

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

<hr/>		)
SPEECHNOW.ORG,		)
DAVID KEATING,		)
FRED M. YOUNG, JR.,		)
EDWARD H. CRANE, III,		)
BRAD RUSSO, and		)
SCOTT BURKHARDT		)
		)
	Plaintiffs,	)
		)
v.		)
		)
FEDERAL ELECTION COMMISSION		)
		)
	Defendant.	)
<hr/>		)

Civil Case No. 1:08-cv-00248 (JR)

---

**PLAINTIFFS' FIRST MOTION IN LIMINE**

---

For the reasons set forth in more detail in the attached memorandum of points and authorities, Plaintiffs respectfully move for the exclusion of the following improper evidence:<sup>1</sup>

A. Expert reports and declarations of expert witness that were not timely disclosed to Plaintiffs:

1. Declaration of Chairman Ross Johnson (Def.'s Ex. 2);
2. Declaration of Robert Rozen (Def.'s Ex. 3);
3. Results of Nationwide Poll, Zogby International, Aug. 25, 2008 (Def.'s Ex. 96);
4. Declaration of P. Michael Calogero (Def.'s Ex. 97).

---

<sup>1</sup> Because much of the FEC's evidence is inadmissible on multiple grounds, some documents will appear in multiple categories.

B. Declarations and affidavits that were prepared for other cases, not this case:

1. Declaration of John McCain (cited in ¶ 309 but not included as an exhibit);
2. Declaration of Gerald Greenwald (cited in ¶ 143 but not included as an exhibit);
3. Declaration of Robert Shapiro (cited in ¶¶ 133, 339 but not included as an exhibit);
4. Declaration of Jonathan Krasno & Frank Sorauf (cited in ¶¶ 365-66 but not included as an exhibit);
5. Declaration of Rocky Pennington (Def.'s Ex. 33);
6. Declaration of Joe Lamson (Def.'s Ex. 34);
7. Declaration of Terry S. Beckett (Def.'s Ex. 35);
8. Declaration of Elaine Bloom (Def.'s Ex. 36);
9. Declaration of Senator Dale Bumpers (Def.'s Ex. 64);
10. Declaration of Alan K. Simpson (Def.'s Ex. 65);
11. Declaration of Elaine Bloom (Def.'s Ex. 66);<sup>2</sup>
12. Declaration of Pat Williams (Def.'s Ex. 67);
13. Declaration of Linda W. Chapin (Def.'s Ex. 68);
14. Affidavit of Robert Drake and survey results, dated March 28, 2008, attached to Second Renewed Joint Motion for Disqualification of Justice Benjamin (Def.'s Ex. 95);
15. Declaration of Robert Hickmott (Def.'s Ex. 114).

C. Fact witnesses that were not timely disclosed to Plaintiffs:

1. Declaration of Kevin Yowell (Def.'s Ex. 4);
2. Declaration of Michael Bright (Def.'s Ex. 6).

D. Documents that were not timely disclosed to Plaintiffs:

1. Annenberg Public Policy Center, *Electing the President, 2004: The Insiders' View* (Kathleen Hall Jamieson ed., 2005) (Def.'s Ex. 50);
2. Center for the Study of Elections and Democracy, *527s Had a Substantial Impact on the Ground and Air Wars in 2004, Will Return: Swift Boat Veterans 527 Played Historic Role* (Dec. 16, 2004) (Def.'s Ex. 51);
3. Testimony of Michael J. Malbin, Executive Director of the Campaign Finance Institute, before the Senate Committee on Rules and Administration (Mar. 8, 2005) (Def.'s Ex. 116);
4. Advisory Opinion Request 2008-10 (Def.'s Ex. 120);
5. Comment by SaysMe.tv on AOR 2008-10 (Def.'s Ex. 121);
6. Anthony Corrado and Katie Varney, *Party Money in the 2006 Elections* (Campaign Finance Institute, 2007) (Def.'s Ex. 135).

---

<sup>2</sup> Defendants have identified this declaration as both Ex. 36 and Ex. 66. Both are inadmissible.

## E. Exhibits offered for inadmissible hearsay:

1. Declaration of Rocky Pennington (Def.'s Ex. 33);
2. Declaration of Joe Lamson (Def.'s Ex. 34);
3. Declaration of Terry S. Beckett (Def.'s Ex. 35);
4. Declaration of Elaine Bloom (Def.'s Ex. 36);
5. FPPC, *Independent Expenditures: The Giant Gorilla in Campaign Finance*, June 2008 (Def.'s Ex. 47);
6. Michael Janofsky, *Advocacy Groups Spent Record Amount of 2004 Election*, N.Y. Times, Dec. 17, 2004 (Def.'s Ex. 48);
7. Annenberg Public Policy Center, *Electing the President, 2004: The Insiders' View* (Kathleen Hall Jamieson ed., 2005) (Def.'s Ex. 50);
8. Center for the Study of Elections and Democracy, *527s Had a Substantial Impact on the Ground and Air Wars in 2004, Will Return: Swift Boat Veterans 527 Played Historic Role* (Dec. 16, 2004) (Def.'s Ex. 51);
9. Tyler Whitley, *Group Glories in Kerry's Defeat; Swift Boat Veterans Pleaded Ad Campaign Paid Off, Says Local Organizer of Effort*, *Richmond Times Dispatch*, Nov. 8, 2004 (Def.'s Ex. 52);
10. Documents Produced by Alex Spanos (Def.'s Ex. 53);
11. Documents Produced by Peter B. Lewis (Def.'s Ex. 54);
12. *The Election After Reform, Money Politics and the Bipartisan Campaign Reform Act* (Michael J. Malbin ed. 2006) (excerpts: Chapter 5, Weissman & Hassan and Chapter 6, Boatright, Malbin, Rozell, and Wilcox) (Def.'s Ex. 55);
13. Jim Rutenberg, *Democrat's Ads in Tandem Provoke G.O.P.*, N.Y. Times, Mar. 27, 2004 (Def.'s Ex. 56);
14. David Rosenbaum, *Campaign Finance: The Hearings; Oilman Says He Paid For Access by Giving Democrats \$300,000*, N.Y. Times, Sept. 19, 1997 (Def.'s Ex. 57);
15. Stephen R. Weissman and Kara D. Ryan, *Soft Money in the 2006 Election and the Outlook for 2008/The Changing Nonprofits Landscape* (Campaign Finance Institute Report 2007) (Def.'s Ex. 58)
16. Kate Zernike and Jim Rutenberg, *Friendly Fire: the Birth of an Attack on Kerry*, N.Y. Times, Aug. 20, 2004 (Def.'s Ex. 60);
17. Glen Justice and Eric Lichtblau, *Bush Backers Donate Heavily to Veteran Ads*, N.Y. Times, Sept. 11, 2004 (Def.'s Ex. 61);
18. Glen Justice and Jim Rutenberg, *Advocacy Groups and Campaigns: An Uneasy Shuttle*, N.Y. Times, Sept. 8, 2004 (Def.'s Ex. 62);
19. Peter H. Stone, *Betting Man*, NAT'L J., May 10, 2008 (Def.'s Ex. 63);
20. Declaration of Senator Dale Bumpers (Def.'s Ex. 64);
21. Declaration of Alan K. Simpson (Def.'s Ex. 65);
22. Declaration of Elaine Bloom (Def.'s Ex. 66);
23. Declaration of Pat Williams (Def.'s Ex. 67);
24. Declaration of Linda W. Chapin (Def.'s Ex. 68);

25. Hillary Chabot, *'I Can't Be a Referee': Drops 2004 crusade against '527' attack ads*, Boston Herald, June 12, 2008 (Def.'s Ex. 69);
26. Jim Rutenberg and Michael Luo, *Interest Groups Step Up Efforts in a Tight Race*, N.Y. Times, Sept. 16, 2008 (Def.'s Ex. 70);
27. Marc Ambinder, *Quietly, Obama Campaign Calls in the Cavalry*, Sept. 8, 2008, available at [http://marcambinder.theatlantic.com/archives/2008/09/quietly\\_obama\\_campaign\\_flashes.php](http://marcambinder.theatlantic.com/archives/2008/09/quietly_obama_campaign_flashes.php) (Def.'s Ex. 71);
28. Sam Stein, *Source: Obama to Start Looking the Other Way on 527s*, Huffington Post, Aug. 11, 2008, available at [http://www.huffingtonpost.com/2008/08/11/sourceobama-to-start-loo\\_n\\_118240.html](http://www.huffingtonpost.com/2008/08/11/sourceobama-to-start-loo_n_118240.html) (Def.'s Ex. 72);
29. Greg Sargent, *Top Democrats Privately Urging Major Donors to Fund Outside Groups to Attack McCain*, Talking Points Memo, available at [http://tpmelectioncentral.talkingpointsmemo.com/2008/09/top\\_democrats\\_privately\\_urgening.php](http://tpmelectioncentral.talkingpointsmemo.com/2008/09/top_democrats_privately_urgening.php) (Def.'s Ex. 73);
30. Scott Helman, *Romney Seeks to be Alternative to McCain*, Boston Globe, Sept. 23, 2006, at A1 (Def.'s Ex. 74);
31. Steve Weissman and Margaret Sammon, *Fast Start for Soft Money Groups in 2008 Election[:] 527s Adapt to New Rules, 501(c)(4)s on the Upswing* (Report from the Campaign Finance Institute, Apr. 3, 2008), available at <http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=188> (Def.'s Ex. 75);
32. White House News Release, *Guest List for the State Dinner in Honor of Her Majesty Queen Elizabeth II and His Royal Highness the Prince Philip, Duke of Edinburgh*, May 7, 2007; *Statement on House and Senate Resolutions*, Aug. 2, 2005; *President Bush Delivers Commencement Address at Oklahoma State University*, May 6, 2006 (Def.'s Ex. 77);
33. John Fund, *Energy Independent: Maverick Oilman Boone Pickens Talks About Fuel Prices and His Love For Philanthropy*, Wall St. J., June 2, 2007 (Def.'s Ex. 78);
34. Mike Allen, *Clintons Join Crusaders in New York*, Wash. Post, June 27, 2005 (Def.'s Ex. 79);
35. AP, *Bush Withdraws "Swift Boat" Nominee*, CBS News, March 28, 2007 (Def.'s Ex. 81);
36. White House Press Release, *Personnel Announcement*, December 4, 2006 (Def.'s Ex. 82);
37. AP, *Bush Uses Recess Appointment Power to Install GOP Fundraiser Sam Fox as Ambassador*, Fox News, Apr. 4, 2007; Al Kamen, *Recess Appointments Granted to 'Swift Boat' Donor, 2 Other Nominees*, Wash. Post, Apr. 5, 2007; Susan Page and David Jackson, *Bush Bypasses Senate to Appoint 'Swift Boat' Donor*, USA Today, Apr. 5, 2007; Mary Ann Akers, *Biden Slams Sam Fox Recess Appointment*, Wash. Post, Apr. 5, 2007 (Def.'s Ex. 84);

38. Glenn R. Simpson, *Lender Lobbying Blitz Abetted Mortgage Mess*, Wall Street J., Dec. 31, 2007 (Def.'s Ex. 85);
39. White House Press Release, *Personnel Announcement*, July 28, 2005 (Def.'s Ex. 86);
40. Scott Reckard, *Ambassador Nominee's Company is Scrutinized*, L.A. Times, Aug. 7, 2005 (Def.'s Ex. 87);
41. Steven Nicely, *Tribe Again Pushes for KCK Bingo Hall*, Kansas City Star, Oct. 3, 1998 (Def.'s Ex. 88);
42. Rick Alm and Jim Sullinger, *Congressman Calls Lobbyist's Tactics Illegal – Lobbyist Argued Monday Over Whether Papers Faxed to the Congressman's Office Last Month Were A Veiled Attempt to Buy His Vote*, Kan. City Star, Oct. 6, 1998; Tim Carpenter, *Kansas Lawmaker Alleges Bribery Try on Gaming Issue*, Journal-World (Lawrence, Kan.), Oct. 8, 1998 (Def.'s Ex. 89);
43. Steven Walters and Patrick Marley, *Chvala Reaches Plea Deal*, Milwaukee J. Sentinel, Oct. 24, 2005 (Def.'s Ex. 91);
44. Steve Schultze and Richard P. Jones, *Chvala Charged With Extortion*, Milwaukee J. Sentinel, Oct. 18, 2002 (Def.'s Ex. 92);
45. Testimony of Derek Cressman, Government Watchdog Director of Common Cause, Hearing of the California Fair Political Practices Commission, Feb. 14, 2008 (Def.'s Ex. 93);
46. Chris Dickerson, *Company Asks Benjamin to Recuse Himself Again, This Time with Poll Numbers*, Legal Newslines.com, Mar. 8, 2008 (Def.'s Ex. 94);
47. Matthew Mosk, *Economic Downturn Sidelines Donors to '527' Groups*, Wash. Post, Oct. 19, 2008 (Def.'s Ex. 98);
48. Howard Jarvis Taxpayers Association, *About Us*, <http://www.hjta.org/aboutus> (visited Feb. 26, 2008) (Def.'s Ex. 102);
49. Frank Luntz, *Why Bush Won the Credibility Factor*, Wash. Times, Nov. 5, 2004 (Def.'s Ex. 106);
50. Jane Mayer, *The Money Man: Can George Soros's Millions Insure the Defeat of President Bush*, New Yorker, Oct. 18, 2004 (Def.'s Ex. 107);
51. Glen Justice, *Advocacy Group Reflect on Their Role in the Election*, N.Y. Times, Nov. 5, 2004 (Def.'s Ex. 111);
52. Jack Cashill, *Moore of the Same Old Stuff*, Ingram's, Nov. 1999 (Def.'s Ex. 112);
53. Declaration of Robert Hickmott (Def.'s Ex. 114);
54. Testimony of Michael J. Malbin, Executive Director of the Campaign Finance Institute, before the Senate Committee on Rules and Administration (Mar. 8, 2005) (Def.'s Ex. 116);
55. Lisa Vorderbrueggen, *Run a 'clean' campaign, get public funds*, The Contra Cost Times, January 6, 2006, at F4 (Def.'s Ex. 117);
56. Anthony Corrado and Katie Varney, *Party Money in the 2006 Elections* (Campaign Finance Institute, 2007) (Def.'s Ex. 135).

- F. Documents quoted for inadmissible hearsay but not included as exhibits (paragraph numbers refer to Defendant's Proposed Findings of Fact):
1. Richard N. Engstrom and Christopher Kenny, *The Effects of Independent Expenditures in Senate Elections*, Pol. Research Quarterly 55 (4):885-905 at 885 (2002) (¶ 80);
  2. Gary C. Jacobson, *The Effect of the AFL-CIO's "Voter Education" Campaigns on the 1996 House Elections*, 61 J. Pol. (1): 185-94 (¶ 81);
  3. Wilcox Interview with Tom Daschle (¶¶ 84, 154);
  4. David B. Magleby and Jonathan W. Tanner, *Interest Group Electioneering in the 2002 Congressional Elections*, in *The Last Hurrah? Soft Money and Issue Advocacy in the 2002 Congressional Elections* (David B. Magleby et al. eds., 2004) (¶¶ 92, 128);
  5. David B. Magleby et al., *The Morning After: The Lingering Effects of a Night Spent Dancing*, in *Dancing Without Partners: How Candidates, Parties, and Interest Groups Interact in the Presidential Campaign 25* (David B. Magleby et al., eds. 2007) (¶¶ 100, 102);
  6. David B. Magleby, *Conclusions and Implications for Future Research, in The Other Campaign: Soft Money and Issue Advocacy in the 2000 Congressional Elections* (David Magleby, ed. 2003) (¶ 117);
  7. David B. Magelby and J. Quin Monson, *Interest Groups in American Campaigns: the New Face of Electioneering*, in *The Last Hurrah? Soft Money and Issue Advocacy in the 2002 Congressional Elections* (David B. Magleby et al. eds., 2004) (¶ 118);
  8. Center for the Study of Elections and Democracy at Brigham Young University, transcript, release of *Dancing Without Partners*, Feb. 7, 2005 (¶¶ 119, 249);
  9. Richard Berke, *Aide Says Bush Will Do More to Marshal Religious Base*, N.Y. Times, Dec. 12, 2001 (¶ 126);
  10. David D. Kirkpatrick, *Bush Appeal to Churches Seeking Help Raises Doubts*, N.Y. Times, July 2, 2004, at A15 (¶ 126);
  11. Clyde Wilcox and Carin Larson, *Onward Christian Soldiers: The Christian Right in American Politics*, 3rd ed., 2006) (¶ 126);
  12. Interview with Paul Manafort by Jules Witcover, *The Buying of the President*, Center for Public Integrity, March 20, 2007 (¶ 127);
  13. Mark E. Warren, *What Does Corruption Mean in a Democracy?*, 48 Am. J. Pol. Sci. 328-43 (2004) (¶ 133);
  14. Dennis F. Thompson, *Ethics in Congress: From Individual to Institutional Corruption* (1995) (¶¶ 133, 315);
  15. Mark E. Warren, *Democracy and Deceit: Regulating Appearances of Corruption*, 50 Am. J. Pol. Sci. 160-74 (2006) (¶¶ 133, 315);
  16. Robert Y. Shapiro, *Public Attitudes Toward Campaign Finance Practice and Reform*, in *Inside the Campaign Finance Battle* (Anthony Corrado et al., eds., 2003) (Shapiro Declaration from McConnell) (¶¶ 133, 339);

17. Michael J. Malbin, *Rethinking the Campaign Finance Agenda*, 6 The Forum, Iss. 1 Art. 3, at 3 (2008) (¶ 134);
18. Peter L. Francia et al., *The Financiers of Congressional Elections: Investors, Ideologues, and Intimates* (2003) (¶ 137);
19. Gerald Greenwald, *Corporate America Contributes Soft Money Under Pressure*, in *Inside the Campaign Finance Battle* (Anthony Corrado et al., eds., 2003) (Greenwald Declaration from McConnell (paragraph 9)) (¶ 143);
20. Mark J. Rozell and Clyde Wilcox, *Interest Groups in American Campaigns: the New Face of Electioneering* (1999) (¶ 144);
21. Wilcox Interview with David Magleby (¶ 208);
22. Juliet Eiperin, *Small Business Group Sticks to One Side of Political Fence*, Wash. Post May 16, 2002 at A23 (¶ 218);
23. David B. Magleby and Kelly D. Patterson, *War Games: Issues and Resources in the Battle for Control of Congress*, in *Center for the Study of Elections and Democracy Report* (2007) (¶ 219);
24. Wilcox Interview with Michael Bailey (¶ 222);
25. Myra MacPherson, *The New Right Brigade*, Wash. Post, Aug. 10, 1980. (¶ 227);
26. David B. Magleby and J. Quin Monson, *The Consequences of Noncandidate Spending, and a Look to the Future*, in *The Last Hurrah? Soft Money and Issue Advocacy in the 2002 Congressional Elections* (David B. Magleby et al. eds., 2004) (¶ 228);
27. Press Release, FEC, 2004 Presidential Campaign Financial Activity Summary, Feb. 3, 2005 (¶ 247);
28. Thomas B. Edsall, *New Ways to Harness Soft Money in Works*, The Washington Post August 25, 2002, at A1 (¶ 251);
29. Facsimile transmission to Congressman Snowbarger (¶ 293);
30. McCain, John, *Congress is Mired in Corrupt Soft Money*, in *Inside the Campaign Finance Battle* (Anthony Corrado et al., eds., 2003) (McCain Declaration from McConnell (paragraph 8) (¶ 309);
31. Jonathan S. Krasno and Frank Sorauf, *Issue Advocacy and the Integrity of the Political Process*, in *Inside the Campaign Finance Battle* (Anthony Corrado et al. eds., 2003) (Krasno and Sorauf Declaration from McConnell) (¶¶ 365, 366).

Because the above-cited evidence is inadmissible, Plaintiffs further move that this court reject the proposed findings that rely on that evidence and are contained in the following paragraphs of Defendant's Proposed Findings of Fact: ¶¶ 80-81, 83-86, 88, 90-92, 99-105, 107-10, 112-15, 117-20, 125-30, 133-34, 137, 143-44, 146-47, 154-55, 157-59, 161, 167, 169-76, 178, 180, 182, 187-88, 192, 195, 198, 199-202, 204-19, 222, 224-

25, 227-28, 230-32, 234-36, 239, 243-44, 246-47, 249-51, 253, 255, 259-60, 262-63, 266, 268, 272, 275-76, 278-81, 288-97, 299-302, 306, 309-13, 315-16, 326, 328, 333-35, 339, 343-44, 353-57, 359, 365-66, 384, 386-90, 416, 437, and 445.

Pursuant to Local Rule 7(m), counsel for Plaintiffs has conferred with counsel for the FEC concerning this motion. The FEC opposes this motion.

Finally, Plaintiffs move that this Court reject any additional proposed findings of fact for which Plaintiffs have identified evidentiary problems in Plaintiffs' Response to Defendant's Proposed Findings of Fact.

Dated: November 21, 2008.

Respectfully submitted,

/s/ Steven M. Simpson

William H. Mellor (DC Bar No. 462072)

Steven M. Simpson (DC Bar No. 462553)

Robert Gall (DC Bar No. 482476)

Paul M. Sherman (DC Bar No. 978663)

INSTITUTE FOR JUSTICE

901 N. Glebe Road, Suite 900

Arlington, VA 22203

Tel: (703) 682-9320

Fax: (703) 682-9321

Email: [ssimpson@ij.org](mailto:ssimpson@ij.org)

Stephen M. Hoersting\*

Bradley A. Smith\*

CENTER FOR COMPETITIVE POLITICS

124 W. Street South, Suite 201

Alexandria, VA 22314

Tel: (703) 894-6800

Email: [shoersting@campaignfreedom.org](mailto:shoersting@campaignfreedom.org),

[BSmith@law.capital.edu](mailto:BSmith@law.capital.edu)

*Attorneys for Plaintiffs*

*\*Admitted Pro Hac Vice*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 21<sup>st</sup> Day of November, 2008, a true and correct copy of PLAINTIFFS' FIRST MOTION IN LIMINE was electronically filed using the court's ECF system and sent via the ECF electronic notification system to the following counsel of record:

Robert W. Bonham, III  
David B. Kolker  
Steve N. Hajjar  
Kevin Deeley  
FEDERAL ELECTION COMMISSION  
999 E. Street, N.W.  
Washington, DC 20463

/s/ Steven M. Simpson

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

<hr/>		)	
SPEECHNOW.ORG,		)	
DAVID KEATING,		)	
FRED M. YOUNG, JR.,		)	
EDWARD H. CRANE, III,		)	
BRAD RUSSO, and		)	
SCOTT BURKHARDT		)	
		)	
	Plaintiffs,	)	
		)	
v.		)	Civil Case No. 1:08-cv-00248 (JR)
		)	
FEDERAL ELECTION COMMISSION		)	
		)	
	Defendant.	)	
<hr/>		)	

---

**MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF PLAINTIFFS' FIRST MOTION IN LIMINE**

---

Plaintiffs respectfully ask this Court to exclude several pieces of evidence presented by the FEC in its Proposed Findings of Fact. This evidence includes: (1) declarations of experts who did not prepare expert reports and who the FEC failed to disclose pursuant to Fed. R. Civ. P. 26(a)(2); (2) declarations of witnesses from other cases; (3) declarations of witnesses that the FEC failed to disclose in a timely manner and documents that it never produced; (4) documents consisting of inadmissible hearsay; and (5) proposed factual findings that are inadmissible for various evidentiary reasons. (In a separate motion filed today, Plaintiffs ask for the exclusion of the unsworn expert report of Professor Clyde Wilcox.)

Throughout the discovery process, the FEC has simply ignored the agreed-upon discovery deadlines. As discussed below, even though it knew about experts and other witnesses on whose testimony it wished to rely well in advance of discovery deadlines—such as the deadline for expert disclosures—the FEC held back that information until after these deadlines passed. The FEC has further abused the discovery and evidentiary rules by relying on dozens of documents that plainly contain multiple layers of hearsay, relying on documents that it never produced to Plaintiffs or does not provide to this Court, asking third parties not to supply copies of signed declarations that were responsive to Plaintiffs’ subpoenas before those parties’ depositions, and failing to obtain or produce expert reports from several of its expert witnesses. In short, the FEC has treated the Federal Rules of Civil Procedure and Evidence as mere suggestions it is free to disregard. Unless the FEC is to profit by this sandbagging and flagrant disregard of the rules, this Court should exclude all of the evidence discussed below and decline to adopt the FEC’s proposed findings of fact relying on that evidence.

**I. The Declarations of P. Michael Calogero, Robert Rozen, and Ross Johnson Should Be Excluded Because They Are Either Improper Expert Testimony or Not Based on Personal Knowledge**

The FEC has attempted to introduce into evidence three separate declarations that should automatically be excluded under Rule 26(a)(2) of the Federal Rules of Civil Procedure. The first is the Declaration of P. Michael Calogero of Zogby International and a related public-opinion poll that the FEC commissioned. The second is the Declaration of Robert Rozen, who offers his expert opinion on the effect that campaign contributions have on the legislative process. The third is the declaration of Ross Johnson, chairman of the California Fair Political Practices Commission, who offers his expert opinion about the impact of independent expenditures in California.

For the reasons more fully described below, all three declarations offer expert—not lay—testimony. Thus the witnesses’ identities, along with expert reports produced by those witnesses, should have been provided to Plaintiffs under Rule 26(a)(2) by August 15. But none of these witnesses were identified by that time. Indeed, Rozen was not identified until after the close of discovery, and none of these witnesses were identified until well after expert rebuttal reports were due. Moreover, none of these witnesses provided an expert report. The Federal Rules of Civil Procedure require that before a party submits expert testimony into evidence, she must first disclose it to the opposing party according to the strictures of Rule 26(a)(2). Such disclosures must be complete, i.e., they *must* “be accompanied by a written report—prepared and signed by the witness”—and they must be timely. The FEC agreed that all expert disclosures would be made by August 15 and that all rebuttal disclosures would be made by September 15. Instead of following Rule 26(a)(2) and the agreed upon discovery schedule, the FEC delayed its disclosures until Plaintiffs were left with no time to respond. As explained below, exclusion in these circumstances is automatic.

**A. The FEC Identified Only One Expert Witness Before the August 15 Deadline, and Identified No Rebuttal Witnesses.**

On June 6, 2008, and pursuant to Local Rule 16.3, the parties submitted to this court a Joint Scheduling Report, based on a schedule on which the parties agreed in late May. Paragraph nine of that report stated, in relevant part:

Whether the requirements of exchange of expert witness reports and information pursuant to Rule 26(a)(2), F.R.Civ.P., should be modified, and whether and when depositions of experts should occur.

The parties agree to the following schedule for expert disclosures:

Experts identified and reports served pursuant to Rule 26(a)(2) by **August 15, 2008**

Rebuttal experts identified and reports served by **September 15, 2008**

Declaration of Robert Gall in Support of Plaintiffs' First Motion in Limine (hereinafter, "Gall Decl."), Ex. GG, Joint Scheduling Report at 5.

In addition, the parties agreed that all fact discovery was to be completed by September 26, 2008; all document requests, interrogatories, and requests for production were to be served by August 26, 2008. *Id.* at 4. While the parties subsequently agreed to modifications of the briefing schedule, the deadlines for both expert disclosures and discovery as a whole have remained unchanged.

Operating under this schedule, Plaintiffs retained two expert witnesses to testify on their behalf: Jeffrey Milyo, a Professor of Economics at the University of Missouri, and Rodney Smith, a long-time political fundraiser and author. On August 15, 2008, Plaintiffs served the FEC with disclosures and expert reports for both witnesses. Gall Decl., Ex. A, Email from Steven M. Simpson to FEC (Aug. 15, 2008, 05:45 PM). On the same day, Plaintiffs received from the FEC a disclosure and expert report for Clyde Wilcox, a Professor of Political Science at Georgetown University. Gall Decl., Ex. B, Email from Steve Hajjar to Steven M. Simpson (Aug. 15, 2008, 04:58 PM), and attached Expert Witness Designation. Plaintiffs timely produced a rebuttal report by Professor Milyo regarding Professor Wilcox's report on September 15, 2008; the FEC identified no expert rebuttal witnesses and produced no rebuttal reports. Gall Decl., Ex. C, Email from Steven M. Simpson to FEC (Sept. 15, 2008, 08:26 PM). Thus, the FEC identified only one expert witness, Professor Wilcox, and produced only one expert report—his report of August 15, 2008. Accordingly, just as the only experts upon whose testimony Plaintiffs may rely for its proposed findings of fact are Professor Milyo and Rodney Smith, the only expert upon whose testimony the FEC may rely is Professor Wilcox.

**B. The Testimony of Calogero, Rozen, and Johnson Qualifies as Expert Testimony and Was Not Disclosed as Required by the Federal Rules of Civil Procedure**

Despite having properly identified only one expert witness, the FEC has subsequently relied on the expert testimony of three additional witnesses who were not timely disclosed and who did not submit expert reports:

**1. Expert Testimony of Calogero and the Zogby Survey**

On the evening of September 17, 2008—over one month after the expert disclosure deadline of August 15—the FEC sent Plaintiffs an email with an attachment entitled “SpeechNow—Supplement to Initial Disclosures (Calogero).” Gall Decl., Ex. D, Email from Steve Hajjar to Robert Gall and attached Supplement to Initial Disclosures (Sept. 17, 2008, 05:36 PM). In that Supplement, the FEC said that it was disclosing the identity of a Mr. P. Michael Calogero of Zogby International (“Zogby”) along with the results of a survey that the FEC had commissioned from the polling firm.

The admissibility of survey data is a question courts decide by applying the principles of Federal Rules of Evidence 702 and 703. *See* Fed. R. Evid. 703, 1972 advisory committee’s notes (“The rule also offers a more satisfactory basis for ruling upon the admissibility of public opinion poll evidence.”). Surveys, by definition, do not reflect the personal knowledge of the witness, and are developed using the witness’s specialized knowledge. Therefore, surveys must be presented through expert witnesses. *Simon Prop. Group L.P. v. mySimon, Inc.*, 104 F. Supp. 2d 1033, 1039 (S.D. Ind. 2000) (“Consumer survey results must be presented through expert witnesses.”). *Accord Indianapolis Colts, Inc. v. Metro. Baltimore Football Club Ltd. P’ship*, 34 F.3d 410, 414-15 (7th Cir. 1994) (“[T]he parties to trademark disputes frequently . . . hire professionals in marketing or applied statistics to conduct surveys of consumers . . . [though the]

battle of the experts that ensues is frequently unedifying.”) (citations omitted); *Bank of Utah v. Commercial Sec. Bank*, 369 F.2d 19, 27 n.8 (10th Cir. 1966) (“[Survey proponents] should be required to show that: the persons conducting the survey were recognized experts . . . .”) (quoting Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 351, 429 (Mar. 1960)). Courts, recognizing that survey evidence falls under the scope of Rules of Evidence 702 and 703, regularly perform their gatekeeper function under *Daubert* and *Kumho* to decide if an expert may rely on survey evidence when testifying. *See, e.g., Johnson v. Big Lots Stores, Inc.*, No. 04-3201, 2008 U.S. Dist. LEXIS 35316, at \*15 (E.D. La. Apr. 29, 2008) (“Courts have long applied the basic *Daubert* standard to survey evidence . . . .”); *Constellation Brands, Inc. v. Arbor Hill Assocs., Inc.*, 535 F. Supp. 2d 347, 367-68 (W.D.N.Y. 2008) (“While courts in the Second Circuit rely mainly on Rule 403 to exclude unreliable surveys, we note that Rule 702 is clearly applicable as well, because the result of a survey is essentially expert testimony . . . .”) (quoting *Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 580-81 (S.D.N.Y. 2007) (internal quotation marks omitted)); *Avocados Plus, Inc. v. Johanns*, No. 02-1798, 2007 U.S. Dist. LEXIS 4572, at \*9-\*11 (D.D.C. Jan. 23, 2007) (refusing to allow an Internet survey to serve as the basis for an expert opinion under FRE 702).

Mr. Calogero drafted a declaration to introduce the results of the Zogby survey, evidence that courts are to construe under Rules 702 and 703 of the Federal Rules of Evidence. Accordingly, he is an expert witness. This conclusion is further bolstered by the one expert witness that the Federal Election Commission *did* properly disclose to Plaintiffs, Professor Clyde Wilcox. In his deposition, Professor Wilcox commented that one *must* be an expert to design and interpret a methodologically sound opinion survey. *See* FEC Ex. 18, Wilcox Dep. at 273:10-13 (“Q. Okay. It's fair to say that just anybody couldn't conduct a survey. You actually

need expertise to do so, right? A. Yes, I would agree with that.”); *see also id.* at 272:8-13 (“Q. Okay. Zogby, though, I take it is a reputable firm, correct? A. Yes. Q. It’s fair to say they’re experts in doing polling? A. Yes.”).

