DEFENDANT FEDERAL ELECTION COMMISSION’S STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE

The defendant Federal Election Commission (“Commission” or “FEC”) submits the following statement of material facts about which there is no genuine issue or dispute, pursuant to Federal Rule of Civil Procedure 56 and LCvR 56.1.

1. In 2004, the Federal Election Commission conducted a rulemaking in which the Commission considered, inter alia, whether to issue new regulations further construing the statutory term “political committee.” Political Committee Status; Proposed Rule, 69 Fed. Reg. 11,736-760 (March 11, 2004) (AR 11 at 246). At the conclusion of the rulemaking, the
Commission adopted several new regulations, but chose not to adopt a rule interpreting “major purpose,” a judicial gloss on the definition of “political committee” in the Federal Election Campaign Act of 1971, as amended (“Act” or “FECA”), codified at 2 U.S.C. 431-455, that was adopted by the Supreme Court nearly 30 years ago in Buckley v. Valeo, 424 U.S. 1 (1976). The Commission explained that the issue was a complex one whose consequences for nonprofit groups engaged in advocacy were too uncertain to enable the fashioning of a rule of general application, that the agency had been applying the “major purpose” requirement for many years on a case-by-case basis without additional regulatory definitions, and that it intended to continue to do so. See Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056, 68,065 (Nov. 23, 2004) (AR 375 at 2842).1

2. Plaintiffs Christopher Shays and Martin Meehan are Members of the United States House of Representatives and were the principal House sponsors of the Bipartisan Campaign Reform Act of 2002 (“BCRA”), Pub. L. No. 107-155, 116 Stat. 81 (2002), the most recent major amendment to the Act. First Amended Complaint (“Shays FAC”) ¶¶ 14, 15. Their complaint states that they each intend to seek re-election in 2006. Id.

3. In their declarations submitted to support their motion for summary judgment, Shays and Meehan do not identify any section 527 organizations that they believe will try to influence elections in which they are candidates without registering as political committees. They do not refer to any evidence to support their conclusory assertion that the risk of such an occurrence is “strong.” Their declarations do not allege that any section 527 organization not registered with the Commission as a political committee opposed them in the 2004 congressional

1 “AR __” citations are to the administrative record filed by the Commission.
campaigns (in which they were victorious), or that any other congressional candidate in plaintiffs’ home states experienced such opposition. Shays and Meehan do not identify any particular organization that they allege has failed to disclose any information required by the Act. Declaration of Representative Christopher Shays (April 27, 2005); Declaration of Representative Martin Meehan (April 27, 2005).

4. Plaintiff Bush-Cheney ’04, Inc. (“BC ’04”) was the principal campaign committee of George W. Bush and Richard B. Cheney for the 2004 general election campaign for President and Vice President of the United States. See FEC Exh. A and B. President Bush and Vice President Cheney accepted public funding to finance their 2004 general election campaign. See M. Trimble, Public Funding for Bush-Cheney, FEC RECORD (Oct. 2004) at 17; Press Release, “FEC Certifies Public Funds For Bush-Cheney Ticket” (Sept. 2, 2004), available at http://www.fec.gov/press/press2004/20040902fund.html. As a precondition for that funding, they agreed, inter alia, to accept no contributions, limit their expenditures, and consent to the Commission’s conducting a detailed post-election examination and audit of BC ‘04’s finances. See Presidential Election Campaign Fund Act (“Fund Act”), 26 U.S.C. 9001, 9003. See also 11 C.F.R. 9002.11(a)(1), 9004.11, 9007.2(b)(3). Under the Fund Act, the Commission has until November 2007 — a year after the November 2006 elections — to complete the audit and notify President Bush and BC ’04 of any repayments they must make. See 26 U.S.C. 9007(c) (three-year deadline). At least until that process is completed, BC ’04 remains a publicly financed principal campaign committee for the 2004 general election and cannot convert into a multicandidate political committee. See 2 U.S.C. 432(e)(3); 11 C.F.R. 102.13(c) (multicandidate committee cannot serve as a candidate’s principal campaign committee).
5. Bush-Cheney ’04 (Primary), Inc. – President Bush’s and Vice President Cheney’s principal campaign committee for their 2004 presidential primary campaign – has filed two administrative complaints in which it alleges that several section 527 organizations violated the FECA by failing to register as political committees. Complaint in Bush-Cheney ’04, Inc. v. FEC, No. 04-CV-1501 (JR) (D.D.C. filed Sept. 1, 2004) (“Bush-Cheney I”) at 1, 3 and 5, and Exhibits A and B attached thereto. When it filed these administrative complaints, the primary election committee was known as “Bush-Cheney ’04” (FEC Exh. C), but changed its name to “Bush-Cheney ’04 (Primary), Inc.” after the 2004 Republican convention when a new committee with that name (the plaintiff here) was established to received public funds and conduct President Bush’s general election campaign. FEC Exh. D. Plaintiff in this litigation, Bush-Cheney ’04, Inc., was not an administrative complainant in those matters. See Complaint in Bush-Cheney I at 1, 3 and 5, and Exhibits A and B thereto.

