

BEFORE THE
FEDERAL ELECTION COMMISSION

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

v.

MUR No. _____

American Issues Project, Inc.
301 W. Platt Street #353
Tampa, Florida 33606

American Leadership Project
2261 Market Street PMB 319
San Francisco, California 94114

COMPLAINT

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

2. After the enactment of BCRA, a number of political and party operatives, and others, engaged in illegal schemes in the 2004 and 2006 federal elections to use soft money to influence those elections. These illegal schemes were conducted primarily through the use of so-called “section 527 groups” — entities registered as “political organizations” under section 527 of the Internal Revenue Code (IRC), 26 U.S.C. § 527.

3. Democracy 21 and other reform organizations filed multiple complaints with the Commission in 2004 and 2006, seeking enforcement of the law against these illegal schemes. In

response to these complaints, the Commission instituted a number of enforcement actions and found that four large 527 groups active in the 2004 campaign engaged in massive violations of the campaign finance law by failing to register as political committees and failing to abide by the contribution limits, source prohibitions and reporting requirements that apply to political committees. The violations by these four 527 groups in the 2004 election, cumulatively, resulted in FEC findings of more than \$200 million in illegal soft money expenditures to influence the 2004 presidential election.

4. The American Issues Project, Inc. (AIP) and the American Leadership Project (ALP) have been engaged in activities to influence the 2008 presidential election that are similar to the activities found illegal by the Commission following the 2004 campaign. AIP is a corporation organized under section 501(c)(4) of the Internal Revenue Code. ALP is organized under section 527 of the IRC.

5. Neither AIP nor ALP is registered with the Commission as a political committee. However, on information and belief, each group has made “expenditures” or received “contributions” in excess \$1,000 and has a “major purpose” to influence federal elections. As such, they are federal political committees. AIP and ALP are therefore required to register with the Commission under the federal campaign finance laws, 2 U.S.C. §432, and are subject to the federal contribution limits, source prohibitions and reporting requirements on the funds they receive. As political committees, each of these groups may not receive more than \$5,000 per year from an individual donor, and may not receive any union or corporate treasury funds whatsoever. 2 U.S.C. § 441a(a)(1)(C), 441b(a). These limits and prohibitions apply to all “political committees,” including those that engage in independent spending. 11 C.F.R. §

110.1(n). Furthermore, as political committees, each of these groups is required to file periodic reports with the Commission, disclosing all receipts and disbursements. 2 U.S.C. § 434.

6. It is essential for the Commission to continue the enforcement actions it began after the 2004 elections against outside groups making illegal soft money expenditures. The Commission must do so in order to ensure that violators are held accountable and understand that there are consequences for breaking the law. The Commission should take appropriate actions to ensure that all groups which qualify as federal political committees register and operate pursuant to the laws that apply to such political committees.

Standard for “political committee” status

7. Section 431(4) of Title 2 defines the term “political committee” to mean “any committee, club, association or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year.” 2 U.S.C. § 431(4); *see also* 11 C.F.R. § 100.5(a). An “expenditure” is defined as “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office....” 2 U.S.C. § 431(9)(A). Similarly, a “contribution,” is defined as “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office....” 2 U.S.C. § 431(8)(A). In addition, FEC regulations define a “contribution” to include funds received “in response to any communication ... if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate.” 11 C.F.R. § 100.57(a).

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

9. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court construed the term “political committee” to “only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.” 424 U.S. at 79 (emphasis added). Again, in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), the Court invoked the “major purpose” test and noted that if an incorporated non-profit group’s independent spending activities “become so extensive that the organization’s major purpose may be regarded as campaign activity, the corporation would be classified as a political committee.” 479 U.S. at 262 (emphasis added). In that instance, the Court continued, it would become subject to the “obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns.” *Id.* (emphasis added). The Court in *McConnell* restated the “major purpose” test for political committee status as iterated in *Buckley*. 540 U.S. at 170 n.64.

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

The American Issues Project, Inc.