Because Mr. Calogero is an expert, the FEC should have disclosed his identity to the Plaintiffs by August 15, 2008, along with an expert report that contained “the data or other information considered by the witness in forming [his opinions],” i.e., the survey results. Fed. R. Civ. P. 26(a)(2)(B)(ii). It did not do so and, indeed, could not have done so, because the FEC did not even *submit* its draft questions to Zogby until August 18th. Gall Decl., E, Email from Steve Hajjar to Cheryl Korn (Aug. 18, 2008, 05:03 PM). This delay is particularly inexplicable because the FEC’s expert, Professor Wilcox, first suggested to the FEC’s counsel that it commission a survey on June 12, and provided them with sample questions; the FEC contacted Zogby about putting together the poll on July 29, 2008. Gall Decl., Ex. F, Email from Clyde Wilcox to Kevin Deeley (June 12, 2008, 05:23 PM); Ex. G, Email from Kimberly Wyborski to Steve Hajjar (July 30, 2008, 03:42 PM) (“Thanks for calling yesterday.”). Zogby informed the FEC that they could enter the questions into a national poll running on Friday, August 1, 2008, with results provided to the FEC by August 4. Gall Decl., Ex. U, Email from Kimberly Wyborski to Steve Hajjar (July 30, 2008, 04:25 PM).

Instead, the FEC waited. Over the next several weeks, through August 20, the FEC had numerous communications with representatives of Zogby. Gall Decl., Ex. H, Emails between FEC and Zogby (Aug. 4-20, 2008). At just before 3 p.m. on August 25, Zogby sent to the FEC its “summary” of the survey results.<sup>1</sup> Gall Decl., Ex. I, Email from Cheryl Korn to Steve Hajjar (Aug. 25, 2008, 2:51 PM). Just after 9:30 p.m. on that same day, the FEC submitted its answers

---

<sup>1</sup> This summary is not an expert report because (among other reasons) it was not prepared and signed by Mr. Calogero as required by Rule 26(a)(2)(B).

to Plaintiffs' First Set of Discovery Requests. Gall Decl., Ex. J, Email from Robert Bonham to Counsel for Plaintiffs (Aug. 25, 2008, 9:41 PM). Despite the fact that the survey materials were responsive to those requests,<sup>2</sup> the FEC did not supply them or identify Mr. Calogero or anyone else at Zogby. Instead, the FEC waited until two days after rebuttal reports were due—i.e., the date for Plaintiffs to produce a report rebutting the results of the survey had it been timely disclosed—to identify Mr. Calogero and produce the survey. Gall Decl., Ex. D.

There is no excuse for the FEC's failure to either properly designate Mr. Calogero (or someone else at Zogby) as an expert, produce a timely expert report, or turn over responsive documents that would have alerted Plaintiffs to the existence of this survey. If the FEC simply had insufficient time under the discovery schedule—a dubious proposition—they should have approached Plaintiffs and this Court and asked for an extension of the expert disclosure deadline. But the FEC failed to do this and instead sat on the survey results for almost a month, waiting until after the passage of the deadline for the submission of rebuttal reports. As explained more fully below, the mandatory remedy for the FEC's deliberate disregard for Rule 26(a)(2) is the exclusion of the Calogero Declaration and the survey results.

## **2. Expert Testimony of Rozen and Johnson**

On October 1, 2008, almost a week after discovery had closed in this case, Plaintiffs received an email from the FEC identifying Mr. Robert Rozen, a partner at the D.C. lobbying firm Washington Council Ernst & Young, who the FEC said had “discoverable information regarding campaign financing and its effects on candidates, Members of Congress, and public policy.” Gall Decl., Ex. K, Email from Kevin Deeley to Robert Gall and attachment, Federal

---

<sup>2</sup> Plaintiffs asked for all documents concerning whether independent expenditures pose a risk of corruption and any documents concerning legislative facts. They also asked for the names of all individuals likely to possess legislative facts pertaining to the issues in this case. Gall Decl., Ex. BB, Pls.' First Set of Disc. Reqs., Doc. Reqs. 3 & 6, Interrog. No. 1).

Election Commission's Fifth Supplemental Disclosures (Oct. 1, 2008, 10:02 PM). The FEC did not provide Plaintiffs with an expert report from this new witness, nor did it disclose any other information about him that Rule 26(a)(2)(B) requires. In response, Plaintiffs sought to subpoena documents from Mr. Rozen, including "all documents concerning or referring to this lawsuit" and "any documents related to your possible testimony in this case," that would let Plaintiffs know what opinions Mr. Rozen would offer in his testimony. Gall Decl., Ex. L, Subpoena Duces Tecum of Robert Rozen and attachment (Oct. 7, 2008). The FEC objected to this subpoena to the extent it sought any drafts of declarations that were in Mr. Rozen's possession. Gall Decl., Ex. M, FEC's Objections to Pls.' Subpoena Duces Tecum to Robert Rozen (Oct. 14, 2008). Mr. Rozen subsequently claimed to have no responsive documents beyond drafts of his declaration, but refused to produce these, citing the FEC's objection. Gall Decl., Ex. N, Email from Robert Rozen to Paul Sherman (Oct. 16, 2008, 11:13 AM) ("I have in my possession draft copies of declarations but I am not producing them at the FEC's request."). As a result, Plaintiffs only learned the substance of Mr. Rozen's testimony once they received the Federal Election Commission's Proposed Findings of Fact on October 27, 2008.<sup>3</sup> See Exhibit 3 to Federal Election Commission Proposed Findings of Fact (hereinafter, Rozen Decl.).

Similarly, after the close of business on the day that discovery in this case ended—September 26, 2008—the FEC sent Plaintiffs a supplement to its initial disclosures that listed Ross Johnson as a potential witness regarding a report that his commission, the California Fair Political Practices Commission (FPPC), had published in May of 2008 called *Independent Expenditures: The Giant Gorilla in Campaign Finance*. Gall Decl., Ex. O, Email from Kevin Deeley to Counsel for Plaintiffs and attached Supplement to Initial Disclosures (Sept. 26, 2008,

---

<sup>3</sup> Because nothing in Mr. Rozen's declaration was offered in rebuttal to the expert reports of Plaintiffs' witnesses, Mr. Rozen should have been disclosed as an expert on August 15. The same is true for Mr. Johnson.

07:32 PM). Because Plaintiffs had already scheduled a 30(b)(6) deposition of the FPPC for October 1, Plaintiffs deposed Mr. Johnson both as an individual and a 30(b)(6) representative. This deposition was hampered, however, by the FEC's refusal to produce Mr. Johnson's signed declaration in advance of the deposition, and by its request that the FPPC not turn a copy over to Plaintiffs even though Plaintiffs had served a subpoena calling for its production. Gall Decl., Ex. P, Subpoena Duces Tecum of Cal. Fair Political Practices Comm'n (Sept. 19, 2008); Ex. Q, FEC's Objections to Pls' Subpoena Duces Tecum to the Cal. Fair Political Practices Comm'n (Sept. 25, 2008); Ex. R, Letter from Scott Hallabrin to Steven M. Simpson (Sept. 25, 2008). The FEC clearly intended to use the signed declaration as evidence that it would eventually disclose to Plaintiffs and this Court. But whenever Plaintiffs' counsel asked about the declaration, counsel for the FEC asked Mr. Johnson not to disclose its specific contents on the ground that it constituted the work-product of the FEC.<sup>4</sup> See, e.g. FEC Ex. 10, Deposition Transcript of Ross Johnson at 19:21-20:11, 21:8-12. Mr. Johnson's attorney stated that he would honor the FEC's objection against disclosing a copy to Plaintiffs. *Id.* at 36:23-37:7. Plaintiffs' counsel could thus not ask Mr. Johnson questions based on their review of the declaration's contents. Plaintiffs' counsel did elicit answers from Mr. Johnson about the declaration, but his recollection of its contents was lacking in detail and woefully incomplete—understandable since the declaration is ten pages long. (Regardless, even complete recollection is not a substitute for compliance with the Federal Rules of Civil Procedure). Thus, Plaintiffs did not learn exactly what was in the declaration until the FEC filed its proposed findings of fact and exhibits on October 28.

---

<sup>4</sup> The FEC took the position that the signed declaration of its witnesses are its work product, even though it planned to use those declaration as evidence. Gall Decl., Ex. S, Email from Steve Hajjar to Steven M. Simpson (Sept. 25, 2008, 10:21 AM). The FEC also requested that Justice Larry Starcher of the West Virginia Supreme Court not to provide his signed declaration before his deposition. Gall Decl., Ex. T, FEC's Objections to Pls.' Subpoena Duces Tecum of Justice Larry V. Starcher (Sept. 25, 2008); FEC Ex. 16, Deposition Testimony of Justice Larry Starcher, taken Sept. 26, 2008, at 55:19-56:7.

The opinions offered in the declarations of Messrs. Rozen and Johnson are those of experts. A long-time political operative, Mr. Rozen's testimony describes in a general manner his belief as to why different individuals and political action committees make contributions, FEC Ex. 3, Rozen Decl. at ¶ 6, his belief that contributions affect the relationship between legislators and contributors, *Id.* at ¶¶ 7-8, his belief that groups and individuals gave soft money contributions for access purposes, *Id.* at ¶ 10, and his belief that allowing independent-expenditure groups like SpeechNow.org to operate would give rise to the same problems Congress addressed with the BCRA. *Id.* at ¶¶ 15-17. Much of Mr. Rozen's declaration was adopted from similar testimony he provided in *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003). Compare FEC Ex. 3, with Gall Decl., Ex. V, Declaration of Robert Rozen from *McConnell v. FEC*. For his own part, Mr. Johnson opines on how "powerful special interests are putting their money into independent expenditures because they can no longer make unlimited direct contributions," FEC Ex. 2, Johnson Decl. at ¶ 6, how "[i]ndependent expenditures can also be very effective," *id.* at ¶ 9, how a large contribution to an independent expenditure committee "has a much greater likelihood of creating the appearance of corruption," *id.*, and how "it would be unreasonable to conclude that direct contributions are the only way to gain undue influence or that only direct contributions pose a danger of corruption." *Id.* at ¶ 11.

Any fair reading of Messrs. Rozen and Johnson's declarations forces one to conclude that they are both expert testimony.<sup>5</sup> Except for experts, who are subject to the provisions of Rule

---

<sup>5</sup> The Plaintiffs think the only plausible way to view the Rozen and Johnson Declarations is as expert witness testimony that the FEC had to disclose under Rule 26(a)(2)(B). However, Fed. R. Civ. P. 26(a)(1)(A)(i) imposed on the FEC a separate duty to disclose its lay witnesses in its initial disclosures, which it submitted on June 6, 2008. Gall Decl., Ex. W, Def. FEC's Initial Disclosures (June 6, 2008). Furthermore, it was under a continuing duty to amend and update its disclosures in a timely manner if it "learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(1)(A).

703, a witness must have personal knowledge of the matters to which he or she testifies. Fed. R. Evid. 602. A lay witness may not proffer his opinion to the extent it is based on “scientific, technical, or specialized knowledge within the scope of Rule 702.” Fed. R. Evid. 701. But the statements Messrs. Rozen and Johnson both put forward are not simply specific facts learned during their political careers. Instead, both declarations are full of generalizations, suppositions, and opinions that, to the extent they have any basis at all, find that basis in the specialized knowledge and training that Messrs. Rozen and Johnson possess.

Were Mr. Rozen a lay witness, opinions such as “[l]oosening the federal campaign finance rules so that groups devoted to independent candidate advocacy could raise money in unlimited amounts would foster most of the pernicious effects of the soft money system,” FEC Ex. 3, Rozen Decl. at ¶ 16, would be inadmissible. Likewise, opinions such as “[i]ndependent expenditures can determine the outcome of elections and create the appearance of corruption or of undue influence on candidates” by Chairman Johnson, FEC Ex. 2, Johnson Decl. at ¶ 13, can only be proper if he is considered an expert witness. While such opinions may arguably be “based on the perception of the witness,” they rely on the application of “specialized knowledge.” They are not lay opinion, which is an opinion that could be reached by any ordinary person. *See* Fed. R. Evid. 701, 2000 advisory committee’s notes (amending Rule 701 to “eliminate the risk that the reliability requirements ... will be evaded ... [by] proffering an expert in lay witness clothing”). The FEC certainly did not procure the testimony of Messrs. Rozen and Johnson because they are ordinary men with ordinary knowledge; it sought them out for the

---

Here, the FEC waited until after the close of business on the day discovery ended before they chose to disclose the fact that they may seek the testimony of Mr. Johnson in this matter. For Mr. Rozen, disclosure did not occur until five days later, on October 1, 2008. But as discussed *infra*, the FEC had long known about both witnesses, and it strains credulity to suggest that it was not until these late dates that the FEC first learned that these two witnesses likely had discoverable information that it “may use to support its claims or defenses.” Fed. R. Civ. P. 26(a)(1)(A)(i). Accordingly, exclusion is appropriate regardless of whether the Rozen and Johnson Declarations are characterized as expert or lay opinion.

same reason that they sought out Professor Wilcox: their specialized knowledge and experience. The only way that such statements can be considered by the Court (wrong though Plaintiffs think they are) is because both Messrs. Rozen and Johnson bring with them specialized knowledge and experience regarding political campaigns and fundraising that is not available to the public at large. Indeed, Plaintiffs would suggest that the testimony Mr. Rozen and Mr. Johnson offer is little different in type from that of Rodney Smith, who testified as to the difficulty of raising funds under the hard-money contribution limits. All three declarants discuss how changes in campaign-finance law have affected the nature of political giving. And all three, in making those statements, rely on the specialized knowledge that they gained through their employment experience.

But that is where the similarities end. The Plaintiffs made a timely disclosure of Mr. Smith, had him draft an expert report, and made him available for a deposition. The FEC, on the other hand, pursued a different path that diverged sharply from Fed. R. Civ. P. 26(a)(2) and the agreed discovery schedule. Rather than make a timely disclosure to Plaintiffs, the FEC only disclosed to Plaintiffs that it may have Chairman Johnson serve as a witness after the close of business on September 26, 2008 (the day discovery in this case ended). With Mr. Rozen, the FEC's disclosure failure was even more egregious, as it only deigned to let Plaintiffs know of his existence on October 1, 2008, five days *after* the discovery deadline had passed. And, as noted above, the FEC did not provide expert reports from Messrs. Johnson and Rozen and made sure that Plaintiffs did not get copies of their signed declarations during discovery.

As with the Calogero declaration and Zogby survey, discussed above, there is no excuse for the FEC's failure to timely identify these witnesses and produce expert reports. Mr. Rozen was well-known to the FEC and had submitted declarations in their support in two previous

Supreme Court cases. Gall Decl., Ex. V, Declaration of Robert Rozen in *McConnell* (and incorporating his testimony in *FEC v. Colo. Republican Fed. Campaign Comm.*). The FEC had also known about the FPPC report for months and, in fact, included it in its initial disclosures of June 6, 2008. Gall Decl., Ex. W. Furthermore, e-mails between the FEC and representatives of the Commission go back as far as April of this year. Gall Decl., Ex. X, Email from Graham Wilson to Counsel for Plaintiffs (Sept. 30, 2008, 08:24 PM), and attached emails between Graham Wilson and Roman Porter (Apr. 21-25, 2008).<sup>6</sup> The FEC clearly knew of Messrs. Rozen and Johnson's existence and could have thus designated them as experts by August 15, 2008. But it did not do that. Instead, the FEC waited to send Chairman Johnson a draft declaration until September 17, 2008, two days after the deadline for submitting *rebuttal* expert reports. Gall Decl., Ex. Y, Email from Graham Wilson to Scott Hallabrin (Sept. 17, 2008, 08:24 PM). That declaration was returned to the FEC on September 30, one day before the 30(b)(6) deposition of the California Fair Political Practices Commission was scheduled. Gall Decl., Ex. Z, Email from Scott Hallabrin to Graham Wilson (Sept. 30, 2008, 01:23 PM). Similarly, the FEC did not send a draft declaration to Mr. Rozen until October 1, 2008. Gall Decl., Ex. AA, Email from Kevin Deeley to Robert Rozen (Oct. 1, 2008, 10:38 AM).

The FEC's attempt to ambush Plaintiffs with undisclosed expert witnesses is clearly forbidden by Fed. R. Civ. P. 26(a)(2). "By channeling testimony that is actually expert testimony to Rule 702, the amendment [to Rule 701] also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed. R. Civ. P. 26 . . . by simply calling an

---

<sup>6</sup> The e-mails between the FEC and the representative of the Commission were not produced by the FEC until 6:47 PM on the eve of the 30(b)(6) deposition of the California Fair Political Practices Commission. Those e-mails were clearly responsive to Plaintiffs' Requests for Production 2, 3, and 5 and thus should have been produced by the FEC along with its responses to Plaintiffs' First Set of Discovery Requests on August 25. Gall Decl., Ex. BB. At a minimum, Defendant's had a duty to supplement their initial disclosures to reveal the identity of Roman Porter, the FPPC employee with whom they communicated, as he clearly had discoverable information relevant to the case. Gall Decl., Ex. X, Email from Roman Porter to Graham Wilson (Apr. 21, 2008, 6:47 PM) and attachments.

expert witness in the guise of a layperson.” Fed. R. Evid. 701, 2000 advisory committee’s notes; *see also Palmer v. Rice*, No. 76-1439, 2005 U.S. Dist. LEXIS 10123, at \*14 (D.D.C. May 27, 2005). As explained more fully below, the mandatory remedy for the FEC’s deliberate disregard for Rule 26(a)(2) is the exclusion of the Rozen and Johnson Declarations.

**C. The FEC’s Failure to Properly Disclose Either the Zogby Survey or the Declarations of Calogero, Rozen, and Johnson Mandates “Automatic” Exclusion of This Evidence**

The FEC’s failures with regard to the Calogero Declaration, the related survey from Zogby International, and the Rozen and Johnson Declarations are without justification or excuse. It knew about all three witnesses well in advance of the disclosure deadline but chose to do nothing despite the prejudice it would work on the Plaintiffs. The only sanction that is sufficient to address the FEC’s willful and flagrant failure to act is exclusion of the offending expert evidence and the proffered facts that rely upon them. *See, e.g., W. Union Holdings, Inc. v. E. Union, Inc.*, No. 1:06-CV-01408-RWS, 2007 U.S. Dist. LEXIS 66281, at \*32-33 n.9 (N.D. Ga. Sept. 7, 2007) (“Defendants did retain an expert who conducted a survey, but since the Defendants never identified any survey expert prior to the close of discovery, any evidence offered through him is inadmissible.”).

Under the Federal Rules of Civil Procedure, a party’s failure to “to provide information or identify a witness as required by Rule 26(a) or (e)” means that “the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1). D.C. District Courts have held that, unless the offending party can show that its failure was substantially justified or harmless, the Federal Rule requires “automatic” exclusion. *Elion v. Jackson*, 544 F. Supp. 2d 1, 6 (D.D.C. 2008) (quoting *NutraSweet Co. v. X-L Eng’g Co.*, 227 F.3d 776, 785-86 (7th Cir.

2000)); *Coles v. Perry*, 217 F.R.D. 1, 5 (D.D.C. 2003) (“I must invoke the automatic sanction required by Fed. R. Civ. P. 37(c)(1) of excluding the evidence unless defendant establishes that the failure to disclose the document or the witness was harmless”). Other jurisdictions have held likewise. *See, e.g., Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001) (describing exclusion as a “self-executing, automatic sanction to provide[ ] a strong inducement for disclosure of material”) (internal quotation marks omitted); *Ciomber v. Coop. Plus, Inc.*, 527 F.3d 635, 641 (7th Cir. 2008); *Lohnes v. Level 3 Communs., Inc.*, 272 F.3d 49, 60 (1st Cir. 2001) (“[T]he required sanction in the ordinary case is mandatory preclusion.”) (internal quotation marks omitted); *Cook v. Rockwell Int’l Corp.*, 233 F.R.D. 598, 599 (D. Colo. 2005) (“This sanction [under Rule 37(c)(1)] is mandatory . . .”).

It is true that Rule 37 has “a narrow escape hatch.” *Lohnes*, 272 F.3d at 60, that lets a party escape exclusion when he can show substantial justification or harmlessness. But the burden is on the party facing sanctions to make that showing. *Elion*, 544 F. Supp. 2d at 6. It is a burden that the FEC simply cannot meet.

#### **1. The FEC’s Failures to Disclose Were Not Substantially Justified**

The FEC chose to dally in their disclosures, often updating them months after they learned about those witnesses whose testimony they might use to make their case. With the Zogby survey, the FEC waited until after the time for rebuttal reports had passed, despite the fact that counsel for the FEC and Clyde Wilcox had first discussed the use of a survey over three months earlier. Gall Decl., Ex. F, Email from Clyde Wilcox to Kevin Deeley (June 12, 2008, 05:23 PM). And with both the Johnson and Rozen Declarations, the FEC waited until discovery was over before disclosure, even though it had known about these witnesses for some time. While a failure to disclose would be substantially justified if it was impossible for the FEC to

make a timely disclosure, “the interest in having meaningful deadlines should require the exclusion of the belated disclosure when the tardy party provides no reason whatsoever for the lateness of its response.” *Coles*, 217 F.R.D. at 5. The only plausible explanations that the Plaintiffs can think of for the FEC’s failures to act involve either neglect or deliberate delay. Neither, though, amount to the “unusual or extenuating circumstances” that would excuse the FEC’s discovery lapses. *Elion v. Jackson*, No. 05-0992 (PLF), 2006 U.S. Dist. LEXIS 63854, at \*3 (D.D.C. Sept. 8, 2006).

## **2. The FEC’s Failures to Disclose Harmed Plaintiffs**

Nor can the FEC demonstrate that its failures should be excused because Plaintiffs have suffered no harm as a result of its inaction. The FEC did not disclose the existence of the Calogero Declaration and Zogby International survey until September 17, 2008, and, even then, the FEC failed to file an expert report by Mr. Calogero and failed to produce the expert for deposition. By that time, of course, the deadline to submit a report in rebuttal had already passed. Even if an expert report had been produced at such a late date, finding an expert to do a rebuttal survey, designing that survey, putting it into the field, obtaining a rebuttal expert report, and defending the expert’s deposition would most likely have taken several weeks, which was simply not possible before briefing on the facts began.

Likewise, the FEC’s tardy and incomplete disclosures concerning Robert Rozen and Ross Johnson harmed Plaintiffs. They received no expert report from Mr. Rozen, and they never, despite requesting it, received a copy of his declaration until the FEC filed its opening brief on the facts. Because Plaintiffs never received an expert report for Mr. Johnson or a copy of his declaration before his deposition, they were not able to depose him about all of his opinions contained in his declaration.

Ultimately, the issue of whether harm exists depends on what a reasonable attorney would have done had the witness or document been disclosed in a proper and timely fashion. One district court, in scrutinizing the failure of a party to make an expert disclosure, concluded that

The testimony of a witness or the introduction of a document will be deemed harmful if it was likely that a reasonable attorney, learning of the witness or the existence of the document, would have engaged in additional discovery or sought to meet the probative force of the testimony or document by creating countering evidence.

*Coles v. Perry*, 217 F.R.D. 1, 6 (D.D.C. 2003).

Had the FEC provided proper and timely notice of the Zogby International survey and the fact that the FEC would seek the testimony from Messrs. Rozen and Johnson, Plaintiffs would have conducted additional discovery, commissioned their own experts in rebuttal, or both. The net effect of the FEC's actions, therefore, harmed Plaintiffs (as more fully described above) by denying them the ability to challenge this evidence. Such consequences are the exact type of harm the rules are designed to avoid. *United States ex rel. Purcell v. MWI Corp.*, 520 F. Supp. 2d 158, 168 (D.D.C. 2007) ("The harm from the failure to disclose a witness flows from the unfair surprise hindering the prejudiced party's ability to examine and contest that witness' evidence."). Because the FEC cannot demonstrate that its actions were without blame, or that they did not harm Plaintiffs, the Court should exclude the above-mentioned materials from evidence and strike those portions of the FEC's Proposed Findings of Fact which rely upon them.

**D. An Additional Ground for Excluding the Rozen and Johnson Declarations from Evidence Is that They Lack Foundation and Reflect a Lack of Personal Knowledge**

Many, if not most, statements in Mr. Rozen's declaration are only assertions that lack any foundation. Before a witness may comment on the purposes behind another's action, he or she

must demonstrate the basis for this knowledge. Without such support, the surmise amounts to nothing, and the finder of fact should disregard it. But Mr. Rozen repeatedly attempts to say what the beliefs and motivations of others are—but without providing any concrete evidence in support. For instance, statements such as “some felt pressured to give above the hard money levels as a result of direct or indirect pressure from Members of Congress,” Rozen Decl. at ¶ 9, imply that Mr. Rozen has personal knowledge of others’ motivations. But, even if such personal knowledge does exist, he provides no foundational facts that would let a finder of fact credit his testimony. Unfortunately, this lack of foundation permeates almost every paragraph in Mr. Rozen’s declaration. *See also* Rozen Decl. at ¶¶ 5-14.

But worse than the lack of foundation that haunts most of the declaration is Mr. Rozen’s complete lack of personal knowledge on the ultimate conclusions his declaration draws. In the final three substantive paragraphs of his declaration, Mr. Rozen says that allowing unlimited contributions to groups like SpeechNow.org would give rise to many of the problems he says occurred when corporations could give unlimited soft money to political parties. These utterances are not facts, but opinions about an event that has not yet happened; yet Mr. Rozen does not—and more importantly, could not—attempt to provide a basis for these views, as they are not based on his personal knowledge. Mr. Rozen simply has no facts at his disposal that would allow him to say that “[l]oosening the federal campaign finance rules so that groups devoted to independent candidate advocacy could raise money in unlimited amounts would foster most of the pernicious effects of the soft money system.” FEC Ex. 3, Rozen Decl. at ¶ 16. And, to the extent that Mr. Rozen would say that his opinion relies on his experience and the specialized knowledge he has acquired, it reveals itself as an expert opinion that should have been disclosed to Plaintiffs back in August under the auspices of Rule 26(a)(2)(B).

Unfortunately, the same lack of support pervades Ross Johnson's declaration as well. While the beginning of Mr. Johnson's declaration rests largely on his own personal knowledge, it soon veers into the realm of unsupported opinion. Like Mr. Rozen, Mr. Johnson often pontificates upon what others think without laying out any facts demonstrating how he has that knowledge. *See, e.g.*, Johnson Decl. at ¶ 6 ("A handful of very powerful special interests are putting their money into independent expenditures because they can no longer make unlimited direct contributions."); at ¶ 11 ("[C]andidates undoubtedly know who is contributing and making independent expenditures on their behalf; this leads to the appearance of corruption or of undue influence over a candidate."). In addition, Mr. Johnson frequently posits a conclusion without ever providing a single substantive fact in support. For example, he concludes that "the emergence of independent expenditures has thwarted the will of the people . . ." without offering any opinion poll regarding Californians' opinion about independent expenditures. Johnson Decl. at ¶ 13; *see also id.* ("[I]ndependent expenditures ha[ve] . . . doubtlessly influenced the outcome of numerous state elections."). As the Federal Rules of Evidence make clear, all opinion testimony by lay witnesses must be "rationally based on the perception of the witness." Fed. R. Evid. 701. But perception implies observation of demonstrable facts, not mere surmise. Because Mr. Johnson's testimony ultimately rests on nothing more than supposition, the Court should reject it in its entirety.

Thus, the Court should exclude from evidence the Calogero declaration and its attached survey results (FEC Exs. 96 & 97), the Rozen Declaration (FEC Ex. 3), and the Johnson Declaration (FEC Ex. 2). Further, the Court should not adopt the Defendant's proposed findings of fact that rely on these documents, which are contained in ¶¶ 86, 115, 130, 169-76, 178, 182,

187-88, 204-07, 216, 224-25, 243-44, 268, 312, 316, 333-35, 343-44, 355-56 of the FEC's Proposed Findings of Fact.

## II. Witness Declarations and Affidavits from *McConnell v. FEC* and *Massey v. Caperton* Are Not Proper Evidence in This Case and Should Be Excluded

The Federal Election Commission, in support of its Proposed Findings of Fact in this case, has submitted nine different declarations that various witnesses filed on behalf of the Government in *McConnell v. FEC*. In addition, the FEC and their expert witness, Clyde Wilcox, quote from four other declarations from *McConnell* that they do not include as exhibits. Finally, the FEC also cites to the affidavit of an expert witness from a second case, *Massey v. Caperton*. These documents, their exhibit numbers (when applicable), and the facts for which they are cited are summarized below:

Exhibit No.	Fact Nos.	Description
33	88, 213, 230, 276	Rocky Pennington <i>McConnell</i> Declaration
34	90, 210	Joe Lamson <i>McConnell</i> Declaration
35	91, 209	Terry Beckett <i>McConnell</i> Declaration
36 <sup>7</sup>	83, 214	Elaine Bloom <i>McConnell</i> Declaration
64	211, 275	Dale Bumpers <i>McConnell</i> Declaration
65	212	Alan Simpson <i>McConnell</i> Declaration
67	215	Pat Williams <i>McConnell</i> Declaration
68	217, 310	Linda Chapin <i>McConnell</i> Declaration
95	328	Robert Drake <i>Massey</i> Affidavit
114	445	Robert Hickmott <i>McConnell</i> Declaration
None	143	Gerald Greenwald <i>McConnell</i> Declaration
None	309	John McCain <i>McConnell</i> Declaration
None	133, 339	Robert Shapiro <i>McConnell</i> Declaration
None	365,366	Krasno and Sorauf <i>McConnell</i> Declaration

The FEC offers these documents, most now more than five years old and from cases involving completely different issues of law and fact, for the truth of their assertions. But

<sup>7</sup> Plaintiffs note that Elaine Bloom's declaration is listed as both FEC Exs. 36 and 66. All arguments regarding Ex. 36 apply equally to Ex. 66.

testimony from another case properly belongs to that case—not this case. Here, the declarations are nothing more than hearsay and could never be converted into competent evidence at trial. Moreover, this approach flies in the face of how civil litigation is designed to occur. For myriad reasons, Plaintiffs ask that the Court strike these exhibits in their entirety and decline to adopt those facts proposed by the FEC that rely upon them.

**A. The McConnell Declarations and the Massey Affidavit are Inadmissible Hearsay**

Declarations and affidavits are hearsay. Indeed, they squarely fall under the definition of hearsay: “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Fed. R. Evid. 801(c). As such, declarations and affidavits are generally not admissible evidence at trial. The Federal Rules of Civil Procedure do permit courts to consider affidavits and declarations by witnesses in a case when deciding motions for summary judgment. Fed. R. Civ. P. 56(c). However, the Rules allow this because, if a trial occurs, those same declarants—who are declarants *in the case pending before the court*—could come to court to testify. The touchstone ultimately is whether the evidence “would be admissible or usable at trial.” 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil* 3d § 2721. Parties may offer declarations at the summary judgment stage, but that “evidence still must be capable of being converted into admissible evidence [at trial].” *Gleklen v. Democratic Cong. Campaign Comm., Inc.*, 199 F.3d 1365, 1369 (D.C. Cir. 2000).

The *McConnell* declarations and the *Massey* affidavit submitted by the FEC could never be converted from inadmissible hearsay into admissible evidence in this case. Declarations from witnesses in *this* case do not face this hearsay problem because the witnesses would be available to testify in any hearing or trial. (That there is no trial in this proceeding is irrelevant; even

though summary judgment motions obviate the need for trial, declarations from witnesses in the case are admissible at summary judgment because the witnesses could be available if a trial were to occur.) Declarations from other cases, however, are prior “testimony given at another hearing of the same or in a different proceeding” and cannot be admitted because (1) the FEC has not shown that any of the declarants are unavailable (as defined by Fed. R. Evid. 804(a)) and (2) Plaintiffs were not parties in the *McConnell* or *Massey* cases and, consequently, have not had “an opportunity and similar motive [in those proceedings] to develop the [declarants’ and affiants’] testimony by direct, cross, or redirect examination.” Fed. R. Evid. 804(b)(1).

Thus, if the FEC wanted testimony from individuals who testified in *McConnell* or *Massey*, it needed to obtain new declarations regarding the issues in *this* case. At the very least, it needed to make a showing that the declarations were admissible under Fed. R. Evid. 804. Even if the *McConnell* and *Massey* declarations could be treated as declarations in this case—which they cannot—they would still be inadmissible. The Federal Rules of Civil Procedure are clear: for a witness to testify in an action, a party must disclose their identity in a timely fashion. Fed. R. Civ. P. 26(a)(1)(a). But in its witness disclosures, the FEC never identified any of the *McConnell* declarants as a potential witness in this case. This is an additional reason the declarations may not be admitted. *See, e.g., Quality Built Homes, Inc. v. Village of Pinehurst*, No. 1:06CV1028, 2008 U.S. Dist. LEXIS 61512, at \*16-17 (M.D.N.C. Aug. 11, 2008) (excluding affidavit and accompanying exhibits of witness not disclosed to opposing party).

Furthermore, not only does the FEC fail to put forth any evidence that the *McConnell* declarants or the *Massey* affiant are unavailable, it also fails to attempt to show that any of the *McConnell* or *Massey* declarants would be either willing or able to testify in this case. After all, *McConnell* took place years ago, and the issues at play in the two cases vary greatly. The legal

issues concerning an independent group like SpeechNow.org were simply not at issue in *McConnell*; the same is true of the issue in the *Massey* case, which inquires as to whether due process requires the recusal of a West Virginia Supreme Court Justice. We know for instance that at least one former *McConnell* declarant refused to provide a statement in this matter due to the different issues involved. *See* Gall Decl., Ex. CC, Email from Robert Shapiro to Clyde Wilcox (Aug. 13, 2008, 1:15 PM). Courts have refused to allow affidavits when the proffering party could not demonstrate that the declarant would be willing and able to provide the same testimony at trial. *E.g., Chamberlin v. Principi*, No. 02 Civ. 8357 (NRB), 2005 U.S. Dist. LEXIS 17011, at \*31-32 (S.D.N.Y. Aug. 16, 2005) (striking affidavit from previous proceeding from being considered at summary judgment when proponent did not establish that affiant was “prepared to testify at trial consistently with her affidavit”).

