Testimony of
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Chairman Lott, Senator Dodd, and Members of the Committee:

Thank you for giving me the opportunity to appear before the Committee. My name is Edward Foley, and I am the Robert M. Duncan/Jones Day Designated Professor of Law at the Moritz College of Law of the Ohio State University.

My remarks today are drawn largely from an article I co-authored with my colleague Donald Tobin, which was published in several BNA publications, including *U.S. Law Week*, in January. (See Foley & Tobin, *Tax Code Section 527 Groups Not an End-Run Around McCain-Feingold*, 72 US Law Week 2403 (1/20/2004).) I respectfully ask that the article be made part of the record.

The article makes three main points, which I would like to summarize briefly this morning:

First, any organization that meets the "major purpose" test set forth in the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (per curiam), is a "political committee" under the Federal Election Campaign Act (FECA), and thus subject to the regulations applicable to political committees under FECA, including the $5000 limit on contributions received by a political committee. This "major purpose" test, as I shall explain momentarily, asks whether the "major purpose" of an organization is to influence the outcome of a federal election.

Second, many so-called "527 organizations" under the Tax Code are likely, but not necessarily, to have the requisite "major purpose" to fall within the "political

committee" category under FECA. To qualify as a 527 organization, an entity must have influencing elections as its primary purpose. But a 527 organization may have influencing *state*, rather than *federal*, elections as its primary purpose; if so, then the particular 527 would not meet the "major purpose" test under *Buckley*, because that test is confined to determining whether an organization's "major purpose" is to influence *federal*, rather than *state*, elections. Thus, to determine whether any particular 527 organization is a "political committee" under FECA, it is necessary to know how the *Buckley* "major purpose" test actually works to distinguish those organizations that have the requisite "major purpose" from those that do not. I will return to this important topic subsequently.

My third and final main point is that there is an open constitutional question whether the $5000 limit on contributions received by a political committee is valid with respect to a political committee, including a 527 that qualifies as a political committee, that confines itself to activities that are uncoordinated with any candidate's own campaign. In my view, as a law professor who specializes in constitutional law, the proper resolution of this as-yet-undecided constitutional question is that there should be no constitutional obstacle to the enforcement of the $5000 contribution limit with respect to such political committees, for reasons that I will touch upon at the end of these remarks.

Now that I have identified my three main points, I will elaborate upon them a bit, although today's discussion is necessarily condensed and will omit some details and finer points that could arise on this topic, which I think all would agree can involve some very

complicated and technical issues under the federal campaign finance laws. To the extent that I am able, I will address such details in response to any questions you may have.

I. The *Buckley* "Major Purpose" Test

In *Buckley*, the Supreme Court adopted the "major purpose" test to narrow FECA's interrelated definitions of "political committee" and "expenditures." Looking solely at the terms of the Act, any organization spending $1000 per year on "expenditures" would be a "political committee," but the statute stated that any spending "for the purpose of influencing" a federal election was an "expenditure" under the Act. The combination of these two provisions meant that an organization would be deemed a "political committee" if it spent more than $1000 per year on activities to influence a federal election. But since the phrase "influencing an election" by itself could be understood quite broadly – to include, for example, public messages on policy issues salient in an election year (such as gun control, or environmental protection, and so forth), there was the danger that organizations that were in no way election-oriented in nature could be considered "political committees" under FECA.

Therefore, the Supreme Court did two things in its *Buckley* decision. First, it said that only organizations having influencing elections as their "major purpose" could be considered "political committees" under FECA, thereby leaving aside organizations that have influencing elections only as a minor or secondary purpose of their activities. Second, even with respect to those organizations that lack such a "major purpose" and thus will not be deemed "political committees," the Court narrowed the definition of "expenditure" to encompass only "express advocacy," so that these organizations would

not be caught by the surprise that their activities were subject to the separate disclosure rules applicable to "expenditures" by entities other than political committees.