6. The primary committee, now Bush-Cheney ’04 (Primary), Inc., filed a lawsuit against the Commission, Bush-Cheney ’04, Inc. v. FEC, Civil Action No. 04-1501 (JR) (D.D.C.) (“Bush-Cheney I”), on September 1, 2004 challenging the Commission’s failure to take final action on the two administrative complaints. Complaint in Bush-Cheney I. The committee’s motion for a preliminary injunction was denied, and that litigation subsequently was dismissed by stipulation on December 2, 2004. See Docket in Bush-Cheney I. Plaintiff in this litigation, Bush-Cheney ’04, Inc., was not a plaintiff in the prior litigation. See Complaint in Bush-Cheney I.

7. The United States House of Representatives adjourned on October 9, 2004, and the United States Senate adjourned on October 11, 2004, and neither the House of Representatives or the Senate reconvened until November 16, after the 2004 general election.
President Bush won re-election in November 2004. Since the Constitution prohibits him from serving a third term as president, see U.S. Const. amend. XXII, § 1, he will not again face electoral opposition from unregistered section 527 organizations and BC ’04 cannot be redesignated as the principal campaign committee for Mr. Bush for another term. Vice President Cheney has confirmed that he will not run for the presidency. Transcript of Fox News Sunday (Feb. 7, 2005), available at http://www.foxnews.com/story/0,2933,146546,00.html.

President Bush and Vice-President Cheney are not parties to this litigation, nor are Mr. Bush’s other political committees, Bush-Cheney ’04 (Primary), Inc. and Bush-Cheney ’04 Compliance Committee. Amended Complaint in Shays v. FEC, No. 04-CV-1597 (EGS) (D.D.C. filed Sept. 14, 2004); Amended Complaint in Bush-Cheney ’04, Inc. v. FEC, No. 04-CV-1612 (EGS) (D.D.C. filed Sept. 17, 2004).

Defendant Federal Election Commission is the independent agency of the United States Government empowered with exclusive jurisdiction to administer, interpret, and civilly enforce the FECA. See generally 2 U.S.C. 437c(b)(1), 437d(a), and 437g. The Act authorizes the Commission to “formulate policy with respect to” the Act, 2 U.S.C. 437c(b)(1), as well as to promulgate “such rules . . . as are necessary to carry out the provisions” of the Act. 2 U.S.C. 437d(a)(8). It also empowers the Commission to issue written advisory opinions construing the statute and to investigate possible violations of the Act and other federal statutes within the Commission’s jurisdiction after receiving a sworn complaint or “on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities.” 2 U.S.C. 437g(a)(1) and (2).

12. Since the 1970s, Congress has not amended the definition of “political committee,” addressed the application of FECA to section 527 organizations, or questioned the Commission’s case-by-case approach to those questions.

13. On May 17, 2000, Senator Joseph Lieberman introduced S. 2582, which would have limited the “tax exemption under Section 527 . . . only to organizations regulated under FECA (unless an organization focuses exclusively on State or local elections or does not meet certain other explicit FECA requirements).” S. 2582 (as introduced on May 17, 2000); 146 Cong. Rec. S4114 (May 17, 2000) (statement of Senator Lieberman). According to Senator Lieberman, “[i]f this bill were enacted, groups no longer would be able to tell one thing to the IRS to get a tax benefit and then deny the same thing to the FEC in order to evade FECA regulation.” 146 Cong. Rec. S4111.