Even beyond the evidentiary and procedural objections, however, lies a more basic point: under our system of adversarial litigation, it is essential that a party builds its arguments using facts that are pertinent to the specific case at hand. It is not a system where one can stitch together an evidentiary Frankenstein’s monster from a hodgepodge of prior case records involving different parties and legal disputes. Plaintiffs can understand why some parties might be tempted to take such an approach. After all, it is much easier to use an affidavit from an earlier case rather than talking to witnesses to see if they could provide an affidavit about the issues in this case. But the end product of taking the easy route is a compilation of declarations that contain irrelevant facts and are signed by declarants who, if approached, might be unwilling or unable to testify in the current matter.

By drawing together declarations from a case long past and presenting them to the Court as evidence in an unrelated matter, the FEC has eschewed its obligations. Plaintiffs are sure that

submitting the *McConnell* and *Massey* testimony was much easier for the FEC than obtaining new declarations about the facts and issues in this case. But by relying on this evidence, the FEC is attempting to lighten its own load by foisting it upon Plaintiffs and the Court, requiring them to root through and consider each and every statement, no matter how irrelevant to the matter at hand. But looking for credible testimony in support of its case was the FEC's responsibility, not Plaintiffs' or the Court's. Indeed, the FEC has recognized that obligation: when it wished to introduce the testimony of Robert Rozen, it did not simply recycle his earlier *McConnell* declaration; instead, it contacted him and had him swear out a new declaration that discussed the issues at hand in this case. Accordingly, Plaintiffs ask that the Court exclude the *McConnell* declarations in their entirety and refuse to consider those proposed facts from the FEC that rely upon them.

**B. The McConnell Declarations and the Massey Affidavit, Being Inadmissible Hearsay Themselves, Also Contain Statements That Lack Foundation and Contain Inadmissible Hearsay**

The *McConnell* declarations and the *Massey* affidavit, being drafted for another action by persons who are not witnesses in this case, are inadmissible for the reasons stated above. Beyond that bar, however, many of the statements from these documents reflect a lack of personal knowledge, amount to nothing more than hearsay, or go beyond the bounds of permissible lay-opinion. Such statements are not admissible evidence and should not be considered by the Court. *Wells v. Jeffery*, No. 03-cv-228, 2005 U.S. Dist. LEXIS 41309, at \*12 n.7 (D.D.C. Mar. 20, 2006) (“The affidavit or declaration cannot contain hearsay evidence, as such evidence would not be admissible at trial.”). Below, Plaintiffs discuss specific proposed findings of facts that are undercut by their reliance on hearsay in the *McConnell* declarations and *Massey* affidavit.

**1. Beckett Declaration (FEC Ex. 35)**

In FEC's Proposed Findings of Fact ¶ 209, the FEC quotes the Terry Beckett declaration for the proposition "[o]f course candidates often appreciate the help that these interest groups can provide, such as running attack ads for which the candidate has no responsibility." (citing Declaration of Terry Beckett at ¶ 16). Such a statement lacks foundation, as Ms. Beckett's declaration contains no basis for her personal knowledge as to the thoughts that candidates may or may not have concerning interest groups.

**2. Bumpers Declaration (FEC Ex. 64)**

In FEC's Proposed Findings of Fact ¶ 211, the FEC quotes the declaration of former Senator Dale Bumpers for the proposition, "[c]andidates whose campaigns benefit from these ads greatly appreciate the help of these groups. In fact, Members will also be more favorably disposed to those who finance these groups when they later seek access to discuss pending legislation." FEC Ex. 64, Declaration of Dale Bumpers at ¶ 27. *See also* FEC's Proposed Findings of Fact at ¶ 275. As with other *McConnell* declarants, Senator Bumpers is offering a categorical opinion about what other Members of Congress may or may not feel despite not putting forward any evidence showing that he has personal knowledge of their inner thoughts.

**3. Simpson Declaration (FEC Ex. 65)**

In FEC's Proposed Findings of Fact ¶ 212, the FEC quotes the declaration of former Senator Alan Simpson for the proposition that "[t]hese ads are very effective in influencing the outcome of elections, and the people who admit to running these ads will later remind Members of how the ads helped get them elected. Members realize how effective these ads are, and they may well express their gratitude to the individuals and groups who run them." (citing Declaration of Alan Simpson at ¶ 13). Senator Simpson is guessing at how others may feel in response to

certain advertisements (“may well express”) and offering that as opinion testimony, without providing any evidence in support of his surmise.

#### **4. Pennington Declaration (FEC Ex. 33)**

In FEC’s Proposed Findings of Fact ¶ 213, the FEC quotes the Rocky Pennington declaration for the proposition that, “[U]sually the ads are helpful and candidates appreciate them.”) (citing Declaration of Rocky Pennington at ¶ 11). Like Senator Simpson and others, Mr. Pennington is opining on how others may feel about certain advertisements, without providing any evidence to support that claim.

Similarly, in FEC’s Proposed Findings of Fact ¶ 230, the FEC quotes Mr. Pennington for the proposition that independent ads “allow the candidate to conserve his limited resources and focus them on getting out a positive message about himself. At the same time, the candidate can disavow the negative ads, saying—with a wink—I didn’t know anything about it and I condemn these things. I think this now happens in virtually every campaign.” (citing Declaration of Rocky Pennington at ¶ 11). Mr. Pennington does not provide any basis for his conclusion that the splitting of messages is a common, if not prevalent, feature of campaigns.

Finally, in FEC’s Proposed Findings of Fact ¶ 276, Mr. Pennington is quoted for the proposition that “[i]n addition to trying to elect candidates, these groups are often trying to create appreciation or even obligation on the part of successful candidates. And candidates usually do appreciate this kind of help, even when they deny it publicly, which they usually do.” (citing Declaration of Rocky Pennington at ¶ 8). Mr. Pennington’s statement that candidates usually do appreciate this kind of help is a generalization that he does not support with his own personal knowledge. Similarly, his statement that candidates usually deny publicly that they appreciate the help an independent ad provides is not supported in his declaration by specific facts.

## 5. Chapin Declaration (FEC Ex. 68)

In FEC's Proposed Findings of Fact ¶ 217, Linda Chapin is quoted for the proposition that "Federal candidates appreciate interest group electioneering ads like those described above that benefit their campaigns, just as they appreciate large donations that help their campaigns." (citing Declaration of Linda Chapin at ¶ 16). While Ms. Chapin has personal knowledge about her own opinions, she does not provide any support for her generalizations concerning the feelings of other federal candidates.

Further, in FEC's Proposed Findings of Fact ¶ 310 Ms. Chapin is quoted for the proposition that one interest group offered to provide [her] campaign support if she would agree to vote a certain way on their issues (citing Declaration of Linda Chapin at ¶ 6). But this statement was made outside of this litigation and was being offered by Ms. Chapin for its truth. It is therefore inadmissible hearsay and should not be considered by the Court.

## 6. McCain Declaration

The FEC's Proposed Findings of Fact cite the *McConnell* Declaration of Senator John McCain, where McCain relates an episode where he says Sen. McConnell said that tobacco companies had promised an advertising campaign on behalf of those who would vote against the tobacco bill that was currently before the Senate. FEC's Proposed Findings of Fact ¶ 309 ("According to Senator McCain, the promise was used to influence votes.") (citing Declaration of John McCain at ¶ 8) ("I was present at the meeting and this is an accurate report of what Senator McConnell said. This episode graphically demonstrates that corporate soft money is widely used to influence votes."). These two sentences have to have at least two serious problems. The first is plainly hearsay: Senator McCain is representing, for the truth of the matter asserted, what Senator McConnell said the tobacco companies said. The second problem is that

the second sentence is based on the prior hearsay statement and puts forward opinion testimony that is not rationally based on the perception of the witness. While Senator McCain may have in fact heard Senator McConnell's statement, that is simply an insufficient basis upon which to make the global conclusion the corporate soft money is widely used to influence votes. Further, given that SpeechNow.org is not a corporation, the statement is irrelevant.

#### **7. Greenwald Declaration**

In the FEC's Proposed Findings of Fact ¶ 143, Gerald Greenwald, chairman emeritus of United Airlines, is cited for the proposition that corporations and unions gave soft money because "experience had taught that the consequences of failing to contribute (or to contribute enough) may be very negative." (citing Declaration of Gerald Greenwald at ¶ 9). Such statements lack foundation, as Mr. Greenwald declaration does not reveal that he has personal knowledge as to why *other* corporations, let alone unions, gave soft money.

#### **8. Drake Affidavit (FEC Ex. 95)**

The Federal Election Commission has put forward various documents filed in connection with a motion for recusal of West Virginia Supreme Court Justice Benjamin from *Massey v. Caperton*. In support of Proposed Finding of Fact ¶ 325, the FEC submits an affidavit by Robert Drake and an attached survey he conducted that purports to gauge how the West Virginia populace felt about having a particular state supreme court justice hear a case. *See* FEC Ex. 95, Affidavit of Robert Drake and Attached Survey Results (Mar. 28, 2008). In so doing, Plaintiffs believe that the FEC is offering the exhibit as substantive evidence to demonstrate that most West Virginians did not think the judge could be fair and impartial in hearing the case as a result of the fact that one of the litigants made substantial independent expenditures in support of his election.

Just as the *McConnell* declarations cannot be admitted from another case, the same is true of the declaration of Mr. Drake, who is not a witness in this case. Furthermore, the affidavit and poll results also cannot be admitted for the same reason that the Calogero Declaration and attached survey cannot be admitted—i.e., introducing the survey information requires expert testimony, and Drake was never designated as an expert. Also, for the reasons more fully described in paragraphs 317 through 332 in Plaintiffs' Response to Defendant's Proposed Findings of Fact, the incident about which the poll asked is simply irrelevant to this case.

Accordingly, because these declarations and affidavits are not competent testimony in this case, the Court should exclude FEC Exhibits 33-36, 64-65, 67-68, 95, and 114. The Court should also exclude declarations from other cases that are cited in ¶¶ 133, 143, 309, 339, and 365-66. Further, this Court should not adopt the FEC's Proposed Findings of Fact that rely on these documents, which are contained in ¶¶ 83, 88, 90-91, 133, 143, 209-15, 217, 230, 275-76, 309-310, 328, 339, and 365-66 of Defendant's Proposed Findings of Fact.

### **III. Additional Witness Testimony and Documents Should Be Excluded Because They Were Not Timely Produced and Are Cited for Inadmissible Evidence**

In addition to the evidentiary problems discussed above, Defendants failed to timely disclose two fact witnesses, Michael Bright and Kevin Yowell, along with a number of documents relied upon in Defendant's Proposed Findings of Fact. Michael Bright was not disclosed to Plaintiffs until after the close of business on the final day of discovery. *See* Gall Decl., Ex. O, Email from Kevin Deeley to Counsel for Plaintiffs and attachment (Sept. 26, 2008, 7:32 PM). Kevin Yowell was not disclosed until October 1, 2008, five days *after* the close of discovery. *See* Gall Decl., Ex. K, Email from Kevin Deeley to Counsel for Plaintiffs and attachment (Oct. 1, 2008, 10:02 PM). And the documents were not disclosed at all until

Plaintiffs learned about them from Defendant's proposed Findings of Fact. Compounding these failures to disclose, the evidence itself is rife with hearsay and conjecture.

**A. The Declarations of Michael Bright and Kevin Yowell and Several of Defendant's Documentary Exhibits Were Not Timely Produced**

The FEC relies on the declarations of Mr. Bright and Mr. Yowell in paragraphs 288-297, 300-302, and 311 of their proposed findings of fact. Plaintiffs do not know when Defendants first became aware of Mr. Bright, but documents produced after the close of discovery indicate that the FEC had been in contact with Mr. Bright as early as September 4, 2008. *See* Gall Decl., Ex. DD, Excerpt from FEC Supplemental Production of Sept. 30, 2008 containing email from Graham Wilson to Michael Bright dated Sept. 4, 2008. Defendants therefore had more than three weeks in which they could have disclosed their intention to rely on testimony from Mr. Bright. Instead, despite making multiple supplemental productions during that period, Defendants said nothing about Mr. Bright. Indeed, it appears that Defendant's simply forgot about Mr. Bright until he emailed them two days before the close of discovery and asked "did i [sic] hear back from you/miss something?" *See* Gall Decl., Ex. EE, Email from Michael Bright to Graham Wilson (Sept. 24, 2008, 05:06 PM). But if this jogged Defendant's memory, it did not spur them to supplement their disclosures. Instead, Defendant waited until two hours past the close of business on the last day of discovery. Similarly, documents produced after the close of discovery indicate that by September 8, 2008, Mr. Yowell had already given the FEC "a lot of information and documentation . . . ." *See* Gall Decl., Ex. FF, Excerpts from FEC Supplemental Production of Oct. 8, 2008, containing email from Graham Wilson to Leon Patton (Sept. 8, 2008, 11:19 AM).

While the FEC's failure to disclose these witnesses before the close of discovery is inexcusable, the FEC goes further when it relies on the following documents that were *never* disclosed to Plaintiffs until the FEC filed their proposed findings of fact:

- FEC Ex. 50: Annenberg Public Policy Center, *Electing the President, 2004: The Insiders' View* (Kathleen Hall Jamieson ed., 2005).
- FEC Ex. 51: Center for the Study of Elections and Democracy, *527s Had a Substantial Impact on the Ground and Air Wars in 2004, Will Return: Swift Boat Veterans 527 Play Historic Role* (Dec. 16, 2004).
- FEC Ex. 116: Senate Committee on Rules and Administration, Hearing to Examine and Discuss S.271, a Bill Which Reforms the Regulatory and Reporting Structure of Organizations Registered Under Section 527 of the Internal Revenue Code, 109th Cong. (March 8, 2005) Written testimony of Michael J. Malbin, Executive Director of the Campaign Finance Institute) (available at <http://rules.senate.gov/hearings/2005/MalbinTestimony.pdf>).
- FEC Ex. 120: Advisory Opinion Request 2008-10.
- FEC Ex. 121: Comment by SaysMe.tv on AOR 2008-10.
- FEC Ex. 135: Corrado and Varney, *Party Money in the 2006 Elections: The Role of National Party Committees in Financing Congressional Campaigns*, Campaign Finance Institute (2007).

These undisclosed documents are relied upon in paragraphs 103-105, 107-110, 120, 125, 167, 231-232, 239, 386-390, and 437 of Defendant's proposed findings of fact. In all but two of those paragraphs—105 and 107—these undisclosed documents are the *only* sources cited in support of the paragraphs' claims.<sup>8</sup> As noted earlier in the context of the FEC's undisclosed experts, parties are under a continuing duty to amend and update their disclosures in a timely manner, Fed. R. Civ. P. 26(e)(1)(A), and a party that fails to do so "is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). This exclusion is

---

<sup>8</sup> The remaining supporting material in paragraphs 105 and 107 is inadmissible hearsay. *See infra*, Section IV and Declaration of Robert Frommer in Support of Plaintiffs' First Motion in Limine, Ex. 1.

“automatic” unless the party can show that its failure was substantially justified or harmless. *Elion v. Jackson*, 544 F. Supp. 2d 1, 6 (D.D.C. 2008). The FEC cannot make these showings with regard to Messrs. Bright and Yowell or the undisclosed documents for the same reasons it could not make them with regard to Messrs. Johnson and Rozen; there is simply no explanation—other than neglect or deliberate delay—for why the FEC sat on this information for weeks, releasing it only after the close of discovery while plaintiffs were preparing to brief proposed findings of fact.

**B. The Information Drawn from the Yowell Declaration and Undisclosed Documents Is Also Inadmissible Because It Contains Hearsay and Speculation**

Even if Mr. Yowell had been timely identified as a fact witness and even if the FEC had timely disclosed the documents upon which it relies, the proposed facts drawn from that declaration and those documents would still be inadmissible on multiple other grounds.

With regard to the undisclosed documents, there is not a single use of those documents that does not constitute inadmissible hearsay, often multiple levels of hearsay.<sup>9</sup> Much of this hearsay is further objectionable because the statements are not even proper facts but rather expert opinions in the form of survey results (¶¶ 103-105), opinion testimony by well-known campaign finance expert and executive director of the Campaign Finance Institute, Michael Malbin (¶¶ 125, 167), and opinions by various policy groups and their officers about the quality and effectiveness of political advertising campaigns (¶¶ 108, 231-232, 239).

Many of the proposed facts drawn from the declarations of Mr. Yowell—contained in paragraphs 288-297 and 311—are similarly objectionable. While portions of the declaration reports facts within the personal knowledge of Mr. Yowell, other portions offered by the FEC as

---

<sup>9</sup> An illustrative example is paragraph 104, which quotes a report of the Annenberg Public Policy Center, which in turn quotes Chris LaCivita, who in turn reports the results of a survey conducted by Public Opinion Strategies.

fact are instead improper pure speculation. In paragraph 296, for example, Mr. Yowell offers conjecture about the amount of money it would take to bribe a corrupt congressman and whether the average amount of money spent on an independent expenditure campaign might have that effect. And in paragraph 297, Mr. Yowell offers opinion about the possible effects that additional mail and telephone advertising might have had on the reelection of his employer, former-Congressman Snowbarger.

As in the other matters discussed above, the FEC has, in multiple ways, ignored both the Federal Rules of Civil Procedure and the Federal Rules of Evidence. It has identified witnesses and documents inexcusably late and then used them to introduce inadmissible hearsay and opinion testimony. Accordingly, the declaration of Mr. Yowell (FEC Ex. 4) and the undisclosed documents (FEC Exs. 50-51, 116, 120-21, 135) must be excluded. Further, this court should not adopt the proposed facts that rely on these exhibits, which are contained in ¶¶ 103-105, 107-110, 120, 125, 167, 231-232, 239, 288-97, 311, 386-390, and 437 of Defendant's Proposed Findings of Fact.

#### **IV. This Court Should Also Refuse to Consider Numerous Facts and Exhibits That Are Inadmissible Hearsay**

In support of its Proposed Findings of Fact, the Federal Election Commission has put forward almost 120 different exhibits that total almost 2,500 pages in length. In doing so, the FEC has violated a great number of evidentiary prohibitions, the chief among them being the use of hearsay. No less than 52 of the FEC's proffered exhibits are used for hearsay purposes. On top of this, the FEC's proposed findings of fact include another 37 paragraphs containing hearsay that is quoted but not offered in an exhibit. Because hearsay evidence would not be admissible at trial, the District Court should refuse to consider both the exhibits and the facts that rely upon those exhibits for support.

Before continuing, Plaintiffs would like to note a frustrating behavior by the FEC: using various publications as evidence while not attaching them as exhibits to their Proposed Findings of Fact. Although they have not have undertaken a comprehensive review, Plaintiffs have encountered at least five different instances where the FEC relies on a newspaper article without introducing that article as an exhibit. *See* FEC's Proposed Findings of Fact at ¶¶ 126, 218, 227, and 251. Its track record is even worse for academic papers; the FEC cites to sixteen academic publications and discussions that it does not include as an exhibit. *See* FEC's Proposed Findings of Fact at ¶¶ 80, 81, 92, 100, 117, 118, 119, 126, 133, 134, 137, 144, 219, 228, and 315. And in some instances it fails to attach to its brief even certain *McConnell* declarations upon which it relies. *See* FEC's Proposed Findings of Fact at ¶¶ 133, 143, 309, and 365. By failing to introduce the articles and papers and exhibits, the FEC denies the Court the ability to look over the materials and determine their veracity and probative value for itself. It once again shirks its duties and forces the Court and Plaintiffs to pick up the slack. But one simply cannot rely upon evidence that one does not submit. The Court should refuse to consider those findings of fact that rely on documents that the FEC failed to introduce into the record.

The Federal Rules of Evidence “apply generally to civil actions and proceedings,” and govern the admissibility of evidence in this matter. Fed. R. Evid. 1101(b). The procedures set in place for the Findings of Fact most resemble the filing of a motion for summary judgment. In deciding on a motion for summary judgment, courts may consider “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any.” Fed.R.Civ.P. 56(c). In addition, a court may take into account any material that would be admissible or usable at trial. 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 3d* § 2721. While such evidence need not be produced “in

a form that would be admissible at trial, the evidence still must be capable of being converted into admissible evidence.” *Gleklen v. Democratic Cong. Campaign Comm., Inc.*, 199 F.3d 1365, 1369 (D.C. Cir. 2000) (emphasis removed).

The Federal Rules of Evidence strictly forbid the use of hearsay evidence at trial. Fed. R. Evid. 802 (“Hearsay is not admissible except as provided by these rules.”). Because hearsay statements are not admissible at trial, neither may courts consider them for purposes like the one at hand. *Cf. Greer v. Paulson*, 505 F.3d 1306, 1315 (D.C. Cir. 2007) (“[S]heer hearsay [] counts for nothing on summary judgment.”) (internal quotation marks omitted); *Wells v. Jeffery*, No. 03-cv-228, 2005 U.S. Dist. LEXIS 41309, at \*12 n.7 (D.D.C. Mar. 20, 2006) (“The affidavit or declaration cannot contain hearsay evidence, as such evidence would not be admissible at trial.”).

The evidence that the FEC puts forward in its proposed findings of fact, however, is rife with hearsay. In some cases, the hearsay is multiple layers deep, with one out of court statement relaying yet another. But yet the FEC leaves it to the Court to untangle the resulting mess. The Court should refrain; because the Federal Rules of Evidence are clear in forbidding hearsay evidence, Plaintiffs suggest that the Court refuse to consider such statements and disregard those findings of fact that rely upon them. Below, Plaintiffs discuss various types of documents containing inadmissible hearsay.

**Newspaper Articles:** At various points in their Proposed Findings of Fact, the FEC cites to numerous newspaper articles and press releases to support their claims. In nearly every case, though, the purpose of the quote or citation is to prove the truth of what the article or release contains. Accordingly, they are hearsay and are not proper evidence in this case. *Hutira v. Islamic Republic of Iran*, 211 F. Supp. 2d 115, 123 (D.D.C. 2002) (citing *Eisenstadt v. Allen*, 113 F.3d 1240 (9th Cir. 1997) (finding that “newspaper articles clearly fall within the definition of

hearsay . . . and, thus, are inadmissible.")). Note that, in many instances, those portions of the newspaper articles that the FEC cites in support of its proposed findings of fact themselves refer to statements made by others. This compounds the problem and leaves it to the Court to unravel multiple levels of hearsay. See the attached list for those newspaper articles and press releases that the FEC submitted that contain hearsay, along with the levels of hearsay each item contains. Declaration of Robert Frommer in Support of Plaintiffs' First Motion in Limine [hereinafter Frommer Resp. Decl.], Ex. 1.

**Academic Publications:** Perhaps more egregious than the FEC's citation to newspaper articles is its extensive reliance on academic studies and conference transcripts. Throughout its Proposed Findings of Fact, the FEC cites to and quotes academic pieces that it says support its contentions. But, just as with the newspaper articles, the FEC's purpose in introducing the academic article or conference transcript is to prove the truth of the matter asserted. The academic studies and conference transcripts, therefore, contain hearsay and are inadmissible evidence for the purposes of this proceeding. *Cf. In re Universal Serv. Fund Tel. Billing Practices Litig.*, No. 02-MD-1468-JWL, 2008 U.S. Dist. LEXIS 34542, at \*6 (D. Kan. Apr. 25, 2008) ("For example, scholarly articles, standing alone, contain inadmissible hearsay and have limited utility under the Federal Rules of Evidence. Therefore the court will not consider excerpts taken from them as statements of 'facts' for summary judgment purposes.").

Plaintiffs presume that the FEC will attempt to argue that their expert's reliance on these academic works, just as with the newspaper articles above, somehow make them admissible. Such an argument though would require a fundamental misreading of the Rules of Evidence. It is true that in "forming opinions or inferences upon the subject," an expert witness may consider inadmissible facts and data "[i]f of a type reasonably relied upon by experts in the particular

field.” Fed. R. Evid. 703. But this is no way lets an expert launder otherwise inadmissible evidence. *Miller & Sons Drywall, Inc. v. Comm’r*, 89 T.C.M. (CCH) 1279 (T.C. 2005) (“While an expert can rely on data that is not admissible to form his opinion, such reliance does not elevate the evidence to be admissible for the truth of the matter asserted.”); *United States v. Katz*, 213 F.2d 799, 801 (1st Cir. 1954) (“But the fact that an expert may use hearsay as a ground of opinion does not make the hearsay admissible.”) (internal quotation marks omitted).

And just like with the newspaper articles, many of the academic studies and conference transcripts that the FEC cites contain multiple layers of hearsay, complicating an already difficult problem. See the attached list for those academic articles and conference transcripts that the FEC submitted that contain hearsay, along with the number of hearsay problems each such item contains. See Frommer Resp. Decl., Ex. 1.

**Testimony from Previous Hearings and Cases:** In another portion of this brief, Plaintiffs make clear that declarations from another civil action, when they are submitted for their truth value in this case, are hearsay. Such a basic lesson seems to have evaded the FEC, however, as it has submitted approximately nine such documents into evidence and refers to four others in their brief. None of these declarations can be considered as competent testimony in this matter and the Plaintiffs would respectfully request that they be struck from the record. See *Wells v. Jeffery*, 03-CV-228, 2005 U.S. Dist. LEXIS 41309, 2006 WL 696057, at \*12 n.7 (D.D.C. Mar. 20, 2006) (“The affidavit or declaration cannot contain hearsay evidence, as such evidence would not be admissible at trial.”).

Beyond the *McConnell* declarations, though, the FEC has submitted into evidence two different pieces of testimony. The first is testimony that Derek Cressman, the Government Watchdog Director of Common Cause, presented to the California Fair Political Practices

Commission. FEC Ex. 93. The second is from Michael Malbin, who testified in the United States Senate concerning a bill that dealt with the reulgatory and reporting structures for Section 527 organizations. FEC Ex. 116. The FEC is offering both items for the truth of what they assert. Both items are clearly hearsay. *See, e.g., Pineiro v. Pension Benefit Guar. Corp.*, 318 F. Supp. 2d 67, 91 n.19 (S.D.N.Y. 2003) (“Plaintiffs have proffered the congressional testimony of Bonne Ann McHenry, an employee of one of PBGC’s contractors, which supports their view of the deficiencies in PBGC’s handling of the Plan. The testimony is inadmissible hearsay, however, and cannot be relied on to support plaintiffs’ motion for summary judgment.”). *See* Frommer Resp. Decl., Ex. 1.

**Correspondence, Interviews and Miscellaneous Documents:** The last set of documents that Plaintiffs discuss largely involve out-of-court communications between two persons. In the correspondence subcategory, the communications are taking place between two non-parties while in the interview subcategory, the FEC’s expert witness was part of most of the communications. The Federal Election Commission is introducing the documents in these two subcategories to prove that the statements made in the documents are, in fact, true. They are paradigmatic examples of hearsay and do not fit into any recognizable exception.

In addition, the FEC offers into evidence a webpage from the Harold Jarvis Taxpayers’ Foundation. This document, which is being offered for its truth value as well, is hearsay and should be stricken from the record. *See* Frommer Resp. Decl., Ex. 1.

Thus, the Court should exclude Defendant’s Exhibits 33-36, 47-48, 50-58, 60-65, 67-75, 77-79, 81-82, 84-89, 91-94, 98, 102, 106, 107, 111-12, 114, 116-17, and 135. Further, this Court should not adopt the proposed findings of fact that rely on these exhibits, contained in ¶¶ 83, 88, 90-91, 99, 101, 103-05, 107-10, 112-14, 120, 125, 129, 147, 155, 157-59, 161, 167, 169-175,

180, 182, 192, 198-202, 209-13, 214-15, 217, 230-32, 234-36, 239, 243-44, 246, 250, 253, 255, 259-60, 262-63, 266, 272, 275-76, 278-81, 288-91, 294-95, 299-300, 302, 306, 310, 313, 326, 328, 353-54, 357, 384, 386-390, 416 and 445 of Defendant's Proposed Findings of Fact.

The Court should also exclude hearsay statements in Defendant's Proposed Findings of Fact that were not submitted as exhibits—and refuse to adopt the associated proposed facts—contained in ¶¶ 80-81, 84, 92, 100, 102, 117-19, 126-28, 133-34, 137, 143-44, 154, 208, 218-19, 222, 227-28, 247, 249, 251, 293, 309, 315, 339, 359, and 365-66.

**V. This Court Should Also Exclude from Evidence All Statements of Facts in the FEC's Submission That Are Plagued with Evidentiary Problems**

Plaintiffs have identified several significant evidentiary problems with the FEC's proposed findings of facts in both this motion and their motion to exclude the expert report of Clyde Wilcox. Where those evidentiary problems can be linked to improper exhibits, they may be solved by simply excluding those exhibits from the record and declining to adopt as "facts" the statements that rely on them. The FEC's submission, however, is so rife with other evidentiary problems barring admissibility—but not necessarily having at their root a document or witness that should be excluded—that they defy enumeration within this motion. For example, many statements of "fact" lack any foundation, are really conclusory statements of opinion dressed up as facts, or are improper characterizations of evidence. In the Plaintiffs' Response to Defendant's Proposed Findings of Fact, Plaintiffs have attempted to identify all of these evidentiary problems in regard to each proposed finding, as well as to identify the handful of actual facts that can be culled from the FEC's submission. Plaintiffs ask that this Court exclude or strike from evidence all the Defendant's proposed findings for which Plaintiffs have identified problems as to admissibility.

**VI. Conclusion**

For all the foregoing reasons, Plaintiffs respectfully request the following relief:

1. That this Court grant Plaintiffs' First Motion in Limine and exclude the following exhibits: Exs. 2-4, 6, 33-36, 47-48, 50-58, 60-75, 77-79, 81-82, 84-89, 91-98, 102, 106-107, 111-112, 114, 116-117, 120, 121, and 135.

2. That this Court decline to adopt the proposed facts that rely on these excluded documents, contained in the following paragraphs of Defendant's Proposed Findings of Fact: ¶¶ 83, 85, 86, 88, 90-91, 99, 101, 103-105, 107-110, 112-115, 120, 125, 129-30, 133, 143, 146-47, 155, 157-59, 161, 167, 169-76, 178, 180, 182, 187-88, 192, 195, 198, 199-202, 204-07, 209-17, 224-25, 230-32, 234-36, 239, 243-44, 246, 250, 253, 255, 259-60, 262-63, 266, 268, 272, 275-76, 278-81, 288-97, 299-302, 306, 309-13, 316, 326, 328, 333-335, 339, 343-344, 353-357, 365-366, 384, 386-390, 416, 437, and 445.

3. That this Court exclude inadmissible evidence, and decline to adopt proposed findings relying on that evidence, contained in the following paragraphs of Defendant's Proposed Findings of Fact: ¶¶ 80-81, 84, 92, 100, 102, 117-119, 126-128, 133-134, 137, 143-144, 154, 208, 218-219, 222, 227-228, 247, 249, 251, 293, 309, 315, 339, at 365-366.

4. Finally, that this Court decline to adopt any of Defendant's proposed findings of fact for which Plaintiffs have identified evidentiary problems in Plaintiffs' Response to Defendant's Proposed Findings of Fact.

Dated: November 21, 2008.

Respectfully submitted,

/s/ Steven M. Simpson

Robert Gall (DC Bar No. 482476)  
William H. Mellor (DC Bar No. 462072)  
Steven M. Simpson (DC Bar No. 462553)  
Paul M. Sherman (DC Bar No. 978663)  
INSTITUTE FOR JUSTICE  
901 N. Glebe Road, Suite 900  
Arlington, VA 22203  
Tel: (703) 682-9320  
Fax: (703) 682-9321  
Email: [ssimpson@ij.org](mailto:ssimpson@ij.org)

Stephen M. Hoersting\*  
Bradley A. Smith\*  
CENTER FOR COMPETITIVE POLITICS  
124 W. Street South, Suite 201  
Alexandria, VA 22314  
Tel: (703) 894-6800  
Email: [shoersting@campaignfreedom.org](mailto:shoersting@campaignfreedom.org),  
[BSmith@law.capital.edu](mailto:BSmith@law.capital.edu)

*Attorneys for Plaintiffs*  
\*Admitted Pro Hac Vice

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 21<sup>st</sup> Day of November, 2008, a true and correct copy of MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' FIRST MOTION IN LIMINE and ACCOMPANYING DECLARATIONS AND EXHIBITS was electronically filed using the court's ECF system and sent via the ECF electronic notification system to the following counsel of record:

Robert W. Bonham, III  
David B. Kolker  
Steve N. Hajjar  
Kevin Deeley  
FEDERAL ELECTION COMMISSION  
999 E. Street, N.W.  
Washington, DC 20463

/s/ Steven M. Simpson

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

<hr/>		)	
SPEECHNOW.ORG,		)	
DAVID KEATING,		)	
FRED M. YOUNG, JR.,		)	
EDWARD H. CRANE, III,		)	
BRAD RUSSO, and		)	
SCOTT BURKHARDT		)	
	Plaintiffs,	)	
		)	
v.		)	Civil Case No. 1:08-cv-00248 (JR)
		)	
FEDERAL ELECTION COMMISSION		)	
		)	
	Defendant.	)	
<hr/>		)	

---

**DECLARATION OF ROBERT GALL  
IN SUPPORT OF PLAINTIFFS' FIRST MOTION IN LIMINE**

---

1. I am an attorney representing the Plaintiffs in the above-captioned matter. I am a member in good standing of the Bar of the District of Columbia and have been admitted to the United States District Court for the District of Columbia. I make this declaration in support of Plaintiffs' First Motion in Limine.

