Progress for America Voter Fund, and Swift Boat Veterans for Truth reveals a leadership structure that has “a special relationship and unity of interest” with the federal candidates. *Id.* at 145.

1. The Media Fund

The Media Fund was established on November 5, 2003, as a “political organization” under section 527 of the Internal Revenue Code. The Media Fund did not register with the FEC as a “political committee.” The Media Fund located its headquarters in the same building in downtown Washington, DC, as the temporary headquarters of the Democratic National Committee.¹⁷ The Media Fund “work[ed] in tandem” with other pro-Democratic section 527 groups¹⁸ by “collaborating on fundraising and strategy.”¹⁹

The Media Fund was headed by Harold Ickes, a current member of the executive committee of the Democratic National Committee and a former White House deputy chief of staff to President Bill Clinton.²⁰ Mr. Ickes also wore two hats at the Democratic national convention: fundraiser for The Media Fund and superdelegate to the Democratic

¹⁷ Eliza Newlin Carney, *New Rules of the Game*, Nat’l J., Dec. 20, 2003, at 3803-04.

¹⁸ *Id.*

¹⁹ *Id.* at 3806.

²⁰ *Id.* at 3805.

national convention.²¹ Ellen Malcolm also worked as a lead fundraiser for The Media Fund. Former Democratic President Bill Clinton, who frequently consulted with DNC chairman Terry McAuliffe during the 2004 election, also worked on behalf of The Media Fund as a principal fundraiser. Stanley Greenberg, after working as a polling strategist for the Democratic 527 organizations, joined the Kerry campaign as an advisor. Greenberg, in fact, admitted to having visited the Kerry campaign several times while he still worked for the 527 organizations in order to brief the Kerry staff on public polling.²² Bill Knapp left The Media Fund after spending the Spring of 2004 making ads for the group and joined the Kerry campaign as a media strategist.²³ Jim Jordan, former campaign manager for the Kerry campaign, worked as a consultant for The Media Fund.²⁴

2. Progress for America Voter Fund

Progress for America Voter Fund (PFA-VF) was established May 27, 2004, as a “political organization” under section 527 of the Internal Revenue Code. PFA-VF did not register with the FEC as a “political committee.” PFA-VF was established by Progress for America (PFA), a non-profit corporation organized under section 501(c)(4) of the tax code.

Organizers and officers of PFA have close ties to the Republican Party and to the Bush campaign. Tony Feather, who was the political director of President Bush’s 2000 campaign, “started PFA in 2001 to help build grassroots support for President Bush’s

²¹ Jim Rutenberg & Glen Justice, *A Delegate, a Fund-Raiser, and a Very Fine Line*, N.Y. Times, July 29, 2004, at A1.

²² Glen Justice & Jim Rutenberg, *Advocacy Groups and Campaigns: An Uneasy Shuttle*, N.Y. Times, Sept. 8, 2004, at A1.

²³ *Id.*

²⁴ *Id.*

agenda.”²⁵ Feather’s firm, Feather, Larson, Synhorst-DCI (FLS-DCI), “has major contracts with both the Bush-Cheney ’04 campaign and the Republican National Committee.”²⁶ In fact, throughout the 2004 campaign FLS-DCI conducted work for the Bush and RNC campaigns for which it received over \$19 million.²⁷ When Feather left PFA “to work for the Bush re-election campaign as a consultant on voter mobilization and fundraising,”²⁸ he “turned over the reins to Chris LaCivita, a former issue-advocacy director at the National Republican Senatorial Committee.”²⁹ LaCivita later left PFA to work for two Republican Senate campaigns. He was succeeded as President of PFA by a partner in DCI Group, Brian McCabe.³⁰ Tom Synhorst, a direct mail and phone bank specialist and a partner in FLS-DCI and DCI Group, “is a key strategic adviser to PFA.”³¹ Benjamin Ginsberg, outside counsel to the Bush-Cheney reelection campaign and to the Republican National Committee, also served as counsel to PFA.³² Recently, a top aide to House Majority Whip Roy Blount (R-Mo.), Jessica Boulanger, left the congressman’s office on a “leave of absence” to work for PFA.³³

3. Swift Boat Veterans for Truth

Swift Boat Veterans for Truth (SBVT) was established on April 23, 2004 as a “political organization” under section 527 of the Internal Revenue Code. Although it described itself as a “Special Purpose Political Action Committee,” SBVT did not

²⁵ Peter Stone, *Republican 527’s: Full Steam Ahead*, Nat’l J., May 29, 2004.