11. According to press reports, American Issues Project, Inc., was originally incorporated in May, 2007 in the State of Delaware under the name “Citizens for the Republic, Inc.” See Certificate of Incorporation (Exh. A); W. Evans and P. Overby, “Obama Goes After Conservative Group” (National Public Radio) (Aug. 27, 2008) (Exh. B). Its incorporation papers state that it was organized for “the promotion of social welfare” under section 501(c)(4) of the IRC. In a Certificate of Amendment signed on March 19, 2008, and filed with the State of Delaware on April 2, 2008, “Citizens for the Republic, Inc.” changed its name to “Avenger, Inc.” (Exh. C). In a Certificate of Amendment signed on August 4, 2008, and filed with the State of Delaware on August 6, 2008, “Avenger, Inc.” changed its name to “American Issues Project, Inc.” (Exh. D).

12. According to its filings with the State of Delaware, the directors for Citizens for the Republic, Inc (CFTR), were Paul Erickson, Stephen Moore and Richard Sharp. A press report discusses the name change for the corporation and states:

Erickson says Avenger, Inc. was just a placeholder name, and that CFTR has nothing to do with American Issues Project. He said AIP has completely separate leadership and simply used the corporate “shell” of Citizens for the Republic after it disbanded. As to why AIP would take the corporate shell instead of forming a new one, Erickson said he could only guess that there were cost savings involved.

Evans and Overby, *supra* (Exh. B). The same article notes:

Perhaps another benefit was that Citizens for the Republic already had received 501(c)(4) nonprofit tax status from the Internal Revenue Service. Inheriting 501(c)(4) status from the get-go would allow American Issues Project to claim a special exemption and do what few other political organizations can do: expressly advocate for the defeat of a candidate, namely Obama, without any contribution limits.

13. The “major purpose” test applies to the entity, not to the name of the entity. Thus, in this case, AIP was incorporated in 2007 as a section 501(c)(4) corporation, and that

corporation with that tax status has been in existence for all of 2008. For purposes of determining the corporation's "major purpose" in 2008, its activities during the 2008 campaign must be taken into consideration, even though for some portion of 2008 the corporate entity operated under different names.

14. According to a letter from an attorney for AIP to the Department of Justice, AIP operates as a qualified nonprofit corporation under 11 C.F.R. § 114.10, otherwise known as an "MCFL group." Letter from Cleta Mitchell to Mr. John C. Keeney, Esq. (Aug. 26, 2008) (Exh. E).

15. On August 19, 2008, AIP filed with the Commission a "Report of Independent Expenditures Made and Contributions Received" (Form 5). (Exh. F). The report indicated that AIP spent \$2.86 million on independent expenditures on August 18, 2008. The report indicated that all of this spending was funded by a single donation from one individual, Harold Simmons, who made a donation to AIP of \$2,878,872 on August 12, 2008.

16. According to press reports, Simmons "was also a primary backer of the Swift Boat Veterans for Truth group that attacked Democratic presidential nominee John Kerry in 2004." T.W. Farnum, "Legal Controversy Erupts Over TV Ads Linking Obama to '60s Radical," *The Wall Street Journal* (Aug. 29, 2008) (Exh. G). One press report stated that Simmons was Swift Boat's second largest donor, giving \$3 million. D. Morain, "Billionaire behind Swift Boat ads funded anti-Obama spot," *Los Angeles Times* (Aug. 23, 2008) (Exh. H).

17. In response to a complaint filed by Democracy 21 and other reform organizations, the Commission in 2006 found that Swift Boat Veterans for Truth (SBVT) violated the campaign finance laws by conducting activities to influence the 2004 presidential election without registering as a political committee and without abiding by the contribution limits and source

prohibitions that apply to political committees. The Commission imposed a civil penalty of \$299,500 on SBVT. Conciliation Agreement, MURs 5511 and 5525 (Dec. 4, 2006).

18. In addition to Simmons, who was apparently the sole donor to AIP for the independent expenditures that AIP made in August, 2008, and who was a major donor to Swift Boat, another key player in the activities of Swift Boat is also involved with AIP. According to a press report, AIP “was launched by Chris LaCivita, who was intimately involved with the Swift boat campaign, and Tony Feather, one of the co-founders of Progress for America, which spent tens of millions backing Bush in 2004.” M. Mosk and C. Cillizza, “Group with Swift Boat Alumni Readies Ads Attacking Obama,” *The Washington Post* (Sept. 14, 2008) (Exh. I). The Commission found in 2007 that Progress for America (PFA), the group Feather worked with in 2004, violated the campaign finance laws for similar activities to influence the 2004 presidential election without registering as a political committee and complying with the contribution limits and source prohibitions that apply to political committees. PFA paid a civil penalty of \$750,000. Conciliation Agreement, MUR 5487 (Feb. 22, 2007).