15. In 2002, the same Congress that enacted BCRA also amended the section 527 disclosure provision, but retained its requirement that section 527 organizations which are not political committees file disclosure reports with the IRS. Pub. L. 107-276, 116 Stat. 1929 (2002).

16. Presently, at least two different bills are pending in Congress that would amend the Act to address, for the first time, the circumstances under which section 527 organizations are to be treated as “political committees” under the FECA. In the House of Representatives, plaintiffs Shays and Meehan introduced H.R. 513, the “527 Reform Act of 2005,” which would amend FECA’s definition of “political committee” to include “any applicable 527 organization,” which is defined to include a “committee, club, association, or group of persons that . . . is an organization described in section 527.” Plaintiffs’ bill would exempt organizations “whose election or nomination activities relate exclusively to . . . elections where no candidate for Federal office appears on the ballot.” See H.R. 513 (as introduced in the House on February 2, 2005). An identical bill, S. 271, was introduced in the Senate by John McCain and Russ Feingold. See S. 271 (introduced Feb. 2, 2005); 151 Cong. Rec. S905-S906 (Feb. 2, 2005) (statement of Senator McCain). Neither of these proposals has reached the floor of the House or Senate.

17. The Shays-Meehan bill (H.R. 513) was referred to the Committee on House Administration. The committee discussed the regulation of 527 organizations on April 20, 2005 – Congressmen Shays and Meehan both submitted written testimony – but no further action has occurred on the Shays-Meehan bill. Instead, the Committee on House Administration is considering a competing proposal, H.R. 1316, the “527 Fairness Act of 2005,” which, instead of altering the status of 572 organizations, would inter alia increase the contribution limits for
House and Senate candidates, and repeal the aggregate limit on contributions by individuals.

H.R. 1316 (as introduced in the House, March 15, 2005).

18. The Senate Committee on Rules and Administration held hearings on S. 271 on March 8, 2005. 151 Cong. Rec. D196 (Mar. 8, 2005). On April 27, 2005, however, the Committee ordered that a substitute measure, S. 1053, be reported in lieu of S. 271, and the substitute bill was introduced in the Senate on May 17, 2005 (151 Cong. Rec. S5321-S5323), and placed on the Senate’s Legislative Calendar. To date, no further action has occurred on S. 1053.

19. On March 11, 2004, the Commission published a Notice of Proposed Rulemaking (“NPRM”) seeking public comment on a variety of issues involving the definitions of “political committee,” “contribution” and “expenditure,” and on possible revisions to the allocation requirements for nonconnected political committees that maintain separate accounts for federal and nonfederal election activities. Political Committee Status; Proposed Rule, 69 Fed. Reg. 11,736-760 (March 11, 2004) (AR 11 at 246). The Commission prepared an expedited schedule that included only four weeks for public comment and hearings on April 14 and 15, 2004. Id. The 2004 rulemaking was resolved in August 2004, only five months after it had begun, despite a record in excess of 100,000 pages. AR 364 at 2732; Certification for Administrative Record (April 29, 2005) at 2.

20. The NPRM presented several possible ways to identify the kinds of disbursements that would count as “expenditures” in determining whether an organization has met the $1,000 threshold requirement to be a “political committee” under the FECA. The first proposal would include the costs of certain activities – “federal election activity,” defined as including particular voter registration, get-out-the-vote, and voter identification efforts, and “electioneering
communications” (see 2 U.S.C. 434(f)(3)) – as counting toward the $1,000 expenditure threshold for political committees. NPRM at 11,738-39 (AR 11 at 249). Provisions concerning those activities were added to the statute by BCRA, and the Supreme Court upheld those provisions against vagueness and overbreadth challenges in *McConnell v. FEC*, 540 U.S. 93 (2003).

