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| **COLORADO SUPREME COURT**<br>101 West Colfax Avenue, Suite 800<br>Denver, CO 80202 | |
| Colorado Court of Appeals,<br>Case No. 08CA2689<br>Opinion by Judge Gabriel<br>Judges Casebolt and Booras concur<br><br>Office of Administrative Courts<br>Judge Robert N. Spencer<br>Case No. OS 2008-0028 | FILED IN THE SUPREME COURT<br>FEB 14 2011<br>OF THE STATE OF COLORADO<br>SUSAN J. FESTAG, CLERK |
| **Petitioner:** COLORADO ETHICS WATCH<br><br>v.<br><br>**Respondents:** SENATE MAJORITY FUND, LLC; COLORADO LEADERSHIP FUND, LLC; and OFFICE OF ADMINISTRATIVE COURTS | ▲ **COURT USE ONLY** ▲ |
| Martha M. Tierney<br>KELLY GARNSEY HUBBELL + LASS LLC<br>1441 18TH STREET, SUITE 300<br>Denver, Colorado 80202<br>Telephone: (303) 296-9412<br>E-mail: mtierney@kghllaw.com<br>ATTORNEYS FOR AMICUS CURIAE COLORADO COMMON CAUSE | Case No: 10 SC 276 |

# BRIEF OF AMICUS CURIAE COLORADO COMMON CAUSE IN SUPPORT OF PETITIONER COLORADO ETHICS WATCH

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all applicable requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with C.A.R. 28(g). It contains 3,664 words.

This brief complies with C.A.R. 28(k). For the party raising the issue, it contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (___) not to an entire document, where the issue was raised and ruled upon.

KELLY GARNSEY HUBBELL + LASS LLC

By: _____
Martha M. Tierney
ATTORNEYS FOR AMICUS CURIAE
COLORADO COMMON CAUSE

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Pursuant to C.A.R. 29, *amicus curiae* Colorado Common Cause ("CCC") through its undersigned attorneys, respectfully files this Brief in Support of Petitioner, Colorado Ethics Watch.

## I. ISSUE PRESENTED

Whether the court of appeals properly interpreted and applied "for the purpose of expressly advocating the election or defeat of a candidate" as it appears in the definition of "expenditure" in article XXVIII, section 2(8)(a) of the Colorado Constitution.

## II. STATEMENT OF IDENTITY OF AMICUS CURIAE

*Amicus curiae* CCC is a state chapter of Common Cause, a national non-profit citizens' advocacy group that works to ensure open, honest and accountable government at the national, state and local levels. Founded in 1970, Common Cause currently has over 300,000 members nationwide and over 7,000 members and supporters in Colorado. Common Cause long has been a supporter and proponent of campaign finance reforms across the nation. Citizens, lawmakers, and press have come to rely on Colorado Common Cause for credible, non-partisan information about the corrupting influence of money in politics and the need for increased disclosure and transparency in candidate and issue campaigns.

The participation by amicus becomes increasingly important depending on whether the issues are of widespread public or narrow private concern and the procedural posture and complexity of a case. This lawsuit presents complex issues of great public interest. CCC's expertise on these issues will assist greatly the Court's understanding of the history of campaign finance reforms in Colorado and the in particular the passage of Amendment 27, now known as Colo. Const. art. XXVIII. CCC has a long history of advancing campaign finance reforms to limit the influence of money in politics and to impose transparency via disclosure of who is paying for communications intended to influence voters. It is precisely in cases like this one that participation by *amicus* in providing supplemental legal briefing is most satisfactory.

## III. STATEMENT OF THE CASE

Amicus Curiae CCC adopts Petitioner's Statement of the Case.

## IV. ARGUMENT

### A. Standard of Review

The Colorado Supreme Court reviews the affirmance of a motion to dismiss *de novo*. *See Abts v. Board of Ed. of School Dist. Re-1 Valley in Logan County,* 622 P.2d 518, 522 (Colo. 1980).

### B. Voters Intended Amendment 27 to Change Existing Law and Require Disclosure of Political Advertising That Unambiguously Supports or Opposes a Candidate.

The Court of Appeals erred when it disregarded the will of the voters who intended to constitutionalize sweeping reforms to Colorado's campaign finance laws with the adoption of Amendment 27. Colorado voters passed Amendment 27 in 2002 as a citizen initiative placing modifications to Colorado campaign finance law in the state constitution. *See* Colo. Const. art. XXVIII. The purpose of Amendment 27 is set forth Section 1 and declares, in relevant part, that:

> The people of the state of Colorado hereby find and declare... that in recent years the advent of significant spending on electioneering communications, as defined herein, has frustrated the purpose of existing campaign finance requirements; that independent research has demonstrated that the vast majority of televised electioneering communications goes beyond issue discussion to express electoral advocacy; . . .and that the interests of the public are best served by . . . providing full and timely disclosure of campaign contributions, independent expenditures, and funding electioneering communications and strong enforcement of campaign finance requirements.

Colo. Const. art. XXVIII, §1. Colorado voters were also informed that Amendment 27 incorporated elements of federal statutes and court decisions, and changed existing campaign finance law:

> Campaign finance is regulated by federal law for candidates in federal races; Colorado law regulates campaign finance for state and local candidates. Courts have also been involved in campaign finance by setting limits on what such laws can regulate and ruling on specific

> federal and state campaign finance provisions. This proposal changes Colorado campaign finance law and places the changes in the state constitution.

2002 Ballot Information Booklet, Analysis of Statewide Ballot Issues and Recommendations on Retention of Judges, Research Publication No. 502-10, p.1 ("Blue Book"). The key to the intent of the voters is contained in these provisions and in the Federal law upon which Amendment 27 was based.

**1. Colorado Law Prescribes Clear Procedures for Interpreting a Constitutional Amendment.**

The Colorado Supreme Court has long held that "the court's duty in interpreting a constitutional amendment is to give effect to the electorate's intent in enacting the amendment." *Davidson v. Sandstrom*, 83 P.3d 648, 654 (Colo. 2004). "[T]echnical rules of construction should not be applied so as to defeat the objectives sought to be accomplished by the provisions under consideration." *People v. Rodriguez*, 112 P.3d 693, 696 (Colo. 2005). If a term in a constitutional amendment is ambiguous, then "courts should construe the amendment in light of the objective sought to be achieved and the mischief to be avoided by the amendment." *Davidson*, 83 P.3d at 654-55.