19. According to press reports, the independent expenditure sponsored by AIP was an ad called “Know Enough?” which attacked Democratic presidential nominee Barack Obama.

The text of the ad is as follows:

Narrator: "Beyond his speeches, how much do you know about Barack Obama?
What does he really believe?"

Consider this: United 93 never hit the Capitol on 9/11. But the Capitol was bombed 30 years before by an American terrorist group called Weather Underground that declared war on the U.S. -- targeting the Capitol, the Pentagon, police stations and more.

One of the group's leaders, William Ayers, admits to the bombings, proudly saying later, 'We didn't do enough.' Some members of the group Ayers founded even went on to kill police.

But Barack Obama is friends with Ayers, defending him as 'respectable' and 'mainstream.' Obama's political career was launched in Ayers' home. And the two served together on a left-wing board.

Why would Barack Obama be friends with someone who bombed the Capitol and is proud of it? Do you know enough to elect Barack Obama?

American Issues Project is responsible for the content of this ad."¹

20. In a release published on its website, AIP said that this ad, “Know Enough?”, ran 7,307 times during the period from August 21 through August 29, 2008 on 69 stations in 14 markets in Michigan, Ohio, Pennsylvania and Virginia, all presidential battleground states in the 2008 election. (Exh. J). In touting the effectiveness of the ad, AIP president Ed Martin described the political impact of the ad by saying, “American Issues Project clearly has struck a nerve inside the Obama campaign, but even more important is the reaction of the American people, who are starting to question why Sen. Obama would have such a close relationship with an unrepentant domestic terrorist.” *Id.*

Count 1

21. On information and belief, AIP meets the test for “political committee” status. On information and belief, it has made more than \$1,000 in “expenditures” or received more than \$1,000 in “contributions” and its “major purpose” is to influence federal elections. AIP has not registered as a political committee and has not complied with the contribution limits and reporting requirements applicable to political committees.

1. Expenditure/Contribution prong

22. AIP’s ad “Know Enough?” contains express advocacy under both subpart (a) and subpart (b) of section 100.22 of the Commission’s regulations. In raising the question of whether voters know enough to “elect” Barack Obama, the ad uses a “phrase[] ... which in

¹ The ad is available on AIP’s website at http://www.americanissuesproject.org/component/option,com_seyret/Itemid,34/id,9/task,videodirectlink/

context can have no other reasonable meaning than to urge the election or defeat” of a candidate. 11 C.F.R. § 100.22(a). Further, the content of the ad “could only be interpreted by a reasonable person as containing advocacy of the election or defeat” of a candidate. 11 C.F.R. § 100.22(b). This is consistent with AIP’s position in reporting the spending as an “independent expenditure.” By law, an “independent expenditure” is an “expenditure” that contains express advocacy. 2 U.S.C. § 431(17). Since AIP spent more than \$1,000 on express advocacy “expenditures” in running “Know Enough?”, it satisfies the “expenditure” prong of the test for political committee status.

23. In addition, given the facts and circumstances regarding the managers of AIP and the contributor to the group, the Commission also should investigate whether the funds raised by AIP for its independent expenditure were received in response to a solicitation that indicated that any portion of the funds received would be used to oppose Senator Obama’s election. If so, the funds constitute “contributions” to AIP, 11 C.F.R. § 100.57(a), and if in excess of \$1,000, satisfy the “contribution” prong of the test for political committee status.

2. “Major purpose” prong

24. The second prong of the test for political committee status is whether the “major purpose” of AIP is to influence federal elections. As noted above, the corporation was formed and received its non-profit tax status in 2007 and has been in existence, under one or more different names, continually since then. The Commission should examine the activities of AIP, under whatever names it has operated, during the 2008 campaign to determine if its spending and its activities demonstrate that the “major purpose” of AIP is to influence federal elections.

