EN BANC ORAL ARGUMENT SCHEDULED FOR JANUARY 27, 2010

No. 09-5342
(Consolidated with No. 08-5223)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID KEATING, *et al.*,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

On Certified Constitutional Questions from the
United States District Court for the District of Columbia

BRIEF FOR THE FEDERAL ELECTION COMMISSION

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December 15, 2009

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), the Federal Election Commission ("Commission") submits its Certificate as to Parties, Rulings, and Related Cases.

(A) ***Parties and Amici.*** David Keating, Fred M. Young, Edward H. Crane III, Brad Russo, and Scott Burkhardt were the plaintiffs in the district court in this suit under 2 U.S.C. § 437h, and are the plaintiffs in this Court. The Commission was the defendant in the district court and is the defendant in this Court.

No amici or intervenors participated in the preliminary section 437h proceedings in the district court. In this Court, the following entities have filed a joint amici curiae brief: Alliance for Justice, Concerned Women for America Legislative Action Committee, FRC Action, The Commonwealth Foundation for Public Policy Alternatives, Mackinac Center for Public Policy, Caesar Rodney Institute, Kansas Policy Institute, Freedom Works Foundation, The James Madison Institute, and Public Interest Institute. Two other organizations have also become amici: Campaign Legal Center and Democracy 21. The Brennan Center for Justice at New York University and Professor Richard Briffault have moved to participate as amici curiae.

(B) ***Rulings Under Review.*** Under 2 U.S.C. § 437h, a district court certifies constitutional questions and makes factual findings but does not rule on the merits; the appellate court answers those questions in the first instance. In this case, the district court issued the certified questions and factual findings on October 7, 2009. The document is in the Joint Appendix at 1260-1283.

The Commission asks this Court to review the district court's decision to limit its findings to facts about the immediate parties to the litigation. The addendum to this brief includes excerpts from the transcript of the hearing at which the district court discussed that decision.

(C) ***Related Cases.*** The Court has consolidated this section 437h suit with Case No. 08-5223, the appeal by these plaintiffs and SpeechNow.org of the district court's denial of their motion for a preliminary injunction. The section 437h suit has not previously been before this or any other court other than the district court for the preliminary proceedings described above.

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GLOSSARY

BCRA	**=**	**Bipartisan Campaign Reform Act**
FEC	**=**	**Federal Election Commission**
FECA	**=**	**Federal Election Campaign Act**
GOTV	**=**	**Get out the vote**
MCFL	**=**	**Massachusetts Citizens for Life**
NCPAC	**=**	**National Conservative Political Action Committee**
PAC	**=**	**Political action committee**

COUNTERSTATEMENT OF JURISDICTION

The district court had jurisdiction under 2 U.S.C. § 437h to certify to this Court constitutional questions raised by plaintiffs' suit and to make factual findings. That same provision grants this Court, en banc, jurisdiction to answer those questions in the first instance.

COUNTERSTATEMENT OF THE ISSUES

The constitutional questions certified by the district court (J.A. 1262-263) are quoted in plaintiffs' brief at pp. 1-2.[1] The district court's proceedings raise another issue:

> Whether the district court erred in declining to make findings of fact "whether ... the challenged provisions are necessary to ward off corruption — or the appearance of corruption — in federal elections."

(J.A. 1261.)

STATUTES AND REGULATIONS

Relevant statutory and regulatory provisions are set out in an addendum ("Add.") to this brief.

[1] "J.A. __" refers to the pages of the Joint Appendix plaintiffs filed with their opening brief in this section 437h proceeding and to the Joint Appendix they earlier filed in consolidated appeal No. 08-5223.

COUNTERSTATEMENT OF THE FACTS

I. BACKGROUND

A. The Parties and SpeechNow.org[2]

The Federal Election Commission ("Commission" or "FEC") is the independent agency of the United States with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act, 2 U.S.C. §§ 431-455 ("Act" or "FECA"), and other statutes.

David Keating is the founder and one of five governing "members" of SpeechNow.org ("SpeechNow") and serves as its president and treasurer. (J.A. 1263-64, ¶¶2-3.) He personally recruited the other four individuals to serve as governing "members," including Jon Coupal, president of the Howard Jarvis Taxpayers Association, to serve as the group's vice president. Br. 7; J.A. 836; J.A. 1264 ¶3. An experienced political fundraiser, administrator, and activist (J.A. 58-59 ¶27), Keating is also the executive director of Club for Growth (*id.*), an advocacy group with a well-financed affiliated political committee. *See* http://www.clubforgrowth.org/aboutus/?id=98 (visited Dec. 10, 2009).

Plaintiff Edward H. Crane III is another governing "member" of SpeechNow and also the founder and longtime president of the Cato Institute, a nonprofit

[2] The Commission's brief (at 1-5) in consolidated case No. 08-5223 ("FEC PI Br.") contains additional background information about the Commission, the plaintiffs, and SpeechNow.

advocacy group. (J.A. 102 ¶2; J.A. 104 ¶8; J.A. 1263 ¶2.) Plaintiffs Fred M. Young, Jr., Brad Russo, and Scott Burkhardt are prospective contributors. Young, whom Keating met through the Club for Growth, wishes to donate $110,000. (J.A. 1156; J.A. 1268 ¶16.) Russo and Burkhardt wish to contribute $100 each. (J.A. 1269 ¶21.) Keating and Crane are also prospective donors to SpeechNow. (J.A. 1267-68, ¶¶15, 18.)

SpeechNow is an unincorporated nonprofit association organized under the District of Columbia Uniform Unincorporated Nonprofit Associations Act, D.C. Code § 29-971.01, and section 527 of the Internal Revenue Code, (J.A. 1263 ¶1.) The organization's stated purpose is to "expressly advocat[e] the election of candidates who support rights to free speech and association and the defeat of candidates who oppose those rights, particularly by supporting campaign finance laws." (J.A. 1266 ¶10.)

SpeechNow seeks to accept contributions from individuals in unlimited amounts to finance its candidate advocacy and administrative costs. (J.A. 420 ¶17; J.A. 433 ¶84; J.A. 1275 ¶39.) During this litigation, however, SpeechNow has refused to accept any contributions in legal amounts — including contributions as low as $100, which would reimburse plaintiff Keating for the out-of-pocket costs he has thus far incurred. (J.A. 900 ¶¶50, 52; J.A. 1159-60; J.A. 1277-78 ¶48.)

The bylaws provide for the five governing "members" to delegate their powers to SpeechNow's officers. (J.A. 79, art. III, §§ 1-2.) In practice, plaintiff Keating runs the organization on a day-to-day basis and makes virtually all the decisions. (*See*, *e.g.*, J.A. 51 ¶4; J.A. 58-59 ¶27; J.A. 1267 ¶¶11-14.)

The bylaws do not require SpeechNow's "members," including president Keating, to consult with nonmember contributors. Although the organization will inform potential contributors that their contributions "may be used for political purposes such as supporting or opposing candidates" (J.A. 83, art. VI, § 11), the organization will also advise potential contributors that their contributions "will be spent according to the sole discretion" of SpeechNow (*id.*; J.A. 1270 ¶¶24-25, 83 § 11).

B. Statutory and Regulatory Background

The Commission's brief in the consolidated case contains the statutory and regulatory background. *See* FEC PI Br. 5-8.

II. COURT PROCEEDINGS

On July 11, 2008, after the proceedings outlined in the Commission's brief in No. 08-5223, the district court granted plaintiffs' motion under 2 U.S.C. § 437h to certify constitutional questions for this Court to consider en banc. (J.A. 408, Item 35.) The parties conducted discovery and submitted proposed findings of fact and briefs on evidentiary and other issues. (J.A. 409-414.) On September 28,

2009, the district court issued its findings of fact (J.A. 1260-1283), and on October 7, 2009, the court sent these findings and five certified questions of law to this Court. On October 26, 2009, this Court consolidated SpeechNow's pending appeal of the denial of its motion for a preliminary injunction (No. 08-5223) with this section 437h merits proceeding.

SUMMARY OF ARGUMENT

Plaintiffs ask this Court to declare unconstitutional longstanding statutory provisions so that SpeechNow, an unincorporated nonprofit association organized under local law and 26 U.S.C. § 527, can finance candidate advocacy advertisements with massive contributions and with less public disclosure than political committees must provide. As applied to these plaintiffs, FECA's limits on contributions by individuals to political committees are closely drawn to match the important interests in preventing corruption and its appearance. The public disclosure that plaintiffs seek to avoid also substantially relates to important governmental interests.

1. FECA's $5,000 annual limit on contributions by an individual to a political committee is constitutional as applied here under the less rigorous standard of scrutiny the Supreme Court uses in reviewing contribution limits. (Questions 1 and 2.) The Court has consistently viewed contribution limits differently from expenditure limits. Unlike an expenditure limit, a contribution

limit entails only a "marginal restriction" upon a contributor's ability to engage in free communication. *Buckley v. Valeo*, 424 U.S. 1, 20 (1976). FECA places no cap on the independent expenditures SpeechNow may make.

The transformation of contributions by SpeechNow's donors into political debate will "involve[ ] speech by someone other than the contributor," namely, a separate legal entity, SpeechNow. *Buckley*, 424 U.S. at 21. And in practice, Keating — the organization's founder, president, and treasurer — controls every aspect of SpeechNow's affairs, including what, when, and to whom the organization will communicate. The other four "members" and potential contributors, including the other individual plaintiffs, play a minimal or passive role. In contrast, an individual independent spender takes an active role in his political advocacy.

Experience shows that the increasingly sophisticated methods used by groups devoted to independent candidate advocacy can help candidates win elections just as direct contributions to a candidate can do. As knowledgeable politicians and consultants attest, winning candidates feel indebted towards those who fund the groups' ads that help elect them. Those candidates, but not necessarily the voting public, easily discover the identity of those contributors and are inappropriately disposed to favor their interests. Thus, unlimited contributions

to groups like SpeechNow pose a genuine risk of corruption and the appearance of corruption.

Supreme Court precedent supports the constitutionality of limits on contributions to political committees even if those committees do not use their receipts to make contributions to candidates, but instead on noncoordinated expenditures. The Court has also recognized that tax-exempt organizations can be a source of potential corruption if they are engaged in noncoordinated federal campaign activity.

The historical record of fundraising demonstrates that political committees can raise sufficient funds for effective advocacy under the existing contribution limits. Although the plaintiffs claim that SpeechNow cannot be effective unless it can accept unlimited individual contributions, the group's experienced political leaders have made little effort to reach out to potential donors, including their extensive networks of like-minded individuals. This failure likely results from SpeechNow's origin as a vehicle for this constitutional test case.

2. FECA's biennial aggregate limits on contributions by individuals are also constitutional. (Questions 1 and 3.) These biennial limits are a corollary to FECA's other contribution limits and help prevent evasion of them.

3. FECA's facially valid political committee disclosure requirements, reviewed under an intermediate scrutiny standard, are constitutional as applied to

plaintiff Keating as SpeechNow's treasurer and president. (Questions 4 and 5.) They serve important interests: informing voters; deterring actual corruption and its appearance; and gathering data to detect violations of FECA. Those requirements provide more information to the electorate about the financing of organizations like SpeechNow, whose major purpose is to elect or defeat candidates, than do the reporting and disclaimer requirements for independent expenditures made by persons other than political committees.

Keating's proposal to postpone registering SpeechNow as a political committee until it makes $1,000 in independent expenditures would make it more difficult for voters to monitor the role of contributors in public policy formation and to know the funding behind advertising campaigns when they are aired.

FECA's disclosure requirements are not unduly burdensome for nonconnected political committees. Keating is a veteran political fundraiser and administrator and has admitted that he "can handle" the duties of a political committee treasurer.

4. The district court erred in limiting its findings to the immediate parties in this case and declining to make findings regarding whether the statutory provisions at issue serve to reduce the danger of corruption and its appearance. In deciding constitutional challenges to campaign finance laws, courts have

repeatedly relied upon information, including "legislative facts," about the actual practice of fundraising and campaigning.

ARGUMENT

I. PLAINTIFFS CHALLENGE ONLY CONTRIBUTION RESTRICTIONS, WHICH PREVENT CORRUPTION BUT DO NOT LIMIT THEIR SPEECH

The Supreme Court has consistently viewed contribution limits differently from expenditure limits. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 19-23 (1976); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 386-88 (2000). "[E]xpenditure limitations impose far greater restraints on the freedom of speech and association" than contribution limits do. *Buckley*, 424 U.S. at 44. A contribution limit "entails only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20. "While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* at 21. Contribution limits leave contributors free to participate in political associations and, for those people who would otherwise contribute greater amounts than the statutory limits, to spend those extra funds on "direct political expression." *Id.* at 21-22; *see also infra* pp. 25-26.

Regarding independent expenditures, the Supreme Court has not found, as a matter of law or fact, that they lack all potential to corrupt. The Court in *Buckley* instead found that independent spending then appeared to pose less danger of corruption than contributions to candidates did; the reduced danger was insufficient to justify the severe burden on speech of a ceiling on independent expenditures. *See* FEC PI Br. 24-25.

Because of these differences, the Court examines expenditure restrictions under a "strict scrutiny" standard but contribution limits under a less rigorous standard. *See, e.g., McConnell v. FEC,* 540 U.S. 93, 134-36 (2003); *FEC v. Beaumont,* 539 U.S. 146, 161 (2002); *Shrink Missouri,* 528 U.S. at 387-88. A contribution limit is valid if it satisfies the "lesser demand" of being "closely drawn" to match a "sufficiently important interest." *Shrink Missouri,* 528 U.S. at 387-88.

Plaintiffs challenge only statutory contribution limits; FECA places no cap on the amount of independent expenditures that SpeechNow may make. Applying the lesser standard of scrutiny, this Court should uphold 2 U.S.C. § 441a(a)(1)(C) as applied to plaintiffs.

A. SpeechNow's President Will Decide How to Spend the Other Plaintiffs' Contributions

This case presents the quintessential example of "the transformation of contributions into political debate involv[ing] speech by someone other than the contributor." *Buckley*, 424 U.S. at 21. *See* FEC PI Br. 46-47.

Evidence supplied by the individual plaintiffs and SpeechNow shows that one person decides what, when, and to whom the organization will communicate: Plaintiff David Keating, SpeechNow's founder, president, and treasurer. (*See, e.g.*, J.A. 898-906, ¶¶41-77; J.A. 1267 ¶¶11-14; J.A. 1273 ¶34.) The other four governing "members" play minimal or passive roles, and the organization's other contributors will play no role whatsoever. (J.A. 895 ¶30; J.A. 898-901, 903-04, 906; J.A. 1270 ¶¶24-25.) For example, plaintiff Young does not "expect to be involved other than as a donor"; besides certain tasks related to this litigation, his role in the organization has been "completely passive." (J.A. 903 ¶¶63, 65.) Indeed, SpeechNow's bylaws state that donors will not play a role in determining how their donations will be spent, and only some of the organization's solicitations will even refer to particular federal candidates by name. (J.A. 1270 ¶¶23-25.)