When interpreting state constitutional provisions, courts "may and should look to the state of things existing when the (state) Constitution was framed and adopted and [each] provision must be presumed to have been framed and adopted

in the light and understanding of prior and existing laws and with reference to them." *Rodriguez*, 112 P.3d at 699 (internal citations omitted). When Colorado voters adopt constitutional provisions from other jurisdictions, they also adopt the construction given to the provisions by the decisions of the courts of the jurisdiction from which they are taken. *Id.* When the language is nearly identical and the timeframe indicates that the State intended to adopt the jurisdiction's law, Colorado courts will turn to that jurisdiction for interpretative guidance. *Id.* at 700. Additionally, Colorado courts will utilize voter guides published by the Colorado General Assembly to analyze state constitutional amendments. *Tivolini Teller House v. Fagan*, 926 P. 2d 1208, 1214 (Colo. 1996).

Here, the Court of Appeals ignored this prescribed approach and disregarded the will of the voters who intended that Amendment 27 would constitutionalize sweeping reforms to Colorado's campaign finance laws. The Court of Appeals focused almost exclusively on a 2001 Court of Appeals decision interpreting the prior campaign finance law that Amendment 27 superseded to conclude that Colorado voters intended to incorporate its definition of "express advocacy" into Amendment 27's definition of "expenditure." *See League of Women Voters v. Davidson*, 23 P.3d 1266 (Colo. App. 2001). This conclusion was incorrect. In *League of Women Voters,* the court interpreted the then-existing definition of

"independent expenditure" in Colorado's Fair Campaign Practices Act, C.R.S. §1-45-101 *et. seq* (2000), and read in an express advocacy standard which it concluded required *Buckley's* "magic words" or other substantially similar or synonymous words. 23 P.3d at 1277. Importantly, this Court is not bound by the "magic words" requirement articulated by *League of Women Voters*. Moreover, the text of Amendment 27 is clear that Colorado voters intended to change existing campaign finance law with Amendment 27 and used a new federal campaign finance law as a guide. *See Union Pac. R.R. Co. v. Martin*, 209 P.3d 185, 188-89 (Colo. 2009).

**2. Amendment 27 Is Modeled on the Bipartisan Campaign Reform Act of 2002.**

Congress enacted the Bipartisan Campaign Reform Act of 2002, Pub.L. 107-155, 116 Stat. 81("BCRA"), on March 27, 2002, as an amendment to the Federal Election Campaign Act of 1971 ("FECA"). For several years prior to BCRA's enactment, the campaign finance reform community, including CCC's national affiliate, Common Cause, worked in coalition and with members of Congress to create a comprehensive campaign finance law to stem the influence of large campaign donations, regulate soft money, and impose broad disclosure requirements on campaign advertising. BCRA was the result. At the same time,

CCC was working in coalition with the League of Women Voters of Colorado and others to develop a similar law for Colorado.

Amendment 27 models its definition of "expenditure" on BCRA. BCRA amended FECA's definition of independent expenditure as follows:

> The term 'independent expenditure' means an expenditure by a person—
>
> (A) expressly advocating the election or defeat of a clearly identified candidate; and
>
> (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.

2 U.S.C. §431(17). FECA defined "expenditure" to include

> (i) 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; and
>
> (ii) a written contract, promise, or agreement to make an expenditure.

2 U.S.C. §431(9)(A). Similarly, Amendment 27's definition of "expenditure" states:

> "Expenditure" means any purchase, payment, distribution, loan, advance, deposit, or gift of money by any person for the purpose of expressly advocating the election or defeat of a candidate or supporting or opposing a ballot issue or ballot question. An expenditure is made when the actual spending occurs or when there is a contractual agreement requiring such spending and the amount is determined.

Colo. Const. art. XXVIII, §2(8)(a). Amendment 27's definition of "expenditure" in Section 2(8) underlies the definition of "independent expenditure" in Section 2(9) and the definition of "political committee" in Section 2(12). *See* Colo. Const. art. XXVIII, §2(9), 2(12).

Given the nearly identical language and phrasing used in Amendment 27 and BCRA's definitions of expenditure/independent expenditure, as well as the close proximity in time between the date that Congress enacted BCRA (March 2002) and when Colorado voters adopted Amendment 27 (November 2002), this Court should look to existing federal law and regulations for interpretive guidance. *See People v. Rodriguez,* 112 P.3d at 700.

### 3. Federal Law and Regulations Do Not Limit Express Advocacy to "Magic Words."

Relying on *League of Women Voters*, the Court of Appeals determined that the communications at issue in this case were not "express advocacy" because they did not include "magic words" or substantially similar synonyms. This determination is inconsistent with the federal laws and regulations upon which Amendment 27 was based. The term "express advocacy" dates back to the Supreme Court's 1976 decision in *Buckley v. Valeo*, 425 U.S. 1 (1976), where the Court narrowly construed the federal statutory definition of "expenditure" to apply, for certain purposes, "only to expenditures for communications that in express

terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 44. The Court listed examples of what have since come to be known as the "magic words": "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.'" *Id.* at 44 n.52. Subsequent to *Buckley,* the Supreme Court decided in *FEC v. Massachusetts Citizens for Life* ("MCFL"), 479 U.S. 238 (1986), that a communication need not use the exact words listed in *Buckley's* footnote 52 in order to be deemed express advocacy, but could be "less direct" so long as the "essential nature" of the message is "express electoral advocacy." *Id.* at 249. Later, the Ninth Circuit Court of Appeals held in *FEC v. Furgatch* that speech could be deemed express advocacy when it is "susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987). The FEC eventually incorporated this *Furgatch* standard into its two-part regulatory definition of "express advocacy." The FEC defined "expressly advocating" as any communication (a) that contains *Buckley's* magic words; or (b) that "[w]hen taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)." 11 C.F.R. §100.22 (1995).