25. One press report quotes a spokesman for AIP as saying the group “formed last year but did not have any financial activity until this year.” J. Kuhnhenh, “Obama, conservative group battle through DOJ,” *Associated Press* (Aug. 27, 2008) (Exh. K).

26. According to press reports as of the end of August, 2008, AIP had engaged in no activities other than airing the anti-Obama ad. The *Wall Street Journal* story (Exh. G) states: “The American Issue Project’s only action so far has been producing the commercial attacking the Democratic presidential nominee, which has aired more than 7,000 times in swing states at a cost of nearly \$3 million, making it the largest expenditure by an independent group so far this election cycle.”

27. A spokesman for AIP said that the group “has set aside money to carry out non-election related work to meet the legal requirements.” J. Kuhnhenh, “Obama seeks to silence ad tying him to 60s radical,” *Associated Press* (Aug. 26, 2008) (Exh. L). A press report dated October 8, 2008 stated that AIP “will begin airing nationwide TV advertisements Wednesday [October 8] that criticize congressional Democrats for their ties to mortgage giants Freddie Mac and Fannie Mae....” B. Mullins and T.W. Farnum, “Group’s Ad Blames Crisis on Democrats,” *The Wall Street Journal* (Oct. 8, 2008) (Exh. M). This report stated that AIP is spending \$1 million on this ad buy, which comes in the closing weeks of the 2008 election. The ad concludes with the tag line, “Who should you trust on the economy?” *Id.* The ad is an “expenditure” within the meaning of the campaign finance laws since it criticizes Democrats generally. However, even if the ad is viewed as not attacking Democrats generally, and thus not as an expenditure, AIP’s spending on the ad is only about one-third of what it spent on the “Know Enough?” ad campaign attacking Senator Obama, and thus does not by itself change the “major purpose” analysis.

28. The attorney for AIP is quoted in a press report as stating that AIP's independent expenditure ad, "Know Enough?," fulfills a non-political mission of the group:

"The purpose of that expenditure is still to promote the organization's issues and purposes," Mrs. Mitchell said. "There can be no higher manifestation of a commitment to a strong national defense or America's role in the world than who is selected to be commander in chief."

T.W. Farnum, *The Wall Street Journal*, *supra* (Exh. G). The reasoning in this statement is that advocating the election or defeat of a candidate is a way to influence issues, not elections. The Commission has never accepted such reasoning, nor have the courts, and any such logic would negate the campaign finance laws by collapsing all campaign-related activity into "issue" activity.

29. The fact that AIP is a qualified non-profit corporation is immaterial to whether it has violated the law by failing to register as a political committee. Although a qualified non-profit corporation is permitted to spend its treasury funds for express advocacy, if its "major purpose" is to influence federal elections, it is required to register as a political committee and operate pursuant to the federal laws that apply to political committees. The Supreme Court made clear in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) that a qualified non-profit corporation is still subject to the test for political committee status. In that case, the Court said, "[S]hould MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee. See *Buckley*, 424 U.S. at 79. As such it would be subject to the statutory obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns." 479 U.S. at 262.

The American Leadership Project

30. The American Leadership Project (ALP) is a group registered as a “political organization” under section 527 of the Internal Revenue Code. 26 U.S.C. § 527. It registered with the IRS by filing a Form 8871 on February 15, 2008. (Exh. N).

31. ALP has close ties to supporters of Senator Hillary Clinton’s campaign. According to press reports, ALP was formed in February, 2008 by “major financial backers” of Senator Clinton, and its purpose was “to air television advertisements echoing her message that she is more qualified than Obama to fix the economy.” M. Mosk, “Independent Group to Air TV Ads Echoing Clinton Attacks on Obama,” *The Washington Post* (Feb. 21, 2008) (Exh. O).

32. According to one press report in April 2008 about ALP,

Almost all of the group’s money has come from two unions that have endorsed Mrs. Clinton, the American Federation of State, County and Municipal Employees, which has contributed \$1.2 million, and the Machinists Union.

But the list of individual donors is telling in that eight of the nine people who gave \$5,000 or more to the group had already given the maximum \$2,300 donation for the primary to Mrs. Clinton’s presidential campaign.