²⁶ Thomas Edsall, *GOP Creating Own ‘527’ Groups*, Wash. Post, May 25, 2004, at A15.

²⁷ Thomas Edsall & James Grimaldi, *On Nov. 2, GOP Got More Bang for its Billion, Analysis Shows*, Wash. Post, Dec. 30, 2004, at A1.

²⁸ Stone, *Republican 527’s: Full Steam Ahead*, *supra*.

²⁹ Peter Stone, *A Catalog of Key Groups*, Nat’l J., Dec. 19, 2003.

³⁰ Weissman & Hassan, *supra* at 9.

³¹ Edsall, *GOP Creating Own ‘527’ Groups*, *supra*.

³² Lisa Getter, *GOP Can’t Beat ‘3rd Party’ Groups, So It Forms Them*, L.A. Times, June 6, 2004, at A20.

³³ Paul Kane, *PFA Vows \$18M Spree on Judges*, Roll Call, June 16, 2005, at 1.

register as a “political committee” with the FEC.³⁴ SBVT made clear that its major, indeed its sole purpose, was to influence the 2004 presidential election and defeat the Democratic nominee for President, Senator John Kerry. SBVT quickly began 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.”³⁵

According to filings with the IRS by SBVT, the group raised \$158,750 in the quarter ending June 30, 2004.³⁶ Of this, \$100,000 was contributed by a single donor, Bob Perry, who *The New York Times* identified as “a Houston developer and major contributor to Republican campaigns.”³⁷ A report in *The Los Angeles Times* stated that Perry “has helped bankroll the widespread success of Republican candidates [in Texas], has longstanding ties to many close associates of President Bush and has contributed to Bush’s last four campaigns.”³⁸

That SBVT’s major purpose was to influence the 2004 presidential election is free from doubt. 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.

³⁴ A copy of Swift Boat’s IRS Form 8871 may be viewed here:

<http://forms.irs.gov/politicalOrgsSearch/search/Print.action?formId=13940&formType=E71>.

³⁵ Maria LaGanga & Stephen Braun, *Veterans Attack Kerry on Medals, War Record*, L.A. Times, Aug. 5, 2004, at A20.

³⁶ Copies of SBVT’s IRS Form 8872 Filings (detailing contributions and expenditures) for the entire 2004 election cycle are available using the IRS’ “Political Organization Filing and Disclosure” search engine, at: <http://forms.irs.gov/politicalOrgsSearch/search/basicSearch.jsp>. To view SBVT’s Forms, enter “Swift Boat” in the “Organization Name” field and click “Search.” On the next page, select “Swift Boat Veterans for Truth” to view SBVT’s six reports filed with the IRS in 2004.

³⁷ Jodi Wilgoren, *Vietnam Veterans Buy Ads to Attack Kerry*, N.Y. Times, Aug. 5, 2004, at A16.

³⁸ Scott Gold, *Top Texas Donor’s Influence Far More Visible Than He Is*, L.A. Times, Aug., 8, 2004, at A22.

Collins: Is it not a campaign ad, then?