The Commission proposed an alternative construction of the term “expenditure” that would include payments for public communications that promote, support, attack, or oppose any political party or clearly identified federal candidate. NPRM at 11,741 (proposed 11 CFR 100.116) (AR 11 at 252). The Commission sought comment on these proposals, and also on the related issue of whether money received and used to pay for such activities should count as “contributions.” NPRM at 11,739 (AR 11 at 250).

21. The NPRM also sought comments on whether the definition of “political committee” should spell out some version of a “major purpose” requirement and, if so, what that requirement should be. NPRM at 11,743-49, 11,756-57 (AR 11 at 254-260, 267-268). The NPRM proposed that a group that “receives in excess of $1,000 in total federal contributions or makes in excess of $1,000 in total federal expenditures would be a political committee only if ‘the nomination or election of one or more Federal candidates is a major purpose’ of the group.” NPRM at 11,743-44 (AR 11 at 254-255).

22. The Commission also requested comments on four possible “tests” to determine a “major purpose” of an entity. NPRM at 11,745-749 (AR 11 at 254-260). The first used the organization’s public pronouncements and a $10,000 annual spending threshold for certain kinds of electoral activities; the second focused on whether the organization spent more than 50% of its total annual disbursements on such activities; the third relied on a $50,000 spending threshold; and the fourth proposal, drafted in the alternative, explicitly addressed section 527 organizations.
NPRM at 11,748, 11,757 (AR 11 at 259, 268). One alternative provided that, with five exceptions, all section 527 organizations would be considered to have the nomination or election of candidates as a major purpose. NPRM at 11,748 (AR 11 at 259). The other alternative would have eliminated the exceptions. Id.

23. In addition to seeking comments on the specific proposals, the Commission also asked a series of questions to engender comment and advice to the Commission concerning its constitutional and statutory authority to adopt a “major purpose” proposal, as well as the impact of various court decisions on its construction of “major purpose.” NPRM at 11,743-749 (AR 11 at 254-260) (listing in 49 questions concerning “major purpose”).

24. The Commission received more than 100,000 comments from political committees, political parties, nonprofit organizations, individuals, campaign finance organizations, and Members of Congress. 69 Fed. Reg. 68056 (AR 375 at 2833); Certification for Certified Administrative Record (April 29, 2005) at 2. At the public hearings, the Commission heard from 31 witnesses representing numerous organizations with a broad range of opinions and concerns about many different issues. AR 352-353 (transcripts of hearings). These commenters offered a wide variety of contradictory views regarding the rulemaking’s complex, controversial issues. Id.

25. In both written statements and at the hearing, many commenters supported incorporating a “major purpose” component into the Commission’s regulatory definition of “political committee,” but they differed widely among themselves about how that concept should be defined. See, e.g., AR 163 at 941 (Prof. Tobin); AR 143 at 782 (Democracy 21, et al.); AR 141 at 718 (Public Citizen). Some commenters proposed that tax-exempt organizations under section 501(c) of the Internal Revenue Code be excluded from any rule defining “major
purpose.” See, e.g., AR 276 at 1570 (National Voting Rights Institute). Similarly, some
commenters believed that the definition of “expenditure” should differ depending on the tax
status of the entity doing the spending, distinguishing section 501(c) organizations from section
527 organizations. See, e.g., AR 271 at 1513-1514 (Sens. McCain and Feingold; Reps. Shays
and Meehan).

26. Many other commenters opposed all of the proposals set forth in the NPRM and
expressed concerns about the potential impact of the proposed rules on political issue advocacy.
See, e.g., AR 139 at 663 (America Coming Together); AR 166 at 1002 (The Media Fund);
AR 265 at 1482 (Service Employees International Union). Several provisions in BCRA,
including those permitting the use of unlimited funds donated by individuals for broadcasting
“electioneering communications” to a candidate’s constituents during the weeks before an
election (see 2 U.S.C. 434(f)(1), (2)(A), (B), (D); 441b(b)(2)), were cited for the proposition that
an overly broad rule defining “political committee” would conflict with BCRA. See, e.g.,
AR 136 at 621 (MoveOn.org Voter Fund); AR 286 at 1614 (NAR). Commenters also argued
that because BCRA only applied the “promote, support, attack, or oppose” standard to party
organizations, it would be improper for the Commission to apply that standard to nonparty
organizations. See, e.g., AR 139 at 664 (America Coming Together); AR 166 at 1003
(The Media Fund). Those commenters borrowed the quoted language from BCRA
which applies only to party committees. See 2 U.S.C. 441i(b). See also McConnell, 540 U.S.
at 170 n.64 (holding that this language is not unconstitutionally vague).

