



**NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.**  
8001 BRADDOCK ROAD, SUITE 600, SPRINGFIELD, VIRGINIA 22160 • (703) 321-8510

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**Mark A. Mix**  
*President*

July 17, 2008

By First Class Mail & FAX

The Honorable Michael B. Mukasey  
Attorney General of the United States  
United States Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

Re: *Andrew Stern and Service Employees International Union*

Dear Sir:

I request that your office open a criminal investigation into the federal election activities of the Service Employees International Union (SEIU) and its President, Andrew Stern.

A recent amendment to SEIU's constitution appears to require SEIU locals to raise political action committee (PAC) money or convert union dues and fees collected as a condition of employment into PAC funds. This amendment suggests that SEIU and its officials are violating, or soon will violate, federal election and labor laws to coerce employees to support candidates the SEIU favors and, thus, thwart a fair and free election this coming November.

Under the National Labor Relations Act (29 U.S.C. §§ 157 & 158(a)(3)) and various state public-sector labor laws, employers and the SEIU are permitted to require employees to join or financially support the SEIU as a condition of employment. Employees who refuse to support the SEIU are subject to being discharged or having the union fees deducted from their paychecks and paid to the SEIU without their consent. This is an unfortunate, but presently lawful, practice.

However, it is absolutely unlawful for SEIU to take these compelled union fees or any other coerced funds and use them to affect federal elections. Specifically, 2 U.S.C. § 441b(b)(3)(A) prohibits "a fund to make a contribution or expenditure by utilizing money . . . secured by . . . financial reprisals, or the threat of . . . financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment."

Moreover, in *United States v. Boyle*, the United States Court of Appeals for the D.C. Circuit held that a union official's transfer of union general treasury funds for use in violation of the forerunner to § 441b(b)(3)(A) violates 29 U.S.C. § 501(c), which also provides criminal penalties. 482 F.2d 755, 764-66 (D.C. Cir. 1973).

The Honorable Michael B. Mukasey  
July 17, 2008  
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You will find enclosed Article XV, Section 18, an amendment to the SEIU Constitution. The June 4, 2008, *BNA Daily Labor Report* ran an article by Michelle Amber in which she reported that this amendment was adopted at SEIU's convention in Puerto Rico last month (June, 2008). After seeing the news report, we contacted BNA and obtained from the BNA PLUS Document Retrieval service the actual documents obtained by its reporter at the SEIU convention. (The enclosure has handwritten notations and markings which are apparently those of the BNA reporter.)

The enclosed constitutional amendment shows that SEIU voted to impose a financial penalty on any local which does not "meet its annual SEIU C.O.P.E. fundraising obligation." I believe this may be an overt violation of 2 U.S.C. § 441b(b)(3)(A), for it shows that SEIU may be obtaining PAC contributions through the "threat of financial reprisal." If the local SEIU affiliate cannot come up with sufficient PAC contributions, it appears that the local will be forced to pay the both the PAC shortfall and the penalty through member dues and agency fees. The resolution is unclear whether the PAC shortfall and penalty monies are also to be paid to support federal campaign activity. Although the use of such monies to fund directly federal campaigns would be a particularly egregious violation of the law, the coercive threats of the SEIU's constitutional amendment warrant your action even absent the direct funding of federal campaigns.

There are three reasons why I ask that you investigate and, if you find the facts warrant, prosecute SEIU's attempt to subvert a free election. First, your office has the authority to criminally prosecute violations of Section 441. *See, e.g., United States v. Galliano*, 836 F.2d 1368 n. 6 (D.C. Cir. 1988); *United States v. Operating Engineers, Local 701*, 638 F.2d 1161, 1168 (9th Cir. 1979). Your authority was recently reconfirmed in two unreported decisions. *Bialek v. Gonzales*, 2007 WL 1879989 (D. Colo. 2007); *Fieger v. Gonzales*, 2007 WL 2351006 (E.D. Mich. 2007).

Second, criminal prosecution is warranted when one of the "core" provisions of the campaign finance laws is violated. The Practising Law Institute, in its article "Federal Prosecution of Election Offenses" 1069 PLI 725, 738 (1998), says, "to warrant criminal prosecution an FECA fraud must have subverted one of the FECA's . . . 'core' provisions." The article then goes on to identify one of those core provisions as:

No contributions from corporations and unions. Financial political activism by unions and corporations can distort, and potentially corrupt, campaign issues. To avoid these adverse effects, and to protect minority members and shareholders from having their shared capital used for political purposes they do not support, unions and corporations may not make contributions or expenditures in connection with federal elections.

Thus, what SEIU has agreed to do clearly appears to violate a core provision of the law.

The Honorable Michael B. Mukasey  
July 17, 2008  
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A more recent statement by officials of the Justice Department on prosecuting election law violations is that "all knowing and willful FECA violations that exceed the applicable jurisdictional floor specified in the Act's criminal provision should be considered for federal prosecution. . . ." Craig C. Donsanto & Nancy L. Simmons, *Federal Prosecution of Election Offenses, 7th Edition*, 1624 PLI/Corp 769, 983 (Oct. 2007). Violations of Section 441b(b)(3)(A), which prohibits use in federal elections of monies required as a condition of membership or employment, are by definition knowing and willful, because that section "address[es] acts that are *malum in se*, that is inherently wrongful conduct from which willful intent to violate the law can be inferred from mere proof that the prohibited act was committed." *Id.* at 966. There is no jurisdictional floor for violations of this section. *See id.* at 966-67.