Horne: Well, I'm not going to quibble with you on that.³⁹

The above statements, as well as the role played by SBVT in the 2004 cycle, make it abundantly clear the group was engaged in activities intended to influence the 2004 presidential election. The group targeted its ads to the battleground states to maximize their influence in the Presidential election. As the 2004 campaign drew to a close, SBVT had spent over \$22.5 million to fulfill its stated purpose of opposing Senator Kerry and influencing the federal election against him.⁴⁰

B. 527 Organizations Raised Millions Of Dollars Of Soft Money During The 2004 Election Cycle From Individuals, Corporations, And Labor Unions

Despite the great successes of BCRA in reining in the political parties' soft money abuses, the FEC opened a new significant loophole in the 2004 election by allowing 527 organizations to raise millions of dollars in soft money contributions and evade FECA's contribution limits, source prohibitions, and disclosure requirements. In 2004, 527 organizations raised a total of \$434 million.⁴¹ While this amount did not match the \$591 million of soft money that had been raised by the political parties in the 2002 elections, 527 fundraising in 2004 signaled three disturbing trends. If 527 organizations remain outside the campaign finance system, these trends leave little doubt that soft money fundraising by 527s will soon outstrip the best pre-BCRA soft money fundraising efforts by the political parties.

First, labor unions, long banned from donating from their treasury funds, used their treasury funds in 2004 to donate \$94 million to pro-Democratic 527 organizations,

³⁹ *Paula Zahn Now* (CNN television broadcast, Aug. 6, 2004), transcript available at <http://www.cnn.com/TRANSCRIPTS/0408/06/pzn.00.html>.

⁴⁰ SBVT's 8872 Filings, *supra*.

⁴¹ Center for Public Integrity, *527s in 2004 Shatter Previous Records for Political Fundraising*, available at <http://www.publicintegrity.org/527/report.aspx?aid=435&sid=300>.

up from the \$55 million that unions had donated to 527s in 2002.⁴² The largest of these contributions came from the prominent labor union Service Employees International Union, which contributed a whopping \$50,636,054 to federal 527 organizations.⁴³ The \$94 million that labor unions contributed to 527s in 2004 included roughly \$76 million in contributions to the unions' own 527s, and \$18 million to other 527s, including ACT and The Media Fund. This \$18 million in union contributions to non-union 527s in 2004 was roughly the same amount of money unions had contributed to national Democratic Party committees in 2002.⁴⁴

Second, big businesses continued to contribute soft money in large amounts in 2004. Though the total amount contributed to 527s by corporations dropped slightly (from \$32 million in 2002 to \$30 million in 2004), the average corporate donation rose 270% (from \$30,286 to \$81,886).⁴⁵ The Chamber of Commerce for the USA gave \$4.1 million; the National Association of Realtors gave \$3.3 million; and 3 groups of lawyers gave over \$3 million. Other top 20 corporate donors included Citigroup, Altria Group, AT&T, and GlaxoSmithKline. In 2004, 361 corporations contributed soft money and nearly matched the amount of soft money contributions that had been made by 1,034 corporations in 2002.⁴⁶ If 527 organizations remain unregulated, there is little doubt that more corporations will re-enter the soft money scheme, and will contribute the drastically higher amounts that were seen in 2004.

Third, and perhaps most important, individuals' soft money contributions skyrocketed, from \$37 million in 2002 to \$256 million in 2004.⁴⁷ At least 46 individuals

⁴² Weissman & Hassan, *supra* at 11.

⁴³ *Id.* at Table A-5.

⁴⁴ *Id.* at 12.

⁴⁵ *Id.* at 11-13.

⁴⁶ *Id.* at 13.

⁴⁷ *Id.*

contributed over \$1 million each in 2004, while in 2002 only six crossed the million dollar summit.⁴⁸ The top four individual contributors (all Democratic) gave more than \$73 million combined.⁴⁹ The number of contributors who gave more than \$100,000 ballooned from 66 in 2002 to 265 in 2004.⁵⁰

These massive amounts of money being paid into the political system are troubling enough, but what is also disturbing is the fact that most of these contributors formerly contributed soft money to the parties. Of the 113 contributors who gave more than \$250,000 to 527 organizations in 2004, 73 (nearly 65%) had given significant amounts of soft money in the past to the parties.⁵¹