Keating administers all the organization's affairs and is solely responsible for its day-to-day activities. (J.A. 1264¶3; J.A. 1267 ¶11.) He created and controls the organization's website, decides in which elections SpeechNow will run express advocacy advertisements, personally selected the candidates for

SpeechNow to support or oppose in 2008, and expects to pick the candidates that SpeechNow will support or oppose in future elections, with possible help of paid staff. (J.A. 899-901, ¶¶47-48, 54; J.A. 1267 ¶¶12-14; J.A. 1273 ¶34.) Keating personally wrote the scripts for SpeechNow's first proposed advertisements in 2008, and expects that he will write future SpeechNow express advocacy advertisements. (J.A. 901-02, ¶58; J.A. 1267 ¶13.)

These circumstances illustrate that "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing." *Buckley*, 424 U.S. at 21. Plaintiffs' circumstances contrast sharply with those in which individuals make independent expenditures, help create or oversee the messages, and thereby speak in their own voices.

B. Unlimited Contributions to Groups Devoted to Independent Candidate Expenditures Pose a Danger of Corruption

Large contributions to groups that make independent expenditures can lead to corruption and its appearance. Because large contributions to those groups help candidates win elections as surely as direct contributions to a candidate's campaign do (*see* J.A. 907-925, 936 ¶¶79-131, 166), candidates are inappropriately disposed to favor individuals who make contributions to pay for independent expenditure ads (*see* J.A. 948-52, ¶¶203-218). The Supreme Court has never doubted the "importance of the governmental interest in preventing" the "problem of

corruption of elected representatives through the creation of political debts." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 787 n.26 (1978).

Candidates feel indebted towards those who fund ads that help elect them. (J.A. 948-52, ¶¶203-18.) As former Senator Alan Simpson explained, "Members realize how effective these ads are, and they may well express their gratitude to the individuals and groups who run them." (J.A. 950 ¶212.) As former Montana Representative Pat Williams stated, party and outside interest advertisements "can be the functional equivalent of a campaign contribution." (J.A. 951 ¶215.) "The notion that campaign funds must be given directly to candidates before they feel obligated to a major financial backer is, simply, not true." (J.A. 951 ¶216 (quoting former California state legislator Ross Johnson).)

Candidates, party officials, consultants, and interest group activists almost universally agree that independent advertising and candidate-focused issue advocacy helps candidates win elections. (J.A. 908-09, ¶¶82, 87; *see also* J.A. 907-25, ¶¶79-131.) "Independent advertising campaigns," explained former Senate Majority Leader Tom Daschle, "can provide huge benefits to candidates." (J.A. 908 ¶84.) Numerous ad campaigns are well-known for their effect on election results, from the Willie Horton (J.A. 912 ¶97) and Swift Boat Veterans and POWs for Truth ("Swift Boat") ads (J.A. 912-15, ¶¶99-106), to Progress for America Voter Fund's ("PFA") pro-Bush "Ashley's Story" ad campaign (J.A. 915

¶107). Empirical analyses confirm their effectiveness. (J.A. 907-08, 912-18, ¶¶80-81, 96-115.) For example, the Swift Boat ads in Florida were the most remembered by all demographic groups, more than any ads run by the candidates themselves or the political parties. (J.A. 914-15, ¶¶104-105.)

Over the past several election cycles, the quality and impact of independent expenditures and candidate-focused "issue advocacy"[3] have increased — as has their value to candidates — as those who run them continue to learn the lessons of past campaigns. (J.A. 918-20, ¶¶116-21.) These ad campaigns are increasingly designed and pretested by professionals, including general political strategists, pollsters, and media consultants. (J.A. 918-19, 1001-02, ¶¶117, 362.) Groups use focus groups, large surveys, and tracking polls to study the impact of independent expenditures and improve them. For example, the AFL-CIO and the National Federation of Independent Businesses have used pre- and post-election polls and focus groups to more productively contact and mobilize voters, as has the National Rifle Association, whose sophisticated campaign in the 2000 presidential election has been credited with ensuring Bush's victory in West Virginia. (J.A. 919-20, ¶¶118-19.)

[3] Candidate-focused "issue advocacy" does not include express words of candidate advocacy. Past spending on this advocacy is relevant here because it was often funded by organizations that received large contributions from individuals. (J.A. 911 ¶95.)

Independent groups can effectively supplement their preferred candidates' campaign efforts without directly coordinating with them. (J.A. 910-11, 920-25, ¶¶93, 122-31.) Those who run independent groups are often campaign veterans who understand how to monitor candidate media buys and know how to echo and supplement candidate messages. (J.A. 921 ¶123.) For example, independent groups like MoveOn.org and The Media Fund achieved "striking synchronicity" with the Kerry Campaign by monitoring its media purchases. (J.A. 924 ¶129.) Similarly, Let Freedom Ring, a section 501(c)(4) group organized in 2004, did not need to consult Bush-Cheney officials to learn that evangelical voters were a key part of the campaign's strategy and thus to concentrate the group's efforts on those voters in swing states. (J.A. 922-23 ¶126.) As plaintiff Keating concedes, independent ads run by Club for Growth — where he serves as Executive Director — have not been counterproductive to the candidates the group supported. (J.A. 909, 916-17, ¶¶89, 111.)

Independent expenditures almost always benefit a candidate, whether their goal is to mobilize voters on his behalf or to turn opinion against an opponent. (J.A. 953 ¶222.)[4] Thus, although a candidate might typically prefer to control campaign spending directly, he would almost always prefer a $100,000 independent expenditure over a direct contribution of $5,000. (*Id*.) Indeed, a

[4] While not all independent ads help candidates, *Buckley*, 424 U.S. at 46-47, even some candidates' own advertising backfires. (J.A. 910-11 ¶93.)

contribution to an independent group to run ads can often be more important than a direct contribution in at least one crucial respect: Ad campaigns run by interest groups allow candidates to keep their distance from hard-hitting, negative campaigns that attack their opponents. (J.A. 954-59, ¶¶226-40.) The Swift Boat ads, for example, were more effective than a similarly-sized contribution: They delivered a message that would have risked a backlash if run by the campaign itself. (J.A. 955-56, 958, ¶¶232, 238.) Although candidates may disavow these ads publicly, they or party insiders will also often call for support from independent groups, or will otherwise give their quiet blessing to independent expenditure campaigns. (J.A. 955-57, ¶¶230-36.)

Large contributions to groups that make independent expenditures lead to preferential access for donors and undue influence over officeholders. (J.A. 968-73, ¶¶275-86.) "While the public may not have been fully informed about the sponsorship of so-called issue ads [run by the parties at that time], the record [in *McConnell*] indicate[d] that candidates and officeholders often were." 540 U.S. at 128-29. "Members of Congress and federal candidates [we]re very aware of who ran advertisements on their behalf," and "fe[lt] indebted to those who spend money to help them get elected.... 'In fact, Members w[ere] also ... favorably disposed to those who finance these groups when they later s[ought] access to discuss pending legislation.'" *McConnell v. FEC*, 251 F. Supp. 2d 176, 556 (D.D.C. 2003) (Kollar-

Kotelly, J.) (quoting former Senator Bumpers). For example, donors to Club for Growth have gained access to candidates and elected officials through forums offered by the group, including luncheons, conferences, and conference calls that allow contributors to communicate with them. (J.A. 972-73, ¶¶282-86.) According to Keating, those members who contributed the most were invited to participate in the conference calls. (J.A. 973 ¶286.)

History demonstrates that influence-seeking donors will make large contributions to any type of group, whether formally connected to candidates or not, if it may incur a candidate's indebtedness. (J.A. 927-35, ¶¶137-62.) One particularly well-known example involved contributions to a section 501(c) nonprofit organization by banker Charles Keating, who attempted to defeat proposed savings-and-loan legislation not only through direct contributions, but also through contributions to a voter mobilization organization. Charles Keating made his largest contribution to a nonprofit organization headed by Senator Alan Cranston's son, an organization created to mobilize Democratic voters to help Cranston win his next election. Cranston acknowledged the connection between this assistance and Keating's request for policy intervention, when he patted Charles Keating on the back at a dinner and said, "Ah, the mutual aid society." Keating's activities led to a broad investigation and in some cases Senate sanctions. (J.A. 931-32, ¶¶151-53.)

Since BCRA banned the receipt of soft money by national parties, influence-seeking donors have increasingly contributed to independent groups, including section 501(c) and 527 organizations committed to electing or defeating candidates, but purporting not to be "political committees" under FECA. (J.A. 931-35, ¶¶150-62.) Data on contributions to section 527 organizations from the two full election cycles since the soft money ban went into effect show that some donors who wish to influence election outcomes have given far more than they are permitted through hard money limits. (J.A. 933, ¶158.) In fact, much of the money raised by such 527 groups in the 2004 election cycle came from former soft money donors: Of the 113 individuals who contributed at least $250,000 to 527 groups, two-thirds had previously given substantial sums of soft money to political parties. (J.A. 932, 934, ¶¶155, 159.) The contributors to such independent spending campaigns were, as former Senate Majority Leader Tom Daschle stated, "clearly avoiding contribution limits in order to gain access or to influence policy making." (J.A. 932 ¶154.) "There is no question that people [have] use[d] them as a way around contribution limits," and if unlimited contributions for independent spending were permitted, the Court would be making permanent "a loophole the size of the Washington monument." (*Id*.)

The proliferation of independent groups devoted to electing or defeating single candidates further suggests that large donors give to independent groups to

circumvent contribution limits to candidates, and to make their identities less transparent to the public. (J.A. 941-42, ¶¶181-84.) Indeed, groups supporting fewer candidates provide a particularly troubling opportunity for corruption and the appearance of corruption. *See* Edward B. Foley, *The "Major Purpose" Test: Distinguishing Between Election-Focused and Issue-Focused Groups*, 31 N. Ky. L. Rev. 341, 346 (2004) ("Foley") ("[W]hen a political committee is focused on electing one particular candidate (or defeating that candidate's opponent), a large-dollar gift to that political committee is almost as good as a large-dollar gift to the candidate's own campaign would be as a means to secure improper favoritism from that candidate once in office.").

Donors seeking access and influence care mostly that their contributions are noticed and appreciated by the candidate, not that they are received directly by the candidate's committee. (J.A. 927-28 ¶139.) A dense web of relations between outside groups, candidates, and parties typically ensures that candidates do indeed take notice of help provided by the groups and who donates to them. (J.A. 944, 946-48, 960-65, ¶¶192, 198-203, 248-66.) In 2004, leaders from both major parties helped independent groups raise money by signaling their approval to potential donors. RNC Chairman Ed Gillespie and Bush-Cheney Campaign chair Marc Racicot both listed Progress for America as a group that could legally engage Democrats. (J.A. 964 ¶263.) Former Clinton Chief of Staff Harold Ickes, who ran

The Media Fund, as well as Ellen Malcolm, president of Americans Coming Together, reassured donors of their relationship to the campaigns. Their message was, "We don't talk to the campaigns, are not connected to them, but they know and appreciate us and contributions are part of the public record and they are aware." (J.A. 963, ¶259.)

Candidates can easily learn the identity of the large contributors to independent candidate groups. (J.A. 942-48, ¶¶185-202.) The people who solicit large contributions are typically former or current party officials, former officeholders, or others who can keep score, and donors gladly tell candidates and party leaders of their contributions to groups that have helped the candidate. (J.A. 944, 946-48, 960-65, ¶¶192-93, 198-203, 248-66.) In testimony before the Senate, political scientist Michael Malbin of the Campaign Finance Institute summarized the danger of permitting unlimited contributions to groups closely tied to parties and candidates: "With almost all of the 527s associating themselves with the two major parties and their candidates, and with the great majority of contributions coming from donors giving in the millions, rather than thousands or even tens of thousands of dollars, big 527 donors today are positioned to garner more attention and consideration from parties and candidates than those who give the maximum direct contribution of $2,000-$25,000." (J.A. 936, ¶167.)

Events at the federal and state level demonstrate that large contributions to groups that make independent expenditures can influence official legislative action, and thus pose a danger of actual quid pro quo arrangements. (J.A. 973-87, ¶¶287-314.) According to Senator McCain, just before a key 1998 vote on tobacco legislation, Senator Mitch McConnell promised fellow Republican Senators that the tobacco industry would mount a television campaign financed with soft money to support senators who voted to kill the legislation. (J.A. 985, ¶309.) Also in 1998, the Wyandotte Tribe of Oklahoma attempted to change Congressman Vincent Snowbarger's position on legislation involving a casino by offering to make a substantial independent expenditure in support of his re-election campaign. (J.A. 974-78, ¶¶288-97.) Snowbarger's campaign manager received a fax outlining a "win-win" scenario that linked campaign assistance — in the form of substantial independent spending — to the Congressman's support for the Wyandotte bill. (*Id*.)[5] The Wyandottes' offer unquestionably involved an attempt to make an independent expenditure after a "wink or nod," which is often "as useful to the candidate as cash." *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 442, 446 (2001) ("*Colorado II").*

[5] The United States Attorney declined to prosecute, finding that the offer "'did not establish a criminal violation.'" Jack Cashill, *Moore of the Same Old Stuff*, Ingram's Magazine, Nov. 1999, FEC Exh. 112 at 20, Dkt. No. 45-10 at 48 (quoting United States Attorney) .

The actions of Charles Chvala, former majority leader of the Wisconsin State Senate, provide another example. (J.A. 978-85, ¶¶298-308.) According to witnesses in the resulting criminal investigation, Chvala frequently held meetings, called "cattle calls," where he encouraged lobbyists who had maxed out their giving to other sources to make contributions to groups that made independent expenditures. (*Id*.) During these cattle calls, Chvala would discuss the legislative interests of the lobbyists' clients and how each client could assist Democratic senatorial candidates by giving directly to the candidate or parties — or by giving to groups that ran independent expenditures or candidate-focused issue ads.[6] (*Id*.) According to a lobbyist at these cattle calls, Chvala would often indicate that no matter where the contribution went, candidates would know that a contribution was made and would appreciate the support. (J.A. 980, ¶301.)

"Congress' legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing 'undue influence on an officeholder's judgment, and the appearance of such influence.'" *McConnell*, 540 U.S. at 150 (quoting *Colorado II*, 533 U.S. at 441); *see also id.* at 152 (rejecting a "crabbed view of corruption" that "ignores precedent, common sense, and the realities of political

[6] Although some of the resulting advertisements may deserve treatment as coordinated expenditures, these events illustrate the value that candidates place on purportedly independent expenditures and their potential to corrupt; this danger exists whether or not the collaboration is sufficiently substantial to count as legal coordination.

fundraising"); *Shrink Missouri*, 528 U.S. at 389 ("[W]e recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors."). The contribution limits at issue here are thus justified not only by the danger of *quid pro quos* but also by the distortion of the legislative process that would arise from the more general sense of obligation that officeholders would feel if contributors were permitted to make unlimited contributions to major-purpose groups to fund independent expenditures.

"Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption." *Buckley*, 424 U.S. at 27. The public views large contributions to fund independent expenditures as potentially corruptive. For example, independent expenditures in a 2004 judicial election in West Virginia created an empirically documented appearance of corruption. (J.A. 988-93, ¶¶317-32.) Don Blankenship, the chief executive of Massey Coal, a company with a high-profile case on appeal to West Virginia's Supreme Court of Appeals, provided the bulk of the funding — approximately $3,000,000 — to "And for the Sake of the Kids," an innocently named 527 group that ran independent expenditures against one of the court's incumbent justices and helped defeat him. (*Id*.) After the justice elected with Blankenship's help refused to recuse himself from Massey's appeal, a telephone poll of West Virginians revealed

that more than two-thirds doubted that he could be impartial. (J.A. 991-92, ¶328.) West Virginia Supreme Court of Appeals Justice Larry Starcher shared that doubt and explained that "[m]illions of dollars in electoral support by the CEO of an active litigant in the court is clearly sufficient to create an appearance of corruption." (J.A. 992, ¶330.)[7]

Recent polling confirms that the public views contributions to groups to run candidate ads are just as likely to lead to corruption as contributions made directly to candidates. (J.A. 993-95, ¶¶333-41.) In a nationwide poll conducted in August 2008 by Zogby International, a significant majority of survey respondents indicated that large contributions to groups to spend on advertising campaigns supporting congressional candidates are just as likely to lead to "political favors" or "special consideration" as direct contributions to candidates. (J.A. 993-94, ¶¶333-36.) The poll regarding Blankenship's contributions in West Virginia (J.A. 991-92, ¶328) as well as a survey conducted during the *McConnell* litigation (J.A. 995 ¶340) yielded findings similar to Zogby's. The public thus seems to agree with Ross Johnson, longtime Republican state legislator and current Chairman of the California Fair Political Practices Commission, who says, "[T]he notion that

[7] In *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252 (2009), the Supreme Court held that in light of the "extraordinary" amount of independent expenditures and contributions to fund independent expenditures by Blankenship, the recusal failure violated plaintiff's due process rights.

the only way you can exercise undue influence over a candidate or officeholder is by handing them a check directly ... is absurd on its face." (J.A. 953-54 ¶225.)

C. Supreme Court Precedent Supports the Constitutionality of Limits on Contributions to Political Committees that Make Only Independent Expenditures

The $5,000 annual limit on an individual's contributions to multi-candidate political committees helps prevent corruption and the appearance of corruption. In upholding contribution limits to candidates and political committees generally, the Supreme Court in *Buckley* explained why contribution limits are a more marginal restriction on speech than expenditure limitations are: They (1) "leave the contributor free" to participate in "any political association and to assist personally" in the association's electoral efforts, 424 U.S. at 22; (2) "permit associations and candidates to aggregate large sums of money to promote effective advocacy," *id.*; (3) "merely ... require candidates and political committees to raise funds from a greater number of persons," *id.*; and (4) "compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression," *id.* The "overall effect of the Act's contribution ceilings," the Court concluded, does not "reduce the total amount of money potentially available to promote political expression." *Id.* at 21-22; *see also id.* at 29.

Contribution limits are thus "closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley*, 424 U.S. at 25. Bribery laws are not by themselves sufficient because they "deal with only the most blatant and specific attempts of those with money to influence governmental action." *Id.* at 28. Nor do disclosure laws alone suffice, for "Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant." *Id*.

As the Commission has explained (FEC PI Br. 24-33), *Buckley* and other major Supreme Court decisions support the constitutionality of the limits on contributions to political committees that make only independent expenditures. Plaintiffs misread those cases. They mistakenly rely, for example, on certain remarks in Justice Blackmun's solo opinion in *California Medical Association v. FEC*, 453 U.S. 182, 202-03 (1981) ("*CalMed*"). As the Commission has explained (FEC PI Br. 27), these are dicta. Indeed, plaintiffs concede (Br. 37) that Justice Blackmun's concurrence "by itself" may not be "binding precedent." *See also* SpeechNow's opening brief at 40 in No. 08-5223.

Contrary to plaintiffs' alternative argument in their merits brief (Br. 36), Justice Blackmun's concurrence does not control the "holding" of *CalMed* under *Marks v. United States*, 430 U.S. 188 (1977). The Supreme Court attempted in *Marks* to give lower courts guidance on how to interpret plurality Supreme Court

decisions: "When ... no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* at 193 (internal quotation marks omitted).

The Supreme Court has since expressed doubt whether the *Marks* inquiry helps the lower courts. It "is more easily stated than applied," the Court commented, and should not be "pursue[d] ... to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it." *Nichols v. United States*, 511 U.S. 738, 745-46 (1994); *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (same). In the D.C. Circuit's view, "*Marks* is workable … only when one opinion is a logical subset of other, broader opinions." *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991). That is, "the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five justices who support the judgment." *Id.*

Justice Blackmun's concurrence in *CalMed* did not represent any such "common denominator," however, because his remarks about groups that make only independent expenditures were dicta that were neither joined by any other Justice nor a logical subset of a position approved by five Justices. That majority position upheld the constitutionality of contribution limits as applied to a political

committee that made both contributions and independent expenditures; even Justice Blackmun agreed that an organization that engages in both kinds of spending could be required to abide by the $5,000 limit on the contributions it receives — even if some of that money would eventually be spent on independent expenditures. *See* 453 U.S. at 203. Thus, Justice Blackmun's remarks about committees that make only independent expenditures do not "embody a position implicitly approved by at least five Justices who support the judgment." *King v. Palmer*, 950 F.2d at 781. *See EMILY's List v. FEC*, 581 F.3d 1, 37 n.14 (D.C. Cir. 2009) (Brown, J., concurring in part) ("[T]he controlling part of Justice Blackmun's opinion is the holding that the FEC may constitutionally regulate contributions to fund independent political expenditures without contravening the First Amendment…").

Moreover, a plurality of the Court in *CalMed* rejected an argument similar to one plaintiffs raise here. The association in *CalMed* argued that its contributions to a multicandidate political committee were constitutionally equivalent to independent expenditures and that contributing to the committee was simply "the manner in which [the group] ha[d] chosen to engage in political speech." 453 U.S. at 196. The Court's plurality disagreed: The political committee annually received contributions from a number of persons, so the recipient committee was not simply the association's "mouthpiece." *Id.* The recipient political committee was

"a separate legal entity," *id.*, and, as in *Buckley*, "'the transformation of contributions into political debate *involves speech by someone other than the contributor*.'" *Id.* at 197 (quoting *Buckley*, 424 U.S. at 21; emphasis added in *CalMed*). The plurality noted that "sympathy of interests alone does not convert [the political committee's speech] into that of [the contributor association]." *Id.* at 196. Plaintiffs' case presents the same fact pattern: Rather than making independent expenditures as individuals, plaintiffs will make contributions to a separate legal entity, SpeechNow, which will pay for the group's independent expenditures in its own name, as directed by one person, David Keating.

In any event, *McConnell* put to rest any doubts about the meaning of *CalMed* on the dispositive issue here. As we have explained (FEC PI Br. 29-33), *McConnell's* analysis of the underlying logic of *CalMed* shows that the constitutionality of the applicable contribution limit did not depend upon the recipient political committee's using its funds to make contributions. 540 U.S. at 152 n.48. Plaintiffs misread (Br. 39) this explication. In upholding the soft money restrictions in Title I of the Bipartisan Campaign Reform Act ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (2002), the Court in *McConnell* indicated that contributions to political committees can be limited even if those funds are used to pay for noncoordinated expenditures. The Court stated that *CalMed* "upheld FECA's $5,000 limit on contributions to multicandidate political committees."

McConnell, 540 U.S. at 152 n.48. As the Court explained, in light of FECA's definition of "contribution," the $5,000 limit encompasses the source and amount of funds available to "political committees ... to engage in express advocacy and numerous other noncoordinated expenditures." *Id.* That limit on contributions to multicandidate political committees would have been overbroad, the Court further explained, if Congress had the constitutional authority only to prevent individuals from using political committees as pass-throughs to circumvent FECA's limit on the amount an individual can contribute to a candidate. *Id*.

Plaintiffs belittle (Br. 39) this explanation because it appears only "in a single footnote." But the Supreme Court has often used footnotes for significant matters, as it did, for example, in *Buckley's* famous footnote using "magic words" in explaining express advocacy. 424 U.S. at 44 n.52. *See also, e.g.*, *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (oft-cited footnote). Plaintiffs also ignore the *McConnell* footnote's pointed reference to "express advocacy and numerous other noncoordinated expenditures" — precisely the activities SpeechNow proposes to undertake. And as we have explained (FEC PI Br. 32), *McConnell's* clarification of *CalMed* was not dicta because Title I's soft money ban was directed at incoming contributions that would *not* be spent on contributions to candidates. The *McConnell* plaintiffs never suggested that they had a right to accept unlimited soft money to make *candidate contributions*. Thus,

the Court did not uphold Title I based on its ability to prevent circumvention of the limits on direct contributions to candidates, but instead on its ability to prevent corruption connected with other forms of campaign spending, including independent expenditures.[8]

Thus, *McConnell* interprets *CalMed* as finding constitutional the contribution limits to political committees even if those committees ultimately spend the money on noncoordinated expenditures. *CalMed's* discussion of earmarking contributions to a political committee for administrative expenses reveals why that reading makes sense. "If unlimited contributions for

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[8] In arguing for their interpretation of *McConnell*, plaintiffs rely in part on the panel majority's opinion in *EMILY's List*, which they characterize as "Circuit precedent," which "should not be overturned lightly." (Br. 22 & n.5.) A holding (but not dicta) of a panel binds only another three-judge panel, not this Court en banc. *See, e.g., Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 897 (D.C. Cir. 1992). *EMILY's List* did not involve a challenge to the contribution limits in 2 U.S.C. § 441a(a)(1)(C); instead, it held invalid three Commission regulations not at issue here. But even if the holding in *EMILY's List* were viewed as encompassing an issue common to this case, the holding would not bind this Court en banc. The panel majority's opinion would effectively prejudge this case, and thus would undermine the authority of the en banc Court. And this result would also directly conflict with Congress's directive that, in suits brought under 2 U.S.C. § 437h, an appellate court en banc decide in the first instance constitutional challenges to FECA's provisions. Finally, the *EMILY's List* panel opinion possesses none of the characteristics that might warrant heightened deference on subsequent review. *See United States v. Bailey*, 36 F.3d 106, 110-11 (D.C. Cir. 1994) (en banc) (stating that en banc court reviews longstanding statutory constructions, but not constitutional interpretations, "gingerly" and that "less weighty" concerns arise when court reviews an issue for the first time), *rev'd on other grounds*, 516 U.S. 137 (1995).

administrative support are permissible, individuals and groups like [CalMed] could completely dominate the operations and contribution policies of independent political committees." 453 U.S. at 198 n.19. A committee's main supporter might well dictate how the committee would use its contributions for election-related activity. *Id.* The supporter would then be able to "influence the electoral process to an extent ... far greater than the individual or group that finances the committee's operations would be able to do acting alone." *Id.* That person could thereby "corrupt the political process in a manner that Congress, through its contribution restrictions, has sought to prohibit." *Id.*

Four years after *CalMed*, the Supreme Court again recognized that when a groups receives small contributions, that lowers the risk of corruption from its independent expenditures. In *FEC v. National Conservative PAC*, 470 U.S. 480 (1985) ("*NCPAC*"), the Court contrasted the small contributions that the two political committees at issue raised — averaging $25 and $75 per contributor respectively, from approximately 200,000 donors — and sought to use to finance independent expenditures, with the large amounts above the $5,000 limit that the entity in *CalMed* wished to contribute. *Id.* at 494-95. The Court noted that the contributions to the political committee in *NCPAC* were "predominantly small and thus do not raise the same concerns as the sizable contributions involved" in *CalMed*. *Id.* at 495.

Similarly, before *McConnell* expounded *CalMed*, the Supreme Court had explicitly acknowledged that limits on contributions to entities making independent expenditures permissibly function as an anti-corruption measure. In *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ("*Colorado I*"), the Court held that political parties have the same First Amendment right to make independent expenditures that other groups and individuals enjoy. The Court nevertheless recognized that "[t]he greatest danger of corruption ... appears to be from the ability of donors to give sums up to $20,000 to party which may be used for independent party expenditures for the benefit of a particular candidate." *Id.* at 617. Addressing this concern, the Court stated that it "could understand" that Congress might decide, as a consequence, "to change the statute's limitations on contributions to political parties" to lower the danger of corruption. *Id.* The Court then cited *CalMed's* plurality opinion as support for this proposition. *Id.*

Plaintiffs also misread *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"). *See, e.g.*, Br. 34, 41, 51-54; FEC PI Br. 27-28. A nonprofit ideological corporation, MCFL engaged in various educational and legislative activities to further its agenda and accepted no donations from business corporations or unions. *Id.* at 241-42. It only occasionally engaged in electoral express advocacy, which it financed from its corporate treasury. The Court

concluded that FECA's provision prohibiting expenditures of corporate treasury funds for independent express advocacy communications could not constitutionally apply to MCFL. But the Court warned that MCFL could still be regulated as a political committee if its spending changed: "[S]hould MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." 479 U.S. at 262. It would then "automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns." *Id.*

Contrary to Keating's repeated assertion (*e.g.*, Br. 20, 51, 52, 55), these statements are not dicta. Rather, having found that MCFL was exempt from the statutory corporate prohibition, the Court explained the scope of that constitutional exemption. The Court limited it to certain nonprofit corporations whose independent expenditures, unlike SpeechNow's proposed expenditures, are not so extensive as to become the organization's major purpose.[9]

As the Commission has explained (FEC PI Br. 6), although FECA defines "political committee" solely in terms of $1,000 thresholds for "expenditures" or "contributions," 2 U.S.C. § 431(4)(A), *Buckley* narrowed the reach of the statutory

[9] Even if the quoted statements in *MCFL* are dicta, Supreme Court dicta "'generally must be treated as authoritative.'" *Southern Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1356 (D.C. Cir. 2008) (quoting *United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997)).

language. It did so out of concern that the language could encompass groups engaged primarily in issue advocacy, which Congress has less power to regulate. *See* 424 U.S. at 79. Under the Court's narrowing construction, a group will not be considered a "political committee" under FECA unless, in addition to crossing the monetary threshold, it is "under the control of a candidate" or its "major purpose ... is the nomination or election of a candidate." *Id*. The Court in *MCFL* repeated that language. 479 U.S. at 252 n.6. Thus, as glossed by the Court, the definition of "political committee" now includes both a monetary (statutory) threshold and the Court's "major purpose" test. (Plaintiffs concede that, once they undertake the actions they propose, SpeechNow will satisfy the criteria for political committee status. (*E.g.*, J.A. 422-23, 426 ¶¶26, 31, 48; J.A. 1274, 1279 ¶¶37, 53.) Plaintiffs' attack on the major purpose test seems to ignore the fact that, without the test, SpeechNow would become a political committee simply by crossing the $1,000 contribution or expenditure threshold in 2 U.S.C. § 431(4)(A).)