It is clear from the language and structure of the *Buckley* opinion that the Court did not intend this second "express advocacy" limitation to apply to organizations that met its first "major purpose" test. In other words, those organizations that did demonstrate their "major purpose" as being the winning of federal elections could be subject to regulation – including disclosure – on all their activities having this "major purpose," whereas organizations that lacked such a "major purpose" would be subject to regulation – including disclosure specifically – on only those activities meeting the separate "express advocacy" requirement. As the *Buckley* Court stated explicitly, immediately after limiting the definition of "political committee" to such "major purpose" organizations, "[w]hen the maker of the expenditure is not . . . a 'political committee', the relation of the information sought to the purposes of the Act may be too remote . . . [and therefore] we construe 'expenditure' for purposes of [these other organizations] . . . to reach funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. at 79-80. In this way, the "express advocacy" limitation ensures that FECA applies only to spending by groups other than political committees when that spending is "unambiguously related to the campaign of a particular federal candidate," *id.* at 80, whereas in its earlier discussion of the "major purpose" test, the Court pointed out that "[e]xpenditures of 'political committees' so construed . . . are, by definition, campaign related." Therefore, precisely because of its "major purpose" test, the "express advocacy" limitation does not operate with respect to spending by political committees.

II. Applying the "Major Purpose" Test

The previous point has implications for how to apply the "major purpose" test to determine whether an organization is, or is not, a political committee. The argument is sometimes made that, to tell whether the organization has influencing elections as its "major purpose," one can look only at whether the preponderance of its spending is for "express advocacy" rather than other activity designed to win elections. Given *Buckley*, however, that contention is clearly incorrect. The "express advocacy" limitation applies only if an organization, based on all its activities, does not have influencing elections as its major purpose.

What then does one look to in order to tell whether an organization meets the *Buckley* "major purpose" test? Although *Buckley* itself did not spell out these details, two alternative criteria make sense given the logic of *Buckley*'s reasoning. First, an organization has as its "major purpose" winning one or more federal election if it says so. We might call this the "subjective" test, although it is not subjective in the sense of reading the mind of the organization or its leaders. It is based solely on the organization's public statements. But if the organization publicly declares – in fundraising communications or on its website, or in a press release – that its overriding mission is to defeat a particular incumbent's bid for reelection, then we can take that organization at its word and say that it has self-identified its own major purpose as influencing a federal election. One need look no further to say that this organization is a "political committee" under FECA and must comply with the applicable rules.

Second, even if an organization does not publicly declare its major purpose to be influencing federal elections, its activities may reveal that it has this major purpose. We

can call this the "objective" test. There may be different ways to fine-tune the exact details of this "major purpose" test, and one of the tasks of the Federal Election Commission (FEC) in its current rulemaking proceedings should be to conduct this fine-tuning. But the basic components of such an objective test should be clear. One looks to see whether the preponderance of an organization's activities are the sort of activities that we would expect to see by an organization whose primary mission is to elect or defeat federal candidates. What sort of activities are these? Public messages supporting or attacking particular candidates. Public messages urging voters to go to the polls to support candidates from one political party or the other. Messages urging citizens to register to vote, so that they can achieve a victory for one party or the other.

These are the sort of activities that are encompassed within the new definition of "Federal election activities" contained in the Bipartisan Campaign Reform Act (BCRA), but I want to make clear that the consideration of these kinds of activities as part of implementing the *Buckley* "major purpose" test in no way depends upon the enactment of BCRA in general, or its new definition of "Federal election activities" in particular. Rather, these are the kind of activities one naturally would look to in order to identify the contributions received and the expenditures made by a "political committee" under FECA, when the definitions of the terms "contributions" and "expenditures" both turn on the key concept of "influencing federal elections," and the Supreme Court in *Buckley* validated the use of that key statutory concept so long as one is dealing with organizations that have this purpose as their major purpose.

Accordingly, a 527 organization that satisfies either the subjective or objective component of the "major purpose" test, as described above, is a "political committee"

under FECA and must register as such and comply with all applicable requirements. An important question remains, however, whether it would be constitutional to apply all of these FECA rules to all political committees, including 527s that qualify as a political committee by virtue of the "major purpose" test. One such question specifically concerns the $5000 limit on contributions that political committees may receive from individual donors. (In this testimony, I will not address any questions concerning contributions to political committees by corporations or unions.)