27. Commenters also noted that Congress in BCRA did not change the definition of
“expenditure” from that enacted more than 25 years ago. See, e.g., AR 136 at 621 (MoveOn.org
Voter Fund). Some commenters pointed out that the FECA has only one definition of “expenditure,” and argued that the definition therefore could not vary with the type of entity spending funds. See, e.g., AR 139 at 668 (America Coming Together). Commenters also objected to any proposal that would presume that all section 527 organizations satisfy the “major purpose” requirement, because many such organizations have no role in electing candidates to federal office. See, e.g., AR 136 at 617 (MoveOn.org Voter Fund).

28. Many commenters also questioned whether new rules were necessary or appropriate at this time and suggested that refinement of Buckley’s “major purpose” language might better be addressed by Congress or the Supreme Court. See, e.g., AR 16 at 284 (130 Members of Congress); AR 230 at 1288 (VoterMarch); AR 279 at 1588 (Richardson).

A joint comment from 672 section 501(c) organizations contended that the Commission did not have access to the sort of comprehensive information Congress had at its disposal, and that the Commission was, therefore, poorly positioned to assess the operations of the variety of organizations that might be affected by new regulations. AR 146 at 739; AR 319 at 1813 (additional signatories).

29. Some commenters noted that Congress did not address political committee status in BCRA even though the new section 527 disclosure legislation enacted in 2000 and amended in 2002 demonstrated that Congress was fully aware that some section 527 groups were operating outside FECA’s registration and reporting requirements and its contribution limitations and prohibitions. See, e.g., AR 16 at 284 (130 Members of Congress); AR 279 at 1588 (Richardson); AR 158 at 909 (Citizens United); AR 150 at 836 (OMB Watch). These commenters argued that legislation requiring section 527 organizations to file disclosure reports
with the IRS indicated that Congress had decided not to require those organizations to register with the Commission as political committees. See id.

30. Some commenters viewed the “major purpose” limitation as a court-created protection to avoid overbroad application of the FECA’s definition of “political committee,” and not as a statutory trigger for political committee status. See, e.g., AR 139 at 680-681 (America Coming Together); AR 166 at 997-998 (The Media Fund); AR 265 at 1481-1482 (Service Employees International Union); AR 152 at 852-857 (Focus on the Family, et al.). A “major purpose” test used as a trigger, some commenters argued, would chill constitutionally protected speech, particularly since the commenters believed that the boundaries of such a test would be inherently vague and thus force organizations to curtail permissible activities. See AR 151 at 837 (National Lawyers Guild, et al.); AR 168 at 1033-1035 (Chamber of Commerce); AR 242 at 1371, 1373 (Beigi); AR 146 at 729-736 (672 section 501(c) groups). Several unions, for example, expressed concern that the proposed rules would affect their core activities, from criticizing public officials to representing public employees during an election season. See, e.g., AR 265 at 1477-1478, 1481, 1483 (Service Employees International Union); AR 162 at 936-937 (American Fed. of Government Employees).

31. Other commenters predicted that the Commission would face practical difficulties in implementing any generally applicable test intended to ascertain a group’s “purpose.” See, e.g., AR 139 at 665-666 (America Coming Together); AR 147 at 816, 818 (NAACP Legal Defense and Educational Fund). These commenters were concerned that the “major purpose” proposals set out in the NPRM might unfairly categorize an organization as a political committee on the basis of a few statements or organizational documents even though those statements and documents might not accurately convey the actual purpose and operation of the organization.
32. Commenters also asserted that the determination of an organization’s purpose would often result in intrusive investigations by the Commission into the private internal workings of an organization. See, e.g., AR 168 at 1044-1045 (Chamber of Commerce). Another commenter feared that any definition of “political committee” with even the potential of encompassing nonprofit organizations would force them to choose between accepting corporate donations and advocating ballot questions as a part of their overall activity. See AR 264 at 1463-1464 (National Assoc. of Latino Elected and Appointed Officials).