That brings me to the third reason to prosecute. The SEIU seeks to have a substantial impact on the November election. Most crimes affect a limited number of people. Not only may large numbers of employees (forced to fill SEIU coffers) be harmed by this crime, but, given the close vote in recent national elections, illegal SEIU activity would effectively disenfranchise voters who follow the law.

My concerns are not imaginary. The SEIU is a recidivist in organizing and financing the "mugging" of federal elections. In the last presidential election cycle, Andrew Stern, the President of SEIU, was one of the founders and leaders of a 527 organization named "America Coming Together" (ACT). According to an SEIU press release dated November 1, 2004 (enclosed), the SEIU was the largest contributor to ACT, admitting a contribution of \$26 million dollars. On August 23, 2007, ACT signed a conciliation agreement with the FEC which is also enclosed. This conciliation agreement determined that ACT improperly considered \$70 million to be "voter drive costs." (Conciliation agreement, page 9, ¶ 15.) In addition, ACT used \$26.4 million in "nonfederal funds" to pay for costs connected with the federal election. (Conciliation agreement, page 10, ¶ 17.) The FEC concluded that ACT "failed to account for millions of dollars of federal expenditures that constituted direct support for John Kerry." (Conciliation agreement, page 11, ¶ 19.) In the conciliation agreement ACT agreed to pay \$775,000.00 in civil penalties. (Conciliation agreement, page 12, ¶ VI. 1.)

It appears that ACT paid less than one cent on a dollar as a penalty for approximately \$100 million being improperly used to influence the national elections. I realize that Mr. Stern was merely one of the founders of ACT, and that it was ACT, not SEIU, which was the subject of the enclosed conciliation agreement. Nevertheless, SEIU put millions of dollars into ACT which improperly influenced the federal elections, and SEIU now seems intent on compelling its locals to improperly support its PAC to the same end.

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To protect the rights of workers forced to pay compulsory dues and fees and the integrity of the November elections, I trust you will act upon this information and direct your Department to investigate Mr. Stern and the SEIU to determine whether they are, as it appears, corrupting the federal election process in violation of federal law.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Mark A. Mix".

Mark A. Mix

MAM/bnc  
Enclosures (3)



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**Mark A. Mix**  
*President*

July 17, 2008

By First Class Mail & FAX

The Honorable Elaine L. Chao  
United States Secretary of Labor  
United States Department of Labor  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

Re: *Andrew Stern, President of Service Employees International Union*

Dear Secretary Chao:

I request that your office, pursuant to 29 U.S.C. § 521(a), open an investigation into whether Mr. Stern, President of the Service Employees International Union (SEIU) or other SEIU officers, agents or representatives have violated 29 U.S.C. § 501.

A recent amendment to SEIU's constitution appears to require SEIU locals to raise political action committee (PAC) money or convert union dues and fees collected as a condition of employment into PAC funds. This amendment suggests that SEIU officials are violating, or soon will violate, federal election and labor laws to coerce employees to support candidates those officials favor.

Under the National Labor Relations Act (29 U.S.C. § 157 & 158(a)(3)) and various state public-sector labor laws, employers and the SEIU are permitted to require employees to join or financially support the SEIU as a condition of employment. Employees who refuse to support the SEIU are subject to being discharged or having the union fees deducted from their paychecks and paid to the SEIU without their consent. This is an unfortunate, but presently lawful, practice.

However, it is absolutely unlawful for SEIU to take these compelled union fees or any other coerced funds and use them to affect federal elections. Specifically, 2 U.S.C. § 441b(b)(3)(A) prohibits "a fund to make a contribution or expenditure by utilizing money ... secured by ... financial reprisals, or the threat of .. financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment."

In *United States v. Boyle*, the United States Court of Appeals for the D.C. Circuit held that a union official's transfer of union general treasury funds for use in violation of the forerunner to § 441(b) was also a violation of 29 U.S. C. § 501(c). 482 F.2d 755, 764-66 (D.C. Cir. 1973).

The Honorable Elaine L. Chao  
July 17, 2008  
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The enclosed constitutional amendment shows that SEIU voted to impose a financial penalty on any local which does not "meet its annual SEIU C.O.P.E. fundraising obligation." I believe this may be an overt violation of 2 U.S.C. § 441b(b)(3)(A), for it shows that SEIU may be obtaining PAC contributions through the "threat of financial reprisal." If the local SEIU affiliate cannot come up with sufficient PAC contributions, it appears the local will be forced to pay the both the PAC shortfall and the penalty through member dues and agency fees. The resolution is unclear whether the PAC shortfall and penalty monies are also to be paid to support federal campaign activity. Although the use of such monies to fund directly federal campaigns would be a particularly egregious violation of the law, the coercive threats of the SEIU's constitutional amendment warrant your action even absent the direct funding of federal campaigns.

There are three reasons why I ask that you investigate to determine if a violation of the law has been or is being made. First, your office has the authority under 29 U.S.C. § 521(a) to investigate potential violations of 29 U.S.C. § 501.

Second, under *Boyle*, that the SEIU may have authorized political contributions is no defense under 29 U.S.C. § 501. "Neither authorization by any union officer, or body . . . would have rendered lawful the transfer of general union funds to a federal political campaign." 482 F.2d at 764.