III. The Constitutional Basis of the "Major Purpose" Test

The Supreme Court has upheld the rule in FECA that limits contributions to a political committee to $5000 in a case involving a political committee that, in turn, made its own contributions directly to candidates. *California Medical Ass'n v. FEC*, 453 U.S. 180 (1981). In doing so, however, the Court left open the question whether the same $5000 limit would be constitutional as applied to a political committee that neither made its own contributions to candidates nor coordinated its own activities with candidates but rather acted entirely independently in support of, or opposition to, a candidate's election. There are plausible arguments to make on both sides of this undecided First Amendment question, and ultimately the answer may depend on the strength of the evidentiary record in the particular case in which it is decided, as was true with respect to the Supreme Court's decision upholding BCRA's soft-money limitations in *McConnell v. FEC*, 124 S.Ct. 619 (2003). Nonetheless, in my judgment, there are two basic reasons why, in principle, this $5000 limit should be upheld as valid with respect to such an independently-operating political committee, whereas the same limit would not be

permissible with respect to a non-profit group that lacked winning elections as its major purpose (which one might label a "non-electoral non-profit").

First, precisely because the "major purpose" test confines the category of political committees to those organizations that have winning elections as their primary objective, it is appropriate to limit the contributions received by these organizations for the same reason as it is appropriate to limit contributions to political parties. Political committees, like political parties, exist to win elections. They have winning elections as their "raison d'etre," their reason for being. Accordingly, donors looking to secure improper influence over successful candidates who become officeholders naturally would look to such election-focused organizations as repositories of their largess. Likewise, successful candidates tempted to return favors to campaign contributors who supported their campaigns would pay special attention to donors who gave large sums of money to organizations whose central mission is to help achieve this election victory. Thus, without a cap on contributions to political committees, large-dollar donations to such committees threaten to reintroduce precisely the same form of improper influence that justified the caps on contributions received by political parties, which were upheld in *McConnell*.

Second, and conversely, non-profit groups without winning elections as their major purpose (the "non-electoral non-profits") do not raise the same risks of corruption, precisely because they are not election-focused entities. Money given to them, even in large amounts, works to achieve the non-profits' primary, non-electoral purposes. Simply put, they are not efficient vehicles for achieving an improper donor-officeholder sense of indebtedness.

This is not to say that large amounts of money given to a "non-electoral non-profit," which engages in some electioneering activities as ancillary activity incidental to its non-electoral major purpose, raise no risk of improper influence at all. Obviously, there is some danger that a $1 million contribution to a large "non-electoral non-profit" that spends several million dollars to help elect a particular federal candidate, but spends much more money on its overall non-electoral mission, so as to escape being a political committee under the "major purpose" test, presents some danger of corruption. But under the First Amendment, which requires a balancing of competing considerations, the relative risk of corruption is less with the "non-electoral non-profit" and the interest in being free from campaign finance regulation is greater. By contrast, with election-focused political committees, the danger of improper influence increases, and the interest in being free from limits on campaign-related contributions lessens. Ultimately, the question is whether political committees should be grouped with political parties, on the one hand, or "non-electoral non-profits," on the other, for the purpose of determining whether caps on the contributions these organizations receive are permissible.

The "major purpose" test, as *Buckle*y itself recognized, is a sensible place to draw this constitutional dividing line. It makes sense, in other words, to group political committees that have this "major purpose" together with political parties as inherently electoral organizations, which under the First Amendment may be subject to greater regulation than organizations that are not inherently electoral in nature. This "major purpose" dividing line thus leaves ample room for First Amendment freedoms because all non-profits that lack such a major purpose are free to receive unlimited contributions to engage in *both* their primary non-electoral activities *and* even their secondary

electioneering activities. But when an organization has influencing elections as its main objective, then it is appropriate to limit the amount of contributions to that organization, as federal campaign finance laws have long recognized.

Thank you.