There are no signs that 527 soft money fundraising will abate anytime soon. *Roll Call* recently reported that Progress for America had already spent \$11 million and planned to spend \$18 million more in 2005.⁵² Looking forward to 2006, one Republican campaign finance expert predicted that 527 organizations will “have a bigger impact on the midterm elections than they had on last year’s presidential race because . . . their spending [will] make up a greater percentage of total political spending.”⁵³ Whether 527 organizations disbanded after the 2004 election (as did Swift Boat Veterans for Truth and the Media Fund, for example), or whether they will continue to be active even in off-

⁴⁸ Glen Justice, *Even with Campaign Finance Law, Money Talks Louder than Ever*, N.Y. Times, Nov. 8, 2004, at A16.

⁴⁹ Center For Public Integrity, *supra*.

⁵⁰ Weissman & Hassan, *supra* at 13.

⁵¹ *Id.* at 16. The mere size of individual contributions made to 527s in 2004 alone suggests that big money contributors were attempting to influence the political process. That attempt to influence becomes even more obvious when one considers that contributions to other political committees are subject to strict contribution limits. In the 2004 election cycle, for example, the Campaign Finance Institute reported that 24 donors gave \$2 million or more, with Democratic financiers George Soros (\$24 million) and Peter Lewis (\$22 million) leading the way. On the Republican side, Texas homebuilder Bob Perry gave \$8 million to Progress for America and Swift Boat Veterans for Truth—two pro-Republican 527s.. The failure of the FEC to regulate 527s in 2004 meant that wealthy contributors such as these could attempt to influence federal elections but not have to abide by the same limits as other donors in the political system.

⁵² Kane, *supra*.

⁵³ Alexander Bolton, *ACT to Spend \$30 Million*, The Hill, June 14, 2005.

election years (as does PFA), there is no doubt that 2006 will usher in a new wave of massive soft money contributions to new 527 organizations created by political operatives whose major purpose is to influence federal elections.

C. 527 Organizations' Activities Illegally Influenced The 2004 Federal Elections

Infused with millions of dollars of soft money, 527 organizations focused their resources almost entirely on promoting, attacking, supporting, or opposing federal candidates, including many vitriolic attacks on presidential candidates Senator John Kerry and President George W. Bush. Democratic 527 organizations played a crucial role in the late spring and early summer months in countering President Bush's campaign allowing the Democratic nominee-in-waiting, Senator Kerry, to husband his resources for the fall campaign. Once the FEC signaled its intentions to do nothing to enforce FECA properly and rein in 527 organizations during the 2004 election cycle, Republican 527 organizations quickly formed and attacked Senator Kerry. The 527 organizations' federal election activities played a crucial role in influencing voters in the 2004 election.

i. Pro-Democratic 527 Organizations Spent Millions Of Dollars Of Soft Money Solely To Counter President Bush.

As Senator Kerry began to emerge from the Democratic primary battle as the presumptive Democratic nominee for President, it was apparent that his campaign had insufficient funds to counter President Bush's campaign until the Democratic national convention.⁵⁴ In 1996, Senator Bob Dole was in a similar position and President Clinton's re-election campaign spent the next several months pounding away at Dole's image while Dole was unable to respond. President Bush's 2004 campaign hoped to replicate Clinton's knockout blow following the primaries. Though Kerry, unlike Dole,

⁵⁴ Matthew Cooper & Karen Tumulty, *Bring on the Cash!*, Time, Feb. 23, 2004, at 18.

opted out of public presidential funding in the primary season, thus enabling him to continue to raise unlimited hard money contributions, it was evident that Kerry would not be able to match the well-over \$100 million war chest that Bush had amassed.