That brings me to the third reason to investigate. The SEIU seeks to have a substantial impact on the November election. Most crimes affect a limited number of people. Not only may large numbers of employees (forced to fill SEIU coffers) be harmed by an improper diversion of union funds, but, given the close vote in recent national elections, the entire nation could be harmed, because illegal SEIU activity would effectively disenfranchise voters who follow the law.

My concerns are not imaginary. Mr. Stern is no stranger to organizing and financing the "mugging" of federal elections. In the last presidential election cycle, Mr. Stern was one of the founders and leaders of a 527 organization named "America Coming Together" (ACT). According to an SEIU press release dated November 1, 2004 (enclosed), the SEIU was the largest contributor to ACT, admitting a contribution of \$26 million dollars. On August 23, 2007, ACT signed a conciliation agreement with the FEC which is also enclosed. This conciliation agreement determined that ACT improperly considered \$70 million to be "voter drive costs." (Conciliation agreement, page 9, ¶ 15.) In addition, ACT used \$26.4 million in "nonfederal funds" to pay for costs connected with the

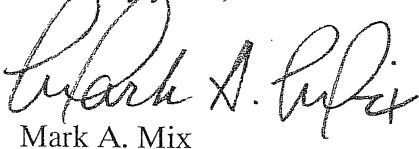
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It appears that ACT paid less than one cent on a dollar as a penalty for approximately \$100 million being improperly used to influence the national elections. I realize that Mr. Stern was merely one of the founders of ACT, and that it was ACT, not SEIU which was the subject of the enclosed conciliation agreement. Nevertheless, SEIU put millions of dollars into ACT which improperly influenced the federal elections, and under the leadership of Mr. Stern, the SEIU now seems intent on compelling its locals to improperly support its PAC to the same end.

This about not only the misappropriation of employees’ compulsory dues and fees, but also the integrity of federal elections. Therefore, I trust that you will act upon this information and direct your Department to investigate Mr. Stern and SEIU’s other officials and agents to determine whether they are violating 29 U.S.C. § 501(c). They should not be able to use union funds to corrupt the federal election process, violate federal law, and trample the rights of individual employees who are compelled to pay union dues to SEIU just to keep their jobs.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Mark A. Mix". The signature is written in a cursive style with a large initial "M".

Mark A. Mix

MAM/bnc  
Enclosures (3)

PROPOSAL # 317  
Constitution Amendment

Strikeout indicates language deleted  
Underline indicates language added

Article XV  
DUTIES OF LOCAL UNIONS

Amend Section 18 of Article XV regarding funding for the Union's political education and action program:

Section 18a. Every U.S. Local Union shall contribute an annual amount equivalent to at least ~~\$7.20~~ \$6.00 per member per year, or as determined annually by the International Executive Board, to support the overall SEIU political education and action program. ~~to be allocated between the International, state councils and local unions as determined by the International Executive Board on an annual basis. This amount can be comprised of local union funds, voluntary member contributions to C.O.P.E. This annual SEIU COPE fundraising obligation may be satisfied by voluntary member contributions to SEIU COPE or a designated organization approved by the International President or a combination thereof. A goal of every local union shall be to enroll and maintain at least 20 percent of its members as voluntary participants in an employer check off or regular deduction program assigned to SEIU C.O.P.E. or to an organization approved by the International President. All contributions to SEIU C.O.P.E. collected by local unions shall be sent to SEIU C.O.P.E. Any contributions in excess of \$3.60-\$6.00 per member per year or such other amount as determined by the International Executive Board shall be returned to the local union for its political program. If a Local Union fails to meet its annual SEIU COPE fundraising obligation, it shall contribute an amount in local union funds equal to the deficiency plus 50%, or such other amount determined by the International Executive Board, to support the overall SEIU political education and action program.~~

~~to be~~ Specific plus 50% of

b. A goal of every local union shall be to enroll and maintain at least 20 percent of its members as voluntary participants in an employer check-off or regular deduction program assigned to SEIU C.O.P.E. or to an organization approved by the International President.

SUBMITTED BY INTERNATIONAL EXECUTIVE BOARD; REFERRED TO: Laws Committee



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FOR IMMEDIATE RELEASE

Nov 1, 2004

CONTACT:

TJ Michels  
202-898-3321  
Ben Boyd  
202-962-9727

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## Anatomy of an Election Strategy: The Facts on SEIU's Role in Bringing Home a Victory for America's Working Families

*Nation's Fastest Growing Union Built Largest Mobilization by Any Single Organization in the History of American Politics*

The 1.7 million-member Service Employees International Union (SEIU) has played a critical role in shaping the outcome of the presidential election and several important races in three key ways:

1. applying organizing know-how to help set up the strategy and structure for a whole range of progressive coalitions.
2. providing an unprecedented level of people power, including more than 2,000 members working full-time for months in battleground states, along with more than 50,000 member volunteers.
3. making the largest investment by any single organization in the history of American politics – a total of \$65 million.

"What our members and allies have done will forever change the face of political organizing," said SEIU President Andy Stern.

"This is just the beginning," added SEIU Secretary-Treasurer Anna Burger, who oversees the union's political operation. "Our campaign will continue beyond election day to help John Kerry ensure that every American has access to quality, affordable health care."

*A closer look at the know-how, people-power and money utilized in SEIU's Fight for the Future campaign (also see [below](#) for graphic breakdowns):*

- **Creating strategic grassroots organizations.** SEIU's leadership helped build bold new organizations to coordinate and fund sophisticated grassroots efforts. President Andy Stern and other SEIU leaders founded and/or serve on the boards of the largest and most progressive community-based voter mobilization groups like ACT, America Votes, Mi Familia Vota, American Families United, and the New American Opportunity Campaign.