2. Attached to this declaration are true and correct copies of the following documents:
- a. Exhibit A: Email from Steven M. Simpson to Kevin Deeley (Aug. 15, 2008, 05:45 PM);

- b. Exhibit B: Email from Steven Hajjar to Steven M. Simpson (Aug. 15, 2008, 04:58 PM);
- c. Exhibit C: Email from Steven M. Simpson to FEC (Sept. 15, 2008, 08:26 PM);
- d. Exhibit D: Email from Steven Hajjar to Robert Gall (Sept. 17, 2008, 05:36 PM);
- e. Exhibit E: Email from Steven Hajjar to Cheryl Korn (Aug. 18, 2008, 05:03 PM);
- f. Exhibit F: Email from Clyde Wilcox to Kevin Deeley (June 12, 2008, 05:23 PM);
- g. Exhibit G: Email from Kimberly Wyborski to Steven Hajjar (July 30, 2008, 03:42 PM);
- h. Exhibit H: Emails between the FEC and Zogby International (August 4, 2008 through Aug. 20, 2008);
- i. Exhibit I: Email from Cheryl Korn to Steven Hajjar (Aug. 25, 2008, 02:51 PM);
- j. Exhibit J: Email from Robert Bonham to Steven M. Simpson (Aug. 25, 2008, 09:41 PM);
- k. Exhibit K: Email from Kevin Deeley to Robert Gall (Oct. 1, 2008, 10:02 PM);
- l. Exhibit L: Plaintiffs' Subpoena Duces Tecum of Robert Rozen (Oct. 14, 2008);
- m. Exhibit M: FEC's Objections to Plaintiffs' Subpoena Duces Tecum to Robert Rozen (Oct. 14, 2008);
- n. Exhibit N: Email from Robert Rozen to Paul Sherman (Oct. 16, 2008, 11:13 AM);
- o. Exhibit O: Email from Kevin Deeley to Robert Gall (Sept. 26, 2008, 07:32 PM);
- p. Exhibit P: Plaintiffs' Subpoena of California Fair Political Practices Commission (Sept. 19, 2008);

- q. Exhibit Q: FEC's Objections to Plaintiffs' Subpoena to California Fair Political Practices Commission;
- r. Exhibit R: Letter from Scott Hallabrin to Steven M. Simpson (Sept. 25, 2008);
- s. Exhibit S: Email from Steven Hajjar to Steven M. Simpson (Sept. 25, 2008, 10:21 AM);
- t. Exhibit T: FEC's objections to Plaintiffs' Subpoena Duces Tecum of Justice Larry V. Starcher (Sept. 25, 2008);
- u. Exhibit U: Email from Kimberly Wyborski to Steven Hajjar (July 30, 2008, 04:25 PM);
- v. Exhibit V: Declaration of Robert Rozen from *McConnell, v. FEC*, 540 U.S. 93 (2003);
- w. Exhibit W: FEC's Initial Disclosures (June 6, 2008);
- x. Exhibit X: Email from Graham Wilson to Robert Gall (Sept. 30, 2008, 06:47 PM);
- y. Exhibit Y: Email from Graham Wilson to Scott Hallabrin (Sept. 17, 2008, 08:24 PM);
- z. Exhibit Z: Email from Scott Hallabrin to Graham Wilson (Sept. 30, 2008, 01:23 PM);
- aa. Exhibit AA: Email from Kevin Deeley to Robert Rozen (Oct. 1, 2008, 10:38 AM);
- bb. Exhibit BB: Plaintiffs' First Set of Discovery Requests (July 22, 2008);
- cc. Exhibit CC: Email from Robert Shapiro to Clyde Wilcox (Aug. 13, 2008, 01:15 PM);

dd. Exhibit DD: Email from Graham Wilson to Michael Bright (Sept. 4, 2008,  
05:06 PM);

ee. Exhibit EE: Email from Michael Bright to Graham Wilson (Sept. 24, 2008,  
05:06 PM);

ff. Exhibit FF: Email from Graham Wilson to Leon Patton (Sept. 8, 2008  
11:19 AM);

gg. Exhibit GG: Joint Scheduling Report (June 6, 2008).

3. I certify and declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

Executed: November 21<sup>st</sup>, 2008.

/s/ Robert Gall  
Robert Gall

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT A

**Paul Sherman**

---

**From:** Steve Simpson  
**Sent:** Friday, August 15, 2008 5:45 PM  
**To:** kdeeley@fec.gov; GWilson@fec.gov; RBonham@fec.gov; dkolker@fec.gov; 'shajjar@fec.gov'  
**Cc:** Bert Gall; Paul Sherman  
**Subject:** expert reports

**Attachments:** Milyo report (IJ023887).PDF; Smith report (IJ023888).PDF

Gentlemen:

Pursuant to the parties' scheduling report, enclosed are reports of plaintiff's experts. Plaintiffs reserve the right to alter the subjects of these experts' testimony relevant to matters raised in this case.

Please let me know if you have any questions.

Steve Simpson  
Institute for Justice  
901 N. Glebe Road  
Suite 900  
Arlington, VA 22203  
703-682-9320  
703-682-9321 (fax)  
www.ij.org



Milyo report  
IJ023887).PDF (1..



Smith report  
IJ023888).PDF (5..

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT B

**Paul Sherman**

---

**From:** shajjar@fec.gov  
**Sent:** Friday, August 15, 2008 4:58 PM  
**To:** Steve Simpson; Bert Gall; Paul Sherman  
**Cc:** kdeeley@fec.gov; GWilson@fec.gov; RBonham@fec.gov; dkolker@fec.gov  
**Subject:** FEC's Expert Witness Designation and Report  
**Attachments:** Expert Witness Designation.pdf; Expert Report.pdf

Gentlemen,

Please find attached the FEC's Expert Witness Designation and Expert Witness Report. Please let me know if you do not receive either or both of these documents.

Declarations referenced by Professor Wilcox will shortly arrive in 3 separate emails to ensure that they (hopefully) don't bounce.

Thanks.

---

Steve N. Hajjar  
Attorney, Litigation Division  
Office of General Counsel  
Federal Election Commission  
Phone: (202) 694-1546

11/18/2008

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

\_\_\_\_\_  
SPEECHNOW.ORG, *et al.*,  
  
Plaintiffs,  
  
v.

Civ. No. 08-248 (JR)

FEDERAL ELECTION COMMISSION,  
  
Defendant.

DEFENDANT'S

IT 623874

As provided for in the parties' Joint  
Defendant Federal Election Commission h  
which it intends to rely in this action.

#27],  
upon

Professor Clyde Wilcox  
Department of Government  
Georgetown University  
ICC 679  
Washington, DC 20057

- Anticipated subject matter of testimony: It is currently anticipated that Professor Wilcox's testimony will generally address the following subjects:
- (1) the impact of allowing unlimited contributions to political committees that only make independent expenditures, and the appearance of corruption that would likely arise;
  - (2) the history of contributions to political organizations to achieve preferential access with, and influence over, candidates and officeholders;
  - (3) an overview of the effect of independent candidate political advertising campaigns on elections, candidates, and officeholders;
  - (4) the value of independent candidate political advertising campaigns to candidates and officeholders;
  - (5) the effect of allowing political committees that only make independent expenditures to disclose only funds raised to further their independent expenditures; and
  - (6) any other relevant matters relating to independent candidate political advertising campaigns and elections.

Defendant reserves the right to alter the subjects of Professor Wilcox's testimony relevant to the matters raised in this case.

Respectfully submitted,

Thomasenia P. Duncan (D.C. Bar No. 424222)  
General Counsel

David Kolker (D.C. Bar No. 394558)  
Associate General Counsel

Kevin Deeley  
Assistant General Counsel

Robert W. Bonham III (D.C. Bar No. 397859)  
Senior Attorney

/s/ Steve N. Hajjar  
Steve N. Hajjar  
Graham Wilson  
Attorneys

FOR THE DEFENDANT  
FEDERAL ELECTION COMMISSION  
999 E Street NW  
Washington, DC 20463  
(202) 694-1650

Dated: August 15, 2008

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
SPEECHNOW.ORG, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civ. No. 08-248 (JR)
	)	
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant.	)	
_____	)	

CERTIFICATE OF SERVICE

I, Steve N. Hajjar, certify that on August 15, 2008, I caused a true and correct copy of the Defendant's Expert Witness Designation to be served electronically on:

Counsel for Plaintiff

Steven M. Simpson  
Institute for Justice  
901 N. Glebe Road, Suite 900  
Arlington, VA 22203

/s/ Steve N. Hajjar  
Steve N. Hajjar  
Federal Election Commission  
999 E Street NW  
Washington, DC 20463  
(202) 694-1650

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT C

## Paul Sherman

---

**From:** Steve Simpson  
**Sent:** Monday, September 15, 2008 8:26 PM  
**To:** shajjar@fec.gov; RBonham@fec.gov; GWilson@fec.gov; gmueller@fec.gov; 'kdeeley@fec.gov'  
**Cc:** Bert Gall; Paul Sherman; Robert Frommer  
**Attachments:** Milyo rebuttal report (IJ024381).PDF

Gentlemen:

Attached is the rebuttal report of Jeff Milyo. Please let me know if you have any questions.



Milyo rebuttal  
report - signed...

Steve Simpson  
Institute for Justice  
901 N. Glebe Road  
Suite 900  
Arlington, VA 22203  
703-682-9320  
703-682-9321 (fax)  
[www.ij.org](http://www.ij.org)

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT D

**Paul Sherman**

---

**From:** shajjar@fec.gov  
**Sent:** Wednesday, September 17, 2008 5:36 PM  
**To:** Bert Gall; Paul Sherman; Steve Simpson  
**Cc:** kdeeley@fec.gov; RBonham@fec.gov; GWilson@fec.gov  
**Subject:** Supplement to Initial Disclosures (Calogero)  
**Attachments:** x-FEC.pdf; wf-FEC.pdf; Calogero Declaration.pdf; SpeechNow - Supplement to Initial Disclosures (Calogero).pdf; FINAL REPORT.pdf

Gentlemen,

Please see attached.

As a courtesy we are attaching Mr. Calogero's declaration.

Thanks.

---

Steve N. Hajjar  
Attorney, Litigation Division  
Office of General Counsel  
Federal Election Commission  
Phone: (202) 694-1546

11/18/2008

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

_____	)	
SPEECHNOW.ORG, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	Civ. No. 08-248 (JR)
v.	)	
	)	FEC SUPPLEMENT TO
FEDERAL ELECTION COMMISSION,	)	INITIAL DISCLOSURES
	)	
Defendant.	)	
_____	)	

**DEFENDANT FEDERAL ELECTION COMMISSION’S  
SUPPLEMENT TO ITS INITIAL DISCLOSURES**

Pursuant to Federal Rule of Civil Procedure 26(a)(1), the Federal Election Commission (“Commission”) supplements its initial disclosures in the above-captioned action. These disclosures are without prejudice to the Commission’s right to rely on additional witnesses and documents that are revealed during the course of discovery in this action.

Pursuant to Rule 26(a)(1)(A)(i), the Commission hereby discloses the name, address and telephone number of an individual likely to have discoverable information that the Commission may use to support its claims and defenses:

Mr. P. Michael Calogero  
Zogby International  
901 Broad Street  
Utica, NY 13501  
(315) 624-0200

Pursuant to Rule 26(a)(1)(A)(i), the Commission has in its possession, custody, or control, the following documents that the Commission may use to support its claims:

- Results of Nationwide Poll
- Zogby America Poll of Nationwide Adults 8/22/08 - 8/24/08 MOE +/- 2.9 percentage points (Cross Tabulations)
- Zogby America Poll of Nationwide Adults 8/22/08 - 8/24/08 MOE +/- 2.9 percentage points (Frequencies)

Copies of these documents are attached.

We will, of course, supplement these disclosures with any additional information as required by Federal Rule of Civil Procedure 26(e).

Thomasenia P. Duncan  
(D.C. Bar No. 424222)  
General Counsel

David Kolker  
(D.C. Bar No. 394558)  
Associate General Counsel

Kevin Deeley  
Assistant General Counsel

Robert W. Bonham III  
(D.C. Bar No. 397859)  
Senior Attorney

/s/ Steve N. Hajjar  
Steve N. Hajjar  
Attorney

Graham Wilson  
Attorney

COUNSEL FOR DEFENDANT  
FEDERAL ELECTION COMMISSION  
999 E Street NW  
Washington, DC 20463  
(202) 694-1650

Dated: September 17, 2008

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT E



Steve Hajjar/FEC/US  
08/18/2008 05:03 PM

To rebecca@zogby.com, cheryl@zogby.com  
cc Graham Wilson/FEC/US@FEC  
bcc  
Subject FEC's Draft Questions

Rebecca and Cheryl,

Please find attached the FEC's draft questions. As we discussed, we would like questions 1 and 2 to be asked, in random order, to 1/2 of the sample, and questions 3 and 4 to be asked to the other half. And also as we discussed, please let me know whether we can get these questions asked on a survey that does not include election-related questions, or if they can be asked before any election-related questions.

Thanks.



FEC's Questions for Zogby Pre-test.doc

---

Steve N. Hajjar  
Attorney, Litigation Division  
Office of General Counsel  
Federal Election Commission  
Phone: (202) 694-1546

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT F



"Clyde Wilcox"  
<Wilcoxc@georgetown.edu>  
06/12/2008 05:23 PM

To <kdeeley@fec.gov>  
cc  
bcc  
Subject RE: possible testimony for the FEC

So, I don't know about your budget on this, but one really quick thing on the perception of corruption.

There are lots of firms out there that do internet polls now and they are pretty widely accepted at this point.

So, you could have a split sample, with two questions – one for each half.

1. If you learned that an interest group or wealthy individual gave a large contribution (we could fill in an amount) to a congressional candidate in your district, how likely do you think that candidate would be to do a favor for the donor once in office
  - a. Very likely
  - b. Somewhat likely
  - c. Not very likely
  - d. Not at all likely
2. If you learned that an interest group or wealthy individual spent a large amount of money helping to elect a congressional candidate in your district, but did not give the money directly to the candidate, how likely do you think....

And then, my guess would be that the results would be the same.

No idea how much it would cost, but a single question would probably not be much, and they might throw in the demographics for free.

**From:** kdeeley@fec.gov [mailto:kdeeley@fec.gov]  
**Sent:** Thursday, June 12, 2008 4:54 PM  
**To:** wilcoxc@georgetown.edu  
**Subject:** Re: possible testimony for the FEC

Is there a different phone number I could use to get a hold of you? I neglected to ask when you called.

Kevin Deeley/FEC/US  
06/12/2008 03:02 PM

To wilcoxc@georgetown.edu  
cc  
Subject possible testimony for the FEC

hello Professor Wilcox- I just got your voicemail message recommending email to contact you. I'm

CW0005

calling regarding some litigation the FEC is in. Some colleagues and former colleagues have recommended you as a possible witness. Please call me as soon as you can so that I can explain and fill you in on some of the details.

Thanks,

Kevin Deeley  
Federal Election Commission  
999 E Street NW  
Washington, DC 20463  
(202) 694-1556 | [kdeeley@fec.gov](mailto:kdeeley@fec.gov)

CW0006

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT G



kimberly  
<kimberly@zogby.com>  
07/30/2008 03:42 PM

To <shajjar@fec.gov>  
cc 'Chad Bohnert' <chad@zogby.com>  
bcc  
Subject Zogby International Memo

Mr. Hajjar,

Thanks for calling yesterday. Attached is a memo that outlines methodology, cost and deliverables for your questions. We are actually going into the field with a nationwide survey as early as this Friday or early next week. If you decide to proceed with the questions what is the date you'd like to receive results by? If you have any questions please don't hesitate to ask. Thank you very much.

Regards,  
Kimberly Wyborski  
Account Manager  
Zogby International  
315-624-0200 x240

	<b>THE WAY WE'LL BE by JOHN ZOGBY</b>	
<i>"John Zogby always knows the pulse of America - and in this book he shares his many insights into who we are and what we think. I will return to his findings again and again." -Tom Brokaw</i>		
[ <a href="#">Learn More</a> ] - [ <a href="#">Order Now</a> ]		

Disclaimer added by CodeTwo Exchange Rules  
[www.codetwo.com](http://www.codetwo.com)



Federal Election Commission.doc bg\_email.jpg

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT H



kimberly  
<kimberly@zogby.com>

08/04/2008 09:41 AM

To <shajjar@fec.gov>

cc 'Leann Atkinson' <leann@zogby.com>, 'Chad Bohnert'  
<chad@zogby.com>, 'Rebecca Wittman'  
<rebecca@zogby.com>

bcc

Subject RE: Zogby International Inquiry

History:

This message has been replied to and forwarded.

Mr. Hajjar,

Our tax id number is 161575328. Are you ready to proceed with the 2 questions? If so, I can send you a contract for them.

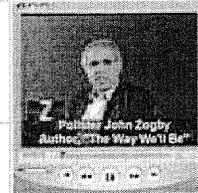
Thank you,

Kimberly

**THE WAY WE'LL BE by JOHN ZOGBY**



*"John Zogby always knows the pulse of America - and in this book he shares his many insights into who we are and what we think. I will return to his findings again and again." -Tom Brokaw*



[ [Learn More](#) ] - [ [Order Now](#) ]

Disclaimer added by CodeTwo Exchange Rules  
[www.codetwo.com](http://www.codetwo.com)

**From:** shajjar@fec.gov [mailto:shajjar@fec.gov]

**Sent:** Friday, August 01, 2008 7:05 PM

**To:** Kimberly Wyborski

**Cc:** Chad Bohnert

**Subject:** Re: Zogby International Inquiry

Kimberly,

Could you provide me with a taxpayer identification number and a DUNS number? If you only have one, we'll take that.

Thanks.

---

Steve N. Hajjar  
Attorney, Litigation Division  
Office of General Counsel  
Federal Election Commission  
Phone: (202) 694-1546

kimberly <kimberly@zogby.com>

07/31/2008 03:43 PM

To <shajjar@fec.gov>  
Cc: Chad Bohnert <chad@zogby.com>  
Subject: Zogby International Inquiry

Mr. Hajjar,  
Just following up on the two questions you were looking to field. Was there any feedback regarding the methodology or timeline because we are ready to field very quickly and we'd love to work with you and your team.

Thank you very much,  
Kimberly Wyborski  
Account Manager  
315-624-0200 x240

---

### THE WAY WE'LL BE by JOHN ZOGBY



*"John Zogby always knows the pulse of America - and in this book he shares his many insights into who we are and return to his findings again and again." -Tom Brokaw*

[ [Learn More](#) ] - [ [Order Now](#) ]

Disclaimer added by CodeTwo Exchange Rules



[www.codetwo.com](http://www.codetwo.com) bg\_email.jpg

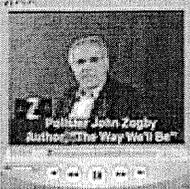


kimberly  
<kimberly@zogby.com>  
08/04/2008 10:49 AM

To <shajjar@fec.gov>  
cc 'Leann Atkinson' <leann@zogby.com>, 'Karen Scott' <karenscott@zogby.com>, 'Marc Penz' <marc@zogby.com>, 'Rebecca Wittman' <rebecca@zogby.com>  
bcc  
Subject RE: Zogby International Inquiry

History: This message has been replied to and forwarded.

I sure can, to whom should I address the contract?  
Thanks,  
Kimberly

	<p><b>THE WAY WE'LL BE by JOHN ZOGBY</b></p> <p><i>"John Zogby always knows the pulse of America - and in this book he shares his many insights into who we are and what we think. I will return to his findings again and again." -Tom Brokaw</i></p> <p>[ <a href="#">Learn More</a> ] - [ <a href="#">Order Now</a> ]</p>	
-----------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------

Disclaimer added by CodeTwo Exchange Rules  
[www.codetwo.com](http://www.codetwo.com)

**From:** shajjar@fec.gov [mailto:shajjar@fec.gov]  
**Sent:** Monday, August 04, 2008 10:47 AM  
**To:** Kimberly Wyborski  
**Subject:** RE: Zogby International Inquiry

On second thought, could you please send us that contract?

Thanks

kimberly  
<kimberly@zogby.com>

08/04/2008 09:41 AM

To: <shajjar@fec.gov>  
cc: 'Leann Atkinson' <leann@zogby.com>, 'Chad Bohnert' <chad@zogby.com>, 'Rebecca Wittman'  
<rebecca@zogby.com>  
Subject: RE: Zogby International Inquiry  
ct

Mr. Hajjar,  
Our tax id number is 161575328. Are you ready to proceed with the 2 questions? If so, I can send you a contract for them.  
Thank you,  
Kimberly



---

**THE WAY WE'LL BE by JOHN ZOGBY**

*"John Zogby always knows the pulse of America - and in this book he shares his many insights into who we are and return to his findings again and again." -Tom Brokaw*

[ [Learn More](#) ] - [ [Order Now](#) ]

---

Disclaimer added by CodeTwo Exchange Rules  
[www.codetwo.com](http://www.codetwo.com)

**From:** shajjar@fec.gov [mailto:shajjar@fec.gov]  
**Sent:** Friday, August 01, 2008 7:05 PM  
**To:** Kimberly Wyborski  
**Cc:** Chad Bohnert  
**Subject:** Re: Zogby International Inquiry



kimberly  
<kimberly@zogby.com>  
08/04/2008 11:06 AM

To <shajjar@fec.gov>  
cc  
bcc  
Subject RE: Zogby International Inquiry

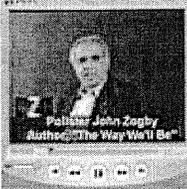
History: This message has been replied to.

Yes, could you please provide the address?  
Thank you.

**THE WAY WE'LL BE by JOHN ZOGBY**



*"John Zogby always knows the pulse of America - and in this book he shares his many insights into who we are and what we think. I will return to his findings again and again." -Tom Brokaw*



[ [Learn More](#) ] - [ [Order Now](#) ]

Disclaimer added by **CodeTwo Exchange Rules**  
[www.codetwo.com](http://www.codetwo.com)

**From:** shajjar@fec.gov [mailto:shajjar@fec.gov]  
**Sent:** Monday, August 04, 2008 11:02 AM  
**To:** Kimberly Wyborski  
**Subject:** RE: Zogby International Inquiry

You can address it to me.

Do you want or need a physical address?

kimberly  
<kimberly@zogby.com> To: <shajjar@fec.gov>  
cc: 'Leann Atkinson' <leann@zogby.com>, 'Karen Scott' <karenscott@zogby.com>, 'Marc Penz'  
<marc@zogby.com>, 'Rebecca Wittman' <rebecca@zogby.com>  
08/04/2008 10:49 AM Subj: RE: Zogby International Inquiry  
ect

I sure can, to whom should I address the contract?  
Thanks,  
Kimberly

---

### THE WAY WE'LL BE by JOHN ZOGBY



*"John Zogby always knows the pulse of America - and in this book he shares his many insights into who we are and return to his findings again and again." -Tom Brokaw*

[ [Learn More](#) ] - [ [Order Now](#) ]

---

Disclaimer added by CodeTwo Exchange Rules  
[www.codetwo.com](http://www.codetwo.com)

**From:** shajjar@fec.gov [mailto:shajjar@fec.gov]  
**Sent:** Monday, August 04, 2008 10:47 AM  
**To:** Kimberly Wyborski  
**Subject:** RE: Zogby International Inquiry

On second thought, could you please send us that contract?

Thanks

kimberly  
<kimberly@zogby.com>

To

08/04/2008 09:41 AM

<shajjar@fec.gov>  
cc'Leann Atkinson' <leann@zogby.com>, 'Chad Bohnert' <chad@zogby.com>, 'Rebecca Wittman'  
<rebecca@zogby.com>  
Subject: Zogby International Inquiry  
ct

Mr. Hajjar,  
Our tax id number is 161575328. Are you ready to proceed with the 2 questions? If so, I can send you a contract for them.  
Thank you,  
Kimberly



---

**THE WAY WE'LL BE by JOHN ZOGBY**

*"John Zogby always knows the pulse of America - and in this book he shares his many insights into who we are and return to his findings again and again." -Tom Brokaw*

[ [Learn More](#) ] - [ [Order Now](#) ]

---

Disclaimer added by CodeTwo Exchange Rules  
[www.codetwo.com](http://www.codetwo.com)

**From:** shajjar@fec.gov [mailto:shajjar@fec.gov]  
**Sent:** Friday, August 01, 2008 7:05 PM  
**To:** Kimberly Wyborski  
**Cc:** Chad Bohnert  
**Subject:** Re: Zogby International Inquiry



kimberly  
<kimberly@zogby.com>  
08/04/2008 11:28 AM

To <shajjar@fec.gov>  
cc 'Gary Smith' <gary@zogby.com>, 'Rosemary Penz'  
<ro@zogby.com>, 'Leann Atkinson' <leann@zogby.com>,  
'Chad Bohnert' <chad@zogby.com>, 'Rebecca Wittman'  
bcc

Subject RE: Zogby International Inquiry

History: This message has been replied to and forwarded.

Steve,  
Attached is the contract. Upon approval you can send it to me via email or fax. If you have any questions let me know. What is the date you would like to receive data by?  
Thanks,  
Kim

<b>THE WAY WE'LL BE by JOHN ZOGBY</b>		
	<i>"John Zogby always knows the pulse of America - and in this book he shares his many insights into who we are and what we think. I will return to his findings again and again." -Tom Brokaw</i>	
[ <a href="#">Learn More</a> ] - [ <a href="#">Order Now</a> ]		

Disclaimer added by CodeTwo Exchange Rules  
[www.codetwo.com](http://www.codetwo.com)

**From:** shajjar@fec.gov [mailto:shajjar@fec.gov]  
**Sent:** Monday, August 04, 2008 11:08 AM  
**To:** Kimberly Wyborski  
**Subject:** RE: Zogby International Inquiry

Steve N. Hajjar

Office of General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

kimberly <kimberly@zogby.com>

08/04/2008 11:06 AM

To <shajjar@fec.gov>  
cc  
Subject RE: Zogby International Inquiry

Yes, could you please provide the address?  
Thank you.



---

**THE WAY WE'LL BE by JOHN ZOGBY**  
*"John Zogby always knows the pulse of America - and in this book he shares his many insights into who we are and return to his findings again and again." -Tom Brokaw*

[ [Learn More](#) ] - [ [Order Now](#) ]

---

Disclaimer added by [CodeTwo Exchange Rules](#)  
[www.codetwo.com](http://www.codetwo.com)

**From:** shajjar@fec.gov [mailto:shajjar@fec.gov]  
**Sent:** Monday, August 04, 2008 11:02 AM  
**To:** Kimberly Wyborski  
**Subject:** RE: Zogby International Inquiry

You can address it to me.

Do you want or need a physical address?

kimberly  
<kimberly@zogby.com>

To: <shajjar@fec.gov>  
cc: 'Leann Atkinson' <leann@zogby.com>, 'Karen Scott' <karenscott@zogby.com>, 'Marc Penz' <marc@zogby.com>, 'Rebecca Wittman' <rebecca@zogby.com>  
08/04/2008 10:49 AM  
Subj: RE: Zogby International Inquiry  
ect

I sure can, to whom should I address the contract?

Thanks,  
Kimberly



**THE WAY WE'LL BE by JOHN ZOGBY**  
*"John Zogby always knows the pulse of America - and in this book he shares his many insights into who we are and return to his findings again and again." -Tom Brokaw*

[ [Learn More](#) ] - [ [Order Now](#) ]

Disclaimer added by CodeTwo Exchange Rules

[www.codetwo.com](http://www.codetwo.com)

**From:** shajjar@fec.gov [mailto:shajjar@fec.gov]  
**Sent:** Monday, August 04, 2008 10:47 AM  
**To:** Kimberly Wyborski

**Subject:** RE: Zogby International Inquiry

On second thought, could you please send us that contract?

Thanks

kimberly  
<kimberly@zogby.com>

08/04/2008 09:41 AM

To: <shajjar@fec.gov>  
cc: 'Leann Atkinson' <leann@zogby.com>, 'Chad Bohnert' <chad@zogby.com>, 'Rebecca Wittman' <rebecca@zogby.com>  
Subject: RE: Zogby International Inquiry  
ct

Mr. Hajjar,  
Our tax id number is 161575328. Are you ready to proceed with the 2 questions? If so, I can send you a contract for them.  
Thank you,  
Kimberly

---

**THE WAY WE'LL BE by JOHN ZOGBY**



*"John Zogby always knows the pulse of America - and in this book he shares his many insights into who we are and return to his findings again and again." -Tom Brokaw*

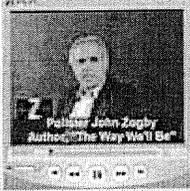
[ [Learn More](#) ] - [ [Order Now](#) ]



kimberly  
<kimberly@zogby.com>  
08/04/2008 04:01 PM

To <shajjar@fec.gov>  
cc 'Leann Atkinson' <leann@zogby.com>  
bcc  
Subject RE: Zogby International Inquiry

The DUNS number is 17-817-1047.

<b>THE WAY WE'LL BE by JOHN ZOGBY</b>		
	<i>"John Zogby always knows the pulse of America - and in this book he shares his many insights into who we are and what we think. I will return to his findings again and again." -Tom Brokaw</i>	
[ <a href="#">Learn More</a> ] - [ <a href="#">Order Now</a> ]		

Disclaimer added by CodeTwo Exchange Rules  
[www.codetwo.com](http://www.codetwo.com)

**From:** shajjar@fec.gov [mailto:shajjar@fec.gov]  
**Sent:** Monday, August 04, 2008 3:54 PM  
**To:** Kimberly Wyborski  
**Subject:** RE: Zogby International Inquiry

I'm not sure about the date yet.

I'm now being told that it would help expedite matters if you could provide us with your DUNS number.

Thanks

kimberly  
<kimberly@zogby.com>  
m>  
08/04/2008 11:28 AM

To <shajjar@fec.gov>  
cc'Gary Smith' <gary@zogby.com>, 'Rosemary Penz' <ro@zogby.com>, 'Leann Atkinson' <leann@zogby.com>, 'Chad Bohnert' <chad@zogby.com>, 'Rebecca Wittman' <rebecca@zogby.com>  
SubjRE: Zogby International Inquiry  
ect

Steve,  
Attached is the contract. Upon approval you can send it to me via email or fax. If you have any questions let me know. What is the date you would like to receive data by?  
Thanks,  
Kim



---

**THE WAY WE'LL BE** by JOHN ZOGBY  
*"John Zogby always knows the pulse of America - and in this book he shares his many insights into who we are and return to his findings again and again." -Tom Brokaw*

[ [Learn More](#) ] - [ [Order Now](#) ]

---

Disclaimer added by CodeTwo Exchange Rules  
[www.codetwo.com](http://www.codetwo.com)

**From:** shajjar@fec.gov [mailto:shajjar@fec.gov]  
**Sent:** Monday, August 04, 2008 11:08 AM  
**To:** Kimberly Wyborski  
**Subject:** RE: Zogby International Inquiry

Steve N. Hajjar  
Office of General Counsel  
Federal Election Commission

999 E Street, NW  
Washington, DC 20463

kimberly <kimberly@zogby.com>

08/04/2008 11:06 AM

To <shajjar@fec.gov>  
cc  
Subject RE: Zogby International Inquiry

Yes, could you please provide the address?  
Thank you.



---

**THE WAY WE'LL BE by JOHN ZOGBY**

*"John Zogby always knows the pulse of America - and in this book he shares his many insights into who we are and return to his findings again and again." -Tom Brokaw*

[ [Learn More](#) ] - [ [Order Now](#) ]

---

Disclaimer added by **CodeTwo Exchange Rules**  
[www.codetwo.com](http://www.codetwo.com)

**From:** shajjar@fec.gov [mailto:shajjar@fec.gov]  
**Sent:** Monday, August 04, 2008 11:02 AM  
**To:** Kimberly Wyborski  
**Subject:** RE: Zogby International Inquiry

You can address it to me.

Do you want or need a physical address?

kimberly  
<kimberly@zogby.com>

08/04/2008 10:49 AM To <shajjar@fec.gov>  
cc 'Leann Atkinson' <leann@zogby.com>, 'Karen Scott' <karenscott@zogby.com>, 'Marc Penz'  
<marc@zogby.com>, 'Rebecca Wittman' <rebecca@zogby.com>  
Subject: Zogby International Inquiry  
ect

I sure can, to whom should I address the contract?