The context in which the Supreme Court added the major purpose test proves that it applies to groups that make independent expenditures: The Court introduced the test in examining FECA's disclosure requirements for those very expenditures. *Buckley*, 424 U.S. at 78-81. And the Court later reaffirmed the test in *MCFL*, which, as we have explained, concerns a nonprofit, ideological corporation that made occasional independent expenditures, not contributions.

Moreover, fourteen years ago, in a 9-2 decision, this Circuit criticized the Commission for applying the "major purpose" test to groups that make contributions, and stated that *Buckley's* narrowing construction of the statutory definition of "political committee" applied *exclusively* to groups making independent expenditures. *Akins v. FEC*, 101 F.3d 731, 742 (D.C. Cir. 1996) (en banc), *vacated on other grounds*, 524 U.S. 11 (1998).[10]

In sum, SpeechNow fits squarely within the definition of "political committee," and no constitutional bar prevents applying FECA's contribution limits to the organization's fundraising.[11]

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[10] The amici brief in support of plaintiffs — essentially an attack on any regulation of political communications — argues that this Court should jettison as "irrelevant" the Supreme Court's "major purpose" criterion for political committee status if a group's speech is "non-corrupting." *See, e.g.*, Amici Br. 1, 4, 5, 24, 31-32. Of course, a lower court cannot dismiss Supreme Court precedent. Substantively, the major purpose test was not designed to deregulate express advocacy communications, as amici assumes, but instead to protect groups "engaged purely in issue discussion." *Buckley*, 424 U.S. at 79.

[11] Plaintiffs also rely on *Davis v. FEC*, 128 S. Ct. 2759 (2008), to attack the "major purpose" test (Br. 56-58), but that case is inapposite for the reasons the Commission has already discussed. (FEC PI Br. 23.) *Davis* concerned the "Millionaire's Amendment," which under certain circumstances "impose[d] different campaign contribution limits on candidates competing for the same congressional seat." 128 S. Ct. at 2765. The "major purpose" criterion creates no asymmetrical contribution limits for competing entities.

D. The Supreme Court Has Specifically Recognized the Potential for Corruption Posed by Tax-Exempt Organizations that Engage in Federal Campaign Activity

McConnell also recognized that donors, political parties, and candidates are likely to exploit independent tax-exempt organizations for campaign purposes, thereby increasing the risk of corruption and the appearance of corruption stemming from those organizations' participation in federal elections. Evidence of that exploitation led the Court to uphold BCRA's limitations on party committees and their agents soliciting funds for or donating funds to section 527 organizations that are not political committees. *See McConnell,* 540 U.S. at 174-81; 2 U.S.C. § 441i(d); 26 U.S.C. § 527. The same concern led the Court to uphold BCRA's regulation of the raising and soliciting of soft money by federal candidates and officeholders. 540 U.S. at 181-84; 2 U.S.C. § 441i(e). In finding these provisions constitutional, the Court applied the less rigorous standard of scrutiny applicable to contribution limits. 540 U.S. at 178, 182.

The Court concluded, for example, that without the solicitation restrictions, party committees would have "significant incentives" to mobilize their fundraising operations "into the service of like-minded tax-exempt organizations that conduct activities benefiting their candidates." *McConnell,* 540 U.S. at 175. Many of the targeted tax-exempt organizations "engage in sophisticated and effective electioneering activities" to influence federal elections, including express advocacy

broadcasts, voter registration and GOTV drives. *Id.* at 175 n.68. The Court's analysis rests on the premise that these tax-exempt organizations — even if they, like SpeechNow, have no formal affiliation with federal candidates or political parties — can bring significant benefits to candidates' election prospects and thus raise serious concerns of corruption. And these concerns exist even if the organizations do not engage in express advocacy or make contributions. The solicitation restriction in section 441i(d), the Court held, was "closely drawn to prevent political parties from using tax-exempt organizations as soft-money surrogates." *McConnell*, 540 U.S. at 177.

Likewise, in upholding restrictions on federal candidates' solicitation of soft money, the Court concluded that corruption concerns arise even though candidates "may not ultimately control how the funds are spent." *McConnell*, 540 U.S. at 182. Without some restriction on solicitations, the Court explained, "federal candidates and officeholders could easily avoid FECA's contribution limits by soliciting funds from large donors and restricted sources to like-minded organizations engaging in federal election activities." *Id.* at 182-83. The Court then noted presciently that "[t]he incentives to do so, at least with respect to solicitations to tax-exempt organizations, will only increase" with Title I's soft money restrictions on political parties. *Id.* at 183.

Although BCRA has limited candidates' and parties' solicitations of soft money, those limitations do not help plaintiffs' case. As the Supreme Court explained, "[e]ven when not participating directly in the fundraising, federal officeholders were well aware of the identities of the donors: National party committees would distribute lists of potential or actual donors, *or donors themselves would report their generosity to officeholders.*" *McConnell*, 540 U.S. at 147 (emphasis added). The record in *McConnell* established the myriad ways in which federal officials, either passively or actively, received information regarding the largest donors and factored it into their legislative priorities and decisions. "[F]or a member not to know the identities of these donors, he or she must actively avoid such knowledge as it is provided by the national political parties *and the donors themselves*." *Id.* (quoting *McConnell*, 251 F. Supp. 2d at 487-88) (Kollar-Kotelly, J.) (emphasis added); *see also id.* (citing *McConnell*, 251 F. Supp. 2d at 853-55 (Leon, J.)). *See also* FEC PI Br. 39-40, 43.

If donors and fundraisers continue to press the limits of the law — as the Court has presumed they will, *see McConnell*, 540 U.S. at 144, and *Colorado II*, 533 U.S. at 457 — candidates and officeholders will inevitably learn the identity of SpeechNow's large contributors. The restrictions in SpeechNow's bylaws (*see* J.A. 1265-66, ¶¶6-9) would not prevent undue influence-seeking, large contributors to SpeechNow from alerting a winning candidate that their money financed

SpeechNow's helpful advertisements or paid for the group's administrative expenses. Nor can those bylaw restrictions prevent, for example, lobbyists from advising their clients to contribute to SpeechNow when the organization is running advertisements supporting an officeholder who could help the client's business interests.

In sum, seemingly independent tax-exempt organizations that engage in federal electoral activities are not immune from exploitation by other political actors. By benefiting candidates, even through noncoordinated expenditures, those organizations raise a risk of corruption sufficient to justify limiting the contributions they receive.

E. Organizations Like SpeechNow Are Not Constitutionally Distinguishable from Political Parties for Purposes of the Applicable Contribution Limits

Plaintiffs wrongly dismiss the lessons *McConnell* drew as relevant only to political parties. *See, e.g.*, Br. 38. They view political speakers as falling into one of two rigid categories: The first consists of political parties, candidates, and their agents, and the second of all other groups and individuals. But this view is "myopi[c], a refusal to see how the power of money actually works." *Colorado II*, 533 U.S. at 450. The Supreme Court takes a nuanced, functional view; political parties are both like and unlike other political actors. *See, e.g., Colorado I* (holding that political parties, like nonparty political associations and individuals,

have a First Amendment right to make unlimited independent expenditures); *Colorado II* (holding that coordinated expenditures by political parties, like those by other entities, may constitutionally be treated as contributions).

For purposes of deciding whether its contributions may be limited, a political organization like SpeechNow that will make only independent expenditures is more similar to a political party than to a purely issue-focused ideological group. *See* Foley, 31 N. Ky. L. Rev. at 345-46. Unlike issue advocacy groups, organizations like SpeechNow and political parties both have as their avowed major purpose the election (or defeat) of candidates. Indeed, some nonparty political players can "marshal the same power and sophistication for the same electoral objectives as political parties themselves." *Colorado II*, 533 U.S. at 455. Limits on contributions to SpeechNow, like limits on contributions to party committees and candidates, permit "the symbolic expression of support," *Buckley*, 424 U.S. at 21; "the transformation of [their] contributions into political debate involves speech by someone other than the contributor." *Id.*; *see also supra* pp. 9-12. Just as soft-money contributions to a national party committee create the risk that the party and its winning candidates will become improperly beholden to large donors, unlimited contributions by individuals to SpeechNow create the risk that those candidates will become improperly beholden to SpeechNow and its donors.

Independent expenditures by individuals differ importantly from independent expenditures by groups. *Buckley* distinguished independent speech from coordinated speech in large part because the Court then supposed that some independent spending would be less valuable to candidates because it "may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." 424 U.S. at 47. In fact, spending by individuals is generally less likely than spending by groups to help a candidate's campaign. As plaintiff Keating explained, "[M]ost of the people running these ads on their own, they don't have a clue of what they're doing." (J.A. 1207.) He recalled only one individual doing anything "effectively" by hiring "good consultants" and running "very effective ads." (*Id.*) In contrast, most groups nowadays design sophisticated advertising and provide significant assistance to their preferred candidates. (*See supra* pp. 14-15; J.A. 907-25, ¶¶79-131.)

Plaintiffs claim they need large contributions and to act as a group for their advertising to have a similar impact. (J.A. 787-88.) If so, SpeechNow's purported need for huge contributions is at odds with the rationale that led *Buckley* to consider coordinated spending more potentially corruptive, *i.e.*, more likely useful to candidates. Thus, if SpeechNow's planned advertisements will be more effective precisely because they will be funded with large contributions and run by

a group, rather than an individual, under *Buckley* they pose a greater danger of corruption.

In addition, some affluent individuals, although able to make large independent expenditures on their own, "prefer to shield their identity by creating groups with positive sounding names." (J.A. 1051.) These large spenders obviously believe that express advocacy in their own names is less effective than advocacy under a group name. While candidates know who makes those independent expenditures, the voting public has more difficulty when the only information in an ad is a deceptive group name. J.A. 998-1001, ¶¶350-360. When ads are run under an individual's name, voters are better able to "assess the reliability of the information and arguments in the advertisements, and perhaps discount them if they perceive a self interest on the part of the individual." (J.A. 998, ¶350.) Plaintiffs present no reason for this Court to reject these differences between individuals and sophisticated electoral groups when examining the contribution limits at issue here.

II. THE PROVISIONS GOVERNING POLITICAL COMMITTEES SERVE IMPORTANT GOVERNMENT INTERESTS AND ARE NOT UNDULY BURDENSOME

The contribution limits that apply to SpeechNow not only help prevent corruption, as discussed above, but are also high enough to permit such groups to

engage in effective advocacy. Likewise, the disclosure requirements for such political committees serve important government interests.

A. Political Committees Can Raise Sufficient Funds for Effective Advocacy under the Existing Contribution Limits

The historical record of fundraising within the current contribution limits and reporting requirements demonstrates that federal regulation has not prevented entities from across the political spectrum from raising large amounts of money. National political party committees as well as nonconnected PACs — political committees that have no connected organizations such as a labor union or corporation — have raised significant sums. (*See* J.A. 1007-09, ¶¶376–84.)

From the 1990 election cycle to the 2006 election cycle, the number of nonconnected committees rose from 1,321 to 1,797, while during the same time their total receipts ballooned from $72 million to more than $350 million per election cycle. (*See* J.A. 1007-08, ¶¶376-79, 383.) Much of that fundraising success has come in recent election cycles: the total receipts of nonconnected committees doubled from the 1999-2000 presidential election cycle to the 2003-04 cycle (from approximately $144 million to approximately $289 million) and more than doubled from the 2001-2002 non-presidential election cycle to the 2005-06 cycle (from approximately $166 million to approximately $353 million). *Id.*

National political party fundraising illustrates that, as *Buckley* stated, the "overall effect of the Act's contribution ceilings is merely to require candidates

and political committees *to raise funds from a greater number of persons* and to compel people who would [have] otherwise contribute[d] amounts greater than the statutory limits to expend such funds on direct political expression." 424 U.S. at 21-22 (emphasis added). After BCRA prohibited the national parties from receiving unlimited soft money donations, the parties raised significantly more hard money by recruiting millions of new donors. (*See* Anthony Corrado, *Party Finance in the Wake of BCRA: An Overview*, FEC Exh. 151 at 28-9, Dkt. No. 55-8 at 8.) The Democratic National Committee increased the number of its direct mail donors from 400,000 in 2000 to 2.7 million in the 2004 election cycle, and had 4 million donors contribute via the Internet during the 2004 election cycle. (*Id.*) Similarly, the Republican National Committee enlisted more than 1 million new donors in 2003 alone. (*Id.*) The two parties' congressional campaign committees likewise recruited hundreds of thousands of new donors in the 2004 election cycle, including 700,000 for the Republican committees and 230,000 for the Democratic Congressional Campaign Committee. (*Id.*)

Largely by recruiting new donors, the national party committees raised more in hard money alone in 2003-04 than they had raised in hard and soft money *combined* in the last pre-BCRA presidential election cycle (1999-2000), replacing nearly $500 million in soft money and nearly fifty percent of their total receipts. (J.A. 1009 ¶¶387-88.) Similarly, the national party committees raised almost

90 percent as much in hard money alone in the 2006 election cycle as they had raised in both hard and soft money combined in the pre-BCRA 2002 election cycle. (*See* J.A. 1009-10, ¶¶ 387-90.) Much of the parties' additional hard money receipts came from small contributions of less than $200 per calendar year from individuals, which approximately doubled from 2000 to 2004 (from $222 million to $442 million), and increased by over $100 million from 2002 to 2006, from $219 million to $309 million. (Corrado and Varney, *Party Money in the 2006 Elections*, FEC Exh. 135 at 6-7, Dkt. No. 45-12 at 57-8.)

FECA does not prevent SpeechNow from following the same strategy. SpeechNow remains free "to aggregate large sums of money to promote effective advocacy," *Buckley*, 424 U.S. at 21, not only from the plaintiffs, but from other likely donors. SpeechNow could have raised $22,200 from the plaintiffs alone under the current limits (J.A. 1011 ¶400; J.A. 1277 ¶47) and surely much more from others. Having received a large amount of free publicity, SpeechNow has already attracted a number of supporters and potential contributors, including (by mid-August 2008) 75 people who specifically indicated that they would like to donate. (J.A. 1271 ¶27.) As leaders of prominent advocacy groups like the Club for Growth, the Cato Institute, and the Howard Jarvis Taxpayer Association, plaintiffs Keating and Crane and SpeechNow vice-president Coupal could have raised funds from their extensive networks of like-minded individuals. FEC PI Br.

at 52-53. Despite these advantages and SpeechNow's success in creating a contributor list (J.A. 1010, 1019, ¶¶392, 426), SpeechNow has not made a serious effort to develop into a functioning organization. Instead, it has refused to accept any contributions in legal amounts. (J.A. 900, 1011-12, ¶¶52, 396-401.)