Exhibit B

- **The largest single contributor.** SEIU is the largest contributor to ACT at \$26 million (exceeding individual contributions by George Soros and Peter Lewis); the AFL-CIO's Labor 2004 Program; and America Votes (\$900,000). SEIU tripled the amount spent in 2000 (\$65 million in 2004) to make significant donations as well as "in-kind contributions" – SEIU members and staff – to groups like Voting is Power, Mi Familia Vota, ACT and its Caribbean Power Vote, and America Votes, that together registered nearly 4.5 million new voters. SEIU gave \$1 million to the DNC and has made large donations to groups that share our goals, like Rock the Vote and the New Democratic Network.
- **Largest commitment of people power.** Accounting for a pre-GOTV total of more than 6 million voter contacts in the battlegrounds, SEIU recruited more than 2,750 members and staff willing to take a leave from their jobs to do full-time political work with organizations like ACT, allowing the union to reach beyond the labor movement for the first time to conduct real voter contact with a wider universe of workers. Roughly 40 percent of SEIU's full-time activists, or "Heroes" don't live in the battlegrounds, so they packed their bags – nearly 1,000 of them as early as April and July – and temporarily moved to 16 key states. SEIU rallied another 50,000 "weekend warriors" who are now ratcheting up their GOTV efforts for a grand total of 19 million phone calls and 10 million doors knocked across the country.
- **Independent TV and radio expenditures.** SEIU spent just over \$3 million on federal independent expenditure TV and radio ads, including \$1.4 million for three TV and six radio spots in Wisconsin on health care, and \$500,000 for three Spanish-language TV ads in Florida's three largest markets running since mid-October through Nov. 2. Several other significant radio and TV buys hit the airwaves in ME, MO, NC, and AR. In addition, SEIU put \$2.6 million into non-federal independent expenditures and initiative campaigns in CA, ME, AZ, FL, and NV and \$9 million in direct contributions to worker-friendly candidates, campaigns and organizations.
- **Worker communication and technology.** 500,000 SEIU members, many of them low-wage workers who earn less than \$30,000 a year, have voluntarily contributed an overall total of \$16 million towards the union's political action fund that helped pay for SEIU's nurses, janitors, security officers, public employees in battleground states to receive over 4 million pieces of direct mail, designed to share with union households John Kerry's vision for the country. Four purple mobile action centers traveled around the country to bring a unique communications technology to SEIU members, allowing them to complete millions of phone calls to voters across the country.
- **Early focus on health care.** The SEIU-led Americans for Health Care helped make health care a top campaign issue throughout the primary season with billboards and TV spots featuring Iowa and New Hampshire nurses calling on the candidates to offer comprehensive health care plans. The group has also identified over 300,000 "health care voters" – Americans who have signed pledges to hold politicians accountable on the issue at the polls.
- **Health care campaign continues.** SEIU members aren't

waiting for the ballots to be counted to spearhead a national effort to make sure quality, affordable health care is the number one priority for the next Administration and Congress. On Election Night, SEIU will begin airing an



issue-based ad on CNN. As well, thousands of SEIU members will begin to distribute 1 million stickers that read "Quality, Affordable Health Care: Job 1 in 2005."

» *View a flash presentation*

*highlighting SEIU's organizational, monetary contributions and resource allocations for Election 2004 – Broadband or Dial-up*

(To view, you will need [Macromedia Flash](#))

» *View graphic breakdowns of SEIU's mobilization efforts:*

[Number Speak Louder Than Words](#) (pdf)

[SEIU's Involvement in 2004 Progressive Political Organizations](#) (pdf)

###

With 1.7 million members, SEIU is the largest and fastest growing union in the AFL-CIO, representing nurses, janitors, security officers and public employees, among others. SEIU is the nation's largest union of health care workers, and represents more immigrants than any other union.

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Service Employees International Union, AFL/CIO, CLC  
1313 L Street NW, Washington, DC 20005  
202-898-3200  
202-898-3481 (Hearing Impaired Callers Only)

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of )
America Coming Together, and, )
Carl Pope in his official capacity as )
Treasurer )

MUR 5403 and 5466

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
2007 AUG 20 P 2:37

CONCILIATION AGREEMENT

These matters, which include allegations transferred from two other matters designated as MURs 5440 and 5612, originated with signed, sworn and notarized complaints filed with the Federal Election Commission ("the Commission"). The Commission found reason to believe that America Coming Together, and, Carl Pope, in his official capacity as Treasurer (collectively, "ACT" or "Respondents"), violated 2 U.S.C. §§ 434, 441a(f), 441b(a) and 11 C.F.R. §§ 102.5(a), 104.10, 106.1 and 106.6.

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

I. The Commission has jurisdiction over the Respondents and the subject matter of this proceeding, and this agreement has the effect of an agreement entered pursuant to 2 U.S.C. § 437g(a)(4)(A)(i).

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

III. Respondents enter voluntarily into this agreement with the Commission.

Conciliation Agreement  
MURs 5403 and 5466 (ACT)

1 IV. The pertinent facts in this matter are as follows:

2 **Background**

3 1. ACT was established in July-2003 as an unincorporated organization with federal and  
4 nonfederal accounts pursuant to 11 C.F.R. § 102.5. ACT's federal account was registered with  
5 the Commission as a non-connected political committee within the meaning of 11 C.F.R. §  
6 106.6(a). ACT's nonfederal account filed disclosure reports with the Internal Revenue Service  
7 under Section 527 of the Internal Revenue Code. 26 U.S.C. § 527. ACT decided in 2005 to  
8 suspend ongoing active operations and its current intention is to wind down and terminate its  
9 affairs upon the conclusion of this matter.