Thanks,  
Kimberly



**THE WAY WE'LL BE by JOHN ZOGBY**

*"John Zogby always knows the pulse of America - and in this book he shares his many insights into who we are and return to his findings again and again." -Tom Brokaw*

[ [Learn More](#) ] - [ [Order Now](#) ]

---

Disclaimer added by CodeTwo Exchange Rules  
[www.codetwo.com](http://www.codetwo.com)

**From:** shajjar@fec.gov [mailto:shajjar@fec.gov]  
**Sent:** Monday, August 04, 2008 10:47 AM  
**To:** Kimberly Wyborski  
**Subject:** RE: Zogby International Inquiry

On second thought, could you please send us that contract?

Thanks

kimberly  
<kimberly@zogby.com>

08/04/2008 09:41 AM

To: <shajjar@fec.gov>  
cc: 'Leann Atkinson' <leann@zogby.com>, 'Chad Bohnert' <chad@zogby.com>, 'Rebecca Wittman' <rebecca@zogby.com>  
Subject: RE: Zogby International Inquiry  
ct

Mr. Hajjar,  
Our tax id number is 161575328. Are you ready to proceed with the 2 questions? If so, I can send you a contract for them.  
Thank you,  
Kimberly



kimberly  
<kimberly@zogby.com>  
08/06/2008 12:20 PM

To <shajjar@fec.gov>  
cc 'Chad Bohnert' <chad@zogby.com>, 'Anibal Abdella'  
<anibal@zogby.com>, 'Rebecca Wittman'  
<rebecca@zogby.com>

bcc

Subject RE: Zogby International Inquiry

History: This message has been forwarded.

Mr. Hajjar,

I'm following up on the status of the project and also to let you know I will be out of the office for the remainder of the week. If you need assistance with the contract or are ready to begin the survey this week, I'm copying my colleague Anibal Abdella who can assist you (315-624-0200 x242). Thank you very much.

Kimberly Wyborski  
Account Manager

	<p><b>THE WAY WE'LL BE by JOHN ZOGBY</b></p> <p><i>"John Zogby always knows the pulse of America - and in this book he shares his many insights into who we are and what we think. I will return to his findings again and again." -Tom Brokaw</i></p> <p>[ <a href="#">Learn More</a> ] - [ <a href="#">Order Now</a> ]</p>	
--	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--

Disclaimer added by CodeTwo Exchange Rules  
[www.codetwo.com](http://www.codetwo.com)

**From:** shajjar@fec.gov [mailto:shajjar@fec.gov]  
**Sent:** Monday, August 04, 2008 3:54 PM  
**To:** Kimberly Wyborski

**Subject:** RE: Zogby International Inquiry

I'm not sure about the date yet.

I'm now being told that it would help expedite matters if you could provide us with your DUNS number.

Thanks

kimberly  
<kimberly@zogby.com>  
m>  
To <shajjar@fec.gov>  
cc 'Gary Smith' <gary@zogby.com>, 'Rosemary Penz' <ro@zogby.com>, 'Leann Atkinson' <leann@zogby.com>, 'Chad Bohnert' <chad@zogby.com>, 'Rebecca Wittman' <rebecca@zogby.com>  
Subj RE: Zogby International Inquiry  
ect  
08/04/2008 11:28 AM

Steve,  
Attached is the contract. Upon approval you can send it to me via email or fax. If you have any questions let me know. What is the date you would like to receive data by?

Thanks,  
Kim



**THE WAY WE'LL BE by JOHN ZOGBY**  
*"John Zogby always knows the pulse of America - and in this book he shares his many insights into who we are and return to his findings again and again." -Tom Brokaw*

[ [Learn More](#) ] - [ [Order Now](#) ]

[www.codetwo.com](http://www.codetwo.com)

**From:** shajjar@fec.gov [mailto:shajjar@fec.gov]  
**Sent:** Monday, August 04, 2008 11:08 AM  
**To:** Kimberly Wyborski  
**Subject:** RE: Zogby International Inquiry

Steve N. Hajjar  
Office of General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

kimberly <kimberly@zogby.com>

08/04/2008 11:06 AM

To <shajjar@fec.gov>  
cc  
Subject RE: Zogby International Inquiry

Yes, could you please provide the address?  
Thank you.



---

**THE WAY WE'LL BE by JOHN ZOGBY**  
*"John Zogby always knows the pulse of America - and in this book he shares his many insights into who we are and return to his findings again and again." -Tom Brokaw*

[ [Learn More](#) ] - [ [Order Now](#) ]

---

Disclaimer added by CodeTwo Exchange Rules

[www.codetwo.com](http://www.codetwo.com)

**From:** shajjar@fec.gov [mailto:shajjar@fec.gov]

**Sent:** Monday, August 04, 2008 11:02 AM

**To:** Kimberly Wyborski

**Subject:** RE: Zogby International Inquiry

You can address it to me.

Do you want or need a physical address?

kimberly  
<kimberly@zogby.com>

08/04/2008 10:49 AM

To: <shajjar@fec.gov>  
cc: 'Leann Atkinson' <leann@zogby.com>, 'Karen Scott' <karenscott@zogby.com>, 'Marc Penz' <marc@zogby.com>, 'Rebecca Wittman' <rebecca@zogby.com>  
Subject: RE: Zogby International Inquiry  
ect

I sure can, to whom should I address the contract?

Thanks,  
Kimberly

---

**THE WAY WE'LL BE by JOHN ZOGBY**

*"John Zogby always knows the pulse of America - and in this book he shares his many insights into who we are and return to his findings again and again." -Tom Brokaw*



[ [Learn More](#) ] - [ [Order Now](#) ]

---

Disclaimer added by CodeTwo Exchange Rules  
[www.codetwo.com](http://www.codetwo.com)

**From:** shajjar@fec.gov [mailto:shajjar@fec.gov]  
**Sent:** Monday, August 04, 2008 10:47 AM  
**To:** Kimberly Wyborski  
**Subject:** RE: Zogby International Inquiry

On second thought, could you please send us that contract?

Thanks

kimberly  
<kimberly@zogby.com>

08/04/2008 09:41 AM

To: <shajjar@fec.gov>  
cc: 'Leann Atkinson' <leann@zogby.com>, 'Chad Bohnert' <chad@zogby.com>, 'Rebecca Wittman' <rebecca@zogby.com>  
Subject: RE: Zogby International Inquiry  
ct



Rebecca Wittman  
<rebecca@zogby.com>  
08/11/2008 04:52 PM

To <shajjar@fec.gov>  
cc 'Cheryl Korn' <cheryl@zogby.com>  
bcc

Subject Questions for Zogby Interactive

History: This message has been replied to and forwarded.

Hello Mr. Hajjar,

I just wanted to introduce myself as the project manager for your project with Zogby International. Cheryl Korn is the writer assigned to your project and she will be your primary contact for question development and reporting. Her contact information is [cheryl@zogby.com](mailto:cheryl@zogby.com) or 315-623-0200 ext 248.

We are going into the field tomorrow with an interactive and that would be the perfect opportunity to get your questions into the field, but it means we are working on a tight deadline. Cheryl will be in contact with you tomorrow morning.

In the meantime, if you have any questions or need anything, please feel free to contact me via the information below.

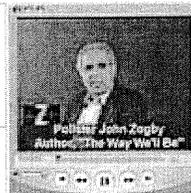
Thanks,  
Rebecca

Rebecca Wittman  
Vice President  
Project Administration  
315-624-0200 ext 230  
[rebecca@zogby.com](mailto:rebecca@zogby.com)  
[www.zogby.com](http://www.zogby.com)  
901 Broad Street, Second Floor  
Utica, NY 13501

**THE WAY WE'LL BE by JOHN ZOGBY**



*"John Zogby always knows the pulse of America - and in this book he shares his many insights into who we are and what we think. I will return to his findings again and again." -Tom Brokaw*



[ [Learn More](#) ] - [ [Order Now](#) ]

---

Disclaimer added by **CodeTwo Exchange Rules**  
[www.codetwo.com](http://www.codetwo.com)



Rebecca Wittman  
<rebecca@zogby.com>  
08/12/2008 02:15 PM

To <shajjar@fec.gov>  
cc 'Cheryl Korn' <cheryl@zogby.com>  
bcc

Subject RE: [BULK] Re: Questions for Zogby Interactive

History: This message has been forwarded.

Hello Mr. Hajjar,

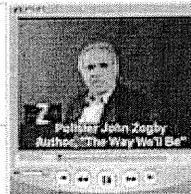
Thanks for the update on the timing. Yes, rotating your questions is no problem, but because it is a random rotation, it will not be exactly 50% for each question.

Thanks,  
Rebecca

**THE WAY WE'LL BE by JOHN ZOGBY**



*"John Zogby always knows the pulse of America - and in this book he shares his many insights into who we are and what we think. I will return to his findings again and again." —Tom Brokaw*



[ [Learn More](#) ] - [ [Order Now](#) ]

Disclaimer added by CodeTwo Exchange Rules  
[www.codetwo.com](http://www.codetwo.com)

**From:** shajjar@fec.gov [mailto:shajjar@fec.gov]  
**Sent:** Monday, August 11, 2008 11:48 PM  
**To:** Rebecca Wittman  
**Subject:** [BULK] Re: Questions for Zogby Interactive  
**Importance:** Low

Rebecca,

We probably will not be ready for another couple of days. I am also out of the office until Wednesday. I should be in contact then.

I do have one question, however. Will it be possible for you to alternate the order our two questions are asked, so that each question can be asked first 50 percent of the time?

Thanks.

---

**From:** Rebecca Wittman [rebecca@zogby.com]  
**Sent:** 08/11/2008 04:50 PM AST  
**To:** Steve Hajjar  
**Cc:** 'Cheryl Korn' <cheryl@zogby.com>  
**Subject:** Questions for Zogby Interactive

Hello Mr. Hajjar,

I just wanted to introduce myself as the project manager for your project with Zogby International. Cheryl Korn is the writer assigned to your project and she will be your primary contact for question development and reporting. Her contact information is [cheryl@zogby.com](mailto:cheryl@zogby.com) or 315-623-0200 ext 248.

We are going into the field tomorrow with an interactive and that would be the perfect opportunity to get your questions into the field, but it means we are working on a tight deadline. Cheryl will be in contact with you tomorrow morning.

In the meantime, if you have any questions or need anything, please feel free to contact me via the information below.

Thanks,  
Rebecca

Rebecca Wittman  
Vice President  
Project Administration  
315-624-0200 ext 230  
rebecca@zogby.com  
www.zogby.com  
901 Broad Street, Second Floor  
Utica, NY 13501

---

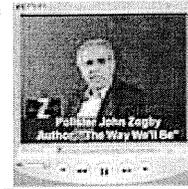
**THE WAY WE'LL BE by JOHN ZOGBY**

*"John Zogby always knows the pulse of America - and in this book he shares his many insights into who we are and what we think. I will return to his findings again and again." -Tom*



Brokaw

[ [Learn More](#) ] - [ [Order Now](#) ]



---

Disclaimer added by **CodeTwo Exchange Rules**  
[www.codetwo.com](http://www.codetwo.com)



Steve Hajjar/FEC/US  
08/18/2008 05:03 PM

To rebecca@zogby.com, cheryl@zogby.com  
cc Graham Wilson/FEC/US@FEC  
bcc  
Subject FEC's Draft Questions

Rebecca and Cheryl,

Please find attached the FEC's draft questions. As we discussed, we would like questions 1 and 2 to be asked, in random order, to 1/2 of the sample, and questions 3 and 4 to be asked to the other half. And also as we discussed, please let me know whether we can get these questions asked on a survey that does not include election-related questions, or if they can be asked before any election-related questions.

Thanks.



FEC's Questions for Zogby Pre-test.doc

---

Steve N. Hajjar  
Attorney, Litigation Division  
Office of General Counsel  
Federal Election Commission  
Phone: (202) 694-1546



Cheryl Korn  
<cheryl@zogby.com>  
08/19/2008 02:45 PM

To <shajjar@fec.gov>  
cc <GWilson@fec.gov>, Karen Scott <karen@zogby.com>, 'Rebecca Wittman' <rebecca@zogby.com>, 'Kimberly Wyborski' <kimberly@zogby.com>, 'Mike Calogero'

bcc  
Subject RE: FEC's Draft Questions

History: This message has been replied to.

Good Afternoon Mr. Hajjar,

I am attaching the draft script for your nationwide questions. We would like to aim for final approval by the close of business tomorrow, or Thursday morning at the latest. Please feel free to contact me with any questions or feedback.

Thank you, and have a great evening.  
Cheryl

Cheryl Korn  
Editorial Writer  
Zogby International  
901 Broad Street, Third Floor  
Utica, New York 13501  
315-624-0200 ext. 248  
cheryl@zogby.com

	<b>THE WAY WE'LL BE</b> by JOHN ZOGBY	
<i>"John Zogby always knows the pulse of America - and in this book he shares his many insights into who we are and what we think. I will return to his findings again and again." -Tom Brokaw</i>		
[ <a href="#">Learn More</a> ] - [ <a href="#">Order Now</a> ]		

---

Disclaimer added by CodeTwo Exchange Rules  
[www.codetwo.com](http://www.codetwo.com)

**From:** shajjar@fec.gov [mailto:shajjar@fec.gov]  
**Sent:** Monday, August 18, 2008 5:03 PM  
**To:** Rebecca Wittman; Cheryl Korn  
**Cc:** GWilson@fec.gov  
**Subject:** FEC's Draft Questions

Rebecca and Cheryl,

Please find attached the FEC's draft questions. As we discussed, we would like questions 1 and 2 to be asked, in random order, to 1/2 of the sample, and questions 3 and 4 to be asked to the other half. And also as we discussed, please let me know whether we can get these questions asked on a survey that does not include election-related questions, or if they can be asked before any election-related questions.

Thanks.

---

Steve N. Hajjar  
Attorney, Litigation Division  
Office of General Counsel  
Federal Election Commission



Phone: (202) 694-1546 FEC Draft Script 8-19.doc



Steve Hajjar/FEC/US  
08/20/2008 11:47 AM

To Cheryl Korn <cheryl@zogby.com>  
cc GWilson@fec.gov, Karen Scott <karen@zogby.com>, 'Kimberly Wyborski' <kimberly@zogby.com>, 'Mike Calogero' <mike@zogby.com>, 'Rebecca Wittman'  
bcc Kevin Deeley/FEC/US@FEC, Robert Bonham/FEC/US@FEC  
Subject RE: FEC's Draft Questions

Cheryl,

These questions meet with our approval. So we're ready to go.

Thanks

Cheryl Korn <cheryl@zogby.com>



Cheryl Korn  
<cheryl@zogby.com>  
08/19/2008 02:45 PM

To <shajjar@fec.gov>  
cc <GWilson@fec.gov>, Karen Scott <karen@zogby.com>, 'Rebecca Wittman' <rebecca@zogby.com>, 'Kimberly Wyborski' <kimberly@zogby.com>, 'Mike Calogero' <mike@zogby.com>  
Subject RE: FEC's Draft Questions

Good Afternoon Mr. Hajjar,

I am attaching the draft script for your nationwide questions. We would like to aim for final approval by the close of business tomorrow, or Thursday morning at the latest. Please feel free to contact me with any questions or feedback.

Thank you, and have a great evening.  
Cheryl

Cheryl Korn  
Editorial Writer  
Zogby International  
901 Broad Street, Third Floor  
Utica, New York 13501  
315-624-0200 ext. 248  
cheryl@zogby.com

## THE WAY WE'LL BE by JOHN ZOGBY



*"John Zogby always knows the pulse of America - and in this book he shares his many insights into who we are and what we think. I will return to his findings again and again." -Tom Brokaw*



[ [Learn More](#) ] - [ [Order Now](#) ]

---

Disclaimer added by CodeTwo Exchange Rules  
[www.codetwo.com](http://www.codetwo.com)

**From:** shajjar@fec.gov [mailto:shajjar@fec.gov]  
**Sent:** Monday, August 18, 2008 5:03 PM  
**To:** Rebecca Wittman; Cheryl Korn  
**Cc:** GWilson@fec.gov  
**Subject:** FEC's Draft Questions

Rebecca and Cheryl,

Please find attached the FEC's draft questions. As we discussed, we would like questions 1 and 2 to be asked, in random order, to 1/2 of the sample, and questions 3 and 4 to be asked to the other half. And also as we discussed, please let me know whether we can get these questions asked on a survey that does not include election-related questions, or if they can be asked before any election-related questions.

Thanks.

---

Steve N. Hajjar  
Attorney, Litigation Division  
Office of General Counsel  
Federal Election Commission



Phone: (202) 694-1546 FEC Draft Script 8-19.doc

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT I



Cheryl Korn  
<cheryl@zogby.com>  
08/25/2008 02:51 PM

To <shajjar@fec.gov>  
cc Karen Scott <karen@zogby.com>, 'Rebecca Wittman'  
<rebecca@zogby.com>, 'Kimberly Wyborski'  
<kimberly@zogby.com>, 'Mike Calogero'

bcc  
Subject Federal Election Commission data and final report

History: This message has been forwarded.

Good Afternoon Steve,

Attached you will find the data and final report for the four questions you submitted for last week's omnibus poll. Please feel free to contact me with any questions.

Thank you, and have a great evening.  
Cheryl

Cheryl Korn  
Editorial Writer  
Zogby International  
901 Broad Street, Third Floor  
Utica, New York 13501  
315-624-0200 ext. 248  
cheryl@zogby.com

	<p><b>THE WAY WE'LL BE by JOHN ZOGBY</b></p> <p><i>"John Zogby always knows the pulse of America - and in this book he shares his many insights into who we are and what we think. I will return to his findings again and again." -Tom Brokaw</i></p>	
<p>[ <a href="#">Learn More</a> ] - [ <a href="#">Order Now</a> ]</p>		

---

Disclaimer added by CodeTwo Exchange Rules  
[www.codetwo.com](http://www.codetwo.com)



wf-FEC.pdf



x-FEC.pdf



FEC FINAL report.doc

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT J

**Paul Sherman**

---

**From:** RBonham@fec.gov  
**Sent:** Monday, August 25, 2008 9:41 PM  
**To:** Steve Simpson; Bert Gall; Paul Sherman  
**Cc:** dkolker@fec.gov; kdeeley@fec.gov; shajjar@fec.gov; GWilson@fec.gov  
**Subject:** FEC Response to Plaintiffs' Discovery Requests  
**Attachments:** FEC Response to Plaintiffs' First Set of Discovery Requests (Aug. 25, 2008).pdf

Steve,

Attached is the Commission's response to plaintiffs' discovery requests.

In a moment, I will also forward documents the Commission is producing. We have tried to organize them by document request or interrogatory, but some documents are responsive to more than one request.

Should you have any questions, please give us a call.

Rob Bonham

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT K

**Paul Sherman**

---

**From:** kdeeley@fec.gov  
**Sent:** Wednesday, October 01, 2008 10:02 PM  
**To:** Bert Gall; Paul Sherman; Steve Simpson; Robert Frommer  
**Cc:** RBonham@fec.gov; shajjar@fec.gov; GWilson@fec.gov  
**Subject:** Supplemental Disclosure  
**Attachments:** SpeechNow 5th Supplemental Disclosure.pdf

Gentlemen: Please see attached. Testimony by Mr. Rozen was part of the previously-referenced *McConnell* record.

Kevin Deeley  
Federal Election Commission  
999 E Street NW  
Washington, DC 20463  
(202) 694-1556 | kdeeley@fec.gov

11/18/2008

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SPEECHNOW.ORG,	)	
<i>et al.</i> ,	)	
Plaintiffs,	)	
v.	)	Civil Case No. 1:08-cv-00248(JR)
FEDERAL ELECTION COMMISSION	)	FEDERAL ELECTION
Defendant.	)	COMMISSION'S FIFTH
	)	SUPPLEMENT TO ITS INITIAL
	)	DISCLSURES

DEFENDANT FEDERAL ELECTION COMMISSION'S FIFTH  
SUPPLEMENT TO ITS INITIAL DISCLOSURES

Pursuant to Federal Rule of Civil Procedure 26(a)(1), the Federal Election Commission ("Commission") supplements its initial disclosures in the above-captioned action. These disclosures are without prejudice to the Commission's right to rely on additional witnesses and documents that are revealed during the course of discovery in this action.

Pursuant to Rule 26(a)(1)(A)(i), the Commission hereby discloses the name, address and telephone number, and information subjects of individuals likely to have discoverable information that the Commission may use to support its claims and defenses:

Kevin Yowell  
8401 West 88 Terrace  
Overland Park, KS 66212  
(913) 648-3493

Mr. Yowell is likely to possess discoverable information regarding the events described in the following previously-disclosed articles: Rick Alm and Jim Sullinger, *Congressman Calls Lobbyist's Tactics Illegal*, KANSAS CITY STAR, Oct. 6, 1998 at B1, and Tim Carpenter, *Kansas Lawmaker Alleges Bribery Try on Gaming Issues*, LAWRENCE KANSAS JOURNAL-WORLD, Oct. 8, 1998.

Robert Rozen  
Washington Council Ernst & Young  
1001 Pennsylvania Ave NW  
Washington, DC 20005  
(202) 467-4318

Mr. Rozen is likely to possess discoverable information regarding campaign financing and its effects on candidates, Members of Congress, and public policy.

We will, of course, supplement these disclosures with any additional information as required by Federal Rule of Civil Procedure 26(e).

Thomasenia P. Duncan (D.C. Bar No. 424222)  
General Counsel

David Kolker (D.C. Bar No. 394558)  
Associate General Counsel

Kevin Deeley  
Assistant General Counsel

Robert W. Bonham III (D.C. Bar No. 397859)  
Senior Attorney

Steve N. Hajjar  
Attorney

/s/ Graham M. Wilson  
Graham M. Wilson  
Attorney

COUNSEL FOR DEFENDANT  
FEDERAL ELECTION COMMISSION  
999 E Street NW  
Washington, DC 20463  
(202) 694-1650

Dated: October 1, 2008

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT L

AO88 (Rev. 12/06) Subpoena in a Civil Case

**Issued by the**  
**UNITED STATES DISTRICT COURT**  
 DISTRICT OF COLUMBIA

SpeechNow.org, et al., Plaintiffs

**SUBPOENA IN A CIVIL CASE**

V.

Federal Election Commission, Defendant

Case Number:<sup>1</sup> 08-248 (JR)

TO: Robert Rozen  
 Washington Council Ernst & Young  
 1001 Pennsylvania Avenue, NW  
 Washington, DC 20005

YOU ARE COMMANDED to appear in the United States District court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
---------------------	---------------

YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

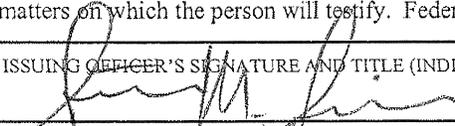
See attachment

PLACE Institute for Justice, 901 N. Glebe Rd., Suite 900, Arlington, VA 22203	DATE AND TIME 10/15/2008 9:00 am
-------------------------------------------------------------------------------	-------------------------------------

YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME
----------	---------------

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT) 	DATE 10/7/2008
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER  
 Steven M. Simpson, Institute for Justice, 901 N. Glebe Road, Suite 900, Arlington, VA 22203, (703) 682-9320

(See Rule 45, Federal Rules of Civil Procedure, Subdivisions (c), (d), and (e), on next page)

<sup>1</sup> If action is pending in district other than district of issuance, state district under case number.

AO88 (Rev. 12/06) Subpoena in a Civil Case

PROOF OF SERVICE

DATE	PLACE
SERVED	
SERVED ON (PRINT NAME)	MANNER OF SERVICE
SERVED BY (PRINT NAME)	TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on \_\_\_\_\_

DATE SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Subdivisions (c), (d), and (e), as amended on December 1, 2006:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection, copying, testing, or sampling of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection, copying, testing, or sampling may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to producing any or all of the designated materials or inspection of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection, copying, testing, or sampling commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

- (i) fails to allow reasonable time for compliance;
- (ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held;
- (iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) If a subpoena

- (i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or
- (ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or
- (iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject

to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) (A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) (A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

(e) CONTEMPT. Failure of any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

**ATTACHMENT TO SUBPOENA DUCES TECUM**

**Robert Rozen**

Civil Case No. 1:08-cv-00248 (JR)

**DEFINITIONS:**

1. "Documents" has the same meaning that the term has in Rule 34(a) of the Federal Rules of Civil Procedure, and includes, without limitation, any writings, drawings, graphs, charts, photographs, recordings, electronic materials, e-mails, letters, faxes, notes, or other data compilations.
2. "Corruption" means the actual or apparent corruption of candidates or officeholders or the possibility of circumvention of contribution limits that courts, including the U.S. Supreme Court, have concluded justify the imposition of contribution or expenditure limits on any groups or individuals.
3. "Independent expenditures" has the same definition as in 2 U.S.C. § 431(17), and includes expenditures in both federal and non-federal elections.

YOU ARE COMMANDED to produce and permit inspection and copying of the following documents:

1. All documents concerning or referring to this lawsuit, SpeechNow.org, et al. v. FEC, Civil Case No. 1:08-cv-00248 (JR) (District Court for the District of Columbia), or the facts that gave rise to the lawsuit.
2. Any documents related to communications with the Federal Election Commission.
3. Any documents related to your possible testimony in this case or to your designation as a witness by the FEC.
4. Any documents indicating that independent expenditures are, or are not, a source of corruption.
5. Any documents related to your knowledge of, or experience with, groups that make independent expenditure but do *not* make contributions to political candidates, parties, or committees.
6. Any documents related to your opinions on campaign finance regulation.
7. Any drafts of declarations related to this litigation that have been disclosed to you and, to your knowledge, are intended at some time in this litigation to be made public.

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT M

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
SPEECHNOW.ORG, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	Civ. No. 08-248 (JR)
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant.	)	
_____	)	

**FEDERAL ELECTION COMMISSION’S OBJECTIONS TO PLAINTIFFS’  
SUBPOENA DUCES TECUM TO ROBERT ROZEN**

Pursuant to Rule 45 of the Federal Rules of Civil Procedure, the Defendant Federal Election Commission (“FEC” or “Commission”) provides the following Objections to the Subpoena Duces Tecum served by Plaintiffs on October 7, 2008, on Robert Rozen.

**OBJECTIONS TO SUBPOENA DUCES TECUM:**

The Commission objects to plaintiffs’ Subpoena Duces Tecum to the extent it calls for the disclosure of information that constitutes attorney work product; represents the mental impressions, conclusions, opinions, strategies or legal theories of any attorneys or other representatives of the Commission; was prepared in anticipation of litigation; or is otherwise protected from disclosure under applicable legal privileges, immunities, laws or rules.

The Commission specifically objects to plaintiffs' Subpoena Duces Tecum to the extent it calls for the disclosure of any testimony, draft testimony, or any communications regarding the specific content of such testimony.

Respectfully submitted,

Thomasenia P. Duncan  
(D.C. Bar No. 424222)  
General Counsel

David Kolker  
(D.C. Bar No. 394558)  
Associate General Counsel

Kevin Deeley  
Assistant General Counsel

Robert W. Bonham III  
(D.C. Bar No. 397859)  
Senior Attorney

Steve N. Hajjar  
Attorney

/s/ Graham M. Wilson  
Graham M. Wilson  
Attorneys

FOR THE DEFENDANT  
FEDERAL ELECTION COMMISSION  
999 E Street NW  
Washington, DC 20463  
(202) 694-1650

Dated: October 14, 2008

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT N

**Paul Sherman**

---

**From:** Robert.Rozen@wc.ey.com  
**Sent:** Thursday, October 16, 2008 11:13 AM  
**To:** Paul Sherman  
**Cc:** kdeeley@fec.gov  
**Subject:** Re: Document subpoena in SpeechNow.org v. FEC  
**Attachments:** Subpoena duces tecum (Rozen) (IJ025181).PDF; Notice of Subpoena (Rozen) (IJ025178).PDF; Subpoena cover letter (Rozen) (IJ025177).PDF

Paul:

I have in my possession draft copies of declarations but I am not producing them at the FEC's request. Other than documents that I understand the FEC has already produced, I have no additional documents in my possession that are responsive to the subpoena.  
Thanks

Bobby

**Robert M. Rozen | Partner | National Tax**

Washington Council Ernst & Young

1001 Pennsylvania Avenue, N.W. Suite 601, Washington, D.C. 20004, United States of America

Office: 202-467-4318 | Fax: 866-547-4805 | [Robert.Rozen@wc.ey.com](mailto:Robert.Rozen@wc.ey.com)

Website: [www.ey.com](http://www.ey.com)

Thank you for considering the environmental impact of printing emails.

"Paul Sherman" <[psherman@ij.org](mailto:psherman@ij.org)>

To <[Robert.Rozen@wc.ey.com](mailto:Robert.Rozen@wc.ey.com)>

cc

10/07/2008 06:21 PM

Subject Document subpoena in SpeechNow.org v. FEC

Mr. Rozen,

Thank you for agreeing to waive formal service of process. Attached is a copy of the subpoena for documents, along with a cover letter and notice of subpoena. We've also overnighted you copies of these documents via FedEx. As explained in the cover letter, we're happy to accept documents electronically if that's more convenient for you.

Please let me know if you have any questions or if there's anything else we can do to make this document production more convenient.

Best,  
Paul Sherman

11/18/2008

<<Subpoena duces tecum (Rozen) (IJ025181).PDF>> <<Notice of Subpoena (Rozen) (IJ025178).PDF>> <<Subpoena cover letter (Rozen) (IJ025177).PDF>>

**Any U.S. tax advice contained in the body of this e-mail was not intended or written to be used, and cannot be used, by the recipient for the purpose of avoiding penalties that may be imposed under the Internal Revenue Code or applicable state or local tax law provisions.**

The information contained in this message may be privileged and confidential and protected from disclosure. If the reader of this message is not the intended recipient, or an employee or agent responsible for delivering this message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by replying to the message and deleting it from your computer.

Notice required by law: This e-mail may constitute an advertisement or solicitation under U.S. law, if its primary purpose is to advertise or promote a commercial product or service. You may choose not to receive advertising and promotional messages from Ernst & Young LLP (except for Ernst & Young Online and the ey.com website, which track e-mail preferences through a separate process) at this e-mail address by forwarding this message to no-more-mail@ey.com. If you do so, the sender of this message will be notified promptly. Our principal postal address is 5 Times Square, New York, NY 10036. Thank you. Ernst & Young LLP

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT O

**Paul Sherman**

---

**From:** kdeeley@fec.gov  
**Sent:** Friday, September 26, 2008 7:32 PM  
**To:** Bert Gall; Paul Sherman; Steve Simpson; Robert Frommer  
**Cc:** RBonham@fec.gov; shajjar@fec.gov; GWilson@fec.gov  
**Subject:** Initial disclosure supplement  
**Attachments:** Speechnow Supplemental Disclosures 09 26 08.pdf

Gentlemen: Please see attached. Documents related to former Wisconsin Majority Leader Chavala were sent to you previously. We will work with you should you seek additional depositions.

Kevin Deeley  
Federal Election Commission  
999 E Street NW  
Washington, DC 20463  
(202) 694-1556 | kdeeley@fec.gov

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

	)	
SPEECHNOW.ORG,	)	
<i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Case No. 1:08-cv-00248(JR)
	)	
FEDERAL ELECTION COMMISSION	)	FEDERAL ELECTION
	)	COMMISSION'S FOURTH
Defendant.	)	SUPPLEMENT TO ITS INITIAL
	)	DISCLOSURES

DEFENDANT FEDERAL ELECTION COMMISSION'S FOURTH  
SUPPLEMENT TO ITS INITIAL DISCLOSURES

Pursuant to Federal Rule of Civil Procedure 26(a)(1), the Federal Election Commission ("Commission") supplements its initial disclosures in the above-captioned action. These disclosures are without prejudice to the Commission's right to rely on additional witnesses and documents that are revealed during the course of discovery in this action.

Pursuant to Rule 26(a)(1)(A)(i), the Commission hereby discloses the name, address and telephone number, and information subjects of individuals likely to have discoverable information that the Commission may use to support its claims and defenses:

Chairman Ross Johnson  
Fair Political Practices Commission  
428 J Street, Suite 62  
Sacramento, CA 95814  
(916) 322-5745

"Independent Expenditures: The Giant Gorilla in Campaign Finance" and the effect of unlimited contributions to groups that make independent expenditures.

Michael Bright  
Bright Consulting, Inc.  
8550 Greenway Blvd, #305  
Middleton, WI 53562  
(608) 669-1904

Solicitations made by former Wisconsin Majority Leader Chuck Chvala and the effect of the suggested donations on the legislative process.

We will, of course, supplement these disclosures with any additional information as required by Federal Rule of Civil Procedure 26(e).

Thomasenia P. Duncan (D.C. Bar No. 424222)  
General Counsel

David Kolker (D.C. Bar No. 394558)  
Associate General Counsel

Kevin Deeley  
Assistant General Counsel

Robert W. Bonham III (D.C. Bar No. 397859)  
Senior Attorney

Steve N. Hajjar  
Attorney

/s/ Graham M. Wilson  
Graham M. Wilson  
Attorney

COUNSEL FOR DEFENDANT  
FEDERAL ELECTION COMMISSION  
999 E Street NW  
Washington, DC 20463  
(202) 694-1650

Dated: September 26, 2008

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT P

§AO88 (Rev. 12/07) Subpoena in a Civil Case

**Issued by the**  
**UNITED STATES DISTRICT COURT**  
 Eastern District of California

SpeechNow.org, et al., Plaintiffs,

**SUBPOENA IN A CIVIL CASE**

V.