David Keating's fundraising success with other political committees demonstrates that SpeechNow could likely raise the funds it needs to pay for its ads. Keating has been Executive Director of the Club for Growth since 2000. Even though the statutory limit on contributions to its PAC has remained $5,000 during his leadership, the PAC's total receipts have increased in every election cycle; the PAC raises nearly $3 million per cycle. (J.A. 1015-17, ¶¶411-415.) Keating grew the organization from just a few dozen supporters who it solicited in 1999 to approximately 35,000 in 2008. *Id.* As Keating explained, "[p]rimarily there were more members asked to give money. So they had more people to ask to give money, you wind up raising more money." (J.A. 1016 ¶414.) Plaintiffs offered no explanation why Keating, assisted by SpeechNow's four governing "members" and "supporters," could not also create a large pool of donors to SpeechNow.

SpeechNow's lack of interest in raising funds stems from the organization's origin in 2007 as a vehicle to challenge the constitutionality of longstanding contribution limits and public disclosure requirements — part of a "joint project"

by Keating with two legal advocacy groups. (J.A. 893-98, ¶¶21-40.) Keating admits he "can handle" raising money within hard money limits (J.A. 1024 ¶451), but created a test-case organization to allow others to take advantage of a favorable court ruling. He believed that "[t]here are a lot of people out there who that don't understand all this stuff about PACs." (J.A. 1209.) Thus, he "wanted to create an organizational structure that would be simple and easy for people to copy" (FEC Exh. 146, at SNK0197) — and he hopes "other groups of people will copy our method of operating." (*Id.* at SNK0158.) Keating asked Young to help bring, in Young's words, "a test case ... to try to push back some of McCain-Feingold."[12] (J.A. 895, 896-97, ¶¶30, 33.) In another email message, one of SpeechNow's governing "members" queried Young, "[should the group] prepare an actual radio ad to lend credence to this initiative?" (J.A. 897 ¶36.) SpeechNow's alleged inability to raise sufficient funds under the Act's contribution limits is thus suspect, given the "test case" nature of this suit. The hundreds of millions of dollars raised by the thousands of nonconnected committees more accurately reflect the ability of groups to raise funds for effective advocacy within the $5,000 contribution limit.

Finally, the proliferation and fundraising success of various political committees also belies the claim of plaintiffs (Br. 17-18) and amici (Amici Br. 24-32) that the threat of Commission investigations severely burdens plaintiffs'

[12] Young mistakenly believed that the decades-old statutory provisions had been enacted as part of BCRA.

First Amendment rights. Plaintiffs note (Br. 17-18) that the Commission conducted 118 investigations of various entities — including candidate and party committees and unregistered persons —from October 1999 through the discovery period last year. Considering that there are approximately 8,000 political committees currently registered with the Commission — as well as thousands of other previously active candidate committees during that time (J.A. 1022 ¶441; J.A. 1204-05) — the proportion of committees that the Commission investigates is small.

More important, when the Commission finds reason to conduct an investigation, that decision is presumed to be warranted. The Commission is entitled — like all government agencies — to a "presumption of regularity" that when the Commission exercises its enforcement powers, it does so in good faith. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *INS v. Miranda*, 459 U.S. 14, 18 (1982). Indeed, the Commission's investigations have vindicated important interests and revealed significant FECA violations, including, for example, the raising of tens of millions of dollars of illegal contributions by groups in 2004 that should have registered as political committees. *See, e.g., supra* pp. 17-19; (J.A. 935 ¶162.) In any event, no statute is immune from violation, and a regulatory agency exercising its enforcement authority hardly suggests that the statute's commands are unconstitutionally onerous. *Cf. FTC v. Standard Oil of*

California, 449 U.S. 232, 244 (1980) ("[T]he expense and annoyance of litigation is part of the social burden of living under government.") (internal quotation marks omitted).

B. FECA's Disclosure Requirements for Political Committees Are Constitutional as Applied to Keating as Treasurer of SpeechNow

1. Intermediate Scrutiny Applies to the Act's Disclosure Requirements

Because "disclosure requirements … do not prevent anyone from speaking," *McConnell*, 540 U.S. at 201 (citation and brackets omitted), the strict scrutiny standard does not apply to them. Instead, a court analyzes whether the disclosure requirement at issue bears a "substantial relation" to a "sufficiently important" governmental interest. *Buckley*, 424 U.S. at 64, 66, 75 (citation omitted). *Accord McConnell*, 540 U.S. at 196, 231. Thus, contrary to plaintiffs' repeated assertion (*e.g.*, Br. 53), this Court should apply an intermediate standard of scrutiny.

2. As Applied to Keating on Behalf of SpeechNow, FECA's Reporting Requirements for Political Committees Are Substantially Related to Important Governmental Interests

The Supreme Court long ago upheld FECA's reporting and disclosure requirements. *Buckley*, 424 U.S. at 60-84. The Court listed three important interests those requirements serve. First, they inform the electorate "as to where political campaign money comes from," thereby aiding voters "in evaluating those who seek federal office" by placing "each candidate in the political spectrum" and

alerting voters "to the interests to which a candidate is most likely to be responsive." *Id.* at 66-67. Second, the requirements "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id.* at 67 (footnote omitted). Third, "recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations" of the Act. *Id.* at 67-68.

Although *Buckley* emphasized disclosure of contributions to candidates, the Court did not hold that the validity of the Act's reporting requirements depends on a political committee's spending pattern. Also, as we explained, the Court later stated in *MCFL* that if the organization's major purpose became independent campaign activity, political committee requirements would apply. 479 U.S. at 262. Those requirements include reporting obligations.

The governmental interests identified in *Buckley* support applying these requirements to political committees that make only independent expenditures. As the Court observed in upholding FECA's independent expenditure reporting requirements for individuals and groups other than political committees, "the informational interest can be as strong as it is in coordinated spending, for disclosure helps voters to define more of the candidates' constituencies." *Buckley*, 424 U.S. at 81; *see also McConnell,* 540 U.S. at 196-97 (upholding disclosure requirements for "electioneering communications" against a facial challenge

because, among other reasons, "citizens seeking to make informed choices in the political marketplace" have "First Amendment interests" in learning how electoral advocacy is funded).

Keating would prefer to substitute the reporting requirements at 2 U.S.C. § 434(c) for the more extensive disclosure requirements that political committees must meet. But section 434(c) fails to provide voters with all the information they need to assess "major purpose" groups like SpeechNow and the candidates they support. Most important, the provision requires an independent spender to identify only each person who contributed more than $200 "for the purpose of furthering an independent expenditure." 2 U.S.C. § 434(c)(2)(C). Thus, the provision does not require an independent spender to disclose contributions for its overhead and administrative expenses, including, for example, a million-dollar contribution for overhead.[13]

Overall, political committees spend about half of their funds on such costs, and about half on independent expenditures and contributions. Under plaintiffs' proposed reporting scheme, there would be no disclosure for approximately *$500 million* of the more than $1 billion that political committees — not including candidate campaigns and political parties — spent in the 2005-2006 election cycle.

[13] Some spenders may interpret the rules as not requiring disclosure of funding for election-related expenses such as opposition research and polling. (*See, e.g.*, J.A. 1006-07 ¶375 (Club for Growth's decision not to disclose disbursements for polling.))

(J.A. 1003-04 ¶369.) The public would thus be unable to ascertain who provided much of the funding to major-purpose entities, while candidates and officeholders would surely be made aware. (*See* J.A. 1001-07, ¶¶361-375.)[14]

Keating promises (*e.g.*, Br. 45, 56, 58) to obey FECA's "disclaimer" requirements, *see* 2 U.S.C. § 441d. That provision requires "any person" financing an express advocacy public advertisement to include in the communication the person's telephone number or street or website address and whether a candidate authorized the communication. 2 U.S.C. § 441d(a). While this disclaimer supplies some useful contemporaneous information, it does not make up for the differences between section 434(c)'s reporting requirements and those applicable to political committees.

FECA's political committee disclosure requirements will also deter corruption and the appearance of corruption by large contributors to SpeechNow. The public and the press will know who gives large contributions to SpeechNow, including for its administrative expenses, and they can keep watch on candidates and officeholders to see if they change their policy positions or take legislative actions beneficial to the large contributors' interests.

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[14] Keating has given conflicting testimony on whether the provision requires independent spenders to identify a large donor who gives his contribution without specifying the purpose of "furthering an independent expenditure" when those funds are used to in fact pay for independent expenditures. (J.A. 1006-07, ¶375 (Keating's agreement with the Club for Growth's decision not to disclose any contributions for an independent expenditure of over $150,000.))

In addition, FECA's recordkeeping, reporting, and disclosure requirements for political committees will help the Commission and the public "gather[ ] the data necessary to detect violations" of the Act. *Buckley*, 424 U.S. at 68. If Keating as treasurer does not comply with those requirements, the Commission and the public will be unable to check whether SpeechNow in fact rejects contributions from foreign nationals, corporations, unions, and other sources, as Keating and SpeechNow's bylaws state the organization will do. (J.A. 1264 ¶4.) As explained above, section 434(c)'s requirements do not capture all the information necessary for that monitoring task.

Keating would undermine these important interests by postponing registering SpeechNow as a political committee and complying with FECA's other requirements for political committees until SpeechNow has made more than $1,000 in independent expenditures. *See* Br. 58. Especially since Keating would limit reporting to the information required by section 434(c), postponing these duties would delay disclosure of SpeechNow's financers. That delay would make it more difficult for voters to monitor the role of donors in public policy formation (J.A. 1002-03, ¶¶365-67) and to factor the sources into their viewing of advertising campaigns in the immediate pre-election period.

3. The Disclosure Requirements Are Not Unduly Burdensome

As this Court commented in *Akins,* "an organization devoted almost entirely to campaign spending could not plead that the administrative burdens associated with such spending were unconstitutional as applied to it." 101 F.3d at 742, *vacated on other grounds,* 524 U.S. 11 (1998). Yet that is precisely what Keating has pleaded here for himself and SpeechNow.

Plaintiffs and their amici exaggerate the difficulty of operating political committees like SpeechNow. Generally, the reporting requirements that apply to nonconnected committees are not complicated. (J.A. 1023 ¶444.) Any organization that qualifies as a political committee must register with the Commission by submitting FEC Form 1, a four-page form. (J.A. 1022 ¶¶439-40.) Registered nonconnected political committees must then periodically file FEC Form 3X disclosing to the public all receipts and disbursements to or from a person in excess of $200 in a calendar year (and in some instances, of any amount), as well as total operating expenses and cash on hand. (*Id.* ¶¶442-43.) Nonconnected political committees must also disclose their independent expenditures on Form 3X's Schedule E. (*Id.* ¶443.)[15]

[15] FEC Form 3X (J.A. 688-708) is a multi-purpose form filed by all political committees that are not the authorized committee of a candidate, which includes political party committees, nonconnected committees, and separate segregated funds. Form 3X thus includes sixteen separate schedules (Schedules A through L-B) that apply to the various types of activities in which these different kinds of

It is not unduly burdensome for a group or individual to file reports of receipts and disbursements with the Commission. (J.A. 1022-23, ¶¶438-46.) Indeed, although in *MCFL* the Supreme Court noted the burdens of political committee reporting on small organizations, it nevertheless explained that if MCFL's major purpose were to become campaign activity, then the group would have to abide by the rules applicable to political committees, which include the reporting requirements that plaintiffs challenge. 479 U.S. at 262. Moreover, the number of political committees and the magnitude of their activity demonstrate that the registration and reporting requirements that apply to such committees have hardly inhibited their formation or growth. (*See* J.A. 1204-05).

As with the contribution limits, plaintiffs are demonstrably capable of establishing a political committee and complying with the Act's registration and

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political committees may engage. Political committees like SpeechNow that only make independent expenditures are not required to complete nine of the sixteen schedules (Schedule F through L-B), nor to provide other pieces of information that apply only to party committees and political committees that engage in allocable state and federal election activity such as voter registration drives. (J.A. 730-40.)

Nonetheless, SpeechNow complains (Br. 49) about the length of the instructions for FEC Form 3X compared with the instructions for Form 5, which persons other than political committees use to disclose independent expenditures. But because SpeechNow alleges that it will not engage in much of the activity that must be reported on Form 3X, the length of that form and its instructions significantly overstate the amount of work SpeechNow would have to complete. In any event, as anyone knows who has attempted to assemble furniture or toys, fewer instructions are not necessarily better, or suggestive of a less complex task, than thorough instructions.

reporting requirements. Several groups have done precisely that under Keating's supervision. *See supra* pp. 46-47; (J.A. 1015, 1024, ¶¶410, 449). Indeed, Keating admits that he "can handle" the duties of a treasurer, and that he "generally" understands the reporting requirements of nonconnected political committees. (J.A. 1024 ¶¶451-52.) He does not wish to do so for SpeechNow simply because he prefers to spend his personal time in other ways. (J.A. 1019 ¶428.)[16] This Court should not create an exemption from the facially valid political committee requirements, thereby depriving the public of congressionally mandated information on electoral financing, based on plaintiffs' inadequate showing.

III. FECA'S BIENNIAL AGGREGATE CONTRIBUTION LIMIT IS CONSTITUTIONAL AS APPLIED TO PLAINTIFF YOUNG

The Supreme Court in *Buckley* upheld FECA's annual limits on the total contributions an individual may make. 424 U.S. at 38. These limits were a "quite modest restraint" and a mere "corollary" of other valid contribution limits. *Id.* Most important, annual limits prevent evasion of the candidate contribution limitation "by a person who might otherwise contribute massive amounts of money

[16] Keating offers a trivial excuse for objecting to treating SpeechNow as a political committee: an alleged need to determine the fair-market value of the use of his home and report it as an in-kind contribution. (Br. 15, 48-49.) Many people who work at home make such a valuation to comply with the tax consequences of that work, and Keating presented no evidence that such a valuation is unduly burdensome.

to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." *Id.*

Plaintiff Young provides no basis to disregard that reasoning here. The biennial limit prevents evasion of the limit on contributions to a candidate through a huge number of contributions to allied groups running ads favoring the donor's preferred candidate. Just as the various committees of a candidate's political party could have spent independently to aid the donor's candidate if the aggregate limit did not prevent such circumvention, as *Buckley* suggested, a number of organizations similar to SpeechNow could spend independently to enable a donor to circumvent the candidate contribution limit. Even though it "does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support," the overall ceiling is "is thus no more than a corollary of the basic individual contribution limitation." *Buckley*, 424 U.S. at 38.

IV. THE COURT'S EVALUATION OF THE DANGER OF CORRUPTION SHOULD GO BEYOND EVIDENCE REGARDING THE IMMEDIATE PARTIES

In most constitutional challenges to campaign finance laws, courts must determine whether the challenged regulations serve to reduce the danger of corruption and its appearance. To do so, courts look beyond evidence about the

immediate parties to ascertain how the world operates. This action under 2 U.S.C. § 437h required that the district court first compile "a fully developed factual record." *CalMed*, 453 U.S. at 192 n.14. The court, however, made findings of fact only about SpeechNow and expressly declined to make findings of fact on "whether or not the challenged provisions are necessary to ward off corruption — or the appearance of corruption — in federal elections." (J.A. 1261.) The court erred by refusing to assist this Court with findings on the central question in this case. This Court may either incorporate the necessary facts into its opinion or remand to the district court.