10 2. ACT was founded by individuals with substantial experience in grassroots  
11 organizational activism and progressive public advocacy. Ellen Malcolm served as President of  
12 ACT. Steve Rosenthal served as the Chief Executive Officer of ACT. Carl Pope served as the  
13 Treasurer of ACT. Harold Ickes subsequently joined ACT as its Chief of Staff in May 2004 and  
14 became President of ACT in February 2005 following Ms. Malcolm's resignation from that  
15 position. According to ACT, its founders were variously motivated by one or more of the  
16 following considerations: (1) concern about the Democratic Party's lack of ability to conduct  
17 sufficient and effective voter contact, identification and registration without the non-federal  
18 ("soft") money that had been available to national party committees in prior election cycles, but  
19 was no longer available to them due to the enactment of the Bipartisan Campaign Reform Act of  
20 2002 ("BCRA"), (2) concern about the ability of the Democratic Party's federal, state and local  
21 candidates to compete, including in so-called "battleground" states whose electoral votes would  
22 most likely decide the 2004 presidential election, and (3) interest in channeling non-federal funds

Conciliation Agreement  
MURs 5403 and 5466 (ACT)

1 that no longer could be donated to the Democratic National Committee into a pro-Democratic,  
2 independent advocacy and voter mobilization effort that progressive activists rather than the  
3 Democratic Party would control.

4 3. During its first eighteen months of existence during 2003 and 2004, ACT opened  
5 approximately 90 offices, employed approximately 13,500 canvassers, recruited an additional  
6 12,000 volunteers, and raised approximately \$137 million in connection with the 2004 elections.  
7 Of this amount, approximately \$33.5 million of its receipts were federal funds and approximately  
8 \$103.5 million were nonfederal funds. ACT raised funds both directly from donors and through  
9 participation in a joint fundraising committee, Joint Victory Campaign 2004.

10 4. ACT's 2003-2004 activities centered on voter contact, voter registration and get-out-  
11 the-vote activities in 17 "battleground" states. In each of these states, ACT's voter drive  
12 communications, delivered by door-to-door canvassing, direct mail, email and telephone banks,  
13 emphasized goals that included defeating President George W. Bush in his bid for re-election.  
14 Many of ACT's voter drive communications also made generic references to supporting  
15 "Democratic" or "progressive" candidates at all levels of government, and some referred to  
16 specific nonfederal candidates. President Bush was the only candidate named in the vast  
17 majority of ACT's communications. Democratic presidential candidate and then nominee  
18 Senator John Kerry was the second most-frequently named candidate in these communications.

19 5. Respondents contend that ACT targeted presidential election battleground states and  
20 emphasized the positions of the presidential candidates in its communications for several  
21 reasons. First, as a national organization whose public communications were prepared centrally  
22 and spanned many states and localities, ACT could not produce and distribute written

Conciliation Agreement  
MURs 5403 and 5466 (ACT)

1 communications so tailored as to name the thousands of state and local progressive candidates in  
2 all states, especially given the widely varying dates of the primary elections that would determine  
3 the identities of state and local nominees. Second, this was the most effective way for ACT to  
4 raise a range of issues that concerned voters about candidates for positions at all levels of  
5 government and to bring to the polls voters who shared their values so they would vote for both  
6 federal and nonfederal Democratic Party candidates up and down the ticket, as ACT regularly  
7 urged them to do. Third, ACT believed that the disproportionate media attention to the  
8 presidential race and the battleground states would amplify ACT's efforts there for the entire  
9 Nation, and so influence voters in other states as well.

#### 10 Applicable Law

11 6. A political committee that finances political activity in connection with both federal  
12 and nonfederal elections must either establish a federal account and a non-federal account and  
13 allocate shared expenses between those two accounts or conduct all activity from a single federal  
14 account. 11 C.F.R. § 102.5(a)(1)(i)(2002). A federal account may contain only those funds that  
15 are permissible in source and amount under federal election law, while the non-federal account  
16 may contain funds that are not permissible under federal law, but are permissible under state or  
17 local law. 11 C.F.R. §§ 102.5(a)(1)(i) and (a)(3). For example, the federal account of a political  
18 committee could not accept contributions from any one individual of more than \$5,000/yr, and  
19 also could not accept contributions from the general treasury funds of corporations or labor  
20 organizations. See 2 U.S.C. §§ 441a(f) and 441b.

21 7. All disbursements, contributions, expenditures and transfers made by a nonconnected  
22 political committee in connection with any federal election must be made from its federal

Conciliation Agreement  
MURs 5403 and 5466 (ACT)

1 account. *See* 11 C.F.R. §§ 102.5(a)(1)(i) and (a)(3). A political committee that allocates shared  
2 federal and non-federal expenses must report each disbursement it makes from its federal account  
3 or separate allocation account for joint federal and non-federal activity. 11 C.F.R. §  
4 104.10(b)(4).