33. Some commenters also suggested that the Commission would be in a better position to address the issue after monitoring the behavior of various organizations during at least one election cycle following the enactment of BCRA. See, e.g., AR 19 at 301-302 (Thiel). Other commenters counseled that the Commission had insufficient data demonstrating the existence of corruption or the appearance of corruption from the activities of many of the groups that would be affected to justify the proposed regulations. See, e.g., AR 139 at 660-661 (America Coming Together), AR 27 at 321 (Common Cause); AR 146 at 738-740 (672 section 501(c) groups). Furthermore, some commenters cautioned that the upcoming elections would be disrupted if the Commission immediately adopted new regulations. See, e.g., AR 139 at 661-662 (America Coming Together); AR 166 at 1012-1013 (The Media Fund).

34. After evaluating these comments, the Commission considered two separate draft Final Rules that would have revised the definition of “political committee.” Each incorporated modified portions of the rules proposed in the NPRM, and each included a “major purpose” component, although they differed in purpose and operation. See AR 354 at 2665-2666
(draft 11 CFR 100.5(a), Agenda Document 04-75, at 37-41), (General Counsel’s proposed draft); AR 355 at 2677-2679 (draft 11 CFR 100.5(a), Agenda Document 04-75-A, at 2-3 (Aug. 19, 2004 meeting) (proposal offered by Commissioners Thomas and Toner). Both drafts were rejected by a 4-2 vote. AR 364 at 2731-2732

35. The first draft Final Rules, proposed by the General Counsel, would have incorporated one interpretation of Buckley’s discussion of “major purpose” into the definition of “political committee” in 11 CFR 100.5(a) by requiring an organization to have “as its major purpose the nomination or election of one or more candidates for Federal office.” See draft 11 CFR 100.5(a)(1)(ii) of Agenda Document 04-75 (emphasis added) (AR 354 at 2665); see also Buckley, 424 U.S. at 79. Draft paragraph (a)(2) presented three ways in which an organization could satisfy this requirement: (1) by publicly declaring that the purpose of the group is to influence federal elections; (2) by spending more than 50% of its funds on certain specified activities; or (3) by receiving more than 50% of its funding through “contributions,” as defined in 2 U.S.C. 431(8) and 11 CFR Part 100, Subpart B. This version of the Final Rules also favored a broader notion of what kind of expenditures a threshold criterion of 50% disbursements for federal election activities would encompass. 69 Fed. Reg. 68,056 (Nov. 23, 2005) (AR 375 at 2833).

36. The second draft Final Rules — the Thomas-Toner proposal — rested on an interpretation of Buckley that focused on whether an organization’s major purpose is the “election of one or more Federal or non-Federal candidates.” Draft 11 CFR 100.5(a)(1)(ii) in Agenda Document 04-75-A (AR 355 at 2677-2678) (emphasis added). Under that proposal, an organization would have the requisite “major purpose” just by virtue of having filed with the IRS under 26 U.S.C. 527, unless covered by one of five exceptions. Organizations that did not file
under 26 U.S.C. 527 would have been subject to the previously existing standards for
determining their major purpose. Draft 11 CFR 100.5(a)(4) in Agenda Document 04-75-A
(AR 355 at 2678).

37. After considering these proposals and the public’s comments, the Commission
concluded that at this time it was not advisable to incorporate a construction of the “major
purpose” limitation into the existing regulation’s definition of “political committee.” The
Commission therefore did not adopt any of the proposals when it approved Final Rules
addressing the “expenditure,” “contribution,” and allocation issues involved in this rulemaking
and an accompanying Explanation and Justification. Instead, the Commission decided to
continue to apply the “major purpose” limitation on a case-by-case basis. See 69 Fed. Reg.
68,065 (Nov. 23, 2004) (AR 375 at 2842).