Recognizing this shortfall of funds, Democratic 527 organizations headed by Democratic Party operatives stepped in and countered President Bush's message. From March to August 2004, Democratic 527 organizations, such as the Media Fund, spent tens of millions of dollars matching the spending by President Bush's campaign.⁵⁵ For example, The Media Fund spent \$28 million between March and August of 2004 on radio and television commercials attacking President Bush and supporting Senator Kerry.⁵⁶

When Senator Kerry announced that he would not spend his hard money on advertisements in August in order to save money for the fall, The Media Fund promptly announced that it would increase its advertising in August.⁵⁷

The federal election activities of the Democratic 527 organizations in the spring and summer months of the 2004 election are clear evidence that the 527 organizations had a major, even overriding and nearly sole, purpose of influencing the federal election.

ii. Pro-Republican 527 Organizations Spent Millions of Dollars Solely To Attack Senator Kerry and Tout President Bush

While Democratic operatives never worried about forming 527 organizations to influence the 2004 federal election, the Republican political operatives and party officials were more hesitant, questioning at the outset the legality of such organizations. President Bush, himself, stated that 527 organizations are "bad for the system."⁵⁸ It only took two weeks, however, following the FEC's May 13, 2004, announcement that it was delaying

⁵⁵ Jeffrey Birnbaum & Thomas Edsall, *At the End, Pro-GOP '527s' Outspent Their Counterparts*, Wash. Post, Nov. 6, 2004, at A6.

⁵⁶ Rutenberg & Justice, *A Delegate, a Fund-Raiser, and a Very Fine Line*, *supra*.

⁵⁷ *Id.*

⁵⁸ Glen Justice, *GOP Group Says It's Ready to Wage Ad War*, N.Y. Times, Aug. 24, 2004, at A20.

its rulemaking on “political committees,” before one of the most influential Republican 527 organizations was created. Progress for America Voter Fund was created on May 27, 2004, as a section 527 “political organization,” but did not register as a “political committee” under FECA. Similarly, Swift Boat Veterans for Truth, arguably the most well known 527 organization, organized on April 23, 2004, only weeks before the FEC signaled its intention to leave 527 organizations outside the FECA limits. Many other Republican 527 organizations formed shortly after the FEC’s inaction.⁵⁹

Data collected by the Center for Public Integrity indicates that Republican 527 organizations were not measurably active until June 2004.⁶⁰ In June and July, Republican 527 organizations spent approximately only \$3 to \$4 million. Once the FEC announced in August 2004 that it was abandoning its rulemaking that would have enforced FECA’s definition of “political committee”, spending by Republican 527s skyrocketed. By August, Republican 527 spending surged to \$14 million. By September, the spending by Republican 527s increased another 36%, to \$19 million. In the weeks before the 2004 general election, the amount of money being spent by Republican 527s spiked to \$27 million, with another \$3 million spent in the first week of November.⁶¹

Given the trends in spending as well as the creation of Republican 527 organizations relatively late in the cycle, it is clear that the FEC’s failure to take any action to enforce FECA’s definition of “political committee” caused massive amounts of soft money to be raised and spent to influence the presidential election. It is simply

⁵⁹ Stone, *Republican 527s: Full-Steam Ahead*, *supra*.

⁶⁰ Center for Public Integrity, *supra*.

⁶¹ *Id.* Democratic 527 spending was steady throughout the summer months of 2004. In August and September, these groups spent around \$20 million each month. In October, however, the Democratic 527 spending exceeded \$42 million. In the final week before the election, the Democratic 527s continued their spending spree, throwing more than \$8 million into last minute efforts to defeat President Bush. *Id.*

indefensible that the FEC failed to rein in the 527s by declaring them to be political committees, when it was obvious to everyone including the FEC that their major purpose was to influence the federal elections. 527s aligned with the Republican and Democratic parties were able to promote and attack candidates for federal office without abiding by the contribution limits that applied to other political committees; and the fact that they were not deemed political committees for FECA purposes permitted them to shield the identity of their donors.