The Supreme Court has repeatedly found this kind of information dispositive. For example, in *Buckley*, the D.C. Circuit relied on sources such as polls and Senate reports to determine whether the challenged legislation served to deter corruption and its appearance, 519 F.2d 821, 837-39 (D.C. Cir. 1975) (en banc), and the Supreme Court explicitly relied on those "deeply disturbing examples." 424 U.S. at 27 & n.28. In *Colorado II*, the Supreme Court relied, *inter alia*, on expert reports and books by political scientists, a statement by a former Senator, and FEC disclosure reports to reach general factual conclusions about non-litigant entities; the Court concluded that "[p]arties are … necessarily the instruments of some contributors ... to support a specific candidate for the sake of a position on one narrow issue, or even to support any candidate who will be obliged

to the contributors." 533 U.S. at 451-52. The Supreme Court in *McConnell* similarly relied on a Senate report and declarations from CEOs, political party staff, consultants, and Members of Congress about evidence unrelated to the particular parties to the litigation to reach conclusions on corruption. *See*, *e.g.*, 540 U.S. at 145.

The district court erred when it declined to make similar findings of fact here. In addition to its erroneous conclusion that such facts cannot be determined on a paper record, the court appeared to rely in part on the press of other business before it and a belief that such findings would not help this Court. (Add. 30, 32-33.) The district court did, however, appropriately invite the parties to present evidence to this Court concerning the danger of corruption. (Add. 34 (suggesting that if the parties "want to put all that together in what will be the kind of ultimate Brandeis brief to the Court of Appeals, I'm sure that they would be thrilled to have it."))

The Commission's proposed findings of fact (J.A. 884-1025) will be particularly useful to this Court because plaintiffs have brought a "carefully constructed test-case." (J.A. 393.) Keating and SpeechNow's other governing "members" have neither run the ads they ostensibly wish to broadcast, nor attempted to raise the funds that would allow them do so. The district court's

limited findings thus reflect little about the way the world operates.[17] This Court can incorporate into its opinion the additional information proposed by the parties or it can remand to the district court to make factual findings that will allow this Court, and perhaps the Supreme Court, to adequately address the threat of corruption or its appearance arising from large contributions to fund independent expenditures. *Cf. Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982) ("When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings ...").[18]

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[17] The Commission's proposed facts draw primarily from plaintiffs' depositions; declarations by campaign consultants, lobbyists, former federal candidates and officeholders, and state officials; an expert report by Professor Clyde Wilcox and studies by other scholars specializing in campaign practices; SpeechNow's responses to the Commission's interrogatories and requests for admission; FEC reports; and public opinion surveys.

[18] Plaintiffs made evidentiary objections to the facts proposed by the Commission in the district court that they may renew in their reply brief. Most of their objections can be overruled on the basis that the Commission's proffered facts are not "adjudicative facts" about the immediate parties subject to the Federal Rules of Evidence, but "legislative facts," which those Rules do not govern. *See* FEC PI Br. 34 n.10; *Friends of the Earth v. Reilly*, 966 F.2d 690, 694 (D.C. Cir. 1992) (Legislative facts "help the tribunal decide questions of law and policy.") (internal quotation marks and citation omitted); Dkt. Nos. 63, 63-2, 63-3, 63-4, 63-5 (Commission briefing generally in support of its proposed facts). Parties and amici may present legislative facts — frequently based on a variety of materials such as reports, news articles, and academic studies, including political and social science studies — at any stage of litigation. Unlike judicially noticed matters, legislative facts need not be clearly indisputable. *See* Dkt. No. 63 at 2-13. "[L]egislative facts [unlike adjudicative facts] are crucial to the prediction of future

CONCLUSION

For the foregoing reasons, the Court should answer all five certified questions in the negative, deny plaintiffs' request for relief, and enter judgment for the Commission.

Respectfully submitted,

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events and to the evaluation of certain risks." *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1162 (D.C. Cir. 1979).

The Commission objected to much of plaintiffs' evidence because, *inter alia*, plaintiffs filed expert reports that were untimely revised; failed to produce a draft expert report until the middle of an expert's deposition; and submitted expert reports unsupported by the narrow data cited or, in one case, by any empirical or anecdotal evidence whatsoever. *See* Dkt. Nos. 55, 56 (Commission briefing generally regarding plaintiffs' proposed facts).

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December 15, 2009

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 13,973 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P 32(a)(6) because the brief uses the proportionally spaced typeface Microsoft Word 14-point Times New Roman.

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§ 431. Definitions

When used in this Act:

(4) The term "political committee" means—

(A) 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;

*****

(8) (A) The term "contribution" includes—

(i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office;

*****

(9) (A) The term "expenditure" includes—

(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;

*****

(11) The term "person" includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government.

*****

(17) *Independent expenditure*. 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.

§ 433. Registration of political committees

(a) *Statements of organizations*. Each authorized campaign committee shall file a statement of organization no later than 10 days after designation pursuant to section 432(e)(1). Each separate segregated fund established under the provisions of section 441b(b) shall file a statement of organization no later than 10 days after establishment. All other committees shall file a statement of organization within 10 days after becoming a political committee within the meaning of section 431(4).

(b) *Contents of statements*. The statement of organization of a political committee shall include—

(1) the name, address, and type of committee;

(2) the name, address, relationship, and type of any connected organization or affiliated committee;

(3) the name, address, and position of the custodian of books and accounts of the committee;

(4) the name and address of the treasurer of the committee;

(5) if the committee is authorized by a candidate, the name, address, office sought, and party affiliation of the candidate; and

(6) a listing of all banks, safety deposit boxes, or other depositories used by the committee.

(c) *Change of information in statements.* Any change in information previously submitted in a statement of organization shall be reported in accordance with section 432(g) no later than 10 days after the date of the change.

(d) *Termination, etc., requirements and authorities*.

(1) A political committee may terminate only when such a committee files a written statement, in accordance with section 432(g), that it will no longer receive any contributions or make any disbursement and that such committee has no outstanding debts or obligations.

(2) Nothing contained in this subsection may be construed to eliminate or limit the authority of the Commission to establish procedures for—

(A) the determination of insolvency with respect to any political committee;

(B) the orderly liquidation of an insolvent political committee, and the orderly application of its assets for the reduction of outstanding debts; and

(C) the termination of an insolvent political committee after such liquidation and application of assets.

§ 434. Reporting requirements

(a) *Receipts and disbursements by treasurers of political committees; filing requirements.*

(1) Each treasurer of a political committee shall file reports of receipts and disbursements in accordance with the provisions of this subsection. The treasurer shall sign each such report.

(2) If the political committee is the principal campaign committee of a candidate for the House of Representatives or for the Senate—

(A) in any calendar year during which there is a regularly scheduled election for which such candidate is seeking election, or nomination for election, the treasurer shall file the following reports:

(i) a pre-election report, which shall be filed no later than the 12th day before (or posted by any of the following: registered mail, certified mail, priority mail having a delivery confirmation, or delivered to an overnight delivery service with an on-line tracking system, if posted or delivered no later than the 15th day before)[1] any election in which such candidate is seeking election, or nomination for election, and which shall be complete as of the 20th day before such election;

(ii) a post-general election report, which shall be filed no later than the 30th day after any general election in which such candidate has sought election, and which shall be complete as of the 20th day after such general election; and

(iii) additional quarterly reports, which shall be filed no later than the 15th day after the last day of each calendar quarter, and which shall be complete as of the last day of each calendar quarter: except that the report for the quarter ending December 31 shall be filed no later than January 31 of the following calendar year; and

(B)[2] in any other calendar year the treasurer shall file quarterly reports, which shall be filed not later than the 15th

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[1]Section 641 of division F, Title VI of the Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, amended section 434(a) to permit the use of priority and express mail and overnight delivery services for timely filing purposes. This amendment is effective as of January 23, 2004.

[2]Section 503(a) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, amended section 434(a)(2)(B) to require additional reports in nonelection years by House and Senate campaigns. This amendment is effective as of November 6, 2002.

day after the last day of each calendar quarter, and which shall be complete as of the last day of each calendar quarter, except that the report for the quarter ending December 31 shall be filed not later than January 31 of the following calendar year.

(3) If the committee is the principal campaign committee of a candidate for the office of President—

(A) in any calendar year during which a general election is held to fill such office—

(i) the treasurer shall file monthly reports if such committee has on January 1 of such year, received contributions aggregating $100,000 or made expenditures aggregating $100,000 or anticipates receiving contributions aggregating $100,000 or more or making expenditures aggregating $100,000 or more during such year: such monthly reports shall be filed no later than the 20th day after the last day of each month and shall be complete as of the last day of the month, except that, in lieu of filing the report otherwise due in November and December, a pre-general election report shall be filed in accordance with paragraph (2)(A)(i), a post-general election report shall be filed in accordance with paragraph (2)(A)(ii), and a year end report shall be filed no later than January 31 of the following calendar year;

(ii) the treasurer of the other principal campaign committees of a candidate for the office of President shall file a pre-election report or reports in accordance with paragraph (2)(A)(i), a post-general election report in accordance with paragraph (2)(A)(ii), and quarterly reports in accordance with paragraph (2)(A)(iii); and

(iii) if at any time during the election year a committee filing under paragraph (3)(A)(ii) receives contributions in excess of $100,000 or makes expenditures in excess of $100,000, the treasurer shall begin filing monthly reports under paragraph (3)(A)(i) at the next reporting period; and

(B) in any other calendar year, the treasurer shall file either—

(i) monthly reports, which shall be filed no later than the 20th day after the last day of each month and shall be complete as of the last day of the month; or

(ii) quarterly reports, which shall be filed no later than the 15th day after the last day of each calendar quarter

and which shall be complete as of the last day of each calendar quarter.

(4) All political committees other than authorized committees of a candidate shall file either—

(A) (i) quarterly reports, in a calendar year in which a regularly scheduled general election is held, which shall be filed no later than the 15th day after the last day of each calendar quarter: except that the report for the quarter ending on December 31 of such calendar year shall be filed no later than January 31 of the following calendar year;

(ii) a pre-election report, which shall be filed no later than the 12th day before (or posted by any of the following: registered mail, certified mail, priority mail having a delivery confirmation, or express mail having a delivery confirmation, or delivered to an overnight delivery service with an on-line tracking system, if posted or delivered no later than the 15th day before)[1] any election in which the committee makes a contribution to or expenditure on behalf of a candidate in such election, and which shall be complete as of the 20th day before the election;

(iii) a post-general election report, which shall be filed no later than the 30th day after the general election and which shall be complete as of the 20th day after such general election; and

(iv) in any other calendar year, a report covering the period beginning January 1 and ending June 30, which shall be filed no later than July 31 and a report covering the period beginning July 1 and ending December 31, which shall be filed no later than January 31 of the following calendar year; or

(B) monthly reports in all calendar years which shall be filed no later than the 20th day after the last day of the month and shall be complete as of the last day of the month, except that, in lieu of filing the reports otherwise due in November and December of any year in which a regularly scheduled general election is held, a pre-general election report shall be filed in accordance with paragraph (2)(A)(i), a post-general election

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[1]Section 641 of division F, Title VI of the Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, amended section 434(a) to permit the use of priority and express mail and overnight delivery services for timely filing purposes. This amendment is effective as of January 23, 2004.

report shall be filed in accordance with paragraph (2)(A)(ii), and a year end report shall be filed no later than January 31 of the following calendar year. Notwithstanding the preceding sentence, a national committee of a political party shall file the reports required under subparagraph (B).[1]

(5) If a designation, report, or statement filed pursuant to this Act (other than under paragraph (2)(A)(i) or (4)(A)(ii) or subsection (g)(1)) is sent by registered mail, certified mail, priority mail having a delivery confirmation, or express mail having a delivery confirmation, the United States postmark shall be considered the date of filing of the designation, report, or statement. If a designation, report or statement filed pursuant to this Act (other than under paragraph (2)(A)(i) or (4)(A)(ii), or subsection (g)(1)) is sent by an overnight delivery service with an on-line tracking system, the date on the proof of delivery to the delivery service shall be considered the date of filing of the designation, report, or statement.[2]

(6) (A) The principal campaign committee of a candidate shall notify the Secretary or the Commission, and the Secretary of State, as appropriate, in writing, of any contribution of $1,000 or more received by any authorized committee of such candidate after the 20th day, but more than 48 hours before, any election. This notification shall be made within 48 hours after the receipt of such contribution and shall include the name of the candidate and the office sought by the candidate, the identification of the contributor, and the date of receipt and amount of the contribution.

(B)[3] *Notification of expenditure from personal funds.*

(i) *Definition of expenditure from personal funds*. In this subparagraph, the term 'expenditure from personal funds' means—

(I) an expenditure made by a candidate using personal funds; and

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[1]Section 503(b) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, amended section 434(a)(4) to require monthly reports by national party committees. This amendment is effective as of November 6, 2002.

[2]Section 641 of division F, Title VI of the Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, amended section 434(a)(5) to permit the use of priority and express mail and overnight delivery services for timely filing purposes. This amendment is effective as of January 23, 2004.

[3]Section 304(b) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, amended section 434(a)(6) by redesignating subparagraph (B) as (E) and inserting new subparagraphs (B)-(D). This amendment is effective as of November 6, 2002.

(II) a contribution or loan made by a candidate using personal funds or a loan secured using such funds to the candidate's authorized committee.

(ii) *Declaration of intent*. Not later than the date that is 15 days after the date on which an individual becomes a candidate for the office of Senator, the candidate shall file a declaration stating the total amount of expenditures from personal funds that the candidate intends to make, or to obligate to make, with respect to the election that will exceed the State-by-State competitive and fair campaign formula with—

(I) the Commission; and

(II) each candidate in the same election.

(iii) *Initial notification*. Not later than 24 hours after a candidate described in clause (ii) makes or obligates to make an aggregate amount of expenditures from personal funds in excess of 2 times the threshold amount in connection with any election, the candidate shall file a notification with—

(I) the Commission; and

(II) each candidate in the same election.

(iv) *Additional notification*. After a candidate files an initial notification under clause (iii), the candidate shall file an additional notification each time expenditures from personal funds are made or obligated to be made in an aggregate amount that exceed $10,000 with—

(I) the Commission; and

(II) each candidate in the same election.

Such notification shall be filed not later than 24 hours after the expenditure is made.

(v) *Contents*. A notification under clause (iii) or (iv) shall include—

(I) the name of the candidate and the office sought by the candidate;

(II) the date and amount of each expenditure; and

(III) the total amount of expenditures from personal funds that the candidate has made, or obligated to make, with respect to an election as of the date of the expenditure that is the subject of the notification.

(C) *Notification of disposal of excess contributions*. In the next regularly scheduled report after the date of the election for which a candidate seeks nomination for election to, or election to, Federal office, the candidate or the candidate's authorized committee shall submit to the Commission a report indicating the source and amount of any excess contributions (as determined under paragraph (1) of section 315(i)) (2 U.S.C. § 441a(i)) and the manner in which the candidate or the candidate's authorized committee used such funds.

(D) *Enforcement*. For provisions providing for the enforcement of the reporting requirements under this paragraph, see section 309 (2 U.S.C. § 437g).