Between 1987 and 2002, the *Buckley/MCFL* "magic words" standard and the *Furgatch* standard served as two alternate tests for determining if a communication constituted express advocacy. During the latter part of this timeframe, some courts rejected the *Furgatch* standard as being vague and overbroad, and the FEC took a lax approach to enforcement of its subpart (b) definition of express advocacy. *See e.g., N.C. Right to Life, Inc. v. Leake,* 344 F.3d 418 (4th Cir. 2003); *Chamber of Commerce of U.S. v. Moore,* 288 F.3d 187 (5th Cir. 2002); *Va. Soc'y for Human Life v. FEC,* 83 F. Supp. 2d 668 (E.D. Va. 2000); *Governor Gray Davis Comm. v. Am. Taxpayers Alliance,* 102 Cal. App. 4th 449 (Cal Ct. App. 2002); *League of Women Voters of Colo. v. Davidson,* 23 P.3d 1266 (Colo. App. 2001).

This trend changed in 2003, however, when the pendulum swung the other way and remained there after the United States Supreme Court upheld BCRA's key provisions in the landmark case of *McConnell v. FEC*, 540 U.S. 93 (2003). In *McConnell,* the Supreme Court held that the "magic words" test is not required by the Constitution and that, indeed, the test is "functionally meaningless." *Id.* at 193. Describing how the use of *Buckley's* magic words had become the legal line separating "express advocacy" from "issue advocacy," the *McConnell* Court explained:

> While the distinction between "issue" and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects. Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words. Little difference existed, for example, between an ad that urged viewers to "vote against Jane Doe" and one that condemned Jane Doe's record on a particular issue before exhorting viewers to "call Jane Doe and tell her what you think."

540 U.S. at 126-28 (citations omitted). The *McConnell* Court concluded that "although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no-less clearly intended to influence the election." *Id.* at 193. This reasoning from the *McConnell* Court is later upheld and refined into the "functional equivalent of express advocacy" test by Chief Justi e Roberts' controlling opinions in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("WRTL") and *Citizens United v. FEC*, ___ U.S. ___, 130 S.Ct. 876 (2010).[1]

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[1] Respondent Senate Majority Fund in its Opening Answer Brief in the Court of Appeals points out that every federal circuit court reviewing *Furgatch* has joined the Colorado Court of Appeals and rejected the *Furgatch*/FEC subpart(b) express advocacy standard. See Opening-Answer Brief, p.21 and footnotes 42 and 43. Note, however, that every case cited except for a 6th Circuit distinguishable outlier, including *League of Women Voters,* was decided prior to *McConnell* articulated that the magic words test was functionally meaningless. *McConnell*, 540 U.S. at 193. The vast majority of cases decided after *McConnell* use the "functional equivalent of express advocacy" test. *Colo. Right to Life Comm. v. Davidson,* 395 F.Supp.2d 1001, 1019 (D. Colo. 2005); *N.C. Right to Life, Inc. v. Leake,* 525 F.3d 274, 281-84 (4th Cir. 2008); *Ctr. for Individ. Freedom, Inc. v. Ireland*, 613 F.Supp.2d 777, 790-91 (S.D.W.V. 2009); *Alask. Right to Life Comm. v. Miles*, 441 F.3d 773, 795 (9th Cir. 2006).

### 4. The Federal Election Commission Determines 527 Organizations Should Have Registered as Political Committees After Ads Contain Subpart (b) *Furgatch*-type Express Advocacy.

After *McConnell* shut down the soft money and sham issue ad loopholes, 527 organizations and 501(c)(4) organizations arose in popularity and provided a new vehicle for money to flow into elections, at both the state and national level. Similar to one of the claims in Petitioner's complaint in this case, the issue became whether these 527 and 501(c)(4) organizations had to register as political committees, which would subject them to source and contribution limits under federal and many state laws, including Colorado. Some organizations, like the Respondent 527 organizations in this case, took the position that they did not have to register as political committees with the FEC and follow the source and contribution restrictions so long as they avoided using "magic words" in their communications.

At the federal level during the 2004 cycle, several such 527 organizations paid hefty fines after raising and spending hundreds of millions of dollars outside FECA's contribution and source limits even though their communications did not use "magic words." One such 527 organization in the 2004 George Bush/John Kerry Presidential race was the now-infamous Swiftboat Veterans and POWs for Truth. The Swiftboat Veterans paid a $299,500 fine after the FEC found that they

had run television and newspaper ads containing subpart (b) *Furgatch*-type express advocacy because the ads "had no other reasonable meaning than to encourage actions to defeat Senator Kerry." *See In re Swiftboat Veterans & POWs for Truth,* MURs 5511 & 5525 (FEC December 13, 2006)(copy attached hereto as Attachment 1). These FEC enforcement actions were a reminder to those, like the Respondent 527 organizations in this case who continue to view express advocacy as requiring only "magic words," that express advocacy also captures ads that have no other reasonable meaning than to encourage action to elect or defeat a candidate.

**5. The Supreme Court Holds that Express Advocacy Does Not Require Magic Words.**

Subsequent to *McConnell*, the Supreme Court has twice reiterated that express advocacy does not require *Buckley's* "magic words" or other substantially similar or synonymous words. In *WRTL*, Chief Justice Roberts, writing for the Court, held that "a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL,* 551 U.S. at 469-70. This "functional equivalent of express advocacy" test is nearly identical to the *Furgatch* standard which requires that in order to be considered express advocacy, speech "must, when read as a whole, and with limited reference to

external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." *Furgatch,* 807 F.2d at 864.

Similarly, and most recently in *Citizens United*, a non-profit corporation brought an action against the FEC in 2008 seeking a declaration that its documentary about Hillary Clinton ("*Hillary*") was not an electioneering communication. The Supreme Court held that even though *Hillary* did not contain "magic words,"

> there is no reasonable interpretation of *Hillary* other than as an appeal to vote against Senator Clinton. Under the standard stated in McConnell and further elaborated in WRTL, the film qualifies as the functional equivalent of express advocacy.

130 S.Ct. at 890. The controlling opinion also summarized the Court's recent decisional history on express advocacy:

> McConnell decided that Section 441b(b)(2)'s definition of an 'electioneering communication' was facially constitutional insofar as it restricted speech that was "the functional equivalent of express advocacy' for or against a specific candidate. WRTL then found an unconstitutional application of Section 441(b) where the speech was not 'express advocacy or its functional equivalent.' As explained by the Chief Justice's controlling opinion in WRTL, the functional-equivalent test is objective: 'a court should find that [a communication] is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. Under this test, *Hillary* is equivalent to express advocacy. The movie, in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President.