....

The group is filled with people who have ties to the Clintons: Roger Salazar, who worked in the press operation of the Clinton White House and is a political consultant in California, and Paul Rivera, another former Clinton White House staff member and senior political adviser for Senator John Kerry’s presidential campaign in 2004 who worked on Mrs. Clinton’s Senate campaign in 2000.

Jay Eisenhofer, a lawyer in New York who raised at least \$100,000 for Mrs. Clinton, making him a “Hillraiser,” gave \$50,000 to the group. Richard Ziman, another Hillraiser and Los Angeles real estate magnate, contributed \$15,000, and William Titelman, a former Pennsylvania lobbyist and longtime Clinton fundraiser who gave enough to spend a night in the Lincoln Bedroom, contributed \$10,000 and has helped the group raise money.

M. Luo, “Facing Obama Fund-Raising Juggernaut, Clinton Seeks New Sources of Cash,” *The New York Times* (April 20, 2008) (Exh. P).

33. In its first quarterly report filed with the IRS (Form 8872) (Exh. Q), covering the period February 15, 2008 to March 31, 2008, ALP reported contributions of \$1.16 million, including a contribution of \$1 million from AFSCME, a supporter of Senator Clinton's presidential campaign. ALP also received contributions from individuals of up to \$50,000 per donor. On this report, ALP disclosed expenditures of approximately \$790,000, most of which was listed for TV airtime and ad production.

34. In its second quarterly report, filed with the IRS (Exh. R), covering the period April 1, 2008 to June 30, 2008, ALP reported contributions of approximately \$2.3 million. This included additional contributions of \$1,160,000 from AFSCME and \$400,000 from the American Federation of Teachers, also a supporter of President Clinton's presidential campaign. In addition, ALP received contributions of \$250,000 from the International Union of Painters Organization, \$150,000 from the Sheet Metal Workers International Association, \$100,000 from the International Alliance of Theatrical Stage Employees, \$50,000 from the Office & Professional Employees International Union, \$50,000 from the Machinists Non-Partisan Political League, \$50,000 from the Bricklayers & Allied Craftworkers PAC, and a contribution of \$100,000 from an individual, Daniel S. Abraham. Each of these donors was a supporter of Senator Clinton's presidential campaign. The bulk of its reported expenditures were for TV buys.

35. Between February 22, 2008, and May 29, 2008, ALP filed multiple reports with the Commission disclosing expenditures for electioneering communications (Form 9). These expenditures were for TV ads that referred to Democratic presidential candidates Hillary Clinton and Barack Obama, and that supported Senator Clinton's election. The total disbursements for such electioneering communications was approximately \$3.4 million. In addition, ALP filed an electioneering disclosure report on August 21, 2008 to report an additional disbursement of

approximately \$78,000 for a radio ad that referred to Republican presidential candidate John McCain and that opposed Senator McCain's election.

36. According to the February 21 story about ALP in *The Washington Post* (Exh. O):

In the group's first ad, the television image shows a shuttered factory and a home in foreclosure, and a voiceover says: "If speeches could create jobs, we wouldn't be facing a recession." The criticism of "speeches" closely mirrors a line of attack Clinton has used against Obama. ...

Supporters of the group, called the American Leadership Project, said yesterday that they decided to undertake the effort late last month, when Clinton was forced to lend her campaign \$5 million to try to minimize Obama's large fundraising advantage.

37. This press report also stated that ALP's ads were run in Texas and Ohio, the next Democratic primaries where Clinton was campaigning against Obama. As the *Post* story (Exh. O) noted, ALP "is advertising only in states where Clinton faces competitive primary contests. And the content of its first ad strongly hints that its purpose is to support her candidacy and oppose Obama's." Press reports stated that ALP spent approximately \$1 million on ads in Texas and Ohio immediately before the primary elections in those states.