(E) The notification required under this paragraph shall be in addition to all other reporting requirements under this Act.

(7) The reports required to be filed by this subsection shall be cumulative during the calendar year to which they relate, but where there has been no change in an item reported in a previous report during such year, only the amount need be carried forward.

(8) The requirement for a political committee to file a quarterly report under paragraph (2)(A)(iii) or paragraph (4)(A)(i) shall be waived if such committee is required to file a pre-election report under paragraph (2)(A)(i), or paragraph (4)(A)(ii) during the period beginning on the 5th day after the close of the calendar quarter and ending on the 15th day after the close of the calendar quarter.

(9) The Commission shall set filing dates for reports to be filed by principal campaign committees of candidates seeking election, or nomination for election, in special elections and political committees filing under paragraph (4)(A) which make contributions to or expenditures on behalf of a candidate or candidates in special elections. The Commission shall require no more than one preelection report for each election and one postelection report for the election which fills the vacancy. The Commission may waive any reporting obligation of committees required to file for special elections if any report required by paragraph (2) or (4) is required to be filed within 10 days of a report required under this subsection. The Commission shall establish the reporting dates within 5 days of the setting of such election and shall publish such dates and notify the principal campaign committees of all candidates in such election of the reporting dates.

(10) The treasurer of a committee supporting a candidate for the office of Vice President (other than the nominee of a political party) shall file reports in accordance with paragraph (3).

(11) (A) The Commission shall promulgate a regulation under which a person required to file a designation, statement, or report under this Act—

(i) is required to maintain and file a designation, statement, or report for any calendar year in electronic form accessible by computers if the person has, or has reason to expect to have, aggregate contributions or expenditures in excess of a threshold amount determined by the Commission; and

(ii) may maintain and file a designation, statement, or report in electronic form or an alternative form if not required to do so under the regulation promulgated under clause (i).

(B)[1] The Commission shall make a designation, statement, report, or notification that is filed with the Commission under this Act available for inspection by the public in the offices of the Commission and accessible to the public on the Internet not later than 48 hours (or not later than 24 hours in the case of a designation, statement, report, or notification filed electronically) after receipt by the Commission.

(C) In promulgating a regulation under this paragraph, the Commission shall provide methods (other than requiring a signature on the document being filed) for verifying designations, statements, and reports covered by the regulation. Any document verified under any of the methods shall be treated for all purposes (including penalties for perjury) in the same manner as a document verified by signature.

(D) As used in this paragraph, the term "report" means, with respect to the Commission, a report, designation, or statement required by this Act to be filed with the Commission.

(12)[2] *Software for filing of reports*.

(A) *In general*. The Commission shall—

(i) promulgate standards to be used by vendors to develop software that—

(I) permits candidates to easily record information concerning receipts and disbursements

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[1]Section 501 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, amended section 434(a)(11)(B) to address Internet access to reports. This amendment is effective as of November 6, 2002.

[2]Section 306 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, amended section 434(a) to add new paragraph (12). This amendment is effective as of November 6, 2002.

required to be reported under this Act at the time of the receipt or disbursement;

(II) allows the information recorded under subclause (I) to be transmitted immediately to the Commission; and

(III) allows the Commission to post the information on the Internet immediately upon receipt; and

(ii) make a copy of software that meets the standards promulgated under clause (i) available to each person required to file a designation, statement, or report in electronic form under this Act.

(B) *Additional information*. To the extent feasible, the Commission shall require vendors to include in the software developed under the standards under subparagraph (A) the ability for any person to file any designation, statement, or report required under this Act in electronic form.

(C) *Required use*. Notwithstanding any provision of this Act relating to times for filing reports, each candidate for Federal office (or that candidate's authorized committee) shall use software that meets the standards promulgated under this paragraph once such software is made available to such candidate.

(D) *Required posting*. The Commission shall, as soon as practicable, post on the Internet any information received under this paragraph.

(b) *Contents of reports*. Each report under this section shall disclose—

(1) the amount of cash on hand at the beginning of the reporting period;

(2) for the reporting period and calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), the total amount of all receipts, and the total amount of all receipts in the following categories:

(A) contributions from persons other than political committees;

(B) for an authorized committee, contributions from the candidate;

(C) contributions from political party committees;

(D) contributions from other political committees;

(E) for an authorized committee, transfers from other authorized committees of the same candidate;

(F) transfers from affiliated committees and, where the reporting committee is a political party committee, transfers from other political party committees, regardless of whether such committees are affiliated;

(G) for an authorized committee, loans made by or guaranteed by the candidate;

(H) all other loans;

(I) rebates, refunds, and other offsets to operating expenditures;

(J) dividends, interest, and other forms of receipts; and

(K) for an authorized committee of a candidate for the office of President, Federal funds received under chapter 95 and chapter 96 of title 26;

(3) the identification of each—

(A) person (other than a political committee) who makes a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office)**,** or in any lesser amount if the reporting committee should so elect, together with the date and amount of any such contribution;

(B) political committee which makes a contribution to the reporting committee during the reporting period, together with the date and amount of any such contribution;

(C) authorized committee which makes a transfer to the reporting committee;

(D) affiliated committee which makes a transfer to the reporting committee during the reporting period and, where the reporting committee is a political party committee, each transfer of funds to the reporting committee from another political party committee, regardless of whether such committees are affiliated, together with the date and amount of such transfer;

(E) person who makes a loan to the reporting committee during the reporting period, together with the identification of any endorser or guarantor of such loan, and date and amount or value of such loan;

(F) person who provides a rebate, refund, or other offset to operating expenditures to the reporting committee in an aggregate amount or value in excess of $200 within the calendar

year (or election cycle, in the case of an authorized committee of a candidate for Federal office), together with the date and amount of such receipt; and

(G) person who provides any dividend, interest, or other receipt to the reporting committee in an aggregate value or amount in excess of $200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), together with the date and amount of any such receipt;

(4) for the reporting period and the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), the total amount of all disbursements, and all disbursements in the following categories:

(A) expenditures made to meet candidate or committee operating expenses;

(B) for authorized committees, transfers to other committees authorized by the same candidate;

(C) transfers to affiliated committees and, where the reporting committee is a political party committee, transfers to other political party committees, regardless of whether they are affiliated;

(D) for an authorized committee, repayment of loans made by or guaranteed by the candidate;

(E) repayment of all other loans;

(F) contribution refunds and other offsets to contributions;

(G) for an authorized committee, any other disbursements;

(H) for any political committee other than an authorized committee—

(i) contributions made to other political committees;

(ii) loans made by the reporting committees;

(iii) independent expenditures;

(iv) expenditures made under section 441a(d) of this title; and

(v) any other disbursements; and

(I) for an authorized committee of a candidate for the office of President, disbursements not subject to the limitation of section 441a(b);

(5) the name and address of each—

(A) person to whom an expenditure in an aggregate amount or value in excess of $200 within the calendar year is

made by the reporting committee to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure;

(B) authorized committee to which a transfer is made by the reporting committee;

(C) affiliated committee to which a transfer is made by the reporting committee during the reporting period and, where the reporting committee is a political party committee, each transfer of funds by the reporting committee to another political party committee, regardless of whether such committees are affiliated, together with the date and amount of such transfers;

(D) person who receives a loan repayment from the reporting committee during the reporting period, together with the date and amount of such loan repayment; and

(E) person who receives a contribution refund or other offset to contributions from the reporting committee where such contribution was reported under paragraph (3)(A) of this subsection, together with the date and amount of such disbursement;

(6) (A) for an authorized committee, the name and address of each person who has received any disbursement not disclosed under paragraph (5) in an aggregate amount or value in excess of $200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), together with the date and amount of any such disbursement;

(B) for any other political committee, the name and address of each—

(i) political committee which has received a contribution from the reporting committee during the reporting period, together with the date and amount or any such contribution;

(ii) person who has received a loan from the reporting committee during the reporting period, together with the date and amount of such loan;

(iii) person who receives any disbursement during the reporting period in an aggregate amount or value in excess of $200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office) in connection with an independent expenditure by the reporting committee, together with the date, amount, and purpose of any such independent expenditure and a statement which indicates whether such

independent expenditure is in support of, or in opposition to, a candidate, as well as the name and office sought by such candidate, and a certification, under penalty of perjury, whether such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such committee;

(iv) person who receives any expenditure from the reporting committee during the reporting period in connection with an expenditure under section 441a(d) of this title, together with the date, amount, and purpose of any such expenditure as well as the name of, and office sought by, the candidate on whose behalf the expenditure is made; and

(v) person who has received any disbursement not otherwise disclosed in this paragraph or paragraph (5) in an aggregate amount or value in excess of $200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office) from the reporting committee within the reporting period, together with the date, amount, and purpose of any such disbursement;

(7) the total sum of all contributions to such political committee, together with the total contributions less offsets to contributions and the total sum of all operating expenditures made by such political committee, together with total operating expenditures less offsets to operating expenditures, for both the reporting period and the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office); and

(8) the amount and nature of outstanding debts and obligations owed by or to such political committee; and where such debts and obligations are settled for less than their reported amount or value, a statement as to the circumstances and conditions under which such debts or obligations were extinguished and the consideration therefor.

(c) *Statements by other than political committees; filing; contents; indices of expenditures*.

(1) Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year shall file a statement containing the information required under subsection (b)(3)(A) of this section for all contributions received by such person.

(2) Statements required to be filed by this subsection shall be filed in accordance with subsection (a)(2) of this section, and shall include—

(A) the information required by subsection (b)(6)(B)(iii) of this section, indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved;

(B) under penalty of perjury, a certification whether or not such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate; and

(C) the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure.[1]

(3) The Commission shall be responsible for expeditiously preparing indices which set forth, on a candidate-by-candidate basis, all independent expenditures separately, including those reported under subsection (b)(6)(B)(iii) of this section, made by or for each candidate, as reported under this subsection, and for periodically publishing such indices on a timely pre-election basis.

(d) *Use of facsimile machines and electronic mail to file independent expenditure statements*.

(1) Any person who is required to file a statement under sub-section (c) or (g)[2] of this section, except statements required to be filed electronically pursuant to subsection (a)(11)(A)(i) may file the statement by facsimile device or electronic mail, in accordance with such regulations as the Commission may promulgate.

(2) The Commission shall make a document which is filed electronically with the Commission pursuant to this paragraph accessible to the public on the internet not later than 24 hours after the document is received by the Commission.

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[1]Sections 502(a) and (c) of the Department of Transportation and Related Agencies Appropriations Act, 2001, Pub. L. No. 106-346, amended 2 U.S.C. § 434 by amending subsection (c)(2) and adding subsection (d), as well as a conforming amendment at 2 U.S.C. § 434(a)(5). These amendments became effective with respect to elections occurring after January 1, 2001. Section 212(a) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, further amended section 434 by striking the undesignated matter after subsection (c)(2) and adding new subsection (g). This amendment is effective as of November 6, 2002.

[2]Section 212(b) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, added a conforming amendment to section 434(d)(1). This amendment is effective as of November 6, 2002.

(3) In promulgating a regulation under this paragraph, the Commission shall provide methods (other than requiring a signature on the document being filed) for verifying the documents covered by the regulation. Any document verified under any of the methods shall be treated for all purposes (including penalties for perjury) in the same manner as a document verified by signature.

(e)[1] *Political committee*.

(1) *National and congressional political committees*. The national committee of a political party, any national congressional campaign committee of a political party, and any subordinate committee of either, shall report all receipts and disbursements during the reporting period.

(2) *Other political committees to which section 323 (2 U.S.C. § 441i) applies*.

(A) *In general*. In addition to any other reporting requirements applicable under this Act, a political committee (not described in paragraph (1)) to which section 323(b)(1) (2 U.S.C. § 441i(b)(1)) applies shall report all receipts and disbursements made for activities described in section 301(20)(A), (2 U.S.C. § 431(20)(A)) unless the aggregate amount of such receipts and disbursements during the calendar year is less than $5,000.

(B) *Specific disclosure by state and local parties of certain nonfederal amounts permitted to be spent on federal election activity*. Each report by a political committee under subparagraph (A) of receipts and disbursements made for activities described in section 301(20)(A) (2 U.S.C. § 431(20)(A)) shall include a disclosure of all receipts and disbursements described in section 323(b)(2)(A) and (B) (2 U.S.C. § 441i(b)(2)(A) and (B)).

(3) *Itemization*. If a political committee has receipts or disbursements to which this subsection applies from or to any person aggregating in excess of $200 for any calendar year, the political committee shall separately itemize its reporting for such person in the same manner as required in paragraphs (3)(A), (5), and (6) of subsection (b).

(4) *Reporting periods*. Reports required to be filed under this subsection shall be filed for the same time periods required for political committees under subsection (a)(4)(B).

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[1]Section 103 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, amended section 434 to add subsection (e). This amendment is effective as of November 6, 2002.

(f)[1] *Disclosure of electioneering communications*.

(1) *Statement required*. Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement containing the information described in paragraph (2).

(2) *Contents of statement*. Each statement required to be filed under this subsection shall be made under penalty of perjury and shall contain the following information:

(A) The identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement.

(B) The principal place of business of the person making the disbursement, if not an individual.

(C) The amount of each disbursement of more than $200 during the period covered by the statement and the identification of the person to whom the disbursement was made.

(D) The elections to which the electioneering communications pertain and the names (if known) of the candidates identified or to be identified.

(E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(20))) directly to this account for electioneering communications, the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. Nothing in this subparagraph is to be construed as a prohibition on the use of funds in such a segregated account for a purpose other than electioneering communications.

(F) If the disbursements were paid out of funds not described in subparagraph (E), the names and addresses of all

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[1]Section 201(a) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, amended section 434 to add subsection (f). This amendment is effective as of November 6, 2002.

contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.

(3) *Electioneering communication*. For purposes of this subsection—

(A) *In general*.

(i) The term 'electioneering communication' means any broadcast, cable, or satellite communication which—

(I) refers to a clearly identified candidate for Federal office;

(II) is made within—

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

(ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term 'electioneering communication' means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate. Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations.

(B) *Exceptions*. The term 'electioneering communication' does not include—

(i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) a communication which constitutes an expenditure or an independent expenditure under this Act;

(iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(iv) any other communication exempted under such regulations as the Commission may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 301(20)(A)(iii) (2 U. S.C. § 431(20)(A)(iii)).

(C) *Targeting to relevant electorate*. For purposes of this paragraph, a communication which refers to a clearly identified candidate for Federal office is 'targeted to the relevant electorate' if the communication can be received by 50,000 or more persons—

(i) in the district the candidate seeks to represent, in the case of a candidate for Representative in, or Delegate or Resident Commissioner to, the Congress; or

(ii) in the State the candidate seeks to represent, in the case of a candidate for Senator.

(4) *Disclosure date*. For purposes of this subsection, the term 'disclosure date' means—

(A) the first date during any calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000; and

(B) any other date during such calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000 since the most recent disclosure date for such calendar year.

(5) *Contracts to disburse*. For purposes of this subsection, a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement.