130 S.Ct. at 889-90, (internal citations omitted).

The Supreme Court's conclusion in *Citizens United* was consistent with its prior decisions, was essential to its holding (not to be dismissed as "dictum"), and clearly indicates that "magic words" are not an essential component of a communication that may constitutionally be regulated due to its express advocacy, if the communication otherwise constitutes "the functional equivalent of express advocacy."

### C. Express Advocacy Analysis Applies to Both Electioneering Communications and Independent Expenditures.

The Respondent 527 organizations in this case seek to minimize the controlling effect of the United States Supreme Court cases discussed herein by contending that cases reviewing electioneering communications provisions instead of independent expenditure provisions do not apply. This is a red herring. Congress created electioneering communications in BCRA to respond to the flood of soft money sham issue ads and to rein in spending that had the purpose and effect of influencing candidate elections, but that evaded regulation through avoidance of "magic words." Essentially, the concept of "electioneering communications" was just one way in which Congress, and Colorado, sought to capture communications containing the "functional equivalent of express advocacy." Congress defined "electioneering communications" to encompass any

broadcast, cable or satellite communication referring to a clearly identified federal candidate and airing within thirty days of a primary or sixty days of a general election, that targeted the electorate of that candidate. *McConnell*, 540 U.S. at 189-90; *see also* 2 U.S.C. § 434(f)(3)(A) (2008). Colorado adopted a similar electioneering provision in Amendment 27 that extended the communications to include radio and print ads. *See* Colo. Const. art. XXVIII, §(2)(7). Electioneering communications may contain express advocacy and independent expenditures must contain express advocacy under Amendment 27, but the analysis as to whether the communication constitutes express advocacy is the same. The Supreme Court's analysis that [a communication] is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate – applies regardless of whether the communication is an independent expenditure or an electioneering communication. *See WRTL,* 551 U.S. at 469-70; *Citizens United,* 130 S.Ct. at 889-90.

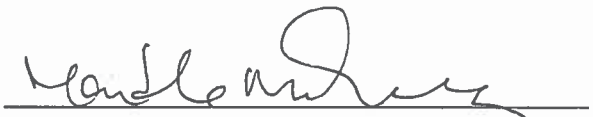
The cases, regulations and agency enforcement actions discussed herein make up the body of law construing BCRA's and FECA's express advocacy provisions that provided the template for Amendment 27's definition of expenditure. This is the body of law that this Court should turn to for interpretive

guidance. *See Rodriguez*, 112 P.3d at 699. Under such an analysis, it is clear that a communication that is the functional equivalent of express advocacy may be regulated just like a communication that openly employs "magic words."

## CONCLUSION

Based on the foregoing reasoning, *amicus curiae* CCC respectfully requests that the Court reverse the decision of the Court of Appeals.

Respectfully submitted,



Martha M. Tierney
KELLY GARNSEY HUBBELL + LASS LLC
**ATTORNEYS FOR AMICUS CURIAE COLORADO COMMON CAUSE**

## CERTIFICATE OF SERVICE

I certify that on January 31, 2011, I served a copy of the foregoing **BRIEF OF AMICUS CURIAE COLORADO COMMON CAUSE IN SUPPORT OF PETITIONER COLORADO ETHICS WATCH** via United States mail, first class mail, postage prepaid, addressed as follows:

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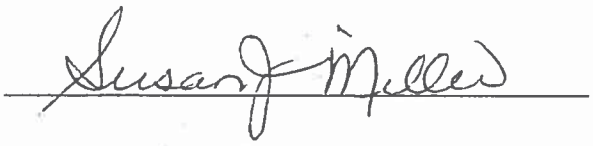

FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

December 13, 2006

Benjamin L. Ginsberg, Esq.
Glenn M. Willard, Esq.
Patton Boggs LLP
2550 M Street, NW
Washington, DC 20037-1350

Re: MURs 5511 and 5525
Swift Boat Veterans and POWs for Truth

Dear Messrs. Ginsberg and Willard:

On December 8, 2006, the Federal Election Commission accepted the signed conciliation agreement and civil penalty submitted on your client's behalf in settlement of violations of 2 U.S.C. §§ 433, 434, 441a(f) and 441b(a), provisions of the Federal Election Campaign Act of 1971, as amended. Accordingly, the file has been closed in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). Information derived in connection with any conciliation attempt will not become public without the written consent of the respondent and the Commission. See 2 U.S.C. § 437g(a)(4)(B).

Enclosed you will find a copy of the fully executed conciliation agreement for your files. Please note that the civil penalty is due within 30 days of the conciliation agreement's effective date. If you have any questions, please contact us at (202) 694-1650.

Sincerely,

Peter G. Blumberg
Attorney

Julie McConnell
Attorney

Enclosure
Conciliation Agreement

**BEFORE THE FEDERAL ELECTION COMMISSION**

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Swiftboat Veterans and POWs for Truth | ) | MURs 5511 and 5525 |
| | ) | |

**CONCILIATION AGREEMENT**

These matters were initiated by signed, sworn, and notarized complaints. The Federal Election Commission ("Commission") found reason to believe that Swiftboat Veterans and POWs for Truth ("SwiftVets") violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a) of the Federal Election Campaign Act, as amended, ("the Act") by failing to register as a political committee with the Commission, by failing to report contributions and expenditures as a political committee to the Commission, by knowingly accepting individual contributions in excess of $5,000, and by knowingly accepting corporate and/or union contributions. Following an investigation, the Commission concluded that SwiftVets did not unlawfully coordinate its activities with, or make excessive in-kind contributions to, any federal candidate or political party committee.

NOW, THEREFORE, the Commission and SwiftVets, having participated in informal methods of conciliation, prior to a finding by the Commission of probable cause to believe, do hereby agree as follows:

I. The Commission has jurisdiction over the SwiftVets and the subject matter of this proceeding.

II. SwiftVets has had a reasonable opportunity to demonstrate that no action should be taken in this matter.

III. SwiftVets enters voluntarily into this agreement with the Commission.

IV. The pertinent facts in these matters are as follows:

Applicable Law

1. The Act defines a political committee as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A).

2. The Act defines the term "contribution" as including "anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i); *see also FEC v. Survival Education Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995) (where a statement in a solicitation "leaves no doubt that the funds contributed would be used to advocate [a candidate's election or] defeat at the polls, not simply to criticize his policies during the election year," proceeds from that solicitation are contributions).