38. In April, according to press reports, ALP spent \$700,000 on ads run in Indiana immediately before the primary election there. J. Kuhnhehn, "Pro-Clinton group airing ad in Indiana," *Associated Press* (April 28, 2008) (Exh. S). As this article notes, "The Indiana ad would be the biggest single expenditure in a state for the mostly union financed group, called the American Leadership Project. ... The ad campaign could come at a crucial time for Clinton. The Democratic presidential race in Indiana is a dead heat, according to public opinion polls. Obama, the better-financed candidate, has been spending more than Clinton."

39. In early June, ALP spent \$300,000 to run ads in Montana and South Dakota, immediately before the primaries in those states. J. Kuhnhehn, "Clinton looks for victory in

Puerto Rico primary,” *Associated Press* (June 1, 2008) (Exh. T). The ad which ran in South Dakota, called “Squeezed,” promoted the campaign of Senator Clinton. It stated²:

Gas and Food prices are squeezing South Dakota families from both ends. Hillary Clinton has the right plan to help 1) promote clean energy to create more good paying jobs in South Dakota 2) cut taxes for the middle class 3) eliminate the special tax breaks for the big oil companies. Call Hillary Clinton and tell her to keep fighting for the middle class. Paid for by the American Leadership Project which is responsible for its content. Not authorized by any candidate or candidate’s committee.

An identical ad, referencing Montana, was run in that state before its primary.³ A similar ad, called “Middle,” which ran in Oregon before the primary in that state, also promoted the campaign of Senator Clinton. It stated⁴:

Gas and Food prices are squeezing Oregon families from both ends. Hillary Clinton has the right plan to help. Her plan focuses on clean energy, creating more good paying jobs right here. No wonder the Salem Statesman Journal wrote that Hillary Clinton gets the concerns of the middle class. Call Hillary Clinton and tell her to keep fighting for clean energy and good jobs. Paid for the American Leadership Project which is responsible for its content. Not authorized by any candidate or candidate’s committee.

40. AIP also spent \$150,000 for ads in Puerto Rico right before the primary there.

According to one press report referring to ALP, “In a sign that her supporters were unwilling to give up, an outside group financed by her labor backers bought \$150,000 worth of television ads on the island promoting her views.” J. Kuhnenn, “Clinton looks for victory in Puerto Rico primary,” *supra* (Exh. T).

41. Following the end of the primary season, ALP switched from promoting Senator Clinton and ran an ad that attacked Senator McCain, the Republican nominee for president. ALP

² The South Dakota ad is available at <http://www.youtube.com/watch?v=nWrpUO8SQHo>

³ The Montana ad is available at <http://www.youtube.com/watch?v=Cv2t3kZiPl4&feature=user>

⁴ The Oregon ad is available at <http://www.youtube.com/watch?v=NFQCtgCk0ZI&feature=user>

ran the following radio ad, entitled “More Money, More Problems,” which was aired in Colorado during the Democratic convention in late August held in Denver. The ad stated⁵:

Gas prices across Colorado exceeded the four-dollar per gallon mark.
Exxon/Mobil reported the biggest quarterly profit ever by a corporation.
Demonstrators in Denver today rallied against big oil profits.

While Colorado families are struggling to make ends meet, Big Oil companies are enjoying record profits.

The John McCain solution?

More money for Big Oil. More problems for us.
McCain wants to drill along our coastline, which experts say won't produce oil until 2018.

But he's repeatedly opposed incentives for proven renewable energies like wind and solar power.

McCain voted against requiring Big Oil to invest their windfall profits in clean energy and new jobs.

But he supports a \$4 billion tax break for America's five richest oil companies. That's not a path to energy independence.

Call John McCain at 202-224-2235 and tell him Coloradans need real solutions to America's energy crisis.

Visit [leadership-project.org](http://www.leadership-project.org). Paid for by the American Leadership Project, which is responsible for its content, not authorized by any candidate or candidate's committee.

42. On the home page of its website, ALP, which had promoted Senator Clinton during her primary battle with Senator Obama, now displays a box which reads, “Speak Out. Contact Senator Barack Obama and tell him to keep fighting for the issues that matter to the middle class.” <http://www.leadership-project.org/preview/?p=25> (October 8, 2008).