(6) *Coordination with other requirements*. Any requirement to report under this subsection shall be in addition to any other reporting requirement under this Act.

(7) *Coordination with Internal Revenue Code*. Nothing in this subsection may be construed to establish, modify, or otherwise affect the definition of political activities or electioneering activities (including the definition of participating in, intervening in, or influencing or attempting to influence a political campaign on behalf of or in opposition to any candidate for public office) for purposes of the Internal Revenue Code of 1986.

(g)[1] *Time for reporting certain expenditures*.

(1) *Expenditures aggregating $1,000*.

(A) *Initial report*. A person (including a political committee) that makes or contracts to make independent expenditures aggregating $1,000 or more after the 20th day, but more than 24 hours, before the date of an election shall file a report describing the expenditures within 24 hours.

(B) *Additional reports*. After a person files a report under subparagraph (A), the person shall file an additional report within 24 hours after each time the person makes or contracts to make independent expenditures aggregating an additional $1,000 with respect to the same election as that to which the initial report relates.

(2) *Expenditures aggregating $10,000*.

(A) *Initial report*. A person (including a political committee) that makes or contracts to make independent expenditures aggregating $10,000 or more at any time up to and including the 20th day before the date of an election shall file a report describing the expenditures within 48 hours.

(B) *Additional reports*. After a person files a report under subparagraph (A), the person shall file an additional report within 48 hours after each time the person makes or contracts to make independent expenditures aggregating an additional

[1]Section 212(a) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, amended section 434 by striking the undesignated matter after subsection (c)(2) and adding new subsection (g). This amendment is effective as of November 6, 2002.

$10,000 with respect to the same election as that to which the initial report relates.

(3) *Place of filing; Contents*. A report under this subsection—

(A) shall be filed with the Commission; and

(B) shall contain the information required by subsection (b)(6)(B)(iii), including the name of each candidate whom an expenditure is intended to support or oppose.

(4) *Time of filing for expenditures aggregating $1,000*. Notwithstanding subsection (a)(5), the time at which the statement under paragraph (1) is received by the Commission or any other recipient to whom the notification is required to be sent shall be considered the time of filing of the statement with the recipient.

(h)[1] *Reports from Inaugural Committees*. The Federal Election Commission shall make any report filed by an Inaugural Committee under section 510 of title 36, United States Code, accessible to the public at the offices of the Commission and on the Internet not later than 48 hours after the report is received by the Commission.

(i)[2] *Disclosure of bundled contributions.*

(1) *Required disclosure.* Each committee described in paragraph (6) shall include in the first report required to be filed under this section after each covered period (as defined in paragraph (2)) a separate schedule setting forth the name, address and employer of each person reasonably known by the committee to be a person described in paragraph (7) who provided 2 or more bundled contributions to the committee in an aggregate amount greater than the applicable threshold (as defined in paragraph (3)) during the covered period, and the aggregate amount of the bundled contributions provided by each such person during the covered period.

(2) *Covered period.* In this subsection, a "covered period" means, with respect to a committee—

(A) the period beginning January 1 and ending June 30 of each year;

(B) the period beginning July 1 and ending December 31 of each year; and

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[1]Section 308(b) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, amended section 434 by adding subsection (h). This amendment is effective as of November 6, 2002.

[2]Section 204(a) of the Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, amended section 434 by adding subsection (i). This amendment applies to reports filed after a period that begins three months after the accompanying regulations promulgated by the FEC become final.

(C) any reporting period applicable to the committee under this section during which any person described in paragraph (7) provided 2 or more bundled contributions to the committee in an aggregate amount greater than the applicable threshold.

(3) *Applicable threshold.*

(A) *In general.* In this subsection, the 'applicable threshold' is $15,000, except that in determining whether the amount of bundled contributions provided to a committee by a person described in paragraph (7) exceeds the applicable threshold, there shall be excluded any contribution made to the committee by the person or the person's spouse.

(B) *Indexing.* In any calendar year after 2007, section 315(c)(1)(B) (2 U.S.C. §441a(c)(1)(B)) shall apply to the amount applicable under subparagraph (A) in the same manner as such section applies to the limitations established under subsections (a)(1)(A), (a)(1)(B), (a)(3), and (h) of such section, except that for purposes of applying such section to the amount applicable under subparagraph (A), the 'base period' shall be 2006.

(4) *Public availability.* The Commission shall ensure that, to the greatest extent practicable—

(A) information required to be disclosed under this subsection is publicly available through the Commission website in a manner that is searchable, sortable, and downloadable; and

(B) the Commission's public database containing information disclosed under this subsection is linked electronically to the websites maintained by the Secretary of the Senate and the Clerk of the House of Representatives containing information filed pursuant to the Lobbying Disclosure Act of 1995.

(5) *Regulations.* Not later than 6 months after the date of enactment of the Honest Leadership and Open Government Act of 2007 [September 14, 2007], the Commission shall promulgate regulations to implement this subsection. Under such regulations, the Commission—

(A) may, notwithstanding paragraphs (1) and (2), provide for quarterly filing of the schedule described in paragraph (1) by a committee which files reports under this section more frequently than on a quarterly basis;

(B) shall provide guidance to committees with respect to whether a person is reasonably known by a committee to be a person described in paragraph (7), which shall include a requirement that committees consult the websites maintained by the Secretary of the Senate and the Clerk of the House of

Representatives containing information filed pursuant to the Lobbying Disclosure Act of 1995;

(C) may not exempt the activity of a person described in paragraph (7) from disclosure under this subsection on the grounds that the person is authorized to engage in fundraising for the committee or any other similar grounds; and

(D) shall provide for the broadest possible disclosure of activities described in this subsection by persons described in paragraph (7) that is consistent with this subsection.

(6) *Committees described.* A committee described in this paragraph is an authorized committee of a candidate, a leadership PAC, or a political party committee.

(7) *Persons described.* A person described in this paragraph is any person, who, at the time a contribution is forwarded to a committee as described in paragraph (8)(A)(i) or is received by a committee as described in paragraph (8)(A)(ii), is—

(A) a current registrant under section 4(a) of the Lobbying Disclosure Act of 1995 (2 U.S.C. § 1603(a));

(B) an individual who is listed on a current registration filed under section 4(b)(6) of such Act (2 U.S.C. § 1603(b)(6)) or a current report under section 5(b)(2)(C) of such Act (2 U.S.C. § 1604(b)(2)(C)); or

(C) a political committee established or controlled by such a registrant or individual.

(8) *Definitions*. For purposes of this subsection, the following definitions apply:

(A) *Bundled contribution.* The term "bundled contribution" means, with respect to a committee described in paragraph (6) and a person described in paragraph (7), a contribution (subject to the applicable threshold) which is—

(i) forwarded from the contributor or contributors to the committee by the person; or

(ii) received by the committee from a contributor or contributors, but credited by the committee or candidate involved (or, in the case of a leadership PAC, by the individual referred to in subparagraph (B) involved) to the person through records, designations, or other means of recognizing that a certain amount of money has been raised by the person.

(B) *Leadership PAC.* The term "leadership PAC" means, with respect to a candidate for election to Federal office or an

individual holding Federal office, a political committee that is directly or indirectly established, financed, maintained or controlled by the candidate or the individual but which is not an authorized committee of the candidate or individual and which is not affiliated with an authorized committee of the candidate or individual, except that such term does not include a political committee of a political party.

§ 441a. Limitations, contributions, and expenditures

(a) *Dollar limits on contributions.*

(1) Except as provided in subsection (i) and section 315A (2 U.S.C. § 441a-1), no person shall make contributions—

(C) to any other political committee (other than a committee described in subparagraph (D)) in any calendar year which, in the aggregate, exceed $5,000;

*****

(3) During the period which begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year, no individual may make contributions aggregating more than—

(A) $37,500, in the case of contributions to candidates and the authorized committees of candidates;

(B) $57,500, in the case of any other contributions, of which not more than $37,500 may be attributable to contributions to political committees which are not political committees of national political parties.

*****

§ 441d. Publication and distribution of statements and solicitations; charge for newspaper or magazine space

(a) Whenever a political committee makes a disbursement for the purpose of financing any communication through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising, or whenever any person makes a disbursement for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising or makes a disbursement for an electioneering communication (as defined in section 304(f)(3)) (2 U.S.C. § 434(f)(3)), such communication—

*****

(3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name and permanent street address, telephone number or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.

(d) *Additional requirements.*

****

(2) *Communications by others.* Any communication described in paragraph (3) of subsection (a) which is transmitted through radio or television shall include, in addition to the requirements of that paragraph, in a clearly spoken manner, the following audio statement: '_____ is responsible for the content of this advertising.' (with the blank to be filled in with the name of the political committee or other person paying for the communication and the name of any connected organization of the payor). If transmitted through television, the statement shall be conveyed by an unobscured, full-screen view of a representative of the political committee or other person making the statement, or by a representative of such political committee or other person in voice-over, and shall also appear in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least 4 seconds.

TITLE 11--FEDERAL ELECTIONS

CHAPTER I--FEDERAL ELECTION COMMISSION

PART 110_CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS--

Sec. 110.1 Contributions by persons other than Multicandidate political committees (2 U.S.C. 441a(a)(1)).

(n) Contributions to committees making independent expenditures. The limitations on contributions of this section also apply to contributions made to political committees making independent expenditures under 11 CFR Part 109.

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Sec. 110.5 Aggregate biennial contribution limitation for individuals (2 U.S.C. 441a(a)(3)).

(d) Independent expenditures. The bi-annual limitation on contributions in this section applies to contributions made to persons, including political committees, making independent expenditures under 11 CFR part 109.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SPEECHNOW.ORG, et al., Plaintiffs	:	Civil Action No. 08-248
v.	:	September 14, 2009
FEDERAL ELECTION COMMISSION, et al., Defendants	:	2:00 p.m.

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE JAMES ROBERTSON
UNITED STATES DISTRICT JUDGE

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. . . .

[Pages 2-10 omitted.]

evidence is a congeries of reports, opinions, scholarly papers, quotations, the kind of stuff that none of it would be received as evidence in a trial of any case. I mean, how am I supposed to make findings of fact on those propositions? Do you want to have a trial and bring all the experts in and let me decide who's right?

MR. DEELEY: I think Your Honor can do it just the way the *McConnell* court did it, just by reviewing the papers. I mean, courts have engaged in this repeatedly; the *McConnell* case, the *Colorado Republican* cases.

I think Your Honor can look at the evidence that's submitted by both sides, and where one side clearly has the upper hand on how the world has worked and how the world will work in the future, make findings of fact. Indeed, Your Honor's very preliminary injunction decision relied upon the fact that -- the importance of the soft money ban, and how that was a motivating factor that was leading people down the path that the plaintiffs are setting upon. And that's exactly the kind of thing that will be relevant to the DC Circuit as well as Your Honor's preliminary injunction decision.

THE COURT: I'll let you in on a little secret, counsel. The DC Circuit doesn't really care what I think about these things.

MR. DEELEY: Well, I'm not sure that's right, Your Honor. In other cases like this, the *Mariani* case, the

. . . .

[Page 12 omitted.]

would be used effectively and are appreciated by officeholders." How do you expect me to make that finding of fact, and on the basis of what evidence? In the first place, it's speculative.

MR. DEELEY: Your Honor, we've submitted evidence of a history of campaign financing that shows that exactly that type of thing occurs, through an expert witness, through people who have been involved in the system for decades, lobbyists, legislators. It's exactly the kind of evidence that the *McConnell* court found determinative; what was the record on how people had behaved in the past, was there a danger.

Your Honor also cited in your preamble a statement from the *McConnell* court about how people test the limits of the law. Well, how did the Supreme Court come to that decision? Evidence that was put into the record by the defendants, exactly the same type of thing; indeed, some of the very same declarations that we've put before Your Honor. And that's how the Supreme Court came to that decision.

THE COURT: Evidence put in by the defendants? Did the District Court make findings of fact on that evidence?

MR. DEELEY: Absolutely, Your Honor. It's almost a full volume of the F.Supp 2d. There are three different findings of fact by Judge Leon, Judge Kollar-Kotelly, and Judge Henderson.

THE COURT: Oh, yeah. But come on. That's three judges who took a year to do it. Are you kidding me? You think

I've got a year to do this?

MR. DEELEY: You have the luxury of doing it on your own, so you don't have to respond to anybody else's arguments.

And yeah, I think this type of case, where the way that federal elections could finance -- I mean, our position is that if plaintiffs prevail, there will be a new danger of corruption that Congress only recently tried to prevent, through unlimited contributions being used to fund federal election advertising. Absolutely that's the kind of case that demands Your Honor's attention, and dealing with what we admit are broad questions.

And even the special provision sort of contemplates that. I mean, a constitutional question gets certified straight to the DC Circuit. I mean, that doesn't indicate a sort of narrow focus on the plaintiffs; that provision in itself shows, and the Supreme Court, by having -- you know, despite no provision for fact finding in the statute, but by the Supreme Court mandating that the District Court do fact finding, that shows that this type of -- despite it being a broad question, that there really is supposed to be some sorting through of the record.

So that's our position. I think it really would be helpful to the DC Circuit. I understand Your Honor has reservations about wading through it all, and maybe a half measure is really just to try and isolate some of the broader questions where you really think one side or the other has

really made a strong showing. If you're worried about volume, our facts do have summary facts at the beginning of each section, so those could be done in a more concise way.

So that's our position on the scope of Your Honor's fact finding.

THE COURT: Okay. Well, I will tell you right now that I'm sticking with the scope that I announced at the opening of this. I do not conceive it to be either necessary to the decision, nor the proper province of a District Court, to make essentially legislative findings of fact on the basis of reports, scholarly articles, uncross-examined expert opinions, newspaper articles, and all the other material that has been cited in what's presented to me. And if the Court of Appeals -- if you want to put all that together in what will be the kind of ultimate Brandeis brief to the Court of Appeals, I'm sure that they would be thrilled to have it.

But what they're going to get from me is findings of fact that are, I won't call them bare bones, because even the scope of what I've indicated I will find is going to be 20, 25 pages. And believe me, I have my own view of the *McConnell* case. I'm not going to go farther than that. I do know that it took three judges the better part of a year to put those findings together; to what end remains to be seen, or remains on the scrap pile of history to be seen, I suppose.

And let's turn to the question of how we're going to

. . . .

[Pages 16-19 omitted.]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID KEATING, ET AL.,	)	
	)	
Plaintiffs,	)	**No. 09-5342**
	)	
v.	)	**CERTIFICATE OF**
	)	**SERVICE**
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant.	)	

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December 2009, I caused the Federal Election Commission's brief in *Keating, et al. v. FEC,* No. 09-5342, to be filed with the Clerk of the Court by the electronic CM/ECF System. I further certify that I also caused the requisite number of paper copies of the brief to be filed with the Clerk.

I also certify that on this date, I caused to be served two paper copies of the Commission's brief by next-day delivery service on the following counsel for the plaintiffs:

Steven M. Simpson, Esq.
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December 15, 2009

Vivien Clair

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