3. The Act defines the term "expenditure" as including "anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i).

4. Under the Commission's regulations, a communication contains express advocacy when it uses phrases such as "vote for the President," "re-elect your Congressman," or "Smith for Congress," or uses campaign slogans or words that in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, such as posters, bumper stickers, or advertisements that say, "Nixon's the One," "Carter '76," "Reagan/Bush," or "Mondale!" *See* 11 C.F.R. § 100.22(a); *see also FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) ("[The publication] provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally

less direct than "Vote for Smith" does not change its essential nature."). Courts have held that "express advocacy also include[s] verbs that exhort one to campaign for, or contribute to, a clearly identified candidate." *FEC v. Christian Coalition*, 52 F.Supp. 2d 45, 62 (D.D.C. 1999) (explaining why *Buckley v. Valeo*, 424 U.S. 1, 44, n.52 (1976), included the word "support," in addition to "vote for" or "elect," on its list of examples of express advocacy communication).

5. The Commission's regulations provide that express advocacy also includes communications containing an "electoral portion" that is "unmistakable, unambiguous, and suggestive of only one meaning" and about which "reasonable minds could not differ as to whether it encourages actions to elect or defeat" a candidate when taken as a whole and with limited reference to external events, such as the proximity to the election. 11 C.F.R. § 100.22(b). Communications discussing or commenting on a candidate's character, qualifications or accomplishments are considered express advocacy under section 100.22(b) if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question." *See Explanation and Justification*, 60 Fed. Reg. 35,291, 35,295 (Jul. 6, 1995).

6. The Supreme Court has held that "[t]o fulfill the purposes of the Act" and avoid "reach[ing] groups engaged purely in issue discussion," only organizations whose major purpose is campaign activity can be considered political committees under the Act. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 79 (1975); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986) ("*MCFL*"). It is well-settled that an organization can satisfy *Buckley's* "major purpose" test through sufficient spending on campaign activity. *MCFL*, 479 U.S. at 262-264; *see also Richey v. Tyson*, 120 F. Supp. 2d 1298, 1310 n.11 (S.D. Ala. 2000). An organization's "major purpose" may also be established through public statements of purpose. *See, e.g., FEC v.*

*Malenick*, 310 F. Supp. 2d 230, 234-36 (D.D.C. 2004); *FEC v. GOPAC*, 917 F. Supp. 851, 859 (D.D.C. 1996).

7. The Act requires all political committees to register with the Commission and file a statement of organization within ten days of becoming a political committee, including the name, address, and type of committee; the name, address, relationship, and type of any connected organization or affiliated committee; the name, address, and position of the custodian of books and accounts of the committee; the name and address of the treasurer of the committee; and a listing of all banks, safety deposit boxes, or other depositories used by the committee. *See* 2 U.S.C. § 433.



8. Each treasurer of a political committee shall file periodic reports of the committee's receipts and disbursements with the Commission. *See* 2 U.S.C. § 434(a)(1). In the case of committees that are not authorized committees of a candidate for Federal office, these reports shall include, *inter alia*, the amount of cash on hand at the beginning of the reporting period, *see* 2 U.S.C. § 434(b)(1); the total amounts of the committee's receipts for the reporting period and for the calendar year to date, *see* 2 U.S.C. § 434(b)(2); and the total amounts of the committee's disbursements for the reporting period and the calendar year to date. *See* 2 U.S.C. § 434(b)(4).

9. The Act states that no person shall make contributions to any political committee that, in the aggregate, exceed $5,000 in any calendar year, with an exception for political committees established and maintained by a state or national political party. *See* 2 U.S.C. § 441a(a)(1)(C). Further, the Act states that no political committee shall knowingly accept any contribution in violation of the limitations imposed under this section. *See* 2 U.S.C. § 441a(f).

10. Pursuant to 2 U.S.C. § 441b(a), it is unlawful for any political committee to knowingly accept or receive, directly or indirectly, any contribution made in connection with a federal election from a corporation.

11. Under certain circumstances, organizations established under I.R.C. § 527 may not qualify as political committees. There is substantial overlap in the content of disclosures required of such Section 527 organizations and the disclosures required of political committees, although they differ in format, timing and level of detail. Unlike a political committee, which must register and file reports with the Commission, a Section 527 organization may avoid disclosing certain receipts to the IRS if it pays the highest corporate tax rate on such funds. SwiftVets, however, maintains that it did not avail itself of this provision and disclosed all of its receipts. In addition, an organization that does not trigger political committee status may accept contributions larger than $5,000 and accept (for limited purposes) funds from corporate or union sources.



Factual Background

12. SwiftVets is an unincorporated entity organized under Section 527 of the Internal Revenue Code, and it filed its Notice of 527 Status with the IRS on April 23, 2004. SwiftVets has not registered as a political committee with the Federal Election Commission, but filed public reports of its receipts and disbursements with the IRS, and also filed reports as to some of its receipts and disbursements with the Commission under the electioneering communications provisions of the Act.

13. SwiftVets contends that its 2004 activities were intended to set the record straight with regard to the public discussion of John Kerry's conduct in, and statements about, the Vietnam War, particularly Mr. Kerry's statements about the conduct of those who fought in

Vietnam, and the declaration that he was "reporting for duty" in connection with his 2004 Presidential campaign. SwiftVets engaged in no activities prior to it becoming apparent that John Kerry would be the Democratic Party's nominee for President of the United States in Spring 2004, and also engaged in no political activities after John Kerry lost the Presidential election in November 2004, which it contends was because it had made its point on the issue of concern at the time it was the focus of public debate.

14. During the 2004 election cycle, SwiftVets raised $25,080,796. As discussed below, most if not all of the solicitations for such funds made reference to Mr. Kerry's 2004 Presidential campaign. SwiftVets contends that a majority of its receipts came from 155,000 separate individual contributions from small grassroots donors, at an average of $124 each. The remaining SwiftVets receipts came from large individual donors or corporations. SwiftVets also maintains that its $715,050 in receipts from corporations constituted a relatively small percentage of its overall revenues, and that these were placed in a segregated account for administrative purposes and not used to make electioneering communications under the Act.