38. In its Explanation and Justification, the Commission noted that, as commenters
had suggested, “the proposed rules might have affected hundreds or thousands of groups engaged
in nonprofit activity in ways that were both far-reaching and difficult to predict, and would have
entailed a degree of regulation that Congress did not elect to undertake itself” when it amended
26 U.S.C. 527 in 2000 and 2002 to require section 527 organizations to file financial reports with
the IRS instead of the FEC, and when it “substantially transformed” the FECA itself in 2002
through BCRA. 69 Fed. Reg. 68,065 (AR 375 at 2842). Furthermore, the Commission found
that neither BCRA nor McConnell “mandated” revising the Commission’s definition of
“political committee.” Id. As the Commission explained, “major purpose” is not part of the
statute written by Congress, but “a judicial construct that limits the reach of the statutory triggers
in FECA for political committee status.” Id. Finally, the Commission noted that it had been
“applying this construct for years [on a case-by-case basis] without additional regulatory
definitions,” and explicitly confirmed its intention to continue to do so. 69 Fed. Reg. 68,065 (AR 375 at 2842).

39. Rather than adopt a rule of general application, the Commission decided to continue applying the statutory term “political committee” to organizations on a case-by-case basis, as it has for some 30 years since that statutory definition was enacted in the 1970s. The Commission did not conclude that section 527 organizations are not regulated by the Act. Instead, it decided to determine which section 527 organizations are required to register as political committees in the concrete setting of the actual activities and circumstances of each group brought into question, rather than promulgating in the abstract a rule of general application, the effects of which on individual advocacy groups the Commission found to be largely speculative at this time. 69 Fed. Reg. 68,065 (AR 375 at 2842).

40. The Commission did not adopt or reject any particular construction of “political committee” or “major purpose,” nor did it conclude that the Thomas-Toner proposal or the General Counsel’s recommendation were wrong as a matter of substance. The Commission explicitly “caution[ed] that no inferences should be made as to the Commission’s position on any of the issues that are not discussed in this document or on any of the proposed rules that are not adopted as final rules.” 69 Fed. Reg. 68,064 (Nov. 23, 2005) (AR 375 at 2841).

41. In addition to the “major purpose” question, the 2004 rulemaking addressed many other issues related to an organization’s status as a “political committee,” including an important clarification of the term “contribution,” and the Commission adopted new regulations that apply to section 527 organizations that are “political committees,” including the allocation regulations under review in Emily’s List v. FEC, No. 05-CV-0049 (CKK) (D.D.C.) (plaintiff’s motion for summary judgment filed May 16, 2005). 69 Fed. Reg. 68,064 (Nov. 23, 2005) (AR 375...
at 2841).

42. The 2004 rulemaking did result in several important new regulations affecting when groups qualify as “political committees” under the Act. For example, new section 11 C.F.R. 100.57 provides that funds received in response to certain solicitations must be treated as “contributions” under the FECA, subject to several exceptions “to avoid sweeping too broadly.” 69 Fed. Reg. 68,056 (AR 375 at 2833). The Commission also adopted rules tightening the allocation requirements in 11 C.F.R. 106.6 for nonconnected political committees with components that engage in federal and nonfederal activities. 69 Fed. Reg. 68,060-63 (AR 375 at 2837-2840).

43. In March 2001, the Commission published an Advance Notice of Proposed Rulemaking seeking comment on the definitions of “political committee,” “contribution,” and “expenditure.” 66 Fed. Reg. 13,681 (Mar. 7, 2001). In September 2001, the Commission voted to hold that tentative rulemaking in abeyance pending legislative or judicial developments. 69 Fed. Reg. 11,737 n.3 (Mar. 7, 2004) (AR 11 at 248). The Commission rulemaking at issue in this litigation is a separate proceeding initiated in February 2004, to address entirely different proposals than the 2001 rulemaking proceeding, and not a continuation of the earlier proceeding. NPRM at 11,737 n.3 (“This NPRM is a separate proceeding”). Therefore, the proceedings from the 2001 notice are not included in the administrative record in this case.

Respectfully Submitted,

/s/

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