5 8. Expenditures or disbursements made by a nonconnected political committee with  
6 federal and nonfederal accounts on behalf of one or more clearly identified federal candidates  
7 and one or more clearly identified non-federal candidates must be attributed to each such  
8 candidate according to the benefit reasonably expected to be derived. 11 C.F.R. § 106.1(a). In  
9 the case of a publication or broadcast communication, the attribution shall be determined by the  
10 proportion of space or time devoted to each candidate as compared to the total space or time  
11 devoted to all candidates. *Id.*

12 9. Commission regulations in effect during the 2003-2004 election cycle required  
13 non-connected committees to allocate both the cost of administrative expenses not attributable to  
14 any clearly identified candidate and the cost of generic voter drives that do not mention any  
15 specific candidate between federal and non-federal accounts based “on the ratio of federal  
16 expenditures to total federal and non-federal disbursements made by the committee during the  
17 two-year federal election cycle.” 11 C.F.R. § 106.6(c)(1) (2004).<sup>1</sup> This “funds expended” ratio  
18 was to be estimated and reported at the beginning of each federal election cycle, based on the  
19 committee’s federal and non-federal disbursements in a prior comparable election cycle or upon  
20 the committee’s reasonable prediction of its disbursements for the coming two years. 11 C.F.R. §  
21 106.6(c)(1) (2004).

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<sup>1</sup> The Commission adopted new regulations, effective January 1, 2005, governing the allocation of joint federal and non-federal activity, which supplanted the regulations that governed ACT during the 2003-2004 election cycle.



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1 10. Because ACT had not existed during any election cycle prior to 2003, it could only  
2 predict the ratio of its federal/nonfederal disbursements to use for the allocation of administrative  
3 and generic voter drive expenses not directly attributable to specific federal candidates. ACT  
4 contends that it calculated its "funds expended" ratio based on the understanding that the  
5 Commission's pre-2005 Part 106 regulations required the "federal expenditure" part of the ratio  
6 to be comprised only of contributions to candidates and expenditures for communications that  
7 expressly advocated the election or defeat of clearly identified federal candidates. ACT contends  
8 that it made very few federal contributions and its communications included little express  
9 advocacy concerning federal candidates within the meaning of the Act and the Commission's  
10 regulations, and federal funds that ACT included in its calculation of the federal share of ACT's  
11 "funds expended" allocation ratio under pre-2005 11 C.F.R. § 106.6 would have covered the cost  
12 of such disbursements.

13 11. For most of the 2004 election cycle, ACT used an estimated initial federal-  
14 nonfederal allocation ratio of 2% federal funds and 98% nonfederal funds for its administrative  
15 and generic voter drive activities. ACT did not adjust its allocation ratio at the end of 2003, or at  
16 the end of each of the first three quarterly reporting periods in 2004. In October 2004, ACT  
17 adjusted this allocation ratio to 12% federal funds and 88% nonfederal funds. ACT subsequently  
18 made a retrospective transfer from its federal to its nonfederal account in order to reflect the  
19 adjustments, and ACT maintained the new ratio for the remainder of 2004.

20 **Impermissible Allocation of Candidate-Specific Voter Drive Expenses**  
21 **as "Administrative Expenses" under 11 C.F.R. § 106**

22 12. ACT characterized slightly over \$100 million of its 2003-2004 disbursements as  
23 "administrative expenses" and paid these costs with predominantly nonfederal funds pursuant to

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1 its claimed "funds expended" ratio. The disbursements ACT characterized as "administrative  
2 expenses" included approximately \$70 million in costs for direct mail, telemarketing, and door-  
3 to-door canvassing communications that, the Commission concludes, were disbursements made  
4 on behalf of, and thus were attributable to, clearly identified federal candidates in a manner that  
5 could only be paid for with federal funds under the Commission's pre-2005 allocation  
6 regulations, and that were not eligible to be allocated as administrative expenses or as generic  
7 voter drive expenses. See 11 C.F.R. § 106.6(b)(2)(i-iii) (2004).

8 13. ACT's voter drive communications contained messages which explicitly asked the  
9 public for help in electing "progressive" or "Democratic" candidates at all levels of government,  
10 frequently using the phrase "help elect progressive candidates from the White House to city hall"  
11 that also contained specific references to President Bush and/or his opponent, Senator Kerry, that,  
12 the Commission concludes, were required to be paid only with federal funds.

13 14. For example, Palm Pilots videos that ACT canvassers showed to undecided voters in  
14 the state of Ohio included the following messages:

15 "Base 6/11/04"  
16

Audio	Visual
It's been four years under George Bush.	<i>George Bush speaking. Text on screen: "It's been four years."</i>
270,000 children in Ohio have no health care.	<i>Young girl and boy. Text on screen: "270,000 children. No health care."</i>
African-American unemployment has skyrocketed to a 10-year high.	<i>Construction worker pulling on a chain. Text on screen: "African-American unemployment; 10 year high."</i>
650,000 African-Americans have lost their jobs.	<i>Construction workers walking together. Text on screen: "650,000 African-American lost their jobs across America."</i>
Ohio has gone backwards.	<i>Outline of the state of Ohio. Text on screen: "Ohio has gone backwards."</i>
We're America Coming Together.	<i>Children playing on a playground.</i>
Please volunteer to move Ohio forward. Sign a pledge to vote or contact us to contribute at <a href="http://ohio.actforvictory.org">ohio.actforvictory.org</a> . Your contribution will ensure	<i>ACT logo and website address.</i>

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that we can fight for jobs, health care and help elect progressive candidates from the White House to city hall.	
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1 "Health Care 6/11/04a"