15. During the 2004 cycle, SwiftVets spent $19,304,642 for 12 television advertisements that were broadcast in the Presidential election battleground states of Colorado, Florida, Minnesota, Nevada, New Mexico, Ohio, Pennsylvania, Tennessee, Wisconsin, and West Virginia, as well as in the District of Columbia and on national cable television stations, such as CNN and the History Channel. All of these advertisements attacked the character, qualifications, and fitness for office of Senator John Kerry, the Democratic Presidential nominee. Excerpts from several of these advertisements include:

**Any Questions?**

John Kerry has not been honest.

And he lacks the capacity to lead.

When the chips are down, you could not count on John Kerry.

...

I served with John Kerry ... John Kerry cannot be trusted.

**Why?**

How can you expect our sons and daughters to follow you, when you condemned this fathers and grandfathers?

Why is this relevant?

Because character and honor matter. Especially in a time of war.

John Kerry cannot be trusted.

**Never Forget (a/k/a Other Hand)**

John Kerry gave aide [*sic*] and comfort to the enemy by advocating their negotiating points to our government.

Why is it relevant? Because John Kerry is asking us to trust him.

I will never forget John Kerry's testimony. If we couldn't trust John Kerry then, how could we possibly trust him now?

**Friends**

Even before Jane Fonda went to Hanoi to meet with the enemy and mock America, John Kerry secretly met with enemy leaders in Paris.

...

Eventually, Jane Fonda apologized for her activities, but John Kerry refuses to.

In a time of war, can America trust a man who betrayed his country?

**Medals**

Symbols. They represent the best things about America.

Freedom … Valor … Sacrifice.

Symbols, like the heroes they represent, are meant to be respected.

Some didn't share that respect … and turned their backs on their brothers.

…

How can the man who renounced his countries [*sic*] symbols now be trusted?

16. SwiftVets also spent $1,120,881.09 for mailers sent to households in Presidential election battleground states. The first mailer accused Senator Kerry of "dishonoring" and "demoralizing" his fellow soldiers and of "aiding and abetting the enemy" by secretly meeting with North Vietnamese officials, and concluded,

> Why is John Kerry's Betrayal Relevant Today? Because character and trust are essential to leadership, especially in a time of war. A man who so grossly distorts his military record, who betrays his fellow soldiers, who endangers our soldiers and sailors held captive, who secretly conspires with the enemy, who so brazenly mocks the symbols of sacrifice of our servicemen … all for his own personal political goals … has neither the character nor the trust for such leadership. JOHN KERRY CANNOT BE TRUSTED. If we couldn't trust John Kerry then, how could we possibly trust him now?

The second mailer listed "Four reasons why John Kerry is unfit for command," claiming Kerry (1) "lied to the American people about his service record in Vietnam," (2) "betrayed his fellow soldiers when he charged them with war crimes," (3) "lost the respect of the men he served with by throwing away his medals – America's symbols of valor and sacrifice," and (4) "betrayed America by assisting North Vietnamese Communists and extreme leftist radicals." This mailer

concluded by stating, "We're not debating Vietnam, it's about John Kerry's character, he betrayed us in the past, how do we know he won't do it again?"

17. SwiftVets spent $39,140.91 for a newspaper advertisement in the St. Louis Post Dispatch for a two-day period coinciding with the 2004 Presidential debate held in St. Louis, Missouri. This advertisement features photographs of Kerry and Jane Fonda, and, after raising questions about Kerry's postwar activities, the advertisement asks in bold type "WHY IS THIS RELEVANT? Because in a time of War – America needs a man that can be trusted to make the right decisions. JOHN KERRY CANNOT BE TRUSTED."



SwiftVets' Contributions

18. The Commission concludes that language used in various SwiftVets fundraising solicitations that made reference to Senator Kerry's 2004 Presidential campaign clearly indicated that the funds received would be targeted for the defeat of Senator Kerry. SwiftVets contends that its solicitations indicated that the funds would be utilized to discuss John Kerry's conduct in and statements about the Vietnam War and those who fought in it, and to respond to his statements about these issues in order to present an accurate record.

19. SwiftVets made a direct mail solicitation to potential donors in September and October 2004, which stated,

> [W]e plan to make sure every American is aware of how John Kerry is misrepresenting his record and ours in Vietnam... ...*and to demonstrate why he is clearly unfit for command*.... *The truth is* that the man whose entire Presidential campaign is based on his experience in Vietnam, used highly suspicious personal injuries to cut his tour of duty to a mere four months.... All of this makes it clear to us that *Mr. Kerry is clearly unfit for command* of the armed forces of the United States!... [N]ow that a key creator of that poisonous image – *John Kerry* – is seeking to be Commander-in-Chief of the United States we have resolved to end our silence

> and set the record straight. Your gift will help us do that by ensuring our message stays on TV.

SwiftVets received total income of $2,020,286.10 in response to three mailings of this solicitation, netting $1,489,683.89.

20. SwiftVets also made e-mail and Internet fundraising solicitations. One such e-mail solicitation, dated September 8, 2004, stated,

> I would like to extend my sincere and personal gratitude for your generous contribution to Swift Boat Veterans for Truth. I am sure you have seen the impact your contribution has had on the public discussion surrounding Senator Kerry's fitness for duties as Commander-in-Chief... John Kerry's campaign – aided by a sympathetic media – has responded to our work by evading our criticisms and turning up the volume on their attacks... You have already done so much, but I'm here now to ask you to help once more. We are at a critical point in this effort and we must keep our ads – including some new ones which I think you'll really appreciate – on the airwaves in key battleground states. We are up against the big guns, and we now need to make sure they can't drown us out... You can lend us a hand, as well, by passing this information on to other friends you think might be interested in helping us tell the true story of John Kerry.

SwiftVets' Third Quarter 2004 Report to the IRS includes approximately 509 contributions to SwiftVets on September 8, 2004, and approximately 554 contributions to SwiftVets on September 9, 2004. These contributions totaled substantially more than $1,000.

21. The Commission concludes that all funds received in response to various solicitations, including those set forth above, constituted contributions under the Act, that SwiftVets received more than $1,000 in contributions by no later than May 2004, and that SwiftVets accepted more than $12.5 million in individual contributions in excess of the $5,000 limit and $715,050 in prohibited corporate contributions. *See* 2 U.S.C. § 431(4)(A).