Federal Election Commission, Defenant

Case Number:<sup>1</sup> 1:08-cv-00248 (JR)  
 United States District Court  
 for the District of Columbia

TO: California Fair Political Practices Commission  
 428 J Street, Suite 620  
 Sacramento, CA 95814

YOU ARE COMMANDED to appear in the United States District court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

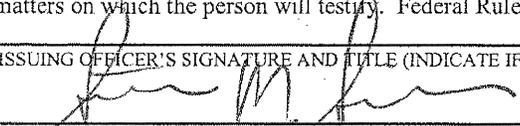
See Attachment.

PLACE Advanced Legal Services 816 H Street, Suite 207, Sacramento, CA 95814	DATE AND TIME 9/25/2008 9:00 am
-----------------------------------------------------------------------------------	------------------------------------

YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rule of Civil Procedure 30(b)(6).

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
	Sept. 19, 2008

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER  
 Steven Simpson, Institute for Justice, 901 N. Glebe Road, Suite 900, Arlington, VA 22203  
 Tel: (703) 682-9320

(See Federal Rule of Civil Procedure 45 (c), (d), and (e), on next page)

<sup>1</sup> If action is pending in district other than district of issuance, state district under case number.

AO88 (Rev. 12/07) Subpoena in a Civil Case (Page 2)

**PROOF OF SERVICE**

DATE	PLACE
SERVED	
SERVED ON (PRINT NAME)	MANNER OF SERVICE
SERVED BY (PRINT NAME)	TITLE

**DECLARATION OF SERVER**

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on \_\_\_\_\_ DATE \_\_\_\_\_ SIGNATURE OF SERVER \_\_\_\_\_

ADDRESS OF SERVER \_\_\_\_\_

Federal Rule of Civil Procedure 45 (c), (d), and (e), as amended on December 1, 2007:

**(e) PROTECTING A PERSON SUBJECT TO A SUBPOENA.**

(1) **Avoiding Undue Burden or Expense; Sanctions.** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

**(2) Command to Produce Materials or Permit Inspection.**

(A) **Appearance Not Required.** A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) **Objections.** A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

**(3) Quashing or Modifying a Subpoena.**

(A) **When Required.** On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) **When Permitted.** To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial

(C) **Specifying Conditions as an Alternative.** In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

**(d) DUTIES IN RESPONDING TO A SUBPOENA.**

(1) **Producing Documents or Electronically Stored Information.** These procedures apply to producing documents or electronically stored information:

(A) **Documents.** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) **Form for Producing Electronically Stored Information Not Specified.** If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) **Electronically Stored Information Produced in Only One Form.** The person responding need not produce the same electronically stored information in more than one form.

(D) **Inaccessible Electronically Stored Information.** The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

**(2) Claiming Privilege or Protection.**

(A) **Information Withheld.** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) **Information Produced.** If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

**(e) CONTEMPT.**

The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

**ATTACHMENT TO SUBPOENA DUCES TECUM**  
**California Fair Political Practices Commission**  
Civil Case No. 1:08-cv-00248 (JR)

DEFINITION(S):

1. "Documents" has the same meaning that the term has in Rule 34(a) of the Federal Rules of Civil Procedure, and includes, without limitation, any writings, drawings, graphs, charts, photographs, recordings, electronic materials, e-mails, letters, faxes, notes, or other data compilations.

YOU ARE COMMANDED to produce and permit inspection and copying of the following documents:

1. Any documents regarding communications between representatives of the California Fair Political Practices Commission (including, but not limited to, the commissioners and employees) and the Federal Election Commission regarding "Independent Expenditures, The Giant Gorilla in Campaign Finance," as well as communications between representatives of the California Fair Political Practices Commission and the Federal Election Commission regarding the case of *SpeechNow.org v. FEC*.

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT Q

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
SPEECHNOW.ORG, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	Civ. No. 08-248 (JR)
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant.	)	
_____	)	

**FEDERAL ELECTION COMMISSION’S OBJECTIONS TO PLAINTIFFS’  
SUBPOENA DUCES TECUM TO THE CALIFORNIA FAIR POLITICAL  
PRACTICES COMMISSION**

Pursuant to Rule 45 of the Federal Rules of Civil Procedure, the Defendant Federal Election Commission (“FEC” or “Commission”) provides the following Objections to the Subpoena Duces Tecum served by Plaintiffs on September 19, 2008, on the California Fair Political Practices Commission.

**OBJECTIONS TO SUBPOENA DUCES TECUM:**

The Commission objects to plaintiffs’ Subpoena Duces Tecum to the extent it calls for the disclosure of information that constitutes attorney work product; represents the mental impressions, conclusions, opinions, strategies or legal theories of any attorneys or other representatives of the Commission; was prepared in anticipation of

litigation; or is otherwise protected from disclosure under applicable legal privileges, immunities, laws or rules.

The Commission specifically objects to plaintiffs' Subpoena Duces Tecum to the extent it calls for the disclosure of any testimony, draft testimony, or any communications regarding such testimony.

Respectfully submitted,

Thomasenia P. Duncan  
(D.C. Bar No. 424222)  
General Counsel

David Kolker  
(D.C. Bar No. 394558)  
Associate General Counsel

Kevin Deeley  
Assistant General Counsel

Robert W. Bonham III  
(D.C. Bar No. 397859)  
Senior Attorney

Steve N. Hajjar  
Attorney

/s/ Graham M. Wilson  
Graham M. Wilson  
Attorneys

FOR THE DEFENDANT  
FEDERAL ELECTION COMMISSION  
999 E Street NW  
Washington, DC 20463  
(202) 694-1650

Dated: September 25, 2008

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT R



FAIR POLITICAL PRACTICES COMMISSION

428 J Street • Suite 620 • Sacramento, CA 95814-2329  
(916) 322-5660 • Fax (916) 322-0886

September 25, 2008

Steven Simpson  
Institute for Justice  
901 N. Glebe Road, Suite 900  
Arlington, VA 22203

Dear Mr. Simpson:

This is in response to the subpoena duces tecum dated and served by e-mail on our agency on September 19, 2008 seeking production of documents regarding communications between our agency and the Federal Elections Commission relating to our agency's report entitled "Independent Expenditures, The Giant Gorilla in Campaign Finance" and also to the case of *SpeechNow.org v. FEC*.

In light of the objections to the subpoena lodged today by counsel for the Federal Elections Commission, we will withhold production of any documents requested by this subpoena until otherwise directed to produce them by agreement between the parties or a court order.

Sincerely,

A handwritten signature in cursive script that reads "Scott Hallabrin".

Scott Hallabrin  
General Counsel, Legal Division

SH:jgl

cc: Graham Wilson, Federal Elections Commission

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT S

**Paul Sherman**

---

**From:** shajjar@fec.gov  
**Sent:** Thursday, September 25, 2008 10:21 AM  
**To:** Steve Simpson  
**Cc:** Bert Gall; GWilson@fec.gov; kdeeley@fec.gov; Paul Sherman; RBonham@fec.gov; Robert Frommer  
**Subject:** Re: Justice Starcher

Steve,

Thanks for your message. Considering that Justice Starcher's deposition is scheduled for tomorrow, we will try to be brief.

Justice Starcher is indeed a fact witness for the FEC and not a client.

Documents relevant to the evolution of the declaration, including drafts and communications regarding the substance of the testimony, qualify as opinion work product because they reveal the mental impressions, conclusions, opinions, etc., of counsel for the FEC. Signed declarations are testimony, not documents within the meaning of the discovery rules, and they are work product until they are filed with the court. Revealing this information at this time would reveal the evidence that Commission has prioritized in this case as well the theories and strategies upon which it intends to rely.

As I'm sure you're aware, Justice Starcher has made a number of public statements on the appearance of corruption arising from independent candidate advertising in the 2004 West Virginia judicial elections. The Commission is not taking the position that all communications with Justice Starcher are privileged. Our position is limited to an objection to providing in discovery his declaration, any drafts thereof, and any oral communications between us and Justice Starcher directly related to the substance of his potential testimony. We of course have no objection to any of your questions about the underlying facts. SpeechNow thus clearly does not have a substantial need for the declaration-related materials to prepare its case and is able to obtain the substantial equivalent without any undue hardship, namely by posing questions to Justice Starcher at the deposition.

We hope that this answers your questions and that we can proceed with Justice Starcher's deposition tomorrow afternoon as scheduled. Please let me know as soon as possible if you do not plan to proceed as I plan to leave for Morgantown this afternoon.

Thanks.

---

Steve N. Hajjar  
Attorney, Litigation Division  
Office of General Counsel  
Federal Election Commission  
Phone: (202) 694-1546

"Steve Simpson" <SSimpson@ij.org>

09/24/2008 07:09 PM

To <kdeeley@fec.gov>, <RBonham@fec.gov>, <GWilson@fec.gov>, <shajjar@fec.gov>  
cc "Bert Gall" <bgall@ij.org>, "Paul Sherman" <psherman@ij.org>, "Robert Frommer"  
<rfrommer@ij.org>

Subject Justice Starcher

11/18/2008

Gentlemen:

I understand that the FEC is taking the position that a declaration Justice Starcher informed us he signed for the FEC is "work product." We don't understand how the declaration could possibly be work product for at least two reasons. First, Justice Starcher is obviously not part of the FEC's legal team in this case or otherwise acting as a litigation consultant. He is, as far as we understand it, a fact witness who is not the FEC's client. Second, if the Justice signed the declaration, as he informed us he did, then he did so intending to make the declaration public--indeed, to make it his testimony in this case. Accordingly, neither he nor the FEC intended the declaration to be confidential.

Please inform us as to whether we are wrong about the Justice's relationship to the FEC in this case (that is, whether he in fact is part of the FEC's legal team) and whether he did sign the declaration. Also, please inform us if the FEC is taking the position that all of its conversations with Justice Starcher and any notes he has about his testimony in this case are work product as well. Indeed, if his declaration is work product then, according to that logic, the testimony he will give in this case must be work product as well, in which case he will presumably refuse to answer most of the questions we intend to ask him.

Please respond to this email tomorrow so we may decide before taking his deposition whether it is worth spending any time on the deposition or whether we should first seek court intervention to resolve this issue. Please be sure to copy Paul Sherman and Bert Gall as I will be in the Keating deposition all day.

Thanks.

Steve Simpson  
Institute for Justice  
901 N. Glebe Road  
Suite 900  
Arlington, VA 22203  
703-682-9320  
703-682-9321 (fax)  
[www.ij.org](http://www.ij.org)

11/18/2008

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT T

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
SPEECHNOW.ORG, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	Civ. No. 08-248 (JR)
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant.	)	
_____	)	

**FEDERAL ELECTION COMMISSION’S OBJECTIONS TO PLAINTIFFS’  
SUBPOENA DUCES TECUM OF JUSTICE LARRY V. STARCHER**

Pursuant to Rule 45 of the Federal Rules of Civil Procedure, the Defendant Federal Election Commission (“FEC” or “Commission”) provides the following Objections to the Subpoena Duces Tecum served by Plaintiffs on September 18, 2008, on Justice Larry V. Starcher.

**OBJECTIONS TO SUBPOENA DUCES TECUM:**

The Commission objects to plaintiffs’ Subpoena Duces Tecum to the extent it calls for the disclosure of information that constitutes attorney work product; represents the mental impressions, conclusions, opinions, strategies or legal theories of any attorneys or other representatives of the Commission; was prepared in anticipation of litigation; or is otherwise protected from disclosure under applicable legal privileges, immunities, laws or rules.

The Commission specifically objects to plaintiffs' Subpoena Duces Tecum to the extent it calls for the disclosure of any testimony, draft testimony, or any communications regarding such testimony.

Respectfully submitted,

Thomasenia P. Duncan  
(D.C. Bar No. 424222)  
General Counsel

David Kolker  
(D.C. Bar No. 394558)  
Associate General Counsel

Kevin Deeley  
Assistant General Counsel

Robert W. Bonham III  
(D.C. Bar No. 397859)  
Senior Attorney

/s/ Steve N. Hajjar \_\_\_\_\_  
Steve N. Hajjar  
Graham Wilson  
Attorneys

FOR THE DEFENDANT  
FEDERAL ELECTION COMMISSION  
999 E Street NW  
Washington, DC 20463  
(202) 694-1650

Dated: September 25, 2008

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT U



kimberly  
<kimberly@zogby.com>  
07/30/2008 04:25 PM

To <shajjar@fec.gov>  
cc 'Chad Bohnert' <chad@zogby.com>, 'Marc Penz'  
<marc@zogby.com>, 'Leann Atkinson' <leann@zogby.com>  
bcc  
Subject Zogby Interactive Survey

Mr. Hajjar,

We can get your questions onto an interactive survey this Friday with results Monday. For this survey you will get a minimum of 1,200 adults nationwide, and the same deliverables for \$2,000. Feel free to give me a call with any questions.

Thanks,  
Kimberly

	<p><b>THE WAY WE'LL BE by JOHN ZOGBY</b></p> <p><i>"John Zogby always knows the pulse of America - and in this book he shares his many insights into who we are and what we think. I will return to his findings again and again." -Tom Brokaw</i></p>	
<p>[ <a href="#">Learn More</a> ] - [ <a href="#">Order Now</a> ]</p>		

Disclaimer added by **CodeTwo Exchange Rules**  
[www.codetwo.com](http://www.codetwo.com)



bg\_email.jpg

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT V

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
SENATOR MITCH McCONNELL, <u>et al.</u> ,	)	
	)	
Plaintiffs,	)	Civil Action No. 02-0582 (CKK, KLH, RJL)
	)	
v.	)	
	)	<u>CONSOLIDATED ACTIONS</u>
FEDERAL ELECTION COMMISSION, <u>et al.</u> ,	)	
	)	
Defendants.	)	
_____	)	

DECLARATION OF ROBERT ROZEN

1. My name is Robert Rozen.
2. I provided a sworn declaration in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, Civ. No. 89-N-1159, in the United States District Court for the District of Colorado. The statements I made in that declaration are reproduced in Exhibit A.
3. I reaffirm that the statements I made in the prior declaration are true and correct.
4. From 1995 until 1997, I worked as a lobbyist for various interests at the law firm Wunder, Diefenderfer, Cannon & Thelen. For the last six years, I have been a partner in a lobbying firm called Washington Counsel; now Washington Council Ernst & Young. It was a law firm until two years ago, when it became part of the accounting firm Ernst & Young. We represent a variety of corporate, trade association, non-profit, and individual clients before both Congress and the Executive Branch. Our firm's primary focus is lobbying on tax issues, but we

also lobby on financial services, health care, and other issues. Our work includes preparing strategic plans, writing lobbying papers, explaining difficult and complex issues to legislative staff, and drafting proposed legislation. We also organize fundraisers for federal candidates and from time-to-time advise clients on their political contributions. Our firm includes both Democrats and Republicans. On the Democratic side, we host approximately six fundraisers per year where we raise hard money for federal candidates.

5. I sometimes advise Washington Council clients with respect to their political contributions. Most of our clients have PACs, and they occasionally ask for advice on who to make contributions to.

6. Clients sometimes ask me for advice on whether to give non-federal money to political party and other committees. I have been approached by elected officials or their staff seeking assistance with raising soft money.

7. Some clients don't want to be major players in the political money system so they only contribute hard money to candidates. They are not interested in playing a bigger role, usually because they know it is difficult to draw the line and once they participate at any level expectations are raised for increasingly larger contributions. Those companies and associations that do give soft money typically contribute to both parties in Congress because they want access to Members on both sides of the aisle.

8. In some cases corporations and trade associations do not want to give in amounts over the hard money limits, but they feel pressured to give in greater amounts and end up making soft money donations as well. They are under pressure, sometimes subtle and sometimes direct, from Members to give at levels higher than the hard money limits. For example, some Members

in a position to influence legislation important to an industry naturally wonder why a company in that industry is not participating in fundraising events.

9. There is a spectrum of reasons people and organizations contribute soft money. Some obviously give for ideological purposes. Others feel the need to give at a level above the hard money limits as part of their public policy strategy. Finally, some feel pressured to give above the hard money levels as a result of direct or indirect pressure from Members.

10. I know of organizations who believe that to be treated seriously in Washington, and by that I mean to be a player and to have access, you need to give soft money. As a result, many organizations do give soft money. While some soft money is given for ideological purposes, companies and trade associations working on public policy for the most part give to pursue their economic interests. In some cases, that might limit their contributions to one political party. More often, they give to both. They give soft money because they believe that's what helps establish better contacts with Members of Congress and gets doors opened when they want to meet with Members. There is no question that money creates the relationships. Companies with interests before particular committees need to have access to the chairman of that committee, make donations, and go to events where the chairman will be. Even if that chairman is not the type of Member who will tie the contribution and the legislative goals together, donors can't be sure so they want to play it safe and make soft money contributions. The large contributions enable them to establish relationships, and that increases the chances they'll be successful with their public policy agenda. Compared to the amounts that companies spend as a whole, large political contributions are worthwhile because of the potential benefit to the company's bottom line.

11. When organizations give greater amounts of money through soft money contributions, they get better access to Members. While hard money contributions also provide some access, larger soft money contributions get you significantly greater access, and of course soft money contributions built around sporting events such as the Super Bowl or the Kentucky Derby, where you might spend a week with the Member, are even more useful. At the events that contributors are entitled to attend as a result of their contributions, some contributors will subtly or not-so-subtly discuss a legislative issue that they have an interest in. Contributors also use the events to establish relationships and then take advantage of the access by later calling the Member about a legislative issue or coming back and seeing the Member in his or her office. Obviously from the Member's perspective, it is hard to turn down a request for a meeting after you just spent a weekend with a contributor whose company just gave a large contribution to your political party.

12. From the perspective of the donor, the difference between hard and soft money is just the amount of money that you are allowed to give. Once an organization's PAC has given up to the hard money limit, then it's simply a matter of how much more the organization wants to give. From their perspective, what account the money goes into or how it's used is not important. When it actually comes time to make out the check, you just make it out to whatever account they indicate. A Member or their agent will raise the money and someone will eventually tell you whether the money should go to a soft money leadership PAC, a national party committee, or a state party, but that's generally not a thought for the giver. Corporations and trade associations, including the ones I am familiar with, are not usually giving to help the Republican Party or the Democratic Party. Even though the original purpose of allowing the national parties to have soft money was to let them raise money to be used on state elections and

general party-building, it would be the height of naïveté to think that donors have motives consistent with that purpose. Donors to the national parties understand that if a federal officeholder is raising soft money--supposedly "non-federal" money--they are raising it for federal uses, namely to help that Member or other federal candidates in their elections. Many donors giving \$100,000, \$200,000, even \$1 million, are doing that because it is a bigger favor than a smaller hard money contribution would be. That donation helps you get close to the person who is making decisions that affect your company or your industry. That is the reason most economic interests give soft money, certainly not because they want to help state candidates and rarely because they want the party to succeed.

13. Members understand and appreciate the difference between smaller hard money contributions and larger soft money contributions. Members are raising both hard and soft money. A PAC can give \$5000 per election to a candidate and that is appreciated. But the organization sponsoring the PAC can also give an unlimited amount of soft money; for example a \$100,000 or \$250,000 contribution to the political party at the request of a candidate. That is a contribution of an entirely different dimension, and it naturally is appreciated more by the Member who raises it. The bigger soft money contributions are more likely to get your call returned or get you into the Member's office than smaller hard money contributions.

14. You are doing a favor for somebody by making a large donation and they appreciate it. Ordinarily, people feel inclined to reciprocate favors. Do a bigger favor for someone--that is, write a larger check--and they feel even more compelled to reciprocate. In my experience, overt words are rarely exchanged about contributions, but people do have understandings: the Member has received a favor and feels a natural obligation to be helpful in return. This is how human relationships work. The legislative arena is the same as other areas of

commerce and life. It is similar to a situation that has been in the news recently: an investment banking firm made shares of hot initial public offerings available to the officers of Worldcom Inc., while Worldcom Inc. executives were giving the firm tens of millions of dollars in investment-banking business. There doesn't have to be a specific tie-in to achieve the result.

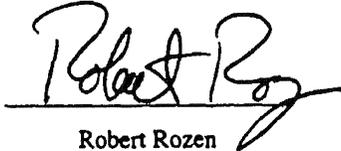
15. Even though soft money contributions often go to political parties, the money is given so that the contributors can be close to, and recognized by, Members, Presidents, and Administration officials who have power. Members, not party staffers or party chairs, raise much of the large soft money contributions. Party chairs do not have that much power because the DNC and the RNC by themselves don't have power to do anything. So people are not giving to be close to the party chairs. The Members of Congress and the President are the heart of the national parties. The elected officials are the ones who are really raising the money, either directly or through their agents.

16. The soft money system has allowed big money from private interests to get into the federal election system. The system works in a very pernicious way that undermines public trust. As I mentioned in my earlier declaration, campaign finance reform was one of the issues that I handled while working for Senator Mitchell. In fact, the DSCC did not raise and spend soft money while Senator Mitchell was Majority Leader because he thought it appeared improper. I have also seen the system at work through my job as a lobbyist over the last seven years. Although there are nominal limits on what individuals and PACs can contribute to federal candidates, that law has now become a fiction because of the soft money contributions that candidates have been able to raise through their political party. The general public does not even begin to understand the degree to which moneyed private interests are able to influence public policy through their campaign contributions. The effect of \$15,000 or \$20,000 contributions on

some Members that I discussed in paragraph 10 of my earlier declaration is even more true with respect to larger \$100,000 or \$500,000 contributions. As I noted there, based on human relationships, you are grateful to people who want to help you and naturally you want to be responsive to them. When people have tried to help you--that is, an elected representative--in the more substantial ways permitted through soft money contributions, you are even more grateful to them and naturally more responsive.

17. If you're a chairman of a committee, you are expected to raise more for the party than more junior Members are. In spite of the seniority rules, you have the chairmanship at the sufferance of the caucus and you are expected to help the party by raising money for a party committee or through a leadership PAC that then distributes money to federal candidates of the party in need. Some of this money is raised in large increments as soft money. Published reports indicate that candidates for chairman have raised money in amounts as high as \$500,000 in their drive to become chairman of a Congressional committee. They are able to in part because they will have so much power if they become chairman. Donors especially want to develop relationships with these Members who will have a lot of power and are therefore in a position to help the contributors achieve their public policy objectives.

18. Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

  
Robert Rozen

Executed on this 3<sup>rd</sup> day of October, 2002

**EXHIBIT A**

1. My name is Robert Rozen.

2. I began working for Sen. Wendell Ford after I graduated from law school in June 1980. I was responsible for all issues before the Senate Finance Committee, and from the spring of 1984 until early 1985 I handled his work with the Rules Committee, on which he was Ranking Minority Member.

3. From January 1985 until January 1995, I worked for Sen. George Mitchell. I handled a variety of legislative issues for Sen. Mitchell, including tax, trade, banking, and other financial issues, including campaign finance reform.

4. Sen. Ford chaired the Democratic Senatorial Campaign Committee (DSCC) in the 1981-1982 election cycle. Sen. Mitchell held this position in the 1985-1986 cycle. My experience was that both Senators kept their DSCC work separate from the office, in the sense that no legislative staff was involved with DSCC campaign activities. I had no direct involvement in DSCC work, although I did gain general knowledge about DSCC operations from my proximity to the Chairmen. Additionally, my extensive work from 1987 through 1994 on campaign finance reform legislative efforts exposed me to DSCC issues. It is my sense that Administrative Assistants know who has contributed both to their Senator's campaign and to the DSCC, although some of them keep closer track of this than others.

5. At least on the Democratic side, the Majority Leader is heavily involved with the Senate campaign committee. The Majority Leader picks the Chair of the DSCC, and is also involved in candidate recruitment, a primary responsibility of the DSCC. Even if other Senators or DSCC staff members make the initial contacts, the Majority Leader wants to size up potential candidates and be helpful in encouraging potentially strong candidates to run for office. Oftentimes, the candidates want to close the deal with the leader of their party in the Senate.

6. Other than recruiting candidates, the DSCC's main responsibility is raising money for Senate campaigns. Especially during the last 15 months of an election cycle, the Committee is very active. Many weekends, four or five Senators will be out on the road, raising money at DSCC events. Certain Senators are bigger draws than others, and the Majority Leader usually is the biggest draw of all. So he probably attends as many of these events as anybody else other than the Chairman.

7. Under the DSCC's tally system, all Senators are expected to help raise money for the party. Some do it more enthusiastically than others, but the expectation is there. Senators can solicit contributions directly, or sponsor fundraising events on behalf of the DSCC. The DSCC also sponsors its own events, using Senators to draw contributors.

8. Sen. Mitchell took an especially active role with the DSCC after he was elected Majority Leader in Nov. 1988. For example, it was his decision that the DSCC did not raise soft money during his six years as Majority Leader.

9. It is only natural that most individuals and PACs want to make sure that they get maximum recognition for whatever money they contribute. Of course, some expect nothing in return, while others are more aggressive in trying to get a lot of mileage out of their contributions. I would expect most of the largest PACs give the maximum allowed, or close to it, to party committees, and then send their members to party events or otherwise attempt to meet personally with Senators. They may buy a table at an event for \$10,000 and invite staff or a Member to sit at the table. Other events are stand-up receptions where this sort of close interaction is more difficult. But the idea for anyone who goes to any of these events is to be seen by Members of Congress.

10. Contributors believe this interaction has an effect on Members, whether it does or not. Certainly, it does have an effect on some Members. If you are raising money for your campaign, or you have a tally and you're raising money for the party, and you have solicited a \$15,000 or \$20,000 contribution, oftentimes this is going to have some effect. This is just based on human relationships, you are grateful to people who want to help you and naturally want to be responsive to them.

11. The bottom line is that there is a symbiotic relationship between contributors and candidates. A contributor gives to have the opportunity to influence a Member, and the Member is willing to provide this opportunity in order to raise more money. While this is usually subtle, it can be extremely direct. For example, I know of a company that was recently involved in a legislative battle critical to its bottom line. One Senator in particular was working on this issue. The company, which was known to be a financial supporter of the other party, was asked by the Senator, "Well, where have you been?" and the Senator's representatives later told the company that they had to "be at the table," to contribute, if they wanted their views to be heard. This was a

shakedown, pure and simple. And it worked -- the company wound up contributing to the national Senatorial Campaign Committee of the Senator's party, as requested.

12. Very little money that does not come through the mail is what I would call "detached" money. Typically, a contributor gives money to establish relationships, to be able to lobby on an issue, to get close to Members, to be able to have influence. While an elected official of course does not have to do something because somebody gave, a contribution helps establish a relationship, and the more you give the better the relationship. It is not that legislation is being written in direct response to somebody giving a lot of money. Rather, it is one step removed: relationships are established because people give a lot of money, relationships are built and are deepened because of more and more money, and that gets you across the threshold to getting the access you want, because you have established a relationship.

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT W

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
SPEECHNOW.ORG, <i>et. al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	Civ. No. 08-248 (JR)
v.	)	
	)	INITIAL DISCLOSURES
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant.	)	
_____	)	

**DEFENDANT FEDERAL ELECTION COMMISSION’S INITIAL DISCLOSURES**

Pursuant to Federal Rule of Civil Procedure 26(a)(1), the Federal Election Commission (“Commission”) makes the following initial disclosures in the above-captioned action. These disclosures are without prejudice to the Commission’s right to rely on additional witnesses and documents that are revealed during the course of discovery in this action.

Pursuant to Rule 26(a)(1)(A)(i), the following individuals are likely to have discoverable information that the Commission may use to support its claims or defenses.

- Organizational designee of SpeechNow.org  
[Name and contact information unknown]  
Subjects of information: SpeechNow.org’s origins, objectives, fundraising, disbursements, advertising, operations, and activities, and the potential effects of SpeechNow.org prevailing in this action.
- David Keating  
3415 Shepherd Street  
Chevy Chase, MD 20815  
Subjects of information: SpeechNow.org’s origins, objectives, fundraising, disbursements, advertising, operations, and activities; the potential effects of SpeechNow.org prevailing in this action; Mr. Keating’s planned donations to SpeechNow.org, his participation in its operations and activities, as well as his involvement in federal elections and other alternative means of expression.

- Fred M. Young, Jr.  
3201 Michigan Boulevard  
Racine, WI 53402  
Subjects of information: SpeechNow.org's origins, objectives, fundraising, disbursements, advertising, operations, and activities; the potential effects of SpeechNow.org prevailing in this action; Mr. Young's planned donations to SpeechNow.org, his participation in its operations and activities, as well as his involvement in federal elections and other alternative means of expression.
- Edward H. Crane, III  
3239 Juniper Lane  
Falls Church, VA 22044  
Subjects of information: SpeechNow.org's origins, objectives, fundraising, disbursements, advertising, operations, and activities; the potential effects of SpeechNow.org prevailing in this action; Mr. Crane's planned donations to SpeechNow.org, his participation in its operations and activities, as well as his involvement in federal elections and other alternative means of expression.
- Brad Russo  
114 Tennessee Avenue NE, Unit B  
Washington, DC 20002  
Subjects of information: SpeechNow.org's origins, objectives, fundraising, disbursements, advertising, operations, and activities; the potential effects of SpeechNow.org prevailing in this action; Mr. Russo's planned donations to SpeechNow.org, his participation in its operations and activities, as well as his involvement in federal elections and other alternative means of expression.
- Scott Burkhardt  
1826 Forest Road  
Durham, NC 27705  
Subjects of information: SpeechNow.org's origins, objectives, fundraising, disbursements, advertising, operations, and activities; the potential effects of SpeechNow.org prevailing in this action; Mr. Burkhardt's planned donations to SpeechNow.org, his participation in its operations and activities, as well as his involvement in federal elections and other alternative means of expression.
- Richard A. Marder  
[contact information unknown]  
Subjects of information: SpeechNow.org's origins, objectives, fundraising, disbursements, advertising, operations, and activities; the potential effects of SpeechNow.org prevailing in this action; Mr. Marder's membership in, and planned donations to, SpeechNow.org; his participation in its operations and activities, as well as his involvement in federal elections and other alternative means of expression.
- Daniel J. Shapiro  
[contact information unknown]

Subjects of information: SpeechNow.org's origins, objectives, fundraising, disbursements, advertising, operations, and activities; the potential effects of SpeechNow.org prevailing in this action; Mr. Shapiro's membership in, and planned donations to, SpeechNow.org; his participation in its operations and activities, as well as his involvement in federal elections and other alternative means of expression.

- Jon Coupal  
[contact information unknown]  
Subjects of information: SpeechNow.org's origins, objectives, fundraising, disbursements, advertising, operations, and activities; the potential effects of SpeechNow.org prevailing in this action; Mr. Coupal's membership in, and planned donations to, SpeechNow.org; his participation in its operations and activities, as well as his involvement in federal elections and other alternative means of expression.
- Edward Traz  
[contact information unknown]  
Subjects of information: SpeechNow.org's origins, objectives, fundraising, disbursements, advertising, operations, and activities; the potential effects of SpeechNow.org prevailing in this action; services provided to SpeechNow.org by Mr. Traz and the Traz Group; his participation in its operations and activities, as well as his involvement in federal elections.
- Custodian of Records  
Federal Election Commission  
999 E Street NW  
Washington, DC 20463  
(202) 694-1650  
Subjects of information: Authentication of Commission documents.

Pursuant to Rule 26(a)(1)(A)(ii), the Commission has in its possession, custody, or control, the following categories of documents that the Commission may use to support its claims:

- Publicly available documents filed by any or all of the named plaintiffs with the Commission or the Internal Revenue Service;
- Publicly available documents filed with the Commission or Internal Revenue Service by individuals or groups, including those organized under 26 U.S.C. § 527, that involve independent election expenditures;
- All documents cited in the Commission's prior filings in this action;
- Documents cited in the Amici's prior filings in this action; and

- Report of the California Fair Political Practices Commission, "Independent Expenditures: The Giant Gorilla in Campaign Finance" (May 2008), available at <http://www.fppc.ca.gov/ie/IEReport2.pdf>.

We will, of course, supplement these disclosures with any additional information as required by Federal Rule of Civil Procedure 26(e).

Thomasenia P. Duncan (D.C. Bar No. 424222)  
General Counsel

David Kolker (D.C. Bar No. 394558)  
Associate General Counsel

Kevin Deeley  
Assistant General Counsel

Robert W. Bonham III (D.C. Bar No. 397859)  
Senior Attorney

/s/ Steve N. Hajjar  
Steve N. Hajjar  
Attorney

Graham Wilson  
Attorney

COUNSEL FOR DEFENDANT  
FEDERAL ELECTION COMMISSION  
999 E Street NW  
Washington, DC 20463  
(202) 694-1650

Dated: June 6, 2008

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT X

**Paul Sherman**

---

**From:** GWilson@fec.gov  
**Sent:** Tuesday, September 30, 2008 6:47 PM  
**To:** Bert Gall; Paul Sherman; Steve Simpson; Robert Frommer  
**Cc:** kdeeley@fec.gov; shajjar@fec.gov; RBonham@fec.gov  
**Subject:** Supplemental Production (3 of 3)  
**Attachments:** FEC Supplemental Production 9-30-08 (3 of 3).pdf

Graham M. Wilson  
Attorney  
Office of the General Counsel  
Federal Election Commission  
Phone: (202) 694-1572  
Email: gwilson@fec.gov



"Roman Porter"  
<Rporter@fppc.ca.gov>  
04/21/2008 07:10 PM

To <Gwilson@fec.gov>  
cc  
bcc  
Subject Independent Expenditures

History: This message has been replied to.