⁵ The Colorado ad is available at http://www.leadership-project.org/MoreMoneyMoreProblems_EN_RV.mp3

Count 2

43. On information and belief, ALP meets the test for “political committee” status. On information and belief, it has made more than \$1,000 in “expenditures” or received more than \$1,000 in “contributions” and its “major purpose” is to influence federal elections. ALP has not registered as a political committee and has not complied with the contribution limits and reporting requirements applicable to political committees.

1. “Major purpose” prong

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

reports with the Secretary as required by section 527(j). ALP has registered as a “political organization” under section 527.

45. Thus, by definition, any entity that registers with the Secretary as a “political organization” under section 527 is “organized and operated primarily” for the purpose of “influencing or attempting to influence the selection, nomination, election or appointment of” an individual to public office. The Commission has cited the section 527 standard as identical to the “major purpose” prong of the test for “political committee” status. *See, e.g.*, Advisory Opinions 1996-13, 1996-3, 1995-11. Accordingly, a group that chooses to register as a “section 527 group” – including ALP – is, by definition, an entity “the major purpose of which is the nomination or election of a candidate...”⁶

46. On the basis of all of the facts and circumstances involving ALP, including its status as a section 527 “political organization,” the purpose for which the organization was founded, the campaign-related activities of the founders and major donors to ALP and the activities undertaken by the organization, the Commission should find that ALP satisfies the “major purpose” prong of the “political committee” test as set forth in *Buckley*.

2. Expenditure/Contribution prong.

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

⁶ This would be true in all instances other than a 527 organization which is organized and operated primarily for the purpose of influencing the selection or appointment of individuals to appointive office such as, *e.g.*, a judicial appointment. This exception does not apply here.

48. The test of whether a group has made \$1,000 in “expenditures” is not limited by the “express advocacy” standard when applied to a section 527 group, such as ALP, as a federal district court in Washington, D.C. concluded last year. *See Shays v. FEC*, 511 F.Supp. 2d 19, 27 (D.D.C. 2007). Rather, the test for “expenditure” in this case is the statutory standard of whether disbursements have been made “for the purpose of influencing” any federal election, regardless of whether the disbursements were for any “express advocacy” communication. The Supreme Court made clear in *Buckley* that the “express advocacy” standard does not apply to an entity, like a section 527 group, which has the major purpose of influencing candidate elections and is thus not subject to concerns of vagueness in drawing a line between issue discussion and electioneering activities. Groups such as section 527 “political organizations” are formed for the principal purpose of influencing candidate elections and, as explained by the Court in *Buckley*, expenditures by such groups “can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.” 424 U.S. at 79. The Court affirmed this position in *McConnell*. 540 U.S. at 170, n.64. Thus, the “express advocacy” test, which the Supreme Court in *McConnell* deemed to be “functionally meaningless,” 540 U.S. at 217, is not relevant to the question of whether a section 527 organization is making expenditures to influence the election of federal candidates.

49. In *Shays v. FEC*, *supra*, the federal district court stated that it was a “misreading” of *Buckley* to apply the “express advocacy” test to determine “expenditures” by groups which have as their “major purpose” to influence elections. The district court said the Supreme Court “imposed the narrowing gloss of ‘express advocacy’ on the term ‘expenditure’ only with regard to groups other than ‘major purpose’ groups.” *Id.* at 27. The district court added that “having misinterpreted *Buckley*, the FEC is applying the express advocacy requirement to expenditures in

cases where it is unnecessary.” *Id.* This is a case where applying the express advocacy test would be unnecessary.

50. ALP has made “expenditures” in amounts far in excess of the \$1,000 threshold for political committee status. These expenditures have been made for broadcast advertisements that promoted Senator Clinton during the 2008 presidential primaries, and after the primaries were over, that attacked Senator McCain, the presumptive- Republican nominee for president. These ads have been “for the purpose of influencing” federal elections, and thus constitute “expenditures” under the law.

51. Even if the Commission were to incorrectly decide that the “express advocacy” test does apply to section 527 groups, however, the ads run by ALP meet the standard for express advocacy in section 100.22(b) of the Commission’s regulations. The Commission regulations define “express advocacy” to include a communication that “when taken as a whole and with limited reference to external events...could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more candidates because the electoral portion of the communication is unmistakable, unambiguous and suggestive of only one meaning and reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidates or encourages some other kind of action.” 11 C.F.R. § 100.21(b). The ads run by ALP, when taken as a whole, can only be interpreted by a reasonable person as advocating the election of Senator Clinton, or advocating the defeat of Senator McCain. Thus, the ads meet the Commission’s existing regulatory definition of “express advocacy” and the disbursements for the ads constitute “expenditures.”