22. SwiftVets contends that it made all of its fundraising communications with the good faith belief that they did not constitute solicitations for contributions under 2 U.S.C. § 431(8)(A)(i).

SwiftVets' Expenditures

23. The Commission concludes that SwiftVets made more than $1,000 in expenditures for fundraising communications and communications to the general public that expressly advocated the defeat of a clearly identified federal candidate, Senator John Kerry. SwiftVets contends that these communications sought to discuss John Kerry's conduct in and statements about the Vietnam War and those who fought in it.



24. The Commission concludes that SwiftVets' fundraising letters unmistakably exhort the recipients to contribute funds to prevent Kerry from becoming President. In one fundraising appeal, SwiftVets stated,

> All of this makes it clear to us that Mr. Kerry is clearly unfit for command of the armed forces of the United States!... Which is why I have sent you this letter. And why I hope I can count on you to send back a special gift of $25, $35, $50, $75, $100 or more to Swift Boat Veterans for Truth.

The Commission concludes that SwiftVets fundraising communications, such as the example above, constitute express advocacy under 11 C.F.R. § 100.22(a) because it references an election and specific candidates, and it advocates action – in this case contributing funds – designed to lead to the candidate's defeat in the election. The Commission concludes that costs associated with the various fundraising appeals that contained express advocacy exceeded $1,000.

25. SwiftVets spent $9,477,999 on five television advertisements, "Any Questions," "Why?" "Never Forget (a/k/a Other Hand)," "Friends," and "Medals," that the Commission concludes expressly advocated the defeat of Senator John Kerry. The television

advertisements were broadcast shortly before the 2004 Presidential Election, explicitly challenge Senator Kerry's "capacity to lead," assert that he cannot be "trusted," and ask why citizens should be willing to "follow" him as a leader. The Commission concludes that, speaking to voters in this context, the advertisements unambiguously refer to Senator Kerry as a Presidential candidate by discussing his character, fitness for office, and capacity to lead, and have no other reasonable meaning than to encourage actions to defeat him. *See* 11 C.F.R. § 100.22(b); *Explanation and Justification*, 60 Fed. Reg. at 35,295.

26. SwiftVets spent $1,120,881.09 for two mailers that the Commission concludes expressly advocated John Kerry's defeat in the 2004 election. Both mailers comment on Kerry's character, qualifications and accomplishments and the Commission concludes that, in context, they have no other reasonable meaning than to encourage actions to defeat Senator Kerry. Senator Kerry, the recipient is told, lacks an essential requirement to lead in a time of war – he "cannot be trusted" and is "unfit for command." Thus, the Commission concludes that the only manner in which the reader can act on the message that "Kerry cannot be trusted" is to vote against him in the upcoming election. *See* 11 C.F.R. § 100.22(b).

27. SwiftVets paid $39,140.91 to place a newspaper advertisement in the St. Louis Post Dispatch. The ad featured photos of John Kerry and Jane Fonda, raised questions about Kerry's "betrayal," and asked in bold type, "WHY IS THIS RELEVANT? Because in a time of War – America needs a man that can be trusted to make the right decisions. JOHN KERRY CANNOT BE TRUSTED." The Commission concludes that, here, the "man" that "America needs" "in a time of war" can only mean "the President," and the reader is to understand that Kerry cannot be trusted to make the right decisions as the country's president in a time of war. The Commission concludes that the only action a voter exposed to this

advertisement could take to ensure that America gets a "man that can be trusted to make the right decisions" is to vote against Kerry.

28. The Commission concludes that all of these communications comment on Senator Kerry's character, qualifications, and fitness for office, explicitly link those charges to his status as a candidate for President, and have no other reasonable meaning than to encourage actions to defeat Senator Kerry. Therefore, because the Commission concludes that the communications are "unmistakable, unambiguous, and suggestive of only one meaning" and because reasonable minds cannot differ that the communications urge Kerry's defeat, the Commission concludes that they are express advocacy as defined at 11 C.F.R. § 100.22(b). Accordingly, the Commission concludes that SwiftVets made expenditures in excess of $1,000, surpassing the statutory threshold for political committee status. *See* 2 U.S.C. § 431(4)(A).

29. The Commission states that in the thirty years since the enactment of the relevant provisions of the Act and the Supreme Court's decision in *Buckley*, *see supra* paras. IV.1-6, the definition of express advocacy and the prerequisites for political committee status have been addressed in Supreme Court and lower court opinions, Commission regulations, advisory opinions, and enforcement actions. This includes the "major purpose" test, which serves as a constitutional limit in determining whether an organization is a political committee. The Commission states that it has been applying these principles for many years, and it will continue to do so in the future. *See* Explanation and Justification, 69 Fed. Reg. 68,056, 68,065 (Nov. 23, 2004).

30. Notwithstanding the foregoing paragraph 29, SwiftVets contends that their referenced communications were intended to respond to statements by John Kerry on the issue of his conduct in, and his statements about, the Vietnam War and those who fought in it. SwiftVets

further maintains that it made all of its communications with the good faith belief that the communications did not contain express advocacy or constitute expenditures under 2 U.S.C. § 431(9)(A)(i), and that its expenditures were properly and in good faith publicly disclosed under I.R.C. § 527. While the Commission disagrees with its reasoning, SwiftVets contends that it was uncertain as to the continued validity and application of the alternative express advocacy test set forth in 11 C.F.R. § 100.22(b) because of: (1) SwiftVets' understanding of the First and Fourth Circuit court decisions holding 11 C.F.R. § 100.22(b) unconstitutional; (2) SwiftVets' understanding of the Commission's history of not relying on 11 C.F.R. § 100.22(b) in recent enforcement matters; (3) SwiftVets' understanding of the division on the Commission in voting whether to initiate a rulemaking to revise or repeal 11 C.F.R. § 100.22(b); and (4) SwiftVets' understanding of the Commission's decision in 2004 not to issue specific regulation regarding the political committee status of 527 organizations whose major purpose was the nomination or election of Federal candidates (May 13, 2004), and its September 27, 2001 decision to hold in abeyance a rulemaking to revise the definition of "expenditure" and to promulgate a definition for the "major purpose" test.