Attached are a few (8) documents I provided to the media prior to our hearing. I'll work on getting the additional information to you before the end of the week.

Thanks,  
Roman--

~~~~~  
Roman G. Porter  
Communications Director  
Fair Political Practices Commission  
916.322.7761 Press line  
916.207.6408 Cell  
916.322.4236 Fax  
~~~~~

-  3 competitive races in 2006.xls
-  8 candidates in 2006 w 50 percent IEs.xls
-  Legislative races w at least 90k in IEs.xls
-  Primary General Numbers.xls
-  Speaker Bios.doc
-  Ten who gave 42 million.xls
-  Top 10 of Top 10.xls
-  Total IE Numbers.xls



Graham Wilson/FEC/US  
04/22/2008 04:43 PM

To "Roman Porter" <Rporter@fppc.ca.gov>  
cc  
bcc  
Subject Re: Independent Expenditures

Hi Roman,

Thank you very much for getting me this information. I couldn't locate Cressman's comments on line, so if you come across that this week, I'd love a copy of it as well. Thanks again and be in touch if you have any questions.

Graham

Graham M. Wilson  
Attorney  
Office of the General Counsel  
Federal Election Commission  
Phone: (202) 694-1571  
Email: gwilson@fec.gov  
"Roman Porter" <Rporter@fppc.ca.gov>



"Roman Porter"  
<Rporter@fppc.ca.gov>  
04/21/2008 07:10 PM

To <Gwilson@fec.gov>  
cc  
Subject Independent Expenditures

Attached are a few (8) documents I provided to the media prior to our hearing. I'll work on getting the additional information to you before the end of the week.

Thanks,  
Roman--

~~~~~  
Roman G. Porter  
Communications Director  
Fair Political Practices Commission  
916.322.7761 Press line  
916.207.6408 Cell  
916.322.4236 Fax  
~~~~~

-  3 competitive races in 2006.xls
-  8 candidates in 2006 w 50 percent IEs.xls
-  Legislative races w at least 90k in IEs.xls
-  Primary General Numbers.xls
-  Speaker Bios.doc
-  Ten who gave 42 million.xls
-  Top 10 of Top 10.xls
-  Total IE Numbers.xls



Graham Wilson/FEC/US  
04/23/2008 05:01 PM

To "Roman Porter" <Rporter@fppc.ca.gov>  
cc  
bcc  
Subject Re: Independent Expenditures

Hi Roman,

I'm not sure if you have tried to send those audio files to me yet, but I checked and IT told me that have a cap of 8 megs on incoming messages. I'm not that tech savvy, so let me know if that is too small to be feasible for sending the audio files and we can work something else out. Otherwise, no real rush, and I will keep an eye out.

Thanks again,

Graham

Graham M. Wilson  
Attorney  
Office of the General Counsel  
Federal Election Commission  
Phone: (202) 694-1571  
Email: gwilson@fec.gov  
"Roman Porter" <Rporter@fppc.ca.gov>



"Roman Porter"  
<Rporter@fppc.ca.gov>  
04/21/2008 07:10 PM

To <Gwilson@fec.gov>  
cc  
Subject Independent Expenditures

Attached are a few (8) documents I provided to the media prior to our hearing. I'll work on getting the additional information to you before the end of the week.

Thanks,  
Roman--

~~~~~  
Roman G. Porter  
Communications Director  
Fair Political Practices Commission  
916.322.7761 Press line  
916.207.6408 Cell  
916.322.4236 Fax  
~~~~~

-  3 competitive races in 2006.xls
-  8 candidates in 2006 w 50 percent IEs.xls
-  Legislative races w at least 90k in IEs.xls
-  Primary General Numbers.xls
-  Speaker Bios.doc
-  Ten who gave 42 million.xls
-  Top 10 of Top 10.xls
-  Total IE Numbers.xls



"Roman Porter"  
<Rporter@fppc.ca.gov>  
04/23/2008 05:24 PM

To <GWilson@fec.gov>  
cc  
bcc

Subject Re: Independent Expenditures

History:  This message has been replied to.

Thanks for letting me know. Each file is ~4.5 megs and there are 19 separate files. It is up to you. I can email or overnight with an account number.  
Roman--

>>> <GWilson@fec.gov> 4/23/2008 2:01 PM >>>  
Hi Roman,

I'm not sure if you have tried to send those audio files to me yet, but I checked and IT told me that have a cap of 8 megs on incoming messages. I'm not that tech savvy, so let me know if that is too small to be feasible for sending the audio files and we can work something else out. Otherwise, no real rush, and I will keep an eye out.

Thanks again,

Graham

Graham M. Wilson  
Attorney  
Office of the General Counsel  
Federal Election Commission  
Phone: (202) 694-1571  
Email: gwilson@fec.gov

"Roman Porter" <Rporter@fppc.ca.gov>  
04/21/2008 07:10 PM

To  
<GWilson@fec.gov>  
cc

Subject  
Independent Expenditures

Attached are a few (8) documents I provided to the media prior to our hearing. I'll work on getting the additional information to you before the end of the week.

Thanks,  
Roman--

~~~~~  
Roman G. Porter  
Communications Director

Fair Political Practices Commission  
916.322.7761 Press line  
916.207.6408 Cell  
916.322.4236 Fax  
~~~~~



Graham Wilson/FEC/US

04/25/2008 03:08 PM

To "Roman Porter" <Rporter@fppc.ca.gov>

cc

bcc

Subject Re: Independent Expenditures 

Hi Roman,

Thank you for sending me the audio files. I received all of your emails, and listened to the testimony -- which I found to be quite helpful. A few of the witnesses mentioned that they were submitting written comments to the FPPC as well, which if you have would be helpful. I know you said that you didn't think you had some of them, so I can just email the various witnesses too. Just thought I would double check.

Thanks again and be in touch if there is ever anything I can help you with.

Graham

Graham M. Wilson  
Attorney  
Office of the General Counsel  
Federal Election Commission  
Phone: (202) 694-1571  
Email: gwilson@fec.gov  
"Roman Porter" <Rporter@fppc.ca.gov>



"Roman Porter"  
<Rporter@fppc.ca.gov>

04/23/2008 05:24 PM

To <GWilson@fec.gov>

cc

Subject Re: Independent Expenditures

Thanks for letting me know. Each file is ~4.5 megs and there are 19 separate files. It is up to you. I can email or overnight with an account number.  
Roman--

>>> <GWilson@fec.gov> 4/23/2008 2:01 PM >>>

Hi Roman,

I'm not sure if you have tried to send those audio files to me yet, but I checked and IT told me that have a cap of 8 megs on incoming messages. I'm not that tech savvy, so let me know if that is too small to be feasible for sending the audio files and we can work something else out. Otherwise, no real rush, and I will keep an eye out.

Thanks again,

Graham

Graham M. Wilson  
Attorney  
Office of the General Counsel  
Federal Election Commission

Phone: (202) 694-1571  
Email: gwilson@fec.gov

"Roman Porter" <Rporter@fppc.ca.gov>  
04/21/2008 07:10 PM

To  
<Gwilson@fec.gov>  
cc

Subject  
Independent Expenditures

Attached are a few (8) documents I provided to the media prior to our hearing. I'll work on getting the additional information to you before the end of the week.

Thanks,  
Roman--

~~~~~  
Roman G. Porter  
Communications Director  
Fair Political Practices Commission  
916.322.7761 Press line  
916.207.6408 Cell  
916.322.4236 Fax  
~~~~~

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT Y



Graham Wilson/FEC/US

09/17/2008 08:24 PM

To shallabrin@fppc.ca.gov

cc

bcc

Subject Johnson

Hi Scott,

Please see attached as we discussed.



Johnson.doc

Also, a quick confirmation that you received this email would be great.

Thanks,

Graham

Graham M. Wilson  
Attorney  
Office of the General Counsel  
Federal Election Commission  
Phone: (202) 694-1572  
Email: gwilson@fec.gov

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT Z



"Scott Hallabrin"  
<Shallabrin@fppc.ca.gov>  
09/30/2008 01:23 PM

To <GWilson@fec.gov>  
cc  
bcc

Subject Johnson Declaration

History:  This message has been forwarded.

Graham: Attached is the declaration of Ross Johnson, relating to the case of SpeechNow.org v. FEC.

Scott Hallabrin  
General Counsel  
Fair Political Practices Commission  
428 J Street, Suite 620  
Sacramento, CA 95814  
Tel. 916.322.5660  
Fax 916.327.2026

Confidentiality Notice: This email message, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any review, use, disclosure, or distribution not authorized by the intended recipient(s) is prohibited. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message.



rjohnson.dec.PDF

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT AA



Kevin Deeley/FEC/US  
10/01/2008 10:38 AM

To robert.rozen@wc.ey.com  
cc  
bcc  
Subject declaration

Please see attached.



#39473 v1 - SpeechNow Rozen Declaration.doc

Kevin Deeley  
Federal Election Commission  
999 E Street NW  
Washington, DC 20463  
(202) 694-1556 | kdeeley@fec.gov

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT BB

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

SPEECHNOW.ORG, )  
 DAVID KEATING, )  
 FRED M. YOUNG, JR., )  
 EDWARD H. CRANE, III, )  
 BRAD RUSSO, and )  
 SCOTT BURKHARDT )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 FEDERAL ELECTION COMMISSION, )  
 )  
 Defendant. )

---

Civil Case No. 1:08-cv-00248 (JR)

**PLAINTIFFS' FIRST SET OF DISCOVERY REQUESTS TO THE  
FEDERAL ELECTION COMMISSION**

In accordance with Rules 33, 34, and 36 of the Federal Rules of Civil Procedure, Plaintiffs SpeechNow.org *et al.* request that Defendant Federal Election Commission respond to the following requests for production of documents, requests for admissions, and interrogatories, within 30 days of the date of service of these discovery requests.

INSTRUCTIONS

1. You are to respond to these requests consistent with your obligations under the Federal Rules of Civil Procedure and the Local Civil Rules of the United States District Court for the District of Columbia.

2. If a document is no longer in your possession or no longer subject to your control, please state when that document was most recently in your possession or subject to your control and what disposition was made of it.

3. In the event you are able to produce only some of the documents or information called for in a particular request, produce all of the documents or information you are able to and state the reasons for your inability to produce the remainder, stating whatever information or knowledge you have concerning the unanswered portion and detailing what you did in attempting to secure the unknown information.

4. When an approximation or estimate is stated, designate the approximation or estimate as such and identify and describe each method by which, and each source of information upon which, the approximation was made.

5. To the extent a term or phrase used in these requests is unclear or unknown to you, you are requested to answer the request using either the meaning of that term or phrase as it is used in any relevant statutes or cases or the generally accepted meaning of that term or phrase.

6. The original documents called for by this request are to be produced on or before August 21, 2008, at the offices of the Institute for Justice, 901 N. Glebe Rd., Suite 900, Arlington, Virginia, 22203. If clear, complete, and legible copies of the documents called for by this request are served on Plaintiffs' counsel by the above date, production of the original documents will not be required.

7. As a reminder, this request is continuing in character and requires you to provide any supplemental documents if, prior to trial, you obtain any additional or supplemental documents responsive to this request.

## DEFINITIONS

1. “And” as well as “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of these discovery requests all responses that otherwise might be construed to be out of their scope.

2. “Campaign finance laws” refers collectively to the Federal Election Campaign Act, the Bipartisan Campaign Reform Act of 2002, and any subsequent amendments or associated regulations.

3. “Contribution limits,” unless otherwise specified, refers collectively to both the individual contribution limit to political committees and the biennial aggregate limit contained in 2 U.S.C. § 441a.

4. “Corruption” means the actual or apparent corruption of candidates or officeholders or the possibility of circumvention of contribution limits that courts, including the U.S. Supreme Court, have concluded justify the imposition of contribution and/or expenditure limits on any groups or individuals.

5. “Corporate-form corruption” refers to the “different type of corruption” identified by the Supreme Court in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990), as “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”

6. “Identify” with respect to a document shall mean state the nature or type of document (e.g., letter, memorandum), the date, if any, appearing on the document, the date on which the document was prepared, the title of the document, the general subject matter of the document, the location of the document, the number of pages comprising the document, and identify each

person who wrote, dictated, or otherwise participated in the preparation of the document (excluding typists), identify each person who signed or initialed the document, identify each person who received the document or reviewed it, and identify each person having custody of the document. Identification of a document includes identifying all originals or copies of that document known or believed to exist.

7. “Identify” with respect to a person shall mean state the full name, the most recent business address and telephone number or residential contact information if the person has no business address, the present occupation or position of such person, and the nature of the connection or association that person has to each party in this proceeding. If the person to be identified is not a natural person, provide the legal and trade names, the address and telephone number, and the full names of both the chief executive officer and the agent designated to receive service of process for such person.

8. “Independent-expenditure committee” means any group that the FEC would consider a “political committee,” but whose political activity is limited to making independent expenditures as that term is used in 2 U.S.C. § 431(17) and 11 C.F.R. § 100.16.

9. “Legislative facts” means those facts referred to by that phrase in the parties’ joint scheduling report.

10. “Proposed activities” refers to the actions described in SpeechNow.org’s advisory opinion request to the Federal Election Commission dated November 14, 2007 (AOR 2007-32), the Amended Complaint and the documents filed in connection with SpeechNow.org’s motion for preliminary injunction in this case.

11. “Unincorporated association” means any group that would be considered an unincorporated nonprofit association under the District of Columbia Uniform Unincorporated

Nonprofit Association Act, D.C. Code § 29-971.01 *et seq.*, whether or not organized in the District of Columbia.

## REQUESTS FOR PRODUCTION

### Document Request No. 1

Any and all documents, other than those already provided by plaintiffs, concerning SpeechNow.org, the individual named plaintiffs, SpeechNow.org's members, organizers, or potential contributors, or Ed Traz and/or the Traz Group.

### Document Request No. 2

Any and all documents concerning the application of campaign finance law to independent-expenditure committees. This includes, without limitation, (1) documents concerning any actual or contemplated investigations or enforcement actions by Defendant against independent-expenditure committees or (2) any complaints received by Defendants about independent-expenditure committees.

### Document Request No. 3

Any and all documents concerning whether independent expenditures cause or pose a risk of corruption.

### Document Request No. 4

Any and all documents concerning whether unincorporated associations pose a risk of corporate-form corruption, including, without limitation, documents concerning whether (1) unincorporated associations enjoy state-created benefits, (2) unincorporated associations can

influence the outcome of elections, or (3) unincorporated associations can amass funds comparable to those amassed by corporations.

Document Request No. 5

Any and all documents concerning the effect of contribution limits on the outcome of elections or the ability of candidates or political committees to raise money or make expenditures.

Document Request No. 6

Any and all documents containing any legislative facts.

Document Request No. 7

Any and all documents related to MURs 5511 & 5525 (Swift Boat Veterans for Truth); MUR 5753 (League of Conservation Voters); MUR 5754 (MoveOn.org Voter Fund); MUR 5487 (Progress for America Voter Fund); MURs 5403 & 5466 (America Coming Together); or MUR 5440 (The Media Fund).

Document Request No. 8

Any and all documents relating to the process, difficulty, or burden of complying with the political committee registration requirements or reporting requirements contained in 2 U.S.C. §§ 432, 433, and 434.

Document Request No. 9

Any and all documents concerning communications from political committees, their officers, or their agents made in response to communications from the Defendant, including

Requests for Additional Information, regarding compliance with political committee registration or reporting requirements contained in 2 U.S.C. §§ 432, 433, and 434.

Document Request No. 10

Any and all documents identifying any burdens associated with complying with political committee registration and reporting requirements contained in 2 U.S.C. §§ 432, 433, and 434.

Document Request No. 11

Any and all documents concerning communications from the public to the FEC's Help Line for information concerning the regulation of political committees, including reporting compliance.

Document Request No. 12

All Requests for Additional Information sent by the FEC Reports Analysis Division to political committees from January 1, 1998 to the present.

Document Request No. 13

Any and all documents concerning administrative fines levied against political committees, treasurers of political committees, or other individuals for registration or reporting violations from January 1, 1998 to the present.

Document Request No. 14

Any and all disclosure documents filed by organizations other than political party committees that, between January 1, 1998 and the present, reported independent expenditures to the FEC but did *not* report any political contributions or coordinated expenditures.

Document Request No. 15

Any and all documents used in the training of (1) Commission employees in the Reports and Analysis Division, or (2) Commission Help Line personnel.

Document Request No. 16

Any and all Statements of Organization filed by PACs connected to a corporation, trade association, or labor organization between January 1, 1998 and the present.

Document Request No. 17

Any and all Statements of Organization filed by non-connected PACs between January 1, 1998 and the present.

Document Request No. 18

Any and all documents concerning whether candidates are, might be, or are not grateful for independent expenditures in support of their candidacy or in opposition to their opponent.

Document Request No. 19

Any and all documents concerning whether candidates are or are not aware of the identities of individuals who made contributions to entities that ran independent expenditures that affected those candidates' elections.

Document Request No. 20

Any and all documents concerning any communications with Dan Burton or Mary Landrieu or their agents, employees, or staff-members concerning this lawsuit or any of the plaintiffs in this lawsuit, or concerning the effect of independent expenditures on elections or the potential for corruption.

Document Request No. 21

Any and all documents concerning any communications with any political candidate or officeholder or their agents, employees, or staff-members concerning this lawsuit or any of the plaintiffs in this lawsuit.

Document Request No. 22

Any and all documents concerning whether candidates approve or disapprove of independent expenditures made to support their election or to oppose their opponent's election.

Document Request No. 23

Any and all filings by individuals or organizations other than party committees disclosing their independent expenditures since January 1, 1998.

Document Request No. 24

For any Request for Admission that the FEC denies, provide any documents supporting the FEC's denial.

REQUESTS FOR ADMISSION

Request No. 1

Admit that if SpeechNow.org engaged in the proposed activities it would meet the statutory definition of "political committee."

Request No. 2

Admit that the FEC believes that the plaintiffs in this lawsuit are aware of the contribution limits, registration requirements, and disclosure requirements that will apply to them under the campaign finance law if SpeechNow.org engages in the proposed activities.

Request No. 3

Admit that if SpeechNow.org engages in the proposed activities, the funds it receives and the amounts it disburses would be “contributions” and “expenditures” under 2 U.S.C. §§ 431(8) and 431(9).

Request No. 4

Admit that SpeechNow.org is not required to register as a political committee before receiving contributions or making expenditures of more than \$1,000 despite having a major purpose of federal campaign activity.

Request No. 5

Admit that if SpeechNow.org accepts more than \$1,000 in contributions or makes more than \$1,000 in expenditures and fails to register as a political committee, SpeechNow.org would be in violation of the campaign finance laws.

Request No. 6

Admit that if SpeechNow.org engages in the proposed activities but does not fulfill the organizational requirements of 2 U.S.C. § 432, SpeechNow.org would be in violation of the campaign finance laws.

Request No. 7

Admit that if SpeechNow.org engages in the proposed activities but does not register as a political committee with the Federal Election Commission under 2 U.S.C. § 433, SpeechNow.org would be in violation of the campaign finance laws.

Request No. 8

Admit that if SpeechNow.org engages in the proposed activities and accepts contributions in excess of applicable contribution limits, SpeechNow.org would be in violation of the campaign finance laws.

Request No. 9

Admit that if SpeechNow.org accepted contributions or made expenditures for the purpose of funding its advertisements as described in the Amended Complaint and the documents filed in connection with the motion for preliminary injunction, and it did not report those contributions and expenditures in accordance with the political committee reporting requirements in 2 U.S.C. § 434(a), SpeechNow.org would be in violation of the campaign finance laws.

Request No. 10

Admit that David Keating, as president and treasurer of SpeechNow.org, would be liable for violations of the campaign finance laws if he allowed SpeechNow.org to accept donations in excess of applicable contribution limits for the purpose of carrying out its proposed activities.

Request No. 11

Admit that David Keating, as president and treasure of SpeechNow.org, would be liable for violations of the campaign finance laws if SpeechNow.org engaged in the proposed activities without registering as a political committee and complying with political committee reporting requirements.

Request No. 12

Admit that if Fred Young, Ed Crane, or David Keating make donations to SpeechNow.org in the amounts indicated in the Amended Complaint for the purpose of funding SpeechNow.org's proposed activities, their contributions would violate the contribution limits.

Request No. 13

Admit that if the contribution limits apply to Fred Young's proposed donation to SpeechNow.org, Brad Russo and Scott Burkhardt may legally pool their funds with only \$5000 or less of Fred Young's funds per year for the purpose of carrying out SpeechNow.org's proposed activities.

Request No. 14

Admit that some candidates do not approve of independent expenditures in support of their election to office or in opposition to their opponent.

Request No. 15

Admit that some candidates are not aware of the identities of those who contribute funds to organizations in order to finance independent expenditures that support such candidates or oppose such candidates' opponents.

Request No. 16

Admit that the Supreme Court of the United States has never recognized mere gratitude by candidates in response to independent expenditures as corruption.

Request No. 17

Admit that political candidates often feel gratitude toward celebrities or other prominent individuals who endorse their candidacies.

Request No. 18

Admit that political candidates and officeholders often feel gratitude toward newspapers that endorse their candidacies or support legislation sponsored by the candidate or officeholder.

Request No. 19

Admit that political candidates and officeholders often feel gratitude toward nonprofit organizations that support causes or legislation of importance to the candidate or officeholder.

Request No. 20

Admit that political candidates ask citizens for their votes and show gratitude for the support of those citizens.

Request No. 21

Admit that contribution limits reduce the overall amount of money that organizations to which they apply have to spend on election-related communications.

INTERROGATORIES

Interrogatory No. 1

Identify all persons with knowledge of legislative facts pertaining to the issues in this case and the legislative facts known to each.

Interrogatory No. 2

Identify all persons at the FEC responsible for responding to communications from the public seeking assistance in complying with political committee registration or reporting requirements, and describe the nature of their responsibilities.

Interrogatory No. 3

Identify all organizations other than political party committees that, between January 1, 1998 and the present, have reported independent expenditures to the FEC but have *not* reported any political contributions or coordinated expenditures.

Interrogatory No. 4

Of the organizations identified under Interrogatory No. 3, identify which, if any, were qualified nonprofit corporations under 11 C.F.R. § 114.10 at the time they reported independent expenditures.

Interrogatory No. 5

Identify all individuals who have reached or exceeded the applicable aggregate limit on contributions to political committees under 2 U.S.C. § 441a(a)(3), along with the date on which the aggregate limit was met or exceeded.

Interrogatory No. 6

Identify the total number of investigations into alleged violations of campaign finance law opened, total numbers of those investigations in which the FEC concluded there was a violation, and, of those, the total numbers of knowing and willful violations found by the FEC

between January 1, 1998 and the present, including the disposition of those investigations or cases.

Interrogatory No. 7

Provide the MUR or ADR numbers for all FEC enforcement cases between January 1, 1998 and the present in which unlawful coordination was alleged against a political committee, treasurer of a political committee, or other individual, and identify the cases in which unlawful coordination was found.

Interrogatory No. 8

Identify the average amount of time between the commencement of an investigation by the FEC into alleged violations of campaign finance law by a political committee and the resolution of that investigation.

Interrogatory No. 9

Identify all attendees of FEC conferences since January 1, 1998.

Interrogatory No. 10

For any Request for Admission that the FEC denies, identify the facts supporting the FEC's denial.

Dated: July 22, 2008

By: /s/ Steven M. Simpson

Steven M. Simpson (DC Bar No. 462553)  
William H. Mellor (DC Bar No. 462072)  
Robert Gall (DC Bar No. 482476)  
Paul M. Sherman (DC Bar No. 978663)

INSTITUTE FOR JUSTICE  
901 N. Glebe Road, Suite 900  
Arlington, VA 22203  
Tel: (703) 682-9320  
Fax: (703) 682-9321  
Email: [ssimpson@ij.org](mailto:ssimpson@ij.org)

Stephen M. Hoersting\*  
Bradley A. Smith\*  
CENTER FOR COMPETITIVE POLITICS  
124 W. Street South, Suite 201  
Alexandria, VA 22314  
Tel: (703) 894-6800  
Email: [shoersting@campaignfreedom.org](mailto:shoersting@campaignfreedom.org),  
[BSmith@law.capital.edu](mailto:BSmith@law.capital.edu)

*Attorneys for Plaintiffs*

*\*Admitted Pro Hac Vice*

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT CC

**Clyde Wilcox**

---

**From:** Clyde Wilcox [Wilcox@Georgetown.edu]  
**Sent:** Thursday, September 11, 2008 9:25 PM  
**To:** 'rys3@columbia.edu'  
**Subject:** RE: RE: From Bob Shapiro, Essay for Oxford Handbook of American Public Opinion and the Media (fwd)

If I have a grad student coauthor, do you insist that I be listed first?

One other invitation I had for one of these did insist on that, so just checking.

-----Original Message-----

**From:** rys3@columbia.edu [mailto:rys3@columbia.edu]  
**Sent:** Thursday, September 11, 2008 6:40 PM  
**To:** Clyde Wilcox  
**Subject:** RE: RE: From Bob Shapiro, Essay for Oxford Handbook of American Public Opinion and the Media (fwd)

Clyde,

Hi. I just wanted to follow up with you about doing the chapter we have proposed for the volume. Are you game? Also, if it were helpful, you are welcome to have a coauthor. Other authors have asked us about this and we are in favor of this for the usual good reasons. I look forward to hearing from you.

Best,  
Bob

On Wed, 13 Aug 2008, Clyde Wilcox wrote:

> Right, there is not much polling on this question for sure.  
>  
> Wirthlin/Mellman had one question in their survey for McConnell.

> -----Original Message-----

> **From:** rys3@columbia.edu [mailto:rys3@columbia.edu]  
> **Sent:** Wednesday, August 13, 2008 1:15 PM  
> **To:** Clyde Wilcox  
> **Subject:** RE: RE: From Bob Shapiro, Essay for Oxford Handbook of  
> American Public Opinion and the Media (fwd)

> Clyde,

> Good question. I thought about this after the BCRA case and also  
> about even with limits on individual contributions, the possibilities  
> of bundling contributions for candidates and for contributions to the  
> parties. I would not want to conclude anything about the independent  
> expenditure groups from the data I looked at. It might also depend on  
> the group, etc. Also, currying what kind of favor -- could be  
> intangible/expressive or collective policy benefits or just preventing  
> someone less desirable from winning.

> Best,  
> Bob

>  
>  
>

> On Wed, 13 Aug 2008, Clyde Wilcox wrote:

> `

>> Do you have any interest in drawing a conclusion from your study of  
>> public opinion on campaign finance for this case?  
>>

>> It involves something not quite directly related to most of the  
>> questions  
> --

>> the question is whether unlimited contributions by individuals to  
>> independent expenditure groups might be seen as corrupting by the public.  
>>

>> That is, would the public assume that the contributions do not  
>> corrupt because they are independent of candidate control, or would  
>> they likely  
> see

>> them as indirect contributions that help the candidate and therefore  
>> curry favor...  
>>

>> -----Original Message-----  
>> From: rys3@columbia.edu [mailto:rys3@columbia.edu]  
>> Sent: Wednesday, August 13, 2008 12:54 PM  
>> To: wilcoxc@georgetown.edu  
>> Subject: Fwd: RE: From Bob Shapiro, Essay for Oxford Handbook of  
>> American Public Opinion and the Media (fwd)  
>>

>> Clyde,  
>> Thanks for the quickly reply. Even discounting my bias, I think  
>> this is one you should be in if at all possible -- our hands-down first choice.  
>> Thanks again.  
>> Best,  
>> Bob  
>>  
>>

>> ----- Forwarded message from Wilcoxc@Georgetown.edu -----  
>> Date: Wed, 13 Aug 2008 12:16:01 -0400  
>> From: Clyde Wilcox <Wilcoxc@Georgetown.edu>  
>> Reply-To: Clyde Wilcox <Wilcoxc@Georgetown.edu>  
>> Subject: RE: From Bob Shapiro, Essay for Oxford Handbook of American  
> Public  
>> Opinion and the Media  
>> To: sjt2115@columbia.edu  
>>

>> Hi, I am in fact just citing your expert witness report now for an  
>> expert witness thing for the Justice Department. Just looked at  
>> your report 10 minutes ago.  
>>  
>>

>> I think I can do this, but let me get back to you in a day or two.  
>> If you do not hear from me, do not hesitate to ask again.  
>>  
>> I just need to see where this falls in commitments during this period.  
>>  
>>

>> I must say that Oxford must be doing handbooks on everything under  
>> the  
> sun.  
>> This is about 6 that I have been invited to write for.  
>>

>> But this one is down my ally...

>>  
>>

>> -----Original Message-----

>> From: sjt2115@columbia.edu [mailto:sjt2115@columbia.edu]

>> Sent: Wednesday, August 13, 2008 12:09 PM

>> To: wilcoxc@georgetown.edu

>> Cc: rys3@columbia.edu

>> Subject: From Bob Shapiro, Essay for Oxford Handbook of American

>> Public Opinion and the Media

>>

>> Dear Professor Wilcox,

>>

>> I am writing to invite you to write an essay for the upcoming

>> Oxford Handbook of American Public Opinion and the Media. Larry

>> Jacobs and I are editing it for publication in 2010.

>>

>> The tentative chapter title and topic area that we would like you

>> write on is Religion. The length of the essay should be no more than

>> 7,000

> words,

>> including references, etc.

>>

>> The due date for your first draft would be a year from now, August

> 2009.

>> Larry and I have made a great effort in organizing the volume and

> selecting

>> our proposed authors, so that we hope you will be able to do this.

>> The attached letter provides more information. We are being assisted

>> by Steve Thompson, a doctoral student at Columbia.

>>

>> Thank you for considering this invitation. If you have any further

>> questions, please phone or e-mail me at my direct line,

>> (212) 854-3944, and rys3@columbia.edu.

>>

>> Best,

>> Bob

>>

>> Robert Y. Shapiro

>> ISERP and Department of Political Science Columbia University 420

>> West

> 118th

>> Street, MC 3320 730 International Affairs Building New York, N.Y.

>> 10027

>> phone: (212) 854-3944

>> fax: (212) 222-0598

>> e-mail: rys3@columbia.edu

>>

>>

>>

>> ----- End forwarded message -----

>>

>>

>

>

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT DD



Graham Wilson/FEC/US

09/04/2008 05:06 PM

To mbright@bright-consulting.com

cc

bcc

Subject Chvala

Hello Mr Bright,

Attached are documents we have regarding the Chvala matter.



Wisconsin v. Chvala - State's Sentencing Memorandum.pdf Milwaukee Journal Sentinel - Chvala reaches plea deal.pdf



Complaint-4.doc

Thanks again, and I look forward to speaking with you Monday at 5:30 Eastern/4:30 Central.

Graham M. Wilson  
Attorney  
Office of the General Counsel  
Federal Election Commission  
Phone: (202) 694-1572  
Email: gwilson@fec.gov

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT EE



mbright@bright-consulting.com  
09/24/2008 05:06 PM

To GWilson@fec.gov  
cc  
bcc

Subject Re: Chvala

did i hear back from you/miss something?

-----Original Message-----

**From:** GWilson@fec.gov [mailto:GWilson@fec.gov]

**Sent:** Thursday, September 4, 2008 04:06 PM

**To:** mbright@bright-consulting.com

**Subject:** Chvala

Hello Mr Bright,

Attached are documents we have regarding the Chvala matter.

Thanks again, and I look forward to speaking with you Monday at 5:30 Eastern/4:30 Central.

Graham M. Wilson  
Attorney  
Office of the General Counsel  
Federal Election Commission  
Phone: (202) 694-1572  
Email: gwilson@fec.gov

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT FF



Graham Wilson/FEC/US  
09/08/2008 11:19 AM

To leon.patton@usdoj.gov  
cc Kevin Deeley/FEC/US@FEC  
bcc  
Subject Snowbarger

Hi Leon,

Thank you for your assistance. Here is a link to the magazine article I mentioned, a piece by Jack Cashill appearing in Ingrams Magazine: [http://www.cashill.com/natl\\_general/moore\\_of\\_same\\_old.htm](http://www.cashill.com/natl_general/moore_of_same_old.htm)

[REDACTED]

Also, in response to your question, it is Kevin Yowell who has given us a lot of information and documentation on the whole incident.

Thanks again,

Graham

Graham M. Wilson  
Attorney  
Office of the General Counsel  
Federal Election Commission  
Phone: (202) 694-1572  
Email: [gwilson@fec.gov](mailto:gwilson@fec.gov)

GALL DECLARATION  
IN SUPPORT OF  
PLAINTIFFS'  
FIRST MOTION IN LIMINE  
EXHIBIT GG

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

SPEECHNOW.ORG, )  
 DAVID KEATING, )  
 FRED M. YOUNG, JR., )  
 EDWARD H. CRANE, III, )  
 BRAD RUSSO, and )  
 SCOTT BURKHARDT )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 FEDERAL ELECTION COMMISSION, )  
 )  
 Defendant. )

---

Civil Case No. 1:08-cv-00248 (JR)

**JOINT SCHEDULING REPORT**

Pursuant to Local Rule 16.3, the parties met and conferred on May 23, 2008 and May 28 2008, and hereby submit their joint scheduling report and joint proposed scheduling order.