Audio	Visual
It's been four years...	George Bush speaking. Text on screen: "It's been four years."
And 270,000 children in Ohio have no health insurance.	Woman comforting girl in hospital room. Text on screen: "270,000 children. No health insurance."
Our seniors face skyrocketing prescription drug costs.	Elderly woman and pills being sorted. Text on screen: "Skyrocketing Rx drug costs."
And big insurance and drug companies reap record profits.	Officials meeting in conference room. Text on screen: "Record profits for drug companies."
Why?	Text on screen: "Why?"
Because George Bush blocked re-importation of less expensive medicines from Canada.	George Bush speaking. Text on screen: "Blocked medicines from Canada."
And Bush said "no" to guaranteeing price controls on health care costs.	George Bush waving as he walks away. Text on screen: "No controls on health care costs."
We're America Coming Together - Ohio.	Children playing on a playground.
To help us improve health care: volunteer. Or contact us to contribute at <a href="http://ohio.actforvictory.org">ohio.actforvictory.org</a> . Your contribution will ensure that we can fight for better health care and other important issues. And help elect progressive candidates from the White House to city hall.	ACT logo and website address.

2 "Iraq Priorities 6/11/04"

Audio	Visual
George Bush. Cutting education and health care here in Ohio	George Bush. Young schoolgirl; woman comforting young girl in hospital. Text on screen: "Cutting education. Cutting health care."
While spending tens of billions to re-build Iraq.	George Bush waving, while walking away. Text on screen: "Spending billions to rebuild Iraq."
Misplaced priorities...	Empty classroom. Text on screen: "Misplaced priorities."
While our needs at home are unmet	Empty hospital hallway. Text on screen: "Our needs are unmet."
We're America Coming Together. Help us get America's priorities back on track. Please volunteer or contact us to contribute at <a href="http://ohio.actforvictory.org">ohio.actforvictory.org</a> . Your contribution will ensure that we can fight for your priorities, and help elect progressive candidates from the White House to city hall.	Children playing on a playground. ACT logo and website address.

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1 "Job Loss 6/11/04"

Audio	Visual
<p>In Ohio, we've lost 225,000 jobs.</p> <p>Why?</p> <p>Because the Bush Administration says outsourcing jobs is good for our economy.</p> <p>It's true.</p> <p>The same George Bush who cancelled the steel tariffs now says outsourcing jobs to India and China is good for our economy.</p> <p>We're America Coming Together - Ohio.</p> <p>To help us save jobs, volunteer or contact us to contribute at <a href="http://ohio.actforvictory.org">ohio.actforvictory.org</a>. Your contribution will ensure that we can fight for jobs and other important issues and help elect progressive candidates from the White House to city hall.</p>	<p>Welder.</p> <p>Text on screen: 225,000 lost jobs.</p> <p>Text on screen: "Why?"</p> <p>George Bush speaking.</p> <p>Text on screen: "Says outsourcing jobs is good."</p> <p>Text on screen: "It's true."</p> <p>George Bush waving, while walking away.</p> <p>Text on screen: "Cancelled steel tariffs. Outsourcing jobs is good for our economy."</p> <p>Children playing on a playground.</p> <p>ACT logo and website address.</p>

2

3 15. The Commission concludes that ACT could not allocate approximately \$70 million

4 in voter drive costs because they were directly attributable to clearly identified federal candidates

5 under 11 C.F.R. 106.6, and that ACT was required to pay such costs either with 100% federal

6 funds or to allocate such costs between identified federal and nonfederal candidates under 11

7 C.F.R. 106.1. The Commission further concludes that, based on the content of the

8 communications, the proper allocation of the approximately \$70 million in candidate-specific

9 expenses under Section 106.1 would have required ACT to use a substantially higher proportion

10 of federal funds than ACT's estimated or adjusted "funds expended" ratio.

11 16. Respondents contend that ACT made these disbursements with the good faith belief

12 that virtually all of them did not involve express advocacy on behalf of or in opposition to federal

13 candidates or constitute contributions to federal candidates. Respondents contend that they

14 predicated this belief on their understanding, informed by legal advice, of the legal definition and

15 scope of "express advocacy" under Supreme Court and other appellate case law and the

16 Commission's regulatory and enforcement policies and practices regarding "express advocacy."

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1 Respondents contend that, because of this good faith belief, they did not view most of their  
2 disbursements as being directly attributable to a particular candidate, and thus believed that such  
3 expenses could be allocated pursuant to ACT's "funds expended" ratio under Section 106.6.

4 **Failure to Use Sufficient Federal Funds for**  
5 **Allocable Administrative and Voter Drive Expenses**

6 17. ACT properly characterized approximately \$30 million in disbursements as  
7 "administrative expenses" or "generic voter drive expenses," but, the Commission concludes,  
8 due to the improper calculation of its "funds expended" ratio, failed to use sufficient federal  
9 funds to pay for these activities. The Commission concludes that, by using an incorrectly  
10 calculated "funds expended" ratio of 2% federal and 98% nonfederal funds (later adjusted to  
11 12% federal and 88% nonfederal funds) for administrative and generic voter drive expenses,  
12 ACT used only \$3.4 million in federal funds and \$26.4 million in nonfederal funds for these  
13 allocated expenses.