Two Republican 527 advertising blitzes, however, provide the most compelling example of the influence that 527 organizations had on the 2004 federal election. Swift Boat Veterans for Truth launched a blistering TV and radio advertising campaign attacking Senator Kerry's Vietnam War record, a key issue for the Kerry campaign. An astounding 75 percent of voters in one poll recalled the stinging SBVT ads.⁶² Another poll of voters in six battleground states cited the SBVT ads as the most influential ads of the whole campaign season.⁶³

The second most influential broadcast political advertisement in these six key states was produced and paid for by PFA (Progress for America), another pro-Bush 527 organization. "Ashley's Story" recounted the experience of 16-year old Ashley, whose mother was killed in the 9-11 terrorist attacks and came out of a deep depression only after a brief, comforting hug by President Bush at a campaign stop in Ashley's home town.⁶⁴ PFA spent \$17 million airing this ad in the battleground states, and reportedly ran the ad over 30,000 times.⁶⁵

⁶² Birnbaum & Edsall, *supra*.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Edsall & Grimaldi, *GOP Got More Bang For Its Billion*, *supra*; and Jon Craig & Catherine Candisky, *Presidential Campaign in Ohio: October Ad Buy Hits \$40 Million*, Columbus Dispatch, Nov. 19, 2004, at A1.

3. The Campaign Spending By 527 Organizations Had A Major Effect On The 2004 Federal Elections

The fact that 527 organizations played such a prominent role in mobilizing voters and influencing the federal election is no surprise. Their major purpose was to influence the federal election. The Center for Public Integrity found that ninety-eight 527 organizations “clearly targeted all or part of their message at the presidential or congressional races.”⁶⁶ Of these, fifty-three focused exclusively on the presidential election.⁶⁷

The overwhelming majority of money raised by 527 organizations was spent on broadcast advertising. Democratic 527s spent nearly \$81 million on ads opposing President Bush and promoting Senator Kerry. Republican 527s also spent heavily, around \$62 million on radio and TV ads. This \$62 million constituted 65% of all spending by Republican 527s.⁶⁸ As SBVT showed, these broadcast advertisements played a major role in swinging the federal election in favor of President Bush, especially in key battleground states. For example, 527s spent the most in Ohio, nearly \$10 million,⁶⁹ where President Bush won the vote by a mere 118,000 votes.⁷⁰ Ohio’s twenty electoral votes were critical to President Bush’s election victory. And 527s spent the second most in Florida, the decisive state in 2000 and nearly as important in 2004, by throwing \$7.5 million into the federal election.⁷¹

It is no coincidence that spending by 527 groups was heaviest in those states that played the largest roles in the 2004 presidential election. To maximize their influence in

⁶⁶ Center for Public Integrity, *supra*.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Election Results, Ohio, CNN, available at <http://www.cnn.com/ELECTION/2004/pages/results/states/OH/P/00/index.html>.

⁷¹ Center for Public Integrity, *supra*.

the 2004 elections, 527 organizations targeted the electorate in those States that were considered “in play.” The only plausible conclusion to be drawn is that these 527 organizations had as their major purpose, and in most instances their sole purpose, to influence the outcome of the federal election. As such, the FEC should have regulated them as political committees, but failed to do so.

CONCLUSION

Requiring the FEC to issue appropriate regulations defining the term “political committee” is important for two reasons: it will address the corruption and appearance of corruption caused by the massive amounts of soft money that were re-introduced into the political system; and it will serve as an effective anti-circumvention measure intended to repair and restore our campaign finance laws.

For the reasons set forth above, *amici* respectfully submit that this Court should grant the plaintiffs’ motion for summary judgment, deny the defendant’s motion for summary judgment, and order complete relief as requested.

Respectfully submitted,

/s/ J. Gerald Hebert
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Dated: July 15, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 2005, I served a copy of the foregoing Memorandum of *Amici Curiae* U.S. Senators John McCain and Russell Feingold Supporting Plaintiff's Motion For Summary Judgment and Opposing Defendant's Motion For Summary Judgment on the following counsel by placing a copy in the court's electronic case files.

/s/ J. Gerald Hebert
J. Gerald Hebert