**A. Preliminary Statement**

This is a constitutional challenge to certain contribution limits and disclosure requirements imposed by the Federal Election Campaign Act on the Plaintiffs. Plaintiffs have requested in their complaint that certain issues be certified to the Court of Appeals for the District of Columbia for an immediate en banc hearing pursuant to 2 U.S.C. § 437h. While Plaintiffs believe that no discovery is necessary in this case and that the constitutional issues raised can be decided on the basis of the factual record submitted to the Court in Plaintiffs' motion for preliminary injunction, complaint, and the FEC's draft advisory opinion to SpeechNow.org, they recognize that prevailing law allows the FEC to develop a factual record

prior to certification. The FEC maintains that prevailing law requires that a full factual record be developed in this Court. Accordingly, as more fully stated below, the parties have agreed to an expedited discovery schedule that will terminate on September 26, 2008. The parties have further agreed that resolution of the issues that can be certified pursuant to § 437h would be beneficial to the efficient conduct of discovery, and, accordingly, have agreed that the Plaintiffs will file a motion outlining the issues on which they seek certification by June 27, 2008. After discovery is completed, the parties will then file proposed facts for certification according to the briefing schedule outlined below. When the second round of briefing concludes, the Court may transfer the certified constitutional questions together with the applicable findings of fact to the United States Court of Appeals for the District of Columbia Circuit.

**C. Rule 16.3 Items and Discovery Plan**

1. Whether the case is likely to be disposed of by dispositive motion; and whether, if a dispositive motion has already been filed, the parties should recommend to the court that discovery or other matters should await a decision on the motion.

The parties believe that certain issues in this case are appropriate for certification under § 437h and further believe that it would contribute to more efficient discovery for the Court to decide the issues that may be certified before the completion of the discovery process and the facts that may be certified after discovery is concluded. Accordingly, the parties agree to the following schedule for briefing the issues that may be certified under § 437h:

Plaintiffs' certification motion and brief filed by **June 27, 2008**

FEC's response filed by **July 18, 2008**

Plaintiffs' reply filed by **July 25, 2008**

The parties agree to the following schedule for presenting their respective proposed facts for certification:

Proposed Findings of Fact filed by **October 10, 2008**

Responses to Proposed Findings of Fact filed by **October 31, 2008**

Replies regarding Proposed Findings of Fact filed by **November 21, 2008**.

2. The date by which any other parties shall be joined or the pleadings amended, and whether some or all of the factual and legal issues can be agreed upon or narrowed.

The parties agree that any additional parties should be added and/or the pleadings amended by **June 20, 2008**. Plaintiffs believe that the factual issues can be agreed upon and narrowed to those stated in the FEC's draft advisory opinion to SpeechNow.org, the Plaintiffs' complaint, and their motion for preliminary injunction. The FEC believes that more factual development is necessary and required by law.

3. Whether the case should be assigned to a magistrate judge for all purposes, including trial.

The parties agree that the case should not be assigned to a magistrate for all purposes. The parties do agree, however, that a magistrate could be assigned to resolve discovery disputes.

4. Whether there is a realistic possibility of settling the case.

The parties agree that there is no realistic possibility of settling the case.

5. Whether the case could benefit from the Court's alternative dispute resolution (ADR) procedures (or some other form of ADR).

The parties agree that this case would not benefit from ADR.

6. Whether the case can be resolved by summary judgment or motion to dismiss; dates for filing dispositive motions and/or cross motions, oppositions, and replies; and proposed dates for a decision on those motions.

The parties believe that some or all of the issues presented in this case are appropriate for certification under § 437h and they will brief those issues according to the schedule outlined under number 1, above. The parties further agree that if any issues in this case are not certified under § 437h, the parties will address whether those issues are amenable to dispositive motion after the issues that have been certified under § 437h are resolved.

7. Whether the parties should stipulate to dispense with initial disclosures required by Rule 26(a)(1), F.R.Civ.P., and, if not, what if any changes should be made in the scope, form, or timing of those disclosures.

The parties agree that they will make initial disclosures according to the schedule established by Rule 26(a)(1) and will make no changes to the scope, form, or timing of those disclosures.

8. The anticipated extent of discovery, how long discovery should take, what limits should be placed on discovery; whether a protective order is appropriate; and a date for the completion of all discovery, including answers to interrogatories, document production, requests for admission, and depositions.

The parties agree to the following discovery schedule and procedures:

All discovery to be completed by **September 26, 2008**.

All document requests, interrogatories, and requests for production to be served by **August 26, 2008**.

The FEC believes that the limit on depositions under Rule 30(a)(2) should be modified to allow 20 depositions per side. The FEC contends that 10 depositions per side may prove to be insufficient for several reasons. First, deposing just the six named plaintiffs in this case would already take up a majority of the depositions initially allotted by Rule 30(a)(2). Second, there are a number of questions presented by this case that demand a development of various legislative facts, including a demonstration that unlimited contributions to a committee making independent expenditures pose a danger of corruption and its appearance. Finally, if more than 10 depositions should be required for any reason, there may simply not be time to seek leave of the Court and then actually take the depositions under the condensed timeframe proposed by the parties. It is preferable for the Court to allow for additional depositions now rather than having to rearrange the entire case schedule at a later date.

Plaintiffs believe that the 10 deposition limit in Rule 30(a)(2) should be maintained and that additional depositions should be addressed on a case-by-case basis via stipulation of the parties or leave of court. Even if the FEC decides it is necessary to depose all six named Plaintiffs, it would still have four additional depositions to establish the “legislative facts” to which it refers. Moreover, Plaintiffs are certainly amenable in principle to stipulating to particular “legislative facts” or to agreeing to short additional depositions to establish those facts if a stipulation could not be reached. In the event that the FEC were forced to seek leave of court, there is no reason to assume that doing so would disrupt the discovery schedule any more than allowing 20 depositions per side.

The parties agree that the other limits on discovery requests under the Federal Rules of Civil Procedure and the Local Rules should apply.

9. Whether the requirement of exchange of expert witness reports and information pursuant to Rule 26(a)(2), F.R.Civ.P., should be modified, and whether and when depositions of experts should occur.

The parties agree to the following schedule for expert disclosures:

Experts identified and reports served pursuant to Rule 26(a)(2) by **August 15, 2008**

Rebuttal experts identified and reports served by **September 15, 2008**

10. In class actions appropriate procedures for dealing with Rule 23, F.R.Civ.P. proceedings, including the need for discovery and the timing thereof, dates for filing a Rule 23 motion, and opposition and reply, and for oral argument and/or evidentiary hearing on the motion and a proposed date for a decision.

This case is not a class action.

11. Whether a trial and/or discovery should be bifurcated or managed in phases, and a specific proposal for such bifurcation.

The parties agree that a trial, if necessary, would not need to be bifurcated.

12. The date for the pretrial conference (understanding that a trial will take place 30 to 60 days thereafter).

The parties agree that a trial will likely not be necessary in this case and that no pretrial conference should be set unless and until the questions certified under § 437h are resolved and there remain issues for this Court to address.

13. Whether the Court should set a firm trial date at the first scheduling conference or should provide that a trial date will be set at the pretrial conference from 30 to 60 days after that conference.

The parties agree that a trial will likely not be necessary in this case and that no pretrial conference should be set unless and until the questions certified under § 437h are resolved and there remain issues for this Court to address. The parties also agree that if there is a pretrial conference, the trial date should be set at that time.

14. Such other matters that the parties believe may be appropriate for inclusion in a scheduling order.

None.

Respectfully submitted,

/s/ Steven M. Simpson  
Steven M. Simpson (462553)  
William H. Mellor (462072)  
Robert Gall (482476)  
Paul M. Sherman (978663)  
INSTITUTE FOR JUSTICE  
901 N. Glebe Road, Suite 900  
Arlington, VA 22203  
Tel: (703) 682-9320  
Fax: (703) 682-9321  
Email: wmellor@ij.org, ssimpson@ij.org,  
bgall@ij.org, psherman@ij.org

Stephen M. Hoersting\*  
Bradley A. Smith\*  
CENTER FOR COMPETITIVE POLITICS  
124 W. Street South, Suite 201  
Alexandria, VA 22314  
Tel: (703) 894-6800  
Email: shoersting@campaignfreedom.org,  
BSmith@law.capital.edu

/s/ Kevin Deeley  
(signed by Steven M. Simpson with  
permission from Kevin Deeley)  
Thomasenia P. Duncan (424222)  
General Counsel

David Kolker (394558)  
Associate General Counsel

Kevin Deeley  
Assistant General Counsel

Robert W. Bonham (397859)  
Senior Attorney

Steve N. Hajjar  
Attorney

Graham M. Wilson  
Attorney

Counsel for Defendant

Counsel for Plaintiffs

\*Admitted *pro hac vice*

Federal Election Commission  
999 E Street NW  
Washington, DC 20463  
(202) 694-1650

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 6<sup>th</sup> Day of June, 2008, a true and correct copy of the Plaintiffs' Joint Scheduling Report and Proposed Order were electronically filed using the court's ECF system and sent via the ECF electronic notification system to:

Robert W. Bonham, III  
David B. Kolker  
Steve N. Hajjar  
FEDERAL ELECTION COMMISSION  
999 E. Street, N.W.  
Washington, DC 20463

/s/ Steven M. Simpson

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

<hr/>		)
SPEECHNOW.ORG,		)
DAVID KEATING,		)
FRED M. YOUNG, JR.,		)
EDWARD H. CRANE, III,		)
BRAD RUSSO, and		)
SCOTT BURKHARDT		)
		)
	Plaintiffs,	)
		)
v.		)
		)
FEDERAL ELECTION COMMISSION		)
		)
	Defendant.	)
<hr/>		)

Civil Case No. 1:08-cv-00248 (JR)

---

**DECLARATION OF ROBERT FROMMER  
IN SUPPORT OF PLAINTIFFS' FIRST MOTION IN LIMINE**

---

1. I am an attorney representing the plaintiffs in the above-captioned matter. I am a member in good standing of the Bar of the District of Columbia and have applied for admission to the United States District Court for the District of Columbia. I make this declaration in support of Plaintiffs' First Motion in Limine.

2. Attached to this Declaration, as Exhibit 1, is a true and correct copy of a summary I created that details the hearsay present in the FEC Proposed Findings of Fact.

3. I analyzed whether the exhibits that the FEC put forward were ones made by one not “testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted” under Federal Rule of Evidence 801(c).

4. In categorizing the out-of-court statements the FEC offered for their truth value, I separated, by type, all the documents wherein those statements appeared, for ease of use by the Court. For each document I identified, I denoted if the FEC had submitted the document as an exhibit, where in its Proposed Findings of Fact the FEC had referred to the document, and how many levels of hearsay appeared on the face of the document.

5. In some instances, the FEC offered a statement for its truth value, but did not cite to the document itself or submit it as an exhibit. In most of those cases, the FEC instead cited to a page from the Wilcox report where, in turn, Professor Wilcox cited to the document. *See, e.g.*, FEC Proposed Finding of Fact ¶¶ 218, 251.

6. Neither the FEC nor Professor Wilcox provided a citation for a quote attributed to Terry Dolan at NCPAC. FEC Proposed Finding of Fact ¶ 227. Through investigation I determined that the original source for the quote was Myra MacPherson, *The New Right Brigade*, WASH. POST, August 10, 1980. I therefore treated the statement made in paragraph 227 as if it had been attributed to its correct source.

7. I certify and declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

Executed: November 21, 2008.

  
\_\_\_\_\_  
Robert Frommer

Frommer Declaration in Support of  
Motion in Limine  
Exhibit 1

## Hearsay Summary

FEC Ex. No.	Finding of Fact	Description	Levels of Hearsay in Cited Material
<b>Newspaper Articles</b>			
84	99	AP, <i>Bush Uses Recess Appointment Power to Install GOP Fundraiser Sam Fox as Ambassador</i> , FoxNews.com, Apr. 4, 2007	1
106	99	Frank Luntz, <i>Why Bush Won the Credibility Factor</i> , Wash. Times, Nov. 5, 2004, at A21	1
52	101	Tyler Whitley, <i>Group Glories in Kerry's Defeat; Swift Boat Veterans Pleased Ad Campaign Paid Off, Says A Local Organizer of Effort</i> , Richmond Times Dispatch, Nov. 8, 2004, at B1	2 (cited portion of article quotes Swift Boat Vet founder)
	126	Richard Berke, <i>Aide Says Bush Will Do More to Marshal Religious Base</i> , N.Y. Times, Dec. 12, 2001	1
	126	David D. Kirkpatrick, <i>Bush Appeal to Churches Seeking Help Raises Doubts</i> , N.Y. Times, July 2, 2004, at A15	1
56	129	Jim Rutenberg, <i>Democrats' Ads in Tandem Provoke G.O.P.</i> , N.Y. Times, Mar. 27, 2004	2 (article relaying statements by Media Fund and MoveOn.org officials)
57	147	David E. Rosenbaum, <i>Campaign Finance: The Hearing; Oilman Says He Paid For Access by Giving Democrats \$300,000</i> , N.Y. Times, Sept. 19, 1997	2 (cited portion of article quotes Roger Tamraz)
111	155	Glen Justice, <i>Advocacy Groups Reflect on Their Role in the Election</i> , N.Y. Times, Nov. 5, 2004	1
117	180	Lisa Vorderbrueggen, <i>Run a 'clean' campaign, get public funds</i> , The Contra Costa Times, January 7, 2006, at F4	2 (cited portion of article quotes Jon Coupal)
61	199	Glen Justice and Eric Lichtblau, <i>Bush's Backers Donate Heavily to Veteran Ads</i> , N.Y. Times, Sept. 11, 2004	1
62	200	Glen Justice and Jim Rutenberg, <i>The 2004 Campaign: The Advisors; Advocacy Groups and Campaigns: An Uneasy Shuttle</i> , N.Y. Times, Sept. 8, 2004	1
63	202	Peter H. Stone, <i>Betting Man</i> , Nat'l J., May 10, 2008	2 (cited portion of article quoting unnamed consultant)
	218	Juliet Eiperin, <i>Small Business Group Sticks to One Side of Political Fence</i> , Wash. Post May 16, 2002 at A23	2 (cited portion of article quotes Congressman Randy Forbes)
	227	Myra MacPherson, <i>The New Right Brigade</i> , Wash. Post, Aug. 10, 1980.	2 (cited portion of articles quotes Terry Dolan)
69	234	Hillary Chabot, <i>'I Can't Be a Referee': Drops 2004 crusade against '527' attack ads</i> , Boston Herald, June 12, 2008, at 5	1
72	236	Sam Stein, <i>Source: Obama to Start Looking the Other Way on 527s</i> , Huffington Post, Aug. 11, 2008	2 (cited portion of article quoting an unnamed Obama source)
73	236	Greg Sargent, <i>Top Democrats Privately Urging Major Donors to Fund Outside Groups to Attack McCain</i> , Talking Points Memo, Sept. 15, 2008	1
	251	Thomas B. Edsall, <i>New Ways to Harness Soft Money in Works</i> , The Washington Post August 25, 2002, at A1	1
107	262	Jane Mayer, <i>The Money Man: Can George Soros's Millions Insure the Defeat of President Bush?</i> , New Yorker, Oct. 18, 2004	2 (cited portion of article quoting George Soros)
74	266	Scott Helman, <i>Romney Seeks to Be Alternative to McCain</i> , Boston Globe, September 23, 2006, at A1	1
78	278	John Fund, <i>Energy Independent: Maverick Oilman Boone Pickens Talks About Fuel Prices And His Love For Philanthropy</i> , Wall Street J., June 2, 2007, at 2	2 (cited portion of article quoting Pickens)
79	278	Mike Allen, <i>Swift Rewards for Pickens</i> , Wash. Post, June 27, 2005, at A04	1
81	279	AP, <i>Bush Withdraws "Swift Boat" Nominee</i> , CBS News, March 28, 2007	1
84	280	Newspaper Articles concerning Sam Fox Ambassadorship	2 (cited portion of Akers article quoting John Edwards for truth of matter asserted)

FEC Ex. No.	Finding of Fact	Description	Levels of Hearsay in Cited Material
85	281	Glenn R. Simpson, <i>Lender Lobbying Blitz Abetted Mortgage Mess</i> , Wall Street J., Dec. 31, 2007	1
87	281	E. Scott Reckard, <i>Ambassador Nominee's Company is Scrutinized</i> , L.A. Times, Aug. 7, 2005, at A-1	2 (cited portion of article quotes Robert Stern)
88	290	Steven Nicely, <i>Tribe Again Pushes for KCK Bingo Hall</i> , Kansas City Star, Oct. 3, 1998	1
98	384	Matthew Mosk, <i>Economic Downturn Sidelines Donors to '527' Groups</i> , Wash. Post, Oct. 19, 2008, A09	2 (cited portion of article quotes Tom Matzzie)
60	198, 200	Kate Zernike and Jim Rutenberg, <i>The 2004 Campaign: Advertising; Friendly Fire: the Birth of an Attack on Kerry</i> , N.Y. Times, Aug. 20, 2004	1 in Fact 198, 1 in Fact 200
70	234, 235	Jim Rutenberg and Michael Luo, <i>Interest Groups Step Up Efforts in a Tight Race</i> , N.Y. Times, Sept. 16, 2008	1 in Fact 234, 2 in Fact 235 (cited portion of article referring to accusations by campaign officials)
71	235, 236	Marc Ambinder, <i>Quietly, Obama Campaign Calls in the Cavalry</i> , The Atlantic, Sept. 9, 2008	1 in Fact 235, 2 in Fact 236 (cited portion of article quoting Obama advisor)
112	288, 289, 291, 294, 295	Jack Cashill, <i>Moore of the Same Old Stuff</i> , Ingram's Magazine, November 1999, at 19-20	1 in Fact 288, 1 in Fact 289, 1 in Fact 291, 1 in Fact 294, 2 in Fact 295
89	292, 294	Rick Alm and Jim Sullinger, <i>Congressman Calls Lobbyist's Tactics Illegal – Lobbyist Argued Monday Over Whether Papers Faxed to the Congressman's Office Last Month Were A Veiled Attempt to Buy His Vote</i> , Kan. City Star, Oct. 6, 1998; Tim Carpenter, <i>Kansas Lawmaker Alleges Bribery Try on Gaming Issue</i> , Journal-World (Lawrence, Kan.), Oct. 8, 1998	1 in Fact 292, 2 in Fact 294 (cited portion of article quotes Congressman Snowbarger)
91	299, 300, 302	Steven Walters and Patrick Marley, <i>Chvala Reaches Plea Deal</i> , Milwaukee J. Sentinel, Oct. 24, 2005, at 2	1 in Fact 299, 1 in Fact 300, 1 in Fact 302
92	300, 306	Steve Schultze and Richard P. Jones, <i>Chvala Charged With Extortion</i> , Milwaukee J. Sentinel, Oct. 18, 2002, at 2	1 in Fact 300, 1 in Fact 306
94	326, 328	Chris Dickerson, <i>Company Asks Benjamin to Recuse Himself Again, This Time with Poll Numbers</i> , Legal Newsline.com, Mar. 8, 2008	1 in Fact 326, 1 in Fact 328
48	99, 105*	Michael Janofsky, <i>Advocacy Groups Spent Record Amount of 2004 Election</i> , N.Y. Times, Dec. 17, 2004  * This article does not support proposition ¶ 105 for which it is offered; but if it did, it would be 2 levels of hearsay	2 in Fact 99 (quoting Charles Lewis); 2 in Fact 105 (citing statement by Republican polling company)*
<b>Press Releases</b>			
51	103, 120, 232	Center for the Study of Elections and Democracy, <i>527s Had a Substantial Impact on the Ground and Air Wars in 2004, Will Return /Swift Boat Veterans 527 Played Historic Role</i> (Dec. 16, 2004)	1 for Fact 103, 1 for Fact 120, 2 for Fact 232 (quoting in part statement by Professor David Magleby)
86	281	White House Press Release, <i>Personnel Announcement</i> , July 28, 2005	1
82	279	White House Press Release, <i>Personnel Announcement</i> , December 4, 2006	1
77	278	White House News Releases re: T. Boone Pickens	1
	247	Press Release, FEC, <i>2004 Presidential Campaign Financial Activity Summary</i> , Feb. 3, 2005	1
<b>Academic Papers</b>			
	80	Richard N. Engstrom and Christopher Kenny, <i>The Effects of Independent Expenditures in Senate Elections</i> , Pol. Research Quarterly 55 (4):885-905 at 885, (2002)	1
	81	Gary C. Jacobson, <i>The Effect of the AFL-CIO's "Voter Education" Campaigns on the 1996 House Elections</i> , 61 J. Pol. (1): 185-94)	1
	117	David B. Magleby, <i>Conclusions and Implications for Future Research, in The Other Campaign: Soft Money and Issue Advocacy in the 2000 Congressional Elections</i> , (David Magleby, ed. 2003)	1
	118	David B. Magelby and J. Quin Monson, <i>Interest Groups in American Campaigns: the New Face of Electioneering, in The Last Hurrah? Soft Money and Issue Advocacy in the 2002 Congressional Elections</i> (David B. Magleby et al. eds., 2004)	1
	126	Clyde Wilcox and Carin Larson, <i>Onward Christian Soldiers: The Christian Right in American Politics</i> , 3rd ed., 2006	1

FEC Ex. No.	Finding of Fact	Description	Levels of Hearsay in Cited Material
	133	Mark E. Warren, <i>What Does Corruption Mean in a Democracy?</i> , 48 Am. J. Pol. Sci. 328-43 (2004)	1
	134	Michael J. Malbin, <i>Rethinking the Campaign Finance Agenda</i> , 6 The Forum, Iss. 1 Art. 3, at 3 (2008)	1
	137	Peter L. Francia et al., <i>The Financiers of Congressional Elections: Investors, Ideologues, and Intimates</i> (2003)	1
	144	Mark J. Rozell and Clyde Wilcox, <i>Interest Groups in American Campaigns: the New Face of Electioneering</i> (1999)	1
58	161	Stephen R. Weissman and Kara D. Ryan, <i>Soft Money in the 2006 Election and the Outlook for 2008/The Changing Nonprofits Landscape</i> , at 22-23 (Campaign Finance Institute Report 2007)	1
	219	David B. Magleby and Kelly D. Patterson, <i>War Games: Issues and Resources in the Battle for Control of Congress</i> , in Center for the Study of Elections and Democracy Report (2007)	1
	228	David B. Magleby and J. Quin Monson, <i>The Consequences of Noncandidate Spending, and a Look to the Future in The Last Hurrah? Soft Money and Issue Advocacy in the 2002 Congressional Elections</i> (David B. Magleby et al. eds., 2004)	1
75	272*	Steve Weissman and Margaret Sammon, <i>Fast Start for Soft Money Groups in 2008 Election[:] 527s Adapt to New Rules, 501(c)(4)s on the Upswing</i> (Campaign Finance Institute, Apr. 3, 2008)  * Misquotes the exhibit; it should be "organizational"	1
	100, 102	David B. Magleby et al., <i>The Morning After: The Lingering Effects of a Night Spent Dancing, in Dancing Without Partners: How Candidates, Parties, and Interest Groups Interact in the Presidential Campaign</i> , 25 (David B. Magleby et al., eds. 2007)	1 for Fact 100, 1 for Fact 102
50	104, 105, 107*, 108, 109*, 110*, 231*, 239*	Annenberg Public Policy Center, <i>Electing the President, 2004: The Insiders' View</i> (Kathleen Hall Jamieson ed., 2005), at 194*  * 107: \$18.8M comprehensive campaign * 109: Improperly quoted * 110: Improperly quoted * 231: Improperly quoted * 239: Improperly quoted	1 for Fact 104 (interview w/ Chris LaCivita), 1 for Fact 105, 1 for Fact 107, 1 for Fact 108 (interview w/ Stephen Moore), 1 for Fact 109 (interview w/ Stephen Moore), 1 for Fact 110 (interview w/ Stephen Moore), 1 for Fact 231 (interview w/ Stephen Moore), 1 for Fact 239 (interview w/ Stephen Moore)
55	112, 157, 158, 159, 192, 201, 250, 253, 255, 259, 260, 263	The Election After Reform, <i>Money Politics and the Bipartisan Campaign Reform Act</i> (Michael J. Malbin ed. 2006) (excerpts, Chapter 5, Weissman & Hassan and Ch. 6, Boatright, Malbin, Rozell, and Wilcox), at 87, FEC Exh. 55	2 for Fact 112 (cited portion of document quoting President Clinton), 1 for Fact 157, 1 for Fact 158, 1 for Fact 159, 2 for Fact 192 (cited portion of document quoting Ellen Malcolm and Harold Ickes), 1 for Fact 201, 1 for Fact 250, 1 for Fact 253, 1 for Fact 255, 2 for Fact 259 (cited portion of document quoting Ellen Malcolm and Harold Ickes), 2 for Fact 260 (cited portion of document quoting an unnamed 527 group leader), 1 for Fact 263
47	114, 169, 170, 171, 172, 173, 174, 175, 182, 243, 244, 246, 353, 354, 357	<i>Independent Expenditures: The Giant Gorilla in Campaign Finance</i> , June 2008	1 for Fact 114, 1 each for Facts 169-175, 1 for Fact 182, 1 for Fact 243, 1 for Fact 244, 1 for Fact 246, 1 for Fact 353, 1 for Fact 354, 1 for Fact 357

FEC Ex. No.	Finding of Fact	Description	Levels of Hearsay in Cited Material
	119, 249	Center for the Study of Elections and Democracy at Brigham Young University, transcript, release of Dancing Without Partners, Feb. 7, 2005	2 for Fact 119 (cited portion of document quoting Steve Rosenthal), 2 for Fact 249 (cited portion of document quoting Harold Ickes)
	133, 315	Dennis F. Thompson, <i>Ethics in Congress: From Individual to Institutional Corruption</i> (1995)	1 for Fact 133, 1 for Fact 315
	133, 315	Mark E. Warren, <i>Democracy and Deceit: Regulating Appearances of Corruption</i> , 50 Am. J. Pol. Sci. 160-74 (2006)	1 for Fact 133, 1 for Fact 315
135	386, 387, 388, 389, 390	Corrado and Varney, <i>Party Money in the 2006 Elections: The Role of National Party Committees in Financing Congressional Campaigns</i> , Campaign Finance Institute (2007) at 2	1 each for Facts 386-390
	92, 128	David B. Magleby and Jonathan W. Tanner, <i>Interest Group Electioneering in the 2002 Congressional Elections, in The Last Hurrah? Soft Money and Issue Advocacy in the 2002 Congressional Elections</i> (David B. Magleby et al. eds., 2004)	1 for Fact 92, 2 for Fact 128 (cited portion of document quoting Seniors Coalition flyer)
<b>Testimony</b>			
	143	Gerald Greenwald, <i>Corporate America Contributes Soft Money Under Pressure, in Inside the Campaign Finance Battle</i> (Anthony Corrado et al., eds., 2003) (Greenwald Declaration from McConnell (paragraph 9))	1
	309	McCain, John, <i>Congress is Mired in Corrupt Soft Money, in Inside the Campaign Finance Battle</i> (Anthony Corrado et al., eds., 2003) (McCain Declaration from McConnell (paragraph 8))	2 (cited portion of document referring to statements from Sen. McConnell and tobacco executives)
	133, 339	Robert Y. Shapiro, <i>Public Attitudes Toward Campaign Finance Practice and Reform in Inside the Campaign Finance Battle</i> (Anthony Corrado et al., eds., 2003) (Shapiro Declaration from McConnell)	1 for Fact 133, 1 for Fact 339
	365, 366	Jonathan S. Krasno and Frank Sorauf, <i>Issue Advocacy and the Integrity of the Political Process in Inside the Campaign Finance Battle</i> (Anthony Corrado et al. eds., 2003) (Krasno and Sorauf Declaration from McConnell)	1 for Fact 365, 1 for Fact 366
114	445	Hickmott Declaration from McConnell (paragraph 12)	1
35	91*, 209	Beckett Declaration from McConnell (paragraphs 12 & 16)  * Not supported by exhibit	1 for Fact 91, 1 for Fact 209
34	90, 210	Lamson Declaration from McConnell (paragraphs 11 & 19)	1 for Fact 90, 1 for Fact 210
64	211, 275	Bumpers Declaration from McConnell (paragraph 27)	1 for Fact 211, 1 for Fact 275
65	212	Simpson Declaration from McConnell (paragraph 13)	1
33	88, 213, 230, 276	Pennington Declaration from McConnell (paragraphs 8, 11, 15, 16)	1 for Fact 88, 1 for Fact 213, 1 for Fact 230, 1 for Fact 276
36	83, 214	Bloom Declaration from McConnell (paragraphs 6 & 17)	1 for Fact 83, 1 for Fact 214
67	215	Williams Declaration from McConnell (paragraph 8)	1
68	217, 310	Chapin Declaration from McConnell (paragraphs 6, 13, 16)	1 for Fact 217, 2 for Fact 310 (portion of cited document discusses statement made by outside interest group)
93	313	Testimony of Derek Cressman, <i>Government Watchdog Director of Common Cause, Hearing of the California Fair Political Practices Commission</i> , Feb. 14, 2008, at 2	1
116	125, 167	Senate Committee on Rules and Administration, Hearing to Examine and Discuss S.271, a Bill Which Reforms the Regulatory and Reporting Structure of Organizations Registered Under Section 527 of the Internal Revenue Code, 109th Cong. (March 8, 2005) (written testimony of Michael J. Malbin, Executive Director of the Campaign Finance Institute)	1 for Fact 125, 1 for Fact 167
<b>Miscellaneous</b>			
	293	Facsimile transmission to Congressman Snowbarger	1
102	416	Howard Jarvis Taxpayers Association, About Us, <a href="http://www.hjta.org/aboutus">http://www.hjta.org/aboutus</a> (visited Feb. 26, 2008)	1
<b>Correspondence</b>			
53	107	Memorandum from McCabe to Spanos, (undated), Email from McKenna to Orfanos and attachments, Oct. 21, 2004	1
54	113	Letter from Wolf to Lewis, Sept. 17, 2004, Peter B. Lewis 00002, 10	1
<b>Interviews</b>			

FEC Ex. No.	Finding of Fact	Description	Levels of Hearsay in Cited Material
	127	Interview with Paul Manafort by Jules Witcover, The Buying of the President, Center for Public Integrity, March 20, 2007	1
	84, 154, 359	Wilcox Interview with Tom Daschle	1
	208	Wilcox Interview with David Magleby	1
	222	Wilcox Interview with Michael Bailey	1

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

<hr/>		)	
SPEECHNOW.ORG,		)	
DAVID KEATING,		)	
FRED M. YOUNG, JR.,		)	
EDWARD H. CRANE, III,		)	
BRAD RUSSO, and		)	
SCOTT BURKHARDT		)	
		)	
	Plaintiffs,	)	
		)	
	v.	)	Civil Case No. 1:08-cv-00248 (JR)
		)	
FEDERAL ELECTION COMMISSION		)	
		)	
	Defendant.	)	
<hr/>		)	

---

**ORDER GRANTING PLAINTIFFS' FIRST MOTION IN LIMINE**

---

For good cause shown, Plaintiffs' First Motion in Limine is GRANTED.

Accordingly, Defendant's Exhibits 2-4, 6, 33-36, 47-48, 50-58, 60-75, 77-79, 81-82, 84-89, 91-98, 102, 106-107, 111-112, 114, 116-117, 120, 121, and 135 shall be struck.

Defendant's proposed findings of fact relying on these excluded exhibits and contained in ¶¶ 83, 85, 86, 88, 90-91, 99, 101, 103-105, 107-110, 112-115, 120, 125, 129-30, 133, 143, 146-47, 155, 157-59, 161, 167, 169-76, 178, 180, 182, 187-88, 192, 195, 198, 199-202, 204-07, 209-17, 224-25, 230-32, 234-36, 239, 243-44, 246, 250, 253, 255, 259-60, 262-63, 266, 268, 272, 275-76, 278-81, 288-97, 299-302, 306, 309-13, 316, 326, 328, 333-335, 339, 343-344, 353-357, 365-366, 384, 386-390, 416, 437, and 445 shall not be adopted.

Further, Defendant's proposed findings of fact and contained in ¶¶ 80-81, 84, 92, 100, 102, 117-119, 126-128, 133-134, 137, 143-144, 154, 208, 218-219, 222, 227-228, 247, 249, 251, 293, 309, 315, 339, 359, and 365-366 rely on inadmissible hearsay statements and shall not be adopted.

Additionally, this Court declines to adopt any of Defendant's proposed findings of fact for which Plaintiffs have identified evidentiary problems in Plaintiffs' Response to Defendant's Proposed Findings of Fact.

SO ORDERED this \_\_\_\_ day of \_\_\_\_\_, 2008.

---

James Robertson, United States District Judge