14 18. To calculate the appropriate allocation ratio to apply to administrative and generic  
15 voter drive expenses, the Commission's regulations in effect at the relevant time required the use  
16 of the "funds expended" method, based on the ratio of federal expenditures to total federal and  
17 nonfederal disbursements made by the committee during the two-year federal election cycle. *See*  
18 11 C.F.R. § 106.6(c) (2004). In calculating the amount of federal expenditures, which serves as  
19 the numerator of the ratio, a committee must include only amounts contributed to or otherwise  
20 spent on behalf of specific federal candidates, sometimes referred to as direct support for federal  
21 candidates. *See id.* Similarly, in calculating the amount of total federal and nonfederal  
22 disbursements, which serves as the denominator of the ratio, a committee must include only

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1 disbursements that constitute such direct support for specific federal and non-federal candidates,  
2 and not overhead or other generic costs. *See id.*

3 19. The Commission concludes that ACT's allocation ratio failed to account for millions  
4 of dollars of federal expenditures that constituted direct support for John Kerry (often due their  
5 opposition to the candidacy of George Bush), causing it to severely understate the federal portion  
6 of the "funds expended" ratio that it used. The Commission concludes that the proper  
7 calculation of the ratio under Section 106.6 would have required ACT to use a substantially  
8 higher proportion of federal funds than that actually used pursuant to ACT's claimed ratio. In  
9 fact, based on a review of a sample of ACT's disbursements, the Commission concludes that  
10 ACT should have used a federal to nonfederal "funds expended" ratio of at least 90% federal and  
11 10% nonfederal funds, and that ACT should have paid \$30 million of administrative and generic  
12 voter drive expenses with approximately \$27 million in federal funds and approximately \$3  
13 million in nonfederal funds.

14 20. Respondents contend that they acted in reliance on the advice of legal counsel and  
15 under the good faith belief that ACT had complied with the requirements of the applicable  
16 provisions of the FECA and applicable regulations in calculating their "funds expended" ratio.  
17 Indeed, the Commission has made no findings or conclusions that respondents committed any  
18 knowing and willful violations of the law, and the Commission acknowledges respondents'  
19 assertions of reliance and good faith.

20 V. Solely for the purposes of settling this matter expeditiously and avoiding the cost  
21 and time of further proceedings, including litigation (in particular, in ACT's view, in light of  
22 ACT's decision in 2005 to suspend ongoing active operations and its current intention to wind

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1 down and terminate its affairs); and, without admitting or denying each specific basis for the  
2 Commission's findings, without any admission with respect to any other proceeding, and with no  
3 finding of probable cause by the Commission, ACT agrees not to contest the Commission's  
4 conclusions above that ACT and Carl Pope, in his official capacity as treasurer, violated 2 U.S.C.  
5 §§ 434, 441a(f), 441b(a) and 11 C.F.R. §§ 102.5, 104.10, 106.1 and 106.6 by failing to properly  
6 attribute and report allocated expenditures directly attributable to specific candidates, by failing  
7 to properly allocate and report shared administrative activities, and by using nonfederal funds  
8 raised without regard to applicable limits and prohibitions to pay for the federal share of such  
9 allocated expenses.

10 VI. Respondents will take the following actions:

11 1. Respondents will pay a civil penalty to the Federal Election Commission in the  
12 amount of \$775,000.00 pursuant to 2 U.S.C. § 437g(a)(5)(A).

13 2. Respondents will cease and desist from violating 2 U.S.C. §§ 434, 441a(f), 441b(a)  
14 and 11 C.F.R. §§ 102.5, 104.10, 106.1 and 106.6 by failing to attribute and report expenditures  
15 made for multiple candidates, by failing to allocate and report shared administrative activities,  
16 and by using prohibited funds to pay for the federal share of those expenses.

17 VII. The Commission, on request of anyone filing a complaint under 2 U.S.C.  
18 § 437g(a)(1) concerning the matters at issue herein or on its own motion, may review compliance  
19 with this agreement. If the Commission believes that this agreement or any requirement thereof  
20 has been violated, it may institute a civil action for relief in the United States District Court for  
21 the District of Columbia.

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1 VIII. This agreement resolves all matters with respect to Respondents arising from  
2 MURs 5403, 5440, 5466 and 5612, and, except as provided in Section VII above, the  
3 Commission will take no further inquiry or action regarding the allegations made and activities  
4 described in those matters as to possible violations of the FECA. Further, the Commission will  
5 take no action with respect to those allegations and activities against the Joint Victory Campaign  
6 2004 (a joint fundraising committee utilized by ACT), or any officer, director, employee of or  
7 contributor to ACT or Joint Victory Campaign 2004 during 2003 and 2004.

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

10 X. Respondents shall have no more than 30 days from the date this agreement becomes  
11 effective to comply with and implement the requirements contained in this agreement and to so  
12 notify the Commission.

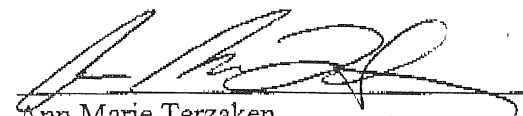


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1 XI. This agreement constitutes the entire agreement between the parties on the matters  
2 raised herein, and no other statement, promise, or agreement, either written or oral, made by  
3 either party or by agents of either party, that is not contained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

5  
6 FOR THE COMMISSION:

7 Thomasenia P. Duncan  
8 General Counsel

9 BY:   
10 Ann Marie Terzaken  
11 Acting Associate General Counsel  
12 for Enforcement

8/24/07  
Date

13  
14 FOR THE RESPONDENTS:

15 Camron E. Gold

16 Judy Corley / Sup

17 Lyn Utrecht / Sup  
18 America Coming Together and  
19 Carl Pope in his official capacity as Treasurer  
20

August 20, 2007  
Date