SwiftVets' Major Purpose

31. The Commission concludes that SwiftVets' statements and activities demonstrate that its major purpose was to defeat John Kerry. *See* Paragraphs IV.12-IV.30. SwiftVets contends that its purpose was to discuss John Kerry's conduct in, and statements about their service in, the Vietnam War and what they believed to be a more accurate record of this issue.

32. In a document distributed to a limited number of prospective donors by a SwiftVets fundraiser, SwiftVets stated,

> GOAL
> Prevent John Kerry from becoming Commander-in-Chief....

**STRATEGY**
Dramatize for key elements of the American public what Kerry did and why he is unfit to be Commander-in-Chief....

**TACTICS**
Train, equip and deploy the Swift Boat Vets who can speak with unique credibility.... *We Will Conduct Such An Aggressive, Passionate Effort That The American People Will Reject John Kerry As A Liar And A Fraud....*

**FUNDING**
Large gifts: the Swift Boat vets ability to reach the American people depends on large gifts from individuals who understand the potent message they carry and why John Kerry must be stopped from being Commander-in-Chief....

33. In addition, SwiftVets made other statements that the Commission concludes establish that its major purpose was to defeat John Kerry. For example, during the 2004 election, its website showed a picture of Kerry and stated, "[O]f the 19 veterans pictured with Kerry, only THREE actually support him for president. 12 now state that Kerry is 'UNFIT to be Commander-in-Chief.'" Also, a letter signed by the Chairman of SwiftVets thanking a large donor for a $100,000 contribution stated,

> We will do our utmost to assure this timely donation will be expended directly and prudently in our quest to derail Senator Kerry's well organized and funded campaign to become the Commander in Chief of the United States Armed Forces. We are adamantly opposed to the political self serving ambitions of this man who betrayed us in 1971.

Finally, On August 6, 2004, a Steering Committee member was asked on a news program whether SwiftVets' advertisements were produced and made to influence the Presidential election and responded, "Yes, of course."

34. In its fundraising solicitations, SwiftVets referred repeatedly to efforts to demonstrate that John Kerry is "unfit to be Commander-in-Chief of the United States" through advertisements targeted to battleground states. Consistent with these statements, the funds

donated to SwiftVets paid for advertisements and direct mail pieces that were focused on states such as Ohio, Pennsylvania, Florida, Nevada, New Mexico, Colorado, Minnesota, West Virginia, Wisconsin and Tennessee. SwiftVets contends that it targeted these states because it believed people were paying the closest attention to John Kerry's conduct in, and statements about, the Vietnam War and those who fought in it.

35. SwiftVets spent $20,464,664, or approximately 91 percent of its reported disbursements, on television and print advertisements and direct mail pieces attacking Senator John Kerry or expressly advocating his defeat.

36. Since the 2004 election, SwiftVets has effectively ceased active operations. It has added no new content to its website, no longer solicits contributions, and has limited its disbursements primarily to legal and administrative costs, as well as charitable contributions to veteran-related charities.

37. SwiftVets contends that it operated under the good faith belief that it had not triggered political committee status in 2004, and that it fulfilled the applicable regulatory requirements via public disclosure to the IRS of its overall receipts and disbursements under I.R.C. § 527, and contemporaneous disclosure to the Commission of its electioneering communications. Indeed, the Commission has never alleged that the SwiftVets acted in knowing defiance of the law, or with the conscious recognition that their actions were prohibited by law, made no findings or conclusions that there were any knowing and willful violations of the law in connection with this matter, and, thus, does not challenge SwiftVets' assertion of its good faith reliance on its understanding of the law.

V. Solely for the purpose of settling this matter expeditiously and avoiding litigation, without admission with respect to any other proceeding, and with no finding of probable cause by

the Commission, SwiftVets agrees not to contest the Commission's conclusions, as stated herein, that it violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a) of the Act by failing to register and report as a political committee with the Commission, by knowingly accepting individual contributions in excess of $5,000, and by knowingly accepting corporate contributions.

VI. SwiftVets states that, upon completing its obligations under this Agreement, it intends to cease operations as an IRC Section 527 organization and to donate the remainder of its funds to a charity supporting the families of U.S. servicemen and servicewomen killed or wounded in the War in Iraq. Pursuant to this Agreement, SwiftVets agrees to do the following:

1. SwiftVets will pay a civil penalty to the Federal Election Commission in the amount of $299,500 pursuant to 2 U.S.C. § 437g(a)(5)(A).

2. SwiftVets will cease and desist from violating 2 U.S.C. §§ 433 and 434 by failing to register and report as a political committee, and will cease and desist from violating 2 U.S.C. § 441(a)(f) by accepting individual contributions in excess of the limits set forth in the Act. SwiftVets states that it has no present intention to accept contributions or to make expenditures as defined by the Act, and will register and report to the Commission if it should engage in activities that the Commission has concluded would trigger Federal political committee status in connection with future elections.

3. SwiftVets will submit to the FEC copies of its Form 8872 reports previously filed with the Internal Revenue Service for activities from January 1, 2004 until December 31, 2004, supplemented with the additional information that Federal political committees are required to include on page 2 of the Summary Page of Receipts and Disbursements of FEC Form 3X.

VII. The Commission, on request of anyone filing a complaint under 2 U.S.C. § 437g(a)(1) concerning the matters at issue herein or on its own motion, may review compliance with this agreement. If the Commission believes that this agreement or any requirement thereof has been violated, it may institute a civil action for relief in the United States District Court for the District of Columbia.

VIII. This agreement shall become effective as of the date that all parties hereto have executed same and the Commission has approved the entire agreement.

IX. Respondent shall have no more than 30 days from the date this agreement becomes effective to comply with and implement the requirements contained in this agreement and to so notify the Commission.

X. This Conciliation Agreement constitutes the entire agreement between the parties on the matters raised herein, and no other statement, promise, or agreement, either written or oral, made by either party or by agents of either party, that is not contained in this written agreement shall be enforceable.

FOR THE COMMISSION:

Lawrence H. Norton
General Counsel

BY: _____ 12/11/06
Rhonda J. Vosdingh
Associate General Counsel
for Enforcement

Date

FOR THE RESPONDENT:

_____ December 3, 2006
Benjamin L. Ginsberg

Date