52. Given the facts and circumstances regarding the contributors to ALP, the Commission also should investigate whether the funds raised by ALP for its ads were received in

response to any solicitation that indicated that any portion of the funds received would be used “to support” Senator Clinton’s election, or “to oppose” Senator McCain’s election. If so, the funds constitute “contributions” to ALP, 11 C.F.R. § 100.57(a), and if in excess of \$1,000, satisfy the “contribution prong of the test for political committee status.

Summary

53. On information and belief, the “major purpose” of AIP and of ALP each is to support or oppose the election of one or more federal candidates, and each has spent more than \$1,000 in “expenditures” or received more than \$1,000 in “contributions” for this purpose. The Commission accordingly should investigate and determine whether each respondent is a “political committee” under the Act. The respondents have not filed a statement of organization as a political committee, as required by 2 U.S.C. § 432, have not complied with the reporting requirements of 2 U.S.C. § 434, and have not complied with the contribution limits of 2 U.S.C. § 441a and, in the case of ALP, the source prohibitions of 2 U.S.C. § 441b. The Commission should investigate and determine whether each respondent has violated the law in this regard.

Disclosure

54. The Commission and the public, including the complainant, are not receiving full and accurate public disclosure of the funds raised and spent by each respondent, as required by FECA. If the Commission determines that AIP and ALP are each a political committee, the funds received by each respondent are “contributions” subject to the mandatory federal reporting requirements of FECA and are required to be fully disclosed to the Commission and to the public, 2 U.S.C. § 434, including complainant.

55. The donations received by AIP, as a section 501(c)(4) organization which is not reporting to the Commission as a federal political committee, are not disclosed to the public.

Thus, to the extent that AIP is wrongly treating contributions required to be reported under FECA instead as donations to a section 501(c)(4) account, the public, including complainant, and the Commission are not receiving disclosure of contributions required to be disclosed under FECA.

56. The donations received by ALP, as a section 527 group which is not reporting to the Commission as a federal political committee, are subject to reporting to the Internal Revenue Service only under 26 U.S.C. § 527 and such disclosure may be avoided altogether if the recipient chooses to pay income tax on the donation. Further, section 527, unlike the FECA requirements applicable to political committees, does not require the reporting of the aggregate amount of un-itemized contributions received by the group, so there is no basis to determine the total aggregate amount raised by such a section 527 group. Thus, to the extent that ALP is wrongly treating contributions required to be reported under FECA instead as donations to a section 527 account, the public, including complainant, and the Commission have no assurance that all contributions required to be disclosed under FECA are properly being disclosed, or that the total amount of contributions to ALP is being disclosed.

Prayer for Relief

57. Wherefore, the Commission should conduct an immediate investigation under 2 U.S.C. §437g, to determine whether the American Issues Project and the American Leadership Project have each violated 2 U.S.C. §§ 432, 434, 441a and, in the case of ALP, § 441b(a), and if so, whether each respondent has engaged in knowing and willful violations under 2 U.S.C. § 437g(a)(5)(B), (C) and § 437g(d). If any such violations have occurred, the Commission should impose appropriate sanctions for such violations, should enjoin each respondent from all such

violations in the future, and should impose such additional remedies as are necessary and appropriate to ensure compliance with FECA.

58. In addition, the Commission should investigate to determine whether the individuals who are serving and who have served as the organizers, managers and leaders of AIP and ALP, including major donors who are playing or who have played such a role, have violated the same laws, and, if so, whether they have engaged in knowing and willful violations under 2 U.S.C. § 437g(a)(5)(B), (C) and § 437g(d). If any such violations have occurred, the Commission should impose appropriate sanctions for such violations, should enjoin each respondent from all such violations in the future, and should impose such additional remedies as are necessary and appropriate to ensure compliance with FECA.

Respectfully submitted,

/s/ Fred Wertheimer

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

October 10, 2008

